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**CONSTITUTIONALISM AS INSTRUCTIONS FOR NATIONHOOD:
A COMMENT ON IDENTITY IN INDIAN CONSTITUTIONAL LAW**

INTRODUCTION

The Indian Constitution was very self-consciously crafted as a document that sought to sweep away the parochialism and social decay of Indian society and to usher in a new era of republican freedom. The brutality of social practices, especially those stemming from caste, could hardly be denied and, as the protector of liberal values the state was expressly called in by the new document to spark what the constitutional historian Granville Austin called a social revolution. Thus dealing with matters as stunningly diverse as social equality, health, education, communal amity, animal welfare and economic prosperity, the new Constitution envisioned a significant role for sovereign power in the making of a new society free from both imperial subjection and moral decay. However, how would the new republic legitimately exercise its sovereign power over contending centres of social power? What was the character of the « people » in whose name and upon whom the social revolution was to be carried out?

This is a question that has at least a hundred year vintage in the making of the Indian constitutional state. Establishing constitutional institutions in India at the turn of the century British administrators set the stage for this conversation by holding that India was too deeply divided on grounds of religion, caste, class, region, education and so on be called a « people » and was therefore unable to rule herself and hold together a modern liberal state. Against this narrative the British state cast itself in the role of a pedagogue that would steward this divided people to eventual nationhood when they could take charge of their political future. Almost all sections of the national opinion disagreed with the imperial hubris of the self-proclaimed British mission for India. However, in crafting their response dominant sections of the nationalist opposition like the Indian National Congress did not contest constitutional identity as tied to nationhood but presented itself as the realisation of a nation whose existence the British denied.

Understandable therefore the « nation » or the aspiration for « national identity » was the most likely form within which constitutional politics would be organised. However, this aspect of the architecture of India's liberal constitutional politics has been continually faced with its limits as it encounters and rubs against autochthonous epistemologies of identity and belonging. Unable to draw on India's own social understandings of social and cultural identity, it is argued that the institutional tropes and structures of liberal constitutionalism have operated to screen off autochthonous epistemologies that continue to provide the background for conceiving ethical striving and diverse conceptions of the good life.

It is this aspect of liberal constitutionalism's inability to draw on Indian epistemologies regarding identity and community that this essay elaborates in three parts. The first part outlines the Indian constitution's initial emergence out of a halting liberalism stemming from a pedagogical mission in colonial government to steward India towards a unified nation. This liberalism went hand in hand, however, with a deep colonial pessimism about whether the factions of Indian society, groups identified as « minorities », would permit the realisation of nationhood. The second part shows how even as the post-independence Constitution rebutted the colonial account of Indian society as a nation of factions or minorities, it did so by merely claiming that the pedagogical agenda of the colonial administration had been realised. This ideal of a unified nation in colonial and post-colonial constitutionalism, it will be argued, has side-lined autochthonous social intuitions and understandings about politics and community which continue to animate Indian society. Finally, the essay presents the constitutional thinking of M.K. Gandhi, and in particular his conception of the « Hind Swaraj », in an attempt to conceptualise political community and social identities in ways that surpass the limitations of the liberal constitutional politics of both colonial and the post-colonial India.

I. THE VANISHING HORIZON OF NATIONALISM: FORGING CONSTITUTIONALISM IN COLONIAL AND POST-COLONIAL INDIA

The structure and the evolving dynamic of Indian constitutionalism as already mentioned was designed under conditions of colonialism, when constitutionalization was conceptualized as a pedagogical project of instructing India in the ways of liberal constitutionalism. This pedagogical frame saw traditional Indian society as being in need of the transformative, modernising leadership of colonial government. Even as there have been different normative orientations to this colonial pedagogy, its goals have remained largely undisturbed during the post-colonial era, and the broad structure of government established in colonial India holds up unto the contemporary moment. Thus, at an institutional level, the entire liberal-structural repertoire of Indian government – including limited government, separation of powers, judicial review, and perhaps ironically, even that of representative government – trace their roots to India's colonial period. In fact, as will be demonstrated, the constitutional nationalism of post-independence has in many ways only deepened the presumptions of colonial government.

Thus from the moment of its introduction by the British, liberal constitutionalism in India has been articulated as a state-led project of education and social transformation. The only question marks surrounding this project were as to whether its liberal values would be internalised by Indian society and, relatedly, whether it would be able to draw on local social epistemologies. As we will see, this has not been the case. Liberal constitutionalism has flattened, bypassed, and largely been unable to tap into or otherwise capture autochthonous social intuitions in demanding acquiescence for its pedagogic reforming claims.

A good perspective from which to examine this unusual case of an ostensibly liberal government being unable to draw upon social epistemologies is through the doctrinal prism of « minority rights », as it has evolved in Indian constitutional history over the last hundred years. The choice of minority rights to discuss constitutional development in India draws on the observation that colonial government regarded the introduction and institutionalization of minority rights as a critical component of its pedagogical-constitutionalizing mission. That is, minority rights formed the ground on which liberal constitutionalism in India was conceived, and this has continued to be the case even as parts of the intellectual framework of justifying minority rights were altered at independence.

The principal legislative milestones that mark British colonial attempts to introduce, as pedagogues, ordered liberal politics to what they viewed to be the feuding races, classes, and castes of India are the constitutional settlements of 1909, 1919, and 1935¹. In this regard, it is especially important to note the colonial assumptions regarding the Indian social body that formed the basis for the facilitating of native participation in British colonial-constitutional government in India. That is, the British saw Indian society as deeply divided by interests of religion, ethnicity, class, and so on. Of these, those of Muslims were initially considered particularly important, and through the Indian Councils Act of 1909, Indian Muslims were granted the privilege of having places reserved to them in colonial legislatures and, eventually, in public employment². Similar representational allotments were then extended to other special groups – or « minorities » as they came to be called – via the Government of India Acts of 1919 and 1935. Such allotments became the most important gateway to local political participation in British India. In practical terms, they provided the framework for governing the cultural diversity of India and through which Indians came to be drawn into participating in British government, by way of limited representation both in political institutions and in government jobs³.

In discussing the social conditions within which the new constitutional scheme sought to draw the groups recognised to be minorities into colonial politics, the *Montagu Chelmsford Report*, which provided the basis for the Government of India Act of 1919, noted cleavages of religion, race, and caste as being a pathological social condition of India, and as being constant threats to social solidarity and eventual political citizenship. Insofar as universal citizenship was a desired goal of colonial constitutionalism, then to

¹ See the India Councils Act of 1909, the Government of India Act of 1919, and the Government of India Act of 1935. See also R. COUPLAND, *Report on the Constitutional Problem in India: The Indian Problem, 1833-1935*, London, Oxford University Press, 1943. See U. SINGH MEHTA, « Constitutionalism », in N. GOPAL JAYAL & P. BHANU MEHTA (dir.), *The Oxford Companion to Politics in India*, New Delhi, Oxford University Press, 2010.

² See *East India (Advisory and Legislative Councils, & c.)*, vol. I: *Proposals of the Government of India and Despatch of the Secretary of State*, London, His Majesty's Stationary Office, 1908, p. 8. See also Coupland, *Report*, p. 25-27.

³ See also S. PATHAN, *A Historical and Theoretical Investigation into Communalism*, Manipal, Manipal University Ph.D thesis, 2009.

the colonial officialdom, these social divisions seemed to represent an overwhelming barrier in the path to such citizenship⁴. In other words, Indian society was viewed as being analogous to a Hobbesian state of nature, unto which history had entrusted to the British the duty of guiding India past its social divisions towards ordered government.

The problem of a divided society was a challenge for the makers of India's post-independence constitution as well. However, they viewed the justification for colonial constitutionalism as a contrivance aimed at dividing and preventing the realization of what they felt was a nation in waiting. For instance, when in 1947, Govind Ballabh Pant sought to outline the « minority question » before the Constituent Assembly, which had been established to draft a post-independence constitution for India, he casts the problem in the following manner:

[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. 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*⁵.

Thus in Pant's account, social divisions are produced by the mischievous designs of imperial government. However, despite disagreements regarding the sources of social division, the only real difference between the earlier colonial account of these divisions (such as that articulated in the Montagu Chelmsford Report) and the later nationalist account like that of Pant in the Constituent Assembly was the latter's belief that the constitutional-pedagogical goals of national unity and universal citizenship were now within reach.

However, when deliberating the new constitution, the wishes of nationalists like Pant notwithstanding, the framers could not escape the epistemic and practical challenges left behind by the fragmented liberal foundations of British constitutionalism. The new Constituent Assembly, which had been called to draft India's post-independence constitution, had inherited a model of constitutional-liberal government built around the idea that India's social divisions could only be constitutionally negotiated via an entrenched scheme of privileges granted to assorted scheduled minorities. This was a model that was now so embedded in colonial constitutionalism that it seemed unavoidable for any post-independence constitutional framework. Therefore the nationalist mission to sweep away the framework of differentiated citizenship in post-independence India simply could not easily overcome entrenched native interests.

⁴ See *Montagu Chelmsford Report on Indian Constitutional Reform*, Superintendent, Government of India Press, 1918, p. 85.

⁵ B. SHIVA RAO *e.a.*, *The Framing of India's Constitution*, vol. 2, Dehli, Indian Institute of Public Administration, 1966, p. 61 (emphasis added).

Thus, in relation to the then existing framework of minority rights, the question as it initially arose before the Constituent Assembly was not whether the framework of differentiated and fragmented citizenship would continue but what shape it would assume in Independent India. In fact, during the early debates, the Constituent Assembly adopted a report by the Advisory Committee on Fundamental Rights granting minorities a set of minority rights similar to those they had hitherto enjoyed under the colonial state – the only significant difference being the case of separate electorates, which many minorities enjoyed in British India but were not included in the Advisory Committee's report⁶.

But when the partition of India on May 26, 1949 into a largely Hindu India and a predominantly Muslim Pakistan removed the Muslim League as a force in Indian constitutional politics, it allowed the Indian National Congress, the political party that controlled the Constituent Assembly, to push towards a position of universal equal citizenship quite like the position envisioned by Pant and other leading nationalist voices of the Assembly⁷. Accordingly the leadership of the Constituent Assembly was able to get ratified a revised proposal on minority rights, also drafted by the Advisory Committee on Fundamental Rights, which recommended « that the system of reservation for minorities other than Scheduled Castes in Legislatures be abolished⁸ ». « Scheduled Castes » referred to caste groups that had been identified during the colonial era as eligible for reserved allotments in legislatures and jobs due to social discrimination stemming from traditional Hindu caste hierarchies. Other « minorities » who had enjoyed similar minority rights under colonial India but who were not classified as scheduled castes – Muslims being the most prominent – were only entitled under the new constitution to a limited set of educational and cultural rights. Importantly, the term « minority » was now used to describe a category that was clearly distinct from that described by the term « Scheduled Castes ».

This new constitutional formulation was clearly set within a nationalist imagination that denied the colonial account of an Indian society that was inexorably divided. Even so, it continued to recognize specific « minority » identities to which attached a now much more limited band of special rights, and continued to grant to the Scheduled Castes special rights analogous to those enjoyed by the « minorities » of colonial India. This was of course in recognition of the practical needs to politically accommodate different social groups in Indian society. In post-partition India, the overwhelming political dominance of the Indian National Congress permitted the constitution makers to fend off the demands for special rights by groups like the Mus-

⁶ See part. XIV of the Draft Constitution of February 1948.

⁷ See R. BAJPAI, *Debating Difference: Group Rights and Liberal Democracy in India*, New Delhi/Oxford, Oxford University Press, 2011. See also I. ANSARI, « Minorities and the Politics of Constitution Making in India », in D. SHETH & G. MAHAJAN (dir.), *Minority Identities and the Nation-State*, New Delhi/New York, Oxford University Press, 1999, p. 111-123.

⁸ *Constituent Assembly Debates: Official Report*, vol. 4, New Delhi, Lok Sabha Secretariat 1999, p. 601.

lims and the Sikhs. However, as a vehicle of social reform and justice, the new Indian republic could not afford to be as dismissive to the Scheduled Castes, whose political identities were largely defined by the historical injustices of caste society in India, and which had already been recognised by the Poona Pact of 1932⁹.

(The constitutional settlement also included special political rights for Scheduled Tribes as well. However, the constitutional import of this classification is not relevant to the focus of this paper).

Thus as the Constituent Assembly was able to whittle down the rights of the non-caste minorities, it nevertheless continued to defend special rights for the Scheduled Castes. In the new context of post-colonial independence, this required a new justificatory language. Accordingly, the new framework of special rights, for minorities as well as castes, was now justified in the name of « social transformation »; or in terms of needing to alleviate the injustices of contemporary Indian society, thus allowing the identities of castes and minorities to be braided together into a common citizenship through a granting of a universal justice, if not through the immediate creation of universalist articulation of citizenship rights.

Commenting on constitutionalism as social transformation, Uday Mehta notes insightfully that it was the assertion of this new transformational form of politics that shed the colonial pessimism about the possibility of a unified national polity. That is, social revolution was framed as an assertion of the supremacy of political claims channelled through the new national-constitutional order over those of an autochthonous social order that it sought to subject to its control. Within this now unified field of politics, different constitutionally recognised identities like castes and minorities could be treated differently from the « majority » and from each other, as it could be argued that these castes and minorities needed to be differently prepared for the transformations that a unified politics demanded¹⁰. Furthermore, the special rights granted to castes were seen as temporary¹¹. And this meant that these rights did not seriously dent the idea of a universal citizenship, but merely functioned as preconditions for a future society with full freedom and equality for all.

On the other hand the rights granted to minorities by the new constitution were not considered temporary. But these were not political rights and therefore were not regarded as threatening to the idea of national unity as were the rights granted to the Scheduled Castes and Tribes. It was in this manner that the revolutionary or transformative approach to constitutionalism could accommodate the differentiated grant of rights both to Scheduled Castes and Tribes and, to (other) minorities, and yet present this as simply a part of an integrated journey towards universal citizenship.

⁹ See S.V. DESIKA CHAR (dir.), *Readings in the Constitutional History of India 1757-1947*, New Delhi/New York, Oxford University Press 1983, p. 561-563.

¹⁰ See, e.g., *Narasu Appa Mali v. State of Bombay* AIR, 1952 Bom 84.

¹¹ See *Constitution of India*, art. 334.

However, if the nationalist objection to colonial politics was that it misidentified or misrepresented the actual social condition of India as being divided by factions, then it is far from certain that the nationalist reframing of this condition has been any more successful. Evaluating the ability of nationalist politics to legitimately and credibly represent the divisions of Indian society as constituents of a unified nation requires training the spotlight of enquiry onto the particular constitutional practices that have been used to incorporate those distinct social identities into a broader national community. Focussing on the « minorities » of independent India, we shall see that the constitutional framework of special privileges has also been unable to represent or notate the condition of « community » in ways that ring true with the social and cultural intuitions and understandings that underlie these distinct identities¹².

II. THE STRUCTURE OF MINORITY RIGHTS IN THE INDIAN CONSTITUTION

A. *The Constitutional Framework*

The Indian Constitution grants « minorities » special rights, capturing its vision of the distinct composition and needs of these groups as set against those of the broader national community. Vastly reduced in scope in comparison to those of the colonial regime that preceded it, the present-day Constitution grants both « minorities » and other distinct cultural groupings special rights grouped under the heading « cultural and educational rights », which are elaborated in Articles 29 and 30 of the Indian Constitution. Article 29 grants « *any section of the citizens* [...] having a distinct language, script or culture of its own [...] the right to conserve the same ». Article 30 grants « *minorities*, whether based on religion or language, the right to establish and administer educational institutions of their choice » (emphasis added).

It is important to note that only Article 30 mentions the word « minority », and it grants to them a special right to establish and administer educational institutions. Article 29, on the other hand, simply refers to any « section » of citizens having distinct language, script or culture, and it merely grants to these sections rights to preserve same. Despite these differences, the rights granted by these two provisions are organised under a common heading, and must therefore be understood as drawing from a common inspiration. Further, to the extent that legislative history is relevant to understanding the structure of these rights, B. R. Ambedkar, the chairman of the drafting committee of India's Constitution and independent India's first Minister of Law, asserted in the Constituent Assembly when discussing a draft version of Article 29 that the phrase « any section of citizens » also re-

¹² M. JOHN, « Identity and the Social Revolution: On the Political Sociology of Constitutionalism in Contemporary India », Jawaharlal Nehru University Centre for the Study of Law and Governance Working Paper N°. CSLG/WP/18, New Delhi, Jawaharlal Nehru University, 2012.

ferred to « minorities », although in a more loosely defined sense¹³. This raises the question of the definitional framework that constitutional understanding and practice have brought to bear on the term « minority », whether loosely defined or more firmly tethered to conceptual and definitional parameters. And, in the context of our larger enquiry, it also raises the question of how this definitional framework comports which larger social intuitions and understandings of Indian society.

As to the constitutional identification of a minority under Article 30, the common-sense nationalist opinion would identify its essence in terms of cultural distinctness from the « Hindu » majority. Thus, in an archetypically nationalist portrayal considering India's constitutional future, the Nehru Report of 1928 identified the idea of political community, and by implication a « minority », in the following way:

The communal problem in India is essentially the Hindu-Muslim problem. Other communities have however latterly taken up an aggressive attitude and have demanded special rights and privileges. The Sikhs in the Punjab are an important and well knit community which cannot be ignored. Amongst the Hindus themselves there is occasional friction especially in the south, between non-Brahmans and Brahmans. But essentially the problem is how to adjust the differences between Hindus and Muslims¹⁴.

The Nehru report exemplified the essence of conceptualizing a « minority » as being something in contradistinction to being « Hindu », which was regarded as being the majority community of India. This position is also supported by judicial decisions, although these decisions seldom represented this foundational division in Indian political community with such clarity.

At the same time, however, this new conception of political community ran and continues to run against fundamental social intuitions. We examine this mismatch between state led identification of political community and social intuitions by examining several important cases in which the Supreme Court of India had to address the issue of defining minorities.

B. Two Conceptualizations of « Minorities »

The challenge of defining minorities within a larger representative framework of Indian nationhood has been posed most sharply by particular « Hindu » groups. Within the nationalist framework, these claims by constituent sections of the « majority » community possess the least credibility. However, in practice, the claims made by these groups display a conceptual coherence and credibility that has caused considerable problems for courts seeking to defend the nationalist demarcation of political community. The cases involving « Hindu » groups have brought to a head two very different conceptions of political community in addressing the challenge of identify-

¹³ See *Constituent Assembly Debates: Official Report*, vol. 7, *op. cit.*, p. 922-923.

¹⁴ *The Nehru Report: An Anti-Separatist Manifesto*, New Delhi, Michiko & Panjathan, 1975, p. 27.

ing minorities. On the one hand, the liberal conception of minority refers to a distinct community that is numerically smaller than that larger community that defines the « national » culture. This is also how India's constitution-makers tried to model political community in Independent India. On the other hand the court has also had to contend with a conceptualisation of a minority as being distinct along a *civilizational* continuum, and not simply or necessarily in numerical terms. The intersection of these different ways of thinking about community and the Supreme Court's efforts at resolving the challenge they raise, is well outlined in the cases of *Bramchari Sidheswar Bhai & Ors. v. State of West Bengal*¹⁵, *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya*¹⁶, and *Bal Patil & Anr. v. Union of India*.¹⁷

In *Bramchari Sidheswar Bhai v. State of West Bengal*,¹⁸ decided in 1995, the Ramakrishna Mission Residential College found itself in conflict with the revised policies of the government of West Bengal regarding the College's management. The College was established by the Ramakrishna Mission in 1960 at the request of the West Bengal state government and was partially funded by both the central and the state governments. The Ramakrishna Mission is a religious organization devoted to the teachings of Sri Ramakrishna (Ramakrishna Paramahansa) (1836–1886). When the College was established, the state government exempted it from government rules pertaining to academic governance. However, the subsequent government action revoked this exemption, which the college challenged claiming theirs was a minority institution under Article 30, and thus enjoyed special rights to administer the College autonomously and free of government interference.

The Ramakrishna Mission was founded by the Ramakrishna Order of supposedly « Hindu » monks. But in advancing their claim to be a minority community, the Ramakrishna Mission argued that they constituted a world religion and were not simply a parochial sect within Hinduism. They noted that Ramakrishna Paramhansa, their spiritual founder, « practiced various religions including Islam and realized the truth underlying these religions [...] That all religions are true [...] that all religions are only different paths leading to the same goal¹⁹ ». Along these lines, the Mission was distinctive in that it allowed members and followers to retain their identity as a Christian, Muslim, Jew, Hindu etc. while also simultaneously being members of the mission. This particular distinction, they argued, differentiated them sufficiently from other religions, particularly Hinduism, and thus made them a religious minority in their own right and not simply a particular philosophical articulation of Hinduism.

¹⁵ MANU/SC/0413/1995.

¹⁶ AIR 1966 SC 1119.

¹⁷ MANU/SC/0472/2005.

¹⁸ MANU/SC/0413/1995.

¹⁹ *Ibid.*, para. 24.

Their argument was accepted by the High Court at Kolkata. On appeal, however, the Indian Supreme Court overturned the High Court decision, holding that the Ramakrishna Mission could not credibly claim to place itself apart from the broader Hindu community. And since the Hindu community constituted the majority religion of India, this meant that the Ramakrishna Mission did not enjoy minority status under Article 30.

At the heart of the Supreme Court's reasoning was what it held to be the High Court's incorrect departure, on the question of Hindu identity, from an earlier and widely studied²⁰ Supreme Court decision in *Sastri Yagnapurshdasji v. Muldas Bhudardas Vaishya*²¹. This case dealt with the followers of Swaminarayan, a 19th century social reformer. The Swaminarayans had built several temples, which they claimed should enjoy immunity on grounds of religious freedom, from the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act 1956, which prohibited *Hindu* temples that were accessible to the general public from refusing entry to persons because they belonged to an untouchable Hindu caste or community.

The Swaminarayans limited rights of entry to their temples solely to member of their sect. They claimed that they were not covered by the Hindu Places of Public Worship Act because they constituted a religious sect that was distinct from that of Hinduism. They argued that even though they might be considered socially and culturally Hindu, they were not part of the Hindu « religion » because:

Swaminarayan, the founder of the sect, considered himself as the Supreme God, and as such, the sect that believes in the divinity of Swaminarayan cannot be assimilated with the followers of Hindu religion [...] that the temples in suit had been established for the worship of Swaminarayan himself and not for the worship of the traditional Hindu idols [...] [T]he sect propagated the ideal that worship of any God other than Swaminarayan would be a betrayal of his faith, and lastly, that the Acharyas who had been appointed by Swaminarayan adopted a procedure of « Initiation » (*diksha*) which showed that on initiation, the devotee became a Swaminarayan and assumed a distinct and separate character as a follower of the sect²².

Quite like the Ramakrishna Mission, the Swaminarayans also claimed that their sect was open to all as long they were appropriately initiated. However, also as in the case of the Ramakrishna Mission, it was not clear whether and how this particular description of their religious practices set them apart from the Hindu « religion » *per se*. This required inquiry into the essential nature of the Hindu religion, which formed a central part of Chief Justice Gajendragadkar's majority opinion disallowing the Swaminarayan claims and pronouncing them « Hindus » subject to the demands of the Bombay Act.

²⁰ See also M. GALANTER, « Hinduism, Secularism, and the Indian Judiciary », in R. BHARGAVA (dir.), *Secularism and its Critics*, New Delhi/New York, Oxford University Press, 1999, p. 233-267.

²¹ AIR 1966 SC 1119

²² *Ibid.*, p. 1123.

However, Justice Gajendragadkar's opinion is ultimately built upon an unresolvable contradiction. On the one hand, he argued that the Hindu religion:

does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more²³.

Despite its fuzziness, this is not an uncommon way to describe « Hindu » religiosity or even a broader traditional sub-continental religiosity²⁴. In other words, through this intuitive sociology, Justice Gajendragadkar characterises the term « Hindu » as referring to the *civilizational* bond holding together and binding the traditions of the peoples of the Indian subcontinent.

On the other hand, however, Justice Gajendragadkar's opinion also advanced a much more formalist, reductive definition of Hinduism. Drawing significantly from the writing of Dr. S. Radhakrishnan and other modern commentators on the Hindu tradition, Justice Gajendragadkar went on to note that the wide variety of practices and philosophical reflections found in the Hindu tradition were nevertheless held together by a common philosophy of monistic idealism. That is:

[b]eneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers [...] lie certain broad concepts which can be treated as basic. The first amongst these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters²⁵.

In this way, Justice Gajendragadkar defined Hinduism, not in civilizational terms, but in terms of particular religious doctrines such as rebirth and predestination. It is this doctrinal account of Hinduism that he ultimately used to refute the Swaminarayans' claim that they were sufficiently distinct from Hinduism as to constitute a separate religion, which he dismissed as simply a product of « superstition, ignorance and complete misunderstanding of the *true teachings* of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself²⁶ ».

In other words, Justice Gajendragadkar justified his rejection of the Swaminarayans claims by appealing to, and affirming, an *authoritative* version of Hindu belief and practice. His opinion was thus founded on a dogmatic and doctrinal conception of Hinduism that contradicted his earlier description of Hinduism as a civilizational phenomenon, a product of intuitive

²³ *Ibid.*, p. 1128.

²⁴ See, e.g., A. NANDY, « The Politics of Secularism and the Recovery of Toleration », in R. BHARGAVA (dir.), *Secularism and its Critics*, *op. cit.*, p. 321-344; T.N. MADAN, *Modern Myths, Locked Minds: Secularism and Fundamentalism in India*, New Delhi/New York, Oxford University Press, 2nd ed., 2009.

²⁵ AIR 1966 SC at 1130.

²⁶ *Ibid.*, p. 1135 (emphasis added).

social identity. (It could be argued that in moving to this more doctrinal definition, he was not denying a broader « way of life » or civilizational conception of the Hindu tradition, but only emphasizing that communities like the Swaminarayans are denominations within that broader tradition, and in this way are not analogous to more archetypically distinct religions – like, for instance, Islam or Christianity).

It is here that the Swaminarayan case becomes salient to the case of the Ramakrishna Mission, as both these cases deal with similar tensions between a formal doctrinal account of the Hindu religion and sociological or civilizational accounts of the Hindu traditions that run at parallels to it. And in both cases there is a judicial attempt to incorporate civilizational accounts into the doctrinal as far as might be possible. In doing so, the Supreme Court recognised the enormous diversity of doctrines practices and traditions within what is considered to be the Hindu religion, but nevertheless proceeded to affirm an authoritative doctrinal conception of Hinduism that had little to do with any civilizational way of life.

Moreover, as between these civilizational and doctrinal definitions of Hinduism, the courts clearly find the latter to be dominant simply as a legal doctrinal matter. The courts in these two cases marshalled no argument to actively disarm the intuitive sociological appeal of the alternative civilizational account of Hindu religiosity. They simply assert that the doctrinal account trumps the civilizational. By contrast, it is useful to examine a later decision of the Court in *Bal Patil & Anr. v. Union of India*²⁷, which actively engages with the civilizational conception of Hindu religiosity and the anxieties it produces for the liberal nationalism on which constitutionalism in India has been founded.

In *Bal Patil*, decided in 2005, the Supreme Court dismissed a petition of the Jain community arguing that the central government ought to have declared them a « minority » under the Minorities Commission Act 1992, a statute providing for the welfare of communities that have been formally classified as « minorities » by the central government for the purposes of that Act. The government had denoted Muslim, Sikhs, Christians, Parsis, and Buddhists as constituting such « minorities », but had left the Jains out of this list. The Jains then petitioned the Supreme Court to direct the government to include them in this list.

It must be emphasised that, like *Sastri Yagnapurshdasji*, this case did not directly involve questions about definition of minority identity under Article 30. Even so, as with *Sastri Yagnapurshdasji*, *Bal Patil* offers important heuristic pointers on the judiciary's thinking about the issue of minority identity. In dealing with the Jain petition, the Court ultimately held that the power to declare a « minority » was vested in the central government and that it was inappropriate for the court to second-guess this exercise of executive discretion. Nevertheless, a significant portion of the Court's opinion looked to justify the government's exclusion of the Jains, and this dicta provides an important lens into examining the tense relationship be-

²⁷ MANU/SC/0472/2005.

tween civilizational distinctiveness and the liberal nationalism of the Indian Constitution.

(Insofar as their status as « minorities » is concerned, the Jains have always been a hard case. They have sometimes been identified as being part of the broader Hindu community²⁸, at other times, however, they have been identified to be distinct²⁹. In fact, despite losing this case, the Jains would eventually succeed in persuading the government to have themselves declared a minority community under the under the Minorities Commission Act in early 2014).

In writing the opinion of the Court, Justice Dharmadhikari argued that Jains ought not to be declared minorities, not because of the absence of any civilizational or even doctrinal distinction, but simply due to the effect such a declaration would have on India's quest for constitutional unity. According to him. « Hindu society [...] is itself divided into various minority groups [...] In a caste-ridden Indian society, no section or distinct group of people can claim to be in a majority. *All are minorities among the Hindus* ». (emphasis added). Consequently, he argued, the government should not act in ways that encouraged groups like the Jains to adopt what he called a « minority sentiment ». Doing so would fragment the conceptualisation of political community on which constitutionalism in India was built.

Of course, Muslim assertion of a distinct « minority » identity would presumably not trouble Justice Dharmadhikari as much as similar claims made by groups like Ramakrishna Mission, the Swaminarayans, and – in this particular case – the Jains. In the history of Indian nationalism, Muslims and certain other groups have *always* been recognised as distinct from the dominant strands of national culture, without contention. But from Justice Dharmadhikari's vantage point, the Jains form part of that particular social spectrum that constitutes the Hindu-majority foundation on which liberal nationalism is to be built. Consequently any demand for minority status from these kinds of groups would fracture this foundation and its unifying force.

All in all, in their quest for national unity Indian courts have consistently and decisively crowded out of civilizational conceptualisation of minority identity in favour of a political identity that comports with liberal nationalism. However, the very fact that civilizational arguments continue to assert themselves in Indian courts suggest that liberal aspirations to build a uniform nationalism have not been able to establish the desired conceptual hegemony. In fact, the continuing and wide-spread social appeal of these civilizational conceptualizations of what distinguishes a « minority » would suggest that constitutional practice cannot continue to ignore the force of these social intuitions. This problem has not received much attention in contemporary Indian constitutional thought. However, in early writing on the challenges for what was then the future Indian nation, Mahatma Gandhi's

²⁸ See, e.g., the Hindu Marriage Act of 1955.

²⁹ See S. RADHAKRISHNAN, *Indian Philosophy*, vol. 1, London, George Allen & Unwin Ltd, 1948, p. 361.

perspicuous insights on the limits of liberal constitutional design throw light on the problem we have identified and how it might be surpassed.

IV. GANDHI'S ON THE ALIENATING EFFECTS OF CONSTITUTIONAL LIBERALISM

As one of the most formidable opponents of colonialism in the 20th century, Mahatma Gandhi foresaw and clearly diagnosed the limits of constitutional liberalism as arising from the alienating effects of colonial rule³⁰. All pivotal institutions of colonial rule – ranging from parliamentary government, modern science and medicine, railways, lawyers and, the political forms of organising community – are seen by Gandhi as producing alienating effects³¹. Accordingly, the location or the site of Gandhian politics was local practice and quotidian social forms interrupted by colonialism. And, the methodological route Gandhi offers for Indian freedom and home rule – « *Hind Swaraj* » – is not found simply in the transfer of state power from the British to Indians, but in the reconnecting of Indians to the autochthonous structures of experience and understandings that had been interrupted by colonial sensibilities, institutions, and forms of knowledge. Regarding the dislocations caused by colonial rule, it is important to note, as does Vivek Dhareshwar, that the target of Gandhi's attack was not the institutions and sensibilities of modernity that colonialism brought with it *per se*, but their occlusion of the autochthonous experiences and understanding in Indian society³².

A detailed theoretical discussion of the structures of experience that colonialism occludes, and how Gandhi thought India could best overcome this occlusion, will have to be reserved for another occasion³³. Nevertheless, Gandhi's observations provide an important perspective from which to view the problem of developing a constitutional definition for « minorities » in India. Reframed in a Gandhian light, such a project can be seen as a particular example of a now post-colonialist « occlusion » produced by the operation of constitutional liberalism.

Gandhi's thoughts are often not organised in neat logical argument and his reflections on the claims that liberal constitutionalism makes on Hindu practices are not as clearly enunciated we have just restated it. However, it is altogether obvious that in Gandhi's thinking the category « Hindu » had

³⁰ See A. BILGRAMI, « Gandhi (and Marx) », in *Secularism, Identity, and Enchantment*, Cambridge, Harvard University Press, 2014, p. 122-174.

³¹ M.K. GANDHI & A. PAREL, *Hind Swaraj and Other Writings*, Cambridge, Cambridge University Press, 1997.

³² V. DHARESHWAR, « Politics, Experience and Cognitive Enslavement: Gandhi's *Hind Swaraj* », *Economic and Political Weekly* 45, 2010, p. 51-58.

³³ See, e.g., U. SINGH MEHTA, « Gandhi on Democracy, Politics and the Ethics of Everyday Life », *Modern Intellectual History* 7, 2010, p. 355-371.

very little to do with what he termed « exclusive nationalism³⁴ ». To Gandhi, Hinduism was a merely an ethic that constituted individual and collective life in India. That is, he invoked the term primarily to identify a « search after the truth through non-violent means [...] Hinduism is a relentless pursuit after truth³⁵ ».

Insofar as he addressed the problem of factional or « communal » conflict within the nation, Gandhi seemed to grant some credence to the nationalist view that the conflict between Hindus and Muslims was the defining problem for national unity. However, because he saw *swaraj* – freedom – as a process of « self-transformation » « to be experienced by each one for himself³⁶ », his concern about Hindu-Muslim conflict can be described merely as a location where the occlusions of exclusive-nationalist understanding of identity had to be engaged with and resisted. This engagement he hoped would clear false understanding regarding these identities and reconnect Indians to the promise of self-transformation contained in terms like Hinduism, or for that matter in any religious tradition.

Thus recognising the devastating effects of the Hindu-Muslim conflict, he notes that this much touted socio-political enmity was a British invention and was by no means a defining problem of the Indian nation *per se*. He goes to say that « there are as many religions as there are individuals [...] [I]n no part of the world are one nationality and one religion synonymous terms: nor has it ever been in India³⁷ ». Most significantly, he also questions why the conflict between Hindus and Muslims should be any more significant for national life in India than those conflicts between other communities, such as the Vaishnavites and Shaivites, or the Vedantins and Jains.

In other words, in thinking about social identity and social conflict, Gandhi made fervent efforts to dislodge socio-cultural traditions from exclusive nationalist identities and relocate them in traditions of ethical self-discovery. It was in this manner he put his faith in India's civilizational or religious traditions and simultaneously sought to loosen the claims that liberalism's universal nationalism made and continues to make on these traditions.

Constitutional practice for over the last half a century has, however, belied the Gandhian hope that Indians would come to think with and reflect on their problems through autochthonous categories and traditions of Indian thought and experience. On the contrary, the very logic of contemporary constitutionalism in India is founded on the need to transform Indian social categories so that they may become serviceable for the particular kind of national political community authorised by the liberal-constitutional imagination. Even so, as we saw, the judicial cases described earlier in this paper

³⁴ See S. BHATTACHARYA, *Mahatma and the Poet; Letters and Debates Between Gandhi and Tagore 1915-1941*, New Delhi, National Book Trust, 1st ed., 1997, p. 30.

³⁵ M. GANDHI, *Hindu Dharma*, New Delhi, Orient Paperbacks, 1978, p. 18-19.

³⁶ M. GANDHI, *Hind Swaraj and Other Writings*, *op. cit.*, p. 73.

³⁷ *Ibid.*, p. 53.

demonstrate that India's autochthonous social imagination continues to interrupt (albeit episodically and unsystematically) or limit the reformist ambitions of Indian constitutionalism. But as we have also seen, constitutional discourse is unable to draw on these social understanding in any meaningful way. It is against this background that both Gandhi's diagnosis of the damaging social transformation that constitutionalism demands from Indian society, as much as his exhortation towards self-discovery through the idioms of autochthonous Indian social traditions, continue to be relevant to India's ongoing efforts to identify its own constitutional identity.

But what prospects does the Gandhian route of charting freedom through self-liberation in the frameworks of everyday life have in the liberal constitutional republic India established at independence? In considering this question, this paper concludes with some observations on a more forthright constitutional acceptance of India's social diversity.

V. CONCLUSION: THE SPACE FOR DIVERSITY IN THE INDEPENDENCE CONSTITUTION

Recapping our discussion, the limits of India's liberal constitutional vision has been shown up for its inability to draw on autochthonous social practices and intuitions in its conceptions of political community. These limits were illustrated through the court cases involving claims by the Ramakrishna Mission and the Swaminarayans that their identity and traditional practices made them significantly distinct from Hinduism – claims that were brushed aside in the courts' pursuit of a constitutional *telos* underpinned by a political community organised along nationalist lines. Viewed in this manner, even the Gandhian approach, which emphasises social diversity as a distinguishing feature of India's civilizational terrain, seems doomed when faced with the nationalising logic of Indian constitutional law.

On the other hand, however, Indian social identities and practices tenaciously continue resist and interrupt liberal constitutional visions of political community, even in the face of constitutional non-recognition. Can these diverse social traditions, now largely unrecognised, chart identities that might someday find constitutional recognition on their own terms?

Perhaps we can begin answering this question by drawing on a distinction that Michael Oakeshott makes between different traditions of thinking about state formation in modern Europe – the idea of the state as a *societas*, or social partnership – and that of the state as a *universitas*, or corporation. A *societas* specifies a moral condition defined by laws where « government is a nomocracy whose laws are to be understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants³⁸ ». Thus a ruler in a *societas* is merely a « custodian of the loyalties and the guardian administrator [...] his concern is to keep the conversation going³⁹ ». On the

³⁸M. OAKESHOTT, *On Human Conduct*, Oxford, Clarendon Press, 1975, p. 202-203.

³⁹*Ibid.*

other hand, a *universitas* is a state imagined on the lines of a corporation to pursue a common end⁴⁰. A *universitas* is accordingly « telocartic » in its orientation such it may facilitate the management of its common purposive concerns⁴¹.

Drawing on this distinction, Martin Loughlin notes that constitutional self-expression in all European states has been constituted as tension between these different forms of orienting and organising constitutional community, between the state as *universitas* and the state as *societas*⁴². But the Indian constitutional framework, by contrast, both in its colonial and post-colonial avatars, has heretofore been defined as almost exclusively in terms of *universitas*, whose defined purpose is the eventual making a modern, unified nation out of the social diversity of India through processes of social and economic transformation. Clearly, the desire for such a *universitas*, founded on pursuit of a liberal justice and equality that is universal to all Indians, runs deep in India. It cannot be ignored. However, neither can India afford to ignore the deeply diverse forms of life that constitute its society as illustrated in the present discussion of minority. And the maintenance of a unity that recognizes and embraces such diversity lies precisely in that realm of *societas* that Indian constitutionalism has heretofore overlooked in its overriding quest for a universal, liberal modernity.

It is against this background that it is useful to observe that there has been almost no intellectual tradition of constitutional thought, in the West or elsewhere, that has used social diversity as a positive ground on which to fashion the identity of the state. Gandhi is an important exception. And, though the prospects for an inquiry inspired by Gandhi are not entirely certain, it would most certainly initiate an important conversation about a liberal constitutionalism in India that has been run aground by its demand for an unyieldingly homogenous universalism⁴³.

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⁴⁰ See *ibid.*, p. 205-206.

⁴¹ See also M. LOUGHLIN, *Foundations of Public Law*, New York, Oxford University Press, 2010, p. 160-61.

⁴² See generally *ibid.*, p. 157-182.

⁴³ My thanks to Upendra Baxi, Arudra Burra, Vivek Dhareshwar, Michael Dowdle, Ramachandra Guha, Prashant Iyengar, Vikram Raghavan and Arun Thiruvengadam for comments on draft versions of this essay. Thanks also to colleagues at the Delhi Law and Philosophy Forum at Jindal Global Law School and to a seminar at Azim Premji University where versions of this work were presented.