

TOWARDS *CUL-DE-SAC*: REFLECTIONS ON THE DESIRABILITY OF HOMOGENEOUS CONSTITUTIONAL IDENTITY IN INDIA

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Abstract

Supreme Court's split verdict on Karnataka State Government's Hijab ban on educational institutes brings out the dichotomous understanding of Constitutionalism and its relationship with plurality. Similarly, the Court in earlier case of Mohd. Zubair Corporal No. 781467 Vs. Union of India & Ors. held that the parameter for freedom to manifest one's religion are not the same in disciplined forces and secondly, maintenance of a beard is not an essential tenet of religion. Both judgments emphasized the need for homogeneity and uniformity as an aspirational path leading to 'national unity'. Romanticization with homogeneous 'national' identity informed recent mainstream political discourses as well. Indian Home Minister, Amit Shah's aggressive and continuous push for Hindi as the national language of India has generated an acutely polarized understanding of what is our constitutional identity. His commitment to 'national' assimilation despite the history of violent linguistic sub-nationalism in the subcontinent countries (leading to the breakdown of Pakistan and prolonged civil war in Sri Lanka) is buttressed by aspirations for creating a homogenized national identity and dissolution of cultural differences.

Consequently, aspirational 'national' identity is breeding intolerance towards other ways of being. The intolerance is now resurging violently in the form of a radical Hindutva ideologue. The provocative hate

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speech, call for arms, and “safai ayvam Myanmar jaisa” was asserted as a need of the hour by powerful religious leaders in Dharam Sansad which was held last year.

The contemporary milieu around identity discourses warrants pressing questions about constitutionalism and its relationship with pluralism in post-colonial societies of South Asian countries. The contemporary politico-legal discourses surrounding the need for the decolonization of ‘Eurocentric liberal constitutionalism’ and its manifest failures to confront the civilizational issues in the sub-continent require us to reformulate, reimagine, and if possible, recalibrate the contours of constitutional consciousness in South Asia.

The primary objective of this essay is to inquire (i) whether ‘imagined’ constitutional identity by institutional functionaries is premised on the normative paradox in modern constitutionalism and secondly, (ii) whether there are avenues for providing equal playing ground to decolonial ontological, epistemological and theological systems?

I intend to do so by unpacking how judicial understanding of “constitutional” identity with aspirational western modernity accentuated the chasm in India- civilization with plural ontological, epistemological, and theological value systems.

Introduction

What is our aspiration for the future? Our aspiration is this. Unfortunately, the country has been divided into so many classes and communities. We should proceed in such a way that all the different communities may vanish and we may have one nation, the Indian nation. If we proceed as the British did, with this class and that class, with this. area and that, we shall fail in the future.¹

¹ Babu Ramnarayan Singh speech, *Constituent Assembly of India Debates* (CAD) (Delhi: Government of India Press, 1949), pp. 984.

- Babu Ramnarayan Singh, Constituent Assembly (5th September 1949)

The abstract idea of fraternity, ..., has to be applied to the ground realities wherein some students wearing headscarf in a secular school run by the State Government would stand out and overtly appear differently. The concept of fraternity will stand fragmented as the apparent distinction of some students wearing headscarf would not form a homogenous group of students in a school where education is to be imparted homogeneously and equally, irrespective of any religious identification mark.²

- Justice Hemant Gupta in *Aishat Shifa Vs. State of Karnataka & Ors.* (2022 case)

Indian Constitutionalism's relationship with plurality is chequered since its inception (the first quoted excerpt is a part of Babu Ram Narayan Singh's speech in Constituent Assembly wherein he strenuously attacked the tribal autonomy provisions in the Constitution)³ to the recent split verdict of Supreme Court concerning Karnataka State Government's *Hijab* ban on educational institutes (The second quoted excerpt is part of Justice Gupta's verdict; he upheld the validity of Government's order).⁴ Justice Dhulia's pronouncement in *Hijab* Ban case brings out this befuddled judicial understanding acutely. His observations concerning intersectionality between uniformity and dignity stands at a sharp contrast with Justice

² *Aishat Shifa Vs. State of Karnataka & Ors.* [2022] SCC OnLine SC 1394 < https://www.livelaw.in/pdf_upload/842-aishat-shifa-v-state-of-karnataka-13-oct-2022-439216.pdf > accessed 2 March 2023 (*Hijab* Ban case).

³ For further reading on tribal autonomy premised conversations in Constituent Assembly, see – Selma K. Sonntag, 'Autonomous Councils in India: Contesting the Liberal Nation' (1999) 24 *Alternatives*, 415-434; Valerian Rodrigues, 'Citizenship and the Indian Constitution' in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

⁴ *Hijab* ban case (n 1).

Gupta's articulations regarding uniformity enabling fraternity. He stated –

School is a public place, yet drawing a parallel between a school and a jail or a military camp, is not correct. Again, if the point which was being made by the High Court was regarding discipline in a school, then that must be accepted. It is necessary to have discipline in schools. But discipline not at the cost of freedom, not at the cost of dignity. Asking a pre university schoolgirl to take off her hijab at her school gate, is an invasion on her privacy and dignity...This right to her dignity and her privacy she carries in her person, even inside her school gate or when she is in her classroom.⁵

Justice Dhulia's pronouncement is widely celebrated but even it has normative paradox concerning plurality especially his comparative analogy with jail or military camp is illustrative of the limits of pluralism.⁶

Romanticization with homogeneous 'national' identity informed recent mainstream political discourses as well. Indian Home Minister, Amit Shah's aggressive and continuous push for Hindi as the national language of India has generated an acutely polarized understanding of what is our constitutional identity.⁷ His commitment

⁵ Ibid, Dhulia's judgment (para 52). For analysis of Dhulia's pronouncement, see, Vineet Bhalla, 'Decoding the Supreme Court's split verdict on hijab ban' (*The Leaflet* 13 October 2022) < <https://theleaflet.in/decoding-the-supreme-courts-split-verdict-on-hijab-ban/> > accessed 3 March 2023;

⁶ Apex Courts have consistently set the limitations of plurality in terms of disciplined forces – see *Mohd. Zubair Corporal No. 781467 Vs. Union of India & Ors.* [2017] 2 SCC 115; *Mohd. Farman Vs. State of UP through Principal Secretary* [2021] SERVICE SINGLE No. - 17225 of 2021.

⁷ Express News Desk, 'People from different states should speak in Hindi, not English: Amit Shah' (*The Indian Express* 9 April 2022) < <https://indianexpress.com/article/india/people-different-states-should-speak-hindi-not-english-shah-7858861/> > accessed 3 March 2023; For disquisition over it, see Editorial, 'Undesirable and divisive: on Amit Shah's push for Hindi' (*The Hindu* 17

to ‘national’ assimilation despite the history of violent linguistic sub-nationalism in the subcontinent countries (leading to the breakdown of Pakistan and prolonged civil war in Sri Lanka) is buttressed by aspirations for creating a homogenized national identity and dissolution of cultural differences. These disquisitions are also reminiscent of the last decade’s Supreme Court’s jurisprudence wherein the judicial test of ‘constitutional morality’ found itself at the crossroads with cultural and religious pluralism (protest against criminalization of instantaneous *talaaq*⁸ or the *Sabarimala* verdict⁹ or *Khap Panchayat*’s open dismissal of the Court’s verdict¹⁰ concerning honor killings¹¹).

The contemporary milieu around identity discourses warrants pressing questions about constitutionalism and its relationship with pluralism in India especially when (i) constitutional values are used as a rhetoric to justify religious persecutions or cow vigilantism¹²; and (ii) Apex court becomes the contesting sites for such civilisational issues. The contemporary politico-legal discourses surrounding the need for the decolonization of ‘Eurocentric liberal constitutionalism’ and its manifest failures to confront the civilizational issues in the sub-

September 2019) < <https://www.thehindu.com/opinion/editorial/undesirable-and-divisive/article59779520.ece> > accessed 3 March 2023.

⁸ *Shayaro Bano Vs. Union of India & Ors.* [2017] 9 SCC 1.

⁹ *Indian Young Lawyers’ Association & Ors Vs. State of Kerala & Ors.* [2018] SCC online SC 1690 (*Sabarimala* case).

¹⁰ *Shakti Vabini Vs. Union of India* [2018] 7 SCC 192.

¹¹ Ashutosh Sharma, ‘Love In The Crosshairs: Honour Killings Still Continue In India’ (*Outlook* 15 January 2022) < <https://www.outlookindia.com/magazine/story/india-news-love-in-the-crosshairs-honour-killings-still-continue-in-india/305349> > accessed 3 March 2023.

¹² Constitution of India 1949, Art. 48 (Directive Principles); Prevention of Cruelty to Animals (Regulation of Livestock Market) Rules (No. 3961 of 2017), < <http://www.egazette.nic.in/WriteReadData/2017/176216.pdf> > accessed 5 April 2023; See appendix of the report, Human Rights Watch (HRW), *Vigilant Cow Protection in India* (19 February 2019), < https://www.hrw.org/report/2019/02/19/violent-cow-protection-india/vigilante-groups-attack-minorities#_ftn21 > accessed 05 April 2023.

continent require us to reformulate, reimagine, and if possible, recalibrate the contours of constitutional consciousness in South Asia.

Through this essay, I intend to inquire (i) whether ‘imagined’ constitutional identity by judiciary is premised on the normative deficit in modern constitutionalism and secondly, (ii) whether there is a possibility of providing equal playing ground to plural ontological, epistemological and theological framework within constitutionalism?

The essay is structured in three parts. Through the first part, I will engage with the thematic underpinnings of plurality, pluralism, and national identity in the context of Indic civic society. In the second part, I will locate competing understanding of pluralistic Indian identity in the constitutional philosophy through prominent icons and respective school of thoughts. In the last part, I intend to unpackage judicial understanding of “constitutional” identity and how with its aspirational western modernity accentuated the chasm in India. This will be followed by my departing note concerning inevitability of cul-de-sac in constitutional relationship with plurality.

PART I – UNDERSTANDING PLURALITY AND NATIONAL IDENTITY

Plurality is not a simple question to answer especially in the context of a civilization or modern nation. The dictionary meaning of pluralism is – “a theory that there are more than one or more than two kinds of ultimate reality”.¹³ In terms of the civilization, below stated dictionary definition seems appropriate for our purpose –

A state of society in which members of diverse ethnic, racial, religious or social groups maintain and develop their

¹³ Merriam Webster Dictionary, < <https://www.merriam-webster.com/dictionary/pluralism> > accessed 05 April 2023.

traditional culture or special interest within the confines of a common civilization.¹⁴

On a related note, defining national identity is a herculean task and it becomes more daunting in the post-globalization era.¹⁵ Benedict Anderson in his seminal work, *Imagined Communities* conceptualized that nation is “an imagined political community and imagined as both inherently limited and sovereign”.¹⁶ He calls it ‘imagined political community’ by asserting that members even of smallest countries does not meet or even know each other but imaginatively share the image of communion.¹⁷

Locating these questions in the context of Indian sub-continent posits unprecedented complexities considering the historicity of the region and pervasive effects of modernity inspired colonial narrative of understanding plurality in colonized civilizations in global south. The same has been rightly challenged in the recent decolonial literature.¹⁸ Prof. Sudipta Kaviraj criticized the Colonial construction of Indian religious plurality. He argued –

European authors were influenced by religious strife in their own history in reading those of others. As the actual

¹⁴ Ibid.

¹⁵ Gal Ariely, ‘Globalisation and the decline of national identity? An exploration across sixty-three countries’ 18(3) *Nations and Nationalism* (2012) 461, 482.

¹⁶ Benedict Anderson, *Imagined Communities* (first published 1983, Verso 2006) 06.

¹⁷ Ibid, Anderson argues that this imagination is (i) finite because there will always be other or foreign, and (ii) sovereign because the construct of nation-state traces its origin to the enlightenment inspired modernity; For similar arguments in the context of Britain, see, Hugh Seton-Watson, *Nations And States: An Enquiry Into The Origins Of Nations And The Politics Of Nationalism* (Westview Press 1977).

¹⁸ Walter D. Mignolo & Catherine E. Welsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press, 2018); Ashis Nandy, *The Intimate Enemy: Loss And Recovery Of Self Under Colonialism* (Oxford University Press, 2009); Sudipta Kaviraj, *The Imaginary Institution Of India* (Columbia University Press, 2010); Sudipta Kaviraj & Sunil Khilnani, *Civil Society: History And Possibilities* (Columbia University Press, 2001); Aditya Nigam, *Decolonizing Theory – Thinking Across Traditions* (Bloomsbury, 2020). For a brief discussion on this, see Anibal Quijano, ‘Coloniality of power, Eurocentrism, and Latina America’, 1 *NEPANTLA: VIEWS FROM SOUTH* (2000) 533, 580.

history of relations between the two major religious communities were understandably checkered, it was always possible for historical interpreters to select elements and construct a “history” and an accompanying social memory according to the historians’ ideological preference... In this kind of historical writing, the empirics of Indian history was mediated through a history of secularism that the modern West had given itself – in which tolerance in the face of religious diversity was an exclusive achievement of European modernity. In the face of this meta-history underlying all history, empirical evidence was powerless. Such colonial histories, starting from James Mill, declared religious plurality an unresolved curse that premodern Indian institutions were incapable of overcoming.¹⁹

How do we proceed amidst overwhelming colonial knowledge traditions and its pervasive effects on our ‘self’ construction? In the same work, Kaviraj argues that to understand the complexities associated with unpacking plurality in Indian context, we should be cognizant that “Indian society is marked by a plurality of distinct faiths; and second, these faiths are unequally distributed in numbers”.²⁰

Rudolf and Rudolf argued in their work that historically plurality existed and was successfully accommodated in Indic civic society because of indigeneous principle that society consisting of different social groups is “prior to the state and independent of it” even when the inter-religious relationship was not characteristically

¹⁹ Sudipta Kaviraj, ‘Plurality and Pluralism – Democracy, Religious Difference, and Political Imagination’ in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021).

²⁰ Ibid. He brings this out acutely through diverse sociological peculiarities within Hinduism – Vaisnavas, Saivas, and Saktas and similar strand can be taken with regard to extension of Indian origin religions such as Buddhism, Jainism, and Sikhism.

mutual and reinforced inequality.²¹ Rochana Bajpai calls it hierarchical pluralism.²² She stated –

In many respects, hierarchical pluralism was pluralist, accommodating of religious and sociocultural plurality. The precedence of the moral order of society implied that the state would not seek to impose its preferred vision throughout society, but respect the internal rules and practices of social groups so long as taxes and revenues were paid.²³

However, Sudipta Kaviraj argued that such pluralism in India is asymmetrical in comparison to western civilization wherein symmetrical hierarchy existed (For him, caste system is a manifest expression of such asymmetrical hierarchy).²⁴ Bajpai argues that modern state in India continued the hierarchal pluralism through its legal structure (for family laws, religious authorities were given legal recognitions).²⁵

National identity conversations gained prominence and traction during the anti-colonial struggle and influence of western modernity with its liberal individualist ideas. Through next part, I will scrutinize disquisitions pertaining to identity and plurality in terms of Indian constitutional philosophy using the icons and their respective entry points of understanding constitutionalism in India.

²¹ Rudolf, S.H. and Rudolf, L.I. *Explaining Indian Democracy: A fifty year perspective, 1956-2006* (New Delhi Oxford University Press 2008).

²² Rochana Bajpai, 'Religious Pluralism and the State in India' in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021).

²³ Ibid, 141.

²⁴ Sudipta Kaviraj, *The Trajectories of the Indian State* (Permanent Black 2010) 15.

²⁵ Bajpai (n 22).

PART II - LOCATING PLURALISTIC NATIONAL IDENTITY IN INDIAN CONSTITUTIONAL PHILOSOPHY

There are multiple ways of conceptualizing the relationship between constitutional philosophy and plurality. Rajiv Bhargava, Indian political scientist located the five competing visions of national identity by historicizing making of Indian constitution.²⁶ They are: (i) Socio-democratic vision of Nehru; (ii) Gandhian Vision (non-democratic, quasi communitarian); (iii) Liberal-democratic Ambedkarite vision; (iv) KT Shah's radical egalitarianism; and (v) Hindutva ideology.²⁷ For the purpose of this essay, I will frame competing understanding of constitutional identity within his segregation.

Nehruvian thought of national identity was deeply critical of Coloniality and its pervasive effect on the civilizational values of India. In his *The Discovery of India*, Nehru stated that greatest of all injuries done by England to India was creation of "the slave mentality".²⁸ Similarly while addressing the constituent assembly, he lamented that there "*has been no imagination in the understanding of the Indian problem*".²⁹ Bhiku Parekh argued that Nehruvian vision was "*inclusive, secular, culturally sensitive, based on the ethnic and cultural plurality of India, could be owned by all Indians*".³⁰ At the same time, Nehru's Indian was one who

²⁶ Rajeev Bhargava (edited), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008) 7; For other models of conceptual understanding of this relationship, Rochana Bajpai's six models - (i) Hierarchical Pluralism; (ii) Integrationist Exclusionary; (iii) Integrationist inclusionary; (iv) Weak Multiculturalism; (v) Strong Multiculturalism; and (vi) Majoritarian Assimilationist. For her, restricted (weak) multiculturalism best describes the overall approach of our constitution towards religious pluralism and attitudinal inclination towards majoritarian assimilation post 2014.

²⁷ Ibid.

²⁸ Jawaharlal Nehru, *The Discovery of India* (first published 1946, Penguin 2004) 52.

²⁹ Speech by Jawaharlal Nehru, Constituent Assembly of India, December 13, 1946, in *Constituent Assembly Debates*, 12 Vols. (first published 1950, 2009) 64.

³⁰ Bhiku Parekh, 'The Constitution as a Statement of Indian Identity' in Rajeev Bhargava

would put India above and beyond belongings of religious, linguistic, caste, or tribal groups.

However, at the same time, Parekh critiqued Nehruvian vision for being statist and elitist. He stated –

Its limitations were just as great. It was statist, elitist, did little to speed up India's economic development and tackle poverty, paid only limited attention to primary education, healthcare, and other basic needs of the masses, and was insufficiently insensitive to rural India and the religious aspirations of its people.³¹

Prof. Baxi ironically calls out Nehruvian vision for elevating constitutional immiseration especially with regard to right of children to education.³² The second civilizational reimagination of 'Indian' identity lies with Gandhian communitarian identity. I am deliberating on two prominent themes of his approach. Firstly, it did not talk in the language of rights. He gave primacy to duties and for him, rights were emancipated from duty. He stated in his prayer meeting in the backdrop of Constituent Assembly debates on Rights, "*Rights cannot be divorced from duties. This is how satyagraha was born, for I was always striving to decide what my duty was*".³³ Secondly, his understanding of *Swaraj*. In an interview with journalists on March 6, 1931, while responding to the question of what is *Swaraj*, he stated –

The root meaning of swaraj is self rule. 'Swaraj' may, therefore, be rendered as disciplined rule from within and

(ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008)

³¹ *Bhiku Parekh* (n 30);

³² Upendra Baxi, 'Outline of a Theory of Practice' of Indian Constitutionalism in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

³³ MK Gandhi, *Collected Works* (Volume 95) 354, also available at: < [http:// www . gandhiashramsevagram . org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf](http://www.gandhiashramsevagram.org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf) > accessed 26 February 2023.

purna means 'complete'. 'Independence' has no such limitation. Independence may mean licence to do as you like. Swaraj is positive. Independence is negative. Purna swaraj does not exclude association with any nation, much less with England. But it can only mean association for mutual benefit and at will.³⁴

Gandhi's concept of *Swaraj* and his dismissal of western parliamentary sovereignty comes out very acutely in his celebrated work, *Hind Swaraj*.³⁵ He called Parliaments as "really emblem of slavery" and asserted that –

Parliament is without a real master. Under the Prime Minister, its movement is not steady, but it is buffeted about like a prostitute. The Prime Minister is more concerned about his power than about the welfare of Parliament. His energy is concentrated upon securing the success of his party. His care is not always that Parliament shall do right.³⁶

He strongly argued against western democratic model and its application in India. He stated –

In effect it means this: that we want English rule without the Englishman. You want the tiger's nature, but not the tiger; that is to say, you would make India English. And when it becomes English, it

³⁴ MK Gandhi, *Collected Works* (Volume 95) 354, also available at: < [http:// www . gandhiashramsevagram . org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf](http://www.gandhiashramsevagram.org/gandhi-literature/mahatma-gandhi-collected-works-volume-95.pdf)> accessed 26 February 2023.

³⁵ MK Gandhi, *Hind Swaraj or Indian Home Rule* (Navjivan Publishing House, 1910), also available at: <https://www.mkgandhi.org/ebks/hind_swaraj.pdf> accessed 26 February 2023.

³⁶ Ibid.

will be called not Hindustan but Englistan. This is not the Swaraj that I want.³⁷

Gandhian constitutionalism is often categorized as antithetical to parliamentary democracy with its strong premise around grassroot village based democratic republic.³⁸ Granville Austin in his seminal work stated that Gandhian thought of village swaraj was tersely dismissed in the Constitution of India. He goes further to argue that provisions and principles of the Indian Constitution are ‘almost entirely of non-indian origin, coming as they had largely from the *former colonial power*’.³⁹ Contemporary Gandhian scholars like Thomas Pantham disagrees with Austin stating that Gandhi was an *original emancipatory thinkers* of post-colonial liberal democratic Constitutionalism.⁴⁰ He argues that Indian Constitutional philosophy is misunderstood to be “dichotomous with, or exclusionary towards the Gandhian Constitutional philosophy” .⁴¹ He argues –

They have a considerable range of overlapping and complementary or compatible democratic values and freedoms...I feel that we need to recognize and emphasize those democratic overlappings and complementarities or compatibilities if we are to appreciate the normative originality and resourcefulness and the institutional vitality

³⁷ Ibid, P. 27.

³⁸ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (first published 1966, Oxford University Press 1999) 31; for paradox of Gandhian Constitutionalism, see, Peter Ronald deSouza, ‘Institutional Visions and Sociological Imaginations: The Debate on Panchayati Raj’ in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

³⁹ Ibid, p.308.

⁴⁰ Thomas Pantham, ‘Gandhi and the Constitution’ in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

⁴¹ Ibid, p.75.

and suppleness of the Indian post-colonial constitutional democracy...⁴²

Third civilization imagination of national identity is of Dr. BR Ambedkar. Ambedkar's lived experiences and corpus of work in a deeply casteist civic society informed his vision of national identity. He was uncomfortable with the term as well as understanding of what 'Swarajya' entails. He believed that Gandhian *swaraj* was a paradox i.e. it endorsed freedom from colonial political order but at the same time reinforced the civic order with its graded inequalities and domination on a hereditary basis. He was often cited to state that when Dalits hear the upper caste speak on Swaraj, it seems to them (Dalits) like they are hearing the Devil cite the scriptures.⁴³ In *Annihilation of Caste*, he wrote, "*swaraj for Hindus may turn out to be only a step towards slavery*".⁴⁴ His criticism of Congress and Gandhian vision of swaraj comes out strongly in his writings and speeches. He stated—

If the foreigner bears in mind these points he will realize why the servile classes of India are not attracted by the Congress brand of Swaraj. What good can the Congress brand of Swaraj bring to them? They know that under the Congress brand of Swaraj the prospect for them is really very bleak. The Congress brand of Swaraj will either be materialization of what is called Gandhism or it will be what the governing class would want to make of it. If it is the former it will mean the spread of charkha, village industries, the observance of caste, Bramhcharya (continence), reverence for the cow and things of that sort.

⁴² Ibid, p. 75; Also see Ashutosh Varshney, *Ethnic Conflict and Civic Life* (New Delhi; Oxford University Press, 2002).

⁴³ Aakash Singh Rathore, *Ambedkar's Preamble: A Secret History of the Constitution of India* (Vintage Books, 2020) 53.

⁴⁴ BR Ambedkar, *Annihilation of Caste* (first edition in 1936).

If it is left to governing classes to make what it likes of Swaraj the principal item in it will be the suppression of the servile classes by withdrawing the facilities given by the British Government in the matter of education and entry in public services.⁴⁵

Ambedkar's reservation to Congress'/ Gandhian '*swarajya*' nationalism foregrounds the importance of inclusivity in the imagination of national identity by promoting 'dignity' and 'fraternity'. Recent works on Ambedkar argue that the term 'liberty' instead of 'freedom' and 'dignity' in the Indian preamble owes its authorship to Ambedkar.⁴⁶

In other words, Ambedkarite swaraj had an umbilical cord to agency of the untouchables. The chronicles of his life story suggest that his understanding of identity and 'dalit swaraj' led him to convert to Buddhism, and pioneered Dalit Buddhist movement.

The fourth conception of national identity in the context of constitutional philosophy is of Economics Professor KT Shah. His conceptual framework of constitutional identity was heavily dipped in the ink of socialism. Professor Shah throughout the Constituent Assembly Debates urged for a progressive liberal constitution.⁴⁷ Firstly, he argued for strict separation of power between organs of the Government – Legislative, Executive, and Judiciary emphasizing that these are basic tenets of liberal constitution.⁴⁸ On a similar note, he

⁴⁵ Dr. BR Ambedkar, *Dr. Babasabheb Ambedkar Writings and Speeches Vol. 9* (first published in 1979, Dr. Ambedkar Foundation 2019), *also available at* < http://drambedkarwritings.gov.in/upload/uploadfiles/files/Volume_09.pdf > accessed 26 February 2023.

⁴⁶ *Aakash Singh Rathore* (n 43).

⁴⁷ Sudhir Krishnaswamy, 'Is the Indian Constitution liberal?' (Friedrich Naumann Foundation 2019), *available at* < <https://www.sudhirkrishnaswamy.net/wp-content/uploads/2019/04/Is-the-Indian-Constitution-Liberal.pdf> > accessed 26 February 2023.

⁴⁸ *Ibid.*

invoked that freedom of press and publication should be an express fundamental right alongside freedom of speech and expression.⁴⁹ However, often his amendments were rejected by Constituent Assembly. For instance, he suggested proviso to right to property in fundamental rights which goes as below:

*"Provided that-no rights of individual private property shall be recognized in forms of natural wealth, like rivers or flowing waters, coastal waters, mines and minerals, or forests."*⁵⁰

However, he did not move the amendment considering the complexities associated. Dr. Suresh Chandra Banerjee lamented on impossibility of incorporating KT Shah's amendment. He stated in his speech –

Mr. President, Sir, I had naturally hoped that we would make some progress towards socialisation at least when we gained our independence within a few months, but in these fundamental rights nothing has been put in regard to socialisation. I would have been really happy, had the amendment of Prof. K. T. Shah been accepted, because there is an element of socialisation there.⁵¹

Coming to the last competing vision of *Hindu* nation. *Rashtriya Seva Sangh* (RSS) has been aggressively asserting the need of "*Gana Rajya System*" and is deeply critical of modern constitutionalism which it argues is dipped in the ink of colonization. It becomes pertinent to unpackage this understanding of decolonization and consequently its rhetoric of national identity. One of the prominent assertions of Hindu

⁴⁹ Ibid.

⁵⁰ Constituent Assembly Debates (CAD), *Volume III* (2nd May 1947), available at < https://www.constitutionofindia.net/constitution_assembly_debates/volume/3/1947-05-02 > accessed 26 February 2023.

⁵¹ Ibid.

nationality was made by MS Golwalkar. In *We or Our Nationhood Defined*, he stated:

The data rendered available to us through the history going over thousands of years and the careful and dispassionate observation of the present day conditions of the Hindus enable us to maintain without any fear of contradiction that the Hindus are a nation or nationality by themselves. They have a distinctive characteristic culture. They have a common cultural language and a common cultural literature which regulate and govern their life even in minute details. They have developed a common out-look on life which is decidedly different from that of any other people...No sane man can question the proposition that Hindus are a nation. There will also be no difficulty to concede that the Hindus constitute the vast majority of the population. India is therefore pre-eminently a Hindu nation, Hindusthan.⁵²

On a similar note, another political figure who is coming at the forefront of mainstream political discourse in India post 2014 is Veer Savarkar, celebrated widely as an articulator of the term, *Hindutva*.⁵³ He defined *Hindutva* in *Hindu Rashtra Darshan* as –

Everyone who regards and claims this Bharatbhoomi from, the Indus to the Seas as his Fatherland and Holyland is a Hindu. Here I must point out that it is rather loose to say that any person professing any religion of Indian origin is a Hindu. Because that is only one aspect of Hindutva.

⁵² M.S. Gowalkar, *We Or Our Nationhood Defined* (Bharat Publications, 1939) 24.

⁵³ Shashi Tharoor, 'Veer Savarkar: The man credited with creating Hindutva didn't want it restricted to Hindus' (*The Print* 26 February 2018) <
<https://theprint.in/pageturner/excerpt/veer-savarkar-hindutva-india/38073/> >
 accessed 26 February 2023.

The second and equally essential constituent of the concept of Hindutva cannot be ignored if we want to save the definition from getting overlapping and unreal. It is not enough that a person should profess any religion of Indian origin, i.e., Hindusthan as his Holyland, but he must also recognise it as his Fatherland as well.⁵⁴

For Savarkar, other faiths owing their origin to India, like Sikhism, Buddhism, and Jainism also qualified to be Hindu and hence part of Hindutva. This strand of thought believes in the Indic civilisational virtues since antiquity and laments the colonial consciousness embedded in our constitutional framework. J. Sai Deepak's recent work on decolonisation is premised around reclaiming the position of Indic civilisational consciousness and presenting it to act as counter-hegemonic to the western normative framework.⁵⁵ In this celebrated work, Sai Deepak acutely brings out the Christian 'civilising' intent and the way it culminated into legislative endeavours, and ways in which Christian OET inspired our legal consciousness.⁵⁶

Despite competing visions, all of them shared passionate consensus and conviction that India is unique with its distinct world view and values. In the next part, I will look at judicial attitude towards plurality and ways through which it curtailed the plurality discourses.

PART III – JUDICIAL TRYST WITH PLURALISM

Hobbesian idea of commonwealth state posits that the sovereign or state is the final authority to make judgments when society is at the crossroads with regard to being harmed or injured. Judiciary as one of the State authorities is a marker of Hobbesian State with its

⁵⁴ Veer Savarkar, *Hindu Rashtra Darshan* (Prabhat Prakashan, 2015) 5.

⁵⁵ J.Sai Deepak, *India That Is Bharat – Coloniality, Civilisation, Constitution* (Bloomsbury, 2021).

⁵⁶ Ibid.

powers to provide finality to civilizational issues using the legal/constitutional lingua-culture. Judiciary's tryst with plurality is marred with doctrinal inconsistencies as well as parental reformist gaze with assimilationist aspirations of approaching plurality.⁵⁷ Professor PK Tripathi concurs that even constitutional text was apprehensive of religious autonomy. He wrote –

Even the freedom of religion was guaranteed in this secular state not out of concern for religions, generally, much less, for any particular religion, but solely and unmistakably out of concern for the individual, as an aspect of the general scheme of his liberty, and as incidental to his well-being.⁵⁸

One of the first post-independence case dealing with religious autonomy, *Commissioner of Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Tirtha Swaminar* (popularly known as the *Shirur Math* case), acknowledged the constitutional protection to practice of religion.⁵⁹ However, the court categorically rejected the assertion test and laid down its own judicial test of Essential Religious Practices (ERP Test). Justice Mukherjea compared opinions in foreign judgments to support his stand (especially concurred with Australian judge Latham's opinion)⁶⁰ and stated that on questions of where to draw the line for courts to inquire on validity of religious practices, it becomes important to note that “*essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself*”.⁶¹ Justice Mukherjea's dicta is widely used as an entry point to understand Essential practices test.

⁵⁷ *Bajpai* (n 22).

⁵⁸ P.K. Tripathi, “Secularism: Constitutional Provision and Judicial Review” (1956) 8 *Journal of The Indian Law Institute* 1,29.

⁵⁹ *Commissioner of Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Tirtha Swaminar* [1954] SCR 1005 (*Shirur Math* case).

⁶⁰ *Adelaide Company v. The Commonwealth* 67 C.L.R. 116, 127.

⁶¹ *Shirur Math* (n 59).

This test acquired critical importance and was used in catena of cases concerning freedom of religion or of religious authorities.⁶² Justice Gajendragadhkar further formulated the test in *Durgab Committee, Ajmer Vs. Syed Hussain Ali* stating –

Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and Observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices.⁶³

Gajendragadhkar's note of caution was skeptical towards plurality. It also gave impetus to judges to inquire the legitimacy of plural theological claims. He himself stated in later judgment that in instances of a competing claim regarding essential feature of a religion, courts should not go always go by what community states to be an essential feature of a religion. It should have liberty to inquire and decide whether conflicting feature is an actual integral characteristic based on evidences produced before it.⁶⁴ This logic or test give wide amplitude to judges to define, interpret or regulate the meaning of religion. J. Duncan Derrett succinctly puts forward the net result of such test, he writes –

⁶² *Venkataraman Devaru v. State of Mysore* [1958] AIR SC 255; *Saifuddin Saheb v State of Bombay* [1962] AIR SC 853; *Bijoe Emmanuel & Ors. v. State of Kerala & Ors.* [1986] SCR (3) 518; and *Ratilal Panachand Gandhi v. The State of Bombay & Ors.* [1954] AIR SC 388; *Acharya J. Avadhuta & Ors. v. Commissioner of Police, Calcutta & Anr* [1983] 4 SCC 522; and *Commissioner of Police & Ors. v. Acharya J. Avadduta* [2004] 12 SCC 770.

⁶³ *Durgab Committee, Ajmer Vs. Syed Hussain Ali* [1962] SCR (1) 383.

⁶⁴ *Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan & Ors* [1963] AIR SC 1638

The Courts can discard as non-essentials anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters... The Constitution does not say freely to profess and propagate the essentials of religion, but this is how it is constructed.⁶⁵

This test continues as I write despite multiple criticism from different sections.⁶⁶ Current CJI, DY Chandrachud expressed his discomfort with ERP in *Sabarimala* stating that judges "lack both the competence and legitimacy to pronounce on the importance of specific doctrines or beliefs internal to religion" and any attempts at interpreting religious texts by judges lead to imposition of an external viewpoint.⁶⁷ Ironically, his formulation of 'Constitutional Morality' is also criticized as a 'top-down model of reformation with a whip' and imposition of judicial morality on restricting plurality. As recent as in *Hijab* case, one of the issues before the High Court was whether wearing hijab/headscarf is a part of Essential Religious practice in Islamic Faith protected under Article 25 of the Constitution? While dismissing the relevance of this question in Supreme Court, Justice Dhulia also laments the frequent usage of ERP test.⁶⁸ He states –

In my humble opinion Courts are not the forums to solve theological questions. Courts are not well equipped to do that for various reasons, but most importantly because there

⁶⁵ J. Duncan Derrett, *Religion, Law and the State in Modern India* (New Delhi, Oxford University Press 1996) 447.

⁶⁶ Mathew John, 'The limits of pluralism: A Perspective on Religious Freedom in Indian Constitutional Law' in Karen Barkey, Sudipta Kaviraj & Vatsal Naresh (eds), *Negotiating Democracy and Religious Pluralism – India, Pakistan, and Turkey* (Oxford University Press 2021); Anup Surendranath, 'Essential Practice Doctrine: Towards an Inevitable Constitutional Burial' (2016) 15 *Journal of the National Human Rights Commission, India* 159.

⁶⁷ *Sabarimala* case (n. 8).

⁶⁸ *Hijab Ban* case (n.1).

will always be more than one viewpoint on a particular religious matter, and therefore nothing gives the authority to the Court to pick one over the other.⁶⁹

Pratap Bhanu Mehta argues that ‘courts seem committed to some Ciceronian idea of *religio* cleansed of *supersititio*, to the search for a pure religion whose theology turns out to be compatible with the civil theology of the Commonwealth’.⁷⁰ Such pursuit often left bitter taste in court’s relationship with plurality, to an extent, that it proved detrimental to Courts’ legitimacy as a vanguard of rights. This got sharply in forefront of mainstream discourse during *Sabarimala* case. Empirical reality of judgment puts direct questions on such impositions and consequently, led to a review petition which is now referred to a nine-judge constitutional bench.⁷¹

To conclude this part, it can be stated that judicial understanding (including innovative judicial jurisprudence such as transformative constitutionalism and constitutional morality) of plurality looks at plural ‘ways of being’ as a negative dimension to liberal constitutionalism and is inevitably destined for what Professor Anup Surendranath calls in a related context, ‘Constitutional burial’.

CONCLUDING REMARKS

Webb Keane, American anthropologist, posits a provocative question as to why religious freedom should be given “either a privileged or a peculiarly worrisome character different in kind from artistic, political, or sexual freedom?”⁷² He concludes that the answer

⁶⁹ Ibid, Para 36 (Dhulia’s judgment).

⁷⁰ Pratap Bhanu Mehta, ‘Passion and Constraint – Courts and the Regulation of Religious Meaning’ in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford university Press 2008).

⁷¹ *Kantaru Rajeevaru v Indian Young Lawyers’ Association* [2020] SCC OnLine SC 158

⁷² Webb Keane, ‘What is Religious Freedom Supposed to be Free?’, in Winnifred Fallers Sullivan et al. eds *Politics Of Religious Freedom* (University of Chicago Press 2015) 324.

to it depends on understanding of “religion” as presupposed by the laws that regulate and protect it.⁷³ Myriam Henin-Hunter in her recent work tries to follow this strand of inquiry and asserts that the court adjudications concerning religious freedom in the UK and France have often looked (especially in the twenty-first) at its negative dimension i.e., negative liberty, to protect believers from State intrusions and interferences.⁷⁴ I have reviewed the work elsewhere.⁷⁵

On a similar note, judiciary in India have historically accommodated plurality and sets limits to it through its jurisprudence of Essential Religious Practice (ERP), transformative constitutionalism or even the more recent one, Constitutional morality. Mathew John while examining the epistemic framework of ERP test concluded –

...the essential practice test that has structured the operation of religious freedom in Indian law to constrain rather than expand India’s plural traditions of religious practice.⁷⁶

Much aggressive criticism vis-à-vis of transformative constitutionalism and constitutional morality came from J. Sai Deepak’s recent work wherein he attacked these tests to be pervasive effect of colonial Onto-Epistemology and Theology.⁷⁷ He wrote –

...modern day constitutional institutions serve colonial constitutionalism and advance the cause of reformation of native society in the image of the European Civilisation, perhaps under the belief that the native society’s salvation lies in Westernisation...If the premise is rooted in

⁷³ Ibid.

⁷⁴ Myriam Hunter-Henin, *Why Religious Freedom Matters For Democracy: Comparative Reflections From Britain And France For A Democratic “Vivre Ensemble”* (Oxford University Press 2020).

⁷⁵ Aditya Rawat, ‘Book Review: Why Religious Freedom Matters For Democracy: Comparative Reflections From Britain And France For A Democratic ‘Vivre Ensemble’ By Myriam Hunter-Henin (Non-West Reading Of Hunter-Henin’s Democratic Approach)’ (2021) 6(1) CALJ 149.

⁷⁶ *Mathew John* (n. 66).

⁷⁷ *J. Sai Deepak* (n 55).

colonialized versions of indigenous history, it is but natural that transformative constitutionalism constantly sees the need to reform the native out of his/her identity.⁷⁸

It leaves us in a suspended limbo wherein we are conscious of immanent incapacitation of modern constitutionalism's toolkit to engage with plurality and our decolonial epistemology is on a bridge to nowhere. Aditya Nigam pointed out this inherent lacuna in his work stating –

However, one must underline that this 'democratic dialogue' is virtually impossible given that our language has no vocabulary to understand the puranic, a necessary consequence of modernity's cognitive arrogance. This democratic dialogue can be made possible by acknowledging a certain equality between different ways of thinking and being.⁷⁹

This brings me back to title of the essay i.e. towards *cul-de-sac*. Professor MP Singh & Dr. Niraj Kumar argued in their recent work that non-state legal orders such as religion based, caste-based, village-based, tribe-based are not operative in peripheries, but there is a strong probability that the state legal system might be the one which is actually at the peripheries.⁸⁰ If we are serious about plurality, we should strive towards epistemic reconstitution of our constitutionalism that sheds the clothes of desirability of homogeneous constitutional identity.

⁷⁸ Ibid, 114; It is tough to align with his conceptual challenges, but at the same time, he is asking pressing questions which makes it imperative to engage with him without brushing him aside because of his political idealogue. For my critique of his work, see, Aditya Rawat, 'Book Review: India that is Bharat-Engaging but Incongruent Decolonial Epistemology to Understanding Indian Constitutionalism' (2022) 7(1) COMP. CONST. L. & ADMIN. L. J. 146.

⁷⁹ *Aditya Nigam* (n 17).

⁸⁰ M P Singh & Niraj Kumar, *The Indian Legal System - An Enquiry* (Oxford University Press 2019).