# Parochialism in Indian constitutional reasoning: The case of religious freedom

By *Mathew John*[*]

**Abstract**: The legitimate source of governmental power in modern constitutional democracies is traced to a people. Drawing on this tradition of founding political power, the Indian Constitution is a radical attempt to secure the consent of the Indian people to transform its colonized and traditional society. However, in what manner would the institutional imagination and practices of the Indian Constitution give concrete shape to a people in whose name this agenda for transformation would be carried out? In a Constitution committed to the protection of individual freedom one would assume that a commitment to equal freedom of all citizens would anchor its constitutional aspirations. By extension this would also mean that no one social group would be permitted to embody the people as a whole. However, by examining the organization and practice of religious freedom in the Indian Constitution this paper will argue that there is a parochial vision of the people ensconced in India's liberal Constitution that is disposed to conceiving the people by entrenching parochial identities like Hindus and Muslims. This problem of the institutional entrenching of identities is elaborated through the adjudication of the dispute over the Ram Janmabhoomi Babri Masjid dispute at Ayodhya. However, even while describing the entrenching of these parochial identities, the paper attempts to argue that this parochial imagination runs contrary to social intuitions on the nature of identity and identification in Indian society.

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## A. Introduction

As a document framed by years of imperial rule, the Indian Constitution was the culmination of the struggle of the people of India against political subjection. Equally, the character of the document and the people it announced also reflected a concern for political stability as well as for fundamental social reform and transformation which were the overwhelming problems of the moment of constitutional founding.[1] That is, the Indian constitution was explicitly framed as a collective project of a people acting to surpass imperial domination

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1 *Uday Singh Mehta*, Constitutionalism, in: Niraja Gopal Jayal / Pratap Bhanu Mehta (eds.), The Oxford companion to politics in India, Oxford 2010; *Granville Austin*, The Indian Constitution: Cornerstone of a Nation, Oxford 1966.

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and social unrest, while also seeking to secure fundamental socio-economic transformation. But how would the collective agency of the Indian people assume concrete form?

Democratic or constituent power located in a people requires concerted effort to generate some kind of self-consciousness or feeling for being and becoming a people.[2] And, in a constitution committed to all hues of liberal freedoms and the equal protection of law, one would assume that these liberal values of equally enjoyed individual liberties would anchor the political fortunes of the new constitutional community. By extension this commitment to liberal values would also suggest that no nationalist or parochial identity could be permitted to stand in for the voice of the people as a whole. However, it is precisely this assumption of a liberal community that aspects of Indian constitutional practice seem to belie by producing and entrenching parochial identities like the 'Hindu' and the 'Muslim' while also parochializing and nationalizing the identity of the people along these lines. This problem is described in this paper through an examination of the contours of religious freedom as it is organized and regulated in Indian constitutional practice.

## B. Sovereign power and its organization of religious freedom

As an expression of the collective power of a people there is of course no template that constitutions must necessarily follow in gathering the will of its people as a political community. As Michael Oakeshott has argued in relation to the history of European state formation, political community in Europe has been organized along the recurring themes contained by the Latin terms the *societas* and the *universitas*.[3] To explain, when the state expresses itself as a corporation motivated by common concerns it acts like a *universitas* and, when it expresses itself as a procedural community that facilitates the ends of individual agents it reflects a *societas*.[4] And, as products of human disposition both to act autonomously and in concert with others, it was only to expected that both tendencies would manifest themselves in the ways in which a people organized their association. However, for both conventional as well as normative reasons, the liberal polities of the trans-Atlantic world have been extremely wary of permitting the imprint of the *universitas* to impinge on the regulation of individual liberties like that of religious freedom.

The reasons for religion generally being organized through the modality of the *societas* are complex. On the one hand, there is much emphasis on the normative reasons why religious experience ought not to be directed by the state and be a matter for private freedom. However, on the other hand, it must also be noted that there is considerable congruence between this normative demand and the social and cultural forms that religion assumes in most North Atlantic democracies. That is, as strands of scholarship suggest, privatized reli-

2 See *Martin Loughlin*, On Constituent Power, in: Michael Dowdle / Michael Wilkinson (eds.), Constitutionalism beyond Liberalism, Cambridge 2017.

3 *Michael Oakeshott*, On Human Conduct, Wotton-under-Edge 1975, pp. 202–6.

4 *Oakeshott*, note 3.

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gion has become the template and the social glue on which North Atlantic liberal democracies have organized their political communities of individual citizens.[5] However, in the Indian case it was assumed by most sections of the constitution makers that state power in relation to religion had to be organized along the lines of a *universitas*.[6]

Discussing the *universitas* in the Indian Constitution, Uday Mehta describes it as part of a constitutional order designed to assert absolute sovereign authority over powerful and recalcitrant centers of social cultural and traditional authority.[7] This authority was embodied in the constitutional document through a series of provisions that facilitated the assertion of state power over economic organization, caste practice, labor mobilization, agricultural traditions, environmental management, religious freedom and so on.[8] That is, the *universitas* in the Indian Constitution was part of far reaching project for socio-cultural, economic and political transformation,[9] within which religion was but one element. Even so, religion was an important part of the *universitas* embodied in the Indian constitution. But more importantly, as this paper will demonstrate, the Indian *universitas* organized religion in a manner that has produced a parochial or even communal conceptions of the Indian people.

As an exemplar of the *universitas* that Indian constitution makers felt was necessary to address the challenge that religion posed, it is useful to recount B. R. Ambedkar's intervention in the Constituent Assembly when participating in a debate on the impending reform of religious personal laws. He argued on the floor of the Assembly that:

> *'religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. [...] There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious [...] I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field.'*[10] *(emphasis added)*

In other words, precisely because religion held far too much of social life in its (often pernicious) grip, it was necessary to assert sovereign power as a *universitas* that would both unambiguously assert its authority over religion as a competing center of social power and

5 See *Philip Gorski*, The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe, Chicago 2003.

6 See *Mathew John*, Framing Religion in Constitutional Politics: A View from Indian Constitutional Law, https://www.academia.edu/33737143/Framing_Religion_in_Constitutional_Politics_A_View_from_Indian_Constitutional_Law (last accessed on 11 August 2018).

7 *Mehta*, note 1.

8 All of these concerns can be traced to provisions across part III and IV of the Indian Constitution.

9 *Austin*, note 1.

10 *Constituent Assembly Debates: Official Report*, Lok Sabha Secretariat Vol. 7, 1999, p. 781.

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also reform and recast its baleful forms and practices. Consequently, the Indian constitution would be modeled as a *universitas* seeking to reduce the expanse of religious experience to what Ambedkar termed 'essentially religious'. But how would state claims operate to reform and refashion religious practice into its 'essentially religious' aspects?

### C. The structure of religious freedom in the Indian Constitution

The core of the Indian constitutional scheme or its *universitas* regulating religion is contained in Art. 25 of the Constitution which protects the right to religious freedom. Though there are other constitutional provisions that also bear on the right to religious freedom, it is in Art. 25 that the Constitution lays out both the general contours of the right to religious freedom as well as the power of the state to reform and regulate various aspects of religious practice.[11]

In its detail, one part of Art. 25 is structured like a standard liberal freedom where the right to practice profess and propagate religion is qualified by standard liberal restraints demanding that such practice does not affect the similar rights of others.[12] That is, to draw on Oakeshott's conceptual framework, state power in Art. 25(1) is organized as a *societas.* However, and in addition, Art. 25 is simultaneously also organized to permit the state to act as a *universitas*. That is, the state has been invested with the power to 'regulate or restrict economic, financial, political or other secular activity which may be associated with religious practice'[13] and, 'provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.'[14] It is this explicit mandate to regulate and reform religion that demands that state practice structure religion into an essentially religious core protected by the right to religious freedom, and a not so essential or perhaps secular periphery which is available for state led reform and regulation.

In one of the earliest and most authoritative judicial decisions[15] on the determination of what counts as being 'essentially religious', the Supreme Court was called to decide on the constitutional validity of the Madras Hindu Religious and Charitable Endowments Act 1951. The petitioner in this case, the chief religious functionary of the Shirur Mutt, contended that this statute which granted the government power to take over mismanaged Hindu religious institutions as a trustee, violated the community's right to religious freedom

11 This essay only deals with Art. 25 and to some extent Art. 26 (which addresses the freedom of religious denominations to manage their affairs). However, the Constitution also makes provision for freedom from religious tax (Art. 27) and freedom from religious instruction in educational institutions (Art. 28).

12 Art. 25(1).

13 Art. 25(2)(a).

14 Art. 25(2)(b).

15 The Commissioner Hindu Religious Endowments, *Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt* MANU/SC/0136/1954.

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and to manage religious institutions as permitted by Art. 25(1) and Art. 26[16] of the Constitution.

Countering the claims of the petitioner, the State contended that it had the broadest powers of reforming and regulating all 'secular' aspects related to a religious tradition under Art. 25(2). A stretched reading of the *universitas* contained in Art. 25 and 26 might suggest that the State could indeed regulate and reform religion as long as it did not completely extinguish the right to religious freedom. However, the court categorically refused to accept this conception of the *universitas* and sought to carve out space for religious autonomy.

In doing so, it held that

> *'what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself […] and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities.'*[17] *(emphasis added)*

In other words, the court stressed that the essential core of a religion was to be determined by taking into account those doctrines and practices that a community *subjectively* viewed to be essential to their religion.

It is important to note that the subjective determination of the core of a religious tradition necessarily has to involve some form of state or judicial appreciation of what a religious tradition regards as essential to their tradition. And in turn, this has resulted in courts participating in the internal hermeneutics of religious traditions to determine what forms an essential part of that tradition. Consequently, following the *Shirur Mutt* case, Indian courts have over the years acted almost as theologians sifting between different kinds of religious claims, establishing some while denying others. Thus, for example the Supreme Court has held that the sacrifice of cows did not constitute an essential part of the Islamic faith;[18] overruled Muslim claims that prayer in a mosque was crucial to the Islamic faith;[19] refused to accept traditional rights of the Tilkayats of the Shrinathji temple at Nathdwara which was taken from them by the Nathdwara Temple Act 1959;[20] stipulated that the tandava dance was not a significant part of the Anand Margi community;[21] declared that the followers of

16 Art. 26 reads 'Subject to public order, morality and health, every religious denomination or any section thereof shall have the right— (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law'.

17 *Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt* MANU/SC/0136/1954, para 20.

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

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

20 *Tilkayat Shri Govindlalji Maharaj v. State of Rajastan* AIR 1963 SC 1638.

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

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Aurobindo did not constitute a distinct religion;[22] that the tradition of Santhara or ritual suicide did constitute a part of the Jain religion[23] and so on.

As obvious, each of these cases exemplifies a particular form of public reasoning where the state has felt compelled to assert its sovereign authority to secure religious regulation and social reform through arguments internal to a particular tradition or practice. However, it is important to note that it is nothing that necessitates this intra-communal reasoning. Thus, the slaughter of cows could have been addressed solely as a matter of efficient animal husbandry or the prevention of cruelty; restrictions to access to a mosque or to other religious practices such as the tandava dance could have been addressed as issues meriting intervention if they threatened public order; state intervention in the functioning of religious institutions as justified by the need to prevent mismanagement in all traditions rather than in one particular tradition and so on. That is, each of these cases could have produced a form of secular public reasoning that was not rooted in specific traditions but which could have been justified independently of these traditions. However, constitutional reasoning regulating religion has taken the route of asserting its authority through internal reasons which has been the model that has structured the legal conceptualization of religion in India. In turn, this paper argues that this form of reasoning has been an axis around which a parochial or populist conceptualization of constitutional politics has taken shape. It is important to mention here that taking the route of the *universitas* does not *per se* make the state parochial, but that it is only when the *universitas* asserts its power through internal hermeneutics or reasoning that a parochial vision of constitutional politics begins to take shape. The specific forms in which this parochialism takes shape however requires more explanation which is detailed in the following sections.

## D. Colonial toleration and the making of religion in modern India

It has been long recognized by legal scholars that state led internal reorganization, reform and regulation of religion is closely tied to the form in which Indian institutional practices have sought to present themselves as legitimate to the Indian people.[24] And, with the coming of the contemporary Indian Constitution there are various normative accounts and interpretations of the manner in which active regulation and reform of religion can be made consistent with broader constitutional norms such as liberty, equality and neutrality.[25] But why is it that sovereign power has sought to intervene in religious matters and present itself

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

23 *Nikhil Soni v. Union of India* 2015 Cri LJ 4951.

24 See *Pratap Bhanu Mehta*, Passion and Constraint: Courts and the Regulation of Religious Meaning, in: Rajeev Bhargava (ed.), Politics and Ethics of the Indian Constitution, Oxford 2008; *Marc Galanter*, Hinduism, Secularism, and the Indian Judiciary, in: Rajeev Bhargava (ed.), Secularism and its critics, Oxford 1999.

25 See *Gautam Bhatia*, Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution, Global Constitutionalism 5 (2016), p. 351.

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as legitimate to the Indian people by offering reasons internal to religious communities? This question requires an explanation that is not readily available within the structure and form of judicial logic and requires a brief detour into aspects of the regulation of religion wrought by the British colonial Constitution and the state it established before the coming of the Constitution of independent India.

The colonial state and its constitution in India was a complex historical phenomenon and is often viewed primarily as an instrument devoted to the pursuit of imperial dominion. Even so, as post-colonial historians have shown there have always been epistemic forms and normative orientations that have structured the organization of the colonial state.[26] One such normative and epistemic form which has recurrently presented itself in the approach taken by the colonial state when governing religion has been that of the normative framework of toleration. That is, the normative position that religious practices ought to be tolerated even when the colonial state found those practices to be both bewildering and even repugnant.[27] Toleration as state practice has cast an indelible mark on the legal and constitutional conceptualization of religion which must briefly be recounted.

At the core of the colonial scheme of toleration was not just the normative belief that all religious practices howsoever repugnant must be tolerated, but also the concurrent rationalization of tolerated practices. That is, toleration as a policy functioned by identifying and reducing practices worthy of toleration as the expression of the true core or foundations of a religious tradition. This toleration through the rationalization of religious traditions has been a defining aspect of colonial policy and has shaped its approach to whole regimes of interconnected practices that have now come to be called personal laws, as well as specific practices like sati, animal sacrifice, temple dancing and so on.[28] And, through this form of rationalization of religious practices the colonial state has presented itself as a defender of religious freedom even as it used rationalization as a template through which it could legitimately intervene and exercise state power over religious and cultural practices.[29]

Thus, to take a concrete example, rationalization through reform and recognition of traditional practices allowed the colonial state to 'discover' and institute from a swathe of practices, the true religious personal laws of the natives and which were lost to plain immorality or to the 'dead weight of time and custom'.[30] That is, as scholars have shown, di-

26 For instance, see *Bernard Cohn*, Colonialism and Its Forms of Knowledge: The British in India, Princeton 1996; *Mithi Mukherjee*, India in the Shadows of Empire: A Legal and Political History, Oxford 2010.

27 See *Jakob De Roover / S.N. Balagangadhara*, Liberty Tyranny and the Will of God: The Principle of Toleration in Early Modern Europe and Colonial India, History of Political Thought 30 (2009), p. 111.

28 This aspect of toleration is highlighted with considerable clarity in the work of *De Roover / Balagangadhara*, note 27.

29 For a classic example See *Lata Mani*, Contentious Traditions: The Debate on Sati in Colonial India, Berkeley 1998.

30 For example see *Cohn*, note 26.

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verse sets of practices regulating social life in amorphous ways were rationalized into what was instituted as the true and religiously sanctioned personal laws of different communities, especially in relation to marriage and divorce, and, inheritance and succession.

Similarly, in the infamous case of Sati or wife burning, it was first tolerated or regulated by the colonial state as a practice that had scriptural sanction when performed according to state recognized scriptures. However, it was later banned when the colonial state was confident enough to search for, discover, and assert that the practice was morally odious and had no sanction in the scripture. Across these forms of interventions in religious practice, the unmistakable stamp of rationalization as form of intervention is hard to miss. That is, that rationalization was the form in which the state asserted its sovereign authority over religion to bring the enormous diversity of religious practices in India into the epistemic framework of essential and true foundations of a particular community.[31]

As the framework of normative rationalization became well established as a form of state regulation of religion, the definitional work of Partha Chatterjee illustrates that it also emerged as a site around which a fledgling Indian national consciousness began to take shape in the latter part of the 19th century.[32] This consciousness coalesced around claims that rationalization and reform operated on aspects of the identity of the 'Indian nation' or 'people' and therefore that Indians alone had the agency to carry out this reform activity. And, having seized the voice of the people, rationalist reform was transformed into a nationalist enterprise.

The nationalist voice found some early expression in colonial legislatures where Indians had a fledgling presence through legislations on the management of religious trusts, temple entry, animal sacrifice and so on. However, this power to reform religion claimed by the nationalists on behalf of the Indian people found full fruition in the Indian Constitution which came to regulate what was 'essentially religious' through a rationalization of religious practice quite like that adopted by the colonial state. Consequently, the conceptualization of a *universitas* regulating religion in the Indian Constitution has left the colonial legacy of rationalizing religious practices almost entirely undisturbed.[33]

This legacy of the rationalization of religious experience therefore explains the specific form that the contemporary Indian *universitas* adopts in its regulation of religion. However, it is important to recognize that rationalization in and of itself was only one prong of the form that the policy of toleration assumed in India. That is, toleration was, in addition, also a form of managing what state policy understood to be a religiously divided polity. To draw on its European histories, normative toleration was the solution to the problem of religious

31 See *De Roover / Balagangadhara*, note 27; *Mani*, note 29..

32 *Partha Chatterjee*, The Nation and Its Fragments, Oxford 1995; *Partha Chatterjee*, Secularism and Tolerance, in: Rajeev Bhargava (ed.), Secularism and its critics, Oxford 1999.

33 *Chatterjee*, Secularism and Tolerance, note 32.

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conflict that both defined the body politic even as it threatened to tear it apart.[34] Or alternatively, as Chatterjee has framed it, rationalization of religion was part of the very same domain in which the identity of the people themselves was to be clarified and defended.[35] And, it is by examining the form in which rationalization of religious experience entwines with conceptualizations of the Indian nation or people that it is possible to get a measure of the parochial and communal forms of reasoning that have inflected the course of Indian constitutional politics. This aspect of Indian constitutional functioning is explored through important examples in the following sections.

## E. Rationalized religion as a call to politics

It is only too obvious from colonial constitutional history in India that unlike European societies which resolved the problem of religious conflict by asserting a political community of tolerant individual citizens, the colonial state in India established a political community of social groups believed to be irreconcilably divided from each other along the lines of rationalized religious identities. That is, in the estimation of the colonial state, India was best understood as a divided society and of its many divisions, religion has always been viewed as crucial.[36] Consequently, pivotal constitutional debates and aspects of institutional design display the conceptualization and organization of a political community organized along communal and religious lines. These include personal laws regimes for major religious communities, the conduct of the census where religion has been a key identity, the fashioning of criminal offenses to assuage the passions and sentiments of religious communities, the formulation of constitutional institutions along the lines of separate religious electorates, as well as the partition of British India on religious lines into India and Pakistan.

In most of these instances rationalized religious communities were folded and inserted into a broader conceptualization of the political community understood as divided along these lines. And, it is in this conjoining of rationalized religions with the political community or the body politic that colonial constitutional practice in India reveals a parochial and communal color. The shadow of this parochial constitutionalism also extends into the contemporary Constitution of Independent India and the practice of religious freedom is one such example of a site marked by constitutional parochialism. And, through the instance of the Ram Janmbhoomi-Babri Masjid dispute, the paper explores a particular stark example of parochialism in contemporary constitutional practice when a local dispute between social groups was transformed by judicial intervention into the competing religious freedoms of major religious groups that constitute the body politic.

34 The definitional work of John Rawls ties up the origins of liberalism itself to debates around and toleration. See *John Rawls*, Political Liberalism, New York City 2005, xxiv.

35 *Chatterjee*, Secularism and Tolerance, note 32.

36 See for example *Reginald Coupland*, Report on the Constitutional Problem in India: The Indian Problem, 1833 – 1935, Oxford 1943.

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### I. The Ram Janmbhoomi-Babri Masjid Case

In September 2010, the Lucknow Bench of the Allahabad High Court delivered judgment in a set of civil suits grouped together in a case titled *Gopal Singh Visharad and Others v. Zahoor Ahmad and Others* (hereafter, the *Ayodhya* case).[37] This decision dealt with a dispute over a religious structure variously called the Ram Janmbhoomi or Babri Masjid located at the North Indian town of Ayodhya and is a conflict older than the Indian republic. The *Ayodhya* case has also been a major flashpoint in contemporary Indian politics and at its core addresses what has become a property dispute between various 'Hindu' and 'Muslim' groups over a 16th century temple-mosque complex at Ayodhya.

On the one hand, the Hindu parties asserted their rights to the disputed property on the grounds of its association with the birthplace of the deity Rama. The Muslim parties on the other hand, claimed that the structure was built as a mosque by Babur, the first of the Mogul Emperors and, that its ownership should vest with those charged with its management for the benefit of the community. The passions raised by the dispute spiraled out of control in 1991 when the temple-mosque complex was demolished by Hindu mobs. Drawing on this fraught issue, this portion of the paper will account for the manner in which this problem has been progressively rationalized and recast by courts from first being a local dispute between communities, into one involving the body politic as a whole.

### II. The Ayodhya Case in Colonial Courts

As it first presented itself in court in 1885, the dispute displayed elements of a conflict between communities over the concurrent use of a religious and cultural place. However, in court the problem was framed as a property dispute to be resolved by determining whether rights holders must be allowed to exercise control over property. Thus, claiming to be an owner, the Mahant or priest at the *Ram Chabutra* (an open air platformed Hindu shrine within the premises of the disputed property) petitioned the Sub-Judge of the trial court at Faizabad for permission to build a permanent structure over the *chabutra* to facilitate ministering to the deity at the site. However, the *Mutawalli* or caretaker of the mosque at the property, contested the Mahant's claims and argued that permission to construct a temple ought not to be granted. He contended that as owners of the property it was the Muslim parties that had granted Hindu devotees permission to use the property, and that this was not to be construed as the right of ownership or possession.

The trial court found that the *chabutra* was in the possession of the Hindus who were performing their traditional rites at the structure. However, it observed that

> *'[t]his place is not like other places where the owner has got the right to construct any building as he likes [...] The prayer for permission to construct the temple is at such a place where there is only one passage for the temple as well as for the*

37 *Gopal Singh Visharad and Others v. Zahoor Ahmad and Others* MANU/UP/1185/2010..

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> *mosque. The place where the Hindus worship is in their possession from of old and their ownership cannot be questioned and around it there is the wall of the mosque and the word Allah is inscribed on it. If a temple is constructed on the Chabutra at such a place then there will be sounds of bells of the temple and shankh [...] and if permission is given to Hindus for constructing a temple then one day or the other a criminal case will be started and thousands of people will be killed. For this reason of breach of law and order the officers have restrained the parties from making any new construction. So this court also considers it to be proper that awarding permission to construct the temple at this juncture is to lay the foundation of riot and murder [...] between Hindus and Muslims.'*[38] *(emphasis added)*

Perhaps there was legitimate nervousness on the part of the colonial administration to permit an arrangement that would allow communities to carry on their practices in such close proximity to each other, especially because there were known instances of past violence.[39] However, if the Mahant and his community was found to be an owner, then it is difficult to understand the denial of their right to absolute title and enjoyment of their properties. But more importantly, as this is a property where there was admitted joint use by different communities for considerable periods of time, such deeply alarmist accounts of the relationship between groups sound rather unusual.

On appeal, the District Judge, rephrased the lower court judgment and stated that in the circumstances of the case it was redundant to assert that the 'ownership and possession' of the chabutra was with the Hindus. However, he also found that there was evidence to suggest that one portion of the building was used by the Muslims and that the *Ram Chabutra* was occupied by the Hindus. Significantly, he also described the property as a whole as representing the divisions between Hindus and Muslims, especially the historical injustice committed by a Muslim emperor on his Hindu subjects. As he noted, '*[i]t is most unfortunate that a masjid should have been built on land specially held sacred by the Hindus*, but as that event occurred 356 years ago it is too late now to remedy the grievance. All that can be done is to maintain the parties in status quo.'[40] (emphasis added). In this statement of the court it is important to note its re-characterization the lower court's presumption that Hindus and Muslims are disposed to conflict into a long-standing problem pertaining to the body politic as a whole and defined by the injustice meted out by a Muslim ruler.

The court of second appeal also seemed to suggest that the disputed property was in the joint use of both Hindus and Muslims and that there was insufficient evidence to support the *proprietary* claims of the Hindus. And, as in the lower court, the appeal court also represented the disputed structure as a mark of historic injustice suffered by the Hindus. Thus, Judge W. Young, observed that

38 *Abdul Gafoor Abdul Majeed Noorani*, The Babri Masjid Question, 1528 – 2003: A Matter of National Honour, Chennai 2004, p. 181.

39 See *Noorani*, note 38.

40 As per Judge Khan; see also *Noorani*, note 38, pp. 182–84.

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> *'Now this spot is situated within the precinct of the grounds surrounding a mosque erected some 350 years ago owing to the bigotry and tyranny of the Emperor Babur, who purposely chose this holy spot according to Hindu legend as the site of his mosque.*
> *The Executive authorities have persistently refused these encroachments and absolutely forbid any alteration of the 'status quo'. I think this is a very wise and proper procedure on their part and I am further of the opinion that the Civil Courts have properly dismissed the Plaintiff's claim.'*[41]

These excerpts extracted from the *Ayodhya* case as it moved through the colonial courts suggests the manner in which colonial judges progressively politicized the Ayodhya dispute into a conflict between 'Hindus' and 'Muslims' over the birthplace of Rama where a Muslim 'invader' had built a mosque. Historical research suggests that none of these claims regarding Hindu spirituality or Islamic tyranny had been led as evidence at trial.[42] And, cultural evidence has until quite recently suggested deeply intertwined and perhaps even contentious social and cultural practices between communities that hardly answer to the characterization of a polity divided by 'Hindus' and 'Muslims'.[43] Even so, by making such assumptions the judges seem to transform a local dispute flowing from a Mahant claiming rights to facilitate ministering to his deity and its largely local community, into property claim made on behalf of the Hindu religious community as a whole. Similarly, the mere existence of the mosque is presented as evidence of Muslim political tyranny. By doing so, the court was not just describing a local dispute in national and communal terms but also rationalizing layers of local religio-cultural experience tied to the disputed property and folding it into essential attributes of nationalized communities of Hindus and Muslims constituting the Indian body politic. And, it was a dispute made national and parochial in this manner (represented through an intruding mosque at Ramas' birthplace) that was passed on to the newly independent republic.

### *III. The Contours of the Contemporary Dispute*

The *status quo* overseen by the colonial courts at Ayodhya was maintained until December 1949 when, at the cusp of the transition to independent India, miscreants broke into the disputed property and installed a set of idols under the central dome of the disputed structure. The installation of the idols could have in turn been triggered off by a finding in 1936 by the colonial Wakf commissioner overseeing Muslim religious endowments declaring the disputed structure to be a Mosque built by the emperor Babur on behalf of the faithful in

41 *Noorani*, note 38, pp. 186–88.

42 *Geetanjali Srikantan*, Reexamining Secularism, Journal of Law, Religion and State 5 (2017), p. 117.

43 See *Ashis Nandy et al.*, Creating a Nationality: The Ramjanmabhumi Movement and Fear of the Self, Oxford 1998.

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the community.[44] That is, albeit by force, the installation of idols was an attempt to highlight the presence of other religious traditions at the disputed property. Irrespective, the forceful installation of the idols resulted in the provincial government attaching the property and putting it in the possession of a receiver. The attachment gave rise to a set of civil suits which were the basis of the present *Ayodhya* case.

Of the five suits filed in the case, one was withdrawn and the other four divide into three sets of claims for title and possession of the disputed property. The 'Muslim' parties claimed that the disputed structure was a mosque constructed by the Mogul emperor Babur upon either barren land or, in the alternative, on the ruins of a temple. As it had been dedicated to the public, they claimed that they were in possession of the property until 1949, when they were dispossessed. However, they also admit the existence of a *chabutra* in the outer courtyard at which Hindus were permitted to pray. The 'Hindu' parties made two kinds of claims. On the one hand, the Nirmohi Akhara, a religious sect that managed the *chabutra* and other religious structures outside the mosque, claimed that the disputed structure was never a Mosque. Therefore, as the group traditionally associated with the management of structure, the Akhara argued that they should be given possession of the entire premises. Other groups contended that, even if the attached disputed property was a mosque, it ceased to be so when it was substantially damaged in a communal riot in the year 1934. All 'Hindu' parties claim that after this date the property was not used as a mosque by Muslim parties and that they were in possession of the property which they believe to be the birthplace of Rama.[45]

While these suits were pending, the attachment order was modified in 1986 to open the locks on the disputed property and permit all members of the public to offer respects to the idols installed in the disputed structure. This was a significant alteration of the status quo which only permitted the limited performance of rituals by specially appointed priests. The alteration of the earlier attachment order is attributed to the machinations of the then ruling Congress party pandering to the demands of electoral politics, especially to what they believed to be Hindu interests. This in turn, catapulted the problem of the disputed structure onto the national electoral stage and set off a chain of events that eventually led to the demolition of the mosque at the disputed site in 1992.

The demolition unleashed a wave of communal violence across the country prompting the central government to enact the Acquisition of Certain Areas at Ayodhya Act 1993. This statute acquired the disputed property and abated all pending suits regarding the property. Separately, the government initiated a presidential reference to the Supreme Court, asking the question '[w]hether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the

44 *Noorani*, note 38, pp. 189–90.

45 See also *Aparna Chandra*, Gopal Singh Visharad and Ors V. Zahoor Ahmad and Ors., O.S.Nos. 1/1989, 3/1989, 4/1989, 5/1989: A Summary of the Babri Masjid-Ram Janm Bhoomi Decision, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690803 (last accessed on 17 February 2011)..

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inner and outer courtyards of such structure) in the area on which the structure stood.' In *Ismail Faruqui v. Union of India*[46] the Supreme Court refused to answer the presidential reference, struck down the provisions of the statute that abated all pending suits, and directed the central government to hold the disputed property as a receiver until the earlier suits, now reinstated, were decided. Accordingly, the Allahabad High Court delivered its decision in the revived suits of the *Ayodhya* case in September 2010.

Running over eight thousand pages, a detailed legal evaluation of the *Ayodhya* judgment would form a study in itself and is not the objective of the present discussion.[47] On the contrary, the present argument seeks only to illustrate the form in which the court, now firmly possessed of the essential practices formulation from the S*hirur Mutt* case, frames the *Ayodhya* case as a problem of contending but essential or parochial religious passions and practices.

As a property dispute in independent India the High Court could have clearly resolved this problem without at all making of it an issue of religious freedom and sentiment. However, the epistemic force of rationalizing religious practice was so strong that the court framed this dispute in parochial terms by asking questions such as: (1) was the disputed structure the birth place of Rama? (2) whether a temple existed at the disputed site where the mosque currently stands and whether the temple was demolished to build the mosque? (3) whether the emperor Babar built a mosque at the site? (4) whether there was continuous worship of the contending communities at the disputed site? and so on.[48]

As a site that has long witnessed multilayered religious practice made possible by joint possession among different groups, such questions only echo the colonial constitutional vision of social division that have been blind to local practice. And, in reproducing colonial truisms of an India divided by groups such as Hindus and Muslims, the courts of independent India were also fated to rationalize religio-cultural experience and practice associated with Ayodhya and recess them into the larger and divided conceptualizations of the body politic as a whole.

Thus, drawing on these parochially disposed questions, the rationalization and politicization of religious identities are made sharper by the court's reasoning characterizing the conflict over the temple as having a bearing on the essential truths, sentiments and freedoms of the Hindu and Muslim religions. In doing so, Rama, a mythological hero across and beyond the sub-continent irrespective of religion, is reduced to a parochial or essential truth of one religious community. Similarly, the local conflict with the custodians of the mosque at the disputed site is transformed into the tyranny of the Muslims as a people. This parochialism can be noticed in the decisions of each of the three judges who decided the *Ayodhya* case despite the fact that two of the three judges ultimately decided to partition the property in equal shares between the three main Hindu and Muslim litigants. And, this

46 *Ismail Faruqui v. Union of India* MANU/SC/0126/1995.

47 For a short summary see *Chandra*, note 45.

48 See also *Chandra*, note 45.

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parochialism in judicial reasoning is especially apparent in the court's understanding and treatment of Rama as being an essential truth of the Hindu community.

Of the three judges who decided the case in the High Court, Judge Khan was least invested in the argument that sought to present legend of Rama and the disputed property as essential to the Hindu religion. Even so, he also entertained the possibility that the disputed structure, supposedly at the birth place of Rama, formed part of the essential core of the Hindu religion. However, by distinguishing the 'spot of conception' from the 'geographical place of birth' he expressed doubts about the possibility of drawing conclusive links between the spot on which the mosque stood and the spot where Rama was conceived.[49] And, for this reason he dismissed the possibility that this could be a ground to establish claims for title over the property.

Judges Agarwal and Sharma however, differed from Judge Khan in their consideration of this issue and granted a much more central role to the place of birth of Rama in organizing their decisions. Thus, for Judge Agarwal, the issue of the birthplace of Rama is cast in terms of popular Hindu religious sentiment, an issue he posed by asking whether the disputed property was the birth place of Rama according to the tradition, belief and faith of the Hindus.[50] He answered the question in the affirmative by asserting that Hindu belief and practice had come to converge on the disputed property to establish that Hindus believed the site to be of essential significance to their faith. And, this was one of the grounds that allowed him to grant the Hindu parties to the dispute a propriety right to a part of the disputed property.

Judge Sharma's decision is similar to that of Judge Agarwal. However, he audaciously historicized the mythological accounts of Rama's birth at Ayodhya. That is, he held that the accounts of travelers, gazetteers and similar anthropological records on the habits and beliefs of the local people at Ayodhya established the historical fact that Rama was born at the disputed site. In his words

> *'[i]t is manifestly established by public record, gazetteers, history accounts and oral evidence that the premises, in dispute, is the place where Lord Ram was born as son of Emperor Dashrath of solar dynasty. According to the traditions and faith of devotees of Lord Ram, the place where He manifested Himself has ever been called as Sri Ram Janmbhumi by all and sundry through ages. Thus, the Asthan, Ram Janambhumi has been an object of worship as a deity by the devotees of Lord Ram as it personifies the spirit of divine […] Birth place is sacred place for Hindus and Lord Ram, who is said to be incarnation of God, was born at this place.'*[51]

Having held that Rama was born at the disputed property Judge Sharma also held that the entire disputed property which was believed to be a deity formed an essential aspect of the

49 Judge Khan, MANU/SC/0126/1995.

50 Judge Agarwal, MANU/SC/0126/1995, paras 4079-4418.

51 Judge Sharma, MANU/SC/0126/1995.

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Hindu religion. And, on that basis he granted the Hindu claimants complete title over the disputed property.

This curious historicization of a mythological figure of lore and legend like Rama might be revised on appeal, however, the broader and more general rationalization of religious practice into the essential tenets of particular religious groups is entirely consistent with Indian constitutional practice as it has been organized for over two centuries.[52] And in all instances, like in the *Ayodhya* case, where rationalized religious identities are folded into conceptualizations of the body politic itself, it produces and entrenches a parochial constitutional practice. And, it is this parochialism produced by conceptual horizons of Indian constitutional practice that this paper has sought to highlight.

To the extent that this parochialism has been noted as a problem by scholarship it has mostly been met by normative arguments that have sought to reconcile the parochial features of the Indian constitution with liberal democratic values. Thus, speaking on the extensive role of the state in matters of religion in the Indian Constitution, an early commentator declared that India was inadequately secular and that it could perhaps become secular and liberal with time.[53] A much more persuasive recent account argues that the Indian state was authorized to act as a *universitas* to transform and secure a radically equal society for citizens, but that judicial interpretation of this power has not been true to this constitutional vision. That is, that wielding state power over religion ought to have been guided solely by the constitution's vision for radical equality in a manner that eschewed internal reformulation of religious traditions.[54] While these insights are valuable, the normativism that shapes these perspectives is unable to explain the colonial constitutional imagination ensconced in the Constitution of independent India and the form in which it goads communities to express and identify themselves in a parochial fashion.

Therefore, recognizing the materiality of a parochial and colonial constitutional imagination in Indian constitutional practice this paper has been organized both as an illustration as well as an explanation of the political imagination that animates this parochial constitutionalism. This explanation has been tied to the operation of colonial toleration as a form of colonial constitutionalism that conceptualized Indian society to be a fractious collection of groups even while setting in motion governmental processes that nudged or rationalized social groups in one or another political community. In this vein, as the *Ayodhya* case demonstrated the state's conceptualization of the body politic as divided between groups like Hindus and Muslims played a significant role in framing this dispute along these parochial lines. Further, the institutional and epistemic might of state power might have over time hardened these identities and the vision of politics that animate them. Even so, as the Ayodhya example suggests and as the present author has argued elsewhere, there is good reason to believe that many if not all religious traditions in India do not easily lend themselves to

52 For other cases see notes 18-23.

53 *Donald Eugene Smith*, India as a Secular State, Princeton 1963.

54 *Bhatia*, note 25.

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reformulation in terms of essential truths that rationalization demands.[55] That is, state power asserted over religion has not been able to completely discipline religious practice and forms of religious identification. It is by exploring this gap between state ambition and intuitive identities and forms of identification that this paper will draw its discussion on parochialism to a close even as it offers some concluding comments on parochial constitutional practice.

## F. The Limits of Parochial Constitutionalism

As a product of a state's conceptualization of its people, the parochialism identified by this paper is tied at least in some measure to the ability of the state to rationalize and discipline the experiences of social groups into a set of essential religious practices and to hold them within a broader conceptualization of the body politic. In turn, as noticed in the *Ayodhya* case, this would involve some form of purging and reformulation of many existing practices and ways of being associated with a religious tradition by using the touchstone of essential practices.[56] However, reducing a tradition to its essential practices would also entail that a religious tradition can indeed be reduced to or rationalized in such a manner and lends itself to being marked off as a distinct community. It is precisely this rationalization that has proved to be particularly difficult with many of India's religious communities and especially its 'Hindu majority'. This is best explained with a much-discussed case about religious freedom that draws out a wedge between different understandings of the term Hindu.

Thus, in *Sastri Yagnapurshdasji* v. *Muldas Bhudardas Vaishya*[57] the Supreme Court had to address a dispute brought before it by a religious sect called the Swaminarayans regarding the power of the Indian *universitas* to abridge their religious freedoms while legislating for social reform. The Swaminarayans administered several temples which they claimed should enjoy immunity, on grounds of religious freedom, from the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act 1956. This statute prohibited 'Hindu' temples that were accessible to the general public from refusing entry to persons because they belonged to an untouchable Hindu caste or community.

As already noted at beginning of this paper, this statute was part of a broader effort by the Indian *universitas* fashioned at independence to rework ethically deficiencies in the interstices of India's traditional society. Set against the discussion on parochialism by this paper, it is now clearly possible to view this aspect of state power as being organized in

55 *John*, note 6.

56 For rationalism as a form of purging of traditional practice see *Michael Oakeshott*, Rationalism in Politics, and Other Essays, York 1962.

57 *Sastri Yagnapurshdasji* v. *Muldas Bhudardas Vaishya* AIR 1966 SC 1119.

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parochial terms, with the Constitution itself casting on the state the duty to throw open all 'Hindu' temples to all classes and sections of 'Hindus'.[58]

The Swaminarayans claimed immunity from this statute arguing that exclusion from their temples was not based on untouchability but only on grounds of appropriate initiation to their religious denomination. In addition, they also argued that they were exempt from the Bombay statute as they were not a 'Hindu' sect. This intriguing latter assertion by a group commonly understood to be part of 'Hinduism' resulted in an inquiry into the essential nature of the Hindu religion through which the court disallowed the Swaminarayan claims and pronounced them to be 'Hindus' subject to the demands of the Bombay Act. However, the court's opinion is built upon an unresolvable contradiction which is of particular significance to understand the difficulties of rationalizing the 'Hindu' religion into essential practices.

Thus, on the one hand, the court seems to concede there could be an element of truth to the Swaminarayan argument when it restates intuitive sociology about the Hindu religion saying that it

> *'does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.'*[59]

Despite its fuzziness, this is not an uncommon way to describe 'Hindu' religiosity or even a broader civilizational religiosity in the Indian sub-continent.[60] And through this powerful resonant intuitive sociology, the court characterizes the term 'Hindu' as a way of understanding the plural civilizational bond holding together and describing the various traditions of the peoples of the Indian subcontinent.

On the other hand, however, the court also advanced a much more formalist, reductive and rationalist definition of Hinduism. Drawing significantly from the writing of Dr. S. Radhakrishnan and other modern commentators on the Hindu tradition, the court went on to note that the wide variety of practices and philosophical reflections found in the Hindu tradition were nevertheless held together by a common philosophy of monistic idealism. As the court stated,

> *'[b]eneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers [...] lie certain broad concepts which can be treated as basic.*

58 Art. 25(2)(b).

59 Judge Khan, MANU/SC/0126/1995, para 1128.

60 See for example *Ashish Nandy*, The Politics of Secularism and the Recovery of Toleration, in: Rajeev Bhargava (ed.), Secularism and its critics, Oxford 1999; *Triloki Nath Madan*, Modern Myths, Locked Minds: Secularism and Fundamentalism in India, Oxford 2009.

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> *The first amongst these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters […].'*[61]

In this latter account, Hinduism is not described in civilizational terms, but through tenets and practices which the court held to be Hindu doctrine. And by deploying this account of Hinduism the court refuted the Swaminarayan claim that they were sufficiently distinct from Hinduism – a claim, dismissed as simply a product of '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'[62] (emphasis added). Thus, it is by rationalizing practices into the 'true foundations' of the Hindu religion that the court discharges the parochial role it has cast for itself through its reading of the Indian constitution.

However, it is nonetheless important to note that even when the court rationalizes practices to make for example a 'Hindu' religious identity, it has been unable to entirely purge or make over the plurality of the intuitive sociologies that constitute Hindu identity. That is, two centuries after the institutional reification of the parochial framework of colonial toleration,[63] parochialism has still not completely established its conceptual hegemony and authority over the civilizational and intuitive sociologies of the experience and practice of Indian religion. And thus, even though the parochial frames of colonial toleration define the common sense that regulates religion in India, its real authority over the sociological contours of religious experience and practice is less than complete. And, it is on this note that this paper draws its account to conclusion.

## G. Conclusion

This paper has demonstrated that the design of the Indian *universitas* regulating religion produces parochial identities and a parochially inflected nation. This aspect of Indian constitutional design was explained as flowing from the influences of the colonial constitution, especially its peculiar institutionalization of toleration through a parochial division of the Indian body politic. And, it was the continuing imprint of this colonially inspired regulatory framework on contemporary constitutional practice that this paper has sought to explain and foreground. In turn, this foregrounds the role played by Indian constitutional design in the making and entrenchment of a politics founded on social and communal divisions.

Even as epistemic force of parochial constitutionalism is considerable, the paper has also noted that there are sufficient reasons to believe that as a constitutional project the

61 Judge Khan, MANU/SC/0126/1995, para 1130.

62 Judge Khan, MANU/SC/0126/1995, para 1135.

63 For a discussion on this point see *Partha Chatterjee*, History and the Nationalization of Hinduism, Social Research 59 (1992), p. 111; *Bernard Cohn*, The Census, Social Structure and Objectification in South Asia, in: Bernard Cohn (ed.), An anthropologist among the historians and other essays, Oxford 1987.

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hegemony of parochial constitutional practice over Indian society is less than totally complete. However, this must not be taken to imply that the structure of Indian society is the only bulwark against the parochialism aspects of Indian constitutionalism. Quite to the contrary, the Indian constitution and its framers also intended the independence Constitution to be a new beginning that would rid India of the parochialism of the colonial constitution that preceded it.[64] Their answer to colonial parochialism was a liberal constitution that protected universal freedom and equal rights for all citizens which is also a strong facet of Indian constitutionalism.[65] However, ensconced in this liberal vision were fragments of an earlier and divisive colonial imagination of the Indian people. And it is the continuing impact of that divisive imagination in the material practice of Indian constitutionalism that this paper has attempted to foreground.

64 For a sense of Independence constitutionalism as a new beginning see *Mehta*, note 1.

65 For a sense of the strength of this liberal constitutional practice see *Rohit De*, Beyond the Social Contract, http://www.india-seminar.com/2010/615/615_rohit_de.htm (last accessed on 6 June 2015).

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