

**LAW, MYTH AND MODERNITY:
A STUDY IN LEGAL EPISTEMOLOGY**

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Introduction

This thesis is an attempt to study the intersection of modern law with religion, through a close look at the Indian Supreme Court. The emphatic resurgence of religion in the latter half of the twentieth century is evident.¹ In the contemporary times the law has become a ‘legitimacy-conferring’ instrument for 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 the modern law. Premised on faith, belief or myth in contrast to the reason, proof, and empiricism which are the hallmarks of the western enlightenment tradition and the modern law. One of the reasons for this study’s close focus on law’s encounter with religious claims is that it in this encounter that the contrast between the two appears most starkly. I focus, therefore, on the Indian Supreme Court’s interpretations of the free exercise of religion clause³ in chapter 1, the issue of legitimacy of religious appeals by political parties during elections in chapter 2, the directive principle exhorting the State for protection of cow and its legal construction in chapter 3, and finally the dispute of entitlement on the sacred geography of Ayodhya in the Babri Masjid- Ramjanambhumi dispute in chapter 4.

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 colonial modernity.⁴ It is because of this

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 the secular age reduces religion or faith to one of the options available to an individual as opposed to a default state, see Charles Taylor, *A Secular Age* (Harvard University Press, Massachusetts, 2007).

² In this study, I 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” (chapter 2), and the Supreme Court decision in the Babri Masjid- Ram janambhumi dispute which settled the title claim in favour of the Hindu parties (chapter 4).

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

⁴ See C.S. Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (Oxford University Press, New York, 2014), ch. 1. Also see, Bernard Cohn, *Colonialism and its Forms of Knowledge: The British in India* (1996), ch. 3; Kunal Parker, “Interpreting Oriental Cases: The Law of Alterity in the Colonial Courtroom” 107 *Harvard Law Review* 1711-1728 (1994); Janaki Nair, *Women and Law in Colonial India: A*

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 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. I should clarify that my argument is not an endorsement of the politics of the Hindu Right, which explicitly aligns religion with Hindu nationalism. Rather, it is a plea for expropriating the religious from the Hindu Right, which has appropriated it for naked political ascendancy. I try to do this by exploring carefully and historicizing how ‘religion’ has figured in the discourse and interpretations of the law in the highest levels of the Indian judiciary since independence.

In order to do this, I rely on scholarship that argues that any neat U.S.-style separation of religion and State is an impossibility. Sanford Levinson, for instance, argues that despite the removal of the sacred from constitutional deliberations, the constitutional text, symbols and values have become a sacred supplement, turning the U.S. Constitution and political institutions into a form of “civil religion”.⁵ From a feminist standpoint, Margaret Davies takes note of the “highly visible social markers of religious difference” becoming an important issue for gender justice towards the end of the twentieth century with the banning of *hijab* in France and Turkey. She raises the question of whether by “excluding religion from political discourse [...] we also silence those who would challenge dominant interpretations of their faith?”⁶ She advocates for dissenting traditions within the religious landscape to occupy the discursive public sphere. This would avoid essentialist views of religion, in the hands of few religious leaders, reinvigorating religious

Social History (Kali for Women, New Delhi, 1996); Upendra Baxi, *Towards a Sociology of Indian Laws* (Satvahan, New Delhi, 1986).

⁵ Sanford Levinson, “The Constitution in American Civil Religion” 1979 (1) *The Supreme Court Review* (1979) (“The Flag, the Declaration, the Constitution – these [...] constitute the holy trinity of [...] the American ‘civil religion’.”). Also see, Sanford Levinson, *Constitutional Faith* (Princeton University Press, Princeton, 2011), ch. 1. In the Indian context, D.Y. Chandrachud, J. in *Sabarimala case* observed: “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 (13) SCALE 75, para 47 (Chandrachud, J., emphasis added).

⁶ Margaret Davies, “The future of secularism: A critique” in Nadirsyah Hosen and Richard Mohr (eds.), *Law and Religion in Public Life* 63 (Routledge, New York, 2011).

orthodoxy, and marginalising alternative religious imaginations. Such exclusion, for Davies, is both “undemocratic” and “unfruitful”.⁷

I. Law and Modernity

Modernity is a laden term referring to a distinct historical time period as well as an attitude or a state of mind.⁸ As an attitude of mind, which is primarily how this study uses the term, modernity is linked to the western enlightenment tradition with a singular aim of, what Max Horkheimer and Theodor W. Adorno describe as “the dissolution of myths and the substitution of knowledge for fancy.”⁹ Modernity and modern law therefore negate myth as all that which is not true knowledge. This negation, I argue, allows the law to fashion its own mythical structure: 1) a rational coherent system of rules which denies any “uncertainty” in its system; 2) An insular and self-sufficient autonomous discipline which in its purity does not require any adulteration of history, social science or political process in its operation; 3) In ex-colonial societies, such fashioning also presents the law as a progressive force to control and civilize the “other” with its modern rationality.

Peter Fitzpatrick shows how myth remains central to the self-representation of modern law.¹⁰ He emphasises on the *reversal* of transcendence, or *displacement* of the non-modern mythic into the “fantastic stories devised in the names of reason and history”, and this is done at the cost, or denigration, of the non-western ‘other’.¹¹ Other scholars have also evocatively highlighted the sheer failure in comprehension that arose in the modern law’s encounter with such an ‘other’.¹²

⁷ The recent turn in the work of Ratna Kapur towards what she describes as “non-liberal philosophical and agnostic spiritual traditions” provides an apt illustration of re-imagining of alternative ways of religious traditions without falling into the trap of religious orthodoxy. See Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing, 2018).

⁸ See, Sionaidh Douglas-Scott, *Law after Modernity* 7 (Hart Publishing, London, 2013). Scott argues how modernity denies the mythos and pioneers the spirit of modernity in its insistence on logocentric reason.

⁹ Max Horkheimer and Theodor W. Adorno, *The Dialectic of Enlightenment: Philosophical Fragments* 3 (Stanford University Press, Stanford, 2002).

¹⁰ Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, London, 1992).

¹¹ *Id.* at 46 and 48 (“My concern with Enlightenment as myth sees it in the terms of the particular and the exotic attributed to those ‘others’ banished from its truth and being”).

¹² Peter Goodrich critiques the modern law for its failure to hear the indigenous peoples (Haida Indians) in Canada when they challenged the logging of their forest in mythic terms, appearing before the court with their totems, legends and mythic origins. The court dismissed their claim merely providing them the “limited hospitality” to present their case because they “had no other arena available to them [...] and generously recommended that a record of the evidence presented should be kept for posterity.” Peter Goodrich, *Languages of Law: From Logics*

I draw on these arguments to explore the contradictions in the Supreme Court's engagements with the categories of modernity, rationality, and myth, while adjudicating disputes relating to religion. I argue that the Supreme Court at once perceives the law as rational, certain, and secular, but also, at the same time takes a recourse to assertions drawing on faith, belief, and what we might broadly call 'mythic structures'. To put it in one sentence, my approach to law's encounter with religious claims explores the complex ways in which this encounter both interrupts, as well as bolsters, law's own mythology as rational. I approach law as an emancipatory force which requires an imagination that is neither premised on the progressive erasure of the mythic in the march towards modernity, nor on the romanticization of the mythic and the non-modern in opposition to modernity. I seek, instead, to underline that "law" and "myth" are intersecting and constantly impacting each other.

Another argument in this thesis that the God like omniscient form of the law, in its claims of certainty, clarity and fixity, represses the uncertain, contradictory aspects despite the fact that uncertainty is central and immanent to the legal process. Fitzpatrick explains this dimension of the uncertainty in 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.

It is this ever-responsive dimension of the law that makes it relevant for history, politics and social understanding. But in presenting itself as coherent and autonomous, the legal tradition discounts on these contexts of history and politics, leading to truncated forms of justice.

of Memory to Nomadic Masks 183 (Weidenfeld and Nicolson, London, 1990). Sumit Sarkar in the Indian context shows that the erasure of the mythic social history from the judicial archive resulted in a constrained understanding of an event of killing and how an alternative narrative could emerge by putting together the micro social history surrounding it. See, Sumit Sarkar, "The Kalki-Avatar of Bikrampur: A Village Scandal in Early Twentieth Century Bengal" in Ranajit Guha (ed.), *Subaltern Studies VI* (Oxford University Press, New Delhi, 2007).

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

Although I have already indicated, but it is pertinent to clarify how I use the term ‘law’ and its politics in this study.

II. Law as a Social Justice Instrument

In a recent collection of essays on law and violence, Latika Vashist and Jyoti D. Sood describe two predominant ways of thinking about law as “‘return or reject’ proposals”.¹⁴ The *return proposal* insists on reinstating more rule of law to strengthen democratic institutions. Emblematic of the Black letter law tradition it emphasises “the predominant view of law as a clear, certain and objective set of rules and principles, neutral in origin and uniform in application.”¹⁵ 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 the post-modernists, and relativists) emphasises law’s “foundational and originary linkages with violence resulting in an impossibility of achieving and securing justice through law.”¹⁶ 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.”¹⁷ Despite their seeming opposition, the two proposals align, “though for different 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.”¹⁸

This perspective of theorising law advocates for constant vigilance against falling into the liberal seduction of rule of law, of looking upon law as a flawless instrument for transformative constitutionalism,¹⁹ simply demanding more *faith* in the principles of rights-based frameworks. It also cautions against a wholesale rejection of law as a violent or bourgeois tool of oppression. Instead, there is a potential of responsiveness which is inchoate, but present in the law. They

¹⁴ Latika Vashist and Jyoti D. Sood (eds.), *Rethinking Law and Violence* (Oxford University Press, New Delhi, 2020).

¹⁵ *Id.* at xv.

¹⁶ *Ibid.*

¹⁷ *Ibid.* (emphasis added).

¹⁸ *Ibid.* (emphasis in the original).

¹⁹ For a recent statement of this theme, see, Gautam Bhatia, *Transformative Constitutionalism: A Radical Biography in Nine Acts* (Harper Collins, Delhi, 2019).

describe this as a contradiction or uncertainty not necessarily in need of resolution or finality but an open ended possibility aligning justice with constant struggle. In their words:²⁰

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, in other words, is not a celebration of the inherent rationality and modernity of law, distinct from all its Others, but an acknowledgment of the contradictions or inadequacies of the law. This thoughtful and politically aware perspective forms the broader canvas for my own approach and arguments in this thesis. I will now turn to the relevance of study of legal precedents as methodology for this pursuit in the next section.

III. Living Law and the Question of Method

In the four chapters of this thesis, I primarily focus on the judgments of the Supreme Court. Although references to various High Court decisions, wherever necessary,²¹ are made throughout the thesis, the principal focus is on the Supreme Court. This is for two important reasons. One, that it is the pronouncement of the Apex Court that becomes binding law for all judicial and civil authorities in India.²² Two, that many cases of free exercise of religion clause originate directly in the Supreme Court as the Indian Constitution provides original jurisdiction in cases where violation of fundamental rights is in question.²³

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”.²⁴ As explained in the above section, 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.

²⁰ Vashist and Sood, *supra* note 14 at xviii.

²¹ Especially, but not only, in chapter 4 where I argue that parts of High Court reasoning were much robust than the Supreme Court ruling in the Ayodhya dispute.

²² The Constitution of India, Article 141.

²³ The Constitution of India, Article 32.

²⁴ For a discussion on how “living law” must include not only foundational texts but also precedents and interpretation, see, Bruce Ackerman, *We the People, Vol 3: The Civil Rights Revolution* 34-35, 37-47 (Harvard University Press, Massachusetts, 2014).

The focus on legal interpretation on the one hand foregrounds the “uncertainty” and “responsiveness” of law. On the other, it is a corrective to the drawback in existing scholarship on law which, as Michael R. Anderson and Sumit Guha point out, focuses excessively on doctrinal developments and “statutes as definitive expressions of the law rather than looking to judicial interpretation or doctrinal exegesis.”²⁵ I will focus on interpretive techniques and doctrinal methods to excavate the contradictions and suppressions in the process of legal interpretation, departing from the lawyers’ habit “to approach the history of case law with an eye for doctrinal coherence rather than subtle contradiction or social context.”²⁶ In foregrounding the historical or political contexts, I do not suggest that the political or historical context is the final determinant of law, or that law is merely an instrument in the hands of political progression. Rather, my larger point is that the political history undoubtedly *conditions* the legal reasoning but it is never *determinative* of it. To an extent I stay in between the historical method proposed by Quentin Skinner in his preference for context – social, political, historical and biographical – in opposition to “text without context”.²⁷ Without being unmindful of the context I try to understand the ideological underpinnings of the judicial discourse through “intertextual contexts”²⁸ within judicial precedents. This method helps to trace interpretive patterns *within* the text of judgments as they interpret legal provisions. This approach, which Jonardon Ganeri calls “moderate contextualism” in a different context, is what I have adopted to read legal cases.²⁹

This methodology is shaped by my training in law and engagement with legal provisions and interpretation as a law teacher. I believe that meaningful and nuanced appreciation of the legal process requires close attention to the text of the law, as also the historical, social, political and cultural contexts which constitute the text. Thus, legal technocracy (doctrines, principles or intricate legal vocabulary) which may remain subdued in the work of historians of law, often relegated as the black letter of law, is a crucial aspect of this study. However, I remain aware that the rules and standards of legal technocracy are not ahistorical, instead they are historically

²⁵ Michael R. Anderson and Sumit Guha, *Changing Concepts of Rights and Justice in South Asia* 2 (1998).

²⁶ *Ibid.*

²⁷ See, Quentin Skinner, *Visions of Politics: Regarding Method*, Vol. I 122-127 (Cambridge University Press, Cambridge, 2002).

²⁸ 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, New Delhi, 2011).

²⁹ 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.

contingent despite their pious mystification by lawyers as universal and transcendent. In other words, this methodological frame assists in offering a grounded view of the law from within its own structure.

IV. An Outline of Chapters

Chapter 1 takes up the interpretation of the freedom of religion clause in early independent India by the Supreme Court. Specifically, it 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 in the Indian Constitution. 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 chapter tries to comprehend the historical necessity that required the emergence of the doctrine. I trace the necessity of translating the claims of religious, as opposed to the secular affairs, back to the Queen Victoria Proclamation of 1858. This makes it clear that the doctrine has historical antecedents and it is not merely a streak of judicial innovation. Some of the questions engaged in the chapter are: what historically and institutional necessity justified the demarcation of essential from the non-essential sphere of religion? Is such demarcation at all possible, and that too by the judiciary? Are judges, lacking any formal training of theological exegesis competent to undertake this enterprise? This chapter will also trace the trajectory of the doctrine in various Supreme Court cases over the years. In doing so, I will show how the discursive understanding of the Court about the doctrine is contradictory at times, and at others goes entirely awry. The Court, it will become clear, does not act as a cohesive institution in application of the doctrine.³⁰

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

³⁰ This point is reiterated from another context in chapter 3 with respect to doctrine of presumption of constitutionality of anti-cow slaughter laws.

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. The predominant scholarship on this issue constantly emphasises the “cognitive competence” argument, suggesting that judiciary should stay out of theological exegesis. However, the problematic alternative of allowing the community to decide the contents and contours of what constitutes ‘essential practice’, without any judicial intervention, has also 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.

My argument, based on a reading of the Court’s judgments, is that such a separation of the secular law from the mythological is an impossibility or an unattainable *dream-work* of secular modernity. Following Davies, I broaden my argument by suggesting that the proposal to expunge the sacred from the public sphere is counterproductive both in law as well as in the political sphere. The disavowal of the sacred will only reinforce the sacred or religious in its most orthodox, patriarchal and conservative forms. In place of a disengagement, a plea for *struggling* with the religious is both desirable for strengthening democratic ideals and for encouraging alternative and radical readings of the sacred. However, such a struggle first entails a careful, empirical and thorough understanding *how* the religious, the sacred, the mythic, figure in modern judicial discourse, what I have termed below as the Court’s “secular mythology.” Rather than rush into places where their cognitive faculties would fear to tread, 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 issue of the sacred or the religious during electoral campaigns. It explores the interpretations given by the courts to a few contentious provisions in the Representation of Peoples’ Act, 1950, which bars the use of

religious speech or symbolism for electoral gains.³¹ I demonstrate that this search for a *hidden kernel* of the symbols or speech discounts the social and political contingency which is the real issue before the Court in cases of communal appeals made in election times. *Om* becomes a symbol that transcends Hinduism, and in later decisions Hinduism itself becomes a category that transcends religion as it is a ‘way of life’. Worse still, the Supreme Court conflates ‘Hindutva’ with ‘Hinduism’ to legitimise the appeal of *Hindutva* as permissible in law. This is illustrative of the argument made in the first chapter for the following reason: the judgments analysed in this chapter never evoke the ‘essential practices test’ but the Court nevertheless undertakes the task of exhuming and digging out the essence of the religion.

This, I argue, reflects the messy inter-connection between the modern law (and its judicial process) and the ‘secular mythology’ of the Court. I deploy this phrase “secular mythology” to signal to these contradictions in the Court’s approach to religion: the idea of arriving at a clear, reasonable, legal understanding of religion co-exists uneasily with a reliance on arguments and assertions based on faith and theology, in effect, myth. As I argue below, this contradiction is immanent in the process of interpretation of the category of religion, but such assertions have also been made in explicitly political and instrumental contexts. I make these connections to emphasise and establish that an erasure of the ‘essential practices test’, advocated as a solution to this contradiction in contemporary legal scholarship,³² would do little to address the deep-seated judicial drive to unearth the essence of the sacred. The cases in this chapter, thus, reiterate the complex and messy relationship between law and religion. I interrogate the Court for its lapses

³¹ In the infamous *Hindutva judgments*, which are analysed in this chapter, one argument challenged the existence of provisions banning communal speech. The argument given (by lawyer, Ramjethmalani) was that constitutional right to freedom of speech and expression is hampered by any law that restricts campaign content. Although the Supreme Court did not find the appeal of ‘Hindutva’ as communal, but, it rejected this argument of invalidity of the election law on the specious ground that ‘decency’ is a permissible restriction on which freedom of speech can be curtailed. See, *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte* along with *Bal Thackeray v. Prabhakar Kashinath Kunte & Others* (1996) 1 SCC 130 (“*First Hindutva judgment*”); *Ramachandra G. Kapse v. Haribansh Ramakbal Singh* (1996) 1 SCC 206 (“*Second Hindutva judgment*”); *Murli Manohar Joshi v. Nitin Bhaurao Patil* (1996) 1 SCC 169 (“*Third Hindutva judgment*”).

³² See, Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (Oxford University Press, New Delhi, 2019), ch. 2; 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, Rajeev Dhavan and Fali Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities” in Rajeev Dhavan, Ashok H. Desai, *et al* (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2000).

and argue, reading attentively a few neglected decisions, that an alternate route is possible while staying within the logic of the law.

Chapter 3 builds on idea of *secular mythology* to illustrate how innocuous looking secular doctrines of interpretation acquire a mythic flavor in their application. It looks at the debate of cow protection legislations arising from the constitutional mandate for protection of the cow in Article 48. I have used two central threads to unpack the cow protection debates and the judicial discourse on this issue. Firstly, I have focused on the doctrine of presumption of constitutionality, according to which 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*, 1958)³³ till the latest pronouncement on the topic (*Mirzapur Moti*, 2005).³⁴ I argue that in the context of anti-cow-slaughter laws, the doctrine has acquired a status of *doctrinal myth of constitutional faith*. This is because, even when the state legislatures acted to subvert the spirit of Article 48, the Court continued to proceed with the presumption of constitutionality of such laws.³⁵ How legal doctrines can transform into instruments of faith is the main discussion at the heart of this chapter.

Secondly, contra predominant scholarship on this issue (that views the judicial discourse as camouflaging the sacred through economic vocabulary), I draw upon the neglected work of C.S. Adcock who challenges this ‘religious’ versus ‘economic’ binary.³⁶ Adcock analyses the vernacular and dominant literature of Arya Samaj in nineteenth century on cow protection. Her argument is that *dharma* was a category of righteous conduct in material life and the path of salvation at once. This made it possible for the Arya Samajis to use it as a notion of welfare with the underlying theme of religiosity within it. Any understanding that separates the material from the spiritual in decoding *dharma* fails to appreciate its complexity. However, attempts of separation dominate the landscape of social sciences, guided as they are by the western conception of ‘religion’ as distinct from the everyday material life. Contrary to this

³³ *Mohd. Hanif Quareshi & Others v. State of Bihar*, AIR 1958 SC 731.

³⁴ *State of Gujarat v. Mirzapur Moti Kassab Jamat*, (2005) 8 SCC 534.

³⁵ It seems, as if, a doctrine resembles the theological hermeneutics where reading the theological text assumes the truth and supremacy of the word of the God.

³⁶ 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).

understanding, I show in chapter 3 that even in distancing itself from the discussion on sacredness of the cow, the Court's secular mythology is deeply interlaced with ideas of the sacred and theology. This chapter 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 more a more *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. Unlike the 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 mythological in one single text. I have attended to the 'addenda' at the end of the judgment. The 'addenda', I argue, is a mythological supplement to this judgment which otherwise espouses 'dispassionate objectivity' as a cardinal virtue for forensic results. I have shown that the 'addenda' exhibits the *other side* of the judgment which the Court neither denies nor accepts fully. In this sense, it is 'the juridical unconscious'³⁷ which illustrates the muddled relationship between rational and mythical tied together at once.

This chapter also explains an important characteristic unique to the Indian law - the notion of the 'Hindu idol' as a juristic 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. 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. 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. This love-hate relationship of the modern law and mythology appears in novel ways and takes different forms. Both sides remain in incessant denial of the other, which makes us reach the end of the debate even before we have begun. The conceptual

³⁷ I take this expression from Shoshana Felman who argues, in the context of famous twentieth century trials, that the 'juridical unconscious' is tied to the tribulations and trauma that a legal trial seeks to articulate and redress but which it ends up re-enacting. Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press, Massachusetts, 2002).

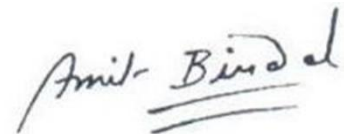
boldness of the modern law about its virtues of objectivity, dispassion or autonomy hide the uncomfortable element of *faith* which constitutes the underbelly of the modern law.

This study is not a nihilistic plea of doom for those who still hope for (social, economic and political)³⁸ 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,³⁹ as from the stories of transformative constitutionalism.



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³⁸ These commitments to justice (in this order) “social, economic and political” are listed in the Preamble of the Constitution of India.

³⁹ 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).