

## Asia Research Centre Working Paper 17

# Indian Exceptionalism?

## A Discussion on India's Experiment with Constitutional Secularism

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The secular state is the most important of contemporary institutional forms available to deal with the problem of sectarian violence in liberal democracies. Despite this, the commitment to constitutional secularism seems to be in crisis, constituting deep fault lines in democratic politics across the world. Within the Euro-American context the secular state seems to have run into trouble with immigrants, especially Islamic communities. Beyond its founding context, well-directed postcolonial polemic in countries like India has seriously questioned the very usefulness of the secular state for non-Western polities. As an avowedly secular state it therefore seems crucial for a profoundly diverse country like India to be able to think through the extent to which the secular state can be defended against some of the challenges being mounted against it. This paper contributes to this contemporary debate on secularism by discussing the claims to an 'exceptional' model of Indian secularism made by the Indian Supreme Court. In doing so it argues with the court on the routes by which such an exceptional model can be (if at all) elaborated and defended.

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## Introduction

On the 11<sup>th</sup> of February 2006 the Economist newspaper published a lead article on the prophet Muhammad cartoon controversy that gripped most of western Europe and even parts of North America<sup>1</sup>. The article began with a satirical reading of a reasonably well-known quote by Voltaire which read "I disagree with what you say and even if you are threatened with death I will not defend very strongly your right to say it". This parody of Voltaire was intended to convey to its audience the tragically weak willed responses of European governments to the controversy. A weakness the Economist claimed was threatening a cardinal value of liberal society – That is, the commitment to freedom of speech. Though one could dismiss the newspapers position as a touch too alarmist it is hardly far fetched to suppose that it does amplify a general sense of unease and threat across much of western Europe. This paper speaks to this sense of unease by trying to follow the implications of what it might mean to take the sense of threat to liberal values seriously. That is, to attempt identification of the limits of liberal society and the conditions within which it can be rendered intelligible.

The paper is organised in the following manner. First it will briefly run through the range within which liberal democracies respond to the kind of problem thrown up by the cartoon controversy. Second it runs through the Indian constitutional scheme on religion and the manner in which contrast to liberal values. Third it tries to speculate on what we might make of the contrast of the Indian case. All along the paper presumes the equivalence of liberal society and secular society. Liberal society being the social form derived from Europe's attempt to build societies where confessional allegiances were irrelevant to civic governance from around the 16<sup>th</sup> and 17<sup>th</sup> centuries. Very roughly invocation of either of these terms is intended to convey a commitment to the values of liberty and fairness.

## The Problem

The cartoon controversy as well as other similar cases like the French ban on wearing religious markers in public schools and in the more distant past the case of Salman Rushdie's offending book the *Satanic Verses* have all been characterised in western liberal societies as exemplifying a particular kind of problem. Viz. How to accommodate minority communities or positions within liberal society?

The range of answers to this question within a liberal society is popularly organised under the debate termed multiculturalism. A debate conducted between poles styled the libertarian and the communitarian positions<sup>2</sup>. Very generally the libertarian position emphasises the individual as the sole locus of universal rights allowing no such concession to particular communities. This position advocates for the creation of a neutral public sphere where particular notions of the good life (religion being one such conception of the good life) are bracketed off from public deliberation. On the other hand the communitarian position allows for some concessions to particular communities and argues for working through contentious issues through public deliberation. However no concession granted to particular communities can be inconsistent with liberal values of freedom and fairness.

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<sup>1</sup> Lead Article in Economist, February 11<sup>th</sup>-17<sup>th</sup> 2006., p. 11.

<sup>2</sup> A good example of the contours of these contending positions can be found in the exchange between Chandran Kukathas and Will Kymlicka. *Political Theory*, v.20 no.2, (1992).

In our cartoon example a libertarian position would strongly emphasise the right free speech and therefore will be more accepting of the blasphemous consequences that might follow. A communitarian position on the other hand would be a little less generous with free speech and will try and argue the need for provisions against hate speech. One way or the other it is important to emphasise that both positions are only variations of the more general liberal model and that both positions are grounded on a commitment to liberty of individual citizens and equal treatment of citizens.

Presumably, in responding to the cartoon controversy the Liberals believe that the terms of resolution that we have just outlined above are being threatened by adverse Muslim responses to the liberal emphasis on freedom. On their part Muslims see these responses as blasphemous and it is the very terms of the liberal resolution (i.e. of supposed indifference of the liberal state) of the cartoons incident that some (if not many) of them find objectionable.

In picking up the contending ends of the responses to the cartoons problem as we have just done we could well say that we are trotting at the outer limits of liberal society – The liberal position seeking to reign in Muslim responses and the Muslim responses on their part seeking to move beyond the boundaries circumscribed by liberal society. Conventionally it is not possible to follow the line of argument articulated by the Muslims as it is charged with being socially anarchic or as being unfair and sectarian<sup>3</sup>. As result there is very little serious intellectual reflection that pushes or breaks through the boundaries of liberal society<sup>4</sup>. It is in this context that the Indian Supreme Court's elaboration of an exceptional model of Indian secularism assumes a special salience for the study of the limits of liberal politics.

## The Indian Supreme Court on Secularism

In dealing with secularism in India the paper will restrict itself only to the manner in which the Indian constitution deals with religious freedom. There are of course a range of other provisions in the constitution that challenges a conception of secularism conventionally understood, however we stick to just one instance in the Indian constitutional scheme to unravel the larger problem that we started with at the beginning of the paper. Viz. Does the Indian constitution instantiate the limits of liberal politics? If so in what manner is it exceptional to liberal politics?

The Indian constitution is very detailed in the manner in which it organizes itself in relation to religion. The right to religious freedom is elaborated in Articles 25-28 of the constitution. The first of these (Art. 25(1)) provides for the right freedom of conscience as well as the right to practice, profess and propagate religion. These rights are subjected to the normal liberal constraints of public order, health, morality etc. In addition to these expected provisos the Indian constitution adds on a few more constraints to the freedom of religion (in Art.25(2)(a)&(b)). These empower the state to make law 'regulating or restricting regulating or restricting any economic, financial, political or other secular activity which may be associated

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<sup>3</sup> See for instance the response of Amy Guttmann to Michael Ignatieff in Michael Ignatieff and Amy Guttmann (ed), *Human Rights as Politics and Idolatory*, (Princeton University Press, 2001).

<sup>4</sup> Even the Marxist tradition can be read to be a distilled version of liberalism. For instance, Karl Marx on the Jewish question.

with religious practice<sup>5</sup> or 'providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus'<sup>6</sup>.

The right to freedom is further clarified in Article 26 which provides for corporate freedom to all religious denominations, permitting them to maintain their affairs in matters of religion, to own and acquire property and to administer property in accordance with law. Further Article 27 indicates that taxes could be levied for religious purposes as long as it is not specifically appropriated for the payment of expenses of any particular religion. Lastly Article 28 of the constitution provides that religious instruction could be provided even in educational institutions partly funded by the state provided that the institution had been established under an endowment or trust, which required that religious education, is imparted. In such institutions however no one can be required to attend religious instruction without their consent<sup>7</sup>.

Art. 27 and Art. 28 could pose problems for liberal politics as they might be seen as establishing religion<sup>8</sup>. However liberal politics might find a way to deal with this problem through pragmatic reasoning arguing that the freedom of religion, the value that disestablishment seeks to further, is actually furthered by some element of state support to religious and parochial institutions<sup>9</sup>. However Arts.25(2)(a)&(b) which gives the state sweeping powers to intervene and reform religion would be less amenable to liberal defence. Exploring the scope of interventionist power vested in the Indian state might therefore speak to our search for the limits of liberal politics. We do so through decisions of the Indian Supreme Court.

To decide on the scope of power to regulate religion vested with the Indian state the courts had to work out a scheme by which the power of regulation and reform granted by Art. 25(2) (a) and (b) was to be reconciled with the freedom granted under Art. 25(1) and Art.26. The terms to reconcile this problem was first addressed by the Indian Supreme Court in a 1954 case titled *The Commissioner Hindu Religious Endowments, Madras v. Sri Laxmindra Thirtha Swamiar of Shirur Mutt*<sup>10</sup>. Among other issues the case dealt with the contest by the head of a Mutt (a 'Hindu' religious and educational centre) located at a place called Shirur on the west coast of India over a 'scheme' (that is, to take over aspects of the management of a Hindu religious institution) for the Mutt proposed by the Commissioner of Hindu Religious and Charitable Endowments under the Madras Hindu Religious and Charitable Endowments Act, 1951. Under the act the commissioner could frame and settle a 'scheme' if he had reason to believe that such religious institution was mismanaging the resources placed under its care or being run contrary to the purposes for which they are founded.

In contesting the 'scheme' framed by the commissioner the head of the Mutt claimed that the 'scheme' violated its freedom to religion provided for under Art. 25(1) and Art.26 of the constitution. The State on its part contended that it had the broadest powers of regulating 'secular' aspects related to religion under Art. 25(2)(a) and the right to freedom extended only to the relationship between a believer and his Deity. It was therefore incumbent on the court to

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<sup>5</sup> Art. 25(2)(a)

<sup>6</sup> Art. 25(2)(b)

<sup>7</sup> Article 28.

<sup>8</sup> A problem that has engaged the constitutional politics of the United States of America in considerable detail.

<sup>9</sup> For a version of this argument see Gutmann, Amy, "Religion and State in the United States: A Defense of Two-Way Protection" in Rosenblum, Nancy L(ed), *Obligations of Citizenship and the Demands of Faith*, (Princeton University Press, 2000), pp. 127-164.

<sup>10</sup> AIR 1954 SC 282

balance the powers given to the state under Art. 25(2)(a) and the rights given to religious groups under Art. 25(1) and Art. 26.

In dealing with this problem the Court refused to buy the State's position that the scope of the word religion in Art. 25(1) extended only to the relationship between believers and their deities. In rejecting this minimalist conception of religion the court held that religion implied a range of ritual practices that were integral to its practice. The determination of this broader notion of religion was to be arrived at by what the court by taking into consideration what the religious denomination considered essential or crucial to the understanding of its denomination. This test of arriving at the definition was called the essential practices test and was to balance the powers of the State to regulate religion and the rights of communities to religious freedom. That is, the essential core of the religion was inviolate and bracketed off for religious freedom and all that was not the essential core was liable to regulation. Interesting to note in this resolution of the contending pulls of the various provisions relating to religious freedom is that this essential core cannot be determined in any way but by the court's doctrinal exegesis of particular religions.

Though in the Shirur Mutt case the court attempted a characterisation of religion that substantially identified with the subjective account of the community, repeated State assertion of its powers arising from the interventionist structure of Art.25(2)(a)&(b) has substantially eroded this subjective element in the determination of the essential core of religions. This erosion is best captured in the comment in of Justice Gajendragadkar in the *Durgah Committee* case<sup>11</sup>. According to him 'practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other'. The essential practices test had in a matter of speaking been transformed from answering to the subjective perceptions of the community to becoming the subjective determination of judges.

The slide of the essential practices test into the subjective determination of judges allowed the courts to assume and legitimate broad ranging interventionist stances in relation to religion. Accordingly the court deprived the Khadims of the Ajmer Durgah some of their traditional rights to gifts and offerings made at the Durgah<sup>12</sup>, refused to accept the rights of those traditionally associated with the Nathdwara temple in Rajasthan<sup>13</sup>, even against their protest declared the Satsangis to Hindus and threw open their temples to all other Hindus<sup>14</sup>, stipulated for the Anand Margis that the tandava dance was not a significant part of their religion<sup>15</sup>, informed Muslims that cow sacrifice was not an essential part of the Islamic faith<sup>16</sup> and also told Muslims that praying in a mosque was not crucial to Islam as Muslims could pray anywhere<sup>17</sup>. Also, the force of the interventionist logic has been so striking that the court significantly eroded the right of religious denominations to administer their property in accordance with law under Art. 26(d), allowing the state to take over and manage many temple administrations<sup>18</sup>.

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<sup>11</sup> AIR 1961SC 1402

<sup>12</sup> *Durgah Committee Ajmer v. Syed Hussain* AIR 1961SC 1402.

<sup>13</sup> *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* AIR 1963 SC1638.

<sup>14</sup> *Sastri Yagnapurushadji And Others v. Muldas Bhudardas Vaishya* AIR 1966 SC 1119.

<sup>15</sup> *Jagdishwaranand v. Police Commissioner, Calcutta* AIR 1984 SC 51.

<sup>16</sup> *M.H. Qureshi v. State of Bihar* AIR 1958 SC 731

<sup>17</sup> *Ismail Faruqui v. UOI* (1994) 6 SCC 360.

<sup>18</sup> See *Bhumi Nath v. State of J&K* (1997) 2 SCC 745; *Sri Adi Vishveshar of Kasbi Nath* (1997) 4 SCC 606; *Sri Sri Lakshmana v. State of A.P* (1996) ( SCC) 548; *Pannalal v. State of A.P* (1996) 2 SCC 498; *Shri Jagannath Puri Management Committee v. Chantamani Khuntia* (1997) 8 SCC 422.

The structure of the adjudicatory framework grounded in the essential practices test does suggest that there is something in Indian constitutional practice that is apart from the liberal approach to religion. However the adjudicatory practice is not self standing elaboration of how exactly the Indian practice is different from the liberal politics. To clarify the contours of this Indian model we have to turn our attention to the Indian Supreme Courts defence of what it understands to be a distinctly Indian version of the secular state.

Secularism is part of the preamble to the Indian constitution and has been defended by the Supreme Court as part of the un-amendable basic structure of the constitution. If Indian secularism is exceptional to the liberal model then how do we understand the India constitution to be secular? We will try to answer this question by examining a few key Supreme Court decisions that have declared secularism to be an animating principle of the Indian constitution.

The courts first declared secularism to be part of the un-amendable basic structure of the Indian constitution in the *Keshavananda Bharathi case*<sup>19</sup>. However it was not until the *Bommai case*<sup>20</sup> that the court comprehensively argued for and defended secularism's place in the constitution. In *Bommai*, three divergent assertions holds together (or fails to) the court's position secularism. First, the court asserts that secularism was crucial to ensure the right to freedom of religion and the concomitant right to be treated equally by the state irrespective of religious affiliation<sup>21</sup>. In the words of Justice Ramaswamy 'the state guarantees individual and corporate religious freedom and deals with an individual as citizen irrespective of his faith and religious belief and does not promote any particular religion nor prefers one against another. The concept of the secular State is, therefore, essential for successful working of the democratic form of Government'. Second, the court asserted that that secularism (the constitutional frame in relation to religion) derives from the Indian civilizational or cultural ethos of tolerance and communal harmony. Accordingly many of the judges in the case were satisfied to hold that secularism was embodied in, and could be derived from the diverse cultural traditions of India<sup>22</sup>. Third, flowing from its understanding of secularism as part of the Indian civilizational ethos, the court enunciated, in the words of Justice Jeevan Reddy, a *positive* secularism, asserting for itself a revolutionary and civilizational role to decisively intervene in situations where such secular civilizational values are under threat.

The court therefore seems to be offering a two fold defence of secularism. First by defending the freedom of religion. Second it argues that the distinctive interventionist structure of the constitution is an embodiment of India's civilisational traditions of tolerance. If an exceptional claim to the secular state is to be made it is to be found in the latter proposition. The question is how we can extract that claim. Classic arguments for toleration are grounded in the defence and provision of liberty<sup>23</sup>. Therefore if there is indeed distinctness to Indian traditions of toleration then this route is not available to us. That is, a distinct Indian secularism would have to be argued for differently.

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<sup>19</sup> (1973) 2 SCC 225

<sup>20</sup> *S.R. Bommai v. Union of India* (1994) 3 SCC 1

<sup>21</sup> *Ibid*, Para 178.

<sup>22</sup> *Ibid*, As per Ahmadi, para 26; Sawant, para 147; Ramaswamy, paras 180, 186;

<sup>23</sup> The font of these arguments usually being John Locke, *A Letter Concerning Toleration*, (Bobbs-Merril Educational Publishing, Indianapolis, 2ed, 1978).

The Indian Supreme Court hints on how this tradition might be accessed by asserting that it is to be found in 'Hindu' thought. The court however does not specify on how exactly Hindu thought might make for a distinct Indian secularism. That problem aside there seems to be a preliminary problem with the very intelligibility of the category 'Hindu' on which the court pins its hopes to discover an Indian secularism. Let us elaborate this through the court's own ruling on the question of how one might understand the term Hindu.

*Sastri Yagnapurushadji And Others v. Muldas Bhudardas Vaishya*,<sup>24</sup> is a case that addresses temple entry legislation enacted in many Indian states in keeping with the constitutional mandate given to the state to reform regressive practices within the 'Hindu' religion. The present case relates to the followers of Swami Narayana or Satsangis, a Vaishnavite sect who claimed that they were not bound by the provisions of the Bombay Hindu Places of Public Worship Act (Entry Authorization) Act, 1956 to open up their temples to all classes and sections of Hindus. One of the claims that the Satsangis adduced before the Supreme Court was that they were not part of the Hindu religion and hence not bound to let all Hindus of all castes and classes enter their temple. Much to the protest of the community, the Supreme Court responded to their claim by entering into a theological exposition of the tenets of Hinduism and concluded that the Satsangis were in fact Hindus.

Relying on S. Radhakrishnan, Max Muller and Monier Williams, the court describes Hinduism in broad and general terms finding 'it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion 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'<sup>25</sup>. The court then circumvented the obvious problems of identification that such a definition posed, by positing that under this great diversity there were certain basic features like the acceptance of the Vedas as the highest authority in religious and philosophical matters, the great world rhythm and belief in preexistence and rebirth<sup>26</sup>. Adapting Radhakrishnan the court then held that gaining freedom from unending cycle of births and rebirths was the ultimate aim of the Hindu religion. Interpreting Hinduism in this fashion the court held that the Satsangis were Hindus and further went on to hold that their views on temple entry were based on a mistaken and false understanding of the teachings of their founder, Swami Narayan<sup>27</sup>. Right through this argument however, the court never explains how Hinduism, which is nothing more than an all encompassing way of life, is at the same time a religion grounded in the Vedas and seeking freedom from the unending cycle of births and rebirths.

If the category of Hindu does not stand up or disappears when put to scrutiny then it seems that we come against a conceptual difficulty in understanding the productions of the Indian court. The professedly Indian secular model does seem to push beyond the range of reference or the limits of the liberal model. However at the very same time it seems equally incapable of propping itself as conceptually distinct and carrying its own specific burdens. Why is this so?

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<sup>24</sup> AIR 1966 SC 1119; For a detailed account of the issues straddled by this case See Galanter, Marc, "Hinduism, Secularism and the Indian Judiciary" in Rajeev Bhargava (ed), *Secularism and its critics*, (Oxford University Press, Delhi, 1998), 268-291

<sup>25</sup> AIR 1966 SC 1119 at p. 1128.

<sup>26</sup> *Ibid* at p. 1130

<sup>27</sup> *Ibid* at p. 1135

What kind of difficulty have we come up against? Why is it that the courts cannot work a measure of coherence to their statements on secularism?

## Towards a Conclusion

To answer the puzzle that we have come up against it might be useful to introduce some historical constraints on our discussion. Historically summing up the project of secularism in contemporary India Partha Chatterjee describes it as a two fold process – that of instituting a modern liberal state and simultaneously of rationalising, modernising or reforming religion. Chatterjee also draws on a quote by B.R.Ambedkar in the constituent assembly to elaborate a very typical formulation of this position. According to Ambedkar

“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 would 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 it beyond beliefs and such rituals as maybe connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion .... 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’.

As we have just captured it the secular project in India has been driven by liberal imagination tied inextricably to a project of social reform. That is, a project that believed that India could be liberal only if it substantially reformed itself<sup>28</sup>. Though there is a high degree of internal coherence<sup>29</sup> to this position it is one that cannot be liberal or secular normally understood. The moment the state executes its reformist project it can no longer be secular. Framed in this fashion the incoherence of the secular state in India is the manifestation of the difficulties faced in putting the liberal project into action in India. In other words the liberal project is faced with its limits in trying to actualise itself in India.

Despite its contradictions, the project that goes under the name of Indian secularism or Indian liberalism has had a life of its own under the supervision of Indian courts. That is, through the wide ranging adjudicatory positions that courts have taken in relation to the range of problems brought to them under provisions like Art. 25-28. That process of adjudication will no doubt continue. However what our discussion on these adjudicatory positions has brought to our attention is the divergence between what the court says and what it does. That is, the court claims to act in the name of secularism but it is difficult to understand in what manner of that word the Indian constitutional scheme is secular and the Supreme Court an upholder of that secular order? Answering this question brings back once again the issue of the limits of the liberal project. What we have managed to do through our discussion is indicate at the level of *form* the contradictions of the debate that goes on under the banner of Indian secularism. However we have not managed to *explain* why law and politics into and through the constitution took the particular shape that it did. It is this intellectual and conceptual problem that we will have to answer to be able to render intelligent the character of the liberal project, the contexts of

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<sup>28</sup> To modernise its society and rid itself of practices like caste and so on.

<sup>29</sup> That is, in its belief and desire to be secular

its relevance or alternatively the limits of its applicability<sup>30</sup>. That is, enquiry that will generate the *explanations* to understand the limits of liberal multiculturalism in the west as also the problems that we have noticed with cases like the Indian experiment with constitutional secularism.

Though this paper will not be able to handle this problem in any depth we must hazard the tentative directions that enquiry has to traverse to address these problems. The anomaly that we have noticed in the Indian experiment with secularism was the power vested in the state to re-order Indian religions or traditions so that that the state could then be modern and liberal. Explaining the problem of Indian secularism would therefore involve comprehending and explaining the point of view that felt obligated to reform Indian customs and traditions so as to be able to create a modern state. The point of view of course was and probably still is the European liberal tradition. The question for future research on the anomalies produced by the Indian secular state in is the manner in which the liberal tradition understands customs and traditions and the manner in which these customs and traditions have been read by the liberal tradition as it exported itself to farthest corners of the globe.

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<sup>30</sup> Assuming of course that the Indian model stands up to some idea of justice howsoever broadly understood.

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