CHAPTER VI
MINORITIES IN THE INDIAN CONTEXT:
EXPERIENCES AND CONTESTATIONS

6.1 BRIEF INTRODUCTION

It can be said that each culture, society and nation in the world finds different ways and means to deal with issues that they must confront during the long period of their historical evolution. These differentiated responses are to a large extent the result of the peculiar social, cultural, political and economic contexts of these diverse societies. They are also driven by the fact that different societies promote and inculcate different values in their constituents. These differentiated responses, in many ways, can be equated to diverse conceptualizations of a concept that may be otherwise global in its presence and influence. For instance, as we have seen in the previous chapter, an individual centric and uniformity seeking ‘western’ conceptualization of cosmopolitanism is contrasted by the conceptualization of cosmopolitanism as a ‘rooted cosmopolitanism’ which derives its inspiration from a seemingly ‘non-western’ background.

In much the same way, while looking to find one such ‘differentiated’ response to the debate between minority rights and cosmopolitanism, one

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may look to the Indian experience in relation to this phenomenon. The present chapter aims to do precisely this.

While examining the present Indian scenario with regard to minority rights, the first port of call in such a journey would undoubtedly be the Indian Constitution. However, to merely appreciate the text of the Constitution would be an incomplete exercise in as much as it would be ignoring the rich historical and political context that gave birth to it, both during the years of the British Raj leading all the way up to Indian independence and the detailed deliberations in the Constituent Assembly that was given the mandate to draw up the Indian Constitution. The present chapter therefore aims to study the aforesaid broad historical background within which the Constitution was drafted. The treatment of various forms of minority identity, based on the factors of language, religion, indigenous origin and caste under the Constitution have also been elaborated upon. The chapter also studies the contemporary Indian scenario as regards the above markers of identity, and examines certain relevant issues that concern the same.

The present chapter may be begun by examining at first, the prevalence of diversity in ancient and medieval India and the historical scenario that subsequently played out in the British Raj leading all the way up to Indian independence.
DIVERSITY IN ANCIENT AND MEDIEVAL INDIA

Diversity, as represented in the existence of various groups, has a long history in the Indian sub-continent. Taking the example of religion, aside from Hinduism which is said to predate recorded history itself, there is recorded evidence of the existence of significant Christian settlements in the 2nd Century A.D. and of Jewish settlements in the 5th century A.D. Islam also has been present in India since the 8th Century A.D. The ancient landscape with regards to languages was also similarly diverse. For example, aside from Vedic Sanskrit and its various offshoots which formed a part of the Indo-European family of languages and were dominant in the northern region of ancient India, the Dravidian family of languages usually identified with Tamil, was dominant in the southern region.

Therefore it can be said that diversity, and the seeming tolerance that makes it possible, has been an integral part of the idea of India since ancient times. Even with the coming of the Mughal Empire in the 15th century, this situation did not change dramatically in as much as the Mughal Empire was characterized by a high degree of religious tolerance, particularly during the reign of its most powerful Emperor Akbar. In fact, the decline of Mughal power in India is said to have begun when this policy of tolerance was

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reversed during the rule of the Mughal Emperor Aurangzeb in the late 16th and early 17th centuries. His prejudiced outlook and behavior ensured that immediately after his death, widespread revolts broke out against the Mughal Empire led by the Sikhs, the Rajputs and the Marathas, precipitating its rapid decline into eventual irrelevance.

Therefore, the aspect of Indian society having been comprised of various diverse social groups throughout its long history is not really in doubt. However, there is a divergence of views on as to what level of influence these historical experiences, particularly those of ancient India, have contributed to the idea of the modern Indian state. The somewhat widely accepted view seems to be that while it would be safe to assume that contemporary India is not completely modelled on the norms, values and institutions of ancient India, a not-insignificant level of influence is nonetheless palpable.

### 6.3 GROUP IDENTITIES IN THE BRITISH RAJ AND THE YEARS LEADING UPTO INDIAN INDEPENDENCE

For the purpose of the present sub-chapter, while keeping the aforesaid statement in mind, the focus may now be shifted to the period of Indian history that was marked by the arrival of the British in India. This is for the
reason that it was under colonial rule that the contours of the present nation of India as a united political entity first started taking shape.\textsuperscript{838} Till the coming of the British colonial rule, starting from the 18\textsuperscript{th} century, though there seems to be the existence of a common culture, the ancient land-mass that correlates to the modern state of India was divided into numerous kingdoms and there was no singular and united nation-state of India.\textsuperscript{839} Thus the modern nation of India as we know it began to take political and institutional shape during the colonial period. A large part of the present legal and political processes and ideas that power the nation can therefore be better understood by examining their treatment within, and by sourcing their origin to, British India. For the purpose of the present study also, it is therefore important to examine in some detail the broad contours of the legal and political philosophy that shaped the treatment of diversity in the structures and institutions of British India.

It has been noted that the British in colonial India implemented a general law applicable to all the territories under their control, which bore striking resemblance to the system of common law and was also similarly implemented through a system of state established and funded courts.\textsuperscript{840} Even though over the years this resemblance to the common law began to taken on a level of similarity at the level of the substantive content of the law

\textsuperscript{839} Daud Ali, Ancient India 4 (2003).
as well, the British reserved certain areas of the law to be ordered as per the religious edicts of particular communities, which can be termed as ‘personal laws’.  

What was the reason behind such a reservation for personal laws? There is of course the ready answer that the same was done in furtherance of the political goals of the British colonial rulers. However, such an answer, the issue of historical veracity aside, holds no relevance for the purpose of the present research for it is not really in dispute that British colonial rule was synonymous with economic exploitation, and that it was politically despotic and repressive. What is required on the other hand, is an examination as to whether this move by the British was part of a wider normative push which might lead to parallels with the debate between cosmopolitanism and minority rights, regardless of the larger motive at play. For an answer to this important question, attention may now be turned to the seminal article in this regard written by the husband-wife duo of Lloyd Rudolph and Susanne Rudolph.

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841 Id. at 272.
(i) ‘Legal Pluralism’ and ‘Cultural Federalism’

The Rudolphs at the very outset coin the terms ‘legal pluralism’ and ‘Cultural federalism’. Pluralism is defined by them as:

“…a norm and the strategy of those who favor dividing, limiting and sharing sovereignty in federal and pluralist states that allow for diversified geographically and culturally defined communities.”

Cultural federalism, they define as:

“…a term we have coined to suggest that India has dealt with diversity in ways that recognize legal identities on the basis of cultural as well as territorial boundaries.”

They attempt to discern as to why the British sought to implement this policy of cultural federalism and legal pluralism while ruling India, and seek to explore the ramifications of this policy that continue to linger on to this very day.

(ii) Divide and Rule?

This question as to the reasons for the implementation of the aforesaid policy does have significance in as much the British colonial rule was brought about and subsequently sustained through the use of brute force and therefore there seemed to be no need to ‘pander’ to local sentiments by implementing

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845 Id. at 38.
846 Id. at 38.
such policies. Though the usual motive ascribed to the British in implementing this policy has been to ‘divide and rule’ Indian society,\(^{848}\) however it has been noted by many scholars that such an assessment is not entirely correct.

There is an increasingly common view that the British policies in this regard, though they might have had the ultimate effect of sowing disunity in Indian society, did so more out of ignorance rather than any calculated design and that they, in fact, at best only aggravated already prevalent tensions.\(^{849}\) P. Hardy for instance visualizes the policy of the British in colonial India as being tailored towards keeping the religious passions in India at as low a level as possible, with a view to using this status quo to their advantage by acting as the neutral and impartial umpire between Muslims and Hindus.\(^{850}\) He calls this a policy of ‘balance and rule’.\(^{851}\) The Rudolphs are also supportive of this view to the extent that they state that there was no overarching ‘divide and rule’ motive at play in the colonial hand-book. They, on the other hand, posit two other driving forces which were responsible for the emphasis on legal pluralism by the British in the early days of colonial rule.

*Firstly,* in the point of time that the British first started to colonialize India the world-view of its officers was greatly shaped by the prevailing attitude

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\(^{848}\) N. JAYAPALAN, SOCIAL AND CULTURAL HISTORY OF INDIA SINCE 1556 72 (2000).
\(^{850}\) P. HARDY, THE MUSLIMS OF BRITISH INDIA 89 (1972).
\(^{851}\) Id. at 89.
of the day regarding world history and the treatment of civilizations. What this meant was that in implementing a policy of legal pluralism, they viewed the Hindu majority community and the large minority community of Muslims as different civilizations, say as diverse as Greece and Rome. Thus, not only was the otherwise heterogonous and class and caste ridden Hindu community seen as one homogenous culture, the same viewpoint was applied to the similarly fragmented Muslim community with the result that these two manufactured ‘mega communities’ were then dealt with differently on the basis of certain presumed immutable socio-religious and political characteristics.

Secondly, there was a sense amongst the top-ranking British officers of the time that they were, and therefore ought to behave as, local overlords or rulers. This view seems to be supported by historical research that brings forth the importance of local rulers in the colonial scheme of things in as much as the British, wherever possible, attempted to ensure the continuance in office of the incumbent local ruler, though under their indirect rule. There can also be said to be a historical and theological basis for such an approach possibly having been adopted by the British, in as much as it said that a foreign ruler is perceived as just and receives praise and approbation

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852 Rudolph and Rudolph, supra note44 at 39.
853 Id. at 39.
854 Id. at 39.
for allowing his subjects to live under their local laws and customs. This notion of being local satraps contributed to the British outlook of what structures of administration should be put in place. While putting in place these structures, they sought to derive inspiration from the existing ground reality leading to the ultimate result of replicating, to a large extent, the existing laws of the people that were so sought to be governed. These existing laws were, as is evident, already categorized in their application on the basis of religious identity. This fact of the differential personal laws having been in place much before the British entered onto the scene has been noted by contemporary personal law scholars in India as well.

(iii) The Hasting’s era and the reversal under Bentinck and Macaulay

To further buttress this point, the Rudolphins note the policy followed by Warren Hasting, by means of which each community was controlled by its own unique laws and customs. They mention the memorandum in this regard issued by Hastings, which seems to be a reference to Bengal regulation of 1780, which ordered that in all cases regarding personal matters such as marriage and inheritance, and relating to religious practices, the laws of the Shastras with regard to the Hindu community and the laws of the Koran with respect to the Muslim community would be adhered to.

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857 Rudolph and Rudolph, supra note844 at 39.
858 K. B. AGRAWAL, FAMILY LAW IN INDIA 38 (2010).
859 Rudolph and Rudolph, supra note844 at 39.
860 STANDISH GROVE GRADY, A MANUAL OF HINDU LAW 16 (2010).
861 Id. at 16.
This was of course preceded by almost a decade by the ‘Warren Hasting’s plan of 1772’ which was categorical in its formulation of the Hindu community and the Muslim community in British India being governed by their own personal laws.\textsuperscript{862}

At this early stage of the British colonial rule, the concept of group differentiated laws and rights held sway. However, this omnipresent trend gradually started to see a reversal, a process which can be pin-pointed to the arrival in 1828 of the Governor General William Bentinck who was a precursor for many more British officials sharing his liberal and utilitarian outlook who were to follow.\textsuperscript{863} The period of Bentinck’s administration has been remarked by scholars as being a time when the ideals and values of early British liberalism began to have an effect on India.\textsuperscript{864} With Bentinck wanting to improve conditions in India through the use of these principles\textsuperscript{865}, these liberal values soon began to become a part of the firmament of British rule in the country and axiomatically started competing with earlier conceptions of an India defined by the groups that constituted it rather than by individuals. Bentinck, and after him Thomas Macaulay, attempted to save Indians from what they perceived as backward and debilitating associations with societal groups centered around family, caste and religious community and to solidify the independence and power of the individual as opposed to


\textsuperscript{863} Rudolph and Rudolph, \textit{supra} note\textsuperscript{844} at 41.


\textsuperscript{865} \textit{Id}. at 234.
the power of the collectivities that he or she was beholden to.\textsuperscript{866} This line of thought was only strengthened with the arrival of Governor General Dalhousie who brought into operation a policy of implementing uniform rules and treatment to all of the Indian subjects of the British Empire.\textsuperscript{867}

It may be noted however that this trend did not just have relatively ‘genial’ colonial personalities supporting it. Individualism and legal universalism also had controversial and not so charitable adherents, for instance as exemplified by Thomas Macaulay. Macaulay’s desire was to inculcate western ideals and learning into Indian thought and action in order to help elevate the extremely poor local civilizational content that India had to offer.\textsuperscript{868} Macaulay was therefore all for the refinement of the Indian populace by the over-arching application of British values, language and method of education. He has been quoted as saying in this regard:

\begin{quote}
“We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and color, but English in taste, in opinions, in morals, and in intellect. To that class we may leave it to refine the vernacular dialects of the country, to enrich those dialects with terms of science borrowed from the Western nomenclature, and to render them by degrees fit vehicles for conveying knowledge to the great mass of the population.”\textsuperscript{869}
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\textsuperscript{866} Rudolph and Rudolph, supra note844 at 41.
\textsuperscript{867} Id. at 41.
\textsuperscript{868} Id. at 41.
\textsuperscript{869} ALANA LENTIN, RACISM AND ETHNIC DISCRIMINATION 23 (2011).
Macaulay, who was self-confessedly unable to comprehend either Sanskrit or Arabic,\textsuperscript{870} even went on to make an eviscerating proclamation belittling the native knowledge and literature of India, in the following words:

“I have conversed both here and at home with men distinguished by their proficiency in the Eastern tongues. .... I have never found one among them who could deny that a single shelf of a good European library was worth the whole native literature of India and Arabia.”\textsuperscript{871}

This new policy didn’t just find expression in mere political discourse or administrative strategies but was also actively propounded thorough legislative acts.\textsuperscript{872} Most of these legislative interventions were aimed at emancipating the individual through various mechanisms. For example, making rights independent of the joint family which was otherwise the customary holder of property or ensuring that converts would not lose their identity as Hindus thus being able to continue to have a right in the property of the joint family.\textsuperscript{873} It has been noted that this tension between individual rights and the interests of the joint family had even otherwise been an arena of vigorous contestations resulting in much litigation.\textsuperscript{874} Women’s rights also received an upshot under this new push for liberal values in as much as widow remarriage was permitted and the rights of upper caste women in particular were given predominance over traditional expectations of them

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\footnote{Rudolph and Rudolph, \textit{supra} note844 at 41.}
\footnote{Viv Ellis, \textit{English as a Subject, in THE ROUTLEDGE COMPANION TO ENGLISH STUDIES}, 4 (Constant Leung & Brian V. Street eds., 2014).}
\footnote{Rudolph and Rudolph, \textit{supra} note844 at 41.}
\footnote{\textit{Id.} at 41.}
\footnote{WERNER MENSKI, MODERN INDIAN FAMILY LAW 330 (2013).}
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from the conservative society. Other scholars, though not fully convinced of the liberalizing effects of colonial rule on the plight of women, have nonetheless opined that the universalizing language of the law in the colonial period offered a new framework within which the debate regarding property rights could be held and helped raise questions about women’s rights and male control over property.

(iv) The scenario after the First War of Independence

However, this trend towards a universalistic and British inspired system slowly began to unravel. There was a proclamation by the Governor General in 1849 which seemed to stress on the non-interfere with religious practices by the colonial authority in the following words:

“The British Government will leave to all the people whether Mussalman, Hindoo, or Sikh, the free exercise of their own religion, but it will not permit any man to interfere with other in the observance of such forms and customs as their respective religions may enjoin or permit.”

The most significant setback occurred however with the first war of independence in 1857. The revolt was the immediate result of the usage of greased cartridges which the Hindu and Muslim sepoys thought were laced

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875 Rudolph and Rudolph, *supra* note844 at 41.
with cow and pig fat. This was the final straw in what the sepoys had generally viewed as an overt British scheme to conspire against their religion and caste, though of course there were political and economic causes for the revolt as well. The revolt resulted in Queen Victoria’s 1858 proclamation that sought to reverse the policy of legal universalism that had been begun to become dominant and instead, once again began to pay heed to the interests and aspirations of the groups that constituted the Indian populace. This increased heed naturally resulted in the British authorities reverting to the non-interventionist plank, albeit not as vehemently as at the beginning.

Another development during this period may be taken note of. It had been the system of judicial administration in colonial India that the personal laws of Hindus and Muslims were administered by Judges in the regular courts who were well versed in the common law. However, these Judges had attached to them local persons with expertise and knowledge of these personal laws, to advise them on the questions of Hindu and Muslim law respectively. However, from 1860 onwards, a radical shift in approach was implemented in as much as the posts of the local religious experts were abolished and the task of ascertaining and applying the law became the exclusive preserve of the judges. This ‘reductive’ process of enumerating

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878 SEKHARA BANDYOPADHYAYA, FROM PLASSEY TO PARTITION: A HISTORY OF MODERN INDIA 170 (2004).
879 Id. at 170.
880 Rudolph and Rudolph, supra note844 at 42.
881 Id. at 42.
882 Galanter and Krishnan, supra note840 at 272.
883 Id. at 272.
884 Id. at 272.
these complex customs and traditions into sterilized texts was further accentuated by means of a constant pruning through the application of the principles of common law and made relatively inelastic by the usage of the common law principle of precedent.\textsuperscript{885} It has been said that this ultimately resulted in the evolution of wholly separate bodies of Hindu and Muslim law in colonial India.\textsuperscript{886}

(v) Group identity in the years leading upto Independence

The years leading upto Indian independence were marked by a new period in the arena of group rights, in as much as the focus now shifted to reserved seats and separate electorates. The foremost proponent of such a conceptualization of group rights was Syed Ahmad Khan who thought that the divisions within Indian society, particularly religious divisions, were too well entrenched and serious enough to be simply brushed under the carpet through use of the nationalistic rhetoric.\textsuperscript{887} Therefore, in order to protect the interests of the minority groups, he was of the view that certain safeguards such as reserved seats and separate electorates were required in order to ensure the balance of power amongst different sections of society. In the absence of these special safeguards, Khan was of the opinion that in any future government the Hindu majority would dominate the minority Muslims and not uphold their interests.\textsuperscript{888}

\textsuperscript{885} Id. at 273.
\textsuperscript{886} Id. at 273.
\textsuperscript{887} Rudolph and Rudolph, supra note844 at 44.
\textsuperscript{888} INDIAN GOVERNMENT AND POLITICS, 44 (Hoveyda Abbas, Ranjay Kumar, & Mohammed Aftab Alam eds., 2011).
The three fundamental precepts of the political identity of the Muslim community as existed during this period of time have been identified as, that: (i) The Muslim community constituted a distinct nation in itself; (ii) Muslims would be a perpetual minority under British colonial rule; (iii) The Hindu community had left the Muslims far behind in recent years and that the Hindu community enjoyed the relative approval and support of the British. 889

It can be seen that Syed Ahmad Khan's purported panacea for the ills of the Muslim community in the form of group-specific reservations was enthusiastically adopted by other communities as well. In pre-independence India, the adoption of communal reservations was the preferred way to safeguard group-identities within a framework of universalistic majority rule. 890 Moving on from establishing enclaves of personal law, this principle took on a political face as Indians were gradually given entry into the administrative structures of local governments in the early 19th century. 891 It is said that the fountain-head for such a policy of communal reservations was the development of organized movements, particularly in southern India, that attempted to challenge the disproportionate influence of the Brahmin upper castes who constituted a miniscule percentage of the population in the concerned areas but dominated the positions in civil service and related important professions in the colonial period. 892

890 Rudolph and Rudolph, supra note844 at 45.
891 Id. at 45.
Just as Indian society could be said to have been divided into various groups or classes, the British therefore decided to mirror such divisions and proportional representation in the political and administrative units of the colonial state.\textsuperscript{893} These groups or classes were varied and based on various socio-economic and political factors, and included for example the land-owning class, and eventually minority religious groups.\textsuperscript{894} In southern India, the anti-Brahmin sentiment ensured that caste identity was the primary battleground in the political and administrative units of the colonial state as opposed to religious identity. The British accordingly introduced reservations in south India for the lower castes into the legislature, government jobs, and schools and colleges starting in the early twentieth century.\textsuperscript{895}

The notion of group identity was given even more prominence in the days before independence by providing religious groups with separate electorates and reserved seats.\textsuperscript{896} Religious identity therefore became the benchmark for identification and representation which in turn lead to the privileging of this identity to the detriment of all other factors, like economic status and caste.\textsuperscript{897} It has however been noted that such a policy was aimed at ensuring a balance in terms of communal representation in government jobs, and later in the political sphere, rather than as a tool for social empowerment aimed at

\begin{footnotes}
\item\textsuperscript{893} Rudolph and Rudolph, supra note844 at 45.
\item\textsuperscript{894} \textit{Id.} at 45.
\item\textsuperscript{895} \textit{Id.} at 45.
\item\textsuperscript{896} \textit{Id.} at 46.
\item\textsuperscript{897} \textit{Id.} at 46.
\end{footnotes}
eliminating socio-economic inequalities. Such an approach also presumed and gave a veneer of sanctity to the discourse that saw religious groups as a distinct homogenous whole. These measures were first institutionalized in the Morley-Minto constitutional reforms of 1909, and continued in the Montagu-Chelmsford reforms of 1919 and in the Government of India Act of 1935. Though the Indian National Congress stoically opposed such reserved and communal electorates, the British insisted on this idea. Such an insistence, it has been suggested, was not only due to a desire to gain favor with the Muslim community but also, more significantly, to chip away at the political power of the Indian National Congress.

Such an approach was therefore obviously viewed with increasing suspicion by the proponents of the struggle for independence who saw such a tactic as a purely political ploy played out with an intention to divide and rule. Despite this suspicion, the demand for group safeguards and representation spread even further to other categories, such as the Scheduled Castes. The nationalistic suspicion for group rights notwithstanding, with the passage of time this idea slowly began to make its presence felt in the deliberations of the major political entities that drove the struggle for independence. A rule was adopted in the Congress party’s constitution in the Lucknow pact.

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899 Rudolph and Rudolph, supra note 844 at 46.
900 Vrinda Narain, Reclaiming the Nation: Muslim Women and the Law in India 52 (2008).
901 Id. at 52.
902 Rudolph and Rudolph, supra note 844 at 46.
903 Id. at 46.
904 Id. at 46.
of 1916 which provided that if three-fourths of the minority community, i.e. Muslim members, opposed a policy deemed to affect their interests, the policy could not go forward, thereby recognizing certain limits on the power of the majority. The decision led to a relative period of harmony between the Indian National Congress and the Muslim League.

6.4 THE CREATION OF THE CONSTITUENT ASSEMBLY AND THE DRAFTING OF THE INDIAN CONSTITUTION

However, this period of bonhomie soon ended. A serious rift began to emerge after the passing of the Government of India Act of 1935, with the Indian National Congress managing handsome results at the hustings when elections were held to the provincial assemblies. The Muslim League however performed disappointingly and had to contend with the ignominy of not being invited to share power, though a few of its members were invited to be a part of the government on an individual basis. With the coming of the Second World War and the British decision to involve India in it, protests broke out leading to a spate of resignations from Congress ministers and the launch of the Quit India movement of 1942 by Gandhi. Though the changing political climate in British accelerated the process towards Indian independence, it was matched by the Muslim League’s increasing penchant

905 Id. at 46.
906 YOUNG, supra note889 at 296.
908 Id. at 141.
909 Id. at 141.
for a separate and distinct Muslim nation to be carved out from within undivided India.\footnote{Id. at 141.}

Capping the rapid movement towards freedom from colonial rule, the British Cabinet Mission to India arrived in February, 1946 in order to seek out a viable methodology for self-determination and independence.\footnote{JOHN F. RIDDICK, THE HISTORY OF BRITISH INDIA: A CHRONOLOGY 117 (2006).} Though no concrete resolution could be achieved, the visit of the Cabinet Mission eventually led to the finalization of a plan to set up an Interim Government and for the constitution of a Constituent Assembly.\footnote{Sumit Ganguly, Explaining India’s transition to Democracy, in TRANSITIONS TO DEMOCRACY, 226 (Lisa Anderson ed., 1999).} The task of the Constituent Assembly was to draft a constitution for a soon to be realized independent India.\footnote{Id. at 227.}

The process of deliberation on the Constitution was set in motion with the holding of elections to the Constituent Assembly in July of 1946, when there was still a modicum of support for it from both the Congress and the Muslim League.\footnote{SHARNUM TEJANI, INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY, 1890-1950 241 (2008).} Owing to its remarkable success in the provincial elections held earlier in the year, the Congress managed to gain an over-whelming majority in the Constituent Assembly.\footnote{Id. at 241.} However there soon arose a serious conflict between the Congress and the Muslim League as to how the government that was to set up to temporarily run affairs till the attainment of independence

\footnote{Id. at 141.}
was to be constituted and its positions of responsibility filled up.\textsuperscript{916} With the Muslim League insisting on parity with the Congress, which proposal was rejected by the Congress and subsequently by the British government as well, the precarious sense of co-operation surrounding the Constituent Assembly soon dissolved.\textsuperscript{917} Jinnah soon announced a ‘Direct Action Day’ on 16\textsuperscript{th} August calling on all Indian Muslims to protest.\textsuperscript{918} When these protests were carried out on the designated day, though India as a whole was relatively peaceful, a devastating communal riot tore through Calcutta which led to the loss of thousands of lives.\textsuperscript{919} It is in these circumstances, that the Muslim League reluctantly joined the Interim Government that was formed by Nehru on 2\textsuperscript{nd} September, 1946.\textsuperscript{920} However, in the prevailing atmosphere of distrust between the Muslim League and the Congress it has been said that any decision of the Muslim League to consider being a part of the Constituent Assembly and the Interim Government of India was achieved solely with the motive of ensuring that the Congress would not further entrench itself in the positions of power without any opposition and at the expense of the Muslim League.\textsuperscript{921} Quite understandably, this grudging union between the Congress and the Muslim League led to a complete stalemate in terms of governance.\textsuperscript{922}

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\textsuperscript{917} \textit{Id.} at 478.
\textsuperscript{918} \textit{Id.} at 478.
\textsuperscript{919} \textit{Id.} at 478.
\textsuperscript{920} \textit{Id.} at 480.
\textsuperscript{921} V. P. MENON, \textit{TRANSFER OF POWER IN INDIA} 318 (1997).
\textsuperscript{922} Markovits, \textit{supra} note916 at 480.
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It was in these vexed circumstances that the Constituent Assembly convened its first session on 9\textsuperscript{th} December, 1946.\footnote{BRIJ KISHORE SHARMA, INTRODUCTION TO THE CONSTITUTION OF INDIA 24 (2005).} However, despite having joined the interim government, the Mulish League refused to send its members for the proposed deliberations of the Constituent Assembly.\footnote{Id. at 24.} Though the objective resolution was moved on the same day itself, the Constituent Assembly, in the hope that the representatives of the Muslim League and the princely states would join sooner rather than later, postponed the passing of the resolution all the way till 22\textsuperscript{nd} January, 1947.\footnote{Id. at 24.}

The rift between the Congress and the Muslim League however only deteriorated further instead of there being any improvement, and soon this began to reflect in open conflict between the Hindu and Muslim communities in various provinces of India. With the coming into the picture of Lord Mountbatten, and his clumsy handling of affairs at the political level, undivided India soon became faced with the inevitability of a partition.\footnote{KARL E. MEYER, THE DUST OF EMPIRE: THE RACE FOR MASTERY IN THE ASIAN HEARTLAND 94 (2008).} The ensuing partition, leading to the creation of the two states of India and Pakistan, also came at a shocking human price leading to the displacement of more than 10 million people and a huge death toll, variously estimated between just under 200,000 to upto 1,000,000, with riots sweeping thorough several regions.\footnote{Id. at 95.} These events have been summed up by saying that Independence had come to India in the last days at bewildering speed, in the
midst of feverish activity and accompanied by violence on an unparalleled scale.\textsuperscript{928}

Though the horror of partition led to the widespread migration of those from the Muslim community of erstwhile undivided India to the newly created state of Pakistan, a large chunk of the Muslim population, estimated at about 35 million, opted to stay back in India.\textsuperscript{929} The diversity of the Indian populace continued to remain strong with several religious communities such as Muslims, Sikhs and Christians amongst others sharing territorial, political, economic and cultural space with the majority Hindu community.\textsuperscript{930}

Therefore, in light of this evident religious diversity and other forms of diversity, in the very initial days of the birthing of the Indian state after the throwing off of the colonial yoke, there arose a need to confront a critical issue of determining what being an ‘Indian’ actually meant and required.\textsuperscript{931} This has led to the pertinent observation that the gap between the often romanticized and abstract idea of a common historical identity, and the reality of diversity only seemed to widen.\textsuperscript{932} The onus was thus entirely on the machinery and apparatus of the fledging Indian state to bring these various diverse communities together in an exercise to create a united Indian

\textsuperscript{928} GOPA SABHARWAL, INDIA SINCE 1947: THE INDEPENDENT YEARS 7 (2007).
\textsuperscript{929} THE AFTERMATH OF PARTITION IN SOUTH ASIA, 231 (Gyanesh Kudaisya & Tan Tai Yong eds., 2004).
\textsuperscript{930} YASMIN SAIKIA, FRAGMENTED MEMORIES: STRUGGLING TO BE TAI-AHOM IN INDIA 44 (2004).
\textsuperscript{931} Id. at 44.
\textsuperscript{932} Id. at 44.
polity. Such an exercise was especially difficult in as much as in addition to the immense diversity of languages, regions, religions and cultures, there was also the specter of the rate of literacy of the population at the time of independence being only about 20%.

From the aforesaid elaboration of the political and scenario that prevailed in India in the years leading upto independence, there is an acute awareness of a highly stratified society divided on the lines of religion and caste. Thus, the newly independent state of India was faced with the vexed problem of accommodating these various groups and their demands in the fabric of the new nation while at the same time ensuring the construction of a polity that was based on a uniform marker of ‘Indianness’. With this context in mind, a brief overview of the issues that the Constituent Assembly was faced with can be considered in greater detail.

(i) The issues that confronted the Constituent Assembly

It was thus in this complex socio-political climate that the Constituent Assembly for the newly independent state of India took up the task of drafting a constitution. In furtherance of this aim, the Constituent Assembly elected a drafting committee on 27th August, 1947, which in turn elected Dr. B.R. Ambedkar to be its President. What followed was a long, exhaustive

933 Id. at 44.
935 SHARMA, supra note923 at 24.
and voluminous process of deliberation that would see 7,635 amendments moved to the draft constitution circulated by the drafting committee on 21st February, 1948.\textsuperscript{936} The three stages of ‘reading’ of the Constitution, each accompanied by detailed discussion and deliberation, began on 4th November, 1948 and continued all the way up to 26th November, 1949 on which day it was declared passed.\textsuperscript{937} The Constitution as adopted on that day contained 395 articles and 8 schedules.\textsuperscript{938}

One must also not lose track of the parallel process that was underway at the same time for the integration of the principle states into the newly created Indian union. Begun in the year 1947, the Indian government’s strenuous efforts to integrate the erstwhile British Indian empire’s 554 princely states were finally successfully concluded around the same time that the Constitution was brought into force in the year 1950.\textsuperscript{939} This process of integration has in itself been labeled as an extraordinary achievement in as much the gain in territory and population that India accrued from this process was more than what it had lost as a consequence of partition.\textsuperscript{940}

The broad political contours within which the constitution drafting process took place are well known. For instance, it is widely acknowledged that the paramount concern of the members of the Constituent Assembly was to

\textsuperscript{936} Id. at 24.
\textsuperscript{937} Id. at 25.
\textsuperscript{938} Id. at 25.
\textsuperscript{939} ROBERT W. STERN, DEMOCRACY AND DICTATORSHIP IN SOUTH ASIA: DOMINANT CLASSES AND POLITICAL OUTCOMES IN INDIA, PAKISTAN, AND BANGLADESH 91 (2001).
\textsuperscript{940} Id. at 92.
ensure India’s unity and territorial integrity by means of the proposed constitution.\textsuperscript{941} With partition a fresh and painful memory, they were eager to avoid any possibility of there being any repeat of such an event in the future.\textsuperscript{942} Therefore, the Constitution as a whole provided for a strong center, and instead of a federation or confederation, India became a union.\textsuperscript{943}

However, how did the Constituent Assembly deal with the more specific issues? Did the approach to these issues also reflect this understanding of a ‘Union’? This question is not meant to lead to a minute analysis of each and every deliberation entered into by the Constituent Assembly. It is however a primer towards an examination of the various issues that the Constituent Assembly had to confront as regards the heterogeneity of the Indian populace and the group rights of various distinct communities. The pressing nature of this problem can be best expressed in the following words of Ambedkar:

“As far as the ultimate goal is concerned, I think none of us need have any doubt. Our difficulty is not with regard to the ultimate, our difficulty is with regard to the beginning. Our difficulty is how to make the heterogeneous mass that we have today to take decisions in common and march on the way which leads us to unity.”\textsuperscript{944}

\textsuperscript{941} Meghnad Desai, \textit{The Rediscovery of India} 299 (2009).
\textsuperscript{942} Id. at 299.
\textsuperscript{943} Id. at 299.
However, this difficulty in taking forward this ‘heterogeneous mass’ ultimately seemed to result in a greater sensitivity to the diversity that exemplified every aspect of everyday Indian life. As has been noted, the process of the making of the Indian Constitution was influenced by various factors ranging from:

“India’s own ancient, medieval and modern political ideas and institutions; the legacy of her nationalist struggle; the severe internal stresses and strains immediately before and after independence; to the needs and aspirations of the common man and the spirit of compromise that pervaded the Constituent Assembly.”

These varied contestations lead to the irresistible conclusion that in order to properly analyze the Constitutional provisions with regard to the group rights or minority rights as they exist today, it is but essential that the treatment of the subject in the Constituent Assembly be considered in brief. In this regard, it would be apt to move on to examine the Constituent Assembly Debates in regard to language, tribal rights, religion and caste. It may be said that what is being attempted in the following section is not a minute and day by day account of the debates surrounding the various articles of the Constitution, but only a broad over-view of the relevant themes at play before the Constituent Assembly relating to group rights.

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945 Rabindra Kumar Sethy, Political Crisis and President’s Rule in an Indian State 46 (2003).
(i) The debate concerning language

It has been said that the issue of language was one of the most volatile and thorny issues that the Constituent Assembly had to deal with. This is but natural considering the great linguistic diversity of newly independent India. It is estimated that as of 1947, there were fifteen major and 1,652 minor languages and dialects in India.

In the initial days of the Constituent Assembly, before partition, there was a sense of consent regarding the usage of Hindustani and English during the proceedings, with Hindustani being a product of the merger between Hindi and Urdu. However, over the years preceding independence the languages of Hindi and Urdu had been increasingly bracketed as being representative of the Hindu community and the Muslim community respectively. The result of this categorization was that Urdu and, by extension, Hindustani had to bear the stigma that partition inflicted upon the Muslim community in India. Therefore, once the Constituent Assembly had its sittings post-partition, the earlier support for Hindustani quickly gave way to an insistence on Hindi.

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948 JYOTIRINDRA DASGUPTA, LANGUAGE CONFLICT AND NATIONAL DEVELOPMENT: GROUP POLITICS AND NATIONAL LANGUAGE POLICY IN INDIA 130 (1970).
950 DASGUPTA, supra note948 at 131.
The debate regarding language in the Constituent Assembly primarily centered on the need for a national language. Many of the members of the Constituent Assembly rooted for a national language which would act as a link or a ‘cement’ to hold India together as a united political and territorial entity, and for them the natural choice for such a language was Hindi.\(^\text{951}\)

However such a claim in favor of Hindi was strongly contested by other members of the Constituent Assembly who felt that such a move amounted to the subordination and marginalization of their languages in favor of the Hindi majority.\(^\text{952}\)

Though the debate was a hotly contested one and dragged on for a significant length of time, it soon became obvious that a compromise formula would be required to be thought of if there was to be any chance of the deadlock being resolved. Ultimately, a compromise was arrived at on the basis of a formulation that has become known as the ‘Munshi-Ayyangar formula’\(^\text{953}\). This formula did not provide for a national language.\(^\text{954}\) The broad contours of this formula were as under:

*First*, eschewing the demand for a national language, in its place was substituted the ‘official language’ which was Hindi\(^\text{955}\);
Second, English was also retained as an official language for a period of fifteen years.\textsuperscript{956} However, what would happen at the end of those fifteen years was left undetermined, with the Constitution providing for the establishment of a parliamentary committee to examine the issue in the future\textsuperscript{957};

Third, the major regional languages, 14 in number, were also given space by means of the VIII\textsuperscript{th} schedule and recognized for official use\textsuperscript{958};

Fourth, there was a directive under Article 351 for the development of a syncretic form of Hindi to serve as medium of expression for a diverse India, with particular reference to an existing variant of Hindi namely Hindustani.\textsuperscript{959} It has been noted that this constitutional directive is quite perplexingly worded in as much as the sheer breadth of all that it aims to encapsulate, leaves scope for widely varying understandings as to its exact mandate.\textsuperscript{960} This widely worded clause has therefore been used by the supporters of both Hindi and Hindustani to argue in favor of their respective positions.\textsuperscript{961}

It is said that the final vote on the compromise amendment ‘Munshi-Ayyangar formula’ in the Constituent Assembly exposed the basic fault-lines on the issue.\textsuperscript{962} The case for a multi-lingual compromise solution that would

\begin{itemize}
\item \textsuperscript{956} \textit{Id.} at 21.
\item \textsuperscript{957} Inbal and Lerner, supra note951 at 57.
\item \textsuperscript{958} \textit{Kumar}, supra note955 at 21.
\item \textsuperscript{959} \textit{Id.} at 21.
\item \textsuperscript{960} \textit{Dasgupta}, supra note948 at 138.
\item \textsuperscript{961} \textit{Id.} at 139.
\item \textsuperscript{962} PAUL R. BRASS, THE POLITICS OF INDIA SINCE INDEPENDENCE 164 (1994).
\end{itemize}
accommodate various languages was championed by Nehru himself and he was supported by most of the Congress organization in this regard.\textsuperscript{963} The cause of plurality in language also had the unequivocal support of the representatives who hailed from southern Indian as also the representatives from other states where the majority of the population did not speak Hindi.\textsuperscript{964} As against this formidable grouping, the opposite camp was comprised of the representatives of the Hindi speaking states, for whom the ultimate triumph meant not just the removal of English as the lingua-franca of the nation but also that Hindi would unequivocally take its place.\textsuperscript{965} However, despite the odd protestations, the amendment incorporating the ‘Munshi-Ayyangar formula’ was eventually passed on 14\textsuperscript{th} September, 1949.\textsuperscript{966}

It has been said that the push for Hindi ultimately failed because it was based on a nation of invincibility and entitlement due to the democratic numerical superiority that its adherents enjoyed.\textsuperscript{967} The push for Hindi, it has been remarked, was soon being based on pure majoritarianism and this led to a significant trust deficit with the non-Hindi speaking members of the Constituent Assembly.\textsuperscript{968} The compromise solution was brought about as a result of the resistance offered by these non-Hindi speaking representatives

\textsuperscript{963} Id. at 164.
\textsuperscript{964} Id. at 164.
\textsuperscript{965} Id. at 164.
\textsuperscript{967} ALOK RAI, TRACTS FOR THE TIMES: HINDI NATIONALISM 112 (2001).
\textsuperscript{968} Id. at 112.
to what was otherwise the sheer and over-whelming numerical might of the
pro-Hindi lobby.\footnote{Id. at 112.}

Whatever may have been the various political confabulations and competing
ideologies at play, it is clear that at the end of the day the spirit of compromise
won over. It has been said that the nature of the compromise accepted by the
Constituent Assembly is revealed in the provisions in the Constitution of
India relating to language in as much they are marked by complexity and
ambiguity.\footnote{DASGUPTA, supra note948 at 137.} The compromise solution has been typified as the Constituent
Assembly having found a way to strike a balance between the calls for a
linguistic uniformity based on national identity and the lived reality of Indian
linguistic diversity.\footnote{Inbal and Lerner, supra note951 at 57.} More crucially, it has been noted that this formula also
represented a desire to not unilaterally enforce a decision as to such
fundamental matters of identity.\footnote{Id. at 57.} It has been surmised in this regard as follows, that the Constituent Assembly:

“…preferred to adopt ambivalent formulations which did
not attempt to crystallize a coherent identity and
accommodated the conflicting positions. By adopting a
strategy of deliberate ambiguity, the Constituent
Assembly achieved two things: first, it drafted a
constitution which successfully represented the actual
identity of “the people”: a divided identity. Second, it left
the door open to the slow and gradual emergence of

\footnote{Id. at 112.}  
\footnote{DASGUPTA, supra note948 at 137.}  
\footnote{Inbal and Lerner, supra note951 at 57.}  
\footnote{Id. at 57.}
united national identity, which would be crafted incrementally by the political institutions of the state.\textsuperscript{973}

The sagacity of the ambivalent formulation adopted by the Constituent Assembly can be gauged by the fact that when the 15 year period in which English was granted an equal status to Hindi was about to expire in the year 1965, there broke out huge protests and demonstrations in the non-Hindi speaking southern state of Tamil Nadu on account of the fear of Hindi domination under the new language regime.\textsuperscript{974} The situation was so volatile that it began to represent the gravest secessionist challenge to the Indian state in the early years.\textsuperscript{975} An effort to defuse the tension and reassure the non-Hindi speaking sections of the populace eventually led to the Constitution being amended in the year 1968 and Hindi and English being declared as co-official languages, a position which continues till today.\textsuperscript{976}

The aforesaid narration would show that when dealing with the aspect of language, the Constituent Assembly was quite explicitly drawn into the debate between an over-arching Indian identity, which it was said was best served by Hindi, on the one hand and the demands for equal respect and legitimacy of the various Non-Hindi languages on the other. The manner in which this tussle was resolved does not represent a final solution either way.

\textsuperscript{973} \textit{Id.} at 57.
\textsuperscript{974} \textsc{Viniti Vaish}, \textsc{Biliteracy and Globalization: English Language Education in India} 12 (2008).
\textsuperscript{975} \textsc{Ayesh Jalal}, \textsc{Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective} 167 (1995).
\textsuperscript{976} \textsc{Vaish}, \textit{supra} note\textsuperscript{974} at 12.
Though the importance of Hindi was accepted by giving it the designation of an official language, the retention of English on the same level and the constitutional recognition given to the major Non-Hindi languages also spelled out the respect for the heterogeneous linguistic composition of India. The fact that the situation is virtually unchanged as of today, more than 65 years since the passing of the compromise amendment in the Constituent Assembly, not only displays the resilience of group identities centered on language but also goes to show that despite this diversity the unity of India has not been compromised.

(ii) The debate concerning the Tribes

Before examining the Constituent Assembly debates relating to the tribes in India, we may very briefly examine their history. Tribals in the Indian context can be best described as originally forest-dwelling communities who came together on the basis of kinship, rather than by the caste-linkage of mainstream Hindu society, and they ranged over the virgin forests of the Indian subcontinent.977 Tribal communities in India have a very long history, and are considered the earliest inhabitants of the land-mass that is India.978 This old lineage is also reflected in the fact that most of the expressions used to describe them refer to their ancient origins or their abode in the forests; for instance Adimjati and Adivasi.979 The over-arching moniker provided for

979 Id. at 25.
in the Indian Constitution is of course, Scheduled Tribe (Anusuchit Janjati).980

Even as late as the period just before the coming of the British to India, the tribal people enjoyed a large degree of autonomy and were left relatively unmolested by the prevailing rulers on the mainland. As has been noted in this regard, the Mughal Empire preferred to enter into settlements with the local tribal rulers, thereby giving them a measure of revenue through tribute, rather than attempting to invade the tribal communities.981 Such a political arrangement was possible in as much as most of the tribal groups that the Mughal Empire encountered reasonably mirrored concrete state formations.982 This arrangement of course ensured that the local way of life and the native customs of the tribals could continue unhindered and uninfluenced by the way of life practiced by the mainland or mainstream society.

With the arrival of the British in India, the early phase saw a relative lack of interest towards the tribal populace, and even the existence of many of the tribal societies was not known to the British for quite some time due to the fact that these societies were based in remote and inaccessible regions of the country.983 However, it seems that with the expansion and consolidation of

980 Id. at 25.
983 DAS, supra note 981 at 130.
the British Empire over the years, there was an increasing interest in these tribal societies. Part of this interest may be explained by the not-insignificant size of the tribal population. For instance, it has been estimated that the tribal communities made up an estimated 10% of the Indian population in the late nineteenth century. The more important reason however seems to have been that the British realized the economic value of the vast tribal lands and accordingly put in place a system of generating revenue from tribal lands by giving land and tenancy rights to peasant farmers. The problem of ‘land alienation’ i.e. the transfer of historically tribal held land to non-tribals is said to have begun with the implementation of the economic policies of the British Empire. This gradual assimilation of the tribal strongholds into the economic structure of the British Empire in India had devastating economic and social consequences for the ordinary tribals, which in turn lead to various revolts that were crushed with brute strength by the colonial state.

Despite this fraught and uneasy relationship with the British, the tribal areas were recognized as distinct by the colonial administration and a number of special mechanisms were put into place for the administration of these recognized areas. It has been noted that this special dispensation was not on account of any altruistic reasons. Since the tribal areas were predominantly situated in the border regions of the British Empire, the

984 WALSH, supra note977 at 146.
985 Id. at 146.
986 MAHENDRA LAL PATEL, AGRARIAN TRANSFORMATION IN TRIBAL INDIA 59 (1998).
987 RAMACANDRA PRADHANA, RAJ TO SWARAJ: A TEXTBOOK ON COLONIALISM AND NATIONALISM IN INDIA 278 (2008).
988 DAS, supra note981 at 137.
British Empire did not desire an active presence as long as the security of the border could be maintained.\textsuperscript{989} It has been noted that it was this desire to maintain the peace and ensure the security of the border that led the British to accept a measure of independence to the tribal groups residing in these regions.\textsuperscript{990}

Be that as it may, what is more important in the present context is to note that the common feature that seemed to reflect in all of the colonial era legal instruments relating to the tribal areas in this regard was the restricted and case-specific implementation of legislations that were otherwise applicable to other areas within the provinces or colonial India as a whole.\textsuperscript{991} It is said that it was on account of this ‘reserved’ status that tribal areas enjoyed within the British Empire that the Cabinet Mission specifically mentioned the tribal areas as matters of special import to be deliberated upon by the Constituent Assembly.\textsuperscript{992} This statement was worded as follows:

“The Advisory Committee on the rights of Citizens, Minorities and Tribal and Excluded Areas will contain due representation of the interests affected and their functions will be to report to the Union Constituent Assembly upon the list of the fundamental rights, clauses for protecting Minorities, and a Scheme for the administration of Tribal and Excluded Areas, and to advise whether these rights

\textsuperscript{989} AMIT PRAKASH, JHARKHAND: POLITICS OF DEVELOPMENT AND IDENTITY 35 (2001).
\textsuperscript{990} Id. at 35.
\textsuperscript{991} DAS, \textit{supra} note981 at 137.
\textsuperscript{992} Id. at 137.
should be incorporated in the provincial, the group or the Union constitution.”

When the Constituent Assembly eventually took up this issue of tribal rights, there were two schools of thought that pervaded the discussion. The first school favored an overly integrationist approach. The proponents of this view criticized the provisions of the draft Constitution that seemed to allow for the differentiated political and legal treatment of tribal areas on the lines of the British model. One representative was unequivocal in his view that the tribals should be assimilated into the larger fabric of society emerging in the newly independent state of India. This emphasis on assimilation was also supported by the making of a claim, though unsupported, that the desire for assimilation was also strong in the tribal communities who had purportedly been unjustly denied this option in the past. This view has been characterized as smacking of a ‘big-brotherly attitude’ in as much as the opposition to tribal autonomy was based on the supposed barriers that it would pose to the project of supplanting the indigenous tribal culture with the imposition of the external dominant culture.

The second school of thought however, preferred a slightly different approach to the issue of tribal identity in newly created state of India. This view, while supporting economic, political and social integration of tribal

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993 *Id.* at 137.
995 *Id.* at 116.
996 *Id.* at 116.
groups and regions with the Indian state, however was also agreeable to providing a certain degree of autonomy to the tribal groups so as to enable them to protect their distinct identity and culture. While this autonomy would not mean an isolated or a separate existence completely untouched by the larger Indian state or its inhabitants, it would ensure a modicum of valuable autonomy. K. M. Munshi, in his speech to the Constituent Assembly, defined the aim of this policy, which can be referred to as ‘soft integrationist’, as follows:

“We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time we want them to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated forever.”

This view, it may be noted, explicitly rejected the claim made by certain voices, particularly that of the tribal leader Jaipal Singh, which advocated a strong sense of tribal pan-nationalism and the inherent, and immutable, distinctiveness of the tribals as compared to the non-tribal inhabitants of India. This rejection has been characterized as meaning that the foundational basis of the treatment of tribal identity within the Indian Constitution is to be understood as asking for a commitment to India as the

997 DAS, supra note981 at 151.
998 LUDWIG GUMPLOWICZ, OUTLINES OF SOCIOLOGY 364 (1980).
new nation, while simultaneously allowing for the retention and
development of a relatively autonomous way of life.999

To get a better idea of what this ‘soft integrationist’ approach represented,
one may turn towards the five basic principles for tribal advancement which
were propounded by Jawaharlal Nehru in the year 1958, almost a decade
after the deliberations of the Constituent Assembly.1000 Though these
principles are much later in time, they offer a revealing insight into the stream
of thought that prevailed in the Constituent Assembly at the relevant
time. We may briefly consider these principles, which in a nut-shell are as under:
(i) Tribals should be allowed to develop themselves as per their own
conception of the good life and any unilateral imposition should be avoided.
The traditional arts and culture should be whole-heartedly encouraged.1001
(ii) The rights of the Tribals to their lands and the forests which they lived in
land should not be questioned.1002
(iii) The aspects of governance and development should be left to the tribals
themselves, albeit the training in this regard might require to be provided by
outsiders. However, as thumb rule, introducing too many non-tribals into
tribal territory under the guise of assistance should be avoided.1003
(iv) The tribal areas should be left relatively unmolested i.e. there should not
be an overwhelming state involvement in those areas. For any state

999 Pooja Parmar, Undoing Historical Wrongs: Law and Indigeneity in India, 49 OSGOODE
1000 K. N. DASH, INVITATION TO SOCIAL AND CULTURAL ANTHROPOLOGY 274 (2004).
1001 Id. at 274.
1002 Id. at 274.
1003 Id. at 274.
involvement, the tribal mechanisms themselves should be encouraged and used.\textsuperscript{1004}

(v) The net result of this endeavor should be weighed as per the quality of life and human character it manages to bring about in tribal communities.\textsuperscript{1005}

As to the formal process that the Constituent Assembly undertook to achieve the aforesaid aims, it may be noted that the Constituent Assembly formed an advisory committee on Tribal areas which was chaired by Vallabhai Patel, which in turn formed a sub-committee chaired by Gopi Nath Bordoloi to look into the issue.\textsuperscript{1006} After vesting and extensively travelling through the tribal areas while consulting with the local people, the sub-committee formulated its recommendations.\textsuperscript{1007} These recommendations were subsequently deliberated upon and accepted by the Constituent Assembly which led to their reflection in the Constitution of India in the form of the Fifth and Sixth Schedules of Article 244.\textsuperscript{1008}

The Fifth and Sixth Schedules provide varying measure of autonomy to the tribal areas and their inhabitants, which aspect shall be discussed later on in the present chapter. As an additional measure, the tribal population was also

\textsuperscript{1004} Id. at 274.
\textsuperscript{1005} Id. at 274.
\textsuperscript{1006} BRAJA BIHARI KUMARA, SMALL STATES SYNDROME IN INDIA 47 (1998).
\textsuperscript{1007} Id. at 47.
\textsuperscript{1008} Id. at 47.
granted reserved seats in the legislature and they were also given a measure of reservation in government jobs.\textsuperscript{1009}

Therefore, it would be clear that the Constituent Assembly chose a formulation of tribal identity that walked a very fine line between the complete assimilation of the Tribes into Indian society on the one hand, and allowing for a separate tribal nation, on the other. The ultimate conclusion that was arrived at respected the autonomous and distinct way of life practiced by the Tribals and their categorization as a distinct group on the basis of their indigenous origin. At the same time, the Tribals were granted this status ‘within’ the newly created Indian nation and not outside of it.

(iii) The debate concerning religion

While examining the manner in which the Constituent Assembly dealt with the issue of religion, two distinct aspects may be considered separately. The first of these is the debate surrounding the presence of religion \textit{per se} in the life of the newly independent state of India. The second relates to the role assigned to the majority religion of Hinduism in the newly formed constitutional scheme and the safeguards, if any, put in place for the benefit of the various minority religions like Islam, Christianity, Sikhism etc.

Coming to the first aspect, it may be noted that though the word secularism was repeatedly used in the Constituent Assembly it was not intended to convey the widely accepted western meaning of the term i.e. strict and vehement separation of state and religion. This is in par with the different conception of secularism in the Indian ethos, which doesn’t follow the western model of being hostile to any interaction with religion while running the affairs of the state, but on the other hand follows a policy of treating all religions alike.

K. M. Munsi’s words in this regard, spoken on the floor of the Constituent Assembly, are illuminating and are reproduced hereunder in detail:

“…A secular State is not a Godless State. It is not a State which is pledged to eradicate or ignore religion. It is not a State which refuses to take notice of religious belief in this country. As a matter of fact, every State recognizes this. We have done it in passing the fundamental rights with regard to religion. Religion is the richest possession of man and even under this secular State, a person having a religious belief will be fully entitled to it in the way that he likes. Any State that seeks to outlaw God, will very soon come to an end.

We must take cognizance of the fact that India is a religious-minded country. Even while we are talking of a secular State, our mode of thought and life is largely coloured by a religious attitude to life. …the subconscious mind of India is highly religious. We should not be ashamed of it. And it will be a day of disaster for India if, by some legislative trick, our

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State is converted into an irreligious, Godless State. We need not fear that a secular State is inconsistent with a religious mind among the people.”

It has been said that it may be due to this widely accepted understanding of secularism that there is little evidence to show any outright hostility to religion amongst advocates of a secular state in the Constituent Assembly. This however should not be taken to mean that there were no dissenting voices. For instance, E. V. Ramaswami, a leading Tamil intellectual and leader of his time, criticized the Constituent Assembly for its failure to condemn religion as being the main contributing cause to the presence of inequity and discrimination in India. This view though, was in a minority and hence the widespread sentiment in the Constituent Assembly, which eventually comfortably prevailed, did not favor the outright abolishment of religion from public life. This aspect of the debate therefore, can be said to have been resolved in a relatively uncontroversial fashion.

The second aspect of the debate, relating to the dynamic between the various religious groups in newly independent India, was far more controversial. One major reason for the heat that this debate generated was on account of the fact that the Constituent Assembly debates occurred in the backdrop of

1013 Bajpai, supra note1010 at 23.
The general mood of widespread distrust between the two major religious groupings i.e. Hindus and Muslims, on account of the brutal violence and bloodshed during the partition undoubtedly made discussion of the issue that much more difficult.

The immediate effect that this backdrop had was on the aspect of reserved constituencies based on religious lines. As has been discussed in the previous part of this chapter, towards the concluding period of the British Empire, there was a process of communal representation that was put in motion by providing religious groups with separate electorates and reserved seats, which therefore pitch-forked religious identity as the primary benchmark for identification and representation. However, the partition of the country seemed to have created an unshakeable underlying distrust towards the very idea of reserved electorates around religious lines. As has been noted in this regard, there seemed to have been general political consensus around the view that if overly elaborate and generous safeguards were included in the Constitution for religious minorities, then these safeguards had the potential to birth a separatist agenda and thereby militate against the nationalistic spirit that the Congress was working desperately to inculcate in order to ensure a robust patriotic consciousness towards the newly independent state amongst its numerous inhabitants. Added to this mix was the fact that the Congress

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1015 Rajarama Tolpady, Reconstructing Democratic Concerns in India, in INDIAN DEMOCRACY: PROBLEMS AND PROSPECTS 7 (M. Manisha & Sharmila Mitra Deb eds., 2009).
1016 Id. at 7.
did not have to please the otherwise powerful Muslim League, which had for long treated reserved electorates as the basic prerequisite for its participation in the nation building process.\textsuperscript{1018} The debate in the Constituent Assembly regarding minority religious rights in general and reservations in particular saw frequent reference to the horrors of partition, and the idea of separate electorates was vehemently opposed by juxtaposing it with the policy followed by the British which was squarely blamed for having caused partition.\textsuperscript{1019}

It may be noted that despite this general negative sentiment of the time, Ambedkar was a strong votary of special Constitutional protections to the minorities. He was of the opinion that the minorities had been historically wronged by the majority and were therefore entitled to safeguards to ensure their continued existence.\textsuperscript{1020}

Despite the various confabulations on the issue, the balance was irrevocably tilted against separate electorates once Jawaharlal Nehru also endorsed the rejection of separate electorates.\textsuperscript{1021} The Constituent Assembly ultimately rejected any possibility of reservation-centric religious minority protections on the ground that separate electorates had no place in a nation that was being created on the basis of a uniform citizenry, unlike in the past when pre-

\begin{flushleft}
\textsuperscript{1018} \textit{Id}. at 47.\\
\textsuperscript{1019} \textsc{Rita Manchanda, The No Nonsense Guide to Minority Rights in South Asia} 15 (2009).\\
\textsuperscript{1020} \textsc{Chakrabarty, supra note1017 at 48.}\\
\textsuperscript{1021} \textit{Id}. at 48.\\
\end{flushleft}
independence India was thought of a collectivity of different groups without a shared political identity. Furthermore, the ghost of partition was once again invoked and it was argued that religious reservations would lead to a repeat of the incident in the future. It may also be noted before parting with this part of the discussion, that certain representatives in the Constituent Assembly hailing from the religious minority Christian community also supported the doing away with reservation for Christians.

This desire to cede as little ground as possible to religious minority identity is visible in certain other facets as well. For example, an important point that has been made in the examination of the Constituent Assembly debates that though the initial terminology that was used for the Scheduled Castes and Scheduled Tribes also posited them alongside religious minority groups within the wider rubric of the term ‘minority’, the general distrust in the Constituent Assembly towards minority based group rights led to a subsequent segregation. Hence, at the end, special exemptions in the form of reservations were made for Scheduled Castes and Tribes, after they were demarcated from religious minorities who were not accorded the benefit of reservation. What is important is the symbolic action of removing Scheduled Castes and tribes from the grouping of minorities which seems to reflect a position that was explicitly adopted by a representative in the

1022 Id. at 49.
1023 Id. at 49.
1026 Id. at 4.
Constituent Assembly, who argued vociferously that Scheduled Castes were Hindus and hence should not be identified as minorities.  

One of the significant provisions of religious minority protection in the Indian Constitution today, i.e. Article 29 witnessed a significant narrowing of its ‘minority emphasis’ from the draft stage to the finally approved version. To elucidate, when the Constituent Assembly considered the report of the Advisory Committee on Minorities in its meeting on 1st November 1947, the text of the recommendations of the Advisory Committee read as follows:

“Minorities in every unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.”

However, this was subsequently modified to read as follows:

“Any section of the citizens residing in the territory of India or any part thereof having distinct language, script and culture of its own shall have the right to conserve the same.”

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1029 Id. at 215.
However, it was not as if the Constituent Assembly totally abrogated the concept of religious minority identity. In some crucial spheres, the minority identity was given due importance. For instance, religious minorities were given the right to establish and manage their own educational institutions, under the present Article 30 of the Constitution of India.

Even more important is the issue relating to the uniform civil code. There is a view that the support for a uniform civil code was in effect a counter-blast to the contemporaneous introduction of the Hindu code bill which was being objected to by the right-wing sections of the majority community.\(^{1030}\) Be that as it may, though the Constituent Assembly seemed to be veering around to the supremacy of a uniform civil code over the various personal laws of various religious communities in India, in the end this idea was not put into practice.\(^{1031}\) The idea of a uniform civil code was put into the non-justiciable part of the Indian Constitution i.e. the Directive Principles of State Policy.\(^{1032}\) It has been said that the decision to not enforce a uniform civil code reflected an appreciation of the group dimension of the rights of religious minorities in as much as through this they were seen not only as Indian citizens enjoying equal rights as their fellow citizens but also as members of particularistic religious groups whose distinct identity would be safeguarded through the


\(^{1031}\) Lloyd I. Rudolph & Susanne Hoeber Rudolph, Living with Multiculturalism: Universalism and Particularism in an Indian Historical Context, in ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES , 53 (Richard A. Shweder, Martha Minow, & Hazel Rose Markus eds., 2002).

\(^{1032}\) Id. at 53.
sustaining of their own personal laws. The decision to not enforce a uniform civil code has been characterized as the state having conceded to the ‘multicultural rule of law’.

Minority rights were also indirectly protected on account of the provisions in the Constitution providing for the fundamental right of equality and non-discrimination and the free practice of religion. Though this may not seem to be a very path-breaking development in the field of minority rights when viewed from a current lens, it may be remembered that there was a not insignificant set of voices in the Constituent Assembly which aggressively pushed for a formulation of Indian polity on exclusively Hindu lines. Therefore, though the fundamental rights provisions have been described by some as merely creating a ‘romantic air’ in the Constituent Assembly without offering anything credible to the religious minorities, the end result should be juxtaposed with the rejection of the demand made by certain members of the Constituent Assembly for the recognition of Hindu culture as the majority culture occupying a special and exalted position in the constitutional scheme.

1033 Id. at 53.
1034 GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 13 (2011).
The discourse surrounding the rights of religious minorities in the Constituent Assembly would show that there was significant distrust towards these provisions in the background of the horrors of partition. This led to the abandonment of any notion of a separate electorates or reservations in the legislature. Despite this general negativity however, there were still significant concessions granted to minority identity on religious lines. This was that the desire to retain and develop the unique culture and practices of the religious minority group was not looked down upon as being illegitimate. In line with this trend, not only were individuals belonging to minority religious groups guaranteed complete equality under the Constitution on the basis of their status as Indian citizens, the religious group itself as a whole was allowed to conserve its distinct cultural and religious practices.

(iv) The debate concerning the Backward Classes

Having examined the debates in the Constituent Assembly in relation to group identity on the basis of language, religion and indigenous origin it would now be relevant to turn to the debate concerning the Backward Classes. Though a long winded discussion on the same is not being proposed for the sake of brevity, it is important to note that the debate concerning the Backward Classes stands on a very different footing from the debates relating to linguistic, religious and indigenous identity. This is for the reason that in the case of the Backward Classes, the minority status was predicated not so much on the distinct culture of these groups requiring protection against the
majority but on the terribly unequal position held by these groups in Indian society on account of centuries of discrimination.

Caste is the foundation within which the definition and understanding of Backward Classes operates in India. A caste can be defined as a group in which membership is earned by birth and which is associated with a traditional occupation or set of activities which its members can perform, and yet further the different castes are ranged in an immutable and unchanging hierarchy based on the aspects of ritual purity and pollution. The caste system finds its origin in the ancient varna system, which at its most basic can be described as a system of social classification. The varnas, four in number, are believed to have emanated from the limbs of the creator, as per the Manusmriti, with the Brahmins representing the mouth, the Kshatriya the arms, the Vaishya the things and the Shudras the feet. However, there later also developed a fifth varna being the Untouchables who were seen as being beyond the pale of ordered society in as much as they found no place in the body of the creator and were thus considered unclean and illegitimate.

There is a great deal of debate regarding the justificatory basis for this caste based discrimination. One view takes the position that the caste system owes

1037 Vijai P. Singh, Caste, Class, and Democracy 21 (1976).
1038 Rajendra Kumar Sharma, Rural Sociology 109 (1997).
1039 Id. at 109.
its position and influence on account of the emergence of Hinduism and its beliefs of ritual pollution and rebirth. It is said that Manusmitri explicitly preaches upholds a system of rigid hierarchies based on birth and reinforces a notion of superiority for the highest ranking Brahmin caste while at the same time legitimizing the dehumanizing treatment of the Untouchables.1041 Any attempt at social mobility is curtailed by the provision of horrific punishments that have religious sanction and therefore a rigid system of caste is perpetuated to the grave detriment of the Untouchables.

The opposite view, however, looks upon the prevailing caste system as a degeneration of the varna system which was intended simply as a division of labor based upon skills. It is said that while the varna system was based on skills and was therefore inherently flexible and permitted social mobility amongst generations, the caste system abandoned these basic precepts and started revolving around the inherited status of birth and was defined by a rigidity that trapped generations in the same social class irrespective of individual merit.1042 The basic argument of those holding this view is that the unfortunate coming about of the caste system was not on account of sanction by Hindu religious texts, which only supported the varna system, but was a result of a purely social process of degeneration and decay.1043

1041 Id. at 43.
1042 SHARMA, supra note1038 at 112.
Though there is significant contestation about which one of the aforesaid views is correct, it can be said that both sides are in full agreement that the rigid hierarchy that the caste system has produced is wholly abhorrent in as much as it involves discrimination, injustice, and exploitation.\footnote{Id. at 160.} It led to the creation of a large section of people within Indian society who lived in abject poverty, and who were restricted to performing only menial tasks, and were subjected to extreme discrimination and oppression.

The Backward Classes that are at the lowest rungs of the caste ladder were referred to by different names in ancient and colonial India such as ‘Achhuts’, lower castes etc. However, during the twilight years of the British rule in India, these Backward Classes were tagged under the moniker of the ‘Scheduled Castes’ in the Government of India Act, 1935.\footnote{C. L. Sharma, Social Mobility Among Scheduled Castes: An Empirical Study in an Indian State I (1996).} This category of Scheduled Castes was operationalized in the year 1936 with the British government specifying a list of group as Scheduled Castes by means of the Government of India-Scheduled Caste Order.\footnote{Id. at 1.}

There was significant mobilization on the basis of caste in the years leading upto independence.\footnote{Indian Government and Politics, supra note 888 at 80.} This also resulted in the British government recognizing the distinct identity of the Scheduled Castes and extending them separate electorates. When Mahatma Gandhi went on an indefinite hunger
strike against this move,\textsuperscript{1048} which he saw as a ploy to divide Hindu society, a compromise was later arrived at which was referred to as the ‘Poona Pact’. It has been remarked that though there was a strong moral ground on which Gandhi based this resistance, there was also the practical consideration inherent in such a stand of ensuring that the separate electorates should not lead to a division of the Hindu community.\textsuperscript{1049} The repercussions of this pact have been said to be momentous, both for the future nation of India as also the Scheduled Castes. The immediate result of the Poona Pact was that it brought an end to the movement for a separate nation based on scheduled caste identity, which was premised on the right of the Scheduled Castes to self-determination.\textsuperscript{1050} As a concession, the Poona Pact recognized the Scheduled Castes as a political category and paved the way for reservation of seats for them in the elections.\textsuperscript{1051} It is in these broad circumstances that the Constituent Assembly debated the issue of the treatment of the Backward Classes. For the purpose of the present study, the discussion is being restricted to a discussion of the draft Article that permitted for reservation in government posts.

The original Draft Constitution did not contain any reference to ‘Backward Classes’. On the other hand, the term which was used in the draft clause was

\begin{itemize}
\item \textsuperscript{1048} Himanshu Charan Sadangi, Dalit: The Downtrodden of India 36 (2008).
\item \textsuperscript{1049} Encyclopaedia of Dalits in India: Reservation, 144 (Sanjay Paswan & Pramanshi Jaideva eds., 2002).
\item \textsuperscript{1050} Gauri Viswanathan, Outside the Fold: Conversion, Modernity, and Belief 212 (1998).
\item \textsuperscript{1051} Id. at 212.
\end{itemize}
‘particular classes of citizens’. However, this was subsequently substituted by the term ‘Backward Classes’; a decision which generated a fair deal of controversy. When the draft Article containing the expression ‘Backward Classes’ was submitted for consideration before the Constituent Assembly, it proposed that the state would have the power to make reservation in posts for those Backward Classes who it felt were not adequately represented therein.

The provision witnessed heated debate. There were strident voices which favored outright deletion of this clause that permitted reservations. The argument that was raised was one of efficiency and merit. Reservation was viewed as a detraction from the promise of equality enshrined in the Constitution and as putting certain sections on a higher pedestal without any consideration of merit. An argument was also made that even though it could not be denied that the provision for reservation was called for in the context of historical discrimination faced by certain groups, it should however still not be incorporated into the Constitution as it would be dangerous to agree to something like this as a matter of principle. An acceptance of such a principle, it was argued, would open the floodgates for further examples of favoritism and sectarianism in the Indian polity leading

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1053 Id. at 77.
1054 MATHUR, supra note898 at 215.
1055 Id. at 215.
1056 Id. at 215.
to ruinous results. The path that was strongly advocated was that of ‘absolute equality’, without reservations of any sort for any class or community.\textsuperscript{1057}

The counter-view was that the draft Article contained the perfect compromise between maintaining a general principle of equality of opportunity in theory, however at the same time recognizing the reality of insidious discrimination and remedying the same by permitting the entry of certain groups which had till then been excluded from the administration.

The aforesaid view favoring reservations eventually prevailed, despite certain lingering misgivings regarding the difficulty in defining Backward Classes, and the Draft Article was passed without any amendments or modifications. A similar provision for reservation of seats in the legislature for Scheduled Castes was also adopted, though it was approved initially for a limited period of 10 years.\textsuperscript{1058}

It has been pertinently observed that the acceptance of the policy of reservation by the Constituent Assembly represented an incorporation of the spirit of the Poona Pact into the Indian Constitution.\textsuperscript{1059} Such a view holds that the Constitution therefore amounts to a contract that the newly created nation of India entered into with the Scheduled Castes.\textsuperscript{1060} It can indeed be

\textsuperscript{1057} Id. at 215.
\textsuperscript{1058} Id. at 135.
\textsuperscript{1060} Id.
said that the provision for special group rights for the Scheduled Castes amounts to a categorical power-sharing agreement between groups instead of the soft liberal approach towards dispensing rights primarily centered on the principle of equality.\textsuperscript{1061}

6.5 THE PROVISIONS IN THE INDIAN CONSTITUTION PERTAINING TO GROUP IDENTITIES AND RIGHTS

Having very briefly examined the process of deliberation in the Constituent Assembly in relation to the issue of language, religion, Tribal identity and case, the Constitutional provisions that have come about as a result may briefly be examined. It may be mentioned that aside from a few exceptions, the focus will be on the justiciable parts of the Constitution.

At first, one may turn to the preamble of the Constitution itself which, quite importantly, provides a guarantee of liberty of thought, expression, belief, faith and worship. This is obviously of critical importance to religious minorities. It reads as follows:

\begin{quote}
“WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship;
\end{quote}

\textsuperscript{1061} Id.
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and
the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth
day of Novembers, 1949, do HEREBY ADOPT, ENACT
AND GIVE TO OURSELVES THIS
CONSTITUTION.”

Attention may now be turned to the equality provisions as enshrined in Articles 14, 15 and 16 of the Constitution of India. These provisions guaranteed formal equality to all citizens of India, regardless of their secondary identities based on religion, gender, caste etc. Article 14 is categorical in this guarantee of equality, and mandates each that individual person is guaranteed equal treatment by the state. It is interesting to note that Article 14 has been consistently interpreted by the Supreme Court as mandating not only formal equality, but also mandating that the state should not treat un-equals equally i.e. differentiated treatment can be justified by the context in which it is applied. For instance, in the decision titled Management of Coimbatore District Central Co-operative Bank v. Secretary, Coimbatore District Central Co-operative Bank Employees Association and Anr., the Supreme Court reiterated this principle in the following words:

“It is settled law that equals must be treated equally and unequal treatment to equals would be violative of Article
14 of the Constitution. But, it is equally well-established that unequals cannot be treated equally. Equal treatment to unequals would also be violative of 'equal protection clause' enshrined by Article 14 of the Constitution.”

Article 15 reiterates the commitment towards equality, though it couches the same in the negative language of anti-discrimination and injuncts the state from discriminating against any citizen on the grounds of religion, race, caste, sex etc.\textsuperscript{1065} However, this equality provisions is also expressly made subject to exceptions in as much provisions are made for special entitlements being provided to vulnerable groups such as women and children, Scheduled Castes and Scheduled Tribes and socially and educationally Backward Classes of citizens.\textsuperscript{1066}

Article 16 specifically extends the equality and non-discrimination mandate to matters of public employment.\textsuperscript{1067} This article is also expressly made subject to exceptions in as much provisions are made for special entitlements being provided to Scheduled Castes and Scheduled Tribes and any Backward Classes of citizens.\textsuperscript{1068}

It is interesting to note that the aforesaid provisions, aside from prohibiting any discrimination on the basis of religious or cultural identity, specifically empower the government to treat the disadvantaged sections of the society

\textsuperscript{1065} Article 15, \textit{THE CONSTITUTION OF INDIA, supra} note1062.

\textsuperscript{1066} \textit{Id.}

\textsuperscript{1067} Article 16, \textit{Id.}

\textsuperscript{1068} \textit{Id.}
‘unequally’ in order to ensure their welfare. The spirit behind these provisions has been pithily explained, in the context of the Tribals, in the judgment of the Supreme Court titled *Kailas and Ors. v. State of Maharashtra*, in the following words:

“34. However, giving formal equality to all groups or communities in India would not result in genuine equality. The historically disadvantaged groups must be given special protection and help so that they can be uplifted from their poverty and low social status. It is for this reason that special provisions have been made in our Constitution in Articles 15(4), 15(5), 16(4), 16(4A), 46, etc. for the upliftment of these groups. Among these disadvantaged groups, the most disadvantaged and marginalized in India are the Adivasis (STs), who, as already mentioned, are the descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early mortality etc.”

Articles 15 and 16 have also sanctioned the policy of reservation, or ‘quotas’ for Scheduled Castes and Scheduled Tribes, as also educationally and socially backward classes, in educational institutions and government jobs, which has for long formed the corner-stone of India’s welfare push to alleviate the discrimination faced by the Backward Classes. However, recent attempts to extend this benefit of reservation to minority religious groups, purely on the basis of their religious identity, has been struck down

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1069 AIR 2011 SC 598
1070 KAUR AND SURI, supra note892 at 147.
by the High Court of Andhra Pradesh and the issue is currently pending before the Supreme Court.\textsuperscript{1071}

Tied in with this push to end the discrimination faced by the Scheduled Castes, Article 17 of the Constitution explicitly forbids the practice of untouchability and makes it an offence.\textsuperscript{1072}

Articles 25 to 28 of the Constitution of India may now be considered, which specifically deal with the freedom of religion.

Article 25 guarantees the liberty to practice and propagate a religion of one’s choice, without any fear of state interference.\textsuperscript{1073} Interestingly, the Article specifically protects the right of the religious minority Sikhs to carry their ceremonial dagger, called a ‘kirpan’ as part of their right to profess their religion.\textsuperscript{1074}

Article 26 protects the freedom to manage religious affairs, without which the freedom to practice religion would obviously be ineffectual.\textsuperscript{1075}

It may be noted that the freedom to practice religion and to manage religious affairs under Articles 25 and 26 is not just restricted to the minority religious

\textsuperscript{1071} Kate O’ Regan & Madhav Khosla, \textit{Equality in Asia}, \textit{in COMPARATIVE CONSTITUTIONAL LAW IN ASIA}, 291 (Rosalind Dixon & Tim Ginsburg eds., 2014).

\textsuperscript{1072} Article 17, \textit{THE CONSTITUTION OF INDIA, supra note}\textsuperscript{1062}.

\textsuperscript{1073} Article 25, \textit{Id.}

\textsuperscript{1074} \textit{Id.}

\textsuperscript{1075} Article 26, \textit{Id.}
communities but is also available to the adherents of the majority Hindu faith. These provisions therefore provide a ‘group right’ rather than a specific ‘minority right’. The Supreme Court in the judgment titled *Pannalal Bansilal Patil and Ors. v. State of Andhra Pradesh and Anr.*,\(^{1076}\) has confirmed the said fact as under:

> “26. Hindus are majority in population and Hinduism is a major religion. While Articles 25 and 26 granted religious freedom to minority religions like Islam, Christianity and Judaism, they do not intend to deny the same guarantee to Hindus. Therefore, protection under Articles 25 and 26 is available to the people professing Hindu religion, subject to the law therein…”

Moving on, Article 27 ensures that the state would not use funds from the state exchequer, which is paid for by the citizens, for the advancement or upkeep of any particular religion.\(^{1077}\)

In a similar vein, Article 28 states that public educational institutions wholly maintained out of state funds would not impart instruction to the students which is of a religious nature.\(^{1078}\)

The next set of provisions which may be examined in this regard are Articles 29 and 30.

\(^{1076}\) (1996) 2 SCC 498
\(^{1077}\) Article 27, *THE CONSTITUTION OF INDIA*, *supra* note1062.
\(^{1078}\) Article 28, *id.*
These deal with cultural and educational rights. Article 29 stipulates that any section of citizens who have a distinctive language or culture of their own shall be entitled to preserve the same.\textsuperscript{1079} It is widely accepted that the aforesaid article is not confined to minorities alone, though the heading of the Article makes reference only to minorities.\textsuperscript{1080} This is because the reference in the main body of the Article is to ‘any section of citizens’. The Supreme Court has also taken this view in the judgment titled \textit{Ahmedabad St. Xavier’s College Society v. State of Gujarat}.\textsuperscript{1081}

The next Article i.e. Article 30, however is intended to be available to religious and linguistic minorities alone and seeks to provide them with the freedom to set up and manage their educational institutions.\textsuperscript{1082} It may be noted that though a detailed study of the said pronouncements is beyond the scope of the present study, this Article has been the sight of several contestations between the state and minority religious institutions, which contestations have resulted in several landmark pronouncements from the Supreme Court such as the judgments titled \textit{T.M.A. Pai Foundation and Ors. v. State of Karnataka & Ors.},\textsuperscript{1083} \textit{P.A. Inamdar and Ors. v. State of Maharashtra and Ors.},\textsuperscript{1084} \textit{Islamic Academy of Education and Anr. v. State of Karnataka and Ors.},\textsuperscript{1085} \textit{Ashoka Kumar Thakur v. Union of India &}

\begin{itemize}
\item \textsuperscript{1079} Article 29, \textit{Id.}
\item \textsuperscript{1080} AZRA KHANAM, \textsc{Muslim Backward Classes: A Sociological Perspective} 97 (2013).
\item \textsuperscript{1081} (1974) 1 SCC 717
\item \textsuperscript{1082} Article 30, \textsc{The Constitution of India, supra note1062.}
\item \textsuperscript{1083} (2002) 8 SCC 481
\item \textsuperscript{1084} (2005) 6 SCC 537
\item \textsuperscript{1085} (2003) 6 SCC 697
\end{itemize}
Ors.,\textsuperscript{1086} Pramati Educational and Cultural Trust and Ors. v. Union of India and Ors.,\textsuperscript{1087} amongst others.

Mention may at this stage also be made to the Constitutional provisions that give special protection to tribal areas as also certain provisions relating to the Scheduled Castes. For instance, Article 244 provides for the autonomous administration of scheduled areas and tribal areas.\textsuperscript{1088} Though the Fifth Schedule and the Sixth Schedule are not being reproduced herein for the sake of brevity, it may be noted that they provide the specifics for the implementation of autonomous administration for tribal areas in myriad forms like the setting up of tribal advisory councils, district councils, regional councils etc. and the implementation of measures like differential application of laws amongst other mechanisms. There are also the provisions made in Article 371A-H which specify special measures for certain states that have significant tribal populations.\textsuperscript{1089}

There are also provisions in the Constitution that provide for the upliftment of members of Scheduled Castes and Scheduled Tribes through measures such as reservations. Articles 330 and 332 of the Constitution also provide for reservation for members of the Scheduled Castes and Scheduled Tribes in the Union Parliament and State Assemblies respectively.\textsuperscript{1090}

\textsuperscript{1086} (2008) 6 SCC 1
\textsuperscript{1087} AIR 2014 SC 2114
\textsuperscript{1088} Article 244, THE CONSTITUTION OF INDIA, supra note1062.
\textsuperscript{1089} Article 371A-H, Id.
\textsuperscript{1090} Articles 330 & 332, Id.
A mandate to the effect that the interests of the members of the Scheduled Castes and Scheduled Tribes should also be taken into account in the matter of public employment is also expressly mandated in Article 335.1091

There are also certain provisions in the Constitution which need to be noted in as much as they relate to the arrangement relating to language in India. For instance, Article 343 provides for making Hindi an ‘official language’ in contradistinction to the status of ‘national language’.1092 More importantly, the use of English for the official purposes of the Union has been continued as a direct consequence of the provision to this effect provided in the Article.1093

Article 345 gives freedom to the states to choose any of the local languages in their territories as the official language of the state, without any interference in this regard by the Union.1094

Article 346 once again ensures parity in language between the various states of India by mandating that official inter-state communication, unless otherwise mutually agreed to be Hindi, shall be carried out in English.1095

1091 Article 335, Id.
1092 Article 343, Id.
1093 Id.
1094 Article 345, Id.
1095 Article 346, Id.
Article 347 empowers the President to direct the official recognition by a state of the language spoken by a significant percentage of the population of a state, thereby recognizing the in-principle validity of language based group-demands.\textsuperscript{1096}

Article 348 once again ensures parity in language in terms of access to the pronouncements of the higher judicial bodies like the Supreme Court and the High Courts by providing for the use of English, as also mandates the bills and amendments in the legislative bodies shall be in the English language.\textsuperscript{1097}

Linguistic minorities are also specifically catered to in Article 350A of the Constitution, wherein a mandate has been put in place for their protection and preservation by calling upon the state to endeavor to provide children belonging to such groups with education in their mother tongue.\textsuperscript{1098}

As has already been mentioned, the focus of the present study is predominantly on the justiciable parts of the Constitution. However, there are certain provisions in the Directive Principles of State Policy in the Constitution which are also quite relevant for the purpose of the present study.

\textsuperscript{1096} Article 347, Id.
\textsuperscript{1097} Article 348, Id.
\textsuperscript{1098} Article 350A, Id.
The first of these provisions is Article 38 which mandates that the state should focus not just on reducing inequalities of various kinds between but also strive to reduce these inequalities which may exist between groups as a whole.  

Article 46 of the Constitution once again makes reference to educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections of the people of India and mandates that the state shall take special care of the same and attempt to obviate social injustice and all forms of exploitation.

This recognition of group identities can further be seen in the Article that specifies the fundamental duties that the citizens of India are expected to perform. Article 51A (f) calls upon the citizens of India to value and preserve the rich heritage of the ‘composite culture’ of India.

There is also Article 44 of the Directive Principles of State Policy, pertaining to a uniform civil code, which is of significance to the present study. However, the said Article is considered in more detail in the later part of the present chapter.

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1099 Article 38, Id.
1100 Article 46 Id.
1101 Article 51A, Id.
A review of the provisions in the Constitution of India would display the co-existence of identities, and consequent entitlements, based both upon individual as well as group status. Whereas there are certain fundamental and unalienable rights guaranteed to all citizens irrespective of their group membership, at the same time groups as a whole based on language, religion, indigenous origin, caste and even on wider parameters such a gender, have been provided with certain specific rights as a ‘collectivity’ or group. Though the content of these rights, and the contestations that have evolved around them in the political and legal spheres of the country, may invoke differing reactions and opinions, it is clear that the Constitution of India is textually comfortable with both group as well as individual identity.

### 6.6 GROUP RECOGNITION IN CONTEMPORARY INDIA

From a brief enumeration of the constitutional provisions, it is evident that the fundamental rights, while securing individual liberty and autonomy, do not restrict their ambit therein but also move forward to encompass rights based on group identities. As has been seen, these group identities based on religion, language and tribal origin are clearly identified in the Constitution. This much is a given. However, what is also important for the purpose of the present study is to consider some of the more nuanced facets of these group identities, particularly those relating to religion, in the contemporary day and age.
(i) The Indian conceptualizations of Secularism

The preamble to the Constitution of the India declares India to be a ‘Sovereign, Socialist, Secular, Democratic Republic’. The import of this definition as a secular state is that India does not have an official state religion, unlike countries where a particular religion would have an official status. However, every discussion of the Indian secular ethos and the structure promulgated under the same must begin with the caveat that the India conception of secularism is very different from the western concept, as has already been noted in the discussion in the present chapter regarding the Constituent Assembly Debates pertaining to religion. The western concept of secularism overtly rejects religion and its practices, and certain western thinkers have gone as far as to say that a strong form of secularism is actually the equivalent of atheism.\textsuperscript{1102}

As has already been noticed in the earlier part of the present chapter, in the Constituent Assembly Debates relating to religion the western notion of secularism as a ‘religion-less’ concept was not accepted. In the place of a concept that is anti-religion \textit{per se}, has been substituted an Indian version of secularism that merely aims for equidistance and the avoidance of favoritism to any particular religion. The concept of Indian secularism can perhaps be best described as under:

\begin{quote}
"Indian secularism is thus neither separation of the Church and the State nor anti-religious nor multi-religious. It is non-religious and anti-communal. It is
\end{quote}

\textsuperscript{1102} Ishanand Vempeny, \textit{Raw Materials for an Indian Theology} 266 (2008).
marked by an attitude of religious neutrality and equal treatment of all religions and religious minorities. It does not forbid religious or non-religious practices, nor does it show preference for the non-religious over the religious or vice-versa.”.\textsuperscript{1103}

However, the aforesaid enunciation of the Indian notion of secularism does not exhibit the great diversity in its interpretation in contemporary Indian political and legal discourse. These varied conceptualizations of secularism which inform the contemporary debate in India have been categorized into four distinct heads by Shabnum Tejani. These may briefly be considered hereunder.

Firstly, there is the ‘liberal left’ conceptualization of secularism which stresses on the strict separation of religion and politics.\textsuperscript{1104} This position is vehemently opposed to the right-wing formulation of Hindutva and believes it to be representative of the very anti-thesis of the secular state and of modernization.\textsuperscript{1105} Secularism on the other hand is a panacea for all these problems and it represents progress and modernity. A very influential stream of thought within this position does not subscribe to the theory that secularism is a foreign ideal, but rather it points towards the long history of religious accommodation and tolerance in India as being emblematic of the presence of secular ideals in India from time immemorial.\textsuperscript{1106} Other scholars

\begin{footnotesize}
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\item \textsuperscript{1103} A. K. LAL, SECULARISM: CONCEPT AND PRACTICE 106 (1998).
\item \textsuperscript{1104} TEJANI, supra note914 at 7.
\item \textsuperscript{1105} Id. at 7.
\item \textsuperscript{1106} Id. at 8.
\end{itemize}
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have also noted that this ‘spirit of secularism’ as represented in the values of
tolerance, benevolence and broad-mindedness that pervaded ancient Indian
society as well. This argument has been further been linked to the concept
of *sarva dharma samabhava* i.e. the equal treatment of all religions.

**Secondly,** there is the conceptualization that views secularism as being alien
to India. This argument stresses on the purportedly foreign nature of
secularism and its inherent unsuitability in the Indian context. In such an
understanding, secularism is seen as something that emerged out a Christian
context particularly the experience of Protestantism and the reformation.
This view therefore stresses on the need to resuscitate the Indian tradition of
tolerance rather than creating a secular political and social space in India.
However, the proponents of this view do firmly base this tradition of
tolerance specifically in Hindu thought alone and not in a syncretic or multi-
religious context.

**Thirdly,** there is the far-right conceptualization of secularism that views any
recognition of the identity of religious minorities as ‘pseudo-secularism’.
Any identification, and the provision of a consequential group entitlement,
on the basis of a religious identity different from the majority one is

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1107 ATUL KUMAR SINHA, SOME ASPECTS OF ANCIENT INDIAN SOCIETY AND POLITY 84
       (2005).
1108 Id. at 85.
1109 TEJANI, supra note914 at 8.
1110 Rajeev Bhargava, The “Secular Idea” before Secularism: A Preliminary Sketch, in
        COMPARATIVE SECULARISMS IN A GLOBAL AGE, 159 (Linell E. Cady & Elizabeth Shakman
        Hurd eds., 2010).
1111 TEJANI, supra note914 at 9.
1112 Id. at 9.
characterized as minority appeasement as per this view.\textsuperscript{1113} The moral and political justification of this position seems to be that a state that professes to be secular in the true sense would not allow for any form of differential treatment amongst its citizens and apply the law ‘equally’ to each one.\textsuperscript{1114}

Fourthly, there is a distinct conceptualization of secularism that seeks to abandon the ‘institutional opposition’ towards religion in India and recommends taking the spiritual and ethical elements that are shared by all religions and thereafter constructing a kind of ‘secular religion’ which can then be practiced by all citizens.\textsuperscript{1115} One may perhaps identify as a distant precursor to this idea, the Divine Faith (Din-i-Illahi) as promulgated by Akbar in the 16\textsuperscript{th} Century that sought to bring Hindus and Muslims together in their common observance of the tenets of this new faith.\textsuperscript{1116}

The aforesaid conceptualizations of secularism bring to light the contested and controversial nature of religious group identity in contemporary India. The contemporary Indian legal system is characterized by the application of the specific religious laws of various religious groups in matters relating to their family affairs.\textsuperscript{1117} These are referred to as ‘personal laws’ in common parlance.\textsuperscript{1118} Personal law in India encompasses family affairs such as

\begin{footnotesize}
\textsuperscript{1114} Tejani, supra note914 at 9.
\textsuperscript{1115} Id. at 10.
\textsuperscript{1117} Galanter and Krishnan, supra note840 at 274.
\textsuperscript{1118} Id. at 274.
\end{footnotesize}
marriage and divorce, adoption, succession, etc. The pseudo-secular critique of group recognition in the context of religious minorities, as discussed above, is very interesting, because it posits such recognition as a betrayal of the secular cause and as evidence of hypocrisy. As will be seen in later parts of the present chapter, group recognition in terms of language and tribal origin is far less controversial.

(ii) Religious identity: The base for a minority right or a group right?

Much of the ire against religion based group recognition is directed towards the system of differential laws that are applied to different religious communities. However, is such a differential application of laws the sole prerogative of religious minorities? Such a question is very important to answer in as much the criticism that group identity should not influence the content or the application of the law in any manner whatsoever anchors its legitimacy solely on the ground that such differentiation is never directed ‘in favor of’ the majority religious community and is therefore unfair.

Religion or religious identity is recognized by, or is the sole focus of, several national and state legislations that are in force in India. This recognition is independent of majority or minority status. Such recognition may be in varied contexts. To take the example of the criminal law of India, the Indian Penal Code, 1860 has an entire chapter, namely chapter XV which deals with

1119 Id. at 274.
offences against religion. There is a clear recognition and identification of a religious group *per se* in the criminal law of the land.

The ‘pseudo-secular’ critique however is not that religious groups are identified as such on the basis of the religion being followed but that the law grants differential status to minority religions alone. Is such an assertion correct? A comprehensive review of the various religion based community specific laws existing in India that has been undertaken by Tahir Mahmood is illuminating in this regard.\(^{1120}\) It reveals that, quite contrary to popular belief, a large number of the special or differentiated laws actually govern the legal affairs of the majority religious Hindu community. Some of these examples may now be examined in brief.

Cow protection is of significant relevance to the Hindu religion in as much as per its beliefs and tenets the cows are considered sacred animal and their slaughter is strictly forbidden. In fact, the issue of cow protection has been one of the consistent fault-lines in Hindu-Muslim relations for centuries.\(^{1121}\) This reverence for the cow has been given constitutional sanction in the form of Article 48 which is part of the Directive Principles of State Policy, wherein the state is mandated to take steps for the prohibition of slaughter of cows and calves.\(^{1122}\) Laws have been enacted in various states to implement this Directive Principle such as the Bombay Animal Preservation Act, 1948.

\(^{1120}\) **TAHIR MAHMOOD, LAWS OF INDIA ON RELIGION AND RELIGIOUS AFFAIRS (2008).**


\(^{1122}\) **MAHMOOD, supra note 1120 at 80.**
West Bengal Animal Slaughter Control Act, 1950, Bombay Animal Preservation Act, 1961 and Bombay Animal Preservation Act, 1994, whereas certain similar laws were already in force before the coming into force of the Constitution.\textsuperscript{1123} Even in the Muslim-majority state of Jammu and Kashmir, cow slaughter is an offence under the local Ranbir Penal Code, 1932.\textsuperscript{1124} The constitutional validity of these laws was challenged before the Courts of law, however most of these challenges were repelled.\textsuperscript{1125} The most striking of these decisions is that of the Supreme Court in the judgment titled \textit{Mohd. Hanif Qureshi v. State of Bihar},\textsuperscript{1126} wherein the decision was at least partly based on Hindu sentiments. The issue before the Supreme Court related to the reasonableness of a legislative measure banning the slaughter of cattle. Some of the observations of the Court are telling in this regard and are reproduced hereunder:

“22. There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.”

\textsuperscript{1123} Id. at 80.
\textsuperscript{1124} Id. at 80.
\textsuperscript{1125} Id. at 80.
\textsuperscript{1126} AIR 1958 SC 731
It is also relevant to refer to another decision of the Supreme Court in this regard, namely the judgment titled *Om Prakash and Ors. v. State of U.P. and Ors.* The issue before the Supreme Court related to the reasonableness of a legislative measure banning the sale of eggs within the municipal limits of the temple town of Rishikesh. In various portions of the judgment, the concurring opinion of D.M. Dharmadhikari J. makes explicit reference to the Hindu religious sentiments and sensitivities in order to justify the ban.

Moving on from the amplification of the ethos of the majority in judicial adjudication, it has also been noted that certain customary practices which emanate from the Hindu religion now enjoy the de-facto status of universally followed practices and are even employed during state functions. Probably the best example of such a practice is the ceremony of *bhoomi pujan*, which is a religious ceremony that is performed prior to the initiation of the construction of a building or structure. Interestingly, such a practice of performing *bhoomi pujan* was held to be not violative of the secular mandate of the Indian Constitution in a judgment of the High Court of Gujarat in the case titled *Rajesh Himmatlal Solanki v. Union of India.*

There also exist several state legislations on shrine management, which regulate Hindu places of worship. It may be noted that these provisions

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1127 *(2004) 3 SCC 402*
1128 MAHMOOD, *supra* note1120 at 83.
1129 *Id.* at 83.
1130 *(2011) 1 GLR 782*
1131 MAHMOOD, *supra* note1120 at 85.
can even extend to the banning of activity concerning other religions in the concerned areas. For instance, the Andhra Pradesh government has passed a Government Order that bans propagation of any religion other than Hinduism in Tirupati and other specified temple areas.\footnote{1132 Only Hindus can preach at Tirupati, \text{http://ibnlive.in.com/news/only-hindus-can-preach-at-tirupati/42509-3.html} (last visited Apr 11, 2014).}

As regards pilgrimages as well, like in the case of the Haj for the Muslim community, specific provisions have been put in place which are either subsidized by the state or elaborate arrangements are put in place by the state for the performance of these pilgrimages such as in the case of the pilgrimage to the holy Mansarovar, the pilgrimage to the Mata Vaishno Devi temple, the Mahakumbh fair held at Allahabad, etc.\footnote{1133 MAHMOOD, supra note1120 at 89.}

There are also legislations that explicitly protect Hindu religious family practices. The Protection of Hindu Usages Decree, 1880 in force in Goa, Daman, and Diu is one such example which protects customs such as those of Brahmins being allowed to take oath in the courts of law on the Bhagwad Geeta, amongst others.\footnote{1134 Id. at 84.}

As far as personal Laws relating to Family Law and Succession are concerned, it has been opined that it is a misnomer to state that the Hindu community is governed by a wholly ‘religion-neutral’ and secularized law, in as much as the applicable laws continue to have several religious elements.
which practice differentiation both internally and externally.\textsuperscript{1135} An oft quoted example in this regard is the differentiated application of the \textit{Mitakshara} and the \textit{Dayabhaga} schools of law amongst Hindus belonging to different regions of the country.\textsuperscript{1136} While the \textit{Dayabhaga} system operates in Bengal and Assam, the \textit{Mitakshara} system is followed in the rest of the country.\textsuperscript{1137} It may be noted that this differential application of the two schools of law is not based on the present location of the person but rather on the location from which he hails.\textsuperscript{1138} Certain succession laws having their base in South India and based on the matrilineal system such as the \textit{Aliyasantana}, \textit{Marumakkattayam} and \textit{Naboori} customs also remain protected in the Hindu Succession Act, 1956.\textsuperscript{1139} Quite pertinently, there is the continuing existence of the concept of the Hindu Undivided family (HUF) and its notion of jointly held coparcenary property in Hindu society.\textsuperscript{1140} The intention of this provision though of course being to protect the traditional Hindu family structure, it is said that in the present day and age it is also an excellent tax saving mechanism,\textsuperscript{1141} and has allowed the Hindu urban and rural propertied class to get significant tax concessions\textsuperscript{1142}.

\textsuperscript{1135} \textit{Id.} at 89.
\textsuperscript{1136} \textit{Id.} at 90.
\textsuperscript{1137} REENA PATEL, \textsc{Hindu Women's Property Rights in Rural India: Law, Labour and Culture in Action} 44 (2013).
\textsuperscript{1138} SUHAS CHATTERJEE, \textsc{Indian Civilization and Culture} 338 (1998).
\textsuperscript{1139} MAHMOOD, \textit{supra} note 1120 at 93.
\textsuperscript{1140} \textit{Id.} at 90.
\textsuperscript{1142} Flavia Agnes, \textsc{The Supreme Court, the Media and the Uniform Civil Code Debate in India, in The Crisis of Secularism in India}, 314 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2006).
Another very relevant aspect pertains to some explicit 'exceptions' that are enshrined in the Hindu Marriage Act, 1955. Most pertinent in this regard is section 5 of the Act which lays down the essential pre-requisites of a legitimate and valid Hindu marriage. The otherwise mandatory requirements of the parties not being within the degrees of prohibited relationship and of the parties not being *sapindas* of each other, are expressly derogable if the local custom or usage permits the same.\textsuperscript{1143} There are several such local customs in India. For example, South India is home to several communities that practice consanguineous marriages, a common variant of which are the first-cousin marriages.\textsuperscript{1144} Even coming to the form of marriages under the Act, section 7 of the Act allows for a wide variety of rites to be taken into account for determining the validity of a Hindu marriage and does not seek to posit any uniform rites or rituals in this regard.\textsuperscript{1145}

This heterogeneity is reflected in areas traditionally outside the purview of personal law as well. For instance, in recognition of their unique martial history, members of the *Kodava* or Coorgi community of the state of Karnataka are permitted the right to own guns without having to go through the process of getting a license, which is otherwise mandatory under the Arms Act, 1959.\textsuperscript{1146}

\textsuperscript{1143} MAHMOOD, *supra* note1120 at 92.
\textsuperscript{1144} AMITESHWAR RATRA, PRAVEEN KAUR & SUDHA CHHIKARA, MARRIAGE AND FAMILY: IN DIVERSE AND CHANGING SCENARIO 75 (2006).
\textsuperscript{1145} MAHMOOD, *supra* note1120 at 92.
Provisions also exist that specifically debar non-Hindus from performing certain functions or receiving benefits under certain acts meant for the Hindu community. For instance, under section 6 of the Hindu Minority and Guardianship Act 1956, a non-Hindu relative is not permitted to be the guardian of any Hindu child and yet further the father will be replaced by the mother as his child’s natural guardian if he has ceased to be Hindu.\textsuperscript{1147} Section 24 of the same Act debars a non-Hindu from claiming maintenance from his or her Hindu relatives.\textsuperscript{1148} The Hindu Adoption and Maintenance Act, 1956 also ties in several of the rights mentioned therein to religious identity. For instance under section 7 of the Act, a father’s decision to adopt a child or to give his child in adoption does not require consent from the mother if she has ceased to be a Hindu, though the consent is otherwise required.\textsuperscript{1149} Section 8 is a mirror provision in as much as a mother’s decision to adopt a child or to give her child in adoption does not require consent from the father if he has ceased to be a Hindu, though the consent is otherwise required.\textsuperscript{1150}

In a similar vein, section 26 of the Hindu Succession Act, 1956 bars an otherwise available right to succession, if the concerned individual has converted to another religion, and not thereafter returned to the original Hindu religious fold before the opening of succession.\textsuperscript{1151}

\textsuperscript{1147} MAHMOOD, supra note\textsuperscript{1120} at 93.
\textsuperscript{1148} Id. at 93.
\textsuperscript{1149} Id. at 93.
\textsuperscript{1150} Id. at 93.
\textsuperscript{1151} Id. at 93.
Therefore it is clear that recognition of religious identity and differentiated rights and entitlements based on the same are not the exclusive preserve of the minority religious communities under the Indian legal system. The Indian legal system recognizes religious identity and consequently provides group-differentiated rights, irrespective of the minority-majority dynamic.

(iii) Uniformity and the Civil Code: Viewing the debate through an ‘extreme cosmopolitan’ lens

One of the burning issues in relation to the aspect of religious identity in India has been the continuing existence of the personal laws of various religious communities. This differentiated personal law regime has however been the subject of virulent attack by its opponents. There are two distinct streams that this opposition emerges from. One is the outright majoritarian one which posits the continued existence of the personal laws of the minority religious groups as an irritant that deserves to be uprooted. The other stream though, and one that is more relevant for the present study, is the one which calls for uniformity.

This argument is the one invoked by the proponents of a uniform civil code. As is clear from a review of the Constituent Assembly Debates on religion which have been gone into in some detail in the initial portion of the present chapter, the framers of the Constitution specifically turned down the immediate imposition of a uniform civil code. The legal foundation of the argument is based upon the mandate contained in Article 44 of the
Constitution of India which was placed in the Directive Principles of State Policy by the Constituent Assembly. The Article is as under:

“44. Uniform civil code for the citizens.—The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.”

Based on the aforesaid provision, the frequently projected view is that there needs to be implemented a civil code that replaces the distinct personal laws of various religious communities and ensures uniformity in personal law matters for all Indian citizens. Based on this argument, there have been several judgments of the Supreme Court that have called for a uniform civil code on the seemingly unequivocal premise that religious minority specific laws threaten the unity of India. Perhaps the strongest enunciation of such a position can be seen in the following words of Kuldip Singh J. where he observes:

“…The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.”

The aforesaid observation makes two presumptions. One, that the codification of Hindu personal law has completely removed elements of religious practice from within the same. This presumption is incorrect as is

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1152 Article 44, THE CONSTITUTION OF INDIA, supra note1062.
1153 Sarla Mudgal Vs. Union of India: 1995 (3) SCC 635
clear from an examination of the contemporary position as regards the Hindu personal law as has been attempted in the previous part of the present chapter. Yet further, the Supreme Court of India is at present seized with a petition filed by members of the Sikh community that has questioned this very subsuming of the Sikh identity within the Hindu personal law and has demanded the recognition of the separate religious identity of the Sikhs in the relevant statutes.1154

The second presumption, and which is more relevant at this stage, is that the presence of differentiated identities is a stumbling block to the cause of national integration and unity, and that a desire for the same is outdated and undesirable. The resemblance between this argument and that espoused by the supporters of an extreme cosmopolitanism, such as Jeremy Waldron, is striking. Both aim for the obliteration of group identities, the former in the hope for a ‘religious cosmopolitanism’ based on a conceptualization of a united and uniform ‘Indianness’, whereas the latter calls for an ‘international cosmopolitanism’ characterized by global linkages. However, both of these formulations suffer from the same weakness which is that they both overlook the inherently hegemonic norm that they seek to propound in the guise of a cosmopolitan alternative. The hegemonic norm in the case of this ‘religious cosmopolitanism’ is that it is too strongly premised on a homogeneity that is driven by a right-wing formulation. To elaborate, Ronojoy Sen in his

comprehensive study of judgments of the Supreme Court in the realm of religion, has ultimately surmised that several judicial pronouncements have served to identify Hindu religious practices with a way of life i.e. transpose religious faith into a purportedly uncontroversial secular doctrine. He says that in a serious of judgments over several decades the Supreme Court has sought to define and interpret what constitute essential religious practices that are particularly concerned with Hinduism.\textsuperscript{1155} He is of the view that though this process was initiated with the laudable aim of reform and rationalization it eventually resulted in the identification of Hindu religious practice with a way of life. The high modernist and rationalist thrust of the Supreme Court, as reflected in the essential practices doctrine, failed to accomplish what it set out to, and in fact certain later developments represent a literal \textit{mea culpa}.

This was because the early homogenizing definition of Hinduism which was used by the Supreme Court, based on the purported ‘vedic unity’ that transcended all of Hinduism, was subsequently appropriated by Hindu nationalists to legitimize Hindutva.\textsuperscript{1156} This was made possible in as much this process of homogenization not only posited Hindu religious practices as one homogenous whole, it also simultaneously allowed for an argument to be made about Hindutva as a way of a life that represents the national

\textsuperscript{1155} \textit{Ronojoy Sen, Articles of Faith: Religion, Secularism, and the Indian Supreme Court} (2012).

\textsuperscript{1156} \textit{Id.} at 198.
The danger of hegemony masquerading as neutral uniformity is therefore all too palpable.

However, this is not to say that the constitutional mandate for a uniform civil code is still-born or that the same is undesirable in principle. What is however required is for the uniform civil code to be conceptualized in a fashion that it remains ‘uniform’ without being hegemonic or destructive of identity. To best express this sentiment, it would be apt to borrow the words of Ruma Pal J., as to what this vision represents, when she opines:

“The Constitution as it stands does not proceed on the 'melting pot' theory. The Indian Constitution, rather represents a 'salad bowl' where there is homogeneity without an obliteration of identity.”

Instead of an extreme cosmopolitan conceptualization of the uniform civil code, there should be adopted a conceptualization that promotes a ‘rooted cosmopolitanism’ that is respectful of particularistic attachments and loyalties in much the same way that the Hindu personal law is itself respectful of its internal heterogeneity. Therefore, as has suggested by certain scholars in the field, the uniform civil code should not be seen as being opposed to legal pluralism and should instead be visualized as being one in substance and operation throughout the country while retaining pluralistic content and norms. Further, the reformation of any blatant

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1157 Id. at 199.
1159 See page nos. 81-82 of the present chapter for a discussion of this internal heterogeneity.
1160 RAJU, supra note1030 at 214.
discriminatory provisions in any of the personal laws, need not be seen as being achievable only through the obliteration of the personal law itself.\footnote{Id. at 214.}

(iv) Tribal identity

Having considered the status of group recognition based on religion in the contemporary Indian landscape, it would be apt to look at the consideration of Tribal identity next. At the very outset, it may be noted that under Article 342 of the Indian Constitution, the President of India has the authority to specify the tribes or tribal communities, which after such recognition are recognized as Scheduled Tribes.

In matters concerning Tribal rights in India, it is frequently remarked that tribal rights are unachievable in practice unless a measure of socio-economic development is also ensured.\footnote{Amit Prakash, \textit{Rights and Social Justice for Tribal Population in India}, 3 in \textit{STATE OF JUSTICE IN INDIA: ISSUES OF SOCIAL JUSTICE}, 105 (Paula Banerjee & Sanjay Chaturvedi eds., 2009).} However, there is not really any doubt that the recognition of the tribal populace as a distinct group is uncontroversial. Studies have shown that Tribal identity amongst the members is still very strong in India.\footnote{Moonis Raza & Aujazuddin Ahmad, \textit{AN ATLAS OF TRIBAL INDIA: WITH COMPUTED TABLES OF DISTRICT-LEVEL DATA AND ITS GEOGRAPHICAL INTERPRETATION} 227 (1990).} Reserved seats for the Scheduled Tribes in the legislature, public employment and education have been more or less accepted by all sides of the political firmament as a permanent feature, though this unqualified acceptance is absent in the case of groups like the Other
Backward Classes (OBCs).\textsuperscript{1164} Strong political movements have in the recent past led to the creation of two states based predominantly on tribal identity, namely Chhattisgarh and Jharkhand.\textsuperscript{1165} A National Commission for Scheduled Tribes has also been set up to cater to the welfare of the Scheduled Tribes.

Particularistic legal norms can be seen in other arenas as well. Several state and central legislations make the transfer of tribal lands to non-tribals subject to very strict restrictions.\textsuperscript{1166} For instance, the Tripura Land Revenue and Land Reforms Act, 1960 contains such a provision in section 187. Section 189 of the same Act makes it explicitly clear that provisions of the Act shall override anything to the contrary contained in any other law, custom or usage or agreement or decree or order of a court. There are legislations that positively restore to the tribals the land sold by them to non-tribals and provide for debt redemption.\textsuperscript{1167} An example in this regard is section 7 of the Kerala Restriction on Transfer by and Restoration of Lands to Scheduled Tribes Act, 1999.

Reference should of course also be made to the more contemporary Forest Rights Act, 2006 that recognizes the rights of Tribals over the forest land that they inhabit, and has been characterized as a watershed movement in the

\textsuperscript{1164} THOMAS E. WEISSKOPF, AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA: A COMPARATIVE PERSPECTIVE 23 (2004).

\textsuperscript{1165} POVERTY AND SOCIAL EXCLUSION IN INDIA, 72 (2011).

\textsuperscript{1166} PATEL, supra note 986 at 97.

\textsuperscript{1167} Id. at 97.
fight for tribal rights.\textsuperscript{1168} Though these statutory provisions are alleged to have been followed more in breach rather than in practice\textsuperscript{1169}, the moot point is that do provide legal recognition of a distinct Tribal identity and rights flowing from the same.

The rights flowing on the basis of tribal identity in the Indian scenario have remarked as being categorizable into two distinct, but inter-connected subsets which are; \textit{firstly}, the right of the tribals to preserve their socio-cultural distinctiveness, and \textit{secondly}, the right to socio-economic development.\textsuperscript{1170} Many aspects of these rights are rooted in the argument that the Tribals are ‘original inhabitants’, and therefore have a special claim to the land they inhabit and its resources of the region.\textsuperscript{1171}

However, it is not as if the aforesaid rights are uncontested or in no danger of usurpation. There is the constant tussle in modern India between the need for resource exploitation and infrastructure development, and the particularistic entitlements of the Tribals over their lands. In this context, there have been recent indications that the aforesaid rights, particularly the Forest Rights Act, 2006 might be diluted to facilitate diversion of tribal land

\textsuperscript{1170} Amit Prakash, Rethinking “Regional Developmental Imbalances”: Spatial versus the Socio-political, \textit{in Rethinking State Politics in India: Regions Within Regions}, 39 (Ashutosh Kumar ed., 2012).
\textsuperscript{1171} Id. at 39.
for industrial activities. The reasoning for such a move as reportedly given by the Indian Tribal Affairs Minister is premised on the ground that the industrial development would be for the benefit of all. He has been quoted in this regard as saying that:

"Projects such as roads, railways and electricity and irrigation will help the tribal people too. So regarding these types of projects, there is a discussion underway. If there are projects (that) are benefiting the tribals also, then what is the problem in amending the Forest Rights Act to include exemptions?"

The aforesaid argument, and its myriad variations, once again seem to make a call to cosmopolitan welfare in as much as society as a whole is sought to be projected as having benefited from certain proposed schemes. However, as has already been noted above, these arguments fail to notice the fact that the call for a cosmopolitan welfare rides roughshod over the particularistic aspirations of tribal populations, which may quite legitimately posit a vision of the good life that does not permit for any interference whatsoever with their environment or way of life. As to why exactly such a conceptualization of cosmopolitanism is problematic, has been considered in the previous part of the present study.

1173 Id.
1174 Id.
(iv) Scheduled Caste identity

Having considered the status of group recognition based on tribal identity in the contemporary Indian landscape, attention can be turned towards Scheduled Caste Identity. It can be said that Scheduled Caste identity in contemporary India is quite strong. This strength is premised upon two primary factors. One negative and the other largely positive.

The negative factor is that discrimination against Scheduled Castes continues in myriad forms in Indian society despite decades of reformative state polices. This discrimination is manifested in several areas such as low literacy rates as compared to the national average, and in many cases still takes the form of outright physical violence and intimidation.1175 It has been recorded that this discrimination extends even to the urban space, with office colleagues insisting on disclosure of caste identity and landlords refusing to rent out homes to person belonging to the Scheduled Castes.1176 Therefore, it is clear that relatively cosmopolitan spaces also do not really guarantee the obliteration of discrimination based on group identity.

The largely positive factor has been the rise of Scheduled Caste politics, which scholars have opined have enhanced and democratized Indian polity and also helped in bringing about a positive change in social attitudes.1177

1176 Id. at 10.
Due to his newfound political significance, it is now political suicide for any political party to disregard the concerns of the Scheduled Caste.\textsuperscript{1178} Further, it is now very rare to find any public expression of opinion that supports the retention of caste prejudices, and outright expressions of caste discrimination have largely been eliminated.\textsuperscript{1179} The downside that has been posited to the political angle, though the same is also debatable, however is that it has aimed for securing formal power in the form of control over government instead of radically attempting to redefine the underlying power equations that power the institutions of the state and which continue to be dominated by contrarian interests.\textsuperscript{1180}

The aforesaid apart, reservations that are promised under the Constitution to the Scheduled Castes continue to operate after having been extended on several occasions. Several social schemes and programs are run by the central and state governments for the welfare of the Scheduled Castes.\textsuperscript{1181}

There are specific statutes, namely the Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which criminalize untouchability and term as offenses a wide range of actions that may be based to insult or denigrate an individual on the basis of his scheduled caste or tribal identity. It has been said that the

\begin{footnotesize}
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  \item \textsuperscript{1178} Id. at 126.
  \item \textsuperscript{1179} Id. at 126.
  \item \textsuperscript{1180} Id. at 126.
  \item \textsuperscript{1181} Scheduled Caste Welfare - Schemes and Programs, , http://socialjustice.nic.in/schemespro1.php (last visited Sep 12, 2014).
\end{itemize}
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promulgation of the latter act is an acknowledgment by the state that the most dehumanizing forms of abuse target Scheduled Castes as a group and cannot be effectively addressed merely by recourse to the general criminal law. A National Commission for Scheduled Castes has also been set up to oversee the implementation of these acts and for the welfare of Scheduled Castes in general.

(v) Linguistic identity

Before concluding with the present chapter, one may briefly take a look at the status of group recognition based on language. It has already been discussed that there are a mind boggling number of languages and local dialects in India. The Constitution itself identifies and grants official recognition to 22 such languages, with 15 being present originally and 3 having been added by way of an amendment in the year 1992 and 4 more having been added by way of an amendment in the year 2003. These 22 languages are Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu and Urdu. As has already been seen in the examination of the constitutional provisions pertaining to language, the states are permitted to use a local language as

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1182 Smita Narula, Broken People: Caste Violence Against India’s “Untouchables”, 183 (1999).
their official language as distinct from the official languages of Hindi and English used by the Union. The rights of linguistic minorities to preserve their language is also explicitly mentioned in the Constitution.

What is also relevant to note is that the very internal demarcation of contemporary India amongst different states is based predominantly on language. Facing significant demands from certain regions of the country for the reorganization of India in the days immediately post the independence of the country, a States Reorganization Commission (SRC) was set up by the government in the 1950s to suggest measures to carry out this reorganization. Language was the major, though not the sole, factor for reorganization which was suggested by the States Reorganization Commission to the government of the day. The recommendations of the States Reorganization Commission were accepted by the government with minor modification and this led to the passing of the States Reorganization Act of 1956, which primarily used language as the criteria for reorganization. The reorganization of India was therefore carried out primarily on a linguistic basis. Such a reorganization was a clear nod to the aspirations of various linguistic groups in the country. Language in the Indian sub-continent has even over-come the other strong factor of group identity i.e. religion, at several instances. For example, the unified identity based on religion in the

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1186 Id. at 389.
1188 DAS, supra note1185 at 389.
Pakistan was shattered by the assertiveness of the Bengali linguistic-group when faced with discrimination, which ultimately led to the break-up of Pakistan and the creation of Bangladesh.¹¹⁸⁹

Language continues to be a strong marker of identity for Indians. While this can be said to be true on a global level as language is an integral part of culture, this has been said to be especially true of India.¹¹⁹⁰ It has been noted that the twin occurrences of the linguistic reorganization of states and the increasingly influential role played by the English language, have resulted in ever greater inter-locking between language and identity in everyday India.¹¹⁹¹

The rise of English, which might be considered an expression of a cosmopolitan condition, has in fact reinforced allegiance to the vernacular language in as much as India is increasingly characterized by a state of ‘bilingualism’ with the regional language as the identity marker and English as a link language.¹¹⁹² This situation does not seem likely to change in the near future as the post-independence fervor for a national language as a marker of unity has largely died down and though government policy may seek to promote Hindi, social and economic opportunities clearly favor English.¹¹⁹³

¹¹⁹⁰ Bipan Chandra, Aditya Mukherjee & Mridula Mukherjee, India Since Independence 113 (2008).
¹¹⁹¹ Rita Kothari, Translating India 27 (2005).
¹¹⁹² Id. at 27.
¹¹⁹³ Id. at 31.
CONCLUDING REMARKS

The Indian formulation of citizenship and the legal rights that it fosters, can perhaps be best expressed through the phrase ‘qualified equal citizenship’. This qualification has been employed as a means of augmenting the protections offered to individual citizens by means of the fundamental rights, in the case of those who by reason of their group affiliations or memberships are subjected to discrimination. It has also been employed to protect the minority group identities of those individual citizens who are constituent members of such minority groups based on the factors of language, culture, religion etc. From an overview of the contemporary scenario in India in relation to the aforesaid minority rights based both on anti-discrimination as well as cultural preservation tenets, it is quite clear that these group identities and legal and institutional recognition of the same are a common feature of modern Indian society.

The Indian Constitutional framework, both in the circumstances of its birth in the deliberations held in the Constituent Assembly as also the contemporary legal regime that it has given rise to, bears striking resemblance to legal theories that stress on the possible complimentarity between universal individual rights and group based rights. For instance, it reflects Bhikhu Parekh’s idea of ‘reciprocal obligations’ wherein the state when it recognizes the identity of groups is seen as reciprocating for the

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political loyalty that has been promised to it by these groups. The Indian Constitution in this regard represents a contract by means of which varied groups cutting across caste, creed and language profess loyalty to the Indian state and the state in turn guarantees the protection of these group identities within its fold. The Indian Constitutional framework also reflects Kwame Anthony Appiah’s idea of a ‘rooted cosmopolitanism’ which is wary of a universalistic and uniformity driven conceptualization of cosmopolitanism and instead rejoices in particularistic attachments and affiliations. The Indian Constitution, while creating a cosmopolitan uniting bond based on the notion of a common Indian citizenship, at the same time celebrates the richness and diversity that is offered by the varied languages, cultures and religions that exist within Indian society. Yet further, in its various explicit provisions that call for the welfare and protection of the weaker sections of society, the Indian Constitution reflects the socially inclusionary values of Boaventura de Sousa Santos’ subaltern cosmopolitanism.

The Indian Constitutional framework is however not be praised merely on the normative values it represents. The real validation comes about in the light of the widespread estimation that despite enormous pressures and strains, India as a country has not only grown stronger but has also been remarkably successful in accommodating cultural diversity and managing conflict through its Constitution and the democratic institutions that have
been nurtured under it. Above all else, it represents a balance, howsoever tenuous, between universal individual rights and group rights.

The Indian experience also offers a valuable lesson in the sense that if cosmopolitanism is to be viewed as a theory that engages with the everyday reality of human life, and does not merely aim to sit on a utopian pedestal, then it would be difficult to justify a conceptualization of cosmopolitanism that denies the great diversity of human life that exists in the world and the value, though subjective, that individual human beings might derive from this diversity. Transcending differences, as the Indian experience shows, does not necessarily mean obliterating them in the process.

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