

## ‘Faith’ in Law

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This article focuses on the appropriation of ‘faith’ as a legitimate right under the emerging discourse of secularism endorsed by the Hindu Right. This is reflected in the Ayodhya decision which strengthens such redefining of the meaning of the right to freedom of religion in majoritarian terms. The Ayodhya judgment has been analyzed and critiqued as appropriating the discourse of formal equality and religious tolerance to provide an essentialist picture of Indian secularism favoring the agenda of the right wing Hindu nationalists. It argues in favour of a robust right to freedom of religion in a way that defends the rights of worship of Muslims, and in the process rescues one of the central planks of Indian secularism.

### INTRODUCTION

God is out of the closet in the liberal democratic world. The amplified role of religion in the public arena has produced anxieties for those committed to a secular, liberal democratic state. And yet this anxiety seems somewhat misplaced given that religion has been so intimately connected to a broad array of political and economic agendas. In India, religion has been tethered to the struggle for freedom and the articulation of a national identity. Similarly, religion has been foregrounded as a mark of separation and distinction from the “West”, even amongst progressive groups, and as a way to separate the country from its colonial past. And in the neo-liberal moment, religion is repackaged and sold as brand “Incredible India” for global tourist consumption.

Yet despite these facts, anxiety over the role of religion remains and has come to be most acutely felt in the area of law and the contest over the meaning of secularism in the Indian constitution. In this paper, I locate the source of this anxiety by unpacking the struggles that have been taking place in and through the discourse of secularism. In particular, I identify the ways in which the Hindu Right, a right wing political and ideological movement intent on establishing India as a Hindu State, has been successfully pursuing its agenda in and through the discourse of secularism, manufacturing an understanding of the concept that is reasonable, logical and highly persuasive. Its perseverance has left one mosque destroyed, produced a mass purging of Muslims in Gujarat in 2002, and resulted, temporarily at least, in Hindu parties being given the lion’s share of the disputed site that they have claimed to be the birthplace of Ram. It has also left the political left and progressive scholars with a sense of political

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disorientation and stasis, having abandoned the terrain of religion to be almost exclusively defined by the religious right, while they themselves have come to be cast as pseudo-secularists. These upheavals cannot be regarded simply as a secular project being derailed by fundamentalist forces, nor does the answer lie in a complete abandonment of the secular project as a foreign or alien ideal.<sup>1</sup> In this paper I trace how the law and judicial discourse has been integral in enabling the Hindu Right to pursue its vision of secularism, focusing on the recent decision by the Allahabad High court in the Ayodhya dispute.

On December 6, 1992, the mobs of the Hindu Right destroyed a sixteenth century mosque, the Babri Masjid, demolishing history, trammelling over the rights of religious minorities, and in the process shaking the edifice of Indian democracy.<sup>2</sup> At the time the Indian Supreme Court bemoaned the event, describing it as a “national shame”, and stating that what was demolished was not merely an ancient structure; but the faith of the minorities in the sense of justice and in the rule of law and constitutional process.<sup>3</sup> However, recent developments in the Supreme Court’s jurisprudence as well as the mammoth decision by the Allahabad High Court indicate that all is not well and that the enemies of secularism are increasingly and successfully waging their war not in opposition to secularism, but in and through the discourse of secularism.

This paper is divided into three sections. In the first part I set out the background to the Ramjanambhoomi-Babri Masjid dispute and the competing claims of the respective parties. In the second section, I set out the reasoning and holdings of each of the three judges in the decision of the Special Full Bench Hearing of the Ayodhya matters.<sup>4</sup> In part three, I locate

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1. This paper is a slightly modified version of a talk presented at the Faculty Workshop on February 9, 2011, at the Jindal Global Law School. It is a shorter version of a larger work in progress that examines how secularism comes to be constructed in Indian Constitutional discourse. I am grateful to the Jindal law faculty for their active engagement with the paper and lively discussion. I would like to thank the participants of the South Asian Studies Lecture Series on November 4th, 2010, held at the Gallatin School, New York University as well as the Current Indian Legal Affairs Series at Yale Law School, October 16th, 2010, for their helpful comments and feedback on an earlier version of this paper. My special thanks to Vasuki Nesiiah, Rajeswari Sunder Rajan and Brenda Cossman for their comments. Thanks to Aparna Chandra and Latika Vashist for very able and extremely helpful research assistance.  
*Ashis Nandy, The Politics of Secularism and the Recovery of Religious Toleration, in SECULARISM AND ITS CRITICS: THEMES IN POLITICS 321 (Rajeev Bhargava ed., 1998).*
  2. The Hindu Right refers primarily to the *Bharatiya Janata Party* (BJP), (Indian Peoples Party) the political arm of the Right, in power at the national level from 2001-2004; the *Rashtriya Swayam Sevak* (RSS) (National Volunteer Organisation) the main ideological component of the Right; and the *Vishwa Hindu Parishad*, (VHP) (World Hindu Council) the exponents of the Right’s religious doctrine. Other parties include the militant and virulently anti-Muslim *Shiv Sena* (Footsoldiers of Shiva). These organizations collectively promote the ideology of *Hindutva* - an ideology that seeks to establish a Hindu state in India.
  3. *M. Ismail Faruqui v. Union of India*, 1994 AIR SCW 4890, ¶ 7.
  4. *Gopal Singh Visharad (deceased) survived by Rajendra Singh v. Zahoor Ahmad and Others* (Other Original Suit No. 1 of 1989; Regular Suit No. 2 of 1950); *Nirmohi Akhara and Others v. Babo Priya Datt Ram and Others* (Other Original Suit No. 3 of 1989; Regular Suit No. 26

the Ayodhya decision within the broader constitutional legal discourse and the judicial pronouncements on the meaning of secularism in India. In the final section, I discuss the implications of the Allahabad High Court decision on the rights of religious minorities in India. While the Supreme Court of India has subsequently stayed the decision of the High Court, the decision remains relevant in terms of its ability to influence the understanding and meaning of secularism in both judicial and popular discourse.

### I. THE AYODHYA CASE AND THE CLAIMANTS OF HISTORY

The Ayodhya case involves a dispute over the legal title to a property approximately 1500 square yards in size. The site marks the spot where a sixteenth century mosque once stood which was subsequently destroyed by the mobs of the Hindu Right in 1992. Hindu parties claim that this particular spot in Ayodhya is the *janamsthan* or birthplace of Ram, that they have a right of worship at the site, and that the title and possession of the site itself belongs to Hindu deities. While there are no less than 4 million gods and goddesses who live with Indians on the sidewalks, streets and even travel with passengers in taxicabs, Ram has been accorded prime significance, especially in the discourse of the Hindu Right and those who have sought to consolidate the tradition under one god and one institution. It is a thoroughly modern move.<sup>5</sup>

The specific facts of the case indicate that in 1855, after a skirmish between a group of Muslims and Hindus, a partition was constructed on the disputed land in two equal parts with the inner portion or inner courtyard being allotted to the Muslims and the outer portion or outer courtyard allocated to the Hindus. In 1885, the Hindu Mahant (head priest) sought permission from the district court to build a temple over what was called the Ram Chabootra in the outer portion. The *Mutwalli* (manager) of the Babri Mosque contested the suit claiming that the entire land belonged to the mosque. He argued that merely because Hindus had been allowed to pray in the mosque from time to time they could not acquire title over the property. A map submitted to the court indicating the demarcation of the land into two equal parts was not however disputed. While the possession of the land by the Hindus was accepted, the suit was denied on a public policy ground that the construction of a temple would lead to the blowing of conches and shells, and since Muslims were praying nearby, their service would be disrupted. The court was of the view that the

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of 1959); *The Sunni Central Board of Waqfs, U.P and Others v. Gopal Singh Visharad* (since deceased) and Others (Original Suit No. 4 of 1989; Regular Suit No. 12 of 1961); *Bhagwan Sri Ram Lala Virajman and Others v. Rajendra Singh and Others* (Other Original Suit No. 5 of 1989; Regular Suit No. 236 of 1989). Judgment delivered in the High Court of Judicature at Allahabad (Lucknow Bench), September 30, 2010. (hereinafter referred to as the Ayodhya decision)

5. Romila Thapar, *Syndicated Moksha* SEMINAR 313 (1985). See also Chetan Bhatt, *Primordial Being: Enlightenment and the Indian Subject of Postcolonial Theory*, in *PHILOSOPHIES OF RACE AND ETHNICITY* 40, 60-61 (Peter Osborne and Stella Sandford eds., 2002).

construction would aggravate the already pervasive ill will and tension between the two communities. The suit was dismissed as was the appeal against the judgment.

In 1934 there were further riots between Hindus and Muslims at the disputed site, which caused severe damage to the mosque. Some of the Hindu parties claimed that the structure ceased to exist as a place of worship for Muslims from that time and as Hindus continued to hold their prayers at the disputed spot they could claim possession of the entire suit property. Muslim parties, in particular the Sunni Central Waqf Board, claimed that Muslims had continued to offer *namaz* (prayers) in the inner courtyard and remained in possession of the property. In 1949 there were a series of further disturbances that culminated in some Hindu worshippers placing the idols from the outer area into the inner courtyard under the central dome of the mosque during the night of 22/23rd December claiming the spot to be *the* exact birthplace of Ram. The court immediately issued a notice to attach the disputed property and gave it over to the receivership of a government appointed receiver. Since December 23, 1949 Muslims have not been able to use the mosque though in the attachment order, Hindu *pujas* (prayers) were permitted to continue.

In 1950, a suit was filed by a devotee claiming that his right to worship Shri Ram Lalla was denied to him by the order of receivership. He claimed an unobstructed right to worship the idols at the place where the main dome of the mosque once stood. In 1959 the Nirmohi Akhara (Group without Attachment) claiming to be the religious order traditionally charged with the maintenance and management of the Ram *Janamsthan*, filed a further suit. They claimed that a Hindu Temple dedicated to “Shri Ram Lalla” stood at the disputed spot ever since the 12th century, marking his birthplace.<sup>6</sup> In the alternative they argued that Babur, the first Moghul emperor had tried to unsuccessfully convert the temple into a mosque. In any case, ever since 1934, as Hindus had continued to pray and worship at the spot and no *namaz* (prayer) had been held inside the mosque, the Akhara was the sole owner of the Ram *Janamsthan*, as well as the temple and idol. In 1961 the Sunni Central Wakf Board sought a declaration that the disputed structure was a mosque and that possession of it be handed over to the Board. They stated that the structure was built on barren land or in the alternative, on the ruins of a temple and that Muslims had been praying at the Babri Masjid since 1528, a practice that was halted after the idols were installed. They claimed that they had exclusive possession of the premises though Hindus had prayed in the outer courtyard.

The most recent suit was filed in 1980 on behalf of the Shri Ram Lalla Virajman, the idol, and the Ram *Janamsthan*, with the petitioner claiming

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6. While the Archeological Survey of India (ASI) reported that its excavations revealed that a temple once stood in the place where the mosque was constructed, these findings remained disputed throughout the course of the proceedings by the Sunni Central Wakf Board as well as various academics.

both to be juristic entities, as both are deities capable of holding land in their own name, and of suing and being sued. The petitioner in this instance filed a suit as “a friend” of the idol, seeking title and possession of the disputed property solely in favour of Ram.<sup>7</sup> The petitioner was a member of the Vishwa Hindu Parishad (VHP)(World Hindu Council) established in the mid-1960s to popularize the message of the Hindu Right. The relevance of this suit lay partly in the fact that the VHP did not trust the Nirmohi Akhara, whose interest seemed to be in asserting a religious claim and not with the broader political agenda of the VHP. This suit was filed at a time when the political climate in India had changed considerably as a mass based agitation had been launched for the construction of the temple led by the BJP, the political wing of the Hindu Right, led by its former head, L.K. Advani.<sup>8</sup> This movement partly saw its culmination in the destruction of the mosque by the mobs of the Hindu Right in December 1992.

## II. THE HOLDING: DETERMINING THE SPOT WHERE GOD WAS BORN?

The Ayodhya bench consisted of three judges: Judge Khan, a Muslim, and Judge Agarwal, who delivered the majority opinion, and Judge Sharma, who was the dissenting judge in the case.

Judge Khan held that neither party was able to demonstrate exclusive title to the disputed property. The available evidence indicated that by the middle of the 18th century there existed a mosque at the site and that by the middle of the 19th century Hindus were claiming that this site was the Ram *Janamsthan*. Since 1855 both parties appeared to be in joint possession of the site. Judge Khan decided to divide the disputed property into three equal parts: one part was awarded to the Muslim parties; one part was given to the Hindu Idols, with the caveat that their part should include the land under the central dome; and one part was handed over to the Nirmohi Akhara with the caveat that their part should include the outer courtyard. Khan based his entire decision on the issue of title and possession, rather than on considerations of the right to freedom of religion, although he recognized the significance of the site for Hindus.

7. Idols are juristic persons in law, but the origins of this seem to be more Roman law, where a similar concept operated with respect to churches, rather than Hindu. As stated in a text on the History of English law, “Perhaps the oldest of all juristic persons is the God, hero or the saint” (SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 481 (1895)). However, by and large, over the years, the notion of a juristic person for the idol has been developed by Indian courts as one based on the religious customs of the Hindus themselves: *Pramatha Nath Mullick v. Pradyumna Kumar Mullick and Ors.*, 52 I.A. 245.

8. The Hindu Right is a right wing nationalist movement determined to establish India as a Hindu State. See JYOTIRMAYA SHARMA, *HINDUTVA: EXPLORING THE IDEA OF HINDU NATIONALISM* (2003) and TERRIFYING VISION: M.S. GOLWALKAR, *THE RSS AND INDIA* (2007). See also CHRISTOPHE JAFFRELOT, *THE HINDU NATIONALIST MOVEMENT IN INDIA* (1998).

His decision to divide the property into three is curious and there is no real explanation for altering the situation from 1949 when the property was divided into two nearly equal parts between the Hindu and Muslim communities. In permitting the area under the central dome to be given over to the idols, Judge Khan's decision is contrary to the finding of all the judges that the idols were placed there only in 1949 and illegally. His decision places the onus on the Muslim community to make all the necessary adjustments in relation to the dispute.

Judge Agarwal accepted that there was a non-Islamic, ancient structure that stood where the mosque once stood.<sup>9</sup> While the earlier structure appeared to be a Hindu religious place, the ruins could also be evidence of other non-Islamic traditions or practices. He also accepted that there was evidence of persistent practice as well belief on the part of Hindus that the disputed spot, particularly the spot under the central dome, was the birthplace of Lord Ram. This faith was borne out by ancient literature that Judge Agarwal stated should be accepted on its face without any "tinkering". He thus held that such persistent practice and faith was enough to deify the place and give it a juridical personality.

Judge Agarwal also held that the deity was a perpetual minor and no claim of adverse possession could be made against the deity. In effect the deity held title in perpetuity – a concept that could have serious implications with regards to claims being made all over India in relation to Islamic structures and historical monuments. He coupled this observation with the right to freedom of religion and the view that the right to worship at the birthplace of Ram constituted a core ingredient of the Hindu faith. To allow a claim of adverse possession would extinguish a core feature of the religion and hence the religion itself, and would be contrary to the fundamental right of freedom of religion protected under articles 25 and 26 of the Constitution. What is implicit in Agarwal's reasoning is that the offering of *namaz* by Muslims was not taken to be as significant to their religion as worship at the birthplace of Ram for Hindus. Agarwal's reasoning reflects how the dispute was transformed from one between various private parties over title and possession into a contest over the constitutional meaning of the right to freedom of religion, in particular, the right to worship.<sup>10</sup>

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9. Judge Agarwal's decision has been extensively discussed in ALIGARH HISTORIAN'S SOCIETY, HISTORY AND THE JUDGEMENT OF THE ALLAHABAD HIGH COURT, LUCKNOW BENCH, IN THE RAMJANAMABHUMI-BABRI MASJID CASE (2010) (demonstrating how the reasoning and understandings of the dispute by Judge Agarwal are historically flawed).

10. While the Supreme Court stayed the operation of the High Court decision partly on the grounds that the court granted a relief of partition of the property that was not sought by any of the parties, the constitutional implications of the larger contest over the meaning of religion and the right to worship continue to be of considerable relevance.

Judge Agarwal held that the Muslim parties had not proved that Babur had title over the land nor challenged the argument that the construction of the mosque failed to adhere to the principles of Islam. Hence, he declared that the structure was not a legitimate mosque and that it was *non est or non-existent*. Judge Agarwal held that the area under the dome had to be given to the idols, the inner courtyard to be shared between Hindus and Muslims and the outer courtyard to be shared between the idols and Nirmohi Akhara. However, he also stated that the Muslim parties should be given at least a third of what the other parties were being given, and requested the government to ensure land was made available for such a purpose. This last move seemed more like an act of solomonic justice, rather than based on the facts and legal questions raised in relation to possession and title.

In his dissenting opinion, Judge Sharma held that the disputed site had long been believed to be the birthplace of the "Lord of the Universe"- Shri Ram. On the basis of the Archeological Survey of India report that there existed a temple before the mosque and parts of the temple were used in the construction of the mosque, Judge Sharma came to the conclusion that a Ram Janambhoomi temple was *destroyed* in order to construct the mosque. Concluding that there was proof that the disputed area was the birth place of Ram, and that the birthplace of Ram itself being a deity for purposes of holding property, the property belonged to the deity itself. He also found that for the purposes of limitation, a deity was a perpetual minor and therefore its land could never be taken away by adverse possession. Therefore, the title of the land never passed either by conquest or by adverse possession.

Finally and perhaps most importantly, Judge Sharma held that to dispossess Hindus from the land would be to extinguish a core ingredient of the Hindu religion, which is the birthplace of Ram. In the process he essentialised and ossified the Hindu tradition against any notions of plurality, diversity or fluidity. Sharma and Agarwal together based their reasoning on the earlier Supreme Court decision that held:<sup>11</sup>

[w]hile offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

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11. Dr. M. Ismail Farooqi v. Union of India, 1994 (6) S.C.C. 360, ¶ 82.

### III. THE JUDICIAL (RE)SHAPING OF INDIAN SECULARISM

Secularism in India is not based on the separation of religion and state model, which includes the equal treatment of all religion, the right to worship, and state neutrality.<sup>12</sup> In India, the third leg of the separation model – that is state neutrality, is replaced with tolerance.<sup>13</sup> Increasingly, secularism has become the subject of intense political contestation in which right wing religious and fundamentalist forces endeavor to claim the secularist terrain as their own. The Hindu Right—a nationalist and right wing political movement devoted to creating a Hindu State has increasingly staked out its own claim arguing that it alone is committed to upholding secularism. Indeed, secularism has become a central and powerful weapon in the Hindu Right’s quest for discursive and political power.<sup>14</sup> These struggles over the meaning of secularism, and the place of religion in politics, have entered into the legal arena. The courts have been called upon to adjudicate the claims for and against secularism, and to decide whether the strategies of the Hindu Right violate this basic constitutional principle. Increasingly, we are witnessing how orthodox or conservative forces, in particular, the Hindu Right, are successfully defining the meaning and parameters of each of the various components of secularism. Their agenda is pursued through the doctrine of *Hindutva* that its ideological leaders have described as a mental state or attitude of the Hindu race and the Hindu nation. It propagates the idea that the holy lands for Christians and Muslims lay elsewhere and that their presence in India makes them a threat to the Indian nation. This idea allows the ideological leaders of the Hindu Right to construct Muslims and Christians as foreigners, aliens and invaders.

The Ayodhya decision needs to be read against a backdrop of the dominant understanding of secularism in India as well as some of the landmark judicial decisions in this area, especially since the 1990s in the context of the rise of

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12. While the separation model is the dominant understanding of secularism in liberal democratic states, it is unclear that any state has escaped the majoritarianism that remains embedded in this model. See Marc Galanter, *Secularism, East and West*, in *SECULARISM AND ITS CRITICS*, *supra* note 1 at 234; Charles Taylor, *Modes of Secularism*, in *SECULARISM AND ITS CRITICS*, *supra* note 1 at 31-53. Leti Volpp, *Why Citizenship?: The Culture of Citizenship*, 8 *THEORETICAL INQUIRIES L.* 571 (2007) (exposing the majoritarianism in France’s model of secularism and republican citizenship based on laïcité or state neutrality); TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003); Ratna Kapur, *The Right to Freedom of Religion and Secularism in the Indian Constitution*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 199 (Vicki Jackson and Mark Tushnet eds., 2002).
  13. Gurpreet Mahajan, *Religion and the Indian Constitution: Questions of Separation and Equality*, in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION: QUESTIONS OF SEPARATION AND EQUALITY* (2009).
  14. Madhok Balraj, *Secularism: Genesis and Development*, in *SECULARISM IN INDIA: DILEMMAS AND CHALLENGES* 110 (M.M. Sankdher ed., 1995); Gyan Prakash, *Secular Nationalism, Hindutva, and the Minority*, in *THE CRISIS OF SECULARISM IN INDIA* 177 (Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, eds., 2006); SHABNUM TEJANI, *INDIAN SECULARISM: A SOCIAL AND INTELLECTUAL HISTORY, 1890-1950* (2008); RATNA KAPUR AND BRENDA COSSMAN, *SECULARISM’S LAST SIGH: HINDUTVA AND THE (Mis) RULE OF LAW* (2001).



the religious right. Initially, the Supreme Court's position on secularism was somewhat stellar. In 1994, the Supreme Court upheld the declaration of presidential rule in four states following the destruction of the Babri Mosque, a 16th century mosque that Hindus declared had been constructed on the exact spot where Ram was born.<sup>15</sup> The full constitutional bench unanimously affirmed the importance of secularism to the Indian Constitution while emphasizing the distinctively Indian concept of secularism - the equal treatment of all religions and tolerance. The decision contained not only statements about secularism - as religious tolerance and equal treatment of all religious groups - but also a very strong condemnation of those political forces committed to undermining this constitutional ideal.

*Bommai* represents a high watermark in the Court's protection of secularism at a time when the country was experiencing its most violent manifestations of communal politics. The discourse of the Hindu Right, as powerful as it may be, was not powerful enough to mask or obscure the death and destruction brought on by its forces. The case suggested that the Court at least was committed to upholding the principles of secularism and holding back the tides of intolerance and Hindu majoritarianism.

However in 1995, there is evidence of a shift in the Court's position on the meaning of secularism. The most famous set of cases during this period are the ones delivered by the Supreme Court in 1995, in what has come to be known as the *Hindutva* cases.<sup>16</sup> These cases involved a challenge to the election of several members of right wing parties to the state legislature on the grounds that they had appealed to religion in the course of their election campaigns and incited religious enmity and hatred in violation of the provisions of the Representation of Peoples Act. Many candidates had appealed to the idea of *Hindutva*, a central plank of the Hindu Right that challenges the special treatment of religious minorities, casting it as appeasement, intolerant, and discriminatory against the religious majority. While several candidates were held to be guilty of appealing to religion to gain votes, the Court held that *Hindutva* - the ideological linchpin of the Hindu Right - simply represented "a way of life of people of the subcontinent"<sup>17</sup> rather than an attitude hostile to

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15. S.R. Bommai v. Union of India, AIR 1994 SC 1918.

16. These cases were as follows: Prabhoo v. Prabhakar Kasinath Kunte and Ors. 1995 SCALE 1; Sri Bal Thackeray v. Shri Prabhakar Kasinath Kunte and Ors; Manohar Joshi v. Nitin Bhaurao Patil, A.I.R. 1996 S.C. 796; Ramachandra G. Kapse v. Haribansh Ramakbal Singh, A.I.R. 1996 S.C. 817; with Pramod Mahajan v. Haribansh Ramakbal Singh, and Anr., and Sadhi Teetambrara [sic] v. Haribansh Ramakbal Singh and Anr. ; Ramakant Mayekar v. Smt. Celine D'Silva, A.I.R. 1996 S.C.. 826; with Chhagan Bhujbal v. Smt. Celine D-Silva and Anr., Balasaheh Thackeray v. Smt. Celine D'Silva; Shri Moreshwar Save v. Shjri Dwarkadas Yashwantrao Pathrikar, A.I.R. 1996 S.C. 3335; Chandrakanta Goyal v. Sohan Singh Jodh Singh Kohli, A.I.R. 1996 S.C. 861; Suryakant Venkatrao Mahadik v. Saroj Sandesh Naik, 1995 SCALE 92.

17. Prabhoo, *id.* at 22.

persons practicing other religions or an appeal to religion. The Court held that in fact the speeches promoted secularism.

In reaching its conclusions about the meaning of *Hindutva*, the Court quoted extensively from two earlier decisions by the Constitutional Bench of the Supreme Court. The opinion in *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another*<sup>18</sup> included a lengthy discussion about the identities of Hindus and provided extensive commentary on the meaning of Hinduism:<sup>19</sup>

Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more . . . . When we consider this broad sweep of the Hindu philosophic concepts, it would be realized that under Hindu philosophy, there is no scope for ex-communicating any notion or principle as heretical and rejecting it as such. . . . Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and these different approaches are not only compatible with each other, but are complementary.

The second case, *Comm'r. Of Wealth Tax, Madras, and Ors. v. Late R. Sridharan by L.Rs.*,<sup>20</sup> also contained a considerable discussion on the meaning of Hinduism:<sup>21</sup>

It is a matter of common knowledge, that Hinduism embraces within self {sic} so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term "Hindu" with precision.<sup>22</sup>

In *Sridharan* the Court further elaborated on the nature of Hinduism, which it described as "incorporat(ing) all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant, leaving others-including both Hindus and non-Hindus- whatever creed and worship practices suit them best."<sup>23</sup>

18. *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another*, 1996 (3) S.C.R. 242.

19. Prabhoo, *supra* note 16, at 18-20.

20. *Comm'r. Of Wealth Tax, Madras, and Ors. v. Late R. Sridharan by L.Rs.*, 1976 Supp. S.C.R. 478

21. The decision included various dictionary and encyclopedic definitions of Hinduism. For example, Webster's International Dictionary defined Hinduism as "a complex body of social, cultural and religious beliefs and practices evolved in and largely confined to the Indian sub-continent . . . an outlook tending to view all forms and theories as aspects of one eternal being and truth." Prabhoo, *supra* note 16, at 20. This passage also referred to listings in the Encyclopedia Britannica and the works of B.G. Tilak.

22. Prabhoo, *supra* note 16, at 20.

23. *Id.*

Guided by these two decisions, the Court in *Prabhoo* concluded that it could not give precise meaning to the terms Hindu, Hinduism, or Hindutva:<sup>24</sup>

no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term Hindutva is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the fact of these decisions the term "Hindutva" or "Hinduism" per se, in the abstract, can be . . . equated with narrow fundamentalist Hindu religious bigotry, or {how it might} . . . fall with the prohibition of . . . Section 123 of the {Representation of the People Act}.

These words have troubling ramifications for the secular debate. For instance, while the Court could not define Hinduism, it refused to limit it to the narrow confines of religion. That Hinduism should extend beyond these secular restraints presents a contentious and, ultimately erroneous, perspective. The very definitions cited by the Court in *Sridharan* all point to the common understanding of Hinduism as a religion that embraces many gods, texts, and rituals. Despite its emphasis on these precedents from the Constitutional Bench, the Court seemingly ignored the fact that neither of these two decisions mentioned the word "Hindutva". The Court nevertheless described this term as the way of life or state of mind of the people on the subcontinent, a meaning that confuses *Hindutva* with prior notions of Hinduism. Its citation to the work of Maulana Wahiduddin Khan highlights this disparity:<sup>25</sup>

The strategy worked out to solve the minorities problem was, although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all of the cultures co-existing in the country. This was felt to be the way to communal harmony and national unity. It was thought that this would put an end once and for all to the minorities problem.

This passage is used by the Court to support its conclusion that *Hindutva* is a synonym of "Indianisation," the "development of uniform culture by obliterating the differences between all the cultures co-existing in the country."<sup>26</sup> What remains unstated here is the fact that the passage quoted is a description of a particular strategy worked out by a particular political party, the Bharatiya Jana Sangh, the ideological precursor of the BJP. Although this discourse did equate *Hindutva* with Indianization, the political rhetoric of the Hindu Right should create considerable cause for concern. The Court, however, did not question this strategy of Indianization. It did not consider that the creation of a uniform (Hindu) culture might require the obliteration of Muslim identity

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24. *Id.* at 22.

25. *Id.*

26. *Id.*

and religion. The Court instead took the passage out of its proper context and used it as authority for the proposition that *Hindutva* is synonymous with a way of life for the Indian people.

The Court also quoted at length from *Kultar Singh v. Mukhtiar Singh*,<sup>27</sup> in which the Constitutional Bench of the Supreme Court held that a poster containing the word “Panth” did not constitute a religious appeal for votes. It held that the word “Panth” made no reference to the Sikh religion and reiterated this basic conclusion:<sup>28</sup>

Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words “Hinduism” or “Hindutva” are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith.

The Court further emphasized that nothing inherent to the terms Hinduism or *Hindutva* depicted any hostility or intolerance to other religious communities. Although some may have misused the terms to promote communalism, such departures did not change “the true meaning of these terms.”<sup>29</sup> The Court finally concluded that mere references to the words Hinduism or *Hindutva* in a speech did not violate sections 123(3) or 123(3A) of the Representation of the People Act, 1951 (Act).<sup>30</sup> It held that it is “the kind of use made of these words and the meaning sought to be conveyed in each particular speech must be considered.”<sup>31</sup>

What is most extraordinary about the Court’s reasoning, from a strictly legal point of view is that it drew such an unequivocal conclusion about the meaning of *Hindutva* without referring to any relevant authorities. None of the Constitutional Bench decisions cited addressed the meaning of the term *Hindutva*, but simply the meaning of Hindu or Hinduism. The Supreme Court, however, took no notice of the possibility that these terms might not converge. It simply conflated their meanings, understanding both *Hindutva* and Hinduism to refer to the way of life of the people of the subcontinent. This conclusion on the meaning of *Hindutva* exemplifies the way in which the unstated norms of the majority have become inscribed in legal principles. Through this assimilation, Hinduism, the religion of the majority of Indians, comes to reflect the way

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27. *Kultar Singh v. Mukhtiar Singh*, 1964 (7) S.C.R. 790

28. Prabhoo, *supra* note 16, at 24.

29. *Id.*

30. *Id.* at 24-25.

31. *Id.* at 24.

of life of all Indians. *Hindutva*, abstracted from the religion of the majority, similarly becomes the way for all people on the subcontinent. Thus, the Court uncritically assumes that the norms of the majority can simply apply to all Indians, regardless of their religious or cultural identity. "Indianization" is similarly assumed to represent the political and cultural aspirations of all Indians, through the construction of a uniform culture. The Court fails to consider that this uniformity is based on the assimilation of religious and cultural minorities and the reconstitution of all Indian citizens in the image of the dominant Hindu norm. The Court simply assumes that majoritarian norms provide the appropriate measure for judging the practices and rhetoric of the Hindu Right.

The Court's conclusion on the meaning of *Hindutva* is legally, historically, and politically unsupportable, as it is (1) an appeal to religion and (2) does promote of religious enmity and hatred. The history of *Hindutva* demonstrates that the term has long been an appeal to religion. The Court fell into the complex trap set by the Hindu Right in which a fundamentally non-secular project of Hindu supremacy and the assimilation of religious minorities has been packaged, sold, and consumed as a secular one. Although judicial reasoning often demonstrates an implicit reliance on dominant norms, the implications of these norms for religious and cultural minorities who deviate from these customs can be very damaging. As I reveal in the sections that follow, the implications of these unstated majoritarian norms in the Supreme Court's rulings on *Hindutva* have particularly devastating effects on those minorities targeted by the Hindu Right. Not surprisingly the Hindu Right hailed the decision in the *Hindutva cases* and the *Ayodhya case* as victories. The decisions have not only been used by the Hindu Right to serve as an endorsement of the "true meaning and content of *Hindutva* as being consistent with the true meaning and definition of secularism"<sup>32</sup> but also to declare that its movement to begin the construction of the temple. The Ayodhya campaign, in which the Hindu Right sought to have the Babri Masjid replaced with a Hindu Temple proved to be enormously successful in generating broad-based support for the Hindu Right. The VHP and subsequently the RSS and the BJP stirred up a controversy of enormous proportion, alleging that the mosque was built on the site of the birth of the Hindu god Ram, seeking to impose this belief which was already being argued through the court, resulting in the Ayodhya decision. The campaign succeeded in mobilizing thousands of supporters, some of whom followed the marches to Ayodhya, many others of whom sent money and bricks to Ayodhya to help construct the new temple. After a steady escalation in the anti-Muslim political rhetoric and the demands for the destruction of the mosque, a mob destroyed the Babri Masjid on December

32. Bharatiya Janata Party Election Manifesto 2 (1998). See also Bharatiya Janata Party Election Manifesto 8 (2009), The 2009 manifesto makes no reference to the term *Hindutva*. Instead the BJP refers to the true meaning of secularism within the framework of cultural nationalism.

6, 1992. The destruction was cast as a legitimate expression of the sentiment of the majority. While it triggered massive communal riots around the country in which thousands were killed, the decision by the Allahabad High Court appears to have conferred some legitimacy on the destruction, which received barely any mention in the decision.

#### IV. SECULARISM AND ITS IMPLICATIONS FOR RELIGIOUS MINORITIES

A creeping majoritarianism is defining the meaning of secularism in India. The Supreme Court's performance in promoting tolerance and a respect for the rights of religious minorities has been increasingly brought into question.<sup>33</sup> And the judicial pronouncements are indicative of the Hindu Right's success in capturing the terrain of secularism and defining its terms and parameters in ways that seem entirely logical and reasonable. The definition of Indian secularism, which has never been based on state neutrality as in the separation model, has been based on the equal treatment of all religions, tolerance, and freedom of religion.<sup>34</sup> The Hindu Right has succeeded in making inroads into determining the meaning of each of these components in law.<sup>35</sup>

Firstly, the principle of equal treatment and toleration of all religions is used by the Hindu Right to establish the supremacy of Hinduism as the only religion that truly respects difference and toleration (since, unlike Islam and Christianity, it is not proselytizing). On the issue of tolerance, according to the logic of the Hindu Right, since secularism is about toleration, and only Hindus are tolerant, then only Hindus are truly secular. The principle of protecting minorities virtually disappears.<sup>36</sup>

And as far as the definition of equality is concerned, the various laws through which minority rights have been protected are attacked as "special treatment" and as a violation of the constitutional mandate of equal treatment, which is argued as being based on sameness in treatment or formal equality. Within this vision of the Hindu Right, then, secularism comes to be equated with a Hindu state, where religious minorities must be treated the same as the Hindu majority (i.e., where those religious minorities are effectively assimilated into the Hindu majority).

33. Sanghamitra Padhy, *Secularism and Justice: A Review of Indian Supreme Court Judgments*, 39(46/47) ECONOMIC AND POLITICAL WEEKLY 5027 (2004); V.S. Rekhi, *Religion, Politics, and Law in Contemporary India: Judicial Doctrine in Critical Perspective*, in RELIGION AND LAW IN INDEPENDENT INDIA 252 (Robert D. Baird ed., 2005).

34. Some scholars have unpacked the majoritarianism implicit in the American model of secularism, which is ostensibly based on state neutrality: See for example, Ann Pellegrini, *Religion, Secularism and a Democratic Politics 'As If'*, 76(4) SOCIAL SCIENCE RESEARCH: AN INTERNATIONAL QUARTERLY 1345 (2009); See also JANET JAKOBSEN AND ANN PELLEGRINI, SECULARISMS (2008).

35. RATNA KAPUR AND BRENDA COSSMAN, *supra* note 14.

36. See WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE (2008) (unpacking the ways in which tolerance has been used to deny access to full equality as well as to reinforce majoritarian norms and values).

However, another equally important component of secularism is the right to freedom of religion. The courts have devised a test based on identifying the “essential characters of the religion” in order to protect the right to freedom of religion. In doing so, they continually engage in determining the core of religious belief for a given religious community. While initially, in the 1950s there was some indication that essentiality would be tested on the basis of a community’s own beliefs and popular practices, over time the courts have taken on the task themselves. There is an increased focus on identifying the essential practices or the foundational core of a religion. The cases illustrate how religion was being remade.<sup>37</sup> The courts have set out the distinction between the true religious experience as opposed to rituals and symbols.<sup>38</sup> In relation to Muslims, they restrict the protection of Article 25 to the Quran, and reject anything not specifically stated in the Quran as not being essential to Islam and therefore, not within the protective sphere of Article 25.

In the case of Hindus the shift is more dramatic and is deeply connected it seems to the way in which Hinduism is articulated by the reformists in the 19th and 20th century through an anti-colonial nationalist lens. Core religious practices come to be identified in Supreme Court decisions as based on foundational documents and the construction of a common Hindu belief and culture.<sup>39</sup> In the process a juridically constructed “rational Hinduism” has come to define the parameters of legitimate faith. In articulating a common Hindu culture and belief, the Court has come to cast Hinduism in the same framework as Semitic traditions – that is – as a monolithic religion based on foundational documents. It is also a position that ends up converging with the position of the Hindu nationalists.

While in relation to both traditions, the markers of religious identity, or practices and beliefs that do not fit within the “gospel” are rejected as being not

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37. RONOJOY SEN, *ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT* (2010).

38. A. S. Narayana Deekshitulu v. State of A.P. (Andhra Pradesh), AIR 1996 SC 1765.

39. The earlier cases tend to offer a wider understanding of religion as including rituals and superstitious practices. See *Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) SCA 415 (the first case to sanction the elaborate regulatory regime for Hindu temples and *maths*, while also widening the definition of religion to include rituals and practices). However, gradually the Court begins to whittle down the scope of what constitutes religion by introducing a requirement that the practice must have a scriptural or textual basis: See *Saraswathi Ammal v. Rajagopal Ammal*, AIR 1953 SC 491 (rejecting the right of woman to set up a perpetuity to have worship conducted at the location of her husband’s Samadhi. The Court elaborates a requirement that such practices need to have a shastraic or textual basis in order to be considered as part of the Hindu faith); *Sri Venkatramana Devaru v State of Mysore*; *Durgahy Committee v. Hussain, Ali* AIR 1961 SC 1402 (where the Court affirmed that the practices of a denominational temple to restrict the entry of Harijans or untouchables into the temple was scripturally based and hence a part of the essential practices of the Hindu faith, while at the same time it upheld the right of the State to open public temples to all Hindus under Article 25(2)(b)). The emergence of the doctrine of essential practices occurs in the early 1960’s, specifically articulated in the rulings of P.B. Gjendragadkar. See *Surgah Committee v. Hussain Ali*, AIR 1961 SC 1402 and *Shri Govindlalji v. State of Rajasthan*, AIR 1963 SC 1638 both of which involved upholding the right of the state to regulate religious institutions.

within the domain of Article 25 protections, there is an increasing convergence between notions of nationalism and Hindu majoritarianism in and through the discourse of secularism.<sup>40</sup> For example, in one case, the Supreme Court not only conflates the idea of a ‘core’ or ‘essential’ ingredient of a religion with the Hindu term *dharma*, it also uses the term *dharma* to include all those good feelings and sense of ‘brotherhood’ unity, and friendship for the integration of Bharat (India).<sup>41</sup> This conflation is reflective of the majoritarianism that informs the discourse of secularism in Indian constitutional law.

Similarly, a dalit activist from Gujarat challenged the holding of a *bhoomi puja* (grand prayer) and the chanting of *mantras* at the foundation stone laying ceremony for a new High Court building.<sup>42</sup> The function was performed in the presence of the Governor of the State of Gujarat as well as the Chief Justice of the Gujarat High Court. The petitioner argued that the rituals were purely Hindu in nature and origin and violated the secular guarantees of the Constitution. And in attending the performance of the rituals the legal dignitaries and High Court judges present had identified themselves with the Hindu religion. The Court dismissed the petition and fined the petitioner. The Court held that the *bhoomi puja* was nothing more than a prayer seeking the pardon of the earth to graciously bear the burden of damaging her and to ensure that the construction was successful. The Court traced the meaning of secularism through case law and principles of *dharma* producing a concept that was steeped in Hindu majoritarianism. The Court went so far as to state that *dharma* related activity, which embraces all religions, is a secular activity and hence obscures the completely Hindu origins of the concept.<sup>43</sup> The Court stated that secularism was not antithetical to religious devoutness.<sup>44</sup> It held that the prayers were within the secular tenets of the Constitution and performed for the betterment of the institution of the High Court and the welfare of

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40. Jacobsohn discusses how the ideas of nationalism are entangled in understanding of Indian secularism to produce what he describes as an “ameliorative secularism” or secularism based on “the good of the people”. See GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 91-121 (2003).

41. *Supra* note 38 at 1790.

42. *Rajesh Himmatlal Solanki v. Union of India through Secretary, Writ Petition (PIL) No. 2 of 2011.*

43. *Id.* at 13.

44. *Id.* ¶ 7. The Court reiterates that secularism is not anti-God. See also *Atheist Society of India v. Govt. of Andhra Pradesh*, AIR 1992 Andhra Pradesh 310 (where a challenge by the Atheist Society of India to practices such the breaking of coconuts, performance of pujas, chanting of *mantras* as contrary to the secular objects of the Constitution were rejected. The High Court held that such practices were not only a part of Indian tradition and recognized as a part of religious practices, it further stated that “There is no constitutional guarantee to the faith of the Atheists who worship the barren reason that there is no God, and that they can’t seek to enforce such [sic] non-existing right by preventing the believers in [sic] invoking the blessings of the Gods.” *Id.* at 317.



everyone and was harmful to no one.<sup>45</sup> These cases highlight how Hindu practices have percolated into judicial discourse and subsequently recast as universal practices.

In the Ayodhya case the claims of the Hindu Right were based on a more robust notion of freedom of religion. While the Hindu Right initially paid little attention to the right to freedom of religion, preferring to focus on the meaning of equality and tolerance, in the Ayodhya case, freedom of religion was argued to mean more than an *individual* right to worship. Instead the Hindu parties pursued a more substantive notion of freedom of religion which recognized that religious identity was necessarily constituted in and through a broader community, that is, it was a matter of the group's collective survival: their right to practice their religion collectively, including to worship in a place that has deep reverence and meaning to the Hindu tradition. The Muslim parties did not argue "essentiality" or core ingredients in the Ayodhya case. They were more focused on title and possession, rather than the right to worship, though providing evidence of worship was used to try and establish title/adverse possession. In the Ayodhya case the right to freedom of religion played a much more significant role in the arsenal of the Hindu Right than in the hands of the Muslims.

Until the Ayodhya decision, the Hindu Right's claim to freedom of religion was the weakest component in its struggle to secure the meaning of secularism on its own terms. In its discourse, freedom of religion was rarely articulated specifically as a political norm. Rather, it spoke primarily in terms of an individualized right to worship. Yet, even this right was limited by the Hindu Right's vision of equality and toleration. As the weak link in the Hindu Right's rhetorical chain, freedom of religion represented an easy target in the effort to chip away at their claim to secularism.

While the right to worship is an important component of freedom of religion, both Agarwal and Sharma held that the right to worship on the exact spot where god was born was a core or essential ingredient of the Hindu faith and part of the collective belief of the community. The right to worship was not read in a similar way in relation to the Muslim claims. The argument exemplifies how the focus shifted from rival claims about title or property to a focus on the meaning of freedom of religion and what constitutes an essential ingredient of the Hindu faith. While the decision was ultimately stayed by the Supreme Court on grounds that partition of the property was not a relief claimed by any of the parties, the broader discursive struggle over the meaning of freedom of religion and the Hindu Right's pursuit of a more robust

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45. Rajesh Himmatlal Solanki v. Union of India through Secretary and 3 Others, Gujarat High Court, February 10, 2011, MANU/GJ/0040/2011, ¶ 17,18.

understanding of this concept have implications for the meaning of secularism in Indian Constitutional law well beyond the decision.

The Hindu Right is pursuing a more robust understanding of freedom of religion while at the same time in the context of the religious minority community confining this right to the right to worship anywhere, but not where it conflicts with Hindu core practices. In the context of Muslims, this right can be exercised anywhere, even outside of a mosque.<sup>46</sup> However, in the context of Hindus the exercise of the right to worship at the very spot where God was born is cast as a core or essential ingredient of the religion. This argument emphasizes that the freedom of religion is not simply an individual right, but also a collective right incorporating the rights of individuals and their religious organizations to collectively pursue their religious beliefs.

There is of course nothing extreme in this argument. To insist on such a vision of freedom of religion is to do little more than insist on the rights that are already recognized and articulated within the Indian Constitution. All persons are guaranteed “freedom of conscience and the right to freely profess, practice and propagate” their religion under Article 25 of the Constitution. Article 26 further guarantees “to every religious denomination or any section thereof” certain collective rights of religion, including establishing and maintaining institutions for religious and charitable purposes, managing its own affairs in matters of religion, owning, acquiring and administering property. These constitutional guarantees contemplate both individual and collective rights to freedom of religion that extend well beyond the limited right to worship. But it is the Hindu Right that uses the claim of collective rights in the Ayodhya case to pushback against what it has perceived to be Muslim appeasement and also to more aggressively pursue its claims through the fiction of a consolidated, homogenous, monotheistic and thoroughly modern religious identity.

The meaning given to the freedom of religion needs to be read within the broader political context of the redefinition of the meaning of equality and toleration by the Hindu Right. The inroads of the Hindu Right have been primarily in relation to *these* concepts. Within the Hindu Right’s understanding of formal equality any recognition of religious differences--differences that require recognition in accordance with the Constitutional requirement of freedom of religion--becomes a violation of the Constitutional guarantee of equality. Similarly, it is through its understanding of Hinduism as the only tolerant religion that the right of religious minorities to profess and propagate their “intolerant” religions is cast as a violation of freedom of religion. The site of contestation, then, has been less over freedom of religion and more over equality and toleration. Until the Ayodhya case, the Hindu Right’s concept

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46. Subramanian Swamy, *Fundamental Issue in Ayodhya Case*, THE HINDU, October 8, 2010, available at <http://www.thehindu.com/opinion/op-ed/article818314.ece> (last visited May 31, 2011).

of freedom of religion was almost entirely derivative of its conceptions of equality and toleration.

In Ayodhya, they specifically focus on the right to freedom of religion in ways that on its face seem to revitalize and democratize secularism – if the Muslims can have so many special rights to protect their religious identity – then Hindus should be entitled to nothing less. Of course, the Hindu Right's real position on freedom of religion does not agree with the constitutional guarantees of the individual and collective right to freely practice, profess, and propagate religion. But the problem is not one of legal discourse alone. It is, rather, a broader political problem in which the Hindu Right is increasingly capturing the popular imagination. After all, it is in the name of freedom of religion and the protection of religious minorities that the Hindu Right has been demanding constitutional amendments. It is not enough simply to assert the discourse of Indian constitutionalism when the Hindu Right is challenging the very legitimacy of that discourse. Ironically, although freedom of religion may be the weak link in the Hindu Right's claim to secularism as traditionally defined, the strength of its approach is beginning to displace this traditional definition. And the courts are deeply implicated in determining the boundaries of the right to freedom of religion that is either inadvertently or consciously reinforcing the Hindu Right's agenda, the discourse of secularism and nationalism.<sup>47</sup>

#### CONCLUSION

Defending secularism against the encroachments of the Hindu Right involves no less than reversing the growing domination of formal equality, religious toleration, and freedom of religion defined in majoritarian terms. A redemocratised revision of freedom of religion will need to break its association with formal equality and religious toleration, both of which disavow any recognition of religious/group difference. While freedom of religion needs to be something seriously addressed especially by progressive scholars who are loath to support this claim especially those who feel it needs to be practiced in the private arena and not fought out in the public space. Yet such a position is reflective of intellectual indolence rather than a well thought through counter to the forces of majoritarianism, which are increasingly staking a claim to determine the contours and features of Indian secularism. It will be interesting to see if progressive scholars are up to the challenge to argue in favour of a robust right to freedom of religion in a way that defends the rights of worship of Muslims, and in the process rescues one of the central planks of Indian secularism.

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47. SEN, *supra* note 37.