CHAPTER 13

THE RELIGIOUS ASPECTS OF CASTE: A LEGAL VIEW

MARC GALANTER

IT IS WELL KNOWN that the Indian Constitution envisages a new order both as to the place of caste in Indian life and the role of law in regulating it. However, in spite of much talk about a "casteless" society, the Constitution is quite unclear about the position of the caste group in Indian life. There is a clear commitment to eliminate inequality of status and invidious treatment and to have a society in which government takes minimal account of ascriptive ties. Beyond this the treatment of caste is undetailed and in some respects unclear. In this paper, I shall attempt to elucidate some features of the relation between caste and law by considering the religious aspects of caste and their treatment by courts and government since Indian independence.

Both western and Indian writers reveal some hesitation and vacillation over whether or not to characterize castes as "religious" groups. To many writers caste groups are the very units of Hinduism; to others they are "purely social" with only an accidental attachment to Hinduism.[1] Much of this confusion derives from different views of "religion." I shall not attempt any reconciliation of these views; instead I shall look at the way the legal system has dealt with caste as a religious grouping. This is of historical importance, for there is evidence that the legal system is a powerful disseminator of images about the nature of groups in society and may affect their self-image and the image others have of them.[2] Also, it is of some practical importance in a legal system in which there are on the one hand restrictions on the power of castes, on governmental recognition of caste, on claims that can be made in the name of caste standing and where the government is committed to abolish certain undesirable

Marc Galanter is assistant professor in the social sciences at the University of Chicago.

1 See, e.g., K. M. Panikkar, *Hindu Society at Cross-Roads*, Asia Publishing House, Bombay, 1955.

2 E.g., William McCormack suggests that the notion of a unitary Lingayat group with a single distinctive culture appeared as a result of the application of the Anglo-Hindu law and British judicial administration, "Lingayats as a Sect," *Journal of the Royal Anthropological Institute*, 1963, vol. 93, part I, pp. 59-71.

features of caste;[3] and yet on the other hand religious groupings enjoy certain constitutional protections and the government is committed to allow them free play within broad limits.[4] Which way a caste group is characterized by the law may, then, be of crucial importance. And to the extent that these legal notions influence behavior, the legal characterization of the caste group may be an influential factor in the reformulation and reorganization of Hindusim taking place in India.

In order to describe the judicial conceptualization of the caste group, I propose to use three models: these models represent different ways of visualizing caste groups and their mutual relations. We shall find all of them employed by judges in dealing with concrete issues. Often the judicial response to an issue may employ more than one of these models or approaches. However, I believe these models are helpful in pointing to very different ways of visualizing the caste group; and these differences prove useful in describing recent changes in the legal view of caste. The first model sees the caste group as a component in an overarching sacral order of Hindu society. Hindu society is seen as a differentiated but integrated order in which the different parts may enjoy different rights, duties, privileges and disabilities; these are determined by the position of the caste group in relation to the whole. We may call this the *sacral* view of caste. In contrast to this is what we might call the *sectarian* view which sees the caste as an isolable religious community distinguished from others by idiosyncratic doctrine, ritual or culture.[5] It is a self-contained religious unit, disassociated from any larger religious order. The rights and duties of the group and its members follow from its own characteristics, not from its place in a larger order. Where the *sacral* view visualizes castes as occupying the various rooms, shrines, courtyards and outbuildings of the great labyrinth temple of Hinduism (to each of which is attached special prerogatives and disabilities), the *sectarian* view visualizes castes as a series of separate chapels under independent management. In the sacral view, the rights and duties of a caste can be determined by its relation to the whole (or at least to its surroundings); in the sectarian view, they can be described by

[3] See Constitution of India, Arts. 15 (1), 15 (2), 16 (2), 17, 29.

[4] See Constitution of India, Arts. 25, 26, 29, 30.

[5] In employing the term "sectarian" it is necessary to resist both the connotation that such groups have been "cut off" from some larger body and the implication that such groups are associated with a distinctive and precise doctrine.

reference to its own internal order. It is the difference between a ward in a great and dense city and in a small town.

There is yet a third view of caste which lies beyond both the sacral and the sectarian. For want of a better term we might call it the *associational* view of caste. Here, the caste is seen as a body of persons with internal autonomy and rule-making powers, but characterized neither by a fixed place in some larger religious order nor by distinctive and idiosyncratic religious beliefs or practices. It is a kind of association with its own principles of affiliation and its own internal order. These may be in some respects like those of a corporation, a club, a dissenting church (in English law), or some other voluntary association, but they make the caste a form of association *sui generis*. The nature of the tie is not characterized conclusively by religious fellowship. The bonds of association may include religious ones, but the religious tie is only one among a constellation of affinities—economic, educational, occupational, associational. Like the sacral view of the caste group, the associational view avoids characterization in terms of specific religious characteristics. Like the sectarian view it does not identify the caste by its standing in a differentiated religious order of society. The sacral view regards the caste group in terms of its relation to the larger body of Hinduism; the sectarian view sees it in terms of its own religious distinctiveness; finally the associational view defines caste in terms of its associational bonds. These may include religious features along with others, but the religious ones are not conclusive in identifying or characterizing the group.[6]

During the latter part of the British period all three views of caste can be found in judicial pronouncements. I submit that by and large the sacral view prevailed as an integrating principle to organize and inspire the judicial view of castes as the component units of Hindu

[6] The organization of these models may be schematized as in the following chart.

Conclusiveness of religious factors in characterizing the group	Characterization of group in terms of its position in the larger society: −	+
+	Sectarian View	Sacral View
−	Associational View	

The empty box represents a fourth possibility—that view which sees the caste group in terms of its position in the wider society but not exclusively in terms of religious criteria. The use of caste in selecting "backward classes" strikes me as an instance of the use of this fourth model which I call the "organic" view; however, I have made no attempt to distinguish it in the body of this paper.

society. It is my contention that the Constitution and post-independence developments must be read as rejecting the sacral view and emphasizing in its stead the sectarian and associational views of caste groups, and that the courts have in good part responded by dismantling the sacral view and replacing it with the others. The rest of this paper will try to suggest this process and some of its possible implications and consequences.

In order to trace the changing judicial conceptualization of caste, I would like to take several kinds of cases in which caste comes before the courts and see how its religious aspects are treated. The matters I have chosen are (1) the administration of "personal law"; (2) the recognition of claims for precedence and for the imposition of disabilities; (3) the recognition of castes as autonomous self-governing groups. After briefly suggesting the judicial characterization of caste that prevailed in each of these fields in the latter days of British rule[7] in India, I shall attempt to trace developments since independence to show the emerging judicial view of the religious aspects of caste.[8]

THE OLD REGIME

Personal Law

The Hindu law applied by the courts in matters of "personal law"[9] did not address itself to the multitude of caste groups, but recognized

[7] By this I refer to the period since the founding of the modern legal system, which can be dated about 1860.

[8] The developments described here are at the higher and more authoritative levels of the legal system. In describing the development and application of doctrine by legislatures and higher courts, it is not intended to imply any one-to-one correspondence between the pronouncements of these higher authorities and the day-to-day operations of magistrates, officials, and lawyers, and much less the lay public. In the long run, however, the higher courts' pronouncements are uniquely influential; first, by disseminating influential "official" conceptions of caste which have an impact on the caste system; and second, by deflecting behavior toward conformity with the doctrines they promulgate.

[9] Under the legal system which the British established in India, all persons were subject to the same law in criminal, civil and commercial matters. However, a group of matters that might roughly be described as "family law"—marriage and divorce, adoption, joint family, guardianship, minority, legitimacy, inheritance and succession, and religious endowments—were set aside and left subject to the laws of the various religious communities. The applicable law in these fields was "personal" rather than territorial. In these family and religious matters, Hindus were ruled by *dharmasastra*—not by the ancient texts as such, but by the texts as interpreted by the commentators accepted in the locality. This was to be modified by prevailing custom since the doctrine that "clear proof of usage will outweigh the written text of the law" was early accepted as part of the Hindu law. However the application of stringent common law requirements for proving a valid custom made it difficult to prove variation from the rules of the lawbooks and had the effect, it appears, of extending the rules of the classical lawbooks to sections of

only the four *varnas* (and occasionally the intermediate classes of classical legal theory).[10] This law contained a number of instances in which different rules were to be applied to members of different *varnas*—in most cases one rule for the three twice-born *varnas* and a different rule for the Sudras. The most notable of these differences were in the law of succession, the law of adoption and the law of marriage.[11] With limited exceptions, marriages and adoptions involving members of different *varnas* were not valid at all. In order to apply these rules which differed according to *varna*, it was necessary for the courts to determine which castes and individuals were included within which *varna*. The assignment of standing in the four-*varna* system to actual castes presented an opportunity, often taken advantage of, for eliciting legal recognition of the ceremonial status of the group and certification of its claims for higher status.

The courts developed several kinds of tests to determine the *varna* standing of particular castes. One was the listing of certain diagnostic customs: e.g., admission of illegitimate sons to commensality and marriage within the group, the prevalence of second marriages for widows, marked the group as *Sudras*.[12] Another line of cases developed an alternative approach to testing the *varna* standing of a caste group by its own consciousness of its status and by the acceptance of this self-estimate by other castes in the locality.[13] These tests involve reliance on the widespread conventional notions of purity and pollution; they emphasize orthodox and prestigious practice rather than refinements of doctrine or ritual.[14] These notions of differential purity

the population which had previously been strangers to them. The British period then was marked by an attrition of local customary law at the expense of the written and refined law of the texts. See my paper "Hindu Law and the Development of the Modern Indian Legal System" in David Wilson, ed., *Political Institutions in Underdeveloped Countries*, forthcoming.

[10] The judicial treatment of the relation between *varna* and caste was plagued by confusion, engendered in part by the use of "caste" to refer both to the four great classes or *varnas* into which Hindu society is theoretically divided by the Sanskrit lawbooks and to the multitude of existing endogamous groups or *jatis*. In the sequel, unless the context indicates otherwise, caste is used only in the latter sense.

[11] These differences are concisely summarized by J. D. M. Derrett, "Statutory Amendments of the Personal Law of the Hindus since Indian Independence," *American Journal of Comparative Law*, 380, 83-85 (1958).

[12] See, e.g., *Gopal v. Hanmant*, I.L.R. 3 Bom. 273 (1879).

[13] See, e.g., *Subrao v. Radha*, I.L.R. 52 Bom. 497 (1928).

[14] Mere performance of ceremonies associated with higher castes will not elevate lower classes to that station, though "where caste is doubtful, the performance of Vedic or Puranic ritual may be important evidence as to caste. . . ." *Maharajah of Kolhapur v. Sundaram Ayyar*, A.I.R. 1925 Mad. 497 at 553.

are used to assign castes to their proper *varna.* It is assumed that the castes are components of the *varnas* which in turn comprise Hinduism. It is assumed that all groups within Hinduism are subsumed under one or another *varna.* Although there are some instances of judicial departures from the symmetry of this scheme,[15] generally the picture of Hinduism found in the administration of personal law is one which regards caste and *varna* as co-extensive with Hinduism. Castes, therefore, have certain religious characteristics; they occupy their respective places in the sacral order of ranks which embraces all groups within Hinduism. Positions in this order could be assigned by certain widely-shared notions about the relative standing implied by certain practices.

Precedence and Disabilities

Prior to British rule, some Indian regimes had actively enforced the privileges and disabilities of various caste groups. Indeed such enforcement of the caste order is urged by Hindu legal tradition as the prime duty of the Hindu king. During the latter part of the British period the prerogatives and dignities of castes received only limited support by active governmental sanctions. This limited support was undertaken on the basis of upholding customary rights, but these rights were often conceptualized in terms of the religious characteristics of caste groups.

With respect to the use of religious premises, caste groups did enjoy the support of the courts in upholding their claims for preference and exclusiveness. Courts granted injunctions to restrain members of particular castes from entering temples—even ones that were publicly supported and dedicated to the entire Hindu community.[16] Damages were awarded for purificatory ceremonies necessitated by the pollution caused by the presence of lower castes; such pollution was

[15] Thus it is possible to have *varna* standing without belonging to a caste group. *Sunder Devi v. Jheboo Lal* A.I.R. 1957 All. 215 (convert to Hinduism); *Upoma Kuchain v. Bholaram* I.L.R. 15 Cal. 708 (1888), (daughter of outcaste); cf. *Ratansi v. Administrator General,* A.I.R. 1928 Mad. 1279 (convert to Hinduism). For some purposes at least, Hindu caste groups may fall outside of or below the four *varnas. Sankaralinga Nadan v. Raja Rajeswara Dorai,* 35 I.A. 176 (1908). Possibly one can be a Hindu without caste or *varna.* See *Ratansi v. Administrator General, supra.* Caste and *varna* may apply to persons who are not strictly Hindus, *Inder Singh v. Sadhan Singh,* I.L.R. (1944), 1 Cal. 233 (Sikh Brahmins). For some purposes caste groups have been recognized which neither have *varna* nor are Hindu in any sense. *Abdul Kadir v. Dharma* I.L.R. 20 Bom. 190 (1895). Again members of the same caste may hold different *varna* statuses. *Subrao v. Radha, supra.*

[16] *Anandrav Bhikaji Phadke v. Shankar Daji Charya,* I.L.R. 7 Bom. 323 (1883); *Sankaralinga Nadan v. Raja Rajeswara Dorai,* 35 I.A.C. 176 (1908); *Chathunni v. Appukuttan,* A.I.R. 1945 Mad. 232.

actionable as a trespass to the person of the higher caste worshippers.[17] It was a criminal offense for a member of an excluded caste knowingly to pollute a temple by his presence.[18] These rights to exclusiveness were vindicated by the courts not only where the interlopers were "untouchables," but also against such "touchables" as Palshe Brahmins and Lingayats, whose presence in the particular temple was polluting.

In these cases the courts were giving effect to the notion of an overarching, differentiated Hindu ritual order in which the various castes were assigned, by text or by custom, certain prerogatives and disabilities to be measured by concepts of *varna,* of pollution and required ceremonial distance. Thus, in *Anandrav Bhikaji Phadke v. Shankar Daji Charya* the court upheld the right of Chitpavan Brahmins to exclude Palshe Brahmins from worshipping at a temple, on the ground that such an exclusive right "is one which the courts must guard, as otherwise all high-caste Hindus would hold their sanctuaries and perform their worship, only so far as those of the lower castes chose to allow them."[19]

In 1908 the Privy Council upheld the exclusion of Shanars from a temple and granted damages for its purification after a careful scrutiny of their social standing. Finding "their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies (who are on all hands regarded as unclean and prohibited from the use of Hindu temples) and below that of the Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples," the Council concluded that the presence of Shanars was repugnant to the "religious principles of the Hindu worship of Shiva" as well as to the sentiments and customs of the caste Hindu worshippers.[20] As late as 1945, Nair users of a public temple were granted damages for pollution for the purificatory ceremonies necessitated by Ezhavas bathing in tanks.[21] Untouchable Mahars who entered the enclosure of a village idol were convicted on the ground that "where custom . . . ordains that an untouchable, whose very touch is in the opinion of devout Hindus pollution, should not enter the enclosure surrounding the shrine of any Hindu god," such entry is a defilement in violation of Section 295 of the Penal Code.[22]

[17] See cases cited, note 16 *supra.* Cf. *S. K. Wodeyar v. Ganapati,* A.I.R. 1935 Bom. 371, where damages were awarded although the parties agreed there should be no finding on the question of pollution.

[18] *Atmaram v. King-Emperor,* A.I.R. 1924 Nag. 121.

[19] 7 Bom. 323 at 222.

[20] 35 I.A.C. 176 at 182.

[21] A.I.R. 1945 Mad. 232.

[22] A.I.R. 1924 Nag. 121.

While Hinduism is seen as a unified order, it is also seen as differentiated. Religious obligations and prerogatives for groups differ according to their standing in this whole. Where Brahmins tore the sacred thread from the neck of an Ahir who had lately taken to wearing it, the court ruled that since he was a Sudra, the wearing of it was not "part of his religion" vis-à-vis other Hindus. To them it was an assertion of a claim to higher rank. Therefore the injury was not to his religious susceptibilities—an offense—but only to his dignity.[23] Had it been torn by non-Hindus, it might have been an insult to his religion itself.

In these cases the courts clearly express their notion of a rank ordering of all Hindu groups in a scheme of articulated prerogatives and disabilities. One looks to the position of the caste in the whole—its position on the scale relative to the other groups—to find what are its rights. This approach did not always work to the disadvantage of the excluded class. In *Gopala v. Subramania,* members of the Elaivaniyar community obtained a declaration of their right to enter the outer hall of the temple and an injunction restraining other worshippers from ejecting them. The court declared that each group enjoyed a prima facie right to enter that part of the temple assigned his caste (i.e., *varna*) by the *Agamas* (texts on use of temples), that these texts authorized the entry of Sudras in this part of the temple, and that the plaintiffs were "at least Sudras." Their right could only be overcome by proof of a custom of exclusion.[24] Similarly where Moothans were convicted for defiling a temple by entering the part open to "non-Brahmins" the court reversed the conviction on the ground that Moothans are Sudras, no lower or more polluting than the Nairs who were allowed to enter the temple.[25]

Again we see the notion of a single articulated Hindu community in which there are authoritative opinions (supplied by custom and accepted texts) which determine the respective rights of its component groups. The effect of this conception of the Hindu order is revealed clearly in the case of *Michael Pillai v. Barthe.* Here a group of Roman Catholic Pillais and Mudalis sued for an injunction to require the bishop of Trichinopoly to reerect a wall separating their part of the church from that entered by "low caste Christians" and to declare plaintiffs' exclusive right to perform services at the altar. The court characterized the claim as one for "a right of freedom from contact

[23] *Sheo Shankar v. Emperor,* A.I.R. 1940 Oudh 348.
[24] A.I.R. 1914 Mad. 363.
[25] *Kutti Chami Moothan v. Rama Pattar,* A.I.R. 1919 Mad. 755.

which can have but one origin . . . that of pollution,[26] but refused to recognize pollution as either a spiritual or a temporal injury among Christians. Nor could Christians constitute "castes" with rights based on their respective purity. Not being Hindus, plaintiffs "cannot . . . invoke the authority of accepted sacerdotal texts for perpetuating the distinction between touchables and untouchables during a particular life solely by reason of birth."[27] Having placed themselves by conversion outside the sacral order of Hinduism, caste groupings are not invested with those rights which follow only upon their occupying a place in that order.

Exclusionary practices did not enjoy the same judicial support in regard to "secular" public facilities such as schools, wells and roads. The courts declared that no right could be maintained to exclude other castes or sects from the use of streets and roads.[28] The situation is more complicated regarding the use of water-sources. The Lahore court held other users had no right to prevent Chamars from drawing water from a public well,[29] but other courts conceded that a right to exclude might be upheld if a custom of exclusive use by higher castes could be proved. However, such customs were difficult to prove. In *Marriappa v. Vaithilinga,* Shanars obtained an order allowing them to use a large tank on the ground that no custom of exclusion was proved. (A right of exclusion was upheld in regard to one well in the dispute where such a custom was proved.) The interesting thing for our purpose is that even in denying the exclusionary claims of the higher groups, the courts reveal an implicit view of an integrated Hindu community with graded rights. The absence of a custom of exclusion from the large tank, as distinguished from the well, is indicated by textual passages to the effect that precautions for impurity may be less intense in a body of water of this size.[30] Again, in *N. D. Vaidya v. B. R. Ambedkar,* the court found it unproven that there was any long-standing custom of exclusion. Textual provisions indicating that no elaborate precautions against pollution are required in a tank of that size rendered it "doubtful whether any attempt would have been made to secure exclusive use of the water until such time as the tank came to be surrounded by the houses of caste Hindus."[31]

In dealing with exclusionary rights the courts tried to confine themselves to claims involving civil or property rights, as opposed to

[26] A.I.R. 1917 Mad. 431 at 433. [27] *Ibid.,* at 442.
[28] E.g., *Sadogopachariar v. Rama Rao.* I.L.R. 26 Mad. 376, aff'd 35 I.A. 93.
[29] *Kazan Chand v. Emperor,* A.I.R. 1926 Lah. 683.
[30] 1913 M.W.N. 247. [31] A.I.R. 1938 Bom. 146 at 148.

mere claims for standing or social acceptance. Thus the courts refused to penalize such defiance of customary disabilities as failure to dismount from a wedding palanquin or failure to concede another caste an exclusive right to ceremonial deference.[32] The prevailing notion was that social and religious matters did not give rise to legal rights unless the right was the sort of thing that could be possessed and made use of. Thus we find gradation from the temple cases, where there was ready enforcement of exclusionary rights, to water-sources, where it seems enforcement might be forthcoming if difficult technical requirements were met, to customs in no way connected with the use of specific property, where there was no enforcement at all.[33] Where government intervened, it upheld custom, but this custom was evaluated and rationalized by the courts in terms of notions of ceremonial purity and pollution—existing in different degrees among different groups of Hindus.[34]

Caste Autonomy[35]

Castes were early recognized as juridical entities with the right to sue and be sued, to sue on behalf of their members, to acquire, hold and manage property. More importantly for our purpose here, the caste was recognized as a group having the power to make rules for itself and to constitute tribunals to enforce these rules. While caste power was limited by confining jurisdiction over many matters (e.g., criminal law or the validity of a marriage) to the official courts, on most matters the caste could make, modify and revoke its rules. The

[32] *Jasnani v. Emperor*, A.I.R. 1936 All. 534; *Govinda Amrita v. Emperor*, A.I.R. 1942 Nag. 45.

[33] While there was no support for these usages at the high court level, there is evidence of widespread local acquiescence in and enforcement of such practices. See, e.g., the actions of the local officials described in *Kazan Chand v. Emperor*, A.I.R. 1926 Lah. 683; A.I.R. 1927 Lah. 430; *Jasnani v. Emperor, supra.* note 32; *Govinda Amrita v. Emperor, supra.* note 32.

[34] However, these prescriptive rights and disabilities received their greatest governmental support not from direct judicial enforcement but from the recognition of caste autonomy—i.e., from the refusal of the courts to interfere with the right of caste groups to apply sanctions against those who defined these usages. Members of the caste could be outcasted and outsiders could be boycotted for violations of customary usage.

[35] For detailed analysis and references in the area of caste autonomy, see L. T. Kikani, *Caste in Courts*, Rajkot, 1912; "Caste Customs, Caste Questions and Jurisdiction of Courts," *Hindu Law Journal*, vol. 1 (Journal Section), pp. 32ff. (1918-1919). The only legislation directly impinging on caste autonomy was the Caste Disabilities Removal Act (Act XXI of 1850, also known as the Freedom of Religion Act) which provided that there was to be no forfeiture of civil or property rights "by reason of renouncing, or, having been excluded from the communion of, any religion, or being deprived of caste. . . ."

majority, or the established authorities within the caste, could not be overruled by the civil courts on these "caste questions." Caste questions were said to include all matters affecting the internal autonomy and social relations of a caste. The right to have a fellow caste member accept one's food, gifts, or invitations; the right to receive invitations from him; the right to have precedence in leading one's bullock in a procession—in all of these cases of dignity, acceptance or precedence within the caste, the civil courts would not entertain a suit. Again, claims to leadership of a caste, claims to a caste-office, claims to enjoy privileges and honors by virtue of such office, and claims to officiate as priest, were held to be caste questions. Even if the dispute resulted in the expulsion of one person or faction, the courts would take no cognizance in such cases. Publication of a sentence of excommunication to other caste members was privileged—i.e., immune from a claim for defamation—so long as it was not more extensive than necessary to effect the purpose of informing the caste.

But the courts were willing to take jurisdiction where they found that the claim was not merely for social acceptance or dignities, but involved enforceable civil or property rights—these included rights in caste property, the right to offices with pecuniary emoluments and the right to reputation. Even here, the courts were wary about the extent of intervention and set up standards that emphasized procedural rather than substantive supervision. The courts would entertain claims only: (1) that the decision of a caste tribunal had not been arrived at *bona fide*; (2) that the decision was taken under a mistaken belief; (3) that the decision was actually contrary to the rules or usage of the caste; or, (4) that it was contrary to natural justice. The latter was the most important of these rules—violations of natural justice included omission of proper notice to the accused and the denial of an opportunity to be heard and to defend himself.

Here we have a judicial view of caste more congenial to our sectarian or associational models than to the sacral model. Castes are seen as independent bodies with their own internal order and the rights and duties of individual members follow from this order. This order is not determined by the position of the caste in an overarching order of Hindu society. Although analogies are sometimes drawn from such associations as clubs,[36] corporations, partnerships or dissenting churches, the courts never subsume the caste group under any of these. It is a group *sui generis*.[37] Although some courts speak of the caste

[36] See *Appaya v. Padappa*, I.L.R. 23 Bom. 112.

[37] "The Hindu caste is an unique aggregation so wholly unknown to the English law that English decisions, concerning English corporations and partnerships tend

as a voluntary organization in the sense that one can leave it, it is generally conceded that "the caste is a social combination, the members of which are enlisted by birth, not by enrollment."[38]

Is the caste group a "religious body?" We have seen that the courts refused to take cognizance of suits for mere "religious honors" or to enforce obligations they regarded as purely religious. The caste group was recognized as a proper forum for settling these religious questions. The caste is recognized as a corporate body with the right to promulgate and enforce its own religious doctrine, ritual and leadership.[39] But it cannot be conclusively characterized by its religious attributes. "The caste is not a religious body, though its usages, like all other Hindu usages, are based upon religious feelings. In religious matters, strictly so called, the members of the caste are governed by their religious preceptors. In social matters they lay down their own laws."[40]

Thus the caste unit is not solely religious in its concerns and nature. It is mixed—partly civil and partly religious.[41] Or as a Madras court summed it up, "a caste is a combination of a number of persons governed by a body of usages which differentiate them from others. The usages may refer to social or religious observances, to drink, food, ceremonies, pollution, occupation, or marriage." That is, a caste is not wholely or solely to be characterized by religion, either in doctrine or practice.[42] Castes are autonomous units with internal government and characterized partly by religious and partly by non-religious usages. Unlike the personal law[43] and the cases involving precedence and disabilities where castes were allocated differential religious honor because of their place in the wider Hindu scheme, here the castes are treated as autonomous and self-sufficient entities whose order proceeds from internal organs.

This detachment from the context of the wider Hindu society comes out clearly in the treatment of non-Hindu groups under the heading of caste autonomy. Here we find that the autonomous caste group is

rather to confusion than to guidance upon matters relating to caste." *Jethabhai Narsey v. Chapsey Kooverji* 34 Bom. 467.

38 *Raghunath v. Javardhan* 15 Bom. 599 at 611.

39 See, e.g., *Devchand Totaram v. Ghaneshyam* A.I.R. 1935 Bom. 361 (jurisdiction of caste includes outcasting of members for adherence to sub-sect said to be outside Vedic religion).

40 *Raghunath v. Javardhan, supra.* note 38, at 611.

41 *Haroon v. Haji Adam,* 11 Bom. L.R. 1267.

42 *Muthuswami v. Masilamani,* I.L.R. 33 Mad. 342 (1909).

43 The personal law inclined away from the sacral view toward a view more like that found in the caste autonomy area in the recognition of castes as units whose customs, where proven, would serve to vary the law of the textbooks.

recognized not only among Hindus but also among Muslims, Parsis, Jews, Sikhs, Jains and Christians.[44] In this context caste groups are not subsumed under the *varnas;* they are treated as a special kind of group. Where the rights and powers claimed by a caste derive from a place in a larger Hindu order they are not recognized in non-Hindu groups. But where they derive from internal order, customary and deliberative, of the group as an autonomous entity, they are recognized among all religions.

THE NEW DISPENSATION

The Constitution sets forth a general program for the reconstruction of Indian society.[45] In spite of its length, it is not detailed in its treatment of the institution of caste and of the existing group structure of Indian society. But it clearly sets out to secure to individuals equality of status and opportunity,[46] to abolish invidious distinctions among groups,[47] to protect the integrity of a variety of groups—religious, linguistic and cultural,[48] to give free play to voluntary associations,[49] the widest freedom of association to the individual,[50] and generally the widest personal freedom consonant with the public good.[51] Without pursuing all of these in detail, it is clear that the following general principles are consistently in evidence: (1) a commitment to the replacement of ascribed status by voluntary affiliations; (2) an emphasis on the integrity and autonomy of groups within society; (3) a withdrawal of governmental recognition of rank ordering among groups.

In order to see how the new constitutional scheme has affected the judicial view of the religious aspects of caste, we shall trace recent developments in the areas previously discussed and in some new problem areas that have emerged since independence.

44 See, e.g., *Abdul Kadir v. Dharma,* 20 Bom. 190 (1895) where the court observed that "caste" comprised "any well-defined native community governed for certain internal purposes by its own rules and regulations," and was thus not confined to Hindus.

45 This new dispensation did not arrive on the scene suddenly. It represents the culmination of more than half a century of increasing anti-caste sentiment among reformers, the gradual acceptance by politicians of the need for reform of caste, a variety of provincial anti-disabilities and temple-entry legislation, and the growing conviction that caste is inimical to democracy and progress and should play a restricted role in the new India.

46 Preamble, Articles 14-18, 23, 46.

47 Articles 14-17, 25-30.

48 Articles 25-30, 347, 350A, 350B.

49 Articles 19(1)c, 25, 26, 30.

50 *Ibid.*

51 See generally, Parts III and IV of the Constitution.

Personal Law

The Constitution contains a commitment to replace the system of separate personal laws with a "uniform civil code."[52] In spite of its strictures against discrimination on the ground of religion, the Constitution has been interpreted to permit the continuing application of their respective personal laws to Hindus and Muslims. The continuing validity of disparate rules of personal law and the power of the state to create new rules applicable to particular communities has been upheld.[53] Within the Hindu law itself, the constitutional ban on caste discrimination has not been read as abolishing differences in personal law between Hindus of different castes. Although legal enforcement of disabilities against lower castes was sometimes rationalized in *varna* terms, the use of *varna* distinctions in the personal law is not included within the constitutional abolition of untouchability.[54] However, the Hindu Code Acts[55] of 1955-1956 have largely abandoned the shastric basis of Hindu law and established a more or less uniform law for Hindus of all regions and castes. The new law creates the hitherto unknown capacity to marry and adopt across *varna* lines and, with a few minor exceptions, eliminates all of the distinctions along *varna* lines embodied in the old law.[56] *Varna* has virtually been eliminated as an operative legal concept—although for the present the courts still have to apply it to transactions covered by the older law. In addition the new legislation severely curtails the opportunities for invoking caste custom in order to vary the generally applicable Hindu law.

Precedence and Disabilities

The Preamble to the Constitution resolves "to secure to all of its citizens . . . EQUALITY of status and opportunity." Accordingly, it confers on all its citizens a fundamental right to be free of discrimination by the state on the ground of caste. But the Constitution does not only forbid caste discrimination by the government; it goes on to outlaw invidious treatment on the basis of caste by private citizens as well. Art. 15 (2) prohibits discrimination by private persons in regard to use of facilities and accommodations open to the public such as wells, tanks, shops and restaurants.[57] Art. 17 provides that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offense punishable in accordance with law. The guarantee of freedom of religion is explicitly qualified to permit temple-entry legislation.[58] Under these provisions, there is no longer any governmental power to make discriminations among citizens on caste lines.[59] Nor may government enforce any customary right to exclude certain castes from a public facility.[60]

The Untouchability Offenses Act of 1955 outlaws the imposition of disabilities "on grounds of untouchability" in regard to, *inter alia*, entrance and worship at temples, access to shops and restaurants, the practice of occupations and trades, use of water sources, places of public resort and accommodation, public conveyances, hospitals, educational institutions, construction and occupation of residential premises, holding of religious ceremonies and processions, and use of jewelry and finery. Enforcement of disabilities is made a crime, punishable by fine or imprisonment, and the power of civil courts to recognize any custom, usage, or right which would result in the enforcement of any disability is withdrawn.

In order to gauge the scope of Art. 17 and this legislation, it is necessary to determine the meaning of "untouchability." Although it is yet unclear in detail, judicial construction so far gives us some

[52] Article 44.

[53] *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84.

[54] The assignment of a community to a *varna* has been held not to constitute a deprivation of rights to equality before the law, nor is it religious discrimination. *Sangannagonda v. Kallangonda*, A.I.R. 1960 Mys. 147. The classification of the offspring of a Sudra and his Brahmin concubine as a *chandala*, the lowest of untouchables in the traditional scheme, did not strike the court as unconstitutional in *Bachubhai v. Bai Dhanlaxmi*, A.I.R. 1961 Guj. 141.

[55] I.e., the Hindu Marriage Act of 1955, the Hindu Succession Act of 1956, the Hindu Minority and Guardianship Act of 1956 and the Hindu Adoptions and Maintenance Act of 1956.

[56] Derrett, note 11, suggests that the only instances in which *varna* might continue to have effect are succession to *sannyasis* and determination of the maximum age for adoption.

[57] See also Arts. 28 (3) and 29 (2) which forbid discrimination in private educational institutions.

[58] Art. 25 (2)b. When the Constitution was enacted, customary exclusion of lower castes from temples and secular facilities, previously recognized and to some extent enforceable at law, had been transformed into statutory offenses throughout most of India. For a survey of this provincial legislation and its continuing efficacy, see my article, "Caste Disabilities and Indian Federalism," *Journal of the Indian Law Institute*, 1961, vol. 3, pp. 205-234.

[59] See, e.g., *State of Madras v. Champakam Dorairjan* [1951] S.C.J. 313; *Sanghar Umar v. State*, A.I.R. 1952 Saur. 124. Caste cannot be recognized for electoral purposes. The Constitution rules out electorates according to caste for Parliament and state legislatures. Art. 325. Communal electorates in local bodies are unconstitutional. *Nain Sukh Das v. State of U.P.*, A.I.R. 1953 S.C. 384; nor can caste be used as a criterion in delimiting territorial constituencies (by excluding from a ward "houses of Rajputs in the east of the village"). *Bhopal Singh v. State*, A.I.R. 1958 Raj. 41.

[60] *Aramugha Konar v. Narayana Asari*, A.I.R. 1958 Mad. 282.

guide-lines. Apparently the "untouchability" forbidden by the Constitution does not include every instance in which one person is treated as ritually unclean and polluting. It does not include such temporary and expiable states of uncleanliness as that suffered by women in childbirth, mourners, etc.[61] Nor does it include that "untouchability" which follows upon expulsion or excommunication from caste.[62] It is confined to that untouchability ascribed by birth rather than attained in life. Further, it does not include every instance in which one is treated as untouchable in certain respects because of a difference in religion or membership in a different or lower caste. It includes, in the words of the first court to pass on the issue explicitly, only those practices directed against "those regarded as 'untouchables' in the course of historic development"—i.e., those relegated "beyond the place of the caste system on grounds of birth in a particular class."[63] Thus it would not include practices based on avoidance due to a difference of religion or caste, except in so far as the caste was traditionally considered "untouchable" and "outside the pale of the caste system." Thus disabilities imposed, e.g., by one group of Brahmins on other Brahmins, by Brahmins on non-Brahmins, by "right-hand" on "left-hand" castes would all fall outside the prohibition of Article 17.

The meaning of untouchability then is to be determined by reference to those who have traditionally been considered "untouchables." But it is no easier to define untouchables than it is to define "untouchability." "Beyond the pale of the caste system" is a misleading and unworkable formulation. Even the lowest castes are within the system of reciprocal rights and duties; their disabilities and prerogatives are articulated to those of other castes. Presumably the Mysore court means, by this phrase, outside the four *varnas* of the classical lawbooks. In reference to their customary rights, untouchables have sometimes, particularly in southern India, been referred to as a fifth *varna*, below the *Sudras*.[64] But in other places they were regarded as *Sudras*.[65] For purposes of personal law, the courts have never attempted to distinguish untouchables from *Sudras*; all Hindus

[61] *Devarajiah v. Padmanna*, A.I.R. 1958 Mys. 84.
[62] *Hadibandhu v. Banamali*, A.I.R. 1960 Or. 33; cf. *Saifuddin Saheb v. State of Bombay*, A.I.R. 1962 S.C. 853.
[63] *Devarajiah v. Padmanna*, note 61, at 85.
[64] See, e.g., *Sankaralinga Nadan v. Raja Rajeshwari Dorai*, 35 I.A.C. 176 (1908).
[65] See, e.g., *Atmaram v. King-Emperor*, A.I.R. 1924 Nag. 121.

other than the twice-born have been lumped together as *Sudras*.[66] Even where untouchables are popularly regarded as *Sudras*, they cannot be equated with them since there are non-untouchable groups which belong to this category. Thus, the tests used for distinguishing *Sudras* from the twice-born, cannot be used as a satisfactory measure of untouchability. Thus although the abolition of untouchability amounts to a kind of negative recognition of the sacral order of Hinduism, it is not likely that the jurisprudence recognizing that order will find new employment for the purpose of identifying "untouchables." In attempting to identify untouchable groups for the purpose of giving them benefits and preferences the government has not tried to apply general criteria, but has adopted the device of compiling lists of castes in each locality.[67]

Thus the "untouchability" forbidden by law is confined to discriminations against certain not readily defined classes of persons. It includes not every discrimination against them, but only those imposed because of their position in the caste system. The provisions making untouchability an offense attempt to distinguish between those disabilities and exclusions imposed on grounds of caste position and those which derive from religious and sectarian difference. Crucial sections of the Untouchability Offenses Act are qualified to make an offense only the exclusion of untouchables from places "open to other persons professing the same religion or belonging to the same religious denomination or section thereof."[68] Thus the scope of the rights conferred on untouchables by the act depends on the meaning of the phrases "the same religion" and "the same religious denomination or section thereof." To the extent that caste distinctions are con-

[66] See, e.g., *Muthuswami v. Masilamani*, I.L.R., 33 Mad. 342 (1909): *Maharajah of Kolhapur v. Sundaram Aiyar*, A.I.R. 1925 Mad. 497, 521.
[67] Such lists derive from earlier attempts (in the 1930's) to find a single set of criteria to measure "untouchability." These included such tests as whether the caste in question was "polluting" or "debarred" from public facilities—which may admit of no equivocal answer—and whether they were served by "clean" Brahmins —which has only a local and comparative reference. All attempts to set up tests based on the assumption that "untouchables" are set off by some uniform and distinctive pattern of practices proved inadequate to isolate the groups which local administrators felt deserving of inclusion. Additional criteria of poverty and illiteracy had to be added. The government lists then give little guide to the meaning of untouchability. There is no adequate inclusive list of all groups considered untouchable or any single set of criteria for identifying them. For a discussion of the problem of identifying the "untouchables," see Lelah Dushkin, "The Backward Classes," in *The Economic Weekly* for Oct. 28, Nov. 4, and Nov. 18, 1961 and her "The Policy of the Indian National Congress Toward the Depressed Classes," unpublished M.A. thesis, University of Pennsylvania, 1957.
[68] Sec. 3 (1).

ceived of as religious or denominational differences, the rights of untouchables are limited. Thus exclusion of untouchables by Jains is not forbidden, in so far as it is on the ground that they are non-Jains rather than because of their caste.[69] In spite of some attempt by the lawmakers to minimize such distinctions,[70] courts have (on solid textual grounds) been reluctant to read the act as obviating these distinctions. In *State of Kerala v. Venkiteswara Prabhu,*[71] untouchables were prevented from entering the Nalambalam of a temple belonging to the Gowda Saraswat Brahmin community. Since only members of this community ordinarily entered this part of the temple, the court held that exclusion of untouchables was not an offense since they did not belong to the same "denomination or section thereof." The acceptance by the court of denominational lines within Hinduism as limiting the operation of the temple-entry provisions may produce some unanticipated results. For the "religion" and "denomination" qualifiers also appear in other provisions of the Untouchability Offenses Act.[72] Thus judicial solicitude for the sectarian prerogatives of groups within Hinduism may severely limit the rights granted by some of the central provisions of the act.

Since untouchability has been interpreted to include only discriminations against untouchables, the legislation against it has not touched discriminations against other classes of Hindus. The anomalous situation that it is an offense to exclude untouchables from temples, but classes of touchable Hindus may be excluded with impunity, has led several states to enact supplementary legislation. A Bombay act, for example, makes it an offense to prevent "Hindus of any class or sect from entering or worshipping at a temple to the same extent and in the same manner as any other class or section of Hindus."[73] These laws extend protection to non-untouchables and they also overcome the sectarian and denominational limitations

[69] *Ibid.; State v. Puranchand,* A.I.R. 1958 M.P. 352.

[70] See the "Explanation" attached to Sec. 3 of the Untouchability Offenses Act.

[71] A.I.R. 1961 Ker. 55.

[72] The qualification appears in the provisions relating to: use of utensils and other articles kept in restaurants, hotels, etc.; use of wells, water-sources, bathing ghats, cremation grounds; the use of "places used for a public or charitable purpose"; the enjoyment of benefits of a charitable trust; and the use of dharmasalas, sarais and musafirkhanas. Sections 4(ii), 4(iv), 4(v), 4(vi), 4(ix). Strangely enough it does not appear in Sec. 4(x) regarding "the observance of any . . . religious custom, usage or ceremony or taking part in any religious procession." Thus untouchables seem to have access to the religious processions of Hindu denominations and sects, but not to their wells, etc.

[73] Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956. Cf. United Provinces Temple Entry (Declaration of Rights) Act, 1956.

which the courts have found in the Untouchability Offenses Act. It remains to be seen whether these limitations represent a constitutional restriction and to what extent the state is constitutionally obliged to recognize these sectarian distinctions.

The attack on discrimination is only one side of the attempt to remove the disabilities of the lower castes. For the purpose of securing equality, the government is authorized to depart from indifference to caste in order to favor untouchables, tribals, and backward classes. These provisions for "protective discrimination" are the only exceptions to the constitutional ban on the use of communal criteria by government. The Constitution authorizes government to provide special benefits and preferences to previously disadvantaged sections of the population. Reserved posts in government, reserved seats in legislatures,[74] reserved places in public education and an array of preferences and welfare measures have been made available to the Scheduled Castes and, to a lesser extent, to the "backward classes."

With membership in these groups a qualification for preferment of various kinds, it is not surprising that disputes have arisen concerning such membership. In order to qualify for preferences, one must be a member of the listed caste. In *Chatturbhuj Vithaldas Jasani v. Moreshwar Pareshram,* the Supreme Court decided that a Mahar who had joined the Mahanubhava Panth, a Hindu sect which repudiated the multiplicity of gods and the caste system, remained a Mahar and was thus eligible to stand for a reserved seat in the legislature. The court arrived at this conclusion on the ground that he had continued to identify himself as a Mahar and had retained full acceptance by the Mahar community. The court concluded that "conversion to this sect imports little beyond an intellectual acceptance of certain ideological tenets and does not alter the convert's caste status."[75] Thus the court saw no distinctive religious content in membership in the caste; its bonds are "social and political ties." "If the individual . . . desires and intends to retain his old social and political ties" and if the old order is tolerant of the new faith and does not expel the convert, the conversion does not affect his caste membership.[76] However, the court recognized that there is a religious dimension to caste affiliation as well; it is not only his own choice that must be taken into account "but also the views of the body whose

[74] As originally enacted, the Constitution provided reserved seats in Parliament and the state legislatures for the Scheduled Castes and the Scheduled Tribes for a ten-year period. This has been extended for another ten-year period by the Constitution (Eighth Amendment) Act, 1959.

[75] [1954] S.C.R. 817 at 840.

[76] *Ibid.,* at 839.

religious tenets he has renounced because here the right [to stand for a reserved seat] is a right of the old body, the right conferred upon it as a special privilege to send a member of its own fold to Parliament."[77] So here we see the court treating the caste group as primarily bound by "social and political ties" but also as having "religious tenets." In this case, the latter are given no effect.[78]

Recently the same question came before the Madras High Court in the case of *Shyamsunder v. Shankar Deo,*[79] where the question was whether the candidate had lost his membership in the Samgar caste by joining the Arya Samaj, a Hindu sect which rejects idolatry and ascription of caste by birth. The court said there would be no deprivation of caste unless there was either expulsion by the old caste or intentional abandonment or renunciation by the convert. Since there was no evidence of expulsion or ostracism by the old caste, the question was whether there had been a break from the old order "so complete and final that . . . he no longer regarded himself as a member of the Samgar caste."[80] Here the court felt this was refuted not only by his activities, but by his testimony that he believed in idols and in texts repudiated by the Samajists. Again, while religious criteria played a secondary role in defining membership in caste, the court, like the *Jasani* court, conceived of the caste as having some body of religious tenets. One might remain a member while repudiating them, but adhering to them was evidence that one regarded oneself a member. In these cases the caste fits what we have called the associational model of the caste. It is a group characterized by a constellation of social and political ties; it has "religious tenets" though adherence to them is not an indispensable requisite for membership so long as the other ties are not severed.

In *V. V. Giri v. D. Suri Dora* the question before the Supreme Court was whether a candidate had lost his membership in the Moka Dora tribe by becoming a Kshatriya. The candidate was born a Moka Dora and his family had described itself as such in all documents from 1885 to 1923. Since that time they had described themselves as Kshatriyas. There was evidence that the family had adopted Kshatriya customs, celebrated marriages in Kshatriya style, was connected by marriage to Kshatriya families, employed Brahmin priests

[77] *Ibid.*, at 839.

[78] Perhaps "religious tenets" are mentioned here only because the court used as authority the case of *Abraham v. Abraham,* 9 M.I.A. 199 (1863), which involved conversion from one religion to another with retention of personal law.

[79] A.I.R. 1960 Mys. 27.

[80] *Ibid.*, at 32.

and wore the sacred thread in the manner of Kshatriyas.[81] His election was challenged on the ground that he was no longer a Moka Dora and was therefore ineligible to stand for a seat reserved for Scheduled Tribes. The Supreme Court solved the question by deciding that he had not in fact become a Kshatriya because "the caste status of a person in this context would necessarily have to be determined in the light of the recognition received by him from the members of the caste in which he seeks entry." Finding no evidence of such recognition, the court said that "unilateral acts cannot be easily taken to prove that the claim for the higher status . . . is established."[82] This recognition test is essentially a variant on the reputation test for the *varna* standing of caste groups. It is notable that it completely excludes any religious test of Kshatriyahood. One judge (J. L. Kapur), dissenting, vigorously rejected the majority notion that caste is determined in the first instance by birth and can only be varied (at least upward) by recognition of his claims by members of the group to which he aspired. He put forward a theory that caste rank varies as a consequence of the *gunas, karma* and *subhavana* and is dependent on actions; he found that the candidate had "by his actions raised himself to the position of a Kshatriya. . . ."[83] The majority did not accept this but did regard the *varna* order as hierarchic. It was a hierarchy determined by mutual social acceptance rather than by possession of traits indicative of religious capacity or attainments.

The provisions for "protective discrimination" extend not only to untouchables but to "other socially and economically backward classes." Although the Constitution refers to backward *classes,* caste groups have commonly been the units selected as backward. Increasing criticism within and without the government and the increasing willingness of the courts to subject preferences for backward classes to close scrutiny have caused a trend away from caste in favor of non-communal economic and educational criteria. It is constitutionally

[81] A.I.R. 1959 S.C. 1318. Apparently the candidate's family was one of a number of families of Mokasadars or large landholders who, according to the Election Tribunal, "would not like to be called Moka Doras but considered themselves Kshatriyas." XV E.L.R. 1 at 38 (1957). The tribunal found that the candidate had ". . . totally given up feeling himself to be a member of the Moka Dora tribe and considers himself a Kshatriya." For a comparison of the divergent approaches of the Election Tribunal, the High Court and the Supreme Court in this case, see my article, "The Problem of Group Membership: Some Reflections on the Judicial View of Indian Society," *Journal of the Indian Law Institute,* 1962, vol. 4, pp. 331-358 at 337-339.

[82] A.I.R. 1959 S.C. at 1327.

[83] *Ibid.*, at 1331.

permissible for the state to use castes or communities as the units it designates as backward,[84] but the Supreme Court struck down a scheme for reservations in colleges for backward classes on the ground that they were selected primarily on the basis of caste—i.e., the groups were chosen on the basis of their ritual and social standing. The Supreme Court is willing to permit recognition of the caste as a group of persons associated with a given level of resources, attainment and opportunities. But the state cannot rely exclusively on "the test of caste," i.e., it cannot select the caste solely by its rank or standing in the religious and social order. Here again we find willingness to recognize caste in our associational model, but not in the sacral one.

We have seen that so long as they are dealing with caste within Hinduism, whether it is the precedence or rights of a caste or membership in it, the courts have been unwilling to describe and rationalize these differences in terms of the sacral model of caste. They assign only a minor role to the religious content of caste and avoid invoking the idea of an overarching sacral order in which all castes are hierarchically arranged. The use of their "untouchability" as the criterion for selecting the Scheduled Castes implies a kind of reverse recognition of the Hindu ritual order. However, it is clear that such recognition cannot be extended to the selection of the "backward classes." The only instance so far in which we have seen implicit reference to a hierarchical ordering is in the case of the tribals. In the Moka Dora case, the Kshatriya status was denied on grounds that implied such a hierarchy, even though it had no specially religious content.

However, when we move to questions which concern persons and groups outside "Hinduism" we find that the religious content of caste reemerges.

The "Hindu" Component of Caste

The Constitution forbids religious discrimination on the part of the state[85] and guarantees freedom of religion.[86] The courts have been vigilant in invalidating governmental measures framed along religious lines.[87] Nevertheless, in some instances religion has been

[84] *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649; *Ramakrishna Singh v. State of Mysore*, A.I.R. 1960 Mys. 338.

[85] Arts. 15, 16.

[86] Arts. 25, 26, 30.

[87] *State of Rajasthan v. Pratap Singh*, A.I.R. 1960 S.C. 1208; *Nain Sukh Das v. State of U.P.*, A.I.R. 1953 S.C. 384; *State of Jammu and Kashmir v. Jagar Nath*, A.I.R. 1958 J & K 14.

made a qualification for preferential treatment. The president's order specifying Scheduled Castes provided that "no person professing a religion different from Hinduism shall be deemed a member of a Scheduled Caste."[88] Who is a Hindu? What is the role of caste in deciding who is a Hindu? What is the role of Hinduism in determining membership in a caste group?

The legal definition of Hinduism, developed for the purpose of applying appropriate personal law, was neither a measure of religious belief nor a description of social behavior as much as a civil status describing everyone subjected to the application of "Hindu law" in the areas reserved for personal law.[89] Heterodox practice, lack of belief, active support of non-Hindu religious groups,[90] expulsion by a group within Hinduism[91]—none of these removed one from the Hindu category, which included all who did not openly renounce it or explicitly accept a hostile religion. The individual could venture as far as he wished over any doctrinal or behavioral borders; the gates would not shut behind him if he did not explicitly adhere to another communion.[92] In *Chandrasekhara Mudaliar v. Kulandaivelu Mu-*

[88] Constitution (Scheduled Caste) Order, 1950, para. 3. Cf. the Government of India (Scheduled Caste) Order, 1950, para. 3, which provided that "No Indian Christian shall be deemed a member of a Scheduled Caste." The Constitution (Scheduled Tribes) Order, 1950, contains no analogous provision.

[89] Or, more accurately, all who would be subject to Hindu law in the absence of proved special custom or of a contingency such as marriage under the Special Marriage Act (III of 1872).

[90] *Bhagwan Koer v. Bose*, 30 I.A. 249 (1903). A similar latitudinarianism may be observed in the tests for whether a tribe is sufficiently Hinduized to attract the application of Hindu law. Orthodoxy is unnecessary; it is sufficient that the tribe acknowledge themselves as Hindus and adopt some Hindu social usages, notwithstanding retention of non-Hindu usages. *Chungu Manjhi v. Bhabani Majhan*, A.I.R. 1946 Pat. 218.

[91] *Ratansi D. Morarji v. Admr. General of Madras*, A.I.R. 1928 Mad. 1279, 1283.

[92] No proof of formal abandonment of his new religion is necessary for the convert to effect a successful reconversion to Hinduism. While a mere declaration is not sufficient to restore him to Hinduism, acceptance by a Hindu community with whatever formalities it deems proper—even none at all—is sufficient. *Durgaprasada Rao v. Irulappa Konar*, A.I.R. 1934 Mad. 630. However, cf. *Marthamma v. Munuswami*, A.I.R. 1951 Mad. 888, 890, where the primary test is the "intention" of the reconvert; the court says "the religious persuasion of a man now-a-days depends on his 'subjective preference' for any religion."

For purposes of at least certain preferences, reconverts to Hinduism who were born in Scheduled Castes are deemed members of the Scheduled Castes. But those born in another religion (e.g., whose fathers were converts) are not treated as members of Scheduled Castes "whatever may be their original family connections." *Report of the Commissioner for Scheduled Castes and Scheduled Tribes*, 1953, p. 132. In the personal law cases, acceptance by the community was a measure of one's success in reentering Hinduism; here, Hindu birth is a pre-condition of gaining membership in the community.

daliar[93] the Supreme Court had to decide on the validity of a consent to adoption by a sapinda who disavowed belief in the religious efficacy of adoption, in Hindu rituals and scriptures, in the existence of *atma*, and salvation. But the court found that "the fact that he does not believe in such things does not make him any the less a Hindu. . . . He was born a Hindu and continues to be one until he takes to another religion. . . . [W]hatever may be his personal predilections or views on Hindu religion and its rituals. . . ."[94]

In the post-constitutional cases involving preferences the same broad conception of Hinduism has been carried over from the area of personal law. To "profess" Hinduism merely means to be a Hindu by birth or conversion. Unorthodoxy or lack of personal belief in its tenets does not mean lack of profession for this purpose.[95] In effect the test seems to amount to a willingness to refrain from calling oneself something else. Thus where the election to a reserved seat of an active supporter of Dr. Ambedkar's neo-Buddhist movement was challenged on the ground that he was not a Hindu, the court found that "it has to be established that the person concerned has publicly entered a religion different from the Hindu . . . religion." Mere declarations falling short of this would not be sufficient.[96] The candidate had supported the movement for mass conversion by serving on the reception committee, editing a newspaper supporting the movement and attending a rally where an oath, "I abandon the Hindu religion and accept the Buddha religion" was administered by Dr. Ambedkar. When those who wished to convert were asked to stand, the candidate stood. But there was no evidence that he did in fact take the oath; the court held that in the absence of evidence of such a declaration, he remained a Hindu.[97]

Converts to Christianity and Islam are, of course, non-Hindus.[98] Although Buddhists, Sikhs and Jains are treated as Hindus for some purposes, they are considered non-Hindus for purposes of preferences.[99]

[93] A.I.R. 1963 S.C. 185. [94] *Ibid.*, at 200.

[95] *Michael v. Venkataswaran*, A.I.R. 1952 Mad. 474.

[96] *Karwadi v. Shambharkar*, A.I.R. 1958 Bom. 296, 297.

[97] *Ibid.*, at 299. The vagaries of the declaration test are illustrated in *Rattan Singh v. Devinder Singh*, VII E.L.R. 234 (1953), XI E.L.R. 67 (1955), where the candidate had at various times described himself as a Mazhabi Sikh, a Harijan Hindu, a Balmiki, and a Balmiki Hindu.

[98] *Michael v. Venkataswaran*, note 95. But Hindu personal law has sometimes been applied to Christians (see, e.g., *Abraham v. Abraham*, note 78) and to Muslims (until the passage of the Muslim Personal Law [Shariat] Application Act [XXXVI of 1937]).

[99] These groups are Hindu for purposes of personal law. But their separateness has been recognized in other contexts. E.g., Jains are not Hindus for purposes of temple-entry legislation. *State v. Puranchand*, A.I.R. 1958 M.P. 352; *Devarajiah v. Padmanna*, A.I.R. 1958 Mys. 84.

Sikhs were excluded from the Scheduled Castes and are now mentioned separately from Hindus.[100] Neo-Buddhists lose their right to preferences. "As Buddhism is different from the Hindu religion, any person belonging to a Scheduled Caste ceases to be so if he changes his religion. He is not, therefore, entitled to the facilities provided under the Constitution specifically for the Scheduled Castes."[101] The central government, recognizing that conversion itself is unlikely to improve the condition of the converts, has recommended that the state governments accord the neo-Buddhists the concessions available to the Backward Classes. Such preferences, less in scope and in quantity than those for Scheduled Castes, have been granted in some cases.[102] Persistent efforts by neo-Buddhists to be treated as members of Scheduled Castes have proved unavailing.[103]

The "Hinduism" test for recipients of preferences has been challenged as an infringement of the ban on religious discrimination by the state. The judicial response to this challenge presents a problem of characterizing the relation of the caste group to Hinduism.

In *S. Gurmukh Singh v. Union of India*[104] a Bawaria Sikh protested his exclusion from the Scheduled Castes in which the president had included Hindu Bawarias. The court conceded that Scheduled Castes were to be designated on the basis of their backwardness. But, finding that the Constitution vested in the president the entire power to make such determinations, the court refused to review his order by considering whether the Sikh Bawarias were in fact sufficiently backward to be included. In this situation, it was conceded that these non-Hindus either constitute or are members of a caste group; what

[100] *Gurmukh Singh v. Union of India*, A.I.R. 1952 Pun. 143; *Rattan Singh v. Devinder Singh*, note 97. Sikh members of four of the thirty-four Scheduled Castes listed for the Punjab were included in the Scheduled Castes. See Constitution (Scheduled Castes) Order, 1950, sec. 3 and cases cited *supra*.

[101] *Report of the Commissioner of Scheduled Castes and Scheduled Tribes*, 1957-1958, vol. 1, p. 25. This ruling is based squarely on the "Hinduism" requirement of the president's order. See the statement of Pandit Pant, *Times of India*, August 21, 1957.

[102] *Report of the Commissioner of Scheduled Castes and Scheduled Tribes*, 1957-1958, vol. 1, p. 25, vol. 2, p. 60. While some states have included neo-Buddhists within backward classes, others have continued to treat them like Scheduled Castes for some purposes and still others have withdrawn all preferential treatment.

[103] A bill to this effect was defeated in the Lok Sabha. *New York Times*, August 30, 1961.

[104] A.I.R. 1952 Pun. 143.

was decided was that the president's exclusion of that group (or part of the group) was unreviewable.[105]

In *Michael v. Venkataswaran*[106] the religious requirement was upheld against a Paraiyan convert to Christianity who wished to stand for a reserved seat. Even if there are cases in which both the convert and his caste-fellows consider him as still a member of the caste, the court found, "the general rule, is [that] conversion operates as an expulsion from the caste . . . a convert ceases to have any caste."[107] The presidential order, according to the court, proceeds on this assumption and takes note of a few exceptions. The court declined to sit in judgment on the president's determination that similar exceptional conditions do not prevail in other instances. Thus the presidential order was upheld not because of an absence of judicial power to review it but of its accuracy in the general run of cases.

In *In re Thomas*[108] another bench of the Madras Court considered a convert case which did not involve the presidential order. The Madras government had extended school-fee concessions to converts from Scheduled Castes "provided . . . that the conversion was of the . . . student or of his parent. . . ." A Christian student whose grandfather had converted could not, it was held, complain of discrimination since converts did not belong to the Harijan community. By conversion they had "ceased to belong to any caste because the Christian religion does not recognize a system of castes."[109] The concessions to recent converts were merely an indulgence and the state could determine the extent of this indulgence.

The theory that acceptance of a non-Hindu religion operates as loss of caste reflects the continued force of the sacral view of caste.

[105] The unreviewability of the presidential order would seem open to question in the light of subsequent cases which have firmly established judicial power to review the standards used by government to designate the recipients of preferential treatment. *Balaji v. State of Mysore*, A.I.R. 1963 Mys. 649. There is no indication in the Constitution that executive action, even in pursuance of expressly granted and exclusive constitutional powers, is immune from judicial review for conformity with constitutional guarantees of fundamental rights. The position in the Gurmukh Singh case must be seen as one of judicial restraint rather than judicial powerlessness. See Art. 12. The restraint there expressed seems out of line with later judicial assertiveness in this area.

[106] See note 95.

[107] *Ibid.*, at 478.

[108] A.I.R. 1953 Mad. 21.

[109] *Ibid.*, at 22. The exclusion of neo-Buddhists from the preferences for Scheduled Castes has been similarly justified by the notion that "Buddhism [does] not recognize castes." Statement of B. N. Datar in Rajya Sabha, August 26, 1957. Reported in *Times of India*, August 27, 1957.

The question arises in two kinds of factual situations: first, those involving a caste group or a section of a caste made up of members who are non-Hindus; second, those involving an individual convert. In the first type, there is little dispute that such persons as, e.g., the Sikh Bawarias in the *Gurmukh Singh* case, are in fact, members of a caste in the associational or sectarian sense of caste encountered in the law regarding "caste autonomy." The existence of such caste groups among non-Hindus in India is well known and has long been recognized by the judiciary.[110] To refuse to recognize caste membership among such non-Hindu groups implies that the "caste" of which the court is speaking is not caste in the sense of a body of persons bound by social ties, but caste in the sense of a body which occupies a place in the ritual order of Hinduism.

In the case of individual converts, the question facing the court would seem to be whether the individual convert's acceptance of Christianity, Islam or Buddhism evidences a loss of membership in the caste group to which he belonged at the time of the conversion. This can be treated as a question of fact, to be answered by evidence about his observable interactions with other members of the group. This was the approach taken in the cases dealing with conversions to sects within Hinduism.[111] In at least some cases of conversion outside Hinduism there is evidence that the convert continues to regard himself and to be regarded by others as a member of the old caste.[112] However in dealing with these conversions to religions outside Hinduism the courts have forsaken this empirical approach and have treated the conversion as depriving him of his membership as a matter of law. This conclusion derives not from the facts of the individual case but from a view of castes as the components in the sacral order of Hinduism. When that overarching scheme is abandoned, so is caste membership.

[110] Cf. *Report of the Backward Classes Commission*, vol. 1, pp. 28-30.

[111] A similar empirical approach is found in dealing with conversions among Scheduled Tribes. *Gadipalli Paroyya v. Goyina Rajaryya*, XII E.L.R. 83 (1956).

[112] The reports are replete with cases in which converts have lived so indistinguishably with their caste-fellows that the courts retrospectively infer a tacit reconversion without either formal abjuration of the new religion or formal expiation and readmittance to Hinduism. *Durgaprasda Rao v. Sundarsauaswaram*, A.I.R. 1940 Mad. 513; *Gurusami Nadar v. Krulappa Knoar*, A.I.R. 1934 Mad. 630; *Venkatramayya v. Seshayya*, A.I.R. 1942 Mad. 193. The "indulgence" extended by the state in the Thomas case, note 108, seems to reflect an awareness that recent converts, if not effective members of their old castes, are at least subject to similar disabilities. And cf. *Muthuswami Mudaliar v. Masilamani*, I.L.R. 33 Mad. 342 (1909) where Christian wives were accepted as members of a Hindu caste.

Caste Autonomy

Notwithstanding the common rhetoric about the casteless society, the Constitution is quite unclear about the position of the caste group in Indian life. While there are guarantees to preserve the integrity of religious and linguistic groups,[113] there are none for the caste group—it would not seem to enjoy any constitutional protection as such. This silence may represent an anticipation that caste will wither away and have no important place in the new India. Or it may represent an implicit ratification of the old policy of non-interference.

Apart from explicit restrictions on caste discrimination, there is a tendency to discourage any arrangements which promote the coherence and integrity of the caste group as such. Thus, for example, the Supreme Court recently struck down (as unreasonable restrictions on property rights) laws providing for pre-emption on the basis of vicinage. The court held that the real purpose of these laws was to promote communal neighborhoods, a purpose which could have no force as public policy since the desire to promote such exclusiveness could no longer be considered reasonable.[114] There is a desire to minimize the impact of caste groupings in public life. The government has discouraged the use of caste as identification on official documents, and appeals to caste loyalty in electoral campaigning are forbidden.[115]

What is left of caste autonomy? What remains of the prerogatives previously enjoyed by the caste group? The caste retains the right to own and manage property and to sue in court. Section 9 of the Civil Procedure Code, with its bar on judicial cognizance of "caste questions" is still in force. Courts still refuse to entertain suits involving caste questions (e.g., fitness of an officer to manage property),[116] and castes retain their disciplinary powers over their members (e.g., the courts refused to declare invalid the assessment of a fine for an alleged breach of caste rules).[117] The caste retains its power of excommunication. It is still a good defense to a criminal action for defamation to assert the privilege of communicating news of an excommunication to one's caste fellows.[118] Yet these powers are subject to some restriction—the Untouchability Offenses Act makes inroads by outlawing any disciplinary action directed to enforcement of untouchability.

113 Arts. 25-30, 350A, 350B.
114 *Bhau Ram v. Baij Nath*, A.I.R. 1962 S.C. 1476.
115 Representation of the People Act, Sec. 123.
116 *Kanji Gagji v. Ghikha Ganda*, A.I.R. 1955 N.U.C. 986.
117 *Bharwad Kama v. Bai Mina*, A.I.R. 1953 Saur. 133.
118 *Panduram v. Biswambar*, A.I.R. 1958 Or. 259.

The Representation of the People Act forbids the use of caste disciplinary machinery for political purposes.

In one sense the autonomy of the caste group is enhanced by the constitutional provisions. One of the basic themes of the Constitution is to eliminate caste as a relevant factor in the relationship of government to the individual—as subject, voter, or employee. The Constitution enshrines as fundamental law that government must regulate individuals directly and not through the medium of the communal group. The individual is responsible for his own conduct and cannot, by virtue of his membership in a caste, be held accountable for the conduct of others. Thus the imposition of severe police restrictions on specified castes in certain villages, on grounds of their proclivity to crime, was struck down as unconstitutional since the regulation depended on caste membership rather than individual propensity.[119] Similarly, the Supreme Court held unconstitutional a punitive levy on a communal basis since there were some law-abiding citizens in the penalized communities.[120] Thus it would appear that regulative or penal measures directed at certain castes are beyond the power of government; a caste, then, enjoys a new protection from regulation directed at it as a corporate whole.

The autonomy of the caste group is also affected by the provisions of the Constitution which guarantee the prerogatives of religious groups. Art. 26 guarantees to every "religious denomination or section thereof" the right to establish and maintain religious and charitable institutions, to own and administer property and to "manage its own affairs in matters of religion." It is in the application of these denominational rights that we can see the courts viewing castes in our sectarian model.

In *Sri Venkataramana Devaru v. State of Mysore* the government sought to apply the Madras Temple Entry Act to a temple which the trustees claimed was exempt as a denominational temple belonging to the Gowda Saraswat Brahmin community. The government contended that the temple was "only a communal and not a denominational temple" unless it could be established that there were "religious tenets and beliefs special to the community. . . ."[121] Finding that members of the community brought their own idols to the temple, that they recognized the authority of the head of a particular Math, and that others were excluded from certain ceremonies, the Supreme Court concluded that they were indeed a "religious denomination."

119 *Sanghar Umar Ranmal v. State*, A.I.R. 1952 Saur. 124.
120 *State of Rajasthan v. Pratap Singh*, A.I.R. 1960 S.C. 1208.
121 1958 (1) Mad. L.J. 109 at 114.

A denomination's right to manage its own affairs in matters of religion included not only matters of doctrine and belief but also practices regarded by the community as part of its religion—including the restriction of participation in religious services. However the court found that the temple-entry rights granted by Art. 25 included such denominational temples and overrode the denomination's rights to exclude untouchables completely. Nevertheless the denomination's rights are not entirely without effect. The court held that the denomination's rights may be recognized where "what is left to the public is something substantial and not merely the husk of it." Since the other occasions of worship were sufficiently numerous to make the public's rights substantial, the court was willing to recognize the right of the denomination to exclude all non-members during special ceremonies and on special occasions.

Thus we find that the caste's assertion of its denominational character enables it to enjoy certain prerogatives. But this view of the caste is of a sect or denomination; their claim rests not on their position in the Hindu order, but on their distinctiveness.

In a recent and important case the Supreme Court held that the power to excommunicate for infractions of religious discipline is part of the constitutional right of a religious denomination to manage its own affairs in matters of religion.[122] The case, involving excommunication from a Muslim religious sect, held unconstitutional a Bombay act making excommunication a criminal offense. This does not imply a similar protection for caste groups as such; it would presumably protect only those that can qualify as religious denominations. It probably would not protect excommunication that was merely social and was not intended "to preserve the essentials of religion." Even if the excommunication were a matter of religious discipline, it would probably not be constitutionally protected if the breach of discipline involved failure to observe untouchability or if its purpose were political.

Once a caste is recognized as a religious denomination, then as a religious group it is presumably a "minority . . . based on religion" and as such enjoys a constitutional right under Art. 30 (1) "to establish and administer educational institutions of [its] choice." Art. 30 (2) provides that in granting aid to educational institutions the state shall not "discriminate against any educational institution on the ground that it is under the management of a minority, whether based

122 *Saifuddin Saheb v. State of Bombay*, A.I.R. 1962 S.C. 853.

on religion or language." (On the other hand, once it receives state aid it cannot discriminate on caste lines in admissions).[123]

To the extent that its religious (or other) distinctiveness can be construed as giving it a "distinct . . . culture of its own" the caste group may merit the protection afforded by Art. 29 (1) which provides that "Any section of . . . citizens . . . having a distinct language, script, or culture of its own shall have a right to conserve the same." Art. 29 (1) has rarely been considered by the courts independently; usually it has been mentioned in the context of the assertion of rights under Art. 30 (1). Apparently every religious denomination could qualify as a cultural group. Their right to "conserve" their culture clearly includes the right to transmit this culture. In the Bombay Education Society case "the right to impart instruction in their own institutions to children of their own community in their own language" was referred to as the "greater part of the contents of Art. 29." Recently the Supreme Court has indicated that this right extends to political action to preserve the distinctive characteristics of the group.[124] The potential protections of Articles 29 and 30 have been greatly enhanced by several recent Supreme Court cases which refer to these rights as "absolute"[125]—in contrast to most fundamental rights which are subject to "reasonable restrictions" in the interests of the public.

Presumably, then, any group that can characterize itself as either "a minority based upon religion" or a "section of citizens with a distinct . . . culture" may qualify for a wide range of protections. The characterization of the caste group by the sectarian model puts it in the constitutionally privileged status of a religious denomination. Once so characterized the group enjoys, to some extent at least, constitutional protection not only in its right to control its religious premises, but also to excommunicate dissidents, to maintain educational institutions free from governmental regulation which is not in *its* interest, and to "conserve" its distinctive culture by political means. Of course this applies only to those castes which could qualify as "religious denominations or sections thereof." However it seems unlikely that any government could allow these privileges to some castes and not others; and in any event it seems probable that all castes could

123 Art. 29 (2).

124 *Jagdev Singh v. Pratap Singh*, A.I.R. 1965 S.C. 183.

125 *Rev. Sidhrajbhai Sabbaj v. State of Gujerat*, A.I.R. 1963 S.C. 540; *Jagdev Singh v. Pratap Singh, supra* note 124. Cf. the less stringent views in *In re Kerala Education Bill*, A.I.R. 1958 S.C. 956; *Dipendra Nath v. State of Bihar*, A.I.R. 1962 Pat. 101, 108; *Arya Pratinidhi Sabha v. State of Bihar*, A.I.R. 1958 Pat. 359.

produce enough distinctive ritual or doctrine to qualify as denominations. This view of caste would seem to present difficulties to those proponents of the casteless society who advocate prohibition of communal charities and educational institutions.[126]

New Models for Old

Before suggesting some of the implications of this new dispensation, let us summarize briefly the way in which castes have been characterized by the law since independence. There has been no refusal to recognize the claims of caste; nor, once it is recognized, is it treated as a strictly non-religious grouping. Caste is still recognized and so is its religious character. However this character is visualized in a new way.

Since independence, the sacral view has been drastically impaired. In the personal law, *varna* distinctions (and with them the necessity of determining the *varna* standing of caste groups) have been eliminated—at least for the future, although these matters persist for a time. In the area of precedence and disabilities, there has been a withdrawal of all support for precedence based on ritual standing—provisions against caste discrimination, the abolition of untouchability, temple-entry laws. The government has now reversed its previous policy by intervening to prevent the imposition of disabilities and to give preferential treatment to those at the bottom of the socio-religious order. In administering these preferences, the courts have avoided giving recognition to this sacral view, at least when dealing with transactions with Hinduism, although the shadow or mirror of it appears in the definition of untouchables and it appears in an attenuated form in a few instances involving non-Hindus.

Even where the sacral order remains implicit, the religious content remains relatively diffuse and indefinite. But in other post-independence developments we see caste given a more positive religious treatment. A different image of the caste group is found alongside the remnant of the older one. This view sees the caste group as a religious unit, denomination or sect distinguished by its own idiosyncratic cult, doctrine and ritual. This we found in the cases involving temple-entry and in the protection of denominational rights.

Finally, there is the associational model which sees the caste as

[126] See, e.g., Shriman Narayan, "Socialist Pattern and Social Revolution" in Myron Weiner, ed., *Developing India*, University of Chicago, 1961, vol. 2, p. 75; Irawati Karve, *Hindu Society—An Interpretation*, Poona, 1961, p. 154 ("Contributions to funds intended to benefit castes or communal groups should be stopped by law").

an association characterized by a complex of features (including but not exclusively religious ones). We find this view strengthened since independence. The area of caste autonomy where it previously prevailed is largely unimpaired and in some respects enhanced. It remains in a minor way in the personal law area. It prevails in the area of preferences where it is the economic, occupational and educational aspects of the caste group that are stressed. It has been accepted in the cases involving group membership, at least within Hinduism.

We can, in short, say that there has been a decline in the use of the sacral model and an increasing reliance on the sectarian and associational models to characterize the religious aspects of caste groups. We may think of the courts during the British period as conceiving of castes primarily as graded components in the sacral order of Hinduism and secondarily as autonomous associations. In administering the law, they were sensitive to vertical differences between castes (expressed in *varna* distinctions and pollution) as well as horizontal differences (expressed in sectarian distinctiveness and in caste autonomy). The Constitution now forbids them to give recognition and support to the vertical, hierarchical distinctions; but other constitutional provisions (guarantees to religious denominations and of the integrity of groups) enjoin the courts to recognize and support the horizontal distinctions. The Constitution can be read as the "disestablishment" of the sacral view of caste—the courts can give no recognition to the integrative hierarchical principle; yet it recognizes the religious claims of the component parts. Claims based on the sacral order are foreclosed (in personal law reform, temple-entry, abolition of untouchability, de-recognition of exclusionary rights), but claims based on sectarian distinctiveness or group autonomy are not. The British system worked the attrition of "the tangled networks of medieval Indian civilization"[127] by substituting unified radial or pyramidal networks of cultural communication (among them the court system). While the new dispensation continues this unification in some respects, the disestablishment of the predominant organizing model of cultural unity may give new vitality to lesser traditions and new scope for innovation.

But the substitution in large measure of the sectarian for the sacral view of caste may leave unsatisfied two groups: those who would have the state refuse to recognize any connection between caste and religion

[127] McKim Marriott, "Changing Channels of Cultural Transmission in Indian Civilization" in Verne F. Ray, ed., *Intermediate Societies, Social Mobility and Communication: Proceedings of the 1959 Annual Spring Meeting of the American Ethnological Society*, p. 72.

and those who would have the state promote a unified monolithic Hindu society.

Does India's secularism require that the sectarian view of caste be avoided? Government is forbidden to confer recognition of hierarchic superiority; does the Constitution similarly withhold a mandate to recognize claims of religious distinctiveness of caste groups? A refusal to recognize such claims would perhaps be gratifying to those whose refined notions of Hinduism detach it entirely from caste practices. But if such a distinction is made by many educated Indians, it should be acknowledged that large numbers of people regard their caste practices as imbued with religious values. So long as such a condition prevails, the sectarian view of caste protects them from the imposition of a view of "religion" alien to them. Similarly the withdrawal of official recognition and support for the sacral order of Hinduism may be offensive to some of those who see it as divinely ordained and appropriate for a Hindu state. Yet recognition of the sacral order encounters the same objection of imposing a view which might violate the understanding of many groups.

On the whole, the present arrangement seems a fair middle course. It implements freedom of religion and the integrity and autonomy of the group by permitting the group to choose the distinctive traits that it wishes to emphasize in characterizing itself. It avoids government promulgation of an official over-all view of the Hindu social order with which component groups may not agree. Thus the law's combined use of the associational and sectarian models of the caste group is compatible with the constitutional commitments to voluntarism, withdrawal of recognition of the rank ordering of groups and respect for the integrity of groups within the society. In most respects, the present legal view of the religious aspects of caste strikes a balance which combines the commitment to a far-reaching transformation of the social order with the commitment to permit the widest range of freedom in the present. Remnants of the sacral view persist and in some cases raise serious constitutional questions of religious discrimination and freedom of religion which have as yet received no definitive answer. One expects that before long the courts will address themselves to these questions and will employ views of caste that are compatible with voluntarism and pluralism.[128]

[128] Two recent Supreme Court cases have important bearings on the matters discussed here but were received too late for inclusion. They are: *Chitralekha v. State of Mysore*, A.I.R. 1964 S.C. 1823 (on the use of caste criteria in selecting backward classes); *Punjabrao v. D. P. Mershram*, III *Maharashtra Law Journal* 162 (1965) (on the exclusion of Buddhists from the Scheduled Castes).