Chapter Five

Identifying “Doctrine”: Tracing Theologisation in Legal Narratives of the Place of Worship in India

5.1 The Colonial Legal System in the Framework of English Legal Culture

We have seen that the process of codification has been considered to be secular in nature. The truth of this story has been interrogated and we have found it to be false. We have discovered that the process of theologisation or the making of religion as a legal category necessarily involves the importation of secular legal frameworks. In looking at the story of law in the West we have see how it has inextricably tied up with theology. We have also seen the various developments that have taken place in the English legal system that have been the necessary result of the nature of their own tradition being part of Western law.

The role of the transplantation of dual systems of law came in for active discussion in the context of how the Indian legal system should be structured. The views of Erskine Perry, a judge of the Bombay High Court is interesting in this respect. On comparing the two systems of law Perry has no doubt as to which one he thinks is superior:

Now it is evident that of these two conflicting systems which co-exist with a view to the same object-the elicitation of truth-both cannot be correct, and I think that a very little examination will shew that the Equity system is far more consonant to common sense, and the requirements of justice, and that it has a marked superiority over its rival in excluding chicanery, technicalities, and the triumphs of form over substance..........The rules of the Common Law on the subject have on the other hand been framed without reference to principle, and have been subjected to no searching examination, but are the accidental growth of centuries, and, (certain symptoms of their little foundation in reason,) are modified by innumerable exceptions. (Perry 1850, 12-13)
In discussing legal reform proposals by Sir Lawrence Peel regarding procedure at the Supreme Court, Perry notes with approval the efforts by Lord Peel to incorporate the best elements of both systems. He commends Peel’s efforts to introduce the viva voce examination prevalent in equity into the common law jurisdiction of the Supreme Court, but reprimands him for not using the procedure as analogically used in equity i.e. viva voce examination is allowed only at a later stage and not at the beginning.\(^1\) Perry was also against a system of legal procedure known as special pleading which was part of the common law on the grounds that the speedy production of an issue (which was what such rules were meant for) did not allow for certainty and the elicitation of truth from both parties to the dispute.

The various efforts to include both equity and common law not as a separate systems, but by taking features from both systems is characteristic of colonial law-making in India. Therefore Perry’s views were not particularly unusual. Equity as a form of reasoning was also introduced in the test of justice, equity and good conscience to be used by judges when there were no specific rules applicable in decisions as varied as determining valid custom\(^2\) and property disputes.\(^3\) However its significance lies in the manner in which it has been incorporated in the legal framework on property. We have seen earlier that charity as a theological principle has secularised itself becoming part of the conceptual framework that governs property ownership in the form of the modern day trust. Colonial law-makers imported such structures into legal frameworks in India. They observed that the distinction

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\(^1\) The procedure for taking evidence in common law and equity differ considerably as pointed out by Perry. In equity the parties have to make the facts of the case known to the opponent at the immediate instance of making a complaint. This necessitates procedures such as discovery by oath (which Perry was incidentally critical of). In the case of the common law, such an examination does not take place and false pleas can be brought against the opponent.


\(^3\) Varden Seth Sam v Luckpathy Royjee Lallah, Bunhah Lall, Sadaseva Tanker, and James Ouchterlony 1863 9 M.I.A 307.
between legal and equitable ownership necessitated approaching separately the Court of Equity and the Court of the Common Law thus causing a great deal of inconvenience. This was also felt in India wherein courts exercised dual jurisdictions till the enactment of the Code of Civil Procedure. Therefore where the law on property ownership was concerned:

………..we have been careful to carry out the real purpose of the Statute [of Uses] in plain terms, so that the Legal and the Equitable Ownership of immovable property may not again be separated. We have provided that when disposition of immovable property is made whether by observance or by will, to one person only for the benefit of another, the latter shall take any benefit or interest intended to be conferred on him in the same way as if it had been directly given to him, and also that no person shall as a trustee have any estate or interest in any property, but that the person having a beneficial interest in property shall be deemed the owner of the property to the extent of that interest

M.C. Setalvad (1960) suggests that what was applied in India was common law liberalised by equity. In India equity worked through and not in opposition to the common law. The law never recognised any distinction between legal and equitable interests. Such doctrine was stated by the Privy Council in Tagore v Tagore wherein it was held that:

The law of India knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England

However Setalvad (1970) points out that the statute law of India substantially incorporated equitable rules and doctrines. The Indian Trusts Act, 1882 embodied in a concise form the whole structure of trusts built up by the equity courts in England. Illustrations of principles were based on English decisions. The Act also dealt with certain obligations in the nature of trusts. These enumerate the circumstances under which a person may be placed in the position of a trustee and are no different from the implied and constructive trusts found in the

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4 The Third Indian Law Commission’s Sixth Report of Her Majesty's Commissioners Appointed to Prepare a Body of Substantive Law for India, 1870.

decisions of the English equity courts. Another instance of transplantation can be found in the Specific Relief Act of 1877 with its remedies for specific performance (involving both restitution of property and performance of contracts).

Whereas one may suggest that the British learned from the inadequacies in their legal system and that Indian legal reform reflected their desire to ensure that the Indian legal system did not have such defects. However, it seems to be unusual that they did not have the will to carry out such reforms in their homeland. I would like to suggest that this had to do with the legal challenges they faced in the making of the Indian legal system. As has been demonstrated in Chapter Two, the task was to create a law that was consistent in its nature and application. Therefore equity in its role of resolving conflict and reconciling inadequacies within the common law had a different role to play when imported to India.

It was in this framework that “the place of worship” or the religious place came into being as a legal category due to a series of enactments in the late nineteenth century. This began with The Religious Endowments Act, of 1863 by which the colonial government of India began the process of withdrawal and decided to appoint trustees, managers or superintendents and local committees. This was followed by the Charitable and Religious Trusts Act of 1920, which provided for more control over the administration of charitable and religious trusts. There was a slow process by which the categories of the wakf and the Hindu religious endowment became visible, some of the reasons being the rise of Hinduism and Islam as distinct identities. In the early twentieth century separate enactments governing wakf and Hindu endowments were promulgated. These included the Mussalaman Wakf Validating Act of 1913 and the MussalmanWakf Act, 1923. There were many local enactments governing wakfs and endowments that were enacted by various states such as the Bihar and Orissa Mussalman Wakf Act 1926, the Bengal Wakf Act 1934, the United Provinces Muslim Wakfs Act, 1936. The Tamil Nadu Hindu Religious Endowments Act of 1927 was the first attempt
to address the issue of temple misadministration. Many states have created their own public
trusts and endowment Acts since the adoption of the Constitution.

5.2 Tracing the Outlines of the Discourse around the Place of Worship

In order to understand the legal category of the religious place or the place of worship as
being the product of the process of theologisation, one needs to look at the discourse that
such an entity produces. The most prominent work that comes to mind in the context of the
religious place is Arjun Appadurai’s work on the Sri Parthsarathi Svami temple in Chennai.
Appadurai (1983) argues that the temple is part of a redistributive process which consists of a
continuous flow of transactions between worshippers and deity, in which resources and
services are given to the deity and are returned to the worshippers in the form of symbols.
The temple is a system of symbols to define key ideas of authority, exchange and worship.
He further argues that the British radically complicated temple control and fragmented
authoritative relations in the temple. However authoritative relations form the locus of
continuity in the temple, the idea of the deity having survived as an authoritative figure.

Appadurai’s characterisation of the redistributive process rests on the ground that the puja
retains elements of the “Vedic sacrifice”. He suggests that there are three forms of worship
i.e. puja or elementary worship, the processional extension of puja in calendrical festivals and
archannai which is for the benefit of the worshipper (the offering of archannai being
occasioned by a crisis, a change in status or gratitude for a wish fulfilled) and not the cosmos.
In the case of archannai the model of exchange is reciprocal and there is no real allocation of
shares for either the worshippers or the staff, the offering being returned to the worshipper.
However in the case of puja and utsavam where the offering of edible food to the deity is
central, shares in the leavings of the deity accrues to the donor, the worshippers and the staff.
He suggests that the redistributed leavings of the deity are known as honours ( mariyatai) and
are subject to variation and fluidity in both content and recipients. These honors were constitutive features of culturally privileged roles in relationship to the deity. The receipt of specific honors, in any given context renders authoritative the individual’s share in the temple. Such a share would consist of offering service to the deity, through endowment and ritual function. These involved rights to command persons in the performance of ritual, the right to perform ritual itself and the right to worship the deity by simply witnessing the ritual.

It is difficult to understand how a redistributive process can describe the experience of participants in the various processes that take place in a temple.\(^6\) Does anyone going to a temple consider his or her actions as part of a redistributive process which arises from the deity being “authority”? Is witnessing a ritual a right? Appadurai’s explanation is baffling because it does not explain anything about what goes on in a temple. Instead his explanations point us in a different direction altogether i.e. why is it that “authority” became the conceptually relevant term in explaining the various processes in the temple. Unusually enough this term surfaces in the context of all literature on temple regulation. Franklin Presler in his study of South Indian temples draws upon Appadurai’s formulation and uses it to characterise conflicts around the temple. Kanakalatha Mukund (2005) also draws a story of the various conflicts around the temple particularly the question of the appointment of the dharmakarta and who was eligible to manage finances and be responsible for all the various activities conducted in the temple.

Let us try to get a better grip on this particular problem by examining more closely their accounts of the conflicts involved particularly the conflict of the Sri Parthasarathi temple in Chennai which is narrated by both Mukund and Appadurai. This conflict which was between

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\(^6\) Although Appadurai has provided examples by narrating incidents of how such redistribution takes place it does not appear as to why failure to provide honors or misappropriation of food offered to the deity should be considered a redistribution arising from the action itself being a share that is rendered authoritative.
the Tenkalai and Vadagalai sects has continued till post colonial times with both sects litigating on issues of ritual. The core point of the dispute as Mukund (2005, 63) has suggested was over which verse should be sung in the temple after the Tamil prabandan which is a narration of four thousand Tamil verses composed by Vaishnavite saints-the Sri Sailesadayapatram or Ramanujadayapatram. The version recited by the Tenkalai, particularly the Sanskrit verse beginning with Sri Sailesadayapatram is in praise of Manavala Mamuni, the leader of the Tenkalai school, whereas in the version used by the Vadagalai the verse beginning with Ramanujadayapatram is in praise of Vedanta Desika the leader of the Vadakalai school.

In 1754 the dispute between the two groups was first mentioned in the public records. A petition was submitted to the Governor and Council by local inhabitants and was signed by the leading merchants and the heads of the right and left hand castes. The petition mentioned these prayers being disputed between the two sects i.e. the Tenkalai Brahmins insisting that the Sailesadayapatram at the beginning of the prabandam and the Vadagalai Brahmins contending that they should be left at liberty to repeat the Ramanujadayapatram at the beginning and the end of the prabandam. A request was made that the Tenkalai Brahmins be allowed to say their prayer in the Venkata Kistnah Swamy temple and the Vadagalai Brahmins could recite the Ramanujadayapatram at the Tellisingha Swami temple. The request was granted but the dispute flared up again in 1780 a Tenkalai petition asserting that since the temple was built the Sailesadayapatram had been recited and that it was the only form of prayer. It was only later that the Vadagalai Brahmins came up with their own form of prayer. A dispute arose during the time of Admiral Boscowen (1749) wherein he confirmed

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7 The narration of this conflict in this chapter is based on the accounts provided by Mukund (2005) and Appadurai (1983).

8 The temple complex had two main temples, the Parthasarathi and the Tellasingha.
that the old prayer should continue to be recited. The petitioners alleged that a particular
dubash, Manali Muddukrishna Mudali favoured the Vadakalai Brahmins as they were his
ministers. The Vadakalai Brahmins tried to use his influence and introduce the new invented
prayer. This was brought to the notice of the existing Governor Saunders who requested the
Brahmins to settle the dispute between themselves. During the reign of Governor Bourchier
the parties agreed to continue the old prayer and signed a deed of consent that they would not
get into further disputes on the issue. The petition further alleged that in 1775-1776 in the
reign of Lord Pigot the same Manali Muddukrishna Mudali allowed the Vadakalais to
introduce their prayer. This was allowed by Lord Pigot who sent in soldiers to execute the
orders.

The Fort St George Council declared that the “old form of prayer, whatever it be, which has
been customary to use since the Pagoda of Triplicane was first built be strictly abided by
(Mukund 2005, 68)” . This meant that the Tenkalai prayer was the only one to be recited
which resulted in a counter petition from the Vadakalais. Mr. Sadleir, a member of the
Governor’s Council criticised the Government for supporting the Tenkalais and suggested
that nothing was done to ascertain the correct and ancient form of prayer. Based on these
comments it was ordered that neither the Sailesadayapatram or the Ramanujadayapatram
should be recited until they were able to determine which form of prayer had been used since
the temple had been built. However nothing eventually materialised and the Vadakalais
submitted two more petitions in the 1790’s which accused the Tenkalais of violating the
Government’s orders and of gaining control of the temple through violence. The Government
avoided settling the dispute on the ground that it was not “advisable to interfere in the
religious disputes of the natives” (Appadurai 1983, 108).

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9 A dubash was an interpreter for the British and acted to convey the affairs of local society to the British.
Appadurai suggests that the successful establishment of Tenkalai control of the Sri Parthasarathi Svami temple was due to the Tenkalai sympathies of several powerful merchants or dubashes for being brokers in the colonial economy. He further mentions that the formation of the Board of Revenue in 1789 reflected the increasingly bureaucratic centralisation of the colonial state in South India. This was reflected in the policy decisions that were made such as the centralisation of the collection and distribution of temple revenues.

Temple conflict then took new dimensions in 1799 when a petition of complaint was received by the board of revenue against the dharmakarta for embezzling the funds of the temple. This pattern was observable in other temples as well. Mukund’s narration of the dispute in the Kanchipuram temple suggests that the dispute revolved around the appointment of a gomasta or a manager. This related to conflicts between the Vadakalais and the Tenkalais in relation to the control of the temple which in turn was related to the performance of ceremonies. Mukund also narrates another incident wherein a conflict between the right hand and left hand castes led to claims on past usage and custom and the authority of the representative of the lefthand castes over the temple servants.

A characteristic of all these disputes was that they revolved around the figure of the dharmakarta. In the narration of these disputes both Mukund and Appadurai note a common theme of corruption. In his description of the dispute where charges of embezzlement were levied against the dharmakarta Narayan Pillai, Appadurai notes the following:

....the accusations were a convenient code in which to express a considerably more complex complaint involving the rights of the complainants to certain shares in the distributed leavings of the deity. It is revealing that the witnesses did not draw any clear semantic distinction between the crime of ‘embezzlement’ and the crime of improper distribution of the central value objects of the temple (111-112).
Mukund further says that there was a genuine feeling of resentment among the temple Brahmins because the accepted order of precedence for distributing the tirtham or holy water had been changed under the dharmakarta. They had also been denied their share of cooked rice or prasadam which was distributed among temple servants. However the nature of this complaint was worded in a language acceptable to the colonial state.  

Further conflicts centering around the role of the dharmakarta came up in the 1820’s where there were a series of acrimonious confrontations between Annasami Pillai the dharmakarta and the Collector Murray. This dispute not surprisingly enough began with charges of embezzlement against Annasami Pillai. However certain other Brahmins came to the support of Pillai on the ground that these charges were baseless, condemning those who had made the complaint. Around this time the Board of Revenue decided that the policy of non-interference was not practical and decided to restore to the collector the authority to audit the accounts of the temple. According to Appadurai this was a response to petitions by temple servants.

In re-establishing control over the temple the Collector attempted to reinstate the temple servants who had been dismissed during the previous year by the dharmakarta. The dharmakarta refused to reinstate the temple servants. This led to further action by the Collector who accelerated the conflict by sending his agents to establish control over the temple by placing seals on the temple jewels on the grounds that they were “public property”. This led to litigation in the Supreme Court, the dharmakarta alleging trespass on the part of the collector and taking the stand that the temple was his property. Further pressure was used by the collector by collecting cess from the temple shops. Extraordinarily enough, the dharmakarta changed his stand and did not argue that the temple was his property but

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10 Mukund describes two other conflict over temples i.e the Kapalisvarar temple and the Sriperumbdur temple where embezzlement was an issue. As I will demonstrate later in this chapter embezzlement or corruption was a pervasive phenomenon when it came to the question of authority over the temple.
complained of the collector’s trespass on the property which was in his possession. He however continued to spend his own fortune on the upkeep of the temple. Finally in 1825 nearly five years after the dispute had begun, he offered to resolve the dispute. The agreement which was drawn by the Attorney General effectively subordinated the dharmakarta to the collector. It obligated the dharmakarta to prepare temple budgets and provide accounts to the Collector.

The conflict however still continued. A year later when Annasami Pillai submitted a list of mirasi servants, the Collector objected to him classifying certain employees as coolies. Another dispute arose in 1828 when the Collector did not advance money to the dharmakarta on the ground that detailed temple accounts had not been submitted. These disputes were resolved by the Board who tried to ascertain the custom and usage followed in the case of finding out who were the mirasi servants.

In further describing the dispute around the Parthasarathi temple as it emerged in the nineteenth century, Appadurai mentions that between the period 1800-1831 the idea of Tenkalai affiliation was not a crucial element. However the idea of becoming Tenkalai becomes an important element of temple politics in 1831 when the new dharmakarta applied for the post on the basis that he belonged to the same caste and sect as his predecessor. In an exchange between the board and the collector, the collector reported that “The former Dhurmacurtahs of the Triplicane Pagodas were all Tengalahs, the sect to which S. Narasimhloo Naick belongs (Appadurai 1983, 156).” In 1843, the collector of Madras was given responsibility for implementing the withdrawal from interference with the religious institutions policy of the British Government, and in connection with that made the following statement:\footnote{Appadurai quotes the Board of Revenue consultations in this respect.}:

\footnote{Appadurai quotes the Board of Revenue consultations in this respect.}
The selection of a trustee on the occurrence of a vacancy may be left to the suffrage of the community of the Tengala sect as has heretofore been customary on the occasion of the appointment of a Dharmakarta (Appadurai 1983, 157)

Based on his analysis of the various conflicts that arose subsequent to 1843 and after the constitution of the native district committees prescribed by the Religious Endowments Act, 1863, Appadurai suggests that the term “Tenkalai” acquired a local constitutive meaning which revolved around the mechanisms and operation of Tenkalai control. This departed from the contrastive meaning that it had taken against the term Vadakalai. Appadurai attributes this change due to the shift to settling disputes by the judiciary.

What are the kinds of explanations that Mukund and Appadurai offer for the exacerbation of temple conflict? Appadurai (1983, 162) suggests that the colonial state was responsible for a fundamental change in the regulatory framework relating to the temple. Such a change was threefold in nature. Firstly, king-deity relations honors transactions that were the cultural and moral basis of temple-state relations were abolished and there was a shift from the sectarian groups and leaders as the operational machinery of this relationship to centralised bureaucratic structures acting as the mediators of the relationship. Secondly, rule governed day to day state control was accompanied by an avoidance of the arbitration of temple disputes. Thirdly, there was a shift from the unitary model of the Hindu king as judge-cum-administrator to an institutional structure, where the supervision of temples was divided between bureaucracy and judiciary.

According to Appadurai the interaction between the Anglo-Indian judicial system and the litigants interested in the Parthasarathi temple had two consequences. It led to the gradual evolution and legal codification of the idea that the Tenkalai community of Triplicane had control over the management of the Sri Parthasarathi temple and resulted in the fragmentation of authority in the temple. He says that the Court’s efforts to classify, define and demarcate
the concrete meaning of the “Tenkalai community of Triplicane” generated more tensions than it resolved. The schemes of administration for the governance of the temple, the judgements and precedents created by the courts provided opportunities for litigants to reflexively refine their self- conceptions and their political aspirations. The elections to the board of trustees that were held on the basis of legal pronouncements “turned contexts into texts” and further factionalised the various groups in the temple (Appadurai1983, 178). These renewed disturbances allowed courts to refine legal conceptions through judgments and precedents thus creating another cycle of disruption.

What is the basis of colonial legal rationality? Appadurai (1983, 167) contends that the colonial state’s policies in respect of law and the judicial system in India oscillated between the wish to leave Indian “custom and usage” intact and the wish to create rationality and uniformity in indigenous law. He however does not mention why the colonial state’s policies should oscillate and why both these policies were important. In suggesting that litigation revolved around the mechanics and operation of Tenkalai as a term, he commits a mistake as litigation on the performance of rituals by Vadakalais and Tenkalais has continued till the last decade of the twentieth century.12

Mukund’s explanation is also not particularly compelling. According to her the colonial state’s desire to control temples was restricted by their dependence on local dubashes whom they tried to control. She suggests that colonial officers were suspicious of local chieftains and the nineteenth century dispute between Collector Murray and Annasami Pillai with regard to the Parthasarathi temple needs to be seen in this context. According to her Collector Murray was ‘forceful and aggressive” and “disliked the same characteristics in others”. He

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12 The Supreme Court in 1992 in the case of *R. Thathadesika Thathachariar and Anr v K.V. Alagai Manavala and Ors* 1995Supp(4)SCC 563 settled a dispute between the Tenkalais and Vadakalais on the use of elephants in the performance of rituals. Such a dispute revolved around who could use the elephant and thus related to the Tenkalais distinguishing themselves from the Vadakalais.
was also ready to believe that individuals such as Annasami Pillai would misuse their status and influence. Such an explanation cannot be an explanation of how temple conflict in India was articulated in the nineteenth century, as it only tells us about the personality of Collector Murray. An adequate explanation needs to go beyond motives of particular individuals, and should provide us with an account of the conditions that make the dispute possible.

Despite such faulty analysis, both Appadurai and Mukund have certain common observations regarding temple conflict which are pertinent and provide certain insights into the nature of the colonial regime. Mukund states that by the end of the eighteenth century, the Madras Government began to apply English notions of public trusts supported by the provision of public money to temples. In 1796, the system of financing temples by tax–free land was abolished and more formal institutionalised support was provided by the Government from its tax revenues. When this policy was introduced dharmakartas became accountable for the finances and management of the temple by the English authorities in Madras. According to her, the colonial state was motivated not just by notions of public responsibility but also the desire to control the appointment of dharmakartas so it could not be claimed by anybody as a hereditary right.

Mukund rightly shows in her analysis of other temple disputes that such a notion of public money did not exist prior to the colonial period. In the dispute over the Kapalisvarar temple she describes how Masilamani Mudali made a claim to be the dharmakarta on the ground of how he and his ancestor Kumarappa Mudali had contributed to the revival of the temple. In particular the claim to being Dharmakarta entitled highlighting how Kumarappa Mudali had procured his own resources to continue the daily rituals of the temple, had idols, carriages and jewels made and provided endowments to generate finances for the temple. Whereas the English understood this as a charity to be continued by his descendents, this was not how the local people understood it. She further elucidates:
For the general public, such visible inputs were a clear confirmation of the legitimacy of a person’s aspiration to become the dharmakarta of a temple. But, for the dharmakarta himself, also, there was an acceptance that he was expected to spend his personal fortune on the temple so that the routine rituals as well as special festivals could all be conducted with as much grandeur as possible. Thus, in spite of the fact that the English understood the temple to be a “public” charity, functioning with public funds, the reality was that the personal assets of the dharmakarta were equally expended on maintaining the temple. *As a result the dividing line between the public and private or personal “charity” was itself neither clear-cut nor even real* (Mukund 2005, 101).

Appadurai appears to agree with Mukund when he remarks that the Anglo Indian legislation provoked judicial codification of a large variety of rights, wrongs and rules on ‘public” conflict in the temple as the various enactments applied only to “public” rights and interests. In his opinion this did not deter private claims on the temple which could be under common law. However in practice it was difficult to make this distinction between public and private interests so private rights were codified under these sections as having to do with ‘public” interests. The problem with inadequate governance lay in the fact that the sole administrative and judicial model that nineteenth century British officials used was the model of the charitable trust. He says:

> The English model of the trust, whereby endowed property was transferred to, and vested in, a trustee for the benefit of others, called ‘beneficiaries”, was clearly not applicable to the Hindu temple, where property clearly was vested in the idol and was only “managed”, on its behalf, by the trustee. Although this fundamental difference between the English and Hindu conceptions was repeatedly noticed by Anglo Indian judges in the nineteenth century, an alternative model for the Hindu temple was never generated..... (1983,173).

He then continues:

> This implied a fundamental misunderstanding of the sovereign personality of the deity, which, by virtue of its capacity to confer legitimate authority and its incapacity to adjudicate conflicts involving such authority, is the major structural source of temple disputes..............The willingness of the court to
codify both general schemes as well as particular sets of rights in the temple created a “ripple effect, so that every act of codification, which temporarily satisfied one set of litigants, was a threat and therefore a stimulant to another set of individuals to bid for a similar codification of their rights (1983, 211).

It seems surprising that after these findings, Appadurai still considers the deity as authority, the same resulting in a redistributive process. He further mentions that judges expected the temple trustee to behave according to the standards of the English charitable trust. This was culturally unsound as the trustees were personally interested in many aspects of the redistributive process of the temple. They were often donors and the question of their roles as donors and trustees often collided. As the functions of protection and endowment could be combined in the activities of a trustee, there were an immense number of ways in which trustees could express factional interests, use their power to reward their clientele and manipulate their opponents’ shares in the redistributive process of the temple. Appadurai thus comes to the conclusion that factionalisation entails claims of embezzlement as the redistributive process itself entails factionalisation.

If one takes Appadurai’s explanation it appears that all those involved in the temple are essentially corrupt, as embezzlement becomes essential due to the redistributive process which is once again due to the deity being authority. Such a conclusion seems to suggest that Hinduism as a religion is itself corrupt. An answer such as this cannot be the right answer as it paints an entire people as immoral.

We come to a clearer description of the problem of the deity being authority in an examination of Gunter Dietz Sontheimer’s analysis of the deity as juristic personality. Sontheimer analyses current post-colonial law on this issue which states that although an idol is a juristic person capable of holding property, it cannot be the beneficial owner and it is
only in an ideal sense the deity is the owner of the endowed property.\textsuperscript{13} He then suggests that there is a faulty combination of certain Sanskrit texts known as purvamimamsaka texts and western legal theories which is contrary to popular practice, and that one needs to examine Indian sources on this question. He then raises the question as to whether a deity is a sentient being and whether a gift to a sentient being is valid. He further suggests that there are conflicting views between the purvamimamsaka texts and Vedic literature the latter suggesting that the deity possesses corporeality. The theories propounded by purvamimamsa authors as elucidated in medieval legal texts dictate that property that has been offered to the gods is of a sacrificial nature and thus becomes the property of the Brahmin (who was supposed to know how to employ the property according to Vedic ritual). When the deity enjoys the property after the donation it becomes “god’s property” for the time it is used as a sacrifice. The Brahmin is admonished to use the property for sacrificial purposes otherwise he would be guilty of the appropriation of “god’s property”. This limited the right of the priest. However the land on which the idol stood belonged to the idol and the priest could not dispose of it.

According to Sontheimer, popular belief held that deities were real corporeal beings capable of holding property. However as laid down in medieval legal texts ‘god’s property’ cannot be construed as a right or a form of proprietorship as there is no relation between property and proprietor. The motive of the gift was not to benefit the Brahmin or to contribute to worship but to benefit the deity. This is however not reflected in legal discourse which prefers to follow the purvamimasa interpretations. In the Dakor case\textsuperscript{14} the idol is compared with the Roman foundation. Sontheimer objects to this judgment as:

\textsuperscript{13} Deoki Nandan v Muralidhar AIR 1957 SC 155.

\textsuperscript{14} Manohar Ganesh Tambekar v Lakshimiram Govindram 1887 I.LR.12 Bom 247.
...... relies heavily on western notions of dedication to pious uses and considers the essence of the gift to the deity to be rather the facilitation of worship. It does not contemplate the deity as the actual object of the gift. We have indicated that the popular attitude is to ‘impress’ the deity with the gift and the object of the gift is not the general purpose of worship as such. It consequently appears that the decision is based on the notion that the deity symbolises or personifies a ‘pious or benevolent idea’ recognised as a ‘merely artificial person’( Sonthiener 2005, 44).

What are the obstacles that do not allow for a full understanding of the deity as possessing complete ownership? In his reading of legal discourse, Sontheimer identifies them in the shebait or the person competent to manage the property on behalf of the deity. A number of Privy Council cases consider the question of who has the right of management and the right to sue in the context of the property vested in the deity as crucial to the governance of Hindu endowments. An analysis of this question has led to judicial decisions confirming the proprietary right of the shebait over the property vested in the deity.

Sontheimer criticises legal discourse on the ground that it is not in consonance with popular views. According to him dedications have been made to deities as an act of worship and what is intended is that the deity shall obtain benefit from this act of worship. Worship by its very nature must exhaust capital and income. The idea that the deity ‘owns’ the assets and that the shebaitship is proprietary is inevitable but not necessary. He then quotes another Hindu Law scholar Golap Chandra Sarkar Sastri who suggests that rents and profits of the dedicated property must be appropriated to worship and a fiction is introduced by judges and lawyers for convenience. Sontheimer interestingly concludes that it is quite unnecessary to investigate whether property may vest in a deity, whether the shebait has the right to property and that the endowment is an “ownerless thing”.

15 Sontheimer quotes the case of Manohar Mukherji v Bhupendranath Mukherji AIR 1932 Cal 791 where it was held that the endowment was an ownerless thing.
Sontheimer is right in raising the question as to why this legal analysis has to take place and he joins the others in placing the blame on western legal theory (although only partially) for their selective interpretations of Indian legal traditions. But he also does not raise the question as to why should property vest in the deity and why is the notion of authority important to the British colonisers? He also does not look into the question of multiple authorities which has generated so much discussion in legal discourse. Is the shebait separately identifiable from the priest? If the endowment is ‘ownerless’, it seems unclear as to how the shebait’s proprietorship can proceed from an ownerless object? Sontheimer fails to understand the fundamentals of Western legal theory on property which requires ownership to proceed from a source; a primary legal maxim being that one cannot have better title than what is passed on.

5.3 Structuring Legal Narrative

We have seen that our examination of the sociological discourse around the temple yields certain insights which are the importance of the deity, the consequent abuse and misuse of the authority which represents the deity and the accessibility of the temple as being public or private. These insights replicate themselves in legal discourse. However the grand narrative of corruption and mismanagement around the temple remains.

What are the approaches that one needs to take in resolving this problem? Let us try to understand typical ways of resolving this problem. A historical approach would try to understand this problem from the various measures that have been taken to resolve the question of mismanagement and corruption. This attributes causality to the activities around the temple. A typical illustration of such an approach is Franklin Presler’s study of temple regulation in South India. Presler takes as a starting point the British colonial legislation, the “withdrawal” policy, which was later changed, and the establishment of the Hindu Charitable
and Endowments Board (HRCE). Such a manner of analysis saw the colonial government as the locus of governance and supervision. Therefore the HRCE became the primary institution to analyse temple governance, the model of governance becoming important. Presler suggests that the theory behind the HRCE was characterised by three elements. The first element was that temples were religious and that the religious core of the temple was the ritual of puja performed by the priest who stands as intermediary. Priests therefore need to be well versed in ritual and a concern of the HRCE was that priests were not adequately trained and measures had to be taken to improve their skills. The second element was that temples were public and had to benefit society. This has led to the position that all temples should be under state control. The third element was that temples had to be free from politics (it is unclear as to what politics is) and this required the HRCE to reorganise the temple into units to which universal rules and regulations can be applied. Such rules and regulations when interpreted by the courts are characterised by three concepts which are “rights, “property” and “custom and usage”. Rights revolved around rights to shares, right to receive honours, right to temple entry etc. Rights were to be determined according to custom and usage and property was always conceived in terms of rights. This approach generates the question that it purports to answer. If the temple is religious, how does this line of analysis distinguish between the religious and the secular? If ritual is religious, why is the financial process of producing ritual secular? How does one distinguish between the public and the private and why should temples be free from politics?

Legal discourse ironically produces the same problem of circularity. To call a place religious or a place of worship, one has to see whether it fulfils certain legislative requirements and judicial requirements. Compliance with the same requires understanding the carryovers and differences from different legislations in the colonial period such as the Religious Endowments Act, 1863, The Charitable Endowments Act 1890, and the Charitable and
Religious Trusts Act, 1920 and the judicial discourse on this question. It would involve examining the policy of non-interference and how local committees were seen to be ineffective, thus providing for new legislation and new forms of regulation. Such an approach assumes causality within this continuity, thus assuming the effectiveness of one form of governance over the other. The problem of temple mismanagement and governance is seen as causally related to the performance of temple ritual. The manner in which performance needs to be articulated is once again causally related to how such performance can be articulated and its origin which is located in the idol. Therefore the legal question that arises is whether ritual is being performed accurately, the question of causality leading to the question of responsibility.

This allows us to frame questions and sub-questions in a region of circularity. What constitutes dedication? Dedication is understood as an act or ceremony of dedicating to a divine being or to a sacred use; setting aside for a particular purpose or a transfer for the benefit of the deity (Varadachari 2006). An act of dedication involves consecration of the idol and the performance of certain acts such as Sankalpa and homa in accordance with the Dharmasastras. Can there be partial dedication? It can take place when the property retains its secular character such as when a charge is created in favour of the idol but the owner retains the property and it is inherited by the natural heirs. This leads to yet another question –what is religious and what is secular? Property that is completely vested in the idol becomes religious. This would involve a purely secular question such as to whether documents establish title.

The performance of ritual and the articulation of such ritual is seen as attached to a responsibility to perform the ritual correctly. This responsibility is attached to several persons such as the dharmakarta, the shebait, the priest etc. Therefore questions can be formulated on the manner in which such responsibility can be attached and the roles in which such
responsibility can be enacted. What are the rights of the founder of the temple? Does he have rights of management and worship? Can he transfer such rights? Can he attach property and in what circumstances can such alienation take place?

How does worship of the idol take place? Who is responsible for the conduct of such worship and its correct performance? Who is allowed to worship? Is worship confined to the founder and his family or to the public at large? Judicial discourse understands this question as the division between public and private temples, the public implying that everyone must have access to God in certain cases. This is when the institution is charitable in nature or when the public has contributed to the institution in some way.

I propose to analyse these questions in a different manner moving away from ascribing causality and responsibility which allows for a synthesis of the different events/actions and brings about a uniform description. As one has already shown in order for the religious place to be a legal category, a place that is charitable is also considered religious. We have seen that in western legal discourse, charity which is a Christian concept becomes secularised. We have also seen that the legal frameworks behind such secularisation have been imported into India. Therefore for an understanding of how such frameworks work in India, one would require to locate the conditions that allow the legal discourse outlined above to operate. These conditions can be loosely described as dedication to God, the public and the private, and interpretative authority. Without these conditions it is not possible for legal discourse to enunciate the various problems that it throws up.

In analysing this question I would like to take up a central motif that appears in the writing of scholars and in legal discourse around generally including the discourse around the religious place which is the distinction between the religious and the secular that law is unable to make. I have shown that trying to solve the problem in the manner in which law tries to solve
it by defining realms of the religious and the secular do not work. I would like to suggest that this problem of demarcation is mainly set up by these conditions and attempt to describe them in this context.

5.4 God, Representation and the Problem of Idolatry: Understanding the Legal Act of Dedication

In the 1920’s the difficulties governing Hindu religious endowments became a topic of much discussion. The Religious Endowments Act, 1863 which provided for local committees to manage the affairs of the endowment was seen as a failure and repealed. This enactment was succeeded by the Charitable and Religious Trusts Act of 1920 which sought to remedy commonly perceived abuses such as corruption and mismanagement prevalent in these institutions. The role of legal intervention in changing the state of affairs was debated with fervour in the legislative history of that period and in the legislative debates around the enactment itself.

In a conference held in 1913 on the working of the religious endowments it was expressed by Reginald Craddock a representative of the Government “that the amount of control exercised is insufficient, that the machinery for preventing malversations and misuse of funds is not working properly......” It was suggested that committees or persons managing such trusts and charities be suitable persons, that accounts be simplified and made obligatory and persons interested in the trust be able to have materials relating to the trust in the event he or she wishes to file a suit for mismanagement. Diwan Bahadur Ramawamy Chetty was of the view that there were defects in the Act of 1863 itself, and that the subjection of temples to the

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16 Refer to the National Archives of India (NAI), Legislative Proceedings relating to the Charitable and Religious Trusts Act of 1920 April 1920 Nos 87-103
control of local committees was not incompatible with the policy of severance, and the problem lay in the Act not extending its jurisdiction to temples of which the trustees though not originally hereditary being treated as such in the years prior to the Act and not having power to enforce their orders. What was needed was not radical change in the policy of the Act of 1863 but adequate statutory remedy and easy resort to civil courts. According to Ibbrahim Rahimtoola, trustees were the middlemen appointed to carry out the objects of such charities and it was the duty of the state to legislate in the direction which any abuse of the trust reposed in them should be stopped. Babu Bhupendra Nath Basu pointed out that the Act only applied to establishments that were vested in the Government or had a superintendent or manager which was appointed by the Government. However the transfer of property by the Government by virtue of Section 4 of the Act to private managers and trustees led to gross mismanagement and abuse. Fazl Hussain, another member in the conference felt that it was not the policy of non-interference of the Act of 1863 that stood in need of reconsideration, but the misunderstanding of that policy.

A unanimous thread running through this conference was the failure of the frameworks provided by the Act to control the mismanagement and corruption prevalent in these institutions. However the proposal to replace it was met with widespread opposition. In examining the opposition to this bill certain contentions become visible such as widespread anxiety over certain legal frameworks not being able to take root in Indian conditions. In the words of Mokshadarajan Kanungo:

> The proposed Bill provides that the trustee of any trust will not be liable for any act according to the direction or advice of the local District judge previously obtained upon a formal petition. The District

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17 Letter dated 25th January, 1920 from Mokshadarajan Kanungo to the Secretary to the Council in Legislative Department Proceedings NAI April 1920 Nos 87-103.
judgeships are almost invariably held by European civilians who are born and bred in religious and social atmospheres quite different from that that prevails here. It is no wonder that in spite of their efforts they are liable to make mistakes in handling the religious endowments and may find themselves pronouncing such decisions as are contrary to the Hindu shastras, customs and usages.

Such a concern seemed to be based on not just the frameworks being unsuitable but the unsuitability of European judges on account of their lack of cultural experience to understand indigenous norms. This concern is further formulated in the question of how religion can be represented in law appearing in a subsequent debate in legislative history that took place around the introduction of a bill by Hari Gaur for the management of Hindu religious and charitable trusts in 1924, its objective being bringing about a uniform law on Hindu endowments across the country. In a discussion on the word “professing the Hindu faith” it was expressed by Sir Tej Bahadur Sapru a leading lawyer of that period, that there may be purposes that are not recognised as religious, pious or charitable by Hindu law but only by Hindu custom. The Punjab Government expressed difficulties in construing the definition of the word “Hindu” and suggested that local legislatures have the power to include or exclude from the category of Hindus, certain persons, tribes and communities. It was also observed that the Bill would not be applicable to a number of important institutions and trusts as they are so old that dedication by a person could not be proved.

The problem of what was Hindu, and what could be law within Hinduism, manifested itself in concerns about the manner in which these institutions may be brought under the law through the legal concept of dedication. This could be most clearly seen in the petition of Rao Bahadur Annamalai Chettiar a member of the Nattukotiar Chettiar community who suggested that the chief defect of the bill is that it aims at all trusts created for public purposes.

18 Home (Judicial) 1924 .File No 415/24.

19 Letter dated November 19, 1919 from Rao Bahadur Annamalai Chettiar to the Secretary to the Government, Madras in Legislative Department Proceedings NAI April 1920 Nos 87-103.
of a charitable and religious nature irrespective of the antecedent history of their management and does not take into account local conditions and the consciousness prevailing in particular communities such as the Nattukottai Chettiar. Many charities in the country owned their existence to the Chettiar whose benefactions took the form of the renovation of ancient early temples, the establishment of pathshalas and the erection of choultries for the feeding of poor pilgrims. The system was that families set apart part of their funds for the establishment and maintenance of charities concerned. In a few cases funds were set apart by a particular community or communities in the nature of caste funds. In such cases it was not easy to predict whether there had been a completely legal dedication or not, with regard to the funds, as instruments in writing were not common.

According to Rao Bahadur Annamalai Chettiar, the mismanagement of trusts was confined to those institutions that had ancient state grants and that there were very few instances of mismanagement of trusts that owed their origin to private benefactors. There has been no such complaint against the Nattukotai Chettiar and this efficiency in management can be attributed to communal consciousness. Public trusts can be classified into three kinds. The first kind would be the trusts brought into existence by state grants whereas the second kind would be those with definite endowments established by private beneficiaries. The third kind would be trusts that benefit the public, but are maintained entirely by particular families or groups of families or special communities. In the first two kinds of trusts, the question of what constitutes a complete dedication does not arise. But in the third kind the difficult question of whether there is a complete dedication of the funds or not may arise.

What does it mean to dedicate to God and why is it so essential to determine whether there has been a proper dedication to regulate a religious place? This is due to the legal principle of debuttar that has been evolved by Hindu law. The conception of debuttar is comprised of two essential ideas. The first is that property is dedicated to the deity and vests in an ideal sense in
the deity itself as a juristic person. The second is that the personality of the idol becomes linked up with the natural personality of the shebait, being the manager or being the dharmakartha and who is entrusted with the custody of the idol and who is responsible otherwise for the preservation of the property of the idol (Varadachari 2006). There cannot be a dedication in the name of a deity that is not recognised by the Shastras.20

Judicial discourse reveals a great deal about this question. The concept of dedication and its characterisation is explained in the case of Maharani Hemanth Kumar Debi and Others v Gauri Shankar Tewari21. In this case there was a dispute over the usage of a religious ghat which led to the question whether Maharani Hemanth Kumari (who had claimed obstruction of the ghat) was the owner of the ghat itself or the hereditary superintendent of a religious endowment. In order to establish this the court held the following:

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object.

Thus dedication has a specific consequence. It involves divesting property completely of human ownership and vesting the property in the institution or object. It was held in this case that dedication had not been proved and that:

The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu: but the practice of bathing in the Ganges is not in general so directly connected with the


21 AIR 1941 PC 38.
worship of a particular deity that nothing short of complete dedication was required for a public bathing ghat

The Maharani had ownership over the river banks which she had not relinquished. This was shown by evidence of agreements with the ghatias or occupants of the ghat, their efforts to repair the ghat and the imposition of tolls on the keepers of festivals. There was also no evidence that she was a superintendent. Thus dedication cannot flow from practices that appear to be linked to human agency. The Maharani was acting for herself and not for any divine cause.

A similar reaffirmation was made in *Jadunath Singh v Thakur Sita Ramji*22 wherein it was held that where there is clear expression of an intention to apply the whole estate for the benefit of the idol and temple, and the rest is only a gift to the idol, the dedication is valid. Such a demarcation between what can be dedicated to an idol which takes the form of charity (or the upkeep of the idol itself) and purely human activities such as providing for the settler’s family and descendants is expressed in other case law such as *Ramappa Naidu v Lakshmanan Chettiar*23 and *Pande Har Narayan v Surja Kanwari*24 wherein the will of the testator was examined to show whether properties had been dedicated to the trust or simply burdened with a trust. Public usage is not evidence of dedication.25

Dedication thus involves considering the idol as a juristic entity with a manager to act on its behalf. We shall now take up the problem that has troubled so many courts of law but is deemed unfit to investigate by Sontheimer i.e. why does property have to be vested in the

22 AIR 1917 PC 177.
23 AIR 1928 Mad 190.
24 1921 48 I.A 143.
25 Babu Bhagwan Din and Ors v Gir Har Swaroop AIR 1940PC7.
deity. I would like to suggest that the vesting of the property in the idol, the narrative of mismanagement and conflict over the performance of ceremonies is a reflection of the process of theologisation.

What does this process of theologisation consist of? I argue that there are three main elements in this entire process which are the concept of God in the Christian context, an authority to interpret his purposes and the public and the private. In examining how these elements unfold in the following sections, I further argue that it is idolatry that is central to the process of theologisation in the “place of worship”. Therefore the legal structure of vesting the property in the idol reflects the problem that arises out of the mode by which the Semitic religions perceive the pagans.

We have already analysed the role of idolatry in drawing the distinction between the religious and the secular in the second chapter. We have seen that idolatry is understood metaphorically in the context of man’s obligation to God. The rejection of idolatry is thus based on an accepted moral intuition in human relationships and acts towards fulfilling morally acceptable values and beliefs (Halbertal and Margalit 1992). It is thus not the acceptance of monotheistic principles, but the moral assumptions that underlie them. But if idolatry as a concept draws the boundaries between the religious and the secular, what does it eventually achieve? If worship must be exclusive to one force and sacrifices may be made only to God who is to be worshipped, it serves to map the exclusive domain of God. (Halbertal and Margalit 1992, 5). The question then arises as to what is the nature of this exclusive domain and what is the attitude to a force that makes it into idolatry.

For the Semitic religions, the error that the idol worshipper commits is when the idol ceases to be the representation of God and is considered God itself. Such an error of false worship becomes defined as false belief. In their analysis of substantive error Halbertal and Margalit
(1992) rely on the commentary of Mainomides a Jewish theologian who explains the significance of the error in substitution as a transition in belief in a first cause to the worship of idols as gradual and occurring in stages. Firstly the worshippers worshipped heavenly forces such as the moon and the stars and their images as intermediaries between them and God. They thought that this was a way of showing respect to God. Secondly they built temples on the advice of false prophets filling them with idols that represented the stars. They then began to believe on the advice of other false prophets that these forces had the additional power of commands and prophecies. The masses then forgot that the idols were the representation of the stars and not independent forces. This process of transformation of the representation into an independent power was the use of representation of the representations which results in the error of substitution. According to Mainomides the error of substitution is the cause of idolatry and the purpose of the prohibitions against idolatry is to ensure that the worship of God would be free from substantive error. The cause of the error of substitution is the act of worship as beliefs follow actions (Halbertal and Margalit, 1992, 42-44)

What is the consequence of such an act of substitution? I suggest that this has to do with the relationship that the Semitic religions have with the pagan world. Balagangadhara (1994, 367) elaborates on this issue by describing the Christian attitude towards pagans as transforming tradition it into religion. When transformed into another religion, the pagan tradition acquires the property of reflexivity which it did not earlier have. This is by providing the myths and legends of the pagan a deeper foundation. Such inconsistent practices which have allegedly been practised since time immemorial express a deeper truth as the pagan traditions have retained intimations of their original nature .Therefore realising that one had entertained false beliefs is not merely to be aware of this fact but also to recognise it as an expression of the thirst for truth. Thus belief in the Devil is due to the desire to believe in God.
Balagangadhara further maintains that being religious in the context of the Semitic religions is not just seeing that God exists but seeing one’s life as part of the purposes of God. Thus an explanatorily intelligible account comes into being. This means that the origin of the Cosmos and human life is caused by God and that there is a link between the Will of God as creator and the cause of the universe in such a way that the world expresses his purposes. In order to maintain faith in God and consequently retain faith in this explanatorily intelligible account the worship of God becomes necessary. Worship involves seeing the Cosmos as explanatorily intelligible; and doing what is essential and as specified by the doctrines of the religion in order to continue to experience the Cosmos in this way.

Thus the legal act of dedication must be understood as mapping the exclusive domain of God. Therefore it becomes essential that property vests in God and rights to deal with the property flow from God itself. All actions in relation to a religious place therefore must be consistent with God’s role as the cause of the Universe and the Universe being an embodiment of his purposes. His purposes are embodied in the doctrines of the religion itself. Therefore it is imperative that dedication be complete and not partial, and that it also shows no signs of being linked to human agency as we saw in the Maharani’s case.

Balagangadhara’s hypothesis on the transformation of tradition into religion helps us understand how dedication can be made. In Veluswami Goundan v Dandapani26 it was contended that the deed of dedication did not mention any particular deity and was void for uncertainty under Hindu law as Hindus worship numerous deities. The court held that “this was a fundamental misconception of “Hindu theology” stating that the notion that a Hindu

26 1946 MLJ 354.
worships only particular deities and not one Supreme Being is incorrect. Elaborating on this it held that:

There are doubtless various deities worshipped by Hindus holding different tenets but these are only personifications of what are believed to be the various attributes or the cosmic manifestations of the Supreme Being.

It further held that:

where no deity is named in the deed of endowment, it is sufficient to point out that in most cases the problem can be easily solved by ascertaining the sect to which the donor belonged, the tenets which he held, the doctrines to which he was attached and the deity to which he was devoted and arriving by such means at his presumed intention in regard to the application of the property. It was observed by Lord Eldon in Attorney-General v. Pearson (1817) 3 Mer. 353, 409 : 36 E.R. 135, already referred to “where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship I know no means the Court has of ascertaining it except by looking to what has passed and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders” (at page 410)(Cf. Re Louisa Kenny; Clode v. Andrews (1907) 97 L.T. 130)

Therefore to map the exclusive domain of God, one has to rely on doctrines. However trying to derive a doctrine on the basis of God being image based representation meets with difficulties as one cannot claim an exclusive domain in case of the idol. The idol cannot have the properties of God, as it is not the cause of the universe or embodies its purposes. Consequentially, it also does have sovereignty or be able to possess inalienable rights over property. Therefore the idea of a human agent acting on its behalf seems implausible. This however leads to something antithetical to Christian theology. Human agency takes predominance and “acts” on behalf of the idol. A few judicial decisions will demonstrate the problematic nature of such a relationship.
In *Prosunno Kumari Debya and Another v Golab Chand Baboo* a shebait (a title for manager of the temple) by the name of Rajah Baboo was alleged to have mismanaged the temple, spending money on his own pleasures and pledging the property unlawfully. The question of law that arose was whether he could lawfully alienate temple property. To determine the status of a shebait the court relied on another case known as *Maharanee Shibesouree Debia, Trustee and Guardian of Her Minor Son Koomar Gobindnadh Roy v Mothooranath Acharjo* which held that the shebait had only the title of manager of a religious endowment and in the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage. The court further held that:

.......... it is, in their Lordship’s opinion, competent for the sebait of property dedicated to the worship of an idol, in the capacity as sebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the sebait of an idol’s estate would appear to be in this respect analogous to that of the manager for an infant heir......

It went one step further by actually referring to an earlier judgment i.e. *Hanooman Persaud Pandey v Mussumat Babooee Munraj Koonweree* on the duties of a manager for an infant heir wherein it was held that the power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It also elucidated on the nature of these powers as follows:

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27 1875 2 I.A. 145.

28 1869 13 M.I.A 270.

29 1856 6 M.I.A. 243.
It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as sebait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them.

It then drew further conclusions from this that a sebait may incur debts, or borrow money for necessary purposes. Therefore the judgments obtained against a former sebait in respect of debts incurred should be binding upon succeeding sebaits who, in fact, form a continuing representation of the idol’s property.  

This suggests that the idol is in a position where it requires protection through human agency and its situation is that of a minor. Thus being in the position of a minor it lacks capacity and is unable to show agency. In this context another judgment in the case of Pramanatha Mullick v Pradyumna Kumar Mullick causes some surprise. In this case three brothers shared the worship of an idol. One of the brothers made the claim that he was entitled to remove certain family idols to his own residence during his turn of worship. The court held that a Hindu idol is a juristic entity and thus has a juridical status of suing and being sued. It also reiterated the earlier decision that the sebait of an idol has the powers of the manager of an infant heir, but went on to contradict itself by saying that “...the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would

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30 This was further supported in the case of Palaniappa Chetty v Devisakamony Pandara 1917 44 I.A. 147.

31 1925 42 I.A. 245.
be treated by his humble servant...” 32 as if the idol had capacity (a master-servant relationship would only be possible if the idol had capacity to delegate).

This inconsistency is apparent in the final pronouncement in the judgment that the will of the idol in regard to location must be respected. If the proper worship of the idol required a change in its location, such a change in location must be made by the will of the idol given effect to by its guardian. As an idol cannot possess will, it does appear that it is human agency and human decision making that eventually takes place.

Some of the problems were recognised by judges as can be seen in the case of Vidya Varuthi Thirtha v Balusami Ayyar and Others 33. It was held in this case that that the ‘trust’ in the manner in which it is used in English law, is unknown in the Hindu system. However religious institutions did possess juristic capacity. In dealing with the powers of the mahant (head of a math) which was broadly applicable to those in similar positions, the court held that when the gift (the property) is directly to an idol or a temple, the seisin (right to possession) to complete the gift is necessarily effected by human agency. Such person is only the manager and custodian of the idol or the institution and is given the right to a part of the usufruct, depending again on custom and usage. In no case the property can be conveyed to or vested in him, nor is he a “trustee” in the English sense of the term although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense of maladministration.

What are the implications of human agency in this context? For this we need to understand the consequences of dedication. The mapping of the exclusive domain necessarily implies

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32 This quote is from another judgment which the court relies in i.e. Rambrahma Chatterjee v Kedar Nath Bannerjee 1922 36 C.L.J. 478.

33 AIR 1922 PC 123.
that there needs to be some authority to interpret whether the performance of action in that
domain fulfils God’s purposes.

Raf Gelders (2010) provides us with a narration of how certain conceptual debates on the
priesthood in the context of the Protestant Reformation were transplanted in India. The
Catholic priests were seen as corrupt, immoral and unfit to be intermediaries between God
and man. This image was transferred to Brahmin priesthood who were seen as morally
incapable of carrying out the worship of God. This was reflected in the British preoccupation
with ritual in temples and the “right” performance of such ritual. Due to their policy of non-
interference they could not judicially decide the content and performance of the ritual.
Therefore the focus of their preoccupation became attaching responsibility to the
performance of ritual.

What the British did not realise was that ritual in temples in India was unlike liturgical ritual
which created a community and had a standard. In liturgical ritual the objective of the ritual is
a sacramental act with intent to revive a foundational situation or basic figure. This is
assumed in the doctrine of transubstantiation, where the sacrament of the bread and wine
recreates the symbolic presence of Christ and thus revives the symbolic purpose of his death.
It is assumed that ritual among the pagans has the same structure.34

It was widely perceived that priests were ignorant and their inability to perform ritual
correctly led to Hindu reform groups campaigning for education of the priests. In Tamil Nadu
(Fuller 2003) this took the form of establishing Agamic schools and instituting programs and
training courses for priests. Fuller further remarks that the publication of the Agamas
transformed the way they were conceptualised. Now reformers could actually see whether

34 For an account of the difference between pagan ritual and sacramental ritual, refer to Halbertal and Margatil
priests were deviating from the ritual. The earlier manuscripts did not completely contain the complete text of any one Agama or manual and the very defect of the manuscript was that the meaning of the text was determined by ritual practice, not the other way around. The publication of these texts meant that the Agamas were now considered established texts that were authoritatively meaningful and one should no longer need to perform a ritual in order to understand what a text says about it, but on the contrary one must understand the text in order to know how to perform the ritual (Fuller 2003, 91-92). However Fuller notices that the Agamas themselves allow for an abbreviation of the ritual.

Fuller’s attempt to trace the regulatory aspects of temple ritual in post-colonial law necessarily bears the imprint of colonial interventions. It was during the colonial period that the question of the right way of performing ritual came to the forefront and the person who performed it became important. This emphasis on the right way to worship in order to fulfil God’s purposes and the legal concept of dedication to God (thus demarcating what was God’s) has unseen consequences. This can be seen in Ramasashier v Virasami Mudali a judgement of the Madras Sudder Adalat which was pronounced in 1860. In this case a claim was made by a former temple manager’s son that certain expenses in respect to the temple had been paid by his father. He claimed these expenses along with certain other monies that had been paid to the present manager of the temple. The Court went into the question of whether the expenditure made by the former temple manager was necessary for the uses of the temple. Its finding was that expenses made by the temple manager could not be justified as requisite for the preservation of the building or the fulfilment of unavoidable exigencies. Instead the outlay had been spent on articles of “pomp and show” which could have been deferred till the time the temple had adequate funds. The manager had to strictly keep expenditure within the income of the temple which he did not do being “extraordinarily
lavish” and incurring debt to the extent of three years income. On this basis the court dismissed the claim.

It is not surprising that in legislative history that these perceptions of wastefulness in temple expenditure were discussed. In a note by H. Wheeler\textsuperscript{35} the Secretary to the Government of India apprehensions were expressed that western ideas of waste and misuse does not necessarily appeal to Oriental sentiment in the same logic, exact standards of mismanagement not being easy to apply. It would be difficult to find skilled auditors and even if one did “he was likely to be misled by fabricated papers put forward by fraudulent trustees”. However he says interestingly that:

Hinduism is split up into numerous sects with different rituals, which regards one another in many cases with jealousy and suspicion; the constitution of committees likely to be able to supervise the various institutions within its charge without friction will be no simple matter

It does appear that there is already a colonial perception of the wasteful Oriental. However the two descriptions do not specify as to why the Oriental is wasteful. I propose the reason for this lack of specification, is the nature of ritual and its inherent idolatry. This can be demonstrated by the nature of the questions that appeared in judicial discourse. For example in a decision on the dispute between the Tengala\textsuperscript{is} and the Vadagalais\textsuperscript{36} the grounds of contention that came up before the Sudder court were as follows:

.....at what time the plaintiffs may join the defendants in the recitation of a prayer; which of the plaintiffs is entitled to do so; whether the Tengal priest is entitled to a blessing to be pronounced at the conclusion of the prayer; whether a hymn may be sung in his honor; whether certain festivals called birth star festivals are to be kept; and whether the images may be taken out in procession.

\textsuperscript{35} Legislative Department Proceedings NAI April 1920 Nos 87-103.

\textsuperscript{36} \textit{Tirumalai Tata Chariyar v Ragava Chariyar} 1861 S.D.A. 152.
One cannot imagine these kinds of questions in liturgical ritual. Firstly there would be no question of two sects worshipping in the same church. The question of being entitled to a certain part of the ritual does not arise as there is a specific authority that can carry out the ritual of the sacrament. Therefore disputes had to be around this authority, not around two different authorities. Hinduism was inherently corrupt due to it having different rituals controlled by different authorities as suggested in the earlier description in Wheeler’s letter to the Government.

If ritual had to be performed in the right manner it could not change and had to be standard. The nature of ritual performed in temples was not standard and did not have a symbolic purpose unlike Christian churches. If ritual was not standard it became difficult to have standard expenditure and accounts, as expenses on ritual could vary based on the nature of the ritual itself. Ritual itself was inherently corrupt as it was dictated by human agency. It was the human who could decide what the content of ritual was, not God. Therefore the narrative around the temple had to be that of corruption and mismanagement.

Shebaits, Dharmakartas and Others: British Colonial Law and the Multiplication of Authority:

The interpretation of ritual had to automatically lead to a focus on authority. There had to be an authority to interpret the ritual to ensure that the worship of God took place and one could know his purposes for mankind. However in trying to identify an authority that would exert control over the religious place met with many difficulties. The priest who appeared to be in control of ritual besides being ignorant of the ritual did not actually have control over the finances and the management of the temple. Although there were steps to hold the priests accountable for temple jewels\(^\text{37}\), the British were unable to fix responsibility upon them in

\(^{37}\) There were specific regulations for the keeping of temple jewels in the Mysore Muzrai Manual.
light of multiple figures around the religious place. This was once again due to the role of human agency. As the idol had to be represented by human agency, certain figures came into play such as that of the founder. This can be demonstrated in *Gangaram Paikoo v Dooboo Mania*\(^\text{38}\) wherein it was held that the worship of an idol is vested in the founder and his heirs. This doctrine is limited to the founder, and does not extend to persons who, subsequent to the foundation, furnish additional foundations. Consequently all rights to the temple including its management vest in either the manager or trustees of the temple whoever they may be.

The case of *Vidya Varuthi Tirtha v Balusami Ayyar*\(^\text{39}\) which has been explained earlier lays down the position of the manager or the trustee. He is only the manager and custodian of the idol or the institution. In almost every case the manager is given the right to a part of the usufruct, depending again on custom and usage. In no case is the property conveyed to him or vested in him, nor is he a “trustee” in the English sense of the term although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense of maladministration. Of particular interest here is the question of custom and usage which the court deems important to judge what the manager’s rights are, the various tests of custom being applied. In *Ram Prakash Das v Anand Das*\(^\text{40}\) it was held that:

> The question as to who has the right and office of mahant is one, in their Lordships’ opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular math or asthal. Such questions in India are not settled by an appeal to general customary law; the usage of the particular math stands as the law therefor.

\(^{38}\) AIR 1936 Nag 223.

\(^{39}\) Supra n.169.

\(^{40}\) 1916 43 I.A 73.
This was supported in *Greedharee Doss v Nundkissore Doss, Mohunt* 41 it was held that if a person endows a College or religious institution the endower has a right to lay down the rule of succession. However if no such rule has been laid down it must be proved by evidence as to what is the usage in order to carry out the intention of the original endower. Each case is required to be governed by the usage of that particular Mohuntee. This was further supported by *Srimati Janoki Debi v Sri Gopal Acharjia* 42 which held that such usage had to be proved by evidence if the rules of succession were not clear.

The question of custom and usage was further complicated by the “hereditary” nature of authority itself. It was perceived by the British the nature of authority was based upon the community. Such conceptions were due to their perception that knowledge about custom and practice was closely guarded and that any role that appeared within certain forms of kinship confirmed their suspicions, Therefore their perception that authority was based on custom and usage and that it could be identified as hereditary (once again dependent on custom and usage) led to them favouring a certain form of authority. This could be seen in the case of *Gossamee Sree Greedhareejee v Rumanlolljee Gossamee* 43 where the claimant alleged that he was entitled to the shebaitship on the ground that his grandfather had consecrated the idol.

According to Hindu law, when the worship of a thakoor (idol) has been founded, the shebaitship is held to be vested in the heirs of the founder. This is in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or in some circumstances to shew a different mode of devolution. In this particular case it was held that the claimant was not entitled to the shebaitship as an additional dedication of another temple that housed the idol had been made on the condition that another person is shebait.

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41 1867 11 M.I.A 405.
42 1882 10. I.A. 32.
43 1889 16 I.A. 137.
The puzzle of the identification of one authority to control the religious place led to a multiplication of authorities, a number of entities who would not be identified as being similar to each other, now being understood as similar in function and responsibility. Thus the temple manager was called by different names such as the shebait, the dharmakarta etc. As one has already mentioned the shebait is required to act in the interests of the idol. He also has a beneficial interest in property of the idol. This means that he is entitled to revenues which have to be according to usage as laid down in the *Vidya Varuthi* case. However a distinction in law was made between the dharmakarta and the shebait. In the case of *Ramanathan Chetti v Murugappa Chetti* it was held as follows:

The manager of a temple is by virtue of his office the administrator of the property attached to it. As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person.

This meant that the status of the dharmakarta was merely a set of rights and obligations and there were no other pecuniary benefits attached to the office. Thus he did not have a beneficial interest in the manner the shebait did. This characterisation of authority allowed for the production of the inherently corrupt temple manager as we have seen in Appadurai’s analysis. The dharmakarta is thus seen as taking more than what he is entitled to as a bare trustee in fulfilment of his duties.

This lack of understanding could be seen in British efforts to reconcile diverse forms of control over the religious place. This is illustrated particularly well in two cases that I shall analyse.

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44 1906 33 I.A. 139.
In the case of *Rajah Muttu Ramalinga Setupati v Perianayagum Pillai* the zemindar Ranee Setupathi Parvatavardhani Nauchear filed a suit against the pandaram (a title for manager which we will elaborate on later) against the panduram Amnabvalana Pillai, stating the gifts and claims of the family in respect of the pagoda, alleging that the pandaram had not been duly appointed. He had not managed the affairs of the pagoda under the superintendence of the zemindar although he was supposed to do so due to a special convention entered into in 1837 with the person who was then pandaram. The pandaram insisted that he was the dharmakarta and not the zemindar. In trying to solve this dispute the questions that came up whether 1) the pandaram had been legally appointed 2) the powers of the zemindar to supervise the pandaram. Evidence came up in court in a report of the principal collector of the District that ‘it has been the established custom that the dying pandaram nominates one of his disciples, and that the election is reported for the zemindar’s sanction...” In the rules formulated by collectors it was prescribed that a samprathi (person appointed by the zemindar for supervision) scrutinise temple management and send a monthly return to the zemindar. Arguments were put forward by the pandaram’s lawyers that the zemindar’s sanction could not be valid as he was from a lower caste (being meat eating) and could not appoint the pandarams.

It was observed by the court that there were no materials to elucidate the constitution of the community or brotherhood attached to this pagoda, the duties of the pandarams, and whether they are selected from a particular family or class. It was also not clear as to whether the zemindar had the right to appoint or confirm. The court found that that the title dharmakarta had many different meanings -it could mean appointment of the pandaram, or the pandaram himself. In view of its varied significance the court decided it would abstain from using this title and confine itself to the question whether the zemindar had the power to appoint or

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45 1874 I I. A. 209.
confirm. It was held that the zemindar had failed to show that such a right is derived from
either the original foundation or any subsequent endowments of the pagoda by his
predecessors. It was highly probable that the Setupatis in the days of their power exercised
control over the pagoda not, however, in virtue of any proprietary right of patronage, but as
the rightful or defacto rulers of the district. The powers that they enjoyed as Sovereigns,
whatever they may have been, have now passed to the British Government. The zemindars
can have no right with respect to the pagoda, other than those of a private and proprietary
nature, which they can establish by evidence to belong to them.

Authority had to be based on sovereignty and such sovereignty could not be considered as
territorial control, it had to have a legitimate origin. Such legitimacy was eclipsed in light of
the British takeover. This can be seen in *Sunkur Bharti Swami v Sidha Lingyah Charanti* where
a dispute arose between Sunkur Bharti Swamy, successor of Shankaracharya and the
Swami of Sringeri on the privilege of being carried crossways in a palanquin. There were
various sunuds (documents evidencing title) produced by the Smartha Brahmins (the
followers of Shankaracharya) to show that grant to Vidyarana (their predecessor) to be
carried in the palanquin in that manner. The Sudder Dewany Adalat in this case affirmed the
Zilla court’s decision which rejected the Smartha Brahmins’ claim on the grounds of lack of
evidence. It further stated that the use of palanquins, of horses and umbrellas are considered
marks of distinction when conferred by the Government. However a person so honoured
could not have any right of action against another who assumes similar pageantry unless he
can show that it injures him unjustly. The Privy Council held that although in England an
action may be maintained for the disturbance of an office or franchise, the grantee of a
dignity from the Crown could not maintain an action against a person who, without a grant,
assumes the same dignity. It however does not follow that such is the Law in Bombay. The

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46 1843 3 M.I.A 198.
court went on to hold that evidence had not been taken adequately and sent the case back to the court for retrial.

This indicated the manner in which notions of authority puzzled the British. The idea of a legitimate form of authority delegated by the sovereign somehow could not work in India. The idea of authority as being tied to the interpretation of ritual was also further tied to the practice of ritual being based on custom and usage. Thus if the right practice of ritual had to be tied to usage, such practice could only be right if the authority itself was acceptable and this was once again according to usage. This is apparent in yet another case where the question of how usage could be decided was discussed. In Rajah Vurmah Valia and Ravi Vurman Mutha the assignment from the persons known as the urallers (yet another name for manager) of the Tracharamana pagoda and its subordinate chetrums, was held to be beyond the legal competence of the urallers, both under the common law of India and the usage of the foundation. The findings of the court were that the founder of the institution intended that the urallers were to be the karnavens or chief members of four different tarwards and therefore the uraima (right of management) should be exercised by four persons representing four distinct families. However it was not likely that he envisaged them being able to transfer their right of management. It was held that the urallers had no power and could only effect such transfer on the establishment of a well proved and established custom. In this case there is evidence against the existence of such custom. Usage could also be evidence against the custom.

This indicates the notion of authority that was being used to determine the interpretation of ritual had parameters to bind the scope of the authority. Whereas this may look like a merely technical legal point that a certain authority has powers and cannot exceed these powers.

47 1876 4 I.A.76.
consequences are rather different as can be seen in the case of *Sardar Singh v Kunj Behari Lal*\(^{48}\). This case laid down the validity of a dedication made by a Hindu widow to alienate property (devolving on her on the death of her husband) for religious purposes. The dedication of the property was for her husband and family members’ salvation and her own salvation. It was held that:

The Hindu system recognises two sets of religious acts, one in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased; the other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased’s soul. With reference to the first class of acts, the powers of the Hindu female, who holds the property, are wider than in respect of the acts which are simply pious and if performed are meritorious, so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view.

Therefore in making a distinction between essential and non-essential acts, one is actually not just demarcating the scope of authority to perform these acts but also demarcating human activity by describing it. Such a description entails the role of authority itself in the context of its capacity to perform human activity. This description leads to other consequences such as women being disallowed from participation in a certain sphere.

**The Wakf and its Superintendence: God and Authority in Islam**

As we have seen, there are certain complications that arise in the case of the legal category of the Hindu endowment. An immediate question that comes into mind is the nature of Islamic

\(^{48}\) AIR 1922 PC 261.
endowments. Do the conditions that operate to make the legal category of the Hindu endowment also arise in the case of the Islamic wakf? In order to discover whether or how these conditions operate we need to analyse how charity itself is regarded in Islam.

Charity in Islam is a religious practice as evident by the key position that zakat (which means the giving up of a fixed portion of one’s wealth for specified good causes) occupies as one of the five pillars of Islam. Zakat in Islam is understood not just merely as the act of giving alms but as a moral action that purifies the believer. Zakat is derived from the verb zaka which means to purify with the connotation of growth and increase (Bentham 1999). By giving up a portion of one’s wealth, one purifies the portion that remains through a restraint on one’s greed and imperviousness to others’ sufferings. The recipient is also purified from jealousy and hatred of the well-off.

Let us now go to the classic textbook definition of a wakf as provided by Fyzee (1949) who refers to three sources i.e. 1) prominent Islamic jurist Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad 2) Shiite sources 3) the definition in the Wakf Act of 1913. He states that according to Abu Hanifa the wakf is “the tying up of the substance of property in the ownership of the wakif and the devotion of its usufruct for some charitable purpose” According to the two disciples of Abu Hanifa, a wakf is “ the tying up of the substance of a thing under the rule of the property of Almighty God so that the proprietary right of the wakif becomes extinguished and is transferred to Almighty God for any purposes by which its profits may be applied to the benefit of all his creatures”. The Shiite view is that a wakf is a contract, the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free. The Wakf Act of 1913 refers to a wakf as the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognized by the Mussulman law as religious, pious or charitable.
It seems clear from the above definitions taken from varied sources that the dedication to God is an essential part of the wakf. The definitions also seem to suggest that the nature of the property being used for religious or charitable purposes automatically flows from the property itself being dedicated to God. This is reiterated in *Vidya Varuthi v Balusami Ayyar* wherein it was held that the law of wakfs owes its origin to a rule laid down by the Prophet of Islam. It means ‘the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings’. Further when such a dedication is done the right of the wakif is extinguished and the ownership is transferred to the Almighty.

This is demonstrated in *Muhammad Rustom v Mustaq Husain* where the words of the wakf document were as follows:

> I was the lawful owner of the said property. I was partly in actual possession thereof, and partly in legal possession thereof, that is, I was in possession through my servants, mustajars (farmers or lessees) tenants and cultivators, I had power in every way to transfer the same. By virtue of the said power I divested myself of the connection of ownership and proprietary possession thereof, and placed it into the proprietary possession of Him who is the real owner, that is God, the owner of the universe, and changed my temporary possession known as proprietary possession into that of a “mutwalli” (superintendent). With effect from this day the said property no longer belongs to me; nor am I any longer in proprietary possession thereof. It belongs to God and is a sadka (alms) for His creatures. I am in possession thereof that is as a trustee for those who are according to the benefits of the said wakf entitled to be, in any way to be benefited thereby.

Such an inference of wakf can be drawn without the word wakf being mentioned in the context of the particular activity. This is apparent in the case of *Jewun Das Sahoo v Shah Kubeer Oodeen* wherein certain lands were claimed as wakf by the sajjada nashin (the head of the religious institution). In order to determine whether the lands were wakf or not, the

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49 Supra n.169.
50 1920 47 I.A .224.
51 1840 2 M.I A.390.
sanads or the documents evidencing the grants of the lands were examined. The court interpreted the document to read that a certain sum was fixed for the purpose of defraying the expenses of the Khankah (the shrine) and was provided to the sajjada nashin and his successors to manage and control. Such management was not for the sajjada’s own use but had to be applied towards the religious institution, which made it an activity for a religious purpose.

This point is once again highlighted in *Mohammad Kasim v Abu Saghir*\(^2\) wherein it was held that:

The requirement of a valid wakf is a substantial dedication of the usufruct of the property to charitable, religious or good purposes as understood in the Mahomedan law; no particular form is necessary; a wakf may be construed from royal grants of properties made in favour of individual persons as long as it was for a perpetual religious, charitable or good purpose. The dedicator need not use the word “wakf” at all or may not formally transfer the properties to the ownership of God. If there is a substantial dedication to a valid object it will not cease to be a wakf because some objects are mentioned which are not legal objects of wakf.

The complications that have arisen in the case of the Hindu endowment in determining what is a religious purpose, does not occur in the case of the wakf. The question of a certain practice being seen as part of human agency does not arise. In the case of the Hindu endowment there is difficulty in determining what is a truly religious practice (a practice dictated by the divine) because all practices seem to be associated with human agency. In the Semitic religions in order to determine whether a purpose is religious or not, it must conform to God’s purpose for mankind. The prohibition on idolatrous practices allows one to distinguish between a practice that is linked to human agency and a practice that is linked to the divine. Therefore when one is dedicating property to God, the property itself acquires a religious purpose, and cannot be used for action that runs contrary to the precepts of religion.

\(^2\)AIR 1932 Pat 33.
Therefore property cannot be dedicated for un-Islamic purposes. Articles which Muslims cannot lawfully buy or sell—such as swine’s flesh or intoxicants cannot be lawfully dedicated. (Ameer Ali 2007, 273) Divine approval is what is required and a Muslim cannot make a dedication in favour of an idol, a non Muslem place of worship or any object which is held unlawful or sinful in his law (Ameer Ali 2007, 223).

Thus dedication to God means that property and its uses must have religious purposes i.e. it must conform to God’s purposes. Thus a place becomes an object embodying that purpose. Such objectification can be seen in the manner in which graveyards are deemed as sacred. In *Lal Jhao Lal v Ahmadullah*\(^{53}\) it was held that when a community buries its dead the land which is used for this purpose becomes sacred and should not be used for any other purpose whatsoever. In *Abdul Gaffoor v Rahmat Ali*\(^{54}\) it was similarly held once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery unless for any reason the land turns out to be unfit for use as a cemetery. In *Musaheb Khan v Raj kumar Bakshi*\(^{55}\) the character of a mosque was defined as, “something more than the mere appearances of a mosque are needed before it will become entitled to be treated as a mosque for all time. There must be proof of dedication or of permission of user such as the saying of prayers in a congregational manner.” Therefore a place that can be described in any other manner is now described not in terms of function but in terms of purpose.

As we have observed there have been difficulties in dedicating property to God in the context of the Hindu endowment and these difficulties have shown that there is no concept of God in the context of these practices. However dedication to God in Islam does not present such difficulties as the concept of God already exists, and it is possible to conceptually describe a

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\(^{53}\) AIR 1934 All 335.

\(^{54}\) AIR 1930 Oudh 245.

\(^{55}\) AIR 1938 Oudh 238.
place as having a purpose. When property is dedicated to God and thus has a religious purpose, it follows that one automatically needs an authority to ensure that this purpose is fulfilled. In this context authority becomes important as fulfilment of a purpose and not merely as interpretation of ritual as in the Hindu endowment. The question of authority then becomes understood as a distinction between the religious and the temporal, necessarily following from the dynamic of western secularisation.

These observations are demonstrated when one analyses the regulatory debates around the wakf and the role of authorities such as the mutavalli, the mujhawar and the sajjada nashin. The mutavalli’s role is clearly explicated in *Mohammad Abdul Gani Fakir v Mt Kulsum Nessa Bibi*[^56] wherein it was laid down that a mutavalli can be removed not only on the ground of untrustworthiness but also on the ground of incompetence or dereliction of duty. The non performance of his duties in respect of religious services enjoined by the wakfnama is sufficient to justify his removal. His position being analogous to that of a trustee although the property does not vest in him[^57], is described in *Mt Kishwar Jahan Begum v Zafar Mohammad Khan*[^58] wherein it was held that:

> the position of a mutawalli as the manager of the estate goes and so far as it is his duty to make certain payments enjoined by the deed of wakf, he in our opinion stands in a position of a quasi trustee. He may not have any personal interest in the property but he has to discharge all the obligations which would ordinarily fall upon a trustee…

The role of the sajjadanashin is seen as different as elucidated in the case of *Muhammad Kasim v Abu Saghir*[^59] wherein it was held that:

[^56]: AIR 1945 Cal 328.
[^57]: Saadat Kamel Hanum v Attorney General, Palestine AIR 1939 PC185.
[^58]: AIR 1933 All 186.
[^59]: Supra n. 188.
Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a sajjadanashin as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property, but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. A sajjada nashin who is also a manager may be deprived of managership though he may be retained as sajjada nashin. A sajjada nashin is not a mutawalli and his powers of expenditure are wide; and as long as he keeps up the institutions in a fairly decent condition he is not accountable to anybody.

Therefore a distinction is made between the religious functions of the sajjada nashin and the managerial or secular functions of the mutavalli. It is this distinction between the religious and the secular which forms the basis for defining the scope of authority, and frames the debate on eligibility including whether women are eligible to perform the functions of any of these authorities. This is witnessed in *Kassim Hussein v Hazra Begum* where it was laid down that no religious office can be held by a woman under the Mahomedan law if the duties attached to the office are of a nature that she cannot perform in person or by deputy. A discussion of this position is found in *Kaniz Zohra v Syed Muztaba Hussain* wherein Roland Wilson's treatise on Anglo-Muhammadan law is quoted as saying that:

A female may be the mutawalli of an endowment and so may a non-Muhammadan; but if the endowment be for the purpose of divine worship, neither females or non-Muhammadans are competent to hold the office of sajjada nashin or spiritual superior.

Further support can be found in the court's reliance on MacNaughten's Principles and Precedents of Muhammadan law which reads that:

Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usage of the country, because it is the duty of the superior to instruct and guide his

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60 AIR 1920 Cal 800.

61 AIR 1923 Pat 576.
disciples, to teach his scholars, and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded.

It can be seen that the legal position that women can hold certain religious offices subject to certain conditions such as previous custom and usage is well established. Another case that reiterates this is *Abdul Aziz valad Haji Subhan v Mahomed Ibrahim Ghatkar*62 wherein it was held that the duties of a mujhawar which consist of sweeping and cleaning the place, reading the fatiha, offering prayers and incense are duties of a religious nature, and were at one time performed by a female. Therefore a female was entitled to succeed to the office of a mujhawar. Therefore the notion of authority is configured in a manner so as to separate the realm of the secular from the religious. Through this emerges the problem of female participation. The manner in which authority is understood in law is not very different from the Hindu endowment where the nature of authority is understood as having the capacity to perform essential and non essential actions, the role of female participation being subject to this. Since the notion of authority is constituted differently in the context of the wakf, the phenomenon of corruption is also constituted differently. In the case of the Hindu endowment we have observed that corruption is integral to the formation of the endowment due to Hinduism itself being corrupt. In Islam the problem of corruption unfolds differently due to God and authority being conceptually relevant terms within Islam. Therefore the corrupt mutavalli is not analogous to the corrupt dharmakarta when one looks at the legislative debates in the early years of the twentieth century. This is apparent in the statement of objects and reasons provided in the draft bill that subsequently became the Mussalman Wakf.

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62 AIR 1941 Bom 238.
Validating Act of 1923. The objects of this bill included the registration of wakf estates, keeping of regular accounts by the mutavallis, and appointment of committees to exercise control over the management of the wakf. This states that some mutavallis are entirely unfit to carry on the administration of the wakfs and bring disrepute to the entire community. Therefore steps need to be taken to ensure that incompetent and unscrupulous mutavallis are checked from waste and mismanagement. A system of compulsory registration requiring a mutavalli to notify some responsible officer about the wakf needs to be put in place.

The language of corruption is therefore different as one can see when one reads the statement of objects and reasons a little further:

Further, even where a wakf is well-known and a Mutavalli is obviously thoroughly incompetent to carry on his duties, the public find a difficulty in instituting suits to remove him from his post by reason of the cumbersome procedure laid down in the Code of Civil Procedure. Lastly there appears to be general consensus of opinion amongst the Muhammadans throughout the country that there should be some responsible officer who may go about and find for himself whether the various wakf properties scattered throughout the country are being properly managed or not.

J.D.Dikshit a district judge expresses his apprehension over the “public” nature of the wakf stating that in a majority of cases the wakf is only a device to keep the property intact for the benefit of the descendent. He remarks that there has been a growing sense of public spirit within the Muslim community which have led to them focusing on estates not really entitled to be a trust but were created for private benefit. He further says that the registration of the wakf:

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64 Letter dated 15th Feb, 1922 by J.D.Dikshit, District Judge Khandesh, to the Deputy Secretary to the Government of Bombay in Ibid.
will make it clear whether a particular endowment was really a public trust made for the public, charitable or religious purposes in respect of which the Mutavalli is accountable to the public. But the enactment proposed will necessitate an inquiry into the complex question of the origin and history of each so called wakf, the evidence for which may not be available.

The description of wakfs and Hindu endowments as public or private arose within a certain conceptual framework where the religious and the charitable as categories can only be understood as public or private. We shall examine how this is conceptualised in the law of wakfs and the legislative history that led to the Mussalman Wakf Validating Act of 1913 in the next section.

The Public and the Private: The Role of Western Cultural History in the Mussalman Wakf Validating Act

Legal discourse regarding the wakf shows a certain amount of confusion about religious purposes and charitable purposes as concepts. In Gholam Hossain Shan v Syed Muslim Hussein it was observed that that religious purposes do not exclude charitable purposes and there is nothing in the Indian statutes or in Mahomedan law, which draws a clear cut distinction between religious and charitable purposes.

This is visible in the objects of the wakf itself (Hidayatullah 1992 ) which are manifold in nature including 1) provision for mosques. (including the construction of a building in Mecca known as robat) 2) colleges 3) aqueducts and caravansarais 4) distribution of alms to

65 AIR 1934 Cal 348.
poor persons 5) the maintenance of a khankah 6) celebrating the death anniversaries of the settlor and other members of the family 7) performance of fatehas 8) burning lamps in a mosque 66 (9) reading of the Quran in public places and also at private houses and 10) maintenance of poor relations and dependants. In Ramanadar Chettiar v Vava Levviar Marakayar 67 charitable objects were classified into four heads 1) cash doles to the poor on the 28th and 29th of the Ramzan month which among Mohammedans is regarded as a holy month in which giving alms to the poor is enjoined as a duty 2) Distribution of clothes to the poor on these days 3) Distribution of kanji to the poor during the month of Ramzan 4) performance of fatiha on three days of ancestors and feeding of friends and the poor. These charitable objects were considered valid although the terms wakf was not explicitly mentioned in the deed.

In Abdul Sattar Ismail v Abdul Hamid Sai 68 it was held that the the reading of the Koran in public and private places can only be regarded as religious and pious and that it must also be regarded as charitable for the reading is for the benefit of all Mussalmans. The fact that money may be expended on the reading of the Koran in private places as well as public places does not detract from the religious, pious and charitable character of the object.

Further in Kunhamutty v Ahmed Musaliar 69 it was held that in order to create a valid trust for religious purposes there must be a charitable object. The dedication for the purpose of reciting the Koran over the tomb of a private person does not create a valid wakf…. “ and it is not right to say that the words “or charitable” really provide an alternative to “religious and pious”.

66 Gobindra Chandra v Abdul Majid 1944 Cal 163.
68 AIR 1944 Mad 504.
69 AIR 1935 Mad 29.
Why is there so much confusion about the nature of these activities? Is it the admission of our Lordships that they have not forgotten “how far law and religion are mixed up together in the Mahomedan communities”\textsuperscript{70}. It is not just the inability to make this distinction but a failure of Western categories itself that do not allow for the distinction to be made. This is unlike the clear distinction that is possible in Western society between the religious and the charitable, wherein the term charitable is seen as “public” in nature.

In a prominent nineteenth century case\textsuperscript{71} wherein a tax exemption to the missionary establishments of the Protestant Episcopal Church was discussed, it was opined by one of the judges that “the conversion of heathens and heathen nations to Christianity is not a charitable purpose” and “…a charitable purpose is where assistance is given to the bringing up, feeding, clothing, lodging and education of those who from poverty, or comparative poverty stand in need of such assistance” He further goes on to give illustrations such as “a bequest upon trust to pay, divide or dispose thereof for the benefit or advancement of societies, subscriptions or purposes having regard to the glory of God or the spiritual welfare of his creatures.”

Activities that are charitable are thus characterised by their contribution to public utility. Such a distinction cannot be made in Mahomedan law as it has not been subject to the events in Western intellectual history that have allowed for the distinctions between the public and

\textsuperscript{70} Infra n. 214.

\textsuperscript{71} \textit{Lord Bramwell in Income Tax Special Purposes Comrs} 1891 AC 591. In this case the church’s appeal to reverse the order lifting the exemption was dismissed.
the private to be made. Such an admission was made in the case of *Abdul Sattar Ismail vs Abdul Hamid Sait* wherein prominent jurist Ameer Ali (2007) was cited as saying:

> The words piety and charity have a much wider significance in Mussalman law and religion than in any other system. *Khair, bir, ihsan* etc. include every purpose which is recognized as good or pious under the Mussalman religion and the Mussalaman Law; and the test of what is ‘good’ or ‘pious’ or ‘charitable’ is the approval of the Almighty. Every good purpose (wajah-ul-khair) which God approves, or by which approach (kurbat) is attained to the Deity, is a fitting purpose for a valid and lawful wakf or dedication. A provision for one’s self, for one’s children, for one’s relatives, is as good and pious an act as a dedication for the support of the general body of the poor.(298)

This distinction between public and private has not been taken into account by scholars such as Gregory Kozlowski whose work on the development of the wakf in British India provides a detailed account of the dynamic between legal and political discourse concerning the wakf and the developments leading to the Mussalman Wakf Validating Act of 1913. In his narration of the legal histories of the wakf he concentrates on the social and political questions that these cases brought up and the difficulties that Anglo Saxon law had in accommodating these questions. He notes that the chief question was whether Muslim endowments had to be for charitable purposes and whether this could be read as primarily benefiting one’s family. Initially this question did not arise in the approximately twenty endowments cases that arose at the Sadr Diwani Courts. This was due to the fact that British judges had to consult Mahomedan law officers before giving decisions. These law officers were allowed to maintain their own functioning and based their decisions on treating each

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72 We have already mentioned that charity in Islam is a religious practice. Gaudiosi (1988) describes how the founder of Merton College, Oxford set up the trust for the college in line with Islamic principles that would normally govern the wakf. According to her the only significant difference between a wakf and a trust is the reversion of the wakf to charitable purposes once its specific object ceases to exist.

73 Supra n.204.

74 For a rendering of this narration please see chapters 5 & 6 of Kozlowscki’s book.
case as an isolate unlike the British system of precedent where cases were decided based on decisions on previous cases.

Kozlowski describes the case of Phate Saheb Bibi v Damodar Premji\(^75\) as being a turning point in endowments law in India. This case was instituted around the legality of a mortgage around the wakf. It was dismissed on the ground that it was not instituted by a non-custodian but the issue of the property not being wakf property due to it primarily benefiting the family was raised. This question however became of utmost importance in Sheikh Mahomed Ahsanullah Chowdhry v Amarchand Kundu\(^76\) wherein certain properties belonging to the wakf were attached. This case came up before the Privy Council wherein it was held by Lord Hobhouse that there was a great deal in the deed that was designed for the aggrandisment of family property and for keeping it perpetually in the hands of the family. He held that it was not a bona fide dedication and only a veil for the aggrandizement of the family.

This Privy Council however did not make this decision final stating in the judgment itself that they did not attempt to lay down a precise definition of what is a wakf due to the conflicting decisions in India. This led to variation in various High Court decisions in India. The issue came to the fore once again in Bikani Mian’s\(^77\) case in the Calcutta High Court wherein noted jurist Ameer Ali put forward the argument that there is no distinction between public and private endowments in the shariah. The key case which finally brought the question of wakfs into the political arena was Abdul Fata Mahommed Ishaq (and others) v Russomoy Dhur Chowdhry.\(^78\) One of the custodians of the wakf borrowed heavily, prompting his nephew to institute an action for his removal as custodian. A favourable order was obtained from the

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\(^75\) 1879 I. L. R., 3 Bom, 84. Kozlowiscki cites this case as Bom III 84 ff.

\(^76\) 1889 27 I.A. 28

\(^77\) Bikani Mia v Shuk Lal Poddar (and another) 1893 ILR 20 Cal 116. Cal XX, IIff cited in Kozlowski.

\(^78\) 1894 22 I.A. 76
Subordinate Court and the matter went up to the High Court. The court decided to take Sheikh Ahsan-ullah’s case as a precedent and declared that the endowment did not serve a religious or charitable purpose and served only the family interest. An appeal was sent to the Privy Council which ruled that the deed was purely a cover for the aggrandizement of the family.

Abdul Fatah’s case reinforced existing debates about Muslim family endowments within the Muslim landlord community and the colonial administration. One of the developments subsequent to this was the enactment of the Bengal Settled Estates Act, 1894 which allowed for estates to be immune from partition by the rules of the shariah. However this matter assumed further importance in light of political formations among communal lines and the formation of the Muslim League. The early years of the twentieth century saw constant requests from Muslim League members for greater accounting standards for such endowments and powers to investigate actions of custodians. After the implementation of the Minto Morley reforms the reorganized Governor General’s Council saw Muhammad Ali Jinnah make a proposal for legal steps to protect Muslim family endowments. This led to the enactment of the Mussalman Wakf Validating Act of 1913. As the Act was not retrospective in nature an amendment was subsequently passed in 1930 to rectify this problem.

Kozlowski in the narration of this legal history goes into individual interpretation and records of the judges laying down these decisions. He points that most judges relied on Charles Hamilton’s version of the Hedaya which in its English translation tended to mislead readers unlike Baillie’s version of the Fatawa-Alamgiri which approved of private endowments. He also points out that the debates in British law over trusts and entails and the laws regarding perpetuities (any legal form that restricted sale or inheritance of land). In this connection he points out Lord Hobhouse’s views on trusts which were in not in favour of perpetuities as influencing his decisions.
On an analysis of the case law the anxiety about perpetuities seems obvious. In *Abdul Gafur v Nizamuddin’s* case it was held that “the document professes to create a wakf but in reality the legal heirs of Karimudin are the only objects of his bounty, …The lands are destined to his wives and children, and to the descendents of the latter in perpetuity” In *Khajeh Solomon Quadir v Nawab Sir Salimullah Bahadur* the point was further reiterated:

The purpose of these two deeds is plain. The intention of the donors in each case was to make perpetual provision for the members of the family by settling the properties upon such members generation after generation so long as the family should last; ……………and by inserting a distant and contingent provision for charitable purposes.

Kozlowscki is right in pointing out that the debates in British law did influence the debates on wakfs on India. However one is unable to understand how the terms of the debates have been framed if one merely relies on the individual interpretation of legal terms. What is the discourse that allows for the law of perpetuities to assume importance? Such a discourse is intricately connected to the religious and the charitable. When courts ruled that Muslim family endowments were not for religious and charitable purposes, they were using certain kinds of frameworks available to them in the West. Charity was a matter of public benefit and religious purposes could be considered charitable only if they demonstrated adequate public utility and advancement to the public.

As we have seen in the last chapter charity which was a religious principle ceased to be religious and became secular due to the inherent nature of Christianity to secularise itself. However the most significant moment in the secularization of Christianity arose in the Protestant Reformation. This led to certain changes in charity as a thematic framework,

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79 1892 19 I.A. 170.

80 1922 49 I.A. 153.
particularly the idea of charity being public benefit. Lutheran theology replaced the Gregorian two swords theory – that the spiritual and secular powers church and state, interact with each other, with a two kingdoms theory (Berman 2003). The church belonged to the heavenly kingdom of grace and faith, being governed by the gospel. The earthly kingdom was the kingdom of sin and death being governed by law. Connected with the Lutheran doctrine of the two kingdoms were the twin doctrines of the priesthood of believers and universal Christian callings. All believers were said to be priests and should accept the Christian responsibility of performing their occupation conscientiously. A Christian social ethic differed from a Christian personal ethic. As “a private person” in his direct relationship with God a Christian may require to love his neighbor, whereas as a public person serving in offices such as the judiciary or the legal profession, a Christian may require to resist his neighbor.

Such a distinction between the public and the private caused irrevocable changes in European society, particularly its legal and political systems. This influenced the way poor relief and charity were structured in both Protestant and Catholic kingdoms. After the Protestant Reformation, sixteenth century English Parliaments established by statute, a national system of poor relief which clearly had a theme of public benefit. This was the Elizabethan statute of 1601, the Statute of Charitable Uses which listed a wide variety of purposes, such as relief of aged and poor people, education of orphans, maintenance of schools of learning etc (Moffat, Bean and Dewar 2005). Between 1520 and 1580, some sixty European towns and a few states issued comprehensive legislation designed to direct and control poor relief (Pullan 2008). Protestant societies redefined the objects of charity and the responsibility of directing funds often fell on princes. The support of chantries and religious brotherhoods were inimical to Protestant theology who deemed it unfit to support the voluntary poverty of monks and
pilgrims. The Lutheran theology of poor relief differed from the earlier Roman Catholic theology in placing responsibility on the community to help the needy and less emphasis on the church, the local political authorities having the primary responsibility to administer poor relief (Berman 2003).

Jakob De Roover’s work on secularism and toleration is relevant in understanding the impact of the Protestant Reformation in the context of Christianity and its secularization. De Roover (2006) outlines how toleration emerged as a value in the wars of religion in Europe. Toleration was based on the belief that there were two realms of society - a public sphere where the laws of the state should be obeyed, and a private or personal sphere where one is allowed to live according to one’s values. It implies that the first sphere ought to be governed by a free standing political conception of justice, which is neutral towards all moral and religious comprehensive doctrines. De Roover argues that one can suggest that the public and private spheres are fluid but that does not help us develop a criteria to identify them. However the puzzle of the two spheres can be solved if one could identify the domain of religion. Thus religious liberty corresponds to the private sphere. Thus the principle of toleration can be formulated as the state should not interfere in religion and religion should not interfere in state policy. As salvation could be by faith alone, no human being could be compelled to believe in the truth of a particular doctrine and all compulsion and force had to be eschewed in matters of religion.

These changes brought about by the Protestant Reformation are important because they determine legal discourse on charity in the colonial and modern periods. An illustration of this is *Gilmour v Coates*, 81 wherein the question of income from a trust fund being used for a

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81 1949 All E R 848.
Carmelite convent being used for a charitable purpose arose. The prayers and worship conducted in the convent was regarded by the Roman Catholic Church as bringing about spiritual benefit to the members of the public. It was held that the court could not determine the truth of one religious belief and was not entitled to accept the belief of the Roman Catholic Church that these intercessory prayers benefited the public. The benefit to be derived by others from the example of pious lives was too vague and intangible to satisfy the test of public benefit. The precedent that was quoted was *Cocks v Manners* \(^{82}\) wherein it was held that a gift to a convent cannot be considered a charitable bequest. The logic in this case is more succinctly outlined in *In Re White* \(^{83}\):

A society for the promotion of private prayer and devotion by its own members and which has no wider scope, no public elements, no purposes of general utility would be a “religious” society, but not a “charitable” one.

Such a stand was dictated by state neutrality as evident by the statement of Lord Du Parcq:

> It must be remembered that the law of England recognises as proper objects of charitable endowment at least all those varied forms in which the Christian religion is professed and practised. In some respects there are differences and irreconcilable conflicts of opinion between some of the many religious bodies which are thus recognised. An argument which leads to the conclusion that the courts, when they are considering whether it is for the public benefit that property should be devoted for ever to a religious purpose are compelled to accept as true any doctrine of a particular religion which ascribes efficacy, spiritual or temporal, to acts which that religion enjoins upon its followers, cannot I think be sound.

Such a statement allows us to understand decisions in India stating that in order to create a valid trust for religious purposes there must be a charitable object. Unlike Mahomedan law which saw no distinction between the religious and the charitable, English law made two

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\(^{82}\) 1871 L.R. 12 Eq. 574.

\(^{83}\) 1893 2 Ch. 41.
distinctions; the religious being private and the charitable being public and a further
distinction that saw the religious become charitable once it became sufficiently public. Such a
distinction was required in order to recognize a religious place within the legal category of
the wakf. Lord Du Parcq points out that such a distinction did not arise before the
Reformation when there was only the Roman Catholic religion. After the Reformation, the
policy of state neutrality and the need to respect religions compelled a different notion of
charity that could not be private in nature i.e. allow for beliefs or doctrines of a particular
religion to be considered true.

This distinction between the public and private spheres helps us understand the law of
perpetuities as being framed by the question of control of land in the domain of the family
(which belongs to the private sphere) Whereas Lord Hobhouse may have had various views
on the logic and structure of trusts as being vehicles for preserving property within the
family, the questions that he raises cannot be framed without a distinction between the public
and the private spheres.

This notion of charitable purpose being something of public utility is very much present in
Govindram Family Charity Trust v Commr of Income Tax Bombay\textsuperscript{84} charitable purpose
includes relief of the poor, education, medical relief and advancement of any other object of
general public utility. In this case it was held that it was impossible to contend that relief of
poverty which is restricted to members of one’s family, is a charitable purpose. The
Mussalman Wakf Validating Act may have helped legalise family endowments but did not
remove the distinctions between public and private introduced by British law. An illustration
of this is the difference between public and private graveyards, the court holding in Fakir

\textsuperscript{84} AIR 1952 Bom 346.
Dost Mahomed v Seth Chainrai\textsuperscript{85} that private ownership of a plot is incompatible with dedication of it as a waqf, the graveyard being the personal property of a family of Syeds. A distinction was also made between public and private waqfs, the estate of a private waqf vesting in the beneficiaries (like a trust) and the mutavalli being in the position of an owner (like a trustee) except there are limitations on the transfer of the property. \textsuperscript{86} The discourse on the corrupt mutavalli continued with different states setting up Wakf Boards through the various waqf enactments to ensure that these properties were managed properly.

The overall development of the waqf as an institution during the colonial period must be considered as part of the process of Islamicisation. Whereas there was an institutional tradition of waqfs in the Mughal period, they were certainly not organised on the conceptual basis of British colonial law. As we have mentioned in the third chapter these institutions involved a relationship between the sadarat as a representative of the king and the grantee and the question of the purposes which the institution could be used for or the proceeds that could be generated from it were subject to this relationship. We have also seen in the fourth chapter that places of worship that would be considered Islamic today would be characterised by their function and activity not their purpose. The colonial period thus saw a movement “to be Islamic” in India. This process deployed Western conceptual frameworks despite vigorous proclamations of resistance and rejection of such frameworks.

\textbf{How Shall We Worship: The Public and Private Distinction in the Hindu Endowment}

In an opinion on Dr Hari Gaur’s Bill\textsuperscript{87} Achyut Rao Sathe expressed apprehensions on the consequence of classifying endowments as public and private. He says:

\begin{footnotesize}
\textsuperscript{85} AIR 1940 Sind 43.

\textsuperscript{86} Mohammad Qamar Shah Khan v Mohammad Salamat Ali Khan AIR 1933 407.

\textsuperscript{87} Home Judicial 1924. File No 415/24.
\end{footnotesize}
.....every trust is a mixed trust partly for a pious purpose but also to maintain a family. The Guru of a Raja dies and the Raja builds a temple in the name of the Guru. He endows the temple with lands to be enjoyed by the Guru’s family subject to loyalty and pious behaviour. The definition of Dr. Gour would make it a public trust as the lands were given to the temple while the grant was really to the family, subject to the burden of maintaining the temple and rendering service to it. This is a private trust and the Act should not apply to it. .......The same way pujaries of a temple may enjoy lands by way of remuneration and such grants would be merely contemporaneous with the service.

Similar concerns 88 were expressed by others on the ground that the definition of trust did not distinguish between a “public trust “and a “private trust. It was stated that it was not uncommon among Hindus to constitute private property into trusts in the name of the household or other deity so that property was protected from alienation by the injudicious acts of one’s successors. The objective of these trusts of this kind was to secure the benefits of the property to an individual or individuals in whom the endower is interested, and to place such property out of the reach of creditors.

Dr Tej Bahadur Sapru in his opinion on Dr.Gaur’s bill also expressed his reservations on the definitions of religious and charitable on the ground that the term charitable has a specific meaning in English law. The many things that are religious and charitable under Hindu law would not fall under the test of the English statute. It would also not allow for purposes that are recognised as charitable under the custom of a locality or community.

The consequences of understanding these endowments as public had already been discussed in the legislative history of the Charitable and Religious Trusts Act, 1920 wherein the question of any worshipper being interested in the trust came up and it was noted that:

.............the inconvenience and absurdity of the proposition that any two Hindus residing say in Peshwar can be said to have an interest in a temple at Malabar by virtue of merely of being Hindus with a right to worship in that temple, if they should find themselves in its vicinity

Objections were raised that a person having an interest in the trust could include:

A dissatisfied beggar or even a hypocrite spectator..............a dissatisfied and refractory tenant, a dismissed servant or...... in the guise of a person having interest and having various sorts of motives in view ......if a locus standi is given to such persons to impeach and call into account the honesty of holy and devotional men by merely filing a mere petition before the District Judge....... surely it will never produce any good result......

It becomes clear as in the case of the Islamic wakf that the term charitable carries with it the notion of public utility. Therefore in order to be regulated by the colonial government the endowment had to be for religious and/or charitable purposes (charitable purposes necessitating the description of it being a public institution). This description along with the principle of toleration compelled the logic of regulation by the colonial Government. This logic is laid down in a Supreme Court decision in 1855 on the regulation of Hindu charities.

89 Madras high Court decision quoted in letter dated November 19, 1919 from Rao Bahadur Annamalai Chettiari to the Secretary to the Government, Madras in Legislative Department Proceedings NAI April 1920 Nos 87-103.

90 Letter by mahants of the mathas connected to the temple at Puri in Legislative Department Proceedings NAI April 1920 Nos 87-103.

91 This did not mean private religious endowments did not exist but they were not the subject of regulation by the main endowments enactments. Varadachari (2006, ) provides a useful overview of the criteria that the courts require to use in distinguishing between public and private endowments.

This dealt with the policy of regulation being challenged on the ground that a Christian nation cannot regulate pagan places of worship. The court held:

Where there is a religion tolerated by the State, the Crown will see that that religion is enjoyed, though it may be strongly at variance with the State religion in doctrine, as in the case of Roman Catholic and Unitarian charities

Understanding a religious place as a public place of worship was to lead to many difficulties as evidenced by judicial decisions. In *Pujari Lakshmana Goundan v Subramania Ayyar*\(^{93}\) it was observed that the founder of a temple allowed Brahmins and people from all Hindu castes to worship the idol as a public idol. With the offerings he maintained the temple, the balance of the income being in support of himself and his family. On the basis of these facts the court held that this was a public temple. In another case *Bhagwan Din v Swaroop*\(^{94}\) it was held that dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. One cannot infer that public usage is tantamount to dedication as it would not be in consonance with Hindu sentiments or practice that worshippers should be turned away. These decisions appear clearly contradictory in the importance that they give public usage.

However the “public” at a conceptual level did not have the relevance that it did in Europe. Under English law a charitable trust could be only be deemed charitable on the ground of public utility i.e. it must be shown that there is benefit to the community, the test being the spirit of intention under the Statute of Elizabeth. In *Trustees of Sir Howell Jones Williams Trusts v Inland Commissioners*\(^{95}\) it was held that no trust can be charitable unless it is beneficial to the community in a way in which the law regards as charitable. Therefore not

\(^{93}\) AIR 1924 PC 44.

\(^{94}\) Supra n.161.

\(^{95}\) 1947 1 All E R 513.
all objects of public utility can be considered charitable. The logic behind this is elucidated in a case *Re Moss.Horborough v Harvey and Others* 96 wherein an estate was bequeathed for the work of receiving, sheltering and caring for stray cats. The question that came up before the court was whether this was a charitable gift. The court relied on *Re Grove Grady* 97 which laid down that the test for determining a valid charitable gift was the trust’s benefit to mankind. In order to ascertain how the test may be applicable the court relied on *Inland Revenue Commissioners v National Anti-Vivisection Society* 98 which held that the care and consideration of animals which are unable to care for themselves are manifestations of the finer aspects of human nature. Thus the court held:

> It is plain that a gift to prevent cruelty in relation to cats and kittens would be good as having an elevating effect on mankind......................the gift is perfectly good as being a valid charitable bequest

However in the Indian context there is a conflation between the religious and the charitable to demonstrate public utility. This is demonstrated in *In Re Vallabhdas Karsondas Natha* 99 where the question of whether the supply of fodder to animals and cattle could be considered a charitable object of a trust arose, and it was held that the object was not just charitable but also religious on the ground that:

> If we were construing this object in England, I should be of opinion that this was not charitable, because the feeding of animals which are obnoxious to mankind cannot in my view, be said to be beneficial to the public. However we are considering the will of a Hindu and apart from the charitable object of the matter, the feeding of dumb creatures is in Hindu religion regarded as religious

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96 1949 1 All ER 495.
97 1929 1 Ch 557.
98 1947 2 All E R .
99 AIR1947Bom382.
I have no hesitation in holding that in India and especially among the Hindus both the customary law and the common opinion in that community would certainly uphold the view that giving fodder to animals and cattle is a good charity.

However it was not the case that every religious action could be considered charitable. In Advocate General on the Relation of Sundar Jagiavan and Others v Damothar and Karson Madowji\textsuperscript{100} a residuary clause in a Gujarati will was not established as charity as the Gujarati expression was not equivalent to the technical term charity, as described in the Court of Chancery. In analysing the word dharm that was used in the will it was held that this term was not equivalent to charity and that it implies the performance of acts considered meritorious in the Hindu religion. What is the reason for this lack of equivalence? I would like to suggest that this is due to the fact that these acts are not considered acts of public utility.

**Theologisation: Creating the Conditions for the Application of “Doctrine”**

The generation of the legal category of religion has involved three main components, dedication to God, an authority to interpret God’s purposes, and the public and the private. What do these conditions seek to do and why is it that they assume such a peculiar form? I would like to argue that theologisation is merely a process for the application of doctrines. As we have seen in the first chapter it is important that the doctrines of the religion be identified in order to identify whether a practice can be a religious practice and more importantly how the religious can be demarcated from the secular. The court’s reliance on what it perceives as doctrine does not help in finding out whether such practices are essential or not as it leads to inconsistency. Such a mode of legal reasoning is distinctly post-colonial in nature and only

\textsuperscript{100} Vide Perry’s O.C. 526.
appears in the later colonial period, the early colonial period not being preoccupied with what
the religious and the secular could mean legally.

This can be demonstrated by a sample of the cases over this period. The dilemmas of the
post-colonial Indian court appear to be significantly missing in a case before the Calcutta
Sudder Dewanee Adawlut, Petamburree Dassee v Dhunmonee Dassee decided on May 11th,
1857. The subject matter of the case was whether expenses for the establishment of an idol
could be defrayed from the rents received from a village as per the will of Petambaree
Dassee’s husband. The court held that the will of the husband explicitly laid down that the
second wife (who was Petambaree Dassee) was responsible for setting up the idol of the god
Shama in accordance with the principles of the shastras. The expenses for the consecration of
the idol should be on the second wife exclusively although the service of the idol is to be
charged to the rents of the village. Such a decision is unusual for the fact that the court does
not see the need to go into whether the legal requirements for consecration have been
fulfilled which is necessary for service of the idol. The court does not attempt to link the
service of the idol with consecration thus making a distinction between the religious and the
secular. Therefore it is irrelevant to see whether they are interlinked, or decide the case based
on their interlinkage.

The absence of the religious and the secular as legal concepts is also reflected in another case,
some years later. In 1871 a case came before the Bombay High Court regarding the right to
perform the ceremony of breaking a curd pot in the temple of Vithoba and Tukaram on a
particular day. It was alleged by the representative of a branch of the family of Tukaram that
a group of people broke a curd pot on the same day and the same place depriving him of a

101 1858 S.D.A. 200.

102 Narayan Sadanand Bava v Balkrishna Shidheshvar 1871 9 B.H.C 413.
donation by a certain Kallianji Shivji. On this basis, a claim for damages was made. Although the Munsiff had held that there had been infringement of the right of the representative, the Assistant Judge held that the group had broken their own pot and not the pot of the representative and therefore there was no infringement. The High Court held that the representative’s right was infringed as it was an established right but he was not entitled to damages for the loss of the donation.

It is interesting to note that the claim for damages had to be tied to the infringement of a right but proof of such infringement did not allow for damages to be claimed as damages could not be awarded for a claim on the ground that it was not a consequence of the infringement. Therefore the dispute was not really resolved but rights that were based on the test of custom were introduced. However the matter was settled on the question of damages. There was no attempt to interpret whether the actions narrated in the case were essential practices or whether such practices could be derived from any particular sources. To put it succinctly the court did not seem to be concerned whether such an action could be religious legally. There is no effort by the court to go into the history of the temple.

The abovementioned decisions were considerably different from a Privy Council decision in 1946 on the rights of the Vadagalais and the Tengalais whose dispute we have already discussed at considerable length. In this case the question was the regulation of the rituals of the Vadagalai and Tengalai groups in a group of temples. Worship began with the invocation to the saint and the recitation of five stanzas (four stanzas being in common between the Vadagalais and the Tengalais). The dispute arose on the final verses to be said, the Vadagalais and the Tengalais wanting their own verse to be recited. The court records the history of the Vadagalais and the Tengalais as the Vadagalais being of the Northern cult (the

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103 Thiruvénkata Ramanuja v Venkatacharlu 1947 1 MLJ 159 (PC).
followers of Vedanta Desikar) and the Tengalais being from the Southern cult (the followers of Manavala Mahamuni). It also describes the head of the temples as Pedda Jiyangar who is a Tengalai who may be described as the high priest being assisted in the performance of his duties by a Chinna Jiyangar, several assistants called adhyapakas and acharya-purushas. Along with the **general body of worshippers**, they constitute the Adhyapaka Gosha or congregation. The extent and nature of the Pedda Jiyanger’s rights had to be decided. In order to ascertain this, the court went into the history of the dispute (this has been described earlier in the chapter) and gave the decision in favour of the Tengalais on the ground that they had established the right to use the manthram and the Vadagalais could not interfere with the Tengalai ritual in the worship in these temples.

The difference between this case and the Bombay High Court decision of 1871 is the manner of investigation. The court in the case of the Vadagalais and the Tengalais made an inquiry into “doctrine”. It tried to ascertain the “doctrines” of the Vadagalais and the Tengalais as groups in a manner akin to the difference in doctrines between Protestants and Catholics. This is apparent in the manner in which temples are characterised according to patron saints i.e. temples propitiating Vedanta Desikar are Vadagalai and temples propitiating Manavala Mahamuni are Tengalai. It then sought to see the actions of these groups as being differences in “doctrine” using tests of established custom (a description of these tests have already been provided in Chapter Two).

Why has the court perceived the different actions of the two groups as differences in “doctrine” whereas a century ago it would not have done so? I would like to suggest that the presence of the **conditions** that generate the legal category of the religious place are also the **conditions** that generate the application of doctrine in this case.  

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104 This is further indicated by a decree passed by the Sudder Court in 1853 (Decree dated 15th October 1853 in *Rulings of the Court of Sudder Udulat contained in the decisions passed by them during the years 1850-57*).
dedication to God is something that is already proved, the existence of the idol in the temple being considered legitimate. The interpretation and performance of rituals are attributed to an authority or a hierarchy of authorities i.e. the dictates of the patron saint interpreted and performed by the Pedda Jiyangar and assisted by the Chinna Jiyangar. Such individuals form part of the general body of worshippers or the public which allow them to make their claim that right ritual should be followed. Their claim is not based on it being a private temple, the basis for such claims being different as being a founder or stakeholder in the temple. These conditions were not visible at earlier points in time so they do not appear in the earlier two cases which let such cases be decided in a different manner more akin to civil disputes.

However it was not the case that such conditions were capable of application in a consistent manner. We have seen the number of problems that the British had in regulating the temple. However some form of regulatory framework could be achieved on the basis of making the idol a juristic entity. However when such a framework was not possible it led to quandaries over certain kinds of places. For instance could mathas and dargahs be considered places of worship? This caused a great deal of anxiety which exists till today, the issue of whether mathas should be regulated by the religious endowments enactments being a topic of much discussion. In a Privy Council case it was held that the head of a religious institution is not a “trustee” in the English sense, and the property vests in the deity installed in the institution. The mahant is answerable only for maladministration of the funds but otherwise he has ample discretion in applying the funds in accordance with the usage of the particular

wherein the question of whether the Vadagalai Vaishnavas could build a temple for publicly worshipping their saint within the area within which the Tengala sect carried processions arose. The court did not bother to ascertain the differences in doctrine but decided the question on the basis that this was an invasion of privileges.

One of the reasons for the Karnataka Hindu Religious Endowments Act, 1997 being struck down was its inapplicability to mathas.

Supra n, 169 cited as I.L.R. 44 Madras 831 (This is quoted in Opinion of Rai Bahadur D.N.Choudhury in Dr.Gaur’s Bill).
institution. In debating whether mathas should be part of the regulatory framework governing Hindu endowments\(^{107}\), it was suggested that in the case of mathas, it must be left to the disciples to take action for mismanagement. In *Vidya Varuthi Thirtha v Balusami Ayyar and Others*\(^{108}\) the position on the mathadipathi was laid down:

\[\ldots\ldots where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of math were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage\ldots\ldots.\]

Called by whatever name he is only the manager and custodian of the idol or the institution\ldots\ldots. In no case was the property conveyed to or vested in him, nor is he a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration.

Questions arise in this context. What happens if the matha does not have an idol installed? The problem that courts face is that mathas do not appear to be completely religious, they also appear to be schools of philosophy. Such activities were not seen as idolatrous as they may or may not have reflected actions of everyday life and were not traceable to an ultimate source. One is thus not able to construct the web of authorities that one is able to do in a temple. The peculiar position of the mathadhipathi is that he is liable for maladministration but does not have to render accounts.

Such quandaries were also displayed in the regulation of dargahs. In concerns about the corruption in the Ajmer dargah a comment was made about the inherently corrupt nature of the committee set up to govern it.

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\(^{107}\) Opinion of Justice Kumarswami Sastri on Dr Gaur’s Bill.

\(^{108}\) Supra n. 169.
...the revenue of the Dargah is not duly realised, that its expenditure has been for many years extravagant and ill directed and that it is now heavily in debt

........It represents rival and quarrelsome factions and the result is that each party nullifies the action of the other. No definite system is followed in the distribution of the endowment among the objects of the trust or in the management of the estate.\(^\text{109}\)

How does one regulate the Dargah? In a proposal to reform the management of the Dargah\(^\text{110}\) it was envisaged that the proportions in which the objects of the trust are to be distributed should be fixed. These objects involved the expenses of the Urs, food to the poor, expenses on lights and flowers, stipends to people, expenses on visitors and travellers, and all matters of charity. The nature of the allotments were also finalised such as 1/10 for the Urs, 1/7 for stipends, 1/10 for building etc. This was important as the various sanads for the Dargah issued by Mughal emperors did not specify the objects, let alone the proportion and merely made the land grant.

Why was there such a need for this allotment? It appears unclear as who is responsible for the fulfilment of these objects. This is apparent in the constitution of the committee that was considered corrupt. The committee\(^\text{111}\) has seven members who represented people who were interested in the dargah i.e. a representative of the Sajjada Nashin, a representative of the khadims\(^\text{112}\) and five representatives of the independent Muslims in Ajmer.

A comment about the nature of the mismanagement reveals its causes:

\(^\text{109}\) Letter dated February 14, 1885 from the Chief Commissioner, Ajmer Merwara to the Secretary to the Government of India, Foreign Department. Foreign and Political Internal. 1885 (May). File 410/22.


\(^\text{111}\) Foreign and Political Department, Internal – A. 1929. File No 52-1.

\(^\text{112}\) These were priestly attendants who managed the dargah in the context of day to day affairs and rituals.
much of the mismanagement characterised the affairs of the Durgah is proved to be due to the want of a well organised scheme setting forth clearly the position of the Mutavalli and his relation to the Committee.

The disparate nature of the authorities concerned led to questions on the fair distribution of this allotment when a separate enactment governing the Dargah was proposed:

.......this amendment will cause not only great hardship to a vast number of khadims who have been getting a small share from this income for several generations past.......the offerings which are made at the shrine are distributed between the diwan, the mutavalli and the khadims. I know that the diwan would not mind because he gets half .......but the other half..............is distributed between the khadims.......and a number of people which includes widows and orphans.

Whereas in this case the matter was resolved by consulting Islamic law on this question by taking an opinion from the ulemas as to the role of the mutavalli and his position under the shariat, it is noteworthy to see that this question did not even arise in the Mughal period. There is an assumption within these discussions that the dargah constitutes a wakf but no efforts to bring it under any of the wakf enactments were made. I would like to suggest that the reason for this was the ambivalent nature of the dargah itself and the inability to make any of the conditions that constituted the legal category of religion applicable with any level of coherence.

Such conditions are generated by the theoretical framework and its concepts and themes such as charity and equity that allow for a particular legal framework to be take shape. However its basic structure in the context of a source, its interpretation and availability of such


114 Raza Ghazanfar, in the Extract from the Council of State Debates in Home Judicial. 1938. Legislative Dept File No 144-11/36-(C&amp;G ) File No. 28/31

115 An alternative suggestion that has been made is the importance that the Dargah had amongst Muslims. This is an ironic remark as the discussions around the Dargah clearly mention the lack of interest in it by the ‘Muhammadan public’
interpretation forms the compulsion for the dynamic of theologisation to operate. Whereas the operation of such a dynamic of theologisation only began in the nineteenth century with the introduction of the tests of custom, such theologisation actively sought to establish doctrine. The manner in which such establishment of “doctrine” took place was particular to the legal category generated in the context of the theoretical framework for such a category.

An illustration of such compulsion in the form of its basic structure is the Ananda Tandava dance cases which we have already discussed. In this particular case the Ananda Margas were considered part of the Hindu religion. The writings of the founder of the Ananda Marga are essentially founded upon the essence of the Hindu philosophy, (indicating a source). In interpreting the tenets of Hindu philosophy the authority for interpretation was the founder Anand Murthiji. In upholding the tenets or rather “doctrines” of the sect the High Court states that such practices in the form of the Tandava dance are essential practices. In doing so it also states that such practices do not have to be accepted by the entire Hindu community allowing for differences in doctrine and the responsibility of each individual believer (the availability of interpretation) to arrive at his own interpretation of the truth.

**Conclusion**

We now come to the end of the argument and it becomes desirable to summarise one’s findings. We have begun with the problem of the legal regulation of religion wherein we have found out that religion is unintelligible within law i.e. it is impossible for courts to identify coherently what religion is. We see that the problem is more marked in institutions which are considered syncretic in nature i.e. both Hindu and Muslim.

In order to resolve the problem we undertake an archaeology of legal discourse. In doing so we interrogate the standard narrative of religion fading away and the secular coming into being as a transition that necessarily describes all societies and law’s role in such a transition.
We discover that process of codification which has been described as secular by legal historians is intrinsically connected with religion. This process is theologisation and seeks to bring about the existence of ‘religion’ as the West understands it. Such a process involves idolatry as a concept. In further interrogating the narrative of secularisation across societies, we learn that it takes a different turn in the context of descriptions of Islam i.e. the inability of Islam to secularise. We attempt to answer the question as to what is Islamic law and what is the nature of Indian Islam. We then describe the process of Islamicisation.

In understanding how the process of theologisation works and its elements, we interrogate the place of worship as a legal category and find that charity as a theme allows the formation of such a category. We discover that that there are three main components to this process i.e. which is dedication to God, an authority to interpret God’s purposes and the public and the private. We find out that at a conceptual level, the notions of God and authority have some resonance in the case of the wakf and that the public and the private although resisted as a conceptual framework is eventually accepted as an element of the category of the place of worship. In the case of the Hindu endowment we discover that the Semitic perception of pagans transforms a tradition into a religion. Idolatry is central to this transformation which makes beliefs and practices of the heathens into an inferior and erring variant of the Semitic religions.

In understanding the genealogy of the category of the place of worship we realise that these conceptual components are absent in the early colonial period and only begin to appear in the later colonial period. Thus the religious and the secular as legal concepts are not preoccupations. I argue that this is necessary for the court to determine “the doctrines” of a religion. However such conditions could not be brought about in certain cases such as that of dargahs and mathas. In understanding how theologisation seeks to establish doctrine I
identify the compulsion behind such establishment in the form of a basic structure consisting of a source, authority, and interpretation by each individual believer.