LAW, MYTH AND MODERNITY:

A STUDY IN LEGAL EPISTEMOLOGY

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CERTIFIED THAT THE THESIS ENTITLED

“Law, Myth and Modernity: A Study in Legal Epistemology” submitted by me for the award of the Degree of Doctor of Philosophy in Arts at Jadavpur University is based upon my work carried out under the Supervision of Dr. Prachi Deshpande.

And that neither this thesis nor any part of it has been submitted before for any degree or diploma anywhere/ elsewhere.

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INTRODUCTION

This doctoral thesis is an attempt to study the intersection of modern law with religion, through a close look at the Indian Supreme Court. Religion has made an emphatic resurgence in the latter half of the twentieth century in India and in the global arena.[1] In the contemporary times, law has become an instrument to confer legitimacy on the decisions taken by the political class. It is not only religious minorities that seek protection through the law, but majoritarian forces also ardently seek the legal stamp for their proposals, actions and policies in the sphere of religion.[2] Nevertheless, religion remains the 'other' of modern law. It is premised on faith, belief or myth in contrast to the self-understanding of modern law as an episteme of reason, proof, and empiricism, the hallmarks of the western enlightenment tradition. One of the reasons for this study's close focus on law's encounter with religious claims is that it is in this encounter that the contrast between the two appears stark. I focus, therefore, on the Indian Supreme Court's interpretations of the free exercise of religion clause,[3] the construal of religious appeals by political parties during elections, the directive principle exhorting the State for protection of the cow and its legal construction, and finally the dispute of Babri Masjid-Ram janambhumi in Ayodhya.

Legal historiography in ex-colonial societies faces a unique hurdle because of the transplantation of an alien legal system. Modern law, conceived as a gift from the West to the rest of the world, locates itself in opposition to its colonized 'other'. The inquiry into the origins of modern law, in other words, needs to account for the fact that its identity and legitimacy is premised on a 'lack' in non-western societies: it represents rational, systemic, coherent, and modern orderliness as against the despotic, savage, status-

[1] See generally, Jose Casanova, *Public Religions in the Modern World* 1-39 (University of Chicago Press, Chicago, 1994). For a comprehensive overview of how in the secular age being religious is an option available to a person as opposed to a default identity, see, Charles Taylor, *A Secular Age* (Harvard University Press, Massachusetts, 2007).

[2] I will take two instances of majoritarian Hindu Right seeking and celebrating the ratification of the judiciary. Justification by the Supreme Court that appeal of 'Hindutva' is unrelated to religion as 'Hinduism' is a way of life in chapter 2, and the verdict of the Apex Court in the Babri Masjid- Ram janambhumi dispute which settled the title claim in favour of the Hindu parties in chapter 4.

[3] Specifically, Articles 25 and 26 of the Constitution of India together provide the fundamental right to religious freedom.

oriented, pre-modern, and mythic rules of the colonized.[4] Peter Fitzpatrick remarks that "modern law emerges, in a negative exaltation, as universal in opposition to the particular, as unified in opposition to the diverse, as omnicompetent in contrast to the incompetent, and as controlling of what has to be controlled."[5] Modernity, in itself, is a laden term, which can refer to a specific historical time period as well as an attitude or a state of mind.[6] As an attitude of mind, which is how this study employs the term, modernity is linked to the western enlightenment tradition with a singular aim of "the dissolution of myths and the substitution of knowledge for fancy."[7] As Horkheimer and Adorno mention: "In the enlightened world, mythology has entered into the profane. In its blank purity, the reality which has been cleansed of demons and their conceptual descendants assumes the numinous character which the ancient world attributed to demons."[8]

The triad in the title of this thesis – law, myth, modernity - is thus central for unpacking the contemporary functioning of the modern legal system, especially in a postcolonial country like India, where law continues to be central to the idea and substantiation of modernity. Even as modern law conceives itself in opposition to the mythic, it also rests on certain mythic foundations of its own, which are discernible in the principles and processes of legal interpretation. This *secular mythology* is the subject matter of this study. Here, myth is to be understood as the 'other' of law, in the sense that it is constitutive of all that marks unreason: irrationality, religion, faith, and non-modern. However, without endorsing such law-myth binary, I approach law as an emancipatory force requiring an imagination which is neither premised on the progressive erasure of the mythic in the march towards modernity, nor any elevation of the mythic in opposition to modernity in the romanticisation of 'pre-modern' societies. I seek, instead, to underline that 'law' and 'myth' are intersecting and constantly impacting each other.

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[4] See, Upendra Baxi, "The Rule of Law in India" 4(4) *Sur-International Journal of Human Rights* 7-25 (2007).
[5] Peter Fitzpatrick, *The Mythology of Modern Law* 10 (Routledge, London and New York, 1992).
[6] See, Sionaidh Douglas-Scott, *Law after Modernity* 7 (Hart Publishing, 2013).
[7] Max Horkheimer and Theodor W. Adorno, *The Dialectic of Enlightenment: Philosophical Fragments* 3 (Trans. by Edmund Jephcott, Stanford University Press, 2002). For a critical review of how the western enlightenment orchestrated secularization, reducing the space of religion in the public sphere, see, Jose Casanova, *Public Religions in the Modern World* (University of Chicago Press, Chicago, 1994), ch. 1.
[8] Horkheimer and Adorno, *supra* note 7 at 28.

In the four chapters of this thesis, I focus principally on the judgments of the Apex Court of India, the Supreme Court,[9] with references to various High Court decisions, wherever necessary.[10] I focus on the Supreme Court for two important reasons. One, the pronouncements of the Apex Court become binding law for all judicial and civil authorities in India.[11] Two, many cases pertaining to the free exercise of religion clause originate directly in the Supreme Court, as the Indian Constitution vests the Court with original jurisdiction in cases where the violation of fundamental rights is in question.[12]

The choice of judicial verdicts as the major archive for this study is premised on the assumption that legal interpretation provides a glimpse into the tradition of 'living law'. Here, I understand law as not merely constituted and inscribed in notifications, rules, statutes, codes or the Constitution, but as something protean which reformulates itself continually when confronted with new situations that arise with changing times. Critically engaging with this aspect of the law is the motivation for undertaking this work. Fitzpatrick explains this dimension of the law succinctly:[13]

> For there to be a rule of law, for law to rule, it itself must have determinant force. Yet if it were merely or fixedly determinant, if it were not responsive, it would cease being able to rule a situation which had inexorably changed around it […] The legal decision is ever responsive. It can neither be rendered beforehand nor sustained simply in terms of some empirical reality or simply in terms of a previous decision.

This *responsiveness* of law is ingrained in the legal process, best captured through a study of legal interpretive techniques. The mythology of modern law refutes this uncertainty and contingency by foregrounding determinacy, fixity, certainty and clarity. In doing so,

[9] After independence from the British rule and before the commencement of the Constitution, the highest judicial organ in India was the Federal Court. With the coming into force of the Constitution, the Supreme Court became the highest judicial body.

[10] Especially, but not only, in chapter 4 where I argue that parts of the High Court reasoning were much more robust than the Supreme Court ruling in the Ayodhya dispute.

[11] Article 141, The Constitution of India.

[12] Article 32, The Constitution of India.

[13] Peter Fitzpatrick, *Modernism and the Grounds of Law* 16 (Cambridge University Press, New York, 2001).

it presents itself as a self-contained and an autonomous system uninfluenced by history or politics. It is this self-image of the modern law, which is a hallmark of all positivist legal thinking, that forms one of its many 'myths'. An expose and exposition of this mythic self-enclosure of the law by foregrounding the historical and political processes that shape legal interpretation is another task pursued through this thesis.

Following Fitzpatrick, I see law's uncertainty as the potential to respond to the unknown, or yet to be known, which forms the subject matter of legal interpretation. By acknowledging this uncertainty as inherent in the legal process, modern law can dispel its insularity to learn about its limitations from, and be in conversation with, other disciplines.[14] I will try to establish how legal reasoning elides historical specificity to present itself as eternal, universal and unaffected by historical contingencies. Foregrounding these contexts in different chapters helps us see how such claims to universality obscure the self-representational myths that underlie legal reasoning. This study of legal interpretation is also mindful of the drawback in existing historical scholarship on law in avoiding "the questions of doctrinal development" in preference to "statutes as definitive expressions of the law rather than looking to judicial interpretation or doctrinal exegesis."[15] I will focus on interpretive techniques and doctrinal methods linked with judicial interpretation, excavating the contradictions in the process of legal interpretation, while engaging with the judicial discourse, and suggest that this contradiction is ingrained in the legal process. This will hopefully provide the necessary corrective to the lawyers' habit, via the black-letter-legal-tradition, which tends "to approach the history of case law with an eye for doctrinal coherence rather than subtle contradiction or social context."[16] However, this does not mean that the political or historical context is the final determinant of law and law is merely an instrument in the hands of political progression. The political history undoubtedly *conditions* the legal reasoning but it is never *determinative* of it.

[14] The Critical Legal Studies (CLS) inaugurated an alternative jurisprudence to this positivist understanding of law. However, it ventured into the other extreme of indifference to the legal doctrine or posited law which led to its failure. See, Peter Goodrich, "The Empty Tomb: Post-Critical Legal Hermeneutics" 10 *Nev. L. J.* 607 (2010).
[15] Michael R. Anderson and Sumit Guha, *Changing Concepts of Rights and Justice in South Asia* 2 (Oxford University Press, 1998).
[16] *Ibid.*

Quentin Skinner has developed the theory of historical method with his cardinal assumption that it is the context of the text that is essential in order to find out the nature of the 'intervention' that the author of the text attempts to make.[17] This context includes the biographical details or the 'actual conduct' of the writer, information with respect to the social surrounding, the political environment, and for Skinner, the literary culture of the times.[18] In one way the Skinnerian framework is useful to counter the tradition of legal positivism which sees the law as all about text, bereft of any context. However, there are limitations of this approach as well. First, such an approach would make it difficult to capture the intertextual developments within the legal precedents over a long period of time. Second, due to the predominance of legal positivism, there is little available biographical scholarship on Supreme Court judges.[19] Therefore, I suggest that to fully understand the ideological underpinnings of the judicial discourse one must also study the "intertextual contexts"[20] of the living, organic and ever-changing body of law. This methodology helps to trace interpretive patterns *within* the text of judgments as they interpret legal provisions.[21] This approach, which Jonardon Ganeri calls "moderate contextualism" in a different context, is what I have adopted to read legal cases.

My inquiry in traversing the triad of law, myth and modernity is limited to the legal interpretation of the constitutional category of the free exercise clause.[22] The focus on the religious freedom clause of the Indian Constitution is guided by the fact that modern law directly comes in conflict with religion. This is also the field where the Supreme Court has constructed the modern myth of secular law most luminously. However, law emphasises its ability to carry out the project of modernity by constructing its own mythical status – as something above religion, faith or irrationality and therefore above reproach. This is mythical because it rests ultimately on a belief. These two ways –

[17] See, Quentin Skinner, *Visions of Politics: Regarding Method,* vol. I (Cambridge University Press, 2002).
[18] *Id.* at 122-127.
[19] One notable exception to this is George H. Gadbois Jr., *Judges of the Supreme Court of India (1950-1989)* (Oxford University Press, New Delhi, 2011).
[20] For a critique of Skinner's approach in the context of reading ancient Indian historical texts, see, Jonardon Ganeri, *The Lost Age of Reason: Philosophy in Early Modern India 1450-1700* 63-73 (Oxford University Press, 2011).
[21] Ganeri usefully alerts us to the danger of Skinnerian approach as running the risk of turning "moderate contextualism into an extreme form of social constructivism." *Id.* at 68.
[22] I will briefly elaborate on the historical emergence of the free exercise clause from Charles Cornwallis's Code of 1793 in the later part of the Introduction.

disavowal of the irrational and a faith in laws' insular positivism - is how I employ the term secular mythology in this study. There are multiple registers and roles of the category of myth understood as the antithesis of law: it can be deployed both within *and* against the law. Section I of this introduction provides a synoptic review of the category of myth as critique of modern law. Section II clarifies the way in which this thesis understands the category and politics of modern law as a tool of social justice and its emancipatory possibilities. In Section III, I outline the colonial encounter that contributed to the emergence of modern law and the politics of codification of the laws both by the British colonial authorities in India and the process of codification in Britain. Section IV takes a glimpse at the Subaltern Studies project in its effort to foreground the suppressed dimensions of the legal discourse in general and judicial vocabulary in particular. Section V provides a historical background of the 'free exercise clause' of the Indian Constitution from the late eighteenth to the mid-nineteenth century with the Queen's proclamation and how it shaped the religious freedom clause in independent India. Finally, Section VI provides an overview of the chapters.

I. Myth as a Critique of Modernity and Modern Law

One of the most moving accounts of the modern law encountering myth literally in an adversarial battle can be found in Peter Goodrich's study of *Languages of Law*.[23] He narrates an event of 1985, when the traditional inhabitants of the Lyell Island – Haida Indians - had to withstand an American corporation which acquired logging license from the government of British Columbia (Canada). The license was granted without any consultation with the inhabitants. The logging was foisted on the inhabitants and their traditional economy which was based on woodcraft and fishing, and it invited vehement opposition. The American company obtained a court[24] injunction against any interference. The Haida Indians (Haida) decided to appear before the court without any

[23] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson, London, 1990).

[24] Throughout the thesis, I have used 'Court' with a capital C when the word is used as a pronoun, or short-form for specifically the Supreme Court, or the High Court. When I have used it as a common noun (*viz*, "the courts were called in to determine the matter" or "he took them to court" or "the courts were involved in") or while referring to the subordinate courts, I have used it with a small c, 'court'.

legal assistance in their persistence to speak for themselves.[25] The inhabitants appeared in their full 'ceremonial dress' with eighteen elders. For Goodrich, dress or insignia of the modern law is also part of 'myth' and not simply tradition.[26]

Goodrich describes this as a clash of two mythologies as "the judge's robes can be contrasted the button blankets of the defendants."[27] Haida furnished the argument of sacred origins using the vocabulary of rights: "They had a right 'to stand on the islands' and to act as caretakers from that moment at the dawn of time when the first Indians had emerged, according to Haida legend, from a clamshell carried by a raven and dropped on the sands of the islands."[28] This language could not be *heard* by the judges. Nor did the totem poles, art forms, masks or poetry and songs qualify as relevant for the court.[29] Though the judge permitted Haida to bring their stories, legends and tradition to the courtroom, none of it met the acceptable standards of legal evidence. This "limited hospitality" was granted because "Haida had no other arena available to them, he had been prepared to listen and generously recommended that a record of the evidence presented should be kept for posterity."[30] Goodrich points to the remark of the judge that he cannot do much as judges cannot enter into the domain of policy-making. This "washing of hands", for Goodrich, is an instance of annulment and annihilation of non-legal vocabulary in the courtroom. More importantly, he argues, this refusal to countenance the 'other' is not merely because of the impossibility of admitting the other language. This refusal, he says, is a *necessary* denial or negation of the other as it might put into question the identity of the modern law itself:[31]

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[25] See, Jacques Derrida, "The Force of Law: Mystical Authority of Law" 11 *Cardozo Law Review* 920, 924-25 (1990). ("I must speak in a language that is not my own because that will be more just […] it is more just to speak language of the majority, especially when, through hospitality, it grants a foreigner the right to speak. It's hard to say if the law we are referring to here is […] the law of the strongest, or the equitable law of democracy. And whether it depends on justice or law (*droit*).")
[26] Another variation of this style of argument can be found in Gary Watt, *Dress, Law and Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury Academic, New Delhi, 2013). For a critical review, see, Jeanne Schroeder, "Always True to You in my Fashion" 27(3) *Law and Literature* 1-15 (2015).
[27] Peter Goodrich, *supra* note 23 at 181.
[28] *Id.* at 182.
[29] *Id.* at 183.
[30] *Ibid.*
[31] *Ibid.* (emphasis in the original; internal references omitted).

> The court would not compare mythologies, *it refused even to countenance the question of the 'other',* because to do so would raise questions of its 'self', of the social and mystic construction of its own body, its social role and actions, its own clothes.

Such denial of the 'other' and the "legal deafness" in this case, he argues, is intrinsic to modern law. Haida is the most profound illustration of the structure and *habitual logic* of the common law, "one which throughout its history has systematically obliterated difference in all its manifestations, in all its discourses."[32] For Goodrich, both Haida and the modern law have their own mythic structures. But the modern law consistently denies its 'mystical construction' and presents itself in opposition to myth. In the next section, I will examine the fragility in the binary opposition between myth and modern law.

Myth in Modernity

A theoretical elaboration of the legal mythology can be found in the work of Peter Fitzpatrick (1992). Fitzpatrick in a synoptic observation of his argument asserts: "I […] argue that myth is a suppressed dimension of modernity and I see its components finding a specific coherence in law as myth."[33] The western enlightenment tradition, for Fitzpatrick, defines itself in opposition to myth. But despite efforts to erase the mythic dimension, myth has been incorporated in the foundational precepts of modernity. He argues that the 'transcendental' dimension of the mythic worldview is only substituted and not annulled in modernity: "The profane is swept up into a sacred […] as a project and a progression towards that resolution. For the perfection of beginnings in pre-modern myth is substituted the perfection of ending."[34] His formulation insists on the reversal of transcendence, or displacement of mythic into the "fantastic stories devised in the names of reason and history' at the cost, or denigration, of the non-western 'other'".[35] He

[32] *Id.* at 184.
[33] Fitzpatrick, *supra* note 5 at 14.
[34] *Id.* at 36.
[35] *Id.* at 46, 48.

explains this by taking the example of elevation of 'property' as a transcendental object in western modernity which is both particular and universal, at once:[36]

> As an 'external', reified object, it is suffused with the palpable and the specific. Yet it is also elevated in terms no less extensive than those attributed to the transcendence of myth. It is, to summarize various formulations of Enlightenment, the foundation of civilization, the very motor-force of the origin and development of society, the provocation to self-consciousness and the modality of appropriating nature.

What is deified as universal is "a particular form of Occidental property."[37] The geographical locations lacking this notion of property "can only be its precursors or [evidence of] savagery."[38] Law becomes the transcendental (despite its materiality) and a universal system in its perfection, completeness and rational coherence. This marks the dawn of the discourse of modern law:[39]

> The sovereign is no longer God's earthly representative and is now the autonomous and self sufficient source of law. Law, once it was processed by Kant, is no longer tied to any extraneous order, now deriving its force and origin purely from its intrinsic being. Yet, despite all this, law does not or cannot assume merely terrestrial dimensions. It continues to bear the characters of God. But it does this now in a mundane world.

This 'autonomous' and 'self-sustaining' character of the law likens it to its divine counterpart. The omnipresence and omnipotence of the law is reflected in its claim to do *anything*, if not *everything*. "Some areas are supposed to remain characteristically apart, notably a 'private' domain of the subject."[40] The Kantian reference in the above passage is noteworthy as Kant emphasised the 'systematic unity' in order to distinguish a

[36] *Id.* at 50.
[37] *Ibid.*
[38] *Ibid.*
[39] *Id.* at 55. For a discussion of law as modern myth, see, Fitzpatrick, *id.* at 55-57.
[40] *Id.* at 57.

'system' from an aggregate of rules.[41] This Kantian idea would take its highest sophistication in the writings of German jurist, Hans Kelsen as an exemplar of twentieth century 'language of faith' of self-sustaining, autonomous and 'pure theory' of law.[42]

II. Varying Visions of Law as a Social Justice Instrument

In the previous section, I argued that mythology is paradoxically exemplified in the institution of modern law. An immediate fall out of this line of argument would be to question the very character and relevance of the law. I must clarify that my purpose is *not* a mere exploration of the violence suffused in legal interpretation or majoritarian reaffirmation in legal pronouncements. Throughout this study, by heightening the repressions and contradictions of modern law, I argue for its emancipatory potential.

In a recent monograph on Law and Violence, Latika Vashist and Jyoti D. Sood describe two predominant ways of thinking about law as "'return or reject' proposals".[43] The predominant legal theorisation operates in two mutually conflicting suggestions. The *return proposal* harps on reinstating more rule of law that seems to be lacking in the contemporary times. This proposition, emblematic of the Black letter law tradition accentuates "the predominant view of law as a clear, certain and objective set of rules and principles, neutral in origin and uniform in application."[44] Vashist and Sood point to the linear trajectory of progressive history, emblematic of the discourse of modernity, in the return proposals. On the contrary, the *reject proposal* (which unites post-modernists, post-colonialists and relativists) emphasises law's "foundational and originary linkages with violence resulting in an impossibility of achieving and securing justice through law."[45] Such a rejection of law, paradigmatic of the critical legal scholarship is full of "scholarly despair and hopelessness with law and legal institutions, often culminat[ing] in proposals of *exceeding* or *transcending* the law to achieve justice."[46] Despite their

[41] Immanuel Kant, *Critique of Pure Reason* (1887), cited in Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* 38 (Palgrave Macmillan, UK, 1987).
[42] For a critical review of Kelson's work as a narrative of faith, see, Goodrich, *supra* note 41 at 35-44.
[43] Latika Vashist and Jyoti D. Sood, *Rethinking Law and Violence* (Oxford University Press, New Delhi, 2020).
[44] *Id.* at xv.
[45] *Ibid.*
[46] *Ibid.* (emphasis added).

seeming opposition, the two proposals align, although for altogether distinct reasons, in their conceptualization of law as "*inadequate* and *lacking* in its response to violence […] The law is either too meek to counter injustice or inherently unjust."[47]

This perspective of theorising law advocates for a constant vigilance against the liberal seduction of principles of cosmopolitan constitutionalism, or the fashionable notions of transformative constitutionalism,[48] which simply demand 'more *faith* in the principles of rights based frameworks.' It also cautions against a wholesale rejection of the law as immanently violent or bourgeoisie tool of oppression. Instead, what is advocated is, what I described above as, the potential which is inchoate but present in the law. Vashist and Sood describe this potentiality as an 'ambivalence' which, "following Freud, is the simultaneous and co-equal presence of contradictory feelings or tendencies with respect to an object."[49] They describe the category of contradiction or uncertainty as not necessarily in need of resolution or finality but an open ended possibility aligning justice with constant struggle. In their words:[50]

> The contradictions of law instead of being seen as weaknesses should be viewed as its strength for these contradictions keep it alive—protean, transient, never so settled or certain, always questioning and in process of change.

What is encouraged is not a celebration but an acknowledgment of contradictions or inadequacies of the law. This perspective is pertinent to appreciate the 'living law,' as law is a system of language and much of interpretation is about the construction of meaning. This reminder that the possibility originates in the very moment of failure would serve as a beacon light in the chapters of this thesis.

The Marxist analysis of legal complexities finds an expression in the early work of Upendra Baxi. In his *Marx, Law and Justice* (1993), he outlines two forms of denial of

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[47] *Ibid.* (emphasis in the original).
[48] An emphatic statement on this in the recent Indian legal scholarship can be found in Gautam Bhatia, *Transformative Constitutionalism: A Radical Biography in Nine Acts* (Harper Collins, India, 2019).
[49] *Id.* at xiv.
[50] *Id.* at xviii.

the law in the Marxist tradition: the instrumentalist and the materialist approach.[51] The instrumentalist approach characterises law as an 'instrument' of the bourgeoisie to perpetuate class oppression.[52] Taken to its ulterior logic, law deserves rejection as it serves as a smokescreen to hide and legitimise injustice. Such a view, for Baxi, is a form of 'vulgar instrumentalism' as it never "specifies what it is precisely to say that whatever is called the 'law' is necessarily an instrument of the ruling classes."[53] It paints the 'ruling classes' as monolithic, and thus fails to explain the special provisions for the vulnerable sections in the Constitution and welfare legislations. It also remains unsuccessful in appreciating the changing interpretations given to laws in each decade, even though, Baxi argues, there has been no "notable change in the class origins of Indian Supreme Court and High Court justices in the last four decades."[54] He stresses that the sweeping generalisations miss the nuanced understanding of both the *ruling classes* and the *law*:[55]

> [S]uch an approach *ascribes a degree of permanence* to the ruling classes in the human history and endows them not just with a *lack of heterogeneity* but with, as it were, a *collective unconscious* unerringly and omnisciently pursuing its own interests. This is a wholly unilluminating manner of reading legal history.

This critique raises the second question about the extent to which law is affected by the social structure which is class-dominated. This question is dealt with in the critique of, what Baxi calls, the materialist approach. This approach considers the law, as an entity of the *superstructure,* to be determined by the *economic base*. Simply put, the law is determined by the economic modes of production and social relations "[i]f so, the law cannot be of much relevance in understanding and promotion of social change since it is not an autonomous social force."[56] Through a careful reading of the passage from Marx's

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[51] Upendra Baxi, *Marx, Law and Justice* (N.M. Tripathi (P) Ltd., Bombay, 1993).
[52] On this register, the discourse of rights or law in its 'universal' application masks the inequality of the social.
[53] Baxi, *supra* note 51 at 16.
[54] *Id.* at 17 (internal citations omitted).
[55] *Ibid.* (emphasis added).
[56] *Id.* at 32.

Preface to Contribution of Political Economy, Baxi outlines the possible alternative readings arguing that economic base does not 'determine' but merely 'conditions' the superstructure.[57] In his reading of Marx in *Capital, volume III* and *Grundrisse*, Baxi argues that Marx has indicated that there exists "a dialectical relationship between the law as superstructure and the economic system."[58] He reiterates this point in the conclusion to the chapter that "while the material base conditions law as superstructure, the law too influences the base."[59] This points towards a *relative autonomy* of the law, despite its embeddedness in the social order ridden with class antagonism, which certainly affects it but does not determine it wholly. In his suggestion that the conditioning is mutual, Baxi is arguing for a more radical thesis of questioning the very *topological metaphor* of 'superstructure' and 'base' for the colonized societies (which he argues were well known to Marx and Engels). He suggests that the experience of colonialism is ridden with 'extra-ordinary inversions' for Indian and other colonial societies. He asserts:[60]

> The legal system introduced by the British imported bourgeoisie relations of property […] 'the legal system and property relations actually hindered the development of capitalist relations in agriculture, given the context of colonialism.' The base neither 'determined', nor 'conditioned,' the superstructure of colonial law in India. (But if it did, it was the 'metropolitan' base of the English society!) Marx who wrote extensively concerning the British rule in India was deeply aware of this inversion.

He finds a possibility of interrogating the "seductive simplicity of the topological metaphor" and an alternative explanation which is marred by a "rapid reading of Marx"

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[57] The relevant passage in Marx's *Capital Vol. I* is the following: "The sum total of […] relations of production constitutes the economic structure of the society, the real foundation, *on which rises a legal and political superstructure and to which correspond definite forms of social consciousness*. The mode of production of material life *conditions* the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but on the contrary, their social being that *determines* their consciousness." Cited in Baxi, *id.* at 31-32.

[58] *Id.* at 40.

[59] *Id.* at 47.

[60] *Id.* at 32.

which betrays “anything Marx and Engels themselves said.”[61] The neglect of this work in Indian legal scholarship and the vanishing scholarship on Marx, especially in legal academia, has not compelled Marxist scholarship to take up this provocation. For my purpose, this reading remains important as it outlines a possibility of relevance and significance of law despite the predominantly dismissive attitude towards it in classical Marxism. Baxi convincingly argues for a foundational and central role of the law. In doing so, he distinguishes himself from those left-leaning intellectuals who are suspicious of the law as a site of emancipatory politics.[62] As we shall see in chapters 2 and 4, Baxi’s approach also has its limits as he, in his later works, appears to be insufficiently critical of *Hindutva judgments* (chapter 2) and more specifically his reading of the *Ayodhya case* (chapter 4). His appreciation of *Ayodhya case*, for instance, based on abjuration of what is present, discounts any ‘conditioning’ of the judiciary by the Hindu majoritarian sentiment. Contra such denial, I argue for a more robust and critical reading of the workings of the judicial processes which entails exploring ‘possibilities’ in failure while remaining alert to the *internal resistances* within the system to such possibilities.

In the next section, I will map the historical trajectory of the colonial legal history linked to my research questions. This will help in understanding the unique status of law in colonized societies as also the meaning of ‘modernity’ in this thesis.[63]

III. Religion, Law and Colonial Modernity

Jonardon Ganeri argues that in the history of philosophy, modernity is conceptualized in two mutually opposite ways. The predominant version, defines modernity as total rejection of ancient knowledge. Modernity makes a fresh beginning entirely purging itself from the past. The second approach views it not as rejection but, what Ganeri describes as, a “profound reorientation” of the ancient past. In this study, I will prefer the latter

[61] *Ibid.*
[62] See, Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond Law* (University of Illinois Press, 2004).
[63] In my exploration, I seek to closely examine the relatedness and linkages in the supposedly opposite conceptual categories. Kate Schick describes such ‘speculative approach’ as “a struggle-filled approach, one that emphasises the need to work towards a greater comprehension of socio-political realities, to see how we are implicated in the challenges we face and to take the risk of acting politically.” Kate Schick, *Gillian Rose: A Good Enough Justice* 17 (Edinburgh University Press, 2012).

view as it helps in an understanding of modernity as a continuum where the traces of the past are ever present.

Ganeri argues that the predominant view "radically simplifies the ways in which the moderns drew upon the ancients."[64] He shows that Indian philosophy witnessed its own 'modernity' but it remained neglected in the history of ideas. He expounds the historical diversity of the Indian tradition vis-à-vis European tradition,[65] the dialogic relationship between Hindu and Arabic traditions,[66] and philosophical debates and opposition between the positions of scholarly conservativism (in favour of ancient knowledge) and radical revision.[67] These aspects of his work, however, are beyond the scope of this thesis.

The reason for a discussion of this dimension of Indian philosophy serves an important backdrop in thinking about the Indian judges' incessant preoccupation with the theological (a central issue in chapters 1 and 2). The interpretation of scriptures in order to rediscover new meaning(s) for contemporary times is not alien to ancient Hindu philosophy. This may not be understood as an advocacy for judges to act as theologians. But certainly my argument in chapter 1 with respect to essential practices test is that any self-righteous plea for disengagement of secular courts with theological questions without any reference to ancient Indian or colonial history negates this historical context of colonial modernity in general and legal codification in particular.

However, in the interaction of the legal/modern with theological/ scriptural/ancient, it is important to acknowledge the difficulty in any attempt to look for origins of Indian legal tradition. Most of what we describe as pre-colonial/ indigenous law of India originated in the search of the colonizers to learn about and apply the 'Indian law' to 'Indians' (which

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64 Ganeri, *supra* note 20 at 2.

65 *Id*. at 6-7.

66 Ganeri's finest analysis appears in his excavation of Dārā Shukoh, the elder son Shāh Jahān. Shukoh encouraged scholars from Varanasi to translate fifty-two Upanishadas in Persian. This inaugurated the tradition of interpreting Qurān through Hindu Upanishadas. The premise of the project was to see Upanishadas as a commentary on Qurān, which eventually became the basis of his execution for heresy by his younger brother, Aurangzeb in 1659. See, Ganeri, *supra* note 20 at 22-30.

67 For a discussion on Raghunātha Śiromani (1460-1560) as pioneer of path-breaking work on "new reason" in the town of Navadvīpa in Bengal, see, Daya Krishna, "Raghunātha the Rebel" in *Indian Philosophy: A New Approach* 174-180 (Sri Satguru Publications, Delhi, 1997).

in itself is a new colonial category!). It thus needs to be clarified at the outset that my search here is *not* for origins (as that would already be 'modern') but for what may have been lost or occluded in the trajectory followed by the modern law. It is this 'anti-search' that we must undertake for the legal traditions and systems that existed prior to and during the British rule.

Classical Hindu Law

Robert Lingat's *Classical Law of India* (1973) outlines the intersection of theological and legal categories in ancient India. It explores how spiritual salvation and moral code of duty in material world was simultaneously present in the notion of *dharma*.[68] *Dharma* was both a social and religious category, defying any clear demarcation. The *Dharmashastras* were not codes of law as understood by the Europeans. They were integrally linked to the tradition of interpretation (*mimamsa*) which interpreted, validated and bridged the gap when customary law conflicted with the *Dharmashastras*. It was a juristic device to align the textual edicts with the unwritten customary law.[69] An illustration of the indirect manifestation of the textual and the people's law is visible in the following instance. Despite the *shastric* prescription condemning the marriage of a *dvija* (twice born or upper caste) and a *sudra* (a term used for lower caste undertaking menial work), there was categorical "rules for a share of paternal estate for a son of Brahmin, *ksatriya* [warrior upper caste], or *vaisvaya* [trading caste] born of female *sudra*!"[70]

Lingat explains the co-relation between the textual and customary, but he takes a conclusive position on classical Hindu law as reflecting prominence of *authority* and absence of *legality* (positive law made by a sovereign State). By contrast, western law

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[68] Dharma was 'essentially rule of *interdependence*, founded on the hierarchy corresponding to the nature of things and necessary for the maintenance of social order' and to deviate from *dharma* was 'to violate one's salvation'. Robert Lingat, *The Classical Law of India* 211 (translated from the French with additions by J. Duncan M. Derrett, University of California Press, Berkeley, 1973). Also see a discussion in Upendra Baxi, *Towards a Sociology of Indian Laws* 5-10 (Satvahan, New Delhi, 1986).

[69] *Shastric* law had predominant 'transcendental character' whereas custom as a source of law was entirely a 'social phenomenon'. But Lingat warns the reader against neat categorical separation as at times the *shastric* law included the customary law. Lingat, *supra* note 68 at 176-177.

[70] Baxi, *supra* note 68 at 8.

was based on legality and clear statutory rules. This reductionist conclusion reinforces the stereotypical understanding of colonial societies.[71] Such conclusions are indicative of the problems in reframing the historicity of the ancient Hindu laws on the register of western legality.[72]

Colonial State and Formations of its Juridical Forms

Warren Hastings brought about a major transformation in the eighteenth century juridical administration. His Judicial Plan of 1772 replaced the existing indigenous dispute settlement system in Bengal with the English court system. While there was admiration for the ancient Indian past, East India Company was also reluctant to endow indigenous adjudication with the status of law. The non-State indigenous legal systems were soon superseded by the British judicial administration.

The representation of Indian rulers as 'despotic and lawless' forms the basis of the consolidation of British rule in India. The predominant view about India of the eighteenth century was that it was marked by the dominance of arbitrary whim of the monarch and the absence of any laws/ codes in the forms of governance under the Mughal rule. This representation served a dual purpose. One, it led to vilification of existing systems of law and order in order to establish the British as superior administrators. Two, the notion of times of 'crises' or *exceptional* situations demanding extraordinary measures served as justification for better governance. The colonial subjectivity of the natives was discursively invented: lacking any civilized sense of governance and requiring a paternalistic guardian. Bernard Cohn describes this as "the ideological infrastructure of

[71] It also simplifies the complex dimension of the western law. See, Costas Douzinas and R. Warrington, *Justice Miscarried: Ethics Aesthetics and the Law* 25-92 (Edinburgh University Press, 1994) (ch 2: "Antigone's Dike: The Mythical Foundations of Justice").

[72] Baxi underlines Lingat's limitations in perceiving forms of Indian positive law by pointing out that "even at the level of history of ideas, one might relate to Lingat his own criticism of the classical commentators: like them, he too pays very little attention to Arthashastra. The latter contains, at any rate normatively, the science of positive law." Baxi, *supra* note 68 at 10.

British rule in India".[73] This provided a justification for paternal authority of the British as benevolent:[74]

> As benevolent despots, the British were to appear in several forms- as "platonic-guardians," as patriarchs habitually addressed by the simple folk as *ma-bap* (mother and father), as authoritarian rationalist utilitarians, and in *times of crisis* as the not-so-benevolent *Old Testament avengers*.

The colonial sovereign in his decision-making capacity, during crisis, dawns an authority of God-like sovereign performing the miraculous task of civilizing the 'heathens' from darkness to the light of law and order. The notion of crisis had created circumstances that were exceptional. The exception elicited a sovereign who could decide upon that exception.[75]

A counter model to *despotism* was proposed by Warren Hastings: India as the *theocratic* State. Hastings opposed the 1772-73 Parliamentary Committee's recommendation of introducing British laws and institutions in order to ameliorate despotic governance in India.[76] "Under the provision of plan for the Administration of Justice, 15 August 1772," the East India Company under Hastings declared that the civil courts should "administer Islamic law to Muslims and the law of the 'Shaster (*Dharmashastra)* to Hindus."[77] This was in accordance with the principle of non-interference in the 'personal laws' – a peculiarly colonial term – of the Indians.[78] Hastings persuaded a group of Bengali

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[73] Bernard S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* 65 (Princeton University Press, 1996).
[74] *Ibid.* (internal citations omitted, emphasis added).
[75] "Sovereign is he who decides on the state of exception" is the proposition of Carl Schmitt. See, Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2005). The connection between theology and exceptional times is captured exquisitely in Schmitt's assertion that the "exception in jurisprudence is analogous to the miracle in theology." As a jurist trained in catholic tradition, Schmitt is quite explicit in his likening of concepts of politics as transformed theological precepts. In his words, "[a]ll significant concepts of the modern theory of the state are secularized theological concepts […] the recognition of which is necessary for a sociological consideration of these concepts." For him, it is unsurprising that the modern law would become the myth-maker of modernity as its structure is deeply embedded in mythology. *Id.* at 36.
[76] Cohn, *supra* 73 at 66.
[77] Ganeri, *supra* note 20 at 59.
[78] This initial protection of 'personal laws' had been reiterated in the nineteenth century in the Royal Proclamation of the Queen in 1858: "We declare it to be our royal will and pleasure, that none be in anywise favoured […] by reason of their religious faith or observances […] And we do strictly charge and

Brahmins to cooperate with the British in developing Anglo-Indian legal codes. The Hindu laws were primarily drawn out from the *shastras* and the Muslims from the *Quran*. Duncan Derrett remarks that "in securing the approbation of the British administrators in 1772 *śāstrīs* of Bengal vindicated for the *śāstra* what was virtually a new field for Hinduism at its most consciously normative."[79]

Due to the difficulty in translation of the codes from Sanskrit to English, the texts were first translated into Persian and from that into English. Eventually in 1776, *A Code of Gentoo Laws* was brought into existence, translated by N.B. Halhed. This Code served as an important instrument for the beginning of Indic studies and elicited many translations. Sir William Jones (1746-94), the well-known scholar of Persian and Arabic from Oxford and the founder of the Asiatic Society of Bengal, studied Sanskrit and undertook the task of codification of the Hindu and Mohammadan laws in line with Code Justinian. By the end of his lifetime he succeeded in translating both Hindu and Mohammadan law from Sanskrit and Arabic respectively. It was only after his death, in 1798, that the final English translation was completed by H.T. Colebrook and published as *The Digest of Hindu Law on Contracts and Successions* in Calcutta.[80] Cohn captures the paradoxical nature of the colonial enterprise in his assessment that, "[w]hat had started with Warren Hastings and Sir William Jones as a search for the "ancient Indian constitution" ended up with what they had so much wanted to avoid – with English law as the law of India."[81]

Lloyd Rudolph and Susan Rudolph describe the development of classical Hindu law as the flashpoint of emergence of the 'high culture' of cosmopolitan law.[82] 'High culture'

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enjoin all those who may be in authority under us, that they abstain from all interference with the religious belief, or worship." Cited in Terence Thomas, "The Impact of Other Religious" in Gerald Parsons (ed.), *Religion in Victorian Britain (II Controversies)* 280, 287 (Manchester University Press, 1989).

[79] J. Duncan Derrett, *History of Indian Law (Dharamaśāstra*) (Leiden, Brill, 1973).

[80] Cohn points out how Jones convinced the then governor-general Cornwallis by formally writing to him in March, 1778 for government funding for his project. Cohn, *supra* 73 at 70.

[81] *Id. at* 75. William Jones who followed Hastings had no illusions that the notion of liberty and liberation may be extended to the natives. Cohn notes: "it appears that Jones believed that even though manners, habits, dispositions, and prejudices were not fixed or immutable, the Hindus of India had usages that were fixed from time immemorial. Unlike British with their case law […] the Hindus […] lived a timeless existence, which I turn meant that differences in interpretations offered by Pundits must have arisen from ignorance or venality." *Ibid.*

[82] Lloyd I. Rudolph and Susanne Hoeber Rudolph, *The Modernity of Tradition: Political Development in India* 269 (The University of Chicago Press, 1967).

law, for them, is the escalation of 'literary law inscribed in classic texts' of Hindus (*shastras*) as well as Muslims (*Quran*) and developed by English judges who received assistance from *pandits* and *maulvis* from 1772 till 1864. They contrasted this with the "popular law of the peasant society."[83] Ganeri argues that the collation and compilation of important texts and commentaries in late eighteenth century was an adaptation of the "old law that might apply to new circumstances."[84] An exercise which was "still another modernism" but something that was in line with Indian modernity of rediscovering the meaning of the ancient texts for changing circumstances. Contemporary legal scholars and historians need to supplement this understanding of seventeenth century classical codes with the interpretations rendered by the colonial law courts which has percolated into postcolonial judicial memory.

The suspicion of these native officials (*pandits* and *maulvis*) soon gave way to the colonial judges as interpreters of the indigenous texts. Kunal Parker explores the interpretive techniques of the Anglo-Indian courts.[85] As Parker reveals, in a private letter to Charles Chapman, William Jones underscores the untrustworthiness of the native officers: "I can no longer bear to be at the mercy of our pundits […] who deal out Hindu law as they please, and make it at reasonable rates, when they cannot find it ready made."[86] Parker calls this a "momentous process of controlling sacred legal texts through translation, from which the textual Orientalist tradition of British India descends."[87] This inaugurated the surreptitious introduction of the principles of English common law to adjudicate the claims of 'personal laws' of the natives. This historical process of judges taking up the role of theologians via modern law, which I will argue continues in post-independent India in interpreting freedom of religion clause of the Constitution, remains understudied. This "undocumented process of judicial legislation […] has escaped the scrutiny of contemporary historians almost entirely."[88]

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[83] *Ibid.*
[84] Ganeri, *supra* note 20 at 59.
[85] Kunal Parker, "Interpreting Oriental Cases: The Law of Alterity in the Colonial Courtroom" 107 *Harvard Law Review* 1711-1728 (1994).
[86] Letter dated Sept. 28, 1785, cited in Parker, *id.* at 1715.
[87] *Id.* at 1715.
[88] *Ibid.*

It is also important to refer briefly refer to Janaki Nair's work who argues that through the colonial exercise of discovering Indian law "the 'natives' were given back their own history, of which they had been previously ignorant."[89] However, the preference for the written over the spoken or memorized, or that of historical and factual over the mythic and legendary, only indicated that British 'invented' themselves in inventing the Indian tradition. She points out the ironies of historiography of tradition and the law of colonial India: [90]

> One of the enduring ironies of current historical knowledge of the Indian past is that it has been derived largely from the interpretations developed over the last 200 years, and, as a result, derived from ways of studying the past which were inaugurated by the Orientalists.

The colonial interpretation of the ancient codes sketched a static view of the Indian society. The interpretive traditions aligning the *shastras* with changing times were discarded and superseded with English common law. This fixed and frozen notion of time for the natives formed the basis of the codification. The search for the origin, pure and unadulterated Hindu and Muslim laws was a modern compulsion. Baxi summaries this phenomenon in his mapping of the sociology of Indian law:[91]

> Just as the written texts of religious laws and processes of Western-style interpretation and exegesis led to Anglicization of Hindu law, so did the neglect of custom led to the stagnation of Hindu law during the British period.

Islamic Law and the Colonial Encounter

Despite striking differences between the Hindu and the Muslim law or *Anglo-Muhammadan law*, there were similarities in the way it was 'constructed' during colonialism. Muslim law, unlike its Hindu counterpart, did not recognise customary law

[89] Janaki Nair, *Women and Law in Colonial India: A Social History* 20 (Kali for Women, Delhi, 1996).
[90] *Ibid.*
[91] Baxi, *supra* note 68 at 13.

as an integral part of Islamic jurisprudence.[92] But these distinctions did not save Muslim law from stagnation. The Anglicization of Islamic law cemented a fixed identity for the South Asian Muslims on the basis of textual tradition as evolved by the British courts.[93] The Hasting's Plan, Michael R. Anderson argues, homogenised the interpretive traditions of Islamic law in a unidimensional manner. The Quran (the official text in Hastings' Plan) was not primarily a legal text.[94] In a remarkable similarity to the classical Hindu law, it exhibited both religious/ transcendental aspirations and in practice, it was a normative document for societal interactions in the community.[95] In the words of Anderson: [96]

> To apply the 'laws of Koran with respect to Mohammedans', was a project that mistook Qur'an for a code of law. The Qur'an, and even more specifically legal texts such as *al-Hidaya* had never been directly applied as sources of legal precept. Their legal relevance had always derived from a properly authoritative *quadi* whose moral probity and knowledge of local arrangements could translate precept into practice.

In the brief period when *maulvis* served as law officers, the British judges consulted the *maulvis* on the issues of personal laws in a unique manner. Without narrating the facts of the dispute to the *maulvis*, the judges asked them "a question formulated in an abstract, hypothetical manner, often shorn of relevant details."[97] The response to this abstract question by the Muslim law officers was applied on the facts of the dispute by the British

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[92] Tahir Mahmood points out that "the legal theory of Islam, on the whole does not recognize custom as an *Independent* and *formal* source of law." It only formed a 'minor constituent' of law at the option of the jurist. See, Tahir Mahmood, "Custom as a source of law in Islam" 7(1/2) *Journal of Indian Law Institute* 102 (1965).

[93] The discussion in this section is limited to 'personal laws'. For a discussion on supersession of Islamic criminal law by British codification, see, Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press, New Delhi, 1998).

[94] Michael R. Anderson, "Islamic Law and Colonial Encounter in British India" 11 (WLUML Occasional Paper No. 7, June 1996), *available at*: https://cdn.atria.nl/ezines/web/WomenLivingUnderMuslimLawsOP/1996/No7June.pdf (last accessed on Jul 11, 2021).

[95] Anderson also refers to the problem of translatability. *Al-Hidaya* followed the usual route of translation: from Arabic to Persian and then translated into English from Persian by Charles Hamilton in 1791. However, due to absence of "inheritance" as a subject, "in 1792, *al-Sirajiyya*, a treatise on inheritance, was translated direct from the Arabic by Jones personally." *Id.* at 13.

[96] *Id.* at 11.

[97] *Ibid.*

judges. The process of decision making, thus, removed the specificity of the litigant in favour of universal and mechanical rule-application.

The judicial reliance on the translated versions of textual sources stagnated Islamic jurisprudence limiting it to modern interpretations of ancient texts. This hampered the possibility of changes within Islamic jurisprudence. As Anderson notes:[98]

> Although produced in haste, and with imperfect language skills, the unrevised eighteenth-century translations remained authoritative. A number of translating errors were discovered in *Al-Hidaya* but corrections were made *only to the Persian version* in 1807. The English version remains uncorrected.

This ad-hoc treatment of the native laws resulted in a distorted picture of Muslim law in India. Contemporary Muslim law scholars have lamented this fact as this unfortunate interpretive trend continues in the post-independence judiciary. Furqan Ahmed, a Muslim law scholar, insists that Muslim law is not a judge-made law. It is rather a jurist-made law, a fact that has not been recognized and respected in its contemporary interpretation and application.[99] A few exceptional Indian judges have recognized this distorted interpretive history aspect, V.R. Krishna Iyer, J. being one of them.[100] In the case of *Yousuf Rawther* v. *Sowramma*,[101] Iyer, J. aptly remarked:[102]

> Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of

[98] *Id.* at 14.
[99] For a critique of some recent cases of Muslim law, see, Furqan Ahmad, "Muslim Law" L *Annual Survey of Indian Law* 901 (2014).
[100] For the contribution of Krishna Iyer, J., see, Furqan Ahmad, "Understanding Islamic Law in India: An Assessment of the Contribution of Justice V.R. Krishna Iyer: A Tribute" 57(3) *Journal of the Indian Law Institute* 307-332 (2015).
[101] AIR 1971 Ker 261.
[102] *Id*. at 264.

> India and Arabia. The soul of a culture -- law is largely the formalised and enforceable expression of a community's cultural norms -- cannot be fully understood by alien minds.

These historical acts of interpretive violence gave birth to rigid colonial categorization of Hindu and Muslim identities.[103] A critical reading of the *Ayodhya case* in chapter 4 illustrates this point.

Fixity and certainty: rigor or *rigor mortis*?

Fixity, universality and certainty of law were cardinal virtues for eighteenth and nineteenth century legal positivists.[104] Pierre Legrand, in his critique of the motivation of positivist lawyers, points out how in over-emphasising fixity and certainty "[w]hat we get is not rigor but *rigor mortis*."[105] There is ample literature suggesting the deeply fraught process of codification of the Hindu personal law in India.[106] The writings of legal historians also show how despite the nineteenth century codification of the criminal law that sought to achieve uniformity and precision,[107] the judicial interpretations consolidated and cemented differences on the basis of caste[108] as well as gender.[109]

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[103] Despite acknowledging the non-recognition of customs as integral to the Islamic jurisprudence, "reference to 'usages' of Muslims may have been partly inspired by the position and practices of Hindu converts to Islam (Malabar, Punjab and Central Provinces) who continued to follow certain aspects of Hindu law as well as the adherence to certain regimes of customary law." Baxi, *supra* note 68 at 18.

[104] For a critique of universal construction of criminal law categories, see generally, Alan Norrie, *Crime, Reason and History* (Cambridge University Press, 2014).

[105] Pierre Legrand, "Siting Foreign Law: How Derrida Can Help?" 21 *Duke Journal of Comparative & International Law* 595, 599 (2011).

[106] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (Cambridge University Press, 2017). Also see, Madhu Kishwar, "Codified Hindu Law: Myth and Reality" 29(33) *Economic and Political Weekly* (Aug. 13, 1994).

[107] T.B. Macaulay, J.M. Macleod, G.W. Anderson and F. Millett, *A Penal Code Prepared by the Indian Law Commissioners* (published by command of The Governor General of India in Counsel) (The Lawbook Exchange Ltd., New Jersey, 2002). This original draft of the Indian Penal Code with "notes" demonstrates that the ideas of "certainty and precision" were hallmarks of the process of codification in India.

[108] See, Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (Permanent Black, Ranikhet, 2010). She traces the history of Maharashtra during 1880s -1990s, in order to "rethink India's political modernity from the perspective of the Dalits." *Id.* at xii. For a review of this work, see, Charu Gupta, "Book Review: Anupama Rao, The Caste Question: Dalits and the Politics of Modern India" 50(1) *Indian Economic and Social History Review* 115-118 (2013).

[109] For a discussion of the paternalist discourse of saving Indian women, see, Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India" in Kumkum Sangari and Suresh Vaid (eds.), *Recasting Women: Essays in Colonial History* (Zubaan, 2013). Also see, Partha Chatterjee, "The Nationalist

Elizabeth Kolsky, in her study of colonial rape cases, shows how the native woman came to be situated in a doubly marginalised position due to her gender, class and caste *and* the colonial perception of natives being 'untrustworthy':[110]

> Indian women faced a twofold challenge in colonial courtrooms. Not only were they subjected to British legal presumptions about false charges, they also had to contend with specifically colonial ideas about the unreliability of native witnesses and other prejudicial ideas about Indian culture. Indian rape victims were doubly suspect suspects.

She also demonstrates how the prejudices of caste were reiterated by the colonial judges who relied on the prejudiced precepts of medical jurisprudence.[111] The post-independence judicial discourse displays a colonial continuity in the double, triple marginalization of legal subjects – as individuals as well as collectives – who are inscribed not merely by historical markers of caste, class and gender, but also of religion as it has played out in the post-partition, independent secular polity of India.

In sum, the foundational myth of continuity, the interpretive process which supplanted the native systems of dispute resolution was superseded by the English common law.[112] The fixity and certainty of law (and order) was attained at the cost of 'epistemicide' of native systems. In its implementation, the law became a form of universal precept to be applied to factual situations without appreciating thick narratives of the litigants before the law. This fully-formed law is itself a mythic category as it obscures the necessary responsiveness of law to the emergent situations.

Resolution of the Women's Question" in Kumkum Sangari and Suresh Vaid (eds.), *Recasting Women: Essays in Colonial History* (Zubaan, 2013).

[110] Elizabeth Kolsky, "'The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860–1947" 22 (1) *Gender & History* 113 (Apr., 2010). For a recent statement on the construction of "prostitute" as a colonial category, see, Durba Mitra, *Indian Sex Life* (Princeton University Press, New Jersey, 2020).

[111] *Id.* at 113 (emphasis added).

[112] The judicial precedents served as, what Walter Benjamin called, 'law preserving violence'. Walter Benjamin, "Critique of Violence" in Marcus Bullock and Michael W. Jennings (eds.), *Walter Benjamin: Selected Writings Vol I (1913-26)* 236-252 (The Belknap Press of Harvard University Press, Massachusetts, 1996).

IV. Subaltern Engagement with the Law

The Subaltern Studies project attempted to write an alternative history to frameworks of colonialist and nationalist historiography, providing insights about the interrelationship between law and social history. The 'unreadability' of social events in their encounter with law is an important theme that surfaces in the subaltern project. Shahid Amin underscores how judicial discourse de-politicised social events by stripping them of their political content.[113] In a similar vein, Ranajit Guha shows how collective political resistance translated into the colonial legal register as the violation of codes of criminal law.[114]

One intervention which directly concerns the themes of this thesis is Sumit Sarkar's essay titled "The Kalki-Avatar of Bikrampur: A Village Scandal in Early Twentieth Century Bengal".[115] Taking the argument of unreadability forward, Sarkar raises the question of absence and erasure of mythology in the colonial legal archive. *Kalki Avatar* investigates the event of killing (or culpable homicide)[116] in the small town of *Doyhat* in Bengal. An upper caste householder invited a Brahmin *sadhu* along with his two lower caste disciples. One of the disciples, Prasanna killed his co-disciple, Ananda, molested the women of the household (asking them to strip, to kick their husband's forehead, and to insert smoke-pipes inside their private parts), and attempted arson. The trial judge convicted the accused for culpable homicide. The Calcutta High Court, in appeal, confirmed the conviction and issued 'stiffer sentences' against him.

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[113] This is demonstrated through his reading of the 'approver' from the colonial archive. See, Shahid Amin, "Approver's testimony, judicial discourse: The case of Chauri Chaura" in Ranajit Guha (ed.), *Subaltern Studies V: Writings on South Asian History and Society* (Oxford University Press, Delhi, 1987),

[114] Ranajit Guha, *Elementary Aspects of Peasant's Insurgency in Colonial India* (Duke University Press, 1999). Guha shows the unreadability of the peasant insurgency which on the colonial legal register only became a crime. He also shows how the legal codes are incapable of appreciating crimes of theft committed by starving population. *Id.* at 87-88.

[115] Sumit Sarkar: "The Kalki-Avatar of Bikrampur: A Village Scandal in Early Twentieth Century Bengal" in Ranajit Guha (ed.), *Subaltern Studies VI: Writings on South Asian History and Society* 1-53 (Oxford University Press, New Delhi, 1989). It is quite surprising that Baxi's essay in the next volume, mapping the trajectory or presence of law in subaltern studies, fails to acknowledge this important contribution on reading the law. See Upendra Baxi, "'The State's Emissary': The Place of Law in Subaltern Studies" in Partha Chatterjee and Gyanendra Pandey (eds.), *Subaltern Studies VII: Writings on South Asian History and Society* 247-264 (Oxford University Press, New Delhi, 1992).

[116] Culpable homicide is different from murder in legal vocabulary. The quantum of blame is lesser than murder. Therefore, death penalty can never be inflicted for the offence of culpable homicide. In Euro-American jurisdictions the expression used for culpable homicide is 'manslaughter'.

Sarkar foregrounds the surrounding mythology linked with the murderous rage which was neglected entirely in the judicial narrative, and provides an alternative reading of the event. On this register, the accused personified himself as the mythic Lord of Death (*Yama*) and rendered sacrifice for the dawn of a fresh beginning of a new epoch (*Yuga*). Arson, for Prasanna, was equivalent to burning of the city of demons (*Lanka*), just like the monkey-god (*Hanuman*) in the Ramayana. Sarkar reconstructs the incident by digging out such vernacular mythological representations in theatre and other forms predominant in colonial Bengal.[117] He shows how the erasure of the mythic social history from the judicial archive resulted in a constrained understanding of the event, and that an alternative narrative could emerge by putting together[118] the micro social history surrounding it.

Sarkar thus opens the possibility of reading Prasanna's actions, viewed from his Dalit subjectivity, as a form of defiance of the predominant Brahmanical narrative of the mythological story of *Kalki-Avatar*. While the Kalki-myth reinstates hierarchical gender and caste ridden social relations, Prasanna re-wrote and subverted the dominant myth (making the wives kick their husbands was once such sign). Sarkar's argument is comparable to Goodrich's narration of the erasure of the vocabulary of Haida Indians discussed earlier. Both essays narrate the violence of legal language and the impossibility of acknowledging its 'other'. Sarkar's narrative as a historian, however, explores the possibility of making legible the tribal myth in the legal landscape. Sarkar's subversive reading can be contrasted with the judicial labour invested in the reconstruction of the Hindu majoritarian myth of the birth of Lord Ram at Ayodhya in chapter 4. This contrast also indicates that the 'mythic' version cannot be idealised as a response to the disavowal of the mythic by the secular courts. In other words, reinstating the mythic uncritically is not any guarantee of a fair and just outcome. The exercise that Sarkar undertakes

[117] Sarkar's "primary interest was never in reconstruction of what may have really happened" but "in what was remembered about it, what forgotten and why." He analyses various vernacular forms of the permeation of the myths through dramatic representations, cheap paintings of Kalighat and many other forms of renditions of the myth. This foregrounds the subtext of the mythic-historical milieu that surrounded the incident. Sarkar, *supra* note 117 at 5.

[118] Sarkar explores the themes of *Kali-Yuga* and *Kalki-avatar* in Mahabharata (*vana parva*) and also other available Sanskrit/ Puranic literature around the myth. The origins of *Kalki-Puranas* are traced as early as the eighteenth century "possibly originating in Bengal" which provides the myth a more concrete memory "by giving it local habitations and names." Sarkar, *supra* note 117 at 5.

focusses on the left out, unsaid or hidden from the formal narrative.[119] The merit of Sarkar in establishing diverse reading practices is not to idealize the 'mythic' but to remind us that an alternate or latent narrative of the text can diversify meanings and provide a richer narrative of social history.

In his essay "Chandra's Death", Ranajit Guha illustrates how the possible multiple readings of an event can be clipped off by the law, reducing the "range of signification to a set of narrowly defined legalities."[120] The essay interrogates the mediation of law and its effects on the death of a woman, Chandra in the nineteenth century Bengal. The historical re-construction of the death is based on deposition documents (*ekrars*) by Chandra's sister and mother to "a tribunal which functioned independently of and parallel to the network of colonial courts."[121]. The depositions were about Chandra's death by consuming medicine intended for abortion. Chandra had entered into an (illicit) relationship with 'her husband's sister's husband' and had become pregnant. The two options available to her were either aborting the foetus, or accepting social banishment by going to *bhek*, a form of 'living death', for her illegitimate act. It was her choice to abort that eventually led to her death due to excessive bleeding. Guha demonstrates how the women who stood before the law as complicit in abetting her death were indeed representing the "strength of women's solidarity"[122] by defying the patriarchal authority of *bhek*. The legal lens entirely 'silenced' this act of 'resistance' into the codes of legality thereby, in ways similar to *Approver's Testimony* and *Kalki Avatar* reducing the act of rebellion into an act of criminality where the "truth of an event [is] *already* classified as a crime."[123] Such a transformation of the "matrix of real historical experience" into

[119] Such a reading throws light on the violence of erasure in the reported event. It demonstrates the failure to grasp or reconstruct an event if we only remain within the confines of official legal archives. At some level if Amin's *Approver's Testimony* reflected upon the reduction of collective political violence to narrowly constructed categories of law, *Kalki Avatar* unfolds the violence of the legal categories themselves in their potential to erase the caste and class realities which were the major triggers of the event of killing which law sought to understand in the first place. In other words, the very tools of law employed for the reconstruction of an event ended up becoming the instruments of wiping off the social dimensions which formed the real impetus for such killing.

[120] Ranajit Guha: "Chandra's Death" in Ranajit Guha (ed.), *Subaltern Studies V: Writings on South Asian History and Society* 135, 140 (Oxford University Press, New Delhi, 1987).

[121] *Id.* at 150.

[122] *Id.* at 165.

[123] *Id.* at 141.

"abstract legality" and the silencing or freezing of multiple significations into a linear and singular narrative is at the heart of Guha's essay.[124]

Upendra Baxi's argues that Guha's essay despite having "the qualities of a discourse worthy of being called a classic"[125] confuses the conception of law with the forensic colonial law of the courts. Such colonial law of the courts in seen in opposition with the non-law of the *samaj* or community represented by tribunals or *byabostha*. Baxi sees this slippage as induced by the colonial understanding of law as a facet of State sovereignty: "Already the word 'court' stands appropriated by sovereignty; communities have mediatory structures to be labelled by all other names but 'courts'."[126] How can the community mores and practices be differentiated from the label of 'law'? In the context of Chandra's death, Baxi writes, that the "structuration of subalternity with the ideologies of 'government of sexuality' and its ultimate sanction of *bhek*, a sentence of 'living death', are no different, in range and in intensity, than State law's death or life-imprisonment sentences."[127] He underlines that an opposition of modernity/ the modern law in favour of a romantic vision of community driven justice can be problematic.[128] In studying the law and its 'other' i.e. the mythic, one has to tread the path carefully without falling into romantic views of the extra/non-legal justice beyond the law. It is an important insight that any *a priori* division of 'law' and 'myth' as historically or factually separate categories can slip into an elevation of 'pre-colonial' arrangements over the modern ones.[129]

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[124] *Id*. at 140-141. The transformations involved conversion of "death into murder, a caring sister into a murderess, all the actants in this tragedy as defendants, and what they said in a state of grief into *ekrars*."
[125] Baxi, *supra* note 117 at 250.
[126] *Id.* at 251.
[127] *Id.* at 252.
[128] See, for instance, Shiv Visvanathan and Chandrika Parmar, "Life, Life World, and Life Chances: Vulnerability and Survival in Indian Constitutional Law" in Boaventura de Sousa Santos and Ce´sar A. Rodrı´guez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* 339-362 (Cambridge University Press, 2005). The authors point to the syncretic relationship that existed between the forest and its inhabitants: "[in] the traditional system, [the rulers] did not claim revenue nor did they generally interfere with the forest dwellers." *Id.* at 344. However, Sumit Guha in *Environment and Ethnicity in India* (Cambridge University Press, New York, 1999) shows that pre-colonial regimes did in fact extract substantial revenue from forest dwellers and tribes for maintaining their military establishments.
[129] Ashis Nandy, in the context of Babri Masjid – Ram janambhumi dispute, arguing against modern/ positivist history, tries to explore an alternative to legal solutions based on truth and reparation. Nandy's

V. Colonial History of Free Exercise Clause and Religion in Public Sphere

In this section, I will sketch a brief historical impression of the free exercise of religion clause of the Indian Constitution and the scholarship advocating for a robust engagement with religion in the public sphere. We have already noted that Warren Hastings resolved to set up a system of indigenous laws as against English common law to govern Indians. However, it was the Queen's Proclamation of 1858 that charted the map for emergence of the vocabulary of religious freedom, the shades of which can be seen in the free exercise clause of the Indian Constitution enshrined in Articles 25 and 26.[130]

Despite Hastings' departure to England for his impeachment trial, Charles Cornwallis, his successor, expanded and transformed the idea of religious freedom into a policy of free exercise. Regulation III of 1793 mentioned that local religious laws must be preserved to protect the natives 'in the free exercise of their religion'. Nancy Cassels argues that this regulation later became the "ultimate rationalization for British rule in India."[131] During the late eighteenth and early nineteenth century there were rigorous debates on the possible interpretations of the free exercise clause. Did the clause encourage an active support for indigenous religion by East India Company or a complete dissociation from Indian religion?[132] This issue was settled with Queen Victoria's proclamation which also coincided with the transfer of East India Company's authority to the British Crown. The Queen's proclamation dated November 1, 1958 after declaring the equal and impartial

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exploration of an imaginative solution is an alternative way of thinking, especially when the positions based on truth, on the one hand, and history, on the other, are so hardened and opposed. However, this view is based on a presupposed binary opposition between myth and positive history which is where it is limited. See, Ashis Nandy, "History's Forgotten Double" 34(2) *History and Theory* 44-66 (1995). For a critical review of literature on the binary of myth and modernity, see, Prachi Deshpande, *Creative Pasts: Historical Memory and Identity in Western India, 1700-1960* 1-18 (Columbia University Press, New York, 2007).

[130] I have textually analysed both the Articles in chapter 1. The Introduction is limited to the colonial history that shaped the nature of the free exercise clause.

[131] Nancy Gardner Cassels, *Religion and Pilgrim Tax under the Company Raj* ix (Manohar Publications, New Delhi, 1988). Section I of the Cornwallis Code reads: "The regulations which may be adopted for the internal government of the country, will be calculated to preserve them the laws of the Shaster and the Koran, in matters to which they have been invariably applied—to protect them in the free exercise of their religion — and to afford security to their persons and property." *Id.* at i.

[132] See, C.S. Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* 27-30 (Oxford University Press, New York, 2014). She argues how the British Evangelists were against the support, sustenance or management of 'heathen' religious institutions. Co-equally they were against the idea of 'neutrality' as that would impede the pursuit of conversion to Christianity. Nonetheless, the 1858 Queen's proclamation inscribed the notion of neutrality with respect to the religious matters of the natives.

protection under the rule of law charged "and enjoin[ed] all those who may be in authority under us, that they abstain from all interference with the religious belief, or worship."[133] Adcock deftly describes the impact of the proclamation in the following words:[134]

> The Queen's Proclamation established the political languages that Indians would be obliged to use when addressing their colonial rulers, if they would be taken seriously. But before they could appeal to their rights as members of a religious community, Indians had first to translate their concerns in terms of the distinction between the religious and the nonreligious.

This obligation to translate into the colonial language is, what she terms as, the politics of translation.[135] The distinction between the religious and the non-religious would acutely find its way in the constitutional vocabulary in the free exercise clause which I will discuss in chapter 1. The important theme that is important for this study is that the colonial history provides the impetus for the formation of the binary of religious and non-religious which came to govern all interactions with and articulations against the Empire. This context serves as a vigorous foundation to understand this binary that will haunt the constitutional text and its interpretation in post independent India (as we will see in chapter 1).

Another corollary of this argument is that the vocabulary of 'religion' originated with, or more accurately in protest against, the colonial rulers. There was nothing natural about a wide variety of social and cultural practices to be self-evidently religious.[136] Scholars

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[133] Cited in Thomas, *supra* note 78 at 281.
[134] Adcock, s*upra* note 134 at 38.
[135] Also see, Shabnum Tejani, *Indian Secularism: A Social and Intellectual History 1890-1950* (Permanent Black, New Delhi, 2007). Tejani argues that the Queen's proclamation provided a framework to articulate local grievances: "The promise of non-interference in religious custom framed the language with which Indians sought accountability from their rulers." *Id.* at 74.
[136] Partha Chatterjee argues that "there does not exist in any Indian language a term for 'secular' or 'secularism' which is standardly used in talking about the role of religion in the modern State and society and whose meaning can be immediately explicated without having recourse to the English terms." See, Partha Chatterjee, 'Secularism and Tolerance' in Rajeev Bhargava (ed.) *Secularism and its Critics* 350 (Oxford University Press, 1998).

have shown that the idea of 'religion' as doctrines, scriptures and beliefs is a European historical category.[137] However, of more relevance to this study is "to understand the ways in which Europe, in its world-conquering project of empire, altered the conditions of the lives of non-European peoples in ways that obliged them too to reconstitute themselves as members of one exclusive 'religious' community *against* others."[138] It is in this limited sense that I will argue in chapter 3 that the religion-economics binary which is central to the cow protection debates is insufficient to fully appreciate the validation of the anti-cow slaughter laws by the Supreme Court. I develop the rather neglected work of C.S. Adcock on cow protection where she argues that religion "in colonial India must be treated as a pragmatic category, one that described the discursive positions that were available to cow protectionists and the political ramifications of those positions."[139] She specifically studies the Arya Samaj discourse to understand the dual idiom employed in the vernacular idioms, as against the English language literature (directed at the colonial authorities), where the language of religion fuses with that of the economy and the social sphere. I borrow this argument to study the judicial interpretation of anti-cow slaughter laws which follows a similar trajectory and cannot be fully comprehended with a priori binary of logic of economy and religion.

The engagement of the modern law with broad socio-cultural, theological, and philosophically complex of ideas and practices called 'religion' in India has been present since colonial times. This is not because Indian society is overtly religious by its very nature but because religion and its interpretations were central to the encounter with the politics of Empire. It is because of this central, and often divisive role played by religion, especially religious differences understood as 'communalism,' that the Nehruvian State sought to establish a firmly secular polity in postcolonial India. But it is clear that the

[137] See, Wilfred Cantwell Smith, *The Meaning and End of Religion: A New Approach to the Religious Traditions of Mankind* (Mentor Books, New York, 1964). Smith argues that the category of religion has specific roots in sixteenth and seventeenth century Europe. Also see, Peter Harrison, *"Religion" and the Religions in the English Enlightenment* (Cambridge University Press, New York, 1990); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, New Jersey, 2000).
[138] David Scott, *Refashioning Futures: Criticism After Post Coloniality* 56 (Princeton University Press, New Jersey, 1999) (emphasis in the original).
[139] C.S. Adcock, "Sacred Cows and Secular History: Cow Protection Debates in Colonial North India" 30(2) *Comparative Studies of South Asia, Africa and the Middle East* 297–311, 298 (2010).

question of religion cannot be simply erased in the espousal for a secular polity. Such an attitude, illustrated in the Nehruvian imaginary, would mean both the denial of this history as well as the complexity of the struggle against colonialism. A strict separation between religion and the public sphere in the postcolonial India is thus rendered impossible; in the next section I will argue that it is also not desirable in the contemporary times.

Rethinking Secularism with Thick Conception of Religion

Political liberalism granted a limited role to religion as it came to be seen as a 'private' and 'individual' affair. Religion was not eradicated but privatised and religious freedom in liberal societies became a private right. Emblematic of the United States (U.S.) Constitution's famous wall of separation thesis,[140] Charles Taylor, describes how this approach has become fundamental in imagining western secularism. Churches "are now separate from political structures (with a couple of exceptions, in Britain and Scandinavian countries, which are so low key and undemanding as not really to constitute exceptions)."[141] However, even in the context of western secularism, the sacred is only *downplayed* from the public realm without its complete *erasure*. Individual religiosity, Rodney Stark remarks, has remained untouched by the process of secularization. Western secularization, he argued, has merely resulted in dividing the individual psyche into two halves. The private face of the subject on which a public mask is superimposed. The mask exhibits the official and formal values of secularization in public domain. Due to the persistent tension between the personal and the political, secular values remain shallow and peripheral.[142]

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[140] An anti-establishment clause inserted by way of the First Amendment to the U.S. Constitution prohibited the federal State from legislating on the affairs of the Church. The Constitution of the United States of America, Amendment I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[141] Taylor, *supra* note 1 at 1.

[142] Rodney Stark, "Secularization, R.I.P." 60(3) *Sociology of Religion* 249-273 (1999). The effort made to maintain the appearance only strengthened the inner religiosity. As if, the outward public appearance was counterbalanced by the inner religiosity, irrational or even superstitious core.

Sanford Levinson, again in the context of U.S. Constitution, argues that the separation thesis had removed the theological and sacred from constitutional deliberations. But paradoxically the constitutional text, symbols and values served as sacred supplements for the constitutional framers and the various organs of the State.[143] This has turned the U.S. Constitution and its political institutions into a "civil religion".[144] "The Flag, the Declaration, the Constitution – these […] constitute the holy trinity of […] the American 'civil religion'"[145] As if, the repressed religiosity returned as a compulsive force obliging the framers and vanguards of U.S. Constitution - from James Maddison to Abraham Lincoln – to turn the Constitution into a document of faith in public discourse, superseding the Bible.

From a feminist standpoint, Margaret Davies raises the question of 'uncertainties' and 'controversies' in American separation thesis. She locates such uncertainties even in the more inclusive or "weak constitutional principle of State impartiality towards religion" in the Australian Constitution.[146] Towards the end of the twentieth century, she argues, the "highly visible social markers of religious difference" became an important issue for gender justice with the banning of *hijab* in France and Turkey.[147] She provocatively asks if the exclusion of religion from public space violates the fundamental tenets of democracy and equal treatment as it marginalises the views of religiously-minded in the structures of governance?[148] She argues that such exclusion abdicated religion from the definition of the political. Whether by "excluding religion from political discourse […] we also silence those who would challenge dominant interpretations of their faith?"[149]

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143 See, Sanford Levinson, *Constitutional Faith* (Princeton University Press, 2011).
144 Sanford Levinson, "*The Constitution* in American Civil Religion" 1979 *The Supreme Court Review* 123-151 (1979).
145 Irvin Kristol quoted in Levinson, *id.* at 5. In the *Sabarimala judgment* (discussed in detail later in chapter 1), one of the majority judges evoked the notion of constitutional trinity and faith: "While the Constitution is solicitous in its protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the *trinity which defines the faith* of the Constitution." *Indian Young Lawyers Association* v. *State of Kerala*, (2018) SCC SC 1690, para 47 (Chandrachud, J.) (emphasis added).
146 Margaret Davies, "The future of secularism: A critique" in Nadirsyah Hosen and Richard Mohr (eds.), *Law and Religion in Public Life* (Routledge, 2011).
147 *Id.* at 57.
148 *Ibid.* Also see, Veit Bader, Religious Pluralism: Secularism or Priority for Democracy? 27(5) *Political Theory* 597-633 (Oct., 1999).
149 Davies, *supra* note 148 at 63.

She advocates for dissenting traditions within religious landscape to emerge and occupy the discursive public sphere. This would avoid the essentialist view of the religion, in the hands of few religious leaders, reinvigorating religious orthodoxy and marginalising alternative religious imaginations. Such exclusion, for Davies, is ‘undemocratic’ and “unfruitful’ in its potential to delegitimise the possibilities of emergence of alternative imaginations on the theological terrain.[150] The contemporary politics across the world demonstrates the increasing relevance of sacred returning back in political contestations and constitutional discourse.[151] Thus, any attempt to salvage the legacy of constitutional secularism will have to pay heed to the presence of the sacred and the non-rational in politics and the law.

VI. Outline of Chapters

Chapter 1 focusses on the judicial doctrine of ‘essential practices’ (or essential practices test, as it has come to be called). This doctrine was inaugurated by the Supreme Court of India to interpret the freedom of religion clause. After its initial appearance in 1954, this doctrine has been used to separate the ‘essential’ and ‘integral’ aspects of religion from the non-essential or secular, economic and financial ones. This separation is premised on the presupposition that only essential and integral aspects of the religion will elicit complete protection from any form of State regulations. Since its inception, the doctrine has invited criticism as the Supreme Court observed that the determination of an essential tenet must be done from an evaluation of religious scriptures.[152] However, careful reading of the judgment of the constitutional bench which inaugurated the doctrine makes it clear that the Court did not limit itself to religious scriptures only, but also included

[150] Ratna Kapur’s work provides an illustration of re-imagination of alternative ways of religious traditions from a legal standpoint without falling into the trap of religious orthodoxy. See, Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing, 2018).

[151] See, Alex Deagon, “The Name of God in a Constitution: Meaning, Democracy, and Political Solidarity” 8(3) *Oxford Journal of Law and Religion* 473–492 (Oct., 2019). Advocating for recognition of God in the Constitutions of secular and democratic republic, with specific reference to Australian Constitution, Deagon argues that inclusion of God in the Constitution does not tantamount to imposition of religion but engenders political solidarity.

[152] *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

tradition and customary practices when it came to the exploration of essential aspects of the religion.[153]

The doctrine has been modified over the years in the successive precedents of the Supreme Court. Initially, the Court allowed such determination by the community. In later cases, the Court gave up the 'community determination' logic, recognising that the community speaks in multiple voices and cannot be reduced to a single homogenous entity. I have discussed the evolution, use and misuse of the doctrine over the years in various cases. In recent years, we find that the Supreme Court itself has grown suspicious of the legitimacy of the doctrine. The Court has accepted the plea for a re-evaluation of the doctrine (following the decision of the Supreme Court in Sabarimala temple controversy) and the fate of doctrine is pending, at present, before a nine-judge bench of the Supreme Court.

I confess that writing this chapter has been a difficult task and every draft made me question my position on the issue. Initially, I was all-too-certain and self-righteous in joining hands with the advocates of abolition of this doctrine. There are strong and convincing reasons that exist supporting this viewpoint. The primary reason is the lack of cognitive competence of the judiciary to read theological texts or traditions. The judges, after all, are trained neither in theology nor anthropology. A related, but equally weighty, reason was the eclectic (ab)use of the doctrine by the Supreme Court in at least two ways. First, in reading religion where it never existed and imposing the requirement of proof of essentiality on the petitioners who never pleaded religion in the first place;[154] and second, the misapplication of the doctrine in regressive ways by the Supreme Court.[155]

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[153] For a contrary opinion, see, Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (Oxford University Press, New Delhi, 2010).
[154] See, Amit Bindal, "Resurrecting the Other of 'Modern' Law: Investigating Niyamgiri Judgment and Legal Epistemology" 5 *NUJS Journal of Indian L. & Soc.* 237-247 (Monsoon, 2015). I discuss this point in chapter 3, on how the Supreme Court (in *Hanif Quareshi* v. *State of Bihar*, AIR 1958 SC 731) relied on this doctrine to convert the issue of livelihood into predominantly a religious issue.
[155] The comments of the Supreme Court (in *Ismail Faruqui* v. *Union of India* (1994) 6 SCC 364) observing that a "mosque is not an essential part of the practice of the religion of Islam and namaaz (prayer) by Muslims can be offered anywhere, even in open" demonstrated the partisan manner in which the doctrine can be applied. I discuss this and other related aspects of the case in chapter 4.

I have come to realise, during the course of this thesis, the limits of the position which advocates for the abolition of the doctrine as a standard policy recommendation. I mention this since the reason behind the change in my position is linked to the central argument of the thesis: that there is no easy separation possible between the law and religion or the law and the mythic. Although I continue to maintain my critique of the doctrine, I have questioned the easy erasure prescription that is predominant in legal scholarship. The predominant scholarship on this issue constantly emphasises the cognitive competence argument suggesting that the judiciary should stay out of theological exegesis. However, the problematic alternative of allowing the community to decide the contents and contours of what constitutes as 'essential', without any judicial intervention, has been iterated quite uncritically. I have argued that the issues of impossibility of strict separation between law and religion/mythic on the one hand, and the dangers of community determination, on the other, have remained unattended in the vast legal literature on the essential practices test.

I specifically engage with the 'community determination' argument with respect to the *Sabarimala judgment*. I argue that both the scholars (and even the Supreme Court) remain overtly devoted to a mythical idea of community has univocal and monolithic. Following the central thesis of this study, I argue that a simplistic policy recommendation of relinquishing the essential practices test – as a rectification of the interpretational error – fails to appreciate its symbolic depth as well as historical force. This rejection hypothesis imagines neat separation of the law and judicial process from the mythic or transcendental concerns which can be cleansed entirely. These positions are informed by either a complete denial of the mythic in modern law or expulsion of this dispensable adjunct smearing the law. My argument is that such a separation of the secular law from the transcendental or mythological is an impossibility or an unattainable *dream-work* of the secular modernity.

I conclude the chapter by arguing that a wishful withering away of the doctrine of essential practices would not eradicate but only *repress* its compelling force. I argue that the Court must encourage all available, including marginal and alternative views of reading the scriptures, customs or traditions, and validate the one(s) which comes closest to the values of the Constitution in a particular historical time and space.

Chapter 2 is both an illustration and continuation of the argument that I have tried to develop in the first chapter. This chapter deals exclusively with the realm of the sacred or the religious during electoral campaigns. The chapter explores the interpretations given by the Court to few contentious provisions in the Representation of Peoples' Act, 1950 (RPA) which bars the use of religious speech or symbolism for electoral gains. I argue that the Supreme Court in its interpretation of the statutory provision has missed the social and political context. I demonstrate that this search for a *hidden meaning* of the religious symbols or speech discounts the social and political contingency of communal appeals made in election times. For example, *Om* becomes a symbol that transcends Hinduism and in later decisions 'Hinduism' itself becomes a category transcending religion as it is a 'way of life'. This analysis is illustrative of the argument made in the first chapter for the following reason: the judgments analysed in this chapter never evoke 'essential practices test' but still the Supreme Court undertakes the task of digging out the essence of the religion. Which is why there are various other prominent Supreme Court decisions where the Court has undertaken the task of scriptural interpretation, re-fashioning the very meaning of "Hinduism" in contemporary times.[156] The judgments in this chapter reveal the Court's attempt of finding the essence of religious motifs without any reference to the 'essential practices test'. This establishes the fact that an abandonment of 'essential practices test', advocated as a panacea in contemporary legal scholarship, would do little to address the deep-seated judicial drive to engage with religion. This chapter shows the consequences of falling over, of the Court towards the mythological, at the expense of the historical, the social and the political. I interrogate the Court for this lapse and argue, reading attentively a few neglected decisions, that an alternate route is possible while staying within the logic of the law.

[156] The classic case on this point is *Shastri Yagnapurushadji* v. *Muldas Bhudardas Vaishya,* AIR 1966 SC 1119 (discussed in chapter 2) where the Supreme Court refers to *Bhagwadgita* and interprets its meaning to dismiss the argument of *Swaminarayan* sect that they are not Hindus and therefore the legislation enforcing temple entry of Dalits in Hindu temples is not applicable to them.

Chapter 3 looks at the debate of cow protection legislations arising from the constitutional mandate for protection of the cow in Article 48. It charts out the co-existence of the sacred (myth) and secular (modernity) infused in the constitutional provision through the debates of the Constituent Assembly and the interpretive labour of the Supreme Court. It traces the trajectory of the Supreme Court's reasoning and the objectionable way in which it has dealt with the issue.

I have used two central threads to unpack the cow protection debates and the judicial discourse on this issue. In the first exploration, I have focused on the doctrine of presumption of constitutionality. According to this doctrine, all laws are presumed to be constitutional unless the contrary is shown by the party challenging the law in question. This doctrine has been consistently used from the very first case on anti-cow slaughter laws (*Hanif Quareshi*) till the latest pronouncement on the topic. I argue that in the context of anti-slaughter laws, it has acquired a status of *doctrinal myth of constitutional faith*. This is because, despite the state[157] legislatures' repeated attempts to subvert the law laid down by the Supreme Court, the Court continues to proceed with the presumption of constitutionality of such laws. This chapter thus illustrates the complex web of the modern law and mythology and suggests ways, from within the logic of modern law, of orienting the discourse of the Court towards a *just* outcome.

Finally, chapter 4 attempts to critically analyse mythology and modern law through a careful reading of the text of the Supreme Court judgment in the Babri Masjid- Ram janambhumi dispute at Ayodhya. Unlike other chapters, this chapter focusses on a single judgment. Through this singular, deep focus, I seek to illustrate the enveloping of the legal/ rational and the mythological in one single text. Reading the 'addenda' at the end of the judgment, I argue that the 'addenda' is a perfect mythological supplement to this judgment which praises 'dispassionate objectivity' as a foundational virtue for forensic discussions. The 'addenda' exhibits the *other side* of the judgment which the Court

[157] Throughout this thesis, 'State' with capital 'S' is used to refer to the overall Indian state/governmental structure, while 'state' with a small 's' is for the state law or the state governments of West Bengal, Maharashtra, etc.

neither denies nor fully accepts. In this sense, it is "the juridical unconscious"[158] which illustrates the muddled relationship between rational and mythical tied together at once.

This chapter also explains a characteristic unique to the Indian law - the notion of the 'Hindu idol' as a juristic or artificial legal person. I have shown how the theory of ascribing juristic personhood to 'idols' takes a perverse form in the judgment as the Court accords legal personality to idols, which it acknowledges, were illegally installed. Here, the Court fails to appreciate the logic of its own precedents. It is important to put chapter 3 in conversation with this chapter on the issue of the Hindu idol. Unlike the Hindu idol, the cow is not conferred juristic personality in Indian law. This is despite the fact that 'cow protection' was elevated to the status of a constitutional virtue by the framers. This point is worth noticing to appreciate the novel ways in which the law and legal interpretation engage, embrace and at times, distance themselves from the mythological or the sacred. The conceptual boldness of the modern law about its virtues of objectivity, dispassion or autonomy hides the uncomfortable element of *faith* which constitutes its underbelly.

This study is not a nihilistic plea of doom for those who still hope for (social, economic and political)[159] transformation through the law. Rather, it is a plea for strengthening the law by acknowledging its *other* sides, which, if repressed or disavowed, can endanger the transformative ideals of law. It is central to the argument of this thesis that there is as much to learn from failures and pitfalls of law,[160] as from the stories of transformative constitutionalism.

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[158] See Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, 2002).

[159] These commitments to justice (in this order) 'social, economic and political' are listed in the Preamble of the Constitution of India.

[160] This point of learning from failures of law has been made in the context of LGBTQ+ politics by Ashley Tellis, "Violence against the Law: Reading Sexual Minority Judgements in Contemporary India" in Latika Vashist and Jyoti Dogra Sood (eds.), *Rethinking Law and Violence* 244-276 (2020). Also see, Jacqueline Rose, "Something Amiss" in Noreen Giffney and Eve Watson (eds.), *Clinical Encounters in Sexuality: Psychoanalytic Practice and Queer Theory* 391-395 (Punctum Books, 2017).

CHAPTER 1

INTERPRETING THE FREE EXERCISE CLAUSE: REFLECTIONS ON THE DOCTRINE OF ESSENTIAL PRACTICES

Introduction

On April 16, 1954 a seven judge bench of the Supreme Court delivered a judgment which was to became foundational for future interpretations of the religious freedom or free exercise of religion clause of the Indian Constitution. The free exercise clauses guarantee freedom of religion as a fundamental right to both individuals (Article 25) and religious institutions (Article 26). The judgment in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1] inaugurated the 'doctrine of essential practices' (or 'essential practices test'). This test was to become the touchstone to determine the essence of the constitutional right of religious freedom for decades thereafter. This chapter will critically appraise this doctrine and its evolution through various precedents.[2] Part of the justification for the doctrine appears under Article 25 itself, which distinguishes "secular" from "religious".[3] The doctrine ascertains the *integral* or *essential* aspects of religion and limits the claims of religious autonomy within this compass. After the above verdict, determining these

[1] AIR 1954 SC 282: MANU/SC/0136/1954 [Hereafter, "*Srirur Math*"]. B.K. Mukherjea, J. wrote the opinion of the Court. The other judges on the bench were Mehar Chand Mahajan, CJ., Sudhi Ranjan Das, Vivian Bose, Ghulam Hasan, N.H. Bhagwati, T.L. Venkatarama Aiyyar, JJ. The citations in this chapter are taken from Manupatra.

[2] I will briefly deal with the textual analysis of freedom of religion clause of the Indian Constitution (section I) in order to situate the introductory discussions on secularism within the constitutional context.

[3] I have already outlined the historical origins of this distinction in the Free Exercise Clause (see 'Introduction' to the thesis) arguing that the vocabulary of religion in opposition with the secular affairs took shape after the Queen Victoria's Proclamation of 1858.

essential tenets became necessary for any religious claim to acquire the status of an enforceable fundamental right.[4]

India's secularism, already discussed in the Introduction of this dissertation, consists of its own peculiarities, defined by the unique context and the fissures of colonial history and the prevalence of state-controlled religion in the public forum. The necessity of the doctrine, I will argue, appears to have sprung from the conflict between an exclusive right to religion and the State interventionist compulsion for social transformation. Religion is seen as *vis inertia*e, operating against social transformation, but also, at the same time, as an enforceable right against the State. State intervention (for "social welfare and reform"), thus, became constitutionally permissible for all non-essential facets of any religious institution.

Partha Chatterjee charts historically this tension with respect to religious freedom as the "liberal paradox" of the modern Indian State.[5] One of the anomalies of the secular State in India, for Chatterjee, is the "use of state legislation" to achieve a modernist purpose which comes directly "in conflict with another modernist principle, of the freedom of religion […]."[6] The paradox lies in the Constitution in the recognition of religious freedom as a fundamental right and beyond the purview of legislative action, and, at the same time, anticipating social reform and welfare within and from religion. The doctrine of essential practices is an outcome of this historical paradox negotiating between these two mutually contradictory impulses. It is therefore important to study the historical background, the ideological underpinnings and the historical contingencies within which the doctrine emerged. What historical and institutional necessity justified the demarcation

[4] The non-essential features, if found objectionable, could be meddled through State interference and reform legislations.

[5] Partha Chatterjee, "Secularism and Tolerance" in Rajeev Bhargava (ed.), *Secularism and its Critics* (Oxford University Press, 1998).

[6] Chatterjee, *id.* at 360. The reformist impetus for religious institutions beginning from nineteenth century was a part of the vocabulary of the Indian ruling classes. "Legal intervention in the cause of religious reform was not undesirable *per se*, but it was undesirable when the state was colonial." *Ibid.* This is important to contextualise Indian secularism as historically entwined with State regulation of religious affairs. The nineteenth century reform impetus was carried over to the State from colonial legislature but it stayed as an important aspect of Indian secularism. This distinguishing feature of Indian secularism makes it at odds with the U.S. 'wall of separation' model, nevertheless, such reformist impetus was a part of Indian provincial legislature before independence and the State after independence. This further explains the emphasis on subjecting religious freedom to State reform in the constitutional text.

of essential from the non-essential religious practices? Is such a demarcation possible, and that too by the judiciary? Are judges, who lack knowledge of or training in theological exegesis, competent to undertake this enterprise? These and related questions will be explored in the course of this chapter. I will also show how the Supreme Court has interpreted the doctrine in a contradictory manner. The Court, it will become clear, does not act as a cohesive institution in the application of the doctrine.[7]

The predominant scholarship assessing the Supreme Court and its performance advocates for an abandonment of this doctrine on account of the lack of judicial competency to evaluate the domain of theological discourse.[8] I will, instead, propose a critical evaluation of the doctrine to appreciate its failures more creatively. If one attributes the failures of the doctrine to the incapacity of the secular courts to adjudicate the theological domain, then, should religious or unsecular disputes be kept outside the domain of law? Who, then, would adjudicate the competing interpretations of the religious texts or traditions when these impinge on individual or collective rights guaranteed in the Constitution? More importantly, can the religious domain at all be neatly separated from the secular or political? I will propose that carefully working through with these questions, largely neglected in the scholarship of religion and constitutional law, will encourage a critical engagement with the appearance of the doctrine on the landscape of Indian constitutional law. Let me begin in the next section with a delineation of the religious freedom clause in the Constitution.

I. Free Exercise Clause of the Indian Constitution

The historical impetus for reform by an interventionist State with respect to religion can be noted in the religious freedom clause: Articles 25 & 26. It makes a distinction between

[7] This theme will be reiterated in another context, in chapter 3, with respect to doctrine of presumption of constitutionality of anti-cow slaughter laws.

[8] See, Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities" in Rajeev Dhavan, Ashok H. Desai B.N. Kirpal, and Raju Ramachandran (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2000); Rajeev Dhavan, "When the judiciary rewrites a faith", *The Hindu* (Oct. 15, 2018). Dhavan argues that the belief of the community in tenets of religion should be accepted as final determinant of essential aspects of religion. Also see, Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* 40-72 (Oxford University Press, 2010).

secular and non-secular activities associated with the religious practices. The secular activities are amenable to State intervention and reform. This distinction is premised on the *liberal paradox* that Chatterjee talks about. In this brief section, I aim to foreground some textual semantics necessary to appreciate the judicial discourse in the later part of this chapter.

> Article 25. Freedom of conscience and free profession, practice and propagation of religion
>
> (1) 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.
>
> (2) 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 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.

Article 25 (1) provides religious freedom as a fundamental right for individual practitioners of religion.[9] This must be distinguished from Article 26 which encapsulates the rights for religious institutions or denominations. Unlike any other Article guaranteeing fundamental rights in Part III of the Constitution, the clauses dealing with free exercise of religion begin with the limitations to this freedom. This can be seen in the opening words of both the Articles: "subject to public order, morality and health". This is a departure from the general constitutional scheme where a right is mentioned first followed by limitations or restrictions. The Constitution limits only Article 25 by further subjecting it "to the other provisions of this Part". This indicates a constitutional hierarchy between the fundamental right to religious freedom and other fundamental rights. Matters get even more complex as an additional limitation is mentioned under Article 25 and not Article 26 which reads thus:

> Article 26. Freedom to manage religious affairs
>
> 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

The denominational right is subjected to "public order, morality and health" but not "to the other provisions of this Part". Is there a constitutional hierarchy *inter se* between Article 26 and Article 25? This semantic latitude towards the denominational right has led to various legal controversies.[10] Most notably we will discuss this textual confusion

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[9] Article 25 of the Indian Constitution provides the right to individual religious freedom to "all persons".

[10] See, P.K. Tripathy, *Spotlights on Constitutional Interpretation* 100-126 (N.M. Tripathy Pvt. Ltd., Bombay, 1972).

with respect to the Supreme Court's 1957 decision in *Sri Venkataramana Devaru* v. *State of Mysore*[11] and more recently in the dispute over the entry for women into the Sabarimala temple. The framers not only proposed a cautious religious freedom by putting limits such as public order, morality, and health, but Article 25 (2) also provides a further list of permissible State interventions.

Article 25 (2) distinguishes between "existing law" (the pre-constitutional law)[12] and law made by the State (post-independence law). Article 25 (2) (a) permits *regulation* or *restriction* by law of any "economic, financial, political or other secular activity […] associated with religious practice". A clear separation of "religious practice" from "secular activities" is created in this provision validating the State intervention in the latter. A positive obligation is cast upon the State under Article 25 (2) (b) to *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." "Social welfare" and "reform" is anticipated through an interventionist State for all religions. But specific mention is made of the context of caste violence in Hinduism, instructing the throwing open of the temples for all classes and sections of Hindus.[13] Chatterjee notes how the reformist fervor historically coalesced with nation building from late nineteenth century onwards. The paradox is that the modern Indian State rejected the strict separation between Church and State, but the "violation of this principle of the [Euro-American] secular state was justified precisely by the desire to secularize."[14] This strict separation was sidestepped in favour of State intervention for the reform of religious orthodoxy.

These prefatory remarks on the textual semantics foreground a few characteristics of religious freedom in India: Constitution aspires for an interventionist State for the purpose of "social welfare and reform" of all religions with specific mention of Hindu

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[11] MANU/SC/0026/1957: AIR 1958 SC 255.

[12] The Indian Constitution specifically permits continuity with pre-constitutional laws unless they are superseded by legislative action. See, Article 372, Constitution of India. A discussion on this colonial continuity appears with respect to the Ayodhya dispute in chapter 4.

[13] This provision has to be read along with Article 17 of the Constitution which abolishes "untouchability" in all its forms and compulsively mandates the State to criminalise the practice of untouchability. A detailed discussion on Article 17 and its interpretation in the context of religious freedom clause will follow later in this chapter.

[14] Chatterjee, *supra* note 5 at 358.

caste system. An active involvement of the State is envisaged to combat caste discrimination. This synoptic discussion provides the necessary background to appreciate of the doctrine of essential practices.[15]

II. Origin & Development of the Doctrine of Essential Practices

In 1952, in the case of *Nar Hari Shastri* v. *Shri Badrinath Temple Committee,*[16] a division bench of the Supreme Court approved a bye-law under Shri Badrinath Act, 1939 which restricted the entry of priests as escorts to pilgrims at the famous Hindu temple at Badrinath. The argument of the maintenance of order inside the temple premises by avoiding overcrowding had convinced the Court. The specific issue was the entry of the priests ('*pandas*') as escorts in the sacred Badrinath temple.[17] The petitioners (*pandas*) claimed their right, "by immemorial custom, to act as Pandas and "Tirtha Purohits" of the pilgrims at Badrinath."[18]

The Court distinguished between *pandas* belonging to the priestly class (engaged as escorts/ guides) and the worshipping priests.[19] The petitioners (Brahmins belonging to the priestly class) contested the obstruction as unlawful restraint denying them from "assisting the pilgrims in the usual way at the time of 'darshan' and worship of the deities inside the temple."[20] The defendants (members of temple committee and the State government) justified the restriction as necessary to avoid overcrowding. It did not restrict, they argued, any visit to the temple for the worshippers. But the plaintiffs could not be allowed to accompany their clients or receive gifts from them which was the prevalent custom. The Supreme Court declared that the right to entry and worship in the

[15] The doctrine also reflects a continuation of the British colonial legacy which was interested in finding out the core of Indian religions as discussed in the 'Introduction'.
[16] 1952 SCR 849. The three judges on the bench were B.K. Mukherjea, Fazal Ali, and S.R. Das, JJ. (speaking through B.K. Mukherjea, J.) [Hereafter *Badrinath Temple*].
[17] The temple is situated in high hills of Himalayas in the district of Gadhwal. "The place to which the appellation of 'Puri' is given, contains a number of temples but the principal temple is the one where the idol Badrinath along with some other subsidiary idols is installed." *Id.,* para 1.
[18] *Id.,* para 7.
[19] *Id.,* para 2. The Court distinguishes between different classes of *pandas* at Badrinath at the time of the litigation. The Deoprayagi *pandas* who preferred the plaint in this case were responsible for the escort and guidance of the pilgrims arriving at Badrinath from the plains. As opposed to this, the 'Dimri' class of *pandas* were responsible to attend pilgrims coming from the hill area. *Id.*, para 3.
[20] *Id.,* para 7.

temple was innate and inherent as the temple was a public place. Despite acknowledging the customary right to escort the pilgrims, it declared that restrictions for the purpose of decency and maintenance of order were valid. The *pandas* were restrained from receiving gifts and presents from the clients inside the precincts of the temple. The Court clarified that the restriction under the Shri Badrinath Act of 1939 was permissible for maintenance of order. This established that even an administrative requirement for the maintenance of order could supersede a long standing customary practice that was part of the religious establishment and environment. The judgment implicitly recognized the historical context of temple regulation as one of the important tasks that the independent Indian State had undertaken for itself. This took a doctrinaire form in *Srirur Math*.

'*Srirur Math*' and the Doctrine of Essential Practices

Srirur Math[21] in 1954 inaugurated the vocabulary of essential as distinct from non-essential facets of religion within the Court's understanding of the religious freedoms in the Constitution. The context arose in a pre-independence legislation, Hindu Religious Endowments Act, 1927, which was promulgated to take over the administration and management of the Hindu temples by establishing "endowment boards" which are vested with the power of such management.[22] This enactment was superseded after independence by the then state of Madras, through the Madras Hindu Religious and Charitable Endowments Act, 1951. It abolished the Endowment Board created by the 1927 law, and vested its powers in the state government.[23] An organised hierarchical structure was established under the 1951 Act with the commissioner at the top (who superseded the endowment board president of the 1927 Act) and other government functionaries under him. The scope and jurisdiction under the 1951 Act extended beyond religious endowments to include purely charitable endowments as well.

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[21] *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* AIR 1954 SC 282; MANU/SC/0136/1954 (*supra* note 1).

[22] The reform of religious institutions began by the provincial legislatures way before the attainment of independence. The Madras Temple Entry Authorisation Act, 1947 was a noteworthy enactment as it criminalised the exclusion of any caste Hindu on the grounds of untouchability. This provincial legislation came before the enactment of Article 17 of the Constitution of India.

[23] Chatterjee points to the historical significance of religious endowments in the India. The British in the initial years of rule "took over many of the functions of patronage and administration previously carried out by Indian rulers, by middle of nineteenth century it largely renounced those responsibilities and handed them over to local trusts and committees." Chatterjee, *supra* note 5 at 352.

The initial petition was filed in the Madras High Court by Sri Lakshmindra Theertha Swamiar, the spiritual head of the Srirur Math ('*maths*' are institutional spaces belonging to different religious sects where religious leaders and students live, and theological learning and rituals take place) under the 1927 enactment. He prayed that the endowment board be prohibited from interference in the affairs of the *math*, which was founded by Sri Madhawacharya, a well-known exponent of dualist theism in Hindu religious philosophy. After the Constitution came into force in 1950, a subsequent petition was filed in 1951 by the *Mathadipati* (the superior head) who was the successor in authority of the previous petitioner. With the change in circumstances, this subsequent petition added an additional argument, challenging the constitutional validity of the 1951 law itself. The High Court decided the case in favour of the petitioners. It declared the new law as unconstitutional, on the ground that it violated the religious freedom clause (Articles 25 and 26).[24]

This decision was challenged by the Commissioner, Hindu Religious Endowments, Madras, who superseded the President, Hindu Religious Endowments Board under the Earlier Act. Here too, however, a seven judge bench approved the decision of the Madras High Court. The Supreme Court observed that the spiritual head could not be equated with an ordinary priest or a paid servant:[25]

> He is the head and superior of [sic.] spiritual fraternity and the purpose of [sic.] *math* is to encourage and foster spiritual training by maintenance of a competent line of teachers who could impart religious instructions to the disciples and followers of the *math* and try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the *Mathadhipati* down to the level of a servant under a State department.

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[24] The High Court also invalidated the law on the ground of it violating the right to property under Article 19 (1)(f) which was then a fundamental right. Right to property ceased to be a fundamental right after the 44th Constitutional Amendment Act, 1978. However, it still remains a constitutionally protected right under Article 300-A.

[25] *Srirur Math*, *supra* note 1, para 12.

In this argument, a *mathadipati* or *mahant* was considered as a bearer of rights in individual capacity under Article 25 (as the head of the spiritual fraternity) as well as under Article 26 (on behalf of the institution).[26] Any legal restriction/s or regulation/s preventing him to discharge his functions would amount to infringement of his rights.[27] The Court therefore concluded that his duties could not be confined or restricted to mere managerial functions or looking after the temporalities.[28]

In arriving at this conclusion, the Court discussed what constituted religion, religious practice or matters of religion. It insisted on the Constitution's permission to the State to intervene within the realm of "secular" activities associated with "religious" practice (Article 25 (2)).[29] It explained that in order to secure constitutional protection, religious freedoms must be an "essential" part of the religion. It clarified that "religion" need not presuppose an existence of, or faith in the concept of God:[30]

> Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There 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.

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[26] The Court concluded that Article 26 "contemplates not merely a "religious denomination" but also a "section thereof", the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article." *Srirur Math, supra* note 1, para 15.
[27] The Supreme Court referred to the historical legacy of Adi Sankaracharya, who began the practice of setting up *maths*. *Id.,* para 15.
[28] *Id.,* para 12.
[29] Making it necessary to categorically demarcate 'secular' activities (allowing the State regulation), from the 'religious' activities (regulation free zone) of the religious denominations.
[30] *Supra* note 1, para 17 (emphasis added).

In other words, the Supreme Court argued that it was not just doctrines, but also ritual observances, ceremonies and modes of worship connected with belief that were protected by the Constitution. Both belief, as well as actions taken in furtherance of belief, would be covered under "matters of religion".[31] As Khagesh Gautam explains, since the link between the religious action and the belief was deemed inseparable, the actions too became essential, and therefore worthy of constitutional protection.[32]

Religion, custom, and tradition overlap in this formulation of the doctrine. One may surmise that the ritual observances are evolved through customs or customary practices. However, the Court emphasised the doctrinal tenets: "what constitutes the essential part of a religion is *primarily* to be ascertained with *reference to the doctrines* of that religion itself."[33] This made the primary and paramount assessment as doctrinal. The Court made a further observation, privileging the doctrinal tenets of the religion even when they are linked with dietary habits or even dress:[34]

> 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 ablations 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 within the meaning of article 26(b).

It is difficult to clearly demarcate "food offerings" from customary practices, as these offerings have developed over time in different regions according to local conditions and

[31] The justification for including religious rituals appears to have been derived from the religious freedom clause itself as it guarantees the right to 'practice' religion. Khagesh Gautam, "Protecting Free Exercise of Religion under the Indian and the United States Constitutions: The Doctrine of Essential Practices and the Centrality Test" 8(3) *Indian Constitutional Law Journal* 311 (2014).
[32] *Ibid*.
[33] *Srirur Math, supra* note 1, para 20 (emphasis added).
[34] *Id.*, para 20.

preferences. Customs develop historically, adapt to changing conditions and change over time; indeed it was this very flexibility and change in the evolution of religious customs that colonial law, as we saw in the Introduction, froze as "timeless custom" or "timeless tradition" when it took some current customs and turned them into fundamental tenets of Hindu or Muslim law, and discard others as later accretions and therefore "corruptions" of correct religious practice.[35] The Court also insisted on the scrutiny of religious texts, practices *and customs* in order to find out what constitutes 'essential' to a particular religion. This lack of clarity between customary and doctrinal religion had existed in the colonial understanding of religion, and it continued in the Supreme Court's future judicial precedents as well.

In his critique of the *Srirur Math* judgment (and the essential practices test), Ronojoy Sen describes the doctrine as an effort to "cleanse Hinduism of […] superstition, and providing it with a modernist and rationalist definition of religious error and religious truth."[36] For Sen, the doctrine "has served as a vehicle for legitimizing a rationalized form of high Hinduism, and delegitimizing usages of popular Hinduism as superstition."[37] Even as Sen subscribes to the dominant reading of the judgment, that the Court elevated the doctrinal religion over its customary practices, on close examination we see that the Court actually weighed both customary practices (including food and dress) alongside textual evidence in its effort to establish what was essential religious practice. Although the essential practices test, over time, may have privileged high Hinduism over popular practices, we see in these individual interpretations, as in *Srirur Math*, that many customary practices could find their way into the 'essential' category as well. I shall return below, in the discussion of the *Sabarimala Judgment*, to Sen's division between high and popular religion, and his privileging of the latter in deciding who can determine what constitutes 'essential practices'.

Eventually, in *Srirur Math*, the Court declared entry of the State authorities to enter the temple anytime of the day (under section 21) as *ultra vires* and violating the freedom of

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[35] See section III of the Introduction to the thesis.

[36] Ronojoy Sen, "The Indian Supreme Court and the quest for a 'rational' Hinduism" 1(1) *South Asian History and Culture* 86 (2010).

[37] Sen, *supra* note 8 at 41.

religion clause. The Court distinguished between the entry of the "outsiders" into the "outer portion of the temple" and into the sacred "inner part". It relied on what it called "traditional custom" to declare as unconstitutional, the specific provision in the 1951 Act that permitted entry of the State officials in the inner part of the temple.[38] The Court outlawed sanctions on the high priest to take personal gifts etc., but permitted certain other regulatory mechanisms of the legislation as acceptable. The decision became prominent as a precedent to be followed in the later cases for the understanding of the meaning of religion through the lens of what is essential or integral to the religion.

Modifications and Development of the Doctrine

The next important judgment reiterating *Srirur Math* and the doctrine was *Ratilal Premchand Gandhi* v. *State of Bombay* (1954).[39] The Bombay Public Trusts Act, 1950 was passed by the Bombay state legislature "to regulate […] the administration of the public and religious trusts in the State of Bombay."[40] The manager of the Jain public temple and trustees of the Parsi Panchayat Funds and Properties challenged this Act. They challenged some of its provisions as unconstitutional on the ground of violation of Article 26.[41] The Supreme Court relied upon *Srirur Math* for its judgment in this case, reiterating that religious freedom includes belief as well as "the performance of outward acts" in pursuance of "religious belief". Further, the Court made the observation that no "outside authority has any right to say that these are not essential parts of religion."[42] A "secular judge" the Court observed, "is bound to accept that belief- it is not for him to sit in judgment on that belief."[43] On facts, the Court declared that the provisions relating to the appointment of a charity commissioner as the trustee of the religious institutions were

[38] *Srirur Math, supra* note 1, para 27 (per Mukherjea, J.).
[39] AIR 1954 SC 388. This appeal was taken up by the Court along with another appeal relating to properties of Parsi community in *Shappoorjee Bomanjee Billimoria* v. *State of Bombay* (1954). This was a five-judge constitutional bench of the Supreme Court. B.K. Mukherjea, J. wrote the opinion for the Court. Other judges were M.C. Mahajan, CJ., S.R. Das, Vivian Bose, Ghulam Hasan, JJ.
[40] *Id.,* para 2.
[41] Another ground of challenge was that the state legislature went beyond its power (ultra vires) in exercise of levying the tax. The Supreme Court rejected this contention on a technical ground that what was levied by the state was in the nature of "fee" and not "tax". *Id.*, paras 20-22.
[42] *Id.,* para 13. I will soon elaborate why the Court relinquished this test in a later decision.
[43] *Id.,* para 13.

unconstitutional.[44] The powers vested under sections 55 and 56 of the Act, which allowed the Court or the charity commissioner to "divert the trust property or funds" belonging to a public trust to objects other than those intended by the donors, were declared as interfering with the free exercise of religion. However, certain other provisions requiring the institution to prepare accounts and their audit, the preparation of balance sheets of expenditure and modes of investment of the trust money were upheld as 'secular' activities associated with 'religious practice'. Here, therefore, we can see that the Court's judgment cemented the proposition laid down in *Srirur Math*, that any institutional framework set up by the state governments to regulate the religious institution's administration was in violation of the Constitution. It also put a finger on whether secular judges of the Court could at all judge religious beliefs, or whether they were simply required to accept stated religious beliefs as such. Both these cases sought to clarify the boundary not only between State and religious practice, but also between the judiciary and the very determination of religious practice, through an invocation of the idea of essential features of religion.

Religion & Discrimination: Temple Entry Legislations

Sri Venkataramana Devaru v. *State of Mysore* (1958)[45] was a landmark decision in consolidating the doctrine of essential practices. The origin of the dispute can be traced to pre-independence India, when the political movements for opening of Hindu temples against caste restrictions in the early twentieth century led to the enactment of various state legislations. One such legislation, enacted by the Madras province, permitting the "excluded classes" to enter Hindu temples, was the Madras Temple Entry Authorisation Act, 1947.[46] The trustees of the Sri Venkataramana temple located in the district of south Kanara, Mysore, who were of the Gaud Saraswat Brahmin caste, challenged the application of this law on them as an encroachment on the ancient temple.

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[44] *Srirur Mutt, supra* note 1, para 17 (per Mukherjea, J.) ("To allow the Charity Commissioner to function as the Shebait of a temple or the superior of a math would certainly amount to interference with the religious affairs…").
[45] MANU/SC/0026/1957: AIR 1958 SC 255 [Hereafter, "*Devaru*"].
[46] Section 3 (1) of the Act permitted the "excluded classes" entry into "any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general".

While the case was pending, the Constitution of India came into force. In constitutional terms, a conflict appeared between the mandate of Article 25 (2) (b) to throw open Hindu temple to "all sections of Hindus", and the denominational right to "manage one's own affairs" under Article 26 (b). The petitioners argued that the Venkataramana Devaru temple was denominational, and a private temple that was reserved for the exclusive use of the Gaud Saraswat Brahmins, and not for the Hindu community in general.[47] Characterizing the temple as "private" was a careful stratagem to bypass the constitutionally mandated state reform in temples of a "public character" under Article 25 (2) (b).[48]

The Supreme Court rejected the "private" temple argument on facts.[49] The genesis of the temple may have a private character but, the Supreme Court observed, it acquired a public character with the passage of time. The Court, thus, accepted the possibility of change over a period of time in custom or character of denominational property. Customary practice can undergo a change and a private temple may acquire public character. The Court, however, accepted the denominational status of the Gaud Saraswat Brahmins for the purpose of Article 26, and the debate became centered on whether exclusion from entering into a temple for worship was 'a matter of religion' according to Hindu Law. The Court went into a detailed analysis of "religion of Hindus, as revealed in Vedas". It cited from the Upanishads and discussed the chief "Agamas of the Vaishnavas". The Court did not explicitly refer to the essential practices test but implicitly applied it in finding out the meaning of 'matters of religion'. Approvingly citing *Srirur Math*, the Court reiterated that both belief as well as the ritual practices were

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[47] *Devaru, supra* note 45, paras 5, 12 and 13.

[48] See, Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* 90-117 (University of California Press, California, 2010). She shows in detail how many temple trusts and institutions used this idea of the temple as private property in order to prevent Dalits from entering them. The colonial government wanted to control temples in order to tax them and manage them better because they saw them as repositories of wealth that was not properly taxed. Declaring the temples as private property was a way to get temple entry protestors arrested for unlawful entry under the criminal code.

[49] Possibly, the Supreme Court saw through the ruse of the petitioners in this form of argumentation to circumvent the constitutional aspiration of throwing open temples to all sections of Hindus The trustees never denied permission to the non Gowda Brahmins devotees and they were allowed entry in the temple.

protected under the free exercise of religion clauses.[50] Despite acknowledging the denominational status to the religious sect, it validated the temple entry legislation as constitutional. The Court observed that the customary practice of untouchability in Hinduism "denied to large sections of Hindus the right to use public roads and institutions."[51] Such a practice based on one's birth "could not be considered reasonable and defended on any sound democratic principle."[52] The principle of democracy or non-discrimination became fundamental, despite the customary exclusion of Dalit*s* from Hindu temples in the classical Hindu law. In arriving at this conclusion, the Court referred to Article 17 of the Constitution and it prohibition of "untouchability".[53]

Two important conclusions can be gleaned from the reading of *Devaru*. First, it acknowledged that a religious institution can indeed undergo a change in character, a shift from private to public access for a temple. Second, while accepting the link between customs, usages or rituals and religious belief, the Court observed that caste stigmatization could not secure constitutional protection. The 'affairs of religion' based on caste discrimination would be amenable to legislative and constitutional scrutiny. The denominational right under Article 26 could not trump over the anti-caste discrimination principle. Article 17 became instrumental in rejecting protection to customary, but violent Hindu practices. The Court observed:[54]

> The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the

[50] *Devaru*, *supra* note 45, para 14 (per T.L. Venkatarama Aiyyar, J.) ("not merely its wisdom (*Gnana*) but also its devotion (*Bhakti*) and Rituals and observances (*Karma Kandas)*" are included in essential practices).
[51] *Id.*, para 23.
[52] *Ibid.*
[53] The term "untouchability" within quotes, seeks to indicate historical discrimination based on caste.
[54] *Devaru, supra* note 45, para 29.

> other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b).

The basic contradictions between State intervention for social justice, such as caste equality, and the guarantee of religious freedoms that rested precisely on the perpetuation of social injustice, like caste inequality and untouchability, are brought out by the Court's reading of the two articles, 26 and 25 (2) (b), as mutually contradictory, and therefore requiring a harmonious construction. The Court in harmonising the two provisions also approved certain modifications made by the Madras High Court in favour of the appellant that "during certain ceremonies and on special occasions, it was only members of Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded."[55] This, in the view of the Court, was a balancing concession to the petitioners "without affecting the substance of the right declared by Art. 25 (2) (b)."[56]

This was a surface solution which ignored the real, underlying issues involved, i.e. caste-based discrimination and practice of untouchability. By resolving the question of historical discrimination and injustice through "harmonious construction" of conflicting rights, in effect allowing the Brahmin community to practice exclusion on "special occasions", the Court reveals the limits of judicial imagination in actualizing the promise of Article 17.[57] While in *Devaru,* the Supreme Court said that the exclusion of certain classes was not an essential practice, it simultaneously allowed the exclusion by the back door anyway. So even though it *seems* as if it had upheld Article 17, it actually also

[55] *Id.,* para 32. This, the Court observed, "would clearly be a denominational right."
[56] *Ibid.*
[57] The case of *Shastri Yagnapurushadji* v. *Muldas Bhudardas Vaishya,* AIR 1966 SC 1119, is similar to *Devaru* as the Supreme Court did not allow exclusion of Dalits from Swamiar temple. It rejected the argument that *satsangis* as a sect are not Hindus by giving an expansive interpretation to the term. This case is discussed elaborately in chapter 2 due to its relevance to election verdicts.

furthered the discourse on essential practice, and diluted the importance of Article 17. The cases discussed so far have shown that no matter which side the judgment favoured, the underlying importance of determining an essential practice grew stronger with each case.

III. The Application of the Doctrine in non-Hindu Religious Disputes

The Supreme Court in *Devaru* approved the proposition of community determination of the 'matters of religion' or what is essential religious practice citing the case of *Srirur Math*. This consolidated the notion of complete autonomy for religious denominations to determine the contours of essential practices. It is this theory of autonomy of religious denominations which was put under a "note of caution" in the next important Supreme Court decision, delivered in 1961. The case, *Durgah Committee, Ajmer* v. *Syed Hussain Ali & Others,*[58] was related to the Sufi saint, Nusrat Khwaja Moin-ud-din Chisti's shrine located at Ajmer. A five judge bench[59] of the Supreme Court considered a dispute which arose with respect to certain provisions of the Durgah Khwaja Saheb Act, 1955 passed by the Central government. The provisions of the enactment allowed the Rajasthan government to appoint a committee which not only could advise the managing devotees (*Khadims*), but also determine their privileges and regulate their presence at the tomb of the Sufi saint. Syed Hussain Ali, along with eight other *Khadims* of the tomb, approached the Rajasthan High Court at Jodhpur under Article 226 of the Constitution against the Durgah Committee formed under the statute regulating their powers and privileges. The Rajasthan High Court declared several provisions of the legislation challenged by the *Khadims* as unconstitutional on the ground that the legislation affected the religious autonomy of the *Khadims*. It relied on *Srirur Muth* to reiterate that no outside authority but the community itself can decide on what practices are essential and the statutory provisions undermining that authority were unconstitutional.

The Durgah Committee appealed against the Rajasthan High Court judgment to the Supreme Court. A five judge bench decided the appeal considering the validity of the

[58] AIR 1961 SC 1402 [Hereafter, "*Durgah Committee*"].
[59] P.B. Gajendragadkar, J. wrote the opinion on behalf of four other judges. Other judges were: A.K. Sarkar, K.N. Wanchoo, K.G. Das Gupta & N.R. Ayyanagar JJ.

statutory provisions. The *Khadims* belonged to the Chisti order of Sufis. Their claim was that they, as *Khadims*, and earlier their ancestors, had managed the *Durgah* and the legislation had divested them of this right. They traced their ancestry back to Nusrat Khwaja Moin-ud-din Chisti and argued that "the maintenance of the shrine has […] been the sole concern of the said sect."[60] The central issue revolved around the management and claims on the "offerings" made by the devotees at the shrine. The appellants, from the Muslim community as well as the state of Rajasthan, challenged the claim arguing that *Khadims* had no status or claim on the offerings, as they were merely watch guards of the shrine.[61] In effect, the argument of the appellants was that the sole maintenance of the shrine was not an essential feature of the section of the sect claiming such a right. Khwaja Moinuddin Chishti was born in 1142 A.D. in an eastern province of Persia, had come to India towards the end of twelfth century, and settled at Ajmer. He attracted various followers and was venerated during his lifetime. After his death, he was buried at Ajmer and during fifteenth century the Khilji Sultans of Malwa created a dome over his tomb which became a prominent pilgrimage site of Muslims. Tracing the Mughal and post-Mughal period of the East India Company, the Supreme Court attempted to understand the position of the sect and outlined the historic distinction between the positions of the *Sajjadanashin* (entrusted to perform religious observances) and *Muttavallis* (responsible for the administration and management of the shrine).[62] The Supreme Court observed that administration of the shrine must be distinguished from religious practices and that the administration of the shrine was purely a secular activity unconnected with anything religious. It also noted that during the reign of the Mughal emperor Akbar "on occasions the post of the Mutawalli was held by a Hindu as well."[63] This historical background formed the basis for the Court to establish that the sect never had the claim to the offerings or administration of the shrine. To claim it as a denominational right, thus, was bound to fail. Overruling the conclusions arrived at by

[60] *Durgah Committee, supra* note 58, para 7.
[61] *Id.,* para 8.
[62] *Id.,* para 23.
[63] *Ibid.*

Rajasthan High Court, the Apex Court upheld the constitutionality of the law enacted for administrative reforms of the shrine.[64]

The methodological key in arriving at the denouement was the essential practices test. It served to distinguish the essentially religious from the administrative tasks. The Supreme Court, speaking through P.B. Gajendragadkar, J., struck a note of caution in providing complete autonomy to religious denominations to determine what is essential and constitutes matters of religion:[65]

> [I]t may not be out of place incidentally to strike a *note of caution* and observe that in order that the practices 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 practices 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 practices within the meaning of Art. 26. Similarly, even practices 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 practices as are an essential and an integral part of it and no other.

The emphasis on the need for careful scrutiny of the religious practices indicated the implicit apprehension of the Court in keeping judiciary entirely out from the question of determination of essential practices, as observed in *Devaru*. For Gagendragadkar, J. the doctrine of essential practices served as a tool, additionally, to sieve out the "superstitious beliefs" from the ambit of religious freedom. The doctrine, in this form, followed the trajectory of the modernist reform of the religious institutions by the post-independent

[64] *Ibid.* ("Art. 26(c) and (d) do not create rights in any denomination or its section which it never had; they merely safeguard and guarantee the continuance of rights which such denomination or its section had").
[65] *Id.,* para 33 (emphasis added).

Indian State. P.K. Tripathy reads this judgment as prescient in its "spotting the risk" of granting complete autonomy to the communities with respect to essential practices: "The learned Judge [P.B. Gajendragadkar, J.], therefore, was clear in his opinion that the doctrine of autogenesis of denominational powers laid down by the Court in the *Swamiar* [*Srirur Muth*] and *Devaru* cases needed severely to be restricted if not rejected."[66] In section IV of this chapter we will see how Gajendragadkar, J. articulated the role of the Court in determining the essential practices in another Supreme Court judgment. But at present I will elaborate on the 'risk' flagged by Tripathy as it turned into reality within less than a year in the excommunication case of Bohra Muslim community.

Bohra Muslims and Excommunication

An important challenge to the social reform law enacted by the Bombay state legislature, the Bombay Prevention of Excommunication Act, 1949, came up in the case of *Sardar Syedna Taher Saifuddin* v. *State of Bombay*.[67] Taher Saifuddin, the 51st Dai-ul-Multaq (Dai), of the Dawoodi Bohra Community approached the Supreme Court under Article 32 challenging the constitutionality of the Bombay Act under Articles 25 and 26.[68]

The Bohra community comprises of Muslims from Shia sect of *Imami Ismailis*. The head priest of the community possessed not only the powers to regulate the institutional property but also power to excommunicate. He challenged the Bombay Act arguing that "the Dawoodi Bohra community constitutes a religious denomination within the meaning of Article 26 of the Constitution."[69] He argued that "he, as the religious leader and Dai-ul-Mutlaq of the community, is entitled to excommunicate any member of the Dawoodi Bohra community for an offence, which according to his religious sense justifies expulsion."[70]

[66] Tripathy, *supra* note 10 at 117.
[67] AIR 1962 SC 853: 1962 Supp (2) SCR 496. All the paragraphs referred below are from SCC online edition. (Hereafter, "*The excommunication case*").
[68] A five judge constitutional bench which decided the case was comprised of. B.P. Sinha, CJ, A.K. Sarkar, K.C. Das Gupta, N. R. Ayyenger and J.C. Mudholkar, JJ.
[69] *The excommunication case, supra* note 67, para 3.
[70] *Ibid.*

The Bombay Act put a ban on the excommunication power of the head priest. The preamble denounced the practice as culminating in "the deprivation of legitimate rights and privileges of its members."[71] Section 4 of the Act made the practice of excommunication a criminal offence.[72] The issue before the Supreme Court was whether matters of religion which lead to deprivation of civic rights be justiciable and to what extent.

The petitioner reiterated *Srirur Math* to argue that customary practices and rituals are protected under Article 26.[73] He defended the excommunication power vested in him to ensure solidarity of the community which involves "the right to enforce discipline, if necessary by taking the extreme step of communication."[74] As a head of a religious denomination under Article 26, he argued that such a power is constitutionally protected as a "matter of religion" within the meaning of Article 26(b) of the Constitution.

The State of Bombay (now Mumbai), which was the sole respondent, contended that "excommunication" as defined by the Act deals with rights of a civil nature "as distinguished from religious or social rights or obligations and a law dealing with civil consequences" and thus, does not violate the freedoms in Articles 25 and 26.[75] Finally, the legislation, it was argued by the respondent, was protected by Article 25(2)(b), which permits State intervention for "social reform."

The Supreme Court, by majority,[76] declared the Bombay Act as violating the constitutional religious freedom clause. K.C. Das Gupta, J. commented that the essential practices test extends to the protection of rituals and ceremonies which are integral to the religion. And it is the community which will determine what constitutes as essential.[77] The judge went on to discuss, generally, "the place of excommunication in the life of a

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71 *Id.,* paras 10, 27 & 49.

72 The relevant provisions of the Act can be found in paragraph 10 of the judgement. "The Act has added a new offence to the penal law of the country by penalising any action which has the effect of depriving a person of his human dignity and rights appurtenant thereto." *Id.*, para 11 (per B.P. Sinha, J.).

73 *Id*., para 8.

74 *Ibid.*

75 *Id.* para 53.

76 Das Gupta, J. wrote the majority opinion for himself, A.K. Sarkar and J.C. Mudholkar, JJ. N. R. Ayyenger, J. wrote a separate opinion agreeing with the majority.

77 *The excommunication case, supra* note 67, para 33.

religious community."[78] By highlighting that a member of the Bohra community takes an oath of unquestioning faith and loyalty to Dai, the Court held that excommunication served "the purpose of maintaining the strength of the religion."[79] Despite the important civil rights which the Act intended to protect, for the majority of the Supreme Court, the Act violated Article 26 (b) guaranteeing freedom to religious denominations to "manage their own affairs."[80] N.R. Ayyangar, J. concurred with the opinion of Das Gupta, J. and approved the disciplinary powers of the Dai as essential and beyond legislative interference by way of legislation. To him the denominational right had to be secured in order to ensure "religious continuity" and "bond of religious discipline".[81]

In contrast to these opinions, B.P. Sinha, J. wrote a dissenting opinion. Sinha, J. acknowledged that the Bohra community constituted a religious denomination and the Dai possessed the privilege to excommunicate. However, the dissent attempted to understand the Bombay Act in light of the historical continuity where the legislature has enacted legislations to combat discrimination or uphold civil rights of the individuals. Sinha, J. observed that "the Act is a culmination of the history of social reform which began more than a century ago"[82] and drew comparison between the impugned Act and the-independence legislation which was called the Caste Disability Removal Act, 1850. The dissent concluded:[83]

> The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others.

[78] *Id.,* para 34. Das Gupta, J. undertook survey of Christian Churches, "scholarly" work from Hazeltine's Encyclopedia, and the history of Islam where the Prophet and Imam had this right.
[79] *Id.,* para 39.
[80] Das Gupta, J. preferred to read the religious clause of the constitution literally. "The right given under Article 26 (b) has not however been made subject to preservation of civil rights." *Id.,* para 40.
[81] *Id.,* para 52.
[82] *Id.,* para 11.
[83] *Ibid.*

This dissent acknowledged what Chatterjee has termed the "liberal paradox". The dissent located the legislation in the unique historical context of social reform in colonial India. Its emphasis on social reform as a historically developed social commitment became an intrinsic part in interpretation of the religious freedom clause.[84] This historical context of social reform allowed the dissent to read the religious clause of the Constitution with emphasis on individual dignity and validating the legislation. The dissent also made an analogy with Article 17 foregrounding the "social aspect" of the power of excommunication:[85]

> On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Article 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden.

H.M. Seervai finds the analogical inspiration drawn from Article 17 problematic. In his view, "this analogy is incorrect" as the notion of untouchability was peculiar to "Hindu religion and Hindu society".[86] However, this criticism fails to appreciate the novel manner in which B.P. Sinha, J. contained the scope of Article 26 by upholding the individual rights of the members of the community.[87] The dissent by drawing inspiration from a constitutional provision (Article 17) was able to read the removal of

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[84] *Id.*, para 23 ("Another result of excommunication is that no other member of the community can have any contacts, social or religious, with the person who has been excommunicated. All that is true. But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Article 25(1) of the Constitution, and not in derogation of it.").
[85] *Id.*, para 24.
[86] H.M. Seervai, *Constitutional Law of India* 1278 (Law and Justice Publication, New Delhi, 4th Edn., 2021).
[87] Here it may be noted that Seervai in his criticism on the reliance of Article 17 does not make a distinction between using Article 17 as an analogy as against its literal application and extension to other marginal groups. In the last section of this chapter, I will explain and contrast Sinha's, J. analogic reference to Article 17 with the literal extension of Article 17 by D.Y. Chandrachud, J. in the *Sabarimala Judgment*. I will argue that drawing inspiration by analogy is desirable and distinct from its literal extension to contexts other than caste discrimination. See, Amit Bindal, "Sabarimala and the flattening of religious community" 721 *Seminar* 76 (2019).

discrimination based on institutionalised religious practices as a mandate of the Constitution, even in the case of non-Hindu communities.[88] It, therefore, was reading the religious freedom clause with the aid of Article 17 to combat the discriminatory religious practices. The dissent had endorsed and relied on *Devaru* as a precedent in rejecting the petitioner's argument that Article 26 was hierarchically superior to Article 25: "it is impossible to read any such limitation into the language of Art.25(2)(b)."[89]

The *Excommunication case* demonstrated that constitutional interpretation informed by history provides a useful tool to combat religious discrimination than one based on abstract principles of religious freedom applied in universal terms. This notion of historically contingent constitutional interpretation will be elaborated at length in chapter 3 with respect to interpretation of constitutional validity of anti-cow slaughter laws.

IV. A Major Shift in the Doctrine: The *Nathdwara Temple Case*

In *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan and others* (1964)[90] the constitutional validity of the Nathdwara Temple Act, 1959 was challenged before a constitutional bench.[91] The case concerns Srinathji temple, located in the town of Nathdwara in the state of Rajasthan. Constructed by Goswami priests in 1672, the temple is a pilgrimage site for Vallabha sect of Vaishnava Hindus. In March 1959, the Rajasthan state legislature enacted the 1959 Act, describing the temple as public temple. The provisions of the Act relegated the *Tilkayat* (the spiritual head of temple and Vallabha sect) as a mere manager of the temple property divesting him of any substantial beneficial interest in the property of the temple. Shri Govindlalji Maharaj, who was the *Tilkayat* filed a petition in 1959 in the Rajasthan High Court challenging the validity of the enactment. Along with *Tilkayat*, ten other petitioners, followers of the Pushtimargiya

[88] Gautam Bhatia, in a recent commentary on B.P. Sinha's, J. dissent seems to equate the dissent with literal application and extension of Article 17 to other marginalised groups which was done in the *Sabarimala Judgment*. I will take up the problem with such an extension later in this chapter. See, Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 141-168 (Harper Collins, 2019).
[89] *Devaru* is approvingly cited in B.P. Sinha's, J. judgment in *the Excommunication case, supra* note 67, para 22.
[90] (1964) 1 SCR 561 (Hereafter, *Nathdwara Temple*).
[91] Bhuvaneshwar Prasad Sinha, CJ, P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta and J.C. Shah JJ. The judgment was authored by P.B. Gajendragadkar J.

Vaishnava Sampradaya also challenged the Act in a second petition filed in the High Court. The third petition was filed by Goswami Shri Ghanshyamlalji who described himself as a direct descendent of Vallaba and therefore possessing interest in the properties at Nathdwara temple.

Tilkayat contended that the idol in the temple and its properties were his private properties and the state was incompetent to pass the legislation divesting him from those properties. Even if the Nathdwara temple were to be considered a public temple and he was treated as the *Mahant* (or *Shebait*), he had an interest in the office of the high priest as well as the properties of the temple.[92] As a representative of the Vallabha religious sect, he urged that the Act contravened not only his fundamental rights as an individual devotee but also of the denomination as guaranteed under Articles 26 (b) and (c) of the Constitution. The state of Rajasthan emphasised the public character of the Nathdwara temple. It argued that *Tilkayat* "was no more and no better than its manager" and thus had no substantial beneficial interest in the property of the temple.[93] Based on the documentary evidence, the High Court concluded that the temple was a public temple. It looked at the *firmans* and *sanads* (placed before the Court by the *Tilkayat*) and observed that "the said grants supported the plea of the state that the temple was not the private temple of the *Tilkayat*."[94] But the High Court declared the *Tilkayat* as the "spiritual head of the denomination as well as the spiritual head of the temple." He could perform *seva* (service) at the temple, and also that the two minor idols of Navnit Priyaji and Madan Mohanlalji were his private idols.[95] *Tilkayat's* rights of residence, to distribute *prasad*, to conduct or supervise the worship and the performance of *seva* in the temple were

[92] He made this latter argument relying on the constitutional provision guaranteeing the fundamental right to property (Article 19 (1) (f)). He also argued that the idols in the temple were 'private idols' and therefore, there could be no public interest in the property pertaining to them. The law with respect to legal personality of the Hindu idol and *Shebait* is elaborately discussed in chapter 4.
[93] *Nathdwara Temple, supra* note 90, para 4 ("…about the character of the temple was also a mixed question of fact and law and so, it could not be properly tried in writ proceedings.")
[94] *Ibid.* (Relying on the *firman* issued by the Maharana of Udaipur on Dec. 31, 1934, the Court observed that "this Firman clearly established the fact that the temple was a public temple, that the Tilkayat was no more than a Custodian, Manager and Trustee of the property belonging to the temple and that the State had the absolute right to supervise that the property dedicated to the shrine was used for legitimate purposes of the shrine.")
[95] The Court thus struck down that part of the definition of temple which included the two idols within the temple of Shrinathji.

recognised.[96] As to the contention of the denomination, the state argued that the law is valid as it "did no more than regulate the administration of the property of the temple as contemplated by Art.26 (c) of the Constitution." The Court accepted the state's plea on this ground. The High Court thus did not hold the Act unconstitutional but stuck down certain sections of the Act. This decision led to appeals and cross appeals by the state as well the petitioners and thus the case came before the Supreme Court.

P.B. Gajendragadkar, J. (speaking for the Supreme Court) laid out the historical background of the dispute. He noted that "mythology has woven an attractive web about the genesis of its construction."[97] The juridical narrative drew upon the religious and cultural works viz, Haridas Bhattacharyya's *The Cultural Heritage of India*, R.G. Bhandarkar's *Vaishnavism, Saivism and Minor Religious Systems* and Bhai Manilal C. Parekh's *A Religion of Grace,* to construct the history of the temple and its followers. The founder of the Pushtimargiya Vaishnava Sampradaya was Vallabha who, according to the legend, had acted upon the divine vision and built a small temple in around 1500 AD. Vallabha was succeeded by his son, Vithalnath, who in turn was succeeded by his seven sons. The principal idol of Srinathji was entrusted to the eldest son and other "Swaroops" were given to the other sons who founded separate shrines at different places. The judgment recorded that the tradition of religious denominations was supported by the Mughal emperor, Akbar who issued a *firman* in 1593 AD granting land to Vithalnathji for construction of buildings, gardens, cowsheds for the temple, and later by Shah-Jahan who issued another *firman* in 1633 AD and granted land. The tradition continued in the reign of the Emperor Aurangzeb.[98]

The rule of primogeniture had governed the succession to "the Gaddi of the Tilkayat". The estate faced financial difficulties during the management of *Tilkayat* Govindlalji.

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[96] The High Court affirmed his beneficial interest in the properties of the temple protected under Article 19 (1) (f). The High Court held that since the majority of the Act did not contravene fundamental rights of the *Tilkayat* under Article 19(1)(f), the Act in itself was not unconstitutional. Sections 16, 28(3), 28(3), 30(2)(a), 36 and 37, however, did contravene *Tilkayat's* fundamental rights, and so, the said sections and a part of the definition of 'temple' in section 2 (viii) were struck down by the High Court as ultra vires.

[97] *Nathdwara Temple, supra* note 90, para 5 (per P.B. Gajendragadkar, J.) (The story of its genesis- "[p]art of it may be history and part may be fiction […] is handed down from generation to generation of devotees and is believed by all of them to be true.").

[98] *Id.,* para 8 (per P.B. Gajendragadkar, J.)

This led to the establishment, by the *Tilkayat* himself, of the various committees comprising of 12 members in 1952 and 21 members in 1953. Whilst the 1953 committee had been in charge of the financial affairs of the shrine, the *Tilkayat* Govindlalji had removed some valuables from the temple, leading to an excitement amongst his followers and the general public. In 1957, therefore, the Rajasthan government had appointed an enquiry committee. The dispute relating to the removal of valuables between the *Tilkayat* and the state government had been referred to arbitration, with the arbitrator, the retired Chief Justice, Mehr Chand Mahajan, finding that with some exceptions, the property was *Tilkayat's*, who had removed the items thinking them to be his personal property. It was against this background, therefore, that the state government promulgated the Nathdwara Ordinance, 1959 which was replaced by the Nathdwara Temple Act, 1959.

The first issue before the Supreme Court was whether the "public" temples were inconsistent with the tenets of the *Vallabha* denomination. The Court concluded that even though some of the temples of the sect may be private, there is nothing in the tenets or religious practices of the sect which necessarily postulate that the followers must worship in a private temple. The Court also rejected *Tilkayat's* contention that the provisions of the Act contravened his property right under Articles 19 (1) (f) and 31(2) of the Constitution.

The word "trustee" was interpreted to divest the *Tilkayat* any right to individual property. The Court noted that under the Hindu law, the idol of *Srinathji* is a juridical person and therefore the temple as well as the endowments made before the idol, were the property of the idol.[99] While the properties of the temple would vest in the idol, the Board constituted under the Act would administer the said property as its trustee. The Court sought to maintain the sanctity of the institution of *Tilkyat*: "the Board will act reasonably and fairly by (sic.) the Tilkayat and nothing will be done to impair his status or to affect his authority over the servants of the temple in so far as they are concerned with the religious part of the worship in the temple […] the Board (will act) consistently with the

[99] In chapter 4, I have critically discussed the jurisprudential foundations and outcomes of treating "idol" as a juristic person by the courts in India.

true spirit of the Act without offending the dignity and status of the Tilkayat as a religious head"[100]

Another contention of the appellants (Tilkayat and other petitioners) as members of Vallabha sect was that the Act violated the autonomy granted under Article 26 (b) to every religious denomination to manage its own affairs under Article 26 (b) and to administer properties in accordance with law under Article 26 (d). In responding to this argument of denominational autonomy, Gajendrajadkar, J., speaking for the Court, in a major methodological shift discussed the limitations of existing precedents allowing complete autonomy to the religious community to determine the meaning of "essential".[101] He observed:[102]

> In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. *This formula may in some cases present difficulties in its operation.* Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. *In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down.* This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in

[100] *Nathdwara Temple case*, *supra* note 90, para 72.
[101] The Court referred to the previous cases of *Srirur Math*, *Devaru* and *Durgah Committee* on the meaning of religion in Articles 25(1) and 26(b) respectively. *Id.*, paras 55 and 56.
[102] *Id.*, para 57 (emphasis supplied).

> character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.

Here, one may recall the "note of caution" given by the same judge, Gajendragadkar, J. in *Durgah Committee* which took the form of an elaborate assertion here against the previous precedents for taking a monolithic view of the religious community. The Supreme Court recognised the ambivalence of the voice of the community, and the difficulties of designating the religious community as a monolithic or neatly discernible entity. A religious tenet is entrenched with multiplicity of voices, not reducible to a singular monolithic narrative. The possibility of alternative readings of the religious tradition or text can never be ruled out. The Court's notion of a "break down" was with respect to the idea of transparent access to the community. The above passage is important in as much as the Court underscored the role of adjudication in matters related to religion or religious denomination, and the need to permit ambivalence and diversity of definitions of religion. The task of the Court, then, would be to accept that version or reading of the tradition that fits well within constitutional aspirations. Scholars who argue for the community determination wish away this complexity in determination of the community itself, but we see the Court's recognition of this complexity in this decision.[103]

After inaugurating this conceptual shift in understanding of the doctrine, the Court went on to observe that free exercise of religion clauses accorded protection to only *religious practices* (Article 25 (1)) or the management of affairs *in matters of religion* (Article 26 (b)). A legislation engaging with purely secular practice is constitutionally permissible. The task of distinguishing the religious and the secular "must nevertheless be attempted

[103] Sen, *supra* note 8 at 41. Sen remarks that the "most striking aspect of the essential practices doctrine is the attempt by the Court to fashion religion in the way a modernist state would like it to be, rather than accept religion as represented by its practitioners." Sen's advocacy for community to have a final voice inadequately responds to the concern raised by the Supreme Court that no unilateral determination of religious practice is possible because there is no monolithic community.

in dealing with the claims for protection under Arts. 25 (1) and 26(b)."[104] The Court rejected the denomination's argument that management of the properties by the *Tilkayat* amounted to a religious practice under Article 25(1) or denomination's right to manage one's own religious affairs under Article 26(b). It concluded that it was not established that the tenets of the Vallabha denomination required that properties must be managed solely by the *Tilkayat*. In fact, "[t]he course of conduct of the denomination and the *Tilkayat* based on that belief may have spread for many years, but […] such course of conduct cannot be regarded as giving rise to a religious practice under Article 25(1)."[105] In other words, even if a religious denomination believed that management of properties was a religious affair, the Court did not find any merit in the argument. For the Court, the management of the property was a purely secular practice/ affair and thus could not seek protection under the Constitution.

Finally, the Court took up the argument related to Article 26(d) – that the right to administer its property *in accordance with law*- has been taken away by the Act. It was argued by the appellants that the word "law" under Article 26 (d) implies the "law prescribed by the religious tenets" of the religious community and not a legislative enactment of a competent legislature. The Court found this argument "wholly untenable" and ruled out the possibility of reading "law" as "religious law". It was held that "law means a law passed by a competent legislature […] this clause emphatically brings out the competence of the legislature to make a law in regard to the administration of the property belonging to the denomination."[106] The Court noted that "[i]f the clause "affairs in matters of religion" (article 26(b)) were to include affairs in regard to all matters, whether religious or not the provision under Article 26 (d) for legislative regulation of the administration of the denomination's property would be rendered illusory."[107]

With this decision, therefore, a major turn occurred in determination of the essential religious practices. The Supreme Court cast doubt on the previous precedents which provided a latitude to the religious community to have the final say in determination of

[104] *Nathdwara Temple case*, *supra* note 90, para 59.
[105] *Id*., para 60.
[106] *Id*., para 61.
[107] *Id*., para 62.

what constitutes "essential" to a particular religion. As already noted, Gajendragadkar's J. "note of caution" in *Durgah Committee* became an emphatic assertion in *Nathdwara Temple* case. This variance in the judicial understanding was seen by some as making "the already narrow guarantees of freedom of religion in India [as] precarious."[108] However, others saw this as a welcome move necessary to save the spirit of the free exercise of religion clauses from "the dangerous theory of autogenesis of denominational authority culminating in the complete annihilation of the individual's rights enshrined in Article 25."[109] In my view, the sacrifice of civil rights in the majority opinion of the *Excommunication case* and the elevation of institutional authority above individual dissent within the community paved the way for this important shift in the approach of the Supreme Court. Before we discuss this point in detail, in the next section, we shall see how other kinds of practices in the public sphere associated with other sects and groups also challenged the contours of the doctrine.

V. The Divine Dance: Peculiar Challenge to the Doctrine

One contentious practice that was challenged before the Court was that the divine inspired dancing with skulls and tridents on the roads of Calcutta (now Kolkata) in West Bengal. The question of whether it was a part of an essential religious practice arose in two unique cases with respect to the denominational sect of the Anand Marga. The issue in both these cases was unrelated to any institutional property, as we have seen in the cases thus far, but the question of belief, nevertheless, was at their core. The first case, *Acharya Jagdishwaranand* v. *Commissioner of Police* (1983),[110] arose when the Commissioner of Police issued prohibitory orders under section 144 of Criminal Procedure Code, 1973 (CrPC) on March 29, 1982. The orders restrained the performance of divine *tandav* dance, by the participants of Ananda Marga Sect on apprehension of disruption of public order because of the use of tridents and skulls by the participants.

[108] J. Duncan Derrett, "Freedom of Religion under the Indian Constitution: Excommunication (Based on Sardar
S. T. Saifuddin Saheb v. State of Bombay)" 12(2) *The International and Comparative Law Quarterly* 697 (1963).
[109] P.K. Tripathy, "Secularism: Constitutional Provision and Judicial Review" 8(1) *Journal of Indian Law Institute* 1-29, 18 (1966).
[110] (1983) 4 SCC 522 (Hereafter, "*First Ananda Margi Case*").

The application made to the Police Commissioner seeking permission for the dance was rejected. Previously, the Police Commissioner's repetitive orders under section 144 of the CrPC since August 1979 had directed that "no member of a procession or assembly of five or more persons should carry any fire arms, explosives, swords, spears, knives, tridents, lathis or any article which may be used as weapon of offence or any article likely to cause annoyance to the public, for example skulls."[111]

Acharya Jagdishwaranand (the petitioner), the general secretary of public relations of the Ananda Marga Pracharak Sangh filed the petition under Article 226 of the Constitution in the High Court of Calcutta against that order. The Calcutta High Court refused to entertain the petition seeking issuance of the writ prohibiting the Police Commissioner from restraining the dance performance on the public roads. The Calcutta High Court observed:[112]

> If the petitioners or any member of their group want to hold a procession or reception or demonstration accompanied by any dance or music, that by itself may not be objectionable. However, brandishing fire torches or skulls or daggers in the public places including streets cannot come under the same category. Here other things are involved. The interests of other members of the public are involved, the sense of security of the others is also involved.

In the Supreme Court, the petitioner raised the constitutional question against the prohibition by the instrumentality of the State (police), arguing that the chaotic dance for Ananda Marga constituted an essential practice of their religion.

The Supreme Court, in its judgment, discussed the history of the religious sect. Anand Marga (literally "the path of bliss") was a "socio-spiritual organisation" founded in the year 1955 by Pravat Ranjan Sarkar otherwise known as Shri Ananda Murti. The organization was initially located in Ranchi (then in the state of Bihar, now the capital of Jharkhand), and later shifted to Calcutta. In 1966, the organization for the first time

[111] *Id.,* para 6.
[112] *Ibid.*

introduced for its participants the practice of *anand tandav dance*, one of the dances performed by Lord Shiva. It was one of the prescriptions that the dance should be performed every day "with a skull, a small symbolic knife and a Trishul [trident]."[113] All these devices and instruments were held to have an esoteric and symbolic significance. The contention of the sect was that "tandava dance is an essential part of the religious rites of the Ananda Margis" and therefore such a dance can be performed both in private as well as any public place. The respondent, Commissioner of Police, Calcutta, emphasised upon the violent nature of the religious organization to challenge this contention. He argued that militancy continues to be the main feature of the organisation. The processions were taken out on the roads of Calcutta despite the prohibitory orders and they turned violent leading to police intervention.

Following the argument of the High Court, this issue could have become that of conflict between "public order" and "public morality" and the performance right of the religious denomination. Understood this way, there would be hardly any constitutional complexity. This is because both Articles 25 and 26 are subject to "public order, health and morality". The constitutional text categorically limits the religious freedom clause on the grounds of public order and morality. As already noted in *Badrinath Temple* case in section III of this chapter, the Supreme Court gave way to a long standing customary practice in order to avoid overcrowding (an issue of public order) inside the temple. However, the Court formulated the issue in terms of the essential practice test. It asked whether Anand Marg's procession is protected under Articles 25 and 26 and if the dance constituted an essential practice of the sect. This was because the petitioners framed the issue in the terms of proclaiming chaotic dance as an essential practice. Why the Supreme Court did not foreground the question of 'public order' is difficult to comprehend. Part of the answer lies in the adversarial form of legal process where the failure of the opposing party to raise an issue in the plaint can result in an abandonment of the issue altogether.

In the judgment, Anand Marg was found to be well within the tenets of Hindu religion and did not constitute a separate religion. But the Court agreed that it certainly possessed

[113] *Id.*, para 3.

the traits of a religious denomination within the meaning of Article 26.[114] The next question then was regarding the centrality of the divine *tandav* dance to the denomination. The Supreme Court decided this question by following the public-private distinction. Describing the modes and forms of dances in the tradition, it arrived at the conclusion that public performance of the dance was certainly not an essential practice of the denomination.[115]

> [T]here is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public. At least none could be shown to us by Mr. Tarkunde [counsel for the petitioners] despite an enquiry by us in that behalf.

An interesting turn of events triggered a second round of litigation by the Ananda Margis. The founder Anand Murti revised one of the books titled *Carya Carya* containing the doctrines of the denomination, and included the performance of the *tandav* dance in public as an essential practice in the revised edition. On the basis of this revised version, the devotees pleaded permission for the public dance from the police, which was denied. The Margis challenged this denial in the Calcutta High Court. The High Court accepted that after the revised version of the book, the chaotic dance had become an essential part of the sect. It observed that the Supreme Court in *First Ananda Margi* case had failed to appreciate this fact "due to the non-availability of any literature or prescriptions by the founder."[116] The High Court proceeded on the argument that it is the subjective determination of the community that discerns what is essential or integral to any religion. The Commissioner of Police, Calcutta, along with the state government challenged this judgment in the Supreme Court.

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114 Anand Marg was accepted as a religious denomination within Hindu religion. The Court also elaborated upon the meaning of the word "denomination" under Article 26 as requiring three considerations of "common faith", "common organisation" and "distinctive name". All the considerations were fulfilled by the organization of Anand Marg.

115 *First Ananda Margi Case*, *supra* note 110, paras 14-15.

116 Cited in *Commissioner of Police & Others* v. *Acharya Jagdishwaranand* (2004) 12 SCC 770 [Hereafter, *Second Ananda Margi* case].

The Supreme Court, by majority of 2:1, speaking though Rajendra Babu, J.[117]overturned the judgment of the Calcutta High Court and restored the position of *First Ananda Margi* case. The issue that required a thoughtful engagement was whether a practice that was declared as non-essential by the Court can be reintroduced by way of textual amendment altering the religious doctrine.[118] On this issue, the majority judges recognised the danger of alterations in the religious precepts subsequent to an unfavorable verdict against them. The majority opinion observed that "it will create problematic situations if the religion is allowed to circumvent the decision of Court by making alteration in its doctrine."[119] This was the nub of the matter in the present case as revision was made in response to the Supreme Court's observation that there was no literature available which would link the *tandav* dance to an essential requirement of the sect. Anticipating this subversion of the judicial decisions, the Court declared that such an attempt "could only be treated as a circuitous way to overcome the finding of a Court. If subsequent alterations in doctrine could be allowed to create new essentials, the judicial process will then be reduced into a useless formality and futile exercise."[120] Although this issue merely found one short paragraph in the judgment, one can appreciate the potential danger that the Court anticipated in these remarks. Can the essence of a religion or religious sect be inserted by way of amendment in the new edition? Although religious practices and traditions undergo a change over time and no precise time period can be fixed to comprehend such transformation, but such editorial insertion directly after judicial verdict would truly have made a mockery of the essential practices test.

However, the central premise of the reasoning adopted by the majority in its discussion of the essential practices test took a different and unconvincing turn. It seemed to operate on an assumption that essential practices are constitutive of a fixed and unalterable character and it is "such permanent essential parts which are protected by the Constitution."[121] For

[117] The other judge in the majority was G.P. Mathur J., while A.R. Laxmanan, J. wrote a dissenting opinion.
[118] Surprisingly, this issue does not find space and discussion in the judgment which was warranted. Instead, the majority opinion largely devoted itself to the question of what constitutes "essential practice" in an abstract sense. The dissent, in the same vein, entered into the theological symbolism of "trident" and "knife" and relegated the issue of change of precepts subsequent to an adverse judgment to the margins.
[119] *Second Ananda Margi Case, supra* note 116, para 11.
[120] *Ibid.*
[121] *Id.*, para 9.

the Supreme Court, this was the primary reason on which the Calcutta High Court verdict must be overruled.[122] The Supreme Court explained its conception of essential practice as one which was unalterable and permanent for all times.[123]

> Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion [….] If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character.

Such a conception of essential part of religion is at odds with the notion first developed and followed in *Srirur Math* where "forms and observances might extend even to matters of food and dress" which do not form the cardinal core of any religion, but are also necessarily subject to change and adaptation over time. *Srirur Math* decision did not assert that core beliefs of a religion always remained fixed and static. It seems that in describing the essential practices test as one which determines whether taking away a part or practice would result in a fundamental change in the religion, the Supreme Court was innovating a test which had little to do with the previous judicial precedents on essential practices test. This formed the basis of the conclusion that the *tandav* dance is not an essential part of the *Ananda Margi* sect: "Had Tandava dance been the core of Ananda Margi faith, then without it Ananda Margi faith could not have existed."[124] This logic of the Supreme Court defining "essential" as the basic foundation on which the superstructure of religion rests obscures and complicates any coherent understanding of the essential practices test. It seems that the Court in its preoccupation with the end result

[122] *Id.*, para 8. According to the Supreme Court, the Calcutta High Court was "under the wrong impression that an essential part of religion could be altered at any subsequent point of time."
[123] *Id.*, para 9.
[124] *Id.*, para 10.

discounted on the process and method used in arriving at the eventual decision. The judgment failed to discuss the issue of disturbance of "public order" which was the basis of the restrictive orders passed by the police authorities. "Public order" is a constitutional limitation on the exercise of freedom of religion. There is no discussion in the majority opinion which can explain how the processions carried out by Ananda Margis were posing a potential threat to public order.[125] Thus, the judgment despite deciding an important aspect of alteration of essence of religious by textual amendment, remains inadequate in providing a convincing rationale for evoking public order exception and in its application and interpretation of the essential practices test.

Even as the *Second Ananda Margi* case sought to delimit the content as well as scope of what can be described as 'essential' to religion, the controversy about 'religious' versus 'secular' is far from settled. This issue re-surfaces every time the individual and denominational rights come into conflict. In the next section, we turn to the *Sabarimala Judgment,* where the contours of the essential practices test were tested once again in the context of sex and gender based exclusion from temple premises.

VI. *Sabarimala Judgment* and Religious Freedom Clause

The Sabarimala temple of Lord Ayyappa in Kerala excluded women in the age group of ten to fifty from entry inside the temple. This practice of exclusion was rotted in the antiquated custom based on the belief that Lord Ayyappa was an ardent practitioner of celibacy (*Naishthic Brahamachari*) and therefore shunned the presence of women. The custom was legalized under rule 3 (b) of public worship rules made under section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965.[126] It

[125] This gap in the majority opinion provided the basis for the dissent to turn the issue into one of tolerance. It pointed out that "the Sikh community carry 'kirpans' as a symbol of their religious practice and the Gurkhas the 'kukris' or 'dagger' […] Persons professing Islamic Faith are allowed to take out procession during "Moharrum" Festival and persons participating in such processions beat their chest with hands and chains and inflict injuries on them and the same has been permitted as a religious practice of that community." *Id.,* para 81.
[126] Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965. The issue was whether rule 3(b) violates Articles 25(1) and 15(1). Also whether the rules framed under the Act were *ultra vires* the parent Act?

specifically prohibited women between ten to fifty years to visit the deity Lord Ayyappa.[127]

On September 24, 1990 a petition came before the Kerala High Court on the basis of complaint sent by K. Mahendran to a High Court judge, Paripoornan, J. He complained that Smt. Chandrika, who was holding the post of commissioner of Devasworm Board, participated in the rice feeding ceremony of her grand-daughter despite the prohibition on women to enter the temple. This complaint was considered as a public interest litigation and the Kerala High Court, turned it into a writ petition filed under Article 226 of the Constitution. Notice was issued to Trancore Devasworm Board, a statutory body constituted under Travancore Cochin Hindu Religious Institutions Act, 1950, which was responsible for administration and making of rules with respect to the Sabarimala temple. The Indian Federation of Women Lawyers, Kerala Branch, filed an application to be impleaded in the case as the issue concerned larger interest of general public and women.[128] This became the genesis of the Kerala High Court taking up the issue of restriction on entry of women as constituting gender discrimination in *K. Mahendran* v. *The Secretary, Travancore Devasworm Board* (1993).[129]

The respondent along with one of the interveners (M.P. Gopalakrishnan) argued that "Ayyappa devotees form a denomination by themselves, and have every right to regulate and manage its own affairs in matters of religion."[130] The High Court accepted the denominational status of the Ayyappa devotees stating that a "religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion."[131] The High Court

[127] Ironically the exclusionary rule was designed within a law meant for 'authorisation of entry' in places of public worship. Perhaps, that is why the petitioners also challenged the rules as *ultra vires* the parent legislation.
[128] Sri M. P. Gopalakrishnan, the President of the Kerala *Kshetra Samrakshana Samithi* also impleaded himself in the case.
[129] AIR 1993 Ker 42.
[130] *Id.* para 14.
[131] *Id.* para 22.

eventually upheld the prohibition as matter of religion on account of the celibacy of Lord Ayyappa. The constitutional rationale provided by the High Court was the following:[132]

> The freedom of conscience and freedom to speak, profess and propagate religion guaranteed under Article 25 of the Constitution is subject not only to public order, morality and health, but also subject to the other provisions of Chapter III. It necessarily implies that the right to freedom of religion guaranteed under Article 25 is subject to the freedom to manage religious affairs guaranteed under Article 26(b) of the Constitution.

Although in *Devaru* the Supreme Court had clarified that Article 26 cannot be read independent of the requirements of Article 25 (2), the Kerala High Court arrived at a contrary conclusion without making any reference to *Devaru*. The fact that the recent Supreme Court judgment did not consider such misapplication of law by the High Court as an urgent cause of concern only exacerbates the oddities of judicial process in India. One may surmise that it is preferred that socially inconvenient disputes remain shrouded in the cloak of silence despite apparent misreadings of the law. This perhaps explains why the High Court decision was not challenged for many years.

In 2018, another public interest petition was filed in the Supreme Court by an association registered under the name of Indian Young Lawyer's Association. Few gender rights activists based in the state of Punjab impleaded themselves in this petition. This revived the issue and the Supreme Court took up the matter making the state of Kerala and Devasworm Board as respondents.[133] In *Indian Young Lawyers Association* v. *State of Kerala* (2018),[134] the petitioners challenged the exclusionary practice as "based upon a biological factor which [was] exclusive to women only, and which [was] based upon custom allegedly constituting an essential part of religion, can be said to be violative of their rights under Article 25."[135] The respondents pleaded the argument of complete autonomy of religious denomination of Ayyappa devotees and their right to determine

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[132] *Ibid.*
[133] The Court permitted various other organisations and individuals to implead as the question was of general public importance.
[134] (2018) SCC SC 1690 [Hereafter, *Sabarimala Judgment*].
[135] *Id.*, para 1 (per R.F. Nariman, J., speaking for the majority).

what was essential for them under Article 26 (b). The respondents asserted that the practice of celibacy of Lord Ayyappa was an integral part of the sect and the rule of exclusion was not against the tenets of the religious faith.

The Supreme Court judgment, by majority of 4:1, invalidated rule 3 (b) of public worship rules framed by the Devasworm Board and declared it as unconstitutional. It permitted the entry of women into the Sabarimala temple on the ground that the rule violated the fundamental right of equality. All the judges who wrote the majority opinion (three separate opinions)[136] rejected the plea that exclusion of women, on the grounds exclusively of biology is an essential part of Ayyappa sect. Dipak Misra, CJ. (who wrote the opinion for himself and A.M. Khanvilakar, J.) and Y.V. Chandrachud, J. evoked the notion of constitutional morality to declare the rules as unconstitutional. As both Articles 25 & 26 are subject to "morality", these judges interpreted this term as equivalent to constitutional morality. R. F. Nariman, J. wrote a separate opinion declaring the rules as unconstitutional without taking recourse to the discourse of constitutional morality. Indu Malhotra, J. wrote a dissent upholding the ban on entry of women accepting it as an essential practice of the sect. She also raised concerns on the locus of the "Young Lawyer's Association" which was a north Indian organization, unconnected with the devotion of Lord Ayyappa, to challenge the rule of women's exclusion: "Courts normally do not delve into issues of religious practises, especially in the absence of an aggrieved person from that particular religious faith, or sect."[137]

The majority opinion found the exclusion as an instance of biological determinism reinforcing the stereotypical taboo against menstruation. All the three opinions of the majority judges held that such exclusion was not integral to the Ayyappa sect. D.Y. Chandrachud, J. relied on the essential practices test but also raised doubts on its usefulness and implored for a reconsideration of the test in a future Supreme Court judgment.

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[136] D.Y. Chandrachud, J., R.F. Nariman, J. and Dipak Misra, CJ. (for himself and A.M. Khanwilker, J.) wrote three separate majority opinions while Indu Malhotra, J. wrote the dissenting opinion for the Supreme Court.

[137] *Sabarimala Judgment*, *supra* note 134, para 7.3 (per Indu Malhotra J.).

Another unique dimension of the *Sabarimala Judgment* that requires attention was the literal application (as opposed to analogical inspiration in *Devaru* or dissent of the *Excommunication case*) of Article 17 to women as a class. This novel interpretation of the meaning of "untouchability" in Article 17 was limited to the judgment of D.Y. Chandrachud, J. So I will focus on his judgment and its rebuttal in the dissent of Indu Malhotra, J. The first important topic of discussion was the evocation of constitutional morality by the Supreme Court to invalidate rule 3 (b) framed under the Act.

Constitutional Morality and its ephemeral content

Dipak Misra, CJ. (speaking for himself and A.M Khanvilakar, J.) and D.Y. Chandrachud, J. in their separate opinions observed that the word "morality" in Article 25 and 26 should be understood as synonymous to constitutional morality. "The draftspersons […] would not have meant that the content of morality should vary in accordance with the popular fashions of the day […] Popular notions of what is or is not moral may in fact be deeply offensive to individual dignity and human rights."[138] The content of the term *morality* in both the Articles, must be understood in line with constitutional aspirations.[139] The liberal philosophical tenor underlying the notion of autonomous choice making individual at the core of constitutional morality was obvious and forms the foundation of constitutional morality.[140]

The majority opinion (with the exception of Nariman, J.) saw constitutional morality as a secular alternative to engage with religious mythology. However, despite its good intentions, the Court's conception of constitutional morality remains ahistorical. The contours of constitutional morality are also not defined which may lead to problematic interpretations. For instance, the interpretation given to the constitutional cow protection

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[138] *Sabarimala Judgment, supra* note 134, para 11 (per D.Y. Chandrachud, J.) (*"*Individual dignity cannot be allowed to be subordinate to the morality of the mob*"*).
[139] *Ibid.*
[140] For a general discussion on how the idea of "constitutional morality" in Indian judicial discourse has been reduced to enforcement of fundamental rights, see Mahendra Pal Singh, "Observing Constitutional Morality" 721 *Seminar* 14-21 (2019). Singh points out how the "dissenting judge, Justice Indu Malhotra, also did not disagree on the interpretation of morality in terms of constitutional morality, but in her view the Constitution must be seen in the light of multiple religious groups in our country who all have to be protected in respect of their rights. In that case the religious rights of the devotees of Lord Ayyappa are to be counted for determining the content of constitutional morality." *Id.* at 19.

provision (Article 48) by the Supreme Court, as we will see in chapter 3, has been far from desirable. But cow protection cause, seen as a constitutional inspiration, can also be pitched mooted as constitutional morality. The notion of "unity and integrity of the nation" mentioned in the Preamble of the Constitution can, in similar manner, become a form of constitutional morality for curtailing dissent as "morality" is also an enlisted ground of reasonable restriction under Article 19 (2) to curtail free speech. On this register, the opinion of R. F. Nariman, J. is more grounded as he arrived at the conclusion on the basis of contradictions within the plaint to show that the practice of exclusion was based on an age-old cultural stereotype that menstruating women are 'polluted' and need to be excluded from 'sacred' spaces. The affidavit filed by the respondent's side mentions: "The problem with women is that they cannot complete the 41 days [of] vrutham because the Asaucham of periods will surely fall within the 41 days. It is not a mere physiological phenomenon. It is the custom among all Hindus that women during periods do not go to Temples or participate in religious activity."[141] Nariman, J. compared the notion of impurity of menstruation in other religious texts to conclude that the practice was an outcome of idea of contamination based on biological essentialism. Instead of using an ahistorical conception of constitutional morality, Nariman, J., remained historically informed in asserting that Article 25 heralds a departure from these customary rules found in various religious scriptures. Further, all customs and usages are subject to fundamental rights guaranteed in the Constitution:[142]

> The fundamental right claimed by the Thanthris [Head priest] and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa.

A study of the "social life and history of religion will recognise that practices are constantly adapted and reshaped, as collectivities themselves are changed, adapted and

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[141] Cited in *Sabarimala Judgment*, *supra* note 134, para 21 (per R.F. Nariman, J.).
[142] *Id.*, para 29.

refashioned to suit the constraints of cash, time or even aesthetics. For this, the historians E.J. Hobsbawm and Terence Ranger coined the term "the invention of tradition".[143] Janaki Nair argues that the "absolute prohibition of women of menstruating age from worship at Sabarimala under rules 3(b)" was an *invention of tradition* as such a strict prohibition never existed in practice in the last five decades.[144] No pure tradition of Sabarimala temple was discernible, as burgeoning "pilgrim tourism" had already threatened the local ecology and radically transformed the forms of worship that existed in ancient times.[145] We have already seen that the Supreme Court had accepted the possibility of change of customary practice in *Devaru*. An analysis of re-formed tradition at the Sabarimala temple could have provided a way to revisit this understanding of tradition. Instead of the ahistorical and universalist rhetoric of constitutional morality, I suggest, the Court could have arrived at the same verdict in a more robust manner, as indicated in my reading of the judgment of Nariman, J. That might have enhanced the possibility of democratic discussion. Indeed, originally the idea of constitutional morality was formulated in the Constituent Assembly by Bhim Rao Ambedkar on November 4, 1948 in the following terms: "Constitutional morality is not a natural sentiment. It has to be *cultivated*. We must realize that our *people have yet to learn* it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic."[146] How can constitutional morality be *cultivated* without a grounding in historical consciousness. The manner in which the majority opinion of the Supreme Court employed the idea in the *Sabarimala Judgment* did not live up to this possibility that Ambedkar invested in the idea of constitutional morality.

Expansive meaning of "untouchability"

Chandrachud, J. was the only judge on the bench who accepted the argument for an expansionist reading of Article 17 of the Constitution to extend to the exclusion of women from temples. The existence of the term "untouchability" within inverted commas under Article 17 had been understood and interpreted as limited to the specific caste

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[143] Janaki Nair, "A Pilgrim's Progess", *The Hindu* (Oct. 22, 2018).
[144] *Ibid.*
[145] *Ibid.*
[146] VII *Constitutional Assembly Debates: Official Reports* 38 (Lok Sabha Secretariat, New Delhi, 2014).

exclusion envisaged by the Constitution.[147] Chandrachud, J. emphasised the phrase "in any form" under Article 17 to encompass the exclusion of women in Sabarimala.[148] The "use of punctuation mark cannot be construed as intent to circumscribe the constitutional width of the expression."[149] The dissenting judge, Indu Malhotra, J. rejected the application of Article 17 to women on the traditional lines, limiting the application of the provision to the discrimination based on caste.[150] She also relied on the Constituent Assembly debates and academic opinion in constitutional law scholarship to arrive at her conclusion.[151] The dissent could have elaborated productively on the conceptual problems of extending the meaning of untouchability to all women across caste and class as a whole, and why such a broad interpretation may be untenable. Unfortunately, the dissent rejected this interpretation of Article 17 merely, and unconvincingly, on the grounds that such an interpretation did not exist in constitutional memory: "Not a single precedent has been shown to interpret Article 17 in the manner contended by the Petitioners."[152]

The opinion of Chandrachud, J. seems to be path breaking. Gautam Bhatia in his enthusiastic evaluation of the opinion has described it as a judgment ahead of its time.[153]

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[147] Article 17 reads: Abolition of "Untouchability": "Untouchability" is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.

[148] *Sabarimala Judgment*, *supra* note 134, para 72 (per D.Y. Chandrachud, J.) "The addition of the words "*in any form*" in the initial draft prepared by the Sub-Committee on Fundamental Rights is unambiguous statement to the effect that the draftspersons wanted to give the term "untouchability" a broad scope."

[149] *Id.*, para 79.

[150] *Sabarimala Judgment*, *supra* note 134, para 14.2 (per Indu Malhotra, J.) ("Article 17 pertains to untouchability based on caste prejudice. Literally or historically, untouchability was never understood to apply to women as a class.").

[151] Reference was made to the works of H.M. Seervai's *Constitutional Law of India: A Critical Commentary* (Universal Law Publishers, 1999) and M.P. Jain, *Indian Constitutional Law* (Lexis Nexis, New Delhi. 2010) who also take a similar viewpoint.

[152] *Sabarimala*, *supra* note 134, para 14.7. Another strand in the reasoning of the dissenting judge, Indu Malhotra, J., focussed on the identity and geographical location of the petitioners. She argued that the petitioners do not have any claim as they are interveners and "gender rights activists working in and around the state of Punjab […] they learnt of the practice of restricting the entry of women […] from three newspaper articles […]" (para 1). There are problems with this reasoning. First, it presupposes that only those who individually suffer injustice can challenge it in the court of law. Further, this posture of the dissent not only endorses regressive identity politics but also disavows the liberalisation of "standing" by the Supreme Court where any public spirited person can challenge injustice in the court of law.

[153] See, Gautam Bhatia, "'I send my soul through time and space/ To greet you. You will understand…': On Sabarimala and the Civil Rights Cases", *Indian Constitutional Law and Philosophy* (Oct. 29, 2018), *available at*: https://indconlawphil.wordpress.com/2018/10/29/i-send-my-soul-through-time-and-space-to-greet-you-you-will-understand-on-sabarimala-and-the-civil-rights-cases/ (last visited on Jul 12, 2021).

What was unique in the opinion of Chandrachud, J. was a literal extension of Article 17 to other forms of exclusion and not its evocation by way of an analogy. Chandrachud, J. focused on abolition of untouchability "in any form" but overlooked the second limb of Article 17, which required that untouchability "shall be an offence punishable in accordance with law." The provision has a unique historical specificity as B.R. Ambedkar claimed this provision in the Constitution to make caste untouchability a punishable offence required the legislature to enact legislation criminalising all forms of caste untouchability.[154] Reading other forms of discrimination under Article 17 would require the creation of fresh punishable offences, which could, in turn raise the possibility of over criminalisation. In other words, if rules of exclusion from temples are to be read as "untouchability" as defined under Article 17, then the legislature would be bound to criminalise such exclusions. Here it may be useful to refer to the insights of feminist scholars, Janet Halley and Prabha Kotiswaran who have argued against feminist alignment with State power, and especially the use of criminal law for feminist reforms. They have argued that such feminism, which they describe as "governance feminism", strengthens the repressive State apparatus in the guise of women's empowerment.[155] It is one thing to *analogically* refer to the constitutional basis of prohibition against ideas of human beings as agents of contamination, it is quite another to literally extend Article 17, not only in spirit but also in letter, to all forms of discriminations beyond caste. This again demonstrates the lack of attention given in the "progressive" opinions of the courts to historical consciousness. In its zeal to broadly interpret Article 17, Chandrachud, J. disregarded one of the predominant voices of the contemporary feminist movement which alienates itself from aligning with State based criminal law reform measures as that strengthens the State security discourse and reinstates the paternalistic interventions as desirable goals of feminist politics.

[154] Untouchability (Offences) Act, 1955 was enacted in pursuance of this constitutional mandate.

[155] See, Janet Halley, Prabha Kotiswaran, Rachel Rebouché, and Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press, Minneapolis, 2018). The courts need to be cautious of such interpretive leaps when feminist literature is increasingly suspect of use of repressive police power as transformative.

Community determination and the essential practices test

The majority judges sketched the history of essential practices test and applied it to conclude that the rules of exclusion are not essential for the Ayyappa sect. The dissent left the issue of what constitutes "essential" entirely on the community: "what constitutes an essential religious practice [was] for the religious community to decide." [156] It maintained that the judiciary should not pronounce on the religious doctrines and beliefs. One exception was carved out by Indu Malhotra, J. from such judicial reticence. It is "not for the courts to determine which of these practices of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like *Sati*."[157]

Some questions however remain unaddressed. Why the rules of exclusion based on menstrual contamination would not count as "oppressive" or "pernicious"? If the practice of *sati* - burning women on the funeral pyres of their husbands with religious sanction – qualifies judicial intervention, then what is the rationale for excluding practices based on biological determinism and exclusion from judicial review? It is also worth asking why the Supreme Court did not engage with its own precedent which reflected on the difficulties of community determination of essential practices (specifically, the *Nathdwara Temple* case which had rightly cautioned that "the community may speak with more than one voice and the formula would, therefore, break down").[158]

The majority opinion of Chandrachud, J. pointed to the problems in judicial determination based on essential practices test. This was a necessary and welcome posture acknowledging the limits of the doctrine and its application. But, unfortunately, instead of indicating the uneven and selective manner in which the previous precedents applied it, he suggested that except in cases of exclusionary practices ("the anti-exclusion principle"), it should be the community and not the courts, which must decide on what is essential or integral part of religion:[159]

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156 *Sabarimala Judgment*, *supra* note 134, para 8.6 (per Indu Malhotra, J.).
157 *Id.*, para 8.2.
158 *Nathdwara Temple* case, *supra* note 90.
159 *Sabarimala Judgment*, *supra* note 134, para 112.

> The anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines […] The essential religious practices test should merit a close look […] in an appropriate case in the future.

Since Chandrachud, J. relies on "constitutional morality" framed in terms of "autonomy" and the "dignity of individual", it is submitted, "his deference to the community opinion for determination of essential aspects of religion" seems contradictory.[160] Chandrachud, J. argued that the community can decide upon the meaning of essential unless the practice was exclusionary. Indu Malhotra's J. opinion substitutes exclusion with *oppressive or pernicious* practice. The question, then, is on what grounds do we determine what is the content of these terms? Despite the efforts in the opinion of Chandrachud, J. to identify judicial limits to community determinations of essential religious practice, he was unable to wriggle out of the problem that there is no objective formula for where such limits begin. Part of the problem lies in the lack of conversation between the judges of the Supreme Court. Chandrachud, J. did not work through the difficulty already indicated in *Nathdwara Temple* case. Indu Malhotra, J. without engaging with the previous precedents declared that the practices and beliefs which are considered to be integral by the religious community should be regarded as 'essential' and thus given protection under Article 25.[161] This failure of the Supreme Court to speak in one voice with clarity in disagreements or ways of employing previous precedents leads to the messiness in court's message making it difficult even for legally trained minds to fully appreciate the reasoning of the Court. This is further complicated with the evocations of abstract and transhistorical categories like "constitutional morality", which instead of earnestly confronting the mythic, weave their own mythology. The judiciary instead of washing off its hands has to dirty them by entering into the quagmire of religion and perform its constitutional function by upholding that interpretation of tradition which best suits the constitutional mandate.

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[160] Bindal, *supra* note 89.
[161] *Sabarimala Judgment*, *supra* note 134, para 13.6 (per Indu Malhotra, J.)

Conclusion

The unresolved issue of polyvocality of religious interpretations even within a specific religious community can be traced to the founding decision of the *Srirur Math* case which left the question of determination of integral aspects of a religion to the religious community. Although the Court attempted a course-correction of this monolithic understanding of the community in the *Nathdwara Temple* case, the subsequent decisions and scholarly opinions remained unsure of the competency of the Court to decide on the predominant voice of the community especially when there were divergences and disagreements within the said community. The dissenting opinion in *Sabarimala Judgment* seems to have come full circle in giving up the task of determination of "essential practices" to the community (Indu Malhotra, J.) or even surrendering the future of the doctrine itself (D.Y. Chandrachud, J.).

The idea of relinquishing the doctrine finds its most recent exposition in the argument of Gautam Bhatia who proposes "the anti-exclusion principle as a replacement for 'essential practices test.'[162] He is careful not to apply this new principle to the category of cases dealing with "State control over religious institutional property" but "where constitutional protection is sought for religious customs or practices, and where there is a conflict *within* religious communities."[163] However this idea remains fraught with conceptual difficulties. Bhatia's proposal proceeds on a rationale that the doctrine of essential practices is applied by the Court in two types of disputes: first, in dealing with religious institutional property or endowments (as in *Srirur Math, Devaru, Nathdwara Temple* etc.) and second, in engaging with issues about individual faith and interior belief (as in *Sabrimala Judgment* and the *Excommunication case*). His argument being that the issues of temple trusts, money and positions may be subject to judicial review while leaving the issues of personal belief and faith community determination. But this distinction is problematic as both are about institutional decisions and spatial entities, and the role of

[162] Bhatia, *supra* note 87 at 166.
[163] *Ibid.*

leadership positions in decision making. In that sense even the cases which are seemingly about individual faith and interior belief, are as much about the public and communitarian dimension of governing religious practice which is interlaced with power, thus warranting judicial intervention in a secular, democratic polity.

This is because the idea of "exclusion" can in itself be tested on competing registers. Further, when there is conflict within the community, a disinclination to engage with such difference of opinion only complicates matters. This strategy imagines religion as an episteme in colonial terms, as transhistorical and not subject to modifications of history. The only modifications, on this register, that can be brought within judicial review are based on the language of "exclusion" which itself is troubled with difficulties to anchor the reform vocabulary.

This reluctance to engage with religion cannot sufficiently tackle the liberal paradox with which I opened this chapter. The judiciary has to acknowledge its own mythological traits and engage with varying voices of the religion keeping in mind the history of Constitution making and conceptualising religion as a changing and historical phenomenon (something which the colonial epistemology did not permit). The liberal paradox is foundational and constitutive of the Indian republic. The doctrine which negotiates this paradoxical freedom requires working through. This conclusion should by no means be understood as a defense of the doctrine. But many times its misapplication[164] is a result of its conceptualization in universal and transcendental terms. This brings us to another central argument of the thesis: that judicial performance with respect to the doctrine, as explored in this chapter, cannot be understood in instrumental terms for political expediency but as a product of the contradictions *immanent* in the legal reasoning which is emblematic of the historical paradox of liberal constitutionalism.

In the following chapter, I will examine judicial decisions which do not expressly refer to the essential practices doctrine, but nevertheless discursively endeavor to decipher the inner core or essence of the religious cosmology. This will further substantiate my claim

[164] As we will see in *Mohd. Hanif Quareshi & Others* v. *State of Bihar* (AIR 1958 SC 731) in chapter 3 and *Dr. M. Ismail Faruqui* v. *Union of India* ((1994) 6 SCC 364) in chapter 4.

that delving into religious semantics and mythic cosmology is inevitable for the secular courts. We will also see how the historical linkage of modern law with myth is not only revealed in the doctrinaire forms but is immanent in the act of interpretation itself.

CHAPTER 2

RELIGION AS CORRUPTION: AN ANALYSIS OF RELIGIOUS APPEAL IN ELECTION CASES

Introduction

> The corruption of every government generally begins with that of its principles.[1]

The previous chapter examined the judiciary's efforts to excavate the 'essence of religion' through the 'essential practices test'. In this chapter, we will see how the Supreme Court in three different cases, wittingly or unwittingly, ended up legitimising the appeal of *Hindutva* during elections. Popularly known as the *Hindutva* judgments of the Supreme Court, these three judgments will be the focus of this chapter.[2] These judgments became important for both social scientists and lawyers to understand the socio-political role of the Supreme Court in shaping the democratic polity of independent India. I will argue that *Hindutva judgments* which collapse religious Hinduism and its cultural form are neither standalone decisions nor distinct in their style of judicial reasoning. Indeed, these cases must be seen as an outcome of a pattern of previous precedents revealing the judicial tendency of insisting on theological (deeper) meaning of religious symbols and motifs which ends up justifying the prohibited religious speech during elections.

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[1] Montesquieu cited in Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* 165 (Princeton University Press, New Jersey, 2003) [Hereafter, *The Wheel of Law*'].

[2] *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte* along with *Bal Thackeray* v. *Prabhakar Kashinath Kunte & Others* (1996) 1 SCC 130 (Hereafter, '*First Hindutva judgment*'). The other two judgments were *Ramachandra G. Kapse* v. *Haribansh Ramakbal Singh* (1996) 1 SCC 206 (Hereafter '*Second Hindutva udgment*') and *Murli Manohar Joshi* v. *Nitin Bhaurao Patil* (1996) 1 SCC 169 & (Hereafter, '*Third Hindutva judgment*').

I will thus trace the judgments dealing with the use of religious symbolism or religious speech during political campaigning in elections, and discuss the context, history as well as the judicial interpretation of the provisions prohibiting the use of religion for eliciting votes. One dominant argument that runs throughout this chapter is that the Court never arrives at any precise meaning of religion (at least in the context of Hindu religion). But every attempt of the Court to bring out the *hidden kernel* or deeper meaning of religion bypasses the fundamental mandate of the legal provision which is to combat corruption stemming from identity politics based on religious affinities.

As the epigraph to this chapter, cited by Gary Jeffrey Jacobsohn, a comparative constitutional law scholar, in the context of Indian election law suggests, the election law of India equates the use of religion in political speech with "corrupt speech". Section 123 (3) of the Representation of Peoples Act, 1951 (RPA) forbids any religious invocation to solicit electoral gain. In doing so, it considers the use of religious identity for political gain against the principle of deliberative democracy. As the Supreme Court remarked in a leading case of election law, discussed at length later in the chapter:[3]

> Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

This explains the justification of Section 123 (3) of the RPA which describes religious rhetoric as 'corrupt' and potentially corrosive of democratic principles in India. Significantly, United States of America (U.S.), which cherishes its secular democratic credentials does not have a similar restrictive provision in its election law.[4] Indeed,

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[3] *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra & Ors.* (1976) 2 SCC 17, para 9 [Hereafter, '*Bukhari*'].

[4] Corrupt electoral practice in the US only connotes campaign financing of the elections by private corporations or unfair use of money to win elections. For a critical discussion see, Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, New York, 2015), ch. 5.

Jacobsohn argues that a similar provision cannot stand the constitutional scrutiny in the United States:[5]

> [S]tructural inequalities are in India directly and profoundly implicated in religious belief and practice, they can only be addressed through policies that limit religious freedom—possibly including speech—in ways that would not pass constitutional scrutiny in a polity such as the United States, where religion is much less of a factor in configuring the shape of the temporal world.

The statutory prohibition on religious speech during elections thus has a unique history.[6] It is the historical specificity of the Indian sub-continent which makes Jacobsohn argue that the legal prohibition of religious speech in elections cannot be appreciated through the abstractions of the liberal political theory[7] which presuppose a neat separation between the public and the private sphere, relegating religion to the latter.[8] A deep linkage between socio-economic inequalities and religious practices justifies the State regulation of religious freedom in India (as discussed in the previous chapter).[9] Any denial of the connection between the freedom of religion and underlying socio-economic inequalities is "radically to misconstrue the essence of Indian constitutionalism."[10] It is this "disappearance [between the religious and the secular] that, in the case of India, renders problematic […] the application of Rawlsian public reasoning, which, predicated on the existence of a distinct secular realm, insists on separating what may be

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[5] Jacobsohn, *The Wheel of Law, supra* note 1 at 163.

[6] See, Upendra Baxi, "Savarkar and the Supreme Court" in Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court & Secularism,* Policy Studies East-West Centre, Monograph Series (Washington D.C., East West Centre, 2007). Baxi describes these provisions of the Representation of Peoples Act as 'governance-oriented secularism.' He distinguishes them from the 'rights oriented secularism' which "entails a complex interface between rights to religion and other related rights." Governance-oriented secularism deals with the anti-democratic features that exist alongside democratic processes of governance. Baxi insists on the distinction as the "main focus here is with the preservation of the integrity of secular governance structures and processes." *Id.* at 48.

[7] "Indian restrictions on religious speech can be justified according to content-neutral principles that conform to contemporary conceptualizations of the liberal State; but those principles do not readily conform to the non-neutrality of the Indian State as delineated in the nation's Constitution." *Id.* at 179.

[8] See generally, John Rawls, *Political Liberalism* (Columbia University Press, New York, 1996).

[9] See generally, Government of India, Report on Social, Economic and Educational Status of the Muslim Community of India (2006), *available at*: http://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf (last accessed on Oct. 20, 2020).

[10] Jacobsohn, *supra* note 1 at 171.

indivisible."[11] Here Jacobsohn seems to drawing a link between socio-economic disparities on the one hand and religious sphere on the other. I use his argument to the extent that caste (which is a product of religion) and economic disparity are not altogether distinct in the Indian Constitution and this makes the role of religion more complex in India than it is understood in the discourse of political liberalism. Therefore, it is not the commitment to political liberalism but the specific historical context that has shaped Indian constitutional philosophy, and made the statutory regulation of incendiary religious speech in elections a desirable legislative goal.[12] These prefatory observations form the backdrop of the statutory limitations on religious speech in elections.

I. Election Law and Religious Rhetoric

The Representation of Peoples Act, 1951 (RPA) is a single comprehensive legislation governing the election law in India at Union as well as state levels.[13] Section 123 (3) of RPA prohibits "the appeal by a candidate or his 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 […] for the furtherance of the prospects of the candidate or for prejudicially affecting the election of any candidate."[14] Section 123 (3-A), added by way of an amendment in 1961, prohibits the "promotion of, or attempt to promote, feelings of enmity or hatred […] on grounds of religion, race, caste, community, or language, by a candidate or his agent […] for the furtherance of the prospects of the election."

[11] *Id.* at 171-172, fn. 36.

[12] This is in continuation of my argument in chapter 1, where we evaluated the permissible limitations on the religious freedom clause on the ground of 'social reform' generally and against caste discrimination in particular.

[13] Article 327 of the Constitution of India empowers the Parliament to "make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State." The RPA was enacted under this provision. Article 324 of the Constitution of India vests the superintendence, direction and control of elections in the Election Commission.

[14] Section 123(3) prohibits, among other things, religious speech and religious symbolism to enhance electoral prospects. Any person who is declared guilty of 'corrupt practice' under section 123 (3) can be disqualified from casting vote in any election (sections 8-A and 11-A of RPA) and his/ her election can be declared void (section 100 (1) of RPA) by the court for indulging in forbidden electoral practices.

Caste discrimination and partition of the subcontinent on religious basis form the historical antecedents of section 123 (3). This explains the departure of section 123 (3) from the English statute on the basis of which RPA was formed. The "corrupt practices provisions of the Representation of the People Act are traceable to an 1883 British statute, which became the model for the Government of India Act of 1919."[15] "With only minor changes, the Indian approach incorporated the substance of British law as promulgated as late as 1949 in the British Representation of the People Act." But there was no mention of religious invocation as a form of corrupt practice in the British statute of 1949.[16] Enacted in 1951, RPA distinguished major and minor corrupt practices (section 124(5) which mentioned religious appeal, formed a part of 'minor' corrupt practices):

> Section 124 (5): The systematic appeal to vote or refrain from voting on grounds of caste, race, community or religion or the use of, or appeal to, religious and national symbols, such as, the national flag and the national emblem, for the furtherance of the prospects of a candidate's election.

The requirement of "systematic appeal" indicated that repeated appeals were an essential ingredient of the section. The 1956 amendment Act relinquished the distinction between minor and major corrupt practices but retained the requirement of the "systematic" appeal made by the candidate, his agent or by "any other person."[17] In 1958, another amendment inserted the words "with the consent of a candidate or his election agent" after "any other person".[18] Still another important amendment was made in 1961 to "widen the scope of corrupt practice" under section 123(3). The amended section made the following changes: it removed the word "systematic," thereby enlarging the scope of the prohibition; inserted "language" as a prohibited category; and added the pronoun 'his' to

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[15] Jacobsohn, *supra* note 1 at 172.
[16] One important departure of the provision regarding corrupt practices included "abuses associated with religious speech." *Ibid.*
[17] Section 123(3) of the Act (as amended in 1956) read as follows: "The systematic appeal by a candidate or his agent or *by any other person* to vote or refrain from voting on grounds of caste, race, community or religion or the use of, or appeal to, religious symbols […] for the furtherance of the prospects of that candidate's election" (emphasis added).
[18] Here, "any person" could have meant even a person not authorised by the candidate.

prohibit the candidate from soliciting votes "on the ground of *his* religion, race, caste, community or language."[19]

Section (3-A) was also added to section 123 of RPA in 1961. This provision prohibits the promotion of "feelings of enmity and hatred" between two communities during election campaigns.[20] In the following section, I will evaluate the decisions of the Supreme Court and the interpretation of such "religious" appeals under the RPA. I will argue that various judicial decisions sidestep the basic prohibition of the provision in their attempt to differentiate "religious" from cultural, mystical and related dimensions. This approach eventually found fruition in the legitimization of communal appeals of the *Hindutva* cases in 1995. I will argue that if the provision is interpreted in its true spirit, as the Supreme Court has actually done in a few cases, it can effectively be used to combat the divisive and communal tendencies which can destroy the fabric of secular constitutional aspirations.

Mythical Symbolism in Electoral Context

One of the earliest cases related to section 123 (3) of the RPA is *Shubnath Deogram* v. *Ram Narain*,[21] dealing with general elections of 1957. The appellant (Shubnath), an *adivasi* (tribal)[22] belonging to the "Ho" community won his election for a seat in the Bihar Legislative Assembly. The electoral symbol allotted to his party was a rooster. His opponent (Ram Narain Yadab), a non-*adivasi* Hindu, challenged his election on the grounds that he had deployed the "corrupt practice" under section 123 (3), by publishing

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[19] The amended section 123 (3) reads as follows: "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, or appeal to, 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."

[20] In the same year, section 153-A was added to the Indian Penal Code, 1860 (IPC) making the promotion of "disharmony or feelings of enmity, hatred or ill-will" as punishable offence. The Supreme Court in the *First Hindutva case* pointed out the overlap between the two provisions. The "difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill-will between different groups of people is an offence under Section 153-A, I.P.C. while under sub- section (3A) of Section 123 of the R.P. Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign." *First Hindutva case*, *supra* note 2, para 19.

[21] AIR 1960 SC 148 [Hereafter, '*Shubnath*'].

[22] *Adivasis* are indigenous peoples who are designated as 'scheduled tribes' in the Constitution.

and distributing two leaflets in which he made systematic appeals invoking religion. The constituency had a predominantly tribal electorate of members of the Ho, Munda and Oraon communities. The constituency also had a strong presence of non-tribals. All non-tribal communities (and a few tribal communities as well) were Hindi speaking, while the Hos and the Oraons used their own languages to communicate. Shubnath belonged to the Jharkhand party whose primary objective was to carve out a separate administrative unit for the Jharkhand area. The party never sought a separate statehood, but it sought to cater to both tribal and non-tribal communities, which is likely why the leaflets challenged by Yadab were written in the Ho language, but using the Devanagari script.

In one of the leaflets, the rooster (the party symbol) sought votes by making the electors recall how it had served them in adverse times: "I am with you even after giving my life. You recover [from illness] even by applying a knife at my neck […] In exchange give me *chara* [food] in the shape of a vote so I am victorious." The leaflet also contained the threat of divine displeasure: "Do not forget me, otherwise I declare, ye sons of men will suffer eternal miseries […] Yours only, Rooster."

Ram Narain Yadab (respondent) challenged this electoral appeal as a craftily camouflaged use of the official symbol with subtle religious undertones. The election tribunal dismissed the petition on the grounds that the petitioner had failed to discharge the burden of proof. On appeal, however, the Patna High Court overturned the tribunal's decision, setting aside the electoral victory of the candidate on the ground of use of "corrupt practices." It observed that both the leaflets contained religious appeals banned under the RPA. Aggrieved by the High Court decision, Shubnath preferred an appeal to the Supreme Court.

The Supreme Court by 3:1 majority dismissed his appeal. According to the majority judges:[23]

> [W]hen the leaflet stated that food should be given to the cock in the shape of votes what was meant was that the deities would be pleased if votes

[23] Authored by A.K. Sarkar, J. (on behalf of S.K. Das and P.B. Gajendragadkar, JJ.). *Shubnath*, *supra* note 21, paras 16.

> were cast in the box with the cock symbol. Further, the reference to the religious ceremonies involving the sacrifice of the cock and the alleviation of pain and miseries thereby, is clearly a reference to religion. If the meaning was not what we have stated earlier, it is difficult to understand why it was necessary to refer to the religious ceremonies for the happiness of the community involving the sacrifice of cocks […] When the cock in the leaflet said "give me *chara* in the shape of vote", what it said in substance was that the giving of such votes would result in the deities being pleased.

The Court was able to appreciate the symbolism of the appeal which implored the voters that voting for the appellant would please the deities. It referred to "divine wrath" as a clear instance of religious appeal "for the substance of it is that it would be an irreligious act not to vote for the party."[24] Subba Rao, J. wrote a dissent refusing to read the leaflet as "religious appeal". The dissent distinguished the metaphorical use of mythology from religious speech:[25]

> This section is not obviously intended to prevent appeals in picturesque or metaphorical language drawing analogies from mythology, religion or folklore. *When most of the voters are illiterate*, the candidate or his agent can attract and enthuse the audience or drive home his points only by parables, similes or metaphors drawn particularly from religious lore *which most of the people understand and appreciate*. A distinction must, therefore, be drawn between canvassing on grounds of religion and seeking of votes in graphic or picturesque language with analogies from religious lore.

[24] *Id.,* para 18.
[25] *Id.,* para 27 (emphasis added).

The dissent limited the statutory scope in its suggestion that all "[those] similes are drawn from religion, but they do not embody an appeal, directly or indirectly, to vote for the candidate on grounds of religion."[26] In conclusion, Subba Rao, J. remarked:[27]

> [W]hat is the religion of the Adibasis? They are a backward community and they do not appear to have any highly evolved religion. *Presumably, they are all Hindus.* The peculiarity of the Hindu religion is its universality. Along with its worship of gods, goddesses, and even of trees and snakes […] It is well-known that not only Adibasis but also many other backward communities in India sacrifice animals to appease spirits and deities. The animal which is sacrificed is not an object of veneration, but only a convenient or conventional sacrificial medium. It cannot, therefore, be said that any reference to a sacrificing bird or animal is a reference to religion.

Here, the argument made in the dissent, that tribals are (presumably) Hindus, is assimilationist. But it is made to argue that the category "Hinduism" includes a wide variety of animist practices that are not immediately locatable in "scripture" and therefore difficult to define.[28] Various Indologists as well as post-colonial scholars have argued that the category of 'religion' as such has originated in Europe and is thoroughly modern.[29] The dissent is a good example of how myth, folklore and religion are intertwined and difficult to separate in the context of Hindu religion. There exists a practical difficulty in understanding Hinduism as a broader category that cannot be encompassed within the standard meaning of "religion". It is the political appropriation

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[26] *Id.*, para 27 ("to illustrate, a candidate may appeal to the electorate consisting of persons professing different religions, say Hindus, Mohammadans, Christians etc., to vote for him and say that he would sacrifice his life in the cause of his constituency just like Christ sacrificed his life to redeem the world. He may also say that like Rama, the virtuous, who killed Ravana, the rakshasa, the embodiment of evil, he would, if elected, put down corruption, nepotism and the like in Government. He may even say that he would sacrifice himself as a goat before Kali to being happiness and prosperity to his constituency.").

[27] *Id.*, para 29 (emphasis added).

[28] The question of codification of custom/myth/tradition was integral to the shaping of colonial modernity (as discussed in the Introduction to this study).

[29] See, Talal Asad, *Genealogies of Religion: Disciplines and Reasons of Power in Christianity and Islam* 27-27 (John Hopkins University Press, Baltimore, 1993); Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* 214-216 (Edward Elgar, Cheltenham, 2018).

of this complexity by the Hindu nationalists that helps them to pursue their political agenda. The specific context of elections that forms the backdrop of this chapter, provides a useful location where the broader meaning of Hinduism can lead to anomalous results. There is a risk of all Hindu symbols per se becoming non-religious and therefore outside the purview of the prohibited category or rendering the prohibition as meaningless.[30] While the dissent carved out myth and mythology as closely entwined with religion and having a thin distinguishing line, its limitations begin in its failure to appreciate that it is precisely this thin line of distinction which makes myth amenable to be used as religious appeal in the context of elections. As V.S. Rekhi points out: "Levi Strauss has brought out the solidarity potential of mythical stories. Religious objects and mythical stories both perform the function of reinforcing solidarity of the candidate with the voter. The distinction between myth and sacrificial object is one without difference particularly in the context of elections."[31]

Hindu Symbols during Elections

In a 1965 case of *Jagdev Sidhanti* v. *Pratap Singh*[32] the question of interpretation of the "Om" symbol came before the Court. The elected candidate (Jagdev Sidhanti) had used flags with the inscription of "Om" during the election campaign in the Jhajjar constituency of the state of Haryana. The Punjab High Court invalidated the election of the candidate for violating section 123 (3) of the RPA. The High Court invalidating the election remarked that the word "Om" is a religious symbol of the Hindus in general and of the Hindus belonging to *Arya Samaj* in particular, and therefore the "Om Dhwaj" (flag bearing the symbol of Om) flown during the election campaign constituted use of

[30] The dissent observed that the appeal on the leaflet - that the candidate (like Lord Ram) would end the evil of corruption may not amount to an appeal to religion. The question is, what if the reference to Lord Ram were coupled with a divine threat (as was in the present case)? The Indian Penal Code (IPC), under section 508, punishes any person inducing another "to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of divine displeasure if he does not do the thing." The recognition of 'divine displeasure' as a punishable category under IPC signifies the complex relationship of the secular law with the divine and mythological realm. The fact that fear of divine wrath can take the form of 'harm' sociologically is entirely eschewed in the dissenting view of the Supreme Court.

[31] V.S. Rekhi, "Religion, Politics and Law in Contemporary India: Judicial Discourse in Critical Perspective" in Robert D. Baird (ed.), *Religion and Law in Independent India* 253 (Manohar Publishers and Distributors, New Delhi, 2005).

[32] AIR 1965 SC 183 [Hereafter, '*Om symbol case*'].

religious symbolism. In appeal, the Supreme Court did not agree with the High Court's reasoning and overturned the High Court verdict, arguing that "Om" does not symbolise religion, or for that matter anything religious. In the words of the Court:[33]

> [I]t is difficult to regard 'Om' which is a preliminary to an incantation or to religious books as having religious significance. "Om" it may be admitted is regarded as having *high spiritual or mystical efficacy*: it is used at the commencement of the recitations of religious prayers. But the attribute of *spiritual significance will not necessarily impart to its use on a flag the character of a religious symbol* in the context in which the expression religious symbol occurs in the section with which we are concerned […] To 'Om' high spiritual or mystical efficacy is undoubtedly ascribed; but its use on a flag does not symbolise religion, or anything religious.

In making a distinction between spiritual/ mystical and religious appeal, the Court, in my view, preferred the route taken by the dissent of *Shubnath*. We see here the emergence of a pattern of persistent difficulty – or perhaps deliberate refusal – to parse the meanings of spiritual/religious/mythical features, through which the Court gradually leaned towards allowing more and more symbolism under the characterization of its being mystical/spiritual, rather than 'religious.'

Ramanbhai Ashabhai Patel v. *Dabhi Ajitkumar Fulsinji*[34] is an important case in continuation with the line of reasoning inaugurated by the dissent of Subba Rao, J. in *Shubnath* and followed in the *Om symbol* case. It was related to an election dispute which arose in the state of Gujarat in 1962. The appellant (Ramanbhai Patel) contested and won his election as a member of *Swatantrata* party. The respondent (Dabhi Fulsinji) filed a petition before the election commission challenging the election on various grounds, including the use of corrupt practice during election campaign. The official election symbol of the candidate was a star. However, the accusation against him was that in the

[33] *Id.*, para 13 (emphasis added).
[34] (1965) 1 SCR 712 [Hereafter, "*Dhruva*"].

pamphlets he described it as the pole star, 'Dhruva' which is associated with Hindu mythological symbolism. The election commission dismissed the accusation but the Gujarat High Court invalidated the election on the ground of use of religious appeal. The appellant thus appeared before the Supreme Court.

One of the issues before the constitutional bench of the Supreme Court[35] was whether the mythological 'Dhruva' has any significance in the religious beliefs or practices of Hindus. The Supreme Court, speaking through, J. R. Mudholkar, J. acknowledged that the pamphlet associated 'Dhruva' with the devotee of Lord Vishnu and referred to its divine characteristics.[36] But it denied any such possible associations as constituting 'religious appeal' and assailed the High Court for finding out the mythological associations linked to 'Dhruva'.[37] The Supreme Court endorsed the distinction between a religious symbol and myth, and in doing so it approved the *Om Symbol case* and *Shubnath* as precedents:[38]

> [T]he story of Dhruva is that as a result of his steadfast devotion and complete surrender to God, Dhruva earned a boon and that was being accorded a unique place in the firmament where in relation to the rest of the sheller bodies his position is fixed. According to the Puranas he was promised this position till the destruction of the universe. This itself shows that he was not raised to the status of divinity, that is to say, he did not join the company of the 33 crore deities which are said to comprise the Hindu

[35] Mudholkar, J. wrote the opinion on behalf of P.B. Gajendragadkar, CJ., M. Hidayatullah, K.N. Wanchoo, and Raghubar Dayal, JJ.
[36] J.R. Mudholkar, J. speaking for the Court, said: "It is not disputed that on some pamphlets the following characteristics associated with the star Dhruva are set out: Dhruva means eternal. Dhruva means firm. Dhruva means guide. Dhruva means determined. Dhruva means one devoted to religion.". *Dhruva, supra* note 34, para 7.
[37] *Dhruva, supra* note 34, para 8. ("The High Court seems to have delved deep into the Vishnu Purana, the Mahabharata and the Bhagwat for digging up the story of Dhruva and ascertaining and describing his qualities and particularly of his steadfast devotion to the creator. All that seems to us to have been wholly unnecessary because it leads us nowhere.").
[38] *Id.*, para 8 (emphasis added). Mudholkar, J. speaking for the Court, observed that "the five qualities which are generally associated with Dhurva are, indeed, noble qualities but they have no significance peculiar to Hindu religion. The significance of these qualities to the Hindus would be in no way different from that to persons professing other religions or systems of beliefs."

> Pantheon. How then can the association of Dhruva with the star be regarded as an appeal to Hindu religious sentiments?

The Supreme Court refused that the association with Hindu tradition or mythology can constitute 'religious appeal'. Just like the precedents cited by the Court, the reasoning of this case followed the universalization and secularization of Hinduism and Hindu mythology as 'Dhruva' was shifted from the sphere of religion to the sphere of mythology. This argument was spelled out by the Court as follows:[39]

> [I]f they are told [to] cast their vote for a particular candidate whose election symbol is associated with a particular religion just as the Cross is with Christianity that will be using a religious symbol for obtaining votes. But where, as in the case of the Hindu religion, it is not possible to associate a particular symbol with religion, the use of a symbol even when it is associated with some deity, cannot, *without something more,* be regarded as a corrupt practice within the meaning of sub- s. (3) of s. 123 of the Act.

This 'something more' is understood in terms limited to "fear of authority" or "hope of reward" from divinity and that too only limited to what in the Court's description are "the illiterate, the orthodox or the fanatical electors."[40] One can appreciate the argument of the Supreme Court in light of the fact that the symbol of star was officially allocated to the candidate and its description as the pole star perhaps could not be a sufficient reason to overturn a democratically elected candidate. However, the reasoning of the Court is too broadly worded to exclude any mythological appeal unless it is coupled with divine fear or reward from the prohibition. In one way, this case along with the dissent of Subba Rao, J. in *Shubh Nath* provides a good illustration of the legal difficulties that arise in evaluation of mythic symbolism in ex-colonial societies. Dhruva was not explicitly a

[39] *Id*., para 12 (emphasis added).

[40] *Id.,* para 9 ("all this only shows that Dhruva was regarded as a great devotee of Vishnu and held in reverence by Hindus. It clearly negatives the idea of Dhruva being at Godhead. Worship of mortals is so common, at least in our country, that no one can seriously attach religious significance to it. Such worship has no connection whatsoever with religion and is often motivated by fear of authority or by hope of reward.").

deity himself and that allowed the Supreme Court to say he was only myth and not religion. Even as the Supreme Court was critical of the Gujarat High Court for finding mythological associations of Dhruva in Puranas, the High Court was actually making a similar argument in a different way. Puranas, for the High Court, were repository of more widespread legends, and therefore different from idols or figures associated explicitly with places of worship which is associated with religion. One of the tasks of this chapter is to emphasise that the electoral context constructs a distinct meaning other than what is ordinarily associated with religious symbolism. It is the failure to appreciate this contextual meaning which eventually led to the *Hindutva* judgments despite the fact that they were delivered in a historical moment when Hinduism took a more aggressive political form of *Hindutva*. Before discussing that, in following sections, I will first discuss cases pertaining to religious appeals made by non-Hindu candidates.

Interpreting Sikh Religious Speech

In a 1965 case of *Kultar Singh* v. *Mukhtiar Singh,*[41] Kultar Singh (appellant), was elected on Akali Dal's ticket to the Punjab Legislative Assembly. Mukhtiar Singh (respondent) accused him for soliciting votes by making religious appeals, specifically claiming that he alone was the "proper representative of the Sikh Panth". The appellant was also accused of deriding the respondent as a representative of a Hindu-ridden Congress party and who could neither protect the Sikh religion nor the Sikh language (Punjabi). The election tribunal and the Punjab High Court decided the case in favour of Mukhtiar Singh declaring the election of the appellant void under section 123 (3). The Supreme Court referred to the disputed pamphlet issued by diasporic Sikh community for the resident Sikhs in India:[42]

> We, who are living in Singapore, Malaya, and South East Asia, place this before you, most respectfully, that at this critical juncture it is your duty to keep high the honour of the Panth. This is not the time to criticise the weaknesses of the leaders of the Panth; the need is that in the coming

[41] (1964) 7 SCR 790.
[42] *Id.,* para 10.

> General Elections you should defeat the opponents of the Panth the same way as you did in the last Gurdwara Elections. Every Sikh vote should go to the representatives of the Akali Dal, and we hope that this prayer of ours from far off will be accepted by you and you will once again preserve the honour of the Panth. Victory of the Panth will maintain the honour of the Panth. By maintaining such honour we will reach our final goal that is Punjabi Suba […] We remain anxious to keep the honour and prestige of the Panth ever high.

The election tribunal and the Punjab High Court held that the imploration to protect the honour and prestige of the 'Panth' was a direct reference to the Sikh religion. The Supreme Court however had a different view. Carving out the etymological origins of the word 'Panth', the Supreme Court described it as "one of Sanskrit origin" which originally meant "the path or the way".[43] It conceded that "by itself it has come to indicate the Sikh religion because it has been used by Sikhs to denote their religion and their denomination."[44] Further, it clarified that the adjective 'Panthic' means "of the Panth or belonging to the Panth, and so, *prima facie*, the glory or prestige of the Panth may mean the glory or prestige of the Sikh religion."[45] Clearly, till this juncture of the judgment the Supreme Court shared the view taken by the Punjab High Court.

But the Supreme Court differed with the High Court in its interpretation of the pamphlet. In the initial part of the pamphlet when the word is used in honour of the Panth "the word 'Panth' may conceivably mean the Sikh religion."[46] But, the Court observed, "when we go to the use of the word 'Panth' in the next sentence, it becomes clear that the said word cannot possibly mean the Sikh religion."[47] Referring to the part where the pamphlet said: "you should defeat the opponents of the 'Panth' the same way as you did in the last Gurdwara Elections", the Court remarked that the opponents meant the opponents of the Akali Dal Party and not specifically opponents of the Sikh religion. According to the

[43] *Id.,* para 12.
[44] *Ibid.*
[45] *Ibid.*
[46] *Id.,* para 13.
[47] *Ibid.*

Court, “It is common ground that the Gurdwara Elections were fought between different parties of the Sikhs and the Akali Dal party triumphed at the said Elections. Therefore, there is no doubt whatever that in this sentence, the Panth cannot possibly mean the Sikh religion.”[48] The Court thus differentiated religion from politics despite considerable overlaps in the religious and political identities in this context. Although the Court noted that interpreting the pamphlet in the “cold atmosphere of a judicial chamber” was distinct from the “surcharged” atmosphere of the campaign and that “it would be unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings”,[49] the Court’s own verdict, ironically, was based on a fine etymological and contextual differentiation, which may well have been difficult for the ordinary voter to grasp. This microscopic examination of the pamphlet to find an alternative meaning of ‘Panth’ ignored the spirit of the statutory provision which aims to discourage solidarity formations solely through communal identity. This point is made by V.S. Rekhi who argues that the “use of Panth to refer to elections to a religious management body definitely reinforced the relationship of Panth with Sikh religion. It did not distinguish Sikh religion from Sikh politics. Yet, the Chief Justice was willing to relate Panth to politics and separate the domain of politics from the domain of religion.”[50]

This decision highlights the difficulty faced by the courts in separating the political from the religious. One way to read this judgment is that it reflects the liberal attitude of the courts allowing more latitude to the minority community.[51] Even if that were the case, such liberal posturing was misguided as it eventually became precursor to the Court’s collapsing of cultural Hinduism with political appeal of Hindutva.

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[48] *Ibid.*
[49] *Id.*, para 9.
[50] Rekhi, *supra* note 31 at 257. Rekhi brings out the failure of the courts in understanding the function of religion in forging group identities and solidarities.
[51] It is not possible to locate any responses to the judgment of the Court in the local newspapers of the time. Therefore, I am limiting myself to the analysis of the judicial discourse.

Muslim Candidate and Religious Appeal

Two Muslim candidates from the Dhing constituency of Assam Legislative Assembly came before the Supreme Court in 1975 in *Abdul Husain* v. *Shamsul Huda*.[52] The petitioner (Shamshul Huda) alleged that the respondent (Abdul Hussain), who professed Islam, sought support from tribal voters on the ground that he was half-tribal, half-Muslim (his mother being from the *Kachari* tribe). The place in question was a tribal area of Assam with a heterogeneous composition of tribespeople, plainspeople who were Hindus, and a considerable number of Muslims. Amongst the Hindus settled from the plains, the respondent pleaded that he was half Hindu and thus more acceptable than the petitioner who was hundred percent Muslim. The Guwahati High Court held that the charges against Abdul Hussain were proved and annulled his election. He approached the Supreme Court challenging the judgment of the High Court. V.R. Krishna Iyer, J., writing the judgment for the Supreme Court, rejected this as constitutive of religious appeal. He observed:[53]

> [M]ere reference to one's tribe, ancestry or genetic commingling may not be tainted with the legal vice of religious or communal appeal, exceptional situations apart. It may well be that a strong secularist candidate may plead with the electorate to be non-communal and therefore vote for him on the basis that he was an inter-caste or inter-racial or inter-religious product and as such a symbol of communal unity. Indeed, mixed marriages may accelerate national integration and a candidate cannot be warned off by the law from stressing this non-communal merit of his. That would be a perversion of the purpose of the provision.

For the Court, "(t)o declare oneself an offspring of a religious renegade is not to appeal to religion. It is unlikely because it does not socially pay."[54] Here one may agree with Krishna Iyer, J. as this approach may keep the emancipatory possibilities of religion open

[52] AIR 1975 SC 1612.
[53] *Id.*, para 16. Krishna Iyer, J., further remarked, ""substance of the appeal, if at all is-not the delicate, legal concoction for Court consumption-that being of Hindu and Muslim extraction he is a less communal Mussalman." *Id.*, para 17.
[54] *Id.*, para 18.

(as this may allow an electoral appeal which dilutes Brahmanical caste identity in favour of marginalised castes). But the appeal to ancestry in this case (the respondent referring to his mother's religion) was framed to secure a hostile solidarity through religious affinity which clearly prohibited under the RPA.

"Nothing beneath the cloak": An alternative approach

A division bench of three judges confronted a dispute which arose in August 1971 elections from the Kumbharwada constituency of the Maharashtra State Assembly in *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra & Ors*.[55] The appellant, Z.B. Bukhari (a Muslim League candidate) made speeches to induce voters to believe that "they will be objects of divine displeasure or spiritual censure if they voted for Shaukat Currimbhoy Chagla [as] he alone stood for all that was Muslim whereas Chagla represented all that was against Muslim religion and belief."[56] In the speeches Chagla was accused of not being a true Muslim due to his affiliation with the Congress Party which is committed to bring about legislative changes in the Muslim Personal Law. The appellant (Bukhari) told the audience that Muslim personal law was a matter of religious faith. He also asserted that if the Congress Government brought in "amendments in our religious law", the "battle would be fought in every street" as "the question of religion has arisen". The appellant was charged under sections 123 (3) & (3-A) for six separate speeches delivered at different places. He advocated for staunch religiosity and adherence to Islam without any dilution in the faith.[57] The trial court and the Bombay High Court declared various speeches as violating section 123 (3) and others inflammatory enough to come within section 123 (3-A). Bukhari appealed to the Supreme Court against the judgment of the High Court.

The appellant argued that the essence of speeches made by him amount to preference for one who opposes the changes in Muslim personal law. If "change of personal law is, it is

[55] *Bukhari, supra* note 3.
[56] *Id.*, para 2.
[57] *Id.*, para 32 ("It contained allegations against Chagla's faithfulness to Muslim religion on the ground that he advocated inter-communal and inter-caste marriages and that he wanted a Hindu to be a member of the Haj Committee […] Bukhari claimed that he could die for Islam.").

suggested, only a secular matter, opposition to its change could not become an appeal on grounds of religion."[58]. Dismissing the argument, the Supreme Court observed:[59]

> To accept this argument would be to view the appeal to the voters after turning it upside down, or, perhaps, inside out. We are not concerned so much with the real nature of what is opposed or supported as with the grounds on which a candidate claims support over a rival. *We have to primarily examine the cloak which the appeal wears to parade in and not only what lies beneath it.*

The Supreme Court discerned that the primary examination ought to be of "the cloak which the appeal wears to parade in and not only what lies beneath it." This is in contrast with the Court's approach in *Ramanbhai* (*Dhruva case*) and *Om symbol case* where, as we have seen above, the Court went into the latent content of the religious speech/ symbolism, and ignored the *form* which encompassed the religious appeal. In this case M.H. Beg, J. argued that the 'religious' cannot be understood in binary opposition with temporal affairs which ought to be secular. Commenting on the distinction between secular and religious matters, he observed:[60]

If all human activity in this world could be labelled 'secular', on the ground that it appertains to 'this world' as against 'the other world', all religious thought and activity could be described as 'secular', as it takes place in this world. But, the term is not used so broadly.

The point made by the Supreme Court of taking the *form* of religious speech seriously[61] is crucial in unmasking the secular garb placed on the essentially religious nature of the

[58] *Id.*, para 41.
[59] *Ibid*.
[60] *Id.*, para 42. (Beg, J. also added: "It is a convenient label to distinguish all that is done in this world without seeking the intervention or favour of or propitiating a Superhuman or Divine Power or Being from that which is done professedly to please or to carry out the will of the Divinity.").
[61] Beg, J. reiterates this point as follows: "To return to the precise question before us now, we may repeat that what is relevant in such a case is what is professed or put forward by a candidate as a ground for preferring him over another and not the motive or reality behind the profession or ostensible ground that very secular or mundane. It is the professed or ostensible ground that matters.". *Id.,* para 46.

appeal. Beg, J. unfortunately drew some rather sharp contrasts between 'primitive' and 'modern' man's understanding of religion:[62]

> Primitive man does practically nothing without making it wear a religious garb because his understanding of the physical world, of human nature, and of social needs and realities, is limited […] Modern man, with his greater range of scientific knowledge and better understanding of his own needs as well as of the nature of the universe, attempts to confine religion to its proper sphere-that where he reaches a satisfying relationship between himself and the Divinity [...] (and) does not permit his religion, which should be essentially his individual affair, to invade what are properly the spheres of law, politics, ethics, aesthetics, economics and technology.

Apart from this neat parallel between the 'primitive' and 'modern' version of mankind, the judgment emphasises the need for a careful scrutiny of the *form* or appearance of the speech challenged under section 123 (3) of RPA. Unfortunately, this line of reasoning did not receive sufficient attention as it deserves in later cases.

II. The Hindutva Appeal and Free Speech Conundrum

Before evaluation of the *Hindutva Judgments*, an important decision of the Supreme Court delivered in 1966 requires our attention: *Shastri Yagnapurushadji* v. *Muldas Bhudardas Vaishya* (1966). In this case, the Court went at great length to define 'Hinduism' as a religious category.[63] Although unrelated to the RPA, this judgment was heavily relied upon as precedent in the *First Hindutva Judgment*. The controversy in the judgment was about the Swami Narayan sect (*Satsangis*) that wanted to bypass the provisions of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 (hereafter, "Bombay 1956 Act"). This statutory mandate was against the exclusion of Dalits from the Hindu temples. The *Satsangis* wanted to establish that they were not

[62] *Id.*, para 44 (per Beg, J.).
[63] AIR 1966 SC 1119 [Hereafter, "*Satsangi Judgment*]. The genesis of the controversy goes back to pre-independence times, however, the issue before the Supreme Court was with respect to the post-independence legislation. A brief overview of the history is laid down in the judgment, *id.*, paras 1-12.

within the Hindu fold and therefore the mandate of the Constitution and this legislation was inapplicable to them. The Supreme Court in its broader definition of the term 'Hinduism' rejected this contention and ensured the application of temple entry law to the *Satsangi* sect.

The origin of the controversy in this judgment dates back to the pre-constitutional time. Few provincial legislatures had begun to enact laws for the reform of religious practices. One such significant reform legislation was the Madras Temple Entry Authorization Act, 1947 which made it a punishable offence to prevent any person from entering or worshipping in a Hindu Temple on the ground of untouchability. The Act was immediately followed by similar legislations in the Central provinces, Bihar, Bombay etc. and finally the temple entry provisions of the Constitution of India (as discussed in chapter 1). The Bombay 1956 Act was challenged by the *Satsangis* in the Bombay High Court. The High Court decided against the *Satsangis* holding that the *Satsangis* followed Hindu religion and the legislation applied to them.[64]

Against this decision of the Bombay High Court, in January 1966, the *Satsangis* preferred an appeal before the Supreme Court. The *Satsangis* argued that the Swaminarayan sect was a "distinct and separate religious sect *unconnected with the Hindus* and Hindu religion."[65] The argument was that they are not strictly Hindus despite the Hindu flavor in the doctrines and legacy of the founder of the sect, *Swami Sahjananda*. If the claim to their being non-Hindu had been successful, the appellants could have prevented Dalits (the legislation used the term "Harijans") from entering their temples, as the legislation would have become inapplicable to them. The appellants supported their argument by highlighting the absence of traditional Hindu idols in their temples and their belief that "the sect propagated the ideal that worship of any God other than Swaminarayan would be a betrayal of his faith."[66] The respondents argued, in opposition, that the appellants were not true representatives of the sect and "many Satsangis were in favour of the

[64] The High Court held that the legislation was in consonance with the constitutional mandate of "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."
[65] *Satsangi Judgment, supra* note 63, para 1 (emphasis supplied).
[66] *Id.,* para 10.

Harijans' entry into the Swaminarayan temples, even though such Harijans were not the followers of the Swaminarayan sect."[67]

The Supreme Court rejected the argument of the appellants and discussed the category of 'Hinduism' at length. Citing extensively from *Encyclopedia of Religion and Ethics*, Monier William's *Hinduism* and then president Radhakrishnan's *The Hindu View of Life*, the Supreme Court remarked that "unlike other religions and religious creeds, Hindu religion [was] not tied to any definite set of philosophic concepts as such."[68] This broader conception of Hinduism enabled the Court to hold that the *Satsangis* cannot be outside the scope of Hindu religion. In this context the Court remarked that Hinduism "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."[69] The expression *way of life* for Hinduism, which later became the basis for *Hindutva* judgments and Indian political rhetoric, was first used at a judicial forum in the *Satsangi Judgment*.[70] The judgment had a positive outcome, as an inclusive view of Hinduism curtailed the possibility for religious denominations to stall social reform legislations. Jacobsohn praised the decision as an exemplar of "ameliorative secularism."[71] Jacobsohn's treatment of this judgment focuses on Supreme Court's interpretive labour which in effect reinstated the spirit of social reform. To this extent, Jacobsohn's reading is astute and his critique of the *Hindutva Judgments* for misreading *Satsangi Judgment* is correct. The only difference that I have with such a reading is that it fails to see this possibility of appropriation within the *Satsangi Judgment* despite its otherwise desirable outcome. The Supreme Court fused the Hindu identity with Indian identity, and juxtaposed the uniqueness of Hinduism and that of Indians.

[67] *Id.*, para 3.
[68] *Id.*, para 36.
[69] *Id.*, para 29 (emphasis supplied).
[70] *Id.*, para 40 (emphasis supplied).
[71] Jacobsohn, *supra* note 1.

The *Hindutva Judgments*

The Supreme Court in 1996 delivered three important decisions which shaped the electoral future of India. These decisions, commonly described as *Hindutva Judgments*[72] confronted many important issues. One of them was whether the invocation of 'Hindutva' constituted a religious appeal and 'corrupt practice' under the RPA. Another issue was the constitutional validity of the provision itself, and whether it violated the free speech clause of the Indian Constitution? Finally, there were individual speeches by the candidates or their agents which were alleged to be foul under section 123 (3) of the RPA if it withstood the constitutional challenge.

The *First Hindutva judgment* was based on allegedly three corrupt speeches that were delivered by Bal Thackeray on behalf of Shiv Sena candidate, Ramesh Prabhoo. The contents of the provocative speech were undisputed as the "candidate himself admitted the content of the public speeches" in one of the pleadings in the Court.[73] The High Court of Bombay declared all the three speeches as offending both sections 123 (3) and (3-A) of the RPA, which led to the appeal before the Supreme Court by Ramesh Prabhoo. Various objections were raised by the appellant including, as mentioned before, a constitutional challenge to sections 123 (3) and (3-A) on account of their violating the free speech clause of the Constitution. Another important argument tendered by Ram Jethmalani, the lawyer for the appellant, was that the main thrust of the speeches was on 'Hindutva', which he argued, "mean[t] Indian culture and not merely Hindu Religion."[74] Ashok Desai, the lawyer for the respondent, argued that "the term 'Hindutva' used in election speeches is an emphasis on Hindu religion bearing no relation to […] Indian culture."[75]

The Supreme Court rejected the argument that the speech contemplated by the section must be direct – 'Vote for A' (the candidate) or 'Do not vote for B' (the opposing

[72] The High Court of (then) Bombay invalidated the electoral victories of all the three concerned candidates for use of corrupt practice: Ramesh Yeshwant Prabhoo, Murli Manohar Joshi, and Ramachandra Kapse. All of them filed appeals against the High Court decisions to the Supreme Court.
[73] *First Hindutva Judgment*, *supra* note 2, para 6.
[74] *Id.*, para 7.
[75] *Id.*, para 34.

candidate) on account of his religion. But a limited interpretation was given to the word 'his' as limited to candidate only and not the voter. It acknowledged that an indirect appeal would suffice to elicit the prohibition of the section. However, the Court added that for "understanding the meaning and effect of the speech, *the context has to be found in the speech itself and not outside it with reference to any other background* unless the speech itself imports any earlier fact in the context of that speech."[76] The Court never explained the precise import of this statement indicating the isolation of the text from the context. The only justification provided by the Court is that "the public speeches during election campaign ordinarily are addressed to audience comprised of common men" and they must be distinguished from "academic debate."[77]

The Court also made an important clarification that the use of religion 'as such' was not prohibited by the provision. If a candidate evoked religion for the protection of secular polity or unfavourable treatment to a particular religion by any political party, then such an invocation was well within the permissible limits of election law. In the words of the Supreme Court:[78]

> It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and *promising removal of the imbalance* cannot be treated as an appeal on the ground of religion as *its thrust is for promoting secularism*. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism […] In other words, *mention of religion as such in an election speech is not forbidden* by sub-section (3).

This was an important clarification from the Supreme Court which could also be extended to the other prohibited categories in the section. For example, an appeal on the ground of 'caste' is permissible if it is meant to remove caste imbalance or discrimination

[76] *Id.*, para 12 (emphasis mine).
[77] *Ibid.* The Court also rejected the proposition of reading the disruption of public order as a necessary implication of section 123(3). The interpretation given to this provision by the Court is that any appeal to religion of the candidate is sufficient to attract the provision and any additional requirement "of likelihood of prejudice to public order is unnecessary, on account of which it is not implicit in the provision." *Id.*, para 13.
[78] *Id.*, para 16 (emphasis added).

which was a constitutional aspiration. Similarly, an appeal on the ground of 'language' would not be barred by this section if it was meant to preserve it from danger of extinction. Thus, this interpretation was in line with the constitutional mandate which guarantees the fundamental right to 'any section of the citizens' to preserve and conserve one's language and culture.[79]

Constitutional Validity of RPA provisions

The three judge bench of the Supreme Court upheld the constitutional validity of the sections 123 and 123 (3-A) of RPA.[80] The Court found it easy to uphold the validity of (3-A) as falling within the 'reasonable restrictions' that are permissible on free speech enumerated under Article 19 (2) of the Constitution. The Court cited the 'public order' exception and 'incitement to an offence' as justifying the grounds to curb free speech to uphold the validity. With respect to section 123 (3), the Court resorted to interpretive ingenuity by arguing that the head of 'decency and morality' under Article 19 (2) would justify the provision. The Court had already rejected the claim to read disruption of public order as implicit within section 123, so it relied on an expansive interpretation of 'decency' as more than sexual morality, as suggested by Ram Jethmalani. The Court thus concluded that "seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society."[81]

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[79] Article 29 of the Constitution of India. The Court made its point referring to the legislative debates where the Law Minister pointed out that "If you say Bengali language in this area is being suppressed or schools closed because they bore a particular name, then, you are speaking not to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter. But "I am a Bengali, you are all Bengalis, vote for me", or "I am an Assamese and so vote for me because you are Assamese speaking men." I think, the entire House will deplore that as a hopeless form of election propaganda." *Id.,* para 14.

[80] The vires of section 123(3-A) was challenged previously in *Dr. Dasrao Deshmukh* v. *Kamal Kishore Kadam* (1995) 5 SCC 139. Here a Shiv Sena candidate had provocatively espoused for teaching lesson to the Muslim community. The Court had upheld the section as a "reasonable restriction" on the fundamental right to freedom of speech and expression.

[81] *First Hindutva Judgment*, *supra* note 2, para 29. S.P. Sathe argues against such an expansion of the meaning of the word 'decency'. The Court, in his view, could have used the ground of 'public order' as a reasonable restriction or the principle of 'secularism' which is the basic structure of the Constitution. "If a class of speech or expression is likely to threaten to threaten public order, it can be banned by law and it cannot be a defence that a particular speech did not endanger public order. It is the *probability* of the danger, not *actual* danger, that determines the reasonableness of the restriction […] The words 'public order' ought to be widely construed to include secularism and democracy and restrictions on freedom of

After adjudicating on the constitutional validity, however, the Court extensively discussed the issue of appeal of Hindutva under a separate section titled "Meaning of 'Hindutva' and 'Hinduism'. It reiterated that "mere reference to any religion in an election speech does not bring it within the net of sub-section (3)". This was a point which the Court had previously made to assert that a speech intended to combat religious discrimination cannot be outlawed under this section. But in this passage the Court equated the speech against religious discrimination with a speech for 'preservation of Indian culture' and in the same breadth concluded that "mere use of the word 'Hindutva' or 'Hinduism' or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3A) of Section 123, unless the further elements indicated are also present in that speech."[82] The interchangeable use of 'Hindutva' and 'Hinduism' and their awkward alliance with 'preservation of Indian culture' make this passage both abrupt and somewhat unclear.

The Court heavily relied on and extensively cited the *Satsangi Judgment*. Without any reference to the different context of *Satsangi Judgment*, which was about temple entry legislation (and not electoral appeal), the Court concluded:[83]

> [N]o precise meaning can be ascribed to the terms 'Hindu', 'Hindutva' and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that *the term 'Hindutva' is related more to the way of life* of the people in the sub- continent.

The Court, thus, obfuscated the different contexts of the two decisions. The *Satsangi Judgment,* as already stated, was not about Hinduism, much less Hindutva, as an electoral appeal. Moreover, the expansive interpretation of Hinduism was premised upon expanding the scope of temple entry laws to all sects of Hindus. But selective citations of passages from different judgments is quite a significant feature of the case. The Court cited another

speech in the interest of secularism and democracy ought to be held constitutionally valid." S.P. Sathe, *Judicial Activism in India* 190 (Oxford University Press, New Delhi, 2003).

[82] *First Hindutva Judgment, supra* note 2, para 33.

[83] *Id.,* para 37 (emphasis mine).

passage from the dissent of S.M. Barucha, J. in *Ayodhya Land Acquisition* case (1994) (which will be discussed in detail in chapter 5):[84]

> Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land.

This made the Court conclude that "Hindutva is understood as a way of life or state of mind."[85] One obvious concern lies in the ready substitution of Hinduism with Hindutva. But there is another problematic aspect to the selection of the above quote which was done without paying attention to the context in which it had appeared. The quote is from the dissent view in the *Ayodhya Land Acquisition Case* (1994) where Barucha, J. bemoaned the acquisition of the disputed land by the Central government, and maintainance of the status quo by way of a legislation after the demolition of Babri Masjid on December 6, 1992. He along with A.M. Ahmadi, J. found the maintenance of status quo discriminatory against the Muslims and favouring the Hindu community. This case will be discussed in chapter 4 of this study, but it is important to note that J.S. Verma, J. wrote the majority opinion for the Supreme Court in the *Ayodhya Land Acquisition Case*. In selectively quoting from the dissent of *Ayodhya Land Acquisition Case*, the Verma, J. went against the spirit of that opinion which had emphasised the majoritarian/ Hindu turn in the Indian polity. Read in its true spirit, Barucha's J. opinion would have led to a completely different conclusion as it would have furnished as the basis to understand how the appeal of political Hinduism was taking a militant turn with an aggressive posture. *First Hindutva Judgment*, thus demonstrates the malaise of judicial discourse which permits extraction of passages from precedents without referring to the larger argument or contexts. Simply out, viewed in its proper context, the citation from

[84] *Id.*, para 38.
[85] *Id.*, para 39.

the dissent would have made it impossible to equate Hindutva with Hinduism in the present case.[86]

Further, approvingly citing the cases of *Kultar Singh* and *Om Symbol case*, the Court concluded:[87]

> [T]he words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people […] these terms are indicative more of a *way of life* of the Indian people.

The approach of the Court can be summed up in its insistence to interpret the section of the statute narrowly while expounding Hindutva very broadly.[88] Paradoxically, the Court underscored the emancipatory potential of such an appeal. It held that these words can well be "used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant."[89] The Court referred to *Bukhari*'*s* case as an "assurance to the correctness of the construction made by us of these provisions"[90] but at the same time it stayed with the search of 'true meaning' of Hinduism and Hindutva, despite *Bukhari*'s insistence on "the cloak which the appeal wears […] and not only what

[86] Babri Masjid demolition took place a few years earlier. It was fresh both in political imagination and the judicial memory. The Court could have taken 'judicial notice' of this historical context under Indian Evidence Act, 1872 to avoid the abstract understanding of the appeal to Hindutva.
[87] *First Hindutva Judgment*, *supra* note 2, para 42.
[88] The term "his" inserted after 1961 amendment act under section 123 (3) is interpreted as relating to the candidate and his rival's religion only, and not the voter/ elector. On this issue there were contrary opinions of the Supreme Court. In *Kultar Singh's* case, the Court interpreted "his" in a narrow way as limited to candidate and his/her rival, whereas, *S.R. Bommai*'s decision construed the meaning in a broader fashion and included the voters. A relatively recent decision of the seven bench Supreme Court in *Abhiram Singh* v. *C.D. Commachen* (2017) 2 SCC 629, decided that "his" within section 123 (3) includes the religion of the elector or voter as well. Three majority opinions were delivered by T.S. Thakur, CJ., S.L. Bobde, J. and Madan Lokur, J. (speaking for himself and L. Nageshwar Rao, J.), and a detailed dissenting opinion of D.Y. Chandrachud, A.K. Goel, and U.U. Lalit, JJ. (authored by Chandrachud, J.). For a detailed critique of the dissenting opinion, see, Amit Bindal, "Religion, Governance and Corruption: An Analysis of the Judicial Reasoning in the Election Judgment" 59(1) *Journal of Indian Law Institute* 57-77 (2017).
[89] *First Hindutva Judgment*, *supra* note 2, para 44.
[90] *Ibid.*

lies beneath it."[91] Ronojoy Sen rightly concludes that the decision undoubtedly "was welcomed by the Hindu nationalists as a vindication of their ideology, Verma's additional move of equating Hindutva with 'Indianization' gave the Court's seal of approval, in a sense, to the Hindu nationalists' conception of the nation."[92] In short, even as the Court declared Bal Thackeray's speech to be corrupt and worthy of prohibition, it opened up a space for the legitimation of the ideology underlying his speech.

On facts, it was not difficult for the Court to declare that the speech by Bal Thackeray fell within the prohibitions of both sections 123 (3) and (3-A). In his first speech Thackeray had remarked that "[w]e are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so."[93] In his second speech, the assertions became even more extreme: "Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion."[94] The Court thus concluded that "all the three speeches of Bal Thackeray amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub- section

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[91] *Bukhari, supra* note 3, para 41.
[92] Ronojoy Sen, *supra* note 6 at 38. Sen argues that in equating Hinduism with Hindutva, Justice Verma "also gave a highly political twist to the judicial discourse on Hinduism." *Ibid.* The Court cited from Maulana Wahiduddin Khan's book, *Indian Muslims - The Need for a Positive Outlook* (Al-Risala Books,India, 1994) to argue that "Hindutva" is equivalent to "Indianisation". The Supreme Court said that "considering the terms 'Hinduism' or 'Hindutva' per se as depicting […] intolerance towards other religious faiths or professing communalism, proceeds form an improper appreciation and perception of *the true meaning* of these expressions". A.G. Noorani has demonstrated that the judgment has wrongly cited Wahiduddin Khan's book as the author was critical and not in support of Hindutva as Indianisation. See, A.G. Noorani, "A Shocking Judgment with Selectivity in Quotation." *The Statesman* (Dec. 26–27, 1995). The manifesto of the BJP, released before the Lok Sabha elections (on Apr. 7, 2014), stated that "India shall remain a natural home for persecuted Hindus and they shall be welcome to seek refuge here." "BJP Election Manifesto 2014", *available at*: http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf> (last accessed on Jan. 14, 2020). On being asked, on a TV news channel, why only persecuted Hindus are welcome and not people from other religions, P.M., Narendra Modi, replied: "According to the Supreme Court judgment, Hindu is not a religion. It is a *way of life*. You went into religion we have written according to the Supreme Court judgment." "PM Modi on Frankly Speaking with Arnab Goswami" (May 9, 2014), *available at*: https://www.youtube.com/watch?v=JIjMGNwStt0 (last accessed on Oct. 20, 2020).
[93] *First Hindutva Judgment, supra* note 2, para 54.
[94] *Id*., para 59 ("The first speech also makes derogatory reference to Muslims by calling them "snake" and referring to them as "lande" (derogatory term used for those practising circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech, therefore, also constitutes and corrupt practice under sub-section (3A).").

(3A) of Section 123 of the R.P. Act."[95] This case laid the principled position which was followed in the other two cases as well.

In the *Second Hindutva judgment,* Ram Kapse was elected as the BJP candidate for Lok Sabha defeating the respondent (who belonged to the Congress (I)). The High Court of Bombay declared him guilty under both sections 123 (3) and 123 (3-A). Two of the three speeches which were held as 'corrupt' by the High Court were delivered by Sadhvi Reethambara and Pramod Mahajan on behalf of the appellant. The Supreme Court reversed the findings of the High Court on technical grounds.[96] The High Court found the evidence sufficient as it relied on the manifesto of the BJP which contained religiously motivated appeals to invalidate the election of the appellant. The Supreme Court, however, reversed the decision of the High Court. It observed: "Ex facie contents of a manifesto, by itself, cannot be a corrupt practice committed by a candidate of that party."[97] The Court, thus, refused to rely on the manifesto to declare the campaign as corrupt.

The Court's reasoning here is difficult to understand on two grounds. First, while the Court referred to the provision under the RPA where every party has to file an affidavit showing its allegiance to constitutional principles (including secularism),[98] the controversial manifesto of the BJP posed no issue as far as its status as a registered political party was concerned. The Court, remarkably, found no inconsistency between the allegiance to the constitutional principle of secularism and its explicit rejection in the party manifesto. How could a party manifesto be immune from judicial scrutiny under section 123 (3) or (3-A) when the party was registered under the RPA? Why did the Court not address this apparent contradiction in the affidavit and the party manifesto, especially when the nine judge bench of the Supreme Court, in *S.R. Bommai* v. *Union of*

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[95] *Id.,* para 61.
[96] The Court cited lack of witnesses to depose about the speech and its contents as well as Kapse's unawareness about Sadhvi's utterances as the reasons. In a nutshell, the Supreme Court reversed the findings of the High Court on the grounds of insufficient evidence provided by the respondent.
[97] *Second Hindutva Judgment, supra* note 2.
[98] *Id.*, para 21 ("Sub-section (5) of Section 29-A requires […] that [every registered political party] shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy […] Admittedly, B.J.P. had been so registered as a political party and continues to be registered as political party under this provision.").

India (1994),[99] had relied precisely on the party manifesto of the BJP as justification of President's rule in BJP ruled states after the demolition of Babri Masjid? The conspicuous absence of *Bommai* as a precedent in this case not only foregrounds the pervasive problem of judicial cherry picking but also the failure of the Apex Court to work as one institution that speaks in one voice.[100]

Second, the Court's reasoning proceeded on the grounds that the candidate could not be held accountable for making religious appeals that resonated with the claims in the manifesto, if he had neither drafted nor specifically used the controversial part of the manifesto in his campaign. S.P. Sathe makes a pertinent observation in this regard: "This means that a candidate who stood for election under a party ticket was presumed not to share the party's programme and ideology. This strikes at the very root of the party system in parliamentary democracy."[101] Another issue was one of judicial propriety. J.S. Verma, J. was the one of the two dissenting judges who observed in *Bommai* that party manifestoes are beyond 'judicially manageable standards'.[102] In contrast, the majority opinion in *Bommai* had cited the manifestoes of the BJP and condemned them wherever they went against the secular principles. Therefore, the High Court was not wrong in placing reliance on the party manifesto. But J.S. Verma, J., overruling the High Court, turned his own minority opinion (in *Bommai*) into the law laid down by the majority in this case without even making a reference to *Bommai*! This oddity yet again indicates that the Supreme Court does not work as one institution. Despite the elaborate principles of hierarchy of courts and hierarchy within the Supreme Court on the ground of strength of judges on the bench, it has become normal judicial practice to ignore, bypass or selectively rely on the previous precedents. Put differently, courts, even in decisions that would have far-reaching political consequences, arrive at conclusions without seriously

[99] (1994) 3 SCC 1 [Hereafter, '*Bommai*']. The majority of nine-judge bench confirmed the imposition of president rule in BJP ruled states immediately after Babri demolition as the BJP manifestoes contained communal overtones. I will discuss the *Bommai* case in chapter 4 more elaborately.

[100] One of the majority judges of *Bommai*, P.B. Sawant, J. wondered "why they did not refer to this case at all." P.B. Sawant, J. in his interview to Jacobsohn. *supra* note 1 at 195.

[101] S.P. Sathe, *supra* note 87 at 189.

[102] This unique legal expression means that ordinarily the judiciary will not enter into deciding political questions. This proposition was laid out in *State of Rajasthan* v. *Union of India* 1978 SCR (1) 1. *Bommai* in 1994 overturns this standard. On judicially manageable standards see generally, Richard H. Fallon, Jr., "Judicially Manageable Standards and Constitutional Meaning" 119 (5) *Harvard L. Rev.* 1274-1332 (2006).

engaging with contradictory precedents. This turns judicial process into an aggregate of discreet cases without any internal coherence. Such amorphous and eclectic nature of judicial decision-making opens up gaps which allow room for personal ideological leanings of Supreme Court judges. Whether such incoherence is visible more in decisions that have direct political repercussions than others is a matter of a separate study. But the above cases certainly reveal the fissures and cracks in the judicial process. We will return to this discussion in chapter 4 where the five judge bench would pay lip service to *Bommai* in the *Ayodhya case*[103] despite the immediate relevance of the case to the dispute. But it is sufficient here to note that such repetitive disregard of prominent but inconvenient precedents shows that the malaise is not limited to individual judges only but is increasingly becoming a part of the nature of judicial process itself.

The *Third Hindutva judgment* was decided on the same day by the same bench. It concerned the speech of Murli Manohar Joshi where "in the meeting held on 24.2.1990 at Shivaji Park, Dadar, he had stated that 'the first Hindu State will be established in Maharashtra'."[104] The issue was whether this is a 'religious appeal' and covered by the prohibition of section 123 (3) of RPA. In a brief response to this complicated question, the Supreme Court observed:[105]

> In our opinion, a mere statement 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*.

The Supreme Court conceded that such a statement was despicable and uncalled for, but dismissed it as merely a 'hope'. But as Jacobsohn argues, this hope, if realised, would be contrary to the basic structure and features of the Constitution as described by the nine-judge bench in *Bommai*: "this leads to the anomalous conclusion that if Chief Minister Joshi, rather than Candidate Joshi, had publicly expressed the aspiration for a Hindu state of Maharashtra, a dismissal of his government under President's Rule could, following

[103] *M Siddiq (D) Thr Lrs* v. *Mahant Suresh Das & Others* (2020) 1 SCC 1.
.[104] *Third Hindutva Judgment, supra* note 2, para 30.
[105] *Id.*, para 62 (emphasis mine).

Bommai, plausibly be upheld by the Supreme Court."[106] This 'hope', remarkably, remained permissible in the electoral context as it was not seen as communal. This makes the exclusion of *Bommai* deliberate, and not inadvertent, in all the *Hindutva Judgments*. Jacobsohn in his reading of the case delineates the role of J.S. Verma, J. as instrumental by supporting his claim in his interviews with the judge and other sources. However, my argument focusses on the nature of judicial process itself which permits selective reading and citing of precedents in arriving at a particular conclusion. Such selective reading of the preceding cases can surely be governed, consciously or inadvertently, by an individual philosophy or leanings of an individual judge. but for me the important point lies in failure of the Supreme Court, as already mentioned, to speak in a coherent institutional voice which leads to these interstices or gaps in the law where one judgment can bypass, ignore or cherry-pick the precedents to suit a particular outcome without engaging with the contrary voices existing within the judicial archive. From the point of process and procedure an amorphousness about custom/ practice/ religion/ 'way of life' existed, which created spaces for very divergent interpretations. For instance, the *Satsangi Judgment* in its invocation of the 'way of life' metaphor for Hinduism and conflation of Hinduism with Indian culture, despite its progressive verdict, opened a route to be employed in the service of political Hinduism in the *Hindutva judgments.*

The opposing counsel in the *Hindutva judgments*, Ashok Desai, had argued that a "party which rides to power on such speeches [...] or manifestos will also act accordingly when in Government. This was the danger which was recognised in the decision of [*Bommai*]."[107] Indeed, a writ petition was filed under Article 32 before the Supreme Court on the incorrectness of the *Third Hindutva judgments* with one argument based on the absence of such a prominent precedent in the case.[108] J.S. Verma, J. who dismissed the petition provided the following justification:[109]

> We may observe that the decision of this Court in [*Bommai*] did not relate to the construction of, and determination of the scope of sub- sections (3)

[106] Jacobsohn, *supra* note 1 at 195.
[107] Jacobsohn. *supra* note 1 at 199.
[108] *Mohd. Aslam* v. *Union of India & Others,* AIR 1996 SC 1611.
[109] *Id.,* para 3.

> and (3A) of Section 123 of the Representation of the People Act, 1951 and, therefore, nothing in the decision in *S.R. Bommai* is of assistance for construing the meaning and scope of sub-sections (3) and (3-A) of Section 123 of the Representation of the People Act. Reference to the decision in S.R. Bommai is, therefore, inapposite in this context.

This was a disingenuous justification, as it ran contrary to the very structure of the *Hindutva judgments*. As mentioned above, the *Satsangi judgment*, which was central to the Court's reasoning, did not relate to the RPA in any manner and was thus quite 'inapposite' in itself.[110] I have attempted to show how the judicial reasoning in *Hindutva judgments* stands in line within a trajectory of long-standing precedents. The methodology of the Supreme Court in this line of cases discounted the apparent, *prima facie* literal meaning and spirit of section 123 (3) in preference to some deeper, hidden or true meaning of 'religion'. But an alternative line of reasoning does exist in the judicial corpus, most notably in the majority of *Shubnath* and exemplarily in *Bukhari*.[111]

Conclusion

The provisions of the RPA discussed in this chapter demonstrate the prominence, but also the slipperiness of the category of religion in the political history of India. The centrality of religion in India goes beyond the proverbial presence of religion in the everyday lives of Indian people. Constitutionally speaking, religion represented various forms of inequalities that the framers of the Constitution sought to combat. The idea of an interventionist State requires a special mention with respect to religion in India. Such permissible State regulation for social reform is explicitly mentioned under the freedom of religion clause of the Indian Constitution. This chapter has sought to demonstrate how sections 123 (3) and (3-A) of the RPA are an extension of the State's attempt to regulate the political and electoral rhetoric when it is entwined with religious rhetoric. Despite the absence and impossibility of similar provisions restricting speech in other jurisdictions,

[110] Unlike *Bommai*, where RPA and sections 123 (3) & (3-A) find a mention, the *Satsangi* case did not mention RPA even in an obiter.

[111] *Bukhari's* caution about the danger of differentiating this worldly (secular) from other worldly (religious) was a useful reminder of how such differentiation can stultify the rule in its entirety.

they are needed in our context to ensure that religion does not become an instrument to corrupt the principles and ideals of the Indian republic. I have tried to argue that in the light of the constitutional history of India, these provisions strengthen the basic premise of secularism. Their justifications go beyond the ground and bourgeois virtues of 'decency' and moral propriety of speech as envisaged by the Court.

The judiciary has not accepted the constitutional challenge made to these provisions on grounds of violation of the free speech clause. However, the constitutional justification expressed in terms of 'decency and morality' has limited the judicial imaginary to a great extent in favour of self-restraint when it is not desired. This explains the refusal of J.S. Verma, J. to consider the manifesto of the party for fuller appreciation of the evidence against a candidate who indulged in corrupt practices. This restrained judicial attitude emerges from erroneous conceptualisation based on abstract ideals of political liberalism (which would be hesitant to legally prohibit unwelcome speech), than an understanding of historical contingency of these provisions.[112]

Upendra Baxi misses the point in his sympathetic reading of *Hindutva judgments*:[113]

> I continue to think that too much is made of Brother Verma's reference to Hindutva as 'way of life.' It was neither a kiss of life to Hindutva forces nor a kiss of death for Indian constitutional secularism; rather, the issue concerned the invocation of differently constituted Utopias during the campaign speech-making; how may Justices and legislators prohibit freedom of speech and expression as forms of constitutionally dreaded Dystopia? [...] Put another way, where as a matter of principle may Justices draw bright lines between the Utopic and the Dystopic?

The *Bommai* case is an exemplary answer to this question, as the majority puts a limit to 'constitutionally dreaded Dystopias' by taking judicial note of election manifestoes illustrating dystopic aspirations in context of the Babri Masjid demolition. It was this

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[112] Jacobsohn, *supra* note 1, chs. 6 and 7.

[113] Upendra Baxi, "Understanding Constitutional Secularism in 'Faraway Places': Some Remarks on Gary Jacobsohn's *The Wheel of Law*" 1 *Indian Journal of Constitutional Law* 231, 242 (2007).

judgment that cemented ‘secularism’ as the basic structure which cannot be amended or altered even by the Parliament. Is it a coincidence then, as already noted, that ‘Brother Verma’ remained most reticent and passive in the *Bommai* decision?[114] Despite the heavy weather of the Supreme Court about its reluctance and restraint in entering into the domain of policy, as Rekhi remarks, the “policy choices made by the courts in India in dealing with election matters have significantly affected the use of religion in elections.”[115]

This chapter has also highlighted the interpretive ambiguity of the judiciary. While approving the constitutional basis of the RPA provisions, the Apex Court eroded their very spirit through its interpretations of the term ‘religious’. It incessantly differentiated between the ‘religious’ and the cultural, mythological, mythic, mystical or spiritual, and termed electoral appeals as permissible if they fell within the realm of the latter. Such differentiations, ultimately, left little in the sphere of the ‘properly religious’ that the RPA provisions actually sought to prohibit. Moreover, it sought to excavate the true, deeper and hidden meaning of religious speech and symbolism, discounting the power of its surface appearance or the actual form it took. In this pursuit, the judicial interpretation lost sight the intent of the RPA provisions in their entirety.

In electoral cases, the task of the Court is to ascertain the meaning of ‘religious’ so that it can be expunged from the public sphere. This exercise resembles the one undertaken in the previous chapter where we studied cases of essential practices doctrine. The distinction lies in the fact that in the essential practice cases, the judicial search for the meaning of religious was with a view to constitutionally protect it. By contrast, the truly religious speech in the context of RPA invited an invalidation of the electoral verdict. These cases and their interpretive process, ultimately, underscore the need for more contextual and historically informed adjudicative practices to emerge from the Supreme

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[114] Baxi’s critique of Ronojoy Sen illustrates a similar obfuscation when he conflates *Bommai* case with *Hindutva* cases. Baxi, commenting on both the decisions in one breadth (despite the absence of the former in the latter decisions) observes, “these adjudicatory feats may, alternatively, be read as progress narratives that resist competitive party politics of the already heavily blood-stained political capture of constitutional secularism.” Baxi, *supra* note 6 at 56.

[115] Rekhi, *supra* note 31 at 249. Rekhi argues that the “highest Court in India has been singularly unresponsive to the rising threat of religious interference with the democratic process.” *Id.* at 249.

Court, for the realisation of constitutional aspirations. In this regard, this chapter has argued, *Shubnath and Bukhari*, though forgotten, offer important alternative readings from within the judicial archive itself.

CHAPTER 3

CONSTITUTIONAL FAITH AND COW PROTECTION LAWS

Introduction

The cow protection debates in India have a chequered history from the late nineteenth century. The cow became an ideological category for anti-colonial resistance, as well as a symbol and marker of Hindu identity for the Arya Samaj, formed under the aegis of Swami Dayananda Saraswati.[1] Historical work has challenged the ideology of homogeneous unity of the Hindu community combating the colonial threat of cow slaughter. As Gyanendra Pandey has demonstrated in his work, the concern for cow protection had not only divided Hindus from Muslims but led to stigmatisation of the lower caste Hindus.[2] Muslims slaughtered cows as part of their eating preferences as well as on religious ceremonies, and lower caste Hindus also consume(d) beef as a staple in

[1] Recently a strike against the task of removal of carcasses was organised by the Dalit community in the state of Gujarat. ""Your Mother, You Take Care of It": Meet the Dalits behind Gujarat's Stirring Cow Carcass Protests", *Scroll.in* (Jul. 12, 2016), *available at*: https://scroll.in/article/812329/your-mother-you-take-care-of-it-meet-the-dalits-behind-gujaratsstirring-cow-carcass-protests (last accessed on Jun. 12, 2021); Surinder S. Jodhka and Murli Dhar, "Cow, Caste, and Communal Violence: Dalit Killings in Jhajjar" 38(3) *Economic & Political Weekly* 174-6 (Jan. 18–24, 2003). Sandra Freitag provides a useful account of homogenisation of Hindu identity in the late nineteenth century around cow. While giving an account of how connections were forged between cities and countryside, mobilising people around the symbol of cow, she delineates the coercive power tactics used by *Gorakshini Sabha* both in formal and informal settings. See, Sandria B. Freitag, "Sacred Symbol as Mobilizing Ideology: The North Indian Search for a Hindu Community" 22(4) *Comparative Studies in Society & History* 597-625 (1980). Also see, Anand Yang, "Sacred Symbol and Sacred Space in Rural India: Community Mobilization in the "Anti-Cow Killing" Riot of 1893" 22 (4) *Comparative Studies in Society and History* (CSSH) 576–96 (1980). For a comprehensive account of the role of Arya Samaj in perpetuation of the discourse against cow slaughter, see, C.S. Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (Oxford University Press, New York, 2014).

[2] Gyanendra Pandey, "Rallying round the Cow: Sectarian Strife in the Bhojpuri Region, c. 1888 – 1917" in Ranajit Guha (ed.), *Subaltern Studies II: Writings on South Asian History and Society* 60-129 (Oxford University Press, Delhi, 1983). Pandey explores the complexity of the caste question in his study of the late nineteenth century Bhojpuri region. He shows, *inter alia*, that how the adaptation of anti-beef eating or pro cow protection attitude was adapted by the lower caste to acquire legitimacy of caste status. Also see, Rohit De, *A People's Constitution: The Everyday Life of Law in Indian Republic* 150 (Princeton University Press, New Jersey, 2018). Mughal emperors like Akbar also prohibited cow (and peacock) slaughter in certain parts of his empire. This injunction was taken seriously despite its variance with four ordinances (*ahkam*) of Islam. See, Iqtidar Alam Khan, "State in the Mughal India: Re-Examining the Myths of a Counter-Vision" 29(1/2) *Social Scientist* 16, 21-22 (2001).

their diet. As Hindu revivalists considered the cow as a religious and sacred animal, they resented both cow slaughter and consumption.

Hindu nationalists also projected cow protection as a major plank for building a new India after independence. And thus, during the making of the Indian Constitution, the aspiration of cow protection was elevated into a uniquely drafted constitutional provision.[3] In this chapter, I argue that cow protection has acquired a mythic and sacred status in both the Constitution and judicial reasoning. In fact, the interpretive methods of the courts have demonstrated a strong doctrinal *faith* in the 'presumption' of validity of cow protection laws which, I will argue, has become a form of 'civil religion' of secular courts.[4] Even though the doctrine of presumption of constitutionality is ill-suited to adjudicate the constitutional disputes arising out of cow protection legislations, the continual, uncritical judicial reliance on this doctrine has taken the form of *constitutional faith*. My larger argument is that despite its secular pretentions, the secular interpretive practices of the judiciary appear as readings of sacred laws having a divine source. This structural mythic construction in the judicial interpretive mode is the focus of this chapter.

Specifically, this chapter analyses the Constituent Assembly Debates (CADs), discusses the judicial interpretations of Article 48 of the Constitution which provides for cow protection, and various laws enacted by the state legislatures in pursuance of this constitutional provision. We will see how the foundational moment of the CADs keeps haunting the post-independent legal interpretations. Therefore, in order to understand both the present-day cow vigilantism[5] and the originary constitutional conflict between the right to freedom of trade, occupation and livelihood on the one hand, and the religious commitment to protect the cow on the other, we need a close analysis of the 'constitutive desire' and its reverberations in later judicial decisions. In other words, I will argue that

[3] Granville Austin, *Indian Constitution: A Cornerstone of a Nation* 82 (Oxford University Press, New Delhi, 1966).
[4] I develop the idea of civil religion relying on the work of Stanford Levinson who has shown how constitutional faith substitutes Biblical faith in the context of U.S. constitutional history. See, Sanford Levinson, *Constitutional Faith* (Princeton University, New Jersey, 2011), ch. 1.
[5] For a discussion on how stirring up of cultural emotions and affective dimensions plays its role in perpetuating vigilantism, see, Shabnum Tejani, "Cow Protection, Hindu Identity and the Politics of Hurt in India, c.1890–2019" 3 *Emotions: History, Culture, Society* 136–157 (2019).

the roots of this particular expression of religious sentimentalism/fundamentalism are embedded in the very foundations of the constitutional text.[6] Thus, we need to work through the interpretive strategies of *constitutional faith* and open up possibilities of critical re-readings of the constitutional text and its formations[7] in order to arrive at any just resolution on the issue of cow protection in India.

I. Constituent Assembly Debates (CADs): Making of the Constitutiona Provision

The Constituent Assembly cemented the symbol of cow as worthy of constitutional protection. The aspiration of cow protection finds a place as a directive principle in Part IV of the Constitution.[8] These principles are not directly enforceable in the court of law but they are considered as "fundamental in the governance of the country"[9]. Article 37 of the Indian constitution makes the application of directive principles a "duty of the state […] in making laws."[10] Article 48 which inscribes the principle of cow protection reads thus:

> Organisation of agriculture and animal husbandry: The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

The above provision can be divided into three distinct aims: the advancement of agriculture on modern and scientific lines, improvement of cattle breeds and the protection of the cow. It enshrines the general proposition towards the organisation of 'agriculture and animal husbandry' on modern and scientific basis as an injunction for

[6] Such structural bias towards the religious majority informs judicial interpretation in known or unknown ways to reiterate 'institutional communalism' in the Indian legal system. See, Pritam Singh, "Institutional Communalism in India" L(28) *Eco. & Pol. Weekly* 48-56 (Jul 11, 2015).
[7] Levinson, *supra* note 4.
[8] Part IV of the Constitution elaborates the "Directive Principles of State Policy" (Articles 36-51). In the constitutional scheme, directive principles are different from fundamental rights (specified in Part III) as they are enabling provisions and the State cannot be compelled to make laws in order to enforce the mandate of these provisions.
[9] Article 37, The Constitution of India.
[10] *Ibid.*

modernisation and adoption of a scientific outlook by the State. It proceeds to offer concrete steps, recommended 'in particular': a mandate of improvement and preservation of breeds and the recommendation of prohibition of slaughter of cows, calves and other milch and draught cattle. There is an inter-weaving of diverse (and perhaps conflicting) worldviews in Article 48 as the aspiration of organising agriculture on 'modern and scientific lines' is combined with the 'sacred' injunction of saving the holy cow. The invocation of modernity and science with the romantic invocation of the sacred past in one stroke is striking.[11]

The Constituent Assembly discussed Article 48 (Article 38-A in the draft Constitution) on November 24, 1948.[12] The advocates of the prohibition on cow slaughter found their cause already 'sacrificed' as ideally the provision should have found a place in Part III of the Constitution (as an en*force*able fundamental right). To this impassioned plea for the use of the *force of law* to protect the cow, B.R. Ambedkar responded that the objective of the provision must be attained in a non-coercive manner persuading the assembly members for its inclusion under Part IV.

Thakur Das Bhargava who moved the amendment began with the argument of economics drawing on detailed statistical data to contend that "the whole agricultural and the food problem of this country is nothing but the problem of the improvement of cow and her breed."[13] Asserting that cow protection and improvement of cattle breeds would lessen imports and foster export possibilities, he slipped into the mythic relevance of cow. The holy cow, he noted, is "*Kam-Dhenu* […] fulfiller of all our wants" in Hindu cosmology and ancient Hindu sages had elevated it to the status of sacred animal: "Here, Lord Krishna was born, who served cows so devotedly that to this day, in affection he is

[11] Those who pushed this provision on the grounds of impressing Gandhian philosophy upon the Constitution little noticed the Gandhian anathema to modern science or western parliamentary forms of governance as against indigenous alternatives. Some scholars find the insistence on modernity a moral mistake and indicative of the failure of decolonisation. See, Ashis Nandy, "The Political Secularism and the Recovery of Religious Tolerance" in Veena Das (ed.), *Mirrors of Violence* (Oxford University Press, New Delhi, 1990). For Nandy, the emergence of militant Hindutva ideology is symptomatic of perverted modernity wearing the mask of religious obscurantism. See generally, T.N. Madan, "Secularism in its Place" 46 *Journal of Asian Studies* 747 (1989).

[12] *Constituent Assembly Debates,* vol. VII, 568-581 (Lok Sabha Secretariat, New Delhi, 2014) (Hereafter, *CADs*).

[13] Pandit Thakur Dass Bhargava (East Punjab), *CADs, id.* at 569.

known as '*Makhan Chor*' [Butter-stealing God]."[14] He pointed out that Mughal rulers too abstained from cow slaughter "not because Muslims regarded it to be bad but because, from the economic point of view, it was unprofitable."[15] While he acknowledged that cow worship is at the foundation of this constitutional provision, he maintained that this appeal was not in the name of religion, but "in the light of economic requirements of the country."[16] Despite the claims of utility at the core of Bhargava's assertions, he could speak about the clause elevating it to a status that can only be given to the sacred claims: "I attach very great importance to this amendment, so much so that if on one side of the scale you were to put this amendment and on the other all these clauses of the draft [Constitution], I would prefer the former. If this is accepted, the whole country would be, in a way, electrified."[17]

The economic category (profitability) melded seamlessly with the theological one (sinfulness). One must note the evocation of the category of *dharma* in the CADs to appreciate how by such invocation the cause for cow protection became righteous at once in both economic and theological sense.[18] Govind Das, another prominent champion of the cause of cow protection, evoked the category of *dharma* while articulating his 'religious' claims. "It is my firm belief," he stated, "that Dharma had never been uprooted from the world and nor can it be uprooted."[19] Specifically addressing the Muslim members of the assembly, he pleaded for 'cultural unification' despite religious diversity: "Just as Hindu and Sikh or Hindu or a Jain can live in the same family, in the same way a Hindu and a Muslim can also live in the same family."[20] The innocuous familial metaphor (leaving aside for the time being the feminist critique of the patriarchal family, perhaps unavailable to the founding fathers) reminds one of the metaphor of

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[14] *Ibid.*
[15] *Ibid.*
[16] *Id.* at 570. This was followed by an imploration of the words of Gandhi suggesting that the issue of prohibition of cow slaughter "is a great moment - in certain respects even greater moment - than that of Swaraj [self-determination]."
[17] *Ibid.*
[18] The discourse of the Arya Samaj in the nineteenth century exhibits the use of *dharma* where matters of material and other-worldly concerns co-existed. For a discussion on the rhetoric of cow protection in the vernacular literature of Arya Samaj. See, C.S. Adcock, "Sacred Cows and Secular History: Cow Protection debates in Colonial North India" 30(2) *Comparative Studies of South Asia, Africa and the Middle East* 297-311 (2010).
[19] *CADs, supra* note 12 at 571.
[20] Seth Govind Das, *CADs, id.* at 572.

'friendship' used by Mohandas Gandhi to argue that Muslims must voluntarily give up the cow.[21] Sikhs and Jains were made a part of the 'Hindu' community which was crafted as a legal category in the Constitution.[22] Clearly, the invocation of the Muslims as a part of the family, like the Jains and Sikhs, has an assimilative association: "Muslims should come forward to make it clear that their religion does not *compulsorily* enjoin on them the slaughter of the cow."[23] The reminder of compulsory, as opposed to optional, presages the doctrine of essential practices later inaugurated by the Supreme Court of India, as discussed in chapter 1.

In his submissions, Shibban Lal Saxena affirmed that he was not "one of those men who think that merely because a thing has a religious aspect, it should not be enacted as law."[24] Reiterating the usefulness of the principles followed in the Hindu religion, he suggested the rational and statistical basis for advocating prohibition. He imagined the provision to be a step towards pure ghee in lieu of Vanaspati ghee "which is injurious to the health of the nation."[25] Another pointed out how the civilisational principle of *ahimsa* (non-violence) calls for "non-killing and non-injury, not merely of human beings but also of the animal kingdom."[26] In this aspirational, all-encompassing, non-violent attitude towards sentient beings, the cow takes a hierarchical preference above other animals and at times, as we will notice, even fellow humans. Saxena rhetorically remarked: "Ladies and Gentlemen in this House, I appeal to you to look back with serenity and to search your souls."[27] The framing of *dharma* in terms of economic rationality runs through the CADs. Why did the framers feel the need to use the argument of utility rather than simply asserting religion? Was it because they did not want to appear 'communal' in the aftermath of partition, or in what was an evidently Nehruvian moment? These questions cannot be answered with any degree of satisfaction within the CADs.

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[21] Faisal Devji, "A Practice of Prejudice: Gandhi's Politics of Friendship" in Shail Mayaram, M.S.S. Pandian and Ajay Skaria (eds.), *Subaltern Studies XII: Muslims, Dalits, And The Fabrications of History* 78-98 (Permanent Black, 2005).

[22] Explanation I to Article 25 of the Constitution. This assimilation was also followed in the Hindu Code Bills in defining the expression "Hindu". For a critique of this clubbing of categories see, Pritam Singh, "Hindu Bias in India's Secular Constitution" 26(6) *Third World Quarterly* 909-926 (2005).

[23] Seth Govind Das, *CADs*, *supra*, note 12 at 572.

[24] Prof. Shibban Lal Saksena, *CADs*, *id.* at 574.

[25] *Id.* at 575.

[26] Dr. Raghu Vira, *CADs*, *id.* at 575.

[27] *Id.* at 576. At this moment, he had to be reminded by the Chair that this "is not a public platform."

R.V. Dhulekar was exemplary of passions and emotive appeals despite his pretentions "to discuss this subject from a dispassionate point of view."[28] In his speech, he observed:[29]

> We want that India should declare today that the whole human world as well as the whole animal world is free today and will be protected. The cow is a representative of the animal kingdom, the *peepal* tree is the representative of the vegetable kingdom, the touchstone or the *shaligram* is the representative of the mineral world. We want to save and give peace and protection to all those four worlds and therefore it is that (sic) *the Hindus of India* have put these four things as representatives of this world - the human being, the cow, the *peepal* and the *shaligram*. All these were worshipped because we wanted to protect the whole humanity.

Despite his caveat and advocacy for dispassionate rationality, passions ran high in his speech: "It is my fundamental right to protect my mother, to protect my wife, my children and my country […] we shall be protected, our families shall be protected. And our Hindu society, or our Indian society, has included the cow in our fold. It is just like our mother. In fact it is more than our mother."[30] He went on to state: "I can declare from this platform that there are thousands of persons who will not run at a man to kill that man for their mother or wife or children, but they will run at a man if that man does not want to protect the cow."[31] As is evident, the normative sentiments of largely Hindu community found their way in the drafting of the cow slaughter provision.[32]

The dissenting Muslim members raised the concern of violent outbursts 'on the occasion of Bakrid' (against the slaughtering of cow by Muslims as a religious rite) which led to the imposition of section 144 of the Criminal Procedure Code and resulted in "arrests of

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[28] Shri R.V. Dhulekar, *CADs*, *supra* note 12 at 576.
[29] *Ibid* (emphasis supplied).
[30] Shri R.V. Dhulekar, *CADs*, *supra* note 12 at 576-577.
[31] *Ibid*.
[32] This reading of the *CADs* is in line with Pritam Singh's contention about the violent nature of the cow protection provision as a product of Aryan Brahmanism camouflaging itself as a universal aspiration for all Indians. Singh, *supra* note 22. Singh, quoting Kancha Ilaiah, remarks: "The Dalits in the spiritual realm have more affinity with Buddhism and Christianity than Hinduism. In their spiritual realm, the cow is not sacred. How can Hindutva forces impose their spirituality on others?" *Id*. at 917.

many, molestation of even more, and imprisonment of some."[33] Pre-empting the clash between Hindu sentiments and Muslim practice, Z.H. Lari's assertions were couched as a 'permission' by the majority to continue the minority practice:[34]

> [W]e will not stand in the way of the majority if the majority wants to proceed in a certain way, whatever may be our inclinations […] we know that our religion does not necessarily say that you must sacrifice cow: it permits it. The question is whether, considering the sentiments that you have, considering the regard which the majority have for certain classes of animals, do they or do they not permit the minority - not a right - but a privilege or a permission which it at present has? I cannot put it higher.

The history of constitutional cases around this issue, discussed in the next part of this chapter, shows how this hope could not translate into reality. It was Syed Saiadulla who contested the economic argument up front. He pointed out the flaws in the methodology of arriving at figures of slaughter in both Govind Das's and Pandit Bhargava's arguments.[35] He argued that economic arguments were used as mystifying rhetoric where Hindu religious sentiments were universalised as 'the' common good and will of the nation:[36]

> I do not also want to obstruct the framers of our Constitution, I mean the Constituent Assembly if they come out in the open and say directly: 'This is part of our religion. The cow should be protected from slaughter and therefore we want its provision either in the Fundamental Rights or in the Directive Principles.' But, those who put it on the economic front, as the honourable Member who spoke before me said, do create a suspicion in the minds of many that the ingrained Hindu feeling against cow slaughter is being satisfied by the backdoor. If you put it on the economic front, I

[33] Z.H. Lari, *CADs*, s*upra* note 12 at 577.
[34] *Ibid.*
[35] Syed Muhammad Saiadulla, *CADs*, s*upra* note 12 at 579. He, for instance, pointed out how the figures of slaughter during the war time are presented as figures of normal times and how Hindus themselves were keenly practicing the slaughter of cows. For an elaborate discussion of the rejection of economic grounds for cow slaughter see, *CADs*, s*upra* note 12 at 578-580.
[36] *Id.* at 578.

> will place before you certain facts and figures which will show that the slaughter of cows is not as bad as it is sought to be made out from the economic point of view.

This was an important indictment of the self-presentation of Hindu sentiments as 'secular' (and progressive). However, what this indictment misses, is the fact that the entire edifice of cow protection has historically being framed through the juxtaposition of emotive appeal with the logic of economic rationality. The use of theological vocabulary along with economics had historical continuity and as Shabnum Tejani has recently argued, it provided the necessary affective dimension concerning the pride of the Hindu community and the civilizational distortion due to the intervention of the 'outsiders', a hallmark of the discourse of Arya Samaj in the late nineteenth century.[37] The passionate desires and religious sentimentalism immanent in the CADs on the cow require a careful reading as these affective moments perpetuated the violent orders of constitutionalism. Upendra Baxi in his reflections on reading CADs usefully observes "that we ought to grasp constitutionalism as in some sense being passional rather than entirely rational. Constitutionalisms, forever, construct and reconstruct the violent orders of the desiring subjects."[38] This makes the narrative of mystification an important one that stands out in the CADs on the issue of cow protection as they set the tone for the way in which the Constitution represented cow protection, and the subsequent judicial interpretations.

II. Post-Independence Judicial Discourse on Cow Slaughter

In pursuance of Article 48 various state legislature started promulgating laws for protection of the cow. The states of Bihar, Uttar Pradesh and Madhya Pradesh pioneered in enacting legislations prohibiting slaughter of cow. The Bihar Preservation and Improvement of Animals Act, 1956 (the Bihar Act, 1956) imposed a ban under section 3 against the slaughter of species belonging to 'bovine cattle'[39]. The only exception was for

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[37] Tejani, *supra* note 5 at 148.

[38] Upendra Baxi, "Justice of Human Rights in Indian Constitutionalism: Preliminary Notes" in V.R. Mehta and Thomas Pantham (eds.), *Political Ideas in Modern India: Thematic Explorations* 268 (Sage Publications, New Delhi, 2006).

[39] The Supreme Court while interpreting this expression observed that "species of bovine cattle" in the Bihar Act of 1956 is expansive enough to include "buffaloes" within its prohibitory ambit. In a moment of

'medicinal or research purposes' after obtaining an 'order' from the concerned authority.[40] The Uttar Pradesh Prevention of Cow Slaughter Act, 1955 (the U.P. Act) prohibited cow slaughter under section 3. An exception via section 4 permitted the slaughter of cows who were inflicted with 'contagious or infectious disease' or subjected to 'experimentation in the interest of medical or public health research.' Section 6 provided an institutional framework providing care for 'uneconomic cows' as the law contemplated a total ban on any form of cow slaughter irrespective of its age or utility.[41]

The third important legislation was Central Provinces and Berar Act, 1949 (1949 Act). Chronologically it was the earliest but it was challenged in the Supreme Court together with the above two enactments as primarily it was the 1956 amendment made to the Act which stirred the controversy. The original 1949 Act permitted the slaughter of animals with due certification. However, two subsequent amendments changed this framework. The 1951 amendment imposed a total ban on cow slaughter but defined 'cow' as including only a female calf of a cow.[42] The 1956 amendment changed this definition of 'cow' to include male and female calves, bulls, bullocks and heifers, leaving only the slaughter of buffaloes as permissible. Unlike the Bihar legislation, both the U.P. and M.P. legislations kept buffaloes outside the ban. None of these enactments permitted the slaughter of cattle for 'bona fine religious purposes', a ground which was present in other state legislations, such as the Bombay Animal Preservation Act, 1948.

The constitutionality of all the three legislations was challenged in *Mohd. Hanif Quareshi & Others* v. *State of Bihar*,[43] a case which has now attained iconic status due to its repeated citation in later decisions. The case originated in 1958 as twelve writ petitions

judicial wit, the Court observed that if "the intention of the Bihar legislature was to exclude buffaloes (male or female, adult or calves) from the protection of section 3 then it must be said that it has failed to fulfil its intention." *Hanif Quareshi, infra* note 43, para 7.

[40] Section 4 of the Bihar Act provides for penalties which are prescribed for the prohibited act.

[41] The law also provided for stringent criminal sanctions for violation of the prohibitions. Section 8 enlisted the punishable acts while section 9 made the offences both cognizable (allowing arrest without a warrant) and non-bailable (requiring anyone accused under the Act to go to the court for bail).

[42] The slaughter of "any other animal" required a certificate under section 4. The grant of certificate required written permission from "executive authority" and a "veterinary officer". This made slaughter an arduous process as an expert certification escalated the ladder of bureaucracy.

[43] AIR 1958 SC 731 [Hereafter, "*Hanif Quareshi*"]. The Supreme Court judgment uses the spelling 'Quareshi' which I have employed throughout this chapter. Rohit De uses 'Qureshi' in his book and I have used this spelling wherever I have cited his work.

were filed by 3000 Muslim petitioners from different states under Article 32 assailing the legislative enactments of the three Indian states as violating the petitioners' fundamental rights. All petitioners were Muslims and a majority of them belonged to the *Quareshi* community, the merchant class engaged in the business of meat and meat-related products.[44]

The constitutional grounds of challenge included the violation of the fundamental right to equality (Article 14), the right to freedom to practice trade and business (Article 19 (1) (g)) and the right to freedom of religion (Article 25).[45] The petitioners argued that the state government's anti-cow-slaughter laws in pursuance of Article 48 was a continual misreading of the constitutional provision. Instead, they proposed a distinction between the *principal* and *ancillary* purposes of Article 48. Its principal purpose, they argued, was to be situated in its thrust on modernisation and scientific organisation of agriculture and animal husbandry. The latter half of the Article (dealing with prohibition) was merely illustrative or ancillary to the principal purpose. The constitutional vice, according to the petitioners, lay in the state governments' attempt to turn the provision upside down by making the ancillary purpose as the principal one.

The above interpretation of Article 48 was corroborated with a reference to Entry 15 in the State List (List II) of the Seventh Schedule of the Constitution.[46] It reads: 'Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.' This legislative entry is conspicuously silent on the prohibition of slaughter of animals. There is no other legislative entry in the Seventh Schedule which empowers the state government to legislate on the prohibition of the slaughter of animals. The constitutional focus therefore, it was argued, lies in 'preservation and improvement of stock,' leaving prohibition of slaughter ancillary to this

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[44] This community of Muslims primarily "engaged in the butcher's trade and its subsidiary undertakings such as the sales of hides, tannery, glue-making, gut-making and blood dehydrating, while some of them [were] also engaged in the sale and purchase of cattle and in their distribution." *Id.*, para 2.

[45] This specific order of challenge is significant and will be elaborated in the next section.

[46] The Seventh Schedule contains the three Lists enumerating items under which laws can be made by central/union government as well as state legislatures. List I (Union List) enumerates the items on which central government can make laws while List II (State List) provides heads on which state legislature can enact laws. List III (Concurrent List) contains items where both central and state government are empowered to make laws.

predominant purpose. In response, the state governments argued that the ‘three distinct and separate directions’ under Article 48 must be understood and ‘implemented independently’. [47]

The Supreme Court brushed aside this issue of the spirit of Article 48 without addressing it and observed that it is unnecessary “to express a final opinion on this question.”[48] No reasoning was given by the constitutional bench for leaving this question unanswered. As the first important decision by the constitutional bench on the scope of cow protection legislations, the Court was expected to fully address this constitutional issue instead of describing it as ‘unnecessary’. A clear interpretation with respect to the spirit of this provision would have limited the state legislatures from further legislations with an emphasis on prohibition. For instance, the U.P. Act of 1955, unlike the other legislations, was entirely devoted to prohibition without any effective and serious concern for protection or improvement of stock. There was no mention of the scientific development of animal stock in either the preamble or the statement of objects. The Supreme Court acknowledged this: “Although the U.P. Act has been made under entry 15 in List II and presumably pursuant to the directives contained in Article 48, nowhere in the Act is there any express reference whatever to the ‘preservation, protection or improvement of stock.’”[49] The Supreme Court did not investigate or elaborate on this point. Could a law be within the legislative competence when it did not follow the listed requirements of entry 15, List II? The silence of the court on these important questions constitutes a foundational flaw in *Hanif Quareshi*.[50]

Leaving this important issue unanswered, the Supreme Court foreclosed the possibility of an alternative history around cow slaughter debate. This issue remained unanswered even in the future pronouncements of the Supreme Court.

[47] No rebuttal of the argument based on federal scheme by petitioners (lack of legislative head for slaughter) was provided by the respondents.
[48] *Hanif Quareshi, supra* note 43, para 6.
[49] *Id.*, para 8.
[50] This aspect has been ignored by legal commentators on *Hanif Quareshi*. On the face of it, this issue might appear as a mere legal quibble. But it may be noted that the Supreme Court in its inadequate response to this point also permitted, implicitly, legislations merely aimed at prohibition of slaughter. This opened up a possibility of over-criminalisation or use of criminal law even when it was not required. The Court’s interpretation also gives a distorted view of Article 48 which by virtue of being in Part IV of the Constitution, ought to be interpreted to promote welfare by enshrining socio-economic rights.

The Fundamental Rights Challenge in *Hanif Quareshi*

The first challenge to the laws by the petitioners was on the grounds of inequality owing to the differential treatment of those who slaughter cattle (*kasais*) and those who slaughtered other animals such as sheep or goat. Second, the petitioners argued that the legislations violated the freedom to practice trade, business and profession as the traders in slaughter of cattle were thrown out of their businesses. Relatedly, they argued that the law violated the requirement of 'reasonable restrictions' as it was neither 'reasonable' (as it whimsically divested the petitioners from their trades and occupations) nor a 'restriction' (as it contemplated a *complete shutdown* of the trades and businesses of the petitioners instead of *restricting* them). The third and final ground of challenge was the violation of freedom of religion under Article 25 as no exception was carved out even for *bona fide* religious purposes.

In a reversal of the pleadings, the Court began its analysis with the last argument of religious freedom. The Court expressed surprise at the lack of material placed on the question of importance of cow sacrifice in Islam despite the importance of the issue.[51] However, Rohit De rightly explains why the religious freedom argument was relatively unimportant for the Quareshi community, as 'livelihood' and not 'religious freedom' was their central concern. In De's words:[52]

> The Qureshis were uninterested in getting permission to sacrifice a cow once a year on Eid; they wanted to ensure the continuation of their livelihood […] Despite Qureshi butchers' lack of interest in making a claim as Muslims, the court tended to see their claims through this lens.

[51]*Hanif Quareshi*, *supra* note 43, para 13. ("…the materials placed before us to substantiate the claim that the sacrifice of a cow is enjoined or sanctioned by Islam? The materials before us are extremely meagre and it is surprising that on a matter of this description the allegations in the petition should be so vague.").
[52] De, *supra* note 2 at 150. De also elaborates on the failure of the Court to understand and appreciate the petitioners. In this sense, he finds the reversal of the issues in the pleadings of the petitioners by the Court as crucial: "The reversal of the order was crucial: the court saw the petitioners as Muslims first and Qureshis incidentally, whereas for the petitioners it was their Qureshi identity and their profession that were most significant. Their reference to their faith was only to emphasize their dominant role among Indian Muslims." *Id.* at 148.

The Supreme Court converted the issue of religion into the predominant one, despite the petitioners' claims to the contrary.[53] The Court on its own relied on *The Hadea or The Guide: A Commentary on Mussulman Laws*, originally composed in the twelfth century by Burhan al-Din al-Marghinani, a leading Muslim jurist, which Charles Hamilton translated in 1791 for the East India Company. It noted that every mature and free Muslim is required to sacrifice one goat per person or seven Muslims together might sacrifice one cow or camel. The availability of an alternative option in terms of other animals (despite economic hardship) convinced the Court that the practice was not 'essential' to Islam and therefore, as already discussed in chapter 1, outside the protective zone of Article 25 of the Constitution. It found merit in the state's claim, acting jointly as respondents, that "many Mussalmans do not sacrifice a cow on Bakr Id Day."[54] It also took note of the fact that three prominent members of "the Gosamvardhan Enquiry Committee set up by the Uttar Pradesh government in 1953 were Muslims and concurred in the unanimous recommendation for total ban on slaughter of cows."[55]

De points out the failure of the Supreme Court to take into consideration the caste and economic status of the Quareshi community. The economic status of the petitioners could not be equated with that of the elite Muslim members of the Gosamvardhan Enquiry committee[56] as "[t]he Qureshis were *ajlafs*, or of common birth, unlike most Muslim political leaders, who belonged to the *ashraf* (aristocratic) classes and spoke Urdu."[57] While the Court accepted that "a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats", the argument of

[53] *Hanif Quareshi, supra* note 43, para 13. ("No affidavit has been filed by any person especially competent to expound the relevant tenets of Islam. No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow […] We have no affidavit before us by any Maulana explaining the implications of those Verses or throwing any light on this problem.").
[54] *Ibid.*
[55] *Ibid.* The Court also mentioned how Emperor Babar encouraged restraint on slaughter of cows and also encouraged his son Humanyun to do so. Several other Mughal rulers and emperors who did not advocate for slaughter of cows were also cited.
[56] De has highlighted the class character of the three members of Gosamvardhan committee. The three members were Ahmad Said Kahn, Akhtar Hussain and Mohammad Habib. Ahmad Khan (Nawab of Chattri) was an affluent landlord who served as a premier of U.P. and Hyderabad. Akhtar Hussain was a member of the Congress Party nominated to the upper house and Professor Habib was a renowned Professor of History at Aligarh Muslim University (AMU). See, De, *supra* note 2 at 149.
[57] *Id.* at 154. The Quareshis mostly spoke Bhojpuri, a dialect of Hindi: "The Qureshis were a minority within a minority within independent India. They were socially and educationally "backward" class of Muslims who were marginalized within mainstream political leadership."

economic necessity was curtly dismissed as "there [was] no religious compulsion."[58] This was despite the fact "the three thousand petitioners in the case were not interested in basing their argument on freedom of religion."[59] Had the Court appreciated the materiality of the argument advanced by the petitioners, through a careful appreciation of their caste and class, it would have considered the subtleties of the religious freedom argument instead of reducing the issue to one of religious identity.

As to the argument of differential treatment accorded to *kasais*, the Court dismissed it taking recourse to a twin rationale: presumption of constitutionality of legislation and agricultural utility of cattle. The Supreme Court reiterated the "presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles."[60] This presumption was based on an affirmative view of the legislature in independent India assuming that it appreciates "the needs of its own people".[61] The second reason was purely utilitarian: "[c]ows, bulls, bullocks and calves of cow are no doubt the most important cattle for the agricultural economy of this country […] As draught cattle male buffaloes are not half as useful as bullocks. Sheep and goat give very little milk compared to the cows and the female buffaloes and (sic) have practically *no utility* as draught animals."[62] Justifying the classification on the basis of "their usefulness to society", the Court found the law banning their slaughter constitutionally valid.

On the issue of violation of rights guaranteed under Article 19(1) (g), the questions before the Court were about the 'reasonableness' of restrictions on freedom of business, trade and occupation. As to the U.P. Act, the Court pointed out that "so far as the butchers of Uttar Pradesh are concerned, there is obviously *no total prohibition* of their occupation but *only some restrictions* have been imposed on them […] the slaughter of cows, bulls, bollocks and calves of cows."[63]A similar conclusion was arrived at with respect to the Madhya Pradesh legislation. By contrast, the Court noticed that the broad

[58] *Hanif Quareshi, supra* note 43, para 13.
[59] De, *supra* note 2 at 153.
[60] *Hanif Quareshi, supra* note 43, para 14.
[61] *Id.,* para 15.
[62] *Id.,* para 16 (emphasis added).
[63] *Id.,* para 20 (emphasis added).

phraseology of the Bihar Act imposed a ban on slaughter of all kinds of buffaloes. Even though the butchers from Bihar could "slaughter goats and sheep and sell goat's meat and mutton for food",[64] the blanket ban on the slaughter of bulls, bullocks and buffaloes without any reference to their utility or age was considered an unreasonable restriction lacking any general public interest:[65]

> [T]he total ban on the slaughter of bulls, bullocks, buffaloes (male or female, adults or calves) *irrespective of their age or usefulness* is, in our view, not a reasonable restriction imposed on, the butchers (Kasais) in the interest of the general public and that being, therefore, void, no question can arise, even in Bihar, of any total prohibition of the rights of butchers to carry on their occupation or business.

The age-and-usefulness formula became central to the Supreme Court's reasoning in declaring the Bihar ban on slaughter impermissible to the extent that it prohibited slaughter of buffaloes (male, female, adult or calves).[66] The U.P. and M.P. legislations were validated except the part that banned the slaughter of breeding bulls and working bullocks (cattle) of all ages without any consideration of their utility.

The Court stuck a compromise by allowing a complete ban on cows of all ages.[67] However, in case of she-buffaloes, breeding bulls and working bullocks, it permitted the slaughter on the contingency of their lack of usefulness.[68] The age-cum-usefulness test

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[64] *Ibid.*

[65] *Ibid* (emphasis added).

[66] This aspect of age-and-utility/ usefulness test soon became a ploy for the legislature to amend the laws extending the prohibition to all these categories with a specific age group mentioned in the legislation. I will discuss these developments in the next section.

[67] *Hanif Quareshi*, *supra* note 43, para 45, for a summary of conclusions by the Court: "we have reached the conclusion (i) that a total ban on the slaughter of cows *of all ages* and calves of cows and calves of she-buffaloes, male and female, is quite reasonable and valid and is in consonance with the directive principles laid down in Art. 48…". This point of ban on cows *of all* ages requires emphasis as some commentators have oddly read the case as allowing slaughter of unproductive cows as well. For instance, in an otherwise remarkable essay, De misreads the judgment when he comments with respect to *Hanif Quareshi* that the "[C]ourt did rule, however, that such a ban could not be absolute and that some categories of cattle, such as aged bulls or *unproductive cows*, may be slaughtered." *Supra* note 2 at 124. Such a reading is in clear contradiction with the text of Supreme Court judgment as quoted here.

[68] *Ibid.* ("that a total ban on the slaughter of she-buffaloes or breeding bulls or working bullocks (cattle as well as buffaloes) as long as they are as milch or draught cattle is also reasonable and valid and (iii) that a total ban on the slaughter of she- buffaloes, bulls and bullocks (cattle or buffalo) after they cease to be

served as a juristic tool to interpret the constitutional expressions 'interests of general public' and 'reasonable restriction'.[69]

Even as *Hanif Quareshi* sought to foreground the virtues of rationality and objectivity as normative codes of juridical method[70] to "approach and analyse the problem in an objective and realistic manner" and then "[decide] on the reasonableness of the restrictions imposed by the impugned enactments",[71] invariably (religious) sentiments determined the reasonableness of restrictions. One finds this in Court's discourse as it referred to the virtues of the cow in the Rig Vedic times[72] and how despite the prevalence of cow slaughter, the custom diminished due to increasing revulsion towards it: "The cow gradually came to acquire a special sanctity and was called "*Aghnya*" (not to be slain)."[73] Referring to King Janak in the epic Ramayana, it concluded that the "cow was gradually raised to the status of divinity."[74] Reference to this sacred history was made to arrive at the conclusion of the sentimental association of the Hindus with the cow:[75]

> Hindus *in general* hold cow in great reverence and the idea of slaughter of cows for food is repugnant to their notions and this *sentiment* has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified.

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capable of yielding milk or of breeding or working as draught animals cannot be supported as reasonable in the interest of the general public.").

69 A brief discussion on the sacred nature of cow appears in the judgment as a postscript followed by an elaborate economic analysis of the question of its usefulness referring to statistics, surveys, and reports from the Planning Commission, the Five Year Plans, census figures of cattle, etc. This discursive formulation is reminiscent of the *CAD*s where the argument of utility and faith, modernity and myth were fused together.

70 *Hanif Quareshi, supra* note 43, para 1 ("We are […] happy to note that the rival contentions of the parties to these proceedings have been urged before us without importing into them the heat of communal passion and in a rational and objective way, as a matter involving constitutional issues should be.").

71 *Id.,* para 45.

72 *Id.,* para 45. Here the Court relies primarily on the account provided in the work of nationalist historians Dr. A.G. Das and P.V. Kane.

73 *Ibid.* It referred to *vedic* scriptures (*Atharva Veda*) to establish the injunction against cow slaughter.

74 *Ibid.*

75 *Ibid* (emphasis added).

The revulsion for cow slaughter, both pre and post partition, was associated more with upper caste Hindus and not Hindus *in general*[76] but the narrative of the Supreme Court collapsed caste variances in its grand narrative. In the construction of Hinduism, the caste question was eschewed, just as the issue of litigant specificity was invisiblised by side-stepping the caste status of the Muslim litigants.[77] This historical reconstruction of the veneration of the cow and its association with Hindu sentiments followed an endorsement of the role of sentiment in the determination of the standard of 'reasonableness':[78]

> While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.

Sentiment (specifically Hindu sentiment) despite the virtues of rationality extolled by the Court, paradoxically, became one (if not the sole) of the yardsticks to determine the reasonableness of the restriction. Baxi indicts the Court precisely on this aspect as, for him, it is 'extremely hazardous' to take into account the anti-beef eating sentiment of the Hindus 'in general' as substantiating evidence. He wonders "as against some Muslims who favour a ban on cow slaughter, there would be many Hindus who strongly favour the lifting of such a ban. Likewise, if some Muslim emperors imposed a prohibition on cow slaughter in the past, history may remind us of Hindu emperors who did not do so or were entirely indifferent to the issue."[79] One is tempted to say that on a careful reading of the decision, the sentiment of 'cow as a sacred symbol' becomes the *sole*

[76] Pandey, *supra* note 2.

[77] De suggests how the Court "uncritically assumed that all Hindus venerated the cow, ignoring the practices of Hindus for whom beef was an ordinary part of the diet. In addition, caste was not recognised for Muslims, and the Qureshi self-presentation as a distinct community was ignored." *Supra* note 2 at 166-167.

[78] *Hanif Quareshi, supra* note 43, para 23.

[79] Upendra Baxi, "The Little Done, The Vast Undone- Some Reflections on reading Granville Austin's *The Indian Constitution*" 9(3) *Journal of Indian Law Institute* 323, 350 (1967). Baxi acerbically asks: "is it then possible for some to think, somewhat uncharitably, that the only drawback of the Muslims was that they had not agitated sufficiently to win either judicial sympathy or judicial cognition of their "sentiments" towards their religious precepts as providing "one of the many elements" of the Court's "verdict"."

criterion to determine reasonableness with respect to the ban on unproductive and uneconomic cows.

Legislative Response to *Hanif Quareshi*

The three states that were parties in *Hanif Quareshi* tried to bypass the age-cum-usefulness test which was laid down by the Supreme Court through legislative amendments in the state of U.P. in 1958 and the state of Bihar in 1959, and a fresh legislation in state of M.P. called the Madhya Pradesh Agricultural Cattle Preservation Act, 1959. The permissible age for slaughter of she-buffaloes, bulls and bullocks was fixed at 25 years in Bihar and 20 years in U.P. and M.P.

Butchers from various states challenged the excessive age bracket of the legislations by filing petitions in the Supreme Court. All these different petitions were taken together by a constitutional bench of the Supreme Court in *Abdul Hakim Quraishi & Others* v. *State of Bihar and Others* (1961).[80] The petitioners argued that "the age up to which the animals referred to above cannot be slaughtered (20 or 25 years) has been put so high that the practical effect is that no animals can be slaughtered."[81] They further explained that "in India bulls and bullocks and she buffaloes rarely live even up to the age of 15 years; draught bullocks begin to age after eight years."[82] The petitioners also attributed *mala fide* (bad faith) intent to the legislatures for bringing out these laws.

The Supreme Court declared the disputed provisions as unconstitutional, on the ground that they violated Article 19 (1)(g).[83] It noted that the original draft Bill of the Bihar legislation put an age of fifteen years which was increased by the select committee without providing any reason.[84] Accepting the ground that the concerned animals

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[80] (1961) 2 SCR 610.
[81] *Id*.. para 3.
[82] *Ibid.* Even in countries possessing sophisticated scientific procedures cattle hardly ever live beyond fifteen-sixteen years.
[83] The Supreme Court also invalidated the arduous procedure prescribed for slaughter in some enactments.
[84] *Supra* note 80, para 6. ("It is worthy of note that the Bill, as originally drafted, put the age at fifteen years only; but the Select Committee on the Bill said, "The Committee feels that the words *fifteen years* will not be sufficient for the preservation of animals. They feel that it would be better if those words are substituted by the words *twenty-five years*" […] No other reason was given for increasing the age.") (emphasis in original).

become useless after the age of fifteen years, the Court declared section 3 of Bihar Act as unreasonable "insofar as it has increased the age limit to 25 in respect of bulls, bullocks and she buffaloes."[85]

In the same vein, the Court declared the age of twenty years as excessive and unreasonable in the U.P. Act. The procedure for the procurement of a certificate for slaughter was tedious as it required a 'double requirement' of advanced age and permanent incapacitation. The requirement of the age of twenty years in the M.P. law was also declared unreasonable by the Court on similar grounds. It observed with respect to the procedure under section 4 (2) (a) of the M.P. Act:[86]

> [I]f the animal is to be over 20 years of age and also permanently incapacitated from work or breeding etc., then the age limit is really meaningless. Then, the expression "due to age" in the second part of the clause also loses its meaning. It seems to us that clause (a) of sub-section (2) of Section 4 of the Act *as drafted is bad* because, it imposes a disproportionate restriction on the slaughter of bulls, bullock and buffaloes.

The only argument that remained unaddressed was whether an arduous procedure - which even the Court found 'difficult to understand' (Bihar Act) or 'badly drafted' (M.P. Act) - substantiated the argument of a *mala fide* exercise of power. Answering this question would have made it difficult for the Court to apply the doctrine of presumption of constitutionality, which assumes the legislature as 'representative of the best interests of the community.'[87] How, then, could the Court apply this doctrine when the legislature was accused to have acted in an evidently partisan and sectarian manner? Another problematic aspect of the decision was the Court's upholding of the reversal of burden

[85] *Id.,* para 9.
[86] *Id.,* para 19 (emphasis added).
[87] On presumption of constitutionality, see *id*., para 7. ("Another consideration which has to be kept in mind is that 'the legislature is the best judge of what is good for the community, by whose suffrage it comes into existence'.").

of proof, which was imposed on the accused instead of on the prosecution.[88] The Court, however, remained silent on the question of *mala fide* intent, and this silence would have an impact on the events and judgments following this decision leading up to the next important Supreme Court decision.

On January 12, 1967, state government of Madhya Pradesh issued a notification which prohibited the slaughter of bulls and bullocks at Madar Tekdi slaughter house located in Jabalpur. Mohd. Faruk, the petitioner, carried on the occupation of slaughter of bulls and bullocks at Jabalpur. He challenged this notification in the Supreme Court under Article 32. A constitutional bench of the Supreme Court in *Mohammed Faruk* v. *State of Madhya Pradesh* (1969)[89] declared the notification as a direct violation of the fundamental rights of the petitioner. In a five-page judgment, the Court denounced the government's use of law to subvert judicial verdicts. The Court remarked that attempts "were made from time to time to circumvent the judgment of this court in *Mohd. Hanif Quareshi's* case."[90] The notification was "another attempt, though on a restricted scale, to circumvent the judgment of this Court."[91]

This judicial indictment of the legislative and executive intent of continually circumventing judicial verdicts underscores the bad faith of the administration, operating in the garb of cow protection. One cannot be unmindful of the fact that one year earlier, in 1966, there was a collective demonstration of "several hundred thousand people in favour of national ban on cow slaughter."[92] So the populist aspect of such notifications at the level of state government is not difficult to imagine. The Supreme Court, contrary

[88] The Court validated section 12 of the Act which imposed the burden of proof "that the slaughter, transport or sale of agricultural cattle was not in contravention of the provisions of this Act" on the accused. *Supra* note 80, para 23. This is not just the reversal of the basic principle of common law but also of the Indian Evidence Act, 1872 which requires that the accuser, and not the accused, should have the burden to prove the case and adduce evidence. Upholding this section in a short paragraph shows how the Supreme Court had little concern with the fact that the prohibited acts in the legislation were punishable offence. This certainly was a step in strengthening the repressive side of criminal law as prosecution would become possible without any need for the investigative agencies to procure evidence. The burden would rather shift on the accused to disprove the case which is unreasonable by any standard of liberal criminal law jurisprudence and would entail dangerous potential of criminal law becoming an oppressive instrument in the hands of an authoritarian regime.

[89] 1969 (1) SCC 853 [Hereafter, "*Faruk*"].

[90] *Id.*, para 5.

[91] *Id.*, para 6.

[92] D.N. Jha, *The Myth of the Holy Cow* 19 (Navayana, New Delhi, 2009).

to the previous judgments, repudiated the presumption that legislature represents the best interests of the community. It observed that the validity of laws for cow protection must be *proved* by the State. They would no longer be presumed as constitutional:[93]

> When the validity of a law placing restriction upon the exercise of fundamental rights in Article 19 (1) is challenged, the onus of proving to the satisfaction of the Court that the restriction is reasonable lies upon the State.

This neglected passage of *Faruk* introduces, in the context of the anti-slaughter laws, what in U.S. constitutional law is styled as the doctrine of 'strict scrutiny'. In principle, such scrutiny involves a rigorous examination of legislations which affect fundamental rights. Instead of presuming their constitutionality, such laws are presumed as unconstitutional unless proven otherwise by the State. The burden of such proof lies on the State.

This important aspect of *Faruk* has been neglected both by legal commentators and by later judicial pronouncements.[94] Nevertheless, the Court's stance opened possibilities for future in its principled rejection of the presumption of the constitutionality of cow protection laws. *Faruk* declared that in exercising administrative discretion there is actually a 'heavy' burden on the State.[95] To ascertain reasonableness of the restriction, the State must establish that a 'less drastic' measure (than banning slaughter) would not be sufficient to promote the interests of general public. The Court also rejected the state

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[93] *Faruk, supra* note 89, para 8.

[94] The Supreme Court never takes into account the previous cases on this point which proceeded on the presumption of constitutionality. It may also be noted that in the context of this case the strict scrutiny principle is applied to executive action and not legislation. But it opens an alternative possibility for the future. In recent cases, the doctrine has been used by the Apex Court to invalidate legislative provisions but the doctrine has never been used against cow protection and anti-slaughter laws. For an analysis of the recent turn of the Indian Supreme Court towards the Doctrine of strict scrutiny see, Tarunabh Khaitan, "Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement" 50(2) *Journal of the Indian Law Institute* 177-208 (2008).

[95] *Faruk*, *supra* note 89, para 8 (J.C. Shah, J., speaking for the Supreme Court). ("Imposition of restriction on the exercise of fundamental right may be in the form of control or prohibition, but when the exercise of fundamental right is prohibited, the burden of proving that a total ban on the exercise of the right alone may ensure the maintenance of general public interest lies heavily upon the state.")

government's argument based on community sentiments.[96] *Faruk* observed that "a prohibition […] will not be regarded as reasonable, if it is imposed […] merely to respect the susceptibilities and sentiments of a section of people whose way of life, belief or thoughts is not the same as that of the claimant."[97]

Faruk was technically different from previous precedents as the issue before the Court was with respect to an executive notification and not a legislative enactment. From a strictly legal point of view, one may regard this case as a precedent only in cases of executive action and not legislative pronouncements. But understood in a proper perspective, the importance of this judgment, delivered by a constitutional bench, lies in the alternative approach taken by the Supreme Court in assessing the issueP of cow prohibition. Its indictment of the State actions and a possible re-orientation of the established doctrinaire principles of constitutional adjudication were unprecedented. But this approach of *Faruk* has remained neglected in future decisions, and the embryonic potential of the decision for an alternative constitutional interpretation of Article 48-inspired legislations has not found fruition yet.

Reversal of Constitutional Logic

In 1982, the state of West Bengal granted an exemption for the sacrifice of cow to the Muslim community on the occasion of Bakr 'Id festival. This exemption was granted under section 12 of the West Bengal Animal Slaughter Control Act, 1950 which provided an exemption from the slaughter ban for 'religious purposes'. A writ petition in the nature of public interest litigation was filed by twenty seven Hindu respondents, in the then Calcutta High Court (now Kolkata), as they felt aggrieved by the exemption slaughter granted by the State under section 12. The Calcutta High Court decided in favour of the petitioners on the reasoning that cow sacrifice was not a necessary requirement in

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[96] The argument of the state government tried to use an aspect of *Hanif Quareshi* in asserting that the sentiments of the community are hurt on the slaughter of animals even when it is lawfully done. The absurdity of the argument was that no cows were slaughtered anymore in the state of M.P. after *Hanif Quareshi* approved the total ban. And if one is to imagine the argument as suggesting that the sentiments of the community were hurt on slaughter of animals other than the cow, then it is a slippery slope argument, which, if accepted, would end in the advocating of a complete prohibition of non-vegetarian food.

[97] *Faruk*, *supra* note 89, para 11.

Muslim religion and was thus beyond the exemption contemplated under section 12. It issued a writ of *mandamus* prohibiting the state government to permit such sacrifice.

In 1994, the state government and some members of the Muslim community approached the Supreme Court as appellants by way of special leave.[98] This provided the context of the three judge bench decision in *State of W.B.* v. *Ashutosh Lahiri* (1995)[99] The appellants argued that if the text of the law is clear it must receive a literal interpretation. The expression 'religious purpose' under section 12 cannot be interpreted as 'essential religious purpose' and has to be understood as 'any religious purpose.' The Supreme Court, rejecting this argument, upheld the decision of the High Court as "unexceptionable and [that which] calls for no interference."[100] The Supreme Court followed the logic of *Hanif Quareshi*: since cow slaughter is 'optional' and not 'mandatory' in Islam, the State has no jurisdiction to fulfill an optional religious purpose.

A careful focus on the Court's reasoning clarifies how the Court turned the constitutional logics upside down in arriving at its conclusion: the state government had granted permission for the sacrifice of cows on Bakr'Id, and since there is no fundamental right against the slaughter of cows, there was no violation of anyone's fundamental rights.[101] If one were to accept the reasoning of the Supreme Court, then Article 48, which is an unenforceable directive principle, gets converted into an enforceable right. In this case, the sentiments of the Hindu community became sufficient to enforce the directive of Article 48 against the state government. An *enabling* provision turned into an *enforceable* one. To understand this point, consider the following observation of the Apex Court:[102]

> [I]t becomes *obvious* that if there is no fundamental right of a Muslim to insist on slaughter of healthy cow on BakrI' d day, it cannot be valid

[98] The provision for 'special leave' to approach the Supreme Court is constitutionally enshrined under Article 136 of the Indian Constitution.
[99] (1995) 1 SCC 189 [Hereafter, "*Ashutosh Lahiri*"]. The judgment of the Supreme Court was delivered by S.B. Majmudar, J.
[100] *Id.*, para 6.
[101] It may be noted that this case is unrelated to *Hanif Quareshi* where the allegation of violation of specific fundamental rights was in issue.
[102] *Ashutosh Lahiri, supra* note 99, para 9.

ground for exemption by the State under Section 12 which would in turn enable slaughtering of such cows on BakrI'd.

What is 'obvious' to the Supreme Court ends up in a constitutional anomaly. Had it been an essential practice in Islam to slaughter cows on Bakr 'Id, then no exemption or exception was required in the first place as it would have been an enforceable *right* guaranteed under Article 25 with a *corresponding duty* on the State to enforce it. Differently put, Article 48 only *enables* the State to take steps towards cow protection; the State cannot be *forced* to follow this mandate. This basic distinction between fundamental rights and directive principles was blurred in the reasoning of the Supreme Court.[103] Such a conclusion also enabled the Court to eschew any careful examination of the legislative variance towards cow protection in north Indian states and other states which were not so zealous in the mandate for cow protection. The discourse of the Court, thus, erased this federal diversity or even antagonism by the reversal of constitutional logics. The universalisation of the cause of cow protection necessitated the erasure of the contextual and historical motivations that were not homogenously tied for the cause of cow protection.

The counsel for the Bengal state government argued that "India is a secular democratic country and, therefore, the State has to respect the wishes of minority."[104] The Court did not think it worth appreciating this argument; it curtly observed that their concern was with a 'short question' related to exemption, and that the issue of "ours being a secular country would not be relevant."[105] This was the only case that came up before the Supreme Court where the issue of cow protection directly involved the issue of religious freedom as the central issue. The respondents argued their case on the grounds of Hindu sentiments. Clearly, the Court not only subverted the established constitutional principles but also lost an opportunity to elaborate on the issue of secularism in the context of cow protection legislations.

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[103] For a critique of judicial and legislative trends which have disrupted the harmony between Part III and Part IV of the Constitution, see, M.P. Singh, "The Statics and the Dynamics of the Fundamental Rights and the Directives Principles - A Human Rights Perspective" (2003) 5 SCC (*Jour*), *available at*: https://www.ebc-india.com/lawyer/articles/2003v5a4.htm (last accessed on Nov. 28, 2020).
[104] *Ashutosh Lahiri, supra* note 99, para 10.
[105] *Ibid.*

Hashmatullah v. *State of M.P.* (1996)[106] deals with another attempt on the part of the state of M.P. to increase the prohibitory ambit of the slaughter ban. By way of an amendment in M.P. Agricultural Cattle Preservation, 1959, 'bulls and bullocks' were included within the prohibited category, leading to an absolute ban on the slaughter of bulls and bullocks irrespective of their age and usefulness.[107] The division bench of Madhya Pradesh High Court in Jabalpur validated the amendment. The Supreme Court overturned the High Court decision by emphatically stating that the effect of the amendment led to a total ban on all forms of cattle.[108] The Court pointed out the repeated attempts[109] by the state of M.P. on 'flimsy grounds' to amend the law:[110]

> We are pained to notice the successive attempts made by the state of Madhya Pradesh to nullify the effect of this Court's decisions […] each time on flimsy grounds. In this last such attempt, the objects and reasons show how insignificant and unsupportable the ground for bringing the legislation was.

III. The Constitution of Seven Judge Bench: *Mirzapur case*

In *Haji Usmanbhai Hasan Bhai Qureshi & Others* v. *State of Gujarat* (1986),[111] the issue of the validity of the age of slaughter up to sixteen years for bulls and bullocks came in question before the Supreme Court. The Bombay Animal Preservation Act, 1964, which extended to the state of Gujarat, was amended in 1979.[112] By way of this amendment the age bracket was increased to sixteen and challenged by the petitioners who were butchers and dealt in allied trades of beef. They pleaded that bulls and bullocks ceased to be of any value once they completed the age of fifteen years. But the Supreme Court upheld the validity of the amendment and accepted the state of Gujarat's

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[106] (1996) 4 SCC 391.
[107] The case can be seen as a continuous attempt on the part of the state of M.P. to bypass the age-cum-usefulness formula inaugurated in *Hanif Quareshi*.
[108] The Court observed that this is "an unreasonable restriction on the fundamental rights of the appellants and to that extent only the sub-clause is held to be *ultra vires*." *Supra* note 106, para 22.
[109] The Supreme Court noted that it was the fourth attempt of the state government to put the slaughter of bulls and bullocks under total ban even when they were of no use.
[110] *Supra* note 106, para 18.
[111] (1986) 3 SCC 12 [Hereafter, "*Haji Usmanbhai Qureshi"*].
[112] Bombay Animal Preservation (Gujarat Amendment) Act, 1979.

argument that the advancement in science had enhanced the usefulness of cattle to a longer span of time.[113]

A fresh amendment was made in 1994: section 2 of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994 expanded the slaughter-prohibition to bulls and bullocks of all ages. Such a prohibition previously limited to cows and calves was extended to its progeny - bulls and bullocks - by this amendment. Four writ petitions were filed in the High Court of Gujarat challenging this amendment. This enlargement of prohibition adversely affected the Quareshi community in particular. Two of the writ petitioners who individually filed the petitions belonged to the Quareshi community. The other two petitions were filed by representative bodies of Quareshis as a community. The Gujarat High Court declared section 2 of the amendment as unconstitutional as the amendment was in variance with previous pronouncements of the Supreme Court. The state of Gujarat, with one of the interveners, preferred a special leave petition (SLP) in the Supreme Court. The five-judge bench of the Supreme Court referred this case to a larger bench since the appellants had implored the Court to revisit *Hanif Quareshi* in the light of changed situations. This led to the formation of the seven-judge bench, the largest that has been constituted to decide the issue of anti-slaughter legislations.

In *State of Gujarat* v. *Mirzapur Moti Kassab Jamat* (2005)[114] the Supreme Court reviewed previous decisions and noted the insistence of *Faruk* on the burden of proving the 'general public interest' on the state government.[115] *Faruk* had immediate relevance as it had dealt with the slaughter ban on bulls and bullocks.[116] But despite approvingly citing *Faruk*, the seven-judge bench entirely ignored the proposition laid down in that case. It went on to the apply the presumption of constitutionality with respect to the

[113] *Haji Usmanbhai Qureshi*, *supra* note 111, para 17 ("It is thus clear that because of various scientific factors, namely, better cattle feeding, better medical health and better animal husbandry services, the longevity of Cattle in the State of Gujarat has increased").
[114] (2005) 8 SCC 534 [Hereafter, "*Mirzapur"*]. The case was decided with *Shri Ahimsa Army Manav Kalyan Jeev Daya Charitable Trust* v. *Mirzapur Moti Kassab Jamat* (the appellant was a public trust permitted by the Supreme Court to file an appeal along with state of Gujarat) and *Akhil Bharat Krishi Goseva Sangh* v. *Mirzapur Moti Kassab Jamat* (the appellant was an intervener in the High Court of Gujarat and then preferred an appeal along with state of Gujarat).
[115] *Id.*, paras 17-36 (discussing the previous cases on anti-slaughter legislations).
[116] The difference between the two cases was that *Faruk* was concerned with an executive order whereas the slaughter ban of bulls and bullocks was imposed through an amendment in the present case.

assertions of the state government. This also became central for the Court in its eventual conclusion of approving the 1994 amendment of the Gujarat law as 'reasonable'.

Expansion of Slaughter ban

Mirzapur, by majority, stamped an approval to the enlarged ban on slaughter of cow progeny (bulls and bullocks) irrespective of their age. The argument of advancement in scientific technology which made the cow progeny useful in the last years of their lives had convinced the Court. In its interpretation of Article 48 the majority decision of the Court observed that 'other milch and draught cattle' refer to similar species of cow. Thus, like cows and calves, it held, the entire cow progeny deserved constitutional protection regardless of their age.[117] This interpretation given to Article 48 differed radically with the previous interpretations where the category of 'milch and draught' was protected based on age-and-usefulness criterion. *Hanif Quareshi* was the classic instance of the previous interpretations in its reliance of the age-and-usefulness formula with respect to bulls and bullocks. The seven-judge bench overruled all the previous interpretations holding that "the object of using these two adjectives is to enable classification of the noun 'cattle' which follows."[118]

The previous decisions had correctly attempted to strike a balance between Article 48 and the fundamental right to practice trade and occupation (Article 19 (1)(g)). *Mirzapur* overturned all these precedents as, for the Supreme Court, national interest (of protection of cow progeny) should supersede community interest (of pursuing trade and

[117] For the Court, the expression is "used as a matter of description of a species and not with regard to age." *Mirzapur, supra* note 114, para 65.
[118] *Id.*, para 64 (R.C. Lahoti, CJ., speaking for the majority). ("No doubt, cow ceases to be "milch" after attaining a particular age. Yet, cow has been held to be entitled to protection against slaughter without regard to the fact that it has ceased to be 'milch'. This constitutional position is well settled. So is the case with calves. Calves have been held entitled to protection against slaughter without regard to their age and though they are not yet fit to be employed as "draught cattle". Following the same construction of the expression, it can be said that the words "calves and other milch and draught cattle" have also been used as a matter of description of a species and not with regard to age."). *Id.*, para 65.

occupation). Therefore, a total ban on cow progeny became a 'reasonable' restriction on the right of the petitioners to practice trade and business. According to the Court:[119]

> The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant.

However, in so concluding, the Supreme Court in *Mirzapur* de-contextualised the specificity of the issue, and the political motivations of some state legislatures. In fact, it bypassed its own observation that the courts must take "into consideration […] history of the times and matters of common knowledge and the circumstances existing at the time of the legislation"[120] In other words, the Court overlooked the fact that various state governments on many earlier occasions had attempted to circumvent judicial verdicts based on populist and sectarian grounds, making the evocation of the 'the interest of the country or community as a whole' deeply suspect.

The majority decision accepted Gujarat government's argument that cow progeny is useful for the national economy and agrarian development. It was impressed by the fact, cited twice, that "[f]armers love their bullocks". But the Court never deliberated why, if farmers were deeply in 'love' with aged cow progeny, the State would need a legislation to ban slaughter, as the farmer would not sell it for slaughter in the first place. Instead, what we find are elevated appeals to rhetoric in the majority opinion, as the Court whole heartedly accepted the hyperbolic claims in the government affidavit that "the value of dung is much more (sic) than even the famous 'Kohinoor' diamond."[121]

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[119] *Mirzapur, supra* note 114, para 41. Here the Court was relying on the observations made in *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.
[120] *Mirzapur*, *id.*, para 39 (referring to *Pathumma* v. *State of Kerala* (1978) 2 SCC 1, summing up the ratio of *Kesavananda Bharati*).
[121] *Id.*, para 83. In the Conclusion to this study I have tried to argue that ethnographic accounts alert us to the fact the notion of 'love' for cattle is more ambivalent as it appears.

In his dissent, A.K. Mathur, J. struck a different chord. In his view, "the material which has been placed for taking a contrary view does not justify the reversal of the earlier decisions."[122] He found the evidence as 'general' data insufficient to change the course taken by the constitutional courts over the years. The bland description in the affidavits of the government of Gujarat, argued the judge, deserved to be taken with a 'pinch of salt' due to the inconsistency in their own arguments.[123]

An important point that emerges from an analysis of this judgment is that the available material provided possibilities of alternative reading(s). The majority opinion overruling all previous decisions posited the law for the whole of India, when the material in the case was largely specific to the state of Gujarat. Another noteworthy feature of the *Mirzapur* majority opinion was the complete absence of a theological or religious argumentation in the judicial opinion or pleadings of the parties.[124] As the majority opinion observed:[125]

> [W]e must state, in all fairness to the learned counsel to the parties, that no one has tried to build any argument either in defence or in opposition to the judgment appealed against by placing reliance on religion or Article 25 of the Constitution.

I will argue that viewing the economic argument about the cow as a kind of secular approach would be a mistake. Instead, I suggest that a certain kind of faith continued to be present in the judicial discourse surrounding the cow. It was present in a displaced doctrinal form in the Court's deferential use of the doctrine of presumption of constitutionality. The doctrine as employed by the majority opinion (while the dissent stayed silent on this issue) profoundly reposed a faith in legislative wisdom. In this

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[122] *Id.*, para 145.

[123] The dissent foregrounds that too much is made of the empirical evidence adduced before the Court. *Id.*, para 170 (per A.K. Mathur, J., dissenting) ("No doubt the utility of the cow dung for protection of the top soil is necessary but one has to be pragmatic in its approach that whether the small yield of the cow dung and urine from aged bulls and bullocks can substantially change the top soil. In my opinion this argument was advanced only for the sake of argument but does not advance the case of the petitioners/appellants to reverse the decision of the earlier Benches which had stood the test of time.").

[124] It is only the dissent which mentioned the sacred nature of cow by way of citing *Hanif Quareshi*.

[125] *Mirzapur, supra* note 114, para 22 (per R.C. Lahoti, C.J., speaking for the majority).

universalist endorsement of legislative faith, the judicial narrative reposed an alternative faith in, and deference to, the (enacted) law, even as it sought to eclipse religious faith-based arguments. Such a heightened protection to the legislative enactments discounted the possibility that such a faith in law (makers) might dilute existing constitutional protections for minorities in the secular polity. As to the absence of faith arguments in the pleadings of litigants (especially appellants), I will argue that this has a historic resonance with the discourse of Arya Samaj in the nineteenth century around the cow protection cause where the religious and the sacred were enveloped craftily within the economic argument.

Presumption of Constitutionality as Constitutional Faith

Mirzapur found continuity with *Hanif Quareshi* in its consolidation of the doctrine of presumption of constitutionality. The Supreme Court relied on the constitutional presumption considering the legislature as taking forward the 'best interests' of the community. The argument ran thus: since the legislature necessarily represented the interest of the constituency, the statement of reasons, preamble of an enactment, and the enactment itself must be presumed to be cognizant of the needs of the community:[126]

> The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the Preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved.

How far is such a presumption constitutionally desirable without an analysis of the specifics of the affected persons? The cow protection legislations were, and still are, interlaced with political ideology. The judiciary itself has taken note of many state governments, time and again, attempting to circumvent judicial pronouncements. But the interpretive logic of the Court suggests that the benign aspirations stated in the preamble, in itself, have proved sufficient to presume the law's constitutional validity. One may recall that this position is in direct contradiction with the constitutional court's own

[126] *Id.*, para 71.

observations in *Faruk,*[127] where the burden was imposed on the State to prove that a total ban was necessary and for a compelling State purpose. This higher standard of scrutiny adopted there reflected that "the Court gives heightened protection to favored constitutional values".[128] Adopting the strict scrutiny test would have prevented the state governments from circumventing judicial verdicts. Such a recourse would also have strengthened the constitutional framework by implicitly acknowledging the protection of minority rights as a cherished constitutional value. But the failure to develop such a robust constitutional framework in *Mirzapur* shows how faith as a category can take secular, yet exclusionary forms in the judicial imaginary.

This methodological approach of the judicial interpretation raises certain questions of the blind-spots of the judicial process. The premise of the doctrine of presuming constitutional validity stems from the post-colonial belief in democratic representation and legislature as the best representative of community interests. Judicial deference to the laws made by the state legislature also embolden the principle of separation of powers in modern State. However, there are various occasions when the judiciary has underscored the importance of diluting the standard of this presumption when the laws affected the fundamental rights of the petitioners.[129] In *Mirzapur*, not only did the laws enacted by the state legislatures affect fundamental rights of the minorities but in *Faruk*, the constitutional court itself had laid down for the dilution of such standard. In other words, the methodological flaw of the Supreme Court in *Mirzapur* lies in application of the doctrine without engaging with the previous contrary judgment of *Faruk* (which is approved and not overruled in this case) and not providing any reasoning that why this doctrine should be applied. This makes us recall the selective references in the *Hindutva judgments* from previous precedents as discussed in the previous chapter.

[127] As already stated, *Mirzapur* approvingly cites *Faruk* and therefore the logic of *Faruk* has not been abandoned by the seven-judge bench in *Mirzapur*.

[128] Stephen A. Siegel, "The Origin of the Compelling State Interest Test and Strict Scrutiny" 48(4) *The American Journal of Legal History* 355-407, 358 (2006).

[129] See, Khaitan, *supra* note 94. Khaitan argues that the presumption of constitutionality should give way to strict scrutiny for both pre and post constitutional laws if they are alleged to adversely affect fundamental rights.

This is not to suggest any ulterior motive to the judges but to underline the affective role that categories such as national interest can play to obfuscate the judicial process from adhering to its own norms, standards and rules of interpretation. The presumption of constitutionality could have been applied had the Court distinguished *Faruk* from the present case or overruled it. The Court did neither of the two in arriving at the final outcome of the case. The approval of hyperbolic assertion of the state of Gujarat comparing cow dung with Kohinoor diamond is a testimony of this fact in this judgment. This explains how the passion or emotive appeal found in the CADs continues to inform the judicial process discounting the rules of interpretation.

The Economic –Religious Binary and its Limits

Another issue, as pointed out by the Apex Court itself, pertained to the absence of religion based arguments in the litigants' brief. Historically, a similar trend was discernable in the rhetoric of the Arya Samaj, an avid campaigner for the cow protection movement in colonial north India. C.S. Adcock shows that there was a 'prevalence of economic arguments' advocating prohibition in nineteenth century cow protection discourse, which were made without an overt appeal to religion.[130] She contends that a careful study of the 'Arya Samaj discourse in the vernacular' reveals a surprisingly "more complex vision of *public welfare in cow protection discourse* than is visible through binary logic of 'religious' verses 'economy'".[131] Her analysis helps us to appreciate the historic roots of the judicial logic in *Mirzapur,* which stayed resolutely within the concerns of welfare and economy. She demonstrates how the so-called 'religious' arguments were historically subsumed within the economic: "Arya Samaj cow protectionists translated concerns articulated in terms of *dharma* into the civic languages of 'religion' and 'economy' when addressing the state."[132]

130 Adcock, *supra* note 18 at 297. "Scholarly treatments of the cow protection movement" have not carefully engaged with the conspicuous but counter intuitive lack of religious appeals.
131 *Ibid* (emphasis added).
132 *Id.* at 299. Adcock, following Gyan Pandey, argues that in assuming the cow to be the unquestioned unifying symbol for Hindus, we "run the risk of denying agency to non-elites" and suggest a unity of faith in the Hindu community at large of which there is no historical evidence. *Id.* at 300.

Dayanand Saraswati's *Gokarunanidhi*, the foundational text of the cow protection movement in the nineteenth century, exhibits a striking absence of religious arguments in defending the cow: "the Arya Samajists almost entirely restricted themselves to economic arguments of cow protection […] structured around the foundational concept of *dharma*."[133] Adcock suggests, as I have noted in the Introduction to the thesis, that within Hindu cosmology, the notion of *dharma* (unlike the Euro-Western category of 'religion') encapsulates at once the spiritual/ other worldly and the material. The material and economic co-exist in this vernacular vocabulary, making the use of *religion* as an analytic concept fraught with deeper problems. Therefore, she writes, "it would be inadequate to suggest that the economic argument for cow protection functioned merely as a legitimizing veneer; to the contrary, it was integrally linked to the concept of *dharma* on which Arya Samaj cow protection arguments were based."[134] This equivocality embedded in *dharma* made it possible for the Arya Samajis to use the category for welfare with religiosity immanent within it.[135] This means that the issues of faith were not expunged merely by absence of religious vocabulary. Cow protection was advocated by Arya Samaj in a community idiom as a matter of public good or national development.[136] Arya Samaj's core preoccupation with economy and welfare is a testimony of the sacred latent in the language of material transformation. Therefore, a sense of faith in the cow/religious discourse was intertwined with a material, economic understanding of welfare and *dharma*.

In order to understand the absence of (religious) faith based claims in *Mirzapur*, it is important to appreciate two forms of faiths that I have tried to outline. One is the religious faith in the cow which co-exists with the economic discourse. The other faith is the doctrinal secular faith of the law which I have called the secular mythology of the

[133] *Id.* at 302.
[134] *Id.* at 303.
[135] *Ibid.* Adcock further writes: "*Dharma* in this Arya Samaj discourse is not reducible to an economic concern, because it is concerned not only with the production of national and individual health and wealth but also with the maintenance of a moral order that necessarily precedes and supports these economic concerns." *Id.* at 307.
[136] This went a long way for Arya Samaj cow protectionists "to speak on behalf of an undifferentiated public while portraying the demands of their opponents as selfish, sectional, and unreasonable." *Id.* at 311.

courts or constitutional faith. These two forms of faiths come together in the cow protection discourse of the Supreme Court.

The secular mythology borrows the universal idiom and necessarily requires to eschew the historical specificity and contingency. This explains how broad abstract ideas used by the Court in *Mirzapur* sacrificed the immediate (social and political) context when the Court couched the dispute in terms of gratitude:[137]

> It will be an act of reprehensible ingratitude to condemn a cattle (sic) in its old age as useless and send it to a slaughter house taking away the little time from its natural life that it would have lived, forgetting its service for the major part of its life, for which it had remained milch or draught. We have to remember: the weak and meek need more of protection and compassion.

This plea for 'compassion' was misdirected in its evocation of the fundamental duty requiring 'compassion for living creatures'. On these terms what would stop an extension of this logic to buffaloes? Why should the *ingratitude* be permitted against other 'living creatures'? Kathryn Hardy in her ethnographic work with Yadav families in Varanasi has convincingly questioned the stark differentiation between the sacred cow and profane buffalo from the perspective of few low caste Yadav families who take care of buffalos. She challenges the binary classification of merely 'economic' buffalo from 'sacred' cow in the predominant scholarly discourse and argues that it reinforces the "hegemonic Brahmanical visions of the bovine world in a dichotomy that does not hold up for the buffalo-keeping Yadavs, whose counter-narratives treat the cow and the buffalo not as goddess and demon, but as two different forms of social being, bringing hegemonically negative myths about buffalo into more ambivalent terrain."[138]

Further, the Court, following a flawed logic, roped in the anti-slaughter legislations within the larger ambit of environmental protection to read them in harmony with Article

[137] *Mirzapur, supra* note 114, para 67.
[138] See, Kathryn C. Hardy, "Provincialising the Cow: Buffalo–Human Relationships" 42(6) *South Asia: Journal of South Asian Studies* 1156–1172, 1158 (2019).

48-A. This was despite the fact that neither the preamble nor the statement of objects of the Amendment Act, 1994 talked about environmental protection as even a secondary aim of the legislation. But the Court continued to follow the broad interpretive logics to include even Article 48-A[139] - which deals with preservation of environment, in harmony with Article 48 when this combination only created a bad mix.[140]

Conclusion

This chapter tried to demonstrate how the interpretive choices adopted by the judiciary in cow protection cases show the mythic elevation of the law and the Constitution to the realm of the sacred. This interpretive practice shows that the judiciary treats legislation and the Constitution as scriptures. Just as scriptures are an expression of the divine intent revealed, all laws become an expression of popular will presumably enacted for the greater good. Adopting this universalist and trans-historical interpretive stance erases the historical contingency and populist motivations of many legislations. Such interpretive approach defies any fault-lines in the Constitution and the Constitution acquires the status of a mythic, sacred, flawless, faultless and infallible document. This, perhaps, explains the absence of engagement in judicial pronouncements with any available critique of Article 48 offered by constitutional law scholars.[141] The judicial task instead has become one of erasing and silencing the constitutive contradictions rather than evaluating and struggling with the contradictions that might appear in different historical moments.[142]

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[139] Article 48-A of the Constitution reads thus: "Protection and improvement of environment and safeguarding of forests and wild life. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."

[140] The Court simply asserted the following: "Cow progeny excreta is scientifically recognized as a source of rich organic manure. It enables the farmers avoiding the use of chemicals and inorganic manure. This helps in improving the quality of earth and the environment. The impugned enactment enables the State in its endeavour to protect and improve the environment within the meaning of Article 48A of the Constitution." *Mirzapur, supra* note 114, para 50.

[141] Granville Austin asserted that Article 48 ideologically enshrines the 'Hindu sentiment' as a constitutional provision. In his words: "[a]s various provisions of the Irish Constitution show that Ireland is a Roman Catholic nation, so Article 48 shows that Hindu sentiment predominated in the Constituent Assembly." Austin, *supra* note 3 at 82. In 1967, Baxi, argued that some directive principles and "objectives are more important than others […] there are a few whose worthiness for enshrinement in the Constitution is open to question." He goes on to suggest that this "would seem especially true of the two principles pertaining to prohibition of cow killing and to prohibition of liquor." Baxi, *supra* note 79 at 346.

[142] Austin, *supra* note 3 at 82.

However, one must remain mindful of the *minor jurisprudence* of the Supreme Court which contests the deferential mode of legal/ constitutional interpretation.[143] I have argued that *Faruk* presents such a possibility. This alternative approach advocates a critical reading of the law and does not shy away from pointing out the historical motivations and populist impetus that appear in the process of law making. Unfortunately, this interpretive approach flared only briefly in the judicial discourse and vanished soon thereafter. Nevertheless, it represents an alternative potential of emergence of a historically informed jurisprudence. A jurisprudence that is mindful that universal doctrines must be grounded in the historical and political contexts.

This chapter has traced the mythic fragments of the interpretive doctrines despite their secular pretentions. This mythology of judicial interpretation remains expunged from the discourse of universalist application of legal doctrines. An analysis of the judicial decisions on cow protection illustrates that such interpretive approach has only led to the aligning of the Court with the Hindu sentiment despite claiming to be a neutral arbiter. Perhaps by acknowledging and appreciating the mythological and scriptural attitudes of the judiciary, we would be able to notice and learn about the limitations of its functioning in the evaluation of cow protection laws.

[143] The notion of 'minor jurisprudence' as a category exploring the 'minor' as "the crack in the edifice, the fissure in discourse, a site of incompatibility and novelty that Foucault more patulously termed the diffraction of discourse" is developed by Peter Goodrich. See, Peter Goodrich, "How Strange the Change from Major to Minor" 21 *Law, Text, Culture* 32 (2017). Also see, Christopher Tomlins, "Law As...IV: Minor Jurisprudence in Historical Key. An Introduction" 21 *Law, Text, Culture* 1-29 (2017).

CHAPTER 4

MYTHOLOGY AS/AND HISTORY IN INDIAN COURTROOMS: THE AYODHYA DISPUTE

Introduction

The Ayodhya dispute is related to a piece of land measuring 1500 square yards on which stood the Babri Mosque and some Hindu sites of worship adjoining the mosque. The land is situated in Mohalla Ramkot, Faizabad district, Ayodhya, in the state of Uttar Pradesh (U.P.), in India. Spanning the Mughal empire, colonial rule and the present constitutional regime, the dispute, in the words of the Supreme Court of India, originated with "the idea of India itself."[1] In 1856-57, following a communal riot between Hindus and Muslims, spaces of worship for the two communities were segregated. The British colonial government erected a grill-brick wall dividing the disputed land into what came to be known as the inner and outer courtyards.[2] The inner portion of the courtyard, where the mosque was situated, was demarcated for exclusive worship by the Muslims. The outer portion which had structures of religious significance for the Hindus (the Sita *rasoi* and a platform called the Ram *chabutra*) was given to exclusively to Hindus.

Partition, in 1947, did not ease the tensions since the Hindu community claimed that the disputed land- specifically the central dome of the mosque in the inner courtyard- was the birthplace of Lord Ram. They also claimed that the Mughal emperor, Babur, demolished an ancient temple that existed on the site in order to construct the mosque.[3] The Muslim community denied the historical basis of any such demolition. They pleaded that the Hindus continually attempted to damage and defile the mosque constructed by Babur in 1528.

[1] *M Siddiq (D) Thr Lrs* v. *Mahant Suresh Das & Others* (2020) 1 SCC 1 [Hereafter, "*Ayodhya case"*]. All references from the judgment are from the official Supreme Court website, *available at*: https://www.sci.gov.in/pdf/JUD_2.pdf. *Id.* at 6 (para 2).
[2] *Id.* at 63 (para 46).
[3] *Ibid.* ("The Hindus assert that there existed at the disputed site an ancient temple dedicated to Lord Ram, which was demolished upon the conquest of the Indian sub-continent by Mughal Emperor Babur.").

The Hindu community called upon the courts to adjudicate the mythological claim of the land as the sacred birthplace of Lord Ram.[4] The claim was contested by Muslims who argued that the land belonged to them as a public mosque existed on the site since the16th century. Modern law was required to settle this dispute which collapsed myth into history. In this sense, the Ayodhya dispute is integrally linked to the broad theme of this dissertation that attempts to study the intersection between law, myth and modernity.

Five suits were instituted over a course of forty years. The details of the persons and institutions filing the suits will be discussed at length in section II. The first suit (suit no. 1) was filed in 1950 in the district court of Faizabad seeking permission to worship the idols placed inside the mosque. The second suit (suit no. 2) was filed by Paramhans Ram Chandra Das in 1950 but it was withdrawn on December 18, 1990. The third suit was filed by managers of the temple, Nirmohi Akhada (suit no. 3) in 1959. The Sunni Waqf Board and nine Muslim residents filed a representative suit (suit no. 4) for declaration of the status of the Mosque in 1961. Finally, the fifth suit was filed in 1989 by the Hindu idol of Lord Ram (suit no. 5) acting as juristic person, a concept discussed in detail in section III, for the ownership and title of the disputed land. All these suits were taken together by the Allahabad High Court which delivered its verdict on September 30, 2010.[5] By a majority of 2:1, the High Court decided a three-way partition of the disputed land. In this tripartite partition, two portions were awarded to the Hindus and one was given to the Muslims. Sudhir Agarwal and Sibghat Ullah Khan, JJ., speaking for the majority, awarded one third portion to the Hindu idol, which is always represented by a human person called in legal terminology as 'the next friend' of the idol (Suit no.5). One third of the open area of the outer courtyard was given to Nirmohi Akhara (suit no. 3), who were claiming the property as managers of the temple. Finally, the leftover share

[4] The terms Hindu and Muslim community used in this chapter follow the usage by the Supreme Court in its judgment. It will become clear in the course of the discussion that the reference to the communities does not represent the views of these communities in totality. Indeed, there was a conflict between the Hindu parties, discussed later, representing the deity (suit no. 5) and the managing of the affairs of the temple (suit no. 3). The usage is more as a matter of clarity than representative of claims made by the communities at large.

[5] *Gopal Singh Visharad* v. *Zahoor Ahmad,* 2010 SCC OnLine All 1935 [Hereafter, "*Allahabad High Court judgment"*]. The entire text of the judgment with annexures is available on the official website of the Allahabad High Court. *Available at*: http://elegalix.allahabadhighcourt.in/elegalix/DisplayAyodhyaBenchLandingPage.do.

was awarded to the Sunni Central Waqf Board (suit no. 4) that represented the Muslim side.

The majority judges also clarified that partition of the land must be done in such a way that the portion of the inner courtyard, where idols were installed in 1949, must be given to the Hindu community. The dissenting judge, Dharam Veer Sharma, J., dismissed the entire case of the Muslim side, and awarded the entire disputed land to the Hindus. In their reasoning, both S. Agarwal, J. (the majority judge) and D.V. Sharma (dissenting judge) arrived at the conclusion, by referring to Islamic texts "to prove that the Masjid was not validly built (sic.) under Islamic law; and Hindu text to (sic.) claim and assert that the Indian law on limitation […] does not and cannot apply to idols, to properties held by them and even to the sites on which they are placed, while they, on their part, can acquire title to other properties by adverse possession."[6] S.U. Khan, J., despite his agreement with the final outcome, dismissed the arguments accepted by his co-judges about the mosque being invalid according to the tenets of Islam or the non-application of limitation law on the deities (due to their claim of perpetual minority). He also rejected the claim that the site where the idols were placed constituted a legal person. In this sense, despite his agreement with the eventual outcome, Khan, J. dissented from the reasoning adopted by the other two judges. I will devote section V of this chapter to his judgment and demonstrate that he was the only judge who foregrounded the question of violent dispossession of the mosque and the role played by the administration and the judiciary in perpetuating criminal actions by the Hindu side. This judgment of the Allahabad High Court was appealed in 2010 itself by all the parties challenging the tripartite partition in the Supreme Court of India.[7]

On November 9, 2019, in *M Siddiq (D) Thr Lrs* v. *Mahant Suresh Das & Others*[8] (hereafter, *Ayodhya case*) the five-judge bench[9] of the Supreme Court, setting aside the

[6] A.G. Noorani, *Destruction of Babri Masjid: A National Dishonour* 2 (Tulika Books, New Delhi, 2014).
[7] For an analysis of the High Court decision, see, Ratna Kapur, "The 'Ayodhya' Case: Hindu Majoritarianism and the Right to Religious Liberty" 29 *Md. J. Int'l L.* 305 (2014); Kumkum Roy, "Issues of Faith" XLV (50) *Eco. & Pol. Weekly* 53-60 (2010); G. Arunima, "Ayodhya Verdict: Bad Theology, Without Justice" XLV (41) *Eco. & Pol. Weekly* 13-14 (2010).
[8] *Ayodhya case, supra* note 1.

verdict of the three-judge bench of the Allahabad High Court, decided the dispute in favour of Hindus, handing over the1500 acres of land, in its entirety, to the Hindu community for the construction of a temple.[10] In an unprecedented move, the unanimous Supreme Court judgment kept the authorship of the judgment anonymous. This authorial anonymity continued with an addendum written by one of the five judges. Although, a careful attention to the social, political and historical context has been my concern throughout this study, the uniqueness of this dispute requires outlining of the political context in greater detail than in previous chapters. It is my argument that the greatest flaw of the Supreme Court judgment lies in its studious attempt to grossly underplay the political context surrounding the dispute. Its lukewarm description of the 1949 desecration of the mosque as something done "otherwise than by the due process of law"[11] and the obliteration of the mosque in 1992 as "an egregious violation of the rule of law"[12] without any serious engagement with these events or their impact demonstrates the conspicuous silence of the Court on the question of (communal) violence.

This chapter is an attempt to uncover the hidden aspects in the narrative of the Court, focusing on what it tries to suppress, exclude and erase. The previous chapters of this thesis indicate how the judicial interpretation misreads, obfuscates or selectively use the previous precedents. In this chapter, I will follow a similar approach with respect to the other related cases that are inter-textual in the sense that they are linked with the Ayodhya dispute. I will also show how the Supreme Court judgment eclectically engages with those aspects of the Allahabad High Court judgment which suit its narrative construction. It bypasses those parts of the High Court judgment which highlight the complicity of the executive and judicial wing in a partisan manner. In mapping this trajectory, I hope to excavate the political theology that guides the jurisprudence of the Supreme Court despite all its attempts to veil it in the language of law. For the sake of clarity, the chapter is divided into six sections, which analyse the judgment from different vantage points.

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[9] Ranjan Gogoi, CJ., & S.A. Bobde, Dr. Dhananjaya Y. Chandrachud, Ashok Bhushan and Abdul Nazeer, JJ.

[10] *Ayodhya case*, *supra* note 1 at 926 (para 805).

[11] *Id.* at 913 (para 788).

[12] *Id.* at 914 (para 788).

Section I deals with the event of the mosque demolition in 1992 and discusses varied judicial responses to the legal and political questions raised by the demolition, tracing how the Supreme Court opened two pathways to engage with the event of desecration. *S.R. Bommai* v. *Union of India* (1994)[13] shows the first path, where the Apex Court took the political context of the demolition head on and sought to uphold the secular fabric of the Constitution not only in letter but in spirit. The second way to approach the question of demolition of a sacred structure of the minority community by militant majority mobs was illustrated in *Ismail Faruqui* v. *Union of India* (1994),[14] which was decided after *Bommai*. In this case, I will show, that the Supreme Court not only underplayed the violence but further alienated the Muslim community. Unfortunately, the Supreme Court in the *Ayodhya case* followed the latter path in sanitizing the political context and erasing the possibilities of justice based on non-negotiable secular values instituted in *Bommai*.

Section II analyses the historical events of 1949 arguing that the beginning of the controversy immediately after independence and the partition deserves more attention. Section III tries to understand the phenomenon of gods as litigating actors to the dispute by analysing the unique characteristic of the Indian law where the Hindu idol is conferred a juristic personality. Section IV outlines the central tenets and legal principles of civil law applied in arriving at the final decision of the ownership of disputed land. I argue that in assessing the pre-colonial history of the dispute, the Supreme Court appears to have fallen in an *orientalist* trap in as much as it adopted a faulty dual standard in its assessment.

Section V maps the history of the Ayodhya dispute through a comparative reading of the Supreme Court judgment, on the one hand, and S.U. Khan's, J. (dissenting) opinion in the Allahabad High Court decision, on the other. This section critiques the Apex Court's silence regarding judicial complicity in the violence that ultimately *let* the majority to bring down the structure of the mosque: the judiciary was thus not just instrumental in the post-facto validation of the act but was also crucial in its pre-facto authorisation.

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[13] *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1 [Hereafter, "*Bommai*"]. The reader might recall that we have referred to *Bommai* and its absence in the *Hindutva judgments* in chapter 2. I will discuss the context and outcome of this case in this chapter more elaborately.

[14] *Dr. M. Ismail Faruqui* v. *Union of India* (1994) 6 SCC 364 [Hereafter, "*The Land Acquisition case*"].

Finally, section VI looks at the anonymous *addendum* which, I argue, is an illustration of law as mythology in as much as it collapses all distinctions between faith-fact, mythology-history, and belief-evidence to arrive at a partisan verdict.

I. The Demolition of Babri Mosque and its Aftermath

On December 6, 1992, in "the most devastating political/religious conflagration on the Indian subcontinent since Partition",[15] the entire structure of the Babri mosque was dismantled. A mob of right-wing Hindu nationalists razed the mosque under the political patronage of various nationalist political organisations.[16] The central government imposed President's rule in the states of Rajasthan, Madhya Pradesh and Himachal Pradesh on the grounds of tacit or express collusion of some of the highest public officials in the demolition.[17]

A nine-judge bench of the Supreme Court was constituted to decide on the validity of the imposition of President's Rule in these states. The Supreme Court in *Bommai* (1994)[18] approved the imposition of state emergency under Article 356 of the Constitution in all three states. The Supreme Court, by majority of 7:2 reasoned that the state governments dented the constitutional promise of secularism which is a part of the basic structure of the Constitution.[19] The Supreme Court was candid in entering the political thicket

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[15] Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* 129 (Princeton University Press, New Jersey, 2003). Sunil Khilnani mentions the destruction as "the most piercing assault ever faced by the Indian State, one that shook its basic political identity." Sunil Khilnani, *The Idea of India* 151 (Farrar Straus Giroux, New York, 1997).

[16] The Vishwa Hindu Parishad (VHP), the Rashtriya Swamsevak Sangh (RSS) and the Bajrang Dal, militant Hindu nationalist organisations, were banned by the central government after the demolition of the mosque.

[17] The Chief Minister Kalyan Singh of the government of Uttar Pradesh, the state in which the town of Ayodhya is situated, itself tendered his resignation after the event of demolition.

[18] *Supra* note 13. Article 356 of the Indian Constitution comes under the head of 'Emergency Provisions' which allow imposition of the Federal/ President's Rule where the President can dissolve the Legislative Assembly of any state and dismissing the state government, if he is satisfied that the government in incapable of functioning under the provisions of the Constitution. It is the Central/ Federal government that effectively takes over the governance during the time of President's Rule. In India, this power *de facto* is vested with the council of ministers headed by the Prime Minister.

[19] The Supreme Court has declared that the basic structure cannot be amended even in the exercise of amendment power in the Constitution in *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225. The *Bommai* decision specifically extended the doctrine of basic structure to the ideal of secularism. A comprehensive analysis of the basic structure doctrine can be found in Sudhir Krishnaswamy, *Democracy and Basic Structure Doctrine* (Oxford University Press, New Delhi, 2010).

surrounding the demolition. One of the majority judges, B.P. Jeevan Reddy, J. went on to analyse the manifesto of the Bhartiya Janta Party (BJP) in its commitment to "build[ing]Sri Ram Mandir at Janmasthan", along with the actions and exhortations of prominent leaders of the party as inciting such an outrage.[20] The echoes of the event of the mosque demolition triggered not just national but international reverberations and the landmark decision of *Bommai* etched them in the judicial archive.[21]

On January 7, 1993, an ordinance was issued by the President of India, later superseded by the Acquisition of Certain Areas at Ayodhya Act, 1993. Section 4 (2) of the Act allowed the central government to acquire the disputed land and the land adjacent to the disputed site. Clause (3) of the section provided for abatement of "all the suits and legal proceedings" extinguishing the judicial remedy available to the parties. The enactment and consequent acquisition of land by the central government were challenged before five-judge bench of the Supreme Court in the *Land Acquisition Case* (1994).[22] The Supreme Court by a thin majority of 3:2 upheld and approved the temporary acquisition of the land till the final adjudication of the title suits. The Apex Court was unanimous in declaring section 4(3) of the Act unconstitutional as it annulled the judicial remedy available to the parties (which revived the claims of the title to the disputed land which were pending in the Allahabad High Court).[23] Except for this provision, the majority (J.S. Verma, J. wrote the opinion on behalf of himself, M.N. Venkatachaliah, C.J., G.N. Ray, J.) upheld the constitutional validity of the Act.

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[20] *Bommai*, *supra* note 13, para 433 (per B.P. Jeevan Reddy, J.): "The communal situation was tense. It could explode anywhere at any time. On the material placed before us, including the reports of the Governors, we cannot say that the President had no relevant material before him on the basis of which he could form the satisfaction that the BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot dissociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of the disputed structure, cannot be dissociated from the acts and deeds of the leaders of BJP." Also see, *Bommai*, *supra* note para 156 (per K.Ramaswami, J.).

[21] The Court decried and bemoaned the events resulting in demolition as a 'serious blow' to peace as well as harmony both at the national and international level.

[22] *Supra* note 14.

[23] All the suits pending in the local courts were transferred to the Allahabad High Court for final decision in July 1989. On Aug. 14, 1989, an interim order was passed by the High Court to maintain the *status quo* on the disputed land till the final adjudication by the Court. The 1992 demolition took place despite these orders.

According to the majority judges, the mosque as a place of worship is at par with other places of worship which too can be acquired by the State.[24] Section 7(2) of the Act ensured the *status quo* and non-alteration of "the position existing before the commencement of this Act". The position which existed before the midnight or night of January 6, 1993 (date of the Presidential ordinance) was thus maintained. The challenge to the legislation was made on the ground that it gives preferential treatment to the Hindu community and thus is a violation of the principle of secularism. The majority judges, rejecting this argument, stated:[25]

> While offer of prayer or worship is a religious practice, its offering at every location […] would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion […] Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

This abstract statement discounted the fact that the inner portion of the site had belonged to Muslims since colonial times. The *status quo* also meant that worship by the Hindu community continued despite demolition. The sting of injustice became more poignant as idols (whose worship was legitimised by this decision) were placed at the disputed site on December 6, 1992, after the demolition (these idols, it may be noted, were installed in addition to the ones placed inside the mosque during the events of 1949 which will be discussed in section II).

While the Supreme Court in the *Land Acquisition case* allowed the worship of these idols without any hesitation, it did not permit Muslims to offer prayers there despite the violence perpetrated upon them. This was done by making the strange observation that "[a] mosque is not an essential part of the practice of the religion of Islam and *namaz*

[24] *The Land Acquisition case, supra* note 14 ("[a] temple, church or mosque etc. are essentially immovable properties […] [e]very immovable property is liable to be acquired […] a mosque does not enjoy any additional protection which is not available to religious places of worship of other religions." *Id.*, para 81 (per J.S. Verma, J.).
[25] *Id.,* para 78.

(prayer) by Muslims can be offered anywhere, even in open."[26] These comments slipped in from the majority, speaking through J.S. Verma, J., despite the fact that this question was neither an issue nor pleaded by the parties to the case.[27] This oddity of the judgment was coupled with its turning the entire episode of demolition upside down by suggesting that the maintenance of *status quo* by the Act was detrimental to the Hindu community. This is because the Hindus had to pay the price of the mob violence in the form of a curtailed right to worship, as the mob had also damaged the Ram *chabutra* in the outer courtyard which was now no more available to Hindu worship. The Hindu community, the majority judges of the Supreme Court observed, had to 'bear the cross' on its chest:[28]

> The provision does not curtail practice of right of worship of the Muslim community in the disputed area, there having been de facto no exercise of the practice or worship by them there at least since December 1949; and it maintains status quo by the freeze to the reduced right of worship by the Hindus as in existence on 7-1-1993. However, confining exercise of the right of worship of the Hindu community to its reduced form within the disputed area as on 7-1-1993, lesser than that exercised till the demolition on 6-12-1992, by the freeze enacted in Section 7(2) appears to be reasonable and just in view of the fact that the *miscreants* who demolished the mosque are *suspected to be persons professing to practise the Hindu religion*. The Hindu community must, therefore, *bear the cross on its chest*, for the misdeed of the miscreants reasonably suspected to belong to their religious fold.

The two dissenting judges (A.M. Ahmadi and P. Barucha, JJ.) took a contrary view to this argument quoted above, and arrived at the conclusion that the entire legislation was

[26] *Id.* para 82.
[27] In 2018, the question with respect to these observations was raised before a three- judge bench of the Supreme Court. The bench had to clarify that the observations on 'mosque' and 'namaz' must be read as limited to the facts of the case. The "observation need not be read broadly to hold that a mosque can never be an essential part of the practice of the religion of Islam." *M. Siddiq (D) Thr. Lrs.* v. *Mahant Suresh Das & Others* (2018) SCC online SC 1677 (per Ashok Bhushan, J., for himself and Deepak Misra, J., decided on 27 Sep., 2018). *Id.*, para 59.
[28] *The Land Acquisition case*, *supra* note 14, para 53 (emphasis added).

unconstitutional. They observed that permitting worship of the trafficked idols betrayed the spirit of secularism:[29]

> [N]o account is taken of the fact that the structure thereon has been destroyed in a most reprehensible act (sic) […] No account is taken of the fact that there is a dispute in respect of the site on which puja is to be performed […] the disputed structure was being used as a mosque; and that the Muslim community has a claim to offer namaz thereon.

Why and how did worship of Hindu idols begin inside the mosque? How were Hindu idols present inside the central dome of the mosque in the inner courtyard when the colonial administration had earmarked it for Muslims? To answer these questions, we need to travel back to the events on the night of December 22, 1949 which revived the Ayodhya controversy in the courts of independent India.

II. Hindu Worship inside the Mosque: The Events of December 22/23, 1949

On December 22, 1949, Abhiram Singh, a militant Vaishnavite ascetic belonging to the Ramanandi sect, clandestinely trespassed inside the Babri mosque situated in the inner courtyard. He was accompanied by a few other co-conspirators. Together, they had hatched the plan of putting the idols of the Hindu god, Ram, inside the central dome of the mosque. The execution of the plan required the installation to appear miraculous, some form of *deus ex machina* "[y]et the miracle, before it could happen, had to be adjusted with the duty hours of the guard who had been won over."[30]

The trespass required precise and calculated timing just before the midnight hour "[f]or a Muslim guard, Abul Barkat, was to take charge after that."[31] By the time the new guard took his duty, the idol, with the silver throne, was smuggled inside the mosque with other material required to perform worship. Gopal Singh Visharad, a prominent member of the Hindu Mahasabha, who instituted the first civil suit in the Faizabad district court on

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[29] *Ibid.*
[30] Krishna Jha and Dhirendra K. Jha, *Ayodhya the Dark Night – The Secret History of Rama's Appearance in Babri Masjid* 74 (Harper Collins, Delhi, 2016).
[31] *Ibid.*

January 16, printed pamphlets and posters "which announced the 'miracle' of reclaiming Babri Masjid"[32] and exhorted the Hindus to gather at the spot in large numbers to witness the 'miracle.' A motley gathering of Hindu worshippers gathered around the site the next morning. As planned, Abhiram Singh with his gang began worship and lit the lamp inside the mosque in early hours of the morning celebrating the supposed appearance of Ram. "The compassionate god has miraculously appeared" (*Bhaye prakat kripala deen dayala*), chanted the gathering of Hindu worshippers. The ascetics in huge numbers started performing elaborate ceremonies and religious hymns (*kirtan*).

The encouragement for the *kirtan* was provided by none other but Shakuntala Nair, wife of the district magistrate of Faizabad district, K.K.K. Nair. Nair's active participation in legitimising the worship of the illegally trespassed gods inside the mosque, archived in the judgment delivered by the Allahabad High Court, which we will discuss in section V, enabled him to retire early from public life. He and his wife were duly rewarded politically for their efforts.[33] This scandalous placing of idols inspired and provided an *elan vital* for Hindu majoritarian forces to re-kindle the Ayodhya dispute. The installation of the idols was just one of the many phases in the long-standing Ayodhya dispute. The historical origins of the dispute are discussed in the next section, however, this event in 1949 certainly became the foundation for the dispute to enter the judicial process in independent India.

On the afternoon of the same day when the conspiracy to smuggle the idols inside the mosque took its final turn at Ramkot, another group of people awaited a train at the Nagpur railway station. The wait culminated with the arrival of the Vinayak Damodar Savakar. He was the face of the Hindu Mahasabha and a staunch advocate for India to become a Hindu nation.[34] The Indian Constitution was adopted on November 26, 1949.[35] The official *commencement* of the Constitution and formation of the Indian republic took

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[32] *Id.* at 77.

[33] Shakuntala Nair was offered a ticket from the Gonda constituency by All India Hindu Mahasabha. She became a Member of Parliament (M.P.) in 1952. K.K.K. Nair became an M.P. in 1967 "on a ticket from Jana Sangh, an off shoot of Hindu Mahasabha." *Jha and Jha, supra* note 30 at 92.

[34] *Id.* at 18-14.

[35] See, the Preamble, Constitution of India*:* "In our Constituent Assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution."

place on January 26, 1950.[36] These two constitutional landmarks stand in contrast to the alternative ideological terrain that underpinned the temple event.

Savarkar's visit to Nagpur was a brief halt on his way to inaugurate the twenty-eighth session of the Hindu Mahasabha in Calcutta on November 24, 1949, the first session after the assassination of Mohandas Gandhi.[37] The revival of the Hindu Mahasabha session historically coalesced with the resurgence of the Ayodhya dispute in Faizabad. On the day when Lord Ram was made to sneak inside the mosque at night at the behest of his devotees, Savarkar in Nagpur bemoaned the constitutional aspirations of the secular Indian State. "The talk of secular state," he observed, "is absurd in a country which is inhabited largely by Hindus, and it is their proud task to establish a Hindu Rashtra."[38]

These historical coincidences, noted by Jha and Jha in their ethnographic study, provide the context to the Ayodhya dispute and its interpellation with the formation of the Indian constitutional republic. The strain between Hindus and Muslims was high due to the partition of India leading to the creation of Pakistan and resulting in the death of millions. The rupture of the partition constituted the *foundational violence* of India. The backdrop of the partition aided Hindu nationalist forces in appropriating the Ayodhya dispute to link Hindu identity as a nationalist demand for the formation of the Hindu temple at Ayodhya.[39] The demand for a temple at Ayodhya became symbolic of the Hindu nation theory for the Hindu Mahasabha. This gave Ayodhya an unprecedented prominence in the rise of Hindu nationalism. The Hindu nationalists of the Ram janambhumi movement made the building of a temple at Ayodhya the central plank for a revival of the idea of a Hindu nation.

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[36] Article 394, Constitution of India states that "the remaining provisions of this Constitution shall come into force on the twenty sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution."

[37] *Jha & Jha, supra* note 30 at 19.

[38] *Ibid*.

[39] Decades later, two prominent leaders of Bhartiya Janata Party (BJP) echoed this sentiment, linking Ayodhya to the nationalist cause: Atal Bihari Vajpayee remarked that "the campaign for a *mandir* in Ayodhya has proved to be a unifying factor […] not only for the Hindu society but for the whole nation." *Hindustan Times* (Sep. 24, 1990). Lal Krishna Advani described the issue as "the basis of nationalism in India." *The Telegraph* (Sep. 13, 1990). Cited in A.G. Noorani, *The Babri Masjid Question, 1528-2003,* vol. I, xxxiii (Tulika, New Delhi, 2014).

The event of idol installation was not isolated. It was preceded by almost a month of confrontations between the two communities as some ascetics (*bairagis*) "infiltrated a Muslim cemetery near the masjid, squatted on the graves and ignited sacred fires there to emphasize their claim that the area was originally Hindu religious space."[40] Harold A. Gould argues that the idol-installing incident was "carefully orchestrated […] by […] civil servants with a very definite political agenda."[41] One of them, the aforementioned district magistrate, K.K.K. Nair, "was notoriously pro-Hindu, a member of the Rashtriya Swayamsevak Sangh (RSS)."[42] Nair vehemently resisted the attempts of the government to restore the state of things by removing of idols transported illegally inside the mosque. He pleaded that violence will ensue if any attempt is made to remove the idols. This led to the attachment of the disputed property by the order of the judicial magistrate.[43]

Nair played an important role in ensuring that worship of the idols continued despite the attachment of the property. "Under the Magistrate's order, only two or three *pujaris* were permitted to go inside the place where the idols were kept, to perform religious ceremonies like *bhog* and *puja*. Members of the general public were restricted from entering and were only allowed *darshan* from beyond the grill-brick wall."[44] The Hindus in general offered worship from outside the locked door. The Muslims were entirely debarred from offering *namaz* at the place which was a mosque before the incident. The administrative complicity and permission of worship despite aggression was almost a farcical repetition of history that was bemoaned by the two dissenting judges of *Ayodhya Land Acquisition Case* when the majority of judges upheld the acquisition of land by the central government allowing the worship of the new idols.

The first petition asserting the Hindu right to worship (suit no. 1) was filed by Gopal Singh Visharad before the civil judge of Faizabad on January 16, 1950, a plea of an ardent Hindu devotee denied his right to worship the idols inside the mosque by the local

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[40] Harold A. Gould, *Grass Roots Politics in India: A Century of Political Evolution in Faizabad District* (1994), cited in A.G. Noorani, *The Babri Masjid Question, 1528-2003,* vol. I, 209 (Tulika, New Delhi, 2014).
[41] *Ibid.*
[42] *Id.* at 208.
[43] Section 145, Criminal Procedure Code, 1898.
[44] *Ayodhya case*, *supra* note 1 at 11 (para 12).

administration. He alleged that government officials, including Nair, one of the defendants, prevented him from offering worship to the deities. His role in publishing pamphlets to mobilise Hindu worshippers to arrive at the site in the morning of November 23, 1949 was peacefully erased in the legal discourse.

After almost seven decades, on November 9, 2019, the Supreme Court of India, in its final verdict, declared that the "right of the plaintiff in Suit 1 to worship at the disputed property is affirmed subject to any restrictions imposed by the relevant authorities."[45] Merely a few pages earlier, the Court noted, in the context of surreptitious installation of idols in 1949, that the "ouster of the Muslims on that occasion was not through any lawful authority but through an act which was calculated to deprive them of their place of worship."[46] How can an unlawful act that was manoeuvred to dispossess Muslims from the site of the mosque found affirmation by the Supreme Court? If the deities were put inside the mosque in violation of law, then, by what logic could the worship of illegitimately placed deities be pleaded in the first place in suit no. 1? The suit for worship was instituted by the plaintiff who was complicit in the act of installation. Neither his complicity nor the organised conspiracy of the local administration was adequately addressed or adversely commented upon by the Apex Court. What should one make of the condemnation by the Apex Court of the events of 1949? This and many such compelling elisions and erasures haunt the judicial reasoning in its final 'resolution' of the Ayodhya dispute.

Other suits were also taken together for final adjudication. Suit no 2, instituted by Paramhans Ram Chandra Das on December 5, 1950 was similar to the first suit. However, this suit was withdrawn on December 18, 1990.[47] Suit no. 3 was instituted on December 17, 1959 by the Nirmohi Akhara, a branch of the Ramanandi sect. The Nirmohis impleaded themselves as managers (*shebaits*) of the temple with their grievance that with the attachment of the property they were "wrongfully deprived of the management and charge of the temple."[48] It was constantly asserted in this suit that no

[45] *Id.* at 927-928 (para 805).
[46] *Id.* at 922 (para 798).
[47] *Id.* at 12 (para 14).
[48] *Id.* at 36 (para 36).

mosque ever existed on the site but it was always a temple of Lord Ram, from which the Nirmohis managed and received offerings.

Suit no. 4 was filed by Sunni Central Waqf Board and nine Muslim residents as a representative suit for the Muslim community on December 18, 1961 seeking for the declaration, and pursuant relief, that the disputed property was a sixteenth century public mosque.[49] They argued that the acts of defilement and eventual demolition has deprived their claim to the mosque and the "cause of action for the suit arose on 23 December 1949 when the Hindus […] plac[ed] idols inside the mosque."[50]

Lastly, suit no. 5 was filed on July 1,1989 by the deities themselves, through plaintiff Sri Deoki Nanadan Agarawala, a former judge of the Allahabad High Court.[51] He acted in the capacity of the next friend of the deities,' the idol, *Sri Ram Lalla Virajman*, (first plaintiff) and the land, *Asthan Sri Ram Janambhumi*, Ayodhya, in and of itself a juristic person (second plaintiff) "since it personifie[d] the divine spirit worshipped in the form of Ram."[52] This brought in the question of the deity as an artificial juristic personality. In the next section, I will discuss this unique legal concept and its application by the Supreme Court of India in the Ayodhya dispute.

III. Idol as Juristic Person

A legal personality is the recognition of a subject in the eyes of law. It is a necessary recognition to assert any legal entitlement, claim or capability to enter into legal relations with others. The Supreme Court in the *Ayodhya* case observed that the "ability to create or recognise legal persons has always varied depending upon historic circumstances."[53] At one point of time even natural persons were denied the recognition of legal

[49] *Id.* at 38-39 (para 38).
[50] *Id.* at 41 (para 38).
[51] *Id.* at 45 (para 40).
[52] *Id.* at 46 (para 40). This suit, *inter alia*, contested suit no. 3 of Nirmohi Akhara accusing them of mismanagement and misappropriation of the offerings made to the deity. This shows how the monolithic expression 'Hindu community' is used generally by the Court without necessarily meaning that the entire community is represented in one voice.
[53] *Ayodhya case*, *supra* note 1 at 127 (para 88).

personhood.[54] However, soon the legal process inaugurated ways to grant personhood not only to natural persons but also to artificial entities. The ascription of legal personality to material objects which are not natural persons forms the core of artificial legal personality. Such conferring of juristic personality is possible by way of legislation or judicial interpretation.

The recognition of the Hindu idol as a distinct judicial person was a creation of judicial interpretation. The attribution of an artificial juristic personality to idols arose from a peculiar historical necessity. Large tracts of land were dedicated by Emperors in pre-colonial times for the creation of Hindu shrines.[55] These dedicated properties, for religious or charitable purposes, known in Hindu law as *debutter* properties, were managed and cultivated by *shebaits* ('managers' of property dedicated for religious purpose). *Shebaits* were not the owners of these large lands in a strictly legal sense. With the escalation in the value of endowed property, various disputes arose in the nineteenth century concerning *debutter* property, idols and endowments.[56] The disputes with respect to ownership and management of the *debutter* property came up before the colonial courts "for the first time in late nineteenth century."[57] Three important cases decided by the High Courts of Bombay (now Mumbai), Madras (now Chennai) and Calcutta (now Kolkata) consolidated the attribution of artificial personality to the idol as a matter of convenience and practical necessity.

Idol as a legal person in colonial times

The first case was decided by the Bombay High Court in *Manohar Ganesh Tambekar & Others* v. *Lakshmiram Govindram* (1888).[58] A temple was dedicated to the deity, Shri Ranchhod Raiji. The plaintiffs (Tambekar and others) approached the High Court as

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[54] The classic instance was the upholding of racial law by the U.S. Supreme Court denying personhood to blacks as late as the nineteenth century in *Dred Scott* v. *Sandford* 60 U.S. (19 How.) 393 (1857). For a critical discussion see, Jack M. Balkin & Sanford Levinson, "Thirteen ways of Looking at *Dred Scott*" 82 (1) *Chicago-Kent Law Review* 49 (2006).
[55] In chapter 1, we noted, in *Nathdwara Temple* case, that Emperor Akbar granted a *firman* for establishing the Shrinathji temple at Nathdwara.
[56] *Ayodhya case, supra* note 1 at 148 (para 106).
[57] *Id.* at 149 (para 108).
[58] (1888) ILR 12 Bom 247.

'persons interested' in the religious foundation. They pleaded for imposing accountability on the defendants (managers of the religious foundation), by appointing an official receiver to the property.[59] The defendants, described as *shevaks* (or ministers) argued that they "are the owners, for all secular purposes, of the idol, whom, in the spiritual sense, they serve."[60] The offering of prayers to the deity, they argued, was a duty of "a purely moral kind, which they discharge merely to satisfy their conscience […] by their own will and judgment."[61] The issue was whether the defendants, who were also beneficiaries of the offerings made to the temple property, can be obligated for a proper management of the temple property? Or, they have ownership rights over the temple property in a private capacity in which case they cannot be sued by an external party for improper management.

The judge in this case, Robin West, J. acknowledged that like Roman law, the traditional Hindu law also accepted "the juridical persons or subjects called foundations."[62] However, unlike the English common law which mandates the formation of a 'trust' for endowed religious property, there was no such need if the property was endowed by a Hindu for religious or charitable purpose. Customarily, the rulers and emperors maintained an endowment in accordance with the will of the person who endowed the property. They were required to safeguard the property "as it [was] consistent with his own dharma or conception of morality."[63] Endowing a judicial personality to an idol under Hindu law and accepting the claim of the plaintiff, the Court observed:[64]

> [I]f there is a juridical person, [which is] the ideal embodiment of a pious or benevolent idea […] this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession […] incur thereby a responsibility for its due application to the

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[59] *Ibid.* (per Robin West, J.) ("The income of the temple having, as they say, largely increased, and being wrongly or unduly appropriated by the defendants, called generally the *shevaks* (or ministers), to their personal purposes, they pray for the appointment of a receiver for the exaction from the defendants of accounts of their management").
[60] *Id.,* para 3.
[61] *Ibid.*
[62] *Id,.* para 11.
[63] *Ibid.*
[64] *Ibid.*

> purposes of the foundation […] They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for maladministration.

The Bombay High Court was not inventing the idea of idol as an artificial legal person. It was only consolidating the position and reverence given to property under traditional Hindu law dedicated for religious purpose. Noteworthy is the fact that the Bombay High Court equated the notion of attributing juridical personhood with embodiment of a pious or benevolent purpose in the category of Hindu idol. In one sentence, the classical Hindu law received a judicial approval by colonial courts in accepting the Hindu idol as juridical person. By conferring personhood on the Hindu idol, the following aims were achieved. First, it provided legitimacy to any person interested in the idol or *debutter* property to check and control corrupt *shebaits* who might go against the purpose of the endowment. The corollary of this legal fiction was that even in the absence of a trust (as required under English common law), it mandated duties and responsibilities on managers of *debutter* property who were receiving benefit from the property. Second, it provided an adjudicative framework to determine the rights, responsibilities and duties of managers in cases where the endowment's original founder was not alive as the *shebaits* lacked legal ownership.

Creation of any endowment with a pious intent/purpose thus became sufficient to attribute legal personality to the idol. The High Court clarified that the legal personality was not rendered to divinity itself but to one or other form of its manifestation.[65] The polytheistic nature of Hindu religion made the consideration of the idol to be granted legal personality more conducive, because the property was generally dedicated in the name of some deity.[66] The juristic personality given to the idol or deity was to safeguard the purpose for which the religious grant was originally made.

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[65] *Ibid.* This distinction between divinity which is formless or abstract from its physical and tangible manifestation has been reiterated by the Supreme Court in the *Ayodhya case*.

[66] As the Supreme Court observed in its survey on the subject in *Ayodhya case*: "Legal personality is conferred on the pious purpose of the individual making the endowment. Where the endowment is made to an idol, the idol forms the material representation of the legal person." *Ayodhya case, supra* note 1 at 152 (para 111).

The next case on this issue came before the Madras High Court in 1904. In *Vidyapurna Swami* v. *Vidyanidhi Swami* (1904),[67] the Madras High Court reiterated the important social function served by investing an idol with artificial personality. The social function was empowering the devotee's interest by empowering them as interested persons who, as 'next friends of the idol', could sue the *shebaits*. This result could also have been attained, the High Court noted, by granting an artificial personality to "devotees as a collective" or a "community of worshippers."[68] However, on grounds of practicality and convenience, the idol itself was considered a juristic person. The attribution of juristic personality, therefore, was based not on a theological recognition of the personhood of the deity, but on reasons of pragmatism and convenience of adjudication by secular courts.[69]

The next decision on this issue was delivered by a five-judge-bench decision of the Calcutta High Court in 1910. In *Bhupati Nath* v. *Ram Lal Maitra* (1910)[70] a complex question came before the Calcutta High Court. The testator (Umesh Chandra Lahiri) bequeathed his property to various trustees; one provision in his will dedicated the property to goddess Kali for the establishment of her idol. After his death, the plaintiff (Bhupati Nath) argued that this provision of the will was void on account of the absence of the idol, at the time of the testator's death, to whom the property was dedicated. Part of the argument of the plaintiffs was based on a previous precedent: that in case of an idol, its presence was not enough because its consecration (*pran-pratishtha*) was imperative.[71] In the present case, both the establishment as well as the consecration of the image of goddess Kali took place after the demise of the testator.

[67] (1904) ILR 27 Mad 435.
[68] *Ibid*
[69] In the *Ayodhya case* where the five-judge bench reviewed and reiterated the law relating to idols as juristic persons, the Apex Court reiterated that the evolution of the concept was "not based on strict legal principle but is an outcome of historical circumstances, legal necessity and convenience." *Ayodhya case, supra* note 1 at 139 (para 98).
[70] (1910) ILR 37 Cal 128 [Hereafter, "*Bhupati Nath*"].
[71] The precedent which laid down this proposition was *Dourga Proshad Dass* v. *Sheu Proshad Pandah* (1880) 7 C.L.R. 278. It was decided, by the Calcutta High Court, that for an idol to have juridical existence, its consecration following proper rituals and ceremonies is required. This decision along with various others that observed that a gift made to a Hindu deity is void if the idol of the deity came into existence in the future, were overruled by the five judge bench judgment.

The Calcutta High Court however upheld the validity of the dedication to safeguard the pious purpose intended by the testator. It observed that "this manifestly was a disposition for religious purposes and favoured by Hindu law."[72] Conceding the nature of the property as *debutter*, it was pointed out that despite the testator's death "the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected […] the pious purpose does not fail merely because the testator directs as a means of carrying it into effect that something should be done after his death"[73] The High Court clarified that an idol was a juristic person in law but "it is only in *an ideal sense* property can be said to belong to an idol."[74] Another judge who wrote a separate concurring opinion, James Stephens, J., compared the position of the idol to a minor and observed that the managers or "the ministers of an idol have […] the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf."[75]

Few important propositions emerged from this decision. First was the attempt of the colonial courts to protect the original intended *purpose* of the endowment which was central in conferring an artificial personality on the idol. This was in tune with the classical Hindu law where a dedication of property made to the deities was greatly valued. The idol was considered the physical or corporeal manifestation of a divine purpose. Second, a consolidation of the traditional viewpoint that pious gifts made to deities stood on a different footing than ordinary gifts of corporeal property.[76] When a gift is made, the donor is divested of his rights over the tangible property (moveable or immovable). But where the gift is made to divinity, the person to whom the gift was made did not exist. This lacuna was filled by ascribing an artificial juridical personality to the deity.

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[72] *Bhupati Nath*, *supra* note 70. In his opinion, H. Lawrence Jenkins, CJ., makes a reference to *Vyavahara Adhyay* of *Mitakshara* and *Mahanirvana Tantra* to elucidate this point.
[73] *Id.*, para 8 (per Lawrence H. Jenkins, C.J.).
[74] *Id.*, para 15 (per Lawrence H. Jenkins, C.J., emphasis added). ("[T]he rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person…this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person.").
[75] *Id.*, para 22 (per James Stephen, J.).
[76] *Id.*, para 62 (per Mookerjee, J.). ("[I]t is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.").

This explains the third important point made by the Court that the property is vested in the idol in an 'ideal sense'. Which means that the actual beneficiaries of the property were natural persons. As already mentioned, any individual devotee can sue as a 'next friend' on behalf of the idol for mal-administration by managers. This formulation provided legal certainty with respect to ownership and possession of the property endowed for religious purposes (*debutter*). The point was again reiterated in a later case of *Mohatap Bahadur* v. *Kali Pada Chatterjee* (1914)[77] where the dedicated idol had been washed away by floods and another idol had been established by the Maharaja of Burdwan.[78] The Calcutta High Court directed the *shebaits* to fulfill their duties and continue to perform religious rites, as the destruction of the original idol did not extinguish the 'pious purpose' for which it had been originally established. This underscored the law's intent which was to protect the pious purpose for which the property is endowed to religious deities.

The Position of the Idol after Independence

This position of the religious idol as a juristic person was consolidated in the early decisions of the Supreme Court in independent India. In 1956, a four-judge bench decision in *Deoki Nandan* v. *Murlidhar*,[79] a Hindu ceremoniously installed the idol of 'Shri Radhakrishnaji' on a piece of land called Thakurwada in Sitapur district. After his death, the property, which was in the name of the idol, got transferred and managed by his nephew Murlidhar. A distant agnate of the original founder filed a case on the grounds of gross mismanagement of the dedicated property. The lower court and first appellate court refused to interfere on the grounds that the property was private and built for worship within the family. The Supreme Court, allowing the appeal, explained that the property dedicated to divinity must be seen as 'abandoned' by the true owner and thus cannot be considered as private property. It vested metaphorically in the gods themselves and therefore an action against the mal-administration of such property was

[77] AIR 1914 Cal 200.
[78] The respondent was the *shebait* of the idol of 'Trilokeshvar Shiva' for whose worship certain land was dedicated by the Maharaja of Burdwan.
[79] AIR 1957 SC 133.

maintainable.[80] Once again the idea of fictional legal personality ensured that the original purpose of the dedicated land was restored.

Yogendra Nath Naskar v. *Commissioner of Income Tax, Calcutta* (1969)[81] posed an interesting issue of taxation before the Supreme Court for the income tax assessment of the deities through *shebaits*. Ram Naskar left property as *debutter* for two deities in the land beside his residential home at 74/75 Beliaghata Main Road, Calcutta. His two adopted sons were appointed as *shebaits*. The appellant was one of the adopted sons who argued that *debuttar* property, in the absence of an express trust, was not amenable for tax assessment. V. Ramaswami, J., referring to the work of B.K. Mukherjea on Hindu religious and charitable endowments observed:[82]

> With regard to Debutter, the position seems to be somewhat different. What is personified here, is not the entire property which is dedicated to the deity but the deity itself which is the central part of the foundation and stands as the material symbol and embodiment of the pious purpose which the dedicator has in view.

The Court held that the dedicated property was owned by the religious foundation and the *shebaits* who carried out the maintenance and acquired the benefits from the property were amenable to be assessed under income tax law.[83] The Hindu idol or deity, the Court observed, is an individual within the meaning of section 3 of the Income Tax Act and can be assessed for tax purpose and the exemption claimed for Hindu deities was rejected.

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[80] *Ibid.* Referring to the classical texts of Hindu laws, the Court pointed out that "according to the texts, the Gods have no beneficial enjoyment of the properties, and they can be described as their owners only in a figurative sense (*Gainartha*), and the true purpose of a gift of properties to the idol is not to confer any benefit on God, but to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship."

[81] AIR 1969 SC 1089.

[82] *Ibid.*

[83] The Court also referred to the origin of this principle from the doctrine of *pia causa* (pious cause) in Roman law. What distinguishes Indian law from its Roman counterpart is the fact that the Roman law "took the view that the endowments of charitable foundations were a species of Church property. *Piae cause* were subjected to the control of the church, that is, of the bishop or the ecclesiastical administrator, as the case might be. A *pia causa* was regarded as an ecclesiastical, and consequently, as a public institution, and as such it shared that corporate capacity which belonged to all ecclesiastical institutions by virtue of a general rule of law. A *pia causa* did not require to have a juristic personality expressly conferred upon it." *Ibid.*

Pious purpose in the context of non-Hindu religious structures

An important question that arose to be decided by the Indian Supreme Court was whether '*Guru Granth Sahib*', the sacred book of Sikhism, acquire the status of legal person? The factual question that arose in *Shiromani Gurdwara Prabandhak Committee, Amritsar* v. *Som Nath Dass* (2000)[84] was whether the land under dispute was a Sikh gurdwara, *dharamshala* or *dera*. The ownership column of the land in official records indicated the '*Guru Granth Sahib*' as the owner. It is the prominent religious book, considered as a master/guru in Sikhism after the demise of the last living guru, Guru Gobind Singh. The revenue officer had permitted the transfer of title (mutation) of the land in the name of the religious book.

The tribunal and the Punjab High Court invalidated the mutation on the ground that *Guru Granth Sahib* was not a juristic person and therefore cannot acquire immovable property. The Supreme Court, setting aside these decisions, declared the book itself as a juristic person. Following the logic of a benevolent endowment for the religious purpose, it observed that the faith of the Sikhs in the book "necessitated the creation of a unit to be recognised as a 'juristic person.'"[85] When the "donor endows for an idol *or for a mosque* or for any institution, it necessitates the creation of a juristic person."[86] This reinstated the notion that by virtue of a juristic personality, the legal apparatus ensures that the divine purpose for which the original grant was intended is protected and the original intent of the donor is executed.

The Supreme Court distinguished Hinduism and Sikhism and clarified that the *Guru Granth Sahib* "cannot be equated with an 'idol' as idol worship is contrary to Sikhism."[87] Nevertheless, despite different contexts, the Court conferred an artificial juristic personality upon the *Guru Granth Sahib*. It is because of the "legal recognition as a juristic person, the followers of both the religions give them respectively the same

[84] (2000) 4 SCC 146 [Hereafter, "*Guru Granth Sahib*"].
[85] *Id.,* para 28.
[86] *Id.,* para 19 (emphasis added).
[87] *Id.,* para 34.

reverential value."[88] The absence of the phenomenon of idol worship did not limit the judiciary from ascribing a distinct legal personality to the sacred book. It is this legal expediency and the underlying premise (that public interest was served by the benevolent dedication of religious or charitable property) that became central in deciding the question of artificial personality.[89] On this register, and as specifically mentioned in the *Guru Granth Sahib case*, it would seem that there is actually no limitation on attributing a juristic personality to a mosque in India. It is significant, then, that the mosque in the Babri Masjid case was not granted juristic personality[90] by the colonial courts. This was because in the pre-colonial judgment that formed the basis of the proposition, the question was framed in unique terms seeking judicial personality for the mosque *as* land in and of itself.

Land as juristic person in and of itself

The issue of land or birthplace itself (Asthan, Shri Ram Janambhumi, Ayodhya) as a juristic person arose for the first time in post-independent India in the *Ayodhya case*.[91] If the land itself were to be accepted as a tangible manifestation of divinity and in turn a juristic person, all competing claims against it would have stood extinguished since it would have ceased to have the character of an immovable property and would have become an owner in and of itself.

It was urged before the Supreme Court in the *Ayodhya case* (in suit no. 5 filed in 1989) that the spot under the central dome of the mosque where the idols were placed was Lord Ram's birthplace, which should be conferred a juristic personality. It was contended that since the presence of an idol was not necessary in Hinduism for ascription of legal

88 *Id.,* para 34.
89 In the *Ayodhya case*, the Court consolidated this position: "The State will therefore protect property which stands vested in the idol even absent the establishment of a specific or express trust. The pious purpose, or 'benevolent idea' is elevated to the state of a juristic person and the idol forms the material expression of the pious purpose through which legal relations are affected." *Ayodhya case, supra* note 1 at 156 (para 115).
90 This was held in *The Mosque, Masjid Shahid Ganj* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar* (AIR 1940 PC 116).
91 "Asthan Sri Ram Janambhumi, Ayodhya" (the second plaintiff) in suit no. 5 sued as a juristic person.

personality (as other forms of *manifestation* of the deity were equally acceptable),[92] the land which was worshipped as a deity could itself be granted the status of a juristic person.[93]

The Supreme Court in *Ayodhya case* (rightly) rejected this contention. It noted that idols were granted legal personality to safeguard the benevolent purpose of religious dedication, which was not the case in the present instance because there is no express dedication to the land which had been ever made. The Apex Court rejected and overturned the verdict of the Allahabad High Court in this regard. According to the Supreme Court, this contention, if accepted, had the potential to stultify the very purpose of attributing juristic personality to material objects:[94]

> [In the absence of any clear] manifestation, recognising the land as a self-manifested deity would open the floodgates for parties to contend that ordinary land which was witness to some event of religious significance associated with the human incarnation of a deity (e.g. the site of marriage, or the ascent to a heavenly abode) is in fact a Swayambhu deity manifested in the form of land.

The Supreme Court distinguished property vested in a religious foundation or deity from property in and of itself as a juristic person. The latter would amount to altering the character of immovable property and making all the legal principles inapplicable to it. Accepting such a proposition would amount to legitimising all the "claims to 'absolute title' sustained merely on the basis of the faith and belief of the devotees."[95] Accepting this argument would have amounted to elevating subjective faith and belief of devotees beyond the legal framework and its categories – limitation, ownership, possession, etc. It

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[92] "It is conceivable that in certain instances the land itself would possess certain unique characteristics. For example, it may be claimed that certain patterns on a sea-shore or crop formations represent a manifestation of the divine. In these cases, the manifestation is inseparable from the land and is tied up to it." *Ayodhya case, supra* note 1 at 215 (para 193).

[93] *Ayodhya case, supra* note 1 at 192, para 160. This argument was accepted by two of the three judges in the Allahabad High Court - V. Shama & Sudhir Aggarwal, JJ – who accepted that the land in Ayodhya itself constitutes a juristic person.

[94] *Id.* at 215 (para 192).

[95] *Id.* at 221 (para 201).

seems that the Supreme Court did not wish to open the floodgates for all kinds of religious claims by declaring the *spot* of Ram janambhumi as a legal personality, because its purpose for securing the janambhumi to the Hindu side was better served in this particular case by declaring the idol itself a juristic person. Nevertheless, this proposition as laid down in the *Ayodhya case* is important to stultify any future claims that would have arisen had the Court declared the land in and of itself a juristic person. But the contentious point, for this chapter, is that if juristic personality of the idol was meant to protect the pious purpose, then how and where did the Supreme Court locate that purpose in this particular dispute where the idols were placed in violation of the rule of law.

Maintainability of the deity's plaint of 1989

The Supreme Court set aside the decision of Allahabad High Court which declared a tripartite partition of the disputed land between the Hindu deities, the Nirmohi Akhada and the Sunni Waqf Board. With respect to the Nirmohi Akhara (suit no. 3), the Supreme Court clarified that the plaintiffs had claimed the management rights of the temple as *shebaits*. They were not *de jure shebaits,* as they did not have deed of dedication.[96] Their assertion was one of *de facto shebaits* "by virtue of their long-standing presence at the disputed site."[97] They pleaded the absence of any mosque at the site and claimed that they had managed the inner courtyard at all times. Both assertions, however, were made without any evidence and were rejected by the Supreme Court.[98]

The Nirmohi Akhara's attempt to claim title of the land adversely affected their case. This was because it gave an impression to the Supreme Court of dereliction of duty on their part. The Court accepted the argument pleaded on behalf of the deities that the Nirmohi Akhada had failed to fulfil its managerial duties as it claimed the title to the land. In the Court's words: "Suit 5 is founded on the plea that the needs and concerns of the deity of Lord Ram were not being protected and that the parties to the earlier suits

[96] *Id.* at 406 (para 360).
[97] *Ibid.*
[98] *Id.* at 426 (para 385). ("Nirmohi Akhara has failed to prove that at the material time, the disputed structure was a temple which was in its possession and that no incident had taken place on 22/23 December, 1949. Absent exclusive possession of the inner courtyard, the claim that Nirmohi Akhara was managing the inner courtyard as shebaits does not arise.").

were pursuing their own interests. This apprehension as the basis of Suit 5 is not without substance."[99] Besides the aforesaid reasons, the Court also dismissed the suit of the Nirmohis as barred by limitation. It was only on account of their 'historical presence' and 'role' at the disputed site that the Court directed that they must be given 'an appropriate role in the management' of the trust to be made for the construction of the temple.[100]

The suit on behalf of the deities (suit no. 5) was filed in 1989. There was an issue regarding the limitation period as the cause of action had arisen in 1949. On principle, the Supreme Court accepted that the deities could not be treated as *perpetually minor* and the law of limitation applied to the deities as it did to any other natural person.[101] However, the Court accepted the suit on two grounds. First, that the worship or *seva-puja* of the deities continued even after the attachment of property in 1949. Therefore, it observed, one could not suggest that "the cause of action in Suit 5 arose on 29 December 1949."[102] The second ground was that the dereliction of the duty by the *shebaits* (the Nirmohi Akhada) has given sufficient reason for a 'next friend' to sue on behalf of the idols.

The Supreme Court itself acknowledged the illegality of the act of idol installation in 1949, but at the same time it stretched the time period for the cause of action for the purposes of limitation in favour of the Hindu community.[103] The continuation of worship of illegally transplanted idols, by administration and judicial order, instead of inviting the

[99] *Id.* at 479 (para 428).
[100] *Id.* at 925 (para 804). This was an extraordinary direction in which the Court justified taking recourse to Article 142 which allowed it to pass orders and decrees beyond the claims in order to effectuate 'complete justice.'
[101] *Id.* at 473 (para 425). ("it is an established position that a deity cannot on the ground of being a perpetual minor stand exempted from the application of the Limitation Act.").
[102] *Id.* at 477 (para 428).
[103] One can notice the hesitation and reluctance of the Supreme Court in discussion and, simultaneous, denial of, the events of Nov. 22/ 23. At various points, it accepted and condemned the plantation of idols inside the mosque. Commenting on the maintainability of suit no. 4 (filed by Sunni Waqf Board), the Court observed that their "cause of action […] is founded on the events which took place on 23 December 1949 [when] […] idols were placed inside the mosque by a crowd of Hindus. The intent of doing so was to destroy, damage and defile the mosque." *Id.* at 737 (para 612). Yet the Court, while evaluating the testimonies of Hindu and Sunni Muslim witnesses, mentions that the "possibility of any idol under the central dome prior to 22-23 December 1949 stands excluded on a *preponderance of probabilities*." *Id.* at 630-631 (emphasis added). This transformation of an established fact into the realm of "probability" in the same judgment shows how the Court wanted to *deny* this established fact, something they could only suggest in a weak manner due to the historical evidence, even in the form of a first information report (FIR) lodged in the local police station available for this criminal act by the Hindu mob. But this minor detail explains a lot about the eventual outcome arrived at by the Court.

Court’s condemnation, functioned to the benefit of the Hindu party in suit no. 5. As to the second reason, for allowing the suit instituted by the idols the Supreme Court indicated that the Nirmohi Akhada failed to perform its managerial functions satisfactorily. Instead of focusing on their managerial functions they “travelled beyond the claim of management” in their plaint and claimed the “alleged ‘right and titles’ and its ‘title and interest’”[104]

The Supreme Court also accepted the deity’s suit on the ground that they were juristic persons. However, this presumption of juristic personality of idols was made without any evidence for their dedication for a specific religious or benevolent purpose (which, as we have seen in the survey of cases above, had been the pre-requisites for conferring juristic personality to idols in previous judgments). To the contrary, the Supreme Court itself accepted that the purpose for instituting the idols had been malevolent and *mala fide*. In this sense, the argument that applied to *Asthan Sri Ramjnambhumi*, i.e. the land (second plaintiff in suit no. 5) applied equally to *Sri Ram Lalla Virajman* (first plaintiff), the idol. These flaws in the Court’s reasoning appeared at least two levels. For one, the entire jurisprudence of pious purpose and historical necessity fell flat. For another, this acceptance of the illegally placed idols flew in the face of the entire jurisprudence of a pious purpose and historical necessity thus far. By allowing the deities to sue for title to that land, the Court turned the idols themselves into annexationist gods. Second, this encouraged the violation of the law by justifying Hindus trespassing into premises delineated for Muslims.

In denying legal personality to land as birthplace, the Court observed that the “adjudication of civil claims over private property must remain within the domain of the secular if the commitment to secular values is to be upheld.”[105] It further stated in strong words that “our courts cannot reduce questions of title, which fall firmly within the secular domain and outside the rubric of religion, to a question of which community’s

[104] *Id.* at 479-480 (para 428).
[105] *Id.* at 223 (para 204).

faith is stronger."[106] But in allowing the deities' claim, in the absence of any dedication or benevolent purpose, it acceded itself to the subjective faith of the Hindu community.

IV. Structure as Mosque and Title Claim/s

In deciding the title, the first question before the Court was the existence of the mosque as a matter of fact. Did a mosque in fact exist at the disputed site? The Nirmohi Akhara (suit no. 3) denied its existence arguing that "the structure has always been a Hindu temple […] managed by the Nirmohis at all material times."[107] But both the Sunni Central Waqf Board (suit no. 4) as well as the suit on behalf of idol (suit no. 5) accepted the presence of the mosque at the disputed site.[108] The Apex Court accepted the existence of the mosque and that *namaz* was offered inside the mosque. "[I]t had been established that since 1857 until the last *namaz* was offered in the inner courtyard on 16 December 1949, Muslims had visited the mosque for worship."[109] The argument on behalf of deities (suit no.5) that the mosque was against the tenets of *Shariat* was declared by the Court to be of 'no significance' on account of "the plural diversity of religious beliefs as they are practiced in India," where "cultural assimilation cannot be construed as a feature destructive of religious doctrine."[110] Also rejecting the argument of Nirmohi Akhara, the Court affirmed the presence of the mosque and that the "last namaz […] offered in the mosque was on 16 December 1949."[111]

After determining the existence of the mosque, the Court went on to determine ownership and title of the entire property. According to the Court, the assessment for the purpose of determination of the title must consider the entire property as one "composite whole."[112] It discarded the colonial bifurcation on the grounds that it never affected the

[106] *Id.* at 224 (para 205).
[107] *Id.* at 103 (para 68). Nirmohi Akhara also denied the plantation of the idols in 1949.
[108] *Ibid.* ("Hence, both in the pleading in Suit 4 and in Suit 5, there was essentially no dispute about the fact that the mosque was raised in 1528 A.D. by or at the behest of Babur.").
[109] *Id.* at 113 (para 74).
[110] *Id.* at 115 (para 115). It was pointed out that the "belief and faith of the worshipper in offering *namaz* at a place which is for the worshipper a mosque cannot be challenged." *Id.* at 114-115 (para 77).
[111] *Id.* at 79 (para 51).
[112] *Id.* at 883 (para 771) (emphasis added). ("the nature and use of the disputed premises as a whole by either of the parties."

"determination of proprietary rights."[113] To analyse the claim of possession, an assessment across historical time, governed by different sovereigns, was required. The Court proceeded on the principle that "[m]unicipal courts will only recognise those rights and liabilities which have been recognised by the new sovereign either expressly or impliedly through conduct established by evidence."[114] Since a change in sovereignty is an act of State, in the absence of recognition of the acts of a regime by the subsequent sovereign, the "Court cannot compel a subsequent sovereign to recognise and remedy historical wrongs."[115]

The present dispute, the Court has noted, spanned across "four distinct legal regimes"[116]- the regime of King Vikramaditya who allegedly constructed a Hindu temple; Mughal era in the sixteenth century; the British conquest of Oudh in 1856; and the constitutional regime of independent India. The Court found a continuity between the Mughal regime and annexation of Oudh by the East India Company on February 13, 1856 "which later became the colonial government of the British sovereign."[117] This continuity arose from the implied recognition as "no actions were taken by the [British] sovereign to exclude either the Hindu devotees of Lord Ram from worship nor (sic) the resident Muslims offering namaz at the disputed property."[118] The line of continuity between British sovereign and Independent India found approval by the Indian Constitution itself. The Constitution specifically permits prior colonial laws to continue and "remain in force therein until altered or repealed or amended by a competent Legislature."[119] It is the presence of line of continuity with respect to the dispute that allowed its adjudication by municipal courts in India.

[113] The setting up of the railing was not a determination of proprietary rights over the inner and outer courtyards, the measure having been adopted to maintain peace between the two communities.
[114] *Ayodhya case, supra* note 1 at 765 (para 644).
[115] *Id.* at 766 (para 646).
[116] *Id.* at 757 (para 634).
[117] *Id.* at 768 (para 650).
[118] *Id.* at 768 (para 650).
[119] Article 372 (1), Constitution of India.

But no such continuity existed between the regime of King Vikramaditya and Mughal conquest of the territories.[120] The Court observed that the Mughal 'conquest' was a "supra-national act between two sovereigns"[121] and perceived an absence of "the recognition by the new sovereign of pre-existing rights."[122] Therefore, it argued, it could not "entertain or enforce rights to the disputed property based *solely* on the existence of an underlying temple dating to twelfth century."[123] Even if one were to surmise the destruction of the Hindu temple, this fact became irrelevant to determine the title as the "change of sovereignty [was] an act of State and this Court [could not] compel a subsequent sovereign to recognise and remedy historical wrongs."[124]

Once this jurisdictional proposition was accepted, the Hindu claim became one of faith and belief in the site as the birthplace of Ram. This was assessed from 1528 (when the mosque was established) till 1856 (the annexation of Oudh by the British) and from 1856-57 till India attained independence. During the latter period the grill wall, erected by the colonial government in 1857, separated the land into inner courtyard and outer courtyards. I will attempt to show how, in the assessment of historical events, the Court itself elevated Hindu faith to fill the lack of evidence of a prior Hindu temple at the site.

Worship at the mosque during the Mughal period (1528-1856)

The Court accepted the existence of the mosque constructed by Babur in 1528. However, it argued, "in assessing the title of the Muslims, the physical structure of the mosque [was] one fact but a claim to possessory title [had] to be based on *exclusive and unimpeded possession* which [had] to be established by evidence."[125] The principle of possession as both 'uninterrupted' and 'exclusive' became the cornerstone of the assessment. To establish this principle, the plaintiffs in suit no. 4 (Sunni Waqf Board and Muslim residents) relied upon documentary evidence of "cash grants […] paid by royal

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120 *Ayodhya case, supra* note 1 at 767 (para 648). ("no evidence has been led by the plaintiffs in Suit 5 to establish that upon the change in legal regime to the Mughal sovereign, such rights were recognised.").
121 *Id.* at 768 (para 649).
122 *Ibid.*
123 *Ibid* (emphasis in the original).
124 *Id.* at 766 (para 647).
125 *Id.* at 884 (para 772) (emphasis added).

treasury during the rule of Babur which was continued (sic) under colonial rule by the British."[126]

However, the Supreme Court emphasized the "crucial […] absence of any evidence to indicate that the mosque was, after its construction, used for offering namaz until 1856-7."[127] Here, it is worth asking: why was the proof of worship needed when the presence of a mosque was established?[128] Why would a mosque be constructed in the Mughal period if not to offer prayers? If one were to assume that it was an abandoned mosque, then why would the subsequent British regime provide for its maintenance?[129] As there were no original grants from the pre-colonial period, how could one establish through contemporary evidence that the mosque had been in use for prayer before the nineteenth century? The counsel for the Sunni Waqf Board, Rajeev Dhavan, conceded that "the evidentiary record essentially [commenced] with grants *which were stated to have been continued* by the British government for the upkeep of the mosque."[130] However, this was not sufficient for the Court. It insisted on additional and specific proof that *namaz* was offered at the site. One wonders why the presence of the mosque constructed by a Muslim ruler during Mughal regime was not sufficient, on balance of probabilities, to deduce that devotees offered *namaz* there.

In contrast, the Hindus were never asked to show 'exclusive' possession of the site. The evidence of Hindu 'faith and belief' of the site as the birthplace of Ram was significant to win over their counterparts. In referring to Tieffenthaler's account of 1770, the Court rejected his hypothesis of construction of the mosque 'most likely by Aurangzeb' as hearsay and not "based on his personal knowledge."[131] But it found his account having "significant value when it advent[ed] to the existence of the faith and belief of Hindus in Lord Ram and of the association of the place of birth in close-proximity to the three-

[126] *Id.* at 791 (para 678).
[127] *Ibid.*
[128] The Indian Evidence Act, 1872, section 114 provides that the Court "may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."
[129] A.G. Noorani, in his comment on the Supreme Court judgment, rightly asks whether the Court was presuming that "the British spen[t] money for the upkeep of a mosque in which none prayed?" A. G. Noorani, "Supreme Court denies Justice" *Frontline* (Dec. 6, 2019).
[130] *Ibid.*
[131] *Ayodhya case*, *supra* note 1 at 683 (para 573).

domed structure."[132] The Court also referred to Robert Montgomery Martin's *History, Antiquities, Topography and Statistics of Eastern India*.[133] In the section on 'Analysis of Title' towards the end of the judgment, the Court found both Tieffenthaler and Martin's accounts sufficient to indicate the "existence of faith and belief of Hindus that the disputed site was the birthplace of Lord Ram."[134] These, as against the uphill requirement of exclusive possession, were enough to serve as signposts to the "historical presence of worshippers and the existence of worship at the disputed site even prior to the annexation of Oudh by the British."[135]

The Court also drew inference from a report of Archaeological Survey of India (ASI) which said that "recoveries[were] suggestive of a Hindu religious origin comparable to temple excavations in the region and pertaining to the era."[136] The Court was prompt to add that any "finding of title [could not] be based in law on the archaeological findings which have been arrived at by ASI"[137] but certainly this must have had some bearing on the Court. After all, the Court spent considerable ink, close to one hundred pages, on the discussion of the ASI report.[138] The Court also pointed out that title "[could not] be established on the basis of faith and belief alone."[139] But the travel accounts and the ASI report were indicative of 'patterns of worship'[140] which, the Court accepted, could establish title.

The Court repeatedly asserted a relationship of co-existence between the two communities. It mentioned a 'syncretic culture' and a 'medley of faiths' allowing worship of both communities to co-exist at the site.[141] But it really did not know what to make of this history where religious identities were not so rigid. It, in fact, reconfigured the past in terms of British colonial categories providing a reductionist account of the

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[132] *Id.* at 684 (para 573).
[133] Adduced as Exhibit 20 in suit no. 5. For a discussion see, *id.* at 668-669 (para 562).
[134] *Ayodhya case*, *supra* note 1 at 908 (para 788).
[135] *Ibid.*
[136] *Id.* at 906 (para 788).
[137] *Id.* at 907 (para 788).
[138] *Id.* at 507- 599.
[139] *Id.* at 908 (para 788).
[140] *Id.* at 908 (para 788).
[141] *Id.* at 881 (para 769).

Hindus and Muslims as warring factions on the basis of their ‘religious’ identity.[142] The evidence before the Court showed a complex historical reality not reducible to any simplistic religious categorisation. But the Court reduced it into neat categories of Hindu and Muslim identities.[143] The Court’s failure to notice its own contradiction demonstrates its lack of engagement with history.[144] In the concluding part of the judgment the Court observed:[145]

> As regards the inner courtyard, there is evidence on a *preponderance of probabilities* to establish worship by the Hindus prior to the annexation of Oudh by the British in 1857. The Muslims have offered no evidence to indicate that they were in *exclusive possession* of the inner structure prior to 1857 since the date of the construction in the sixteenth century.

The evidentiary standard of the preponderance of probabilities acquires distinct form for the two sides; while the Muslims were required to show exclusive possession in material terms, the Court accepted mere faith and belief as sufficient requirement for the Hindu claim.

Worship in the inner courtyard (mosque) during British Era (1856-1947)

The colonial wall of separation after the riots of 1856-57 also limited the right to worship of the two communities within specified spheres (Muslims having the right of passage to the mosque from the outer courtyard). The Court asserted that the “Hindu worship at

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[142] Edward Said explains in the opening pages of his classic work *Orientalism* that “Orientalism is a style of thought”. He explains with remarkable clarity how categorisation itself can become imperialistic and dominant that a certain reality cannot be understood without those categories. His focus is on the categories of difference between Euro-American and the rest of the world, which are *institutionalised* in a certain kind of knowledge production dominant in 19th and 20th century. See, Edward Said, *Orientalism* (Penguin Books, London, 2003).

[143] Harbans Mukhia, historian of medieval Indian history, explains how James Mill “metamorphosed the entire, long history of ancient and medieval India, divesting it of all its diversities by making the religious identity of the rulers […] the central category of understanding the past; all diversity of explanation was lost to the uniformity of the religious identity”. Harbans Mukhia, “Indian Historiography under threat” *The Hindu* (Oct. 27, 2015).

[144] This judicial approach also demonstrates the sway of orientalist categories in law’s engagement with history, illustrative of Edward Said’s caveat that “the modern Orient, in short, participates in its own Orientalizing.” Said, *supra* note 142 at 325.

[145] *Ayodhya* case, *supra* note 1 at 921 (para 798) (emphasis added).

Ramchabutra, Sita Rasoi [...] clearly indicated their *exclusive and unimpeded possession* of the *outer courtyard*."[146] It is noteworthy that it was only in this context that the Court employed the yardstick of 'exclusive' possession with respect to the Hindu community. But that was limited to the outer courtyard which was exclusively granted to them in any case. However, following the standard mentioned by the Court, in adjudicating on the land as a 'composite whole,' possession with respect to both the outer as well as the inner courtyard was needed. Once again the Court accentuated Hindu faith: "Despite the construction of the wall in 1858 by the British and the setting up of the Ramchabutra […] Hindus continued to assert their right to pray inside the three-domed structure."[147] It is difficult to comprehend how the Hindu assertion of the inner courtyard can be understood as 'their right' when the colonial law, which the Court never contests given its constitutional continuity, would consider such an encroachment contrary to law. It is useful to mention here a few illustrations of these encroachments and their transformation in the eyes of the Court.

On November 28, 1858, Nihang Singh went inside the inner courtyard and "erected a religious symbol"[148] according to the report of the *thanedar* of Oudh. An application was filed against this by the *moazzin* of the masjid which spoke of the "highhandedness of Hindus"[149] in erecting religious symbols and offering worship. The Court remarked that "[e]vidently, the railing did not prevent access to the inner courtyard or to the precincts of the mosque."[150] This was despite the fact that Nihang Singh was admonished and served summons for his trespass. "Eventually, the [sic] Nihang Sikh was evicted from the site and record was maintained."[151]

Another skirmish between the two communities ensued in 1860 where Mir Rajjab Ali filed a complaint which stated that "when the Moazzin recites Azaan, the opposite party begins to blow conch (Shankh/Naqoos)."[152] In March 1861, Mohd Asghar and Rajjab Ali

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[146] *Id.* at 910 (para 788) (emphasis added).
[147] *Ibid.*
[148] *Id.* at 64 (para 46).
[149] *Id.* at 65 (para 46).
[150] *Ibid.*
[151] *Id.* at 66 (para 46).
[152] *Ibid.*

together complained against the construction of a new *chabutra* in the graveyard[153] without permission. The *subedar* sent a report for the eviction of the person. In 1866, the *mutawalli* again complained that some fresh *kothari* (small room) has been constructed by the *bairagis* inside the mosque for placing idols. This fact too had been acknowledged by the Supreme Court.[154] But all these acts of encroachment were interpreted by the Apex Court as evidence of 'contestation' by the Hindu community.

The Suit of 1885

On January 29, 1885, *mahant* Raghubar Das instituted a civil suit (suit of 1885) in the court of the sub-judge of Faizabad. The plaintiff described himself as "Mahant Janmasthan at Ayodhya".[155] The plaintiff sought an injunction that the defendant should be restrained from obstructing the plaintiff from constructing a temple over the *chabutra* situated in the outer courtyard. Although the Court recognised the possession and right of the plaintiff to construct the temple on the platform described in the plaint as "Chabutra Janam Asthan" (the birthplace of Ram), it refused to grant permission due to law and order issues that might arise on such construction.[156] The appeals filed against this order were also dismissed. The Supreme Court while referring to this case only considered the limited question "whether the findings in the suit will operate as *res judicata*"[157]

The Court was correct in its technical conclusion that the judgment in suit of 1885 does not operate as *res judicata* in the present case as the questions raised in the two judgments are substantially different. The principle of *res judicata* (a case already decided cannot be revived) was inapplicable as the suit was filed in a 'personal capacity' and "reliefs sought were distinct and so were the suit properties."[158] However, what was

[153] An ancient Muslim graveyard existed adjoining the mosque where, the legend goes, Muslims who died in the battle with the previous ruler of Ayodhya were buried. Previously, this area was also a part of the contested site but the *Ayodhya Land Acquisition* case confined the dispute to the inner and outer courtyards.
[154] *Ayodhya case*, *supra* note 1 at 889 (para 777).
[155] *Mahant Raghubar Das, Mohanth, Asthan, situate Ayodhya, plaintiff* v. *The Secretary of State for India in Council, Defendant.* Full text of the judgment is available in Noorani, *supra* note 40 at 175-188.
[156] *Id.* at 181 (per Hari Kishan, Sub Judge, "This place is not like other places where the owner has got the right to construct any building he likes […] For this reason of breach of law and order the officers have restrained the parties from making any new construction.").
[157] *Ayodhya case*, *supra* note 1 at 71 (para 46).
[158] *Id.* at 499 (para 441).

left under-appreciated was the fact that the Hindu *mahant* who instituted the suit referred to the *chabutra* situated in the outer courtyard as the birthplace of Ram. Further, there was no reference, much less any claim, with respect to the mosque or the inner courtyard as the birthplace of Ram.

Various scholars have pointed out that the claim of the central dome of the mosque as the birthplace of Ram appeared only in the twentieth century with the revival of Hindu majoritarianism. Anupam Gupta[159] has asserted the absence of any assertion of janambhumi in the works of Swami Vivekananda "who visited Ayodhya in 1888, and again in 1890, as a *parivrajaka*, or wandering monk."[160] A similar silence exists in the writing of Vinayak Damodar Savarkar, who "writing in 1908 on the first war of independence, 51 years earlier, devoted a whole chapter entitled 'Ayodhya' to the havoc wrought by the British in Oudh before 1857."[161]

Gupta concludes that the stark "absence of any allusion to the Ram janmabhoomi issue in their speeches and writings is an eloquent reminder of the artificiality of the main issue."[162] A.G. Noorani has pointed out that the invention of the issue as national honour belongs to recent Hindu revivalism.[163] "Surely, if it was a matter of 'honour' for the Hindus, the founder of RSS, Hedgewar, his successor M.S. Golwalkar, and their ideological mentor V.D. Savarkar, would not have kept silent on the issue."[164] In this light, the suit of 1888 and the description of the *chabutra* in the outer courtyard as birthplace of Ram, if alternatively read, could have furnished the documentary proof against the Hindu claim present in the judicial archive itself.

In 1934, substantial damage was inflicted upon the mosque, for which the Hindus were fined.[165] The colonial government "sanctioned the work of repair and renovation of the

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159 He also served as a council for Liberhan Commission, a commission of enquiry set up by the government of India ten days after the demolition of the Babri mosque.
160 Anupam Gupta, "Dissecting the Ayodhya Judgment" XLV (50) *Eco. & Pol. Weekly* 33-37 (2010).
161 *Id.* at 35.
162 *Ibid.*
163 Noorani, *supra* note 40, 'Introduction' and literature cited there.
164 *Id.* at xxi.
165 *Ayodhya case, supra* note 1 at 72 (para 47).

damaged structure of the mosque."[166] The Supreme Court read all the above incidents, including the damage to the mosque in 1934, as matters of "contestation" and lack of "exclusive possession" of the Muslims over the inner courtyard:[167]

> The riots of 1934 and the events which led up to 22/23 December 1949indicate that possession over the inner courtyard was a *matter of serious contestation* often leading to violence by both parties and the Muslims did not have *exclusive possession* over the inner courtyard. From the above documentary evidence, it cannot be said that the Muslims have been able to establish their possessory title to the disputed site as a composite whole.

Even if, for the sake of argument, one accepts the contestation argument, it remains a fact that even during the British era, the Hindu community never proved 'exclusive possession' with respect to the inner courtyard. What, then, were the legal basis on which the inner courtyard was awarded to them as a part of composite land? Also, how can trespass, aggression and violence ever qualify as matters of contestation in the legal adjudication of property rights? Can these actions not be read, as evidence of historical aggression by the Hindus? The Court remained silent on the issue of Muslim contestation. The Court observed that "[d]espite the existence of the railing, the exclusion of the Hindus from the inner courtyard was a *matter of contestation* and at the very least was not absolute."[168] The only way that the interpretation of the Court can be understood is that it placed the faith of Hindus on a higher pedestal.

V. Silencing the Regime Sponsored Violence[169]

"One must exercise caution before embarking on the inclination of a legally trained mind to draw negative inferences from the silences of history. *Silences are sometimes best left*

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[166] *Ibid.*
[167] *Id.* at 892 (para 781) (emphasis added).
[168] *Id.* at 892 (para 781).
[169] The issues elaborated in sections V and VI have been discussed in Amit Bindal, ""Complete Justice"? Silences and Erasures in the Ayodhya Judgment" 11(1) *Journal of Indian Law and Society* 48-71 (2020).

to where they belong - the universe of silence."[170] The Supreme Court made this observation in the context of a judicial attempt to interpret historical evidence. The Court eschews the question of violence to such an extent that the term hardly finds a place in the entire judgment.[171] This exclusion of violence constituted the *positive unconscious* of the judgment. As Peter Goodrich points out, the "language of law carries with it all that is unsaid, that has been driven within, hidden from view: it carries its failures within as an indelible past, as the memory of battle, as litigation."[172] This section, drawing from the Allahabad High Court judgment of S.U. Khan, J. attempts to foreground the *unsaid* of the *Ayodhya case*.

Illegalities of 1949 and Judicial mala fides of 1986

S.U. Khan, J. in the Allahabad High Court judgment, takes note of the partisan attitude of the district magistrate both prior to and after the fatal night when the idols were secreted into the mosque. The possibility that idols might be installed was suspected by the Muslim community almost a month before its occurrence.[173] The original file regarding the incidents on the night of November 22, 1949 made some startling revelations. A letter written by the superintendent of police, Kripal Singh, addressed to K.K.K. Nair, anticipated in clear terms the apprehensions of mosque capture by Hindu ascetics. It also mentioned the dismantling and digging of several Muslim graves during the grand event organised by the Hindu community: "Several thousand Hindus, Bairagis and Sadhus […] intend to continue the present Kirtan [worship accompanied with music] till Puranmashi. The plan appears to be to surround the mosque in such a way that entry for the Muslims will be very difficult and ultimately they might be forced to abandon the mosque."[174]

[170] *Ayodhya case*, *supra* note 1 at 700 (para 593) (emphasis added).
[171] The term "violence" appears four times in the entire judgment (including the *Addendum*). Twice it appears in other cases cited, once in Carnegy's account of 1857 and finally in suggesting that "possession over the inner courtyard was a matter of serious contestation often leading to violence by both parties." *Id.* at 892 (para 781).
[172] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* 16 (Weidenfeild & Nicholson, London, 1990).
[173] *Allahabad high court judgment, supra* note 5 at 25 (per S.U. Khan, J.).
[174] Letter by Kripal Singh, S.P. to K.K.K. Nair, DM, dated Nov. 29, 1949, quoted in the *Allahabad High Court judgment*, *supra* note 5 at 27.

Prescient, Singh mentioned the "strong rumour, that […] the Hindus [would] try to force entry into the mosque with the object of installing a deity."[175]

Khan, J. cites at length from the report/diary prepared by Nair after the incident, which feigned complete ignorance of any such apprehension. The news, Nair mentioned in the report, came to him as a 'great surprise,' as something like this had neither been suspected nor reported. As Khan, J. notes, his "surprise d[id] not appear to be genuine as there was a clear mention of such a plan in the above letter of S.P."[176]

Khan, J. further highlights the contradiction in Nair's previous letter, written to the state government on December 16, reassuring that things were under control, and his later surprise over the incident in his report/diary.[177] This narration makes it clear that massive mobilisation through organisational support and the support of high level administrative functionaries formed the backdrop of the installation of the idols.

K.K.K. Nair refused the state government's request to remove the idols. In his report/ diary on December 27, he noted, that "if the Government still insisted that removal should be carried out in the face of these facts, I would request to replace me with another officer."[178] Nair's letter to the chief secretary of the Uttar Pradesh government pleaded for continuation of the Hindu worship of the deities. His "solution to offer for government's consideration" involved the attachment of the premises of the mosque excluding both Hindus as well as Muslims, "with the exception of the minimum number of pujaris […] who would offer pooja and bhog before the idol."[179]

On December 29, 1949, the property was attached, under section 145 of the Criminal Procedure Code (CrPC), in the order passed by the judicial magistrate attaching the inner

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175 *Ibid.*
176 *Id.* at 28 (per S.U. Khan, J.).
177 In K.K.K. Nair's letter to the state government, dated Dec. 16, 1949, demonstrating the manner in which instead of taking action, Nair blamed the Muslims for 'exaggerating these happenings' due to heightened Muslim anxiety "by the recent Navanh (sic.) Ramayan Path, a devotional reading of Ramayan by thousands of Hindus." Dismissing the complaints from the Muslim community as 'grossly exaggerated,' Nair assured the government that "the situation was entirely in control and police picket was functioning efficiently." *Id.* at 29-31.
178 *Id.* at 34-35.
179 "Letter from Deputy Commissioner, Faizabad, dated Dec. 27 1949, to Chief Secretary, Government of UP" in Noorani, *supra* note 40 at 215– 16.

courtyard and appointing a receiver to manage it.[180] After taking charge, he submitted a 'scheme' of arrangements stating that "*the most important* item of management is the maintenance of bhog and puja in the condition in which it was carried on when I took over charge."[181] Therefore, Hindu worship conducted for less than two weeks superseded the *status quo* that had existed over several hundred years.

Almost in accordance with Nair's proposition, two or three pujaris were permitted inside to the exclusion of all others who were not permitted to cross the grill brick wall. This explains the emptiness of the Supreme Court's observation that the Hindu devotees were always "looking towards the sanctum sanctorum" and therefore even the wall of separation "did not obliterate their belief in the relevance of the Garbh-Grih being the birth-place of Lord Ram."[182] This 'looking towards,' at least after 1949, was triggered by the non-removal of illegally foisted idols and the legitimacy given to Hindu worship, while entirely excluding the Muslim community from the site.

An addition, a new development took place in 1986. Umesh Chandra Pandey, a practicing lawyer in Ayodhya, filed an application in the court of the deputy munsif on January 25, 1986, to open the locks and allow access to the Hindu community to perform worship and offer prayers. Pandey was neither a party nor was he representing any party. The court did not pass any orders because the matter was pending in the Allahabad High Court. This led to his filing an appeal in the court of the district judge in Faizabad on January 31, 1986. On the very next day, the district judge, K.M. Pandey, without possession of the case file, allowed the appeal and passed an order for the opening of the locks on the gate of the mosque: "If the Hindus are offering prayers and worshipping the

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[180] The *Allahabad High Court judgment* mentions another act of judicial impropriety in this order by the judicial magistrate. "At the end of the order […] there was a line which was admittedly scored off by the Magistrate himself […] The Magistrate stated that he scored off the sentence before signing the orders as it was redundant […] [But] the cutting does not bear initials." Nevertheless, the High Court with "great difficulty" made sense of the scored off sentence. "It is to the effect that *puja darshan* shall continue as was being done at that time (presently)." *Allahabad High Court judgment, supra* note 5 at 39-40 (per S.U. Khan, J.) (emphasis in the original).
[181] *Id.* at 40 (emphasis added).
[182] *Ayodhya case, supra* note 1 at 884 (para 773).

idols, though in a restricted way, for the last 35 years, the heavens are not going to fall […] if the locks are removed."[183]

Mohammed Hashim, a plaintiff in suit no. 4, filed an application to be impleaded in the case on the very next day, February 1, 1986. But the district judge rejected the application on the grounds that it was unnecessary and improper. The multiple faultlines in the court order are bemoaned by S.U. Khan, J. in his judgment of the Allahabad High Court. Other than the technical glitches in the order,[184] the High Court found it appalling that "a person who was a party in the connected suit which was leading case (sic) was considered to be neither necessary nor proper party by the District Judge, however, Mr. Umesh Chand Pandey who was not a party in the suit was held entitled to file appeal which was also allowed."[185] Undoubtedly, this partisan judicial interruption of the thirty-five years of *status quo*, in an extraordinarily erroneous fashion, provided the necessary stimulus to the eventual demolition of the mosque, as this was the time when politically the Ram janambhumi movement was gaining momentum.[186]

S.U. Khan's, J. eight-page analysis of the incident of the unlocking of doors, exposes how the judiciary became implicated in the failure to find a just resolution for this age-old conflict. Khan, J. asserted that the proverbial wisdom that justice must not only be done but must also seem or appear to have been done was mutilated in the *modus operandi* of the district judge.[187] Khan, J. rendered great service by inaugurating the tradition of critical analysis in judicial reasoning which unfortunately found no echo in the judgment of the Supreme Court. He described this farcical order by the district judge, K.M. Pandey, as a 'real tragedy' because this 'shook the faith' of the affected parties,

[183] *Umesh Chandra Pandey* v. *State of U.P. & Others*, Civil Appeal No. 66/ 198, in Noorani, *supra* note 40 at 267-269.

[184] The order of the *munsif* never decided anything and therefore appeal could not lie against it. The order was passed without the judge even having the file of the case (which was in the High Court where the case was pending) that made it all the more suspect.

[185] *Allahabad High Court judgment, supra* note 5 at 90 (per S.U. Khan, J.).

[186] Since 1983, the Vishwa Hindu Parishad (VHP), a Hindu nationalist organisation, began its movement to *liberate* the Babri masjid and mosques at Varanasi and Mathura. An ultimatum was served to the U.P. government "to restore the birthplace of Lord Rama in Ayodhya to Hindus by Shivratri Day (Mar. 8, 1986) or face the consequences in the shape of massive agitation led by religious leaders of the country." *Organizer* (Aug. 25, 1985), cited in Noorani, *supra* note 40 at 252-266.

[187] *Allahabad High Court judgment, supra* note 5 at 91. "Before passing the judgment dated 1.02.1986 the learned District Judge first buried the second limb of the principle (appearance of justice) very deep."

who were largely unaware of these proceedings, in the judicial system itself. The Supreme Court, which invested much of its intellectual labour on 'faith and belief,' did not find this landmark event that shook the faith of people in the judiciary as worthy of any elaboration. No critical comment on this sordid episode exists in the entire judgment which otherwise is eager to imagine law as healing the injustices of the past.

This series of events after independence constituted the underside of the Ayodhya moment. Ironically, in independent India, at various times, the local administration, government and even the judiciary became complicit in deepening the scars of majoritarian violence. Despite the Apex Court's efforts to sanitise this violence, its traces remain in the legal archive which haunt this judgment's sense of 'complete justice.' Foregrounding these traces, as S.U. Khan, J. tried to do briefly, paints an alternate picture of the dispute which would not permit any easy reduction of this controversy to a mere 'title suit.'

VI. The Addendum as Judicial Unconscious

Making sense of the *addendum* at the end of the judgment is a profoundly difficult task given the secrecy of authorship (of the main judgment as well as the *addendum*), an unprecedented practice inaugurated by the *Ayodhya* judgment. The judgment's anonymity reveals the temptations of the judiciary to hide behind the veil of secrecy. The deliberate obfuscation of the authorship of the judgment demonstrates that judicial transparency perhaps is no more a democratic virtue for the Supreme Court of India.

We are given to understand by the Supreme Court that one of the judges "while being in agreement with the above reasons and directions has recorded separate reasons."[188] The separate elaboration, running into more than a hundred pages of the *addendum*, addresses the following issue: 'whether the disputed structure is the birth-place of Lord Ram according to the faith and belief of Hindu devotees.'

This concern is strange since the anonymous author, signatory to the main text, must have also shared the unanimous view that the issue of the site being or not being the birthplace

[188] *Ayodhya case, supra* note 1 at 929.

of Ram is irrelevant to decide the title suit. This leaves one wondering how and why this hypothesis, shrouded in mythology and receding in space and time, even further back from the times of King Vikramaditya, found such elaboration in the *addendum*? The question posed is answered affirmatively with extensive iteration of Sanskrit *slokas* and references to the *puranas*, among other things.

One might characterize the *addendum* as irrelevant or impermissible.[189] But that would be covering up what disrupts the unity of the judgment. The crack it uncovers exposes the original wound. The oddity of the *addendum* is apparent from its different *form* (a distinct font) in which it is written, as if denying any continuity with the main text. In terms of its content it provides clues to the crisis and contradictions that are at the heart of the judgment itself.

All five judges, after all, agree that the reasons recorded in the *addendum* are separate but they insist that they are not in disagreement with it. This, then, is not a dissent. But its attempt to answer the question unworthy of consideration in the main text leaves it split. This outburst at once in agreement and at odds with the main text. In this odd attempt, the judgment reveals its own crisis. It unravels the uncritical stitching together of faith and fact, tradition and history in both itself and the judgement as a whole.

Mythology as/of the Judicial Discourse

The *addendum* in no uncertain terms declared that "[f]aith and belief foster and promote the spiritual life of the soul."[190] Then it clarified that the faith, trust and belief of the Hindus in the birthplace of Ram was the central inquiry of the *addendum*. The *addendum* scanned and cited centuries-old Hindu texts in original Sanskrit and their English translations. A reference to mythology to appreciate the Hindu belief was one thing but

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[189] As learned a scholar as Upendra Baxi, in a short article demonstrating his extraordinary capacity to get everything wrong about the judgment, does not see the addendum as a part of the judgment. "This, clearly, cannot be part of the judgment because anonymous judicial opinions are constitutionally impermissible." Upendra Baxi, "Award of five acres for masjid in Ayodhya is an effort to do complete justice" *The Indian Express* (Nov.12, 2019).
[190] *Ayodhya case, supra* note 1, *Addendum*, at 16 (para 28).

the fusion of mythology into history is quite another. It is the latter which turned the judicial reasoning into ecclesiastical elaboration.

In paragraph 32, the anonymous judge provided the necessary impetus and trigger to the sacred geography argument of the Hindu nationalists when he recited from *Brihad Dharmottara Purana*, a passage where Ayodhya was one of the sacred cities for the Hindus: "Ayodhya, Mathura, Maya (Haridwar), Kashi, Kanchi, Avantika (Ujjain) and Dvaravati (Dwarka) are seven most sacred cities"[191] In one stroke the judicial discourse far surpassed the claims of the Ram janambhumi movement. The astrological preciseness and 'planetary situation' at the birth of Ram was also inferred from the Valmiki Ramayana.[192] After referring to the visit of Guru Nanak, the founder of Sikhism, who visited the birth place sometime during 1510-11, the Court found this as corroborating "the faith and beliefs of the Hindus" which "[could] not be held to be groundless."[193]

The most fateful part of the *addendum* was when the illegalities and criminalities of the Hindu parties found mention as forms of persistent protest, as actions of worship of the Hindu devotees. The context of this comment was the reference to the 1934 demolition of the mosque. The documents of the repair of the mosque were put on record by the plaintiffs of suit no. 4 to show their possession prior to 1949. The *addendum* turned it on its head by describing them as "testimony of *differences and disputes* between the parties which took place in 1934 damaging the Mosque."[194] The silencing of violence, also the hallmark of the main text, was not the only sin of the *addendum* as the documentary evidence of the mosque destruction metamorphosed into evidence of proof "that within the premises of Mosque which premises is (sic.) bounded by boundary wall (sic.) the Hindus were visiting and worshipping in the period in question."[195] The *addendum* concluded the section in the following words: "The above documentary evidence are testimonials of faith and belief of the Hindus that the Mosque was on the janamsthan of

[191] *Id.* at 19.
[192] *Id.* at 31.
[193] *Id.* at 65. "It can, therefore, be held that the faith and belief of Hindus regarding location of birthplace of Lord Ram is from scriptures and sacred religious books including Valmiki Ramayana and Skanda Purana, which faith and belief (sic.), cannot be held to be groundless." *Id.*, para 72.
[194] *Id.* at 99 (emphasis added).
[195] *Ibid.*

Lord Ram. Their *protests, persistence and actions to worship* within the Mosque is testimony of their continued faith and belief that premises of the Mosque is Janmasthan of Lord Ram."[196]

Conclusion

At one place in the judgment, the Supreme Court observed that "in matters of faith and belief, the absence of evidence may not be evidence of absence."[197] But there exists an ineffable and inevitable lack of evidence in the deference of the Court to faith and belief. Besides the erasure of the violence of the 'official' representatives of the rule of law, there were myriad other absences that scar the text of the judgment.

The absence of any serious discussion of and on the *Bommai* case conspicuously marked its presence in the judgment. The case appeared once under the sub-section with the title "Secularism as a Constitutional value."[198]A quote from Jeevan Reddy's J. opinion was taken iterating that secularism "is a constitutional goal and a basic feature of the Constitution"[199] and any action undermining it "is in plain words unconstitutional."[200] The Court neither provided the context of these observations nor discussed its relevance to the present case. The precedent then vanished never to return in the entire judgment.

The solitary passage from *Bommai* extracted in the Ayodhya judgment spoke of secularism as "more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions."[201] Here it may be useful to recall the distinction between a "personal ethic of tolerance" and 'tolerance as a political discourse' made by Wendy Brown.[202] As a political discourse, tolerance can reduce questions of justice into conflicts of cultural assimilation, or as Brown puts it, the "justice project is replaced with

196 *Id.* at 99-100.
197 *Ayodhya case, supra* note 1 at 215 (para 192).
198 *Id.* at 123.
199 *Bommai* cited in *supra* note 1 at 123 (para 83).
200 *Ibid.*
201 Cited in *supra* note 1 at 123 (para 83).
202 Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* 13 (Princeton University Press, New Jersey, 2006). ("Tolerance as such is not the problem. Rather, the call for tolerance, the invocation of tolerance, and the attempt to instantiate tolerance are all signs of identity production and identity management in the context of orders of stratification or marginalization in which the production, the management, and the context themselves are disavowed.").

a therapeutic or behavioral one."[203] The Supreme Court referred to religious tolerance as an unquestionable social and political virtue.[204] But in doing so, it buried any interpretive potential of the quote it approvingly cited from *Bommai.*

In the last pages of the judgment, the Apex Court decreed the entire disputed land in favour of the deities in suit no. 5. The central government was asked to 'formulate a scheme' for various things "including the construction of a temple and all necessary, incidental and supplemental matters."[205] Along with this, the Court also asked for the allotment of "a suitable plot of land admeasuring 5 acres"[206] to the "Sunni Central Waqf Board, the plaintiff in Suit 4."[207] These directions, the Court continued, "were issued in pursuance of powers vested in this Court under Article 142 of the Constitution."[208] This Article of the Constitution empowers the Supreme Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."[209]

In 1985, the *Organiser*, the mouthpiece of the Hindu nationalist organisations, in 1985, pointed to the 'display of generosity' of the "offer of the Hindu religious bodies to Muslims to allot them a different land and get a mosque of their choice design (sic.) constructed through donations raised by Hindus, if they withdraw their claim […] over the birthplaces of Shri Rama in Ayodhya, Shri Krishna in Mathura and the Vishwanath temple in Varanasi."[210] In 2019, this language of "great Hindu generosity" found the constitutional vocabulary of "complete justice" in the hands of the Supreme Court.

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[203] *Id.* at 16

[204] "Tolerance and mutual co-existence nourish the secular commitment of our nation and its people." *Ayodhya case, supra* note 1 at 923 (para 800).

[205] *Id.* at 926 (para 805).

[206] *Id.* at 926-927.

[207] *Id.* at 927 (para 805).

[208] *Ibid.*

[209] Article 142, Constitution of India. The Court also asked the government to provide "appropriate representation […] to the Nirmohi Akhara in such manner as the Central Government deems fit." *Ayodhya case*, *supra* note 1 at 927 (para 805). This too was strange given that the Supreme Court indicted the Nirmohi Akhara for dereliction of duty in acting contrary to the claims of the deities.

[210] *Organiser* (Aug. 25, 1985), cited in Noorani, *supra* note 40 at 258.

IN LIEU OF A CONCLUSION

Modern law and religion are perceived as two opposing ends of a spectrum. One is associated with democratic participation and is harbinger of reason and modernity, the other is seen as a "pre-modern" relic governed by hierarchy, mythology and unreason. Despite these dominant conceptions, there exists a wide scholarship that contests this division and shows how western secularism was never really separate from religion.[1] Ran Hirschl's suggestion aptly captures the essence of the relationship between modern constitutional law and religion: "constitutionalism and religion often fail to get along well with each other not because they are so different- although in many respects they no doubt are – but because they are so similar, each with its own constitutive texts, elevated moral aspirations, interpretive institutions, and, at times, less-than-reverent motivations."[2] Following this insight, this thesis has tried to highlight the functional dimension of law, and argue that the technocratic doctrines and interpretive tools exhibit a form of *secular mythology* where law becomes a sacred site insular from history or society. Focusing on judicial interpretation(s) in Supreme Court and High Courts' cases where law intersected with religion - essential versus secular practices of religion (chapter 1), election law and religious electoral appeals (chapter 2), debates on anti-cow slaughter laws (chapter 3) and Babri Masjid- Ram janambhumi case (chapter 4) - this study has traced the developments in laws and their interpretations while excavating the details wherein lie the deeper mythical structures of secular law. Simply put, the (limited) scope of this study has revealed that while interpreting and adjudicating on religious disputes, the modern law most acutely exposes its own mythology.

While adopting the methodology of studying the interpretive processes of the judiciary, with statutes and case law as the primary archival material, I remain aware that the mythological character of the modern/secular law, could be excavated with other methodological approaches, such as looking at biographies - the intellectual or political

[1] Graeme Smith, *A Short History of Secularism* (I.B. Tauris, London 2008).
[2] Ran Hirschl, *Constitutional Theocracy* 207 (Harvard University Press, 2010).

make up - of individual judges who delivered the verdicts. One could also undertake a purely 'internal' study of the judicial process (within legal precedents and the language of the law) as distinguished from an 'external' study of law (entirely shaped by political considerations). However, for a historicized account of the jurisprudence of constitutional secularism and religious freedom, it is imperative to situate the 'legal' text within the 'social', 'political' and 'cultural' context. As Peter Goodrich remarks:[3]

> [A] critically adequate reading of the law should take account of the various levels of law as social discourse, as a series of institutional functions and rhetorical effects, a project which requires reading within the legal text precisely those facets or meanings of legal regulation and discipline which its self-protective doctrines of unity, coherence and univocality have traditionally endeavoured to exclude […] the legal text should be read linguistically in terms of a theory of deconstruction, that is in terms of the order of discourse or social and political context which it systematically endeavours to deny or obscure[.]

Following Goodrich, I have attempted to take a middle path, between the two extremes - 'legal formalism' on the one hand,[4] and instrumentalist view of law, on the other[5]- to understand the evolving history of legal judgments. Thus, for this study, the legalese, technocracies and the internal workings of the logic(s) of law have been as important as social and political forces that shaped its ever-evolving face.

In what follows, in lieu of a conclusion, I will map a few recent developments that have taken place since some of the major pronouncements discussed in the chapters. Reflecting on some pressing issues which have been discussed in this thesis (and are again before the Court demanding judicial intervention and resolution), I maintain and accentuate the overall argument of this thesis: despite the temptation of viewing the judiciary as an instrument of political class to evaluate its decisions, one must remain

[3] Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* 206 (Palgrave Macmillan, UK, 1987).
[4] *Id.* at 32-62.
[5] Upendra Baxi, *Marx, Law and Justice* 16-30 (N.M. Tripathi (P) Ltd., Bombay, 1993).

focused on judicial process as well as legal technicalities that construct the logic of these outcomes. Further, I will highlight frontiers which could not be pursued in this work but pave way for further possibilities in research.

I. Challenge to the Supreme Court Verdicts

Against the verdicts in *Sabarimala Judgment* (chapter 1) and *Ayodhya case* (chapter 4), review petitions were filed in the Supreme Court in 2018 and 2019 respectively. The procedure for the review petition is specified in the Supreme Court Rules, 2013. These rules relating to practice and procedure are made by the Supreme Court with Presidential approval.[6] More specifically, the Indian Constitution has empowered the Supreme Court to review its own judgments or orders under Article 137.[7] The Supreme Court in various precedents has iterated on the limited and narrow scope of its review jurisdiction. This proposition had found its clearest expression in the words of one of India's most prominent judge, V.R. Krishna Iyer, J.:[8]

> A review of a judgment is a serious step and reluctant resort to it is (sic.) proper only where a glaring omission or patent mistake or like (sic.) grave error has crept in earlier by judicial fallibility. A mere repetition, through different Counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.

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[6] Article 145 (1) of the Constitution of India empowers the Supreme Court to make its own rules "for regulating generally the practice and procedure of the Court" after an approval from the President of India.

[7] Order XLVII (Part IV) of Supreme Court Rules, 2013 lays down the procedure for review. The review petition must be filed within 30 days of the judgment and once dismissed no other review petition can be entertained. The grounds of review of a judgment are restricted by Order XVIII of the Supreme Court Rules, 2013 read along with Order XLVII, Rule 1 of the Civil Procedure Code, 1908. The grounds for seeking review are limited to (1) discovery of new evidence which was either not found earlier or could not be produced, (2) the existence of an error apparent on the face of the record, or (3) any other sufficient reason which is analogous to the above two reasons. A review application, according to the Rules, "as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed." *Available at*: https://main.sci.gov.in/sites/default/files/Supreme%20Court%20Rules%2C%202013.pdf (last accessed on June 12, 2021).

[8] *Sow Chandra Kante and Ors.* v. *Sheikh Habib* (1975) 1 SCC 674 (emphasis added).

Only a conspicuous and glaring error, therefore, on account of judicial fallibility invites a review. This procedural background is important to fully appreciate the reviews of *Ayodhya case* and *Sabarimala judgment.* The review petitions in the *Ayodhya case* were summarily dismissed in an "in-chamber" hearing, whereas the *Sabarimala review* took a long course of hearings eventually leading to a review verdict delivered one year later. The *Sabarimala review* verdict kept the review petition as pending and asked a larger bench to clarify and settle certain legal questions which arose in the *Sabarimala judgement*.

The Ayodhya Review

A five judge bench[9] dismissed 18 review petitions which were filed against the Supreme Court verdict in the *Ayodhya case*. The first review petition was filed on December 2, 2019 by Maulana Syed Ashhad Rashidi, legal heir of original litigant M. Siddiq and U.P. President of Jamiat Ulama-e-Hind,[10] who argued that the use of 'complete justice' under Article 142 of the Constitution by the Supreme Court was erroneous.[11] On December 9, another petition was filed by Hindu Mahasabha questioning the grant of five-acre land to the Muslim side and against the refusal of the Supreme Court to grant juristic personality to the 'land' at Ayodhya.[12] On the same day, 40 academics and activists such as Irfan Habib, Sabnam Hashmi, Jayati Ghosh, Nandini Sundar, among others, filed a review on

[9] The judges who heard the review petitions were same as those who delivered the original judgment. However, Sanjiv Khanna, J. replaced Ranjan Gogoi, CJ. who retired soon after delivering the *Ayodhya* judgment.

[10] "President of Jamiat Ulama-e-Hind files review plea against Supreme Court's Ayodhya verdict", *available at*: https://theprint.in/judiciary/president-of-jamiat-ulama-e-hind-files-review-plea-against-supreme-courts-ayodhya-verdict/329121/ (last visited on Jul 20, 2021). Full text of the petition is *available at*: https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1081/Review_Petition_-__Final_.pdf (last visited on Jul 20, 2021). All India Muslim Personal Law Board (AIMPLB) was also one of the review petitioners. "10 key arguments in 18 Ayodhya review petitions before Supreme Court today" *Hindustan Times* (Dec. 12, 2021), *available at*: https://www.hindustantimes.com/india-news/10-key-arguments-in-18-ayodhya-review-petitions-before-supreme-court-today/story-KYhEw2k3JhDDsJatei9heL.html (last visited on Jul 21, 2021). Uttar Pradesh Sunni Central Wakf Board, one of the original parties to the dispute, decided against challenging the verdict.

[11] The problems of invoking Article 142 in *Ayodhya* judgment are discussed in chapter 4. Also see, Amit Bindal, "'Complete Justice'? Silences and Erasures in the Ayodhya judgment" 11 *Journal of Indian Law and Society* 48 (2020).

[12] "Ayodhya verdict: Hindu Mahasabha files review petition over 5-acre land to Muslims", *The Indian Express* (Dec. 9, 2019), *available at*: https://indianexpress.com/article/india/ayodhya-verdict-hindu-mahasabha-files-review-petition-over-five-acre-land-to-muslims-6158509/ (last visited Jul 20, 2021).

the ground of framing of the dispute by the Supreme Court as strictly between two religious communities.[13] All these appeals were dismissed.[14] The Supreme Court did not find any substance in the review petitions filed by the parties to the suit. It dismissed the other petition (filed by academics and activists) on the ground that those who were not a party in the original dispute cannot file petitions for review of the final verdict.

The Sabarimala Review

After the *Sabarimala judgment*, more than 50 review petitions were filed by various individuals and institutions. The first petition was filed by National Ayyappa Devotees Association and the Nair Service Society on October 8, 2018. A five judge bench heard all the review petitions and delivered the judgment one year later on November 14, 2019 in *Kantaru Rajeevaru* v. *Indian Young Lawyers Association* (2019).[15] The review petitions were heard along with "several fresh writ petitions [that were] filed as a fall out of the judgment".[16] The Supreme Court, by a majority of 3:2,[17] decided to keep the review (and fresh writ) petitions pending while referring the same to a larger judge bench.[18]

Two unique and unprecedented aspects of the review judgment are noteworthy. One, that A.M. Khanwilkar, J. who was in favour of the entry of women in the Sabarimala temple in *Sabarimala judgment* and had concurred with Dipak Misra, CJ., reversed his position in the *Sabarimala Review*. Khanwilkar's, J. change of position – he now concurred with Ranjan Gogoi, CJ. and Indu Malhotra, J. - remains unexplained as he did not write a

[13] The petition challenged the very opening para of the *Ayodhya* judgment which reads: "These first appeals center around *a dispute between two religious communities*…" (para 1, emphasis added). For the details of review petition see "Academics, Activists File Review Petition Against Ayodhya Verdict" *The Wire* (Dec. 11, 2019), *available at*: https://thewire.in/law/ayodhya-review-petition (last accessed on June 12, 2021). Full test of the review petition is *available at*: https://www.livelaw.in/pdf_upload/pdf_upload-367790.pdf (last visited on Jul 21, 2021).
[14] "Ayodhya verdict is final. Supreme Court dismisses 18 review petitions" *Hindustan Times* (Aug. 4, 2020).
[15] *Kantaru Rajeevaru* v. *Indian Young Lawyers Association* (2020) 2 SCC 1, *available at*: https://www.sci.gov.in/pdf/JUD_6.pdf (Hereafter, "*Sabarimala Review"*). All the judges on the bench were same except Dipak Misra, CJ. who retired and was replaced by Ranjan Gogoi, CJ.
[16] *Id*., para 1.
[17] The majority opinion of *Sabarimala Review* was written by Ranjan Gogoi, CJ. (on behalf of A.M. Khanwilkar and Indu Malhotra, JJ.). The dissent was written by R.F. Nariman, J. (on behalf of D.Y. Chandrachud, J.).
[18] *Sabarimala Review*, *supra* note 15, para 9.

separate opinion either in the original judgment or its review. Even though one of the justifications given by the majority judges for deferring the petitions was to "ensure consistency in (judicial) approach for posterity",[19] this inconsistency in the Khanwilkar's, J. opinion remains unexamined. The second procedural uniqueness was the clubbing of the review petitions with 'fresh writ petitions'. In doing so, the Court departed from the settled principles of law on the scope, required cause of action and procedure for entertaining review and writ petitions.[20] In this regard, one can also notice the disparity in judicial approach: rejecting the review petition filed by third parties in the *Ayodhya Review,* while entertaining new writ petitions along with the review petitions in the *Sabarimala Review*. Legal commentators and newspaper editorials rightly decried the majority judgment in the *Sabarimala Review*, calling it "unnecessary", leading to an "irresolution"[21] and "open[ing] up for abuse the limited jurisdiction for review."[22]

The majority opinion referred to the pending cases of entry of Muslim women in Durgah/ Mosque,[23] the inter-religious marriage of Parsi women[24] and female genital mutilation in Dawoodi Bohra Muslims[25] and observed that the "prospect of the issues arising in those cases being referred to larger bench cannot be ruled out."[26] Simply put, the majority foresaw (and listed)[27] the issues that could potentially arise in the above pending cases, which overlapped with the review petitions, and thus justified its decision of calling for constitution of a larger bench. The dissent written by R.F. Nariman, J. rebuffed this

[19] *Id.*, para 4.
[20] While a review petition is filed against a judgment of the Court, writ petition is filed under Article 32 of the Constitution against the violation of any fundamental right. "[B]y virtue of Order VI Rule 1 of the Supreme Court Rules, the 'fresh writ petitions' should have been heard by a division bench of the court. If the division bench had any 'doubt' regarding the 2018 verdict, they could have invited the attention of the Chief Justice, who could have then referred the matter to a bench of appropriate strength. A reference to a larger bench- if made- could have only been through the writ petitions and not while exercising the review jurisdiction under Article 137." See Nivedhitha K., "Sabarimala Review: The curious case of Review Petitions' Adjudication" (Nov. 21, 2019), *available at*: https://www.theleaflet.in/sabarimala-review-the-curious-case-of-review-petitions-adjudication/ (last visited on Jul 21, 2021).
[21] See, Editorial, *The Hindu* (Nov. 15, 2019).
[22] A review to the judgment of the Supreme Court is maintainable only if there is an error which is apparent and significant enough to jeopardise the interests of justice. See, Suhrith Parthasarathy, "A revival of battle already fought and lost" *The Hindu* (Nov. 28, 2019).
[23] Writ Petition (Civil) No.472 of 2019.
[24] Special Leave Petition (Civil) No. 18889/2012.
[25] Writ Petition (Civil) No.286 of 2017.
[26] *Sabarimala Review, supra* note 15, para 5.
[27] *Ibid.*

judicial approach of the majority judges, explaining that "if and when the issues that have been set out in the learned Chief Justice's judgment arise in future, they can appropriately be dealt with by the bench/benches which hear the petitions concerning Muslims, Parsis and Dawoodi Bohras. What is before us is only the narrow question as to whether grounds for review and grounds for filing of the writ petitions have been made out."[28] This was a reminder that the speculative questions and concerns were not in issue even in the original judgment, much less in a review petition. The dissent also noted that most of the arguments in the review were "reargued" or were a "mere rehash" of the original case and thus did not constitute "an error apparent on the face of record."[29] Responding to the contention of lawyer, K. Parasaran (who led the arguments on behalf of the review petitioners) that the sole observations of D.Y. Chandrachud, J. on Article 17 were a "material error", Nariman, J. remarked that Chandrachud's, J. opinion was "a possible view" and thus "cannot be a subject matter of review."[30]

Sabarimala Review is unsatisfactory in both its procedural and substantive evaluation. One cannot rule out the instrumentalism of the verdict, succumbing to the difficulties that were faced in the execution of the *Sabarimala judgment*. However, such a reading is easy and somewhat misguided. Instead, I suggest that this reveals the *internal* failure of the judicial process. We must locate the reason behind the "irresolution" of the review in the lack of conversation between the majority judges in the *Sabarimala judgment* and their failure to work through the issues arising from the concept of constitutional morality. To illustrate, one of the issues proposed for resolution in *Sabarimala Review* to a larger bench (of at least seven judges) was the contours of the term "constitutional morality". A larger bench was called to decide: "Is it [constitutional morality] over arching morality (sic.) in reference to preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective."[31] I have argued in chapter 1 that constitutional morality in the majority opinion of the *Sabarimala judgment* was expounded in universalist and transhistorical terms. This was perhaps the reason why K. Parasaran's argument that constitutional morality was a "vague" concept found

[28] *Id.*, para 2 (dissenting opinion).
[29] *Id.*, paras 18, 19 (dissenting opinion).
[30] *Id.*, para 14 (dissenting opinion).
[31] *Id.*, para 5 (majority opinion).

resonance with the majority of the judges (including Khanwilkar, J. who had previously endorsed it in the *Sabarimala judgment*). Another issue for reconsideration raised by the *Sabarimala Review* was whether what was “essential” or integral to religion should be “left exclusively to be determined by the head of the section of religious group.”[32] This again, as I have argued in chapter 1, was an issue that had not been satisfactorily resolved by the majority opinion in *Sabarimala judgment* in the first place. A closer reading of the interpretive process, therefore, reveals deeper conceptual and procedural issues in understanding the outcomes and implications of critical Supreme Court judgments.

For this study, these two questions, posed to a larger bench, are also pertinent as they expose the deeper linkage it has tried to explore, between religious and judicial faith. On the one hand, we find judicial reticence in answering the question of “religious faith,” ostensibly on the grounds that the Court as a secular institution was incompetent to deal with theology. But on the other, we see a form of “judicial faith” appearing in the form of universal doctrines and principles which transcend all historical, political or social context. The judicial distancing from religious faith illustrated a constitutionalism arising out of liberal political philosophy with modernity defining itself in opposition to myth. But the interpretive process of several critical cases that had, in different ways, to do with religion in one way or other, did bring questions of religious faith into the judicial domain, leading the Court to investigate and pronounce on religious faith and its essential practices. This interpretive process, combined with the formal reluctance of the judiciary to confront the religious, has ceded ground to an authoritarian religious orthodoxy, permitting community leaders to determine the contours of “essential” religious faith, a result which also potentially undermines the liberal value of preserving individual autonomy. This conundrum, thus, calls for a robust engagement with religion without relinquishing the useful elements of liberal constitutionalism as suggested in this study. In one sentence, the judicial discourse must relinquish and abandon the strict opposition between the religious and the secular.

The ‘judicial faith’ or what I have described as ‘secular mythology’ in the Introduction, appearing in concepts like constitutional morality, constitutes a blind-spot of the legal

[32] *Ibid.*

process. The judiciary needs to recognise the difference between these idealized conceptions and the manner in which they are actualized or developed concretely in particular historical moments. These ideational forms take the shape of judicial faith/mythology unless put under scrutiny with respect to their origins, moves and shifts in different historical periods. As I have analysed in chapters 1 and 3 respectively, the notion of constitutional morality and the doctrine of presumption of constitutionality of laws enacted by a competent legislature have acquired the shape of judicial faith in their articulation by the judiciary. In this sense, this study encourages critical accounts of standards, norms and doctrines that are evolved by judicial interpretation by continually putting them to contextual scrutiny.

II. The terms of the Cow Protection Debate and the Way Forward

An insight that I have tried to pursue in the cow protection debates is to rethink the very framing of the debate in terms of the binary of religion and economy. This binary was adopted not only by the Hindu nationalists who couched their cow protection position in economic terms but also by scholars who (rightly) argued that the economy claim was merely a tactic of Hindu nationalists to camouflage the real religious motives (as discussed in chapter 3). However, the dominant historical scholarship on this subject has not provided insights into the continued popularity of cow protection cause in popular as well as judicial discourse. These gaps in in the legal and historical research surfaced in the stark shift in the Supreme Court's position, from *Hanif Quareshi* in 1958, which partially allowed the slaughter of cow progeny (bulls and bullocks) to *Mirzapur* decision in 2005 which approved a total ban on slaughter of cow and its progeny. The argument that convinced the Supreme Court for this total ban in 2005 was the claim of scientific reasoning linked to improvement of breed, the utility of the cow for the national economy and the argument of compassion for creatures. Unsurprisingly, the Supreme Court did not mention the religious reverence of the cow even once in the majority opinion of *Mirzapur*. It applauded the parties of the dispute from staying away from religious sentimentalism and adhering to economic objectivity.

Cassie Adcock demonstrates that scientific advancement and breed improvement was an old trope for the cow protectionists:[33]

> [The state] endorsement for cow protectionist institutions did not begin, but rather continued, after Independence. When colonial cow protectionists embraced the language of breed improvement and focused attention on the slaughter associated with the urban milk supply, they succeeded in securing state endorsement of cow protectionist *gaushalas* as institutions working for the material good of all Indians.

She argues that this connection between economic utility and national development sat well with the rhetoric of Hindu nationalists. Enlisting the utility of the cattle for agricultural draught labour, manure, milk products enabled cow protection to acquire a form of national cause.[34] The underlying message of such formulation was "that those who insist on slaughtering cattle are, at best, selfish and short-sighted, and cause significant harm to the national interest."[35] According to her, the focus must be to unpack the economy-religious argument by emphasis on the *effect* that the anti-slaughter laws and their strengthening by the State has had not only on the Muslim community but also on the leather industry, which is largely dominated by Dalits.[36]

Also of significance is the work of James Staples who in his ethnographic analysis of beef trading in South India challenges the commonly held assumption that the beef trade is primarily conducted by non–Hindus, Dalits or tribals and that "respect towards cattle,

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[33] Cassie Adcock, "'Preserving and Improving the Breeds': Cow Protection's Animal-Husbandry Connection" 42(6) *South Asia: Journal of South Asian Studies* 1141-1155, 1152 (2019).

[34] In the election campaign of 2014, two slogans used by Hindu nationalists were: "*Modi ko Matdaan, Gai ko Jeevan Daan"* (Vote for Modi, give life to the cow) and "*BJP ka sandesh, bachegi Gai, bachega Desh"* (BJP's message, the cow will be saved, the country will be saved). See, Iqtidar Karamat Cheema, *Constitutional and Legal Challenges Faced by Religious Minorities in India* 7 (United States Commission on International Religious Freedom, 2017).

[35] Cassie Adcock, "Cow Protection and Minority Rights in India: Reassessing Religious Freedom" *Asian Affairs* 7 (2018).

[36] *Id.* at 9. In July 2016, various Dalit family members were spanked for skinning a cow in Una, Gujarat. This led to a protest by the Dalits involved in carcass removal in the state of Gujarat. See, Shivani Kapoor, "'Your Mother, You Bury Her': Caste, Carcass and Politics in Contemporary India" 3(1) *Pakistan Journal of Historical Studies* 5-30 (2018). Also see, Kathryn C. Hardy, "Provincialising the Cow: Buffalo–Human Relationships" 42(6) *South Asia: Journal of South Asian Studies* 1156-1172 (2019).

cows especially, and the application of the logic of kinship to human–bovine relations are the near-exclusive preserve of high caste, mostly vegetarian Hindus."[37] Staples illustrates the role played by wilful ignorance at all levels of the beef trade in Andhra Pradesh and Telangana. His conclusions, based on two decades of work in the field, are important not only to challenge the commonly held assumptions about beef eating and trading practices, but also to address the increasing incidents of "cow vigilantism" which have led to lynching of people (especially from minority and marginalized communities) on the suspicion of eating beef.[38] Summing up his essay, Staples writes:[39]

> Brahman cattle owners, for example, appear no less likely than their lower-caste or Muslim counterparts to sell their no-longer-useful cattle into the beef market, even if they work hard to maintain ignorance of their involvement. Those who eat beef, too, relate to their own cattle via the same kinship idioms as vegetarian Hindus, in some cases even keeping their own animals out of the market. Such knowledge might be used to challenge a vigilantism which […] is often less about meat per se and more about the identities of those targeted.

If law is a social discourse, then legal scholarship must find ways for these forms of knowledge to find their way in the judicial discourse. Such a possibility would begin by debunking the modern law's self-assessment as a fully autonomous institution unmindful of the prevalent sociological and historical realities. Staples' work provides a necessary change in orientation for historical and legal scholarship on this issue, which is yet to account for "the concrete, everyday relationships, exchanges, networks and processes

[37] James Staples, "Blurring Bovine Boundaries: Cow Politics and the Everyday in South India" 42(6) *South Asia: Journal of South Asian Studies* 1125-1140, 1127 (2019).
[38] See, Shabnum Tejani, "Cow Protection, Hindu Identity and the Politics of Hurt in India, c.1890–2019" 3 *Emotions: History, Culture, Society* 136-157 (2019). Tejani describes the killing of Mohammad Akhlaq near Dadri in the state of U.P. and merciless beating with iron rods of Dalit youth in Una, Gujarat. *Id.* at 136-138; Vatsa Aditi, "Dadri Lynching: Delhi CM Arvind Kejriwal Claims He was Initially Stopped from Entering Bisara", *The Indian Express* (Oct. 4, 2015), *available at*: http://indianexpress.com/article/india/india-news-india/kejriwal-stopped-from-entering-dadri-village-asks-why-me/ (last accessed on June 12, 2021).
[39] Staples, *supra* note 37 at 1140.

through which buffalo and cows are transformed into one of the most contested components of the Indian diet."[40]

The Anthropocene and Species Best Interest

Following the methodology of extensive analysis of the judicial precedents and the Court's reasoning, this thesis could not attend to some important issues which require deliberation in a separate monograph. I will briefly touch upon them here. One such issue with respect to cow protection debate is the concern with the ethical treatment of animals.[41] The cow protectionists (*gau rakshaks*) do not pursue their cause as a political one, but one which is driven by the impetus of ethical commitment towards the cow. This has led to the argument that the Hindu Right, in juxtaposing its religious reverence with the ethics of care, stands on the side of animal rights activists.[42] Undoubtedly, this claim is false as the exclusive focus on cows betrays the claim of universal ethics in the Hindu nationalist imagination. Nevertheless, one must acknowledge the strategic use of the argument and challenge it seriously beyond the standard trope of dismissing this as a mere masquerade. For the legal scholarship, as I have discussed in chapter 3, this became a pressing issue as the 2005 *Mirzapur* decision accorded its approval for total ban on cow progeny by evoking the fundamental duty of all citizens under Article 51-A (g) to "protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures."[43] In a different but not unrelated context, a recent Supreme Court decision in *Animal Welfare Board of India* v. *A. Nagaraja & Ors*, delivered on May 7, 2014 is noteworthy.[44] The judgment examined the question of *Jallikattu* (a traditional event with a ceremonial bull-man tussle that has cultural and ritual meanings), bullock cart races in the states of Tamil Nadu and Maharashtra from the vantage point of animal rights. The Supreme Court in its

[40] *Id.* at 1127-28.
[41] I am grateful to Tapati Guha-Thakurta for probing the issue, in my annual presentation, of combating cruelty towards animals without sacrificing the concern of vigilantism of the Hindu nationalists in the name of cow protection.
[42] Cassie Adcock and Radhika Govindrajan, "Bovine Politics in South Asia: Rethinking Religion, Law and Ethics" 42(6) *South Asia: Journal of South Asian Studies* 1095-1107 (2019).
[43] Article 51-A (g), Constitution of India.
[44] (2014) 7 SCC 547 [Hereafter, "*Jallikattu Judgment"*]. The judgment was written by K.S. Radhakrishnan, J. on behalf of Pinaki Chandra Ghose, J.

interpretation of Prevention of Cruelty to Animals Act, 1960 (PCA) articulated the concern for non-human species in a poignant manner. It declared that it is the duty of the Court to protect animals as “they are unable to take care of themselves as against human beings.”[45] The Court upheld the ban on *Jallikattu* on the grounds of cruelty meted out to animals such as bulls and bullocks. Abhayraj Naik, an environmental activist and lawyer applauded the decision of the Supreme Court as the “legal recognition of nature” and noted that the rights granted to the animals “unlike the earlier judgements, apply to individual animals and not just to the species of animals.”[46]

The ontological imaginary of this judicial interpretation was guided by what the Court described as “Species Best Interest”.[47] This was certainly a judicial step beyond a utilitarian and anthropocentric imagination of modernity. One important point to note about the *Jallikattu Judgment* was that despite its citations from Isa Upanishad and struggle for an alternative imagination, its eventual decision follows the rights-based framework in imagining justice for non-human species. Even Naik, who celebrated this judicial endeavour, notes that the judgments on environmental protection exhibit “a liberal, rights-centric, individualistic frame struggling to contain the seeds of non-Socratic, non-Cartesian, eastern philosophies and lived experiences on the interconnected nature of life.”[48] It prompts the question about whether the liberal vocabulary of rights is sufficient and adequate for alternative ontological imaginaries. This question troubles, and limits, the transformative potential of the judgment and requires scholarly attention. This thesis touches upon one important context of cow-protection that would benefit from such further explorations, but clearly, the issue has wider ramifications.

Another aspect that requires deliberation is the near monolithic and one dimensional distinction that such a discourse creates between animal lovers and animal haters/ killers which feeds into the language of Hindu nationalists. Staples introduces the notion of ambivalence of love when he mentioned that beef eaters and cattle traders baulk at the

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[45] *Id*. para 26.
[46] Abhayraj Naik, “Law’s Nature” 721 *Seminar* (2019), *available at*: https://www.india-seminar.com/2019/721/721_abhayraj_naik.htm (last accessed on Jul 6, 2021).
[47] *Jallikattu Judgment*, *supra* note 44, para 12.
[48] *Supra* note 46.

idea of eating their own animals or even selling them in the market for consumption: "'They are like brothers and sisters to us', or 'they are our children!', people routinely claimed of their livestock, invoking kinship as the logic that prevented them from eating them."[49] While he acknowledges the limits of this kinship-tie, as the animals are not always treated well and demands of excessive labour on them were commonplace, he describes this as mirroring the image of all forms of kinships and familial relations. It is this ambivalence of love that challenges the simplistic opposition between animal-lovers and animal-haters.[50]

Aarti Sethi pursues this argument in distinguishing social embeddedness from the rights-bearing individuality of non-human species in an agrarian social order.[51] Acknowledging that violence was a marked feature of this social co-existence of men and bullocks, Sethi seeks to examine its signification or meaning from within the social order. Sethi argues that in the festival of Pola in western India "the ritual enactment of domination [was] thus not only, or […] not centrally, the mark of the taming of an animal by humans, but rather the mark of the bull's inclusion into social relations."[52]She demonstrates this by examining the rituals, mythology in folklore and official Gazettes of Maharashtra, associated with Pola: washing of feet, adorning of the bull, its treatment as a gift from Lord Shiva/ Mahadeva etc. The Chandanpur Gazette of 1909 records the lore of origin of the festival: how Lord Shiva on the complaint of bullocks of not being treated well decided to appear to enquire into the situation himself, "[m]en got to know of this and that day treated the bullocks so well that when Mahadeo came he found their complaint utterly groundless. The bullocks were outwitted but they still claim their day."[53]

From a legal perspective, Sethi's claim undermines itself as she recounts the associated violent practices, on the day of the duel, of inebriating the bull, rubbing substances into

[49] Staples, *supra* note 37 at 1135.
[50] For a psychoanalytic exploration on the point of ambivalence in the context of death penalty debate, see, Judith Butler, "On Cruelty" 36(14) *London Review of Books* (2014).
[51] Aarti Sethi, "Mahadev's Gift: Men, Bullocks and the Community of Cultivation in Central India" 42(6) *South Asia: Journal of South Asian Studies* 1173-1191 (2019). Sethi pursues an archival and ethnographic study of Maharashtra's Pola festival of bullock fights and bullock races, which are specifically noted in the *Jallikattu Judgment*.
[52] *Id.* at 1178.
[53] Cited in Sethi, *id.* at 1183.

its eyes and many other cruel manifestations which find mention in the *Jallikattu Judgment*.[54] She also notes the gendered nature of the event and the "masculine excess spiralling into violence that is a feature of Jallikattu and Pola [was] performatively also indexed to the social body of caste."[55] Despite this, against the *Jallikattu Judgment*, she maintains:[56]

> In the ritual, while violence is certainly present, animality is not the mark of an exception to socio productive and ethical recognition, where 'the bulls involved are physically and mentally tortured for human pleasure and enjoyment'. Rather, the animal marks the order of the normative. The animal is a participant in rites that represent the domains and practices of normative prescriptions, divine and ancestral debts, familial and social exchanges, relations of domination, hierarchy and violence, which compose agricultural life.

What Sethi describes as "social personhood" is also an offshoot of the utilitarian anthropocentric imaginary and hardly sensitive to the "Species Best Interest" standard evoked by the Supreme Court in *Jallikattu Judgment*. While it remains difficult to advocate uncritically for these performances and performative excesses for the reasons mentioned above, Sethi reminds us that an inquiry into social embeddedness of meaning is needed for legal justice to become more grounded. This would also interrogate and debunk the ethical claim of cow protectionists as one of "compassion".[57]

III. Mother, Myth and History

One theme I have attempted to pursue is the way in which the technical legal process's conflating of Hinduism with Hindutva ignores the historical and political differences in these categories (chapter 2) and bolsters the conflation of myth and history in arriving at the final verdict in Ayodhya (chapter 4). Here, I wish to draw upon this argument of

[54] *Jallikattu Judgment*, *supra* note 44, para 12.
[55] Sethi, *supra* note 51 at 1190.
[56] *Id*. at 1184.
[57] Also see, Shaheed Tayob, "Disgust as Embodied Critique: Being Middle Class and Muslim in Mumbai" *South Asia: Journal of South Asian Studies* 1-18 (2019).

personification of the land and its association with the Hindu nationalist agenda. Gyanendra Pandey notes the recurring theme of 'timelessness' in what he calls the 'Hindu History' that is circulated by Hindu nationalists in various forms.[58] "The monument (Hindu Temple) and the struggle (for avenging the wrongs) are always there – like God or the nation, eternal and immutable."[59] In variety of vernacular literature reviewed by Pandey, what is notable is the absence of any concrete historical moment of *construction* of the *janamsthan*. Only the theme of *destruction* follows the logic of historical time as firmly fixed. "History", framed this way, "becomes an endlessly repeated tale of aggression by "foreigners and resistance by 'the Hindus' […] the identity of 'foreigners', like that of 'natives', is (permanently?) fixed."[60] It was this 'permanence' or eternal fixity of identity that formed the hallmark of mythologisation of 'Hindu history' writing. The Ram janambhumi, Pandey notes, on this account was always present, at times 'smiling', despite its alleged destruction by Babur! On this formulation, there never was any mosque but eternally the sacred land of Lord Ram, an argument central in the review petition filed by Hindu Mahasabha against the *Ayodhya* judgment. Further, this narrative is useful in discerning the tone, tenor and framing of the 'addendum' of the judgment (chapter 4) which also slipped into this form of mythic importance of the land in establishing the faith and belief of the Hindus.

More worrying is the future threat that this discourse of permanent hurt can lead to. A city civil court of Varanasi has recently ordered a survey of the site at Kashi-Vishwanath Temple-Gyanwapi Mosque by a five-member committee of Archeological Survey of India (ASI).[61] Some lawyers who are inclined towards the cause of Hindu nationalism have celebrated this move as a "glimmer of hope".[62] Curiously, they claim that such an

[58] Gyanendra Pandey, "The Appeal of Hindu History" in Vasudha Dalmia and Heinrich von Stietencron (eds.), *Representing Hinduism: The Construction of Religious Traditions and National Identity* 369–88 (Sage Publications, New Delhi, 1995).
[59] *Id.* at 378.
[60] *Id.* at 379.
[61] Radhika Rameseshan, "Will Varanasi's Gyanvapi mosque go the Babri Masjid Way?" *Times of India* (Apr. 13, 2021).
[62] Yasowardhan Tiwari and Anujay Srivastava, "Kashi Vishwanath vs Gyanvapi Mosque: Resolving Battles over 'Sacred Spaces'" *The Daily Guardian* (Apr. 24, 2021).

order was a logical fallout of the Ayodhya judgment of the Supreme Court.[63] I have shown in chapter 4, that the Supreme Court judgment did not allow, and categorically rejected, such opening up of the historical claims. However, the selective/ (mis)readings of previous precedents as seen in the discussion of *Hindutva* judgments (chapter 2) is an ever present possibility in the discursive realm of law. The question of judicial process and the Supreme Court speaking as an institution becomes important in this respect. Equally compelling is the issue of confronting the appeal of mythological history which is increasingly gaining prominence despite its imaginary formulation.

The above issues also acquire significance from a feminist perspective. For instance, the concern around protecting the cow, which is imagined as the "mother" of the nation requires deeper exploration with regard to the implications of such gendered vocabulary and reliance on the maternal metaphor.[64] This perhaps would make the connection between the masculine/ militant discourses of cow protection and the protection of the-land-seen-as-mother, the *Asthan Sri Ram Janambhumi*, through the grant of juristic personality, more pronounced.

Urvashi Butalia had anchored the idea that the role of women and their mythological framing was used by the Hindu nationalists to keep the "myth" of "permanent rape" alive around the discourse of "abducted women" after partition.[65] The nationalist discourse of the newly formed Indian State was keen to bring them back as a question of national honour and virility. In doing so it entirely denied the agency of the abducted women. But for the Hindu nationalists the desire was quite the opposite:[66]

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[63] "The present legal tussle could be adjudicated by the court in line with the Ayodhya decision, by recognizing and allowing the claims of the hindu deity, i.e., Lord Vishveshwar or Lord Shiva, over the disputed land and providing adequate compensation and an alternate land for the building of a mosque for the representatives of Gyanvapi Mosque in accordance with the precedent set by the Ayodhya judgment." *Ibid*.

[64] See generally, Tanika Sarkar, "Nationalist Iconography: Image of Women in Nineteenth Century Bengali Literature", 22(47) *Economic and Political Weekly* 2011-15 (Nov. 21, 1987).

[65] Urvashi Butalia, "Muslims and Hindus, Men and Women: Communal Stereotypes and the Partition of India" in Tanika Sarkar and Urvashi Butalia (eds.), *Women and the Hindu Right* 58–81 (Kali for Women, New Delhi, 1995).

[66] *Id.* at 76 (emphasis in the original).

> The abducted and raped women must stay where they are, in a state, if you like, of *permanent* rape because it is this that will enable Hindu men to avenge themselves on those responsible for this condition of their 'sisters', every Sita and Draupadi.

This eternal identification of permanent victimhood (arising from the discourse of permanent or eternal hurt), Butalia showed, made various men turn towards militant Hinduism during the Ram Temple movement in the nineties.[67] Thus, the Ayodhya dispute and what will follow must be examined from a gender perspective.[68] Butalia points to the gendered dimension of linking women with property in communal disputes including Ayodhya: "This is a motif that recurs in almost all communal rhetoric today […] In much sectarian violence in India today the 'losses' of partition, in terms of women and property provide powerful referrents (sic)."[69] The *Ayodhya* judgment, from this perspective, requires a clarion call for thinking the appeals and strategies of the agenda of Hindu nationalism and how they play out on the legal register.

However, the Supreme Court has stripped Hindutva of all political ascriptions and entrenched it with Hinduism sidestepping the complex history of these notions. This insular and ahistorical judicial attitude demonstrates how the Indian Constitution has been increasingly read as a scripture with its sacred text, institutional hierarchies and morality guiding the judicial interpretive practices. The insistence of this study is not to separate the realms of constitutionalism and religion, or law and myth but to understand and engage with the close affinities between the two. Such an acknowledgment would make the law less amenable to violent appropriation by the sectarian ideologies of religious politics.

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[67] *Ibid.*

[68] In this context, the work of British psychoanalytic feminist, Jacqueline Rose is worth mentioning. For her scathing indictment of Zionism and the construction of Jewish victimization as a fixed identity, see, Jacqueline Rose, *The Question of Zion* (Princeton University Press, 2005).

[69] Butalia, *supra* note 65 at 77.

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