



‘Constitution-Building in Culturally Diverse States: The case of India’

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What aspects of culture affected the constitution-making process at the time? Who made cultural claims and why?

In India, culture, religion and social life are inextricably linked with each other. There were, therefore, many aspects of culture that deeply affected the constitution-making process. These included discussions over the kind of broad structure of governance that the *Constitution* was meant to put in place: Should India be a secular state? Should it guarantee a freedom of religion? Should it contain a charter of fundamental rights specifically recognising cultural freedom? Should the *Constitution* guarantee to minorities special liberties and privileges? Should the *Constitution* impinge upon private spheres in a bid to see equality trumping matters of tradition and culture? These were among the many pointed questions that were hotly debated during the drafting of the *Constitution*.

Cultural claims were made by all manner of people and communities. There were a few from the Hindu majority who wanted the state to recognise Hinduism as its official religion. But while these efforts were quickly dismissed, the question of what kind of secularism India’s *Constitution* should establish remained a fraught one. As KM Munshi, a member of the Constituent Assembly, put it,

The non-establishment clause (of the US Constitution) was inappropriate to Indian conditions and we had to evolve a characteristically Indian secularism...We are a people with deeply religious moorings. At the same time, we have a living tradition of religious tolerance—the results of the broad outlook of Hinduism that all religions lead to the same god...In view of this situation, our state could not possibly have a state religion, nor could a rigid line be drawn between the state and the church as in the US.

Ultimately, India’s *Constitution* while seeking to establish a secular state and to provide to all persons with the right to freedom of religion, also allowed the government to intervene in religious administration with a view, for example, to providing for social welfare and reform or to ‘the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus’ (Art.25).

These provisions in the *Constitution* also speak to a peculiarly Indian problem, the problem of caste which the framers were profoundly concerned with. Indeed, the constitutional chapter on fundamental rights expressly abolishes and punishes the practice of untouchability. For centuries, certain depressed castes in India had been ostracised and segregated from the mainstream. The touch of an untouchable was considered impure. These claims made against untouchables were often justified as products of culture and tradition. So, when the *Constitution* sought to overthrow these grossly unfair and degrading practices of the past, it was, in a way, militating against claims of culture. As a result, any effort at protecting existing cultural practices, important as they were, had to be carefully tailored.

How was cultural diversity accommodated as part of the constitution-making process, if at all?

While claims predicated on caste had to be expressly rejected, India's *Constitution* does expressly recognise cultural claims. Article 29, for example, guarantees to Indian citizens possessing a distinct language, script or culture, the right to conserve the same, and Article 30 grants to minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Moreover, the *Constitution* also recognises, subject to considerations of morality, public order and health, a right to freedom of religion. In this, it grants particular freedom to religious denominations, allowing them, in theory, complete liberty over their beliefs and practices (Articles 25 and 26).

Ultimately, however, India's *Constitution*, as Professor of Political Science Uday S. Mehta has pointed out, much like many such documents, has a complex and distinctive provenance.¹ At the time of independence in 1947, India was burdened with the challenge of 'drawing a curtain on the past' of social inequality and prejudices. The idea behind the *Constitution's* drafting, therefore, was to secure to India not only political freedom, but also to secure to its citizens economic and social freedom. While the Constituent Assembly had to provide for measures, especially in the form of justiciable rights that would help eliminate the vestiges of India's colonial past, they also had to be careful not to protect claims of culture that would help perpetuate degrading practices that were often seen as products of India's traditions. Any claim for pure cultural freedom, therefore, so long as it did not impinge on rights guaranteed to others, it was thought, had to be rooted through the basic guarantee of a right to equality, which included within its broad ambit and scope a right to both equality of status and of opportunity. This clause guaranteeing equality, in Article 14, has proved seminal important. In many ways, it represents the *Constitution's* backbone.

How was cultural diversity accommodated as part of the substance of the constitutional settlement? With what outcomes?

The express recognition of rights to cultural freedom, in Articles 29 and 30 of the *Constitution*, stems from a deeply felt concern that India's Constituent Assembly had for the preservation of cultural difference. India's efforts at striving towards maintaining a multicultural society, therefore, substantially predates the liberal, global concern for diversity. At the time when the *Constitution* was drafted, the cultural divisions in India were manifold: religion, language, caste and gender, among others. But many within the Constituent Assembly believed that only linguistic minorities should be specifically protected.² Jay Prakash Narayan, for example, said, 'secularisation of general education necessary for the growth of a national outlook and unity', demanded that the *Constitution* confine its guarantee of distinct liberties only to linguistic minorities. Promising minorities a 'right to establish and administer educational institutions of their own', Damodar Swarup Seth said, 'would not only block the way to national unity but would also promote communalism and an anti-national outlook'. Providing safeguards to minorities, it was believed, would undermine the nation's political integrity and the idea of a common citizenship. But these objections were dismissed. In the absence of an express provision protecting the rights of minorities, especially a promise of their right to preserve and nourish their culture, it was believed, would lead to the entrenchment of a majoritarian state.

¹ Uday S. Mehta, 'Indian Constitutionalism: Crisis, Unity, and History', in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016).

² See: Shefali Jha, *Secularism in the Constituent Assembly Debates*, Economic and Political Weekly, Vol. 37, No. 30 (Jul. 27 - Aug. 2, 2002), pp. 3175-3180.

Yet, it must be said, the second of the *Constitution's* guarantees described above, that is Article 30, has proved especially controversial. At the time when the *Constitution* was drafted, the term 'minority' was not understood as denoting the numerical status of a group.³ It was understood rather as constituting communities, enjoying separate religious or cultural status, which were somehow disadvantaged. But the failure to define the term 'minority' in the *Constitution* has led to several interpretive problems. For example, in 1958, the Supreme Court held that an arithmetical tabulation ought to be made to see if a group constituted less than 50 per cent of the population, to determine whether such a group has a claim to a minority status. The guarantee contained in Article 30, and its extension, possibly to areas beyond what might have been originally envisaged, has also led some groups within the Hindu majority alleging that the state has indulged in a policy of minority appeasement.

Where and how was the balance struck between accommodating cultural diversity and social cohesion?

The question of whether a proper balance between cultural diversity and social cohesion was actually achieved through the *Constitution's* drafting remains intensely contested. But the Constituent Assembly certainly strived towards striking such a balance. The *Constitution*, for example, recognises a form of secularism vastly different from western conceptions of the theory; India's secularism is nothing like the French or American versions. The *Constitution* recognises a right to freedom of religion, but, simultaneously, it also allows the state to intervene in matters of religious administration in an endeavour to bring about social welfare and change. Equally, it also allows the state to make laws that throw open Hindu religious institutions to all castes. India's history — and indeed, in many ways, the present moment — is mired by the problem of caste. Notoriously, Hindu temples forbade certain castes of Hindus from so much as entering the precincts of a shrine. That the *Constitution* seeks to actively accord to the state a responsibility to help eliminate practices such as this might be seen by some in the West as unsecular, as an intervention in matters of pure ethical responsibility. For example, Donald Smith, one of the earliest chroniclers of India's secularism, saw any intervention in Hinduism, including intervention in matters of temple entry for the backward classes, as diluting secularism. But the *Constitution's* framers realised that to achieve true and full equality the state had to be interventionist as opposed to entirely neutral. One scholar, Rajeev Bhargava, has described the *Constitution* as imposing a principled distance between the state and religion 'which entails a flexible approach on the question of intervention', that is, the state can intervene depending on the context, nature or current state of relevant religions.⁴

For its part, the Supreme Court, in interpreting Articles 25 and 26, which guarantee a right to freedom of religion, has carved out a very particular kind of jurisprudence to determine when intervention by the state might be justifiable. It has held that the state can interfere in all secular matters connected with religion, but cannot intervene to correct customs or beliefs that are 'essential' to the practice of a religion. This doctrine has proved far from uncontroversial, with the court having virtually arrogated theological power unto itself. The cost, some argue, is that customs and traditions are allowed to fall

³ See generally: Rochana Bajpai, *Multiculturalism in India: An Exception?*, <<http://www.bu.edu/cura/files/2015/06/bajpaipaper-formatted.pdf>>.

⁴ See: Rajeev Bhargava, *Should Europe learn from Indian secularism?*, http://www.india-seminar.com/2011/621/621_rajeev_bhargava.htm, accessed November 14, 2018.

by the wayside. But, equally, there is a risk that practices deemed essential to religion are tolerated despite their encroachment on people's basic civil rights.

What lessons might be learned from this experience for other multicultural societies?

India is generally seen as the perfect example of a democratic, multicultural society. There is unquestionably some merit to this assertion. The *Constitution* has allowed the thriving of diverse cultural and linguistic practices and the maintenance of separate personal laws by different religions and groups. But at the same time there are valid concerns that the country's growth, especially subsequent to the liberalisation of its economy in 1991, has been unequal and lopsided, that those from historically disadvantaged groups have not been treated fairly. Ultimately, therefore, there are both positive and negative lessons to take from India's experience.

Presently, India is in the midst of a Hindu nationalist wave. Many from minority communities live in a state of fear. Demands for a Hindu state are on the rise. To what extent the *Constitution* has allowed a space for these thoughts to flourish is a question to be posed. Yet we might also want to ask: isn't it the *Constitution* and the values that it embodies that have stood as a bulwark against majoritarian claims?

India's bid to strive for a multicultural society has been built on the foundations of a constitutional vision that expressly allows for (a) affirmative action in the form of reservation in state employment and higher education for historically disadvantaged castes and communities; and (b) the protection both of cultural practices and of religious and linguistic differences. If India's experience has taught us anything it is this: that achieving an equal society in a diverse country requires a multi-pronged approach, and that state intervention in matters of religion and culture is essential, when undertaken with a view to correcting unequal practices that infringe civil liberties, but that the state should know where to draw the metaphorical line.

When government oversteps its mark, review by the courts becomes critical. It was for this reason that India's Constituent Assembly grappled at great length on the question of how to make the country's judiciary independent. In matters of cultural freedom, the Supreme Court, in particular, has played a critical role. Two recent cases, one concerning the entry of women into the famous Sabarimala shrine in Kerala, and another concerning the practice of female genital mutilation by the Dawoodi Bohra community, have brought issues of cultural freedom and the court's role in managing and resolving competing claims, into sharp focus.

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