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The Communalisation of Religion in Indian Constitutional Law

This chapter begins the task of charting the communal identification of the Indian people in the constitutional practice of religious freedom. It does so by drawing on a genealogical account of toleration and the movement to reform religious practices in colonial India as they have determined the contours of religious freedom in the Indian Constitution. Doing so, this chapter also sets out the methodological approach through which this book makes salient the forms in which colonial state practice communally inflects contemporary constitutional design and practice.

Outlines of the Constitutional Scheme Regulating Religion

To make apparent the form in which the government of religion by the Indian Constitution communally inflects the identity of the Indian people, it is important to begin by outlining the contours along which the Constitution seeks to regulate religion and religious freedom in particular. The obvious place to begin this task would be the provisions on religious freedom which are laid out in a set of four constitutional provisions in the chapter on fundamental rights (Articles 25–28). Between them, these provisions protect the right to religious freedom for individuals and groups, provide for state action against religion in the public interest, and specifically mention instances where the state and religious power ought not to impose themselves on an unwilling public. These provisions would seem like those of any liberal constitution.

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Therefore, uncovering a communal dimension from these broadly liberally inclined provisions requires deeper scrutiny of their structure and practice.

Of the provisions spanning Articles 25–28, Articles 27 and 28 deal with very particular concerns bearing on the power of the state to impose religious taxes (Article 27) and the bar on religious instruction in educational institutions run on state funds (Article 28). Important as these constitutional guarantees might be, they have not determined the course of religious freedom in the Indian Constitution. On the other hand, Articles 25 and 26 have been key provisions that have determined the template that has come to organise state power as it has been exercised over religion.

Examining these provisions in greater detail, Article 25(1) is structured like a standard liberal freedom where the right to practise, profess and propagate religion is granted to all individuals. However, this provision is subject to other provisions of the fundamental rights chapter and a proviso which permits the state to impose restraints on religious freedom in the interest of public order, morality and health. In addition, Article 25(2) permits the state to 'regulate or restrict economic, financial, political or other secular activity which may be associated with religious practice' (Article 25(2)(a)) 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' (Article 25(2)(b)).

Sub-clauses (a) and (b) in Article 25(2) clearly provide distinct grounds for the exercise of state power over religion though constitutional practice, especially constitutional adjudication, has understood these clauses as analogous and as extensions of each other. However, even if constitutional interpretation were to develop a more fine-tuned classification of these clauses, they are both organised to empower state action to reform and regulate religious practice. Moreover, these clauses facilitating the exercise of state power over religion is clearly distinct from the more easily recognised restrictions that liberal democracies impose on religious freedom in public interest as laid out in Article 25(1). Of course, state action in public interest can also be seen as empowering the state to act as needed to secure public order, morality, and so on.[1] Even so, the explicit empowerment of state-led reform and regulation of religion in Article 25(2) has pushed it to the centre of discussions pertaining to the institutional design and practice of religious freedom in the Indian Constitution.

Doctrinally and as a matter of constitutional interpretation, the principal problem that Article 25(2) poses is the challenge of delimiting the power that the state can legitimately wield over religious practice. This problem of the

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legitimate exercise of state power breaks up into three broad questions as it has arisen in the interpretation of Article 25 as also of related provisions of Article 26: First, to what extent does Article 25(2) control 25(1)? Second, to what extent does Article 25(2) control Article 26? Third, and though not directly related to the scope of state power in Article 25(2), to what extent is Article 26 controlled by the other provisions of the chapter on fundamental rights?

To address these questions in turn, it is clear from the text of the Constitution that the power to reform and regulate religion in Article 25(2) overrides and controls the freedom to religious practice granted in Article 25(1). In addition, it must also be reiterated that the right to religious freedom granted to individuals in Article 25(1) is also subject to state control in the interest of public order, morality and health, as well as other provisions of the fundamental rights chapter of the Constitution. However, Article 25(2) sits in some tension with Article 26, a provision that grants denominations the right to manage their religious affairs.

Unlike the freedom in Article 25, which is explicitly subject to a range of restraints as already noted, Article 26 is only subject to the restraints of public order, morality and health. This has raised questions about the extent to which Article 26 is subject to Article 25(2) as well as other fundamental rights. Regarding the tension between Articles 25(2) and 26, the Supreme Court has held that denominational rights to manage religious affairs are subject to the reform and regulatory power of the state under Article 25(2).[2] An allied and related question pertains to the extent to which denominations in Article 26 are subject to the exercise of state power to advance broader constitutional values, especially those embodied in constitutional provisions protecting equality and dignity. This is a problem of interpretation that is unresolved in constitutional adjudication with evidence pointing in different directions.[3]

These questions on the scope of state power across Articles 25 and 26 have in turn been tied to the way constitutional practice has defined and valued religion as a domain that states ought not to violate. The Constitution says very little about the contours of religious freedom, and therefore delimiting the scope of religious freedom has required courts to devise principles for constitutional interpretation. Consequently, examining judicial labours towards this end, this chapter highlights the way constitutional interpretation has functioned to foreground communal identities.

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Adjudicating Religious Freedom in the Indian Constitution

For constitutional adjudication, the challenge of delineating the domain of religious freedom against the legitimate exercise of state power has been the identification of 'essentially religious' doctrines, rituals or practices which the state ought not to violate. This interpretative framework wrought by the Supreme Court to identify what is 'essentially religious' has come to be called the 'essential practices test' or the 'essential practices doctrine'.[4]

In its defining decision on the essential practices test, the Indian Supreme Court was called to decide on the constitutional validity of the Madras Hindu Religious and Charitable Endowments Act, 1951.[5] The petitioner in this case, the chief religious functionary of the Shirur Mutt at Udupi, contended that this Madras statute, which granted the government power to take over mismanaged Hindu religious institutions as a trustee, violated the denomination's right to religious freedom and to manage religious institutions as permitted by Article 25(1) and Article 26 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 Article 25(2).

Resolving these contending positions, the Supreme Court devised the essential practices test which continues to guide the determination of constitutionally protected aspects of religious freedom. Addressing the contending arguments in this case the court 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. (Emphasis added)[6]

In this manner the court began the search for essential religious practices by seeking out doctrines and practices that a community subjectively viewed to be essential to their religion.

Following *Shirur Mutt*, early Supreme Court decisions seemed relatively open to serious consideration of a community's subjective assertions about their traditions. Thus, in the *Venkataramana Devaru* case,[7] dealing with the claims of the Gouda Saraswath Brahmins that their religious tradition required exclusion of certain communities from certain parts of their temple, the court found in their favour. However, the court held that this denominational

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right granted by Article 26 to manage affairs in matters of religion was to be balanced with the power of the state to reform such practices in Article 25(2). Accordingly, even as the religious freedom of the Gouda Saraswaths was construed broadly, their denominational rights were held to be subject to the reforming demands of temple-entry legislation which mandated that all Hindu public temples could not exclude any class or section of Hindus.

In the 1960s, however, the strongly statist and reforming orientation of Justice Ganjendragadkar led the Supreme Court to fundamentally transform the essential practices test as it was articulated in the *Shirur Mutt* case. Through a series of decisions,[8] the understanding of essential practices was recast by the Supreme Court from practices a community ascertained as essential to its religious tradition to practices a court judged to be essential to that tradition.[9] This interpretative move opened space for subsequent courts to involve themselves in the resolution of hermeneutic questions associated with the doctrines and practices of various religious traditions. Thus, following Justice Gajendragadkar's lead, the Supreme Court in subsequent decisions has, almost as theologians, sifted between different kinds of religious claims, establishing some while denying others.

To take some examples – the Supreme Court has held that the sacrifice of cows did not constitute an essential part of the Islamic faith;[10] overruled Muslim claims that prayer in a mosque was crucial to the Islamic faith;[11] 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;[12] stipulated that the *tandava* dance was not a significant part of the Anand Margi community;[13] declared that the followers of Aurobindo did not constitute a distinct religion;[14] that the tradition of *santhara*, or ritual suicide, did constitute a part of the Jain religion,[15] and so on.

Each of these decisions exemplifies a peculiar form of public reasoning where the judiciary legitimates state regulation and reform through forms of religious interpretation internal to that religious tradition. In so doing courts have not only transformed the essential practices test as articulated in *Shirur Mutt* but also arrogated to itself the last word on what constitutes the essential religious truths of particular religious traditions. Most importantly, it is noteworthy that this transformation was effected without formally overruling *Shirur Mutt*, which continues to be the stated source of the courts' power to determine essential religious practices.

A whole body of scholarship has responded to this manner of governing religion, arguing that it sits uneasily with India's secular constitutional state.[16]

It is not difficult to see why this is the case as this hermeneutic model does not seem to be consonant with the freedoms of individuals and groups to practise religion without fear or prejudice. Of course there could be various models of secular intervention in matters pertaining to religious practice. For instance, religious freedom could be delimited through interpretative frames similar to that adopted in the *Shirur Mutt* case. Alternatively, courts could even adopt models of interpreting the bounds of state power that are less solicitous of religious freedom and which demand religious freedom be firmly justified against the background of other constitutional values such as equality and dignity.[17] Such 'secular' models of regulating religion would also require the state to perform boundary-marking functions between religious freedom and the legitimate and legally permissible bounds of state power. However, even granting such boundary marking, it is difficult to envisage that such secular and liberal constitutional practice could permit courts to substitute their judgment for that of a practitioner or a denomination as is the case with the existing form of the essential practices test.

The line of Supreme Court decisions that have staked out a new approach to essential religious practices since the 1960s does seem to present an incorrect account of the constitutional guarantees on religious freedom. However, mere assertion of error cannot account for the court's resolute affirmation of this incorrect normative position in case after case. That is, judicial error or its inability to live up to constitutional norms does not explain an attachment to error. This section therefore suggests that this error is an opportunity to diagnose the condition made ripe for judicial engagement in religious hermeneutics to determine essential religious practices.

Therefore, in contrast to normative analysis that attempts to evaluate the essential practices test against the text and the values of the Constitution, the following sections attempt to locate the essential practices test against the sweep of socio-historical and political scholarship on the governance of religion in India. Doing so they argue that the essential practices test draws on colonial state practice even as it seems a taint or an aberration on the normative scheme of the Indian Constitution.

The historical antecedents to which this chapter will turn, toleration and social reform, have already been outlined in the introductory chapter as elements of the constituent axes that have determined Indian constitutional identity. The links between these constituent axes are further detailed in the next sections and tied up to the constitutional organisation and practice of religious freedom, especially the hermeneutic approach to

essential religious practices. Consequently, by drawing out these connections between toleration, social reform and the essential practices test, this chapter moves the trajectory of its argument towards the communalisation of Indian constitutional identity.

Toleration, Reform and the Regulation of Religion in Modern India

Drawing essential practices from the historical arc of toleration and social reform in India requires a short account of these modalities of government as they have organised religion in modern India. Accordingly, these modes of colonial and contemporary government are detailed in turn, especially as they bear on the hermeneutic model of determining essential religious practices adopted by the Indian Supreme Court.

What Kind of Toleration?

Toleration is the root model through which modern liberal democracies organise state power to govern religious and cultural division. As scholars have shown, the institutionalisation of toleration is founded on the equal protection of individual liberty and is closely tied to the founding of modern politics in all North Atlantic societies. That is, equal liberty of private citizens within a broadly neutral state provided North Atlantic polities with a model to organise stable societies by defanging irreconcilable conflict between religious factions that threatened the prospect of political unity.[18]

Toleration and the commitment to equal liberties, as outlined earlier in this chapter, are clearly also a part of the Indian Constitution. At the same time, it is important to note that the adoption of toleration as value choice precedes the Constitution and is a policy with considerable vintage in the colonial state.[19] However, the adoption of toleration as state policy in the colonial state did not result in an emphasis on individual liberty and the withdrawal of controversial matters of faith from a neutral public sphere. On the contrary, toleration in colonial India only deepened state involvement in religion through a thorough-going search for the religious truths or foundational axioms governing religious practices of their colonial subjects.

Drawing on the history of toleration in European societies, the privatised faith that toleration carved out as a matter of constitutional practice was possible in Europe because it coincided with the changes brought about by the

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Protestant reformation, which laid emphasis on individual conscience and the personalisation of faith. As this form of social discipline was absent in India, a government driven by toleration was obliged to deploy state power to foster a landscape that mapped and reordered society along the religious truths of its unreconciled subjects. This effort of mapping the myriad practices of the Indian people to supposed religious truths or axioms has already been outlined in the introductory chapter as the methodological orientation with which toleration operated in colonial India.

The methodological approach of toleration that the introductory chapter has made salient has been alternatively characterised as driven by the prism of expedience and the pragmatic demands of stabilising rule over a diverse society, the expression of colonial control and power, or simply the expression of the insatiable colonial urge to classify and organise the diverse society it came to rule.[20] While there is an element of truth to these claims, it does not capture the normative dimension to toleration. That is, these alternative approaches do not explain toleration understood as an expression of forbearance for practices that were abhorrent, especially those like Sati which strained the ethical and religious commitments of most colonial officials. This aspect of toleration is key to understanding the uniqueness of the concept, especially as it has become the kernel of modern liberal democratic societies both in India and elsewhere.

In an essay that shapes the form in which this chapter deploys toleration as a normative idea, Balagangadhara and De Roover trace the normative aspect of toleration to protestant theological ideas of the inviolate relationship between divine truth and individual conscience which states came to view as values they were bound to respect. More importantly, these scholars show that this inviolate relationship between divine truth and human conscience was also mirrored in India as the early colonial state devised its form of governing the religious practices of its subjects. Thus, it is the normative charge in toleration as a concept that pushed the colonial government to map European forms of organising society onto the Indian religious landscape. Most importantly, as these truths were not readily apparent or available for state policy, the colonial state set up an extensive programme to generate, classify and systematise these truths. As an important pillar of colonial state policy towards religion, this search for the religious truth as state practice must be discussed in greater detail, especially its consequences for the framing and firming of religion and religious identity.

Toleration as Truth Seeking

As a long-standing policy, instances of toleration dot the history of the British colonial state in India from the conquest of Bengal to the transfer of power after Indian independence. Arguably, one of the most important aspects of colonial policy which exemplified the ethic of toleration was laid out in the judicial plan for Bengal in 1772, stating that

> in suits regarding Inheritance, Marriage, Cast, and other religious usages or institutions, the laws of the Koran with respect to the Mahometans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to: on all such Occassions, the Moulavies or Brahmins shall respectively attend to expound the Law, and they shall sign the Report and assist in passing the Decree.[21]

As evident, this assurance given by Governor General Hastings committed the colonial state to tolerate and administer their subjects understood broadly as Hindus and Muslims, each according to their respective religious or personal laws.

Driven by their commitment to tolerate these laws, the colonial state soon found itself drawn into the project of finding and expounding these religious injunctions that they believed governed the lives of their largely Hindu and Muslim subjects. As already described, this state-propelled search for the true religious foundations of personal laws was not just the pragmatic accommodation of the beliefs of a subject population but a norm to which the colonial state had bound itself. The systematisation of personal laws into foundational rules governing distinct religious communities is a topic of much scholarly debate and is addressed in greater detail in Chapter 2 of this book. By contrast, this section contours colonial toleration with broad brush strokes, tying the obligation to tolerate with the making of a communal conceptualisation of the Indian people.

This section does not and cannot offer a detailed account of toleration as it developed and evolved in the colonial state.[22] On the contrary, it merely draws on existing scholarship to elaborate the transformation that colonial toleration brought about in the organisation of religious practice and religious self-understanding. To do so it echoes and amplifies earlier discussions in this book on the iconic instance of Sati as it was subject to colonial government reform and eventually to abrogation.

Historical work on Sati, or wife burning, shows that the early regulation of the practice assumed that it was a practice sanctioned by the Hindu religion. By implication, it followed that the true doctrinal foundations of the practice were to be found in Hindu religious texts and that Hindus were obliged to follow the axioms or doctrinal truths laid out in these texts. Practice was hardly

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as straightforward as there were no generally applicable texts or axiomatic principles that declared Sati to be a religious practice and many texts that had something of a bearing on whether and how a Sati was to be performed.[23] Further, there was considerable regional variation in the performance of Sati making it unclear whether the practice was applicable to all castes and groups of Hindus as it was presumed. Even so, driven by the normative will to tolerate, colonial courts narrowed on a set of texts that were identified as axiomatic doctrines which formed the basis of the effort to regulate Sati as a Hindu religious practice. Consequently, based on these texts and the interpretative frames that grew around them, Satis were distinguished between those that were scripturally sanctioned and performed with the consent of the immolated women (the good Satis) and those that were not scripturally so recognised (the bad Satis).[24]

This summary account of the debate on Sati reveals the commitment of colonial toleration to identify and protect doctrinally true Satis quite like how the contemporary Supreme Court divines essential practices of various religious denominations. More importantly, axiomatic doctrinal truths identified by state practice pulled together varied practices of diverse communities as the foundational truths of one religious group – the Hindu people. This orientation of the colonial state to tolerate true practice was mirrored in other Hindu practices, as well as with the practices of other communities it came to identify as Muslims, Christians, and so on.[25] In turn this resulted in the conceptualisation of British India as a collection of sharply demarcated religious people or even nations, which will be elaborated in this and subsequent chapters.

Significantly, this conceptualisation of India did not just remain figments of British imagination about their colonial subjects. On the contrary, British conceptualisations of India were internalised by Indians as they began to participate in the structures of British government. Social reform is one such axis along which Indians internalised British conceptualisation of Indian identity, which must now be briefly outlined.

Toleration and the Organisation of Social Reform

Staying with the example of Sati, as the nineteenth century wore on, changing British opinion about the practice created a crisis in Bengali society. That is, increasing British engagement with Sati and with available textual sources gradually unsettled the consensus that the practice was founded on Hindu scriptural sources. This changing official position contributed to a contentious debate in Bengali society, resulting in influential sections of local Bengali society either endorsing or opposing the revised British position that Sati

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had no religious foundation. Overall, these highly charged debates on Sati allowed the colonial state to press for reform and eventually to ban the practice in 1829.[26]

The abrogation of Sati did not imply the abandonment of the official commitment to tolerate but only a change in the recognition accorded to Sati as a practice embodying the doctrinal truth of the Hindus. That is, the colonial state moved towards the position that there was insufficient scriptural support for the practice and hence that the practice could safely be banned. Significantly, this position was endorsed by a section of the native society on the very same grounds. Even those sections of Bengali society that opposed the ban on Sati did so on scriptural grounds, arguing that the practice was scripturally sanctioned and had religious foundations.[27] Thus, it is possible to understand the ban on Sati not just as the abrogation of the practice but also as the form in which religion would be understood in public debate. That is, the practice of Sati was to be measured against the scripturally enjoined, and axiomatically applied truths of the people identified as Hindu.

This manner of addressing religious practice formed part of a generic and consistent official outlook, though it underwent some degree of change as the nineteenth century progressed, especially in relation to customary practices of local groups. That is, emphasising the importance of customs, religious practices were identified as customary to specific local groups, a development in colonial policy that will be discussed in greater detail in Chapter 2. However, this did not fundamentally disturb the broad contours of linking religious practices with the axiomatic or essential truths of the Indian people nationally identified as Hindu and Muslim, and so on.

Significantly, by the end of the century, Indian nationalists had deeply internalised this colonial approach to framing religious identity. Consequently, when they sought to fashion their legitimacy to speak on behalf of fellow Indians, they did so through social reform projects that were organised along pan-national religious lines. That is, arguing that many traditional and ethically degenerate practices in Indian society required sweeping reform, they made their case to speak on behalf of fellow Indians by reinforcing their identities as Hindu and Muslim people. This process of reorganising practices understood as embodiments of the truths of a people began of course with British efforts to reform and abrogate Sati in the early part of the nineteenth century. However, by the end of the century, as nationalist sentiment began to gather force, Indian elites assumed the lead on reform by relegating the role of the colonial state to the margins. Doing so, they provided reform leadership on behalf of peoples understood as Hindus, Muslims, and so on.

Therefore, reform built on the communal identities that toleration generated became the political ground on which Indians began to organise themselves as a people.[28]

The communal fault lines along which social reform was organised were only further strengthened when nationalists carried forward their reform agenda when exercising power under British constitutional statutes in the first half of the twentieth century. These constitutional statutes, discussed in more detail in Chapters 3 and 4, permitted limited Indian participation in colonial legislatures and government. More importantly, governmental power allowed Indian elites to carry their moral authority into government and to assert sovereign control over the reorganisation of Indian society.[29]

Thus, reform made far-reaching changes in religious traditions as envisaged by the sovereign imagination of emerging nationalist elites. Nonetheless, the authority to reform and remake religious practice was by and large asserted along the lines of religious community. For example, temple-entry legislation did not seek to open religious spaces to all persons but to all classes and sections of Hindus; animal sacrifice was not banned, for instance, as an act of cruelty but as a deficiency or atavistic feature in the Hindu community; similarly *devadasi* reform was articulated not in terms of generalised coercion but as the reform of a deviant Hinduism that exploited women.[30] Similar examples can also be drawn from Muslim law reform at least up to the Shariat Act of 1937, which will be drawn out in greater detail in Chapter 2. However, since the passing of the Shariat Act in 1937 law makers have not taken on the burden of Muslim reform, a problem they shied away from even after Indian independence, primarily on grounds that they did not have the legitimacy to press reform on a minority beleaguered by the partition of British India.[31]

Running up to Indian independence, this model of toleration and reform, and of the Indian people from which it drew succour, came under strain as the Indian Constitution aspired to ground its conception of the Indian people in individual citizenship. The development of this conceptualisation of citizenship and of the people on which it draws upon will be discussed in greater detail in Chapters 3 and 4. For the present discussion it is sufficient to note that religious freedom in the Indian Constitution was, as elaborated earlier in this chapter, granted to individuals and to religious denominations. In addition, the state was granted the power to reform religious practice. However, both denominational freedom and state power to reform denominational practice were understood as having to be made consistent with individual citizenship. In fact, the *Shirur Mutt* case is a good example of adjudicatory practice drawing a balance between denominational rights, the state's power to reform and

regulate religion and the overall constitutional scheme founded in individual citizenship. In this scheme, denominational rights were interpreted as clearly subject to the secular and sovereign power of the state to reform and regulate religion on behalf of all citizens.

Similarly, at the time of the framing of the constitution, the personal law system also came under similar pressure to be reconciled with a constitutional imagination founded on individual citizenship, a challenge resolved by the act of deferral detailed in Article 44. That is, the provision implicitly authorised and carried over the personal law framework into the Indian Constitution but nonetheless directed the state to work towards a uniform civil code applicable to all citizens. Personal laws and their possible contributions to a communal constitutional imagination will be discussed in greater detail in Chapter 2. However, even as the Constitution was broadly disposed towards individual citizenship, it did leave open space for prior colonial forms of religious identification associated with toleration and reform. It is in this gap between colonial and contemporary forms of governing religion that the reformist court of Gajendragadkar stepped in to upend the *Shirur Mutt* approach to essential religious practices and reinforce an earlier colonial and communal form of identifying religion and religious practice. Consequently, it is by foregrounding the continued presence of this conceptualisation of religion that this chapter elaborates its argument about the communal character of Indian constitutional identity.

Essential Religion as a Call to Politics

As already highlighted, much of the legal scholarship approaches the essential practices test developed by the Gajendragadkar court solely as a problem about constitutional interpretation. Against this manner of evaluating the essential practices test, this chapter has attempted to shift the ground of constitutional understanding from contested norms to a contest about the character of the people for whom the right to religion must be defended. That is, it has presented the hypothesis that identifying religion through its essential truths is also a conceptual frame that holds together ideas about India, its people, and the problem of establishing government for its diverse peoples.

Of course, the right to religion that the Constitution grants to groups is specifically vested in 'denominations' which constitutional practice has understood narrowly for the most part. However, the wide discretion that the Gajendragadkar Supreme Court permitted to determine essential religious practices has allowed subsequent courts delimiting religious freedom to draw

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on colonial toleration to cast denominational rights broadly. That is, drawing on aspects of the colonial regulation of religion, the contemporary court has on occasion cast or delimited denominations as identical or nearly identical with the Indian people themselves. Through one such instance where the essential religion has been defined in very broad terms, the following section illustrates the way the essential practices test is deployed to communally inflect Indian constitutional identity.

The *Ram Janmabhoomi–Babri Masjid* Case

The *Ram Janmabhoomi–Babri Masjid* case (hereafter the *Ayodhya* case), which the Supreme Court brought to an uneasy close in 2019, represents one of the most polarising moments that besieged the constitutional politics of contemporary India. Recounting the progress of the case across colonial and postcolonial India, this section demonstrates the way the case framed religion through the prism of essential practices, and, in turn, the way religion framed by essential practices was institutionally mobilised to identify the Indian people in sharply communal terms.

The *Ayodhya* case decided conflicting claims to a religious structure variously called the Ram Janmabhoomi or Babri Masjid located in the north Indian town of Ayodhya and is a dispute older than the Indian republic itself. At its core the case pertains to a property dispute between various Hindu and Muslim groups over a sixteenth-century temple–mosque complex.

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 religio-cultural and mythological hero Rama. The Muslim parties, on the other hand, claimed that the structure was built as a mosque by Babur, the first of the Moghul emperors, and that its ownership should vest with those charged with its management. The passions raised by the dispute spiralled out of control in 1991 when the temple–mosque structure was demolished by a Hindu mob. Drawing on this fraught dispute, this section sketches the form in which communal religious groups understood as bearers of essential truths have transformed a local dispute into a fissure defining the Indian people.

The *Ayodhya* Case in Colonial Courts

As it first presented itself in court in 1885, the Ayodhya dispute pertained to the shared use of a religious and cultural space that was judicially framed as a property dispute. Thus, claiming ownership over a religious structure

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called the Ram Chabutra (an open-air platform and Hindu shrine within the premises of the disputed property), the *mahant*, or priest, at the *chabutra* petitioned the sub-judge of the trial court at Faizabad for permission to build a permanent structure over the *chabutra*. However, the *mutawalli*, or caretaker, of the mosque at the property contested the *mahant*'s claims, contending that as owners they 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 Hindus, who performed 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 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 ... and if permission is given to Hindus for constructing a temple then ... 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.*[32] (Emphasis added)

Scholarship shows that there was legitimate nervousness on the part of the colonial administration to permit the contending parties to carry on their practices in such proximity to each other as there were known instances of past violence.[33] However, if the *mahant* and his community were adjudged owners, it is baffling that the court permitted the state to abdicate its responsibility to protect the enjoyment of property that logically follows ownership. Further, the assessment that communities that have lived with each other for generations were destined to 'riot and murder' also seems an extreme interpretation of the problem and to fly in the face of the facts. However, appellate judges only seemed to reinforce such puzzling assessments about the nature of the problem.

Thus, 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 Hindus. However, he found that there was evidence to suggest that one portion of the temple–mosque complex was used by Muslims and that the Ram Chabutra was occupied by Hindus. Significantly, he also described the property as representing the divisions between Hindus and Muslims, especially the historical injustice committed by a Muslim emperor on his Hindu subjects. As he noted,

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> *[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.[34] (Emphasis added)

This is a more explicit statement of the problem that the disputed structure was understood to have posed, and one that replays the political sociology upon which toleration was built. That is, India was cast as a land of divided people, of whom the division between Hindus and their erstwhile Muslim rulers was particularly significant. Thrust into government, it was the obligation of the British as rulers to protect religious liberty and neutrally hold the peace among this uneasy mix of peoples. Of course this was only how the British viewed their role as rulers. However, ideas are not without consequence as the British conception of their Indian subjects played a significant role in shaping the contending positions in the case as emblematic of the Indian body politic – a position restated as the case was sent on further appeal.

In the court of second appeal, it was held that the disputed property was in the joint use of both Hindus and Muslims but that there was insufficient evidence to support the proprietary claims of the Hindus. However, as in the lower court, the appeal court also cast the disputed structure as a mark of historic injustice suffered by Hindus at the hands of Muslim rulers. Thus Justice W. Young, Judicial Commissioner, Oudh, observed that

> 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.[35] (Emphasis added)

These excerpted extracts from the *Ayodhya* case as it moved through the colonial courts illustrate the way colonial judges cast an ordinary property dispute into a conflict pertaining to the Indian people understood as divided between 'Hindus' and 'Muslims'. Historical research suggests that claims regarding the sacred geography of Hindus as a people or the tyranny of Islamic rule were not led as evidence at trial.[36] Further, socio-cultural evidence has suggested that social life at Ayodhya was deeply intertwined, and even though there were significant instances of conflicts regarding various parts of the disputed structure, they were not beyond the reach of recorded instances of reconciliation and resolution. However, colonial characterisation of the disputed structure cast it as nothing but an emblem of a people divided as Hindus and Muslims, which, in turn, was also replayed in the way colonial

courts organised the dispute.[37] Thus, by characterising the dispute in this fashion, the court transformed a local property conflict into a national dispute pertaining to the body politic or the Indian people as a whole. It was this transformed dispute that was passed on to the republic of independent India.

The Contours of the Contemporary Dispute

The decree of the colonial courts held until December 1949 when, at the cusp of the transition to independent India, miscreants broke into the disputed property and installed idols under the central dome of the Mosque at the disputed structure. The forceful installation of the idols resulted in the provincial government attaching the property, permitting limited worship of idols installed at the site and placing the property in the possession of a receiver until disputes raised by the installation of idols were judicially settled. This 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 divided 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 Moghul emperor Babur upon either barren land or, in the alternative, on the ruins of a temple. As it had been dedicated to the community, they claimed that they were in possession of the property until 1949, when they were dispossessed. However, they also admitted the existence of a *chabutra* in the outer courtyard at which Hindus were permitted to pray. On the other hand, the 'Hindu' parties made two kinds of claims. First, 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 the structure, the Akhara argued that they should be given possession of the entire premises. Second, 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.

While these suits were pending, the attachment order was modified in 1986 to open the locks of the disputed property and permit all members of the public to offer respects to the idols forcibly installed at the disputed structure. This was a significant alteration of the status quo, which until this

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point only allowed the performance of rituals at the site in a restricted manner 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, decisively catapulted the problem of the disputed structure onto the stage of national politics 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 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* ... in the area on which the structure stood'. 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.[38] Accordingly, the Allahabad High Court delivered its decision in the revived suits of the *Ayodhya* case in September 2010[39] and, on appeal, the Supreme Court finally disposed of the matter in 2019.[40]

Of these sprawling judgments that run over several thousand pages, the present comment only emphasises the way the courts continued to present this dispute as a national problem produced by a polity divided by religious interests.[41] As a property dispute, the courts could clearly have avoided approaching this dispute as one animated by irreconcilable religious sentiment. That is, the courts could have delimited the dispute to title and possession or the fact that the matter had been conclusively litigated and resolved in colonial courts. Instead, the courts of independent India allowed themselves to be drawn into a whole set of ancillary questions that included, among others: (1) Was the disputed structure the birthplace of Rama? (2) Was the disputed structure a mosque? (3) Did a temple exist at the disputed site where the mosque currently stands and was the temple demolished to build the mosque? (3) Did the emperor Babar build a mosque at the site? (4) Was there continuous worship of the contending communities at the disputed site?[42] These questions pushed the case away from questions of property rights and the legal rules barring reopening of settled legal disputes, and invited claimants to demonstrate that the disputed property was an essential aspect of their divided religious traditions. In doing so, parties

were permitted to float free of the specific spatial contours of the dispute and characterise their claims on behalf of a national community of Hindu or Muslim people. It is this dimension of the High Court and Supreme Court decisions that must now be surveyed to demonstrate the form in which the courts modelled a communal people at odds with each other.

Parochialising Rama, Communalising the Nation

Of the Supreme Court and High Court decisions, the Supreme Court made a marked attempt to steer its decision away from the essential religious truths of the contending communities in the *Ram Janmabhoomi* dispute. Even so, both decisions are dependent on characterising the disputed property as divided by the essential truths of contending religious communities and whose divisions also constitute a central fissure in the Indian body politic or its people.

In the High Court this commitment to essential religious practice is most pronounced where two of the three judges were explicitly committed to asserting that the disputed property embodied the essential truths of the Hindu community. Deciding in this fashion was not straightforward as the dispute was produced by breaking into and vandalising a property in the management of another religious tradition. Nonetheless, the unsatisfactory answer they provide is rooted in the antiquity of Hindu claims and their unjust displacement by Islamic conquest. In the case of Justice Sharma, this went as far as stretching historical facts to assert that the disputed property was the precise site where Rama was born. That is, he presents local beliefs and accounts of travellers, gazetteers and anthropological records on local beliefs as indisputable evidence that Rama was born at the disputed site. As a heroic figure from mythic time no such claim about Rama can be satisfactorily justified, but the object of Justice Sharma's efforts is clear enough – the site must be presented as an object of Hindu veneration from a time that preceded the establishment of the mosque.[43]

Judge Sharma's reference to history and to the belief of devotees reveals considerable confusion whether Rama is a sacred figure located in historical time or whether he is a deified but mythological hero believed to have been born at the disputed site. This confusion is put to rest in some measure by Judge Agarwal, who casts the issue in terms of popular religious sentiment, an issue he posed by asking whether the disputed property was the birthplace of Rama according to the tradition, belief and faith of Hindus.[44] 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

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the site to be of essential significance to their faith. In turn, judicially divined popular belief became one among other qualifying reasons granting Hindu parties a proprietary right to a part of the disputed property.

To both these judges, the centrality of Rama to the Hindu religion was woven into evidence that they believed supported the fact that the mosque at the disputed property was built over a demolished Hindu temple. This finding allowed the judges to pull together a Hindu people who were tied to the disputed property even prior to the construction of the mosque. By extension, the Hindus are also imagined as a political community pulled together by the common historical wrongs suffered at the hands of alien Muslim rule.

Claiming rights to the mosque that they controlled for many hundred years, the Muslim parties could also assert that their mosque was an essential aspect of their tradition. However, even as they claimed that the mosque was dedicated for the benefit of the community, and that defending their claims to the mosque constituted an essential part of their religious tradition, the High Court set aside their contention relying on an earlier ruling in the earlier Supreme Court decision in *Ismail Faruqui v. Union of India*.[45] In this case, the Supreme Court had held that the Muslim community would have to demonstrate that a mosque had a special place in the Islamic tradition for it to be adjudged essential to the Islamic faith.[46] This demand is a clearly asymmetric demand that Muslims would have to discharge, but bracketing such normative aspects of this judgment, it is important to note that the local Muslims, like the Hindus, were now no longer disputing a local religious structure that was disputed and yet concurrently used by these communities for a considerable period of time. On the contrary, Hindu and Muslim identities were pulled together as embodiments of axiomatically and doctrinally organised divisions that constituted the Indian people. Consequently, this conceptualisation of a people divided by their religious truths formed a central aspect of the court's decision that divided the property into three parts between the three main claimants to the property.

On appeal the Supreme Court made a significant effort to distance itself from explicit reference to the essential religious beliefs of either the Hindus or the Muslims. After satisfying itself of the *bona fide* assertion of property rights claims by the contending parties, the court's efforts were directed at resolving what it saw to be the knotted issues of ownership and possession of the disputed property. These issues were considered alongside preliminary objections, important among which were the contentions that the suits were barred by time and that the doctrine of *res judicata* prevented the court from reopening substantially similar issues that were previously adjudicated. Having held that the claims of the parties were not time barred and that *res judicata*

did not apply to the dispute, the court proceeded to consider the issues of title, possession, as well as the acts of aggression that had marked the recent history to control the disputed property.

As with the High Court decision, the present discussion does not undertake a full technical appraisal of the court's reasons except to note that the court resolved the problem of title and possession by holding that both Hindu and Muslim parties had demonstrated possession of different parts of the property, that the idols were illegally placed in the disputed structure in 1949 and that the demolition of the disputed structure in 1991 was an illegal act. This determination of ownership and possession was arrived at without any significant reference to the essential truths of the Hindu and Muslim religions. Even so, when fashioning its final relief, the court decreed the disputed property entirely in favour of the Hindu parties. However, having also found that Muslim parties had demonstrated possession of the mosque before it was demolished, the court ordered the government to make alternative land available to the Muslim parties.[47] This is a curious aspect of the court's reasoning and requires closer examination.

The Supreme Court justified its decision to shift Muslims from the disputed site on multiple grounds. Procedurally, the court took the view that the earlier High Court decision that partitioned the suit property among the three main litigants was not asserted in the pleadings. Significantly, the relief that the Supreme Court granted the Muslim parties was also not drawn from the pleadings of the respective parties but from the extraordinary power granted to the court by Article 142 to do complete justice in matters pending before the court. Substantively, the court granted the Hindu parties complete possession over the whole of the property on the grounds that their claims to possession stood on a stronger footing. The legal correctness of the Supreme Court's reading of the relief granted by the High Court and its finding that the Hindus' claims were better supported by evidence are technical questions that will be bracketed from the present discussion.[48] However, against the background of the argument in this chapter it is relevant to highlight an incidental observation by the Supreme Court that it chose not to divide the property between the disputing parties as it was not in 'the interest of either of the parties or secure a lasting sense of peace and security'.

Though the court has made considerable effort to keep away all references to casting the disputed property as a contest between communities divided by their essential truths, this last comment bears a striking resemblance to colonial courts that saw the dispute as generated by an irreconcilably divided body politic. Further, though the Supreme Court carefully avoided framing

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the dispute like colonial courts in the main portion of its judgment, this colonial perspective is slipped into an unusual addendum that formed part of the judgment.[49] In this addendum the Supreme Court slides straight back into casting the dispute as one requiring the resolution of the question whether 'the disputed structure is the holy birthplace of Lord Ram as per the faith trust and belief of Hindus'[50] Consequently, drawing on scriptural and historical sources as well as oral testimony, the dispute is cast as a problem involving the essential doctrinal faith of the Hindu religion. Unlike in the High Court, the addendum does not make a pretence of having to balance this essential truth of the Hindus with a similar claim that could be made by Muslim parties. Thus, it is alongside this slanted deployment of essential Hindu truth in the addendum that the Supreme Court has put a lid on this long-standing dispute.

It is unclear whether the addendum to the judgment will be held by a future court to be legally binding. However, by fastening the disputed property to the essential doctrinal truths of the Hindu religion, the addendum has continued a long tradition of state practice that identifies religion and religious freedom with the truths of a people. Of course, the addendum is at best only a footnote to the *Ayodhya* judgment, but its presence in the judgment demonstrates the influence that the communal imagination of the essential practices test continues to exert on Indian state practice.

The *Ayodhya* case is a stark example of the way the essential practices formulation has communally inflected Indian constitutional identity. As already noted, the communal identification of the Indian people is not a necessary consequence that must follow either from the design of Articles 25 and 26 of the Constitution or even from the essential practices test as it was crafted before the Gajendragadkar Supreme Court. However, the wide judicial discretion to fashion essential doctrines permitted by the Gajendragadkar Supreme Court has skewed the determination of religious freedom towards the communal conceptualisation of the Indian people.[51] Consequently, it is along the range of possibilities in the interpretation of religious freedom that the *Ayodhya* case stands out as a particularly stark example of the communal as well as polarising effects of the essential practices approach to delimiting religion.

Constitutional design and practice, as already noted, point to the possibility of alternative normative choices that interpret religious freedom and consequently also conceptualise the Indian people differently. That is, it is possible to fashion religious freedom in ways that push aside the communal sensibilities that the essential practices test foregrounds and cast religious freedom in ways consistent with the people understood as a community of individual citizens. Consequently, drawing on these alternative normative

possibilities, this chapter draws to a close by locating the scheme of the essential practices test against other normative choices and their related forms of modelling the Indian people.

The Communal State and Its Alternatives

The efforts to describe and identify the communal tendencies that have shaped Indian constitutional practice, in both this chapter and this entire book, are set against the Constitution's broader liberal aspirations. These goals and normative frames consistent with them were mentioned briefly when referring to scholarship that interrogated the essential practices test on grounds that it sits uneasily with the normative scheme of the Constitution and its secular values. However, this liberal and secular dimension of the Indian Constitution was bracketed to explain and detail the essential practices test as an important strand in Indian constitutional reasoning. Having done so, it is now important to juxtapose these normative choices that the Constitution offers against the communal obstacle that this chapter has detailed. This task is illustrated through a brief examination of another recent Supreme Court decision as it has laid out normative choices available to bypass the communally inflected approach to delimiting religious freedom.

The *Sabarimala* Decision

In *Indian Young Lawyers Association v. State of Kerala*,[52] the Supreme Court considered a constitutional challenge to a customary practice that barred women between the ages of ten and fifty access to the well-known Ayyappan temple at Sabarimala in Kerala. The temple was under the overall superintendence of temple administration organised by the Kerala government and was subject to temple-entry legislation in Kerala that required all Hindu temples of a public character to permit access to all sections and classes of Hindus. According to denominational practice, this temple permitted access to all persons both Hindu and non-Hindu. Nonetheless, custom barred women in their menstruating years from accessing the temple on grounds that this was against the wishes of the deity at Sabarimala. Besides being defended as part of the religious freedom of the Ayyappans at Sabarimala, this practice was also said to be authorised by rules under the temple statute that permitted customary exclusion of women. Challenging this practice and the rules that were said to authorise it, the appellants argued that a temple, especially one under government

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superintendence, could not oversee practices that undermined existing law on temple entry and broader constitutional values.

This case generated much public debate on the extent to which the state ought to intervene in religious issues. However, glossing over the uproar that the case produced as well as the finer legal detail that was put up for resolution, this section only spotlights the way the judgment approached temple exclusion as an essential aspect of the Ayyappan tradition.

Through four separate decisions rendered in its *Sabarimala* judgment, the Supreme Court pronounced that the custom of excluding women at Sabarimala was illegal and unconstitutional. However, it is not this outcome that secured temple entry for women, but the extent to which the court was able to free itself from seeking out axiomatically organised essential religious truths or doctrines that this discussion will emphasise. Of course, not all the decisions in the judgment cut loose from their attachment to the essential practices framework. Thus, of the plurality of decisions that made up the majority decision to ban the exclusion of women from the temple, the joint decision of Justices Misra and Khanwilkar completely relied on the essential practices test. Their argument proceeds on the assumption that all Hindu women have a right to religious freedom guaranteed under Article 25(1). Consequently, as the Ayyappans as a denomination had not shown sufficient evidence to establish that the exclusion of Hindu women was an essential truth of their religious tradition, they could not displace the right of Hindu women to exercise their fundamental rights to practise their religion.[53] Nonetheless, it is important to note that this line of reasoning brought different approaches to essential religious practice to a head – that of the female devotees of Lord Ayyappan to freely practice religion and that of the Ayyapans as a denomination to access their religious traditions and exclude women from the shrine at Sabarimala.

Unlike Misra and Khanwilkar, all the other judges moved away in different degrees from the determining influence of the essential practices. The essential practices argument was only peripherally significant to Justice Nariman, who organised his opinion around the discriminatory potential of the temple exclusion rule issued under the Kerala Places of Worship Act. To this end he first pushed aside any demand to judicially consider the relevance of essential practice related arguments by holding that the Ayyapans were not a denomination whose essential practices required determination or recognition. Having done so, he organised his decision around the equal right of women to observe their religious faith as provided for in Article 25 and, most significantly, the fact that the temple exclusion rule violated

Article 15(1) of the Constitution, which prohibited discrimination based on, among other grounds, sex.[54]

Unlike Nariman, Misra and Khanwilkar, Justices Chandrachud and Malhotra subjected the essential practices test to searching enquiry and critique. Justice Chandrachud's opinion turns on his conception of constitutional morality, which he outlines as a normative orientation in the Constitution, especially in its equality provisions, that sought to transform and redress systemic discrimination against marginalised groups like women and *dalit*s. It is this transformative constitutional vision that helped him settle the claims of women demanding access to the temple as worshipers in their favour and against the conflicting demands of the institutional authorities seeking to defend custom and tradition. Importantly, he deploys constitutional morality to test essential religious practices by arguing that essential practices could be subjected to the anti-discriminatory aspirations of the Indian Constitution. In particular, he draws on the abolition of untouchability in Article 17 to argue that notions of purity and pollution that have powered the exclusionary form of caste society are also impermissibly at work in the exclusion of women from temples accessible to the public. Thus, his conception of religious freedom qualified the search for essential religious truth, subjecting it to secular public standards grounded on the transformative vision of the Indian Constitution, especially its commitment to equality and the abolition of untouchability in all forms.[55] That is, religious freedom is not seen as a stand-alone section of the Constitution but is tied into and read along with the other parts of the Constitution, especially fundamental rights, that emphasise the Constitution's transformative vision.

Like Justices Nariman, Misra and Khanwilkar, Justice Chandrachud also elected to permit the entry of women into the Sabarimala shrine. However, the dissenting decision of Justice Indu Malhotra voted to permit the shrine to hold on to its exclusionary customary practice. This decision also floats free from the essential practices test in a familiar manner that nonetheless bears recounting. In contrast to 'constitutional morality', the normative value that organised Justice Chandrachud's decision, Justice Malhotra's decision is animated by a commitment to toleration and pluralism. That is, she argued that courts ought not to second guess the constitutional rationality of religious practices, except in exceptional cases like Sati or egregious forms of caste oppression and exclusion. The exclusion of women from temples was to her a customary practice essential to the Ayyappan tradition as they viewed it, and unless the practice disclosed extraordinary injustice it ought to be left undisturbed.[56] In this respect her decision represents a pull back to

the original *Shirur Mutt* formulation of the essential practices test, before it was altered by Justice Gajendragadkar, where essential religious practices were held to include all aspects of a tradition as it was viewed by its adherents.

Collectively, these decisions represent a spectrum of normative positions that stack up alongside the Gajendragadkar-inspired essential practices test. The present narration only outlines the broad contours of these options and makes no attempt to choose between or argue for any one of them. On the contrary, recounting these options only makes plausible these alternative normative possibilities. However, could these options available in the *Sabarimala* judgment shine light on institutional practice seeking to break the grip of the essential practices test? This chapter concludes by briefly touching on this question and tying it to the account of the chapters that follow.

Conclusion

Much of this chapter sought to explain the essential practices test as it is nestled within the normative scheme of the Indian Constitution. Even as the test was traced to the colonial state, this chapter has also noted that the essential practices test sits uneasily within the normative structure of the Indian Constitution. However, having illustrated both the historical salience of the essential practices approach and its troubled place in the contemporary Constitution, it could be argued that reasoning like either judges Chandrachud or Malhotra could edge out the communal imprint of the essential practices test.

This is undoubtedly a real possibility. However, as the subsequent chapters will show, delimiting religion or a religious community by searching for its axiomatically organised foundational truths is not just a doctrinal and adjudicatory form of identifying the scope of religious freedom. More importantly, it is an axis along which the Indian people have been modelled. As a form of imagining the Indian people, the search and identification of axiomatically organised essential truth is also echoed in other key aspects of the Constitution. Accordingly, the chapters that follow identify and elaborate the ways axiomatically organised essential religious truth have identified the Indian people and has been woven into the regulation of personal law, minority rights and caste. These schemes of constitutional government interlock with each other to reinforce a communal conception of the Indian people posing a formidable alternative to the Constitution's liberal vision of individual citizenship. It is this alternative conceptualisation of the Indian people as it is nestled in the Indian Constitution that will be examined and elaborated in the chapters that follow.

Notes

1. For example, see Pratap Bhanu Mehta, 'On the Possibility of Religious Pluralism', in *Religious Pluralism, Globalization, and World Politics*, ed. Thomas Banchoff, 71–72 (New York: Oxford University Press, 2008). See also Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2007).
2. *Venkataramana Devaru v. State of Mysore* 1958 AIR 255.
3. This is illustrated in the contrasting opinions of Judges Nariman Chandrachud and Malhotra in *Indian Young Lawyers Association v. State of Kerala* MANU/SC/1094/2018; see also Gautam Bhatia, 'Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution', *Global Constitutionalism* 5, no. 3 (2016): 351.
4. This author has previously addressed issues arising out of this doctrine in Mathew John, 'Framing Religion in Constitutional Politics: A View from Indian Constitutional Law', *South Asian History and Culture* 10, no. 2 (2019): 124–35; Mathew John, 'Parochialism in Indian Constitutional Reasoning: The Case of Religious Freedom', *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 51, no. 3 (2018): 332–51.
5. *The Commissioner Hindu Religious Endowments, Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt* MANU/SC/0136/1954 (henceforth *Shirur Mutt*).
6. *Shirur Mutt*, para. 20.
7. *Venkataramana Devaru v. State of Mysore* 1958 AIR 255.
8. *Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya* MANU/SC/0040/1966; *Durgah Committee; Ajmer and Anr. v. Syed Hussain Ali and Ors.* MANU/SC/0063/1961; *Tilkayat Tilkayat Shri Govindlalji Maharaj v. State of Rajastan* MANU/SC/0028/1963.
9. Bhatia, 'Freedom from Community'.
10. *M. H. Qureshi v. State of Bihar* MANU/SC/0027/1958.
11. *Ismail Faruqui v. UOI* MANU/SC/0860/1994.
12. *Tilkayat Tilkayat Shri Govindlalji Maharaj v. State of Rajastan* MANU/SC/0028/1963.
13. *Jagdishwaranand v. Police Commissioner, Calcutta* MANU/SC/0050/1983.
14. *S. P. Mittal v. Union of India* AIR MANU/SC/0532/1982.
15. *Nikhil Soni v. Union of India* MANU/RH/1345/2015.
16. For example, see Bhatia, 'Freedom from Community'; Anup Surendranath, 'Essential Practices Doctrine: Towards Inevitable Constitutional Burial' *Journal of the National Human Rights Commission, India* 15 (2016): 159; Ronojoy Sen, *Articles of Faith: Religion, Secularism and Indian Supreme Court* (New Delhi: Oxford University Press, 2010).
17. For example, see opinion of Judge Chandrachud in *Indian Young Lawyers Association v. State of Kerala* MANU/SC/1094/2018.

18. For example, see Rawls, *Political Liberalism*; Jakob De Roover, *Europe, India, and the Limits of Secularism* (New Delhi: Oxford University Press, 2015).
19. See Smith, *India as a Secular State*; Chatterjee, 'Secularism and Tolerance'; De Roover and Balagangadhara, 'Liberty Tyranny and the Will of God'.
20. For example, see Mani, 'Contentious Traditions'; Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996); Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (New Delhi: Permanent Black, 2003).
21. Art. XXIII, Judicial Plan of 1772, IOR/H/420, 1772 (Extended by Justice Elijah Impey in 1882 to include 'Inheritance and succession as also to include the provision that cases where no specific directions had been given the courts was to act according to Justice, equity and good conscience'. ss. LX and XCIII Regulation VI 1781).
22. This has been done elsewhere. For example, see Smith, *India as a Secular State*.
23. See discussion in Mani, 'Contentious Traditions'.
24. See Mani, 'Contentious Traditions'; Andrea Major, *Pious Flames: European Encounters with Sati 1500–1830* (New Delhi: Oxford University Press, 2006); De Roover and Balagangadhara, 'Liberty Tyranny and the Will of God'.
25. See Also Chandra Mallampalli, *Race, Religion and Law in Colonial India: Trials of an Interracial Family* (Cambridge, UK: Cambridge University Press, 2011); Teena Purohit, *The Aga Khan Case: Religion and Identity in Colonial India* (Sew edn, Cambridge, MA: Harvard University Press, 2012).
26. Mani, 'Contentious Traditions'.
27. Mani, 'Contentious Traditions'.
28. Chatterjee, *The Nation and Its Fragments*.
29. Chatterjee, *The Nation and Its Fragments*.
30. Chatterjee, 'Secularism and Tolerance'.
31. Chatterjee, 'Secularism and Tolerance'.
32. Abdul Gafoor Noorani, *The Babri Masjid Question, 1528–2003: 'A Matter of National Honour'*, vol. 1 (New Delhi: Tulika Books, 2004) 181.
33. Noorani, *The Babri Masjid Question*.
34. Noorani, *The Babri Masjid Question*, 1: 182–84.
35. Noorani, *The Babri Masjid Question*, 1:186–88.
36. Geetanjali Srikantan, 'Reexamining Secularism' *Journal of Law, Religion and State* 5, no. 2 (2017): 117.
37. Sushil Srivastava, 'How the British Saw the Issue', in *Anatomy of a Confrontation: The Babri Masjid–Ramjanmabhumi Issue*, ed. Sarvepalli Gopal, 38–57 (New Delhi; New York, NY Penguin Books, 1991). See also Ashis Nandy, Shikha Trivedy, Shail Mayaram and Achyut Yagnik, *Creating a Nationality: The Ramjanmabhumi Movement and Fear of the Self* (New Delhi: Oxford University Press, USA 1998).
38. *Ismail Faruqui v. Union of India* MANU/SC/0126/1995.

39. *Gopal Singh Visharad and Others v. Zahoor Ahmad and Others* MANU/UP/1185/2010.
40. *M Siddiq v. Mahant Suresh Das* MANU/SC/1538/2019.
41. For a short and useful summary of the High Court decision, see Aparna Chandra, 'Gopal Singh Visharad and Ors V. Zahoor Ahmad and Ors., O.S.Nos. 1/1989, 3/1989, 4/1989, 5/1989: A Summary of the Babri Masjid-Ram Janm Bhoomi Decision', 2010, SSRN eLibrary, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690803, accessed 17 February 2011.
42. See also Chandra, 'Gopal Singh Visharad and Ors V. Zahoor Ahmad and Ors.'
43. Judge Sharma, MANU/SC/0126/1995 Vol. 4.
44. Judge Agarwal, MANU/SC/0126/1995, paras 4079–4418.
45. MANU/SC/0126/1995.
46. In addition Justice Sharma also held that the mosque itself was not constructed according to the tenets of Islam for the following reasons: (1) The mosque did not have minarets as mandated by Islamic tenets. (2) It was unusual and against Islamic tenets for a mosque to be surrounded by graveyards. (3) It was unusual for a mosque to be surrounded by Hindu religious structures. (4) The mosque did not have a bathing pool for devotees to wash themselves before worship. (5) There were images and idols on the walls of the disputed property. (6) Discussing the nature of Islamic public trusts or *wakf*s he said the property on which a mosque is constructed must belong to the person dedicating the *wakf* if such dedication was to be valid. As an invader he held that Babur could not have owned the disputed property and therefore the mosque was not validly constructed according to the tenets of Islam. (7) Lastly, and strangely, Justice Sharma even seems to hold that the demolition itself was a reason to assert that no mosque existed at the place and that no Islamic religious rites are followed at the site as a result. See Chandra, 'Gopal Singh Visharad and Ors V. Zahoor Ahmad and Ors.'
47. *M Siddiq v. Mahant Suresh Das*, paras 768–805.
48. *M Siddiq v. Mahant Suresh Das*, paras 768–805..
49. *M Siddiq v. Mahant Suresh Das*.
50. Addendum to *M Siddiq v. Mahant Suresh Das* MANU/SC/1538/2019, para 31.
51. This is well described by Ronojoy Sen who points out that essential practices have tended to delimit localised denominational practices in the image of Hindu high traditions, where the Hindu religion often stands in for a Hindu people. Sen, *Articles of Faith*.
52. MANU/SC/1094/2018
53. *Indian Young Lawyers Association v. State of Kerala*, paras 122–23
54. *Indian Young Lawyers Association v. State of Kerala*, paras 174–77
55. *Indian Young Lawyers Association v. State of Kerala*, paras 258, 286.
56. *Indian Young Lawyers Association v. State of Kerala*, para 304.