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The Idea of Religious Minorities and Social Cohesion in India's Constitution: Reflections on the Indian Experience

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Abstract: India has many religious groups, of which Hindus are a majority, and Muslims, Christians, Sikhs, Buddhists and Jains are minorities. India's Constitution, adopted in 1950, departed from the existing norms of secularism in Europe and elsewhere, which suggested a strict separation of religion and state. Moreover, freedom of religion is a Fundamental Right guaranteed under the Indian Constitution. With its distinct model of secularism and special provisions for religious minorities, India's social cohesion arrangement needs special attention. On one hand, the distinct understanding of secularism in the Indian context has led to the advancement of religious pluralism. At the same time, it has invited criticism for selective intervention in the affairs of religious communities from governments in power. The selective intervention has challenged the exclusivity of Indian secularism. This article evaluates the constitutional and theoretical ideas underlying provisions on religious minorities and freedom of religion enshrined in the Indian Constitution. It appraises the idea of religious minorities enshrined in the constitution through a discussion of the process that shaped the idea. The article reflects on the Indian experience of managing the rights of religious minorities and freedom of religion. By analysing a landmark judgement related to freedom of religion and the rights of religious minorities, the article evaluates whether the Indian Constitution advances a model of social cohesion by balancing freedom of religion and the rights of religious minorities or remains ineffective in achieving the same.

Keywords: minority rights; equality; constituent assembly; independence; secularism; personal law; fundamental rights; judiciary

1. Introduction

The Indian experience in constitution-making coincided with the trajectory of the nationalist struggle for independence from colonial rule. Due to this common trajectory, many issues relevant to the nationalist struggle were also integral to the debates on the constitution-making process. The parallel between the nationalist struggle and the drafting of the constitution was such that both eventually became intertwined. By the year 1947, the two processes overlapped because of the organization that was leading at the national level. Among other things, the Indian National Congress (hereafter 'Congress party') was leading and managing the process of nationalist struggle for an independent India and its probable constitution.[1] Therefore, looking at the Congress party as a common link between the struggle for independence and constitution-making offers an opportunity to explore the underlying idea behind the constitutionalization of matters in India. Alternatively, the concurrence of issues in legal and political discourse in the first half of the twentieth century provides an opportunity to examine the Congress party's ability to manage—and approach in managing—challenges related to equality and minority rights in Indian society.

Any investigation of the issues pertinent to the making of an independent India needs several insights. An observation resulting from the triangulation[2] of the nationalist struggle, the constitution-making process and the workings of the Congress party would fulfil the criteria of a multidimensional analysis. A clear understanding of the social cohesion arrangement adopted to manage diversity, the mechanism devised to accommodate the

demands of linguistic communities, backward classes[3] and management of religious and secular law in the Indian context is feasible in a multidimensional analysis. This paper uses a triangulation-based approach to examine the idea of religious minorities in the first part of the paper, then discusses various provisions enshrined in the constitution to sustain social cohesion and finally reflects on the Indian experience. In this study, the triangulation-based approach is helpful in examining the idea of religious minorities. To explore this idea and social cohesion with a triangulation approach, three points of observation are selected. The nationalist movement, constitutionalization and the Congress party had to deal with the question of religious minorities at almost every phase of the struggle against colonialism. The three reference points—nationalist movement, constitutionalization and the Congress party—were not chosen for their epistemological importance and rich composition of various ideas. Perhaps they can be best understood as interactive categories that shaped an idea of religious minorities in India. Hence, these three reference points in triangulation can sustain a comprehensive study of religious minorities while limiting the scope of distraction. As a methodological approach, here, triangulation makes it possible to expand the scope of this analysis. However, triangulation is applicable for evaluating the idea of minorities in the period before independence and its immediate aftermath because, within the first two decades of independence, the idea of religious minorities and the Muslim minority community in particular encountered different reference categories other than those typically referred to in pre-independent India.[4]

After the establishment of the Congress party in 1885, it gradually pursued the agenda of a secular and undivided struggle against colonialism in India. The party steadily adapted and moderately transformed the charter of nationalist struggle by identifying a united India as the underlying character of the national movement. For example, the changing reference points for minorities were apparent in the Congress party's idea of a united India under the leadership of Bal Gangadhar Tilak. For example, Tilak accepted the demands of the Muslim League in the Lucknow Pact of December 1916.[5] However, the pact was not formalized, as Tilak died in 1920. Tilak's death and Mohandas Karamchand Gandhi's arrival in India from South Africa and subsequent involvement in the Congress party in 1920 enriched the party's efforts to develop a harmonious relationship among various religious communities.[6] Under Gandhi's supervision, the Congress party made a strategic attempt to ensure that the struggle for freedom should not be diluted and that the harmony among religious communities must be maintained. Nevertheless, the Congress party's efforts and Gandhi's ideas were moderately successful in achieving their abovementioned objective in the 1920s.[7]

The existing conflicts along religious and caste lines among communities and the modern objective of universality adopted by the Congress party under the project of nurturing nationalist values produced many challenges. The challenges hindered the party's aspirations to achieve independence for a united India. By 1947, it was clear that, out of the nationalist movement's two ideals—unity and freedom—only one was to be achieved at the cost of the other. The Congress and the Muslim League failed to agree on the Cabinet Mission plan proposed by the British government. As a result, India's independence was an occasion of both hope and despair for its citizens. Freedom was attained but only after compromising the territorial unity of the nation. The mayhem of the partition of India in 1947 fulfilled the agenda of freedom but partially shattered the project of unity.[8] The Indian subcontinent was divided into India and Pakistan. The political leaders of both soon-to-be-free countries had to redesign the organization of their independent nations. In India, the redesign took place in the form of an attempt to draft a constitution for a free India from 6 July 1946 to 26 November 1950. However, the process was initially affected by continued violence taking place between religious communities due to the partition.

In the aforementioned context, this article contemplates the idea of religious minorities in pre-partitioned and post-independence India. Here, the emphasis is on the context that shaped the idea of religious minorities in general and the treatment of Muslims in particular.

The broader focus on religious minorities and the narrow emphasis on Muslims in the article is contextual and follows two explanations. First, a telling analysis of India's struggle for independence is incomplete without paying any attention to the partition of India. That partition brought into existence Pakistan, which adhered to Islam as a state religion. Hence, creating an option for Muslims in British-ruled India either to opt the newly created Pakistan or to continue as citizens of an independent India, which ensured *de jure* equality to all religions. Second, in a post-independent India, religions other than Islam and Christianity were treated the same. Buddhism, Sikhism and Jainism were all treated as an extension of Hinduism, which was the religion of the majority community.[9] So, these two reasons help in assessing the Indian Constitution's special protections for religious minorities and its social cohesion framework.

The paper follows the above-mentioned triangulation points as terms of reference to evaluate the idea of minorities. The three points are not dealt with separately in different sections, as doing so would be impossible because of the historical overlap. In the following sections, the paper will evaluate the challenges facing the national movement and constitution-making vis-à-vis the Congress party's response to the idea of religious minorities. The subsequent section discusses the Constituent Assembly debates on minority rights by deliberating on questions of backward classes and religious minorities. The last two sections of the article will assess the post-independent articulation of the idea of minorities and its impact on the social cohesion framework. Finally, the paper deals with the advent of political challenges due to a highly publicized case on minority rights, personal laws and freedom of religion discussed in the Supreme Court of India. The paper concludes by reflecting on India's experience in managing religious minorities at the theoretical and case law levels by highlighting the strengths and weaknesses of the social cohesion framework in India.

2. Constitution-Making, Congress Party and Religious Minorities

The newly elected Labour government in Britain announced in September 1945 that they were contemplating the creation of an elected Constituent Assembly for India. By January 1946, the government in London followed up on this announcement and dispatched a British commission[10] to India to help the then-viceroy to form a Constituent Assembly for an independent India. The commission discussed the possibilities of power-sharing between majority and minority religious communities in post-independence India. The commission drafted a proposal that it believed would be acceptable to the Muslim League, which claimed to represent the Muslim minority community, and to its counterpart, the Congress party, which was seen as primarily representing Hindus. However, there were disagreements within the Indian leadership on the proposed recommendations by the British commission, 'while the Congress called for a Constituent Assembly and Indian self-determination. Muhammad Ali Jinnah's Muslim League derided the idea, preferring British presence in India as a deterrence to Congress power.[11] Jinnah took this a step further and said that India must have two Constituent Assemblies, one for Hindustan (India) and one for Pakistan' (Austin 1966, p. 4).

Despite the disagreements, the Constituent Assembly was constituted after provincial legislative elections were held in December 1945 without a universal adult franchise.[12] The Congress party won a majority of the 1585 seats contested in the provincial elections. Later, in July 1946, elections for seats on the Constituent Assembly were organized among the winners of the provincial assembly elections of December 1945. In the elections for the Constituent Assembly, the Congress party emerged as the 'Master of the Assembly' (Austin 1966, p. 10). Though the Congress party and the Muslim League contested the provincial elections and the Constituent Assembly elections energetically, Jinnah's Muslim League officially boycotted the Constituent Assembly from its very first meeting held on 9 December 1946. The Muslim League's boycott of the Constituent Assembly led to debates and discussions questioning the newly formed Assembly's authority. It was only the accreditation of the 1947 Indian Independence Act by the House of Commons in England

on 15 July 1947 and its entry into force on 15 August 1947 that eventually led to the official authorization of the Constituent Assembly.

Despite the fact that the Constituent Assembly was predominantly a one-party body, led by the Congress party, the Assembly had opinions from diverse political backgrounds as well as religious communities.[13] The diversity of opinions within the Assembly contributed immensely to the production of a 'living constitution' for an independent India. One of the tasks before the Assembly, as highlighted by Granville Austin, was of 'fostering a social revolution' (Austin 2003, p. 6). The Assembly asked questions such as, what will happen to the countryside—the norms, culture and traditions—when a constitution with alien values comes into effect? As the process of constitutionalism progresses, how will different communities with an underlying unequal composition based on the caste system grapple with the new institutions? Most importantly, how the demands of the religious minorities will be accommodated within the constitutional framework of independent India? Further, the Assembly was not only responsible for safeguarding the future of a newly born nation through the constitution, but under a Congress majority, the Assembly had to refute many assertions of the past and establish new commitments for the future as well. Assertions from the past mainly included 'visions articulated by the Congress, [which] rested on the idea of a united, plural India as a home for all Indians and the other, spelt out by the League, rested on the foundation of Muslim nationalism and the carving out of a separate Muslim homeland' (Khan 2017, p. 6). The Congress party and its members in the Assembly had to refute the vision of the League and ascertain its commitment to the idea of a plural India, as envisioned by Gandhi.

In response to the League's apprehensions and its bleak past of conflict management, the Constituent Assembly had a lot to examine when the issues of minorities were discussed. The Assembly had to ensure that the post-independence philosophy of India as a nation concerning the treatment of religious minorities was coherent. The question of religious minorities in general and treatment of Muslims in particular, as highlighted above, was part of the constitution-making process itself. Despite the Muslim League's absence in the Constituent Assembly, discussions on the constitutional treatment of religious minorities were vibrant, heated and highly nuanced. The various ideas discussed were not only different in their treatment of the religious minorities in an independent India but were altogether based on different ideas of India. One of India's leading political theorists, Rajeev Bhargava, has noticed that, at the time of independence, there existed 'a tussle between at least five competing visions: the social-democratic vision of [Jawaharlal] Nehru, the Ambedkarite thrust [based on the vision of Dr Bhimrao Ramji Ambedkar], Gandhi's anti-modernist communitarianism, the explicitly socialist position and . . . the Hindutva ideology'.[14]

Amongst all competing notions of an independent India, the idea of India's first Prime Minister, Jawaharlal Nehru, prevailed over all the others. Nehru's vision was synonymous with a liberal, democratic and socialist India. According to Bhikhu Parekh, the national philosophy which Nehru envisaged for the Indian Constitution included 'individual liberty, equality of opportunity, social justice, secularism, and the spirit of rational inquiry . . . scientific temper, independence of action and judgement in world affairs of which non-alignment was a contingent expression, and so on' (Parekh 2006, p. 4). In particular, Nehru's idea of minorities was dependent on how the Hindu majority community could be edified by practising communal harmony. Nehru expected that practising communal harmony would improve the Hindu majority from a moral point of view. The idea of tolerance towards minorities on the part of the majority community was implied in Nehru's understanding. It was this approach that implied an unfavourable understanding of minority rights. Nehru expected that the majority community should practice fraternity and brotherhood to create harmony in the society; however, the values stressing the above-mentioned appeals were traditional and demanded leniency from majority community instead of a rational constitutional engagement.

Further, the attitude of tolerance in public life and in the Assembly 'drew [its] normative force from the simultaneous invocation of a secular liberal-democratic idiom and traditional filial and feudal values' (Bajpai 2008, p. 364). Nehru's approach to understanding and managing India's minorities was mostly about being available and open to various demands from minorities. If studied critically, his approach of dealing with Muslim communalism was subjective. However, Nehru's prejudice towards Muslim communalism was not ill-informed or based on ignorance; in fact, it was rationalized due to the atrocious events of the partition. His limited understanding of communalism was made visible when, in an interview, he commented, 'honest communalism is fear; false communalism is political reaction' (Dasgupta 2017).

As pointed out above, Nehru's ideas, which were dominant in the Constituent Assembly, were driven out of fear: fear of a mass exodus and bloodshed after the partition which accompanied India's independence. Any policy decision or perspective that seemingly compartmentalized society was seen in the Constituent Assembly as a threat to national unity. As a result, the partition of India left many issues unresolved and only partially debated. Further, Suhas Palshikar has commented that 'the sense of fulfilment and expectation [in the Constituent Assembly] resulted sometimes in the relegation of controversy to a secondary place' (Palshikar 2008, p. 146). The negative injunction and focused projection of national unity in the aftermath led to the idea of the safeguarding of minorities. The ideas adopted that were to shape the meaning, life and well-being of minorities were chiefly situated in the backdrop of the bloodbath of partition. In addition, it is important to note that Nehru was aware of the criticisms which alleged that his approach towards minorities was clement and appeasing. Nehru responded to the allegations in one of his speeches in the Constituent Assembly. In his response, he said: 'One word has been thrown about a lot . . . it is that this [Nehru's] Government . . . [follows] a policy of appeasement, appeasement of Pakistan, appeasement of Muslims . . . Do the honourable Members who talk of appeasement think that some kind of rule should be applied when dealing with these [read religious minorities] people which has nothing to do with justice or equity? I want a clear answer to that. If so, I would only plead for appeasement. This Government will not go by a hair's breadth to the right or to left from what they consider to be the right way of dealing with the situation, justice to the individual or the group' (Constituent Assembly of India 1949).

Though Nehru rightly assumed that the principle of secularism was inevitable in the making of a modern and independent India, he led the Assembly to believe that, in this process, accommodating various identities would be an asset. In his efforts and ideas to manage the concerns of minorities, Nehru extended the premises of accommodation. Nehru's approach in principle followed unfettered tolerance driven by the recent experience of harrowing violence of partition. The impact of partition on Nehru's treatment of the minority has been explained by Granville Austin. Austin commented: 'Nehru seems to have been thinking of national integration, defined as a large degree of homogenization of society's compartments . . . By postulating India's unity and integrity, indeed its very survival as a nation, as dependent upon the homogenization of its society's compartments, Nehru was envisaging the impossible. An unrealistic definition of national unity and integrity resulted in unwarranted fear that it was in danger' (Austin 2001, p. 19).

3. The Constitutionalization of the Idea of Minorities

In the Indian context, morality and principles in the era of independence (in contemporary India as well) were embedded in the religious set-up which an individual was ascribed to from birth. The community took precedence over the individual. The conditioning of an individual was grounded in the very specific context pertaining to the religious, caste, linguistic and tribal identity one was born into. Not only did community take precedence over the individual but the location of communities within society was also relative. The idea behind the term *minority* in itself—then and now—is community-centric. Rochana Bajpai has argued that 'in the [A]ssembly's deliberations . . . the term "minority" did not

denote the numerical status of the group as much as the claim that the group suffered from some kind of disadvantage with respect to the rest [other groups] that entitled it to special treatment from the state' (Bajpai 2008, p. 356). The Assembly undertook a long process of external consultation and negotiation before drafting provisions related to linguistic, caste and religious minorities.

The approach of balanced and rationally deliberated discussions was not only followed in addressing the concerns of religious minorities, but it was also evident in the Assembly's response to the question raised by the representatives of backward classes (read castes) and tribal and linguistic minorities. For example, on the question of reservations[15] for the backward classes, the resistance to special provisions for reservation was grounded in opposition to any type of group preference to any community. The arguments advanced to oppose reservations for the backward classes proposed that any state recognition of group identity would undermine the proposed secular values of the state. Alternatively, it was suggested that any special provision under reservations for the backward classes would undermine the principles of equality and non-discrimination which the state had to follow. Apart from concerns over concessions based on principles of non-discrimination and equality, any sort of group preference was seen as undermining the project of national unity and encouraging group loyalty.

Many regarded (and still do) reservations as unfair because of the state's deviation from the principle of equality and non-discrimination. However, there was also strong justification within the Assembly for supporting the provisions of reservations for backward classes. The supporting arguments justified reservations, not in the language of group rights, but in the sense of entitlement to which members of the backward classes were eligible. The supporters of reservations proposed that the state was obliged to compensate for the discrimination and humiliation that backward classes and tribal groups were victims of for thousands of years in the Hindu caste system.

Similarly, questions concerning religious minorities were rearranged not to accept constitutional universality but to ensure balance. This approach had twin effects. First, the act of balancing put context-free provisions based on principles of universality in the constitution. Second, the cultural autonomy of religious communities to practice both healthy and unhealthy customs was protected based on a context-sensitive approach.[16] On the question of the Indian Constitution being either a universal or a contextual document in terms of its treatment of minority rights were resolved by choosing a balanced middle path. This approach is evident in the way the Constituent Assembly discussed the issue of cow slaughter, which was a critical component in deciding the relationship between the majority Hindu and minority Muslim communities. From the early nineteenth century, cow protectionists took steps to politicize the issue of cow slaughter by the Muslim community. From a question of social and cultural practice, it gradually became part of the political agenda. Cow protectionists were successful in their project. Cow slaughter was discussed not only at the local level, but it acquired a major place in institutional discourse as well. In the Constituent Assembly, cow protection was principally debated as a question of religious importance to both Hindus and Muslims. According to Hindu mythology, cows were an important animal to be worshipped and were considered equivalent to a symbolic mother, or *gau mata*. For Muslims, on the other hand, cows were an important part of their ritual of sacrifice, or *qurbani* on the festival *bakr-id/eid ul-adha*. In the Constituent Assembly, cow protectionists were able not only to highlight the religious aspect of the cow but also to underline the cow's historical, social and economic relevance in India.[17] However, one of the constitutional committee considered and rejected a clause pertaining to the issue on the grounds that provisions related to cow protection were matters of policy and had no relevance for any constitutional principles. However later, in the final draft of the Indian Constitution, a cow protection amendment was included as a directive principle of state policy.[18] By placing cow protection in the Directive Principles part of the Indian Constitution, the Assembly maintained a balance. The choice of a middle path to strike

a balance between context-free universality and context-sensitivity is also visible in the provisions related to the cultural rights of minorities.

Nonetheless, issues of minorities' cultural practices were critically debated in the Assembly. In addition, to the question of cow slaughter, the Assembly discussed provisions for the Uniform Civil Code (UCC) and the reform of personal laws of both the majority and minorities, which also faced strong criticism from various communities. Most of the practices under the provisions of the personal law of both majority and minority communities defied the norms of the rule of law necessary for adopting a constitution for the nation. Opposition to the UCC was long-standing in Indian society; even the British were aware of the unethical practices among the religious communities, but they were reluctant to arbitrate in matters of the personal law of both Hindus and Muslims. It is of significance to note that the British did not engage with the local laws, 'and it was only in 1772 that the East India Company decided to "stand forth as *Diwan*", (i.e., "civil administrators")' (Larson 2001, p. 5). In fact, the first British governor general, Warren Hastings, introduced 'a uniform criminal law (based largely on Muslim criminal law) together with the notion of equality before the law, for both Hindus and Muslims' (ibid.). The tussle between the UCC and the personal law of the religious communities was discussed intensely during British colonialism as well.

In the Assembly, citing British selectivity, Mr Naziruddin Ahmad, a Muslim member of the Constituent Assembly, while speaking on the provisions of UCC moved amendments to safeguard the Muslim community against the UCC and stated that, 'there are certain aspects of the Civil Procedure Code which have already interfered with our [Muslims'] personal laws and very rightly so. But during the 175 years of British rule, they did not interfere with certain fundamental personal laws . . . What the British in 175 years failed to do or [were] afraid to do, what the Muslims in the course of 500 years refrained from doing, we [the Constituent Assembly] should not give power to the State to do all at once' (Constituent Assembly of India 1948a).

Similarly, Maulana Hasrat Mohani, a member of the Communist Party of India who described himself as a communist Muslim, while speaking on individual liberty, juxtaposed the question of liberty alongside the personal law of Muslims derived from the shariat. He said 'that any party, political or communal, has no right to interfere in the personal law of any group. More particularly I say this regarding Muslims . . . their personal law regarding divorce, marriage and inheritance has been derived from the *Qoran* and its interpretation is recorded therein. If there is any one, who thinks that he can interfere in the personal law of the Muslims, then I would say to him that the result will be very harmful . . . Mussalmans will never submit to any interference in their personal law, and they will have to face an iron wall of Muslim determination to oppose them in every way' (Constituent Assembly of India 1948b).

Ensuring special treatment for minorities and promoting universal constitutional values, such as equality and non-discrimination, were conflicting objectives. Dr Ambedkar, the chairman of the drafting committee argued in response to the aforementioned opposition. He particularly responded to the amendments moved by the Muslim members of the Assembly to attain dual protection by getting special protection in the provisions of the UCC. He said, 'In Europe there is Christianity, but Christianity does not mean that the Christians all over the world or in any part of Europe where they live, shall have a uniform system of law of inheritance. No such thing exists. I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequalities, discriminations and other things, which conflict with our fundamental rights . . . we must all remember—including Members of the Muslim community who have spoken on this subject, though one can appreciate their feelings very well—that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments

of different communities. No Government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad Government if it did so. But that is a matter which relates to the exercise of the power and not to the power itself' (Constituent Assembly of India 1948b).

However, the Assembly resolved the conflict between personal law and civil law to an extent by demarcating two categories of negative and positive rights. Negative rights were categorized as Fundamental Rights[19], and positive rights were attributed to Directive Principles of state policy. When the subcommittee on Fundamental Rights 'decided to divide the negative and positive rights into the Fundamental Rights and the Directive Principles of State Policy, Nehru insisted, in reference to the Sikhs and Muslims, that the framing of a uniform civil code [should] be a goal set out in the Directive Principles, the implementation of whose provisions was neither mandatory nor justiciable . . . The nationalist Muslims in the [A]ssembly, having chosen to remain in India instead of joining Pakistan, opposed even this. Nevertheless, Article 44 of the Directive Principles became part of the [Indian] Constitution' (Austin 2001, p. 18).

Instead of quartering religious communities under a UCC, Nehru tried to redefine the parameters for designing a model of Indian secularism. Scholars have highlighted the fact that the Indian case has its own peculiarities when it comes to the relationship between state and religion. Gurpreet Mahajan has stated that 'the state-religion interface have overwhelmingly been influenced by the way secularism and equality have been interpreted and applied in other countries' (Mahajan 2008, p. 297). In Indian context of state–religion interface, religion and religious communities have been constitutionally placed uniquely in the public realm outside the individuals' private belief. It is these peculiarities of state–religion interface that advanced a unique model of social cohesion and envisaged a different interpretation of equality and minority rights (the specifics of the model will be discussed in the next section). Not only was the model of social cohesion developed in India unique but the challenges it produced were distinct. For example, Nehru's decision to delay any reforms of Muslim personal laws until a demand came from the community itself gradually translated into an inflexible guarantee of absolute non-interference on the part of the state in the internal affairs of Muslims. In 1958, after the constitution had been in force for almost a decade, 'the French intellectual André Malraux asked Nehru to identify the greatest challenges in his 11 years as prime minister. "Creating a just state by just means", replied Nehru unhesitatingly. After a pause, he added: "Perhaps too creating a secular state in a religious country"' (Dasgupta 2017).

4. Minority Rights, Secularism and Social Cohesion

Secularism as a concept remained vague, at least until India's independence. The nationalist movement and questions related to minorities occasionally referred to the idea of secularism. Secularism before independence chiefly coincided only with the imagination of the Congress party's intelligentsia and elite leadership. It was mainly in response to the violent conflict between Hindus and Muslims that the Congress party had proposed the idea of secularism. However, secularism was not a dominant idea in public discussions affecting the prospects of harmony. Nehru and the Congress party's understanding of the term was influenced by the British thinker George Jacob Holyoake, who coined the term *secularism* in 1851. Holyoake suggested secularism means 'development of free thinking, including its positive as well as negative sides. Secularists consider free thinking as a double protest- a protest against speculative error, and in favour of specific moral truth'.[20]

From Nehru's understanding of secularism to its constitutionalization and recent unabashed use of the term by right-wing parties in elections to criticise the Congress party, the term has been interpreted and discussed frequently. The conceptual understanding of the term secularism has evolved along with India's trajectory of managing minority rights in the post-independence period. To begin with, it was only in the Constituent Assembly in 1947 that formal reference to the term secularism was made on various occasions in the drafting of the constitution. For example, Nehru, while responding to his critics' allegations

of appeasement, stated in the Constituent Assembly: 'Another word is thrown up a good deal, this secular State business. May be beg with all humility those gentlemen who use this word often to consult some dictionary before they use it? It is brought in at every conceivable step and at every conceivable stage. I just do not understand it. It has a great deal of importance, no doubt. But, it is brought in all contexts, as if by saying that we are a secular State we have done something amazingly generous, given something out of our pocket to the rest of the world, something which we ought not to have done, so on and so forth. We have only done something which every country does except a very few misguided and backward countries in the world. Let us not refer to that word in the sense that we have done something very mighty' (Constituent Assembly of India 1949).

The concept was further highlighted when the issues of minority rights and special protection for minorities were discussed. From 1920–1947, the meaning of secularism changed from being a normative assertion in the Congress party's vision to its application as a guiding principle for the state–religion interface. The principle of secularism in the Assembly's discussions endorsed the idea that religion would not be considered a private matter but explicitly a public matter and that there would be no official state religion. The aforesaid principles based on secularism served two objectives. As outlined by Gurpreet Mahajan, first 'non-establishment [of state religion] assured different religious communities, particularly the minorities, that the state would not endorse any religion as its own, [and second] non-separation gave a special status to religion and religious communities in the public domain' (Mahajan 2008, p. 303).

The Assembly, in its discussions on secularism and minority rights, not only referred to the examples of various countries but paid attention to the existing conceptions of the topic outlined by veterans of India's national movement. As stated in previous sections, the provisions for guaranteeing freedom of religion and autonomy to minority institutions were pretty much the outcome of deliberation during the early phase of the nationalist struggle against colonial rule. For example, in May 1928 the Congress party appointed a nine-member committee under the chairmanship of Pandit Motilal Nehru (father of Jawaharlal Nehru). The committee was instructed to underscore the basic norms under which the constitution of a free India was to be drafted. Among other things, the committee had to ensure a special mention of and provisions on the communal problem. When the committee submitted its report in August 1928, the demand for group rights for minorities drew significant interest. The section on the declaration of rights in the committee's report specifically mentioned the rights of minorities, which were considered mutually inclusive with the universal guarantee of the right to freedom of religion. Clause XI of Chapter VII of the Nehru Report, consisting of recommendations of Fundamental Rights, stated that 'there shall be no state religion for the Commonwealth of India or for any province in the Commonwealth, nor shall the state either directly or indirectly endow any religion or give any preference or impose any disability on account of religious beliefs and religious status' (All Parties Conference (India) and Nehru Committee 1975, p. 104).

In 1930, the formalization of minority rights was a topic of serious debate within the Congress party. Jawaharlal Nehru, writing in support of the formal adoption of minority rights in the draft constitution, outlined in *Young India* magazine that, 'The history of India and Europe, has demonstrated that there can be no stable equilibrium in any country if attempts are made to crush minorities, or force them to conform to the ways of the majority. There is no surer way of rousing the resentment of the minority, and keeping it apart from the mainstream, than feeling that it has not got the freedom to stick to its own ways. We in India, are clear that our policy is based on granting this freedom to minorities. Under no circumstance will any coercion or repression be tolerated, nor will any unfair treatment of the minority be tolerated. Indeed we should go further and state that it will be the business of the state to give favoured treatment to minority and backward communities' (Chandhoke 2019, p. 124). Later in the Karachi (now Capital of *Sindh* province in Pakistan) session of 1931, which was organized after the Kanpur (a city in the present state of Uttar Pradesh in India) riots of 1930, the Congress party drafted a

resolution on fundamental rights. 'The declaration emphasised the right to religion and the freedom to profess, and practise any religion. The new additions to the list of minority rights were the right to cultural autonomy and equal access to educational facilities' (ibid., p. 125). The Nehru Report of 1928 and the Karachi Resolution of 1931 strengthened the spirit of minority protection.

The ideas of 'non-establishment' and 'non-separation' outlined in the Nehru Report and the Karachi Resolution were consistent with the Assembly's final approach of managing context-free and context-sensitive aspects of the constitution. Further, the Directive Principles in Part Three and Fundamental Rights in Part Four of the Indian Constitution specified the obligations and guidelines allowing the Indian state to keep up with the secular spirit. Put simply, an attempt was made to balance freedom of religion and the rights of religious minorities vis-à-vis the universalization of constitutional values. For example, Article 30, which guarantees the right of religious minorities to establish educational institutions and limits state intervention, and Article 29, which guarantees the right to maintain distinct cultures and provides a special provision allowing religious minorities to preserve their cultural existence, are compatible with the ideas of 'non-establishment' and 'non-separation'. Both articles—29 and 30—were added to the justiciable Fundamental Rights part of the Indian Constitution. The presence of these articles in the Fundamental Rights along with Article 32 ensured that any individual from any community could challenge in Courts of India any violation of Fundamental Rights on the part of the state. This guarantee ensured that minorities could maintain cultural and educational practices which were distinct from those of the majority community.

Moreover, apart from the cultural and educational rights endowed in Articles 29 and 30, the constitution provided an overarching guarantee to the right to freedom of religion, outlined in provisions from Articles 25 to 28. Interestingly, although Article 25 allowed 'all persons . . . to profess, practise and propagate religion', permitted the state to restrain 'economic, financial, political or other secular activity associated with religious practice', and provided for 'social welfare and reform' of Hindu religious institutions, whereas Article 26 guaranteed religious denominations, among other things, the freedom to manage their religious affairs. Article 27 exempts expenses incurred in 'payment for the promotion or maintenance of any particular religion or religious denomination'. Article 28 ensured that state resources, particularly monetary resources, would not be utilized in the promotion and propagation of any religion. Further, it also exempts individuals from taking part 'in any religious instruction that may be imparted in such institution or [attending] any religious worship that may be conducted in such institution or in any premises attached thereto on promotion of religious institutions'.

Despite the enriching context of debates and the subsequent formulation later enshrined in the constitution, there were instances that challenged the advancement of social cohesion through the constitutional arrangement. India's social cohesion was based on a *de facto* commitment to secularism and mutual tolerance on the part of majority and minority communities at the societal level. At the political level, social cohesion was ensured by *de jure* constitutionalization through a special provision for religious, caste and linguistic minorities. Over the years since independence, the structures of the social cohesion model have come under attack at both the political and the constitutional levels. Politically, they have come under pressure from the mobilization of right-wing Hindutva forces to communalize the majority community. Constitutionally, the structures have been dented by the Congress party's unprincipled engagement with the minorities and the Bharatiya Janta Party (BJP) favouritism towards the majority community in different phases.

5. Reflecting on the Indian Experience

The framers of the Indian Constitution were aware of the fact that 'Hindus constituted a majority and that in a framework of formal equality this [Hindu] community may come to dominate the political and cultural domain' (Mahajan 2008, p. 309). The Constituent Assembly provided special safeguards for minorities against this eventuality, as discussed

before. The safeguards were provided in the Fundamental Rights section of the Indian Constitution, and the responsibility to safeguard those rights was given to the judiciary. After independence, the judiciary was responsible for interpreting the constitution. Significantly, after independence many aspects concerning the religion of both the majority and minority were discussed comprehensively in the judicial sphere.

In the Indian experience, the interaction between the state, the judiciary and religion has been mostly pragmatic. Pratap Bhanu Mehta has outlined the states' response to religion as 'Janus-faced'. According to him, 'the states . . . can protect and acknowledge the importance of religious interests and at the same time exclude them from [the] public sphere' (Mehta 2008, p. 314). Mehta's claim of a 'Janus-faced' attitude is also visible in the judiciary's approach to its engagement with religion. Judges have regularly referred to the sacred religious texts of different religions to develop a rationale for their verdicts in religious matters. Whether the subject matter was sacred to the majority or minority religious communities, the courts, in their role as interpreter of the constitution, have relied on the religious text for adjudicating in religious matters. The courts have not only interpreted the provisions of the constitution but also delved into the religious texts of the concerned community. One of the implications of the judiciary's discretion in interpreting the constitutional provision in association with religious texts was that faith-based issues and their relation to individuals or communities were eventually defined by the courts.

In addition to the approach of the courts, the Indian Constitution does not define religion explicitly. Discussing religious texts in constitutional matters has undermined legal principles. In addition, judges on the Supreme Court of India have referred extensively to their counterparts on the Australian and American courts. For example, the judges have often referred to the following definition of religion from a judgement of the High Court of Australia: 'There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance' (High Court of Australia 1943, *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth*, p. 123).

By learning from the best practices used in courts around the globe, the Supreme Court of India devised its own pragmatic formulations to deal with religion in India. One such formulation adopted by the Supreme Court of India has been of distinguishing between the 'essential part of the practice of religion' and those assertive non-essential aspects of religion.[21] The aforementioned formulation is based on the idea that religion in India constitutes certain fundamental elements that are integral to a particular religion. Based on the distinction between foundational elements of the religion and extraneous elements, the Supreme Court has tried to seek a balance between constitutional values and freedom to practise religion. Because of the classification between essential and non-essential elements, many provisions of personal law have been regularly challenged in the judiciary. In fact, it is important to note that 'the Constitution does not treat personal laws as religion though they may have been derived from it' (Pal 2001, p. 32). The judicial classification of religion and borrowed understandings from different courts around the world after independence created further challenges for the Indian judiciary. These challenges were an outcome of the imperfect implementation of 'religious laws by a secular judiciary' (De 2018, p. 151).

Not only did the Supreme Court try to maintain a cordial relationship between religious values and legal principles, but it also attempted, in the immediate aftermath of independence, to accomplish the incomplete task of modernizing society by endorsing legal universalism. From the case of *Shrirur Math* to that of *Shah Bano*, the Court tried to harmonize aspects of religion with the Indian Constitution. The Court sought to secularize the irrational aspects of religion in India. Perhaps because of the judiciary's inclination towards universalization and secularization, the judges undermined the relevance of religion and overlooked the context-sensitivity of religious affairs in the legal discourse as realized by the Constituent Assembly. Moreover, the lack of expertise especially in the

context of diversity in India—a country comprising followers of all major world religions—
resulted in criticism and attacks from politicians and civil society as well. In due course, the
judiciary's push towards universalization and parliament's emphasis on context-sensitivity
led to the development of a strained relationship between the judiciary and parliament
in India.

The lack of expertise was fairly visible in the judicial treatment of cases related to the
Muslim minority in particular. For example, 'to examine Islamic law the judges turned to
the *Hedaya*, a four-volume text whose authority was the result of the pruning and simplifi-
cation of Islamic law through British colonial courts over a century. This text was pared
down in the 1870 edition in the interests of cost and utility . . . In contrast, when considering
Hindu law apart from references to original Sanskrit sources, the court chose to rely on
Abinas Das's study of *Rig Vedic* culture and Pāṇḍuraṅga Kāṇe's work on the Dharmasastras.
Both were nationalist scholars who had delved into ancient Indian history, motivated in
part to recapture the glory of a lost civilization' (De 2018, p. 153). Not only did judges lack
expertise but they also tried to justify their judgements, which suggested reforms by citing
the religious texts themselves. The Supreme Court's excess use of tradition and religion as
the source of modernization undermined the legal–constitutional justification enshrined
in the constitution. The Supreme Court in its judgements approached religious doctrines
and constitution values as compatible with each other. Pratap Bhanu Mehta has called this
approach 'judicial myth-making' (Mehta 2008, p. 327). Mehta argued that the Court in
its rulings stressed that modernization is itself a project integral to most of the religions.
Therefore, values enshrined in the Indian Constitution are compatible with religion. This
approach by Supreme Court set the wrong precedents.

Because of the judiciary's many critical judgements over the years, the context of
the debate on religion after independence gradually changed. Unlike the Constituent
Assembly and the polity during independence, the courts after 1950 delved into questions
pertaining to freedom of religion and special protection of religious minorities in a broader
context, giving up the narrow framework of communalism by 1980s. The views on the
protection of minorities as an obligation inherited from the Constituent Assembly changed
to discussions where aspects of formal equality among religions were often debated.
The special protection of minorities was not seen as an obligation based on the nation's
depressing past but was meant to grapple with the conflict between legal pluralism and
legal universalism. Rudolph and Rudolph have commented that 'conflict between legal
pluralism and universalism were two positions between which Indian politics and law has
vacillated' (Hoeber Rudolph and Rudolph 2001, p. 37). To understand this tension better,
one important case is discussed in the next section. The case is helpful in evaluating the
commitment of the social cohesion arrangement to sustain tension through debates on the
rights of religious minorities and equality.

6. *Shah Bano* and the Idea of Minorities

The debates between legal pluralism and universalism in the Indian context evolved
chiefly in the historical background to the Uniform Civil Code. The story of the UCC
involves a parallel struggle for legal universalism and reaffirmation of legal pluralism in
different phases of this story. The most noticeable chapter in this story, which determined
the discourse between special protection of minorities and equality of religion in India, was
the *Shah Bano* case in 1985. The case still stands out as a watershed judgement in the history
of Indian politics, which transformed the discourse on minority rights and freedom of
religion in the country. It was the *Shah Bano* case which led to 'the rise of Hindu nationalism
and the articulation of *Hindutva* ideology in the 1980s and 1990s (and) lent new meaning
and urgency to the tension between pluralism and universalism' (Hoeber Rudolph and
Rudolph 2001, p. 37).

The case of *Mohammad Ahmed Khan v. Shah Bano Begum*[22], popularly known as *Shah
Bano* is one of the most discussed and publicized cases of the Indian Judiciary. In this
case, the couple had been married to each other for forty-three years. They had three sons

and two daughters. In April 1978, Mohammad Ahmed, who was a successful lawyer, divorced the sixty-two-year-old Shah Bano, who filed for maintenance under the 1973 Code of Criminal Procedure (CrPC) in the judicial magistrate court of Indore, Madhya Pradesh. The petition referred to CrPC provisions and demanded a monetary allowance. In his defence, the husband claimed that the petitioner was no longer his wife in accordance with divorce rules under Muslim personal law and hence that he was under no obligation to support her. Further, the defendant contended that he had already advanced a monthly maintenance of INR 200 for the subsequent two years under the provisions of *iddat*[23] and had also submitted INR 3000 to the court under the provisions of *mahr*[24]. However, the judicial magistrate instructed Mohammad Ahmed to pay INR 25 monthly to Shah Bano. Unsatisfied with the magistrate's judgement, Shah Bano appealed to the Madhya Pradesh High Court, which increased the monthly alimony to INR 179.20.

In response, the defendant took the case to Supreme Court, where the Muslim Personal Law Board and Jamiyat Ulama-i-Hind (Association of Islamic Religious Scholars of India) were admitted as parties to the case. A constitution bench ruled that Shah Bano deserved an allowance under Section 125[25] of the CrPC and commented that the provision of financial support by the defendant did not contradict the Quran. In pronouncing the judgement, 'the Supreme Court took . . . [a] decision regarding the priority between the right to maintenance under Section 125 of the CrPC and the Muslim personal law on the assumption that there was a conflict between the two laws. They said they wanted to set the question of priority to rest once and for all. They took upon themselves the task of giving effect to the objective of Article 44 [of the Indian Constitution]' (Pal 2001, p. 32).

Nonetheless, the Muslim community in general and Muslim men specifically opposed the judgement. The government of the day, led by Prime Minister Rajiv Gandhi of the Congress party, initially supported the judgement but later, due to protests by the Muslim community claiming the judgement was an attack on Muslim personal law, withdrew its support by passing the 1986 Muslim Women's (Protection of Rights on Divorce) Act (MW-PRDA). The central government retreated from its position on the judgement by ensuring that Section 125 of the CrPC did not apply to separate Muslim women. Hindu right-wing stakeholders immediately objected to the MWA act passed by the ruling Congress government. Later, the constitutionality of the MWA was also debated by legal scholars, activists and lawyers.[26]

Right-wing patrons and especially the BJP, as the leading opposition party, saw the *Shah Bano* ruling as an opportunity to reiterate their long-standing demand. This demand called for uniformity in the legal treatment of both majority and minority religious communities. The roots of their demand went back to the discomfort they felt in reforming the personal law of Hindus immediately after independence. Soon after independence, the process of codification for the Hindu community involved 'piecemeal [legislation] in the mid-1950s . . . [such as] the Hindu Marriage Act (1955), the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956), and the Hindu Adoptions and Maintenance Act (1956)' (Larson 2001, p. 6). Right-wing forces found it unpleasant to reform Hindu religious practices while concessions were being offered to Muslims. Their political argument attacked the government's selective intervention in the affairs of religious groups. To mobilize the Hindu community at the social level, 'the Hindu right attacked the government for practising pseudo-secularism . . . [and] the BJP highlighted the theme of pseudo-secularism endlessly to emphasize the political establishment's double standards: one set of standards for the Muslim personal laws and another set for the Hindus' (Chandhoke 2019, p. 144).

Rajiv Gandhi's decision to reverse his government's stand on the *Shah Bano* case highlighted failings in the understanding of minority rights within the Congress party. Another example from the past where fear overtook Nehru's rationality in a similar scenario to what happened with Rajiv Gandhi in the *Shah Bano* case comes from the 1920s. Nehru 'as mayor of Allahabad [a city in the colonial United Province, now in Uttar Pradesh] in 1923 guided the [municipality] Board to reject unanimously the suggestion to prohibit the

slaughter of cattle . . . [based] on a feeling that this was not a matter calling for administrative intervention; for he had earlier suggested to the Hindus that they should request Muslims to stop cow-killing rather than fight them about it' (Gopal 1988, p. 63). Nehru continued this approach of appealing to the conscience of both communities and believed that it would resolve their differences.

7. Analysing India's Model of Social Cohesion

The social cohesion arrangement, adopted after independence, tracked and mediated the relationships among religious communities. However, with the changing political scenario, different political parties challenged and interpreted the values underlying the social cohesion mechanism according to their own political beliefs. The national political parties attempted to redefine the meaning of social cohesion and the underlying values through their respective political ideologies. While, after independence, the Congress party continued their project of maintaining cultural differences through 'differential treatment', the BJP mobilized their supporters to demand 'equal treatment' of religious minorities. As mentioned previously, both parties compromised established constitutional doctrines of engagement for a political advantage. The fact that the political parties were pulling in different directions eventually compromised the constitutional principles underlying the social cohesion arrangement. Both political parties made their respective ideologies the underlying value for reforming the social cohesion arrangement while overlooking the principles enshrined in the constitution. On one hand, the Congress party faced criticism for positioning minorities' rights and freedoms above questions of gender and social justice. The BJP, on the other hand, was criticized for institutionally marginalizing religious minorities, especially Muslims, in the name of equal treatment.

The Indian model of social cohesion can be summarized as a mechanism to resolve the tension between 'equal recognition' and 'differential treatment'. The crux of India's model of social cohesion is based on the recognition of cultural differences among religious communities. To elaborate further, religious communities in India generally struggle to be treated equally in the political domain and to be treated unequally in their social and cultural aspects. Be it Muslims, Hindus, Sikhs, Christians or Buddhists in India, there are aspects of religious practices that require special concessions to be treated as exceptions in policy decisions. The existing arrangement in the name of social cohesion has ensured a multicultural existence for all the communities. However, the social cohesion arrangement has been limited to embracing a cordial relationship among communities and has been challenged from within religious groups and outside them as well.

India's model of social cohesion is operative and flexible. It is not stationary, and despite strong references to the past it has shown the potential to become more open and accommodating. It is an arrangement that is evolving every day due to vibrant interaction between institutions, people and politics. The cross-cutting interaction of issues and identities may have produced a complicated discourse on social cohesion, but the default intersection has also contributed to their relatively successful management. As one of the leading experts on communal violence in India has commented, an individual in India can have multiple identities: 'Depending on where she lives, the first language of a Muslim could be Hindi, Urdu, Bengali or any of the many others. The same is true of the Hindus. Moreover, the Hindus are also divided into thousands of local castes . . . a south Indian Dalit shares little with a north Indian Dalit; and being a Brahmin in north India is very different from being one in south India. Caste names are different, caste histories and traditions are different and spoken languages are different' (Varshney 2013, p. 57).

In the entangled relationship between religion, state and politics, there have been episodes where minority rights and provisions of equality have been debated regularly. After *Shah Bano*, proponents of Hindutva asserted that if secularism meant equality of all religions, then special provisions of minority rights and retention of personal laws violate norms of equality. The Congress party again in response to right-wing criticism invoked secularism as the underlying criteria for strengthening the country's commitment

to minority rights. However, the BJP's furious mobilization of Hindutva across the country in the 1990s made secularism a contested issue; the BJP in its electoral campaigns claimed that it was a tool for minority appeasement. Therefore, the Hindu right-wing depicted the conflict between minority rights, freedom of religion and equality provisions as a project of the Congress party's secularist approach: suppressing the majority at the cost of appeasing the minority. To elaborate further, Ratna Kapoor has argued that 'the concept of equality has become a foundational discourse in Hindutva's attack on minority rights ... In much of its contemporary political rhetoric, the Hindu Right deploys a formal understanding of equality. In the context of the attack on minority communities and the discourse of secularism, "equality" refers to the requirement of formal equal treatment— that is sameness in treatment' (Kapoor 2019, p. 356). In addition, the ongoing debates on the protection of minority religious identity vis-à-vis protection of freedom of religion have been reduced to a discourse of majority versus minority with an essentialist understanding of the religious identity in Indian society. Though, the Indian model of social cohesion can only be framed outside the essentialist framework of identity.[27]

8. Conclusions

The arrangements made by the Assembly have been debated, challenged and sometimes amended as well. A comprehensive review of all the changes and new debates is beyond the scope of this article. However, by triangulating the nationalist movement, constitution-making and the Congress party as reference points, this paper makes a distinct effort to highlight the strengths and weaknesses of the social cohesion arrangement in the Indian experience. This effort remains limited due to its narrow focus on the national experience. The variation in experience of religious minorities among constituting states within India has not been evaluated in detail in this article. In other words, a comprehensive examination of India's social cohesion at the national level limits this analysis, as the different experiences of distinct states and union territories of India remain unexplored in this article. States in India have a lot more to offer concerning social cohesion arrangements to accommodate different groups and communities.

For now, three factors can be identified, based on the discussions above, that have shaped the idea of religious minorities in India at the national level. First, the representatives of minority communities in the Constituent Assembly chose community rights over individual rights. In their approach to secure community rights, the representatives of minority communities emphasised cultural rights. The attention of minority representatives on cultural rights was mainly because of the Assembly's unanimous agreement on universalization of political and social rights for all the citizens. On the question of voting eligibility, for example, the Assembly unanimously agreed on the idea of a universal adult franchise, with age being the only criteria for one's eligibility to vote. The universalization of political and social rights enshrined among the Fundamental Rights in the Indian Constitution encouraged minorities to strive for cultural rights. This purposely brought religious and community-based cultural practices under the purview of the state, with the filters of 'non-establishment' and 'non-separation' to be applied.

Second, the Congress party's vision to maintain a unified and secular India influenced the Assembly's treatment of religious minorities. Most of the discussions in the Assembly were shaped by the vision of the Congress party—for example, the Karachi Resolution and the Nehru Report laid the groundwork for the Fundamental Rights and Directive Principles of state policy in the final draft of the Indian Constitution. The Congress party's hold over the vision of the Assembly highlights the fact that India's constitutional design was a response to critics who believed that, soon after independence, it would be a state dominated by one majority community. Though, the Congress party devised mechanisms that would disprove the critics' claim. The Congress party, in executing its vision, had indeed proved that Jinnah and the Muslim League did evaluate the challenges for the Muslim community correctly, but it was wrong on their part to choose partition in order to overcome those challenges. However, one of the shortcomings that the Congress party

stumbled onto was that its vision advanced a patronizing and feudal relationship between majority and minority communities, which allowed only the elites from both—Hindu and Muslim—religious communities to continue their interactions. The aforementioned shortcoming was exploited by right-wing political parties in later years.

Third, secularism as a conceptual force shaped religious minorities as a political group in post-independence India. The article examines the institutional pragmatism of the courts and parliament. The logic of recognizing religion in the public domain led one of the most powerful courts in the world to accustom itself to the religious forces in society. The acclimatization of the courts and legislative institutions to religious values time and again caused these institutions to deviate from the path of underlying liberal values enshrined in the constitution.

All three factors above primarily shaped the social cohesion arrangement in India. These factors, in their role of shaping social cohesion in India, have several limitations as well. The focus on a community's cultural rights instead of the community itself in general and on individuals as citizens in particular were central to all three factors. This difference between a community and its culture is crucial. As article referred to the distinction between healthy and unhealthy cultural practices based on Bhikhu Parekh's classification of 'content' and 'character' to that of the community itself. Despite the contrasting experiences of partition and communal conflict, the Assembly nevertheless decided to include community rights within the Fundamental Rights part of the constitution. The Assembly's approach of coinciding community rights situated Fundamental Rights of the Individual within community rights.

However, it is important to highlight that the idea of situating communities and individual's rights altogether in the Fundamental Rights section of the Indian Constitution was challenged. In January 1947, G. B. Pant, a member of the Congress party, stated in the assembly that 'there is the unwholesome, and to some extent a degrading habit of thinking always in terms of communities and never in terms of citizens. But it is after all citizens that form communities and the individual as such is essentially the core of all mechanisms and means and devices that are adopted for securing progress, and advancement. It is the welfare and happiness of the individual citizen which is the object of every sound administrator and statesman. So let us remember that it is the citizen that must count. It is the citizen that forms the base as well as the summit of the social pyramid and his importance, his dignity and his sanctity, should always be remembered' (Constituent Assembly of India 1947a). Pant's comment outlined a possible alternative, an imagined future of Indian society—a society that will give preference to the idea of the citizen as an individual rather than as a member of a community based on a particular identity.

India's social cohesion arrangement in its present form gives preference to the idea of culture as a community right. Moreover, if one looks at the religious practices of either majority or minority communities, there exists despising things. The current social cohesion set-up fails to take into account the impact of communities' cultural practices on individuals. The living conditions of Schedule Caste, Tribes and women in different religious communities remain for the most part miserable. Whether one looks at the recent judgment declaring tradition of denying entry to menopausal women into the Sabarimala Temple[28] unconstitutional or Shah Bano's struggle for justice in the Muslim community. This existing arrangement of social cohesion may have allowed the moderation of conflicts among groups, but the struggle between individual rights and community-centric assertions has remained unchallenged. Looking back on the more than seventy years in which the Indian Constitution has been in force, it can be said that the longest handwritten legal document in the world continues to be discreetly successful in nurturing what is both the world's largest democracy and most promising democracy. The success is discreet because the tag of *largest democracy* remains unchallenged in all its continuity, but the notion of being promising is questionable due to the ongoing marginalization of the oppressed members of different communities.

Notes

1   For a detailed account on the Congress party's role in Indian national movement: see, among others, Weiner (1967), Brass and Robinson (1987).

2   Triangulation, though principally used in quantitative research, is used here as a tool of visual projection. In its traditional research-based understanding, triangulation means 'that several observations of a datum, a single piece of data, are better than one; the phrase [triangulation] implies that three are desirable . . . each observation is prone to error, taking the three together will provide a more accurate observation,' in (Bechhofer and Paterson 2000, p. 57). Similarly, an analysis of the idea of religious minorities based on observation from one of any of the three mentioned points may fail to provide a comprehensive overview of the issue.

3   'At the time of Independence, the term "Backward Classes" had a less fixed and definite reference. The term had been around [before independence] for some time. But it had a variety of referents, it had shifted rapidly in meaning and had come to mean different things in different places [different government committees before independence mainly used the term to count aboriginal and hill Tribes, untouchables criminal tribes and marginalized inhabitants of British India] . . . Thus, the term had never acquired a definite meaning at the all-India level . . . [Later, in post-independence period]. Two major species of [backward classes] usage emerge[d]: (1) as the more inclusive group of all those who need special treatment (2) as a stratum higher than the untouchables but nonetheless depressed. This double usage continues today: the former in the usage of Backward Classes in the wide sense (including Scheduled Castes and Scheduled Tribes); the latter in the 'usage as equivalent to "Other Backward Classes",' in (Galanter 1978).

4   Hillal Ahmed 'underline[s] the ways in which Islamic principles are reshaped by postcolonial, secular Indian political processes, such as elections,' in (Ahmed 2019, p. 10).

5   Lucknow pact is an agreement between the Congress party and Muslim which documented a possible framework on co-operation between the Hindu and Muslim community. The document identified prospective social cohesion model for cordial relationship between Hindus and Muslims. The document of the pact were developed jointly by Muslim League and Congress Party. However, in the post-independence period, various scholars have assessed its limitation and achievements and commented that: 'The Pact usher[ed] in a period of Hindu-Muslim cooperation' in (Owen 1972); . . . [the disagreement among Muslims on Lucknow made it] 'clear that the political interests of Muslims were not alike' in (Hasan 1979, p. 97); [merely a] 'deal' in (Robinson 1974, p. 256).

6   For a critical examination of Gandhi's philosophy, see (Parekh 1989).

7   The efforts were moderately successful because as per the published Report of the Kanpur Riots Enquiry Committee in 1933, from 1920–1930 there were communal riots reported in 'Malabar (1922), Multan (1922, 1927), Ajmere (1923), Saharanpur (1923), Amritsar (1923), Sindh (1923), Jubbulpur (1923), Agra (1923, 1931), Rae-Bareli (1923), Delhi (1924, 1926), Kohat (1924), Nagpur (1924, 1927), Indore (1924), Lucknow (1924), Calcutta (1925), Allahabad (1925), Sholapur (1925), Lahore (1927), Betiah (1927), Bareilly (1927), Kanpur (1927,1931), Surat (1928), Hyderabad (1928), Kalipaty (1928), Mumbai (1929), Azamgarh (1930), Dacca (1930), Muttra (1930), Mymemsing (1930), Daravi (1930), Basti (1931), Benares (1931), Mirzapur (1931)', in Report of the Kanpur Riots Enquiry Committee (2007).

8   For a detailed analysis of partition, see (Hasan 1993). Aditionally, see (Ambedkar 1945; Seervai 1989; Nair 2011; Khan 2017). For a detailed analysis on communal violence in pre partitioned India, see (Pandey 2001).

9   Article 25 says that subject to public order, morality, etc., the practice of religion is free. But government may regulate the economic and other secular activities associated with religious practice . . . Sikhs (and Jains and Buddhist) are for the purposes of this article classed as Hindus' in (Austin 2003, p. 547).

10   'Lord Pethick-Lawrence, Secretary of State for India, Sir Stafford Cripps, President of the Board of Trade and Mr A.V. Alexander, First Lord of the Admiralty, collectively known as the Cabinet Mission, or, in Wavell's words, 'the three magi'. They had come to India to try and forge a compromise, to create a constitutional package for one united India and to plan the British handover of power' (Khan 2017, p. 55).

11   To read more on partition and politics of Muhammad Ali Jinnah: see, among others, Jalal (1985).

12   The Constituent Assembly was elected by provincial legislatures, as the franchise was restricted by the tax, educational and property qualifications specified in the 1935 Government of India Act (Bajpai 2000, p. 1844).

13   The representation of different groups was based on their respective population and as per the Cabinet Mission, the Assembly reserved seats for Muslims and Sikh minorities. However, 'it was largely through the support and intervention of the Congress leadership that Parsis, Anglo-Indians, Indian Christians, members of the scheduled castes and tribes and women were brought into the assembly. This fact would have some bearing on the positions that representatives of different minority groups would take during the debates, with those elected through Congress support generally taking a more conciliatory stand towards Congress proposals. The representation of the various minority communities in the assembly after partition was as follows:

Nepalis 1, Sikhs 5, Parsis 3, Christians 7, Anglo-Indians 3, backward tribes 5, Muslims 31, scheduled castes 33—a total of 88 of the 235 provincial seats' (Bajpai 2000, p. 1845).

[14] Rajeev Bhargava as quoted in Dasgupta (2017). As per India's right wing scholars Hindutva—the term—was coined in 1892 by scholar Chandranath Basu from eastern India (State of Bengal). Later in 1923, Savarkar used it and proposed the idea of religious nationalism based on three factors: geographical unity, racial features and a common culture: see (Savarkar 1989). Now, Hindutva is used by Bharatiya Janta Party (BJP) to consolidate identity of majoritarian Hindu community and it has turned out as a dominant ideology in Indian democracy specially due to immense electoral success of BJP. BJP in 2014 and 2019 general elections staunchly propagated the ideology of Hindutva and won absolute majority (282 seats in 2014 and 343 seats from a total 545 seats) in the national Parliament of India. Various scholars have explained Hindutva's ontological importance in Indian democracy and evaluated its epistemological strength and weaknesses in shaping the national identity of India. For a critical reading of Hindutva: see (Jaffrelot 1996; Bhat 2001; Sharma 2011). For a caste based critique of Hindutva from oppressed castes points of view: see (Ilaiah 2002). In recent years, after 2014 there has been a surge in scholarly work encouraging an empathetic reading of Hindutva: see (Dasgupta 2019).

[15] In India, 'reservations' refers to the provisions of positive discrimination where certain number of seats in education institutions, government jobs and electoral constituency at various levels of legislative bodies are reserved for historically marginalised communities such as Schedule Castes (SCs), Schedule Tribes (STs) and Other Backward Class (OBCs). Within aforesaid categories various castes and tribes are notified and enumerated by both state and central governments. For a detailed account of reservation system and debates around it in India: see (Galanter 1984).

[16] By unhealthy cultural practices of religious communities, here I mean, following those customs that harm the dignity of an individual member of religious community, likewise, healthy cultural practices can be identified as those that enhance the quality of life of its members. The aforementioned classification is influenced by Bhikh Parkeh's work on multiculturalism. Parekh argued that 'A culture has two dimensions, a community whose culture it is and the content and character of that culture . . . The two forms of respect have differed bases. We should respect a community's right to its culture for a variety of reasons, such as that human beings should be free to decide how to live, that their culture is bound up with their history and identity, that is means much to them, and so forth. Every community has as good a right to its culture as any other, and there is no basis for inequality . . . As for culture itself, our respect for it is based on our assessment of its content or the kind of life it make possible for its members. Since every culture gives stability and meaning to human life, holds it member together as a community, displays creative energy, and so on, it deserves respect. However, after a sensitive and sympathetic study of it from within, we might conclude that the overall quality of life it offers its members leaves much to be desired. We might then think that we are unable to accord it as much respect as another, which is better in these respects. Although all cultures have worth and deserve basic respect, they are not equally worthy and do not merit equal respect' in (Parekh 2000, pp. 176–77).

[17] Shri Vishwambhar Dayal Tripathi an elected member from United Province constituency, while speaking on the Supplementary Report of the Fundamental Rights Committee tabled by Sardar Vallabhbhai J. Patel, commented: 'Cow protection is very important for an agricultural country. I am happy to know that a resolution to this effect is coming before you in a very nice form, and I hope that this Assembly will adopt it unanimously. This matter too was hotly discussed. No only from financial point of view but from cultural point of view also, I think it is necessary to make adequate arrangements for cow-protection . . . and I am happy that a resolution to that effect is coming before you', in (Constituent Assembly of India 1947b).

[18] Article 48 of the Indian Constitution states: 'The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle'.

[19] Fundamental Rights are enforceable by the judiciary. Article 32 of the Indian Constitution states: 'Remedies for enforcement of rights conferred by this Part. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs . . . for the enforcement of any of the rights conferred by this Part'.

[20] There are many reports that link Nehru's understanding of secularism with Holyoake: 'Among the many who were inspired by his writings were Jawaharlal Nehru, who championed the idea of secularism and wanted his party, the Indian National Congress, to take its ethos and practice forward' in (Jinoy 2018).

[21] The Supreme Court of India in a number of judgements devised new meanings and definitions in its rulings in 1995. For example, the categorization of 'essential' and 'non-essential' was propagated in *Ismail Faruqui v. Union of India*, AIR 1995 SC 605 A. In another judgment on the question of religious appeal and uses of term 'Hindutva' in election campaign to be considered as corrupt electoral practices, SC in its judgment 'indicated that the term 'Hindutva' is related more to the way of life of the people in the sub-continent' in *Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte*, AIR 1996 SC 1113.

[22] *Mohd. Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945.

[23] *Iddat* is maintenance that is payable after divorce and is intended to provide for the divorced wife during her pregnancy if she is pregnant, or for a period of three months to exclude the possibility of pregnancy.

[24] In Muslim law, *mahr* is regarded as consideration for the marriage and is in theory payable by the husband to the wife before consummation. Muslim law allows it to be divided into two parts. One of these is 'prompt' and is payable before the wife can

be called upon to enter the conjugal domicile. The other is 'deferred', which is payable on the dissolution of the contract of marriage by either of the parties or by divorce.

[25] Section 125 of CrPC states that, 'if any person having sufficient means neglects or refuses to maintain . . . his wife, unable to maintain herself . . . a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife . . . at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct'.

[26] Flavia Agnes argues that 'the Muslim Women (Protection of Rights on Divorce) Act of 1986, was enacted amid protests from women's rights groups and progressive social organizations. However, as the act gradually unfolded itself in the lower courts, it was invoked to secure the rights of divorced Muslim women. The writ petitions challenging the constitutionality of the act and the appeals filed by husbands (Daniel Latifi among them) were decided together and a verdict was pronounced by a five-judge constitutional bench of the Supreme Court on 28 September 2001, which declared that the act is constitutional. Declaring that the act would be unconstitutional if not interpreted to mean that women would get a reasonable and fair provision and maintenance, the court simultaneously provided greater protection to Muslim women than the earlier right under Section 125 of the Criminal Procedure' in (Agnes 2007, p. 315).

[27] The distinctiveness of Indian model of social cohesion can be explained by referring to the arguments of Aushtosh Varshney. Among others, Varshney argued that 'India's repeated encounters with ethnic violence of all kinds (religious, linguistic, caste) and its equally frequent returns from the brink have a great deal to do with the self-regulation that its largely integrated and cross-cutting civil society provides. Local structures of resistance and recuperation, as well as local knowledge about how to fix ethnic relations, have ensured that even the worst moments—1947–48 and 1992–93—do not degenerate into an all-out collapse of the country into ethnic warfare. A Rwanda, a Burundi, a Yugoslavia are not possible in India unless the state, for an exogenous reason such as a protracted war, kills all autonomous spaces of citizen activity and organization' in (Varshney 2003, p. 286). For a more nuanced analysis on functioning of civil society in India's communal violence context: see (Varshney 2014). Aditionally, see (Gottschalk 2000).

[28] In September 2018, the Supreme Court's constitutional bench ruled that the customary prohibition of young women between the ages of ten to fifty years (predominantly menstrual age) in Sabarimala as 'unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India' in *Indian Young Lawyers Association v State of Kerala* Writ Petition (Civil) No. 373 of 2006 (2018). However, in November 2019, the Supreme Court in its judgment on review petition filed against 2018 judgment lifting the prohibition has referred the matter to a larger constitutional bench under its review jurisdiction authority to review the 2018 judgment. For more recent development: see (Express News Service 2020). For a detailed analysis of the 2018 judgment: see (Das Acevedo 2018).

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