

# *Privileging the Powerful: Religion and Constitutional Law in India*

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## **Abstract**

There is vast literature on secularism in India and on the effects of Hindu nationalism on secular constitutionalism. This article takes a different tack. It focuses on cases where minority status is contested or competing rights of minorities are at stake. The article uses three exemplary recent cases to illustrate how judicial doctrines devised to reform discriminatory religious practices or to protect minority interests have, perversely, favoured certain groups at the expense of others. In each area examined, the jurisprudence privileges the more powerful of those interests: the sanctity of Muslim personal law over the rights of Muslim women; Hindu *dalits* over *dalits* that converted to other religions; and minority educational institutions over children from ‘weaker’ and ‘disadvantaged’ sections of society. The article concludes by proposing a new jurisprudence of religion and constitutional practice for India, one that takes account of these inequalities and gives meaning to the fundamental rights of the most vulnerable individuals and groups.

## **I. SURVEYING THE LAW AND RELIGION LANDSCAPE IN INDIA**

### *A. Background*

India has long fascinated law and religion scholars. As the birthplace of four major religions, and the largest democracy in the world, it presents a fascinating case study of how liberal constitutionalism and religious pluralism attempt to co-exist. Moreover, as one of only two majority Hindu countries, India regularly serves as a comparator in studies of law and religion across jurisdictions.<sup>1</sup> That Hinduism is a polytheistic religion makes India an especially useful comparative foil to countries with monotheistic majorities like the United States and Israel.<sup>2</sup>

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1. See Asli Bali and Hanna Lerner, ‘Constitutional Design Without Constitutional Moments: Lessons from Religiously Divided Societies’ (2016) 49 *Cornell International Law Journal* 227.
2. See Gary Jeffrey Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context* (Princeton University Press 2003).

At the constitutional level, India adopts a unique approach to religion, balancing, pluralist, rights-protective, and reformist aims. The *Constitution of India 1950* (Constitution) does not establish an official religion or provide special recognition to any religion. It guarantees the right of all people to freely ‘profess, practise, and propagate religion’.<sup>3</sup> The Constitution also permits any denomination or sect to establish and manage its own religious institutions,<sup>4</sup> and protects the right of minority groups, including religious groups, to administer their own educational institutions.<sup>5</sup> On the reformist end of the spectrum, the Constitution permits the state to regulate economic, financial, and political activity that bears on religious practice,<sup>6</sup> and ‘throw[s] open’ Hindu religious institutions to ‘all classes and sections of Hindus’ to promote social welfare.<sup>7</sup>

What does this all mean for India’s constitutional identity? The Constitution’s Preamble was amended in 1977 to refer to India, among other things, as a ‘secular’ republic. The Supreme Court of India has ruled that secularism is part of the unamendable ‘basic structure’ of the Constitution,<sup>8</sup> but it has not set out precisely what that means as a matter of legal interpretation. Scholars have long debated whether or not India has a secular constitution and, if it does, what the features of Indian secularism might be. ‘Antimodernist’ scholars, like TN Madan, have argued that secularism is a Western concept that has not been adequately defined in the Indian context, leaving it open to attack and distortion by fundamentalists.<sup>9</sup> Ashis Nandy has expressed similar doubts about secularism’s suitability in the Indian context, and has called instead for an indigenous ethos of tolerance. As he put it, ‘If secularism only means the traditional tolerance of South Asia, why do we need an imported idea to talk about local tolerance?’<sup>10</sup>

Liberal constitutional scholars generally accept that India is a secular state, but characterize its brand of secularism as unique and pluralistic. Rajeev Bhargava has referred to Indian secularism as a stance of ‘principled distance’ between religion and the state, which ‘neither mindlessly excludes all religions nor is merely neutral towards them’.<sup>11</sup> Rajeev Dhavan separates Indian secularism into three strands: religious freedom, celebratory neutrality, and reformatory justice. Indians have the freedom to hold their own religious beliefs and freedom to practice their faith, the state may subsidize all religious celebrations without distinction among groups, and it may reform religious institutions and practices to bring about transformative socioeconomic change.<sup>12</sup> Gary

3. Constitution of India 1950, art 25(1).

4. *ibid* art 26.

5. *ibid* art 30.

6. *ibid* art 25(2)(a).

7. *ibid* art 25(2)(b).

8. *SR Bommai v Union of India* (1994) 3 SCC 1.

9. TN Madan, ‘Secularism and Its Place’ (1987) 46(4) *Journal of Asian Studies* 747.

10. Ashis Nandy, ‘A Billion Gandhis’ *Outlook India* (New Delhi, 21 June 2004), <[www.outlookindia.com/magazine/story/a-billion-gandhis/224252](http://www.outlookindia.com/magazine/story/a-billion-gandhis/224252)> accessed 16 September 2017.

11. Rajeev Bhargava, ‘India’s Secular Constitution’ in Zoya Hasan, E Sridharan and R Sudarshan (eds), *India’s Living Constitution* (Permanent Black 2002) 117.

12. Rajeev Dhavan, ‘The Road to Xanadu: India’s Quest for Secularism’ in Gerald Larson (ed), *Religion and Personal Law in India* (Indiana University Press 2001).

Jacobsohn seized upon this last aspect in his comparative constitutional study of religion. He coined the term ‘ameliorative secularism’ to describe the Indian Constitution’s aim to improve ‘the social conditions of people long burdened by the inequities of religious based hierarchies’ while also embodying ‘a vision of intergroup comity whose fulfilment necessitates cautious deliberation in the pursuit of abstract justice’.<sup>13</sup>

Recent scholarship in this area has been more sceptical about the internal consistency and conceptual coherence of Indian secularism. Mathew John argues that while India does not fit within a traditional liberal conception of secularism, the jurisprudence of the Supreme Court also does not reflect a coherent Indian conception of secularism.<sup>14</sup> Deepa Das Acevedo surveys the scholarly discourse and constitutional jurisprudence on law and religion in India and concludes that India is increasingly not a secular state and, more controversially, that it was never meant to be strictly secular. While Acevedo accepts that secularism will look different everywhere, she argues that the principle of secularism must have a singular, constant meaning if it is to retain conceptual clarity. She defines secularism as both the formal non-establishment of religion and the desire to keep religion and state separate. On that definition, India neither is, nor was intended to be, secular.<sup>15</sup>

A related branch of scholarship has linked the rise of Hindu nationalism to a decline in constitutional secularism. The most comprehensive account of this phenomenon comes from Ronojoy Sen. Over several articles and books, Sen provides an overview of the Indian Supreme Court’s jurisprudence on secularism, showing how the Court has tried to ‘rationalize’ religion by modernizing and homogenizing religious practices, particularly Hindu practices.<sup>16</sup>

Sen traces the origins of this judicial tendency towards rationalization to the liberal democratic conception of secularism espoused by India’s first Prime Minister Jawaharlal Nehru. Sen argues that the Nehruvian impulse to define and reform Hinduism, reflected most prominently in the judgments of Chief Justice Gajendragadkar,<sup>17</sup> has substantially merged with the aims of Hindu nationalists.<sup>18</sup> Gajendragadkar’s reform-minded attempts to define Hinduism to advance social justice laid the groundwork for two jurisprudential developments that, ironically, advanced the cause of Hindu nationalism. First, the Supreme Court of India developed what has become known as the ‘essential practice test’ in which it distinguishes between integral religious practices that are constitutionally protected, and those less established practices that may be banned or reformed.<sup>19</sup> This doctrine has restricted religious freedom, particularly with respect to minority groups and

13. Jacobsohn (n 2) 94.

14. Mathew John, ‘Decoding Secularism: Comparative Study of Legal Decisions in India and US’ (2005) 40 (18) *Economic and Political Weekly* 1901.

15. Deepa Das Acevedo, ‘Secularism in the Indian Context’ (2013) 38 *Law and Social Enquiry* 138.

16. See Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (OUP 2010); Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism* (East-West Center 2007); Ronojoy Sen, ‘The Indian Supreme Court and the quest for a “rational” Hinduism’ (2010) 1(1) *South Asian History and Culture* 86.

17. Sen, *Articles of Faith* (n 16) ch 7.

18. Sen, *Legalizing Religion* (n 16) 6–7.

19. *ibid* 11–29.

non-mainstream Hindu sects. Second, in establishing the contours of Hinduism, the Supreme Court initially sought to define the religion in progressive liberal terms to bring about reforms, but this later enabled the ethno-nationalist Hindutva movement to successfully argue that its political agenda was coterminous with the Hindu religion.<sup>20</sup> In the landmark ‘Hindutva’ cases, the Court equated Hindu nationalist ideology with the Hindu religion. As a result, it permitted appeals to a narrow, ethnocentric Hindu identity in election campaigns, which has paved the way for Hindu nationalist dominance – led by the Bharatiya Janata Party (BJP) – in recent national and state elections.

The rise of Hindu nationalism, and the ‘Hindutva’ cases specifically, have spawned a literature of their own, with both legal and non-legal scholars analyzing the threat posed to Indian secularism.<sup>21</sup> Broadly speaking, this scholarship links the rise in Hindu nationalist politics in the 1990s to the Mandal Commission, which had recommended that 27 per cent of government jobs and public university seats should be reserved for Other Backward Castes (OBCs).<sup>22</sup> The perception that the Commission sought to divide Hindus along caste lines provoked nationalist leaders to unite upper and lower castes around a common cause. Their target was the sixteenth century Babri Masjid mosque in Ayodhya. The Vishwa Hindu Parishad (VHP), a right-wing, nationalist political party, led the Ram Janmabhoomi movement to tear down the mosque and replace it with a temple to the Hindu deity Lord Ram.<sup>23</sup> According to the VHP and its supporters, the mosque stood in the birthplace of Lord Ram. Following months of anti-Muslim rhetoric from the VHP and its allies, combined with overt calls to build a temple on the site of the mosque, Hindu mobs demolished the mosque in December 1992, setting off widespread communal violence.<sup>24</sup> The President of India eventually intervened and declared a state of emergency in four states. The constitutionality of this declaration was challenged in *SR Bommai v Union of India*.<sup>25</sup> The Supreme Court upheld its constitutionality, declared that secularism was part of the Constitution’s ‘basic structure’, and made clear that both Hindutva ideology and communal violence were unacceptable in a secular India.<sup>26</sup>

But this judicial pushback against Hindu nationalism would be short-lived. In 1995, the Supreme Court issued its principal judgment in the ‘Hindutva’ cases.<sup>27</sup> These cases concerned the legality of Hindu nationalist political campaigns. Section 123 of the *Representation of People Act 1951* (RPA) prohibits candidates for political office from appealing to people’s religion, caste, community or language, and from stoking ‘feelings of enmity or hatred’ between different groups. The question before the

20. *ibid* 29–37.

21. See Brenda Cossman and Ratna Kapur, ‘Secularism’s Last Sigh?: The Hindu Right, The Courts, and India’s Struggle for Democracy’ (1997) 38 *Harvard International Law Journal* 113; Chetan Bhatt, *Hindu Nationalism: Origins, Ideologies and Modern Myths* (Berg 2001); Christophe Jaffrelot, *Religion, Caste and Politics in India* (Columbia University Press 2011).

22. Jaffrelot (n 21) xvi–xx. The Mandal Commission issued its report in 1980, but its implementation was only announced by Prime Minister VP Singh in 1990.

23. *ibid* xx (‘The relation between Mandal and Mandir [temple] is now well-established’).

24. Cossman and Kapur (n 21) 117–119.

25. *SR Bommai* (n 8).

26. *ibid* 151.

27. *Dr Ramesh Yeshwant Prabhoo v Prabhakar Kashinath Kunte* (1996) 1 SCC 130.

Supreme Court was whether candidates from Hindu nationalist parties had violated this provision by spreading the Hindutva ideology. The accused argued that their appeals to communal identity were grounded in Indian culture, not religion, and that their criticism of the then-dominant Congress Party stemmed from Congress's anti-secular appeals to minority communities. The Court ruled in favour of the nationalists, holding that 'the term "Hindutva" is related more to the way of life of the people in the subcontinent'.<sup>28</sup> It added, '[i]t is difficult to appreciate how...the term "Hindutva" or "Hinduism" per se...can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition [in Section 123 of the RPA]'.<sup>29</sup>

This judgement has been rightly criticized for the false equivalency it drew between Hindu nationalism and Hindutva ideology, and for ignoring the communal antagonism wrought by this ideology in Indian elections and socio-political discourse.<sup>30</sup> At a broader level, the 'Hindutva' cases represent a troubling trend in the Indian Supreme Court's jurisprudence on religion. Over time, and across a range of constitutional issues, the Court has generally ruled in favour of more powerful and politically influential interests, rather than vindicate the rights of vulnerable communities.

### B. *Privileging the Powerful*

Given the vast literature on secularism in India, and related scholarship on the effects of Hindu nationalism, this article takes a different tack. It does not provide a comprehensive overview of the effects of religion on constitutional practice, nor does it advance a particular conception of secularism. Rather, it focuses on cases where minority status is contested or competing rights of minorities are at stake. The article uses three exemplary recent cases to illustrate how judicial doctrines devised to reform discriminatory religious practices or to protect minority interests have, perversely, privileged certain minority groups at the expense of others.

The article has three main parts. Part II examines Muslim personal law, contending that the Supreme Court has consistently favoured the interests of religious institutions over women's rights. In *Shayara Bano v Union of India*,<sup>31</sup> the Court narrowly held that the 'triple *talaq*' practice, where a Muslim man can instantaneously divorce his wife, was illegal, but did not hold that it was unconstitutional. Moreover, the justices' convoluted opinions, which held, inter alia, that triple *talaq* was arbitrary and that it was not an essential part of Islamic law because it finds no mention in the *Quran*, did not consider the right to equality for women. This case exemplifies the Court's longstanding reluctance to apply public law to personal law matters. The one prominent exception is *Mohd Ahmed Khan v Shah Bano Begum (Shah Bano)*,<sup>32</sup> where the Court held that a Muslim woman had a statutory right to claim maintenance from

28. *ibid* 22.

29. *ibid*.

30. Cossman and Kapur (n 21) 125–29; Sen, *Legalizing Religion* (n 16) 32–37.

31. Writ Petition (Civil) No 118 of 2016.

32. *Mohd Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945 (Supreme Court of India).

her ex-husband. That judgment created so much furore among Muslim religious institutions that Parliament passed a statute to limit the maintenance that Muslim women could obtain. Thus, though Islamic religious practice has been largely untouched by judicial intervention, Muslim women's rights have not received sufficient statutory or constitutional protection.

Part III examines protections for lower caste groups. It argues that Hindu *dalits* ('oppressed persons' belonging to the scheduled castes) have been consistently privileged over *dalits* that converted to other religions. The exemplar case, *Superintendent of Post Offices v Babu*,<sup>33</sup> upheld the dismissal of a postal assistant who held a position reserved for scheduled castes on the ground that his conversion to Christianity rendered null his scheduled caste status. This case sheds light on related jurisprudential developments, including the Court's validation of anti-conversion laws and its broader refusal to allow groups – like the Jain community – to self-identify as minorities for legal purposes.

Part IV analyzes the intersection of socioeconomic rights and the right of minority groups to administer their own institutions. In *Pramati Educational & Cultural Trust v Union of India*,<sup>34</sup> a constitutional bench of the Supreme Court upheld a previous judgment that exempted minority educational institutions from Section 12(1)(c) of the *Right of Children to Free and Compulsory Education Act 2009* (RTE Act), which required all schools to reserve 25 per cent of their seats for disadvantaged students. While this benefits minority religions in India, it does so at the expense of students from lower castes and other marginalized groups that have historically been denied educational opportunities.

The article concludes by proposing a new jurisprudence of religion and constitutional practice for India, one that takes account of these inequalities and gives meaning to the fundamental rights of the most vulnerable individuals and groups.

## II. DO WOMEN HAVE RIGHTS IN THE PERSONAL LAW REALM?

In August 2017, the Supreme Court of India invalidated 'triple *talaq*' – the practice under which a Muslim man can instantaneously divorce his wife. The Court in *Shayara Bano* correctly determined that this aspect of Muslim personal law was unlawful. However, the five-judge bench was deeply divided on its reasoning: two justices would have upheld the practice, while another justice simply held that triple *talaq* was not an essential practice of the Islamic faith, and hence not part of Muslim personal law. Only two of the justices hearing this case were willing to subject triple *talaq* to secular, constitutional reasoning – and even they only held it unconstitutional on the ground that it was arbitrary under Article 14 of the Constitution. No reliance was placed on Article 15, which, among other things, prohibits discrimination on the basis of sex.

*Shayara Bano*, therefore, illustrates three unfortunate trends in the Supreme Court's jurisprudence on personal law: (1) the justices' reluctance to subject personal law to

33. (2007) 2 SCC 335.

34. (2014) 8 SCC 1.

fundamental rights guarantees; (2) their proclivity to pronounce on which practices are essential to particular religious faiths; and (3), their neglect of women's rights. This Part shows how each of these trends is reinforced through the *Shayara Bano* opinions and how they collectively contribute to deepening gender inequality in this area.

### A. Personal Law Immune from Fundamental Rights

One of the principal grounds of disagreement among the justices was whether triple *talaq* was subject to fundamental rights review. Article 13 of the Constitution provides that any law that contravenes or is inconsistent with fundamental rights in Part III shall be void. An early Supreme Court precedent, *State of Bombay v Narasu Appa Mali*, held that personal laws do not constitute 'law' for the purposes of Article 13 and are immune from constitutional review.<sup>35</sup> None of the justices in *Shayara Bano* sought to overturn this precedent, despite their own misgivings and much critical academic commentary.<sup>36</sup> But, there was a way around this case. The *Muslim Personal Law (Shariat) Application Act 1937* (1937 Act) appeared to have codified triple *talaq* into a statute, which would subject it to Article 13 and, therefore, to other fundamental rights in the Constitution. Section 2 of the 1937 Act provides, 'Notwithstanding any custom or usage to the contrary... regarding... dissolution of marriage, including *talaq*... the rule of decision in cases where parties are Muslims shall be the Muslim Personal Law (*Shariat*)'.

While Justice Nariman (joined by Justice Lalit) was willing to interpret this provision to include triple *talaq*,<sup>37</sup> three out of the five justices in *Shayara Bano* declined to extend fundamental rights review into the realm of personal law. Justice Kurian authored a short concurring opinion in which he found that Section 2 of the Act merely clarified that on certain subjects, including 'dissolution of marriage', Muslim personal law (*Shariat*) would apply to the Muslim community. Because this provision did not enumerate the 'specific grounds and procedures' for triple *talaq*, it did not 'regulat[e]' the practice.<sup>38</sup> Yet, he did not explain why such regulation was required. That the Act provides a statutory basis for triple *talaq* appears sufficient, as Justice Nariman put it, to be 'hit by' Article 13 of the Constitution.<sup>39</sup>

Chief Justice Khehar, who wrote the dissenting opinion on behalf of himself and Justice Nazeer, extended the protection for personal law to an unprecedented extent. Aside from concluding that the 1937 Act did not codify triple *talaq*, the Chief Justice made the novel claim that personal law is shielded by Article 25 of the Constitution, which protects the freedom of religious practice. In other words, he declared that 'the stature of personal law is that of a fundamental right' and is, therefore, protected from 'invasion and breach'.<sup>40</sup> As Gautam Bhatia notes, not only is there no supporting

35. AIR 1952 Bom 84 (Supreme Court of India).

36. *Shayara Bano* (n 31) para 22 (Nariman J); Flavia Agnes, 'Personal Laws' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 909–910.

37. *Shayara Bano* (n 31) paras 11–19 (Nariman J).

38. *ibid* para 4 (Kurian J).

39. *ibid* para 19 (Nariman J).

40. *ibid* para 146 (Khehar, CJ).



authority for this claim, but it is also incoherent to give ‘personal law’, as an entity, the constitutional protections afforded to individuals.<sup>41</sup>

Further, this conclusion erroneously equates personal law with fundamental rights – such as the rights to equality, non-discrimination, and liberty in Articles 14, 15, and 21 – which are given short shrift in the Chief Justice’s opinion. He simply dismissed the constitutional challenges to triple *talaq* on the ground that these provisions apply only to ‘state action’, which he had already concluded did not extend to triple *talaq* because it remained uncoded personal law.<sup>42</sup>

The petitioner also argued that triple *talaq* violated ‘constitutional morality’. As the Chief Justice noted, the question raised was whether ‘under a secular Constitution, women could be discriminated against, only on account of their religious identity?’<sup>43</sup> Submissions made on behalf of the petitioner pointed out that because of triple *talaq*, ‘Muslim women were placed in a position far more vulnerable than their counterparts, who professed other faiths’.<sup>44</sup> Nonetheless, the Chief Justice ruled that personal law remained immune from constitutional challenge and suggested that it superseded claims of constitutional morality. He said:

[Triple *Talaq*] being a constituent of ‘personal law’ has a stature equal to other fundamental rights, conferred in Part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention.<sup>45</sup>

Thus, despite substantial evidence detailing how triple *talaq* violated women’s fundamental rights, a majority of the justices in *Shayara Bano* – the Chief Justice, joined by Justice Nazeer, and Justice Kurian writing separately – were not willing to subject the practice to constitutional scrutiny.

### B. The Essential Practice Test

Both the Chief Justice and Justice Kurian also relied on the dubious ‘essential practice test’ in their opinions. The Chief Justice, as an initial matter, examined whether triple *talaq* had religious sanction. He found that while the practice was not mentioned in the *Quran*, the *hadiths* – reports on the Prophet Mohammad’s traditions that also form part of the Islamic canon – offered some historical evidence of it.<sup>46</sup> Yet, after a long discussion, based on rival submissions of the import, reliability and meaning of the *hadiths*, the Chief Justice concluded that the *hadiths* were inconclusive.<sup>47</sup> He proceeded to examine the history of triple *talaq* and its prevalence across the Islamic

41. Gautam Bhatia, ‘The Supreme Court’s Triple Talaq Judgment’ (*Indian Constitutional Law and Philosophy*, 22 August 2017), <<https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/>> accessed 4 October 2017.

42. *Shayara Bano* (n 31) para 165 (Khehar, CJ).

43. *ibid* para 166.

44. *ibid*.

45. *ibid* para 189.

46. *ibid* para 121.

47. *ibid* para 139.



world. Historically, the Chief Justice noted that triple *talaq* ‘crept into Muslim tradition more than 1,400 years ago’.<sup>48</sup> In terms of its prevalence, he pointed to legislation in more than fifteen countries, all of which are Islamic states or have substantial Muslim populations.<sup>49</sup> He concluded on these grounds that triple *talaq* is ‘integral’ to the Islamic faith, particularly to the Sunni Hanafi school which is followed by ninety per cent of Indian Muslims, and therefore, constitutes part of Muslim personal law.<sup>50</sup>

This historical and comparative analysis is problematic for at least two reasons. First, the Chief Justice did not sufficiently explain why triple *talaq* was integral to the Islamic faith under the ‘essential practice test’. This test, which is well-established in the Indian Supreme Court’s jurisprudence, was first announced in the *Shirur Mutt* case (1954).<sup>51</sup> It provides that integral religious practices, in addition to core beliefs and doctrines, are constitutionally protected. While this doctrine broadened constitutional safeguards for religious practice, it also ‘sanctioned an elaborate regulatory regime for religious institutions’.<sup>52</sup> Sen has documented how the Court, over the past fifty years, entrenched this doctrine to regulate Hindu temples, distinguish ‘legitimate’ religions and sects from ‘fraudulent’ ones, and cleanse religions of aspects that it held to be backward or irrational.<sup>53</sup> The Court has been widely criticized for maintaining this test and for its heavy-handed application thereof.<sup>54</sup>

The problem in the *Shayara Bano* context is that the Chief Justice ignored the Court’s own precedents on this point. The fact that triple *talaq* has ancient roots does not necessarily mean that it is integral to the faith. Indeed, the Court has held in the past that longstanding Islamic practices are not ‘essential’ to the faith if they are not mentioned in the *Quran*. For instance, in *MH Qureshi v State of Bihar*,<sup>55</sup> the Court rejected a constitutional challenge filed by Muslim butchers to state-level laws banning cow slaughter. The butchers claimed that their faith required them to slaughter cattle during the Bakri Eid festival, but the Court held that this practice was merely optional and not protected as an essential practice.<sup>56</sup> Why is triple *talaq* any different? If anything, it is less widely practised than cow slaughter both in India and across the Muslim world.

This raises a second problem with the Chief Justice’s analysis. He pointed to the fact that many countries had legislated on triple *talaq* as evidence that it is a widespread practice. But this evidence actually points to the opposite conclusion. The countries he

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48. *ibid* para 141.

49. *ibid* para 142.

50. *ibid* para 144–145.

51. *Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) 1 SCR 1005.

52. Sen, *Articles of Faith* (n 16) 49.

53. *ibid* 58–69.

54. Pratap Bhanu Mehta, ‘Passion and Constraint: Courts and the Regulation of Religious Meaning’ in Rajeev Bhargava (ed) *Politics and Ethics of the Indian Constitution* (OUP 2008) 322–329; Rajeev Dhavan and Fali S Nariman, ‘The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities’ in BN Kirpal and others (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2004) 263–264.

55. AIR 1958 SC 731 (Supreme Court of India).

56. *ibid*; Sen, *Articles of Faith* (n 16) 129–130.

listed – including India’s Islamic neighbours Pakistan and Bangladesh – have banned the practice through legislation, which strongly indicates that it is not integral or essential to the Islamic faith.<sup>57</sup>

For his part, Justice Kurian simply endorsed the Court’s precedent in *Shamim Ara v State of Uttar Pradesh*.<sup>58</sup> That case held that triple *talaq* did not form part of Muslim personal law in India because, as Justice Kurian put it, the practice ‘is against the basic tenets of the Holy Quran and consequently, it violates Shariat’.<sup>59</sup> Justice Kurian disagreed with the Chief Justice on the application of the ‘essential practice test’, noting that ‘merely because a practice has continued for long, that by itself cannot make it valid’.<sup>60</sup>

Thus, Justice Kurian concluded that triple *talaq* was unlawful, though he did not express a view on its constitutionality. He applied the ‘essential practice test’ more faithfully – and accurately – than the Chief Justice, but his opinion reads more like an extended analysis of the Islamic faith than a judicial decision. Four pages of the opinion are devoted to an extended quotation from the *Quran*.<sup>61</sup> The precedents cited, for the most part, outline what past justices have said about the validity of triple *talaq* as a religious matter.<sup>62</sup>

Justice Nariman, too, employed the ‘essential practice test’ to determine whether Article 25 of the Constitution saved triple *talaq* from being declared unconstitutional. He arrived at the same conclusion – that triple *talaq* is not ‘integral’ to Islam – as Justice Kurian, though he did not rely directly on religious texts. Rather, Justice Nariman cited long excerpts from previous Supreme Court judgments, which themselves elaborated on the content of Islamic doctrine.<sup>63</sup>

These opinions raise the question of whether it is appropriate for a non-ecclesiastical court, presiding over an ostensibly secular constitution, to be so engaged in theological analysis.<sup>64</sup> As a practical matter, the justices are not sufficiently knowledgeable to make authoritative claims on the content of religious doctrine. Chief Justice Khehar essentially conceded this point when he chose ‘not to enter the thicket of determining’ whether the *hadiths* sanctioned triple *talaq*.<sup>65</sup> Nonetheless, he concluded that the practice was essential to Islam. The Court has also struggled to express its views on religious practices in a respectful and impartial manner. Chief Justice Gajendragadkar, perhaps the most committed religious reformer in the Court’s history, described Hinduism, as it was practised, as ‘superstitious’, ‘reactionary’, and ‘backward’.<sup>66</sup>

57. ‘Pakistan, Egypt among 19 countries that have abolished triple talaq’ *The Indian Express* (New Delhi, 22 August 2017) <<http://indianexpress.com/article/india/pakistan-egypt-among-19-countries-that-have-abolished-triple-talaq-supreme-court-verdict-4808780/>> accessed 4 October 2017.

58. (2002) 7 SCC 518.

59. *Shayara Bano* (n 31) para 10 (Kurian J).

60. *ibid* para 24.

61. *ibid* para 9.

62. *ibid* paras 12–14.

63. *ibid* para 25 (Nariman J).

64. Gautam Bhatia, ‘Two Cheers for the Supreme Court’ *The Hindu* (Chennai, 24 August 2017) <[www.thehindu.com/opinion/lead/two-cheers-for-the-supreme-court/article19547560.ece](http://www.thehindu.com/opinion/lead/two-cheers-for-the-supreme-court/article19547560.ece)> accessed 5 October 2017.

65. *Shayara Bano* (n 31) para 137 (Khehar, CJ).

66. Sen, *Articles of Faith* (n 16) ch 7.

The Court has been as impolitic in its descriptions of Islam. Consider, for instance, the landmark *Shah Bano* judgment. The Court held that Section 125 of the *Criminal Procedure Code* (CrPC) required Muslim men to pay regular maintenance to their divorced wives, even though Muslim personal law mandated that maintenance be paid only for three months (*iddat*). Writing for the Court, Chief Justice Chandrachud dismissed the notion that there was a conflict between these provisions, and interpreted Muslim personal law himself to conclude that the '*Quran* imposes an obligation' to pay 'maintenance to the divorced wife'.<sup>67</sup> He also adopted a condescending tone towards the Islamic community,<sup>68</sup> noting how the 'Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all'.<sup>69</sup>

That the five-judge bench, in that case, was composed entirely of Hindu justices who then pronounced on the meaning of the *Quran* and made patronizing comments about Islamic practices, has been cited as a major contributor to the controversy surrounding it.<sup>70</sup> Under pressure from certain segments of the Muslim community, the Indian Parliament enacted the *Muslim Women (Protection of Rights on Divorce) Act 1986*, which exempted Muslim men from the requirements of Section 125 of the CrPC and essentially reversed the *Shah Bano* judgment.<sup>71</sup>

The justices in *Shayara Bano*, too, failed to strike the appropriate tone. For example, Justice Kurian, in describing the Statement of Object and Reasons of the 1937 Act, remarked that the Act was 'enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community'.<sup>72</sup>

If the Court is seeking to advance communal harmony by carving out exceptions for personal law, its attempts have been undermined by its insensitive and often condescending rhetoric, which recurs throughout its jurisprudence on religion. This lack of judicial tact, combined with the justices' limited grasp of religious doctrine, militates against the use of the 'essential practice test'.

More importantly, as a legal matter, such 'religious pontification' dilutes the supremacy of the Constitution.<sup>73</sup> Just as exempting personal law from Article 13 diminishes the fundamental rights contained in Part III of the Constitution, relying on religious texts as the ultimate authority to determine the practices to receive Article 25 protection elevates these texts to a quasi-constitutional status. Moreover, when judges

67. *Shah Bano* (n 32) 951–952.

68. Sagnik Dutta, 'From Accommodation to Substantive Equality: Muslim Personal Law, Secular Law, and the Indian Constitution 1985–2015' (2016) 4 *Asian Journal of Law and Society* 191, 201–202.

69. *ibid* 202.

70. Agnes (n 36) 914; Ruma Pal, 'Religious Minorities and the Law' in Gerald James Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001) 31–32.

71. *ibid*. But see Dutta (n 68) 204–208 (arguing that commentators have misinterpreted the significance of this Act, which several High Courts interpreted to award 'generous amounts' of maintenance to divorced Muslim women).

72. *Shayara Bano* (n 31) para 3 (Kurian J).

73. Arghya Sengupta, 'Let's talk about discrimination: Supreme Court outlawing triple talaq was no surprise, it should have gone further' (*Times of India*, 24 August 2017) <<https://blogs.timesofindia.indiatimes.com/toi-edit-page/lets-talk-about-discrimination-supreme-court-outlawing-triple-talaq-was-no-surprise-it-should-have-gone-further/>> accessed 5 October 2017.

depend on religious texts to determine ‘essential practices’, they are more likely to uphold those practices that conform with ‘authoritative scripture and commentary’.<sup>74</sup> Such religious orthodoxy is difficult to square with modern constitutionalism. However, rather than keeping the two spheres separate, as the Court has done in the personal law context, it should abandon the ‘essential practice test’, reaffirm constitutional supremacy, and subject personal law to fundamental rights scrutiny.

### C. Women’s Rights

Perhaps the most problematic aspect of the *Shayara Bano* judgment is its inattention to the rights of Muslim women. This neglect is apparent in all three opinions but is most pronounced in Justice Nariman’s, which is the only one to subject triple *talaq* to fundamental rights review. Unlike Chief Justice Khehar and Justice Kurian, Justice Nariman concluded that triple *talaq* had been codified by the 1937 Act and, as a result, constituted a ‘law’ under Article 13.<sup>75</sup> This meant that the practice would be unlawful if it violated any of the fundamental rights in Part III of the Constitution. The most obvious candidate – one advanced by the petitioner and parties intervening on her behalf – was Article 15, which prohibits discrimination on the basis of sex. Given that triple *talaq* is a unilateral practice, through which a Muslim man can instantaneously divorce his wife but not vice versa, it is a *prima facie* case of sex discrimination. Moreover, considering the socioeconomic challenges that many Muslim women face, including the aforementioned limitations on maintenance after divorce, there is a strong case to be made that the practice exacerbates gender inequality.

Justice Nariman, though, chose a different path. His opinion focused on the doctrine of arbitrariness in Article 14 of the Constitution. As he explained, there is a long line of precedent on this issue, including most notably the *Ajay Hasia* case,<sup>76</sup> which establishes that legislation can be invalidated if it is ‘disproportionate, excessive or otherwise...manifestly unreasonable’.<sup>77</sup> In the final paragraph of his opinion, Justice Nariman summed up why triple *talaq* was ‘manifestly arbitrary’. He wrote:

Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place...it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it.<sup>78</sup>

This excerpt is striking for its emphasis on saving marriages rather than vindicating the rights of divorced spouses. No doubt the practice of instantaneously ending a marriage without reason is arbitrary and violates Article 14. But, Justice Nariman’s analysis appears to be more concerned with the preserving the sanctity of marriage as

74. Acevedo (n 15) 152; CJ Fuller, ‘Hinduism and Scriptural Authority in Modern Indian Law’ (1988) 30 *Comparative Studies in Society and History* 225.

75. *Shayara Bano* (n 31) para 19 (Nariman J).

76. *ibid* para 44; *Ajay Hasia v Khalid Mujib Sebravadi* (1981) 1 SCC 722.

77. *Shayara Bano* (n 31) para 45 (Nariman J).

78. *ibid* para 57.

an institution than with the rights of Muslim women. Indeed, as other commentators have noted, this is not what a landmark judgment on gender equality looks like,<sup>79</sup> and adds another chapter to the Court's paternalism in family law cases.<sup>80</sup>

Overall, while *Shayara Bano* affirmed the Court's precedent in *Shamim Ara* that triple *talaq* was unlawful, it did not hold that the practice was unconstitutional or that it constituted sex discrimination. Only Justice Nariman, joined by Justice Lalit, was willing to apply fundamental rights in this context, and even he refused to extend such review to all personal laws. And, the effects of triple *talaq* on Muslim women were largely ignored, even though this case presented a straightforward opportunity to advance gender equality in the laws. *Shayara Bano*, therefore, appears to have moved the law very little, if at all – personal law remains immune from Article 13, justices continue to haphazardly invoke the 'essential practice test', and women's rights are placed on the backburner while religious rights are vindicated.

### III. WHO QUALIFIES AS A MINORITY?

Minority status has long been contested in India and along different axes. Two of the most prominent are caste and religion, which intersect in complex ways that have not been fully appreciated in the constitutional jurisprudence. This Part looks at the Indian Supreme Court's case law on the rights of *dalits* that converted to other religions and the claims of the Jain community for minority status.

#### A. Divisions Among Dalits

While the Constitution of India bans the practice of untouchability,<sup>81</sup> it also recognizes that, in practice, caste discrimination persists and must be met with affirmative action. Thus, Article 15 originally banned discrimination, inter alia, on the basis of caste, and was later amended to clarify that this did not 'prevent the state from making any special provision for the advancement of any...backward classes of citizens or for the Scheduled Castes and Scheduled Tribes'(SCSTs).<sup>82</sup> The SCSTs, also known as *dalits* and *adivasis* (ie, original inhabitants) have received legal protection since the British colonial era. The *Government of India (Scheduled Castes) Order 1936* was the first modern attempt to classify these groups, resulting in a list (or schedule) of those castes and tribes for whom government seats would be reserved. In independent India, the President of India enacted the *Constitution (Scheduled Castes) Order* (Scheduled Castes Order 1950) and *Constitution (Scheduled Tribes) Order* in 1950, shortly after the Constitution was adopted. These laws designated more than 1,000 castes and 700 tribes for reservations in public sector jobs and public universities.<sup>83</sup>

79. Sengupta (n 73).

80. Ratna Kapur, 'Triple Talaq Verdict: Wherein Lies the Much Hailed Victory?' (*The Wire*, 28 August 2017) <<https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/>> accessed 6 October 2017.

81. Constitution of India 1950, art 17.

82. *ibid* art 15(2), 15(4). Art 15(4) was added by the Constitution (First Amendment) Act, 1951.

83. Constitution (Scheduled Castes) Order, 1950; Constitution (Scheduled Tribes) Order, 1950.

Initially, only Hindus were eligible for these privileges. The Scheduled Castes Order 1950 was later amended to include Sikh and Buddhist *dalits*.<sup>84</sup> However, it has never applied to *dalits* who converted to Christianity or Islam, despite evidence that these groups experience similar discrimination and persistent socioeconomic disadvantage.<sup>85</sup> This sort of discrimination is well illustrated in *Superintendent of Post Offices v Babu*.<sup>86</sup> The case concerned a postal assistant, who assumed a position reserved for SCSTs. He claimed he was a member of the *Mala* community, which is a scheduled caste, and produced a certificate to prove that affiliation. However, an informant reported that the postal assistant had converted to Christianity and was, therefore, ineligible for that position. This led to a disciplinary proceeding and a simultaneous proceeding to cancel the caste certificate. The disciplinary authority found that the postal assistant supplied 'false information' and ordered that he be 'dismissed' from service immediately and disqualified from future government employment.<sup>87</sup>

The case reached the Supreme Court on a question of administrative law. The charge memo filed against the postal assistant was issued prior to the cancellation of his caste certificate, raising the question of whether it was proper for the disciplinary authority and the Central Administrative Tribunal, which upheld the decision, to take the cancellation into account in its decisions. Lurking below this narrow question, of course, was the broader question of whether the postal assistant had forfeited his claim to a reserved government position by converting to Christianity.

The Court's opinion largely ignored this latter issue. It simply stated that when a vacancy arises for an SCST reserved post, 'the candidate must be one who belongs to that category. If the selectee does not fulfil the said basic criteria, his appointment cannot be allowed to be continued'.<sup>88</sup> In this case, the postal assistant, despite having several opportunities, had 'failed and/or neglected' to provide proper documentation to prove that he was a member of the *Mala* community.<sup>89</sup> Thus, the Court dismissed his appeal.

Although resolved quite simply, and not on constitutional grounds, this case is a window into two larger constitutional issues facing religious minorities in India. First, the Court's ready acceptance of a dubious administrative proceeding, in which an unnamed informant led local authorities to cancel a caste certificate, is indicative of a broader lack of constitutional protections for *dalits* who convert out of Hinduism. Though the *Babu* judgment did not cite any precedents on this matter, it is decided against the backdrop of *Soosai v Union of India*.<sup>90</sup> In that case, the petitioner belonged to the *Adi-Dravida* community, an enumerated scheduled caste, but had converted to Christianity. He, therefore, did not qualify for benefits available to members of scheduled castes. He challenged the constitutionality of the Scheduled Castes Order

84. Laura Dudley Jenkins, 'Diversity and Constitution in India: What is Religious Freedom?' (2009) 57 Drake Law Review 913, 932.

85. *ibid* 933–934.

86. (2007) 2 SCC 337.

87. *ibid* 337–338.

88. *ibid* 339.

89. *ibid*.

90. (1985) SCC (Supp) 590.

1950 on the grounds that it discriminated against him as a Christian by applying (at the time) only to Hindu and Sikh individuals. He relied on Articles 14 and 15 of the Constitution, which guarantee the rights to equality and non-discrimination on the basis of religion, respectively.<sup>91</sup>

Thus, unlike in *Babu*, the Supreme Court was forced to confront the constitutional validity of the Scheduled Castes Order 1950, and to justify its application to Hindus and Sikhs but not to Christians. The Court, led by Justice Pathak, declared that ‘the caste system...is a social phenomenon peculiar to Hindu society’.<sup>92</sup> It further explained that when the Sikh community asked for four of its ‘backward sections’ to receive scheduled caste status, their demand was accepted on the basis that these sects had only recently converted from Hinduism.<sup>93</sup> These castes were included in the original Scheduled Castes Order 1950 and, in 1956, the Order was amended ‘to include all Sikh untouchables’.<sup>94</sup>

However, this reasoning did not justify the exclusion of Christian *dalits* from the Scheduled Castes Order, as many of them had also converted recently to Hinduism. Perhaps anticipating that criticism, the Court inserted an additional, socioeconomic rationale, stating:

It is quite evident that the President [in issuing the Scheduled Castes Order] had before him...material indicating that the depressed classes of the Hindu and the Sikh communities *suffered from economic and social disabilities and cultural and educational backwardness so gross in character and degree* that the members of those castes [required legal protection].<sup>95</sup>

Thus, *dalit* Christians had to show that they ‘suffer from a comparable depth’ of backwardness in all these areas to qualify for scheduled caste status.<sup>96</sup> The Court did not conclude that Christians, like the petitioner, failed to make this showing; rather, it ruled that it was not possible to make a determination because ‘no authority and detailed study’ on this matter had been placed before the justices in this case.<sup>97</sup> It is worth noting that since *Soosai* was decided in 1985, the condition of Christian and Muslim *dalits* has been investigated thoroughly, and if the Court were to consider this issue again, it would have far more evidence to draw upon.<sup>98</sup> For now, however, *Soosai* is the final word on this matter and discrimination against Christian *dalits* continues.<sup>99</sup>

On a related note, India has a long history of anti-conversion laws that have targeted Muslims and, more recently, Christians. In the post-colonial era, the first laws were

91. *ibid* 591–592.

92. *ibid* 594.

93. *ibid* 595.

94. *ibid*.

95. *ibid* (emphasis added).

96. *ibid* 596.

97. *ibid*.

98. Jenkins (n 84) 933–934.

99. Note also that Christian *dalits* do not automatically regain their scheduled caste status if they ‘reconvert’ to Hinduism. See *Rajagopal v Armugam*, AIR 1969 SC 101 (Supreme Court of India) (holding that a candidate for political office belonging to a scheduled caste who converted to Christianity and then reconverted to Hinduism was not eligible to contest a seat reserved for members of his original scheduled caste).



passed in 1968 in the states of Madhya Pradesh and Orissa. The Madhya Pradesh *Dharma Swatantraya Adhiniyam* prohibited ‘forcible conversion through the use of force, fraud, or allurement’, where ‘allurement’ included ‘any gift or gratification either in cash or kind...or grant of any material benefit’. Similarly, the *Orissa Freedom of Religion Act 1967* provided, ‘no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion’.<sup>100</sup>

In the abstract, neither of these laws looks problematic. They seem to merely protect individuals from coerced or otherwise unlawful conversion to another religion. In practice, however, these laws have been misused to limit the spread of Christianity and Islam in India. In *Rev Stainislaus v State of Madhya Pradesh*,<sup>101</sup> the Supreme Court was asked to rule on the constitutionality of anti-conversion laws. Stainislaus, a Catholic priest, had been convicted for forcible conversion under the Madhya Pradesh statute. He argued that the statute was unconstitutional on the grounds that it violated his fundamental right to freedom of religion. This case was consolidated with *State of Orissa v Hyde*, in which eight petitioners challenged the constitutionality of the Orissa anti-conversion law. While the Madhya Pradesh High Court ruled against Stainislaus, the Orissa High Court ruled in favour of the petitioners, though on alternate grounds.<sup>102</sup>

The Supreme Court had to determine, among other issues, whether the freedom to ‘freely profess, practice, and propagate’ religion in Article 25(1) of the Constitution includes the freedom to convert others. Writing for the Court, Chief Justice Ray held that what Article 25(1) ‘grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets’.<sup>103</sup> He relied on *Ratilal v State of Bombay*, which had ruled that Article 25 protects the right to propagate religion ‘for the edifications [sic] of others’.<sup>104</sup> Thus, according to the *Stainislaus* judgment, religious propagation is constitutionally protected if the aim is to improve others’ lives, but not if the aim is to convert them.

These are distinctions without a difference. Expositing the tenets of one’s faith might convince others to convert to that religion. Indeed, those engaging in religious propagation – a constitutionally protected practice – are likely motivated by a desire to proselytize, even if they do not resort to coercion, fraud or ‘allurement’ to achieve their goal.<sup>105</sup> By conflating legitimate religious practice with criminal conduct, the Court unfairly burdens those religions that engage in proselytization. This is the most

100. Orissa Freedom of Religion Act 1967, Act No 2 of 1968, s 3. For an overview of anti-conversion laws in India, see Sen, *Articles of Faith* (n 16) ch 5; James Andrew Huff, ‘Religious Freedom and Analysis of the Constitutionality of Anti-Conversion Laws’ (2009) 10 Rutgers Journal of Law & Religion 12.

101. AIR 1977 SC 908 (Supreme Court of India).

102. *ibid* para 13; Huff (n 100). The Orissa High Court ruled that state legislatures lacked the authority to issue laws on religious matters – the Constitution assigns that competence to the Union (central) government.

103. *Stainislaus* (n 101) para 20.

104. *ibid* para 21 (citing *Ratilal v State of Bombay* (1954) 1 SCR 1055).

105. See Mehta (n 54) 333–334.

problematic aspect of the *Stainislaus* judgment: it implicitly favours Hinduism, which does not advocate conversion, over the minority Christian and Islamic faiths for whom proselytization is a central tenet. And this discrimination, once again, is most keenly felt by members of *dalit* communities, who are the most likely converts to these religions as they try to escape the worst aspects of caste discrimination.

### B. Minority Self-Identification

The *Babu* case also illustrates how the Supreme Court has been reluctant to allow minority groups to self-identify. That the postal assistant averred that he was a member of a scheduled caste was completely irrelevant to the Court's analysis. This fits within a broader pattern in the Court's jurisprudence in which self-proclaimed minority status is given little, if any, weight in determining which groups qualify for minority protections.

In *Bal Patil v Union of India*,<sup>106</sup> the Supreme Court considered whether the Jain community should be classified as a 'minority' under the *National Commission for Minorities Act 1992* (NCMA). The Act listed five religious groups as minorities: Muslims, Christians, Sikhs, Buddhists and Parsis. The appellant in this case filed a writ petition in the High Court of Bombay seeking a mandamus direction to the Central Government of India to include Jains among this list.<sup>107</sup> The High Court dismissed the petition on the ground that the question of which minorities receive constitutional protection was pending before the Supreme Court in *TMA Pai Foundation v Union of India*.<sup>108</sup> On appeal, the Supreme Court postponed its adjudication of *Bal Patil* until the *TMA Pai* judgment was issued.<sup>109</sup>

*TMA Pai* was a landmark precedent, issued by an eleven-judge bench, that covered a gamut of fundamental rights issues. The next section will discuss its importance in the context of minority institutions and the right to education.<sup>110</sup> However, the relevant aspect of this case with respect to *Bal Patil* was whether minority status would be determined at the central or state level. The Indian Constitution does not define the term 'minority', but uses the term in two fundamental rights provisions. Article 29 on the 'Protection of Interests of Minorities', enshrines the right of all citizens to conserve their own language and prohibits the denial of admission to any state-run or state-funded educational institution on the grounds of 'religion, race, caste...[or] language'. Article 30 provides the 'Right of Minorities to establish and administer educational institutions', and specifies that it extends to religious and linguistic minorities. Chief Justice Kirpal, who authored the majority opinion in *TMA Pai*, ruled on the meaning and content of this provision. He concluded that because Indian states were reorganized along linguistic lines, 'the unit will be the state

106. (2005) 6 SCC 690.

107. *ibid* 695.

108. (2002) 8 SCC 481.

109. *Bal Patil* (n 106) 695.

110. See Part IV.

and not the whole of India' in determining who qualifies as a minority for the purpose of Article 30.<sup>111</sup>

Though *Bal Patil* did not concern Article 30, the Supreme Court bench deciding that case nonetheless applied the *TMA Pai* reasoning and held that state governments must decide, on a case-by-case basis, whether the Jain community qualifies as a 'minority' under the NCMA. The appellants argued that the *TMA Pai* case did not render the Central Government redundant in these matters. In their view, the Central Government retained the authority to declare the Jain community a national-level minority under the Act.<sup>112</sup> The *Bal Patil* bench responded to these arguments with some obiter dicta on the criteria for minority status.

The Court sought to define national minorities in historical terms. It pointed to the bitter history of British colonialism and British efforts to separate the Hindu and Muslim communities. The drafters of the Constitution, therefore, aimed to 'allay the apprehensions and fears in the minds of Muslims' by providing constitutional guarantees of freedom of religion.<sup>113</sup> These protections extended to Parsis 'who had migrated from their native State Iran' and to Christians, who were treated separately by the British from Hindus or Muslims because of the presence of Anglo-Indians and 'large-scale intermarriages and conversions' that took place in the colonial era.<sup>114</sup> In contrast, according to the Court, Jainism has historically 'been treated as part of the wide Hindu community'.<sup>115</sup> While the Court conceded that Jains have distinct beliefs and religious practices, including the fact that they do not 'worship idols or images of god', it still concluded that Jainism is a 'special religion formed on the basis of quintessence' of the 'general' Hindu religion.<sup>116</sup>

This analysis is remarkable for a few reasons. First, the Court waded into theological history to determine the uniqueness of the Jain religion. Rather than consult experts, or simply leave it to the parties to present evidence on this matter, the justices cited religious scripture to conclude that Jainism was part of the broader Hindu religion.<sup>117</sup> This fits within the Court's longstanding practice of regulating religion, and pronouncing on the content and significance of various religious doctrines.

For instance, in *Shastri Yagnapurashdasji v Muldas Bhundardas Vaisya*, the Court held that the Satsang community must open itself to reform.<sup>118</sup> The Satsangs claimed that they were not Hindu and asked to be exempted from a law opening Hindu temples to *dalits*. Not only did the Court rule this community was a sect of Hinduism, but it added that the Satsangs' aversion to reform was based on 'superstition, ignorance, and complete misunderstanding of the true teachings of Hinduism'.<sup>119</sup>

111. *TMA Pai* (n 108) 587.

112. *Bal Patil* (n 106) 696.

113. *ibid* 701.

114. *ibid*.

115. *ibid*.

116. *ibid* 702.

117. *ibid*.

118. AIR 1966 SC 1119 (Supreme Court of India).

119. *ibid* para 57.

Similarly, the Court held that the Aurobindo Society (followers of Sri Aurobindo) did not constitute a religious minority under Article 26 of the Constitution. Following a detailed analysis of his writings and relevant scholarly work, it found that Sri Aurobindo merely set forth a ‘philosophy’ and not a religion.<sup>120</sup> Another group, the Ananda Margis, were deemed a religious denomination, but the Court held that their *tandava* dance did not fulfil the ‘essential practice test’ and could be restricted in public places. According to the Court, because this dance was only introduced in 1966 – and Ananda Marga was created in 1955 – it was not integral to the sect’s religious practice.<sup>121</sup> In all these cases,<sup>122</sup> the Court substituted its own judgment on the meaning and import of religious practices with little deference to the self-identity and claims of the groups themselves.

Second, the Court did not place much weight on the fact that Jains, unlike most Hindus, do not worship idols or images of God. This appears to confirm that Jainism is a separate religion, but the Court was not willing to follow through on that line of analysis. Rather, it explained that Jains place greater emphasis on certain Hindu concepts such as non-violence (*ahimsa*) and compassion (*karuna*) and can therefore be seen as a ‘reformist movement amongst Hindus’.<sup>123</sup>

Third, and perhaps most troubling, the Court implied that Jainism could not be a distinct religion because of its roots in the Indian subcontinent and cultural overlap with Hinduism. It noted the similarity of Jain teachings to the ‘Vedic philosophy explained by Lord Krishna in the *Bhagwat Gita*’.<sup>124</sup> This reference to the *Vedas* – the most ancient Sanskrit texts and the basis of Hinduism – strongly hints at a common, historical link between the two religions. The Court also remarked on the meaning of the word Jain (ie, ‘one who has attained “victory”’), which has Sanskrit origins, which again implies shared ancestry. But the Court does not explain how these overlapping historical roots prove that Hinduism and Jainism are part of the same religion. This missing prong of analysis is crucial. Christianity, Islam, and Judaism share regional and theological origins, too, but no one would suggest they form a single religion.

In addition to its observations on the tenets and history of Jainism, the Court discussed other considerations that bear on national minority status. Echoing *Soosai*, the Court said that ‘statistical data’ showing that the Jain community is a numerical minority in a particular state is not sufficient. The socioeconomic status of the community matters as well. As the Court put it:

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...extend any special treatment or protection to them as a minority.<sup>125</sup>

120. *SP Mittal v Union of India*, AIR 1983 SC 1 (Supreme Court of India).

121. *Acharya Jagdishwaranand Avadhuta v Commissioner of Police*, AIR 1984 SC 51 (Supreme Court of India).

122. For a detailed analysis of these cases, see Sen, *Articles of Faith* (n 16) 58–60.

123. *Bal Patil* (n 106) 702.

124. *ibid.*

125. *ibid* 699.

While the Court did not apply this reasoning to the Jain community explicitly, its implication is clear. Jains, broadly speaking, have achieved economical success in India, which would militate against them receiving certain minority protections, such as reservations in government jobs or universities. However, this case did not pertain to reservations; rather, the appellants were seeking recognition from the National Commission on Minorities, which is responsible, among other things, for protecting ‘religious, cultural, and educational rights’.<sup>126</sup> Surely this function should extend even to more socioeconomically privileged minorities. And, in any event, if socioeconomic considerations are weighted so heavily in this context, they should also bear on other judicial determinations of which minority groups are eligible for state protection. As we shall see in Part IV, however, the Court has not extended its solicitude for socioeconomic concerns to the regulation of minority educational institutions.

#### IV. WHOSE RIGHT TO EDUCATION?

The Indian Constitution protects and advances the right to education in a number of ways that touch on religion. Part III of the Constitution includes fundamental rights that prohibit the state from discriminating against minorities in education. Article 29 provides that no citizen may be denied admission into a state-run or state-funded educational institute on the grounds of religion, race, caste or language, while Article 30(1) grants all ‘minorities’, including religious minorities, the right to establish and administer their own educational institutions.<sup>127</sup>

Part IV of the Constitution enumerates a set of non-justiciable Directive Principles of State Policy that are intended, among other aims, to guide the state towards securing greater socioeconomic justice. One of those Directives, Article 45, declares, ‘The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years’. Unlike other Directives, this provision was time-bound. It required the state to provide free primary education for all children within ten years of the Constitution’s founding.

In *Unni Krishnan v State of Andhra Pradesh*,<sup>128</sup> the Supreme Court held that the right to education is a fundamental right within the right to live with dignity under Article 21. The Court emphasized that the parameters of this right must be understood in the context of the Directive Principles, particularly Article 45. As more than forty years had passed since the enactment of the Constitution, and universal primary education had not been achieved, the Court found that Article 45 had been effectively converted from a non-justiciable principle into an enforceable fundamental right.

*Unni Krishnan*’s broad ruling would later be entrenched through a constitutional amendment: the *Eighty-Sixth Amendment Act 2002*. It inserted Article 21-A into the Constitution, which provided, ‘The State shall provide free and compulsory education

126. *ibid* 698.

127. ‘Minorities’ here refers to religious and linguistic groups. See Part III.B above.

128. (1993) 1 SCC 645.

to all children of the age of six to fourteen years in such manner as the State may, by law, determine’.

Seven years later, Parliament enacted the RTE Act to give practical effect to Article 21-A. Section 12(1)(c) of the RTE Act requires schools to reserve at least twenty-five per cent of their seats for children belonging to ‘weaker section and disadvantaged group [sic] in the neighbourhood’. Each state is allowed to provide its own definition of ‘weaker and disadvantaged’ groups based on its specific demographic needs, though it broadly refers to vulnerable minorities including *dalits*. The purpose of this provision was to promote diversity across schools in India and to reduce discrimination.<sup>129</sup>

The constitutionality of Section 12(1)(c) was challenged in *Society for Un-Aided Private Schools of Rajasthan v Union of India*.<sup>130</sup> In this case, a three-judge Division Bench of the Supreme Court had to determine, among other things, if this provision violated the Constitution as applied to minority educational institutions. These institutions were considered ‘schools’ under Section 2(n) of the Act and, therefore, subject to all of its provisions.

In *TMA Pai*, the Supreme Court held that the right of all citizens to establish private educational institutions is protected under Article 19(1)(g) of the Constitution, which enumerates the freedom to ‘practice any profession...occupation, trade, or business’.<sup>131</sup> Article 19(6) limits the scope of Article 19(1)(g), by providing that the state may pass laws in the ‘interests of the general public’ that place ‘reasonable restrictions’ on this right. *TMA Pai* further held that minority groups have the right to establish educational institutions under Article 30(1) of the Constitution and that this right, too, was not absolute.<sup>132</sup> It is subject to regulations ‘framed in the national interest’.<sup>133</sup>

Thus, in *Society for Un-Aided Private Schools*, the Court had to determine whether Section 12(1)(c) of the RTE Act was a permissible regulation on the right of minority groups to establish and administer educational institutions under Article 30(1) of the Constitution. Writing for the Court, Justice Kapadia distinguished between aided (government-funded or supported) and unaided (private) minority schools. As to the latter, he held that reserving a quarter of the seats for children from different backgrounds ‘would result in changing the character of the schools’.<sup>134</sup> Since the purpose of these schools is to preserve the ‘language, script or culture’ of a particular minority group, the reservation was unconstitutional as applied to unaided

129. Jayna Kothari and Aparna Ravi, ‘A Battle of Rights: The Right to Education of Children Versus Rights of Minority Schools’ (2016) 16(2) Oxford University Commonwealth Journal 195, 198.

130. (2012) 6 SCC 1.

131. (2002) 8 SCC 481.

132. The Supreme Court here diverged from its judgment in *Re Sidhajibai v State of Bombay*, AIR 1963 SC 540 (Supreme Court of India), in which it held that Article 30(1) was an absolute right and, therefore, not subject to reasonable restrictions. Prior to *TMA Pai*, the Court had already retreated from this absolutist stance, encouraging minority institutions to integrate into secular society and to admit students from diverse backgrounds. See *St Xavier’s College v State of Gujarat*, AIR 1974 SC 1389 (Supreme Court of India); *St Stephen’s College v University of Delhi* (1992) 1 SCC 558.

133. *ibid* 563.

134. *Society for Un-Aided Schools* (n 130) 43.

minority schools.<sup>135</sup> However, the Court noted that Article 29(2) of the Constitution protects the right of all citizens to be admitted to any state educational institution, which includes schools that receive state funds. Thus, Section 12(1)(c) of the RTE Act was constitutionally valid with respect to aided minority schools.<sup>136</sup>

This case was later referred to a five-judge Constitutional Bench<sup>137</sup> of the Supreme Court in *Pramati*.<sup>138</sup> The Constitutional Bench upheld the *Society for Un-Aided Private Schools* judgment insofar as it held that the RTE Act violated the Article 30(a) right of unaided minority schools to administer themselves. However, it overturned the Division Bench as to aided minority schools. Justice Patnaik's opinion for the Court comes down strongly in favour of minority institutions. He declared that religious and linguistic minorities have a 'special constitutional right' under Article 30(1) to establish and administer schools of their choice and 'the State has no power to interfere'.<sup>139</sup> The state can issue regulations, but it cannot 'force admission' of non-minority students 'so as to affect to the minority character' of these institutions.<sup>140</sup> According to Justice Patnaik, therefore, Article 21-A of the Constitution – which entrenched a fundamental right to education and formed the basis for the RTE Act – would 'abrogate' the Article 30(1) right to minorities if it were applied to their schools, whether aided or unaided.<sup>141</sup>

Both *Society for Un-Aided Schools* and *Pramati* display an admirable respect for the right to minority institutions to protect their own linguistic, religious, and cultural traditions. However, the two judgments fail to reconcile the interests of 'minority groups' under Article 30(1) with the broader societal interests Parliament sought to advance through the RTE Act.

While both judgments acknowledge the socioeconomic and caste-based inequalities that the Act seeks to redress, they ultimately only pay lip service to the Act's broader aims. For instance, Justice Kapadia in *Society for Un-Aided Schools* made clear that the RTE Act was enacted to implement Article 21-A of the Constitution and, therefore, aimed to 'remove all barriers (including financial barriers) which impede access to education'.<sup>142</sup> He also explained that 'fundamental rights have two aspects: they act as fetters on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity'.<sup>143</sup> In a similar vein, Justice Patnaik discussed the importance of including the 'backward classes of citizens and the Scheduled Castes and the Scheduled Tribes' in the country's premier educational institutions.<sup>144</sup> He pointed to the Preamble of the Constitution, which

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135. *ibid.*

136. *ibid.*

137. Art 145(3) of the Constitution requires at least five justices to adjudicate 'a substantial question of law as to the interpretation of [the] Constitution'.

138. (2014) 8 SCC 1.

139. *ibid* 269.

140. *ibid.*

141. *ibid* 270.

142. *Society for Un-Aided Schools* (n 130) 33.

143. *ibid* 32.

144. *Pramati Educational & Cultural Trust* (n 34) 260.



promotes ‘fraternity, unity and integrity of the nation’. These goals, he said, ‘cannot be achieved unless the backward classes’ are ‘integrated into the mainstream’, which hitherto, they had been unable to enter.<sup>145</sup>

Yet, neither judgment is willing to follow through on this rhetoric of socioeconomic justice. *Pramati*, which is the precedent that must now be followed, is especially problematic in this regard. As K Vivek Reddy argues, *Pramati* erroneously characterizes the Article 30(1) rights of minority institutions as ‘exclusive’ or ‘special’ rights that become a ‘sword in the hands’ of these institutions.<sup>146</sup> He notes that while early case law on minority educational institutions employed this analytical framework, *TMA Pai* changed course and adopted an ‘equal rights view’ of Article 30(1).<sup>147</sup> Indeed, *TMA Pai* states that ‘principles of equality’ apply to minority educational institutions and that they cannot engage in ‘reverse discrimination’.<sup>148</sup> Chief Justice Kirpal’s majority opinion in that case also makes clear that the rights of minority institutions are limited by other constitutional guarantees. In his words, it is ‘difficult to comprehend that the framers of the Constitution would have given such an absolute right to...minorities’, where their institutions would be administered ‘in a manner so as to be in conflict’ with other constitutional provisions.<sup>149</sup>

*Pramati*, however, interpreted Article 30(1) precisely in that manner. The Court did not attempt a harmonious construction between Article 30(1) and Article 21-A, which guarantees the right to a free primary education to all citizens. Section 12(1)(c) RTE Act sought to realize that right for the ‘backward classes’, including the SCSTs, who, as we have discussed, face severe discrimination in other legal arenas too. Rather than accommodate the needs of these marginalized communities, the Court simply ruled in favour of the more powerful minority institutions. Perhaps the Court wanted to avoid the constitutional dilemma of balancing Article 21-A with Article 30(1). Still, it could have ruled, as per *TMA Pai*, that Article 30(1) is not an absolute right, and must abide by regulations advancing the national interest, which is precisely what the RTE Act seeks to do.

*Pramati* is likely to have a disproportionate impact on the ‘backward classes’. As Kothari and Ravi explain, neither this judgment – nor any of the relevant precedents – provides criteria or even guidelines for what constitutes a minority educational institution, which has led to ‘significant abuse of the RTE’s exemption for minority schools’.<sup>150</sup> Following *Pramati*, many schools have opportunistically sought that exemption to avoid their responsibility to admit and educate students from the ‘weaker’ and ‘disadvantaged’ segments of society.<sup>151</sup> They are, therefore, discriminating against *dalits* and vulnerable religious minorities. All the more reason for the Supreme Court to revisit this issue to ensure that students from

145. *ibid.*

146. K Vivek Reddy, ‘Minority Educational Institutions’ in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 921.

147. *ibid* 923–925.

148. *TMA Pai* (n 108) 578–579.

149. *ibid* 578.

150. Kothari and Ravi (n 129) 210.

151. *ibid.*

the ‘backward classes’ can be accommodated within all schools, including minority educational institutions.

## V. CONCLUSION: TOWARDS A NEW JURISPRUDENCE ON RELIGION

This article has sought to examine the Indian Supreme Court’s constitutional jurisprudence on religion through a new lens. Rather than analyze the impact of case law on secularism or chart the rise and influence of Hindu nationalism, it has looked at the competing claims of minority groups for constitutional recognition and rights protection. It demonstrated that in each area examined, the jurisprudence privileges the more powerful of those interests: the sanctity of Muslim personal law over the rights of Muslim women; Hindu *dalits* over *dalits* that converted to other religions; and minority educational institutions over children from ‘weaker’ and ‘disadvantaged’ sections of society.

Going forward, the Court must reorient its jurisprudence on these issues in the following ways. First, it should acknowledge the competing interests at stake in each of these areas. Women’s rights must be given full consideration in personal law cases, while socioeconomic status should not simply be used to deny certain groups – like Christian *dalits* and Jains – minority status. Socioeconomic conditions should also be acknowledged and factored into the judgments in other contexts, such as the right to education in minority institutions.

Second, the Court should seek to accommodate competing interests in its judgments. This is particularly true with respect to case law on Articles 30 and 25 of the Constitution. On Article 30, the Court must create guidelines as to what constitutes a minority educational institution and follow the *TMA Pai* judgment in recognizing that this is not a ‘special’ right. Rather it is subject to reasonable regulations that are in the broader national interest. Section 12(1)(c) of the RTE Act, reserving twenty-five per cent of the seats in these institutions for disadvantaged children, is reasonable – it still permits these schools to fill a large majority of their seats with students belonging to the relevant minority group. On Article 25, the Court must abandon the ‘essential practice test’ and subject personal law to constitutional scrutiny. Much as with Article 30, the Court should not treat personal law as a ‘special’ category that supersedes other fundamental rights or rely on religious texts – as opposed to the Constitution – to determine which practices receive constitutional protection.

Finally, and more broadly, the Court should consider the impact of religious laws and minority categorization on the most vulnerable communities. In *Shayara Bano*, for instance, the petitioner was not simply claiming that triple *talaq* discriminated against her, but also that it was part of a broader set of religious and cultural practices that created deeply unequal conditions for women.

Similarly, in declining to protect Christian *dalits* in *Babu* and *Soosai*, the Court seemed not to appreciate the degree of discrimination that *dalits* face or that such discrimination does not evaporate simply because they convert to another religion. While the Court in *Soosai* displayed a willingness to consider social science research on

the condition of Christian *dalits*, it has now been more than thirty years since that decision and the Court has not reversed course.

On the right to education, the RTE Act is less than a decade old, and much research has already been conducted on its impact and effectiveness.<sup>152</sup> Perhaps this sustained attention and empirical data will lead the Court to revisit its judgment in *Pramati* and more fully recognize the right to education for the most disadvantaged children. Whether it will do the same in the personal law and *dalit* context is far less certain.

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152. See for eg Kothari and Ravi (n 129).