Secularism's Others: The Legal Regulation of Religion and Hierarchy of Citizenship

Ratna Kapur

1. Introduction

Secularism is a complex and contradictory concept that means different things in different constitutional jurisdictions. In constitutional discourse, secularism has been interpreted to accommodate a pluralist and tolerance approach towards different religions as well as to adhere to a stricter formal model of separation between the state and religion, that implicitly endorses a majoritarian approach. In this chapter, I set out some of the contradictions and complexities present in the notion of secularism, by comparing the work that it has done in two different legal contexts: postcolonial India and the French republic. I expose the political as well as normative contradictions that lie at the core of this perceived progressive "western import" that are exposed through its encounters with the postcolonial "other" in the peripheries as well as within the centre. The analysis engages with two important questions: First, what does this concept mean in terms of constitutional discourse more generally and how does it actually operate in the West as well as in the non-West? Second, what are the implications of the model of secularism adopted in postcolonial India and the French Republic on the understanding of citizenship?

The chapter sets out two contrasting models of secularism – one that is based on equal treatment of religion and the other which is based on complete separation between religion and the state. I demonstrate how these apparently competing models are both based on a religious majoritarianism and use the constitutional discourse of secularism as a method to target religious minorities. Using a comparative analysis of the workings of secularism in India and France, I illustrate how it emerges as a mechanism for directing religious minorities, in particular Muslims, to assimilate to the claims of the majority faith, and simultaneously cast those who refuse to do so as belligerent and a threat. Focusing my discussion on the constitutional challenges to Muslim women's rights regarding divorce in India, as well as the veil bans in France, I highlight how the fact that these religious minorities are citizens of India and France respectively, does not automatically entitle them to recognition as fully belonging. Faith becomes a basis for rendering the "other" as in a state of constant

precariousness despite their citizenship credentials as I further illustrate in relation to the issue of migrant who is also a Muslim. The analysis demonstrates how secularism ends up being constitutive of religion, of both the minority and majority faiths, and in the process establishes a hierarchy of citizenship, of who belongs and who does not.

This chapter takes as its starting point two basic assumptions about secularism. The first is that secularism is a western concept based on the separation of religion and state. The second is that the non-Western polities with their religious conflicts and public expressions of faith are examples of incomplete secularisation, where the modernising project remains a work in progress. I challenge both assumptions as false: liberal democratic states have been involved in the regulation and management of religion in law and outside of law and the courts and state have been deeply embroiled in reorganising the substantive features of religious life, stipulating what religion is or ought to be, its proper content and quotidian practices. Secularism in short, in both the West and the Non-West is used to advance religiosity and reinforce majoritarianism.

2. Secularism in Indian Constitutional Law

Secularism in India is not based on separation of religion and state which is built on the equal treatment of all religion, the right to worship and state neutrality. In India, state neutrality is replaced with tolerance.[1] Increasingly, orthodox, or conservative forces, in particular, the Hindu Right, which is a nationalist party that seeks to establish India as a Hindu State, is increasingly defining the meaning and parameters of each of these components of secularism.[2] The movement had its origins in

---

[1] Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARVARD INTERNATIONAL LAW JOURNAL 113-170 (1997); DONALD EUGENE SMITH, INDIA AS A SECULAR STATE 132 (2015) (originally published in 1963).

[2] The Hindu Right has its basis in the revivalist and nationalist movements of the nineteenth century, and began to take on its distinctive right wing, anti-minority stance in the 1920s, with the publication of Vir D. Sarvarkar's *Who is a Hindu?* Its organisational structure includes the Rashtriya Swayam Sevak (RSS; National Volunyeer Organisation), the main ideological wing of the Hindu Right that promotes a form of religious and national chauvinism. Under the influence of its second chief, Madhav Sadashiv Golwalkar, who headed organisation from 1942-73, it propagated the idea of India being a Hindu Nation (MADHAV SADASHIV GOLWALKAR, BUNCH OF THOUGHTS (1966); TAPAN BASU, PRADIP DATTA, SUMIT SARKAR, TANIKA SARKAR and SAMBUDDHA SEN, KHAKI SHORTS AND SAFFRON FLAGS: A CRITIQUE OF THE HINDU RIGHT 2 (1993)); established a written constitution; and expanded into

revivalist and nationalist movements of the nineteenth century, which sought to revitalise Hindu culture as a strategy for resisting colonialism. Central to the ideology of the Hindu Right is the installation of religion and culture as primary attributes of nationalism and citizenship identity.[3] In early discussions about citizenship in the Constituent Assembly debates, the forces of the right argued for a Hindu based state identity and raised the threat of being overwhelmed by the Muslim presence, expressed as an "air-born baby boom."[4]

In the area of constitutional law the struggle over the meaning of secularism in India and the place of religion in politics has been a highly contested.[5] Paradoxically, the Hindu Right has sought to redefine the meaning and parameters of the various components of secularism to suit their majoritarian political agenda and increasingly come to cast itself as the true inheritor of Indian secularism by influencing the meaning of equality, tolerance and freedom of religion, the central components of Indian secularism. Firstly, it argues that insomuch as secularism requires that all religious communities be treated the same, the various laws that protect minority rights are evidence of the "special treatment" the state accords them and therefore constitute a violation of the constitutional mandate to treat all citizens equally. Indian secularism has been largely premised on a substantive meaning of equality: not only

---

several front organisations, including the Bharatiya Janata Party (BJP; Indian People's Party), the political wing that currently heads the government and the Vishwa Hindu Parisha (VHP; World Hindu Council), the social, education and religious wing. There are also several local more extreme and violent groups associated with the Hindu Right, including the Bajrang Dal (Footsoldiers of Hanuman), a militant anti-Muslim youth group. Collectively, these are known as the Sangh Pariwar or "family collective" of the Hindu Right. Their core ideology is "Hindutva," which advocates that religious minorities must assimilate to the majority culture and language, respect and revere the Hindu religion, and glorify the Hindu race and culture. In short they seek to establish India as a Hindu State. Muslims and Christians as regarded as foreigners, aliens, and invaders and their religious presence in the country as a threat to the Hindu nation (VIR D. SARVARKAR, HINDU RASHTRA DARSHAN 3-4 (1949); GOLWALKAR (1966) above, and MADHAV SADASHIV GOLWALKAR, WE OR OUR NATIONHOOD DEFINED (1939)).

[3] JYOTIRMAYA SHARMA, HINDUTVA: EXPLORING THE IDEA OF HINDU NATIONALISM (2003); CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT IN INDIA 27 (1998).

[4] Valerian Rodrigues, *Citizenship and the Indian Constitution*, in CIVIL SOCIETY, PUBLIC SPHERE AND CITIZENSHIP: DIALOGUES AND PERCEPTIONS 225 (Rajeev Bhargava & Helmut Reifeld eds., 2005).

[5] GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2003).

are the various religious communities to be treated as equals, but the state provides for special protections extended to religious minorities as a means of addressing their relative disadvantage in relation to the majority religion. Some of these provisions include the right of religious minorities to their own educational institutions, personal status laws, and the special autonomous status accorded to the Muslim-majority state of Kashmir.

The Hindu Right argues that such protections amount to nothing more than "appeasement" measures and constitute a violation of the "true spirit" of secularism. The Hindu Right's emphasis on the formal equality of all religions operates as an unmodified majoritarianism whereby the majority Hindu community becomes the norm against which all others are to be judged and treated. It is this logic that enables them to persuasively argue in favour of a secular Uniform Civil Code to replace the personal family laws of each religious group and to govern all family and domestic matters; or in favour of Muslim women to enjoy the same rights and be treated the same as all Hindu women.

On the question of tolerance, armed with its ideology the views Hindus as both a race and a nation, the Hindu Right has argued that, unlike Christianity and Islam, Hinduism is the only religion in India that is committed to the value of religious tolerance because it does not aim to proselytize or gain converts. According to this logic, then, since secularism is about toleration and only Hindus are tolerant, then only Hindus are truly secular.

A third move is around the content of the right to freedom of religion. The construction of religion and religious identity have been integral to the formation of secularism. The struggle over the meaning of the right to freedom of religion has also involved a struggle over the contours and content of religion. And this struggle has been partly provoked by the framework of secularism. A key site for this struggle involves the dispute over the legal title to the property at Ayodhya. The Hindu Right claims that Ayodhya was the birthplace of the Hindu god Ram, and that a commemorative Hindu temple was destroyed in order to build a mosque.[6] This claim became the justification for the destruction of a 16th century mosque, the Babri Masjid, on 6 December 1992 that Hindu parties claim marked the birthplace of the

---

[6] Ratna Kapur, *The Ayodhya Case: Hindu Majoritarianism and the Right to Religious Liberty*, 29(1) MARYLAND JOURNAL OF INTERNATIONAL LAW 331 (2014).

god Ram. In particular, they argue that worship at this spot is a core ingredient of Hinduism and thus a part of their right to religious liberty. Although there are no less than four million gods and goddesses who live with Indians on the sidewalks, streets, the taxicabs and in their homes, Ram has been accorded the status of the übergod in the discourse of the Hindu Right. As a number of historians have argued the claim that the god Ram is the central Hindu deity runs counter to the polytheist character of Hinduism, transforming its pluralist character that accords well with a modernist and monotheist construction of religion.[7]

3. The Legal Narrative

The Courts have weighed in at several points to give increasing validity to the Hindu Rights interpretation of the various components of Indian secularism. Initially the Supreme Court's position on secularism differed substantially from that promoted by the Hindu Right, and demonstrated a commitment to pluralism, and to holding back the tides of intolerance and Hindu majoritarianism in the name of secularism.[8] However, since the mid-90s there has been a shift. The Court has endorsed an understanding of secularism, where its rationale has been derived primarily from Hindu scriptures, in the name of secularism.

In *Ismail Faruqui*, the Court heard a challenge to the constitutional validity of the Central government's acquisition of a disputed site in Ayodhya, a town in the northern part of India.[9] Mobs of the Hindu Right had destroyed a 16th century mosque, the Babri Masjid, on the grounds that it was the site on which the central Hindu deity, lord Ram, was born. The central government acquired the land where the

---

[7] Romila Thapar, *A Historical Perspective on the Story of Ram*, 20 COMMUNALISM WATCH (21-27 February 1993), https://communalism.blogspot.com/1993/02/historical-perspective-on-story-of-ram.html

[8] See *S.R. Bommai v. Union of India* (1994) 3 Supreme Court Cases 1 (India). After the destruction of the mosque in 1992 the Supreme Court in the *Bommai* case showed encouraging signs in unanimously affirming the importance of secularism to the Indian Constitution and emphasising the principle of equal treatment of all religions. It issued a strong condemnation of those political forces committed to undermining more pluralistic instantiations of this constitutional ideal. In *Bommai*, the Supreme Court's position on secularism differed substantially from that promoted by the Hindu Right, and the case suggested that the court was committed to holding back the tides of intolerance and Hindu majoritarianism in the name of secularism.

[9] *Ismail Faruqui v Union of India*. All India Reports 1995 Supreme Court 605 (India).

mosque once stood as well as the surrounding land with the purpose of establishing two trusts for the construction of a Ram Temple, a mosque, a library, and a museum as well as providing amenities for pilgrims. The petitioner, a Muslim, claimed that the act was anti-secular and slanted in favour of the Hindu community since it sought to simply accept the demolition as a fait accompli, instead of rebuilding the mosque that had been destroyed as a result of a criminal act. The petitioner further argued that the acquisition of the land including the disputed area interfered with the right to worship of Muslims and was thus a violation of their right to freedom of religion. The majority of the judges rejected the argument that the acquisition violated the constitutional principle of secularism.[10] In the name of secularism, the majority opinion praised the principle of religious toleration found in Hindu scriptures and also concluded that a mosque is not an essential part of the practice of the religion of Islam, and that prayer (namaz) by Muslims could be offered anywhere.[11]

As a result, the land acquisition did not violate the religious freedom of Muslims. In this case the court endorsed an understanding of secularism, where the rationale was derived primarily from Hindu scriptures and accepted the claim that secularism existed in India largely because of the religious toleration found in the Hindu scriptures. The court also remarked that those responsible for the demolition of the Babri mosque were miscreants and their acts of vandalism could not be treated as representing the Hindu community.[12]

More recently, the courts seem to have inadvertently supported the ideology of the Hindu Right by stating that their calls for the dissolution of Muslim family law and the creation of a single, secular, uniform civil code to govern all family matters in India was not problematic. In characterising any opposition to the proposed code on the part the religious minorities as an example of religious minorities failing to assimilate into the fabric of the Indian nation, the government was not going against the grain of secularism.

In another set of cases, popularly described at the *Hindutva* decisions, which involved a challenge to speeches appealing to the *Hindutva* ideology of the Hindu Right during an election campaign, the Supreme Court has held that these simply

---

[10] *Id*., at 644-645.

[11] *Id*., at 641.

[12] *Id*., at 634.

represented an appeal to Indianness and "a way of life of people of the subcontinent rather than an attitude hostile to persons practicing other religions or an appeal to religion," and that it was difficult to appreciate how […] the rights wing's position could be assumed to be equated with narrow fundamentalist Hindu religious bigotry.[13] This position not only elides the meaning of Hinduism to what the right wing says it means, it also assumes that Hinduism stands for Indianness, thereby leaving no room for other non-Hindu ways of being Indian. "Indianization" is assumed to represent the political and cultural aspirations of all Indians through the construction of a uniform national culture that was Hindu in its essence.[14] It thus held that the speeches were used to "promote secularism or emphasize the way of life of the Indian people and the Indian culture" and to challenge religious discrimination rather than facilitate it.[15] The speeches were thus in conformity with the right to freedom of religion and didn't constitute incitement to hatred against non-Hindus.

The Supreme Court's judgment was problematic for a number of reasons.[16] First, the court erred in concluding that *Hindutva* constitutes a way of life of the people of the subcontinent. In eliding the meaning of Hinduism with that of *Hindutva*, the court failed to recognise that the term has historically had a specific meaning associated with the political philosophy of the Hindu Right.[17] It also assumed that Hinduism stood for Indianness, thereby leaving no room for other non-Hindu ways of being Indian. "Indianization" was assumed to represent the political and cultural aspirations of all Indians through the construction of a uniform national culture that was Hindu in its essence. Finally, the court erred in its acceptance of the characterisation that the speeches were secular, by failing to appreciate the broader discursive and legal struggle over the meaning of secularism in which the Hindu

---

[13] *Dr. Prabhoo v. Union of India*. All India Reports 1996 Supreme Court at 1129. In the course of one election campaign, many candidates campaigned on the *Hindutva* platform and argued that the protections afforded to Muslims under various legal provisions violated the constitutional mandate of the equal treatment of all religions on which Indian secularism is based.

[14] *Id.*, at 1130.

[15] *Id.*

[16] Ratna Kapur, *A Leap of Faith: The Construction of Hindu Majoritarianism Through Secular Law*, 113(1) SOUTH ATLANTIC QUARTERLY 115 (2014).

[17] Anil Nauriya, *The Hindutva Judgments: A Warning Signal*, ECONOMIC & POLITICAL WEEKLY (6 January 1996).

Right has been a protagonist. The Hindu Right has appropriated the dominant understanding of Indian secularism to promote its vision of *Hindutva* and its agenda of establishing a Hindu state. In its hands, the concept of equal respect for all religions is a method for attacking the rights of religious minorities and ultimately erasing their identities.

Finally, in 2010, the high court of Allahabad, in the northern state of Uttar Pradesh where the city of Ayodhya is located, a majority of two out of three judges found in favour largely of the Hindu parties, in allocating the land on which they claimed Ram was born, and in the process partly recognising that the right to worship at the site was an essential ingredient of the Hindu faith. While this case was based on suits filed by varies claimants, including religious groups, the decision had important constitutional ramifications. This decision set aside the plurality and diversity of arguments within Hinduism over the status of various deities, where many Hindus do not worship Ram, instead privileging one interpretation over others and essentially upholding an ossified conception of Hinduism. While all parties have filed appeals in this case, the BJP was also quick to declare that the law upheld faith. The decision indicates how the majoritarian claims and the Hindu Right's narrow interpretation of Hinduism or what Thapar has called a "syndicated Hinduism" now constitutes the most significant challenge to the model of secularism extant in Indian politics and law as well as the achievement of their central goal – establishing a Hindu State.[18]

The implications of these majoritarian norms in the Court's rulings in the *Hindutva* cases, have bolstered the position of the Hindu Right. Not surprisingly, in the *Hindutva* decisions and the ruling on the Ayodhya temple by the Allahabad High Court, were hailed as victories by the Right, who have repeatedly cited these holdings as an endorsement of the "true meaning and content of *Hindutva* as being consistent with the true meaning and definition of secularism."[19]

4. Implications for Citizenship

The issue of secularism has become increasingly conjoined with the issue of citizenship. In recent times, there has been a growing emphasis on the majoritarian ascriptions of citizenship where Indian descent has become an overriding

---

[18] ROMILA THAPAR, SYNDICATED HINDUISM (2010).

[19] Bhartiya Janata Party Manifesto, 19 January 1999.

consideration, as has Hindu identity.[20] What has emerged during the course of the past 40 years is an increasing emphasis on cultural and religious bonds and Indian origin in relationship to citizenship, rather than territorial boundary. The concept has been increasingly understood not simply in terms of opposition, that is a relationship between the citizen and the "Other," but in what Roy call a "forclusion, where the outsider is present discursively and constitutively in the constitution of citizenship."[21] Citizenship obscures the hierarchies on which it is based, including religion. In India, citizenship is confined to people born to Indian citizens or whose parents were of Indian origin and did not forego their citizenship. However, as discussed in the previous section, with the re-emergence of Hindu majoritarianism throughout the 1990s in the form of the Hindu Right, the entrenchment of citizenship in blood ties and cultural ascriptions has reached a crescendo and citizenship has become more exclusive. The Hindu Right has continuously regarded citizenship as an exclusively cultural and religious enterprise, prioritising religious identity in its definitions of citizenship in the hope of establishing a Hindu state in India where religious minorities, especially Muslims and Christians, would have to conform. The Hindu Right has pursued a narrow conception of citizenship, privileging religious identity from its very inception in the early 1920s.

4.1. Muslim Women and Triple **Talaq**

Two cases illustrate the ways in which secularism has become entrenched in a majoritarianism, through the targeting of the Muslim "Other" and reinforcing a hierarchy of citizenship in the process. The first case involves a constitutional challenge to the practice of triple *talaq*, that is the pronouncement of divorce by a Muslim man to legally separated from his wife by thrice uttering the word "*talaq*" that immediately brings to end their marriage.[22] The issue to be considered is whether this practice is "fundamental to religion" and whether it is the part of an enforceable fundamental right to freedom of religion. The practice has been opposed not only by women's organisations but more importantly by Muslim women who are not allowed a similar right and suffer disadvantage as a result of this unilateral and abrupt

---

[20] Rodrigues, *supra* note 4, at 221-22.

[21] ANUPAMA ROY, MAPPING CITIZENSHIP IN INDIA 6 (2010).

[22] *Shayara Banu v. Union of India* (2016) Supreme Court (judgment awaited).

pronouncement.[23] The practice continues to be backed by the All India Muslim Personal Law Board that argues the triple *talaq* is a legitimate way to end a marriage and also that any interference with the practice would constitute an interference in the right to religious freedom and expression under Article 25 of the Indian constitution. The court case has inevitably become a politicised one with the BJP supporting a ban of the practice that serves its interests in denigrating the Muslim community, a position that remains consistent with its own political and ideological position that denigrates Machine men. At the same time a position that supports the rights of Muslim women and in particular the right to equality immediately sets up the issue as one that opposes the right to freedom of religion, hence placing the Muslim woman in the awkward and risky position of choosing between her right to equality or religious freedom.[24] The very fact that Muslim women are the primary drivers behind the case, brings together both their religious identity and rights to equality and is central to the court challenge. While the decision in this case is still pending at the time of writing this chapter, it sets out an important dimension of secularism and citizenship, by placing the Muslim woman at the centre of the struggle over the meaning of both. A holding that strikes down the practice on the grounds of equality, will reinforce a growing precedent where the secular courts become the ultimate arbiters of what constitutes an essential practice in any given religion. Should the court decide to uphold the practice declaring any intervention to be unacceptable intervention in the personal space and faith of minority communities in contravention of the freedom of religion clause, it will be seen a reinforcing gender subordination.[25] What is important

---

[23] Jyoti Punwani, *Muslim Women: Historic Demand for Change*, 51(42) ECONOMIC AND POLITICAL WEEKLY, 15 October 2016, http://www.epw.in/journal/2016/42/commentary/muslim-women.html

[24] The case involves some of the same dilemmas as the famous *Shah Bano Case* in 1984, which involved the issue of maintenance and whether the secular civil procedures would apply to ensure that a divorced Muslim woman would be given maintenance by her former husband, after the Muslim law ceased to apply. The latter provided maintenance only for up to three months. The court, in a controversial decision decided in favour of Shah Bano produce an uproar among the Muslim groups who argued that this amounted to undue interference in their faith. The Hindu Right backed Shah Bano, invoked the right to equality and attempted to further demonise Muslim men: *Mohammed Ahmed Khan v. Shah Bano Begum* 1985 Supreme Court Cases (3) 1984. See also Zakia Pathak & Rajeswari Sunder Rajan, *Shahbano*, 14(3) SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 558 ff. (1989).

[25] Mathew Idiculla & Satya Prasoon, *Untangling the Debate on Triple Talaq*, THE WIRE (16 June 2017).

is that secularism is the cite on which secular judges are determining the legitimate content and parameters of a religion.

4.2. The "Migrant" Subject and Citizenship

The issue of religious identity has become particularly significant in the debate over the migration of thousands of Bangladeshis into Assam since 1971. While a number of families have established firm roots in the state, their presence has produced tensions with the local indigenous communities who are claiming erosion of their cultural and political identity. There are also competing claims between different groups of migrants, namely the Hindi-speaking migrants, who have entered the state from different parts of India, in particular Bihar and Rajasthan, and the Bangladeshi migrants, who have ostensibly entered the state from Bangladesh.[26] While the story of migration into the north-east is a complex one, the Hindu Right has polarised the issue by viewing it almost exclusively through the lens of religion – as a tension between the Hindu insider and the Muslim outsider.

In the 2005 *Sonowal* case, the Supreme Court reinforced the relationship of citizenship with cultural status or religious identity. The case involved the treatment of Bangladeshi Muslim migrants crossing the border into Assam.[27] Under the terms of

---

[26] Udayon Misra, *Targeting the Innocent in Assam*, 42(4) ECONOMIC AND POLITICAL WEEKLY 273-75 (2007); M.S. Prabhakara, *Assam: Updating the Past*, 43(4) ECONOMIC AND POLITICAL WEEKLY 271 (2007).

[27] *Sarbananda Sonowal v. Union of India* (2005) 5 Supreme Court Cases 665. The case has to be set against the backdrop of the secession of Bangladesh from Pakistan in 1971. Hundreds of thousands of Muslim migrants fled into Assam in the early 1970s when East Pakistan was liberated and the new country of Bangladesh was formed. The migrants continued to pour into Assam throughout the 1980s in search of a better life, an influx that created resentment amongst the local population, and led to violence and the slaughter of thousands of migrants in 1983. Against this background, the Illegal Migrants (Determination by Tribunal) Act (IMDT Act) of 1983 was enacted by the Indian government, partly to prevent a witch hunt against illegal migrants, but also with the professed aim of making the detection and deportation of illegal migrants easier. At the same time, in an accord signed in 1985 (Assam Accord), the government granted citizenship to all settlers from the former East Pakistan who had come to Assam before 1971. In one stroke, thousands of migrants became Indian citizens. But thousands of others, who had arrived after 1971, remained illegal. In the 1990s, the Bhartiya Janata Party (BJP) the political wing of the Hindu Right, launched an aggressive national campaign against the so-called Bangladeshi migrants (Michael Gillian, *Refugees or Infiltrators? The Bharatiya Janata Party and "Illegal" Migration from Bangladesh*, 26(1) ASIAN STUDIES REVIEW 73 ff. (2001); Sujata

the Illegal Migrant's Detention Tribunal Act, 1983 (IMDT Act), they were treated as Indian's unless the person alleging otherwise could prove so. The petitioner, a former president of the Assamese Students Union, alleged that the IMDT Act was unconstitutional as it discriminated against a class of citizens of India, making it impossible for citizens resident in Assam to secure the detection and deportation of foreigners from India. The petitioner claimed that the Act had actually ended up protecting illegal migrants. The Court declared the Act unconstitutional on the ground that it violated Article 355 of the Indian Constitution, which places a duty on the central government "to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution." It could be construed broadly when matters of security were involved and other considerations were subordinate to this end. "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us."[28]

The Court relied heavily on an Indian army report of 1998, which stated that the influx of illegal migrants was a major contributory factor in the outbreak of insurgency in the state and that "dangerous consequences" would result from large-scale illegal migration from Bangladesh, "both for the people of Assam and more for the Nation as a whole [...] No misconceived and mistaken notions of secularism should be allowed to come in the way of recognising this reality."[29]

In striking down the Act, the Supreme Court accept a bloated definition of aggression by incorporating economic aggression into the ambit of Article 355 and equating illegal immigrants with infiltrators and Muslims. The equation of Muslim identity with alterity and danger was overtly manifested in the decision which cast the Bangladeshi Muslim migrant as an "aggressor" and a security threat, and in the process further entrenched the issue of religion into the normative definitions of

---

Ramachandran, *Of Boundaries and Border Crossings: Undocumented Bangladeshi "Infiltrators" and the Hegemony of Hindu Nationalism in India*, 1(2) INTERVENTIONS 235 ff. (1999)), casting them as Muslims and outsiders who pose a security risk.

[28] *Sonowal's Case*, para. 57 citing *Chae Chan Ping v. United States*, 130 U.S. 581 [1930].

[29] *Sonowal*, para. 17.

Indian citizenship, of who belongs and who does not. Those who do not belong are expelled from the realm of juridical entitlements conferred through citizenship, and are subject to policing under migration, anti-terror, and national security laws.
The Court's harsh response to this influx into India foregrounds religion as integral to the formation of Indian citizenship, rendering the situation of the Indian Muslim, who is a citizen, increasingly suspect and unstable.

The suturing of culture into the fantasy of the nation continues to set the discursive stage on which the emerging debates on who is and who is not a legitimate citizen subject are being played out. The role and meaning of Hindu culture elaborated in the decisions on secularism discussed earlier, and how it emerged as integral to the formation of the Indian citizen at the point of independence have remained significant into the twenty-first century. The Muslim continues to be placed on the peripheral boundaries of citizenship, where cultural assimilation becomes a criterion for legitimacy and proof of loyalty to the nation. While the Bangladeshi migrants are not formal legal citizens, their presence destabilises the claims and constitution of the Indian Muslims, who are citizens. Muslims who are citizens within India are rendered suspect should they fail to conform, or claim special or preferential treatment. Muslims, citizen and non-citizen, must prove their legitimacy by establishing loyalty as well as continued subordination to Indian citizens who are Hindu. In the process, religion as one of the technologies of citizenship sets up a hierarchy of citizens who are "real" or "authentic" and those who are suspect or regarded as threats.

The projection of the Muslim as both an outsider and a migrant, as a threat foregrounds religion as a relevant criterion in determining belonging and the shaping of citizenship along the lines of intolerance and disapproval of difference. The cases illustrate how secularism combined with an understanding of citizenship wrapped in a majoritarian culture, sets out the terms for both political inclusion, as well as political exclusion. Within the contemporary period, Muslims are particularly vulnerable to being cast outside the comfort zone of citizenship simply by virtue of their religious identity and the association of Islam in the public domain, both within India and at the broader global level, with "terror," "injustice," and "illiberal" values. And it has increasingly come to define the parameters of Indian secularism in constitutional law.

5. The French Republic and *Laïcité*

In light of the limitations of Indian secularism, the question remains as to what is to be done to save secularism from its majoritarian moorings. One argument is to adopt a model based on the separation of religions and state. But this model has shown little signs of stopping the advancing tides of majoritarianism. In this segment, I examine how this separation model that has been adopted by France in the doctrine of *laïcité*, a term that it considers to be untranslatable on the grounds that it is both distinct as well as superior to most variants of secularism.[30] While *laïcité* proclaims a rigid separation between state and religion, as it is based on the French policy of cultural assimilation, it is not evident that it has managed to contain religion to the private sphere. *Laïcité* is based on the sameness model of equality in the public sphere, and relegates linguistic, cultural, ethnic and religious difference to the private arena. However, this understanding belies the fact that there are at least eight different legal regimes that organise the relations between the state and religion in metropolitan and overseas France. In the overseas department of French Guyana, the 1828 Royal ordinance regulates Catholicism and the department pays the salaries of the Catholic clergy. In Mayotte another overseas department the local customary law of the Muslim majority continues to apply. Within France, Alsace Mosel is governed by the Napoleonic concordat System with its four recognised religions, being subsidised and regulated by the state. In all these instances, there exist features that seem to violate the norms of secular neutrality.

Historians have pointed to the integral relationship between religion and race in the colonial context of France, in particular, Islam and French identity highlighting the fluid nature of these concepts. This historical analysis identifies the existence of a specifically "French Islam" from the interwar years to the present[31] and also a "Muslim French" subjectivity, that refers to French citizens who practice their faith

---

[30] JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 15 (2007). France has held itself out as a secular republic since 1789. The principle of *laïcité* was established through the official separation of the church and state in 1905. See *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État* [Law on the Separation of Churches and State of 9 December 1905], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 9 December 1905, Art. 2, http://www.assemblee- nationale.fr/histoire/eglise-etat/loi-scan.asp

[31] NAOMI DAVIDSON, ONLY MUSLIM: EMBODYING ISLAM IN TWENTIETH-CENTURY FRANCE (2012).

within France.[32] These relationships are claimed by minority groups as integral to the constitution of French citizenship and the identity of the Republic.

What is important is how Christianity emerges as central to the inheritance of secularism in France and elsewhere in Europe. In Mahmood's discussion of the 2011 case of *Lautsi v. Italy* decided by the European Court of Human Rights (ECtHR), she highlights how these linkages are presented in a manner that assumes the crucifix, and hence Christianity, represents the same values as the Enlightenment and that this is claimed as part of common sense.[33] The case was an appeal from a lower chamber decision that struck down the representation of the crucifix in a public classroom as violating the norms of secularism.[34] The Vatican's response to the lower chamber's ruling stated that "It seems as if the court wanted to ignore the role of Christianity in forming Europe's identity, which was and remains essential."[35] In an appeal to the Grand Chamber in 2010, supported by twenty European nations, the Lithuanian Ministry of Foreign Affairs stated, "The use of crucifixes in public in Catholic countries reflects the European Christian tradition and should not be regarded as a

---

[32] MAYANTHI L. FERNANDO, THE REPUBLIC UNSETTLED: MUSLIM FRENCH AND THE CONTRADICTIONS OF SECULARISM (2014).

[33] SABA MAHMOOD, RELIGIOUS DIFFERENCE IN A SECULAR AGE: A MINORITY REPORT 165-168 (2016).

[34] *Lautsi v. Italy*, App. no. 30814/06, Eur. Ct. H.R. 47 (2009), http://www.echr.coe.int/ECHR/homepage_en. Soile Lautsi, a dual Finnish and Italian citizen, sued a public school in Padua on behalf of her two minor sons, arguing that the compulsory display of crucifixes in the school's classrooms violated her and her children's right to freedom of thought, conscience, and religion protected in Article 9(1) of the European Human Rights Convention (ECHR). The Supreme Administrative Court in Italy ruled in March 2005 against Ms. Lautsi, arguing that the crucifix did not have any religious connotation in Italy, and symbolised Italy's historical and cultural values, which may have had religious origins in the past but did not anymore. On appeal to the European Court of Human Rights (ECtHR), the Second Chamber ruled that Italy was in violation of Article 9(1) for several reasons, the most important being that the compulsory display of crucifixes clashed with an individual's "secular convictions" and was "emotionally disturbing for pupils of non-Christian religions or those who professed no religion" and that the decision to hang a crucifix in a public classroom constitutes an assessment of the legitimacy of a particular religious conviction, implying that the Italian government's decision rested on religious belief and thus was implicated in the category demarcated as religious. It thus held that Italian public schools could not display crucifixes.

[35] Quoted in MAHMOOD, *supra* note 33, at 167.

restriction on the freedom of religion."[36] The Chamber reversed the lower court ruling and held that the crucifix was a "passive symbol"[37] that did not infringe on the beliefs of the complainants, even if they were non-believers. It concluded that displaying the crucifix in a public school did not amount to proselytization. It agreed with the Italian Administrative Council's decision that the crucifix was in fact a cultural symbol, representative of "the Italian civilization" and its "value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the state."[38]

Mahmood draws specific attention to the Court's statement that it is possible to discern a thread that links the "Christian revolution of two thousand years ago to the affirmation in Europe of the right to liberty of the person" in a secular state.[39] Thus, the court concluded that "[I]n the present day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality human dignity and religious toleration and accordingly also of the secular nature of the state."[40] The right to display the cross thus fell within the due margin of appreciation, and the Christian theological link with secularism remained uninterrogated. In welcoming the decision the Catholic Church proclaimed that the Europe we know today would not exist without the crucifix.[41]

The case illustrates the central place of Christianity to European identity and the understanding of secularism. And of course, such statements are becoming more and more open and amplified in the context of the increased presence and visibility of the Muslim in Europe who is cast as a threat to Europe's civilizational identity and Islam equated with intolerance, homophobia and fanaticism. The *Lautsi* case asserted the state's ability to define the scope of religion, its content and meaning in accord with values of the majority religion at the expense of minorities.

---

[36] Nathan Greenhalgh, *When a Cross Isn't a Cross*, BALTIC REPORTS (13 January 2010).

[37] *Lautsi v. Italy* (2009) quoted in *Lautsi and Others v. Italy,* 18 March 2011, para. 31, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i-001-104040

[38] Italian Administrative Court's judgment, quoted in *Lautsi v. Italy* (2011)*,* para. 15.

[39] MAHMOOD, *supra* note 33, at 7.

[40] *Lautsi v. Italy* (2009) quoted in *Lautsi v Italy* (2011), para. 15.

[41] MAHMOOD, *supra* note 33, at 168.

The majoritarianism that is replete in the separation model of understanding of secularism, finds its most explicit expression in the French doctrine of *laïcité*. This is made evident in a series of enactments by the French legislative assembly, banning various manifestations of the veil and subsequent challenges to these enactments.

6. The Legal Narrative

The doctrine of *laïcité* is based on complete confinement of religion in the private sphere and prohibition of signs or demonstrations of faith in the public space. The veil has continued to pose a challenge to French identity both in the context of the country's colonial past[42] as well as in the challenge it poses to the doctrine of *laïcité* in contemporary times. The constitutional controversy on the wearing of the veil can be traced back to the "headscarf affair" in 1989, where three junior high school Muslim students were expelled from a public school for wearing the headscarf to class.[43] The position of Muslim women and girls who choose to wear the veil exposed the limited and myopic framework of French identity and belonging in their encounters with the doctrine of *laïcité* and its emphasis on cultural assimilation. The reading of the veil as a religious sign or manifestation of belief based on women's subordination and hence challenging the states inviolable personality dominated the debates and understanding of the veil.[44] However, this reading obscures how this practice is integral to the very being of some adherents.[45] In the subsequent national debates that followed, this understanding of the veil was fully eclipsed as the practice came to be increasingly linked to discussions about immigration and aggressive assertion of the French politics of assimilation. These debates form the backdrop of the subsequent enactments by the French legislature that sought to restrict the wearing of the veil in the public sphere.

---

[42] FRANTZ FANON, A DYING COLONIALISM 35-63 (1965).

[43] Elisa T. Beller, *The Headscarf Affair: The Conseil d' État on the Role of Religion and Culture in French Society*, 39 TEXAS INTERNATIONAL LAW JOURNAL 582-624 (2004); see also Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUMBIA JOURNAL OF GENDER AND LAW 199 ff. (2007).

[44] BERNARD STASI, LAÏCITÉ ET RÉPUBLIQUE, COMMISSION PRÉSIDÉE PAR BERNARD STASI 69-70 (2004).

[45] Talal Asad, *French Secularism and the "Islamic Veil Affair"*, 8(1-2) THE HEDGEHOG REVIEW: CRITICAL REFLECTIONS ON CONTEMPORARY CULTURE 96 (2006).

6.1. The Veil and a Secular Dressing Down

The first law enacted in 2004 involves a ban on the wearing of religious symbols and clothing, including the Islamic headscarf, in public schools.[46] The law is based on the recommendations of the Stasi Commission Report, which stated that "young girls are pressured into wearing religious symbols" and that "[T]he familial and social environment sometimes forces on them a choice that is not theirs."[47] The second law enacted in 2010, banned the wearing of the *burqa*, a traditional garment that veils both face and body, in public.[48]

Though couched in neutral terms and secular language that everyone must be treated the same and that religion be secluded to the private sphere, the 2004 legal ban on manifest religious symbols and veils in France has had a disproportionate impact on Muslim women, who were also often also racial minorities.[49] While this law initially prohibited only overtly manifest markers of religious affiliation, a subsequent clarification by the ministry of education stated that "all forms of the Islamic veil, but only crucifixes of manifestly exaggerated dimensions, would fall within the purview of the ban."[50] The stark socio-political bias underlying the ban is evident in this

---

[46] On 15 March 2004 the French Parliament enacted Law no. 2004-228, inserting a new Article L. 141-5-1 in the Education Code which provides: "In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil" (*Loi 2004-228 du 15 mars 2004* [Law 2004-228 of 15 March 2004], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 17 March 2004, p. 5190).

[47] *Commission de reflexion sur l'application du principe de laïcite dans la Republique. Rapport au President de la Republique* (11 December 2003), http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf.

[48] *Loi 2010-1192 du 11 octobre 2010* [Law 2010-1192 of 11 October 2010], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 12 October 2010, p. 18344, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&fastPos=1&fastReqId=1433419319&categorieLien=id&navigator=naturetextenavigator&modifier=LOI&fastPos=1&fastReqId=1433419319&oldAction=rechTexte

[49] Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban*, 39 UNIVERSITY OF CALIFORNIA, DAVIS LAW REVIEW 745 (2007).

[50] *Circulare no. 2004-084*, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 18 May 2004.

clarification. The stipulated exceptions reflect the practices of the dominant religious community, and the very fact that ostentatious symbols of faith are not permitted to be worn in public is reflective of a religious and cultural ethos where such expression of selfhood, identity and community is not a common or pervasive aspect of popular religious or cultural practice. The benevolent rhetoric of purported equality across different cultures and religions actually signifies "the same as" the dominant culture/religion, and raises concerns of subordination and coercion amongst religious and/or cultural minorities.[51]

In 2007, the ECtHR dismissed a petition that claimed the law violated the wearer's right to religious freedom under Article 9 of the ECHR. The central ground for upholding the law was based on the principle of secularism as being a founding principle of the French Republic "to which the entire population adheres and the protection of which appears to be of prime importance, in particular, in schools;" the law was also upheld on the basis of protection of women's rights.[52] The uninterrogated logic of this position produces outcomes that *seem* reasonable and acceptable, despite evidence to the contrary.

The 2010 law, popularly described as the *burqa ban*, was enacted that outlawed the public wearing of the full veil or *burqa.*[53] The public is defined as "public roads and places open to the public or used for the public service."[54] The initiative for the legislation came from several French members of parliament concerned with the impact of the full-face veil on French secularism. They endorsed the position that France "cannot accept to have in our country women who are prisoners behind netting, cut off from all social life, deprived of identity […] That is not the idea that the French republic has of women's dignity […] The *burqa* is not a

[51] See Susanna Mancini, *The Power of Symbols and the Symbols of Power: Secularism and Religion and Guarantors of Cultural Convergence*, 30(6) CARDOZO LAW REVIEW 2638-2642 (2009), who argues that in the jurisprudence of the ECHR, Christian norms are taken to reflect the neutral standard, and Islam, the irreconcilable other.

[52] *Dogru v. France*, 2008 Eur. Ct. H.R. 1579, para. 72 and 66, respectively.

[53] *Loi 2010–1192*. For a detailed philosophical discussion on the headscarf and *burqa* see Alia Al-Saji, *The Racialization of Muslim Veils: A Philosophical Analysis*, 36(8) PHILOSOPHY AND SOCIAL CRITICISM 875-902 (2010).

[54] *Loi 2010–1192*, Article 2.

sign of religion, it is a sign of subservience."[55] One lawmaker specifically stated that "it is our living together based on the Spirit of the Enlightenment that is violated" by the *burqa*.[56] The French President at the time, Nicolas Sarkozy, similarly declared that the "[T]he full veil is not welcome in France because it is contrary to our values and contrary to the ideals we have of a woman's dignity."[57] These remarks demonstrate a prevalent anxiety that Islam is not simply a religion that is private and personal, but that it is visible and threatens to undermine the secular project. The Constitutional Council subsequently upheld the constitutional validity of the ban.

These legal enactments based on fear and defence of a narrow notion of the French state's personality, reinforces the stigma that attaches to the wearing of the veil and the singular view that Islamic religious practices are subordinating, misogynistic and utterly repressive in relation to women. The position of some French feminists in relation to both headscarf and *burqa* further reproduced the general social idea that Muslim women are *always* coerced into wearing the veil – the rhetoric of gender equality obscuring the liberal democratic state's coercive act of banning the practice. Such skewed conviction completely forecloses any possibility of accepting the rationale that some women are in fact *not* oppressed by the veil, that such practitioners actively desire to veil, and are freely exercising personal choice in this regard.

The "*burqa* ban" was challenged in the case of *S.A.S v. France* as violating the claimants' rights under a host of articles under the ECHR, though the Court focused primarily on Articles 8, 9, and 14.[58] The government's central argument was based on

---

[55] Vaiju Naravane, *The Burqa Debate Splits France*, THE HINDU (14 July 2009).

[56] Assemblée Nationale, *Rapport d'information no. 2262, Au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national*, 26 January 2010, p. 14.

[57] See Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, THE NEW YORK TIMES (13 July 2010).

[58] *S.A.S v. France*, 2014 Eur. Ct. H.R. 695. Article 8 provides for the respect for family and private life, subject to 8(2) which states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 9 protects freedom of thought, conscience and religion, subject to 9(2) which states: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the

public safety concerns as well as "the respect for the minimum set of values of an open and democratic society," which includes gender equality, human dignity and "respect for the minimum requirements of society" or "living together." Interestingly, the Court rejected some of these central arguments that had been made in the earlier cases.[59] Importantly, it accepted that the *burqa* was a choice, avoiding the essentialism and paternalism of earlier cases. Instead, the Court's decision relied on the government's justification of "respect for the minimum set of values of an open and democratic society" or "living together" as a legitimate ground for the restriction on the right to manifest religion or belief under Article 9. As this notion was not explicitly stated as a permissible ground in the ECHR, that is, under either Article 8(2) or 9(2), the Court interpreted it as falling within the broad "protection of the rights and freedoms of others."[60] Thus, even if the claimant wore the veil freely and as an exercise of her choice and liberty of expression, the ban would still be justified on the basis of the court's reasoning that it was incompatible with the democratic precept of "living together."

7. Implications for citizenship

Secularism or *laïcité* in France illustrate how the courts and legislature are deeply implicated not only in drawing the parameters of religious freedom but the actual content of religious belief and expression, including what constitutes public and private expression. Suppressed is the question of the cultural specificity of France's policy of *laïcité* or neutral "secularism" and the hierarchy of citizenship on which it is based. As mentioned at the outset of this chapter, this doctrine features a number of embedded Christian cultural and religious practices that mask as neutral and unbiased. These include the perpetuation of Christian holidays in the Republican calendar; the government funding of hundreds of private Catholic schools in contrast to just a

---

protection of public order, health or morals, or for the protection of the rights and freedoms of others." Article 14 prohibits discrimination on a number of grounds including race sex and religion. The Court completely dismissed the claims brought under Articles 3 (prohibition of torture), 10 (freedom of expression) and 11 (freedom of assembly).

[59] For example *Sahin v. Turkey*, 2005 Eur Ct. H.R. 819.

[60] *S.A.S. v. France*, para. 117.

handful of Muslim schools, nationwide;[61] and the definition of national culture as "Christian." The states envisioning and enshrining of the Republican citizen is *not* a purely neutral act. Rather, it is a demand that the "Other," even though a citizen of France, think beyond the upholding of minority difference, and conceptualise her selfhood entirely in terms of Republican French identity, that is, in alignment with majoritarian ideals. The call to think beyond difference and to assimilate moves in one direction. It usually ends up reinforcing the dominance of the dominant and the conditions where the hierarchies of power that operate through the concept of citizenship do not vanish. Removal of the overt markers of difference ensures the stability of these hierarchical arrangements as well as a distinct understanding of exactly who is adequately and appropriately a citizen within a seemingly pluralistic liberal society. The criteria for full citizenship include evidence of assimilation into the explicit cultural norms of the majority embedded in the doctrine of *laïcité*.

In the *S.A.S* case, the court took the unusual step of upholding the ban on the burqa on the grounds of "living together" a ground that is not stipulated in the ECHR. In upholding this justification, the Court's analysis focused on the "face," stating that it played an important role in the civility of social interactions and open interpersonal relationships. These were important markers of community life of a society, and thus the wearing of the *burqa* in public was "incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together.""[62] The Court accepted the findings of a parliamentary commission tasked with drafting a report on the wearing of the *burqa* in France, that described the practice as being at odds with the values of the Republic, a denial of fraternity and "constituting a negation of contact with others and a flagrant violation of the French principle of living together."[63]

This ruling privileges the concept of "living together" over and above the right to manifest religion; it reflects the assimilationist impulse as well the dominant understanding of the states personality that underscores *laïcité.* The Court's holding further underscores the unstated religious majoritarianism that informs the

---

[61] Catherine Nixey, *A School Condemned to Death*, THE GUARDIAN (16 May 2009), http://www.theguardian.com/education/2009/may/26/reussite-france-muslim-school

[62] *S.A.S v. France*, para. 153.

[63] *Ibid*., para. 17.

requirements of "living together," where manifestations of belief in the form of displays of the cross, or recognition of Christian holidays in the secular calendar, or state support for Christian-denomination schools in France, remain unscrutinised yet continue to inform the principle of secularism or *laïcité* that is declared as the cornerstone of the French Republic. "Living together" operates exclusively in one direction, that is, in favour of majoritarianism; and remains somewhat problematic given that it is not a right recognised under the terms of the ECHR. Nevertheless, the juridical approval of this concept demands compliance by Muslim women who are French citizens. It does not require any simultaneous obligation on the part of the majority to live together with the veiled woman, for whom the practice is an inherent aspect of her subjectivity.

8. Conclusion

The comparison between the different models of secularism presented in this chapter indicates that at the heart of the constitutional discourse on secularism in India and France, is a policy of assimilation into a taut and narrow vision of the state's identity or personality. It is a policy that aims at the erasure of cultural and religious minorities. It is a policy that is most specifically directed at the Muslim minority, but that also includes other religious minorities that pose any threat to, or are in any way different from, the dominant religious norm.

The imperatives of both the separation and administration of religion are integral to secularism. This tension is played out in the different models by being displaced onto religious minorities, invariably Muslims, who become the embodiment of this contradiction. Prejudice against French Muslim citizens or Indian Muslim citizens is constitutive of secularism, emanating from the idea of Europe as essentially Christian or India as essentially Hindu, while being simultaneously secular in their cultural and political ethos. It is about the very identity of the nation and that the preservation of this identity will be the primary consideration in any debates about secularism.

The analysis encourages us to examine the work that secularism is doing in constitutional discourse as a project of governmentality, regulation, and subject/citizenship constitution. It is critical to examine how the imbrication of religion and politics rather than their separation, and the production and management of religious subjects rather than guaranteeing the right to freedom of religion, are

implicated in the story of secularism and constitute part of a disciplinary regime. One way of understanding this is that in order for secularism to deal with religion it first needs to identify what religion is, which religious groups are entitled to protection, and which ones pose a threat to the nation's personality, invariably defined in majoritarian terms. It is possible that the model of secularism that acknowledges the presence of religion and the state's involvement as well as investment in religion may be better enable such an analysis rather than one based on neutrality and absolute separation. The separation model refuses this acknowledgement, despite the fact that religion is present in this model, and hence provides no starting point for us to begin a deeper analysis. This shift in understanding and approach may enable a democratic revitalisation of the principle of secularism and move beyond the general self-explanatory invocation of secularism, that does not turn the mirror on its own architecture and how religion in foundational to its structure.