

## Introduction

Constitutions are statements of ambition. They are the pathways along which a political community envisions its hopes and aspirations. Over time, constitutions are also maps of failure and frustration. This book identifies one such constitutional failure, which it terms India's Communal Constitution. The Communal Constitution picks out a tendency in the Constitution to cast the identity of the Indian people along religious lines. Needless to say, this tendency gnaws at the heart of Indian constitutionalism, the liberal promise of equal liberties. Therefore, describing the grasp of the Communal Constitution, this book examines the manner it might be best understood alongside the Constitution's aspiration to forge a liberal and secular polity.

### Outline of the Problem

To elaborate the communal orientation of the Indian Constitution and the drag it exerts on its liberal goals, a few distinctions and clarifications are useful to kick-start the discussion. In studies on communal tendencies in Indian constitutional politics, a standard point of departure has been the rise of Hindu nationalism over the last century, and especially in the period after the rise of the Ram Janmabhoomi–Babri Masjid dispute.<sup>1</sup> These studies examine the phenomenon of Hindu nationalism in Indian public life and the extent to which it has undermined constitutional commitment to secular ideals. By extension, these studies are a comment on the inability of the broadly

liberal and secular consensus embodied in the Constitution to hold its own against its adversaries.

In relation to the rise of religious nationalism, some scholars have suggested that the religious and group-oriented character of Indian society has not been well disposed to liberal secular norms.<sup>2</sup> In turn, it could be argued that these dimensions of Indian society have not facilitated a robust defence of its liberal constitutional state. Whatever stance one takes in relation to these arguments, it is important to note that they seek to explain socio-cultural forces that exert an external influence on constitutional institutions and values. In other words, these arguments on the working of constitutional institutions foreground forces like Hindu nationalist mobilisation as influences that are analytically distinct and largely external to the liberal secular organisation of the Indian Constitution.

The sway of Hindu nationalist mobilisation has never been more pressing on India's liberal constitutional state as parties vowing allegiance to it hold the levers of state power in many parts of contemporary India. However, the communal programme of Hindu nationalism and the extent to which it has been successful in contemporary Indian politics are not directly the subject of this study. On the contrary, this study seeks to isolate aspects internal to the structure and practice of the Indian Constitution that entrenches religious groups and identifies the Indian people through the lens of such groups.

Turning towards the structure and orientation of the Indian Constitution, it is important to distinguish the Communal Constitution from the mere fact that the Indian Constitution is authorised by its people. The people of India are undoubtedly a self-constituted political community, but one that has by and large chosen to design its institutions to emphasise a community premised on the coming together of free and equal citizens.<sup>3</sup> Thus, the Communal Constitution does not merely refer to the default condition of modern politics – the coming together of a people to authorise the state and government.

Further, enunciating the will of the Indian people, there are many constitutional provisions that recognise identities like caste, tribe, religion, minorities, language, region, and so on. Thus, caste and tribe groups are recognised, and special provisions for affirmative action are made for them in various parts of the Constitution; religious denominations are recognised and granted broad powers to manage their affairs in matters of religion; and minorities are recognised and granted special educational and cultural rights. These examples are clearly part of a constitutional scheme that recognises and affirms group identity. However, the recognition of groups and the grant of collective rights per se do not pose the further problem of groups

being institutionally asserted and entrenched as embodying the people of India. As communitarian scholars have asserted, the recognition of groups or communities in public life as a valuable aspect of human agency can be justified as consistent with a liberal constitutional culture premised on a composite community of free and equal citizens.<sup>4</sup>

On the other hand, identifying particular groups with the ‘people’ undermines any political community’s effort to articulate itself as free and equal. This is very much the case with the Indian Constitution, especially because of its clearly articulated commitment to found a community of free and equal citizens. However, it is against this background that this book picks out the Communal Constitution as a tendency to identify the Indian people in parochial terms. In this respect it is important to note that the Communal Constitution is not merely presented as an episodic challenge posed to the Constitution’s liberal norms. That is, it is not occasional state action that could be revised and corrected. On the contrary, the Communal Constitution points to a structural orientation in the Indian constitutional state.

As a structural feature of Indian constitutionalism, the Communal Constitution subsists in the Indian Constitution despite the overwhelming salience of the Constitution’s liberal commitments. In addition, nurtured by socio-political forces such as Hindu nationalism, the Communal Constitution could well be able to displace the Constitution’s liberal foundations. It is against this backdrop that this book makes salient its case for the study of India’s Communal Constitution.

## The Problem of Indian Constitutional Identity

The Communal Constitution has been presented up to this point as the pathological expression of constituent power, or the sovereign authority of the Indian ‘people’. However, this pathology is also a broader foundational puzzle for all liberal democratic states. That is, if constitutional authority must be tied to the will of a ‘people’, then it must follow that these people cannot escape the process of self-formulation by drawing boundaries distinguishing insiders from outsiders, self from others, friends from enemies, and so on. In other words, the sovereign power of the people always leaves open the potential of being articulated in national communal parochial terms.<sup>5</sup>

However, the constituent power of the people is widely understood as a field of power where ‘material force is converted into political power, ... a “crowd” is transformed into a “people”, and ... a governing regime (i.e., constituted power)

is conceived as one that derives its authority from the consent of its subjects'.<sup>6</sup> In other words, the coming together of a 'people' as a political community is presented as a process of rationalisation, persuasion and justification, where brute power could potentially be reorganised and made subject to the limits of law and norms. In Anglo-European liberal democratic societies, the 'people' have set their union into law and rules through the hegemonic normative assumption of a political community of free and equal citizens. Having embraced this liberal political tradition, the Indian Constitution is also founded on the equal liberties of its citizens. However, if this were so, how is it possible to explain a structural orientation in the Constitution to characterise the people in communal terms?

This book addresses this question by presuming that liberal norms are not all-encompassing. That is, even as the commitment to the equal liberty of citizens is hegemonic, it is only one among several contending options that any polity has available to it.<sup>7</sup> It is true that a liberal constitutional order founded on equal citizenship is the dominating influence in global politics. It is also true that equal citizenship has been the dominant influence on Indian constitutional organisation. Even so, contemporary liberal politics has always had many, even if less attractive, rivals.

In the Indian case, alternatives to contemporary liberalism include the belief that the Indian people ought to be defined along the lines of religion, language, regions or even an anti-modern Gandhianism that emphasised the everyday plurality of Indian society. The most powerful of these alternative visions of political community projected India as a land of contending religious communities, the most important of these being the Hindus and Muslims.

In fact, the partition of British India could be viewed as the vindication of this point of view, with Pakistan being carved out as a separate Muslim homeland. Independent India was at great pains to make clear that the assertion of popular sovereignty in its new Constitution would not establish a 'Hindu' mirror of the Pakistani state to govern India's plural society. However, the efforts of the Indian Constitution-makers to constitutionalise a liberal government as the expression of popular sovereignty were set against a long history of colonial state formation as well as anticolonial national mobilisation that drew on and entrenched communal identities. That is, communal identities have been, and continue to be, viable sources of political and constitutional identity in modern India. Consequently, despite the best efforts of the Constitution-makers of contemporary India, the historical weight of communal identities has seeped into the constitutional imagination of the Indian people. This book seeks to trace the imprint of these communal identities on the contemporary

Constitution but primarily limits its enquiry to religion and the role it has played in shaping the identity of the Indian people.

The choice of religion as the primary axis of study helps systematically organise the scope of this book's enquiry. But more importantly, the choice is driven by the fact that religion is by far the most important identity that has shaped Indian constitutional history. The partition of British India is a self-standing event marking the significance of religion for Indian constitutional identity. However, partition was only the culmination of a long process through which religion came to the foreground of Indian constitutional politics. Consequently, the constitutional identity of the Indian people as it has been organised along the axis of religion must be briefly outlined before they are elaborated in the chapters that follow.

## Religion and the Contours of the Communal Constitution

The British colonial state in India, as already mentioned, was the historical backdrop against which constitutional imagination in modern India took shape. Consequently, to understand the imprint of religion on Indian constitutional identity, this study foregrounds three axes through which the colonial state drew religion into Indian constituent imagination. These are: first, the adoption of toleration as state practice by the colonial state; second, the movement to reform religion in the nineteenth century; and third, the institutional imagination that framed Indian participation in British government along communal lines in the early twentieth century. Each of these axes is outlined and drawn together as the communal shadow that frames the Indian people and their constitutional identity.<sup>8</sup>

### Colonial Toleration

Religion and toleration were always cast as foundational problems for the British government in India from the earliest days of the East India Company's rule in Bengal. From the toleration accorded to personal law systems, through the post-mutiny proclamation by the Crown forbearing Indian religious practices, and right up to the final days of the empire in India, toleration was at the heart of the colonial government's policy towards religion.<sup>9</sup>

In adopting toleration as state policy, the colonial government was doing no more than bringing to India a basic model of government that European societies crafted to address religious and social division. That is, responding

to the divisive wars over religion in the sixteenth century, European polities fashioned states where religious freedom and toleration of religious difference formed the normative foundations of political union.<sup>10</sup> It is important to emphasise the normative dimension of the European practice of toleration that regarded toleration as a civic duty exhorting forbearance for practices that were found abhorrent and also obliging state practice to be evenhanded or neutral when confronted with divisive religious questions. Therefore, when faced with the religious diversity of India, it was understandable that a similarly normatively driven toleration formed the primary governmental response of the colonial state.<sup>11</sup>

Normative high-mindedness was of course not the only influence that drove the policy for toleration as there were good pragmatic reasons to tolerate Indian diversity to maintain social stability and avoid costly confrontation. Even so, there is good reason to take serious note of the methodological orientation that normative toleration assumed in colonial India, especially the way it cast religion and religious practice. This methodological orientation is particularly apparent in the pervasive colonial search for the true and axiomatically applicable foundations of Indian religious traditions.<sup>12</sup>

To understand the impulse to seek religious truth as toleration became state policy in India, consider this example from the *Asiatic Journal* on the toleration to be accorded to the practice of Sati:

*[I]t is solely because the burning of widows has its foundation, whether erroneously or not, in the religion of the country, that the British laws do not and ought not to interfere. Infanticide, however, practised in India, has no sanction from any one of its systems of religion, but, on the contrary, is abhorred and repudiated by them all. It is simply a civil act, and is, therefore, cognizable by simply civil or temporal laws; but the burning of widows is a spiritual and religious act (however detestable), and therefore only out of the reach of that code of criminal law which the British nation has permitted itself to impose upon India.<sup>13</sup> (Emphasis in original)*

This discussion on Sati demonstrates that the practice secured toleration and immunity from criminal prosecution as the colonial state decided that Sati was part of the axiomatically applicable true foundations of a religious tradition. Infanticide, on the other hand, was not recognised as a religious practice and so was identified as an act that could be criminally prosecuted. The methodological commitment to discover truth can also be seen in the way in which different instances of Sati were distinguished from each other as those true to religious doctrine or axioms and those that were not.<sup>14</sup> In turn, true doctrines or foundations of practices like

Sati were often sought out in religious texts and tied to the religious tradition of a people.<sup>15</sup> Further, it was also assumed in the case of Sati that the practice was part of the religious tradition of the Hindu people, a community different from others classified Muslim, Christian, and so on.

Thus, the search for true religious foundations of a practice like Sati is an important instance illustrating the method and orientation through which the state came to axiomatically and deductively identify religion and demarcate religious communities. However, it is important to emphasise that Sati was only one iconic example that picks out a well-established approach that tolerated religious practice by tying it to the axiomatically applicable truths of a religious community or people. A more far-reaching policy decision that embedded a truth-seeking approach towards religion was Governor General Warren Hastings's Judicial Plan of 1772, which promised to govern Indians identified as Hindus and Muslims according to their respective religious laws.

As considerable scholarship has shown, this act of toleration for the supposed religious laws of their Indian subjects sharpened communal identities by identifying vast swathes of local practice with clearly defined doctrinal truths or axiomatically applicable religious laws.<sup>16</sup> The domain of personal laws and its complexities are independently discussed in Chapter 2 but is mentioned here merely to point to the extent to which toleration pulled together diverse religious practices by emphasising the doctrines or truths that axiomatically identified a religious community. Consequently, even paradoxically, toleration produced sharply defined conceptions of religion and a society divided into religious communities or peoples so recognised by colonial state practice.

## Social Reform

In the latter part of the nineteenth century a class of Indians across the subcontinent began to develop a fledgling nationalist consciousness about their collective religious and cultural practices. This assertiveness allowed them the legitimacy to speak on behalf of their fellow countrymen as also to reorganise the unethical contours of Indian religious and social practice.<sup>17</sup> In developing a language to speak for other Indians, nationalists were drawn into a debate both among themselves and with the colonial state on the nature of community in India and the way it might be reformed. What ensued was not just legal engagement with the reform of Indian social practices, but a movement for reform organised along lines of religious communities. This process of reform is the second axis through which this book will demonstrate a constituent imagination that has lent itself to fashioning India as a religiously inflected communal state.



Chronologically, however, the earliest efforts towards social reform were initiated by the colonial state itself through a reorganisation of its deferential approach towards religious practices identified as deserving of toleration. That is, as colonial officials became more confident of their rule in India in the course of the nineteenth century, they argued for the reform of what they deemed to be the ethically and morally deficient aspects of Indian religious practices.

However, drawing again on the example of Sati and its abolition in 1829, it is important to note that the abolition of Sati did not imply any backtracking from the commitment to tolerate as the effort to reform and eventually to ban Sati was argued on grounds of religious truth. That is, an important strand of the argument for abolition drew from the position that Sati had no foundation in the religious canon of the 'Hindu' people. Consequently, abolition was possible without disturbing the commitment to tolerate by re-designating Sati as not obligated by the textual traditions of the Hindus.<sup>18</sup>

However, even as toleration remained a broader current in Indian state practice, there were signs of change in attitudes to Indian religious practices as the nineteenth century advanced. In the broader field of personal law, where vast numbers of religiously inspired practices were axiomatically re-drawn as the textual laws of communities styled Hindus and Muslims, there were signs that state practice was moving away from a simple fidelity to textual legal sources. As scholarship has noticed, the colonial state was forced to confront Indian diversity and the centrality of customary usages in the government of social life.<sup>19</sup>

In a heady confrontation that took place within the colonial establishment in the latter part of the nineteenth century, it was argued by judge James Henry Nelson that the entire textually founded approach to the recognition of personal law ought to be reorganised to emphasise customs alone. Nelson, who will be discussed in greater detail in Chapter 2, argued that the colonial commitment to toleration implied that the relevant object of toleration was a plurality of customs followed by different communities across the country. That is, the object of toleration ought not be practices whose foundations were to be axiomatically found in supposedly canonical texts but customs that could be shown to be practised by particular communities.

By the time Nelson came to emphasise custom in the latter part of the nineteenth century, the centrality of custom was already conceded as a matter of institutional practice in much of Hindu and Muslim personal law. However, there were bounds within which custom was adopted by colonial personal law. That is, the recognition of custom was not the acknowledgement and authorisation of usages as practised by particular social groups but usages that



could be rendered axiomatically congruent with the locally authoritative textual traditions of Hindu and Muslim law. In addition, custom also had to be congruent with reason and morality, besides being consistently practised and having antiquity.<sup>20</sup>

However, Nelson seemed to suggest an approach to custom that accepted custom on its own terms as the closely held practices of the diverse subjects of the colonial state. In turn this meant that there ought not to be any automatic presumption that customs stood tied to the broader religiously and axiomatically organised truths of Hindu and Muslim law. However, this suggestion seemed to go one step too far for his colleagues in the colonial establishment.<sup>21</sup> They could accept that customs were relevant in determining and working the relevant personal law but could not accede to the suggestion that they do away entirely with the textual tradition that axiomatically organised the field of personal law into distinct and divided groups of religious people.

Nelson's opinions were predictably committed to oblivion, most notably because of the pushback it received from prominent figures in the colonial establishment. However, the resolution of the debate is an important constituent moment in the history of the colonial state as it affirmed personal law (Hindu law in this episode)<sup>22</sup> as the set of axiomatically applicable rules attaching to and governing a distinct people. That is, Nelson's defeat affirmed a colonial axiom of India as a collection of people best understood as divided by doctrinal and axiomatically applicable truths ascertained and administered by the British state.

This detour into the broader course of personal law in colonial India is evidently significant for the role it played in firming up the identity of the Indian people for colonial state practice. However, it is also significant as these identities formed the contours along which nationalist elites in British India began to speak on behalf of fellow Indians and for the re-making of Indian society. Consequently, drawing on colonially styled accounts of Hindu and Muslim identities, nationalists gradually took over earlier efforts of the British to reform Indian society.

Thus, from the latter part of the nineteenth century and well into the middle of the twentieth century, reform was the communally organised terrain on which nationalist elites opened political ground to speak on behalf of fellow Indians.<sup>23</sup> This history will be elaborated in more detail in later chapters, but for the present discussion it is also useful to link reform as a site of communal identification to a broader process of political and constitutional representation organised by the colonial state along the very same communal identities. In turn, this communally organised form of constitutional representation for Indians is the third axis along which this book will trace communal influences in Indian constituent imagination.

## Communal Representation in Colonial India

Political representation for Indians through communally organised separate electorates is the most obviously identifiable instance of communal constitutional imagination in British India. This manner of representation formed part of British efforts to legitimate rule, by gradually increasing Indian participation in the colonial government. Colonial efforts to present increased Indian participation in government, especially its grandiose assertions that Indian involvement in government was a preparatory step to an eventual handing over of power to Indians, are easily dismissed as disingenuous proclamations in bad faith.<sup>24</sup> This is especially so as the colonial state did not relinquish power to Indians until it was eventually wrested from them by nationalist struggle.<sup>25</sup> Even so, the Indian goal of coming together as a sovereign people with an independent state has been significantly shaped by engagement with the limited forms of representative government in colonial India. Therefore, colonial representation requires careful attention as it has tracked the shape of constitutional identity in independent India.

Fledgling forms of representation for Indians in British government can be traced to the aftermath of the revolt of 1857;<sup>26</sup> however, this process gathered momentum only in the first few decades of the twentieth century. In these years the principal challenge of representing Indian opinion in colonial government was framed by the supposed 'communal problem',<sup>27</sup> or the task of organising representation in government for a society understood to be divided by social, cultural and religious factions. This judgement about Indian society provided the colonial state with justification for its role in India as a pedagogue or mentor who would guide Indians towards political unity.<sup>28</sup> In turn, the obligation to tutor Indian subjects was discharged by organising Indian representation in colonial institutions through a series of constitutional statutes, the most important of which were enacted in 1909, 1919 and 1935.

Colonial representation invited communities to participate and learn the ropes of colonial government as communally divided groups. These groups, Muslims being the foremost among them, were eligible for quotas in colonial legislatures through separate electorates, and later for government jobs. As with toleration and reform, Indian participation in colonial government reified social identities and sharpened the fault lines of social division. In turn, this came in the way of a united nation that the colonial government ironically claimed it wanted to forge and pass on to Indians.

Representation therefore pulled together two kinds of accounts of the peoples of British India: first, as a collection of distinct and divided communities