

Policy Studies 30

Legalizing Religion: The Indian Supreme Court and Secularism

Ronojoy Sen

With commentary by Upendra Baxi



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The Indian Supreme Court
and Secularism**

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List of Acronyms

AIR	All India Reporter
BJP	Bharatiya Janata Party
GOS	governance-oriented secularism
HRCE	Madras Hindu Religious and Charitable Endowments
HRE	Hindu Religious Endowments
ROS	rights-oriented secularism
RPA	Representation of the People Act
RSS	Rashtriya Swayamsevak Sangh [Association of National Volunteers]
SC	Supreme Court
SCA	Supreme Court Appeals

Executive Summary

Nearly sixty years after Indian independence, the anomalies that have troubled scholars of Indian secularism—the existence of separate personal laws for religious groups, the intervention of the state in religious institutions and practices, and reservations for groups defined by caste—continue to loom large. It is now apparent that the Indian version of secularism differs from the American or European model. The Indian Constitution contains several departures from the wall-of-separation model. Moreover, the idea of secularism itself has become contested in recent times. It is now recognized that separation of church and state is not the only viable model for secularism.

The destruction of the Babri Masjid, a sixteenth century mosque located in Ayodhya, by Hindu fanatics in 1992 and the electoral success of the Hindu nationalist Bharatiya Janata Party (BJP) over the last two decades have inspired several articles questioning the premises and viability of the Indian secular state. These contestations over the secular state raise important questions about the nature of Indian secularism, the constitutional provisions governing the relationship between the state and religion, and their actual implementation by the Indian state.

This study addresses constitutional secularism in India by examining the relationship of one agency of the state—the Supreme Court—to secularism. The Supreme Court is, of course, one among several sites where the contestation over secularism is played out. This monograph examines how the Supreme Court defines and demarcates religion, religious practice, religious organizations, and religious freedom. It also analyzes how the rulings transcend the boundaries of the court and influence the practice of and the public discourse on secularism. The Court not only plays an important adjudicatory role in a host of areas, but also actively inter-

venes and shapes public discourse. Judicial activism has affected religion as much as it has other diverse areas like the environment or federalism. One of the reasons the judiciary can play this role is the legitimacy it enjoys in public perception. This is borne out by surveys and is in sharp contrast to most other state institutions, whose credibility is far lower. This has led to frequent confrontations between the judiciary, on the one hand, and the executive and legislature on the other. This study is, of course, concerned only with judicial activism in the sphere of religion.

The study makes use of Rajeev Dhavan's analysis of constitutional secularism, which disaggregates Indian secularism into three components: religious freedom, celebratory neutrality, and reformatory justice. Religious freedom covers not just religious beliefs but also rituals and practices. Celebratory neutrality entails a state that assists, both financially and otherwise, in the celebration of all faiths. Reformatory justice involves regulating and reforming religious institutions and practices, setting aside some core elements that are beyond regulation.

On the basis of the Supreme Court rulings, the study argues, the Indian state has pushed its reformist agenda at the expense of religious freedom and neutrality. There are two broad claims made in this study. First, through its rulings the Court consistently has sought to homogenize and rationalize religion and religious practices, particularly of Hinduism. Second, though the impetus for the Court's rationalization and homogenization of religion has its origins in a liberal-democratic conception of secularism and the nation-state, as exemplified by India's first prime minister Jawaharlal Nehru and philosopher-president Sarvepalli Radhakrishnan, there is a significant overlap between the judicial discourse and the ontology of Hindu nationalism. This has significantly narrowed the space for religious freedom. It has also strengthened the hand of Hindu nationalists, whose ideology is based on a monolithic conception of Hinduism and intolerance of minorities. Thus, in the name of secularism, a circumscribed multiculturalism has been put in place by the Indian state.

This monograph is divided into three sections. The first examines how the Supreme Court has defined religion, what qualifies as permissible religious practice, and the demarcation of the boundaries of a religious denomination. It traces the development of what legal scholars describe as the "essential practices" doctrine. The second section analyzes what is popularly known as the Hindutva judgment. In this 1996 judgment, the Supreme Court legitimized the use of Hindutva (Hinduness)—the core ideology of Hindu nationalists—in election campaigning and conflated Hindutva with Hinduism. The author pays close attention to the Court's reasoning to show how Hindu nationalism and the liberal-democratic idea

of secularism in India share certain fundamental assumptions, and addresses how this judgment has become part of the political discourse of Hindu nationalists. Finally, the consequences of the judicial discourse on Indian secularism and multiculturalism are laid out.

Legalizing Religion: The Indian Supreme Court and Secularism

In his classic book *India as a Secular State*, Donald Eugene Smith concluded that the Constitution of India provided “a relatively sound basis for the building of a secular state.” Smith felt that there was a good chance that twenty years from the time of the 1963 publication of his work “many of India’s constitutional anomalies regarding the secular state will have disappeared” (Smith 1963: 14). More than four decades after Smith made his predictions and over fifty years after Indian independence, the anomalies that troubled Smith—the existence of separate personal laws for religious groups, the intervention of the state in religious institutions and practices, and reservations for groups defined by caste—continue to loom large. With the benefit of hindsight, one could readily challenge Smith’s prediction. However, he was writing at a time when theories about the decline of religion were dominant and the growth of secularism was “often interpreted as a natural concomitant to the spread of science, education, and technology” (Keddie 2003: 16). The following statement by Smith is fairly typical of the time: “The forces of Westernization and modernization at work in India are all on the side of the secular state. Industrialization, urbanization, the break-up of the joint family system, greatly increased literacy, and opportunities for higher education—all tend to promote the general secularization of both private and public life” (Smith, quoted in Bhargava 1999: 224).

As is now understood, the impact of Westernization and modernization on religion and religious beliefs has been far more complicated and

the thesis of progressive secularization of society has not been borne out. Peter Berger, one of the leading proponents of secularization in the 1960s, has now changed his views: “The world today, with some exceptions . . . is as furiously religious as it ever was, and in some places more so than ever” (Berger 1999: 2). Even Pippa Norris and Ronald Inglehart, who have authored a new study supporting the thesis of a decline of religion in industrialized societies, argue against a simple correlation between modernization and secularization (Norris and Inglehart 2004). This is as true for India as elsewhere.

The other lynchpin of Smith’s analysis—one that is much more important for the purposes of the current study—is his conception of the secular state, which he says is derived from the “liberal-democratic tradition of the West.” Smith conceptualized a secular state as involving three sets of relations: religion and the individual (freedom of religion); the state and the individual (citizenship); and the state and religion (separation of church and state). In liberal-democratic theory, these relations can be classified under the three broad principles of liberty, equality, and neutrality. For Smith, a secular state is one where freedom of religion is guaranteed, all citizens are equal irrespective of their religion, and the state is not connected in any way to religion. In this scheme of things, the Indian state falls short on several counts.

There are indeed several departures in the Indian Constitution from the model that Smith was working with. Article 25, which enshrines the right to individual freedom of religion, also empowers the state to intervene in Hindu religious institutions.¹ Similarly, Article 17 requires the

*the Indian Constitution...
enshrines the right to individual
freedom of religion, [but] also
empowers the state to intervene
in Hindu religious institutions*

state to abolish untouchability, one of the most abhorrent practices of Hinduism. Although equality of citizenship is guaranteed by the Constitution, there are provisions for reservations or affirmative action in elections, educational institutions, and government jobs for lower castes and tribals. Similarly, although no one is required to take part in religious instruction or prayer in educational institutions, the state is committed

to giving aid to institutions run by religious communities. Finally, personal laws are in place for different religious communities, with a non-justiciable “directive principle” in the Constitution calling for a uniform civil code in the future. As Gary Jacobsohn points out, “religious and secular

life are so pervasively entangled [in India] that a posture of official indifference cannot be justified either politically or constitutionally” (Jacobsohn 2003: 10).

However, the idea of secularism itself has become contested in recent times. Although the Christian roots of the term “secular” are acknowledged by most scholars, there is at the same time a recognition that secularism has a relevance for non-Christian societies. It is now recognized that separation of church and state is not the only viable model for secularism. As Charles Taylor writes, “Some kind of distancing is obviously required by the very principle of equidistance and inclusion which is the essence of secularism. But there is more than one formula that can satisfy this. Complete disentanglement of government from any religious institutions is one such, but far from the only one” (Taylor 1999: 52). Moreover, Gurpreet Mahajan points out that there are variations in the way Western democracies have dealt with religion, with only America conforming to the “wall of separation” doctrine (Mahajan 1988: 41). Marc Galanter, too, argues that instead of seeing the Indian secular state as playing catch up with the West, one must accept that India has “as long or a longer tradition of secular government in many respects than most of Western Europe or North America.” This in effect means working with a conception of secularism that does not mark a clear break between church and state, since the former in the Christian sense did not exist in the Indian context. It is worth noting that the term “secularism” actually figures in the preamble to the Indian Constitution, albeit through an amendment in 1976, while it is absent in the American Constitution.

In the Indian context, plenty has been written on secularism since *India as a Secular State* was published. Shortly after the publication of Smith’s book, Galanter critiqued Smith’s conception of secularism by raising the difficulty of separating the religious and secular. He pointed out that underlying Smith’s model of the secular state in India was the belief that the “notion of the religious may be readily distinguished from the ‘secular’ or non-religious” (Galanter 1999: 253). Galanter, in fact, argued that the Indian state was not in the business of promoting freedom of religion but concerned with religious reform: “The freedom that is a principle of the secular state is not freedom of religion as it is (in India) but freedom of religion as it ought to be The ultimate argument for the secular state then is not to maximize the presently desired freedoms but to substitute a new and more appropriate or valuable kind of freedom” (ibid.: 258). This is what Jacobsohn also alludes to when he labels Indian secularism as an ameliorative model that “embraces the social reform impulse of Indian nationalism in the context of the nation’s deeply rooted religious diversity and stratification” (Jacobsohn 2003: 50).

The destruction of the Babri Masjid, a sixteenth century mosque located in Ayodhya, by Hindu fanatics in 1992 and the electoral success of the Hindu nationalist Bharatiya Janata Party (BJP) over the last two decades have inspired several articles questioning the premises and viability of the Indian secular state. Scholars such as Ashis Nandy and T. N. Madan believe that the secular state was doomed to failure in India. Madan writes that “secularism in South Asia as a generally shared credo of life is impossible, as a basis for state action impracticable, and as a blueprint for the foreseeable future impotent” (Madan 1999: 298). Nandy goes even further and identifies secularism as part of a larger package consisting of development, mega-science, and national security which is used by the state to silence its “non-conforming citizens” (Nandy 1999: 333). He calls instead for a religious tolerance outside the bounds of secularism. Both Nandy and Madan assume that the ideology of secularism has its origins in the West and, therefore, is incapable of dealing with the all-embracing character of religion in India.

It is apparent that the Indian version of secularism differs from the American or the European model. If one does not discard the relevance of secularism in the Indian context, as Madan and Nandy do, what model does one employ? The Constituent Assembly, which drafted the Indian

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Constitution between 1946 and 1949, is a good resource to locate the thinking behind the Indian secular state. The Assembly debates reveal that there was no real consensus on the direction that Indian secularism should take. There were several voices in the Assembly, including that of B. R. Ambedkar, who wanted to severely restrict the role of religion in the public sphere. Hence, scientist K. T. Shah raised the demand that there be an article expressly stating that the Indian state has “no concern with any

religion, creed or profession of faith.” However, there were others, like Hindu traditionalist K. M. Munshi, who said the state must take into account that India was a nation of people with “deeply religious moorings” and who articulated religious tolerance in Hindu terms.

Ultimately, it was the “equal respect” theory—where the state respects and tolerates all religions—that won the day. This was also Prime Minister Jawaharlal Nehru’s formulation of secularism. This is a position that oscillates between *sarvadharmā sambhava* (goodwill toward all religions) and *dharma nirpekshata* (religious neutrality). It is no secret that Nehru saw religion as a force that checked the “tendency to change and progress.”

However, he did not let his personal convictions color his conception of the secular state. He wrote, “A secular state does not mean an irreligious state: it only means that we respect and honor all religions giving them freedom to function” (Nehru, quoted in Hasan 1992: 185). On another occasion, Nehru defined a secular state as one where there is “free play for all religions, subject only to their not interfering with each other or with the basic conceptions of our state” (Gopal 1980: 327).

This conception of a secular state is what Rajeev Bhargava describes as “principled distance,” which he believes is the primary characteristic of Indian constitutional secularism. In this interpretation, a secular state “neither mindlessly excludes all religions nor is merely neutral towards them” (Bhargava 2002: 117). Neera Chandoke, too, subscribes to this view of principled distance as the defining characteristic of secularism in India. She writes, “Secularism, we can say, outstripping provisions for freedom and equality, stipulates that the state will maintain an attitude of principled distance from all religious groups” (Chandoke 2002: 48). She further says that Indian secularism was “designed to allow people to live together in civility. This is what contemporary critiques of secularism seem to forget” (ibid.: 50).

These contestations over the secular state raise important questions regarding the nature of Indian secularism, the constitutional provisions governing the relationship between the state and religion, and their actual implementation by the Indian state. The reformist element with regard to religion in the Indian Constitution makes the “principled distance” argument somewhat problematic. One can question what “principled” exactly amounts to and who decides its content. A better description of constitutional secularism is offered by Rajeev Dhavan who disaggregates Indian secularism into three components: religious freedom, celebratory neutrality, and reformatory justice (Dhavan 2001). Religious freedom covers not just religious beliefs but also rituals and practices. Celebratory neutrality entails a state that assists, both financially and otherwise, in the celebration of all faiths. Reformatory justice involves regulating and reforming religious institutions and practices, setting aside some core elements that are beyond regulation.

This study addresses the working of constitutional secularism in India by examining the relationship of one agency of the state—the Supreme Court—to secularism. The Supreme Court is, of course, one among several sites where the contestation over secularism is played out. The study

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examines how the Supreme Court defines and demarcates religion, religious practice, religious organizations, and religious freedom. The ways in which rulings transcend the boundaries of the court and influence the practice of and the public discourse on secularism are also examined.

This begs the question: Why the Court? As in any constitutional democracy, the Indian Supreme Court plays an important role in interpreting the Constitution. However, as in the United States, the line between interpretation of law and legislation often gets blurred in Supreme Court rulings. The “basic structure” doctrine, articulated by the Indian Supreme Court in the landmark *Kesavananda* case (*All India Reporter* [AIR] 1973 Supreme Court [SC] 1461), means that the Court can nullify any legislation that it thinks runs counter to the fundamental principles of the Constitution. The Court then becomes the final arbiter of the Constitution. Hence, one of the foremost legal scholars in India describes the Indian Supreme Court as “probably the only court in the history of humankind to have asserted the power of judicial review over amendments to the Constitution” (Baxi 1985: 64). He goes on to say about the Court: “The question is not any longer whether or not judges make law. Rather the questions are: what *kind* of law, how *much* of it, in what *manner*, within which self-imposed *limits* and to what *willed results* and with what tolerable accumulation of unintended results, may the judge make law?” (ibid.: 3).

This has meant that the Court not only plays an important adjudicatory role in a host of areas, but also actively intervenes and shapes public discourse. Judicial activism has affected religion as much as it has other diverse areas like the environment or federalism. One of the reasons why the judiciary can play this role is the legitimacy it enjoys in public perception. This is borne out by surveys and is in sharp contrast to most other state institutions whose credibility is far lower (Mitra and Singh 1999: 260). This has led to frequent confrontations between the judiciary on the one hand and the executive and legislature on the other.

***the Court...actively intervenes
and shapes public discourse***

On the basis of the Supreme Court rulings, this study uses Dhavan’s description of secularism to show that the Indian state has pushed its reformist agenda at the expense of religious freedom and neutrality. There are two broad claims made. First, the Court has through its rulings consistently sought to homogenize and rationalize religion and religious practices, particularly of Hinduism. Second, though the impetus for the Court’s rationalization and homogenization of religion has its origins in a

liberal-democratic conception of secularism and the nation-state, as exemplified by India's first prime minister, Jawaharlal Nehru, and philosopher-President Sarvepalli Radhakrishnan, there is a significant overlap between the judicial discourse and the ontology of Hindu nationalism. This, it is argued, has significantly narrowed the space for religious freedom. It has also strengthened the hand of Hindu nationalists, whose ideology is based on a monolithic conception of Hinduism and intolerance of minorities. Thus, in the name of secularism, a "circumscribed multiculturalism" has been put in place by the Indian state (Jaffrelot 2004: 131).

The convergence between the Nehruvian Congress and Hindu nationalists also is visible in the Constituent Assembly debates of 1946–47. Although both groups differed in their conception of the Indian nation-state, they agreed on the need for national unity to trump cultural or religious diversity. Thus, Nehru was in principle against any concessions to minorities: "As a matter of fact nothing can protect such a minority or a group less than a barrier which separates it from the majority. It makes it a permanently isolated group and it prevents it from any kind of tendency to bring it closer to the other groups in the country." Radhakrishnan, too, bluntly stated in the Assembly, "What is our ideal? It is our ideal to develop a homogenous democratic State." The convergence between the Hindu nationalists and Nehruvians in the Constituent Assembly on privileging national unity leads Jaffrelot to comment that the two groups "share the same aim, that is to exclude religious communities from the public sphere, the former in the name of individualist values and the latter by virtue of their concern to see Indian identity embodied in Hindu culture" (ibid.: 145). In this context, it is important to note that Hindu nationalists are perfectly willing to use the institutions and procedures of the modern state to further their objectives.

The conclusions of this study on the court's role in restricting religious freedom and imposing homogeneity differ from scholars like Mahajan, who argue, "The Indian Constitution as well as subsequent interventions of the Supreme Court have tried to ensure that religious organizations and groups are not discriminated against in the public domain" (Mahajan 1988: 69). The Supreme Court and its judges see themselves as conscientious upholders of secularism. This comes out both in court rulings and out-of-court writings of judges. However, it remains unclear how the Court defines secularism. The most detailed explication of the Court's views on secularism is available in the *Bommai* judgment (AIR 1994 SC 1918). Although many see the judgment as a clear example of the court's role in safeguarding secularism, it is debatable whether the judgment was good law or a clear exegesis of the secular state in India.

In *Bommai*, the Supreme Court, while upholding the presidential proclamation dismissing three BJP-ruled state governments in the wake of the Babri demolition, declared secularism as a “basic structure” of the Constitution. Seven judges on the nine-judge bench also took the opportunity to spell out their views on secularism. What emerges from the separate judgments is an unclear and often confusing idea of secularism. For instance, Justice P. B. Sawant, writing for himself and Justice Kuldeep Singh, makes a clear-cut distinction between the religious and secular. He writes, “Whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State” (ibid.: 2002). He adds, “The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State” (ibid.: 2002). Justice Sawant concludes: “Religious tolerance and equal treatment of all religious groups and protection of their life and property and of their places of worship are an essential part of secularism enshrined in our Constitution. We have accepted the said goal not only because it is our historical legacy and a need of our national unity and integrity but also as a creed of universal brotherhood and humanism” (ibid.: 2002).

Another judge on the bench, Justice K. Ramaswamy, makes an explicit connection between secularism, on the one hand, and democracy, “positive” religion, and national unity on the other. He writes, “The concept of the secular state is, therefore, essential, for successful working of the democratic form of Government.” Ramaswamy also has a definite idea of the sort of religion that should be permitted by the secular state: “Religion in the positive sense is an active instrument to allow citizen for (sic) full development of his person, not merely in the physical and material but in the non-material and non-secular life” (ibid.: 2014). Like Sawant, he concludes that secularism is essential for the unity of the country. “[The] rise of fundamentalism and communalization of politics are anti-secularism,” he writes. “They encourage separatist and divisive forces and become breeding grounds for national disintegration, and fail the Parliamentary democratic system and the Constitution” (ibid.: 2014).

There are a few important themes that emerge from the Court’s description of secularism: first, the idea that the religious can be neatly separated from the secular and that religion must be kept apart from the affairs of the state; second, the notion of religion as it “ought to be” in contrast to the actual practice of religion; and third, secularism as an essential component of democracy as well as of national unity and integration. All these issues are central to any study of Court rulings on religion and the homogenizing and rationalizing thrust of the Court with regard to reli-

gion, especially Hinduism. By examining the historical background to the judicial discourse on religion, it is possible to trace the Supreme Court's position on religion and religious freedom and how the judgments become part of the political discourse on religion.

The first section of this study examines the Supreme Court's definition of religion, what the Court considers to be permissible religious practice, and how it demarcates the boundaries of a religious denomination. This section traces the development of what legal scholars describe as the "essential practices" doctrine. The second analyzes what is popularly known as the Hindutva judgment. In this 1996 judgment, the Supreme Court legitimized the use of Hindutva (Hinduness)—the core ideology of Hindu nationalists—in election campaigning and conflated Hindutva with Hinduism. There is close attention paid to the Court's reasoning to show how Hindu nationalism and the liberal-democratic idea of secularism in India share certain fundamental assumptions. How this judgment has become part of the political discourse of Hindu nationalists is also addressed. Finally, the consequences of the judicial discourse on Indian secularism and multiculturalism are laid out.

The Supreme Court and Rationalization of Religion

It is important to examine first how the courts have attempted to define religion with respect to the Constitution; and second how the Supreme Court, in adjudicating cases pertaining to Hinduism, has drawn a distinction between the sacred and the secular. The courts are frequently asked to decide what constitutes an "essential part of religion," and therefore off-limits for state intervention, and what is "extraneous or unessential," and therefore an area in which it is permissible for the state to interfere. Some legal scholars have labeled the Court's attempts to define what is fundamental to any religion as the "essential practices" doctrine (Dhavan and Nariman 2000).²

Courts in other secular polities are confronted by similar questions. For instance, the American courts have had occasion to decide on religious practices that run contrary to general laws. However, except in rare cases, such as *Wisconsin v. Yoder* (406 US 205 [1972]), the U.S. Supreme Court has not sat in judgment on the authenticity of religious beliefs and practices.³ The usual stance of the U.S. Supreme Court has been to reject pleas for making exceptions to religious practices that run counter to secular state legislation. The most famous example in recent times is

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Employment Division v. Smith (494 US 872 [1990]). Thus, Jacobsohn labels the American model of secularism as an assimilative one, where “political principles in the development of the American nation” (Jacobsohn 2003: 49) are of ultimate importance, in contrast to the Indian model, which is ameliorative.

The essential practices doctrine in India can plausibly be traced to the so-called Father of the Indian Constitution, B. R. Ambedkar, and to his famous statement in the Constituent Assembly during debates on the proposed codification of Hindu law: “The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. . . . There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are *essentially* religious (italics added)” (Constituent Assembly Debates VII: 781). The most striking aspect of the essential practices doctrine is the constant attempt by the Court to fashion religion in the way a modernist state would like it to be rather than to accept religion as represented by its practitioners.

The essential practices test has been used by the Court to decide a variety of cases. These can be classified under a few headings. First, the Court has made recourse to this test to decide which religious practices are eligible for constitutional protection. Second, the Court has used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the Court has employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations.

Several studies have noted the unusual role of the Indian courts in interpreting religious doctrine and acting as the vanguard of religious reform. J. D. M. Derrett has written about the paradox of the Court playing the role of religious interpreter: “Therefore the courts can discard as non-essentials anything which is not proved to their satisfaction—and they are not religious leaders or in any relevant fashion qualified in such matters—to be essential, with the result that it would have no constitutional protection” (Derrett 1968: 447). Rajeev Dhavan and Fali Nariman have offered a more scathing assessment.

With a power greater than that of a high priest, *maulvi* or *dharmashastris*, judges have virtually assumed the theological authority to determine which tenets of a faith are “essential” to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority (Dhavan and Nariman 2000: 259).

In a similar vein, Marc Galanter asks whether the Constitution has given the Court a mandate to “participate actively in the internal reinterpretation of Hinduism” (Galanter 1997: 251) and to embark on an “active reformulation of Hinduism under government auspices in the name of secularism and progress” (ibid.: 249). Moreover, by employing a stripped down rationalist definition of religion and classifying any religious practice that falls outside this grid as “superstition” or “accretion,” the Court has dispensed with pluralism and popular practices. This has been particularly true for Hinduism, since the Constitution for all practical purposes can be seen as a “charter for the reform of Hinduism” (ibid.: 247). The impact primarily is on the state’s discourse on religion and its practices and not necessarily on the lived life of believers. However, there is a tangible impact on the Hindu religion by virtue of the legitimization of the expanded role of the state in running temples and non-recognition of “little” religions.

Defining Essential Practice

The essential practices doctrine can be seen as a derivative discourse of the colonial-era doctrine of “justice, equity, and good conscience.” After Indian independence, it was first articulated in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (Supreme Court Appeals [SCA] 1954) also known as the *Shirur Mutt* case. It is important to consider this case in some detail since it has become obligatory to cite *Shirur Mutt* in most cases related to reform of Hindu religious institutions. Not only was the meaning of religion, as protected by the Constitution, enunciated in *Shirur Mutt*, but also guidelines as to who or what qualified as a religious denomination were set forth.

In *Shirur Mutt*, the petitioner, the superior or *mathadhipati* (also referred to as *mahant*) of the Shirur Mutt monastery, challenged the Madras Hindu Religious and Charitable Endowments (HRCE) Act of 1951 on the principal ground that it infringed Article 26 of the Constitution. Before dealing with the provisions of the Act, the Court asked a central question: “Where is the line to be drawn between what are matters of religion and what are not?” (ibid.: 430). To come up with a working definition of religion, Justice B. K. Mukherjea (who later went on to become chief justice from 1954–56), who wrote the judgment, drew on examples from the United States and Australia. He rejected the definition of religion offered by the

“Where is the line to be drawn...?”

U.S. Supreme Court in *Davis v. Beason*: “The term religion has reference to one’s views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter” (ibid.: 430). The Court pointed out the inadequacy of this definition in the Indian context by noting that there are major religions like Buddhism or Jainism “which do not believe in God or in any Intelligent First Cause” (ibid.: 431).

Instead, Mukherjea drew on the *Adelaide Company v. Commonwealth* judgment in Australia in which the High Court said the Constitution not only protected “liberty of opinion” but also “acts done in pursuance of religious belief as part of religion.” Collapsing the belief-practice dichotomy, Justice Mukherjea observed, “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 . . .” (ibid.: 431).

It should be mentioned here that this definition of religion, which included rituals and ceremonies as “integral,” was significantly different from the definition offered by the Bombay High Court in an earlier case. In *Ratilal Panachand v. State of Bombay* (AIR 1953 Bom. 242), where the constitutional validity of the Bombay Public Trusts Act of 1950 had been challenged, Chief Justice M. C. Chagla observed that “whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution.” In the same judgment, Chagla stated, “Essentially religion is a matter of personal faith and belief, of personal relation of an individual with what he regards as his Maker or his Creator or the higher agency which he believes regulates the existence of sentient beings and the forces of the Universe” (1954 SCA 431). The definition from *Shirur Mutt* cited earlier shows that the high court’s narrow definition of religion was rejected by Mukherjea. Subsequently, Chagla’s views in the *Ratilal* judgment, too, were overturned by Mukherjea when the case came up for hearing before the Supreme Court.

According to Mukherjea, the American and Australian Constitutions did not impose any limitation on the right to freedom of religion. It was the American and Australian courts that introduced the limitations on the grounds of “morality, order and social protection” (ibid.: 434). Mukherjea, however, believed that the Indian Constitution was an improvement on

other Constitutions since it clearly laid out what could be regarded as religion: “Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not” (ibid.: 434).

According to the Court, “what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself” (ibid.: 434). This “essential part” of religion is protected by the Constitution: “Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters” (ibid.: 435). However, the state can legitimately regulate religious practices when they “run counter to public order, health and morality” and when they are “economic, commercial or political in their character though they are associated with religious practices” (ibid.: 432).

Shirur Mutt was also a landmark judgment because it validated a major portion of the Madras HRCE Act of 1951, which was the first state legislation to put into place an elaborate regulatory mechanism for Hindu temples and *maths*. Several other states followed suit with similar legislation, and they were also taken to court, but *Shirur Mutt* has remained the model for the Court. There is no need here to go into the details of the *Shirur Mutt* judgment regarding the Madras HRCE Act, except to note that the Court did recognize that a *mathadhipati* was not a “mere manager,” because he “has not only duties to discharge in connection with the endowment but he has a personal interest of a beneficial character which is sanctioned by custom. . . .” (ibid.: 427). The Court further said that since the *mathadhipati* was the head of a spiritual fraternity, he could not be treated as “a servant under a State department.” With regard to the powers of the government bureaucrats to interfere in affairs of the math, the Court struck down certain provisions, including the right of unrestricted entry into religious institutions for the Commissioner of Hindu Religious Endowments or his subordinates. The Court said, “It is well

“...the essential part of a religion is...to be ascertained with reference to the doctrines of that religion itself”

known that there could be no such thing as an unregulated and unrestricted right of entry into a public temple or religious institution for persons who are not connected with the spiritual functions thereof” (ibid.: 437). The Court also struck down a section that required a head of a religious institution to be guided by bureaucrats on how to spend the funds of the institution. However, it is noteworthy that the Court in large measure gave its approval to the elaborate apparatus of state control of Hindu temples and religious institutions.

The primary contribution of *Shirur Mutt* to the legal discourse on religion was the recognition that “protection under Articles 25 and 26 was not limited to matters of doctrine or belief only but extended to acts done in pursuance of religion and therefore contained guarantees for rituals, observances, ceremonies and modes of worship” (Mudaliar 1974: 186). Another important principle enunciated by Justice Mukherjea was the “complete autonomy” granted to religious denominations to decide which religious practices were essential for them. Mukherjea reiterated this point in *Ratilal*, which was decided by the Supreme Court the same year as *Shirur Mutt*: “Religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines. . . . No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate” (1954 SCA 548).

Finally, *Shirur Mutt* is a landmark case because it contained a deeply contradictory trend. On the one hand, the judgment is celebrated for widening the definition of religion to include rituals and practices. On the other hand, it sanctioned an elaborate regulatory regime for religious institutions. This anomaly has been noted by P. K. Tripathi: “In the final analysis, therefore, articles 25 and 26 do not emerge from the judgment in the Swamiar [Shirur

[Shirur Mutt] sanctioned an elaborate regulatory regime for religious institutions

Mutt] case as very effective weapons of attack on social legislation affecting the management of religious institutions” (Tripathi 1966).

The Textual Turn

Although a broad definition of religion was laid out in *Shirur Mutt*, the subsequent judgments of the Supreme Court would radically circumscribe the religious practices that were guaranteed constitutional protection. Even before the essential practices doctrine was formally pronounced in *Shirur*

Mutt, the Supreme Court had occasion to pass judgment on whether an attempt to create an unusual perpetuity was in consonance with Hinduism. The central issue in *Saraswathi Ammal v. Rajagopal Ammal* (AIR 1953 SC 491) was not interpretation of the freedom of religion clauses or reform of a religious institution. The issue at stake was the right of a woman to set up a perpetuity to have worship conducted at the *samadhi* (or burial place) of her deceased husband. Speaking for the Court, Justice Jagannadhadas exercised the right of the Court to decide whether this practice was Hindu or not. However, instead of making the essential versus nonessential argument made in *Shirur Mutt*, Jagannadhadas preferred to refer to the Hindu scriptures. The Court said, “To the extent . . . that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit it must be shown to have a shastric basis so far as Hindus are concerned.” The Court went on to say that the “heads of religious purposes determined by belief in acquisition in religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society” (ibid.: 491). In other words, the Court ruled that what qualified as a religious practice could not be enlarged on individual whim but had to have wide recognition in society.

Though the case is not so significant in the development of the essential practices doctrine, the Court was making certain points that were of enormous significance to the future judicial discourse on religion. First, the Court was referring, like the colonial judges, to the sacred texts, or *shastras*, to judge the legitimacy of a religious practice. Second, contrary to *Shirur Mutt*, the Court was not willing to accept the claim of an individual or group regarding a religious practice. Third, the Court was bringing to the fore the need to judge religious practices by the rules of “modern society.” The interpretation of the court, which differs markedly from the *Shirur Mutt* judgment, shows the contradictions between a court committed to modernization of religion and the need to appeal to traditional authorities to justify its decisions. It also shows the willingness of the Court to put “public policy” before an individual or community’s religious practice.

The contradictions between traditional texts and the reformist values expressed in the Constitution would become more apparent in *Sri Venkatramana Devaru v. State of Mysore* (AIR 1958 SC 255). One reason why this case is interesting is that the Court had to weigh the religious freedom of a group against the right of the state to reform a religious practice. But what is more directly relevant to this analysis is the way the Court tackled the primary subject of the case—unrestricted right of entry of Harijans (untouchables) into a temple founded by Brahmins—by seeking

evidence from the Hindu scriptures. The issue before the Court was the applicability of the Madras Temple Entry Authorisation Act, which was intended to remove the bar on Harijans from entering the Sri Venkatramana temple founded by the Gowda Saraswath Brahmins. The original suit was filed by the trustees of the temple in 1949, a year before the Constitution came into effect. Originally, the appellants claimed that the temple was a private one and therefore exempt from the Act. But once the Constitution was in force, the appellants also claimed that the temple was in addition a denominational one and hence entitled to protection under Article 26. Justice Venkatarama Aiyar, speaking for the Court, presented the primary question thus: “The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Art. 26 (b) is subject to and can be controlled by, a law protected by Art. 25(2)(b), throwing open a Hindu temple to all classes and sections of Hindus” (ibid.: 259).

The Court accepted the claims of the appellants that the Sri Venkatramana temple was indeed a “denominational temple founded for the benefit of the Gowda Saraswath Brahmins” (ibid.: 264). The Court proceeded to consider whether the Gowda Saraswaths, exercising the right of a religious denomination under Article 26(b), were “entitled to exclude other communities from entering into it for worship on the ground that it was a matter of religion” (ibid.: 264). This immediately brought into play the essential practices doctrine to determine “whether exclusion of a person from entering into a temple for worship is a matter of religion according to the Hindu Ceremonial Law” (ibid.: 264). Here it must be mentioned that the solicitor-general of India, C. K. Daphtary, who had appeared in the case for the state, had argued that exclusion of persons from temples was not a matter of religion.

Unlike in *Saraswathi Ammal* and later cases, the Court did not resort to modernist rhetoric. Instead it relied on a scriptural exegesis and case law

[In Devaru] the Court...relied on a scriptural exegesis and case law

to examine the practice of excluding Harijans from worshipping in temples, which can be regarded as one of the practices defining untouchability. Justice Aiyar first took up the question of idolatry in Hinduism and commented that there was a

difference of opinion as to “whether image worship had a place in the religion of the Hindus as revealed in the Vedas” (ibid.: 264). He said the

hymns of the Upanishads describe the Supreme Being as “omnipotent, omniscient and omnipresent,” but the later Puranas establish the notion of the Trinity with Brahma, Vishnu, and Shiva as manifestations of the three aspects of creation, preservation, and destruction.

The Court viewed the Puranic period as the time when “daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu” (ibid.: 264). The construction of temples meant that increasing “attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of the worship of the deity” (ibid.: 264). This was also the time when treatises devoted to the ceremonial law of worship were written. The Court identified the 28 Agamas as the principal texts for temple practices specifying rules as to how a temple is to be constructed, where the idols are to be placed, and where the worshippers should stand.

Having traced the evidence in the Hindu texts, the Court invoked a 1915 Madras High Court judgment (AIR 1915 Mad. 363) to close the issue of exclusion in Hindu temples. The judgment had this to say about the Agamas: “In the Nirvachanapaddhati it is said that Sivadwijas should worship in the Garbagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram” (AIR 1958 SC 265). This judgment was affirmed by the Privy Council in *Sankarlinga Nadan v. Raja Rajeswara Dorai*, in which it ruled that a trustee who admitted into a temple persons who were not entitled to enter the premises as prescribed in the Agamas were guilty of breach of trust. Based on his reading of the sacred texts and case law, Aiyar concluded: “Thus, under the ceremonial law pertaining to temples, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion” (ibid.: 265).

The Court, however, did not bring into play Article 17, which abolishes untouchability. The Court opined that Article 17 did not apply to denominational temples: “There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation” (ibid.: 267).

This meant that, according to the Court, the right of the Gowda Saraswaths to exclude persons from worshipping in the temple guaranteed

by Article 26(b) clashed with the right of the state to open public temples to all Hindus under Article 25(2)(b). In Aiyar's words, the case involved "two provisions of equal authority, neither of them being subject to the other" (ibid.: 268). The Court found a way out of this impasse by giving Article 25(2)(b) precedence over Article 26 by pointing out that the language of Article 25(2)(b) implied the limitations were applicable to all Hindu religious institutions, including denominational ones. The Court referred to this as the rule of "harmonious construction" and sought to ameliorate the ruling by stating that the state's right to intervene in religious institutions was subject to limitations. In a minor concession to the appellants, the Court said "that during certain ceremonies on special occasions it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded" (ibid.: 269).

The *Devaru* ruling, in theory, followed the essential practices doctrine of *Shirur Mutt* by accepting that religion encompassed rituals and practices. However, the other cardinal principle laid out in *Shirur Mutt* regarding the "autonomy" of a religious denomination to decide what ceremonies are essential was breached. *Devaru* clearly illustrated that the Court was to decide what practices are essential to any religion. What was striking about *Devaru* was the way it referred to Hindu scriptures to justify the exclusion of lower castes from the temple during special ceremonies when it could have easily referred to other discourses within Hinduism, notably the Bhakti tradition, to argue the opposite case. But having found a textual basis for excluding lower castes at certain times, the Court could not legitimize that practice since it clashed with the state's avowed intention to stamp out caste discrimination. Hence the Court strategically used a "harmonious construction" to find a way out of its dilemma. The Court's role in deciding what was "essential" to any religion would be enhanced in subsequent cases. So also would the explicit reliance on a modernist rhetoric and a reduced dependence on scriptures.

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Redefining Essential Practice

Two cases in the early 1960s would substantially reformulate the essential practices doctrine. The rulings in both these cases were handed down by Justice P. B. Gajendragadkar, who later went on to become Chief Justice of India in 1964–66. The first of these cases was *Durgah Committee v. Hussain Ali* (AIR 1961 SC 1402). In this case, the Sufi Muslim *khadims*⁴

of the shrine of Moinuddin Chishti in Ajmer challenged the Durgah Khawaja Saheb Act of 1955, which took away the *khadims'* right to manage the properties of the Durgah and to receive offerings from pilgrims. Among other things, the *khadims* contended that the Act abridged their rights as Muslims belonging to the Sufi Chishtia order. The *khadims* maintained that their fundamental rights guaranteed by several constitutional provisions, including Articles 25 and 26, had been violated.

Unlike Justice Aiyar in *Devaru*, Gajendragadkar did not make any reference to the scriptures. Instead, he skillfully constructed a “secular” history of the Ajmer shrine to “ascertain broadly the genesis of the shrine, its growth, the nature of the endowments made to it, the management of the properties thus endowed, the rights of the Khadims . . .” (AIR 1961 SC 1406). After surveying the history of the shrine from the pre-Mughal period to the contemporary period, the Court concluded that the administration of the shrine “had always been in the hands of the official appointed by the State” (ibid.: 1410). The Court, however, conceded that the Chishtia sect could be regarded as a religious denomination. But this did not eventually have any impact on the Court’s decision, which upheld the validity of the Durgah Khawaja Saheb Act and dismissed the constitutional challenges to the Act. In doing so, Gajendragadkar issued a “note of caution” that would not only highlight the role of the Court in deciding what was an “essential and integral” part of religion but also make a distinction for the first time between “superstitious beliefs” and religious practice.

*The Court...now...was also
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Whilst we are dealing with this point it 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 religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other (*italics added*) (*ibid.*: 1415).

This extraordinary statement by the Court pushed the essential practices doctrine in a new direction. The Court was not only going to play the role of the gatekeeper as to what qualified as religion, but now it was also taking up the role of sifting superstition from “real” religion. This was a clear statement of the Court’s role—which had not been so overt until that point—in rationalizing religion and marginalizing practices that did not meet the Court’s test.

This redefinition of the essential practices test and the enhanced role of the Court in rationalizing religion would be articulated by Gajendragadkar in two more landmark cases that were decided soon after *Durgah Committee*. The first was *Sri Govindlalji v. State of Rajasthan* (AIR 1963 SC 1638), in which the Tilkayat Govindlalji, the traditional spiritual head of the Nathdwara Temple in Rajasthan, challenged the constitutionality of the Nathdwara Temple Act. One of the grounds for challenging the Act was infringement of Articles 25, 26(b), and 26(c), since the temple authorities claimed that it was privately owned and managed by the Tilkayat as head of the Vallabha denomination. By reconstructing the doctrine of the Vallabha school and the history of the temple, the Court held that the temple was private and that Tilkayat was “merely a custodian, manager and trustee of the temple.” The Court endorsed the Act, laying special emphasis on a *firman* (order) issued by the ruler of Udaipur in 1934 which declared that the royal court had absolute rights to supervise the temple and its property and even depose the Tilkayat if necessary.

Although the outcome of *Govindlalji* was unexceptional given the history of the Court in sanctioning state regulation of religious institutions, Gajendragadkar in his judgment explained why the claims of a community regarding their religious practices could not always be accepted.

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. The question will always have to be decid-

ed by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of 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 (ibid.: 1460–61).

Though Gajendragadkar admitted that this approach may present some difficulties, since “sometimes practices, religious and secular, are inextricably mixed up,” he was confident that the Court would be able to distinguish between what was a religious matter and what was “obviously” a secular matter. Gajendragadkar thus rejected the argument of the senior advocate, representing the appellants, who quoted from the Australian High Court ruling in *Jehovah’s Witness v. Commonwealth*: “What is religion to one is superstition to another.” The Court dismissed this proposition as of “no relevance.”

If an obviously secular matter is claimed to be [a] matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim. . . . A claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) and Art. 26(b) (ibid.: 1461).

This line of thinking would reach its culmination in *Shastri Yagnapurushdasji v. Muldas*, which was yet another case involving a religious group—this time the Satsangis—seeking protection from the Bombay Harijan Temple Entry Act. Unlike some of the denominations discussed earlier, the Satsangis claimed the status of a separate religion as followers of Swaminarayan. In his judgment, Gajendragadkar said, “It may be conceded that the genesis of the suit is the genuine apprehension entertained by the appellants, but as often happens in these matters the said apprehension is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself” (AIR 1966 SC 1135).

Although *Durgah Committee* and *Govindlalji* represent the dominant trend, there were differences of opinion on the bench about the reformist

and rationalist thrust of the Court. *Saifuddin Saheb v. State of Bombay* (AIR 1962 SC 853), which is chronologically placed between *Durgah Committee* and *Govindlalji*, illustrated the split in the Court on how far the judiciary should interfere in and reform religion. It must be noted that the justices did not disagree on the essential practices doctrine, but they did disagree on the extent to which it should be applied. In *Saifuddin*, the Bombay Prevention of Excommunication Act of 1949 had been challenged by the Dai-ul-Mutlaq, who was the religious head of the Dawoodi Bohra community. The majority judgment delivered by Justice K. C. Dasgupta declared the Act unconstitutional by holding that “excommunication cannot but be held to be for the purpose of maintaining the strength of the religion” (ibid.: 869). In a concurring judgment, Justice N. R. Ayyangar wrote, “The power of excommunication for the purpose of ensuring the preservation of the community, has therefore prime significance in the religious life of every member of the group” (ibid.: 876).

However, in a strong dissent, Chief Justice B. P. Sinha pointed out that even if excommunication was a matter of religion, the Act would still be valid, since it was in the interest of “public welfare” (ibid.: 859). In language reminiscent of Gajendragadkar, Sinha wrote, “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” (ibid.: 860–61). Citing the essential practices doctrine, Sinha argued that the actions of the Dai “in the purely religious aspects are not a concern of the courts” (ibid.: 865). Sinha, like Gajendragadkar, was confident of separating “pure” religious practices from those that fell within the “secular” realm. Sinha argued that the Dai’s right to excommunicate affected the “civil rights of the members of the community,” and on this ground he argued for upholding the Bombay Act.

This series of rulings in the early 1960s firmly established the principle that it was the Court’s task to ascertain what constituted religious doctrine and practice. The Gajendragadkar rulings went further and specified that even practices that can be accepted as religious might be classified as superstition or irrational. Some scholars point out that redefinition of the essential practices doctrine was partly fuelled by fears that *Devaru* and *Saifuddin* had widened the scope of religion in the public sphere and consequently impeded social reform (Tripathi 1966: 183). Dhavan and Nariman’s assessment in 1997 sums up the situation as it was after

Yagnapurushdasji: “Judges are now endowed with a three step inquiry to determine, in tandem, whether a claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution” (Dhavan and Nariman 2000: 260).

Essential Practice Entrenched

The role of the Court in determining what constitutes religion and essential religious practice has remained undiminished since the formative years of this doctrine. Subsequent rulings have built on case law but hardly ever reconsidered the doctrine of essential practices. The most prominent effect of this doctrine has been the widening net of state regulation over places of worship. Another significant effect has been the marked disinclination of the Court to accept more recent religious groups as “proper” religions or even religious denominations. Consequently, the religious practices of these groups have not been able to pass the essential practices test. Of course, given the all-encompassing definition of Hinduism in *Yagnapurushdasji*, it is unlikely any sect within Hinduism is ever going to get the court’s approval as a separate religion. This was quite clearly illustrated in the case of the Ramakrishna Mission, which was deemed a “religious minority” (i.e., given separate religion status) by the Calcutta High Court, only to have it changed to religious denomination status by the Supreme Court.

Before looking at the regulation of religious institutions, this study will briefly touch on two cases from the 1980s in which the Court had to make a decision on the claim of an established group for religious denomination status and had to decide whether a religious practice was essential or not. The first case involved the followers of Sri Aurobindo, and the second concerned the group known as Ananda Margis. In *S. P. Mittal v. Union of India* (AIR 1983 SC 1), the legitimacy of the Auroville⁵ (Emergency Provisions) Act of 1980 was challenged. One of the questions before the Court was whether the Aurobindo Society qualified as a religious denomination and hence came under the protection of Article 26. After discussing the meaning of religion, and quoting extensively from Aurobindo’s writings as well as secondary sources, Justice R. B. Misra, writing for the majority, ruled “there is no room for doubt that neither the Society nor Auroville constitutes a religious denomination and the teach-

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ings of Sri Aurobindo represented only his philosophy and not a religion” (AIR 1983 SC 30).

The inconsistency of the majority position was pointed out by Justice O. Chinnappa Reddy in his dissenting opinion. Reddy argued that religion cannot be “confined to the traditional, established, well-known or popular religions like Hinduism, Mohammedanism, Buddhism and Christianity” (ibid.: 4). According to Reddy, religion and religious denomination must be interpreted in a “liberal, expansive way.” He referred to *Shirur Mutt* language stating that the different sects under Hinduism could be designated as religious denominations. In keeping with this view, Reddy wrote, “But this fact stands out prominently that whatever else [Aurobindo] was, he truly was a religious teacher and taught and was understood to have taught new religious doctrine and practice” (ibid.: 11). However, Reddy maintained that Auroville was not a place of worship but a township.

A year after the Supreme Court ruled that Aurobindo was not a religious teacher, the Court decided that the Ananda Margis was a religious denomination. However, in *Jagadishwaranand v. Police Commissioner, Calcutta* (AIR 1984 SC 51), the Court refused to accept the *tandava* dance as an essential practice of the Ananda Margis. Writing for the Court, Justice Ranganath Misra reasoned, “Ananda Marga as a religious order is of recent origin and *tandava* dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances *tandava* dance can be taken as an essential religious rite of the Ananda Margis” (ibid.: 57).

Interestingly, a single bench of the Calcutta High Court, in a rare occurrence, took a contrary line when asked to reconsider the case (AIR 1990 Cal. 336). Justice Bhagabati Prasad Banerjee wrote, “The concept of *tandava* dance was not a new thing which is beyond the scope of the religion. The performance of *tandava* dance cannot be said to be a thing which is beyond the scope of religion. Hindu texts and literatures provide [for] such dance. If the Courts started enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be ” (ibid.: 350). This was a strong indictment of the essential practices doctrine followed by the Supreme Court since the 1960s and a plea for reconsideration of the Court’s role in determining the rationality of religious practices.

That was not the end of the story of the Ananda Margis. In March 2004 the Supreme Court again took up the issue and further narrowed the scope of essential practices to mean the foundational “core” of a religion. The majority judgment said, “The essential part of a religion means the

core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built. Without which, a religion will be no religion” (2004 12 Supreme Court Cases 782). However, Justice A. R. Lakshmanan contested this definition of essential practices and wrote in his dissent, “If these practices are accepted by the followers of such spiritual head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion” (ibid.: 793).

Temple Takeover and Dharma

The essential practices test was one of the major tools whereby the Supreme Court sanctioned a complex regulatory regime for Hindu temples. As has been noted earlier, in *Shirur Mutt* the Court gave its approval to the bulk of the Madras Hindu Religious and Charitable Endowments Act of 1951. Soon after the Madras HRCE Act, most states in India put in place regulatory mechanisms for Hindu religious institutions. Though many of these state laws were challenged, they were usually approved by the Court with minor alterations. One of the consequences of this has been the bureaucratization of religion, with state-appointed officers taking over the running of temples at the expense of traditional authorities. The undermining of traditional heads of temples such as the Nathdwara or the Jagannath Temple at Puri had already begun from the 1960s. Temple functionaries like the chief priests

(*archakas*) and other intermediaries like *pandas* and *sevaks* (attendants) have also been severely affected. *E.R.J. Swami v. State of T.N.* (AIR 1972 SC 1586) was one of the first cases where the hereditary principle for temple priests was held to be void. Writing for the Court in *Swami*, Justice D. G. Palekar ruled that the *archaka* was appointed by the managers of the temple (*dharam karta* or *shebait*), and the fact that after his appointment the *archaka* “performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion” (ibid.: 1597).

A spate of litigation in the 1990s centered on major Hindu shrines like Tirupathi, Vaishno Devi, Jagannath Temple (Puri), and the Kashi Vishwanath Temple (Varanasi). The majority of the judgments, in which challenges to the extensive state regulation of these temples were dismissed, were handed down by Justice K. Ramaswamy. This has led Dhavan and Nariman to observe, “If the regulatory impetus provided by Justice B. K. Mukherjea in the fifties was enlarged by Justice

***The essential practices test
was one of the major tools***

Gajendragadkar in the sixties, the latest judgments of Justice K. Ramaswamy have enthusiastically supported the ‘nationalization’ of some of India’s greatest shrines” (Dhavan and Nariman 2000: 263). Instead of examining in detail the separate judgments on temple regulation, I look at one case which best sums up Ramaswamy’s understanding of the nature of religion and the essential practices doctrine.

In *A.S. Narayana Deekshitulu v. State of A.P.* (Andhra Pradesh), the petitioner was an *archaka* of Thirumala Tirupathi, which is one of the richest temples in India (AIR 1996 SC 1765). The petitioner contended that the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act of 1987, by abolishing hereditary succession among *archakas*, prescribing regulations for appointment of *archakas*, and taking away their right to a share of offerings made to the deity, infringed Articles 25 and 26 of the Constitution. The Court dismissed the petition and upheld the Act with a few minor qualifications. However, in the course of the judgment, Ramaswamy (like Mukherjea in *Shirur Mutt* and Gajendragadkar in *Yagnapurushdasji*) engaged in an elaborate discussion on the nature of religion in the Indian context. Quoting from texts such as the Vedas, Upanishads, and the Gita, and using modern thinkers and writers such as Aurobindo, Vivekananda, Radhakrishnan, Shankar Dayal Sharma, and even Richard Dawkins, Ramaswamy attempted to construct a notion of religion significantly different from *Shirur Mutt*.

Taking the cue from Aurobindo’s distinction between “true religion,” which is spiritual, and “religionism,” which is narrow and focused on ceremonies, Ramaswamy proposed:

The importance of rituals in religious life is relevant for evocation of mystic and symbolic beginnings of the journey but on them the truth of a religious experience cannot stand. The truth of a religious experience is far more direct, perceptible and important to human existence. It is the fullness of religious experience which must be assured by temples, where the images of the Lord in resplendent glory is housed. . . . It is essential that the value of law must be tested by its certainty in reiterating the Core of Religious Experience and if a law seeks to separate the non-essential from the essential so that the essential can have a greater focus of attention in those who believe in such an experience, the object of such a law cannot be described as unlawful but possibly somewhat missionary (ibid.: 1790).

Ramaswamy drew a parallel between a “higher” or “core” religion and the concept of *dharma*. According to Ramaswamy, it is *dharma* rather than

conventional religion that is protected by the Constitution. How then is *dharma* to be understood in terms of the Constitution? “*Dharma* is that which approves oneself or good consciousness or springs from due deliberation for one’s own happiness and also for welfare of all beings free from fear, desire, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection” (ibid.: 1790). Interestingly, this extraordinary position is supported by Justice B. L. Hansaria, the other judge on the Bench, in a separate judgment: “The word religion, as presently understood, is comprised of rituals, customs, and dogmas surviving on the basis of fear and blind faith; whereas *dharma* encapsulates those great laws and disciplines that uphold, sustain, and ultimately lead humanity to the sublime heights of worldly and spiritual glory” (ibid.: 1807).

The idea of a higher or “dharmic” religion, according to Ramaswamy, is fundamental to the essential practices doctrine and the secular Constitution. He states:

In secularizing the matters of religion which are not essentially and integral parts of religion, secularism, therefore, consciously denounces all forms of super-naturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute to some degree to the process of secularization of the matters of religion or religious practices (ibid.: 1792–93).

Ramaswamy finds a congruence between the “secularization” of religion and the religious freedom guaranteed by the Constitution: “The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order” (ibid.: 1793). The unusual redefinition of religion and religious freedom in *Narayana* is far removed from what Mukherjea in 1954 had originally proposed in *Shirur Mutt*. The distinction between “essential” religion and “superstition” had been articulated by Gajendragadkar. However, the conception of religion as *dharma* that can foster an egalitarian society and a unified nation is closer to that proposed in the 1994 *Bommai* judgement.

Historicizing Essential Practice

If the overall impact of court rulings on secularism were to be assessed from 1951 to the present, some patterns are discernible. This has some-

thing to do with the personality of dominant judges, usually chief justices or future chief justices, as well as the prevailing political climate. It must be stressed, however, that no linear movement can be discerned in court rulings. In the early 1950s, the very first years of the existence of the Supreme Court saw rulings that arguably most closely approximated the constitutional position of the state giving “free play” to all religions. Justice B. K. Mukherjea rejected the narrow definition of religion enunciated by the Bombay High Court in *Ratilal Panachand*, where religion was restricted to matters of personal faith and belief. In *Shirur Mutt*, Mukherjea defined religion far more expansively and said rituals, observances, ceremonies, and modes of worship were to be regarded as integral parts of religion. Second, he observed that a religious denomination or body enjoyed complete autonomy in deciding what rites and ceremonies were essential. The Court thus laid the foundation for a relationship between state and organized religion that gave sufficient free play to religious denominations. Mukherjea, who was an expert on Hindu religious and charitable endowments, on which he delivered the famous Tagore lectures at Calcutta University, as well as a Sanskrit scholar, greatly influenced the direction of the Court in the decade after 1950.

This would change, as has been noted earlier, in the 1960s when Justice Gajendragadkar became the dominant voice of the Court with regard to religion. In successive cases, he would whittle the protection of essential practices to those that the court would deem suitable. In *Durgah Committee*, Gajendragadkar made a distinction between superstition and religion; in *Govindlalji* he said that the claims of a community with regard to their practices would not be *prima facie* accepted. This would take the court on a trajectory of social engineering, of which Gajendragadkar was a firm believer. He believed that law was the “only weapon” with which governments “seek to usher in India that glorious stage, which is called a Welfare State” (Gajendragadkar 1965: 167). Gajendragadkar’s views on religion and his emphasis on the need for a rational and scientific outlook on life had a remarkable similarity to Nehru’s position, especially those articulated in his autobiography and *The Discovery of India*. Thus, Gajendragadkar’s views expressed in public lectures echoed Nehru’s: “Religion as it is actually practiced among the Hindu masses, tends to be reactionary in its outlook and seeks to perpetuate the distinctions between castes and communities and sustain social inequality in all its nakedness” (Gajendragadkar, quoted in Mahajan 1966: 101). The phase when Gajendragadkar was dominant also marked the beginning of an increased role for the state in regulation and administration of temples.

The framework that was put into place in the 1960s has never really been questioned since. In the 1980s and 1990s, the Court sanctioned state control of major Hindu temples. It also placed ever-stricter rules on groups claiming religious denomination status and protection under Article 25. Though no single judge was dominant during this period, except for Justice Ramaswamy, who handled most of the temple cases in the 1990s, the idea of state regulation of temples had taken deep roots by then. This was also the period when Hindu nationalism was ascendant, and the sanction of state control of temples possibly stemmed from different imperatives than during Gajendragadkar's time. The court was less concerned about rooting out irrational elements of religion than it was about expanding the role of the state with regard to religion. This comes out in the introduction of the idea of *dharma* into the judicial discourse by Ramaswamy in place of a narrow conception of religion, which gave the state latitude to play benefactor to religious institutions. The court in this phase also was at its most activist in tackling the many perceived ills in India, such as corruption and environmental pollution. The enthusiastic support of the state taking over temples could be seen as a by-product of this activism.

*the Court sanctioned state
control of major Hindu temples*

The Court, Hinduism, and Hindutva

The “Hindutva judgments” is the collective name given to seven decisions handed down by the Supreme Court in 1996. The cases involved twelve members of Hindu nationalist parties such as the Bharatiya Janata Party and Shiv Sena. The twelve members, who included Shiv Sena chief Bal Thackeray and then-Maharashtra chief minister Manohar Joshi, were charged with violating section 123 of the Representation of the People Act, 1951 (RPA) by appealing to Hindutva. Section 123(3) prohibits, among other things, election candidates from appealing for votes on the grounds of religion or religious symbols.⁶ Section 123(3A) prohibits attempts to promote enmity on grounds of religion, race, community, or language. On the specific question of whether an appeal to Hindutva constitutes a violation of the RPA, the main opinion of the Court was delivered in *Prabhoo v. Kunte* (AIR 1996 SC 1113) where Ramesh Yeshwant Prabhoo, then mayor of Bombay, and his election agent, Thackeray, faced corruption charges for appealing for votes on religious grounds or promoting enmity on religious grounds.

Inclusivist and Exclusivist Hinduism

Before looking at *Prabhoo*, it would be useful to make a distinction between two strands of reformist Hinduism: an “inclusivist” and an “exclusivist” model. The most prominent proponent of an inclusivist Hinduism was Sarvepalli Radhakrishnan (1888–1975). During his tenure as president (1962–67), Radhakrishnan forcefully argued for Hinduism as a universal and tolerant religion founded on the Vedas. In the Upton lectures at Oxford in 1926, Radhakrishnan famously described Hinduism thus: “Hinduism is more a *way of life* than a form of thought. While it gives absolute liberty in the world of thought it enjoins a strict code of practice. The theist and the atheist, the skeptic and the agnostic may all be Hindus if they

***[President] Radhakrishnan
forcefully argued for
Hinduism as a universal
and tolerant religion***

accept the Hindu system of culture and life (*italics added*)” (Radhakrishnan 1957: 77). These ideas would play a central role in the Court’s understanding of Hinduism in *Yagnapurushdasji*, where the Court for the first time attempted to define Hinduism. This case would also figure prominently in the Hindutva judgement.

Yagnapurushdasji was critical for the Supreme Court’s construction of Hinduism, a construction that has since become hegemonic in judicial discourse. Writing for the Court, Chief Justice P. B. Gajendragadkar—who had already authored some of the most important judgments on the question of freedom of religion—inquired: “What are the distinctive features of Hindu religion” (AIR 1966 SC 1127). Drawing primarily from English language sources, particularly those of Radhakrishnan, the Court put forward the view that Hinduism was “impossible” to define. Confronted with this amorphous entity, the Court concluded, “It [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 (*italics added*)” (*ibid.*: 1128). It is no coincidence that this was very similar to Nehru’s definition of Hinduism: “Hinduism, as a faith, is vague, amorphous, many-sided, all things to all men. It is hardly possible to define it, or indeed to say definitely whether it is a religion or not, in the usual sense of the word” (Nehru 1989: 75).

The importance of *Yagnapurushdasji* was that the Court, drawing heavily from the ideas of Radhakrishnan and his intellectual predecessors, was interpreting Hinduism as an inclusivist religion. In this sort of usage, certain features of Hinduism are most important: tolerance, universality, a

The importance of *Yagnapurushdasji* was that the Court, drawing heavily from the ideas of Radhakrishnan and his intellectual predecessors, was interpreting Hinduism as an inclusivist religion. In this sort of usage, certain features of Hinduism are most important: tolerance, universality, a

classical core, and a fundamental unity. The Court's views on Hinduism and its inclusive nature recurred in subsequent judgments. In several important later judgments, the Supreme Court relied on the construction of Hinduism as elaborated in *Yagnapurushdasji*. For instance, in *Ganpat v. Returning Officer* the Court declares:

It is necessary to remember that Hinduism is a very broad based religion. In fact some people take the view that it is not a religion at all on the ground that there is no founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism through the ages has absorbed or accommodated many different practices, religious as well as secular, and also different faiths (AIR 1975 SC 423).

The inclusive model of Hinduism has also been used to determine who qualifies as a Hindu for legal purposes. As Robert Baird notes with respect to the application of personal law, the Court has held that the Jains (AIR 1967 SC 506), who consider themselves distinct from Hindus, and the Lingayats, a "lower caste" within Hinduism, should be treated as Hindus (AIR 1964 SC 520). Since *Yagnapurushdasji*, claims put forward by different Hindu sects to be regarded as a separate religion have not found favor with the Court. Among the more prominent cases was the denial of separate religion status to the Arya Samaj (AIR 1971 SC 1731) and Ramakrishna Mission (AIR 1995 SC 2089).

The Court, by adopting the inclusivist model of Hinduism, has contributed to the construction of a homogenous Hinduism that is inimical to autonomous variations in beliefs, practices, and doctrines. In this paradoxical sense, the Court's understanding of Hinduism overlapped with the exclusivist strand associated with the founder of contemporary Hindu nationalism, Vinayak Damodar Savarkar (1883–1966), and his notion of "Hindutva" (Hinduness). Like many Hindu intellectuals before him, Savarkar engaged with the problem of how to define "Hinduism" and "Hindu." In *Hindutva*, he wrote, "Thus Hindu would be the name that this land and the people that inhabited it bore from time immemorial that

*claims put forward by
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even the Vedic name Sindhu is but a later and secondary form of it” (Savarkar 1969: 10).

The key innovation of Savarkar was that “the concept of Hindu is given a predominantly territorial component, a concept of holy land is specifically introduced in a fashion that would create a stratarchy of Indians” (Nandy et al. 2002: 67). “We have found,” Savarkar writes, “the first important essential qualification of a Hindu is that to him the land that extends from Sindhu to Sindhu is the Fatherland (Pitribhu), the Motherland (Matribhu) the land of his patriarchs and forefathers” (Savarkar 1969: 110). More importantly, Savarkar specified that the “Dharma of a Hindu being so completely identified with the land of the Hindus, this land to him is not only a Pitribhu but a Punyabhū, not only a Fatherland but a Holyland” (ibid.: 111). This meant that Muslims and Christians, who might have been born in the “common Fatherland,” could not be regarded as Hindus: “For though Hindustan to them is Fatherland as to any other Hindu yet it is not to them a Holyland too. Their Holyland is far off in Arabia or Palestine” (ibid.: 113).

Savarkar coined the word “Hindutva” to substitute for Hinduism which, in his book, “meant a theory or code more or less based on spiritual or religious dogma or system” (ibid.: 4). According to Savarkar, it was of paramount importance to distinguish between Hinduism and Hindutva: “Hinduism is only a derivative, a fraction, a part of Hindutva. . . . Hindutva embraces all the departments of thought and activity of the whole Being of our Hindu race” (ibid.: 3–4). Savarkar elaborated this notion by ascribing three “essentials” to Hindutva—a common nation (*rashtra*), a common race (*jati*), and a common civilization (*sanskriti*). The exclusivist logic of Savarkar was extended by M. S. Golwalkar, who was the most prominent ideologue of the Rashtriya Swayamsevak Sangh (RSS)⁷ and became its *sarsanghchhalak* (supreme director) in 1936.

The Hindutva Judgment

In *Prabhoo*, the Court first dealt with the question of the constitutionality of Section 123 of the RPA, which was challenged by the appellants. The Court upheld the constitutionality of the relevant sections of the RPA on the grounds that they were “enacted so as to eliminate from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed of any civilized political and social order” (AIR 1996 SC 1124). Writing for the Court, Justice J. S. Verma said: “Under the guise of protecting your own religions, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories” (ibid.: 1124).

On the basis of speeches by Thackeray, the Court held that there was an appeal to voters to elect Prabhoo because he was a Hindu.⁸ The Court also held that one of Thackeray's speeches included derogatory references to Muslims. On these counts, the Court concluded that Prabhoo and Thackeray were guilty of corrupt practices.⁹ However, the most important aspect of the ruling was the discussion on the legitimacy of appealing to Hindutva during the election campaign. In discussing Hindutva, Justice Verma first went over the definition of Hinduism presented in *Yagnapurushdasji*. Basing his opinion on his reading of the inclusivist Hinduism of *Yagnapurushdasji* and on a later decision (1976 Supp SCR 478),¹⁰ Verma proceeded to conflate Hindutva with Hinduism by arguing that Hindutva was a "way of life" and could not be equated with "narrow fundamentalist Hindu religious bigotry" (AIR 1996 SC 1130).

Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words "Hinduism" and "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. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a *way of life* of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith (italics added) (ibid.: 1129).

In conflating Hindutva with Hinduism, the Court ignored the sacred soil and birth/race aspects of Hindutva as defined by Savarkar and Golwalkar.

The Court, however, went further. Quoting from an obscure book on Indian Muslims, Verma then went on to opine that "the word 'Hindutva' is used and understood as a synonym for 'Indianisation', i.e. development of uniform culture by obliterating the differences between all the cultures co-existing in the country" (ibid.: 1130).

According to the Court, the terms Hinduism and Hindutva by

themselves did not violate the provisions of the RPA. "Considering the terms 'Hinduism' or 'Hindutva' per se as depicting hostility, enmity or intolerance towards other religious faiths or professions, proceeds from an

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improper appreciation and perception of the true meaning of these expressions emerging from the discussions in earlier authorities of this Court.... It is indeed very unfortunate, if in spite of the liberal and tolerant features of Hinduism recognized in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage” (ibid.: 1131). Unfortunately, these terms could be and arguably were misused in the way specified.

For the Court, the context in which the terms Hinduism and Hindutva were being used, and to what end, were very important. Thus Verma wrote, “It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for the votes for a Hindu candidate because he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of subsection (3) or (3A) of Section 123” (ibid.: 1131–32).

Though Verma conflated Hinduism and Hindutva, he was silent on the antecedents of Hindutva. For example, he did not consider Savarkar and Golwalkar’s use of sacred soil and race to include some and exclude others as foreigners. However, the intense debate generated by the Hindutva judgment brought out some of the important ramifications of the ruling. Commentators were troubled by the fact that the Court, by inferring the meaning of Hindutva from Hinduism, had “obscured the historical background as well as the contemporary political context” of Hindutva (Cossman and Kapur 1999: 34). It was argued that the Court failed to “recognize that Hindutva as an expression has a special meaning and is associated with the social and political philosophy of Savarkar and Golwalkar” (Nauriya 1996: 11). It was further pointed out that the judgment implied that “Hinduism, the religion of the majority of Indians, comes to reflect the way of life of *all* Indians” (Cossman and Kapur 1999: 33).

At the other end of the spectrum, the Hindu nationalists were jubilant. Soon after *Prabhoo*, an editorial in the *Organiser*, the journal of the RSS, stated, “The apex court has fully and unambiguously endorsed the concept of Hindutva which the [BJP] has been propounding since its inception.”¹¹ The BJP referred to the judgment in the party’s 1999 election manifesto: “Every effort to characterize Hindutva as a sectarian or exclusive idea has failed as the people of India have repeatedly rejected such a view and the Supreme Court, too, finally, endorsed the true meaning and content of Hinduism as being consistent with the true meaning and definition of secularism.”

The Act of Conflation

The conflation of Hinduism with Hindutva in *Prabhoo* hinged on the crucial use of the “way of life” metaphor. It is therefore appropriate to see how this metaphor bridges the inclusivist and exclusivist discourses on Hinduism. As indicated earlier, Radhakrishnan was a key figure in describing Hinduism as a “way of life” rather than a religion based on dogma. In *Yagnapurushdasji*, Gajendragadkar drew on Radhakrishnan’s writings to describe Hinduism as a “way of life.” It is interesting to note that around the same time as *Yagnapurushdasji*, the connection between Hindutva and a “way of life” was already being made. In a book published in 1969, Balraj Madhok¹² uses the “way of life” metaphor to put forward the view that it is “wrong to talk of Hinduism as a religion in the sense in which Islam and Christianity are religions.” Why is this so? Taking the cue from Radhakrishnan, Madhok writes:

Hinduism is not a very happy expression because it creates confusion in the people’s minds about the word Hindu. It creates the impression of its being a creed or religion, a particular dogma and form of worship, which it is not. It comprehends (sic) within itself all the forms of worship prevalent in India which do not interfere with the worshipper’s loyalty to India, her culture and tradition, history and great men” (Madhok 1969: 95).

Although Madhok uses Radhakrishnan’s all-inclusive definition of Hinduism as a religion without “any dogmatic creed,” he also adds a clause of “loyalty” to the Hindu nation. In a later work, Madhok again takes recourse to Radhakrishnan to explicitly make a connection between Hindutva and a “way of life” and also to employ Hinduism and Hindutva as interchangeable categories: “Hinduism or Hindutva represents a specific way of life and a cultural tradition in which different beliefs and thoughts have been flourishing and co-existing side by side since the dawn of history” (Madhok 1982: 8).

The shift from the inclusivist to the exclusivist discourse, as executed by Justice Verma and earlier by Madhok, is possible because at the heart of both discourses lies a project to homogenize Hinduism and deprive it of its pluralistic character. This is quite apparent in Savarkar’s formulation of Hindutva. One of the fundamental principles of Hindutva was to give it a much broader scope than Hinduism, which Savarkar saw as religious or spiritual dogma. A major concern of Savarkar in formulating the concept of Hindutva “was to avoid the political fall-out of an excessively narrow definition of Hinduism” (Sharma 2002: 22). As Savarkar writes in *Hindutva*:

This is Hindudharma—the conclusion of the conclusions arrived at by harmonizing the detailed experience of all the schools of religious thought—Vaidik, Sanatani, Jain, Baudda (sic), Sikha or Devasamji. Each one and every one of these systems or sects which are the direct descendants and developments of the religious beliefs, Vaidik and non-Vaidik, that obtained in the land of the saptasindhus or in the other unrecorded communities in other parts of India in the Vedic period, belongs to and is an integral part of Hindudharma” (Savarkar 1969: 108–09).

Tapan Basu and colleagues point out with regard to Hindutva: “Exclusion, however, goes along with a supreme internal catholicity. All differences of ritual, belief, and caste are irrelevant: what matters is not content but origin in (a vaguely and arbitrarily defined) *Bharatvarsha*. Monists, monotheists, polytheists and atheists, Sikhs, Arya Samajists, and advocates of Sanatan Dharma, are all equally good Hindus for Savarkar” (Basu et al. 1993: 9).

However, it is also vitally important to note that this homogenization of Hinduism was inspired by fundamentally different visions. In the case of Radhakrishnan, regeneration of Hinduism—in his words placing “the whole Hindu population on a higher spiritual plane” (Radhakrishnan 1957: 3)—was his primary goal. Similarly, Gajendragadkar was interested in changes in the “whole social and religious outlook of the Hindu community” (AIR 1966 SC 1135). In contrast, Savarkar was putting forth a territorial and racial conception of Hinduism. Religion per se has little connection with Savarkar’s conception of Hindutva: he was not primarily concerned with reform of Hinduism but with the political goal of creating a Hindu nation.

The Indian Constitution and the Hindu Code Bill (which is comprised of four different Acts) also take an undifferentiated view of

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well) with “Indianization”***

Hinduism. In this approach, anyone who is *not* a Muslim, Christian, Parsi, or Jew is included under “Hindu” as a legal category.¹³ Arvind Sharma notes that the “Indian government, both in the language of the Indian Constitution adopted in 1950, and subsequent legislation, has virtually adopted the Hindutva definition of a Hindu—as one who belongs to any religion of Indian origin” (Sharma

2002: 24). At one level, it could be argued, the Court with its inclusive model was merely reinforcing the constitutional (and legislative) view of

Hinduism. But with the Hindutva ruling, the Court goes beyond the constitutional stipulation and uses the inclusive model to identify Hinduism (and Hindutva as well) with “Indianization” and development of a “uniform culture.”

Conclusion

The discussion of the case law leads to several conclusions about the nature of the Supreme Court’s intervention in the role of religion in the public sphere. First, the Court is at the vanguard of the state’s project to reform and rationalize religion. Although appropriation of the role of interpreter of religious doctrine is most unusual for courts in secular constitutional polities, in the Indian context this role has been facilitated by the lack of a unitary ecclesiastical organization for Hinduism. This is also symptomatic of the faith set in place by post-colonial elites in what James Scott calls “high modernism” and a belief that “structures of the past were typically the products of myth, superstition, and religious prejudice” (Scott 1988: 93–94). This leads the Court, especially the more activist judges, to insist on religion without what the Court in its wisdom designates as superstition and irrationality.

The essential practices doctrine can then be seen as the Court’s attempt to discipline and cleanse religion or religious practices of what it finds to be unruly, irrational, and backward. This has meant that the Court not only has narrowed the “institutional space for personal faith” (Mitra 1997: 91) but also has sought to marginalize popular religion by treating it, in Ashis Nandy’s words, as part “of an enormous structure of irrationality and self-deceit, and as sure markers of an atavistic, regressive way of life” (Nandy 2001). This also has resulted in the sanction for an extensive state-sponsored regulatory regime for Hindu religious institutions and substantial limits on the independence of religious denominations. This is quite contrary to the Court’s understanding of secularism as it was enunciated in 1994 in *Bommai*.

Second, several commentators regarded the Hindutva judgment as grossly out of step with the judicial discourse on religion. However, seen against the backdrop of the Court’s proclivity to construct a centralized Hinduism, the judgment seems less paradoxical. As this study has shown, there is a convergence of the Radhakrishnan-Nehruvian secularist inclusivism with Savarkar’s exclusivist Hindutva in a discourse about a homogenized Hinduism as a “way of life.” This has led the Court to conflate Hinduism and Hindutva.

However, when Justice Verma equated Hinduism with Hindutva, he was not just playing with semantics; he was also giving a highly political

twist to the judicial discourse on Hinduism. Although *Prabhoo* 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. This is clearly illustrated in the "Vision Document" released by the BJP prior to the last general elections in India in 2004. Under the sub-heading "Cultural Nationalism," the document states, "Contrary to what its detractors say, and as the Supreme Court itself has decreed, Hindutva is not a religious or exclusivist concept. It is inclusive, integrative, and abhors any kind of discrimination against any section of the people of India on the basis of their faith."¹⁴ The BJP, following the Verma judgment, says "Indianness, Bharatiyata and Hindutva" must be treated as synonyms.

The strategy of using "Hindutva" and "Bharatiya" (Indian) as interchangeable categories is now very much the centerpiece of the BJP's ideology. The vision document and recent speeches and interviews by Hindu nationalist leaders suggest that the language of inclusivism is being used to justify Hindutva and what is in reality an exclusivist agenda. In early 2004, RSS chief K. S. Sudarshan referred to *Yagnapurushdasji* and commented that since the Supreme Court had said the term "Hindu"

referred to a way of life and not a religion, Muslims and Christians should be considered as Hindus. In a significant blurring of the boundaries of inclusivism and exclusivism, former Prime Minister Atal Bihari Vajpayee said in a recent interview, "Hindus cannot be fundamentalists. The Hindu worldview, we must remember, is inclusivist, as opposed to the exclusivist worldview of other faiths."

*the Court's reading of
Hinduism...has legitimized
the ideology of Hindutva*

Former BJP president Lal Krishna Advani, too, repeatedly has made the point that there is no difference between Bharatiyata and Hindutva. Thus, the Court's reading of Hinduism not only has legitimized the ideology of Hindutva but also aided the Hindu nationalist project.

It should be apparent from the foregoing analysis of Court rulings that the Indian state's relationship with secularism is a troubled one. Moreover, the idea of benign goodwill toward all religions (*sarvadharmasambhava*) does not adequately describe the Indian secular state. Indeed, the Court actively intervenes in the sphere of religion and contributes to a disenfranchisement of multiculturalism. Also apparent is a cognitive collaboration between the liberal-democratic view of secularism and Hindu nationalist ideology on the nature of religion, nation, and citizenship.

The Court rulings are, however, often at odds with what emerges from a reading of the Indian Constitution and the Constituent Assembly debates. Although some members of the Constituent Assembly dissented, the founding fathers favored a “fuzzy multiculturalism” (Mitra 2001: 7) fashioned in the backdrop of partition and communal riots. This meant that the state accommodated group rights to cultural and religious practices without explicitly acknowledging the existence of plural identities. Provisions like Article 44 of the Constitution, which deliberately kept the issue of a uniform civil code open-ended, are a good example of this flexibility.

Secularism and multiculturalism have come under challenge in independent India. The popularity of Hindu nationalist parties, the 1992 destruction of the Babri Masjid, and the 2002 Gujarat riots have unsettled the Nehruvian secularism understood as unity in diversity and composite culture. This has clearly shown up in the tensions in the relationship of the Indian state to religion and religious expression. The Supreme Court will continue to be one of the most important sites where these questions will be debated. The foregoing analysis suggests that the Supreme Court will have to develop a language that goes beyond its standard rhetoric on uniformity, nation-building, and civilized practices. The Court might benefit from a closer reading of the founding principles of the Constitution. It might also benefit from developing a language to creatively engage with religion and religious practices.

Endnotes

1. Article 25 (1): Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
Article 25 (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 of and sections of Hindus.
2. Since the essential practices test has been used, with a few exceptions, to judge the constitutionality of Hindu practices, this section primarily looks at the judicial discourse on Hinduism and Hindu practices.
3. There the Court concluded that the “traditional way of life of the Amish is not merely a matter of personal preference but one of deep religious conviction.”
4. According to the *khadims*, they were descendants of two followers of the twelfth century Sufi saint Khwaja Moinuddin Chisti, whose tomb at Ajmer is known as the Durgah Khwaja Saheb. The *khadims* also claimed they belonged to a religious denomination known as the Chishtia Sufis.
5. Auroville is a township in Pondicherry founded by a French follower of Aurobindo, M. Alfasse, who is also known as the Mother by Aurobindo devotees.
6. Section 123(3) of the RPA says: “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.”

7. Founded in 1925, the RSS aimed to revitalize India's cultural life by organizing branches (*sakhas*) where the country's youth could learn discipline and devotion to the nation.
8. Some of Thackeray's speeches, which were quoted by the Court, included passages such as: "We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of Muslims. The country belongs to Hindus and will remain so."
9. In contrast, in another of the Hindutva cases, then Maharashtra chief minister Manohar Joshi was found not guilty for declaring in a public speech that the "first Hindu state will be established in Maharashtra." The Court ruled: "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 grounds of his religion but the expression, at best, of such a hope."
10. Here the Court said: "It is a matter of common knowledge that Hinduism embraces within self [sic] so many diverse forms of beliefs, faiths, practices and worship it is difficult to define the term 'Hindu' with precision."
11. "Editorial," *Organiser*, December 24, 1995.
12. Madhok was former president of the Jan Sangh party, a predecessor to the BJP. He quit the party in 1973 after a bitter power struggle.
13. Explanation II appended to Article 25 includes Sikhs, Jains, and Buddhists as Hindus. The Hindu Succession Act of 1956, for instance, applies to:
 - (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat, or a follower of the Brahmo, Prathana or Arya Samaj.
 - (b) to any person who is a Buddhist, Jain, or Sikh by religion; and
 - (c) to any other person who is not a Muslim, Christian, Parsi, or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any other custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.
 On this point also see Robert Baird, ed., *Religion and Law in Independent India* (New Delhi: Manohar, 1993), 43–44.
14. For the document see www.bjp.org/Press/mar_3104a.htm.

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Commentary Savarkar and the Supreme Court

Upendra Baxi

In this issue of *Policy Studies*, Dr. Ronojoy Sen offers a clear and provocative critical overview of the complex decisional law of the Supreme Court of India concerning secularism. Dr. Sen offers insights that previously have not been explained about the evolution of Indian secularism.

Like all “isms,” “secularism” means many different things to many peoples at different times and places. Outside the minimal entailment that the state itself not establish any religion, secularism merely offers a changing landscape of meanings. However, some leading students of religion have characterized secularism as a new civic religion. Moreover, public officials, both elected and appointed, faced with the necessity of making decisions, often find it difficult to completely disassociate their religious beliefs from their official task and role. Justices address the changing meanings of secularism differently than the political actors; and although both remain bound by the constitutionally prescribed oaths of office, they often display an astonishing virtuosity in contrasting fidelity to the constitutional text with a deeper loyalty to its spirit. In sum, secularism emerges as an ongoing series of political and juridical constructions.

The everyday practices of organized religious traditions have a relatively autonomous life of their own. Being pious within one tradition remains broadly consistent with deference for other ways of piety; the syncretic nature of India’s living religions suggests pluri-networked practices of multi-faith tolerance. However, when dominant traditions make

recourse to uncivil and even violent practices toward other religious communities, or agnostics, atheists, or apostates, secular governance stands confronted with real dilemmas in fashioning appropriate legal and policy responses which set boundaries to interfaith hostilities. The intra-religious patterns of violent social exclusion—religiously sanctioned by the scrip-

tural canons and the custodians of various faith traditions—challenge the state in similar ways.¹ State regulation often derives its justification from a determined pursuit that Gary Jacobsohn calls “ameliorative” Indian secularism.² Secularism itself becomes a bloodied and battled category when political agents and

***secular governance stands
confronted with real dilemmas***

managers conveniently produce political catastrophes named as “communal riots,” without any real scope of redress for the violated peoples.³ Nor may we ignore patterns of secularization⁴ which occur when increasingly even the practitioners of faith make implicit or explicit decisions concerning the irrelevance of their religion to ways of getting on with acts of daily living.⁵

Sen focuses his study on “constitutional secularism”—a set of adjudicatory/interpretive *practices* and *policies* concerning the meaning and scope of the state-religion nexus. However, this very notion invites differentiation.

Two Forms of Constitutional Secularism

I propose a distinction between two forms of constitutional secularism: rights-oriented secularism (ROS) and governance-oriented secularism (GOS). In ROS, the principal concern is how to make the best complete sense of the normative proclamation of the right to freedom of conscience and to religious belief and practice. ROS has dominated much of the work of the Indian Supreme Court the past three decades; and it remains writ large on this monograph. ROS, however, also entails a complex interface between rights to religion and other related rights, such as: (1) the claims over the near-absolute Article 30 minority rights to establish and administer educational institutions of their own choice; (2) claims to immunity from use of public revenues for renovation of religious shrines or celebrations of historic memory of inaugural figures of religious traditions; (3) contestation over definitions of public order as grounds for regulating associational and movement rights; and (4) claims concerning property rights. ROS signifies, overall, claims and contentions about the integrity of rights-structures.

In contrast, governance-oriented secularism seeks to codify the limits of political practices that craftily appeal to religion as a resource for the acquisition, exercise, and management of political power. Thus, the Representation of People Act disqualifies appeals to religion in electoral campaigns; practices fraught with incitement to religious enmity stand penalized by the Indian Penal Code; the Places of Religious Worship Act enacted in the wake of mass violence that followed the 1992 demolition of the Babri Masjid forbids similar recurrence with multiple penal sanctions, as does the Prevention of Glorification of Sati Act. GOS no doubt remains related to ROS; but the main focus here is with the preservation of the integrity of secular governance structures and processes. The GOS formations explicitly remain subject to adjudicatory surveillance.

This stands spectacularly achieved in, and since, *Kesavananda* by the judicial installation of secularism as an essential feature of the basic structure of the Constitution, even to the point of invalidating a future amendment expunging the preambulatory declaration of India as a secular republic. This high judicial power invoked to discipline amendatory power of Parliament has acquired a “brooding omnipresence” that extends to ordinary legislation and even the exercise of executive powers. Thus, *Bommai* deploys secularism to set some limits on the power to impose presidential rule over states; and *Prabhoo* extends different understandings of secularism to appraise the validity of criminalization of appeals to religion during electoral campaigns.⁶

This accomplishment increasingly restricts the range of human rights-neutral practices of governance and illustrates tense and complex relationship between these two forms. The relatively autonomous sphere of GOS often impacts on ROS and vice versa. Seamless web type narratives of secularism fail to explore the complexity and contradiction of adjudicatory practices and policies.

To be sure, these categories need to be further analytically nuanced. One fruitful way to read Dr. Sen’s monograph entails testing out the categories of ROS and GOS.

Three Claims

Sen makes three interrelated but also distinct claims: the *homogenization* claim, the *ideological* claim, and the *impact* claim. The third claim divides into two further discrete claims. The first two claims have been heard before; the third constitutes the new provocation offered by this study.

The Homogenization Claim

Summarily put, the homogenization claim attributes a collective intent to

the Supreme Court. According to Dr. Sen, the court has “consistently sought to homogenize and rationalize religion and religious practices, particularly of Hinduism.” Sen fully notes the “split” in judicial opinion, and therefore the author speaks of the evolution of judicial *doctrine* of the essential features of religion over time, rather than of any collective *intent* which may suggest any single-minded enterprise. He is further entirely right to suggest the integral relationship between the role of “the personality of dominant judges” and the “prevailing political climate.” Clearly, “no linear movement can be discerned in court rulings.”

However, Sen still remains able to assert at least three overall effects. The Court has (1) widened the “net of state regulation over places of worship,” (2) excluded the potential aspirations of any Hindu sect toward the establishment of a “separate religion,” and (3) “sanctioned a complex regulatory regime for Hindu temples” and shrines, including their eventual “nationalization.” Sen offers a summative claim: judicial performance consolidates “the conception of religion as *dharma* that can foster an egalitarian society and a unified nation.”

Judicial doctrines arise out of litigational contests as well as from judicial leadership that seizes the contingent adjudicative moment to fashion a wide-ranging normativity. Equally important remain the webs of interests and strategies pursued by the litigants. ROS litigants no doubt pursue constitutional protection of religious beliefs and practices. However, they also pursue their vested interests of *power* and *property*—in sum, the right to exclude others. Because of this, a fuller understanding requires more than what Dr. Sen’s monograph offers in a short section entitled “Historicizing Essential Practices.”

Many a petitioner before the Supreme Court—from *Shirur Mutt* to *Kesavananda*, and of course the Ayodhya litigation—claimed protection of

***Many a petitioner...claimed
protection of property rights as the
real foundation of religious freedom***

property rights as the real foundation of religious freedom. Further, the ROS signifies claims over congregational and denominational disciplinary power over persons and groups. Thus, property and power resisting regulation in the name of fair distribution articulate in sum the

materiality *of the right to religion*. The different narratives available when we regard these two genres (ROS/GOS) seriously remains the task of a future essay, beyond the scope of this commentary.

The Ideological Claim

In Dr. Sen's view, many a "rationalization and homogenization" of religious practice derive inchoate authority in some "liberal-democratic conception(s)." In these, the dominant image of secularist law as "social engineering" remains rather outspoken. Surely, Sen eloquently establishes the lineages between Jawaharlal Nehru and Justice P. B. Gajendragadkar and his narratives concerning the "inclusive" and "exclusive" Hinduism is also broadly persuasive.

However, the reference to liberal-democratic conceptions proves too *little* as well as too *much*. Too little, because the necessary and general distinctions between the libertarian, liberal, and communitarian conceptions remain underdeveloped in the rights-oriented secularism discourse. Too much, because the politics of naming some founding "fathers" and "figures" such as Radhakrishnan, Nehru, and Ambedkar rather ahistorically exhaust the range of conceptions of constitutional secularism.

Sen refers to (although is not in agreement with) eminent scholars such as Ashis Nandy and T. N. Madan, who somehow entertain the belief that the secular state was foredoomed to "failure." Madan, in saying that "secularism in South Asia as a generally shared credo of life is impossible, as a basis for state action impracticable, and as a blueprint for the foreseeable future impotent," simply conflates the incoherence of the founding Nehruvian figure as a genetic curse for Indian constitutional secularism. In identifying secularism as a "part of a larger package consisting of development, mega-science and national security, which is used by the state to silence its non-conforming citizens," Nandy blithely overshoots his mark. Neither dirties the authorial hands with any serious understanding of ROS judicial interpretive feats.⁷

The "liberal" invites attention to different libertarian and communitarian traditions of thought, as Rajiv Bhargava has so often reminded us. The libertarian conceptions celebrate the basic rights of human beings to conscience and religion via the right to freedom of property and contract and the fables of legitimate domination that these in turn construct. The liberal conceptions accentuate agency via freedom of conscience severally as: the right to *belong* to faith communities; the right to *change* religious affiliation; the right *not to believe*, or the ways of privileging agnosticism; and the right to *exit*. In some remarkable ways, communitarian liberal democratic conceptions, while affirming group identity and solidarity rights, also subsume individual human rights costs thus incurred.⁸

This sort of differentiation, I suggest, enables us to better understand the fault-lines in ROS than any overarching conception of liberalism.⁹ The distinction between inclusivist and exclusivist ROS remains important,

but only as a part of the overall narrative. At stake remain human rights-oriented practices of the management of the practices of identification and the many-splendored acts of identity subversion.¹⁰

Dr. Sen's study hovers rather ambivalently across the right to *belong* and right to *exit* from religious traditions/groups/affiliations. Concerning the question of powers of excommunication, has the Supreme Court in invalidating these not expanded the scope of the right to *belong* to faith communities against its hegemonic custodians? Concerning the right to *exit* (not discussed here by Dr. Sen), do the judicial validations upholding laws regulating conversion by force or fraud strike at the very root of some missionary/proselytizing Indian religious belief and practice?

Further, it is not clear that progressive decisions that seek to protect women's rights as human rights may fully be understood in terms of homogenizing or hegemonic judicial interpretation. Thus, the recent legislation giving equal inheritance rights to women under the Hindu Law system, or penalizing self-immolation by widows by way of *sati*, both judicially upheld, constitute an ROS formation. These interrogatories are posed not by way of critiquing Sen's valuable analysis but rather are directed toward introducing dialogical reading of this monograph.

The Impact Claim

In utilizing this empirical claim, Dr. Sen suggests that "a significant overlap between the judicial discourse and the ontology of Hindu nationalism...has significantly narrowed the space for religious freedom [and] strengthened the hand of Hindu nationalists, whose ideology is based on a monolithic conception of Hinduism and intolerance of minorities." Incidentally, this "ontology" remains difficult to grasp, and I hope that the learned author can elaborate on this point in future work. The same may be said concerning the conclusion that the Supreme Court has contributed to "a disenfranchisement of multiculturalism"—signifying a "cognitive collaboration between the liberal-democratic view of secularism and Hindu nationalist ideology on the nature of religion, nation, and citizenship." Terms like "multiculturalism" and its "disenfranchisement," as well as "cognitive collaboration," need a great deal of unpacking.

On another level, the claim involves a plea to make recourse to originalism: the Court can do no better than to benefit from a "closer reading" of the founding principles of the Constitution as embodied in the text and the Constituent Assembly debates. The first identifies the problem and the second, as it were, the solution.

Originalism

Taking this last claim first, it is important to unravel what the prescription of “closer reading” of the constitutional text and the debates actually entails. No doubt, when the text is clear it *compels*. But whether the text is clear remains itself a subject of contention. Faced with diverse readings of the text, it is often suggested that the judicial obligation is to scrupulously follow the original intention of the framers of the Constitution.¹¹

Manifestly, some provisions of the Indian constitutional text remain compellingly clear.¹² However, these furnish a minuscule quotient; the constitutional text remains fully fraught with indeterminate meanings and the suggestion that recourse to founding documents may after all provide a complete answer is simply untenable in the light of Indian constitutional experience.

Readings of the “original” or related intent is not easy and remains almost an altogether impossible feat. Do we gather this intent via the patterns of voting behavior? Or via various intendments that precede this behavior—articulated in speeches made or amendments proposed, whether accepted or rejected? May we proceed to interpret the original intent in monological or dialogical modes? How may we grasp the original intent when, as in the Indian case, it is overlaid with prolific subsequent amendments to the constitutional text? What normative as well as political sense, if any, in the Indian context may we make of the rejection by the Constituent Assembly of a proposed amendment adding the word “secular” in the constitutional preamble and its subsequent installation a quarter century later in the Preamble by the 42nd amendment? Against the naïve view that posits the ontological robustness of *the* original intent, the point here is this: “original” or other intents signify interpretive labors that result in acts of both *discovery* and *invention*.

The Indian Supreme Court for a long while extended the common law rule to constitutional interpretation, forbidding justices to look at legislative/constitutional debates, preferring to plumb the textual abyss in order to find a definitive

*[the] provisions of the
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*The Indian Supreme
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interpretation*

intent.¹³ The situation did not markedly improve when justices relaxed the rule: indeed, this brought to pass a reiterated situation wherein justices relied on the selfsame texts of the Constitutional Assembly debates to produce radically divergent interpretations. In part, Dr. Sen's analysis itself offers some evidence for this, but much more remains at hand.

Further formidable difficulties arise when we realize that the constitutional text or its prior discursive histories embody "essentially contested concepts" like equality, property, and freedoms accompanying rights. When such concepts are further divided, as in the Indian Constitution, into Part III (Fundamental Rights) and Part IV (Directive Principles), the original intent becomes available only by highly-crafted remote sensing, if then. If we were to treat these normative concepts as ideological ones, the naiveté here consists in the view in which the original intent may be read as clearly as license plates of a car (evoking Colin Sumner in relation to reading ideologies¹⁴). Interpretive technologies, however, are not as sufficiently advanced as is the case with the digitalized surveillance over high-speeding vehicles, no matter that these even fail to decode the violator's intention.

There emerges a deep ambivalence here. Sen, on the one hand, finally suggests that "closer reading" of the original intent may take us beyond the "standard rhetoric on uniformity, nation-building, and civilized practices." On the other hand, he urges the Court to develop "a language to creatively engage with religion and religious practices." However, any "new" languages of constitutional secularism must, in order to be such, replace the old ones; if so, we must traverse further long distances away from any "closer reading" of the constitutional text and the debates.

Reflexive Originalism

Reflexivity is simply a high theoretical designation for reflection on the sources of our capacity to know the world and our potentiality to act within its opportunities and constraints.¹⁵ Institutional/structural reflexivity, as described by Anthony Giddens, relates to "the use of information about the conditions of our activity as a means of ordering and redefining what that activity is."¹⁶ Reflexive originalism may perhaps be likened to the activity and practice of originalism.¹⁷

The rigorous task that Sen invites the Supreme Court, and Indian constitutional scholarship, to perform does not merely require a radical reinterpretation of ROS that narrows "the space for religious freedom," especially for the adherents of the majority Hindu religion, but also entails the labors of limiting the potential of unintended political appropriation of the judicial enunciation.

This advice raises issues concerning the scope for institutional reflexivity. This varies: constitutional courts, with justices with long, even life, tenure confer a different learning curve than the apex courts with a staggering diversity of jurisdiction amidst a rapid turnover of apex justices. Different landscapes for judicial reflexivity emerge with such courts, in which justices “come and go/ as women talk of Michelangelo” (to here evoke a far from misogynist imagery from T.S. Eliot’s *The Wasteland*).

The Indian Supreme Court, far from being a constitutional court, remains a court of wide-ranging, diverse, and miscellaneous jurisdictions. Its collegiality stands constantly fractured by the ways in which the incumbent Chief Justice of India may proceed, with unguided supremacy, to constitute benches. In effect, we have as many Supreme Courts as the benches, and each one of these may “dare” to speak for the entire Court. Reflexivity appeals necessarily address a perennially unfinished collegiality. Perhaps, a move ahead lies in a suggestion that the Supreme Court, confronted with delineation of meanings of constitutional secularism, may sit as *en banc*, an entire assembly of justices, rather than as serially fractured constitutional benches, whatever compositional size.¹⁸

The Indian Supreme Court...remains a court of wide-ranging, diverse, and miscellaneous jurisdictions

Homogenization and Rationalization

Rationalization, like homogenization, is a process through which the Court “has dispensed with pluralism and popular practices.” I urge a careful reading of the text because it carries two distinct but related messages: first, the Court can and ought to desist from “playing the role of religious interpreter,” and second, we must all aspire to discipline the justices from playing an unbridled role of “religious plaintiffs” (I quote here from Dhavan and Nariman).¹⁹ A more pertinent general point is this: the patterns and contexts of constitutional advocacy of secularism condition, and at times even determine, judicial principles and policies. The Court does not rationalize out of thin air; rather, it responds to contentions and counter-contentions in determinate legal factual and overall social contexts. To be sure, it must be held strictly accountable for its acts of choosing from rival contentions; at the same moment, rarely, it may go entirely beyond this.

The relatively disinterested critique addresses judicial function and role in terms that convert *constraints* into *opportunities*. This is what Dr.

Sen's article seeks to achieve, in the full companionship of distinguished Indian and comparative constitutional-secularism scholars. Even so the problem remains intransigent: the Indian Constitution subjects not just the right to religious beliefs and practices to constitutional restraint on the ground of public order and health but also to "morality." Taken seriously, the right to freedom of conscience *precedes* the rights to religious beliefs and practices, because it is conscience that authorizes agency among choice of belonging to faith communities and interfaith migration (conversion).

Whose/what *morality* may restrict the right to *conscience* is a question scarcely posed by juristic analysis. To say that "morality" signifies constitutional morality is to beg the very question, or at the very least invites the indictment of homogenization and rationalization. Put another way, in the context of this study, how might clear lines between belief/practice and the sacred/secular be redrawn? All this invites rich meditation, especially as providing further narratives of coincidental configuration of Vinayak Damodar Savarkar and the Supreme Court.²⁰ To reiterate: the distinction between ROS and GOS may further help sophisticate/nuance this valuable analysis.

I say this because both *Bomma* and *Prabhoo* discourses raise concerns vastly different from the ROS discourse. Contrary to the analysis here presented, these discourses resist any reiteration of a juristic outlook that presents the Court as a "vanguard" site "of the project to reform and rationalize religion," fulfilling somehow the "lack of a unitary ecclesiastical organization of Hinduism." Rather, 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.

Conclusion

The distinctively Indian constitutional secularism narratives may not be presented *entirely* as an affair of political reason. Political passion as well the logics of public sentiment, empathy, and solidarity also offer diverse disorders of desire that characterize, and even constitute, the politics of governance and the ungovernable insurrectionary subaltern *résistance*. Over-rationalized progress narratives of Indian secularism ignore at their own peril the tasks of decoding various histories of dominant and insurrectionary articulations of unconstitutional, extra-constitutional, and para-constitutional regimes of politics of desire.

Commentary Endnotes

1. In the Indian context, these stand readily provided by issues such as temple-entry by untouchables, or denial of access to public facilities, or brute force expressed in the distinctively Indian idiom of “atrocities against the lower castes,” or “religion-based” practices of violation of women’s right to *be* and to *remain* human.
2. See Gary Jacobsohn’s precious work, *The Wheel of Law: Indian Secularism in a Comparative Context* (Delhi: Oxford University Press, 2003).
3. See Upendra Baxi, “The Gujarat Catastrophe: Notes on Reading Politics as Democidal Rape Culture,” in *The Violence of Normal Times: Essays on Women’s Lived Realities*, ed. Kalpana Kababiran (New Delhi: Women Unlimited in association with Kali for Women), 332–84.
4. Professor M. N. Srinivas invited our attention to this in his *Social Change in Modern India* (Berkeley: University of California Press, 1964).
5. Thus even the most fanatic Hindu believer does not douse a postcard or a bank pass-book, or indeed any book, in holy waters on the mere suspicion that its production or distribution may be contaminated by polluting touch, nor jump out of a ship, aeroplane, or railway compartment en-route, or from an emergency hospital bed or treatment, on the alleged or real fear of spiritual contamination by anonymous polluting caste service providers.
6. I would further suggest that GOS goes beyond the adjudicative realm. Thus, polices, practices, and politics of law reform or constitutional change also remain an integral part of state-religion nexus. I do not however address this aspect directly here.
7. See Upendra Baxi, “The ‘Struggle’ to Redefine Secularism in India,” *Social Action* 44 (1994); and Thomas Pantham, “Indian Secularism and its Critics: Some Reflections,” *The Review of Politics* 59 (1997), 523–40.
8. See Oliver Mendelssohn and Upendra Baxi, eds., *The Rights of Subordinated Peoples* (Delhi: Oxford University Press, 1994); and Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2006), 147–52.

9. See Anthony Blackshield, "Secularism and Social Control in the West," in *Secularism: Its Implications for India*, ed. G. S. Sharma (Bombay: N. M. Tripathi, 1966), 9.
10. See Baxi, *The Future of Human Rights*, 147–53, 186–93.
11. Some judicial observations and scholarly analyses suggest for the United States the notion of "common law originalism." Bernadette Meyler articulates the notion as follows:

Situated between living constitutionalism and originalism, as currently practiced, common law originalism attempts to square fidelity to the Founding era with fidelity to its common law jurisprudence—a jurisprudence that retained continuity yet emphasized flexibility and was inclusive enough to hold disparate legal conceptions in its embrace.

See Meyler, "Towards a Common Law Originalism," Cornell Law School Paper Series, No. 06-22 (2006), 2.
12. For example, Article 1 of the Indian Constitution gives an official name to the country, "India that is Bharat," which shall be a "union of states," although the second naming may raise some anxiety levels concerning secularist practices of reading. Likewise, many provisions that prescribe age limits, or disqualifications for attaining a public office or for holding these, or the definitional article, even defining the term "part" as meaning a "part" of this Constitution, do articulate a specific and incontrovertible original intent.
13. Charles L. Merillat, in his stunning article "The Sound Proof Room," published in the *Journal of the Indian Law Institute*, makes this very point.
14. Colin Sumner, *Reading Ideologies: An Investigation into Marxist Theory of Ideology and Law* (London: Academic Press, 1979).
15. See for a more extended discussion Baxi, *The Future of Human Rights*, 115–20.
16. Giddens as quoted in Baxi, *The Future of Human Rights*, 116.
17. The more recent United States constitutional scholarship thus addresses theoretical approaches to "new originalism." The new version de-emphasizes recourse to original intent as a mode of disciplining judicial power and celebrating deference to elected legislative majority. See Keith E. Whittington, "The New Originalism," www.aals.org/profdev/constitutional/whittington.pdf
18. To say this is, in this context, also to ask whether a full court may have decided any more cogently and differently the *Bommai* case. Recourse to the histories of two distinct occasions when the full Court stood constituted—in *Golak Nath* and *Kesavananda*—suggests no more than the prospect of adjudicatory manufactured/fractured "consensus" reached by wafer-thin judicial majorities.
19. The high authority of these two eminent constitutional lawyers, however, must be held with the fact that when professional demands and integrity so require they, in principle, remain duty-bound to reinforce the vast powers that they as constitutional commentators now otherwise criticize.
20. See further Amalendu Misra, *Identity and Religion: Foundations of Anti-Islamism in India*.

Author Response to Commentary

The comments by Professor Upendra Baxi raise several important and difficult questions. He has also made the justified point on the need to unpack some critical terms such as “multiculturalism” and “disenfranchisement.” However, due to constraints of time and space, I am unable to respond to Baxi’s critique at any great length or rigor. He is quite right when he points out that my study is essentially a work on constitutional secularism. But I have attempted, hopefully with some success, to show the relationship between the juridical and political constructions of secularism.

One of the main points that Dr. Baxi makes is to propose a distinction between rights-oriented secularism and governance-oriented secularism. Although I have not used this vocabulary, I would argue that rights and governance cannot be regarded as two separate entities. They are interlinked, as I have hinted at throughout the analysis. On the homogenization issue, Baxi says that I make a “summative claim” that the judicial performance consolidates the “conception of religion as *dharma* that can foster an egalitarian society and unified nation.” In reality, I make no such argument: I merely point out that this is what the Supreme Court said in *A.S. Narayana Deekshitulu v. State of A.P.*

Baxi also makes much of my prescription that the Court would benefit from going back to the Constituent Assembly debates. He describes this as a plea for originalism—a term that I do not use, but is common among American jurists and legal scholars. In fact, I do not advocate the doctrine of “original intent” in any way whatsoever. My only intention in raising the issue of the Constituent Assembly debates is to underline the fact that the architects of the Constitution were far more alive to the neces-

sity of giving religion and religious practices adequate space than the Supreme Court judges. Contrary to what Baxi says, there is no reason why the Court cannot develop a “new language” by revisiting the Constituent Assembly debates as well as reevaluating them through current perspectives. I am in full agreement with Baxi’s assertion that the Indian Constitution remains open to diverse interpretations. However, it is a misreading of my argument when he suggests that I believe “original intent [again something that I do not mention at all] may be read as clearly as license plates of a car.”

Baxi’s point that the Indian Supreme Court is a court with “wide-ranging diverse jurisdictions” and “fractured” collegiality is an important one. It is well known that the Supreme Court has a rapid turnover and chief justices often have terms of only a few months. But that does not mean there should be no attempt to trace a pattern in judicial rulings on religion. Indeed, I have tried to show that homogenization and rationalization of religion has been a dominant feature of the judicial discourse. I have, however, stressed that this is not a linear narrative.

There are other worthy suggestions made by Baxi on widening the ambit of my study and recognizing that constitutional secularism is not entirely an affair of political reason. However, nowhere do I make the argument that constitutional secularism operates in a vacuum. Someone like Gajendragadkar was, I have argued, deeply influenced by prevailing ideologies and passions. Similarly, the overlap between the judicial discourse on religion and Savarkar’s conception of Hinduism cannot be regarded as coincidental, as Baxi would like to believe. However, to take on the task of “decoding various histories of dominant and insurrectionary articulations of unconstitutional, extra-constitutional, and para-constitutional regimes of politics of desire”—as Baxi suggests—is beyond the limited scope of this study. These suggestions have been duly noted and will surely enrich any further study of this topic.

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About this Issue

This study addresses constitutional secularism in India by examining how the Supreme Court of India has defined and demarcated religion, religious practice, religious organizations, and religious freedom. The Court not only plays an important adjudicatory role in a host of areas related to religious freedom and the intervention of the state in religious institutions and practice, but also actively intervenes in and shapes public discourse. One of the reasons the judiciary can play this role is the legitimacy it enjoys in public perception.

Based on an analysis of Supreme Court rulings, this monograph argues that the Indian state has pushed its reformist agenda at the expense of religious freedom and neutrality. There are two broad claims made: First, through its rulings the Supreme Court consistently has sought to homogenize and rationalize religion and religious practices, particularly of Hinduism. Second, although the impetus for the Court's decisions has its origins in a liberal-democratic conception of secularism and the nation-state, there is a significant overlap between the judicial discourse and the evolution of Hindu nationalism. This development has significantly narrowed the space for religious freedom and strengthened the hand of Hindu nationalists, whose ideology is based on a monolithic conception of Hinduism and intolerance of minorities.

About the Author

Ronojoy Sen is a Senior Assistant Editor with The Times of India. In 2005, he was a Visiting Fellow at the East-West Center Washington, where this study was written. He can be contacted at ronojoysen@gmail.com.

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