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Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India

By
Pratibha Jain*

INTRODUCTION

Can domestic legislation honor both the rights of women and the rights of cultural minorities within liberal political systems?¹ Or are the two goals necessarily at odds? Policy makers debate the role of multiculturalism in modern liberal societies and its effect on rights of women. Determining the most constructive approach for a state seeking to accommodate these competing interests requires that policy makers be sensitive to the needs of various cultural communities as well as to the needs of women or other marginalized populations. Perhaps nowhere is this challenge as currently significant as it is in India, a majority Hindu nation that is also home to 138,000,000 Muslims—the third largest Muslim community in the world—and 24,000,000 Christians,² and which has seen recent and vehement upsurges in both demands for minority rights and concomitant violence against religious minorities.

This paper studies the impacts of granting group rights to religious and cultural minorities within a nation-state, recognizing that such an entity can be comprised of multiple nations,³ and examines the methods legislators and judges

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1. For the purpose of this paper, I assume legal and political equality for all citizens to be a basic tenet that defines liberal democracies. For example, India guarantees equal rights to its citizens irrespective of race, gender, ethnicity, or language through its Constitution, whereas theocratic states have legal structures that reflect the religious laws of the majority religious communities in those countries.

2. Census of India, DATA ON RELIGION 2001, at http://www.censusindia.net/religiondata/Religiondata_2001.xls.

3. Sarah V. Wayland explains that a nation-state requires both "common culture, broadly defined . . . [and] bounded territorial space A 'nation-state' exists when the boundaries of the nation, or people, are the same as the boundaries of the state, or political entity." Sarah V. Wayland, *Citizenship and Incorporation: How Nation States Respond to the Challenges of Migration*, 20 FLETCHER F. WORLD AFF. 35, 36 (1996).

in India have used to navigate this balancing act as an example. India is a multicultural and pluralistic democracy, which through its Constitution provides a comprehensive framework for protecting and promoting the rights of religious, cultural, and linguistic minorities. Its successes and failures in balancing multiculturalist goals against women's rights are instructive of viable and non-viable constitutional, legislative, and judicial strategies a state might adopt to protect both the rights of women and the rights of cultural minorities.⁴

Part II outlines the debate surrounding the role of multiculturalism in modern liberal societies and its effect on the rights of women. Part III briefly discusses terminology and then deconstructs certain assumptions within the above debate as to the meanings of *culture*, *multiculturalism*, and *group rights*. Part IV considers multicultural approaches to governance, with India as a case study of successes and lessons for the future. Part V explores possible solutions, including a constitutional amendment that would affirm the rights of women within a scheme that still protects group rights.

I. THE DEBATE

A classical liberal rights scheme bestows rights on individuals rather than groups. These rights are generally "negative" rights such as freedom from government interference in one's speech, religion, and political ideology, or the right to freedom from discrimination. Barry Brian explains that this "strategy of privatization" can only conceive of individuals, and not groups, as possessors of human rights, because providing individuals with civil and political rights against state action gives them the necessary protection to promote their cultural identities without sacrificing either their individual rights or their right to culture.⁵

Those concerned with maintaining the existence of minority cultures within a dominant national majority culture worry that such a classical scheme based on individual rights cannot adequately protect minority cultures. They seek the implementation of specific legal obligations on the state not only to abstain from interfering with the group rights of minorities but also to provide affirmative support for the enjoyment of such rights, which range from negative rights such as the right to group existence⁶ and the right to equality and freedom from discrimination, to positive rights such as the right to establish autonomous regimes through their right to self-determination and fulfillment of social and economic rights.

4. See generally Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHIL. J. INT'L L. 35 (2001).

5. BARRY BRIAN, *The Strategy of Privatization*, in *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 19-62 (2001).

6. The right to group existence is established in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, G.A. Res. 2670, 3 U.N. GAOR, pt. 1, U.N. Doc. A/810, p. 174, 78 U.N.T.S. 277 (criminalizing "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such").

Without legal protection, group-rights advocates worry that minority groups will always be at a disadvantage within the wider society.⁷ In a rapidly changing world, in which cultural identity forms states, and in which mass media can penetrate even the most isolated village, minority cultures are frequently undermined by social and economic forces beyond their control and the control of their governments, no matter how sympathetic. These advocates argue that only when states recognize group rights as necessary human rights will cultural minorities be able to survive in a global environment that is often hostile to their very existence.⁸

Article 27 of the International Convention on Civil and Political Rights (ICCPR) exemplifies this conception of group rights, guaranteeing “ethnic, religious, or linguistic minorities . . . the right . . . to enjoy their culture, to profess and practice their own religion, or to use their own language.”⁹ Couched in both individualistic and collective terms,¹⁰ the notion of group rights has been used to advocate for the governance of minority groups by separate and culturally specific laws. In India, such group rights include personal law regimes, the concept of which can be traced back to the colonial era wherein the early colonial states promised the various religious communities their own set of laws to govern “inheritance, marriage, caste, and other religious usages or institutions.”¹¹ Personal laws are sometimes used as cultural defenses to criminal prosecutions and as justification for the observation of cultural practices that have a tendency to discriminate against women.¹² Such discriminatory personal or group laws govern women in various Indian communities.¹³

Feminist legal scholars worry about the impact group rights have on the rights of women.¹⁴ Because group rights provide the leaders within a group the power to discriminate against the weaker members within the group, a legal commitment to group rights may prove detrimental to women.¹⁵ Combined with the fact that defining culture seems to be the prerogative of the leaders

7. See generally BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (2000).

8. See, e.g., Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215 (2004).

9. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 27, GA res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171 [hereinafter ICCPR].

10. See HENRY J. STEINER & PHILIP ALSTON, *Comment on Autonomy Regimes*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 992-93 (Henry J. Steiner & Philip Alston eds., 1st ed. 1996).

11. Kunal Parker, *Observations on the Historical Destruction of Separate Legal Regimes*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA—A CALL TO JUDGMENT 184 (Gerald James Larson ed., 2001).

12. See, e.g., Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

13. See Kirti Singh, *Obstacles to Women's Rights in India*, in HUMAN RIGHTS OF WOMEN—NATIONAL & INTERNATIONAL PERSPECTIVES 375-396 (Rebecca Cook ed., 1994).

14. See generally Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996).

15. See generally, Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537 (2004).

within the group, who are traditionally men, group rights appear juxtaposed against women's rights. In India for example, Muslim fundamentalist leaders historically used the personal laws as tools for denying equality to Muslim women, while "[t]he state continued to privilege group rights over the equality rights of Muslim women, rather than insisting on reform."¹⁶ Granting group rights to preserve patriarchal traditional cultures thus sometimes appears at odds with a feminist project.

The ever-widening wealth disparity between first-world and third-world nations, increasing global poverty, international market integration, and globalization has spawned massive trans-border displacement of peoples and cultures. Multicultural populations are a reality facing most states today, forcing them to utilize political and legislative tools to balance the rights of women with the cultural rights of minority groups. Since its independence, India has relied on a two-tier system of personal laws that are specific to particular religious communities and universal civil codes that apply to all citizens. While the latter appear to protect the rights of Indian women to equal treatment and equal opportunity, the personal laws of most religious communities have historically undercut women's access to judicially enforceable civil rights.

II.

DEFINITIONS AND ASSUMPTIONS

Before proceeding with an exploration of the successes and failures of various Indian legislation and case law that address the balance between minority group rights and the rights of women, I would like to define a few concepts that are crucial to this paper's exploration.

A. *Culture*

None of the international conventions that purport to protect or promote group rights for minority cultures have defined what they mean by "culture," however, it is necessary to explain exactly what is being protected. J. Oloka-Onyango and Sylvia Tamale believe that the most important aspect of culture is that it is a "dynamic and evolving feature of human action," thought, and identity.¹⁷ The United Nations Development Programme echoes this notion, asserting that "[c]ulture is not a frozen set of values and practices. It is constantly recreated as people question, adapt and redefine their values and practices to changing realities and exchanges of ideas."¹⁸ Such a progressive understanding

16. VRINDA NARAIN, *GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA* 107 (2001).

17. J. Oloka-Onyango & Sylvia Tamale, *"The Personal is Political" or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691, 707 (1995).

18. UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD* 4 (2004).

of culture as dynamic and disunited appeals to those who favor granting group rights to minorities.¹⁹

I would, however, contend that the term *culture*, when used to determine the rights or privileges to be given to any community, must refer to those practices that have a positive effect on the wellbeing of all group members and not just the dominant few.²⁰ This assertion is based on the basic goal of liberalism: ensuring the welfare of all within a community, without regard to gender, race, ethnicity, religion, or culture.

Moreover, one must take care not to essentialize culture. By describing cultural practices in homogenous terms, one ignores the relativism of these practices. Cultural relativism must be considered in any discussion on the power relationships within a culture and in determining who has the right to define what culture means. By denouncing acts practiced by certain members of a community, we help in informally institutionalizing these practices. Traces of this trend can be found in the revival of fundamentalism in some religions, which is premised on protecting the communities from outside influences alleged to desire the destruction of these groups' religious and cultural heritages. For example, after the Indian Bhartiya Janata Party (BJP) hijacked the agenda of a uniform civil code from the progressive liberals and feminists, the Indian Muslim community has more stiffly resisted a move towards formulation of a uniform civil code.

B. Multiculturalism and Gender Justice

Given that multiculturalism is a reality in almost every nation and that some traditional cultures have historically oppressed women, governments bear the burden of formulating policies that protect women's rights within a multicultural framework. Post-independence India has a strong democratic tradition and a commitment to protecting individual civil and political rights. Yet Indian society is also one of the world's most culturally diverse, with innumerable linguistic, cultural, and religious groups and influences from Dravidian, Aryan, Mughal, British, and recently U.S. traditions. Due to the sheer diversity of the Indian populace, Indian policy makers have faced a tough challenge in providing space to various minority groups to prosper while also ensuring that the individual rights of its citizens, including women, are protected.

Will Kymlicka believes that it is possible to protect multicultural ideals within a liberal democratic framework. On the importance of culture to an individual's development of self-identity, he notes: "Liberal values require both individual freedom of choice and a secure cultural context from which individuals can make their choices. Thus liberalism requires that we can identify, protect,

19. See generally, Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1992).

20. See generally, David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143 (1995-96).

and promote cultural membership, as a primary good.”²¹ Therefore, the importance of culture and group identity to an individual’s development as a participating citizen requires leaders of multicultural liberal societies to protect both individuality and group identity.

There is merit to the argument made by “multiculturalist liberals” like Kymlicka, that membership in a group with its own language and history is important to an individual’s sense of self and self-respect. But, as I argue in the beginning of this Article, within a liberal framework, no justification exists for granting group rights to minorities. Is there then any means of achieving the balance between the competing interests of multiculturalism and individual rights, including women’s rights? Yes. The legitimate goal of protecting minority cultures can be accomplished by giving minority groups privileges, instead of rights, to employ necessary means aimed at preserving their group identities without infringing on the individual rights of those who constitute these groups. *Rights* differ from *privileges* in the sense that a fundamental right granted under a constitution imposes a corresponding duty on the state to protect that right. A privilege, on the other hand, does not impose any such obligation on the state. It merely gives an individual the liberty to do something without interference from the state; in other words, an individual has no legal duty to refrain from doing that privileged action.²² Granting privileges to groups for the preservation of their religious or cultural identity, does, however, require that the limits to such privileges be defined. The limits must be in consonance with the purpose of granting these privileges in the first place, that is, to further the wellbeing of an individual. In this sense, any practice, whether cultural or religious, that hampers the growth or well-being of an individual within that minority culture *cannot* be legally protected within a rights-based framework.²³ So, in the example of India, even the personal laws would be subject to the test of fundamental rights enshrined in the Indian Constitution, including the right to equality.

An ideal strategy, then, would be for the Indian legislature to honor the Constitution by drafting a uniform *secular* civil code that meets the test of equality guaranteed under the Constitution, providing individuals with the option to be governed by their personal laws. This uniform civil code would achieve twin objectives: protecting the individual rights of citizens from being subsumed by group rights, and offering individuals the privilege to choose to be governed by their personal laws. In addition, the code would put pressure on minority groups and less powerful individuals within these groups, whether they are women or other sub-groups, to take the initiative to bring their personal laws into parity with the secular civil code with regard to the equality of rights to all members within the group.

21. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 169 (1989).

22. For further discussion on the difference between *rights* and *privileges*, see WESLEY NEWCOMB HOFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 71 (1923).

23. For a discussion of minority rights in an Asian context, see Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

The above discussion regarding privileges underlies “reasonable pluralism,”²⁴ which aims to create a civic nation in which the state protects diverse religious or cultural practices so as to promote harmonious co-existence of majority and minority groups, as well as the well-being of all individuals. Reasonable pluralism incorporates the conceptions of tolerance and recognition of diversity among views. However, it restricts cultural and religious values to the private sphere, the consensus being the norm for regulating political associations. Thus, a state pursuing this model of liberalism could not authorize practices that are repugnant to the well-being of individuals—men or women.

Granting group rights in an unrestricted fashion would protect some cultural practices that have historically oppressed women. Condoning the oppression of some group members through legally protecting those cultural practices is at odds with a liberal rights agenda minded towards ensuring equal rights for all citizens. There is no doubt that globalization has profoundly influenced multiculturalism, and controversies and disagreements are bound to surround the contours of a multicultural society. In the words of Aung San Suu Kyi, “[i]t is precisely because of the cultural diversity of the world that it is necessary for different nations and peoples to agree on those basic human values which will act as a unifying factor.”²⁵ We ought to ensure that multiculturalist notions conform to universal human rights norms, thereby ensuring women’s rights within a protected culture or group.

III.

MULTICULTURAL APPROACHES TO LAW AND GOVERNANCE

A. *The Three Multicultural Approaches to National Governance: Assimilation, Integration, and Social or Cultural Pluralism*

1. *Assimilation*

An assimilationist approach imposes the dominant national culture on minority groups. Some feminist scholars believe that this is the best strategy that western states can follow to ensure the protection of rights of women within immigrant minority groups. Assuming that at least some forms of gender discrimination are culturally-based, Susan Moller Okin suggests that women in patriarchal minority cultures might benefit from integration into a less patriarchal majority culture.²⁶ I do not believe, however, that such drastic measures would necessarily be in the interest of women within minority groups in such countries. First, any such attempt would be met with strong resistance within the community, which might result in strengthening the cultural practices, thus putting a stronger pressure on the women in these groups to observe those oppressive

24. JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1993).

25. Aung San Suu Kyi, *Empowerment for a Culture of Peace and Development*, Address to the WCCD in Manila (Nov. 21, 1994), at <http://www.ibiblio.org/freeburma/assk/assk3-2c.html>.

26. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 22-23 (Joshua Cohen et al. eds., 1999). See also Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma*, 96 COLUM. L. REV. 1093 (1996).

cultural practices. A state can do very little to control the exercise of cultural practices in the private sphere; it could not, for example, realistically prevent a Muslim woman from wearing a veil inside her home. Second, even if the government can implement strong measures to control such practices and to assimilate minorities into the mainstream culture, women who have often lived in a protected environment might find themselves more vulnerable and exposed. If a state were suddenly to proscribe a particular cultural practice with gender implications, a woman might not consider herself liberated. If, however, the practice were to be weakened over a period of time through giving her tools for growth such as education and economic independence, the movement for change would come from within rather than without, increasing her ability to make a meaningful choice.

As an example, consider the interpretation of Muslim personal laws in India, where Muslims are a minority, as compared to other Muslim countries. In India, attempts to modernize Muslim personal laws, especially the laws affecting women's rights, have met with stiff resistance within the Muslim community. Courts in other Islamic countries, however, have modernized their interpretations of Muslim personal laws without any outcry from the religious clerics or the community in general.²⁷

Thus, the key to reconciling the goals of multiculturalism and feminism lies not in asking women from minority cultures to assimilate, but rather recognizing that multiculturalism and feminism are neither polar opposites nor mutually detrimental. Relativism exists within the discourses of both multiculturalism and feminism. Western feminists who have branded non-western cultures as sexist and inferior to their western counterparts in assaults against multiculturalism are in no sense less relativist than those outside of western societies who use the rhetoric of culture *qua* group rights to maintain patriarchal systems.²⁸ Arguments on both sides harm the women's rights movement.²⁹

2. *Integration*

An integrationist approach asks citizens to restrict the practice of their minority religion, language, or ethnic heritage to the private domain. Article 44 of the Indian Constitution, which directs the state to create a uniform civil code, is representative of an integrationist approach towards multiculturalism, as it aims to create a civil code that applies to all communities in India, irrespective of

27. See, e.g., A.G. Noorani, *Shah Bano: Bangladesh Shows the Way*, in SHAH BANO AND THE MUSLIM WOMEN'S ACT A DECADE ON: THE RIGHT OF DIVORCED MUSLIM WOMEN TO *Mataa*, Readers and Compilations Series 25-26 (Women Living Under Muslim Laws, Readers and Compilations Series, 1998) (noting that the High Court Division in Bangladesh has interpreted Aiyats 240-242 of Quran to hold that a divorced woman has the right to receive a reasonable sum for maintenance for an indefinite period beyond *iddat*).

28. See generally Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

29. See generally Catherine Powell, *Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201 (1999).

religion, while simultaneously protecting individuals' right to practice their religion privately.³⁰

3. *Social/Cultural Pluralism Approach*

A social or cultural pluralism approach allows the existence of different religious, cultural, and ethnic principles in the public sphere. India's framework of separate personal laws for various religious communities is representative of this model and is also a good example of how a multiculturalist approach to law and governance in India has resulted in undermining women's rights. As discussed later in this Article, some people have used the rhetoric of cultural pluralism mainly for political gains without taking into account the suffering of the weaker members of the minority groups that enjoy the protection of multicultural policies.

B. *Multicultural Governance in India*

The task of creating a democratic system of governance after India's independence was enormous. The sheer linguistic, ethnic, religious, racial, and cultural diversity of the Indian populace posed special challenges to the constitutional framers, who understood that national unity and inter-group harmony would require protection for minority groups. While the members of the Constituent Assembly agreed on the need for a solid framework of fundamental rights, they did not agree on how to blend a scheme of civil and political rights with the concurrent challenges of forging structures for economic and social governance. It is in this context of formational dilemmas that the contemporary debate surrounding multiculturalism and its impact on women's rights in India needs to be examined.

1. *The Indian Constitution*

Post-independence India followed a policy of cultural pluralism by maintaining systems of separate personal laws for Hindu, Muslim, and Christian communities, while concurrently assigning itself the goal of working towards a uniform civil code. Including a Declaration of Rights was very important to the early drafters. As Granville Austin noted: "India was a land of communities, of minorities, racial, religious, linguistic social and caste. . . . Indians believed that in their 'federation of minorities' a declaration of rights was as necessary as it had been for the Americans."³¹

When addressing minority group safeguards in the Draft Constitution to the Assembly, Dr. B.R. Ambedkar, Chairman of the Drafting Committee, observed:

I have no doubt that the Constituent Assembly has done wisely in providing such safeguards for minorities as it has done. In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate

30. INDIA CONST. art. 44.

31. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 54 (1999).

themselves. A solution must be found which will serve a double purpose. It must recognize the existence of minorities to start with . . . The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish.³²

The group rights granted to minorities, including restricting practices that were per se discriminatory against women, were not absolute, but rather were subject to state intervention. In sub-committee meetings, some members opposed allowing the free practice of religion and thought the definition of “practice” was too wide, since this could include such anti-social practices as *devadasi*,³³ *pardah*,³⁴ and *sati*.³⁵ Due to protest by the sub-committee members, the Advisory Committee on Fundamental Rights altered the Minorities Sub-Committee’s provisions, and in its own report instructed that the right to practice religion freely should not prevent the state from making laws providing for social welfare and reforms, including laws protecting the rights of women, a provision established in Article 15 of the Constitution.³⁶

Consequently, the drafters created fundamental constitutional rights with an explicit recognition of the need to protect group rights as well. Article 29, for example, protects the rights of groups to preserve their language, script, and culture and prohibits discrimination in access to public educational institutions based on religion, race, caste, or language.³⁷ Article 30 protects the right of religious and linguistic minority groups to establish educational institutions.³⁸ Other articles of the Constitution that guarantee certain fundamental rights to all citizens also operate as safeguards for groups, such as equality before the law (Article 14), freedom from discrimination on the basis of religion, race, caste, sex or place of birth (Article 15), and equal opportunity in public employment (Article 16).³⁹ Articles 29 and 30 bestow a positive right on groups to preserve their culture, whereas Articles 14 and 15 are couched in more individualistic terms, granting negative rights to individuals to protect them from excesses of the State.

While the negative protections from discrimination based on cultural affiliation appear in the early articles, the possibility of a uniform civil code that would ensure all citizens’ equal rights to freedom from oppression appears in Part IV of the Constitution. This Part, named the “Directive Principles of State Policy,” contains a range of directives to the state to seek economic, social, and

32. Constituent Assembly of India—Volume VII (Nov. 4, 1948), available at <http://parliamentofindia.nic.in/ls/debates/vol7p1b.htm>.

33. The practice of marrying a woman to a deity or temple.

34. *Purdah* literally means screen or veil. Women observing *purdah* cover themselves from head to toe and avoid the male gaze at home by remaining behind curtains and screens. See, e.g., Kings College History Department, *Purdah*, at http://www.kings.edu/womens_history/purdah.html.

35. A widow observing *sati* immolates herself on her husband’s funeral pyre.

36. INDIA CONST. art. 15 (prohibiting the state from discriminating “against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them” and providing that “[n]othing in this article shall prevent the State from making any special provision for women and children.”).

37. *Id.* art. 29.

38. *Id.* art. 30.

39. *Id.* arts. 14, 15, 16.

cultural protections for Indian citizens. Article 41, for example, addresses the right to work, education, and public assistance.⁴⁰ Article 38A addresses access to justice and free legal aid.⁴¹ Article 44 establishes the goal of a uniform civil code, though its language, like the language of the other articles in Part IV, is only exhortatory: "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."⁴²

The drafters hoped that a civil code would ensure harmony between groups and strengthen the secular fabric of the country. Instead, contemporary India suffers from internal strife and communal violence. The goal of harmonious multicultural co-existence has not yet succeeded in India where manifestations of continued inter-group tensions include the demolition of the Babri Masjid by a Hindu mob in 1993, followed by the Bombay Riots, in which over 400 persons were killed; the murder of a Christian missionary and his two sons by a Hindu mob in 1999; the Best Bakery case, in which eleven Muslims and three Hindus were burned alive in March 2002 to avenge the death of fifty-eight people on a train carrying Hindu activists in February of the same year; and the attack by Muslim terrorists on a Hindu temple in Gujarat that killed thirty persons in September 2002. Moreover, Indian leaders have failed to prioritize gender justice within the governance system, leading to a lack of protection for women whose communities operate under the personal religious laws. More recently, support for the adoption of a uniform civil code has not been based on a recognition that women's rights might otherwise suffer under the personal laws. Rather, the support, especially from the Hindu Right, stems from a desire to limit the rights of cultural minorities. Ratna Kapur and Brenda Cossman have observed:

It was this dichotomized discourse of the debate that inadvertently allied the women's movement with the Hindu Right and its vicious attack on minority rights. Despite the efforts of some feminist activists and organizations to distinguish their position, within the broader political discourse the positions were seen as one and the same. Feminist efforts to challenge the oppression of women within the private sphere of the family were appropriated, and transformed to support the communalist discourse of the Hindu Right.⁴³

2. *Legislation*

As discussed above, the Indian Constitution exhorts the state to create a uniform civil code. Indeed, the idea of a uniform civil code predates the Constitution to the time of the British rule in India. Historians have noted that the institutionalization of separate laws reinforced the boundaries between minority communities and solidified identities along religious affiliations.⁴⁴ Instead of

40. *Id.* art. 41.

41. *Id.* art. 39A.

42. *Id.* art. 44; see also P.M. Bakshi, *The Constitution of India: with comments & subject index / selective comments* (1992).

43. RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES—FEMINIST ENGAGEMENTS WITH LAW IN INDIA* 64 (1996).

44. See Maitrayee Mukhopadhyay, *Between Community And State: The Question Of Women's Rights And Personal Laws*, in *FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA* 108-129 (Zoya Hasan ed., 1994).

moving toward a secular, equality-based legal system, the recognition of personal laws under the guise of protecting minorities from a dominant majority culture helped institutionalize patriarchal traditional practices that disadvantage Indian women. In particular, support for personal laws relating to polygamy, divorce, property inheritance, and maintenance, all of which directly impact the lives of women, lies at the center of the historical resistance to the implementation of a uniform civil code.

At present, India does not have a uniform civil code that would apply to all citizens irrespective of their religious or cultural identity.⁴⁵ However, all Indians can choose a civil marriage under the Special Marriage Act of 1954⁴⁶ irrespective of their religion. Should a couple register under this Act, they are bound by the Act's provisions, along with the provisions of the Indian Succession Act,⁴⁷ which relates to the succession of property, instead of their respective personal laws.⁴⁸ If a couple does not register under the Special Marriage Act, their respective personal laws apply. Thus the Special Marriage Act is an "opt out" provision for individuals who do not want to be bound to the marriage rules of their religious communities. Other examples of optional civil codes are the Guardian and Wards Act of 1890,⁴⁹ which allows civil courts to appoint a guardian for a minor. While the court is required to consider the minor's religion and governing personal laws, the minor's overall welfare is paramount. Also, the Medical Termination of Pregnancy Act of 1971⁵⁰ permits any woman in India to have an abortion irrespective of her religious or cultural identity.

Legislative reforms have followed different courses within the various religious communities. The first progressive legislation for women's rights related to restricting the practice of child marriages. Child marriage was a common practice among most Indians during the British rule, and various leaders attempted to abolish the practice. The first attempt was the Indian Christian Marriage Act of 1872, which proscribed marriage to girls under the age of twelve.⁵¹ Due to this Act's social ineffectiveness, in 1891 the government passed the Age of Consent Act to prevent the consummation of marriages before the age of twelve.⁵² Despite different practices across the various religious communities and avowed dissatisfaction amongst orthodox Hindu and Muslim classes, all political parties ultimately accepted the legislation.⁵³ Further, in

45. Criminal laws, on the other hand, are applicable irrespective of the caste, sex, religion or culture.

46. Special Marriage Act, No. 43 (1954) (India).

47. Indian Succession Act, No. 39 (1925) (India).

48. If two Hindus marry they may choose to be bound instead by the Hindu Succession Act No. 30 of 1956.

49. Guardian and Wards Act, No. 8 (1890) (India).

50. Medical Termination of Pregnancy Act, No. 34 (1971) (India).

51. Indian Christian Marriage Act, No. 15 (1872) (India).

52. Previous to this reform, a husband could legally cohabit with his wife if she was at least ten years old.

53. Shahida Lateef, *Defining Women through Legislation*, in *DEFINING WOMEN THROUGH LEGISLATION IN FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA* 43 (Zoya Hasan ed., 1994).

1929, the Child Marriage Restraint Act raised the minimum marrying age for girls to fourteen.⁵⁴

The Muslim Personal Law (Shariat) Application Act of 1937⁵⁵ was the first women's-rights legislation targeted at Muslim communities. The Shariat Act clarified and codified civil marriage laws to ensure the protection of divorced Muslim women's inheritance rights.⁵⁶ In support of the Bill, a Member of Parliament, Mr. Abdul Qaiyam, a Muslim himself, noted, "the *Shariat* Act [is] the result and the outcome of the great awakening that has taken place in the Muhammadan community in India . . . to restore all the rights which were granted by the Koran to Muslim women so as to put them on terms of absolute equality with men."⁵⁷ Another Member of Parliament, Mr. M.S. Aney from Berar, suggested doing away with the office of the *qazis*, which registers Muslim marriage deeds and conducts Muslim marriages, given that the Muslim community had turned to secular legislative remedies to this aspect of women's oppression. The Dissolution of Muslim Marriage Act of 1939,⁵⁸ giving Muslim women a right to unilateral divorce, was the last progressive legislation in favor of Muslim women in India. Previous to the passage of the Dissolution of Muslim Marriages Act, the Gazette of India noted:

There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India.⁵⁹

The Act was compiled as an amalgamation of four different schools of jurisprudence under Islam, "picking the most liberal features from each of them."⁶⁰

Civil legislation impacting the rights of women affected Muslim communities before addressing the rights of women under the Hindu personal laws. The second Hindu Law Committee appointed in 1944 to look into legislative reforms for a comprehensive code of marriage and succession submitted its recommendations for enacting a Hindu Code in 1947.⁶¹ Committee reports indicate that improving women's status was the principle motivation for changes proposed to the Hindu Law in the draft code.⁶² Accordingly, the Committee recommended

54. Child Marriage Restraint Act, No. 19 (1929) (India).

55. Muslim Personal Law (Shariat) Application Act, No. 26 (1937) (India).

56. *Id.*

57. 1939: I LEGISLATIVE ASSEMBLY DEBATES (OFFICIAL REPORT), 621 (1939).

58. Dissolution of Muslim Marriages Act, No. 8 (1939) (India). *See also* Lateef, *supra* note 53..

59. *Statement of Objects and Reasons Issued With the Bill Which Became the Dissolution of Muslim Marriages Act, 1939*, GAZETTE OF INDIA, 1936, Part 5:154, *reprinted in* SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON: THE RIGHT OF DIVORCED WOMEN TO *Mataa* 33 (Women Living Under Muslim Laws, Readers and Compilations Series, 1998).

60. SHAHIDA LATEEF, *MUSLIM WOMEN IN INDIA, POLITICAL AND PRIVATE REALITIES: 1890s - 1980s* 71 (1990).

61. FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* 78 (1999).

62. Robert D. Baird, *Gender Implications for a Uniform Civil Code*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 145 (Gerald James Larson ed., 2001).

allowing divorce and abolishing the traditional practice of polygamy. The Committee further recommended granting equal property rights to daughters and sons. Traditionalists opposed the Bill on many grounds, claiming that the grant of such rights to women impermissibly deviated from traditional Hindu practices. For example, the Shastra Dharma Prachar Sabha, a Hindu organization, distributed pamphlets during the debates on the Bill titled "Why Hindu Code Is Detestable," which proclaimed that the bill would allow inter-caste marriage, Sagotra marriage,⁶³ and free divorce, while criminalizing bigamy and giving married women rights to their father's property. This last consequence was especially alarming to Hindu traditionalists who saw women's property rights as a Muslim practice with no place under Hindu family law.

3. *Role of the Judiciary*

The Indian judiciary, especially the Supreme Court, in its role as the defender of the Constitution, has been the forerunner in protecting minorities and safeguarding the multicultural ethos of the polity.⁶⁴ Though the Supreme Court has adjudicated a plethora of cases balancing the rights of minorities against more universal civil rights, I will limit my discussion here to those cases that have impacted the rights of women within minority communities.

The question of who has the power to interpret the personal laws of the various religious communities within India has plagued the judiciary from its post-independence beginnings. In *Ratilal v. State of Bombay*,⁶⁵ the Indian Supreme Court ruled that no outside authority had the right to proclaim the essential parts of a religion. The case dealt with the constitutionality of certain state Trust Acts passed with a view to regulate religious and charitable trusts. The petitioner challenged the validity of these Acts on the ground that they violated the right to freedom of religion under Articles 25 and 26 of the Constitution. The Court, allowing the appeal in part, held:

What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run contrary to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.⁶⁶

Further clarifying the Court's position, Justice Mukherjea wrote, "[n]o outside authority has any right to say that these [religious practices] are not essential parts of religion and it is not open to the secular authority of the state to restrict or prohibit them in any manner they like under the guise of administering the trust estate."⁶⁷ According to the Court, the state had power to regulate the trusts by a valid law, but administration of the trust in accordance with the

63. Marriage to one's relatives.

64. See P. Ishwara Bhat, *Constitutional Feminism: An Overview*, (2001) 2 S.C.C. (Jour) 1, at <http://www.ebc-india.com/lawyer/articles/2001v2a1.htm>.

65. A.I.R. 1954 S.C. 388.

66. *Id.* at 391.

67. *Id.* at 392.

laws was the prerogative of the religious bodies.⁶⁸ This holding demonstrated a break with prior doctrine, which considered personal views and reactions to be irrelevant even when the belief was a genuine and conscious part of the profession or the religion.

In the 1958 case *Mohammad Hanif Qureshi v. State of Bihar*, the Court reversed itself, holding that it was competent to adjudicate on the essentials of any religious practice.⁶⁹ The petitioners in this case, Muslim butchers, challenged the validity of certain state laws banning the slaughter of certain animals, including cows, on the grounds that the prohibitions violated their fundamental right to freedom of religion under Article Twenty-Five. They claimed that Islam required Muslims to sacrifice a cow on Bakr-Id-Day, a holy day in Islam.⁷⁰ Referring to interpretations of various religious books and practices of Muslims in India, the Court declined to hold that sacrificing a cow was an obligatory practice under Islam.⁷¹

In *Durgah Committee v. Hussan Ali*, the Court further clarified its position on adjudicating right-to-religion claims:

In order that the practices in question should be treated as part of religion, they must be regarded by the said religion as its essential and integral part . . . unless such practices are found to constitute an essential or integral part of a religion, their claim for protection under Art. 26 may have to be carefully scrutinized.⁷²

The Court went on to add that it would decide what constitutes an essential part of religion or religious practice with reference to the doctrine of that particular religion.⁷³ Thus, current doctrine gives courts the power to interpret the personal laws of India's religious communities. Courts had exercised this power in a number of cases,⁷⁴ but it was not until the Supreme Court's ruling in *Mohammed Ahmed Khan v. Shah Bano Begum*,⁷⁵ which granted maintenance rights to a destitute woman, did fundamentalist religious leaders create enough pressure on the Parliament to overrule the judgment and the doctrine.

Shah Bano was an aging Muslim woman whose husband unilaterally divorced her and then refused to pay her maintenance beyond the period of *iddat*, an obligatory three-month waiting period after a divorce during which remarriage is prohibited. Shah Bano sued her husband under the Criminal Procedure Code Section 125, which allows destitute wives to sue their husbands for maintenance.⁷⁶ Before *Shah Bano*, the Supreme Court had already ruled in two separate decisions that divorced Muslim women were entitled to maintenance even when they had received the customary one-time sum due to them under Muslim

68. *Id.* at 391.

69. A.I.R. 1958 S.C. 731.

70. *Id.* at 739.

71. *Id.* at 740.

72. A.I.R. 1961 S.C. 1402, 1415.

73. *Id.*

74. *E.g.*, Abdul Jalil v. Uttar Pradesh, A.I.R. 1984 S.C. 882 (holding that no text in the Holy Koran prohibits removal or shifting of graves); R.M.K Singh v. State, A.I.R. 1976 Pat. 198 (holding that the performance of particular Hindu religious ceremonies is an integral part of Hinduism).

75. (1985) 1 S.C.S. 96 [hereinafter *Shah Bano*].

76. *Id.*; INDIA CODE CRIM. PROC. § 125.

Personal Law, provided that sum was not adequate for their maintenance. In *Bai Tahira v. Ali Hussain Fidaalli Chothia*,⁷⁷ the Court ruled that Criminal Procedure Code Section 127, which provides that a woman is not entitled to maintenance if she receives sums under any customary or personal law payable to her on divorce, does not negate the social purpose underlying Section 125 and that “ill-used wives and desperate divorcees” could not be driven “to seek sanctuary on the streets.”⁷⁸ The Court further held that the purpose of payment “under any customary or personal law” is to provide the divorcee with maintenance and to keep her from destitution. *Bai Tahira* proscribes a husband from hiding behind Section 127(3)(b) to shirk his Section 125 maintenance responsibilities.

Fazlunbi v. Vali reached the Supreme Court one year after *Bai Tahira*, in 1980.⁷⁹ *Fazlunbi* also involved a wife’s petition for maintenance. The high court⁸⁰ sought to distinguish this case from the Supreme Court’s binding judgment in *Bai Tahira*, under which the wife would be entitled to maintenance, on the ground that the husband in *Bai Tahira* had not raised a plea based on Section 127(3)(b). On appeal to the Supreme Court, that tribunal made clear in the course of overruling the lower court’s decision not to grant relief to the ex-wife that “[n]either personal law nor other salvatory plea will hold against the policy of public law pervading S.127 (3)(b) as much as it does [not hold against] S.125.”⁸¹ *Bai Tahira* and *Fazlunbi*, therefore, clearly established that Muslim women have a right to continued maintenance under Section 125 if the customary amount paid at divorce is insufficient for their livelihood.

Shah Bano, issued five years later, went a step further, holding that a Muslim man has an obligation to pay maintenance to his ex-wife irrespective of the adequacy of the customary payment. It further held that in cases of conflict between the criminal code and personal laws, the criminal code would prevail. Writing for the Court, Chief Justice Chandrachud explained:

[S]ection 125 is a part of the Code of Criminal Procedure, not of the civil laws which define and govern the rights and obligations of the parties belonging to particular religions Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it make as to what is the religion professed by the neglected wife, child, or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of Section 125.⁸²

However, the Court held that Section 125 did not contradict the Muslim Personal Law. In support of this holding, the Court noted:

77. (1979) 2 S.C.R. 75 [hereinafter *Bai Tahira*].

78. *Id.* at 98.

79. (1980) 3 S.C.R. 1127 [hereinafter *Fazlunbi*].

80. High courts in India besides the Supreme Court of India are the courts which have both original and appellate jurisdiction, in addition to having writ jurisdictions.

81. *Fazlunbi*, (1980) 3 S.C.R. at 1141.

82. *Shah Bano*, (1985) 1 S.C.S. at 101.

There can be no greater authority on this question than the holy Quran Verses (Aiyats) 241 and 242 of the Quran show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives.⁸³

The *Shah Bano* judgment caused agitation among Muslim religious communities, especially the portion of the Court's opinion that held the Quran itself supported the argument that continuing maintenance did not violate the tenets of Islam. Under political pressure from the leaders of the Muslim community, which resulted from the *Shah Bano* judgment, Parliament, dominated by a Congress Party majority, passed the Muslim Women's (Protection of Rights on Divorce) Act in 1986 (MWA).⁸⁴ The effect of the MWA was to reverse the right to continuing maintenance for divorced Muslims pursuant to Section 125 of the Criminal Code.⁸⁵ The MWA provides for a one-time payment within the *iddat* period. Section 3(1), "Mahr or other properties of Muslim women to be given to her at the time of divorce," states:

Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to—(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband; (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.⁸⁶

Recently, various high courts in India have interpreted the scope of Section 3(1) to hold that a divorced Muslim woman is entitled to fair and reasonable maintenance within the *iddat* period, contemplating her future needs. For example, the Gujarat High Court's judgment in *Arab Ahmad bin Abdullah v. Arab Bail Mohamuna Sauyadbhari*, held that "in simplest language the Parliament has stated that the [MWA] is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking away some rights which a Muslim Woman was having either under the Personal Law or under the general law i.e. S. 125 . . . of the [Criminal Code]."⁸⁷ The judgment relies on the Preamble to the MWA and the "reasonable and fair provision and maintenance" clause in Section 3(1)(a) of the Act in concluding that *Shah Bano* is still good law and that Section 125 of the Criminal Code still applies to divorced Muslim women.⁸⁸ Thus, although the Supreme Court has not yet ruled on the MWA, the spirit of

83. *Id.* at 105. The opinion reproduces English translations of Aiyats 241 and 242.

84. C.I.S. Part II (1986), The Muslim Women's (Protection of Rights on Divorce) Act by the Government of India, Chandigarh, May 19, 1986 [hereinafter MWA].

85. However the Act did not take away the power of the courts to interpret the personal laws.

86. MWA, § 3(1).

87. A.I.R. 1988 (Guj.) 141, 142.

88. The Preamble to the MWA states: "An Act to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto." See also *Ali v. Sufaira*, (1988) 2 Kerala Law Times 94.

Section 125 is being upheld by lower courts by interpreting MWA Section 3(1) in favor of divorced Muslim women's right to adequate maintenance.

The Supreme Court's judgment in *Sarla Mudgal v. Union of India*⁸⁹ supports the adoption of a uniform civil code. Mudgal, president of Kalyani, a social welfare organization, brought a case involving three Hindu wives whose husbands had deserted them after marrying Muslim women and embracing Islam. The Supreme Court observed:

Freedom of religion is the core of our culture . . . But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Therefore, a uniform civil code is imperative both for protection of the oppressed and promotion of national unity and solidarity.⁹⁰

While the question of the uniform civil code was not an issue in this case, the Court's language here indicates a judicial willingness for such a code that would protect all individuals, even within a scheme of group rights. A division bench of the Supreme Court, headed by Justice Singh, then directed the Government of India to file an affidavit detailing efforts to enact a universal civil code as urged by Article 44 of the Constitution.

In the recent case *John Vallamattom v. Union of India*,⁹¹ the Court again made reference to a uniform civil code, which was not, however, relevant to the Court's judgment. In dictum, the Court expressed regret that Parliament had still not framed a common civil code in order to fulfill the urging of Article 44 and urged that "a common civil code will help the cause of national integration by removing the contradictions based on ideologies."⁹² The government has not, however, responded to the Supreme Court's indications for a common civil code, demonstrating the inherent limitations on the judiciary's ability to pursue social and religious transformation in India. Without social and political consensus on the need for a uniform civil code among the general citizenry and the political brass, the courts will suffer from a limited ability to formulate laws and policy regulations that promote uniformity among personal laws.

Hasina Khan, a social reformer, points out that after the 1937 Shariat Act and the 1939 Dissolution of Muslim Marriages Act, Muslim women have not attained any new legislative protection against Muslim personal laws.⁹³ Indian courts have proved a more hospitable forum for protecting and promoting women's rights than political branches or minority institutions. The sluggishness of the latter two explains the continued Muslim practice of "triple talaq," which enables a man to divorce his wife by repeating aloud "I divorce you" three times. Even though this practice has been abolished in many Islamic nations, it still prevails in Indian Muslim communities. Recently, there were high expectations that at its annual meeting the All India Muslim Law Board would adopt a

89. A.I.R. 1995 S.C. 1531.

90. *Id.* at 1540 (internal citations omitted).

91. *John Vallamattom v. Union of India*, A.I.R. 2003 S.C. 2902.

92. *Id.*

93. *Help for Distressed Muslim Women*, THE HINDU, Apr. 10, 2001, available at <http://www.hinduonnet.com/thehindu/2001/04/11/stories/14112185.htm>.

model *nikahnama*, or marriage contract, with more equitable divorce laws.⁹⁴ However, the Board declared after the meeting that “law cannot ensure reforms” and that instead they would try to create more awareness among the community on the issue of divorce.⁹⁵

In short, while the Indian model of cultural pluralism aimed to provide minority groups with protection from the imposition of a dominant majority culture while simultaneously bridging gaps between various communities, the model has instead achieved the exact opposite result. The preservation of separate personal laws has spread seeds of division among different religious communities. The continued existence of these parallel legal systems has reinforced separatist tendencies, resulting in a negative impact on the rights of Indian women in two key ways: the very creation of a system of parallel personal laws denied women their constitutional right to equal treatment, while the continued existence of this two-tier system reinforces patriarchal traditional practices, subjecting women to fixed gender roles based on pre-independence authoritarian structures.

IV.

THE WAY FORWARD: LAW REFORMS AND POLICY CHANGES

Democracies like India will always face challenges of providing space for discourse among different interests. India can protect its religious, cultural, and linguistic diversity only on the basis of multiculturalism. However, zealous protection of multiculturalism through the provision of group rights must not ignore the rights of women and the equally viable goal of gender justice. The present discourse on multiculturalism in India celebrates the country’s diversity without sufficiently acknowledging the existence of discrimination against women based on the personal laws. Supporters of multiculturalism should also pursue feminist and gender-based alignments within cultural practices so that Indian society can realize the constitutional goals of universal equality and justice.

Some innovative legislation within the personal law systems provides hope for continuing change. The Hindu Marriage Act of 1955,⁹⁶ for example, which took its inspiration from the Special Marriage Act, is considered a piece of progressive legislation protecting Hindu women’s rights. This legislation put an end to age-old practices such as polygamy. It also transformed Hindu marriage, traditionally considered to be a sacrament, into a contract, thereby providing for divorce by mutual consent.⁹⁷ However, the Hindu Succession Act of 1956⁹⁸ still allows for discrimination in the granting of rights to ancestral property. Under the Act, daughters and wives can only claim a joint share in family prop-

94. A. Faizur Rahman, Editorial, *Triple Talaq: Bad in Law and Theology*, THE HINDU, July 13, 2004, available at <http://www.thehindu.com/thehindu/op/2004/07/13/stories/2004071300491500.htm>.

95. *Id.*

96. Hindu Marriage Act, No. 25 (1955) (India).

97. *Id.* at § 13.

98. Hindu Succession Act, No. 30 (1956) (India).

erty upon the death of their fathers or husbands.⁹⁹ Even when they are able to claim this share, their claim is less than that of the sons in the family.¹⁰⁰ Recently, the Fifteenth Law Commission, led by Justice B. P. Jeevan Reddy, proposed amending the Hindu Succession Act to provide for women's right to an equal share in ancestral property.¹⁰¹ The Muslim personal laws still fail to provide equal treatment for women as well. The Muslim Personal Law in India is still uncoded. Polygamy and triple talaq are still legal. A woman desiring to divorce her husband under certain grounds, however, has recourse to a court of law under the provisions of the Dissolution of Muslim Marriage Act 1939.

Contemporary Christian personal laws also restrict the rights of women. A Christian man can divorce his wife, for example, if he finds she has committed adultery. A Christian woman, on the other hand, can seek divorce only if the charge of adultery is coupled with complaints of serious, life-endangering cruelty, or after two years of desertion without reasonable cause.¹⁰² A Christian woman found guilty of adultery can lose her entire property to her children and husband. Interestingly, the failure of Christian personal laws to provide equal rights to women might result less from resistance within the Indian Christian community and more from the callous indifference of the government in bringing about the necessary change within Christian minority communities.¹⁰³ Any proposed change to Muslim personal laws, in contrast, generally faces stiff resistance from certain parts of the Muslim community. Most Muslim leaders maintain their right to be governed by Shariat and are in opposition to the possibility of a uniform civil code. They rely on Articles 25 and 26 of the Constitution to assert their right to practice Islam without interference by national civil laws.

The fact that religious issues have been politicized since the BJP government's ascent to power has affected the development of a meaningful discourse on the passing of uniform civil code. The growing distrust among religious communities that has resulted from sporadic instances of inter-group violence has only contributed to a fractured debate on the need for a uniform civil code. The power struggle between the fundamentalist forces within the communities, resulted in the withdrawal of the feminists from the debate. Further, the rise in communalism due to the "hindutavization" of the debate over a uniform civil code has resulted in increased pressure on women in these communities to conform to traditional practices that reinforce patriarchal structures, protected under the guise of religion or culture. Delhi recently saw attempts by the BJP govern-

99. See *id.* § 6, on the concept of *mitakshara* property.

100. Madhu Kishwar, *What Women Want*, THE INDIAN EXPRESS, Apr. 10, 2004, available at http://www.indianexpress.com/archive_frame.php.

101. Swati Chaturvedi and Rajesh Kumar, *Law Panel Proposes Equal Share In Ancestral Property For Hindu Women*, THE INDIAN EXPRESS, May 12, 2000, available at <http://www.indianexpress.com/ie/daily/20000512/ina12053.html>.

102. Sumedha Raikar-Mhatre, *Divorce & Christian Marriages in India: Till Cruelty do us Part*, THE INDIAN EXPRESS, May 20 1997, available at <http://www.goacom.com/news/news97/may/marriages.html>. Recently, however, a judgment of the Bombay high court has made it possible for Christian women to get a divorce solely on the grounds of cruelty and desertion. *Id.*

103. See generally Javed Anand, *Behind Demands for a Uniform Civil Code*, in THE SHAH BANO CONTROVERSY (Asghar Ali Engineer ed., 1987).

ment to ban girls from wearing skirts to schools. On similar footings, the fundamentalist forces in Kashmir have been exhorting women to wear *burqa*.

Policing culture is extremely controversial, and problems arise when governments start to dictate how people ought to act according to their religious faiths. It is impossible to have serious discourse regarding the formation of a uniform civil code in this hostile environment. However, there exists the possibility to develop awareness and facilitate meaningful dialogue among different communities with regard to how society can achieve equality between men and women within various religious frameworks. Since the problem has its roots in politics, the solution too has to be political. Without political will, the quest for women's rights will not be fulfilled. Though a uniform civil code based on the principle of equality between the sexes would have been an ideal solution, the hijacking of this issue by fundamentalist forces has made its adoption a difficult if not impossible tool for protecting Indian women's rights. In the highly charged political and religious atmosphere of contemporary Indian governance, with right-wing political parties and groups supporting adoption of such a code, no minority community would welcome such a measure.¹⁰⁴

As an alternative to a uniform civil code, I propose a constitutional amendment to Articles 25 and 29, making the rights to practice religion and conserve culture subject to ensuring the right of equality between men and women. Consequently, this Amendment would make all personal laws subject to the test of equality. The Indian Constitution already contains precedents in this regard—Article 15, for example, carves out an exception to the right of equality, allowing the state to make special provisions for women.¹⁰⁵ Moreover, an amendment would further be justified by Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which India is a signatory. Article 5 requires signatories to:

modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁰⁶

My proposed amendment does not explicitly deal with the personal laws of different religious communities but arguably aims to protect them. Yet the amendment would negate claims of the right to practice gender discrimination based on religion or culture through a universal application of this proposed constitutional exception based on the individual-rights ideals of liberalism.

The paradox that protecting multiculturalism can hinder women's rights can be solved only by creating a civil society based on the separation between

104. See Pratap Bhanu Mehta, *Obscuring Real Issues*, THE HINDU, July 30, 2003, available at <http://www.thehindu.com/2003/07/30/stories/2003073001431000.htm>.

105. INDIA CONST. art 15(3) ("Nothing in this article shall prevent the State from making any special provision for women and children.").

106. Convention on the Elimination of All Forms of Discrimination against Women, art. 5, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 193, U.N. Doc. A/34/46.

religion and state as envisaged in the Indian Constitution.¹⁰⁷ Political leaders must be sensitive to increasing demands for recognition of religious and cultural rights, but subject to the limitations imposed by the Constitution and Article 5 of the CEDAW. The Indian experience demonstrates that there is a need to declare unambiguously the superiority of the right to gender equality over demands for preserving the sovereignty of religious or cultural groups. This Declaration should be included with other fundamental rights in the basic text or law containing these rights, whether it is the Constitution or a Declaration of Rights. Unless this is done, there are no safeguards for the protection of women's rights and the assurance of gender justice.¹⁰⁸

107. See *INDIA CONST.* pmbl. Also, in a number of cases, including the case of *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1, the Supreme Court held that religion is a matter of individual faith and cannot be mixed with secular activities, which only the state can regulate by enacting laws.

108. See Justice S. Rajendra Babu, *Third Shri Akella Satyanarayana Memorial Endowment Lecture on Gender Justice—Indian Perspective*, (2002) 5 S.C.C. (Jour) 1, available at <http://www.ebc-india.com/lawyer/articles/2002v5a1.htm>.