

**Identity and the
Social Revolution
On the Political
Sociology of
Constitutionalism
in Contemporary
India**

Mathew John

WORKING PAPER SERIES

Centre for the Study of Law and Governance
Jawaharlal Nehru University, New Delhi

CSLG/WP/18

IDENTITY AND THE SOCIAL REVOLUTION

*On the Political Sociology of Constitutionalism in
Contemporary India*

Mathew John

WORKING PAPER SERIES
Centre for the Study of Law and Governance
Jawaharlal Nehru University, New Delhi

November 2012
CSLG/WP/18



Mathew John is Assistant Professor at Jindal Global Law School. He was at the Centre for the Study of Law and Governance between December 2011 and May 2012 when he wrote the paper for the current series. He is interested in legal and conceptual issues related to the Indian constitutional compact. The author may be reached at matheujohn@gmail.com

IDENTITY AND THE SOCIAL REVOLUTION

On the Political Sociology of Constitutionalism in Contemporary India

Mathew John

THE PROBLEM

In a particularly insightful essay on Indian constitutionalism Uday Mehta speaks of the constitutional moment as one, which it was fervently hoped, would bookend the past and signpost a radically different future. Drawing on Nehru's eloquence, this was to be a moment when 'we step out from the old to the new, when an age ends, and when the future beckons us'. (2010:16) The conversation between the old and the new is of course true of any 'beginning' but Mehta suggests that this exchange assumed a very particular form in the Indian case where the constituent assembly's vision envisaged the present as a project of preparation for the future. So much so that it muted the jubilation of independence through 'solemnity and the prospect of long national ardour'. (2010:16) All this implied in the Indian case that freedom would be a reformatory or revolutionary project through which the present was unshackled from the embarrassing imprint of a traditional society and the constraining influence of an imperial past. However, precisely because it was a project for the future, the revolution promised by independence seems condemned to be alienated from the moment of its greatest triumph, its moment of founding.

In Mehta's account the project announced by independence implied a constitutional order which instituted an expansive political vision asserting supremacy over other centres of power in Indian society. This expansive role for the state and politics was expressed through an obsessive concern for national unity and social uplift. Significantly the assertion of constitutional and political supremacy was tied to the momentous changes announced in the new Constitution. Among these changes include the institution of universal suffrage, a preamble committed to justice liberty and fraternity, the grant of fundamental rights to all citizens and, an astounding array of directives to state policy covering areas as diverse health, education, economic affairs, agriculture and international affairs. It is the unrealised status of many of these constitutional goals that makes independence an alienated moment, at which freedom is only a promise to carry out a social revolution. However, the revolution is also a political vision to remodel the social domain. Set against this idea of a revolutionary 'social' vision, this paper explores the way in which 'social identities' are modelled by the constitution as the route through which the rights of citizenship can be claimed. In doing so the paper argues that the constitution defends deductive models of society that are unable to draw on society as a product of the rumble and tumble of lived experience.

The Background

Qualified equal citizenship was an important part of the Indian social revolution. That is, it was presumed by the makers of the Indian constitution that equality would be meaningfully actualised in India only by taking into account and compensating for embedded forms of social injustice and discrimination. Thus the Constitution clearly envisaged special rights and measures for groups such as dalits, women, children, minorities and other weaker and backward sections of Indian society. This framework of rights and entitlements envisaged by the Indian Constitution was indeed different from the prior legal approach of the colonial state to the same problem. However, the

interesting aspect of this approach to the social revolution was that it was able to gather up diverse swathes of social experience and reformulate it as *the* Indian social problem

In the Indian Constitution, the rights granted to ‘scheduled castes’, ‘scheduled tribes’, ‘backward classes’ and ‘minorities’ are seemingly unrelated to each other. However, these rights emerged from a common source in the political structure of the British colonial State in which they were all considered ‘minorities’.¹ In fact this was the case even up to the point when the Indian Constituent Assembly considered the rights to be granted to all these ‘minority’ groups. The Assembly resolved the question of ‘minorities’ differently from the colonial State, and the Constitution as it reads currently does not consider scheduled castes, tribes or other backward classes to be ‘minorities’. This was not just a terminological shift as the makers of the Indian Constitution did attempt a substantively different resolution of the problem posed by the erstwhile ‘minorities’. However, the issue is not so much whether the Constitution of Independent India succeeded in its vision to outline the problem of minorities in a different direction but that that the issue being debated was the manner in which the Indian ‘social’ problem was to be understood.

Moving a resolution on the Advisory Committee on Fundamental Rights in the Constituent Assembly, Govind Ballabh Pant outlines the challenge posed by ‘minorities’ in the following terms:

(T)he question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered on this rock ... *It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian nation. Imperialism thrives on such strife.*

¹The Scheduled Tribes were strictly not considered to be minorities by the British colonial state as they were considered special wards of the state and therefore in need of special protection by the colonial State. Hence the treatment of this group is not addressed in this essay.

It is interested in fomenting such tendencies. So far, the minorities have been incited and have been influenced in a manner which has hampered the growth of cohesion and unity (Rao et al 1966:61, *emphasis added*).

Pant's comments are quite representative of the challenge that 'minority' rights posed for the Assembly. That is, how would the nationally divisive or communal scheme of government administered by the colonial State be rejected by independent India?

Pant's target in this address was an peculiar form of colonial government in which elected representatives of legally designated 'minorities', most notably though not only Muslims, were entitled to weighted representation in government institutions (especially in the legislative assemblies and government jobs), that is, minorities were entitled to representation beyond their actual numbers in the population. Equally intriguingly, elections to colonial legislatures were conducted through separate electorates consisting only of members of the relevant 'minority' community. Underlying this organisation of political institutions in colonial India was a conception of Indian society as irreconcilably divided along the lines of its various communities. Its first significant expression in colonial institutions across British India commenced with the Morley-Minto scheme which was institutionalised in the Indian Councils Act of 1909 and was animated by the belief that India was made up of 'congeries of widely separated classes races and communities, with *divergences of interests and hereditary sentiments which for ages have precluded common sentiment or local unanimity*'.² It is this conception of India as it was developed in this and the subsequent constitutional statutes of 1919 and 1935 that set the contours of the minority question for the Indian Constituent Assembly.

² House of Commons Parliamentary Papers, *East India (Advisory and Legislative councils, & c.) Proposals of the Government of India and Despatch of the Secretary of State*, Vol. I, LXXVI, Part.1 (1908) at page 2

The Congress party as the pre-eminent nationalist force in British India was consistently opposed to what it perceived to be the divisions produced by the system of minority rights administered in colonial India. However, it is important to note that this opposition did not find voice in government policy even up the drafting of the Constitution. In the early pre-partition treatment of the issue in the Constituent Assembly it was a position of general consensus that the system of minority rights as it was established in British India would carry on into the Constitution of independent India. Accordingly on the 27th and 28th August 1947 the Constituent Assembly adopted the report of the Advisory Committee granting all the minorities of colonial India a range of rights that included rights to be represented in legislatures and reservations in government jobs (see Ansari 1999:111–23). This position was even incorporated into Part XIV of the Draft Constitution in February 1948. However, in the aftermath of partition and the violence that followed it the minority question as it was understood in colonial India came undone and the Congress could assert its opinions on the Indian social condition and rework the question of social identity into the form it would assume in the present Constitution of modern India.

Reworking the earlier scheme on minority rights while considering the case of Sikh refugees, the Advisory Committee on Fundamental Rights proposed that ‘that the system of reservation for minorities other than Scheduled Castes in Legislatures be abolished’.³ The Assembly ratified this position on the 26 of May 1949, though it granted ‘minority’ rights to some Sikhs castes by identifying them as Scheduled Castes. In addition despite strong opposition from the Sikh community, draft Articles 296 and 299 permitting minority quotas in public employment subject to the interests of efficiency

³ As proposed by H C Mookerji on 11 May 1949. cited in B. Shiva Rao, V. K. N. Menon, Subhash C. Kashyap, and N. K. N. Iyengar, *The framing of India's Constitution*, vol. 4 (Indian Institute of Public Administration 1966) at page 601

in administration, was also modified to exclude 'minorities' other than the scheduled castes and scheduled tribes. All other minorities of colonial India were henceforth only entitled to educational and cultural rights as constitutionally specified. However, it is important to realise that this effort of the Constituent Assembly was an alternative attempt to model the problem of social identity for independent India in ways that would represent the social problem more accurately than as a society divided amongst its various constituent groups. However, this paper demonstrates that the contemporary has not been successful in this enterprise and has only replaced one unrepresentative social model with another.

IDENTITY IN THE INDIAN CONSTITUTION

The new path the Constitution set for itself sought to reject the colonial conception of a divided India and replace it with a new vision for social reconstruction based on the removal of disabilities accruing from caste society. Social reconstruction on the basis of caste disability would necessarily entail the privileging and perhaps even entrenching caste identity in fashioning the new constitutional problem. However, this essay is not so much concerned with the Constitution's emphasis on social disability which is an undeniable necessity in a country like India. On the contrary it is the manner in which caste and identity has been incorporated into the constitutional framework of independent India that is the concern of the essay. It is argued that the Constitution's treatment of the Indian social problem suffers from exactly the same kind of problem which the nationalists used to attack the colonial conception of a divided India. That is, in establishing the minority problem the colonial state represented India in a manner that did not resonate with Indian social experience.

To say that the constitutional resolution of the problem of caste disability was unable to capture the Indian social problem must be distinguished from the project of affirmative action even if carried on the basis of caste. Affirmative action projects designed

for disadvantaged castes might be an entirely defensible form of addressing the problem of compensating inter-generational discrimination and social backwardness. However, just like the nationalists attacked the colonial state of literally conjuring up a problem to rule by division, the resolution of backwardness in the constitution must also be able to stand up to the charge that it has formulated the problem of caste society in a manner that resonates with the problem of caste as it is socially experienced. It must of course be clarified that the essay does not seek to argue for an essential and distilled conception of social experience but that the framing of caste in the Constitution is entirely shielded from the very conception of caste as an empirically and socially experienced phenomenon. This is of course a counter intuitive position and therefore the essay works out its case through the manner in which the constitution identifies the Scheduled Castes, Backward Classes and Minorities as beneficiaries of affirmative action.

Scheduled Castes

The rights granted to the Scheduled Castes flow from the historic injustice of untouchability and are a classic case of the revolutionary promise of Indian constitutionalism. That is, these rights and entitlements are premised on the case that the Constitution's general commitment to equality can have significance only through a transformation of the structure of Indian society. Some of these rights as defined in the Constitution of India include the guarantee against caste discrimination in public places,⁴ the constitutional mandate permitting government to make positive discrimination measures for the scheduled castes, scheduled tribes and other backward classes⁵ and the abolition of untouchability⁶ and forced labour⁷.

⁴ Art 15(2)

⁵ Art 15(4), 15(5), 16(4)

⁶ Art 17

⁷ Art 23

Besides the rights enumerated in the Fundamental Rights chapter of the Constitution, the Scheduled Castes are also granted reserved seats in Parliament and in the State legislatures⁸ and, though these reservations were initially granted for a period of ten years they have been repeatedly extended by Parliament up to the present day. In addition, it is perhaps also possible to argue that the entire scheme of rights for Scheduled Castes is guided by Art 46, a directive principle requiring the State to protect the interests of Scheduled Castes among other weaker sections.

The rights that the Constitution grants to the Scheduled Castes clearly mark out a substantive conception of equality and justice. However, this section is less concerned with the conceptions of equality endorsed by the Indian constitution, and highlights instead the manner in which Scheduled Castes are *identified* as eligible to be claimants or holders of these rights. While doing so it is argued that the constitutional framework as it is currently organised is unable to formulate the problem of inequality, discrimination and, untouchability as empirically located problems of injustice which sociologically obtain in Indian society. This problem of dissonance with sociological experience is tied to the manner in which the *Constitution (Scheduled Castes) Order 1950* identifies the Scheduled Castes by stating that 'no person professing a religion different from Hinduism shall be deemed to be a member of the Scheduled Castes.'⁹ It is by considering possible rationale for this peculiar identification of the Scheduled Castes with one or another religion that the dissonance between the legal category of the Scheduled Caste and the underlying sociological problem posed by untouchability is made apparent. To get a sense of the cleavage between the sociological

⁸ Art 330 and 332

⁹ The Constitution (Scheduled Castes) Order, 1950 was amended in 1956 and 1990 and now reads that 'no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.'

practice of untouchability and its identification with a particular religion, it is useful to extract from the debate in the Constituent Assembly on the inclusion of certain Sikh sub groups as Scheduled Castes. Expressing his dismay at the Sikh demand Vallabhbai Patel states that,

(I)t was against our conviction to recognise a separate Sikh caste as untouchables or Scheduled Castes, *because untouchability is not recognised in the Sikh religion*. A Scheduled Caste Sikh community has never been in the past recognised. But as the Sikhs began to make a grievance continuously against the Congress—and against us, I persuaded the Scheduled Caste people with great difficulty to agree to this for the sake of peace.¹⁰

Though Patel caved in to the Sikh demands, his comments are extremely illuminating of his conviction that the Sikh demand was illegitimate because untouchability was not recognised in their religion.

However, Sardar Hukam Singh whose statements in the Constituent Assembly prompted Patel's intervention demanded that sections of his community be included in the list of scheduled castes because they suffered from the disabilities that accrued from untouchability as an existing social practice.¹¹ These were therefore very different claims about the practice of untouchability and the identification of Scheduled Castes, leading to the question—what does it mean to identify the Scheduled Castes with a particular religion? And, how does this vary from the identification of untouchability as historically and sociologically experienced disability as proposed by Sardar Hukam Singh?

¹⁰ Constituent Assembly debates: official report, vol. 10 (Lok Sabha Secretariat 1999) at page 247, *emphasis added*.

¹¹ Constituent Assembly debates: official report, vol. 10 (Lok Sabha Secretariat 1999) at page 232–36

In an analytical scheme addressing different judicial approaches on the identification of castes Marc Galanter presents different approaches to caste as dilemmas arising about the very nature of the phenomenon itself. To some scholars, castes are the building blocks of the Hindu religion while to others they are merely sociological entities that obtain in India. Working through these different positions on caste Galanter proposes these differences in terms of three models through which castes have been legally conceptualised. These are (1) the Sacral Model, (2) the Sectarian Model and (3) the Associational Model. The sacral model posits caste groups as a constituent part of the sacral order of Hindu society. In this model, Hindu society is seen as a differentiated but integrated order in which the different parts may enjoy different rights, duties, privileges and disabilities, which are determined by the position of the caste group in relation to the whole. The sectarian model posits caste as an independent religious community demarcated by doctrine, ritual or culture. This model conceives of caste as a religious unit but one that is self-contained and disassociated from a larger religious order. The rights and duties of the group and its members follow from its own rules and regulations and not from its place in a larger sacral order. Lastly in the associational model, caste is understood as a self-governing group with its own set of rules and regulations, which are marked neither by a fixed place in a larger religious order nor by distinctive religious beliefs or practices. The bonds of association in this model might include religion but this is to be understood as one among many other aspects of group life. (see Galanter 1966:278–79).

In Galanter's (1966) scheme these three models are not presented as a theory of what castes are, but as three models that colonial courts have employed to organise the issues and problems involving caste. As self-governing entities with powers of internal self-government recognised by the colonial government, they were understood to be organised as sectarian and associational entities. As constituent elements for the governance of religious personal laws, castes were

viewed through the lens of the sacral model. Despite the different functional role these models of caste played in the colonial courts it is important to note the contending assumptions that give these models intelligibility. The sectarian and associational models are sociological models of caste while the sacral model as the name suggests is a doctrinal or religious model of caste. However, what does this latter claim entail?

Caste groups are a ubiquitous feature of the Indian social terrain. Variouslly termed *jatis*, *sampradayas*, or *jamats*, they are sociological entities within which the life of collectives is transacted. However, a sacral or 'Hindu' conception of caste is a specific account that is informed by the category of *varna* from the classical Hindu texts. In classical Hindu law, the multitude of Indian castes are organised into the four hierarchically organised groups or *varnas*—the *Brahmins*, *Kshatriyas*, *Vaisyas* and *Sudras*. This account was implanted into Indian law by the British colonial government by making it the basis of personal laws for all persons designated as Hindu.

Galanter (1966) argues that one of the most crucial distinctions within this *varna* based account of Hindu personal law was its division of the four *varnas* into two groups—the *Brahmin*, *Kshatriya* and *Vaisya* or *dvija* groups, who were considered ritually superior were governed by a different set of personal law rules from the *Sudra* groups who were deemed ritually inferior. There was considerable difficulty in slotting the multitude of Indian castes into appropriate *varnas* and courts had to device ways in which they could distinguish the *dvija varnas* from the *Sudra varna*. In some cases the test to identify a group was the customary practices said to be typical of the *Sudras*. In others the identification of *varna* took place by evaluation of the caste group's own consciousness of its status and the acceptance of this estimate by other castes in the locality, with estimations of status being tied to notions of purity and pollution practices between caste groups (Galanter 1966: 280–82). However, in all these cases castes are seen as religious entities who 'occupy their respective places in the

sacral order of ranks which embraces all groups within Hinduism' (Galanter 1966:282).

The treatment of caste in colonial personal law underwent dramatic transformation with the coming of Indian independence. Two developments are of particular significance. First, the passage of the Hindu Code Acts which established a uniform Hindu law for all Hindus thereby rendering *varna* largely insignificant as a legal category. Second, the constitutional abolition of untouchability as laid out in Art 17. According to Galanter, these developments have resulted in the decreasing significance of the sacral model of caste (see Galanter 1966). This is undoubtedly true at the discursive and semantic level in the Constitutional scheme of independent India. However, at the conceptual level this model of caste continues to shape the intelligibility of the constitutional approach to the problem of identifying the Scheduled Castes.

As standard setting the threshold to identify Scheduled Castes, the sacral model has subordinated both the sectarian and the associational models of caste to the level of sub-classifications. That is, in the present constitutional scheme these other classifications continue to be important in addressing issues related to the scheduled castes but only within the boundaries set by the sacral model. However, in Galanter's (1966) castes schema the sectarian and the associational models of caste were presented as equally plausible ways of representing caste where one model was not dependent on the other. Quoting from a case decided in colonial Madras he notes that 'a caste is a combination of a number of persons governed by a body of usages which differentiate them from others. The usages may refer to social or religious observances, to drink, food, ceremonies, pollution, occupation, or marriage'. (Galanter 1966) In other words caste need not be solely identified with religion, and it could just as well be understood as a way of living together.

As autonomous social groups, castes could even be collections of Non Hindu groups, and, as Galanter (1966) shows, courts have recognised castes among Muslims, Parsis, Jains, Sikhs and

Christians.¹² The sectarian and associational forms of modelling of caste therefore had a salience in colonial India which they do not have in contemporary constitutional identification of the scheduled castes. That is, though castes could potentially be of any religious persuasion in the colonial scheme, the present constitutional scheme under Art 341 identifies scheduled castes only as untouchable groups within the *varna* hierarchy of the sacral model, thereby excluding all non-Hindu groups.

It is the salience of the sacral model that permitted K. M. Munshi to argue during the early debate on the minority question in the Constituent Assembly that the Scheduled Castes were not to be considered apiece with other minorities. Making his case he argued that:

(S)o far as the Scheduled Castes are concerned, they are not minorities in the strict meaning of the term; ... the Harijans are part and parcel of Hindu community, and the safeguards are given to them to protect their rights only till they are completely absorbed in the Hindu Community.¹³

It might seem odd to think of the rights granted to the Scheduled Castes by the Indian Constitution as a framework for their absorption into the Hindu community. However, this is the dominant conceptual model through which Indian constitutional practice has addressed the problem of untouchability and the entitlements the Constitution grants to compensate for the injustice of this practice. This is perhaps better illustrated through a decision of the Supreme Court on a challenge mounted against the *Scheduled Caste Order of 1950*.

¹² See for instance *Abdul Kadir v. Dharma* 20 Bom. 190 (1895) cited in Galanter 1966:289.

¹³ Constituent Assembly debates: Official Report, vol. 5 (Lok Sabha Secretariat 1999) at page 227–28.

*Soosai v. Union of India*¹⁴ dealt with a constitutional challenge to the Scheduled Caste Order 1950 which excluded non Hindu and non Sikh communities from being identified as Scheduled Castes. Soosai, the petitioner in this case, was a cobbler belonging to the *adi dravida* Scheduled Caste community but had converted to Christianity. Against this background his constitutional challenge related to certain welfare schemes of the Government of India intended for *adi dravida* cobblers for which he was not eligible solely because of his conversion. The Government Order granting these welfare measures clearly stated that members of the Scheduled Castes who had converted to Christianity would not be eligible for the assistance envisaged by the scheme. As this government order was framed in accordance with the Constitution (Scheduled Castes) Order 1950, he challenged its validity on the ground that it violated the constitutional guarantees of equality and freedom to practise religion. Stating his case Soosai argued that despite his conversion he remained an *adi dravida* as a matter of *fact* and that the differential treatment accorded to him only because of his conversion would result in the violation of the Constitution's equality provisions as well as his right to religious freedom. The essay will not discuss the constitutional merits of Soosai's case which are undoubtedly strong but emphasise the contending sociologies of caste which came to a head in the case.

In favour of the Scheduled Caste order it was argued that:

(T)he caste system is a feature of the Hindu social structure. It is a social phenomenon peculiar to Hindu society ... Those who occupied the lowest rung of the social ladder were treated as existing beyond the periphery of civilised society, and were indeed not even 'touchable'. This social attitude committed those castes to severe social and economic disabilities and cultural and educational backwardness.¹⁵

¹⁴ MANU/SC/0045/1985

¹⁵ MANU/SC/0045/1985 at para 8.

On the other hand Soosai responded to this contention with an empirical claim that he continued to be an *adi dravida* as a matter of *fact*. The court dismissed Soosai's claim on contradictory grounds—on the one hand it suggested that caste was *prima facie* a Hindu institution and on the other it also held that Soosai had not conclusively established that he retained caste on conversion. Thus though the court refused to accept Soosai's claims, it nonetheless flirted with both the contending arguments in the case. The main thrust of Soosai's empirically grounded contention that he retained his caste despite conversion was dismissed by the court on the doctrinal grounds that caste was an exclusively Hindu institution and that conversion generally implied loss of caste. However, the court also considered the contention that Soosai could retain caste, but dismissed it on grounds that he had not advanced credible evidence to support this claim. But what was the standard of evidence that the court was demanding?

In dismissing Soosai's case the court arrived at the conclusion that Soosai could not demonstrate that he was subjected to the same set of caste disabilities within the Christian community as a Hindu *adi dravida* was within the Hindu community. The burden of proving caste discrimination within the Christian community is a rather odd demand because it does not fully appreciate Soosai's claim. It might well have been possible to establish that he suffered caste disabilities within the Christian community.¹⁶ However, his claim was that he suffered caste disability as an *adi dravida* and not necessarily only as a Christian or a Hindu. That is, his contentions turned on the sociological fact of belonging to a caste group that was subjected to existing and historical disadvantage.

The court was unable to appreciate Soosai's claims because its conception of caste was based on a sacral or *varna* account of

¹⁶ For instance, *Kattalai Michael Pillai And Ors. vs Right Reverend J.M. Barthe, S.J. Bishop Of Trichinopoly And Ors.* AIR 1917 Mad 431.

the phenomenon. However, Soosai was making an empirical and experiential case for untouchability and caste discrimination by arguing that he suffered from untouchability as a matter of fact. In this regard it could perhaps be argued that the sacral or doctrinal model of caste could also be considered reflection of the empirical problem of caste and that Soosai's case is merely a case of under-inclusion. Though it might be true that the sacral account of caste might be able to pick many of the poorest Indians for its affirmative action programs the fact that this model is unable to respond to evident cases of discrimination on the basis of untouchability suggests that there is something about the sacral model that is resistant to compelling sociological and factual evidence. In addition there is also a considerable body of scholarship that suggests that it is not possible to establish a definitive relationship between Indian textual or doctrinal traditions and Indian social practices (Derrett, 1999; Menski, 2003; Cohn, 1996; Mani 1998). That is, on the basis of the Indian textual tradition it is not possible to make the further claim that caste practice flows directly and consequently from the Hindu religious traditions. Consequently the sacral model has been largely impervious to the experiential and sociologically grounded demands of Christians and Muslims who have and continue to suffer from the discrimination and injustice produced by untouchability. Undoubtedly this sacral model does identify many groups who justly deserve compensatory state action on grounds of historic disadvantage. However, it is the suggestion of this essay that this is the result of sub-classification of groups within the sacral model which it must be emphasised is blind to the problem of untouchability that occurs outside a doctrinally demarcated conception of the 'Hindu' religion.

Before concluding this discussion on Scheduled Castes it is important to note that there has been a progressive expansion of the definition of the Scheduled Castes. Thus all Sikh untouchables were included in 1956 and Buddhists were included in 1990. However, Muslims and Christians continue to be barred from being identified as Scheduled Castes. In this regard the Ranganath Mishra Commission

on minority rights has recommended that Art 341 be expanded to include Muslims and Christians as well.¹⁷ Therefore it could be argued that the extension of the Scheduled Caste order to include all religious persuasions could erode the significance of the sacral account of caste. Though this development will perhaps reorient the politics of identity in India towards an experiential and empirically founded conceptions of untouchability and the discrimination and backwardness associated with it, it is also a development that faces considerable headwinds as the sacral account of caste has acquired a resonance in the identification of the ‘other backward classes’, also a major beneficiary of differentiated citizenship in India.

The Backward Classes

The constitutional rights granted to the ‘backward classes’ (BC) are primarily contained in three constitutional articles—Art 15(4), Art 15(5) and Art 16(4). The beneficiaries of these rights contain two groups—‘socially and educationally backward classes of citizens’ and ‘backward class of citizens’ who are the recipients of the rights granted in Art 15(4)&(5) and in Art 16(4) respectively. These constitutional provisions permit governments to undertake measures for the advancement of BCs and historically the principal legal challenge that these entitlements pose is the distribution of opportunity in government jobs and in State funded educational institutions in a manner that does not derogate from the Constitution’s stated commitment to equality. As in the case of the Scheduled Castes, the primary concern of the essay is the manner in which the BCs are identified, not the judicial treatment of the substantive entitlements of the BCs.

In the Constituent Assembly the discussion on the backward classes was limited to what eventually became Art 16(4) because Art

¹⁷ Ranganath Misra, ‘Report of the National Commission for Religious and Linguistic Minorities’ (Ministry of Minority Affairs 2007) at page 153–54

15(4) and 15(5) were subsequent amendments to the constitution. Thus debate on the draft constitutional article which sought to permit the government to reserve jobs for 'backward classes' of citizens was divided between members from the southern provinces who argued in its favour while those from the northern provinces were cautious about wording the provision in terms that they considered too broad. The term 'backward class' had a technical legal meaning in parts of British India like Madras and Bombay but was less common in other provinces (see Galanter 1984:154–58). In Madras, for instance, at the time of independence there was a scheme of quotas in government services that included many castes that were considered socially above the untouchables but yet backward enough to be considered eligible for these measures (see Galanter 1984:157–58). With the constitution makers having resolved in favour of an elaborate scheme of rights for the advancement of the Scheduled Castes, the question was whether similar measures were envisaged for other groups who were considered to be backward in various parts of British India.

The debates of the Constituent Assembly and the adoption of Art 16 permitting reservation of quotas for the 'backward classes of citizens' in government employment, suggest that such measures were indeed intended for the BCs. The case for quotas in educational institutions funded by the State was however less certain. In one of its first decisions on the question of government measures for the BCs, the Supreme Court struck down an executive order of the Madras government that reserved all available seats in government funded professional colleges through a system of quotas for the major communities in the province in the proportion of their size in the population.¹⁸ The Court held that this measure granted benefits to various communities *solely* on the grounds of caste and community, which violated the constitutional commitment to equality.¹⁹ This

¹⁸ State of Madras v. Champakam Dorairajan AIR 1951 SC 226

¹⁹ Especially the guarantee in Art 29(2) which states that (2) No citizen shall be denied admission into any educational institution maintained by the State or

decision however upset the government distribution of educational opportunity as it was commonly practised in many south Indian states, resulting in first constitutional amendment that added Art 15(4) to the constitution. The amendment permitted the government to undertake steps for the advancement of socially and educationally backward classes of citizens. However, the terms ‘socially and educationally backward classes’ and ‘backward classes’ were by no means settled and required detailing through judicial interpretation and institutional practice.

The phrasing of articles Art 15(4), 15(5) and 16(4) permits the government to confer special measures or rights on ‘backward classes of citizens’ and to ‘socially and educationally backward classes of citizens’. Phrased in this broad manner the beneficiaries of these rights can potentially include any class of citizens who successfully demonstrate a case of their backwardness according to the designated government tests and standards. Constitutional practice has identified backward groups through identity based criteria like caste and religion, as well as criteria like income, education levels, and geographic location. Even so, caste has historically been, and remains, the most significant criterion to determine and establish backwardness in Indian constitutional practice. Therefore focusing on the manner in which courts have deployed caste to designate backwardness, it will be argued that to the extent that they rely on caste, courts have found it difficult to escape a sacral conception of the Hindu religion.

Despite the centrality of caste in designating backwardness, there have always been doubts on whether and how caste was a permissible form of constitutional classification for the delivery of ameliorative government schemes under Art 15(4), 15(5) and 16(4). *M.R. Balaji v. State of Mysore*²⁰, an early though defining decision of the Supreme

receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

²⁰ AIR 1963 SC 649

Court held that any measure under these articles would have to be balanced by Art 15(2) and 29(2) and therefore caste alone could not be a criterion for government schemes (seats in educational institutions in this case) providing for the backward classes. However, the manner in which caste would determine backwardness was still an open question that required judicial consideration.

On the significance of caste for the determination of backwardness the court stated that

[...] If the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes *in the conventional sense known to Hindu society*. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art. 15(4). ... That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf.²¹

Intriguingly the Court ties caste as it has been understood in ‘conventional sense known to Hindu society’ to the determination of a backward class in the case of Hindu communities. That is, in all likelihood the court is arguing that castes as sacral Hindu entities are relevant for the determination of backwardness. However, in what way can a varna or sacral account of caste inform backwardness?

Identification of backwardness has acquired a considerable degree of sophistication since the Balaji case. As a result of demands made by the courts that backwardness cannot be determined solely on the grounds of caste, various State commissions as well

²¹ AIR. 1963 SC 649, *emphasis added*.

as two centrally appointed backward classes commissions²² have probed the status of the backward classes and the ways they may be identified. Of the two Backward Classes Commissions established by the central government, the first Commission's report was rejected by the government. However the second Commission's report, popularly called the Mandal report after its chairperson, was accepted by the central government in 1990. According to the Mandal report, identification of a backward class is merely a matter of determining whether a particular caste group meets a given set of social, educational and economic criteria with each criterion being accorded greater weightage in that order. However, this continues to raise the issue of the relevance of the sacral account for the determination of backwardness.

In a particularly important decision on the entitlements of the 'backward classes' the *Indra Sawhney*²³ judgment dealt with a challenge to the decision of the Government of India to implement the recommendations of the Mandal report by issuing an official memorandum reserving 27% of the vacancies in central government services and public sector companies and undertakings for the socially backward classes. The *justification* that Justice Jeevan Reddy advances for measures in favour the backward classes is of considerable importance of understand the significance that a sacral *varna* account of caste assumes in determining social and educational backwardness.

According to Justice Reddy the challenge caste posed to the egalitarian ethos of the Indian constitution was its role in the Hindu religion which was

²² The backward classes commissions are appointed under Art 340. Unlike the commissions for scheduled castes and tribes, this is not a standing body and only reports to the President on the status of the socially and educationally backward classes. From 1993 onwards a significant part of these functions have also been vested on the National Commission for Backward Classes as instituted by the National Commission for Backward Classes Act, 1993. See also Galanter, 1984: 178–86.

²³ MANU/SC/0104/1993

[...] not known for its egalitarian ethos. It divided its adherents into four watertight compartments. Those outside this four tier system (chaturvarna) were the outcastes (Panchamas), the lowliest. They did not even believe all the caste system—ugly as its face was. The fourth, shudras, were no better, though certainly better than the Panchamas. The lowliness attached to them (Shudras and Panchamas) by virtue of their birth in these castes, unconnected with their deeds.... Poverty there has been ... in every country. But none had the misfortune of having this social division—or as some call it, degradation—superimposed on poverty. Poverty, low social status in Hindu caste system and the lowly occupation constituted—and do still constitute—a vicious circle.²⁴

That is, the entitlements of the backward class are justified within a sacralised *varna* based conception of the Hindu religion. Justice Reddy points to the significance of the *varna* based organisation of Indian society as the ‘stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon’.²⁵

However, the line of cases from the *Balaji* decision has also held that a caste by itself would not qualify to be a constitutionally recognised backward class unless it was also established that the caste concerned was ‘socially and educationally backward’. This identification however proceeds on almost entirely non sacral lines. Thus, as Justice Reddy suggests, once a caste has been identified as potentially backward then the authority concerned with the determination of backwardness ‘can take caste ‘A’, apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of Clause (4) of Article 16.’²⁶ That is, castes in this account are seen primarily as sectarian or associational

²⁴ MANU/SC/0104/1993 at para 2.

²⁵ *Ibid.*, at para 82.

²⁶ *Ibid.*, at para 83.

entities and their backwardness measured by a set of largely objective criteria developed for the purpose of running a reservation program.²⁷ Consequently it seems that the sacral justification for including castes as a backward class is very thinly tied to the actual identification of backward classes in Art 15(4) and 16(4).

It is difficult to explain the gratuitous invocation of the varna or sacral conception of caste to justify measures in favour of the backward classes except that it might be an attempt to harness the normative charge of untouchability which is tied to the sacral and doctrinal account of caste. However, untouchability is presumably not the grounds on which backward classes are entitled to welfare measures from the Indian State. That is, even though their entitlement ought to derive from measurable (however inaccurate this might be) standards of backwardness it does seem as though the strong negative charge associated with untouchability is being widely used even by courts to justify and perhaps even entrench on the lines of caste, the entitlements due to the 'backward classes.' In doing the constitutional practice perhaps cuts free of the underlying social experience of backwardness to entrench the entitlements of caste identities rather than being a policy measure by which backwardness can be transcended.

Minorities

The final group entitled to rights by the Indian Constitution's system of differentiated rights are groups designated minorities by Art 30. The rights of minorities in Art 30 are closely tied to Art 29(1) which grants *any class of citizens* the right to protect their language, script or culture, and Art. 29(2) prohibiting discrimination in admission to educational institutions receiving State funds on grounds 'only of

²⁷ Palshikar (2008) makes a similar point when he notices the unfulfilled mandate of the Mandal decision towards a rigorous socio-scientific determination of backwardness. Suhas Palshikar, 'Challenges before the Reservation Discourse' (2008) 43 Economic and Political Weekly 8-11

religion, race, caste, language or any of them'. Art 30 on the other hand grants *minorities* based on religion or language the rights to establish and administer educational institutions of their choice and forbids the State from discriminating against minority educational institutions when making grants in aid. This group is of course slightly different from those that the constitution sought to grant rights on grounds of social and caste related disabilities. However, it is significant because it is a remnant of the colonial constitutional scheme and is suggestive of the problem of the sacral model and especially of the problems arising from basing an affirmative action program on this sacral model. That is, that the sacral scheme is entirely immune to empirical and sociological contest.

Judicial and institutional practice dealing with various aspects of Art 29 and 30 have been primarily concerned with the extent to which the State can regulate the functioning of educational institutions run by various religious and linguistic minorities. The constitutional issue at stake has been the extent to which Art 29 (1) and Art 29 (2) limit the right granted to minorities in Art 30(1) to establish and administer their educational institutions. Commenting on judicial decisions on this issue Rajeev Dhavan and Fali. S Nariman (2000) have remarked that the Supreme Court was remarkably solicitous of the rights of minorities to control their institutions in the early years of the Indian republic but over the years have increasingly permitted greater State regulation. The present essay is less concerned with the manner in which courts have regulated minority institutions as with the manner in which they have identified the minorities, especially religious minorities, who are eligible to avail themselves of the right granted in Articles 30. In this case also it is claimed that the intelligibility of the term religious minority in Indian constitutional practice is tied to a sacral conception of the Hindu religion.

In administering the rights of minorities Indian courts have not emphasised conceptual aspects of the term minority. Instead they have attempted to develop techniques to regulate the provision education as a public good while protecting the rights of groups assumed to

be minorities to establish and administer educational institutions of their choice. Thus Indian courts have been more concerned with administrative about questions like whether the term minority in Art 30 should be determined at the level of the State or the union government than about the term minority as such. Their answers have therefore reflected this administrative approach with the terms minority being generally understood to be a group that comprises less than fifty percent of the population of a State.²⁸ This geographical emphasis is perhaps explained by the nature of the right granted in Art 30. That is, until 1976 the Union government did not have competence to legislate on matters dealing with education though the passage of the 42nd amendment to the Constitution altered this position by making education a concurrent subject.

A constitution bench of the Supreme Court in *T.M.A. Pai Foundation & Ors v. State of Karnataka & Ors*²⁹ held that the 42nd amendment would make no difference to the manner in which a minority would be identified. Holding that the conception of minority could not change depending on the government against whom a right was being claimed Justice Khare noted that out if minorities were to be decided nationally then many linguistic minorities in India's linguistic States could claim to be minorities in their own States where they were in a majority, which he thought was against the design of the constitution makers. Ruma Pal J. dissented from this position by holding that constitutional rights arose in the context in which they were claimed. Thus according to her minorities would be decided nationally for rights that were to be claimed against the national government and at the level of a State for rights that were to be claimed against a State government. None of the judges however dealt with the minority rights as arising out

²⁸ See for example In Re: The Kerala Education Bill 1959 1 SCR 995; Dipendra Nath v. State of Bihar AIR 1963 Pat 54; K.O.Varkey v. State of Kerala AIR 1969 Ker 191; D.A.V. College v. State Of Punjab 1971 AIR 1737.

²⁹ MANU/SC/0905/2002

of a conceptual problem which entitled the minorities so defined to avail constitutional rights.

By suggesting that minorities are groups who comprise less than 50 per cent of the population of a State, it seems as though courts have taken a particularly flexible pragmatic position regarding the designation of minorities. That is, they preferred to determine religious and linguistic minorities depending on the demands of exigent circumstances. However, even if one were to accept that this was what Indian courts were attempting to do, it is not possible to identify many Hindu caste groups as religious minorities even though they may constitute less than 50 percent of the population of a State. This can only be so because caste groups are understood to be part of a sacral conception of a Hindu majority against which the idea of a minority assumes intelligibility. This claim about the Indian constitutional conception of minorities and their rights is best illustrated by drawing on a Supreme Court judgment that decided this issue in relation to the identification of minorities in the Minorities Commission Act 1992.

In *Bal Patil & Anr. v. Union of India*,³⁰ the Supreme Court dismissed the petition of the Jain community challenging the Minorities Commission Act 1992. Providing *inter alia* for the welfare of Indian minorities, this statute defines minorities as communities duly notified by the central government. Accordingly the Muslim, Sikhs, Christians, Parsis and Buddhists were notified as national minorities. The Jains who were left out of this list challenged this notification and petitioned the court to direct the government that they also be included in this list of minorities.

The court responded to the Jain petition by arguing that the Jaina tradition was born of the larger Hindu religion. According to Justice Dharmadhikari, permitting the Jaina religion to be recognised as a minority was similar to construing Hindu castes as

³⁰ MANU/SC/0472/2005

minorities, which he argued would be fatal for national unity. It is quite likely that Justice Dharmadhikari was wrong in considering the Jains to be Hindus. However, his observations on caste reflect the significance of an integrated doctrinal conception of the Hindu religion for the identification of a religious minority. That is, the court's own definition of a minority as a social group (including castes) constituting less than 50 % of the population of a State could not apply to Hindu subgroups because it would destroy the very intelligibility of a religious minority in the constitutional scheme. In other words the term minority reinforces and is reinforced by an integrated and by implication a sacral conception of the Hindu religion. In this context is also important to stress that the Bal Patil case is not an isolated instance and the Supreme Court has dealt with the question of religious minorities similarly in many other cases.³¹ In all these cases the constitutional conception of a religious minority assumes intelligibility only against an integrated and sacral conception of the Hindu religion.

Thus like with Scheduled Castes and Backward Classes, the conception of a minority assumes significance in Indian constitutional practice only against the background of a sacral and perhaps even a non-empirical conception of a majority 'Hindu' community. It is this sacral conception of a 'Hindu' community against which Muslims or Christians are considered minorities, while a Haviyak Brahmin, a Kamma, or a Lingayat are not. Of course it could be argued that this form of classification was an entirely legitimate form of classification produced at independence to accommodate the erstwhile 'minorities' of colonial India who were no longer entitled to the more extensive rights they enjoyed in colonial India. Even so it is important to

³¹ *Bramchari Sidheswar Bhai v. State Of West Bengal* 1995 AIR 2089; *Commissioner Of Police & Ors v. Acharya J. Avadhuta And Anr* MANU/SC/0218/2004; *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya* AIR 1966 SC 1119. the court has been reluctant to divide the Hindu religion into its constituent castes and groups and consider them distinct minority religious sect.

recognise the sacral conceptual framework within which these minorities acquire intelligibility and the ways in which the sacral framework floats free of empirical and sociological scrutiny.

IN CONCLUSION: HOW MUST SOCIETY BE DEFENDED?

This essay's discussion on the constitutional framework in relation to identity permits us to reframe the revolutionary new vision of society that constitutionalism inaugurated at independence. Demands for rights and entitlements on grounds of Identity are no doubt very different today than they were in colonial India. The idea of an India irreconcilably divided amongst its many identities would undoubtedly today be dismissed as preposterous. However, it seems that the vision of a divided India has been replaced by a curious conception of 'Hindu' majoritarianism. A majoritarianism based on a sacralised conception of a 'Hindu' majority whose bearing on social experience is oblique (in the case of the Scheduled Castes) at best or tenuous at worst (in the case of the minorities and the backward classes). In other words the constitutional revolution of modern India is also a social vision that gathers up diverse sets of social experience by the dubious presumption that a sacral conception of 'Hindu' society can model the Indian social problem. Ironically it was exactly this lack of resonance with the Indian social condition that motivated the constitutional project to reframe the colonial system of minority rights.

The experientially skewing modelling of Indian society and consequently of differentiated citizenship in the contemporary constitution has potentially serious implications for the problem of politics in contemporary India and at a policy level for the future of affirmative action schemes. Of course, this essay says very little about the technical discussions that are required to devise suitable programs for affirmative action. On the other hand it has attempted a preliminary attempt to think about the conceptions of Indian society on the basis of which policies of affirmative action are founded. On this matter various scholars have expressed misgivings and anxieties

about the manner in which identity politics, especially in the case of backward classes, manipulates state policies as tools to shore up group interests rather than advance broader common and public goals.³² Against this background, by raising the issue of an experiential and empirical gap in the social models on which politics is founded and social policies devised, this essay asks the question—how has, and more importantly how must society be defended so that it might resonate more closely with Indian social experience?

Bibliography

Cases

- Abdul Kadir v. Dharma* 20 Bom. 190 (1895)
Bal Patil & Anr. v. Union of India MANU/SC/0472/2005
Branchari Sidheswar Bhai v. State Of West Bengal 1995 AIR 2089
Commissioner Of Police & Ors v. Acharya J. Avadhuta And Anr MANU/SC/0218/2004
D. A. V. College v. State Of Punjab 1971 AIR 1737.
Dipendra Nath v. State of Bihar AIR 1963 Pat 54
In Re: The Kerala Education Bill 1959 1 SCR 995
Indra Sawhney v. Union of India MANU/SC/0104/1993
K. O. Varkey v. State of Kerala AIR 1969 Ker 191
Kattalai Michael Pillai And Ors. vs Right Reverend J.M. Barthe, S.J. Bishop Of Trichinopoly And Ors. AIR 1917 Mad 431.
M.R. Balaji v. State of Mysore AIR 1963 SC 649
Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya AIR 1966 SC 1119.
Soosai v. Union of India MANU/SC/0045/1985
State of Madras v. Champakam Dorairajan AIR 1951 SC 226
T.M.A. Pai Foundation & Ors v. State of Karnataka & Ors MANU/SC/0905/2002
- Reports and Primary Material
East India (Advisory and Legislative councils, & c.). Proposals of the government of India and Despatch of the Secretary of State, Vol. I. LXXXVI, Part.1 (1908)

³² For instance see Pratap Bhanu Mehta, 'The Politics of Social Justice' in *India 2011* (Business Standard Books 2012)

- Constituent Assembly debates: official report*, vol. 10 (Lok Sabha Secretariat 1999).
- Constituent Assembly debates: official report*, vol. 5 (Lok Sabha Secretariat 1999).
- Misra, Ranganath, *Report of the National Commission for Religious and Linguistic Minorities* (Ministry of Minority Affairs 2007).
- Secondary Material
- Ansari, Iqbal, 'Minorities and the Politics of Constitution Making in India' in D Sheth and Gurpreet Mahajan (eds), *Minority identities and the nation-state* (Oxford University Press 1999).
- Cohn, Bernard S., *Colonialism and its forms of knowledge: the British in India* (Princeton University Press 1996).
- Derrett, J. Duncan M., *Religion, law and the state in India* (Oxford University Press 1999).
- Dhavan, Rajeev, and Fali S Nariman, 'The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities' in B. N Kirpal and others (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000), 256.
- Galanter, Marc, 'Religious Aspects of Caste' in Donald Eugene Smith (ed), *South Asian Politics and Religion* (Princeton University Press 1966).
- Galanter, Mark, *Competing Equality: Law and the Backward Classes in India*, 1984.
- Mani, Lata, *Contentious traditions: the debate on Sati in colonial India* (University of California Press 1998).
- Mehta, Pratap Bhanu, 'The Politics of Social Justice' in *India 2011* (Business Standard Books 2012).
- Mehta, Uday Singh, 'Constitutionalism' in Niraja Gopal Jayal and Pratap Bhanu Mehta (eds), *The Oxford companion to politics in India* (Oxford University Press 2010).
- Menski, Werner, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press 2003).
- Palshikar, Suhas, 'Challenges before the Reservation Discourse' (2008) 43 *Economic and Political Weekly*, 8.
- Rao, B. Shiva, V. K. N. Menon, Subhash C. Kashyap, and N. K. N. Iyengar, *The framing of India's Constitution*, vol. 2 (Indian Institute of Public Administration 1966).
- , *The framing of India's Constitution*, vol. 4 (Indian Institute of Public Administration 1966).

