

# DIVERSITY AND THE CONSTITUTION IN INDIA: WHAT IS RELIGIOUS FREEDOM?

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## I. INTRODUCTION

The Constitution of India—the world’s most diverse democracy—is a remarkable document, balancing the freedoms and rights of citizens who represent all of the major world religions. After introducing the constitutional basis for religious freedom in India and articulating the distinctive character of Indian secularism, this Article turns to two major issues of religious freedom in contemporary India—the rights of religious minorities, and the right to convert to a different religion. Debates over these rights juxtapose divergent arguments that invoke religious freedom and highlight the multiple facets and meanings of religious freedom.

Minority rights in India include the right of members of various religious communities to use their own religious civil law in certain family law cases. This is known as “personal law,” and the future of this system is the subject of ongoing and heated debate. Is personal law essential to the freedom of religious communities, or does it impede the freedom and

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equality of women within religious communities? Can these freedoms be reconciled?

A second minority rights debate in India is the question of exactly who constitutes a minority. Legal disputes over which religious groups should be recognized by the government as “minorities,” and which individuals within those groups should be recognized as members of religious minorities, demonstrate that the very definition of “minority” is a minority-rights issue. This issue brings other freedoms into tension as well. For example, how should the state balance an individual’s freedom to claim membership in a religious community with that community’s freedom to define the parameters of membership?

The right to convert relates to two bodies of law in India—affirmative action and anti-conversion laws. When members of Hindu untouchable castes convert to Islam or Christianity, they lose their eligibility for affirmative action in the form of government quotas for Scheduled Castes in public sector jobs and universities. Defenders of this policy interpret *caste* as a part of Hinduism and note the particular need to uplift Hindu Scheduled Castes. Critics argue that this loss of affirmative-action privileges upon conversion impinges on the freedom of religion.

Several Indian states have enacted laws against “forcible” conversion. Proponents argue that these laws protect the religious freedoms of vulnerable groups, such as low castes, from missionaries who may induce them to convert for non-religious reasons. Opponents of laws against forcible conversion argue that such laws restrict the religious freedom of converts, especially women and lower castes, who may face patriarchal skepticism when arguing that they freely chose to convert.

India contains extraordinary religious diversity and maintains significant religious freedoms. The devil is in the details. Contemporary debates over minority and conversion rights demonstrate the complex and contested nature of freedom in the context of religion.

#### A. *The Constitutional Basis for Religious Freedom*

The Indian Constitution, enacted in 1950, is the longest in the world.<sup>1</sup> It includes Fundamental Rights—which constitute a quite comprehensive bill of rights—as well as Directive Principles, which guide state policies and actions.<sup>2</sup> The Constitution was written during the 1940s—a key period in

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1. P.M. BAKSHI, *THE CONSTITUTION OF INDIA* a (8th ed. 2008).

2. *See id.* at b–d (summarizing the articles addressing Fundamental Rights

the global development of human rights, including the creation of the Atlantic Charter and the signing of the United Nations Charter.<sup>3</sup> Members of India's Constituent Assembly "were sensitive to these currents, which supported their own faith in the validity of written rights."<sup>4</sup> Due to their British colonial history, members of India's Constituent Assembly were skeptical of the British approach to rights and preferred an explicit bill of rights:

The desire for written rights was reinforced by the suspicion of government engendered by colonial rule—a suspicion that was certainly not diminished by the scoffing attitude of the imperial government toward such rights. The various minority communities also believed that their safety depended upon the inclusion in the constitution of measures protecting their group rights and character.<sup>5</sup>

Several Indian constitutional rights pertain to religious freedom.

The Fundamental Rights<sup>6</sup> in the Indian Constitution include "equality before the law,"<sup>7</sup> as well as the prohibition of discrimination on the basis of "religion, race, caste, sex or place of birth," with the caveat that "[n]othing in this article shall prevent the State from making any special provision for women and children."<sup>8</sup> This protectiveness toward women is a recurring theme in contemporary controversies over religious freedom, especially regarding Muslim women and female converts.<sup>9</sup>

Concerns about the ability of the government to engage in social reforms on behalf of women also shaped the constitutional protections of religious freedoms.<sup>10</sup> Members of the Constituent Assembly raised

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and Directive Principles in India's Constitution).

3. U.N. Charter, *Introductory Note*, available at <http://www.un.org/en/documents/charter/intro.shtml> (stating that the Charter of the United Nations was signed on June 26, 1945); Britannica Online Encyclopedia, *Atlantic Charter*, <http://www.britannica.com/EBchecked/topic/41109/Atlantic-charter> (last visited October 6, 2009) (stating that the Atlantic Charter was issued on August 14, 1941).

4. GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 59 (1966).

5. *Id.* at 58–59.

6. If a right is a fundamental right, "[t]he State shall not make any law which takes away or abridges" that right, and any law that so violates a right "shall, to the extent of the contravention, be void." INDIA CONST. art. 13, § 2.

7. *Id.* art. 14.

8. *Id.* art. 15.

9. *See infra* Part II.A.

10. *See* AUSTIN, *supra* note 4, at 64.

concerns that the free practice of religion could allow practices such as temple prostitution and widow burning;<sup>11</sup> thus, an Advisory Committee issued a report stating that “the right freely to practice religion should not prevent the state from making laws providing for social welfare and reform, a provision that was carried into the Constitution.”<sup>12</sup> In the Constitution, the freedom of religious practice was also modified to ensure that the government could outlaw certain forms of caste discrimination, particularly the practice of barring low castes from temples:

Article 25. Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.<sup>13</sup>

In short, the freedom of conscience, profession, practice, and propagation are balanced against concerns about social justice for women and lower castes. The attention to social justice throughout the Indian Constitution is in large part due to the key role played by Dr. Babasaheb Bhimrao Ambedkar, a tireless activist for the rights of untouchables, or Dalits. Dr. Ambedkar, born a Dalit, became Chairman of the Drafting Committee and independent India’s first Law Minister.<sup>14</sup>

Several other religious freedoms are enumerated in the Indian Constitution. Article 26 protects the “[f]reedom to manage religious affairs . . . [s]ubject to public order, morality and health.”<sup>15</sup> This means that every religious denomination can establish religious or charitable

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11. *Id.*

12. *Id.*

13. INDIA CONST. art. 25.

14. *See* M.V. PYLEE, OUR CONSTITUTION, GOVERNMENT & POLITICS 6 (2000).

15. *See* INDIA CONST. art. 26.

institutions, manage its own religious affairs, and acquire and administer property.<sup>16</sup> Article 27 provides that people may not be compelled to pay taxes that would be “specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”<sup>17</sup>

Additional freedoms relate to religious education. Article 28 provides for “[f]reedom as to attendance at religious instruction or religious worship in certain educational institutions.”<sup>18</sup> In other words, a totally state-funded school may not provide religious instruction, and students at schools receiving any state aid cannot be compelled to take part in religious instruction or worship.<sup>19</sup> Article 30 guarantees the “[r]ight of minorities to establish and administer educational institutions.”<sup>20</sup> Article 30 applies to both religious and linguistic minorities.<sup>21</sup> Indeed, under Article 30, “[t]he State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.”<sup>22</sup> All of the above Articles—each falling under the category of Fundamental Rights—promise broad freedoms of religion, including protection from discrimination, freedom of conscience and religious practice (even extending to propagation), and the right to establish religious schools and colleges.<sup>23</sup>

Another section of the Indian Constitution, the Directive Principles, also addresses religion—in particular, the future of various religious personal laws that continue to be recognized in Indian courts for certain family law cases.<sup>24</sup> One of these Directive Principles calls for a “[u]niform civil code for the citizens,” directing that “[t]he State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.”<sup>25</sup> There is a raging debate between proponents of a uniform civil code and defenders of these distinct legal traditions over the precise

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16. *See id.*

17. *Id.* art. 27.

18. *Id.* art. 28.

19. *See id.*

20. *Id.* art. 30.

21. *Id.* art. 30, § 2.

22. *Id.*

23. *See generally id.* arts. 25–30.

24. BAKSHI, *supra* note 1, at 88 (providing notes on Article 44 of the Indian Constitution).

25. INDIA CONST. art. 44.

meaning of this principle.<sup>26</sup> India's system of personal law is a far-reaching attempt to recognize and incorporate cultural and religious differences into the legal system. Caught between pressures to unify India and to reassure members of various religious communities, the authors of the Constitution were not willing or able to end the system of personal law immediately. They did not, however, intend it to be a long-term solution.

Constitutional historian Granville Austin argues that whereas the Fundamental Rights were meant to make citizens "equally free from coercion or restriction by the state, or by society privately," the Directive Principles were intended to make citizens "free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves."<sup>27</sup> The Directive Principles include wide-ranging goals related to livelihoods, education, and even nutrition.<sup>28</sup> Ultimately, the Constituent Assembly placed the contentious issue of a uniform civil code in with this section of the Constitution because the Directive Principles are not immediately legally binding, but rather are aspirational goals.<sup>29</sup> Directive Principles are not enforceable by any court, but "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."<sup>30</sup> The relevant constitutional subcommittee approved a clause calling for a uniform civil code, but only after the subcommittee decided to create a nonjusticiable section in which it could insert the clause.<sup>31</sup> Until now, the Indian government has not unified its civil code.

### B. *Indian Secularism*

A 1976 amendment added the word *secular* to the preamble of India's Constitution.<sup>32</sup> The Constitution's opening phrase now begins: "WE, THE

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26. Upendra Baxi, *Siting Secularism in the Uniform Civil Code: A "Riddle Wrapped Inside an Enigma?"*, in *THE CRISIS OF SECULARISM IN INDIA* 270–78 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007) (discussing the contested meanings of "uniform," "civil," "code," "endeavor," "secure," and "territory").

27. AUSTIN, *supra* note 4, at 51.

28. *Id.* at 52.

29. *See id.* at 51–52.

30. INDIA CONST. art. 37.

31. AUSTIN, *supra* note 4, at 80.

32. INDIA CONST. pmbL.: amended by the Constitution (Forty-Second

PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC].”<sup>33</sup> The preamble goes on to commit India to “JUSTICE, . . . LIBERTY of thought, expression, belief, faith and worship[,] . . . EQUALITY[,] . . . [and] FRATERNITY.”<sup>34</sup> The original mention of religious liberty and the later addition of the term *secular* signal India’s commitment to maintaining a government that is autonomous from religious leaders, yet responsive to the concerns of minorities in India’s incredibly diverse society.

Two types of secularism are in tension in India.<sup>35</sup> One is a liberal or Western secularism, which emphasizes *separation* of religion and the state, a vision embraced by the first Prime Minister, Jawaharlal Nehru.<sup>36</sup> The other, which arguably is the dominant strain of secularism, emphasizes *equal respect* for different religions, a vision associated with nationalist leader Mohandas Gandhi.<sup>37</sup> The latter approach involves some state support for various religious endeavors, including, for example, financial support for religious educational institutions operated by minority religions and recognition of different religious civil laws—Hindu, Muslim, Christian, and others—in Indian courts in certain types of cases involving persons of those religions.<sup>38</sup>

Secularism in India is about symmetry rather than complete separation between the state and religion. In the words of Amartya Sen, the “dominant approach” to secularism in India has been “a basic symmetry of treatment” of various religious communities rather than a “demand that the state must stay clear of any association with any religious matter whatsoever.”<sup>39</sup> Defining secularism as symmetrical treatment and equal respect means that the government may take an active role in promoting religious freedom, as long as this is done for all. In other words, in India, the state “working hard for religious freedom does not breach the

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Amendment) Act, 1976.

33. INDIA CONST. pmb. (citation omitted).

34. *Id.*

35. Jakob De Roover, *Gandhi and Secularism* 1 (Mar. 26–30, 2009) (unpublished manuscript, on file with the *Drake Law Review*).

36. *Id.*

37. *Id.*

38. *See id.*

39. AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY* 296 (2005).

principle of secularism.”<sup>40</sup> Nevertheless, in a society of diverse religions and ideologies, even the relationship between secularism and religious freedom is contested: “[I]nterpreted as alternatively freedom or coercion, tolerance or intolerance . . . secularism in India has been a divisive issue.”<sup>41</sup> Ongoing debates over minorities and conversion illustrate these recurring tensions.

## II. MINORITY RIGHTS

### A. *Personal Law*

Personal laws in India are civil laws specific to different religious communities. These laws govern certain family-related legal matters, including: marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession.<sup>42</sup> All Indian citizens are subject to the same criminal law and to the other parts of the civil code. Maintaining varied personal laws is a legal and administrative practice that extends back to the British period, when colonial rulers persistently viewed India as a composite of irreconcilable religious communities.<sup>43</sup> Moreover, most personal laws have been unjust to women. There are separate personal laws for Hindus, Muslims, Christians, Jews, and Zoroastrians (also known as Parsis).<sup>44</sup> Notably, for purposes of personal law, the “Hindu” category includes Buddhists, Jains, and Sikhs.<sup>45</sup> This legal precedent subsumes certain religious minorities into the Hindu majority community, which has influenced debates over defining minorities and affirmative action beneficiaries.<sup>46</sup>

Despite the Indian Constitution’s call for a uniform civil code, such a code does not yet exist. Some reforms of personal laws, however, have taken place. The Special Marriages Act of 1954 offered couples a non-

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40. *Id.*

41. Rajeswari Sunder Rajan & Anuradha Dingwaney Needham, *Introduction to THE CRISIS OF SECULARISM IN INDIA* 1, 1 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007).

42. *See* Gerald James Larson, *Introduction to RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 4 (Gerald James Larson ed., 2001).

43. *See id.*

44. *See* DONALD EUGENE SMITH, *INDIA AS A SECULAR STATE* 497–98 (1963).

45. Laura Dudley Jenkins, *Personal Law and Reservations: Volition and Religion in Contemporary India*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT*, *supra* note 42, at 104, 112.

46. *See id.*

religious alternative to personal laws, but due to family expectations and pressures, many brides or grooms may not feel free to choose this option.<sup>47</sup> Given the religious diversity within each religion—especially Hinduism and Islam—varied customs have made it hard to define a single code for each community.<sup>48</sup> With the Hindu Marriage Act of 1955 and other revisions of Hindu personal laws in 1955 and 1956—known collectively as the Hindu Code Bill—the Hindu code underwent a major overhaul to make it more uniform, and also to engage in some limited reforms on behalf of women.<sup>49</sup> The reform process was lengthy, and India's Law Minister, Dr. Ambedkar, resigned in frustration over the glacial progress made during four years of struggle.<sup>50</sup> Despite the best efforts of Ambedkar and other proponents of equality, the revised Hindu code is still unequal in its treatment of women. Hindu women have different age-of-marriage rules, different schemes of intestate succession, and different guardianship rights than men, despite some progress toward the primary goal of these reforms—the improvement of women's status.<sup>51</sup>

The archaic Christian Code of 1872 was only partially reformed much later and after much Christian feminist activism.<sup>52</sup> The Indian Divorce (Amendment) Act 2001, in order to increase gender equity, amended the Indian Divorce Act 1869, which was created for Christians.<sup>53</sup> A more comprehensive proposed reform—the Christian Marriage Bill 2000—failed over disagreements about whether Christian law could be used for interreligious marriages and about maintenance for husbands after divorce.<sup>54</sup> Whereas under existing law a Christian and a non-Christian can

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47. See The Special Marriage Act, No. 43 of 1954, available at <http://indiacode.nic.in/> (providing for non-religious registration of marriage).

48. See Larson, *supra* note 42, at 1, 5.

49. See generally Lotika Sarkar, *Reform of Hindu Marriage and Succession Laws: Still the Unequal Sex*, in FROM INDEPENDENCE TOWARDS FREEDOM: INDIAN WOMEN SINCE 1947, at 100 (Bharati Ray & Aparna Basu eds., 1999) (detailing several acts of legislation serving to expand the rights of Hindu women).

50. See *id.* at 102–03.

51. See Robert D. Baird, *Gender Implications for a Uniform Civil Code*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT, *supra* note 42, at 145, 151.

52. See Lakshmi Iyer, *Christian Marriage Bill on the Rocks: Certain Provisions of the Legislation Have Angered the Community and Set Its Leaders on a Collision Course with the Government*, INDIA TODAY, May 22, 2000, <http://www.india-today.com/itoday/20000522/nation.html>.

53. K.P.M. Basheer, *State Women to Benefit Most from Divorce Law Change*, HINDU, Nov. 18, 2000, <http://www.hinduonnet.com/2000/11/18/stories/0418404u.htm>.

54. See Aruna Chakravorty, *Coupled to Debate—A Marriage Bill*, INDIAN

marry under Christian law, under the proposed law Christian law could only be used for marriage between two Christians.<sup>55</sup> Christians viewed this as an attempt to limit the reach of their law based on undue concern about the growth of minority communities via marriage or conversion.<sup>56</sup> The Christian community, and Christian feminists in particular, felt reform was necessary, but they were dissatisfied with the more comprehensive reform bill.<sup>57</sup>

The Muslim code, in contrast, has not been reformed. “State policy with regard to the civil status of Muslims has been generally cautious.”<sup>58</sup> Many Muslim leaders are resistant to initiating reforms—a defensive response in the face of Hindu nationalist critiques of their laws and their community in general. “Subject to constant politicization, the issue [of Muslim Personal Law] continues to be one on which the Muslim clergy by and large refuses to negotiate, while the Hindu Right uses it as a weapon to beat the opposition . . .”<sup>59</sup> This dynamic marginalizes the issue of reforms for women.<sup>60</sup> A uniform civil code that would apply to all citizens is also viewed with alarm by many Muslims, who believe the impetus for a uniform civil code is a desire to undermine Muslim personal law and that the design of a uniform civil code would be orchestrated by the Hindu majority.<sup>61</sup> This insecurity may be due to the inordinate attention given to Muslim women in personal law discussions; in other words, although each of the personal codes are disadvantageous for women, including the personal codes of Hinduism and Christianity, the public critiques of personal law by politicians, the media, and activists tend to dwell on Muslim personal law in particular.<sup>62</sup> Indeed, the most famous personal law

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EXPRESS, Aug. 28, 2000, <http://www.expressindia.com/news/ie/daily/20000828/ina28039.html>.

55. *See id.*

56. *See id.*

57. *See id.*

58. Zoya Hasan, *Muslim Women and the Debate on Legal Reforms*, in FROM INDEPENDENCE TOWARD FREEDOM: INDIAN WOMEN SINCE 1947, *supra* note 49, at 120, 122.

59. ROWENA ROBINSON, TREMORS OF VIOLENCE: MUSLIM SURVIVORS OF ETHNIC STRIFE IN WESTERN INDIA 223 n.6 (2005).

60. *See id.* at 210–11 (indicating that “[t]here are activists who believe that the stance of religious leaders is detrimental to what they consider to be the ‘wider’ battle: that of the gender struggle or of human rights issues”).

61. *See, e.g.*, Baird, *supra* note 51, at 152.

62. *See* Hasan, *supra* note 58, at 130 (stating that the debate on replacing personal law with the Uniform Civil Code focuses on the inadequacies of the Muslim personal law, and not, for example, the Hindu Code Bill).

case—*Kahn v. Bano*—became a cause célèbre precisely because it was seen as pitting Muslim rights versus women’s rights.<sup>63</sup>

Shah Bano was sixty-two and a mother of five from Indore, Madhya Pradesh, when she was divorced by her husband in 1978.<sup>64</sup> Muslim personal law allows a husband to divorce his wife without her agreement.<sup>65</sup> Bano tried to get maintenance—similar to alimony—through the Indian court system.<sup>66</sup> Maintenance is an area of the law that falls under the personal codes, and Muslim law does not entitle women to ongoing maintenance.<sup>67</sup> A divorced Muslim woman is entitled to her *mahr*—payment from her husband at the time of marriage—and three months of maintenance, after which the divorced woman’s family and community may help support her.<sup>68</sup>

When Bano’s case reached the Supreme Court of India in 1985, the Court turned to the criminal code (which applies to everyone), specifically section 125 of the British Colonial Criminal Procedure Code of 1898, as revised in 1973. Under section 125(1)(a), “any person having sufficient means [who] neglects or refuses to maintain . . . his wife, [who is] unable to maintain herself,” can be asked by the Court to pay a monthly maintenance to his wife at a rate not exceeding five hundred rupees.<sup>69</sup> “Wife,” as used in section 125, includes a divorced woman who has not remarried.<sup>70</sup> Because the Code of Criminal Procedure entitles destitute women to some maintenance, the Supreme Court granted ongoing maintenance to Bano despite a seemingly contradictory Muslim personal law:

Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that section 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 . . . . True, that they do not supplant the personal law of the parties but, equally the religion professed by

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63. Khan v. Bano, (1985) 3 S.C.R. 844, 846.

64. *Id.* at 850.

65. *Id.* at 850–51 (“[T]he Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent.”).

66. *Id.* at 850.

67. *Id.* at 851.

68. *Id.* at 858.

69. *Id.* at 852.

70. *Id.*

the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws . . . .<sup>71</sup>

Thus, the Court in *Bano* sidestepped Muslim personal law.

While relying on the Code of Criminal Procedure, the Court was aware of the storm likely to ensue after it evaded personal law. Thus, it also drew on Muslim law—quoting the Quran—to further legitimize its decision:

There can be no greater authority on this question than the Holy Quran, “The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God’s will.” 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. The Arabic version of those Aiyats and their English translation[s] . . . [provide that] [f]or divorced women [m]aintenance (should be [p]rovided) [o]n a reasonable ([s]cale)[.] This is a duty [o]n the righteous.<sup>72</sup>

The reference to Islamic law was likely an attempt to placate a minority that would be affronted by a decision impinging upon their autonomy.

Other lines of argument in *Bano*, however, undermined this appeal to Muslim sensitivities. The Court called for the government, not the Muslim community, to take the lead on personal law reform:

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India”. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage

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71. *Id.* at 854.

72. *Id.* at 859 (citations omitted).

to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of the courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.<sup>73</sup>

A Hindu judge, writing that “[a] common civil code will help the cause of national integration by removing disparate loyalties in laws which have conflicting ideologies,” proved unnerving to many Muslims.<sup>74</sup> While many Hindus and women welcomed the ruling, the decision and the judges’ discussion of national integration and questioning of citizens’ loyalties was deeply troubling for many Muslims, including many Muslim women.<sup>75</sup>

The ruling in *Bano* was greeted by much protest. New legislation, the Muslim Women (Protection of Rights on Divorce) Bill, which became law in 1986, actually facilitated Muslim law’s denial of ongoing maintenance to divorced women—despite the bill’s rather misleading name.<sup>76</sup> This legislation exempted Muslims from section 125 of the Code of Criminal Procedure, which had been used to override Muslim personal law in *Bano*.

The persistence of personal laws in India is not an anomaly but rather a situation that people in a variety of countries around the world face. Because the British developed many of their colonial practices in India and later applied them in other parts of their empire, the idea of maintaining personal or customary laws persists in many former British colonies.<sup>77</sup> For example, the post-apartheid South African Constitution is quite

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73. *Id.* at 866–67.

74. See Ruma Pal, *Religious Minorities and the Law*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT, *supra* note 42, at 24, 32.

75. See Hasan, *supra* note 58, at 126–27 (discussing the state’s response to *Bano* and the legislation enacted to overturn the Court’s decision on the premise that personal law belonged to the domain of citizens rather than the Court).

76. The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25, Acts of Parliament, 1986, available at <http://indiacode.nic.in/>.

77. Cf. LAURA DUDLEY JENKINS, IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED 10–11 (2003) (discussing the tendency of colonial states to “reinforce or even reinvent” ethnic identities, leading to legacies which endured the transformation from colonial rule to contemporary politics).

progressive for women and even allows same-sex marriages, yet it also recognizes more conservative, customary marriage laws.<sup>78</sup> Nigeria, in its rocky experience with democracy, faces tension and dilemmas as certain parts of the Muslim-dominated north adopt Muslim legal codes, both civil and criminal, which worry local residents of other religions.<sup>79</sup> Moreover, the persistence of community laws within a legal system is not unique to the developing world. For example, marriage and divorce laws are not uniform in the United States. Rather, they vary from state to state—by communities defined geographically rather than religiously—which is illustrated by the varied laws pertaining to marital property rights or same-sex marriage rights.<sup>80</sup>

The story of Shah Bano has a surprise ending. She put a mark, in place of a signature, on a letter renouncing the Indian Supreme Court judgment in her favor.<sup>81</sup>

[R]espectable gentlemen of Indore came to me and explained to me the Commands . . . .

After listening to them and understanding what they said, I have come to the conclusion that the laws of Allah and the Prophet are everything for me and in them I have full faith and belief.

. . . .

Now the Supreme Court has given the judgement on 23 April 1985 concerning maintenance of the divorced woman, which is apparently in

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78. See, e.g., S. AFR. CONST. 1996 ch. 2, § 9 (outlining affirmative protection from unfair discrimination on grounds such as race, gender, sex, pregnancy, marital status, sexual orientation, and culture); *id.* § 15 (preserving the right of the government to pass legislation recognizing “marriages concluded under any tradition” that are consistent with other provisions of the Constitution).

79. See Dan Isaacs, *Islam in Nigeria: Simmering Tensions*, BBC NEWS, Sept. 24, 2003, <http://news.bbc.co.uk/2/hi/africa/3155279.stm> (describing the outbreaks of violence which occurred following the implementation of Islamic criminal punishments in northern Nigeria).

80. See, e.g., CAL. CONST. art. I, § 7.5 (defining marriage as between a man and a woman); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (holding that the Iowa Constitution requires recognition of same-sex marriage on equal protection grounds); see also, e.g., Harry D. Krause & David D. Meyer, *Family Law* 99–101 (2007) (discussing differences in marital property law between “common-law states” and “community-property states”).

81. See Shah Bano’s Open Letter to Muslims (Nov. 2, 1985), in *THE SHAH BANO CONTROVERSY* 211, 212 (Asghar Ali Engineer ed., 1987).

my favour; but since this judgement is contrary to the Quran and the hadith and is an open interference in Muslim personal law, I, Shah Bano, being a Muslim, reject it and dissociate myself from every judgement which is contrary to the Islamic shariat.<sup>82</sup>

Although Bano obviously faced pressures to make such a statement, her ambivalence is an example of the complexity of preserving women's freedom both as women and as members of religious communities.

Christian women faced a similar Catch-22. Many Christian feminists rejected a more comprehensive reform of Christian personal law, which would have helped them as women, due to a clause in the proposed revision that limited the rights of the broader Christian community—specifically, the right to marry non-Christians.<sup>83</sup> To say religious personal law pits the freedoms of religious minorities against freedoms of women does not capture the complex position of women within each community. Many women want to preserve their freedoms and rights both as minorities and as women. Understanding the “religious freedom” of Bano—or of a woman of any other religious community—means considering the intersection of gender and religious identities.

#### B. *Who Is a Minority?*

Although minority rights in India are admirably broad and far-reaching, defining religious minorities creates legal complications at both the community and individual levels. If a group cannot gain minority status, or if an individual cannot be recognized as a member of a minority group, the rights for which that group or that individual may be eligible are moot. For example, the Jain community is having difficulty gaining minority status at the national level.<sup>84</sup> At the individual level, a female Sikh applicant to a Sikh-run medical college is facing rejection for not being fully Sikh in her practices.<sup>85</sup>

Jains are recognized as a minority in several states, but are pushing

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82. *Id.* at 211–12.

83. Emanuel Nahar, *Minority Rights in India: Christian Experiences and Apprehensions*, MAINSTREAM WKLY., Dec. 23, 2006, <http://www.mainstreamweekly.net/article98.html> (outlining the processes of reformation of Christian marriage rights under the Indian Constitution and rejection by Christians of the same).

84. *See Patil v. India*, (2005) 6 S.C.C. 690 (refusing to recognize Jains as a minority).

85. *See Punjab and Haryana High Court: Unshorn Hair Basic for Sikh*, INDLAWNEWS, Feb. 21, 2009, <http://www.indlawnews.com/NewsDisplay.aspx?13039D9E-D6A8-4C5A-BB39-F55250A08616>.

for national-level minority status.<sup>86</sup> The Supreme Court of India, in *Patil v. India*, used several rationales in denying a Jain group's petition for national-level minority status.<sup>87</sup> One rationale hinged on the proper level of analysis for determining minority status—the state level or the national level.<sup>88</sup> Another rationale imposed a socioeconomic litmus test for minority status.<sup>89</sup> Finally, religious rationales ultimately subsumed Jainism into Hinduism.<sup>90</sup> This decision illustrates how minority status is much more than a question of relative numbers.

*Patil* was initiated when a Jain organization petitioned the Supreme Court in Bombay to direct the Central Government to “notify ‘Jains’ as a ‘minority’ under section 2(c) of the National Commission of Minorities Act, 1992.”<sup>91</sup> This would benefit the Jains by adding them to the minorities monitored by the National Commission for Minorities, which is charged with ensuring minority progress and development, as well as with the protection of minority religious, cultural, and educational rights.<sup>92</sup> In *Patil*, the Supreme Court of India held that minority status is not determined by relative numbers at the national level, but rather at the state level—by a group's numbers within that state, as well as its social status and conditions within that state.<sup>93</sup> In addition to tossing the ball to the state level, this definition of minority imposes certain economic criteria on religious minority status and related protections and policies. “If it is found that a majority of the members of the community belong to the affluent class of industrialists, businessmen, professionals and propertied class, it may not be necessary to notify them under the Act and extend any special treatment or protection to them as a minority.”<sup>94</sup> Thus, even if a community is religiously distinct, if a majority within that minority are doing well socioeconomically, the Court felt that official minority status would be superfluous.

Furthermore, in *Patil* the Court found that the distinctiveness of the

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86. Bal Patil, *Jain Minority Status Delhi*, HERENOW4U, July 14, 2008, <http://www.herenow4u.de/pages/eng/articles/jainminoritystatusdelhi.htm>.

87. *Patil*, (2005) 6 S.C.C. at 690.

88. *Id.* at 698–99.

89. *Id.* at 699.

90. *Id.* at 702.

91. *Id.* at 695.

92. *Id.* at 697–98.

93. *Id.* at 696–99 (citing *T.M.A. Pai Found. v. Karnataka*, (2002) 8 S.C.C. 481).

94. *Id.* at 699.

Jain religion was in question.<sup>95</sup> The Court undermined the Jain community's claim to religious minority status by subsuming Jainism under Hinduism—essentially making it part of the majority.<sup>96</sup>

“Hinduism” can be called a general religion and common faith of India whereas “Jainism” is a special religion formed on the basis of quintessence of Hindu religion. Jainism places greater emphasis on non-violence (“Ahimsa”) and compassion (“karuna”). Their only difference from Hindus is that Jains do not believe in any creator like God but only worship the perfect human being whom they called Tirathankar.<sup>97</sup>

Disagreement over the existence of God seems to be a rather fundamental distinction between religions, yet the Court found this insignificant.<sup>98</sup>

The decision also draws on the legal precedent of an expansive definition of Hinduism for purposes of personal law:

The so-called minority communities like Sikhs and Jains were not treated as national minorities at the time of framing the Constitution. Sikhs and Jains, in fact, have throughout been treated as part of the wider Hindu community which has different sects, sub-sects, faiths, modes of worship and religious philosophies. In various codified customary laws like Hindu Marriage Act, Hindu Succession Act, Hindu Adoption and Maintenance Act and other laws of pre- and post-Constitution period, definition of “Hindu” included all sects and sub-sects of Hindu religions including Sikhs and Jains.

The word “Hindu” conveys image of diverse groups of communities living in India.<sup>99</sup>

The expansive definition of Hinduism used in this decision has in other instances also encompassed Buddhists, as in the Indian Constitution's article on freedom of religion.<sup>100</sup> In another interesting maneuver, *Patil* both expands Hinduism into a larger majority and simultaneously shatters it into multiple minorities, ultimately breaking down the distinction

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95. *Id.* at 702.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 701.

100. INDIA CONST. art. 25, § 2(b) (providing Explanation II, which states that “the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion”).

between minority and majority. “All are minorities amongst Hindus.”<sup>101</sup>

The deciding judges’ ambivalence about the entire topic of recognizing minority rights and freedoms becomes clear when *Patil* concludes with a call to the National Commission for Minorities:

[g]radually eliminat[e] minority and majority classes. If, only on the basis of a different religious thought or less numerical strength or lack of health, wealth, education, power or social rights, a claim of a section of Indian society to the status of ‘minority’ is considered and conceded, there would be no end to such claims . . . .<sup>102</sup>

In short, the decision calls on the commission to do away with the categories it was designed to protect.<sup>103</sup> If a group cannot gain minority status, the rights for which it may be eligible—however admirable and far-reaching—are irrelevant.<sup>104</sup> Moreover, this decision denies a religious group’s right to be recognized as religiously and legally distinct from another group.<sup>105</sup>

Questions of who is a minority and who decides who is a minority come up in individual cases as well. The Sikh minority, based on the constitutional right of minorities to establish and administer educational institutions, runs the Sri Guru Ram Das Institute of Medical Education and Research, and reserves fifty percent of its seats for Sikh students.<sup>106</sup> In a recent case, “[t]he constitutional validity of the definition of the Sikh has been challenged by Ms. Gurleen Kaur who was denied admission under the quota reserved for the Sikhs . . . on the ground that she plucked her eyebrows.”<sup>107</sup> In February 2009, a lawyer representing the Delhi Sikh Gurudwara Management Committee argued that unshorn hair is basic for recognition of a practicing Sikh, and concluded that Kaur was not a Sikh because she plucked her eyebrows.<sup>108</sup> In a March 2009 hearing on the

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101. *Patil*, (2005) 6 S.C.C. at 704.

102. *Id.* at 703.

103. *See id.*

104. *See id.* at 695 (citing the National Commission for Minorities Act and illustrating the significance of being designated a minority).

105. *See id.* at 703.

106. Sri Guru Ram Das Institute of Medical Sciences and Research, Sri Amritsar Association, [http://www.sgrdimsr.org/asp\\_files/association.asp](http://www.sgrdimsr.org/asp_files/association.asp) (last visited June 29, 2009).

107. *Punjab and Haryana High Court: Unshorn Hair Basic for Sikh*, *supra* note 85.

108. *Id.*

definition of Sikh, a Sikh scholar said hair was integral to Sikhism, but favored giving people such as Kaur a chance to reform.<sup>109</sup> The Sahajdhari Sikh Federation President testified for Kaur's inclusion, noting that "it was the Sikhs who were a minority and creating further categories for them was not in tune with the times."<sup>110</sup> Even among prominent Sikhs, there are competing ideas about the importance of certain practices to the definition and delineation of the Sikh community.

Is self-definition of one's religious identity—as opposed to state definition—a component of religious freedom? If so, at what level should self-definition occur—within the religious community or by the individual? The above cases illustrate the varied levels at which a religious minority can be delineated. In *Patil*, the state and the community offered competing definitions of which religious communities are considered minorities.<sup>111</sup> In the Sikh example, the group's minority status was not in question, but the religious community and the individuals within it offered varied arguments about which people should be officially recognized as members.<sup>112</sup> In each case, the view of the larger unit—the state or the community—was decisive. In *Patil*, even a fundamental difference—whether or not the community believed in a God—was not enough for the Court to see Jains and Hindus as distinct religious communities.<sup>113</sup> In the Sikh example, the seemingly minor difference of eyebrow plucking was enough for influential community members to distinguish Kaul from the Sikh community.<sup>114</sup> In each case, many individual Jains and Sikhs would likely have demarcated religious minorities differently.

What difference does the definition of religious minorities make? Why is self-definition both important and highly contested in India? As the many clauses in the Indian Constitution pertaining to minorities illustrate, the stakes associated with minority status can be quite high. In the Jain case, minority protections and monitoring were at stake. In the Sikh case, highly competitive educational opportunities at a minority-run institution were on the table. Educational quotas, one of several types of affirmative-action policies in India, are linked to certain religious minority

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109. *Punjab & Haryana High Court: Definition of Sikh: Hearing on March 6*, INDLAWNEWS, Feb. 28, 2009, <http://www.indlawnews.com/NewsDisplay.aspx?A5B45B7D-83B8-4CAA-BF04-ED5434971CF1>.

110. *Id.*

111. *See Patil v. India*, (2005) 6 S.C.C. 690, 696–97.

112. *See Punjab & Haryana High Court: Definition of Sikh*, *supra* note 109.

113. *Patil*, (2005) 6 S.C.C. at 702.

114. *See Punjab & Haryana High Court: Definition of Sikh*, *supra* note 109.

identities, making the question of who is a minority a contentious one.<sup>115</sup> Because religious identity is a factor in determining who is eligible for affirmative-action quotas, affirmative-action policies also complicate another religious freedom—the right to convert to a different religion.

### III. CONVERSION RIGHTS

#### A. Eligibility of Low Castes for Affirmative Action

Although Article 15 of the Constitution of India abolished untouchability and discrimination on the basis of caste, caste discrimination persists, and caste categories are legally recognized in order to implement a form of affirmative action known as “reservations.”<sup>116</sup> The continuing use of the official Scheduled Caste lists is an outcome of these policies, which include quotas for candidates from the Scheduled Castes in government jobs, university admissions, and legislative elections.<sup>117</sup> The Scheduled Castes are a government category that includes the lowest—or untouchable—castes.<sup>118</sup> Many politically engaged members of these groups today prefer the label *Dalit*, which means “the oppressed,” or “ground-down.”<sup>119</sup> The Scheduled Caste category emerged in the late colonial era as a way to promote the rights of these groups in an era of constitutional reform and incipient independence.<sup>120</sup>

After India gained independence, a Presidential Order in 1950 restricted Scheduled Caste reservations to Hindu Scheduled Castes, but was later amended to include Sikh Scheduled Castes in 1956 and Buddhist Scheduled Castes in 1990.<sup>121</sup> Some Christians and Muslims have argued that they too face caste discrimination in India, and should be included in affirmative-action policies regardless of their religion.<sup>122</sup> Social scientists,

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115. See JENKINS, *supra* note 77, at 8–10 (discussing the politics of affirmative action in India).

116. See generally INDIA CONST. art. 15 (prohibiting discrimination on grounds of religion, race, caste, sex, or place of birth); JENKINS, *supra* note 77, at 5–10 (discussing caste classification as a basis for affirmative action and the reservation system).

117. See INDIA CONST. art. 15, § 5 (indicating that nothing in Article 15 shall prevent the state from providing for the “advancement of any socially and educationally backward classes or for the Scheduled Castes”).

118. JENKINS, *supra* note 77, at 13.

119. *Id.*

120. See *id.* at 13–14.

121. See *id.* at 120.

122. See ZOYA HASAN, POLITICS OF INCLUSION: CASTES, MINORITIES, AND

activists, and even government committees have acknowledged the presence of castes within Muslim and Christian communities in India. However, to date, the legislature has not amended the law; nor have the courts declared the denial of Scheduled Caste status to certain minorities to be a denial of religious freedom.<sup>123</sup>

The Supreme Court of India considered religion and caste membership in a case involving the denial of government assistance for Scheduled Castes. In *Soosai v. India*, a Scheduled Caste convert to Christianity claimed that denying him assistance for Scheduled Castes was unconstitutional discrimination on the basis of religion.<sup>124</sup> The Supreme Court held that it is not sufficient to demonstrate that caste membership continues; converts must demonstrate that severe social, economic, and educational deprivations continue in the new religious community.<sup>125</sup> As in *Patil*, the Court noted that minority identity—whether caste or religious—is determined in part by socioeconomic status.<sup>126</sup> The Court acknowledged that some Sikh communities had been recognized as Scheduled Castes,<sup>127</sup> attributing this to the government’s consideration of evidence of their social, economic, and cultural deprivation, and pointing to a lack of detailed study of caste and Christian society at the time of the decision.<sup>128</sup>

Notably, a recent study sponsored by the National Commission for Minorities examines existing studies of caste in Muslim and Christian communities and provides new data on this stratification from the National

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AFFIRMATIVE ACTION 196–97 (2009) (“These groups claim to occupy a position comparable to those officially designated as [Scheduled Castes], but the official framework looks upon caste as a feature of Hindu society and hence excludes them.”); see also Laura Dudley Jenkins, *Becoming Backward: Preferential Policies and Religious Minorities in India*, 39 COMMONWEALTH & COMP. POL., July 2001, at 32, 36, 39–40.

123. HASAN, *supra* note 122, at 198–202.

124. See *Soosai v. India*, (1985) Supp. S.C.C. 590, 591.

125. See *id.* at 595–96 (“It is necessary to establish . . . that the disabilities and handicaps suffered from such caste membership in the social order of its origin—Hinduism—continue in their oppressive severity in the new environment of a different religious community.”).

126. *Id.* at 594–95.

127. The continuity of caste distinctions and the egalitarian doctrines of Sikhism received international attention with the recent assassination in Vienna of a leader of a Sikh sect associated with lower caste Sikhs. Lydia Polgreen, *Killing of Sikh Leader Sets Off Riots in India*, N.Y. TIMES, May 25, 2009, at A4, available at [http://www.nytimes.com/2009/05/26/world/asia/26india.html?\\_r=1](http://www.nytimes.com/2009/05/26/world/asia/26india.html?_r=1).

128. *Soosai*, (1985) Supp. S.C.C. at 596.

Sample Survey.<sup>129</sup> The authors explicitly note in their conclusions that “[i]n the two decades since the last major judicial pronouncement on this question in the *Soosai* case, a lot more evidence has become available.”<sup>130</sup> This data could be utilized in a future Supreme Court decision, although the Court has delayed deciding whether Christian or Muslim Dalits should benefit from Scheduled Caste reservations. Three Dalit Christian cases and one Dalit Muslim case have been consolidated into one case for consideration, but the case has been repeatedly postponed.<sup>131</sup>

As the laws currently stand, the Scheduled Caste policies arguably deny religious freedom because employees holding a job reserved for Scheduled Castes are required to report to their employers if they convert to Islam or Christianity. According to the government memorandum still applied in such situations:

Instances have come to notice where Scheduled Caste candidates on adopting a religion other than Hinduism and Sikhism, did not intimate the change in religion to the appointment/administrative authorities and continued claiming/enjoying concessions/benefits admissible to Scheduled Castes. This necessitated withdrawal retrospectively of the concessions enjoyed by them. It has now been decided that in order to avoid such instances, Ministries/Departments etc. of [the] Government of India may in [the] future stipulate in the letter of appointment issued to Scheduled Caste candidates that they should inform about the change of religion to their Appointing/Administrative authority immediately after such a change.<sup>132</sup>

Given this imperative, in some instances co-workers have even turned in people who either converted or hid their religious identity.

A 2006 decision by the Supreme Court of India illustrates how an informant turned in a Christian employee, showing the practical impact of the existing policy to exclude Muslims and Christians from Scheduled Caste affirmative action and, in particular, the impact on religious freedom. In *Superintendent of Post Offices v. Babu*, a postal assistant in a job

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129. Satish Deshpande & Geetika Bapna, *Dalits in the Muslim and Christian Communities: A Status Report on Current Social Scientific Knowledge* vii–xii (2008) (unpublished manuscript, on file with the *Drake Law Review*).

130. *Id.* at 81.

131. Press Release, All-India Christian Council, After Four Years, India's Supreme Court Continues to Delay Decision on Dalit Case (April 26, 2008), available at <http://indianchristians.in/news/content/view/2065/421>.

132. SANDEEP MUKHERJEE, *GUIDE TO RESERVATION POLICY* 315–16 (2007).

reserved for Scheduled Castes was fired in 1992.<sup>133</sup> When he was hired in 1980, over a decade earlier, “[i]n support of his claim that he belonged to the ‘Mala’ community, he had produced a certificate.”<sup>134</sup> Caste certificates issued by local authorities are routinely used to verify identities in Indian affirmative action, but in this case an unnamed informant called the postal assistant’s identity into question: “On an information received that the respondent in fact belonged to Christian community, a disciplinary proceeding against him was initiated. . . . [T]he collector . . . also initiated a proceeding for cancellation of the caste certificate.”<sup>135</sup> The District Collector cancelled his caste certificate, and the assistant was “‘dismissed’ from service with immediate effect which shall ordinarily be a disqualification for future employment under the Government.”<sup>136</sup> The Supreme Court of India applied the current categorization of Scheduled Castes with little comment on the religious dimensions of this exclusion, simply stating: “[T]he candidate must be one who belongs to that category. If the selectee does not fulfill said basic criteria, his appointment cannot be allowed to be continued.”<sup>137</sup>

Was the postal assistant a convert to Christianity from the Mala community? Did he convert in the twelve years between his appointment and dismissal? Were his parents or ancestors Malas? Or, was he never a Mala at all? Although these distinctions seem to bear on his rights to a Scheduled Caste job, these issues are not raised in the decision, where it is implied, but not stated, that the certificate was fraudulent by reference to another case involving a “false certificate.”<sup>138</sup> Caste certificates are required to benefit from affirmative action in India, and fraudulent certificates are an ongoing problem.<sup>139</sup> Yet adjudicating alleged identity fraud involving an identity as malleable or convertible as religion is a dicey legal area.<sup>140</sup> By ignoring the distinction between them, this decision seems

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133. Superintendent of Post Offices v. Babu, (2007) 2 S.C.C. 335, 338.

134. *Id.* at 337.

135. *Id.*

136. *Id.* at 338.

137. *Id.* at 339.

138. *Id.* at 340 (citing *State of Maharashtra v. Parmar*, (2007) 1 S.C.C. 80).

139. See JENKINS, *supra* note 77, at 69 (“The Ministry of Home Affairs has ‘emphasized the need for a proper verification being made by the certificate issuing authorities before they actually issue a certificate.’” (quoting MINISTRY OF PERSONNEL, PUB. GRIEVANCES & PENSIONS, DEP’T OF PERSONNEL & TRAINING, BROCHURE ON RESERVATIONS FOR SCHEDULED CASTES & SCHEDULED TRIBES IN SERVICES 247 (1993))).

140. See *id.* at 35 (listing multiple reasons for conversion to Christianity, such

to equate conversion with fraud—a troubling assumption. On the other hand, given the complexities of overlapping religious and caste identities in India and the lack of visible characteristics that would qualify one for affirmative action, the government cannot allow a free-for-all affirmative-action policy. This case illustrates the personal and practical impact of delineating Scheduled Castes under current laws.

Proponents of a religion-based definition of Scheduled Castes argue that doctrinally, caste is associated with Hinduism.<sup>141</sup> Despite the egalitarian doctrines of Sikhism and Buddhism, they have been legally subsumed under Hinduism for purposes of personal law, which facilitated the expansion of the Scheduled Caste ranks to include communities within these religions.<sup>142</sup> Opponents of further expanding the Scheduled Castes by removing any religious qualification note that the reserved opportunities for Hindu, Sikh, and Buddhist Scheduled Castes would be diluted with an influx of Christian and Muslim applicants.<sup>143</sup> The arguments of Dalit Christians and Dalit Muslims demanding Scheduled Caste status hinge on their increasingly documented socioeconomic disadvantages, as well as their freedom of religion.<sup>144</sup> Conversion to certain minority religions has tangible costs for members of Scheduled Castes. Losing political, economic, and educational affirmative-action benefits,<sup>145</sup> as well as special protections from human-rights abuses under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,<sup>146</sup> could dissuade someone contemplating a change of faith. If this is not enough, anti-conversion laws at the state level may deter them.<sup>147</sup>

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as “escape from cholera,” “the love of Jesus,” and “[t]o get a wife for my younger brother”).

141. See Jenkins, *supra* note 122, at 39 (stating that the Scheduled Caste category was originally open only to Hindus).

142. See *id.* at 41 (“Hindu nationalists have been more eager to subsume SCs of certain ‘Indian’ religions . . . whereas Islam and Christianity, constructed as ‘foreign,’ remain politically useful ‘Others.’”).

143. *Id.* at 34.

144. See *id.* at 42 (noting that Dalits of all religions face “social, educational and economic disabilities . . . due to the traditional practices of untouchability”).

145. See JENKINS, *supra* note 77, at 15 (discussing the government jobs, university admissions, and legislative seats reserved for disadvantaged groups).

146. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989.

147. See Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, LAW & CONTEMP. PROBS., Spring 2008, at 109, 111–12 (describing state laws limiting conversions among vulnerable populations and the laws requiring that conversions be reported to local officials).

### B. *Anti-Conversion Laws*

In addition to the threat of losing legal protections and benefits associated with Scheduled Caste status, another legal disincentive to religious conversion is the recent proliferation of state laws against “forcible” conversions.<sup>148</sup> The focus of such laws seems to be low-caste or tribal communities.<sup>149</sup> The laws’ designers seem to assume that such groups are particularly vulnerable or susceptible to conversion by “force” or “allurement”—an assumption made explicit in some states’ laws through higher penalties for converting women or members of low castes.<sup>150</sup> Concerns about mass conversions extend back to the mass-movement conversions, predominantly by low-caste communities, during the colonial era.<sup>151</sup> Thus, the right to propagate was included in Article 25 of the Indian Constitution—entitled Freedom of Conscience and Free Profession, Practice and Propagation of Religion—only after considerable debate.<sup>152</sup> The proliferation of state laws attempting to ban certain types of propagation signals ongoing unease with conversions.

Some state laws include broad definitions of force, coercion, or allurement, which could prove difficult to assess.<sup>153</sup> The Tamil Nadu ordinance defined “force” as “a show of force [or] a threat of injury of any kind including threat of divine displeasure or social ex-communication.”<sup>154</sup> Could a judge assess a “threat” involving divine displeasure? A second ambiguity in these laws is the difficulty of assessing the degree of freedom versus coercion of converts. This ambiguity is illustrated by J. Waskom Pickett’s “Mass Movement Survey,” which was carried out in India in the 1930s—the period in which many lower-caste communities were converting to Christianity en masse.<sup>155</sup> Because critics were skeptical about the freedom of these converts’ choices, surveyors asked: “Why did you become

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148. *See id.*

149. *Id.*

150. *Id.*

151. *See id.* at 124–25.

152. *See* P.D. MATHEW, FREEDOM OF RELIGION AND A “DEBATE” ON RELIGIOUS CONVERSION 6, 12–17 (1999).

153. *See, e.g.,* Tamil Nadu Prohibition of Forcible Conversion of Religion Ordinance, No. 9 of 2002 (defining allurement as “any” temptation and force as threats of “any kind”) (repealed 2002).

154. *Id.* § 2(c).

155. *See* J. WASKOM PICKETT, CHRISTIAN MASS MOVEMENTS IN INDIA: A STUDY WITH RECOMMENDATIONS 21 (1933) (“[I]n every province of British India and in many Indian states large numbers profess adherence to the Christian religion because of movements . . . to which they, or one of their ancestors, belonged.”).

a Christian?"<sup>156</sup> The standard answers did not always suffice, so Pickett listed forty nonstandard responses he compiled from survey forms and notebooks used in the study.<sup>157</sup> Freedom and coercion in these decisions to become Christians are blended and blurred:

1. Because I was tired of the devil.
2. To change my character.
3. To escape from cholera.
4. To marry a good girl.
5. So I could amount to something in my life and go to heaven.<sup>158</sup>

These spiritual, psychological, medical, and social reasons for conversion illustrate the messy motives of converts and the difficulty of stating conclusively whether each convert was either entirely forced or entirely free when deciding to convert.

Contemporary interviews with Dalit women who converted to Buddhism in 1956 suggest that one should err on the side of taking converts at their word about the freedom of their choices to convert. These women were girls at the time of their conversions, and they participated in a mass conversion of one-half million largely Dalit people, lead by Ambedkar, the Dalit leader who was integrally involved in the writing of the Indian Constitution.<sup>159</sup> Their gender, age, and sheer numbers might trigger patriarchal assumptions that they were not free to choose Buddhism. Many converted with their families or communities, with a varying degree of understanding of the religious doctrines they were embracing.<sup>160</sup> Yet their own words articulate their freedom. One woman recalled both the influence of Ambedkar and her own sense of freedom upon conversion:

I have seen him very closely . . . I have listened to his many lectures. Baba Saheb [loving honorific for Ambedkar] was a humble and down to earth person. He was a very simple person; he used to wear dhoti and a shirt. He used to give everyone good advice . . . . Before we met

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156. *See id.* 161–62.

157. *Id.* at 160, 163.

158. *Id.* at 163.

159. *See* DEBJANI GANGULY, *CASTE, COLONIALISM AND COUNTER-MODERNITY: NOTES ON A POSTCOLONIAL HERMENEUTICS OF CASTE* 155 (2005).

160. *See generally id.* at 35.

him we used to feel very uncomfortable. We used to feel as if we are all alone and lonely. Nobody is behind us. After taking Diksha [conversion to Buddhism] all our fears vanished, and we felt as if some kind of power is behind us, and because of that power behind us we were able to successfully finish all our works.<sup>161</sup>

Another woman reminisced that although she was very young, she felt empowered by conversion nevertheless:

I cannot describe it in detail as I was very small; however, I can say that I got opportunities to get education. I got a scholarship and studied further. I got a scholarship in college also. All this progress was achieved due to the religious conversion.<sup>162</sup>

Any decision is made in a social context, and conversion is no exception. An idealized notion of individual, purely spiritual conversion does not accurately reflect lived experiences of conversion, and the meaning of force or freedom in that context.

Yet in practice, officials may be skeptical of statements made by low-caste, female, or group converts—and especially of statements made by individuals in all three categories. Consider the following news report about Scheduled Caste Satnami community members:

Twenty-two persons, including seven women belonging to Satnami community (SC), converted to Christianity . . . . The converted families have sent written communication to the district magistrate, SDM and the SO (police) claiming they changed their religion voluntarily and without any allurements, in the presence of two priests that had come from Delhi . . . . They claimed they had changed their religion after reading the Bible and there was no pressure on them.<sup>163</sup>

Nevertheless, the priests were arrested for forcible conversion.<sup>164</sup>

Protecting poor and uneducated persons from unscrupulous missionaries is a freedom-of-religion issue, but laws against “forcible” conversion could also impinge on the religious freedom of the converts—

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161. Interview with Shri Kamal Savatkar, in Nagpur, India (Sept. 8, 2002) (as translated by Krishna Manek).

162. Interview with Bela Dhasvi, in Nagpur, India (Sept. 8, 2002) (as translated by Krishna Manek).

163. Kumar Mishra, *22 Convert to Christianity*, TIMES OF INDIA, Aug. 22, 2002, available at <http://timesofindia.indiatimes.com/home/india/22-convert-toChristianity/articleshw/19798972.cms>.

164. *Id.*

not just the converters. One way to balance these freedom arguments is to scrutinize how—and by whom—the laws are used. Practices such as government officials tracking conversions<sup>165</sup> or requiring advance permission prior to conversions are onerous.<sup>166</sup> The current anti-conversion laws are unclear about “who may bring an action for, or lodge an appeal against, decisions with regard to the permissibility of a religious conversion.”<sup>167</sup> The United Nations Special Rapporteur on Freedom of Religion or Belief argues that “any concern raised with regard to certain conversions or how they might be accomplished should primarily be raised by the alleged victim.”<sup>168</sup> In short, to truly ensure freedom of religion, consult—and take seriously—the convert.

#### IV. CONCLUSION

The above policies, issues, and cases highlight the importance of two frequently overlooked aspects of religious freedom: recognizing the overlapping and sometimes changing identities of individuals when protecting their religious rights, and acknowledging that an important part of religious freedom is letting people define their own religious identities. These two aspects of religious freedom are especially important in the context of the complex diversity present in India. However, all countries and all persons are similar composites of multiple identities.

Recognizing the overlapping identities of individuals when defining their rights is particularly important in an era in which global debates over Muslim women’s rights commonly pit universal and individual women’s rights versus particular, group-based religious rights. Indian Muslims fear what will happen if a Hindu-dominated polity designs a universal civil code. One way to break this dichotomy is to take seriously the interplay of gender and religion in individual lives. The dual identities of religious women—such as Shah Bano or Christian feminists contemplating personal law reforms—mean they are not truly free if their rights as women are

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165. See, e.g., JENKINS, *supra* note 77, at 36 (indicating that when judges hear cases involving conversions, they must assess the motivations of the converters).

166. E.g., Manas Dasgupta, *Permission Refused for Mass Conversion*, HINDU, Oct. 6, 2003, available at <http://www.thehindu.com/2003/10/06/stories/2003100602531300.htm>.

167. The Special Rapporteur on Freedom of Religion or Belief, *Report of the Special Rapporteur on Freedom of Religion or Belief, Addendum: Mission to India*, ¶ 49, delivered to the Human Rights Council and the General Assembly, U.N. Doc. A/HRC/10/8/Add.3 (Jan. 26, 2009).

168. *Id.*

supported but their freedom to practice religion is limited. Saba Mahmood, in her work on pious Egyptian women, calls the women she interviewed “docile agents,” which is a contradiction in terms to many Western feminists, for whom freedom is equated with resistance.<sup>169</sup> The women Mahmood interviewed were not resisting tradition, but nevertheless freely practiced in ways that empowered them.<sup>170</sup> Reconceptualizing freedom itself to encompass both gender and cultural dimensions expands the discussion of freedom of religion in important ways.

Religious controversies over personal law, minority definitions, affirmative action, and conversion in contemporary India also demonstrate the importance of honoring, whenever possible, the freedom of individuals to define their own identities. Religions vary in their emphasis on *choice*, which is more associated with Islam or Christianity, versus being *chosen* or born into a religion, which is more associated with Judaism or Hinduism. Moreover, as the statements of converts suggest, it is difficult to pinpoint purely free choices regarding religious identities. But this does not excuse taking away access to legal and religious alternatives. Due to family or community pressures, some brides or grooms may not feel free to choose to be married under the religiously neutral Special Marriage Act, but it should nevertheless remain available to them. Some people may not have complete doctrinal knowledge or perfect practices when asserting their religious identity or choosing to change religions, yet one should err on the side of taking people at their word when they say they are members of religious groups, when they say they have changed religions, when they say their religions are distinct from other religions, or when they would like to choose a particular personal law. The freedom to define or redefine one’s own religious identity should be as central as rights protecting discrete religious groups. Freedom of religion must include freedom to claim, change, complicate, or reject official religious categories.

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169. Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 *CULTURAL ANTHROPOLOGY* 202, 203 (2001).

170. *See id.* at 203–04 (discussing the importance of women seeking religious education and new occupations to the transformation of an Egyptian Muslim woman’s role in religion and society).