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Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution

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Abstract: The religious freedom clauses of the Indian Constitution attempt to mediate between the competing claims of individuals, religious groups and the state, in a manner that is born out of specific historical circumstances. This article examines the controversial questions of whether, and to what extent, the Constitution grants individuals (specifically, dissenters) rights against the religious communities to which they belong. Taking as its point of departure a landmark Supreme Court judgment that struck down an anti-excommunication law, the article argues that the Indian Constitution is committed to an 'anti-exclusion principle': that is, group rights and group integrity are guaranteed to the extent – and only to the extent – that religious groups do not block individuals' access to the basic public goods required to sustain a dignified life. Moreover – and unlike most other Constitutions – an individual may vindicate this right directly against her community in a court of law, by invoking the Constitution. This remedy is justified both philosophically, and in the specific context of Indian history. In this manner, Indian constitutionalism offers a novel and innovative solution to the perennial problem of balancing individual rights to religious freedom against the claims of community.

Keywords: discrimination; freedom of religion; Indian constitutional law; secularism

In early 2015, women worshippers at the Haji Ali shrine moved the Bombay High Court, claiming their exclusion from the inner sanctum by the shrine's governing board violated their constitutional rights to

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freedom of religion.[1] Soon afterwards, public interest litigation commenced in the Indian Supreme Court, contending that barring menstruating-age women from the popular Sabrimala temple by the Temple administration was unconstitutional.[2] And most recently, in January 2016, the case of *Central Board of the Dawoodi Bohra Committee v State of Mahrashtra* was listed to be heard by a five-judge bench of the Supreme Court. More directly even than the right-to-worship cases, *Dawoodi Bohra* heralds a reopening of a fraught constitutional and philosophical question that has global resonance: in what manner should a Constitution that guarantees the freedom of religion to both individuals and communities, mediate the claims of religious groups *against* the claims of their constituents?

Dawoodi Bohra involves a request to the Court to reconsider, and if necessary, reverse, a 50-year-old judgment: *Sardar Syedna Tahir Saifuddin v State of Bombay*.[3] *Saifuddin* was about a constitutional challenge to the Bombay Prevention of Excommunication Act, 1949, which outlawed the practice of excommunication within religious communities. The Petitioner was the 'Dai', or Head Priest of the Dawoodi Bohra community, an offshoot of Shia Islam. He argued that by taking away his power of excommunication, the Act violated his right to religious freedom under Article 25(1) of the Indian Constitution, and the Dawoodi Bohras' right to regulate their own affairs in matters of religion, under Article 26(b) of the Constitution. The state responded that the power of excommunication was no part of religion. Even if it was, however, the law was saved by Article 25(2)(b) of the Constitution, which expressly authorised the state to override religious freedom in the interests of social reform.

By a 4–1 majority, the Supreme Court agreed with the Dai, and struck down the Act. Writing for three judges, Das Gupta J held that Articles 25 and 26 of the Constitution protected practices that were *essential*, or *integral*, parts of religion. Surveying the authorities, he found that excommunication was needed for preserving community solidarity, cohesiveness, and discipline, and therefore fell within Articles 25 and 26. He then held that since the Act only purported to bar excommunications made on religious grounds, it could not be saved by Article 25(2)(b)'s 'social welfare or reform' clause. In his concurring opinion, Justice Ayyangar went one step further, and held that even if the Act was a measure of social reform,

[1] PTI, 'Now women seek entry into Haji Ali Dargah', *The Indian Express*, 28 January 2016.

[2] Express News Service, 'Supreme Court to examine ban on women's entry on Sabrimala', *Indian Express*, 13 February 2016.

[3] *Sardar Syedna Tahir Saifuddin v State of Bombay*, 1962 SCR Supl. (2) 496.

it could not be allowed, under the Constitution, to 'reform a religion out of existence'.[4]

Chief Justice Sinha dissented. According to him, an excommunicated person 'is excluded from the exercise of rights in connection … with places of worship … from burying the dead in the community burial ground and other rights to property … which are … of a civil nature and are not purely religious matters'.[5] Consequently, Articles 25(1) and 26(b), which were intended to cover only matters that were *essentially*, and not *incidentally*, religious, did not protect excommunication. Indeed, the Act was actually furthering the underlying objectives of Article 25(1) and of the Constitution, by guaranteeing human dignity and the individual freedom to dissent without the price of ostracism, and of being 'treated like a pariah'.[6] He therefore upheld the Act.

The three judgments in *Saifuddin* represent three radically different understandings of the right to, and limits of, religious freedom under the Indian Constitution. In particular, they differ on the relationship between the individual member of a religious community, the community itself, and the state, a relationship that has always been underdetermined by the sparse constitutional text. The majority reasoning, with its focus on 'essential religious practices' and its relegation of 'social reform' to an afterthought, has become the Court's dominant approach. Justice Ayyangar's separationist view is occasionally found in concurring and dissenting judgments through the years. And Sinha CJ's dissent, which sought constitutional protection not only for the religious freedom of the community, but also freedom *from* the religious community, has never found acceptance. The attempt to have the Supreme Court review its judgment in *Saifuddin*, therefore, is not simply about a single case, but a challenge to a 60-year-old judicial practice of interpreting the Indian Constitution's religious freedom guarantees. And in the context of parallel litigations in the Bombay High Court and the Supreme Court about the right of women to access Muslim and Hindu religious shrines against the diktats of community heads, the question has assumed urgent constitutional significance.

In this article, I will argue against the majority and concurring opinions, and in support of Sinha CJ's dissent. I will make the following argument. Textually, the Indian Constitution guarantees the right of religious freedom and autonomy to both individuals and to religious groups. Sometimes (as in the *Dawoodi Bohra* case), individual religious beliefs and conduct come

[4] Ibid, para 61 (concurring opinion of Ayyangar J).
[5] Ibid, para 19 (dissenting opinion of Sinha CJ).
[6] Ibid, para 23 (dissenting opinion of Sinha CJ).

into conflict with their religious communities, and the two rights clash. In such circumstances, a historical and structural interpretation of the Indian Constitution, in the context of the 'thick' role played by religious communities in Indian social life, mandates a balance between individual religious freedom and religious group autonomy. This balance is struck by the application of a principle that I shall label the 'anti-exclusion principle', a proto-version of which is found in Sinha CJ's dissent. The 'anti-exclusion principle' limits religious group autonomy *at the point at which* the actions of groups have the effect of excluding individuals from access to the basic goods that are necessary for a life of material and expressive dignity. The application of the principle, of course, would depend upon the circumstances of individual cases; in particular, it would depend upon the nature of the relationship between an individual and her group, and the extent to which group membership is bound up with access to basic goods.

My article is organised in the following manner. I begin by unweaving the web of textual provisions that characterises the right to freedom of religion under the Indian Constitution, and in particular, the tension between individual religious freedom and group autonomy (Section I). I then trace the genealogy of the 'essential religious practices' test, which was the basis of the majority and the concurrence in the *Dawoodi Bohra Case*, and on the touchstone of which the judges decided to subordinate individual freedom of religion to religious group autonomy. I argue that it rests upon a mistaken understanding of the Constituent Assembly Debates and the Court's own early precedent, and is unworkable in practice, since it involves judicial intervention into questions that judges are fundamentally unsuited to resolve (Section II).

Subsequently, I proceed to argue that the Court's invocation of this test stems from the 'thick' role played by religion in Indian public life, which underscores the need for an approach that is different from the one adopted in Western liberal constitutional jurisdictions. The extent to which religious groups have the power to affect the lives of their constituents has prompted the judiciary to abandon a strictly separationist approach, and appropriate the mantle of religious reform (Section III). *However*, I then argue Sinha CJ's dissent – and the 'anti-exclusion principle' that I develop out of it – provides an alternative that is equally cognisant of the reality of the state-religion-community relationship in India. The anti-exclusion principle, which limits religious group autonomy in the interests of securing individual access to basic material and cultural goods, ought to replace the essential religious practices test in adjudicating between the conflicting claims of individuals and groups (Section IV). I conclude by addressing two possible objections to the anti-exclusion principle, based upon group autonomy, and argue that despite their intuitive plausibility, they do not succeed.

The anti-exclusion principle is faithful to Indian history, to the structure of the Indian Constitution, and to the Constitution's socially transformative purpose of limiting powerful group affiliations in the interests of individual freedom (Section V). It should be the blueprint that the Court adopts in future cases dealing with religious freedom and secularism (Section VI).

I. Individual, community, state: The textual web of indian constitutional secularism

The Indian Constitution's fundamental rights chapter[7] comprises diverse, and possibly conflicting, sets of rights holders, duty bearers, and juridical relationships. There are individual rights against the state, familiar to classical liberal constitutionalism (equality, speech, association, etc). But there are also direct horizontal rights, guaranteeing non-discriminatory access to shops and hotels, and abolishing forced labour and 'untouchability'. In addition, the Constitution explicitly provides for group rights, such as the rights of minorities to conserve their language, script, and culture. And lastly, it allows the state wide regulatory powers over both individuals and groups, with a view to social reform – for instance, through affirmative action even against claims of formal equality.

Later in this article, I shall advance historical and philosophical arguments interpreting – and justifying – the unique manner in which the Indian Constitution mediates these multiple relationships. For now, however, I only wish to point out that academic and judicial debates surrounding the religious freedom clauses – Articles 25 and 26 – have tended to understand these provisions as though they constitute a self-contained code.[8] This, I believe, is a mistake. An understanding of religious freedom under the Constitution is incomplete without acknowledging that the provisions are *nested* within a fundamental rights chapter that, in various contexts and ways, attempts to grapple with the relationship between three actors – the individual, the community and the state.

Let us now consider Articles 25 and 26. Article 25(1) guarantees that 'subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the

[7] Part III, Constitution of India.

[8] See e.g. R Dhavan and FS Nariman, 'The Supreme Court and Group Life' in BN Kirpal *et al*. (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP, New Delhi, 2000) 256–87; BP Rao, 'Matters of Religion' (1963) 5 *Journal of the Indian Law Institute* 509; M Galanter, 'Hinduism, Secularism, and the Indian Judiciary' (1971) 21(4) *Philosophy East and West* 467.

right freely to profess, practise and propagate religion'.[9] This language of personal freedom is similar to liberal-democratic Constitutions all over the world.[10] Immediately after that, however, Article 25(2)(a) permits the state to make laws for 'regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice'.[11] Article 25(2)(b) follows, allowing laws 'providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus'.[12]

Two things stand out. *First*, the Constitution expressly distinguishes between religion, and secular activities that might be 'associated with religious practice'. Implicitly, therefore, it tasks the Courts with drawing the dividing line between the religious and the secular.[13] Secondly, the Constitution allows the state to intervene in, and recalibrate, the relationships within religious groups or communities, in the interests of 'social welfare and reform' – an instance of which is requiring public Hindu religious institutions to be open to all Hindus. Once again, the Constitution makes the courts the ultimate arbiters of the question.

Article 26(b) permits a 'religious denomination' to 'manage its own affairs in matters of religion',[14] while also allowing it to administer property that it owns or has acquired 'in accordance with law'.[15] Two things, again, stand out. *First*, Article 26 *directly* makes groups the bearers of rights. And secondly, like Article 25, Article 26 invites law – and the courts – to draw a distinction between 'matters of religion' and secular questions, illustrated by the express textual provision that property may be administered only in accordance with law.

Articles 25 and 26, taken together, guarantee the rights of individuals and groups to religious freedom, while allowing the state to regulate secular matters that might take a religious form, and to frame reform-oriented laws that might impinge upon the internal autonomy of religious communities. Read plainly, the text seems to represent conflicting impulses, attempting to achieve a 'simultaneous commitment to communities and equal citizenship'.[16] Scholars have disagreed about whether it manages to

[9] Art 25(1) Constitution of India.

[10] See e.g. First Amendment, Constitution of the United States of America; Section 15, Constitution of South Africa.

[11] Art 25(2)(a) Constitution of India.

[12] Art 25(2)(b) Constitution of India.

[13] A point made by BP Rao in 'Matters of Religion' (n 8); DE Smith, 'India as a Secular State' in R Bhargava (ed), *Secularism and Its Critics* (OUP, New Delhi, 1998) 177.

[14] Art 26(b) Constitution of India.

[15] Art 26(d) Constitution of India.

[16] L Rudolph and S Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (University of Chicago Press, Chicago, IL, 1987) 33.

achieve a workable *modus vivendi* between competing claims,[17] or only succeeds in setting up an irreconcilable contradiction.[18]

And lastly, note what is left unsaid. Articles 25 and 26 do not provide a *principle* to distinguish between the religious and the secular. Furthermore, they do not clarify whether Article 26(b) – to borrow Will Kymlicka's terminology – guarantees only a group-differentiated right against state intervention, or whether it also guarantees rights of groups against their own constituents (and *vice versa*).[19] Article 26(b) does not directly speak to situations where the individual and the community might clash with each other over issues of religious freedom. The wide powers given to the state under Article 25(2)(b) suggest the answer might not be as easy as it has been in other jurisdictions, where individuals have few antecedent constitutional rights against their communities.[20] Of course, the answer to this question depends upon a deeper question which, again, is underdetermined by the constitutional text: does the Constitution treat groups as bearers of value in their own right, or does it view groups as instrumental to achieving individual fulfilment, and therefore guarantee group rights?[21] As we shall see, the majority's error in *Saifuddin* lay in its failure to address any of these questions in the comprehensive manner that they required.

II. 'Essential religious practices' – tracing the genealogy of a phrase

In *Saifuddin*, the majority and concurrence both struck down the Excommunication Act on the ground that excommunication was an integral, or essential, part of the Dawoodi Bohra faith. And, as held by the majority, 'what constitutes an essential part of a religious or religious practice has to be decided … with reference to the doctrine of a particular religion and include practices … regarded by the community as a part of its religion'.[22] Once that was established, curtailing the power of excommunication was deemed to be interference into a purely

[17] M Galanter, 'The Religious Aspects of Caste: A Legal View' in D Smith (ed), *South Asian Politics and Religion* (Princeton University Press, Princeton, NJ, 1966) 289.

[18] See (n 16).

[19] W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP, Oxford, 1996) ch 3.

[20] See e.g. *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC*, 565 US ____ (2012) (US Supreme Court).

[21] For a summary of the opposing views, see R Bhargava, 'Introducing Multiculturalism' in R Bhargava *et al*. (eds), *Multiculturalism, Liberalism, and Democracy* (OUP, New Delhi, 2007) 1.

[22] See (n 3) para 33.

religious matter, and therefore not saved by the social reform clause of the Constitution.

The term 'essential religious practices', as the trigger for invoking the protection of Articles 25 and 26, has long been criticised. The objection is well known, and has been made throughout the Court's history: it is not for the judiciary to pronounce on importance of specific doctrines or beliefs internal to a religion.[23] This criticism is familiar to other liberal constitutional jurisdictions. Constitutional courts in the United States,[24] Canada[25] and Europe[26] have established limits upon the extent to which individuals or groups can engage in religious practices that might conflict with the civil law of the state. But they have – for the most part[27] – refused to impose an external point of view upon whether a practice is religious or not, and how important it is to its adherents. This refusal is part of a deeper commitment to constitutional liberalism, which declines to impose particular substantive visions of the good upon individuals.[28] As *Saifuddin* illustrates, this approach is not the approach of the Indian Supreme Court.

What, however, is the genesis of the phrase 'essential religious practices' – if any? An answer, of sorts, is found in the debates of India's Constituent Assembly. While discussing the religious freedom clauses, Dr BR Ambedkar, the Constitution's principal drafter, observed that 'the religious conceptions in this country are so vast that they cover every aspect of life, from birth to death … I do not think it is possible to accept a position of that sort … we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are *essentially religious*. It is not necessary that … laws relating to tenancy or laws relating to succession, should be governed by religion.'[29]

[23] See e.g. S Parthasarathy, 'The Flawed Reasoning in the Santhara Ban', *The Hindu*, 24 August 2015.

[24] *Wisconsin v Yoder*, 406 U.S. 275 (1972) (US Supreme Court).

[25] *Multani v Commissioner*, [2006] 1 SCR 256 (Supreme Court of Canada).

[26] *Leyla Sahin v Turkey*, [2007] 44 EHRR 5 (Grand Chamber) (European Court of Human Rights).

[27] But see *MEC for Education v Pillay* (2008) 2 BCLR 99 (CC) (South African Constitutional Court); *R(E) v Governing Body of JFS* [2009] UKSC 15 (United Kingdom Supreme Court). Note, however, that the JFS case was decided under the UK Race Relations Act, which specifically prohibited discrimination and exclusion in certain aspects of the private sphere. The argument in this article deals with how the Indian *Constitution* speaks to such issues.

[28] G Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, Princeton, NJ, 2003) 102.

[29] Parliament of India, *Constituent Assembly Debates, Vol. VII*, 2nd December 1948 (speech of Dr BR Ambedkar) at <http://164.100.47.132/LssNew/constituent/vol7p18.html> (emphasis added).

Ambedkar, therefore, was speaking to a very specific concern, a concern that scholars have located in the difference between the 'thin' and 'thick' role of religion.[30] In Western liberal democracies, where religion has (largely) been relegated to the sphere of private worship and ceremony, religious autonomy is unlikely to seriously jeopardise the state's legislative programme – or, for that matter, to affect individual rights in any meaningful way. In India, however, according to Ambedkar, religion, the private life of the individual, and the public life of the community, were inextricably bound together (or, in TN Madan's words, religion is 'constitutive of society')[31]. Consequently, the state would have no choice but to restrict the operation of religious freedom to matters that were *essentially* religious, and not those that were secular in character, but over whom religion nonetheless claimed dominion. As we have seen, the Constitution explicitly contains this division, in the very text of the numerous subclauses of Articles 25 and 26. Indeed, Ambedkar's original formulation seemed to be precisely oriented towards denying religious groups sweeping powers over their constituents.

What Ambedkar and the Constitutional text did not do, however, was to provide a test, or a set of principles, for distinguishing the religious from the secular. Both provided examples – Ambedkar of tenancy and succession law, the Constitution of administration of property – without actually answering the question. And so the battle moved to the courts.

A succinct statement of the Indian Supreme Court's approach is provided by Dhavan and Nariman, writing in 1997. Surveying 50 years of case law, they state that there is 'a three step inquiry to determine … whether a claim was religious at all, whether it was essential for the faith and … whether, even if essential, it complied with the public interest and reformist requirements of the Constitution'.[32] This has long been established wisdom, and as we have seen, it formed the core of the majority's reasoning in *Saifuddin*. While not entirely inaccurate, I will attempt to show that this summary misses one crucial aspect of judicial history: that until their conflation in the 1960s, steps one and two were invoked in very different contexts, and intended to deal with separate problems.

Let us start at the beginning. As early as 1954, the Supreme Court acknowledged the 'thick' conception of religion by rejecting a definition that would have limited it to private matters of thought, conscience and belief, and accepting, instead, that the religious freedom clauses would

[30] See ibid 29; also TN Madan, 'Secularism in its Place' in R Bhargava (ed), *Secularism and Its Critics* (OUP, New Delhi, 1998) 297, 302.

[31] See Madan (n 30).

[32] See Dhavan and Nariman (n 8) 260.

also protect action and practice. In *Lakshmindra Swamiar* – a case that dealt with state control over the administration of denominational temples – the Court held that 'if the tenets of any religious sect … prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year … all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment … would not make them secular activities partaking of a commercial or economic character'.[33] In other words, the Court began by adopting an internal point of view to distinguish between the religious and the secular: look to the religion *itself*. This doctrine – again, familiar to Western liberal constitutions, where the Courts refuse to define religion and focus, instead, on the genuineness and sincerity of an adherent's belief – nonetheless fails to solve Ambedkar's poser. If religion *itself* claimed such a vast domain, making religion the arbiter of what fell within its domain seems self-defeating. The position was, however, affirmed in a similar case that same year.[34] In both cases, the Supreme Court employed the 'essential practices' formulation – borrowed from Ambedkar – to distinguish between the religious (free from regulation) and the secular (subject to regulation).

However, three years later, there was a sudden change of tack, when the Allahabad High Court was asked to decide whether government regulations prohibiting bigamy violated Article 25(1). It was argued that because of the special religious duties performed by Hindu sons, bigamy was required in case no male children were forthcoming from the first marriage. In response, the Court analysed certain important Hindu religious texts, and held that 'polygamy … [is not] an essential part of the Hindu religion'.[35]

Here is the key shift: the word 'essential' went from qualifying the *nature of the practice* (i.e., whether it is religious or secular), to qualifying its *importance* (within the religion) – i.e., from whether something is *essentially religious* to whether it is *essential to the religion*. It was a minor grammatical shift, but with significant consequences, because it allowed the Court to address questions internal to religion in a judicial enquiry, and thereby define the nature of religion itself. Towards the end of the decade, this test was affirmed by the Supreme Court in upholding a law prohibiting cow slaughter.[36]

[33] *The Commissioner, Hindu Religious Endowments, Madras v Lakshmindra Swamiar*, 1954 SCR 1005, para 20.

[34] *Ratilal Panachand Gandhi v State of Bombay*, 1954 SCR 1035.

[35] *Ram Prasad Seth v State of UP*, AIR 1957 All 411, para 12, relying upon *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84.

[36] *Mohd Hanif Qureshi v State of Bihar*, 1959 SCR 629, para 13.

At the turn of the Court's first decade, therefore, there appeared to be two distinct tests under Article 25 and 26 of the Constitution. First: was the practice of a religious or secular nature? And secondly: was it essential to the religion? The first enquiry was conducted to decide which aspects of temple or religious trust management could come within state control. The second was to decide whether specific religious practices, which the state sought to prohibit or regulate, met the threshold test for constitutional protection at all. As we have seen above, while the distinction between religious and secular was set up by the Constitution itself, and in Ambedkar's framing speech, the distinction between essential and inessential *religious* practices was nowhere to be found in the text or history. While the Court was yet to recognise – let alone explain – the dichotomy, it is easy to see how and why it came about. The original sin lay in *Lakshmindra Swamiar*. That case had set up two propositions in tension with one another: first, that the scope of the religious freedom clauses extended to practice and conduct; and secondly, what practice or conduct was protected was to be judged from the internal standpoint of the religion itself. When placed in the context of Ambedkar's acute observation about the influence of religion in Indian public life, no court could have faithfully followed both propositions. However, instead of rethinking *Swamiar*, the Court's response was to tweak the test in a subtle but far-reaching direction, one that effectively gave it substantial powers of intervention into religious faith – but a direction that had clearly not been contemplated by the constitutional framers.

In the 1960s, however, in a series of judgments delivered by Justice – and then Chief Justice – Gajendragadkar, the systematic distinction between the two tests was dissolved. While deciding upon the constitutionality of an Act stipulating control over the Managing Committee of a Muslim *dargah* (shrine), Gajendragadkar J observed in *obiter* that '[for] the practices in question … [to] be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form … *Similarly*, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself … .'[37]

In this paragraph, the Justice ran together the two distinct tests. In the first part of the first sentence, he equated 'being part of a religion' with being an 'essential and integral part' of it, for the purposes of constitutional protection.

[37] *Durgah Committee, Ajmer v Syed Hussain Ali*, 1962 1 SCR 383, para 33 (emphasis added).

He then observed that the *reason* for this distinction was to differentiate between the merely secular claiming the mantle of religion, and the actually religious. But that wasn't all: he then argued that 'similarly', there was a distinction between the religious and the merely 'superstitious'.

There is, however, nothing 'similar' between the two! The religious/secular distinction, however it might be drawn, does not involve the Court in external *normative* value judgments about the religious practice in question. In addition to combining the two tests, the Justice Gajendragadkar was making another innovation. Effectively, he was clothing the judiciary with the power to achieve, *by interpretation*, what the Constitution had allowed Parliament to do, through *legislation*: implement 'social reform' by erasing of supposedly regressive religious practices. Earlier, when the Court had taken upon itself the task of deciding what constituted an essential or integral aspect of a religion, it had already assumed the power of erasure. Now, that power was coloured with the brush of normativity. And the very next year, the two (equated) tests were merged into two succeeding steps of a single test. In *Govindlalji v State of Rajasthan*, Gajendragadkar J held that 'the Court may have to enquire whether the practice in question is religious in character *and if it is*, whether it can be regarded as an integral or essential part of the religion'.[38]

And finally, in *Sastri Yagnapurushadji v Muldas*, the appellants tried to circumvent the operation of a Bombay temple entry law, which required public Hindu temples to open themselves up for worship to all castes, by arguing that the 'Swaminarayan sect' did not consider itself to be Hindu at all. This contention was rejected by (now) Chief Justice Gajendragadkar, who devoted reams of paragraphs to prove that the Swaminarayan sect was, indeed, Hindu (contrary to its own self-identification), by isolating a few core concepts that formed the bedrock of 'Hinduism'.[39] The Chief Justice's vision of Hinduism, as many scholars have remarked, was that of a rationalistic and progressive religion, implicit within which was the further notion that the appellants, in trying to continue to deny certain castes the right to worship in their temple, had themselves misunderstood the principles of Hinduism.[40]

To sum up, therefore: through the 1960s, Gajendragadkar CJ combined the two distinct tests – religious/secular and essential/inessential – into a single one. With respect to the first test – now the first 'step' – he continued

[38] *Tilkayat Shri Govindlalji v State of Rajasthan*, 1964 SCR (1) 561, para 57 (emphasis added).

[39] *Sastri Yagnapurushadji v Muldas*, 1966 SCR (3) 242.

[40] R Dhavan, 'Religious Freedom in India' (1987) 35(1) *American Journal of Comparative Law* 209, 224.

to pay formal obeisance to the internal point of view – i.e., to the religious community's determination of the scope of what constituted religion – while actually determining the question by judicial fiat; and to the second, he added a normative prong, which allowed the Court to cleanse and uniformise disparate religious practices in an (allegedly) socially 'progressive' direction, again by judicial fiat.[41] Doing so had two further consequences: as the Court increased its own power in this manner, the use of Article 25(2)(b) – which granted the *state* the power of religious intervention for social reform – began to decrease.[42] And secondly, at times, the Court was led to record seemingly absurd conclusions, such as in *Commissioner of Police vs Acharya Jagdishwarananda Avadhuta*, where it refused to accept a practice (in this case, a warlike public dance performed on the streets) as an essential religious practice even when the sect's founder had stipulated it in the sect's holy book, *precisely* so that it could be accorded constitutional sanctity.[43] Indeed, in that case, the absurdity of the conclusion was recognised by Justice Lakshmanan in a strong dissenting opinion. Justice Lakshmanan observed – the first time any judge had formally noted – that Justice Gajendragadkar's observations in *Durgah*, distinguishing the 'superstitious' from the 'essential religious' and calling for close judicial scrutiny to determine the content of 'essential religious practices', were at variance with the original dictum of the Court in *Swamiar*. Quoting *Cantwell v Connecticut*[44] and *United States v Ballard*,[45] Justice Lakshmanan now swung the pendulum to the other end: 'to allow any authority to judge the truth or falsity of a religious belief or practice is to destroy the guarantee of religious freedom in the Constitution'.[46] Justice Lakshmanan's opinion parallels that of Justice Ayyangar's concurring opinion in *Saifuddin*, and provides a counterpoint to the dominant 'three-step test'. This counterpoint goes back to the original formulation in *Swamiar*. By adopting the internal point of view and a deferential approach towards what constitutes constitutionally protected 'religion', it tips the balance back towards maintaining the integrity of religious groupings over social-reformatory purposes of the parliament and the judiciary.

[41] For criticism, see Rao (n 8).

[42] *Seshammal v State of Tamil Nadu*, (1972) 2 SCC 11.

[43] *Commissioner of Police v Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 770. See also *Ismail Faruqui v Union of India*, 1994 SCC (6) 360, holding that praying at a mosque was not an essential part of Islam.

[44] *Cantwell v Connecticut*, 310 U.S. 296 (1940).

[45] *United States v Ballard*, 322 U.S. 78 (1944).

[46] *Commissioner of Police* (n 43) para 62 (dissenting opinion of Lakshmanan J). See also HM Seervai, *Constitutional Law of India, Vol. 2* (4th edn, Universal, New Delhi, 1993) 1268.

III. The three-step test and its discontents

The Supreme Court itself, on occasion, has evinced awareness of the tensions created by its jurisprudence. In late 2015, Gogoi J observed that 'performance of such tasks [i.e., determination of essential religious practices] is not enjoined in the court by virtue of any ecclesiastical jurisdiction conferred on it but in view of its role as the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity.'[47] These words are interesting, suggesting that the Constitution has *necessarily* entrusted the task of determining 'essential religious practices' to the Court. This necessity would seem to stem from Ambedkar's observation in the Constituent Assembly about the pervasive role of religion in Indian public life. For this reason, the argument goes, the Constitution *itself* exhibits a 'reformist intention',[48] and in interpreting it, Indian courts cannot adopt the hands-off, deferential approach to religion that is the hallmark of other constitutional courts. The extent to which group and community affiliations pervade private and public life in India necessitate the Courts to take an external point of view towards the true scope and extent of religion – either via the religious/secular distinction, or the essential/inessential distinction – so that the influence of religion can be legally and constitutionally limited. This is why the Supreme Court, in its first ever decision in *Swamiar*, appeared to do two contradictory things: extend the scope of Articles 25 and 26 to religious conduct and practice, giving it, in theory, a vast jurisdiction, while placing a limit upon what counted *as religion*, and restricting its influence. And this is why the alternative approach, in Justice Ayyangar's concurring opinion in *Saifuddin*, and Justice Lakshmanan's dissent in *Avadhuta (II)*, while seemingly elegant and attractive, is nonetheless inconsistent with the constitutional text and purpose.

The 'three-step test', however, comes at a high cost. *First*, unlike the religious/secular distinction, it has no root in the constitutional text or history.[49] *Secondly*, the Court has failed to develop a rigorous methodology for determining the content of 'essential religious practices'.[50] It has relied upon English-language sources,[51] colonial writings[52] (in stark contrast,

[47] *Adi Saiva Sivachariyargal Nala Sanga v Govt of Tamil Nadu*, (2016) 2 SCC 725.
[48] See Jacobsohn (n 28) 101.
[49] HE Groves, 'Religious Freedom' (1962) 4 *Journal of the Indian Law Institute* 190.
[50] Galanter (n 8) 482–3.
[51] Dhavan and Nariman (n 8) 260.
[52] For a critique of how colonial scholars themselves approached the question of Indian religion through a set of established lenses, see R Sen, *Articles of Faith: Religion, Secularism, and the Supreme Court* (OUP, New Delhi 2013) 5.

for instance, with the approach of the South African Constitutional Court),[53] and has even decided cases without taking testimony from the affected parties.[54] The Court's enquiry privileges a certain set of sources, and – as Ashish Nandy has pointed out in his famous critique of state secularism's failure to distinguish between 'religion-as-faith' and 'religion-as-ideology'[55] – has the effect of uniformising and homogenisng religious meaning at the cost of dissident and marginalised traditions.[56] As Cecelia Lynch has persuasively argued, religious conduct and practice has to be interpreted *contextually*, that is, in a way that 'makes sense to adherents given their lived experience in particular contexts … [linked] to interpretive moments in daily life'.[57] The Court's approach, on the contrary, takes religious doctrine and ethics as 'given rather than lived, experienced, and interpreted'.[58] This, of course, is part of the broader critique that questions the Court's competence *and* legitimacy to decide such questions.[59]

Thirdly, as cases like *Avadhuta* show, the enquiry itself seems to destroy the balance between secular intervention and religious autonomy. If it is true that religious communities are essential for self-determination by providing the 'contexts of choice' within which individual autonomy becomes meaningful, then the determination and imposition of religious

[53] See e.g. *Shilubana v Nwamitva*, 2008 (9) BCLR 914 (CC) (South African Constitutional Court).

[54] *Mohd Hanif Qureshi v State of Bihar*; see (n 36).

[55] A Nandy, 'The Politics of Secularism and the Recovery of Religious Tolerance' in R Bhargava (ed), *Secularism and Its Critics* (OUP, New Delhi, 1998) 321, 322.

[56] See (n 52) 18; see also (n 28) 101.

[57] C Lynch, 'A neo-Weberian approach to religion in international politics' (2009) 1(3) *International Theory* 381, 400.

[58] See ibid 401. Indeed, this broad critique exposes striking similarities between the judicial analysis of the freedom of religion, and the colonial British view of religious groups in India. The use of textual sources of dubious variety over the lived practice of the constituents, and the imposition of an external point of view that runs contrary to how the believers themselves act, were best exemplified by the notorious *Aga Khan* decision in 1866, dealt with extensively in T Purohit, *The Aga Khan Case* (Harvard University Press, Cambridge, MA, 2012).

[59] JDM Derrett, *Religion, Law and the State in Indi* (Faber & Faber, London, 1968); see also (n 52). More broadly, systems theorists such as Gunther Teubner have argued that autonomous social systems (in this case, law and religion) 'cannot directly influence one another but can only effect self-regulatory processes' through 'structural coupling'. Teubner warns that when the 'juridification process' oversteps these boundaries, it leads to a 'regulatory trilemma', characterised by mutual indifference between the spheres, or by the disintegration of either one. G Teubner, 'Juridification – Concepts, Aspects, Limits, Solutions' in *Juridification of Social Spheres* (Walter de Gruyter, Berlin, 1987) 1. While flagging that point, I note that a complete analysis of the effect of the Supreme Court's 'essential religious practices' doctrine both upon its own jurisprudence, and upon the fate of internal reform movements within religion is beyond the scope of this article.

meaning by an external authority seems to defeat the purpose entirely.[60] And *lastly*, the justifications for this approach seem to rest not in constitutional principles but in consequentialist considerations. Galanter argues, for instance, that the Court's reliance on the three-step test instead of the social reform clause is because regulating a practice that has been pronounced as non-religious, or inessentially religious, enjoys more presumptive legitimacy than granting threshold constitutional protection, and *then* upholding the state's coercive power to regulate.[61] This also explains Gajendragadkar J's efforts to hold that religion, *truly* understood, is in harmony with the reformatory ideals of the Constitution. However, as Galanter himself acknowledges, there is no empirical evidence to substantiate this claim.[62]

The other consequentialist justification has been that of necessity, as Justice Gogoi observed. The three-step test is required because it is the only way the judiciary can stay true to the broader constitutional vision of regulating and limiting the vast scope of religion in Indian life, in the interests of social reform. As mentioned above, the Constitutional text itself exhibits reformist intentions; and scholars of Indian secularism have repeatedly differentiated it from its liberal Western counterpart, noting its 'ameliorative'[63] or 'contextual'[64] nature, which specifically envisages state intervention into religion in order to achieve certain substantive values.

However, is the three-step test the only way to achieve this? This claim too, is doubtful. Each of the cases (referred to above) in which the three-step test was applied could have been decided on alternative, textual grounds. In *Ram Prasad Seth*, the Court upheld bigamy prohibition *both* on the touchstone of Article 25(2)(b), and on the ground that it wasn't an essential religious practice. In *Qureshi*, while upholding a ban on cow slaughter, the Court spent a lot of time on the public health benefits of preserving the bovine population, and could therefore have upheld the prohibition upon the 'public health' prong of Article 25(1) instead of holding, as it did, that cow slaughter on *Id* was not an essential part of Islam. *Sastri Yagnapurushadji* could have been decided under Article 25(2)(b),

[60] As Farah Ahmed correctly notes, in the context of Indian personal law, 'if group autonomy means anything, it surely means that the group should decide for itself the norms by which it is governed'. F Ahmed, 'Remedying Personal Law Systems', *International Journal of Law, Policy and the Family* (forthcoming) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777337>. Ahmed is equally cognisant of the heterodox claims within the group, and the tension securing between group autonomy and such claims.

[61] Galanter (n 8) 482; see also (n 28) 98.

[62] Galanter (n 8) 483.

[63] See (n 28).

[64] R Bhargava, 'What is Secularism For?' in *Secularism and Its Critics* (n 13).

which expressly allows the state to legislate for temple-entry.[65] In *Seshammal*, the abolition of the hereditary priesthood was expressly defended by the state on the grounds of social reform, an argument ignored by the Court. And similarly, in *Ismail Faruqui*, the state takeover of the disputed land in Ayodhya was expressly defended on grounds of preservation of public order, a permitted ground of restriction under Article 25(1) – again, ignored by the Court.

While I do not, in this article, wish to go into the correctness of these decisions, what I do wish to suggest is that existing constitutional provisions were clearly sufficient for the Court to achieve the outcomes that it did, without the further invention of the essential religious practices test. This test, therefore, does not even seem to be a constitutional necessity. Of course, as we saw at the beginning of this article, the Constitutional text itself leaves a significant number of questions unanswered, and in particular, the question of the relationship between religious communities and their own members. *Saifuddin* answered this question by employing the essential practices test, a test that – I have argued – is constitutionally flawed. I will now argue that it is Sinha CJ's dissenting opinion in *Saifuddin* that provides a more coherent understanding of the relationship between individual, community, and state, and one that is truer and more faithful to the constitutional vision.

IV. Civic equality and the transformative constitution

Chief Justice Sinha's dissenting opinion in *Saifuddin* was woven out of three strands of thought. Locating the Excommunication Act within a long history of social welfare legislation, he observed that its purpose was to ensure 'individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity ... .'[66] Secondly, echoing Ambedkar's distinction between the essentially and the incidentally religious, he noted that the effect of excommunication was to deprive an individual of basic civil rights, such as the rights to worship, community burial, community property, and so on. And *thirdly*, traversing beyond the contours of Articles 25 and 26, he linked the Excommunication Act with the prohibition of 'untouchability', under Article 17. Observing that excommunication enjoined other members of the community from having any contact, social or religious, with the outcast, he held that 'the position

[65] A point made by both Galanter and Sen.
[66] *Saifuddin* (n 3) para 11 (dissenting opinion of Sinha CJ).

of an excommunicated person becomes that of an untouchable in his community … the Act in declaring such practices to be void has only carried out the strict injunction of Art. 17 of the Constitution … to do away with all that mischief of treating a human being as a pariah …'.[67]

It is this last argument that I want to consider first. It is true that Article 17 of the Constitution prohibits 'untouchability'. The word 'untouchability', however, is a term of art that refers to a specific practice of caste-based structural and systemic oppression and exclusion, which operates simultaneously in the political, social, and economic spheres, and whose defining characteristic is an injunction against any form of physical contact between 'untouchables' and 'touchables'.[68] Beyond surface resemblances, there is little similarity between 'untouchability' and community ostracism. In equating social ostracism with Article 17, therefore, Sinha CJ chose to adopt an interpretation of 'untouchability' that went beyond its *concrete* meaning, and embraced a wider understanding of social and community exclusion, the 'mischief of treating a human being as a pariah … of depriving him of his human dignity'. Importantly, Sinha CJ was not the first to do so. A few years before, in *Venkataramana Devaru*, the Supreme Court had upheld temple-entry legislation against the claims of religious groups to bar access, on the ground that Article 25(2)(b), when construed *in light* of Article 17, overrode the Article 26(b) community right.[69]

On what basis did Sinha CJ select the more expansive, abstract definition of untouchability? It is important to note that this choice was indicated not only by the text of the clause, which abolishes the practice of untouchability 'in any form',[70] but also by the history of its framing. While the communities constituting 'Untouchables' had been specifically enumerated in the Government of India Act of 1935, the predecessor of the Indian Constitution, the Constitution itself, as Dr Ambedkar pointed out, had elected not to operate at that level of specificity.[71] Indeed, an amendment moved by Naziruddin Ahmed to restrict the scope of the Article to

[67] *Saifuddin* (n 3) para 23 (dissenting opinion of Sinha CJ).

[68] BR Ambedkar, *The Untouchables: Who Were They and Why They Became Untouchables*, <http://www.ambedkar.org/ambcd/39A.Untouchables%20who%20were%20they_why%20they%20became%20PART%20I.htm>. Seervai, for instance, denies the validity of the analogy. See (n 46) 1278.

[69] *Venkataramana Devaru vs State of Mysore*, 1958 SCR 895.

[70] Art 17, Constitution of India.

[71] Parliament of India, *Constituent Assembly Debates, Vol. VIII*, 29 November 1948 (speech of Dr BR Ambedkar) <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>. The first official definition of 'untouchability', in 1931 by the British Census Commissioner, was a broad one, defining it as social segregation characterised by exclusion from public amenities. JH Hutton, *Caste in India: Its Nature, Function and Origins* (3rd edn, OUP, New Delhi 1961), 194.

untouchability only on account of 'religion or caste'[72] was specifically rejected by Dr Ambedkar, and negatived by the Assembly when it went to vote.[73] Furthermore, even though KM Munshi pointed to the fact that the word untouchability was contained within quotation marks, making it clear that the intention was to 'deal with it in the sense in which it is normally understood',[74] many members called for providing a clearer definition of the term on the grounds of vagueness,[75] and in fact, KT Shah specifically 'warned' that it might even be extended to cover women, who at various times had been treated in the manner of untouchables by the society.[76]

Specifically, while some of the members of the Assembly undoubtedly understood untouchability in its narrow, concrete sense,[77] they did not do so to the exclusion of its broader sense. Meanwhile, other members expressly linked the provision to Article 15(2),[78] and repeatedly argued that *their* understanding of Article 17 included the right of everyone to enjoy 'equal social conditions',[79] 'equal rights',[80] 'social equality',[81] the abolition of 'social inequity … social stigma and … social disabilities',[82] and as a remedial clause for 'those who have been left behind in social and

[72] Parliament of India, *Constituent Assembly Debates, Vol. VIII*, 29 November 1948 (speech of Na Ahmed) <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

[73] Parliament of India, *Constituent Assembly Debates, Vol. VIII*, 29 November 1948 <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

[74] Parliament of India, *Constituent Assembly Debates, Vol. III*, 29 April 1947 (speech of KM Munshi) <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm>.

[75] Ibid (speech of RK Choudhury).

[76] Parliament of India, *Constituent Assembly Debates, Vol. VIII*, 29 November 1948 (speech of KT Shah) <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

[77] See Parliament of India, *Constituent Assembly Debates, Vol. III*, 29 April 1947 (speech of Promatha Ranjan Thakur) <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm>; Parliament of India, *Constituent Assembly Debates, Vol. V,* 27 August 1947 (speech of Monomohan Das), <http://parliamentofindia.nic.in/ls/debates/vol5p8a.htm>; Parliament of India, *Constituent Assembly Debates, Vol. XI,* 21 November 1949 (speech of HJ Khandekar) <http://parliamentofindia.nic.in/ls/debates/v11p7m.htm>.

[78] Parliament of India, *Constituent Assembly Debates, Vol. III*, 29 April 1947 (speech of PS Deshmukh) <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm>; Parliament of India, *Constituent Assembly Debates, Vol. VII*, 29 November 1948 (speech of Shri Shibban Lal Saksena), <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

[79] Parliament of India, *Constituent Assembly Debates, Vol. III*, 29 April 1947 (speech of SC Bannerjee) <http://parliamentofindia.nic.in/ls/debates/vol3p2.htm>.

[80] Parliament of India, *Constituent Assembly Debates, Vol. XI*, 19 November 1949 (speech of M Ananthasayanam Ayyangar), <http://parliamentofindia.nic.in/ls/debates/vol11p6.htm>.

[81] Parliament of India, *Constituent Assembly Debates, Vol. XI*, 23 November 1949 (speech of BM Gupta) <http://parliamentofindia.nic.in/ls/debates/v11p9m.htm>.

[82] Parliament of India, *Constituent Assembly Debates, Vol. VII*, 29 November 1948 (speech of Santanu Kumar Das) <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

economic matters'.[83] It therefore seems clear that between both the supporters *and* the opponents of Article 17 as it stood, there was agreement on the *breadth* of its meaning.

Consequently, Sinha CJ's adoption of 'untouchability' in its broad sense, in the sense of social ostracism, had its foundation in both the text of the Constitution and the debates surrounding it. What, however, did that choice entail? To answer this question, let us look again at the first two strands of his argument. The purpose of the Act, he held, was to guarantee individual freedom, remove interferences with liberty, conscience and faith, and guarantee human dignity and freedom of choice. But this is the crucial question: freedom from *what*? Sinha CJ was not talking about *state* coercion and interference with freedom, in its classical liberal sense, in the sense that it is guaranteed by most Constitutions. Rather, he was talking about the coercive freedom-interfering acts of communities (such as social ostracism) against their members. In other words, as discussed above, Sinha CJ believed that Articles 25 and 26 not only guaranteed *group-differentiated rights* to religious denominations in the interests of preserving their integrity, but also provided for the rights of individuals *against* their groups, in the interests of individual freedom, liberty of conscience, and human dignity. It was in this context that the balance between group integrity and social reform, set out textually within the scheme of 25 and 26, was to be understood.

Such a strong statement of horizontality might sound discordant to readers more thoroughly acquainted with constitutional systems where the vertical relationship is the norm, and the horizontal the exception.[84] However, as Mark Tushnet has crucially observed, the extent to which horizontality operates within any given jurisdiction is not fixed *a priori*, but depends upon the relative strength of the norms supporting liberal autonomy on one hand, and social democracy on the other.[85] The enquiry, therefore, must be contextual. And in the rest of this article, I will argue that Sinha CJ's understanding of horizontality, and his construction of Articles 25 and 26, is faithful to the uniquely transformative nature of the Indian Constitution.

[83] Parliament of India, *Constituent Assembly Debates, Vol. XI*, 22 November 1949 (speech of Ajit Prasad Jain) <http://parliamentofindia.nic.in/ls/debates/v11p8m.htm>.

[84] Furthermore, scholars who accept group rights in liberal political theory are circumspect about the legitimacy of *imposing* liberal norms upon groups who might be following illiberal practices. See e.g. C Kukathas, 'Are There Any Cultural Rights?' (1992) 20(1) *Political Theory* 105; W Kymlicka, 'The Rights of Minority Cultures: Reply to Kukathas' (1992) 20(1) *Political Theory* 140.

[85] M Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1(1) *International Journal of Constitutional Law* 79.

By a 'transformative Constitution', I mean one that is consciously designed to transform not merely the existing legal and political system, but also the social and cultural structures that often undergird the law and politics of a society.[86] A transformative Constitution (or, more accurately, transformative constitutional provisions) must be distinguished from Constitutions (or constitutional provisions) that merely recognise or preserve an existing *status quo*, as well as Constitutions that – in pursuit of political liberalism – refrain from endorsing any comprehensive theories of the good.[87] The Indian Constitution, I argue, not only attempts to make a substantive break with the nation's colonial and pre-colonial past, but attempts to do so in service of a rich vision of substantive equality between individuals, and between and within communities, a vision that is best exemplified by its provisions on horizontality.

To understand this, let us briefly look at horizontality under the Constitution. Three provisions in the fundamental rights chapter guarantee horizontal rights. Article 23 prohibits human trafficking and forced labour.[88] Article 17 prohibits 'untouchability'. And then there is Article 15(2), which prohibits discrimination on grounds of race, caste, sex, etc with regard to 'access to shops, public restaurants, hotels and places of public entertainment'.[89] This proto-constitutional civil rights provision was held by the Supreme Court in 2011 to include non-discriminatory access to schools.[90] The Court did so by invoking the Constituent Assembly Debates, where the framers of the Constitution had agreed that the word 'shops' was not limited to physical places where goods were bought and sold, but included the more abstract realm of economic transactions, where a good or a service was offered for consideration. At the heart of the Assembly – and the Court's – understanding was the historical awareness that in India, the economic and social *boycott*, practised by dominant castes, had been one of the most effective ways of discrimination and subordination.[91] The exclusionary effect of the boycott had been recognised

[86] G Bhatia, 'Comprehensive Transformative Amendments – Theory and Practice: Rethinking the Nineteenth Amendment and the Place of Women's Rights in the Constitution' (2015) 13 *Dartmouth Law Journal* 1.

[87] J Rawls, *Political Liberalism* (Columbia University Press, New York, NY, 1993).

[88] Art 23, Constitution of India. In *PUDR v Union of India*, AIR 1982 SC 1473, the Supreme Court interpreted the term 'forced labour' to include non-payment of minimum wage, which workers were compelled – or 'forced' – to accept because of adverse market conditions.

[89] Art 15(2), Constitution of India.

[90] *IMA v Union of India*, C.A. No. 8170 of 2009.

[91] See A Rao, *The Caste Question* (University of California Press, Berkeley, CA, 2009). For a detailed analysis of art 15(2) of the Indian Constitution, see G Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11(1) *Asian Journal of Comparative Law* 87.

as early as 1928, by a colonial government report, which cited the examples of preventing the boycotted persons from using common paths, as well as stoppage of sale of the necessaries of life, and recommended outlawing the practice.[92] Thus, the boycott served as both a means of exclusion from material resources, such as schools, water tanks, and other civic amenities, as well as reinforcing existing social hierarchies through stigmatising the excluded.[93] It was this understanding, and the will to ensure that the newly framed Constitution could guarantee a remedy against community practices whose result was the material and symbolic exclusion (and thereby, the subordination) of individuals from the economic and social life of the polity, that saw the formulation of the oddly worded Article 15(2), and its 2011 interpretation by the Supreme Court.[94]

The story of Article 15(2), in its historical context, tells us something important about the Indian Constitution. Unlike the French or the American experience, where Constitution-making was – primarily – the culmination of a revolution directed against the arbitrary power of an absolutist state,[95] the Indian anti-colonial movement had two distinct aims: against the despotism of colonial rule, *and* against the far-reaching (pre-colonial) grip of caste and community upon individual life.[96] For instance, simultaneously with the Congress Party's agitation against British rule in the 1920s and 1930s, BR Ambedkar (the Constitution's principal drafter) was leading mass movements of the untouchable castes for the right to access drinking water from community wells, and the right to enter Hindu temples.[97] Crucially, these movements were framed within the vocabulary of *civil rights* (of individuals against communities), and *civic equality* (within communities), and *against* the claims of the religious integrity of communities.[98] As Anupama Rao puts it, the focus of the movements was an expanded and inclusive idea of the 'public', that covered important material and symbolic *community spaces* (whether religious or secular), and asked for equality of access to

[92] See Rao (n 91) 165; see also BR Ambedkar, *What Congress and Gandhi Have Done to the Untouchables* <http://www.ambedkar.org/ambcd/41D.What%20Congress%20and%20Gandhi%20CHAPTER%20III.htm>.

[93] Rao (n 91) chs 1–2.

[94] The link between secularism and equality has been suggested by Cossman and Kapur. B Cossman and R Kapur, 'Secularism: Bench-Marked by the Hindu Right' (1996) 31(38) *Economic and Political Weekly* 2613.

[95] See G Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, Chapel Hill, NC, 1998); S Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Routledge, New York, NY, 1992).

[96] This argument is developed in greater detail in Bhatia, 'Horizontal Discrimination' (n 91).

[97] Rao (n 91) 81.

[98] Ibid 81–5.

those spaces.[99] And most crucially for our interpretive purpose, as we have seen, *both* issues – access to water wells and access to temples – would eventually find their way into the text of the Constitution, through Articles 15(2) and 25(2)(b).

The governing principle behind what eventually became Articles 15(2) and 17 of the Constitution was therefore something that we can now define as the *anti-exclusion* principle:[100] the Constitution limits the power of groups and communities to *exclude* their constituents in a manner that would interfere with their freedom to participate in normal economic, social and cultural life, and thereby – in a formulation recently advanced by the discrimination law philosopher Tarunabh Khaitan – 'disrupt secured access to basic goods'[101] such as negative freedom, an adequate range of valuable opportunities and self-respect.[102] Chief Justice Sinha's important innovation in his dissenting opinion in *Saifuddin* was to *extend* the anti-exclusion principle from the specific logic of anti-discrimination under Articles 15(2) and 17, to the relations between religious communities and their members under Articles 25 and 26.

We can immediately see an important benefit of invoking the anti-exclusion principle over the essential religious practices test: as we discussed above, the Court's use of essential religious practices is external, static and acontextual, and thereby – as Lynch points out – fails to be true to how the practitioners of religion make sense of conduct and doctrine in evolving social contexts. However, even if the Court was to shift tack and attempt to faithfully track the dynamism of evolving religious practices, as many scholars have pointed out, this is an inquiry it is institutionally unsuited to undertake, as well as raising concerns of legitimacy. The anti-exclusion principle spares the Court from this impossible choice, by shifting the analysis from the *content* of religious conduct and practice, to its *discriminatory effect*. Of course, discrimination itself is a contextual enquiry, depending upon an investigation both of evolving social meaning (in cases of symbolic discrimination) as well as what goods count as 'basic goods' at any given time. However, it is an enquiry that has always been within the judicial domain – and indeed, is *constitutionally* placed within the judicial domain, in the form of the rights to equality and non-discrimination.

Furthermore, the anti-exclusion principle, as I have developed it here, is substantially stronger than the principles proposed by other scholars

[99] Ibid.

[100] For an overlapping (but different) account, see H Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16.

[101] T Khaitan, *A Theory of Discrimination Law* (OUP, Oxford, 2015).

[102] For a version of this argument, see A Gutmann, *Identity in Democracy* (Princeton University Press, Princeton, NJ, 2003) ch 2.

of secularism and the interface between individual and group rights in the Indian polity. Partha Chatterjee, for instance, argues that balancing liberalism and multiculturalism requires allowing a 'group [to] insist on its right not to give reasons for doing things differently, provided it explains itself adequately in its own chosen forum'.[103] At the base of this is his sense that autonomy and respect are values that are 'sensitive to the varying political salience of the institutional contexts in which reasons are debated'.[104] Akeel Bilgrami, on the other hand, advocates a 'negotiated and emergent secularism', which, echoing Rawls' overlapping consensus, imagines the state as providing 'internal reasons addressing different communitarian perspectives from within their own internal substantive commitments ... so as to eventually provide for a common secular outcome, each on different internal grounds'.[105] Both Chatterjee and Bilgrami privilege the internal norms (and reasons) of the group (subject to certain conditions) over the external norms that might be imposed by the state. Rajeev Bhargava's slightly stronger concept of 'contextual secularism' allows for differentiated group rights subject to 'a dignified life for all',[106] without fleshing out what a dignified life might entail, in practice. By contrast, the anti-exclusion principle holds that the external norm of constitutional anti-discrimination be applied to limit the autonomy of religious groups in situations where these groups are blocking access to basic goods.

V. Two objections considered

However, it is the strong nature of the anti-exclusion claim that gives rise to an obvious objection, one that is keenly perceived by the scholars discussed above: and that is that the logic of anti-discrimination law is not typically extended to religious groupings, precisely because religion is deemed to be a private (even, intimate) activity.[107] Furthermore – and partly for this reason – the actions of religious groups are unlikely to interfere with individuals' ability to access basic public goods. However, as Amy Gutmann points out, there are instances where even private or voluntary associations can act as 'source[s] of public goods' – and thereby can 'block' – through exclusion – access to such goods.[108] In this context, the reader will recall

[103] P Chatterjee, 'Secularism and Tolerance' in *Secularism and Its Critics* (n 13) 344, 375.
[104] Ibid.
[105] A Bilgrami, 'Secularism, Nationalism and Modernity' in *Secularism and Its Critics* (n 13) 380, 405.
[106] Bhargava, 'What is Secularism For?' (n 13).
[107] See e.g. Hosanna Tabor (n 20).
[108] See (n 102) 98.

how the argument of this article has been that religion and religious groupings play a much *thicker* role in Indian life (as the Constitution itself acknowledges), than they do elsewhere.[109] This brings us to the third strand of Sinha CJ's dissenting opinion. As he observed, the effect of excommunication was not simply 'religious', but extended to barring the individual from exercising his civil rights; and furthermore, by forbidding social or economic contact, effectively turned him into a 'pariah'. While this may not be constitutionally significant in jurisdictions where the influence of groups is significantly lesser, and where exit and entry barriers are easier to surmount,[110] it is precisely the thick nature of religious groupings in India that ensure that there is a closer relationship between the acts of religious communities, and individuals' basic rights. In this sense, there is a closer analogy between regulating the conduct of landlords, employers and service providers under civil anti-discrimination law, and regulating the conduct of religious communities (acting through their leaders) under religious freedom law. As we argued above, while discussing Ambedkar's temple-entry movement, it is their ability to impact individuals' access to basic goods necessary to lead a dignified life (including cultural goods) that lift such actions out of the domain of the strictly private, and lends them a 'public' tenor[111] (interestingly, the vocabulary of the temple-entry movement expressly framed it in terms of access to a *public* space, despite its religious character).[112] And it is in this context that it also becomes important to note that basic goods are not limited to the material but include protection

[109] It might be argued that for internal dissidents, the religious context is always a 'thick' one. This is undoubtedly true, to a certain extent, as far as the basic good of cultural membership goes. However, 'thick' religious groups, in the sense that we are discussing here, have the ability to deny to their constituents more than just the good of cultural membership; they have the ability to block their access to other basic goods, including material and economic ones. I am grateful to an anonymous peer reviewer for pushing me towards greater clarity on this issue.

[110] Kukathas argues, for instance, that groups can subordinate their members as long as there is an option to exit into the broader market economy. See Kukathas, 'Are There Any Cultural Rights?' (n 86). See also *Hofer v Hofer*, [1970] S.C.R. 958 (dissenting opinion of Pigeon J) (Supreme Court of Canada). However, as Farrah Ahmed points out (with the specific example of India), the right to exit is often illusory. F Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24(2) *International Journal of Law, Policy and the Family* 222.

[111] Note, however, that this argument doesn't depend upon an *a priori* definition of the term 'public', as has been the route taken by the American Supreme Court, and some judges of the Canadian Supreme Court. *Boy Scouts of America v Dale*, 530 U.S. 640 (2000) (Supreme Court of the United States); *Roberts v United States Jaycees*, 468 U.S. 609 (1984) (Supreme Court of the United States); *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 (concurring opinion of La Forest J; dissenting opinion of L'Hereux-Dube J).

[112] Rao (n 91) 89.

against kinds of 'exclusion [that] can *publicly express* the idea that the excluded are not the civic equals of those who are included',[113] an eventuality that is specifically pertinent in 'societies that have a long history of discrimination against the groups whose members are relegated to second-class membership'.[114]

To put the issue another way – as Michael Walzer argues, and as the South African scholar Stuart Woolman contends in the precise context of imposing egalitarian requirements upon groups[115] – a regime of equality must ensure that 'no citizen's standing in one sphere or with regard to one social good can be undercut by his standing in some other social sphere, with regard to some other social good'.[116] In jurisdictions where religion plays a thin – relatively autonomous role – equality has little to say to the relationships between members of a religious community, since there is little chance of inegalitarianism within the community being translated into burdens in other spheres. However, in the words of Anupama Rao, in a society where 'ritual, economic and social domination'[117] were inextricably bound up with each other, and where 'practices of … segregation [took place] across sites of exclusion',[118] Chief Justice Sinha's important insight in *Dawoodi Bohra* was – to repeat – that excommunication had impacts that went beyond the 'essentially' religious, and affected the excommunicated individual's access to basic public goods.[119]

[113] See Gutmann (n 102) 97 (emphasis added); see also (n 100) 23. See also *Gould v Yukon Order of Pioneers*, ibid (dissenting opinion of MacLachlin J) (Supreme Court of Canada). For an examination of religious group membership *itself* being an important good, see F Ahmed, *Religious Freedom under the Personal Law System* (OUP, Oxford, 2015) 60.

[114] See (n 102) 103. The public expression of second-class citizenship is the basis of some decisions of United States Supreme Court on the Establishment Clause, although that is limited to expression *by the state*. See *Lynch v Donelly*, 465 U.S. 668 (1984) (Concurring opinion of O'Connor J) (Supreme Court of the United States).

[115] S Woolman, 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz on the Distinction between Differentiation and Domination' (2012) 28 *South African Journal on Human Rights* 273, 285.

[116] M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, New York, NY, 1983) 19.

[117] Rao (n 91) 77.

[118] Ibid 82. Rao cites the example of how the right to access temples and water tanks ended up becoming part of the same campaign, because of the spatial proximity of the two.

[119] In response to a possible objection to the use of 'Western' philosophers such as Gutmann and Walzer in the context of an argument about the Indian Constitution (which, I have been arguing, had its own distinct normative origin), I should clarify that Gutmann and Walzer simply help us to understand more clearly the transformative purpose of the Indian Constitution: that is, to transform a political and social reality in which individuals' access to basic goods is often *mediated* (and sometimes blocked) by their religious group affiliations. I am grateful to an anonymous peer reviewer for pushing me towards greater clarity on this issue.

Articles 25(1) and 25(2), I would suggest, form the third limb of the anti-exclusion principle, in addition to Articles 15(2) (non-discriminatory horizontal access) and 17 (prohibition of untouchability). Understanding Sinha CJ's opinion through the lens of the anti-exclusion principle allows us to contrast it sharply with the majority opinion. The core of the majority's reasoning was that since excommunication was based only on *religious* grounds, and was aimed at ensuring the integrity of the group, it was constitutionally protected under Article 25(1) and 26(b), and was not saved by the '*social* reform' clause, notwithstanding its impact upon the individual's civil rights. Effectively, the majority opinion held the group's *religious identity and integrity* (subject to judicial determination) to be sacrosanct – ignoring the Walzerian insight that it is possible that an individual's standing in one sphere (in this case, the religious sphere) can impact her standing in other spheres. On the other hand, Sinha CJ's opinion gave primacy to the anti-exclusion principle, holding that group integrity would have to be *subject* to that.

We have seen how the anti-exclusion principle flows from Articles 15(2) and 17 of the Constitution, and how the thick nature of religious groupings in India provides a principled justification for extending it to Articles 25 and 26. It is at this point, however, that we must deal with another important objection. The above argument, so this objection goes, unduly subordinates the rights to associative freedom and cultural integrity to the claims of equality. As many scholars have argued, values of pluralism and diversity – to which the Indian Constitution is unquestionably committed – require us to tolerate violations of equality and certain other non-basic rights within groups, so as to protect the continued existence of groups.[120] In fact, the thick nature of religious groups might actually provide an argument in favour of non-interference: given the diverse ways in which thick groups provide people their contexts of choice, group autonomy and preservation are even more important goals than they otherwise would be.[121] To this, a textual point may be added: unlike other Constitutions[122] or international legal instruments,[123] which guarantee the rights of individuals to exercise religious freedoms singly or *in community* with others, and refrain from vesting rights in

[120] See e.g. Kukathas (n 86); A Margalit and M Halbertal, 'Liberalism and the Right to Culture' (1994) 61(3) *Social Research* 491; *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978) (Supreme Court of the United States).

[121] However, as Farah Ahmed argues, groups that do not achieve 'minimal representativeness and deliberative quality' end up constraining the individual autonomy of their members; and the thicker the group, the more harmful those constraints will be; Ahmed (n 113) 85–91.

[122] Section 31, Constitution of South Africa.

[123] Art 27, International Covenant for Civil and Political Rights.

groups *qua* groups[124] – the Indian Constitution – through Article 26(b) – expressly makes groups the *bearers* of rights. This would suggest that – textually – the balance between individual and group claims must tilt towards the group.

While it is true that Article 26(b) makes groups the bearers of rights, as pointed out above, the Constitution does not state the *basis* of doing so. It does not clarify whether groups are granted rights for the instrumental reason that individuals can only achieve self-determination and fulfilment within the 'context of choice'[125] provided by communities, or whether the Constitution treats groups, along with individuals, as *constitutive units* worthy of equal concern and respect.[126] The distinction is crucial, because the weight that must be accorded to group integrity, even at the cost of blocking individual access to important public goods, can only be determined by deciding which vision the Constitution subscribes to.

Such a question – as I've observed above – cannot be answered in the abstract, or through a careful reading of competing philosophical accounts, but only by grounding it in the *specifics* of a jurisdiction's legal and political history.[127] Let us briefly consider that history. During colonial times, the British largely followed a policy of non-regulation of 'personal law', leaving 'communities' free to manage their own internal affairs[128] (something akin to the Ottoman 'millet' system)[129]. The fundamental normative unit was the *group*, evidenced through a number of legal measures such as separate electorates, and penal provisions criminalising insulting the religious feelings of any 'class'.[130] For this reason, when the legality of Dawoodi Bohra excommunication was brought before the colonial courts, the only enquiry made was as to whether, historically, the *Dai* had the power that he claimed to exercise.[131]

[124] See *Christian Education South Africa v Minister of Education*, (2000) (10) BCLR 1051 (Constitutional Court of South Africa).

[125] See e.g. C Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton, NJ, 1994); for instances of how religious groups can facilitate personal autonomy, see Ahmed (n 113) 62, 82.

[126] See (n 21) 38.

[127] D Bilchitz, 'Should Religious Associations be Allowed to Discriminate' (2011) 27 *South African Journal on Human Rights* 219; D Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 *South African Journal on Human Rights* 296.

[128] P Chatterjee, 'Colonialism, Nationalism, and Colonized Women: The Contest in India' (1989) 16(4) *American Ethnologist* 622.

[129] See (n 28) 80.

[130] Section 295A, Indian Penal Code. See also Sections 153A and 153B, Indian Penal Code.

[131] *Hasanali v Mansoorali*, (1948) 50 BomLR 389, relied upon in *Saifuddin*. As discussed above though, the colonial approach to determining the composition and character of religious groups was entirely external in nature. Purohit, *The Aga Khan Case* (n 58).

The absence of legal regulation, however, did not impede strong social movements within religious (and other) communities, focused upon two principles: individual freedom and choice *within* community spaces, and the right to social and political inclusion and participation. As Tanika Sarkar argues, for example, the conception and vocabulary of women's rights first evolved in direct opposition to community control, in the debates surrounding the abolition of forced widow immolation[132] and the age of consent.[133] Crucially, these movements found expression in the Constitution. Thus, despite a strong cultural consensus at the end of the nineteenth century, which purported to divide society into something approximating a public/political and private/community domain, consigning women to the latter as embodiments of the 'community',[134] and depriving them of participation in the public sphere, the early twentieth century saw a strong woman suffrage movement, which culminated in that most public of rights – universal adult franchise – during the framing of the Constitution.[135] In fact, universal adult franchise under the Constitution marked a transformation not only in ascribing public citizenship to women, but in *expressly* doing away with the colonial-era separate voting electorates for religious communities, marked a categorical turn away from a vision of society that treated groups as *constitutive*, to one that understood their value to be *instrumental* in guaranteeing effective individual autonomy. In addition, we have already discussed how the horizontal non-discrimination (Article 15(2) and temple-entry provisions (Article 25(2)(b)) were the results of Ambedkar's movements, which were expressly framed in the language of civil rights for individuals *against* their communities, even at the cost of the 'integrity' of the community, understood as the continuation of strongly-held beliefs and practices.[136]

Indeed, it is these legacies that led Ambedkar to clarify, in the Constituent Assembly Debates, that notwithstanding the existence of minority and group rights in the Constitution, its basic unit was the individual;[137] and,

[132] T Sarkar, 'Something like rights? Faith, law and widow immolation debates in colonial Bengal' (2012) 49(3) *The Indian Economic and Social History Review* 295.

[133] T Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal' (2000) 26(3) *Feminist Studies* 601.

[134] Chatterjee (n 128) 622.

[135] M Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Duke University Press, Durham, NC, 2006).

[136] In fact, the 1928 government report specifically stated that the social boycott was particularly 'dangerous', since it invoked the principles of freedom of contract as justification – and notwithstanding that, deserved to be outlawed. Ambedkar, *What Congress and Gandhi Have Done to the Untouchables* (n 94).

[137] Parliament of India, *Constituent Assembly Debates, Vol. VII*, 4th November 1948 (speech of Dr BR Ambedkar), available at <http://164.100.47.132/LssNew/constituent/vol7p1.html>; see also F Ahmed, *Religious Freedom under the Personal Law System* (n 112) 37.

more specifically, to remark, during the debates on the religious freedom clauses: 'what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights.'[138] Notice that, like Chief Justice Sinha, Ambedkar specifically argued that it wasn't merely the state, but the *social system* – i.e., the community – whose actions conflicted with individual rights, and would accordingly have to be 'reformed'. The specific sites of reform, of course, have to be historically understood, and – as we have seen – defined by the manner of discrimination, which primarily took the form of economic, social and cultural *exclusion*.

To sum up, therefore: the history of the relationship between groups and individuals in Indian constitutional history demonstrates that throughout the late nineteenth and twentieth centuries, individual rights, and specifically, rights to basic and public goods, emerged as *oppositional* to the claims of groups to self-governance and autonomy. Whether it was the right of women to an age of consent or against forced immolation, or the rights of certain castes to civic and economic inclusion, or the right of every individual to the vote *qua* individual, these rights were framed *in the context of*, and exercised against, the claims of community. The text of the Constitution speaks to the success of these movements in inscribing their vision into the founding document: Articles 15(2) and 25(2)(b) subordinate claims of group autonomy to civic and religious inclusion, and the guarantee of universal adult suffrage not only frees women from being community subjects, but also repudiates the (colonial) idea that political rights belong to communities *qua* communities. So while the Constitutional vision remains one that views groups as bearers of value, it does not view them as having *constitutive* value, one that would override individual claims against exclusion. This means that – in Amy Gutmann's terms, and *contra* the majority and concurring opinions in *Dawoodi Bohra*, cultural survival (of groups) is an important *derivative* right, but not an end in itself.[139]

At the heart of Ambedkar and Sinha CJ's formulations was the insight that historically, groups have played a uniquely powerful role in Indian society. This brings us back to our original distinction between the thick and the thin roles of religion in public life. As we noted in the beginning of this essay, the Indian Constitution allows for far-reaching intervention into religious community life *because* of the scope and the extent of religious influence over individuals. The judiciary's own attempts to instantiate this

[138] Parliament of India, *Constituent Assembly Debates, Vol. VII*, 2nd December, 1948 (speech of Dr BR Ambedkar).

[139] See (n 102) 77–8.

principle has resulted in the three-step test. However, the three-step test suffers from a number of difficulties, which have made it almost unworkable in practice. Chief Justice Sinha's dissent in *Saifuddin* provides us with an alternative framework that is equally cognisant of the 'thick' role played by religion in private and public life. This approach seeks not to limit the *scope* of religion by an *a priori* distinction (whether external or internal) between the 'essentially' and the 'inessentially' religious, or the religious and the secular, but takes as its starting point the anti-exclusion principle: the state may protect individuals from community action that excludes them from the economic, social and cultural life of the group, action that, precisely *because* of the 'thick' role of religious communities, will inevitably impact the individual's ability to access basic public goods. The Constitution protects the integrity of groups, and their right to self-determination, *subject* to the anti-exclusion principle – and this is what I mean by its 'transformative vision'. It is important to note, in finishing, that the anti-exclusion principle does not do away with associative freedoms. Not *every* act of *every* religious organisation will be subject to the claims of equality, but only those that meet the (fairly high) standard set out above.

VI. Conclusion

Let us sum up. The 'thick' role played by religion and religious groupings in Indian public life rules out a traditional 'liberal' approach to the right to freedom of religion. The Constitution itself eschews this approach, its very text abandoning liberal neutrality for explicitly 'reformist' intentions. The key questions are what, precisely, does the Constitution aim at reforming, and how ought the judiciary effectuate its reformist intentions? The Supreme Court has answered these questions by developing the three-step test, which allows it to separate 'essential' from 'inessential' religious practices, and accord protection only to the former. Ever since Chief Justice Gajendragadkar's time, this has become not only an empirical, but also a normative enquiry: the Court has simply withheld constitutional protection from practices that seem out of step with the Constitution's progressive outlook, by deeming then 'non-essential'. For a number of reasons, however, this approach is unsatisfactory. It also conflates two distinct questions, by making them part of the same test: the distinction between the religious and the secular, which the Constitution itself draws; and the distinction between the essential and the inessential, which it doesn't.

In this article, drawing upon Chief Justice Sinha's dissenting opinion in *Saifuddin*, and locating it within the comprehensive transformative character of the Indian Constitution, I have proposed the anti-exclusion principle as a replacement for the 'essential practices test'. This principle will obviously

not apply to the first category of cases (state control over religious institutional property), which will continue to be subject to the religious/secular distinction drawn by the constitutional text. It will, however, apply to cases where constitutional protection is sought for religious customs or practices, and where there is a conflict *within* religious communities. The anti-exclusion principle stipulates that the state and the Court must respect the integrity of religious group life (and thereby treat the internal point of view of religious adherents as determinative of the form and content of religious practices) *except where* the practices in question lead to the exclusion of individuals from economic, social or cultural life in a manner that impairs their dignity, or hampers their access to basic goods. The form of analysis is similar to that of anti-discrimination law. Under this approach, the Ananda Margis have every right to dance the *tandava* on the streets of Calcutta if they consider it essential to their faith, but the Dawoodi Bohras can be legitimately stopped from excommunicating and outcasting their members.

One final point remains. Does the anti-exclusion principle apply at the threshold stage of deciding whether or not to extend constitutional protection to impugned religious practices, or does it apply to judging the constitutional validity of ostensibly reformatory state laws? In my opinion, it ought to apply at both stages, depending upon the case at hand. In a case like *Saifuddin*, for instance, where the challenge is to a state *law*, then the Court can begin by asking what the law is aiming to achieve; and if the law is aiming at instantiating the anti-exclusion principle, then it is to be upheld, regardless of the status of the impugned practice. On the other hand, in cases like the disputes over the access to the Haji Ali and Sabrimala shrine, with which we began this article, there is no existing law. What is there is an ostensible *clash* between two claimed rights: the constitutional right of women to worship under Article 25(1), and the right of the religious denomination to manage its own affairs under Article 26(b). In such a situation, since the foundation of the denomination's claim is exclusion, and the treatment of women as second-class members of the community, the claim will be overridden by the stronger individual right under Article 25(1). This, I would submit, is a solution that allows the Court to give effect to the Constitution's transformative purposes without getting entangled in knotty questions of religious and theological doctrine.