EQUALITY, DIFFERENCE AND GROUP RIGHTS: THE CASE OF INDIA

by

ASHOK ACHARYA

A thesis submitted in conformity with the requirements

for the Degree of Doctor of Philosophy,

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Abstract

Recent engagements of contemporary liberalism with questions of identity, community, and rights have led to an exciting array of research in political theory. Contemporary liberals and communitarians—Walzer, Taylor, Kymlicka, Young, Parekh, Carens and others—have, each in their own ways, challenged the traditional liberal framework of individual rights and sought to extend this framework to accommodate cultural and disadvantaged minorities. The theoretical prescriptions that flow from these works have implications for re-ordering majority-minority relations in pluralist societies. However, most discussions of this sort have usually involved thinking through examples from advanced liberal democracies. And since most countries in the world today are culturally diverse, there is a need to analyze and use other, mostly non-Western,

examples to illuminate our understanding of what justice requires in regard to identity conflicts and community rights.

My dissertation uses the Indian example to probe morally compelling issues pertaining to liberal justifications of rights for disadvantaged groups. It explores the challenges that cultural difference and group disadvantage pose to the ideal of equal citizenship. More specifically, it draws on caste and religious identities to problematize the notions of cultural recognition and resource redistribution based on disadvantages that groups experience. At a concrete level, the analysis focuses on (a) cultural recognition for religious minorities, and (b) affirmative action for disadvantaged groups. While arguing a case for broadening the referent of equal treatment to include fair strategies of inclusion for groups that find themselves under the burden of unequal circumstances, the thesis also addresses the reasonable limits of such group-based claims in a liberal democracy of India's size and diversity. A study of the Indian model, it is argued, poses fresh challenges and solutions to the theory and practice of liberal democracy in both western and non-western contexts.

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Table of Contents

Chapter One

INTRODUCTION

The 1990s was a turning point in liberal theory. In the span of a decade the focus of contemporary liberal theory converged on issues of multiculturalism, ethnic accommodation, group recognition, rights of minorities, and so on. The interest in these areas grew out of the realization that a) both the state and the majority in nearly every multiethnic society have neglected legitimate interests surrounding the identity of minority communities, and b) the traditional liberal perspective of recognizing the interests of individuals has largely worked in the interests of the majority or the more powerful group(s) and to the detriment of those excluded or disadvantaged.

Empirically, most liberal democracies are today still caught in the dilemma of re-envisioning the contours of nation-building and waking up to new challenges of re-conceiving citizenship. On the other hand, however, realities of cultural difference and pluralism in most multiethnic societies today have injected a new impetus to liberal theory as it makes fresh attempts to redefine citizenship by being both more inclusive and multicultural.

Liberalism and Recognition of Difference

Under such circumstances, a new vigour has marked the rebirth of liberalism, or to those who chart the course today, a 'renaissance' of liberalism. Contemporary liberalism now, more than ever, seeks to normatively accommodate claims of difference. As reflected in the works of Charles Taylor, Michael Walzer, Will Kymlicka, Iris Marion Young, Bhikhu Parekh, Nancy Fraser, Joseph H. Carens, and others in recent times, there has been a growing concern to map issues of cultural difference, justice toward excluded groups, and citizenship in multiethnic societies. Although these theorists focus on contexts that largely prevail in North America and Europe, their work has theoretical resonance and possible application in non-western contexts, too. However, the important task of identifying the right mix of theory and contextual realities of difference remains to be worked out in each context. In other words, much of the conceptual apparatus that goes by the name of 'multiculturalism' today needs to be thought through by examining particular contexts and examples. A quick-fix theoretical resolution does not apply anywhere, although a broad recognition of the need to address group concerns regarding exclusion from the political sphere matters almost everywhere.

The idea of group rights has acquired a new normative and political salience in most multiethnic societies. In contrast to the traditional liberal conception that only individuals can have rights and liberties and that politics be neutral between competing conceptions of good, multicultural liberals and advocates of group rights, despite some differences in their theoretical approaches, commonly agree that some forms of

recognition and protection of disadvantaged groups do not run counter to liberal notions of justice.

Groups: Recognition and Disadvantage

How does recognition of difference matter to multiethnic societies? How does it get played out, say, in a non-western society that institutionally values democratic inclusion and equal citizenship? Why should recognition merit attention in a society that has set itself the massive task of reducing socio-economic inequalities? These questions scream for attention in developing non-western societies that must take into account the scarce resources at their disposal and the adjustments of priorities required in tackling most forms of unjust inequalities.

Struggles for recognition in developing countries cannot ignore the political demands of redistribution. Caught in the vortex of the politics of difference and the politics of egalitarianism, most developing countries must rise to the challenge of accommodating group claims in a manner that secures justice to all. Following Nancy Fraser (1997), the imperative to acknowledge a new epistemology of recognition is called for.

Recognition of cultural differences is indeed important. None has more forcefully made the case for such a politics of recognition than Charles Taylor (1994). "[O]ur identity," Taylor reasons, "is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or

demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being." (Taylor 1994: 25) Extending the logic of recognition to citizenship and a refined version of liberalism, Will Kymlicka (1995) argues that group-differentiated rights are compatible with the liberal emphasis on individual freedom, autonomy, and equality. Advancing a conception of multicultural citizenship that emanates in his case from a reassessment of Canadian diversity in the public sphere, Kymlicka makes a strong case for protections of minority cultures more generally. Contemporary liberal theory, because of Kymlicka's sympathetic interventions on behalf of minorities, is better suited now to conceptions of group rights.

Many other contemporary liberals have largely followed Kymlicka's critique of liberalism to argue in different ways the need to recognize and protect minority cultures in multiethnic societies. Some write from the general perspective of liberalism advancing and evaluating claims of how far and on what grounds group-differentiated citizenship can be defended; others use particular examples of multiethnic societies to think through the liberal framework of rights and citizenship and to suggest appropriate revisions relevant to the existing theoretical framework. Either way, our understanding of many of the issues is enriched. A theory of liberal justice benefits immensely from perspectives—theoretical and contextual—that underscore the need to recognize minority cultures.

However, true as this may be, in many multiethnic societies two other political considerations besides recognition of cultural differences are salient. They relate to (a) the continued injustice of ascription-based discrimination and the unaccomplished goals

of equal citizenship, and (b) forms of economic injustice in a complex interplay with cultural injustice. In other words, group disadvantages can be *both* cultural and economic. This is especially true in developing countries where many minorities face both forms of injustices. Addressing the twin disadvantages requires a different matrix of recognition, one that is also not blind to questions surrounding redistribution.

Groups in the Indian Context

It is not an exaggeration to state that India is a land of huge diversities. With a population that is more than one billion and with one-sixth of the world's population inhabiting it, India's diversity is characterized by multifarious identities of caste, religion, race, sect, language, and ethnicity. India is home to all the world's religions and other social differences, especially caste, language, and ethnicity. These identities cut across and intersect each other in complex ways. The staggering nature of the diversity at a higher scale can be fruitfully compared to the magnitude of diversity obtaining in the whole of continental Europe today.

India's socio-cultural mosaic is characterized by a linguistic diversity that is extreme with over 1000 languages and dialects. There are at least 24 languages with more than a million speakers each. Hindi, spoken by more than a third of the population and concentrated mostly in north and central India, is the recognized official language of India along with English. Besides Hindi, 17 other languages commonly referred to as regional languages are recognized by the constitution in its Eighth Schedule and given official status for both political and historical reasons. Most of the officially recognized

languages serve the basis for Indian statehood, the federal principle of carving post-independence India into ethno-linguistic provinces, or 'states' as they are called in India. Each state has its own official language, and the educational structure largely follows a three-language policy where besides the official language of the given province, English and Hindi are also taught to school-going children residing in that province.

Religion, an inescapable reality of most Indians in everyday life, is another salient source of social cleavage in modern India. Although most Indians are Hindus (roughly 82 per cent of the population), India is also home to 110 million Muslims (the largest minority at more than 12 per cent of the population), Christians (2.3 per cent), Sikhs (2 per cent), and Buddhists and Jains (who together constitute approximately 1 per cent). With the exception of the province of Jammu and Kashmir, where Muslim concentration reaches half the population, most Muslims in post-independence India are scattered throughout the length and breadth of the country. The partition of pre-independence British India on the basis of the two-nation theory into India and Pakistan was a major political event in recent history, one that constantly reminds inhabitants of South Asia how the major fault-line in the subcontinent has been drawn by religion.

Caste, or *jati*, a defining principle of the Hindu social order, but one that permeates other religious groups as well, is an identity marker unique to India. Tying together notions of purity and pollution, a belief in hierarchy and fixed occupations, commonality of social manners and customs, dietary habits, dress codes and the general lifestyle, and endogamous marriage norms, are the more than 3000 castes or *jatis* spread throughout the country. To most Hindus, caste is the constant reminder of the non-

monolithic quality of their religion. Members of each caste share social status that is pre-defined by the larger community surrounding them. Inequalities and inequities of power, wealth, and status are all reflected in the caste hierarchy of India. Although the nature of interaction and attitudes between and among castes is rapidly changing in recent times due to the impact of modernization, education, and industrialization, the traditional framework of *varna* still holds good in broadly classifying and hierarchically organizing the thousands of castes into four categories: (1) the Brahmins, traditionally the priests; (2) the Kshatriyas, past rulers and warriors; (3) the Vaishyas, the trading and the mercantile community, and (4) the Shudras, the lowest *varna*, who comprised the service classes, agriculturalists, and artisans. The first three *varnas*, Brahmins, Kshatriyas, and Vaishyas, constitute what are called the "forward" or "upper" castes, and the Shudras and the untouchables, those who exist beyond the pale of the caste hierarchy and perform menial tasks including the role of scavengers, are usually denoted as the "lower"castes. Some would prefer calling the Shudras as the intermediate castes, and the untouchables as more properly the lower.

Although no caste census has been undertaken since 1931, by a process of complex calculations drawing from different census reports on the demographic figures of Scheduled Castes (SCs) and Scheduled Tribes (STs), and periodic Backward Class Commission reports, one may conclude that of the 65 per cent of caste Hindus, meaning the total of the four *varnas*, roughly 22 per cent constitute "forward" castes and the rest, that is 43 per cent, are lumped together officially as "backward" castes, loosely referred

as Other Backward Classes or OBCs.[1] Scheduled castes constitute around 16.48 per cent of the total population and are the untouchables in Indian society. The different tribes in India, officially recognized as Scheduled Tribes, make up for about 8 per cent of the total population. The liberal thrust of the Indian constitution seeks to ameliorate the conditions of the untouchables and the native tribes of India, by declaring caste-based discrimination as illegal and unfolding for these groups a comprehensive policy of preferences or affirmative action, called "reservations" in India.

Tribes in India are usually believed to be living in the periphery of the mainstream Hindu society. Some believe they are the original inhabitants and have resisted attempts to be assimilated into the Hindu fold. Not generally stratified on a ritual and hierarchical basis as caste Hindus and not "integrated" into the surrounding civilization, tribes in India, in many ways, are Hinduism's 'others.' However, in terms of religious affiliation, some report their religion as Hinduism and others call themselves Christians or Muslims. Despite an acceptance in some form of one of the major religions, most tribes also display a continuity of their own beliefs and age-old customs that is typical to its identity and existence in a particular region. The tribes vary between themselves in different aspects, but are concentrated primarily in northeastern, central, and western India. In the northeastern India, six provinces or states are tribal majority populations along with the recent creation of two in eastern and central India, Jharkhand and Chhatisgarh. In deference to their claims of difference and the principle of self-government, tribal

[1] As Galanter (1984: 42) notes, OBCs are "a heterogeneous category." They vary greatly from state to state, "composed for the most part of castes (and some non-Hindu communities) low in the traditional social hierarchy, but not as low as the SC."

majority provinces have their own laws that protect their cultures and customs, and yet unite them with the rest of India by way of self-governing, semi-independent, developmental institutions at the district level. Tribal issues mostly center on development concerns, but some tribal-majority states in northeastern India do also witness secessionist politics and violence.

The above are a few examples of those politically salient identities that have been, and still are, locked in some form of political struggle with others and the state to sustain and deepen a politics of difference while seeking to widen, in certain cases, the democratic space of collective autonomy. Buttressed by democratic institutions, identity conflicts surrounding caste, language, religion, and tribe challenge conventional notions of pan-Indian nationalism and unity.

In attempting to comprehend the different identities under one sensible term, can one characterize all the identities spoken of—language, religion, caste, and tribe—as ethnic? Or does ethnicity presuppose a limited set of organizing principles say, race or language only? On the wider view, one that is adopted by Donald Horowitz (1985), ethnic identities are *ascriptive* group identities and may refer to distinctness of race, language, religion, tribe, or caste. For studying Indian differences, the term 'ethnic' is considered appropriate as an all-encompassing term (Varshney 1999: 4). However, a caveat to this is necessary. Another term, 'communal' is used by Indians to refer to anything that has a basis in religious terms, very often in a pejorative sense.[2] Communal

[2] 'Communalist', 'communal virus', 'communal violence', and 'communal riots'—terms often used by the media and the intelligentsia carry a derogatory significance. The discourse of communalism in the media, for instance, bespeaks something about a self-serving elitist bias

politics in India, for instance, refers to a form of politics that is not essentially secular but uncovers the religious dimension in the public sphere.

Communal conflict, one involving two religious groups, realistically between Hindus and Muslims, is a sub-category of ethnic conflict[3] understood in a wider sense. A complete discussion of the ethnic dimensions is not possible without taking into account the fact that there are huge variations of the forms in which they are mobilized in different localities and regions. This is beside the fact that identities do not remain constant, nor are they monolithic by nature. Owing to several factors, identities are constantly in flux and are differentiated by space, class, and interests.

Caste, Ethnicity and Religion

India is witness to 'a million mutinies', to borrow a phrase from V. S. Naipaul, in its postcolonial traumatic experience. Of these 'million mutinies' caste, ethnicity, and religion have contributed to extensive and large-scale violence. Loss of lives resulting from such widespread conflicts has especially been acute in the last decade, not ignoring the Hindu-Sikh conflicts that afflicted the body politic in the 1980s. Caste violence has involved atrocities against untouchables by higher castes, the consequent reprisals, and mass agitations against the policy of reservations. Ethnic violence still engulfs parts of

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towards secularism, a remnant of the modernizing impulse unleashed officially by Nehru first and sustained by his legacy in the Congress later. For an insightful discussion of how communalism is nationalism's 'other', see Ayesha Jalal (1997).

[3] Given India's different kinds of conflicts, one may call them 'community conflicts' as well. See, Basu and Kohli (1998).

northeastern India and Kashmir in the north. Religious violence spawns the various 'communal riots' that have taken place at a scale much higher than before in recent times between Hindu and Muslim communities, resulting in deaths of thousands of people in the last decade alone.

At one level, most of these ethnic or community conflicts are directed against the state and their intensity can be gauged by the scale and level of mobilization involved and the range of demands met or unmet. In the political construction of the Indian state, the nationalist elites were guided by a few overriding values, foremost amongst which were beliefs in national unity and secular ideology. As overriding values, they converged to provide, as Paul Brass notes, "the need for a strong, centralized state" (Brass 1994: 12) that was perceived as an "instrument" to preserve India's "unity against foreign enemies and internal secessionists...and discipline in a society perceived always on the brink of disorder and violence." (13) Although the Nehru-Patel model of a strong nation-state successfully defined the unitary basis of the Indian nation-state and remained moderately unchallenged for much of the 1950s and 1960s, challenges to the state, its elites (Congress leaders), and their ideologies (specifically, secularism) emerged in the 1970s and onwards as a strong interventionist state most notably under the leadership of Indira Gandhi pursued non-pluralist policies and solutions[4] that resulted in significantly widening social cleavages of religion, ethnicity, and caste. A strong secular ideology propelled by a centralizing state, Brass argues, has not only compounded the political

[4] This was in sharp contrast, as Brass argues, to Nehru's conciliatory, accommodative, and pluralist policies. For a study of this contrast, see Brass (1994), Ch. 6.

problems of non-Hindu minorities, but has also created conditions for the emergence of a militant Hindu nationalism. (Brass 1994: 192-3)

At issue has been the definition of the state: who should govern and how. Whereas Hindu nationalist political mobilization has underscored the theme of national unity on a religious basis to the exclusion of non-Hindus, especially Muslims and to a lesser degree, Sikhs and Christians, the politics of lower caste mobilization running apace the deepening of the democratic processes were intensified during Indira Gandhi's regime as a political ploy to counter the growing importance of regional Congress leaders and to consequently strengthen her supremacy in the Congress party. The majority of community conflicts in India, hence, have crystallized around an erosion of democratic institutions during Indira Gandhi's period, a deepening and intensification of democratic politics, and a normative vacuum in the secular ideal that entails, among other things, the absence of a flexible framework of difference-based accommodation.

Territorial Claims and the Mixed Record of Institutional Design

The present nature of ethnic conflicts is, however, very different from what obtained in the early years of the nation. A reconfiguration of federalism, and of provincial borders, along linguistic lines helped preserve the linguistic diversity of the nation. The resolution of linguistic differences has largely been a success story in India. Language-based conflicts exist at a low scale but do not threaten the unity of the country anymore. On this score, institutional design has largely been successful. The federal scheme has also been effective in converting the principle of self-government to democratic practice for most

indigenous tribes of northeastern India, including Kashmir in the north which enjoys a special status in the constitution, helping them in the process retain their cultural distinctiveness. Institutional design has not been completely successful in quelling all self-determination movements. Kashmir, Nagaland, Mizoram, Tripura, Assam, and Manipur continue to reflect the problems India has had in resolving the growing demands of autonomy in some areas. Territorial claims can, in certain conditions, gravitate towards the extremes of secession and, in the process, make themselves non-negotiable. That is the challenge that India faces most urgently in Kashmir now, although there seems no reason why Kashmiri uprising may not end the way the Sikh uprising did.[5]

Despite such actual and potential problems, certain forms of group concerns can be suitably met if the groups in question are territorially concentrated. Besides invoking the principle of territorial mediation, ethnic self-determination movements can also be satisfied as negotiations with the latter are based on 'finite resources' that can be mobilized by the state.[6]

Non-territorial Group Claims: Caste and Religion

Caste and religious conflicts can be as violent and exclusionary as self-determination and secessionist movements and display similar complexities, but they work within a different paradigm. In caste and religious conflicts, the demands of groups are mostly

[5] See, Atul Kohli (1998) regarding the bell-curve of self-determination movements in India.

[6] In seeking to answer why have state concessions pacified ethnic self-determination movements but have not been successful with the demands of religious nationalists, Amrita Basu (1998) argues that the former "generally focus on territory, resources and power." (1998: 248)

non-territorial in nature. On both sides of the divide, whether it is between the higher castes and lower castes, or between Hindus and Muslims, competing claims are made regarding notions of equal citizenship.

India's equal citizenship model, while giving equal rights to all citizens on a non-discriminatory basis, also recognizes differences between groups and their need to maintain cultural distinctiveness. In a certain sense, the model works, and was intended to work, as a *group-sensitive* equal citizenship model. The facts of cultural pluralism were incorporated and written into the constitution itself. The constitution, as chapter 2 will analyze, was embedded in social diversity.

However, an issue that has remained highly contested ever since the adoption of the constitution is specifying the exact role of the state vis-à-vis the different communities. At issue has been the supposed *neutrality* of the state and its different organs in matters involving community conflicts. Some people make frequent comparisons with the secular models of other liberal democracies and emphasize the urgency of integrating the nation into an unshakeable, monolithic political community. They contend that the processes of nation-building and the need to modernize the society, economy, and culture, require a revision of the *group-sensitive* approach of the state. Others insist that secularism in India is *asymmetrical* in the social sphere.[7] Lower castes, particularly untouchables, and religious minorities, especially Muslims, are not only at the bottom of the social hierarchy, but lie in the margins of the nation, a concept the majoritarian Hindus define. In recent years, they argue, militant Hinduism has attempted

[7] See, Amartya Sen (1997).

to redefine nationhood and citizenship in ways that privilege the position of caste Hindus and relegate minorities to the periphery of the nation. Some even read such a bias back into the nationalist discourse during pre-independence period.

One thing is clear. Caste and religious conflicts pose a serious problem in India. To merely mention that there has been a persistence of the Hindu-Muslim communal division and caste violence in select regions since India attained independence and after the bloody riots during partition would be a raw understatement. The incidence of riots between Hindus and Muslims has steadily been on the rise. In the aftermath of the destruction of the Babri Masjid—a Muslim mosque—by Hindu zealots in 1992, the riots claimed thousands of lives in many cities, chiefly in Mumbai (Bombay). Although official statistics and record keeping of those killed in the riots suffer from inaccuracies, mostly by way of deflating numerical counts, it is commonly believed that there have been more deaths than reported and that more Muslims have died in the riots than Hindus. NGOs and independent judicial commissions have periodically blamed the riots on the unhealthy collusion of forces between the police, criminals, and ultra-nationalist activists. Although in each particular instance, the riot in question may have been triggered off by different causes, the sheer rise in their incidence and toll on property and persons in the last two decades or so parallels the rise of *Hindutva* forces in India's mainstream politics.[8]

[8] *Hindutva* roughly connotes the essence of Hindu identity. The ideology of Hindu nationalism feeds on the idea of *Hindutva*, the need to identify with it, and define the nation by seeking to stigmatize and exclude all those who are not Hindus. Jaffrelot (1996) provides an insightful empirical analysis of the political processes of exclusion and stigmatization unleashed by Hindu nationalism.

Caste violence in post-independence India has more or less traversed the same trajectory as the Hindu-Muslim violent conflicts. Caste violence reached its peak in the 1990s as a consequence of the implementation of the Mandal Commission Report by the government. This Report effectively raised the existing quotas in affirmative action policies aimed at including more backward castes than the previously affirmed constitutional commitments of reserving quotas for Scheduled Castes and Scheduled Tribes. Caste violence in India has, however, been of two kinds: one, involving torture, discrimination, and manslaughter of mostly the very poor vulnerable and low castes by rich, high, and dominant castes; and the other, involving violence between intermediate and other castes as a result of disagreement on quotas. The former accentuates the hierarchy and dependence between castes and how that translates into group oppression; the latter reflects extremities of unresolved and conflictual pluralism.

There is a trend commonly noticeable in both caste and religious conflicts. In the early post-colonial phase, both lower castes and religious minorities sought protections from social inequities and discrimination by seeking to invoke the principle of equal citizenship. They hoped that this principle would shield them against discrimination and the loss of certain basic freedoms. But the ongoing and increasing violence raises questions about the adequacy of the equal citizenship model as a way to resolve community conflicts.

Group Rights in India

"If America is a melting pot," wrote Shashi Tharoor, "then India is a *thali*, a selection of sumptuous dishes in different bowls. Each tastes different, and does not necessarily mix with the next, but they belong together on the same plate, and they complement each other in making the meal a satisfying repast." (Tharoor 1998: 134) The idea of a *thali* with different culinary selections, or of a *salad bowl*, yet another allegory of the cultural mix of the demographic composition, metaphorically captures the inescapable diversity of India. Both the metaphor and the idea are also close to one invoked in other contexts, especially the Canadian, of a cultural *mosaic*. Cultural pluralism is a given fact of India's public life and has existed for centuries.

Historian Stanley Wolpert, an India scholar, traces the continuous and successful working of a 'multicultural paradigm' in the society's past to the more than three thousand year-old invasion by Aryans. During her long civilizational odyssey, Wolpert maintains, "India's ocean of cultures attracted many conquerors—and conquered almost all of them." (Wolpert 1999: 576) The first severe jolt to the exemplar of peaceful coexistence was the post-independence partition that "proved no solution to the multicultural problem, but instead was an admission of failure." (578) Resurgent Hindu fundamentalism in recent history has "revived internal communal conflicts" and this tragic phenomenon parallels the growing exclusion of, and violence against, the lower castes. (578) On balance then, Indian civilization "presents us with examples of both a rich and relatively pacific multicultural heritage, and a tragic and violent present." (579)

Cultural Pluralism and Composite Nationalism

During the formative phase of the nationalist struggle against British colonialism, the historic fact of India's cultural pluralism was recognized by, and molded into the idea of 'composite nationalism' by the Congress party, led by among others, Gandhi, Nehru, and Azad. The historical backdrop to this idea finds its most authentic expression in Nehru's *Discovery of India*, a work that celebrates the thickly syncretistic, pluralist, and tolerant strands in India's history. In this opus, Nehru's heroes are Ashoka, Kabir, Guru Nanak, Amir Khusro, Akbar, and Gandhi—a mix of Hindu, Muslim, and Buddhist leaders—who lived by, and inspired others to follow, syncretistic and pluralist values.

Despite its diversity, Indian society contained an enduring sense of unity, precisely the reason why the pluralist model in India is called 'unity in diversity.'[9] Drawing on the age-old tenacity and resilience of India's composite culture, Khan writes that it "originated in an environment of reconciliation rather than refutation, cooperation rather than confrontation, coexistence rather than mutual annihilation." (Khan 1987: 36) The vibrant model of unity in diversity presupposes a sharing and commingling at the socio-cultural level. The thrust of the process is on *assimilation* and *synthesis*, without compromising the pluralist and tolerant ethos of the society.

The idea of composite culture, a quintessential version of Indian cultural pluralism drawn from past and recent historical experiences, underpins the idea of

[9] In Nehru's words: "Some kind of a dream of unity has occupied the mind of India since the dawn of civilization. That unity was not conceived as something imposed from outside, a standardization...of beliefs. It was something deeper and, within its fold, the widest tolerance of belief and custom was practised and every variety acknowledged and even encouraged." (Nehru 1989: 62) See also Rajni Kothari (1970) and Ashutosh Varshney (1993).

composite nationalism. The latter is the "master narrative of nation building" which "evokes the image of a nation as a family." (Stuligross and Varshney 1999: 3) "According to this narrative," they contend, "all religions (as well as languages and ethnic groups) have an equal place in the national family and as a principle, none will dominate the functioning of the state." (3) The 'narrative' underscores the fact that social and cultural differences would not impinge on anyone enjoying equal citizenship rights and that "birth in India, or naturalization, would be the sole legal criterion." Such a view does not amount to glossing over cultural differences nor deny the existence of 'social communities' but essentially "denies the primacy of any one over others." Elsewhere, Varshney describes how this idea of the nation played a role in the processes of nation building in helping develop a notion of "secular nationalism," a variant of the idea of composite nationalism that helped shape the nation building policy of the country in the immediate post-independence period during Nehru's leadership. (Varshney 1993)

In any version of composite nationalism, including secular nationalism, the state, with its assumed tasks of forging the diversity of the people into a single nation, stands *apart* from—in pursuing the ideal of neutrality—and *above*—in its capacity as the modernizing agent—the different cultural groups that it derives its legitimate authority from. The narrative of composite nationalism draws its philosophical resources from the past and is largely, though not wholly, indigenous in character. Composite nationalism borrows the objective of the nation-state from liberal nationalist imaginings prevalent in 19th and early 20th century Europe, but transforms this objective in not requiring the Indian state to rest upon the cultural homogeneity of its citizen-constituents.

In practice, however, the idea that the national family would be constituted by equal partner-communities, without the dominance of any one particular community has been belied by experiences of majoritarian democracy in which the Hindu community, by dint of its electoral majority, has displayed an elder-brotherly syndrome (typical of the Hindu ethos) in the family of nations or communities that loosely defines India.

Nevertheless, composite nationalism offers a narrative of the history of social diversity woven together with the emergence of the nation-state. In contrast to majoritarian or Hindu nationalism, 'composite nationalism' as a national vision and *telos* seeks both to embed itself in the larger society and to sculpt a semi-autonomous role for the state. By contrast, Hindu nationalism and other ethno-national exclusivist ideologies are trying today to re-imagine and re-appropriate the conventional (European) requirement that the nation-state display a particular ethnic character and unleash a corresponding homogenizing political project.

Caste, Religion and Liberal Values

Given the fact that the experiences of certain groups—Muslims, Sikhs, and the untouchables—in the latter half of the 20th century have revealed how broadly the patterns of social exclusion and subordination have worked, the liberal paradigm of equal citizenship would appeal as a viable model to most observers of India's recent political history. The reality, moreover, of the contingent and changing character of identities and their shifting claims and interests could also help crystallize belief in an uncomplicated but universal notion of citizenship. Why shouldn't the ethic and the common

denominator of non-discriminatory and egalitarian common citizenship suffice especially for disadvantaged groups, where their differences in relation to others account for much of the prevailing social discrimination and inequalities they face? An answer to this necessitates a brief inquiry into the attractiveness of the liberal individualist ethos in the Indian setting and its relationship to differences of caste and religion.

As an ascriptive identity, caste, as explained above, is demonstrative of the cultural traits of hierarchy and inequality that lock and freeze a member's position in the caste to which he/she was born for his/her entire life. It is an identity that comes with birth to an individual in a particular caste community and exists as long as one is alive. For having imposed by birth one's identity and relative position in a system of differentiated status rankings with corresponding roles and obligations, the structure of caste is essentially inegalitarian in character. Although the caste system is a unique marker of the Hindu social order, historically other societies have also displayed caste-like attributes in ranking their members as either inferior or superior in assigning differential social status to dissimilar groups. The unique character of the caste identity in the South Asian setting, one that permeates even non-Hindu communities, has been a serious object of academic study for many scholars—chiefly sociologists and anthropologists—for decades. In attempting to explain the exceptionalism of the caste identity and its centuries-old resilience in the Hindu socio-religious system, many scholars have been tempted to follow and use the model proffered by Louis Dumont, the French sociologist (1970). Dumont's analysis of the caste system is predicated on the basis of a contrast he draws between two types of society, hierarchical and egalitarian

societies, or *homo hierarchicus* (the title of his book on caste system) and *homo aequalis*. Hierarchy as a social arrangement, Dumont argues, is the social expression of the value of 'holism' whereas equality, in sharp opposition to the former, is best expressed in terms of individualism (Dumont 1970).

Dumont's work accentuates the contrast between the Indian social system and the one that obtains in the European context. In a philosophical defence of his arguments regarding the hierarchical structure of the caste order in India, Dumont writes "To adopt a value is to introduce hierarchy, and a certain consensus of values, a certain hierarchy of ideas, things and people, is indispensable to social life." (Dumont 1970: 54) Drawing partly on Tocqueville's work, Dumont also asserts, "the ideal of equality, even if it is thought superior, is artificial." (55)

Being divided into hereditary groups, castes, according to Dumont, are high or low on the basis of where they are located in a purity-pollution continuum. Purity or impurity is determined not only by what one caste group subjectively thinks about the relative status of itself in relation to other groups, but also how certain acts of individuals belonging to a particular caste, usually lower and including women on occasion, can be adjudged as impure. Rules of ritual purity are most often very detailed. For instance, even the sight of a member of an untouchable caste can be considered 'polluting' for a Brahmin. In certain regions, depending on how low one is located in the caste hierarchy and the degree of the person's corresponding impurity, there could be rules on how close the person may physically stand, walk, or come close to a member belonging to a high caste. A Brahmanical epistemology determined or adjudged what was impure; the idea

here is that religion in a loose sense, and the Brahmanical interpretation of it more concretely, was the touchstone for drawing boundaries between the polluted and the pure.

This is the central cultural justification for caste hierarchy, and ancient Hindu texts account for as much. However, caste inequalities do not just relate to, nor are they limited by, the ritual aspect. Inequalities of power, wealth, and social status over centuries have created enduring patterns of other forms of discrimination and oppression and the lower castes, especially the untouchables, have borne the brunt of it. Caste inequalities—ritual, economic, cultural, and political—continue in Indian society and what's more, the enduring pattern of discrimination, oppression, and violence, make it an intensely unjust experience for untouchables.

In recognizing the hierarchic holism of the caste system at the base of the Hindu religion—one that helps preserve order in society and ascribes social roles and responsibilities to each member depending on to which caste group he/she belongs to—Dumont's sociology may be construed as an early, but serious, academic foretaste of current discourses on communitarianism. Others usually justify his approach as being culturally sensitive to the distinctively Indian tradition and experience. In many ways, however, it will not be incorrect to note that part of Dumont's approach to the complex social phenomena he set out to study was informed by a Western observer's awe and anxiety to decipher the 'exotic.'

Andre Beteille, a prominent Indian sociologist, sharply disagrees with Dumont's approach. For Beteille, a self-proclaimed modern and liberal sociologist, the concept of hierarchy is theological, not sociological, at least not any more in modern times. (Beteille

1991a: 241) Notions of individualism and equality are as much Indian as Western; particular ideas are not frozen in particular societies forever and the popular appeal of some may be enough to transport their significance to others. Beteille concedes that caste is inegalitarian, but argues that, with the support of the state, one may create conditions of equality of opportunity for every individual irrespective of his/her caste membership. Individualism and equality can bridge cultural differences:

> Individualism, equality, and their relationship have so far been discussed almost entirely within the context of Western culture. It is desirable to extend the discussion to cover not only those societies in which these values were first clearly articulated but also others to which they have spread and in which they have found some room for themselves. The social anthropologist can bring to bear, perhaps a little more fully than others, a comparative perspective on the subject. He is trained not only to look for differences among cultures but also to appreciate and respect these differences. It is necessary to ensure, however, that we do not, out of a false sense of appreciation of or respect for other cultures, stress the differences beyond their true proportions. While cultures undoubtedly differ, and differ in important ways, they are in the modern world also closely interconnected. This is particularly relevant in the context of equality, for as an ideal and as a value it has acquired a certain appeal in every part of the modern world. (Beteille 1991a: 215)

Dwelling on the theme of positive discrimination, or affirmative action, Beteille observes how two societies, for instance, the US and India, are closer than ever before in devising strategies to equalize the common social inequalities that blacks in the US and the untouchables in India face. As more and more societies under modern conditions come to respect notions of equality cutting across group differences, the idea of hierarchy becomes less attractive. Clearly, Beteille's analysis exhibits a concern for what equality

may promise to deliver, in spite of what others may argue on the merits of culture-conscious explanations of caste. In his prescriptive tone, he sounds more like a political theorist than a conventional sociologist. Beteille is an ardent adherent of equality of opportunity.

Arguing from a universal human rights perspective more forcefully than others, Jack Donnelly (1990) also follows an individualistic ethic in promoting the equal rights and freedoms of the untouchables. "The struggle against caste and its legacies," Donnelly claims, "is still at the center of the struggle for human rights in India." (Donnelly 1990: 82) In drawing parallels between slavery and the caste system despite some of their subtle differences, Donnelly contends that to turn one's back on these practices in the name of cultural relativism "would reflect not moral sensitivity but moral obtuseness" given especially the fact that an international consensus (not just Western) exists regarding the indefensibility of such practices which overrides internal oppositions. (Donnelly 1990: 76)

If there is a consensus regarding the indefensibility of caste practices among liberals, chiefly because it fails the litmus test of both freedom and equality, liberals are not so sure about the place of religion in public life. Between 1) traditional defences of the principle of toleration, 2) notions of neutrality between competing conceptions of good in a secular society, and 3) contemporary accounts of liberalism that are more cautiously sanguine about the place of religion in the public sphere, liberal accounts of religion in politics reveal a wide but contested range of approaches.

To the Indian communitarians, who are strong critics of the theory and practice of secularism in India, part of the critical response to the secular agenda has come from two distinct directions: 1) from the forces of Hindu nationalism, and 2) from communitarian scholars who are critical of a Western conception of secularism. The first group would wish to define nationhood exclusively in terms of belongingness to a particular religion, in this instance Hinduism, and require others to integrate into a Hindu-defined nationhood. The communitarian strain that we detect here is *mononational* or *monocultural*; by implication, we may term this perspective *mononational* communitarianism. To the second group belong scholars who question the wisdom of employing a Western notion of secularism in the Indian context that builds a wall between state and religion. For communitarian scholars such as Ashish Nandy, T. N. Madan, and Partha Chatterjee, the issue is to acknowledge the pervasive and wide-ranging role religion plays in the lives of Indians. Each one in a different way attempts to present a picture of authentic social realities, which is completely at odds with the Nehru-inspired, alien, and elite discourse on questions of secularism. Nandy, for instance, draws a distinction between two conceptions of religion in the Indian context: (1) religion as a folk way of life which is largely accommodative and tolerant, and (2) religion as ideology which is a political construction, and a fallout of, the nationalist struggle carrying within it strands of intolerance and sectarianism. The latter type is not a true reflection of how most Indians lead their lives but is an aberrant byproduct of modern nationalism and statecraft. (Nandy 1988) Like Nandy, Madan too mounts a critique of 'rationalized' secularism, an idea that draws its sustenance from sources that are atypical of, and

unsuited to, Indian conditions. Madan asserts the need to recognize the worldwide rise of religious fundamentalism emanating from "the excesses of secularism, its emergence as a dogma, even as a religion." (Madan 1993: 695) But Madan goes on also to argue in favour of a distinctively Indian secularism understood as "interreligious understanding in society and the state policy of non-discrimination and of equal distance (*not* equal proximity) from the religious concerns of the people" guaranteed by, among others, "a positive attitude towards cultural pluralism." (Madan 1993: 697; emphasis original)

Like Nandy and Madan, Chatterjee too questions the political project of the modern nation-state and argues in a compelling manner how an exclusivist Hindu religious nationalism uses it to its advantage by exposing what it calls "pseudo-secularists", the purveyors of an alien secularism who preach tolerance of "religious obscurantism and bigotry." (Chatterjee 1994: 1768) Partly as a response to meet this challenge of the charge of the Hindu nationalists, India would do well, Chatterjee reasons, to search for its own "political" conception of tolerance true to the democratic spirit and the non-Western form of modernity in India.

Rights Of Disadvantaged Groups

Part of what I have discussed so far is how identities in the Indian context are conceived and what difference this makes to the ways in which they are addressed and negotiated in different ways by policy makers and scholars. By virtue of having caused major social fault-lines and an increase in the scale and incidence of conflicts in recent times, caste

and religious identities are the most politically salient identities and lie today at the centre of discourses on citizenship and justice toward groups.

Caste and religious identities (1) problematize the significance of cultural difference and question an externally imposed negative identification; (2) in different ways, struggle against a politics of misrecognition; (3) interrogate notions of common citizenship; and consequently, (4) engage a non-territorial model of equal, inclusive, and group-responsive citizenship. Though true in generic terms, the import of the above sharpens when applied specifically in the context of lower castes, especially untouchables, and Muslims in modern India.

Struggling against the politics of misrecognition entails giving political primacy to the idea of cultural identity. In the context of both the lower castes and Muslims in India, social disadvantages accrue differently by virtue of acknowledging how others, and those on the outside may also negatively define an identity. Lower castes are labeled 'unclean,' 'polluting,' or 'impure' and for these reasons considered unworthy of intimate social interaction. Muslims in post-independence India have also been negatively stigmatized for their 'disloyalty' to the nation, religious bigotry, and the practice of polygamy, higher fertility rates compared to other communities, and insistence on state-mandated preferences and privileges.

Externally imposed negative identifications may be different, however, with regard to untouchables and Muslims. While lower castes have lived with an identity that has been demeaning to their existence and sense of self-worth and the externally imposed negative identification has been more of a social stigma, the same would not hold entirely

true in the case of Muslims. For the latter, the core of their religious identity is constitutive of who they are and how they define themselves differently from others. In the aftermath of the partition and the poor record of Hindu-Muslim interactions, however, their distinctive identity was overlaid by negative stereotypes and biases of the larger community.

The difference in the unequal nature of disadvantages and injustice, suffered by untouchables and Muslims on account of dissimilar self-perceptions of cultural identity, it hardly needs stressing, requires a fine-tuned and sensitized model of group recognition. As will be argued later in more detail, the common citizenship model is no viable option. Engaging both caste and religious identities and their distinct disadvantages require re-conceiving forms of equality that is fair to both. Following the helpful interjection by Nancy Fraser, of sensitizing the model of recognition to legitimate issues of redistribution, I interrogate (a) cultural recognition for religious minorities, especially Muslims, and (b) affirmative action for disadvantaged groups, untouchables and other lower castes as appropriate strategies toward inclusion in each instance.

The central focus of my dissertation hinges then on the question: *Given the unequal burden of disadvantages imposed by cultural difference, what forms of differential treatment may be fair toward caste- and religious-based groups?* As a notion of rights for disadvantaged groups[10] requires exploring appropriate uses and application

[10] For a useful account of this notion, slightly different in usage than mine, see the one developed by Melissa Williams (1998: 15-8). My analysis of disadvantaged groups in the Indian context somewhat overlaps with, and is sympathetic to, Williams' case (true in the American context) for differential treatment that also finds a necessity to narrow down the focus on ascriptive groups that face complex and cumulative structural inequalities.

of equality to reduce injustices owing to differences, the dissertation is also mindful of the limits of cases that can fruitfully be discussed. Given the popular appeal of the idea of multiculturalism as a conscious state policy in many multiethnic societies today, the dissertation will hopefully demonstrate a clear need to *index* issues of recognition to redistribution, especially in the developing world, where a large concentration of the population is dependent on proper access to opportunities as a basic precondition for a minimally decent livelihood. In other words, questions of economic justice need to be *jointly* addressed with issues of cultural survival. For industrially advanced established democracies in the west today, the message clearly is to evolve a complex paradigm of multicultural justice that may include policies of affirmative action as temporary remedial measures for the structurally disadvantaged. However, different contexts will require different experiments keeping in view the particular experiences that are distinctive of each. Realizing this is admitting the improbability of evolving a theory of multicultural justice that would apply uniformly in all contexts.

Summary Of Thesis

This dissertation is about the moral relevance of liberal justifications of rights for disadvantaged groups in the Indian context. Recent discussions on liberal multiculturalism in North America today have great relevance for non-western examples, including India, a country marked by huge diversities. However, as argued above, the non-western experience also demands paying close attention to issues of recognition and

redistribution alike in engaging notions of group-differentiated citizenship. The simultaneous engagement of justice claims of recognition and redistribution by identity groups in the Indian case will helpfully illuminate discussions on liberal multiculturalism elsewhere.

Following Nancy Fraser (1997), it will be an important reminder to the western audience of the need to acknowledge a *broader* set of questions regarding claims of justice by groups in multiethnic societies. What this implies is the fact that multicultural rights need not always square off perfectly with other important categories of legitimate group interests. In other words, the factor of cultural recognition for groups will be different from rights of equal distribution in a group-conscious citizenship model. One can think here of the example of caste differences in which equal treatment as regards the relative status of caste groups would matter more. The question of race is roughly analogous.

For the non-western audience, on the other hand, it will be helpful to appreciate that a simple-minded quick-fix solution of multicultural policies may not usefully always transplant from one context to another. One can think here of the different examples of disadvantaged ethnic groups with a different set of needs and interests that hinge on how equitably or inequitably the society allocates its resources or how best to combine the different concerns of differently constituted groups in a manner that is fair to all and relative to their particular disadvantages.

In normative analysis of Indian scholars, one notices a segregation of scholarly research on questions of difference. Those writing on caste and the particular

disadvantages it reproduces do not address the question of religion and those addressing questions of religious difference do not address caste differences. It is important that both are simultaneously engaged to make a better sense of what a group-differentiated citizenship might look like in the Indian case. Whereas both forms of identity claims and conflicts do arise by way of common reference to the inadequacy of a difference-blind and universal citizenship model, questions of cultural recognition and affirmative action are usually treated separately by most scholars when invoking a difference- or group-sensitive approach.

A discussion of the claims of the Muslims will highlight the necessity of the cultural recognition due to a culturally disadvantaged minority and a discussion of the case of the untouchables will significantly highlight the justifiability of recognizing their group disadvantage and the necessity of state-sponsored positive action by way of redress. The former embodies a case of cultural recognition and the latter relates to fairness of redistribution.

A great variety of group claims exist in India, but all are not accommodated. A modest contribution this dissertation (also) seeks to make is to help draw appropriate and useful limits in evaluating claims of identity groups that require accommodation. In the context of cultural recognition of Muslims, the dissertation accomplishes this by drawing attention to the need to balance conflicting claims within the Muslim community. In the context of untouchables, the dissertation argues how by virtue of their relative and cumulative disadvantages, their claims for equal distribution matter more than others not so worse off, or the Other Backward Classes.

In chapter 2, *The Constitution and the Groups*, I explore how questions of difference were constitutionally treated both in the colonial period and the postcolonial period with a particular emphasis on how caste and religious differences were engaged. This helps us give helpful insights on how such questions were raised, addressed, and with what justifications translated into policies of accommodation. An inquiry into the minds of the founders of India's constitution on questions of rights for individuals and groups is also explored. The finally resolved outcome on the correlation between identity and rights helps us to compare the Indian practice with ideas of multicultural constitutionalism. This chapter is set as a backdrop to chapters 3 and 4, which separately take up the cases of religion (the Muslim minority) and caste (the disadvantage of untouchables) respectively.

Chapter 3, *Cultural Recognition and Religious Personal Laws*, is an exploration of the claim of the Muslim minority to recognize their separate personal laws, considered intrinsic to their cultural identity. In this chapter, I address the *Shah Bano* case and its complexities in relation to questions of national unity, uniformity in civil legal codes, and injustice toward Muslim women. The variegated nature and complexity of the personal laws issue is explored to come to terms with what justice requires by way of accommodating Muslims' demand to retain their own separate personal laws and whether it is possible to adjust the different concerns of the members (especially the women) of the group in terms of what liberal justice requires.

Chapter 4, *Caste Disadvantage and Affirmative Action*, looks at the phenomenon of caste disadvantages especially those concerning the untouchables. In attempting to

make a distinction between preferential policies and affirmative action policies, I address questions of fairness that are intrinsic to the latter. The different liberal justifications—of nondiscrimination, equal opportunity, and group disadvantage—of affirmative action policies are explored to assess the relative claims of the untouchables and the OBCs and what they mean when translated in the shape of quotas.

Chapter 5, *Conclusion*, sums up the major arguments in the preceding chapters and makes a common coherent case for recognizing the moral relevance of group disadvantage and why justice toward caste and religious groups, when engaged simultaneously, invoke the bivalence of recognition and redistribution.

The dissertation is a work of synthesis, combining theory and practice, and contrasting both through use of non-western examples.

Chapter Two

THE CONSTITUTION AND THE GROUPS

> After fifty years of an Indian state, the definition of who is an Indian is as passionately contested as ever...The contest is over economic opportunities and about cultural recognition: it is a contest for ownership of the state.
>
> Sunil Khilnani, *The Idea of India*

Constitutions are expressions of a political community's shared cultural and political identity. However, in plural and deeply divided multinational states there is no consensus as to what properly constitutes that shared space.[11] Given the nature of irreconcilable differences, constructing a common space is a task laden with hazards: minority groups in many multinational states rightfully object to the dominant majority's role in arbitrarily defining and filling up the shared space with the latter's own cultural symbols. In the absence of institutional protections, especially a constitution that does not at the least define the shared space that all citizens enjoy and secure some guarantees to protect their rights, minorities are at risk in many societies. *How does a country of India's diversity constitutionally define citizenship that is fair to its minorities?*

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[11] See Williams and Hanafin (1999).

With regard to India, this chapter attempts a study of two dimensions: the historical and the normative. The historical review is necessary to give us a glimpse of how group rights in the Indian context came into being; and the normative analysis will take on an analysis of the justifications of such rights in relation to recent discussions on multiculturalism in contemporary liberalism. The chapter essentially addresses two questions: First, how did the founders of India's constitution negotiate questions of diversity? Second, how does the Indian model measure up to contemporary liberal and multicultural interventions in securing recognition for identities?

Colonial Background

The terms of reference: Cabinet Mission Plan

Led by Lord Pethick-Lawrence, Secretary of State for India and senior member of the Mission, the Cabinet Mission visited India in 1946 to bring about an understanding between the Congress and Muslim League. As an understanding between the two parties was not possible, the Mission advocated a federation within which provinces would have complete autonomy subject to federal powers such as foreign affairs, defence, and communications. The federation would include both British India and the princely states. The Mission's proposal was a watered-down version of a tighter federation envisaged by the Congress. In a continuation of past colonial practice of according political recognition to groups who conceived their interests to be at variance with the Hindu majority, the Mission wanted adequate safeguards to be put in place for other minorities.

The Mission proposed the setting up of a Constituent Assembly to draft a constitution for India. In forming this assembly to decide a new constitutional structure, the Mission felt the first problem was to obtain as broad-based and accurate a representation of the whole population as was possible. After debating the desirable method of adult franchise to elect members to the assembly, the Plan endorsed a second-best practicable solution of utilizing the recently elected Provincial Legislative Assemblies as electing bodies to the Assembly. However, as the elected provincial assemblies did not reflect proportionately the sizes of their assemblies to the population, the Mission concluded that each province ought to be allotted a total number of seats proportional to its population, in the ratio of one to one million. Second, it found it fair to divide this provincial allocation of seats between the main communities in each province in proportion to their population. And, third, it provided for representatives to be elected by the members of their community from the legislative assembly. In what is believed to be a very crucial decision with regard to future constitutional deliberations on matters of importance to minorities, the Mission recognized three communities—'general', Muslim, and Sikh, the general community including all those who were not Sikhs or Muslims.

Ordering Difference

The method of selection of Indian representation during the colonial period broadly followed the principle of representation of communities, not individuals. For purposes of representation through much of the pre-Independence period, the British viewed India as "essentially a congeries of widely separated classes, races, and communities with divergences of interest and hereditary sentiment, which could be properly represented

only by those who knew and shared their sectional opinions."[12] This view of a corporate India had political consequences, most notably group preferences in matters of political representation. Separate representation accorded by the colonial government covered class, religion, and economic interest. This pre-modern approach to India conflicted with the modern perceptions of the latter-day nationalist elites who championed notions of equality, individuality, and national unity.

Although the Government of India Act of 1909 introduced separate electorates[13] for the first time, the roots of such a policy were already visible in the Indian Councils Acts of 1861 and 1892. The 1861 Act is generally credited with the introduction of the representative principle into the Indian Constitution by requiring that at least half of the new or additional members of the Governor's General's Executive Council and the Provincial Legislative Councils be filled from outside the ranks of the civil service which effectively meant inclusion of natives. The 1892 Councils Act, however, was more specific in requiring that for the majority of the positions so filled, recommendations were to be made by the local bodies or corporations such as religious communities, municipalities, universities, and chambers of commerce. Although the process of representation was not secured through direct election, the effective representation of candidates recommended on the basis of group membership meant that in the British-

[12] See Coupland (1944: 24) citing a dispatch of 1892 from the Government of India.

[13] Separate electorates effectively meant communal representation. In such a scheme, only Muslims could elect Muslims as representatives to political offices set aside for them. The Congress and the mainstream nationalists always faulted the British for creating this institution arguing that it paved the way for the creation of Pakistan on the basis of the two-nation theory. A joint electorate with reserved seat implies a constituency of undifferentiated electorate reserved for a particular community irrespective of its relative strength in it.

established councils seats were reserved for commercial interests, large landowners, university faculties, Anglo-Indians, and Muslims among others.

The Govt. of India Act, 1909, continued the tradition of separate representation of the 1892 Act with two differences: 1) the process was formalized, and 2) the scope of representation was enhanced and separate electorates provided for Muslims for the first time. (The 1909 Act needs, however, to be seen against the backdrop of the Morley-Minto reforms and the partition of Bengal into Hindu- and Muslim-concentrated territories.[14]) The 1909 Act is pertinent to the extent of unfolding an official policy that recognized by way of introducing separate electorates that the two communities—Hindus and Muslims, could not be anticipated to vote together for their common good.[15]

The 1919 Govt. of India Act, following the Montagu-Chelmsford Reforms, not only advocated the continuation of separate electorates for Muslims on the basis of the Lucknow Pact between Congress and the Muslim League, but also extended the same principle to Sikhs in Punjab and more generally to Europeans, Anglo-Indians, and Indian Christians, while a certain proportion of non-Mohammedan seats were reserved for non-Brahmins and Mahrattas in the provinces of Madras and Bombay, respectively. All this ran coterminous to the provision of special representation to landholders, universities,

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[14] "The dividing line was so crudely drawn that it meant the splitting of the province into two communal blocs—the one in which the Hindus were in a majority, and the other in which the Muslims predominated." See Menon (1957: 6).

[15] The then Viceroy of India, Lord Minto, recommended the Secretary of State in October 1908 that the Muslims should be granted separate electorates. While making this case he argued: "The Indian Muhamaddans are much more than a religious body. They form in fact an absolutely separate community, distinct by marriage, food and custom, and claiming in many cases to belong to a race different from the Hindus." Quoted in Menon (1957: 10).

commercial, and landed interests and to any other community or class that may have failed to secure adequate representation on the councils. (Menon 1957: 23)

Following the politics of bargaining and the stiffening of attitudes by the Muslim League, which had a different vision than the Congress on the future of self-government and the place of Muslims in postcolonial India, Mohammed Jinnah, the leader of the Muslim League, proposed his 'fourteen points,' of which a few deserve mention. Jinnah in consultation with other Muslim leaders argued that:

- All legislatures in the country and other elected bodies shall be constituted on the definite principle of adequate and effective representation of minorities in every province without reducing the majority in any province to a minority or even equality (point 3).

- Representation of communal groups shall continue to be by separate electorates provided that it shall be open to any community at any time to abandon its separate electorate in favour of joint electorates (point 5).

- Full religious liberty, that is liberty of belief, worship, and observance, propaganda, association and education, shall be guaranteed to all communities (point 7).

- No Bill or Resolution or any part thereof shall be passed in any legislature or any other elected body if three-fourths of the members of any community in that particular body oppose it a being injurious to the interests of that community (point 8).

- Provision should be made in the Constitution giving Muslims an adequate share along with the other Indians in all the services of the State and in local self-governing bodies having due regard to the requirements of efficiency (point 11).

- The Constitution should embody adequate safeguards for the protection of Muslim culture, and for the protection and promotion of Muslim education, language, religion, personal laws, and Muslim charitable institutions and for their due share in grants-in-aid (point 12).

- No Cabinet, either central or provincial, should be formed without there being at least of one-third of Muslim ministers (point 13). (Menon 1957: 36-7)

Jinnah's demands of 28 March 1929 are to be seen against the backdrop of an activist colonial policy that was intent on satisfying demands of groups for representational rights. For reasons of national unity the Congress took an entirely different view. Flailing the colonial process of dividing the nationalist front on lines of group segmentation, the Congress opposed the British initiatives and refused to cooperate with the authorities. The Congress recalcitrance, on the one hand, and the Muslim League's uncompromising intransigence for retention of the separate electorates, on the other, meant that the British had to engage all actors in attaining a negotiated settlement toward self-government.

During the 1930s the British invited members of the Congress, the Muslim League, and leaders of other groups to a series of Round Table Conferences with the ostensible purpose of finding a just settlement of disputes regarding self-government and the constitutional status of the minorities. It was hoped that the ensuing deliberations would pave the way for a workable Indian constitution that would be fair to the groups.

Although the first Round table Conference (convened in late 1930) failed owing to the refusal of the Congress to participate in its proceedings, the second Round Table

Conference (in which all parties, including the Congress, participated) dwelt at length on questions of minority representation. However, the proceedings were by and large inconclusive on the central issue that plagued the deliberations. All minorities, except the Sikhs, demanded separate electorates. To Gandhi's surprise and chagrin, what was most troubling was the demand by the untouchable castes, or the Depressed Classes, for separate electorates. Ambedkar, who represented the latter category, had joined hands with other minorities to enlarge the scope of separate electorates. Although Gandhi was sympathetic to the demands of religious minorities and harped on the necessity of a commonly agreed formula of minority representation, he was far from conceding similar treatment to the untouchables. Gandhi argued that the untouchables were a part and parcel of the Hindu community and need not be granted separate electorates. Gandhi's was an emotive appeal. As the matter remained unresolved, British Prime Minister, Ramsay MacDonald, who was also chairing the Minorities Committee, assumed responsibility for finding a suitable solution acceptable to all at a later date.

A few months later, on 16 August 1932, the Communal Award was proclaimed. The Award not only granted separate electorates to Muslims, Europeans, Sikhs, Indian Christians, and Anglo-Indians, with some reserved seats for Marhattas in selected general constituencies in Bombay: it also extended the benefits to the untouchables, or the Depressed Classes. The untouchables were granted both general voting rights and special and reserved seats. The Communal Award followed unsuccessful attempts in the Round Table Conferences held in London between British colonial administrators, on the one hand, and other communities representing British India, on the other hand, to hammer out

a workable solution towards representation of minorities in Indian legislatures. The Award was a unilateral imposition of the British view of what sort of representation different communities in India would require. The Indian communities themselves were divided on the acceptable basis of power-sharing arrangement in legislatures. While the Muslims found common cause with the depressed classes or the untouchables, the Anglo-Indians, a section of the Indian Christians, the Congress, the Hindu Mahasabha, and the Sikhs remained opposed to demands of Muslims and untouchables.

The award sought to break this impasse between communities. It created separate electorates for both communal and non-communal groups: for the general (mostly Hindu), Muslim, Sikh, Indian Christian, Anglo-Indian, European, untouchables, and tribal and backward areas belonging to the first category, and labour, commerce, landholders, and universities belonging to the latter category with a few reserved seats for women as well.[16] In effect, the idea of separate electorates was expanded to include all minorities and brought under its ambit the untouchables. Gandhi was strongly opposed to granting of separate electorates to the Depressed Classes or the untouchables on grounds that the untouchables formed an indivisible part of the Hindu community and this representational schema would further alienate them from the larger community. In protest, he went on a fast unto death. Following Gandhi's fast and his negotiations with

[16] One of the innovations of the Communal Award related to the idea of *weightage*, a principle by which the various minority communities granted separate electorates were given representation greater than they would normally have received on the basis of their numerical strength. For instance, although the Muslim community, according to the 1931 census, represented 7.9 percent of the population of Madras, it was granted 13.5 percent of the seats in the Madras Provincial Legislative Assembly. See, Retzlaff (1960: 24).

the leader of the untouchables, B. R. Ambedkar, in what is historically referred to as the Poona Pact, it was agreed to do away with the system of separate electorates for untouchables. Having lost the separate electorates, the Depressed Classes were compensated by an increase in reserved seats to be elected from joint or undifferentiated electorates, more in number than what was originally stipulated in the Communal Award.[17] The pact basically established an enduring pattern for the representation of the Scheduled Castes and Tribes, one that continues until today. The historic understanding also unleashed a series of Congress-sponsored efforts to abolish the practice of untouchability and secure their inclusion within the Hindu community through legal and social reformist means.

The Government of India Act 1935, a bulky and exhaustive document detailing provisions for a federal government that encompassed British India and the Indian princely states, not only retained much of the representational scheme unfolded by the Communal Award of 1932 in relation to the minorities, but also included within its ambit more safeguards for different communities, one of which led to the Instrument of Instructions issued to the Governors in 1937 requiring them to secure a due proportion of official positions to the several communities.

Despite a long list of safeguards for minorities instituted by the colonial administration, the political history of the subcontinent in the 1940s led many to accept

[17] "The Poona Pact provided 148 seats for untouchables, instead of the 78 separately elected members given by the Communal Award. It also provided a system of primary elections for those reserved seats; a panel of four seats was to be chosen by electors from the Depressed Classes." (Galanter 1984: 32).

the inevitability of partition. In particular, the failure of the Congress and the Muslim League to enter into genuine and workable power-sharing arrangements in the provincial governments that came to life for a brief spell between 1937-39 made a united India seem implausible.

In 1940 the Muslim League adopted the famous Pakistan resolution, which stated, "no constitutional plan would be workable or acceptable to the Muslims unless it recognized the basic principle that geographically contiguous units should be demarcated into regions so constituted that the areas in which Muslims were numerically in a majority were grouped to constitute 'Independent States'." (Shiva Rao 1967; Vol. V: 744)

Between 1940 and 1947, the inevitability of the partition was increasingly felt to be unstoppable with the Muslim League's demands of a separate and territorially organized Muslim nation remaining uncompromising and the lack of flexibility and creative thinking on Congress' side jettisoning any remaining scope for rapprochement. During negotiations between the Congress and the League with the helpful intervention by the British to arrive at a mutually agreed self-government formula, it was clear that the only important item remaining on the agenda, short of a workable power-sharing arrangement, was to work out the modalities of transfer of power with a continued focus on the protection of the interests of minorities, one that eventually formed the hub of the Cabinet Mission Plan outlining in detail the structure and goals of the Constituent Assembly.

The Colonial Pattern

The colonial trends vis-à-vis the issue of minorities clearly show that the question of adequate representation, especially that of separate electorates, formed the *primary* demand of minority identities. At later stages this was expanded to include other safeguards such as reservation of positions in government jobs and the provincial and federal executive. (Retzlaff, 1960: p. 29) The British, on their part, kept insisting on the need to arrive at a just solution of the 'minority problem' prior to any constitutional settlement of the transfer of power. In this insistence the British largely viewed themselves as playing the role of an *impartial and arbitral authority.* (Shiva Rao 1967; Vol. V: 744)

The gradual broadening of the definition of minorities and the steady widening of the scheme of representation to include new minorities was strategically designed to divide the nationalist front. However, for much of the first half of the 20th century, this also meant satisfying the elites among the minorities. The colonial model of negotiating the politics of difference, designed to act as a *balance* between competing communities or interests, was a top-down power-sharing model.

But this model, imposed for whatever reasons, has become an enduring feature in defining identity today in India. As per the terms of reference of the Constituent Assembly, outlined by the Cabinet Mission Plan, the requirement that minorities' interests be protected in post-British India became an effective precondition to define the nature of rights in the constitutional document. Even after the partition of British India, the prerequisite of minority protection remained in effect during constitutional

deliberations. But the reality of partition was used as a political foil by the Congress, the dominant political actor in the Constituent Assembly, to mute 'immoderate' demands of minorities in trying to achieve national unity.

Constitutional Deliberations

The Constituent Assembly: Representing Diversity

While the Cabinet Mission Plan had already guaranteed the representation of Muslims and Sikhs in the Constituent Assembly, members of the Parsi, Anglo-Indian, Indian Christian, Scheduled Caste, Scheduled Tribe groups were brought into the assembly as Congress Party's representatives. The Constituent Assembly came into existence on December 9, 1946 and for roughly three years it sat in session deliberating on the different aspects of the constitution that was finally adopted on January 26, 1950. Following the Muslim League's initial boycott, subsequent enrolment, and cessation of responsibility caused by partition and creation of Pakistan, the total membership of the Assembly and the minority communities within it kept varying. Of the initial 235 seats allotted to the provinces (barring the Princely States) where indirect elections were first held to fill up the Constituent Assembly, 88 of them, or 37 per cent of the total membership, were derived from the minority communities. In mirroring India's diversity, representatives of the Nepali, Sikh, Parsi, Christian, Anglo-Indian, Backward Tribe, Muslim, and Scheduled Caste communities found places in the Constituent Assembly. Keeping in view the need to ensure adequate representation to minorities, Dr. H. C. Mookerjee, an Indian Christian from Bengal, was elected the Vice-President of the

Constituent Assembly. He also later served as Chair of the Minorities sub-committee that worked under the larger structure of the Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded and Partially Excluded Areas to the Constituent Assembly. Similarly, Dr. B. R. Ambedkar, the Indian untouchable leader, was entrusted with the historic responsibility of preparing the draft of the constitution in his capacity as the Chairman of the Drafting Committee.

Constituent Assembly: Minority Protections

The overall philosophy of the constitution was contained in the Objectives Resolution, moved by Jawaharlal Nehru on the floor of the Constituent Assembly on the fourth day of its first session. Among its objectives, Clause (6) of the Resolution reiterated, "adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes." (Shiva Rao 1967; Vol. 2: 4)

Realizing the need to deliberate upon the minorities question, Govind Ballav Pant moved for a resolution to set up an Advisory Committee on Fundamental Rights, Minorities and Tribal and Excluded and Partially Excluded Areas on the floor of the Assembly on January 24, 1947. He argued:

> The question of minorities everywhere looms large in constitutional discussions. Many a constitution has foundered on this rock. A satisfactory solution of questions pertaining to minorities will ensure the health, vitality and strength of the free state of India that will come into existence as a result of our discussions here. The question of minorities cannot possibly be overrated. It has been used so far for creating strife, distrust and cleavage between the different sections of the Indian Nation. Imperialism thrives on such strife. It is interested in fomenting such tendencies.

> So far, the minorities have been incited and have been influenced in a manner that has hampered the growth of cohesion and unity. But now it is necessary that a new chapter should start and we should all realize our responsibility. Unless the minorities are fully satisfied, we cannot make any progress: we cannot even maintain peace in an undisturbed manner. (CAD Vol. II: 310-1)

For much of the deliberations that took place on the floor of the Constituent Assembly, during various stages in the meetings of its different committees and sub-committees, the issue of what constitutes the rights and protections of minorities was weighted against the demands of national unity. It is interesting to observe that the fear of balkanization loomed heavily in the minds of the founders, especially those representing the Congress party, and a necessity was felt to justify granting of any rights and protections to minorities in accordance with, and in particular consideration to, its possible impact on the unity and integrity of the nation.

If the threat of balkanization created caution in the minds of the Congress leaders, the lure of a common citizenship as a way out of the impasse held out an alternative workable aspiration. This aspiration would also foster common bonds and nationalist sentiments among Indians irrespective of community differences. It had held irresistible appeal back in 1931 when the Congress in its Karachi session had adopted a resolution on fundamental rights applicable to all citizens, majority and minority alike. Underlying the Congress-sponsored views and provisions on common fundamental rights were a central uniting strand of protection against discrimination, notwithstanding group differences among citizens. "The minorities for their part," Retzlaff appropriately notes, "regarded this [i.e., mere protection against discrimination] as insufficient, and demanded additional

constitutional safeguards, as well as other special arrangements in such things as employment in the public services." (Retzlaff 1963: 60)

To fulfill the aspirations of the minorities and in accordance with the Cabinet Mission Plan's stipulations, the Advisory Committee of the Constituent Assembly set up the Minority Rights Sub-committee on 27 February 1947. The sub-committee set itself the task of formulating responses individually and collectively to a set of questions that K. M. Munshi had prepared. Munshi's questionnaire asked:

> 1) What should be the nature and scope of the safeguards for a minority in the new constitution?
>
> 2) What should be the political safeguards for a minority
> (a) in the Centre;
> (b) in the Provinces?
>
> 3) What should be the economic safeguards for a minority
> (a) in the Centre;
> (b) in the Provinces?
>
> 4) What should be the religious, educational, and cultural safeguards for a minority?
>
> 5) What machinery should be set up to ensure that the safeguards are effective?
>
> 6) How is it proposed that the safeguards should be eliminated, in what time and under what circumstances?

Partly as response to this questionnaire and the deliberations in the Minority Rights sub-committee and the floor of the Constituent Assembly, members' views on rights of minorities were divergent. The divergence can be traced as a model of intersecting axes (Fig. 1) between two views of citizenship: the common citizenship

model that takes the individual as the unit of the political community, and the group-differentiated position that approves protections and rights for communities.

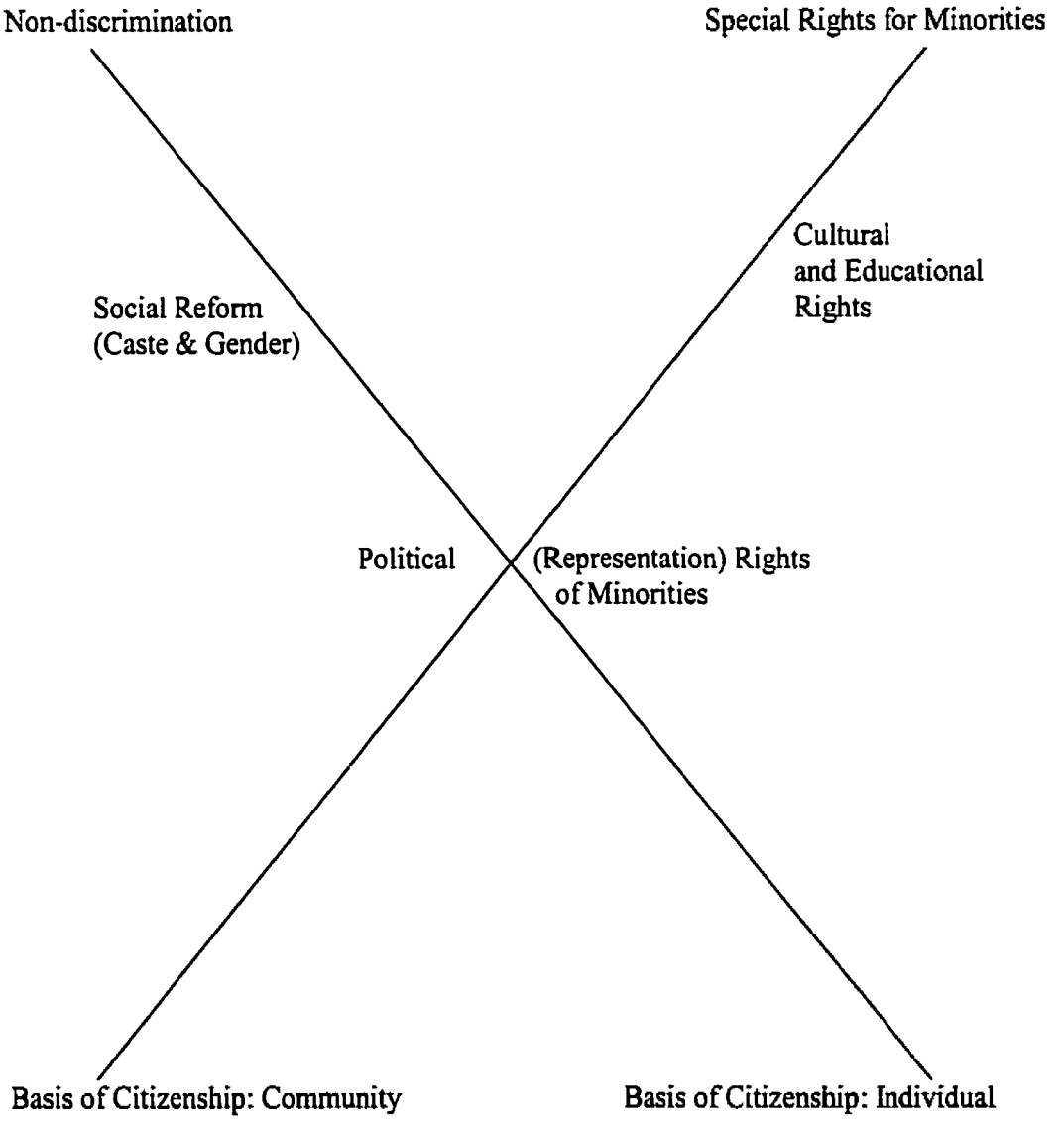

Fig. 1 Mapping Divergence in Founders' Attitudes toward Citizenship

Responses to Munshi's questionnaire depended on which minority one was speaking for. For those who spoke from the lower caste perspective, the emphasis was on non-discrimination and a strong version of legal and political equality among citizens. It was also not uncommon for representatives of untouchables to align their political voices in favour of an egalitarian but well-integrated and assimilated society. However, in terms of what it requires to be politically equal such a perspective marshaled support for special representation rights of untouchables. To those who expressed views on behalf of religious and cultural communities, the choice was clear: to desire both cultural autonomy and political rights of representation. Following the colonial model, and encouraged by the Cabinet Mission's promises of using minority rights as some sort of a constitutional trump card even before actual deliberations on the constitution took place, all the minorities, with the exception of the Parsees, found a common meeting ground in demanding separate representation rights as a necessary political safeguard in post-independence India. (See the intersection of the axes in Fig. 1)

The idea that the principle of representation should be sociologically based, or descriptive in nature, mirroring the diversity of the population, found favour with most members representing minorities throughout the deliberations. Rajkumari Amrit Kaur, a member of the sub-committee, was one among few exceptions, who advanced a crude form of Burkean virtual representation as a remedy to the conundrum of the more popular descriptive representation.[18]

[18] In response to Munshi's questionnaire, Kaur reasoned against political safeguards of minorities. Requiring the minorities to repose trust in the majority community, she argued: "Axiomatically

In April 1947, the Minority Rights sub-committee decided first of all to consider the Fundamental Rights Sub-committee report in detail to ascertain whether any of its recommended provisions required amplification or alteration for the specific purpose of safeguarding minority rights. Having examined the interim proposals of the Report of the Fundamental Rights sub-committee from the minorities' point of view, it recommended:

- Reservation of public offices for the classes that were not adequately represented in government services;
- Freedom to "practise" and "propagate" as well as to profess religion;
- Education through one's mother tongue and script;
- Protection of the language, script and culture of minority groups;
- Free admission of all the minorities in the state-funded schools and other educational institutions;
- Equal state funding to the institutions of minorities;
- Abolition of discrimination in places of public use; and
- Restriction of the right of residence and possession of land in tribal areas.

A few days later the sub-committee met to consider the political safeguards of the minorities and the issues identified for further deliberation were of four types:

1. Representation in the legislatures; joint vs. separate electorates and weightage;
2. Reservation of seats in the Cabinets;
3. Reservation in public services; and
4. Administrative machinery to ensure protection of minority rights partly covered by making certain fundamental rights justiciable. (Shiva Rao 1967; Vol. 2: 392)

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there is no reason why the interests of any individual or community should not be safe in the hands of a good person or persons, irrespective of their personal religion." (Shiva Rao 1967; Vol. 2: 310-1)

Working on the agenda, the sub-committee could not muster unanimity on any one item listed above. In partisan voting, where views differed from one item to another, the working group voted by a majority to do away with the colonial scheme of separate electorates but chose to retain a common scheme of reserved seats in joint electorates for all sizeable minorities for a period of 10 years. Similarly, in relation to item no. 2, the group voted to do away with reservation of seats for minorities in the Cabinet. On item 3, that is, reservations in services, or affirmative action quotas, the sub-committee voted to ensure quotas for Scheduled Castes, Muslims, Sikhs, Plain tribes in Assam, and Anglo-Indians. The Parsees and the Indian Christians did not claim any quotas. On item 4, two proposals were accepted: (1) An independent officer appointed by the executive reporting to the legislature about the working of the safeguards provided for the minorities, and (2) A statutory commission to investigate into the conditions of the socially and educationally backward classes and reporting remedial measures. (Shiva Rao 1967; Vol. 2: 396-400)

However, when deliberating over the specific recommendations of the Minority Rights sub-committee, the Advisory Committee, to which the sub-committee report was submitted, held the view that some proposals needed to be rejected on the grounds that rigid constitutional provisions would make parliamentary democracy unworkable and that it was important to harmonize the special claims of minorities with the development of a healthy national life. (Shiva Rao 1967; Vol. 2: 416-7)

In the immediate aftermath of the country's partition, the reports of the Advisory Committee on minority rights were placed before the Constituent Assembly. Sardar

Vallabhbhai Patel, a prominent Congress leader and President of the Advisory Committee, tabled the Report on Minority Rights, as it came to be called. While fully conscious of the tragic and violent post-partition political environment surrounding the nation and mass migrations triggered between India and Pakistan, Patel stressed how the agreement surrounding the document was arrived at in a consensual manner between the minorities and the majority. Responding to a few minority members' concerns and amendment motions that sought to reclaim separate electorates for Muslims, Patel, mindful of the majority support in the Assembly and the members' strong nationalist sentiments, rejected it on the grounds of national unity. A representation system that entrenched minority constituencies would, in his opinion, pave the way for another Pakistan, or further division of the country. Barring the discussions on joint vs. separate electorates, the Assembly adopted the Report without any alterations and the latter was incorporated into the Draft Constitution presented to the Assembly much later.

Steering a middle course between strong entrenchment of minority rights and the equally crucial task of acknowledging the majority interests, Ambedkar reasoned that a lot of the safeguards for minorities depended for their success on the goodwill and the sense of duty among the majority community to not discriminate against minorities. Ambedkar asserted:

> [T]he Constituent Assembly has done wisely in providing such safeguards for minorities as it has done. In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves. A solution must be found which will serve a double purpose. It must recognize the existence of minorities to start with. It must also be

> such that it will enable majorities and minorities to merge some day into one...[Minorities in India] have loyally accepted the rule of the majority which is basically a communal majority and not a political majority. It is for the majority to realize its duty not to discriminate against minorities...The moment the majority loses the habit of discriminating against the minority, the minorities can have no ground to exist. They will vanish. (CAD, Vol. VII: 39)

In the fast changing political landscape of a partitioned India, however, the growing divide between the majority and the minority communities fueled by Mahatma Gandhi's assassination in 1948 led to a growing intolerance toward political safeguards for minorities. The Congress reflected the changed mood of the nation in the Assembly. Between the seventh session of the Assembly in November 1948 and the conclusion of constitution making in November 1949, several debates within the Assembly and the Advisory Committee led towards a gradual process of whittling down the political safeguards of the minorities.

Although the provision of separate electorates for minorities was done away with, it figured in the discussions of the House during deliberations on the draft constitution. When the majority in the House vehemently rejected this, the idea of proportional representation was also brought up for discussion by representatives of the Sikh and the Muslim communities.[19] The Congress did not see any difference between the demands for separate electorates and proportional representation, and the latter too was rejected on

[19] Sardar Hukam Singh's deliberation. CAD Vol. VII, 32: 1250. Both the Muslim League and the Sikh Panthic Party were, however, divided, fragmented, and demoralized resulting in a weakening of this demand. See, Retzlaff (1963).

grounds that it would have a divisive impact on the polity with the potential to balkanize the nation further.[20]

Of the three choices for minority political safeguards—separate electorates, proportional representation, and joint electorates with reserved seats—it was the third one that applied uniformly to all minorities and was part of the Minority Rights sub-committee recommendations to the Assembly. But even this provision was withdrawn by the Advisory Committee for minorities other than the Scheduled Castes, which now included lower castes from the Sikh community, and Tribes. In a new report submitted to the Assembly on May 11, 1949, Sardar Patel remarked that under vastly changed circumstances

> it was no longer appropriate...that there should be reservation of seats for Muslims, Christians, Sikhs or any other religious minority. Although the abolition of separate electorates had removed much of the poison from the body politic, the reservation of seats for religious communities, it was felt, did lead to a certain degree of separatism and was to that extent contrary to the conception of a secular democratic state. (Shiva Rao 1967; Vol. IV: 600)

Later, the same principle was applied to reservations of jobs; except for the Scheduled Castes and Tribes, every other minority community during the conclusion of the constitution making was excluded from this other important safeguard.

In a nutshell, then, with regard to representation rights of minorities, or the political safeguards, a gradual process of attenuation marked the constitutional

[20] Rubinoff (1990) discusses how the Congress rigged the electoral system in the Constituent Assembly to achieve a majoritarian FPTP system that would benefit them in national elections.

deliberations. From an initial consideration of caste-, tribe-, and religion-based minorities, special representation rights (of reserved seats in joint electorates) were granted only to Scheduled caste and Scheduled tribe communities with an added provision to nominate two members from the Anglo-Indian community to the popular house (Lok Sabha) in the Indian parliament. In denying special representation rights to religious minorities, the founders used the argument of national unity and nation building. The same model applied to the reservations of jobs, too, with the slight modification, in this case, of allowing lower caste members of the Sikh community inclusion in the Scheduled Caste list. In a definite but partial break from the colonial model, the Indian constitution considered it useful and necessary to recognize caste and tribal identities for special representation and affirmative action (job reservations by way of quotas) rights on a temporary basis, to be renewed every 10 years.

It is also useful to recapitulate here that in the making of the Indian constitution, there were differences of opinion between representatives of different communities on who deserves rights of representation and affirmative action. The final outcome of the deliberations suggest anything but complete unanimity, although by some stretch of logic one may claim arithmetical consensus as a way of resolving the issue of minority representation. However, while Granville Austin, the Indian constitutional *guru*, waxes eloquently on the quintessential Indian virtue of consensus displayed in the deliberative process (Austin 1966: 311-7), he also admits to the pressures exerted on religious

minorities by Congress leaders, especially Sardar Patel, to relinquish colonial privileges.[21] (Austin 1966: 151)

Cultural Rights

If a departure from the colonial model was made in the case of representation rights, such a departure or break from the tradition did not inform the founders during deliberations on the appropriate religious, educational, and cultural safeguards for minorities. Although the safeguards contemplated by the Minority Rights sub-committee and the larger Constituent Assembly included a vast array of subjects for consideration and discussion, the essential issues revolved around how identity-bearing individuals *and* groups needed recognition. Some protections and safeguards pertained to clarifying the meaning, implication, and amplification of fundamental rights that all citizens would enjoy at an individual level. These covered areas were commonly grouped together under the categories of freedom of religion, which aroused highly interesting debates on certain religious practices such as *sati*, *devadasi* (dedication of girls to temples), child marriage and on the ever more contentious issues of the freedom to propagate religion and religious instruction in educational institutions. In different ways these issues brought to the fore questions about the role of the secular Indian state, especially about its

[21] For an implication that Patel may have used an arms-twisting approach to secure this outcome, see Chaube (1973). In the same vein, however, Austin acknowledges the possibilities of the division in the ranks of Muslims, similar to what Retzlaff (1963) notes in another context, together with the motive of sacrifice in order to attract fair treatment from Hindus, as reasons for an increased moderation in the demands of religious minorities that eventually paved the way for an alteration in the colonial model of representation. (1966: 151)

responsibility for taking appropriate initiatives to trigger social reform in community practices and questions about the public-private distinction.

To the question of how the state would maintain its relationship with religion, the common overwhelming approach was that the state would be *secular*, which in the Indian case meant that there would be no state religion, but the state would allow religious freedom, including the right to practise and propagate religion. Indian secularism, a feature implicit in the original document but made explicit by way of an amendment to the Preamble by the 42nd Constitutional Amendment Act, 1974, was never contemplated to approximate the American model of the wall of separation between the church and state. The secular state, most founders concurred, was to allow room for both neutral involvement and pursuing a policy of equidistance between religions. Some involvement in religion was considered necessary for a progressive welfare state that sought appropriate legal reforms. What exactly these reforms would mean and how precisely the state would involve itself in cultural or religious matters was never specified in detail, but the state received ample scope within a democratic governance model to act as it deemed necessary. As a general policy this approach was both compatible with democracy and protective of religious freedom.

In terms of how the question of one's cultural or religious identity affected one's status as a citizen, the major divide in the Assembly and the pertinent committees, focused on the question of who was a legitimate bearer of rights in the newly formed political community—the individual or the group—and how this would shape other protections guaranteed to minorities. For example, during discussions in the meetings of

the Fundamental Rights sub-committee, there was a disagreement about what a right to practise religion meant which separated those who believed that the constitution need only spell out a few broad non-discrimination principles together with a common citizenship model and those who advocated explicit constitutional recognition of the rights of cultural and religious minorities.

That citizenship is granted only to individuals was the common refrain of those who were opposed to religious practices and customs such as *purdah* (the practice of veil common to most Muslim and some Hindu women), child marriage, polygamy, unequal laws of inheritance, prevention of inter-caste marriages, and *devadasi*. Spearheading the cause of social reform in opposition to some of these traditional practices were women representatives such as Rajkumari Amrita Kaur and Hansa Mehta, with support from A. K. Ayyar.[22]

On a different plane, whether the right to religion encompasses rights of *propagation* has been, and still continues to be, a highly contested issue. Although the final outcome of the constitutional deliberations included the right of an organization or a group to propagate its religious tenets, the matter was put to a severe test due to the views of some members that Hinduism, unlike Islam or Christianity, did not believe in proselytization. In the Minority Rights sub-committee, M. Ruthnaswami maintained that since Islam and Christianity were essentially proselytizing religions, the purview of religious freedom should encompass the right to propagate religion. (Shiva Rao 1967;

[22] See the minutes of the Sub-Committee on Fundamental Rights meetings of February-April, 1947 in Shiva Rao (1967; Vol. 2: 65-198).

Vol. 2: 201) In spite of several attempts made by Assembly members to curtail this right by seeking to prohibit certain forms of conversion and treat them as illegal, such a move was abandoned as a result of a political conciliation reached between community representatives largely as a concession to the Christian (Catholic) community.

In the last 50 years, especially with a phenomenal increase of violence in recent times caused by an ascendant Hindu nationalism, the question of conversions threatens to endanger harmony between the Christian and Hindu communities. Despite legal wrangles and political controversies that impinge on the reality of religious conversions and re-conversions of lower caste groups and tribals today, K. M. Munshi's broad defence of the principle of conversion made on the floor of the Constituent Assembly,[23] is still reflective of the Indian constitution's general approach to the issue.

Of the non-discriminatory basis of the cultural and religious objects the Assembly found it useful to allow the state to intervene to throw open 'religious institutions with a public character' and disallow compulsory religious instructions, with reasonable exceptions, in educational institutions that are maintained or receiving aid wholly out of public funds.

Long before the constitutional discussions, the subject of *personal laws* was a matter of prime concern to religious minorities, especially Muslims. As a cultural right or safeguard, the issue of personal laws had figured in successive demands made by Muslim League and was part of even Jinnah's 14-point demand made in 1929 cited above.

[23] In spite of his attempts to specify particular methods of conversion—force, fraud, and those involving children—as illegal, Munshi asserted: "So long as religion is religion, conversion by free exercise of the conscience has to be recognized." CAD, Vol. VII: 837.

However, the practice of religious communities having their own separate personal laws dates back to Warren Hastings' 1772 'Judicial Plan' under the East India Company's judicial directive to its new civil courts, or *diwani adalats*, to ensure "That in all suits regarding Inheritance, Marriage, Caste, and all other religious Usages or Institutions, the Laws of the Koran with respect to *Mahometans*, and those of the Shaster with respect to *Gentoos*, shall be invariably adhered to..."[24] For the entire duration of the colonial administration, the institution of personal laws was left completely untouched. During the nationalist movement, the Muslim League rallied around this issue and claimed it to be a core component of its distinctive identity. Deliberations on this issue in the Minority Rights and Fundamental Rights sub-committees and the Constituent Assembly evoked great deal of heat and passion.

Although Rajkumari Amrita Kaur, Hansa Mehta, and Minoo Masani were insistent in demanding a uniform civil code in conformity with their strong views on common citizenship and making the individual the sole bearer of rights, many Muslim representatives in the Assembly took strong exception to this idea, and even to mentioning the prospect of a uniform civil code in the non-justiciable section of the constitution. They regarded this as an infringement upon their collective right.

Speaking for most religious minorities and drawing on appropriate European examples of minority accommodations, Mohd. Ismail Sahib, a Muslim representative, contended that personal laws constituted an inviolable fundamental right of religious

[24] Cited in Dieter Conrad (1995: 306).

minorities on grounds that they were an intrinsic part of their religion and culture. (CAD Vol. VII: 540-1)

Different members gave different reasons for the preservation of personal laws. Mohd. Ismail Sahib defended it as the ethical choice of the community. Other Muslim members gave various reasons—historical, pragmatic, contextual, and democratic—to justify the continued existence of the personal laws. All defenders agreed, however, that personal laws closely reflected the religious practices of the community. To that extent the definition of secularism was reinterpreted to mean non-religiosity, not irreligiosity or anti-religiosity. It was important to define the secular state as non-religious to make a distinction between a form and attribute of neutrality that a non-interfering secular state ought to display and the anti-religiosity of an apparent secularism that an interventionist state uses to legislate uniformity over and against distinctive ways of life.

In line with this reasoning, Mahboob Ali Baig Sahib Bahadur and Hussain Imam argued that secularism should not mean having common laws, but that a secular state can, and ought to, respect diverse religious practices. (CAD Vol. VII: 543-5) B. Pocker Sahib Bahadur asserted that interference in religious practices is tantamount to tyranny. Following the well-known Millian argument, he stressed that a majority is not tyrannical if it respects the rights of the minorities. To objections based on European and American practices, Pocker Sahib responded that it did not matter how other constitutions dealt with this issue. In underscoring that constitutions differ in their approaches to accommodate diversity, Pocker Sahib accentuated the *contextual* foundations of constitutionalism. However, not all members who supported the idea of retaining personal laws saw a

necessary correlation between protection of minority interests and state interference in religious matters. To some, especially Naziruddin Ahmed, certain interventions by the secular state could be in order and legitimate. In fact Ahmed suggested that a future uniform civil code with the consent of all concerned might look attractive under ideal conditions but claimed that pragmatism demanded continuation of the present arrangement. (CAD Vol. VII: 541)

In reaction to these views, K. M. Munshi and Alladi Krishnaswami Ayyar made a case for a uniform civil code, highlighting how it remains a future democratic option that could effectively imply the consent of all communities affected by such an outcome. Munshi argued that any future civil code could not ignore the views of the minority, but insisted that the idea of a civil code was not tyrannical *per se*. Moreover, he suggested that tyranny could take other forms than an imposed secularism or a uniform civil code. For instance, he pointed out, Khojas and Cutchi Memons, despite being Muslim communities, had largely followed Hindu practices in relation to personal laws until they were brought, against their wishes, within the ambit of Muslim personal laws. If the prospect of civil code is tyrannical to Muslims, Munshi argued, then Khojas and Cutchi Memons, minorities within a minority, already suffer from the tyranny of a personal law imposed upon them. Expanding upon this example, Ambedkar observed later that personal laws were neither immutable nor uniform throughout India and until 1939 most of the North Western Frontier Province (presently part of Pakistan) and many Muslims in the southern cone of the subcontinent followed respectively Hindu laws and laws that had

regional moorings.[25] More generally, Ambedkar suggested, "It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method." (CAD Vol. VII: 545)

Playing the familiar chords of unity, both Munshi and Ayyar argued that a uniform civil code could act as a catalyst for national unity and that rather than create a schism between the communities, it might actually help bridge communal divides. (CAD, Vol. VII)

The supporters and detractors of the civil code remained unconvinced of each other's views on what brings about unity. When Mohamad Ismail Sahib had first moved an amendment to the non-justiciable provision of Uniform Civil Code in the Directive Principles of State Policy, he had maintained that harmony is best upheld by a respect for diverse practices, not by uniform legal "regimentation." (CAD, Vol. VII: 541)

The question of whether or not religious instruction could be imparted in state-funded schools also led to a debate about the secular basis of the constitution. While acknowledging the fact that a secular state need not compel students to study religion, Mohd. Ismail Sahib also affirmed that it was not necessary for the secular state to ban religious instruction in public schools especially if parents or their wards wanted religious instruction in conformity to their own religions in the public schools. Such a fact need not

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[25] The latter reference was to Marumakkathayam law, a matriarchal law that applied to both Hindus and Muslims, in North Malabar in southern India.

be construed further as a violation of the neutrality of the secular state. (CAD, Vol. 7: 867) Reacting to this view and offering a narrower version of the secular state, Tajamul Husain, the most 'liberal' of Muslim representatives, argued against religious instruction in schools that were maintained wholly by the state. (CAD, Vol. 7: 871) K. T. Shah further extended Husain's argument to include even those schools that were partially maintained by the state's finances.

In response to these positions, Ambedkar pointed out that the draft version for this particular clause "strikes a mean" whose implication was that (contrary to Ismail Sahib's views) religious instruction could be barred in public schools but in deference to the cultural claims of religious communities, institutions operated by the communities would continue to enjoy full liberties in imparting religious education regardless of whether or not they received aid.[26]

Whatever the scope for public funding for religious communities, the Constituent Assembly agreed that both religious and linguistic minorities should have the right to establish educational institutions of their choice. Drawing reference to an analogous provision in the old Estonian constitution, Harnam Singh in clause 15 of his draft

[26] In regard to such privately-managed community schools, Ambedkar's position was: "The State, of course, is free to give aid, is free not to give aid; the only limitation we have placed is this, that the State shall not debar the institution from claiming aid under its grant-in-aid code merely on the ground that it is run and maintained by a community and not maintained by a public body. We have there provided also a further qualification, that while it is free to give religious instruction in the institution and the grant made by the State shall not be a bar to the giving of such instruction, it shall not give instruction to, or make it compulsory upon, the children belonging to other communities unless and until they obtain the consent of the parents of those children." CAD, Vol. 7: 883.

presentation to the sub-committee on Fundamental Rights in March, 1947, had typically brought to members' attention that

> Religious minorities in the country shall have a right to establish autonomous institutions for the preservation and development of their culture and to maintain special organization with powers to levy taxes for the maintenance and welfare of such institutions. (CAD, Vol. 2: 82)

In the sub-committee on Minority Rights, M. Ruthnaswami, responding to Munshi's questionnaire (see above), dwelt at length on the theme of cultural protections of minorities. Central to his arguments was the distinction he sought to make between political minorities and national or religious minorities. For political minorities that were essentially non-permanent in nature, Ruthnaswami believed, institutional mechanisms of checks and balances, division of powers, rule of law, decentralization, and federal properties, would suffice. (CAD, Vol. 2: 313-4) However, for national or religious minorities, such as Muslims, Sikhs, Indian Christians, and Anglo-Indians, who constituted 'permanent' minorities, certain constitutionally entrenched rights, would be in order. "It is as a permanent minority," he said, "never able or hoping to be able to influence and carry the government of any day that they require certain rights to be asserted and safeguarded." (CAD, Vol. 2: 314) Among his suggestions for rights of permanent national minorities were: 1) grants-in-aid to schools and educational institutions maintained by religious communities; 2) special grants toward enhancement of education of educationally backward minorities; and 3) schools for minorities, where their religion and culture would be preserved and cultivated, which the government ought to maintain especially in those areas where such minorities are majorities in a

demographic sense. (CAD, Vol. 2: 315) Largely conforming to Ruthnaswamy's suggestions, S. P. Mookerjee in his memorandum on Minorities made a similar case for the educational rights of minorities to preserve their culture, language, and script. (CAD, Vol. 2: 337-41)

As can be seen from the discussion above, the justification for cultural rights varied. Founders who narrowly defined citizenship clustered rights in favour of individuals; others prioritized the needs and interests of different communities. The balance sheet is captured best by Lloyd and Susanne Rudolph's general observation that the Indian constitution makes "simultaneous commitment to communities and to equal citizenship." (1987: 38-9) What is pertinent to note in this context is how such simultaneous commitments pervade the domain of cultural rights as well. As the figure (1) above illustrates, such simultaneous commitments are to be best understood as reflecting conflicting perspectives of founders on the sources of citizenship. As a result of a series of compromises made between the members of the Constituent Assembly, political safeguards for minorities, i.e., representation rights and promises of state-mandated reservation policies, were confined only to the Scheduled Castes and Tribes while other religious, cultural, and educational safeguards were extended to religious and ethnic minorities. This compromise prompts some to critique the process by which the religious minorities were deprived of their share of political safeguards.[27] While the dominant role of the Congress in the Assembly, the changing political realities and compulsions, and the newly discovered accent and rhetoric of national unity all help to

[27] Notably Retzlaff (1963), Chaube (1974), Ansari (1999) and Chirkandiyath (1999).

explain the lack of support for political rights of religious minorities, the constitutional model that ultimately evolved, also jettisoned the colonial model on principled grounds. Committing themselves to a new beginning and a new chapter, the founders rejected the top-down model of elite power-sharing between communities that had shaped colonial policies.

Identity and Rights in the Indian Constitution

Considered to be the longest written constitution in the world, with features and principles compatible with Indian thought but "nevertheless almost entirely of non-Indian origin" the constitution was, as Granville Austin notes, "perhaps the greatest political venture since that originated in Philadelphia in 1787." (Austin 1966: 308) India's age-old civilization and modern democratic political institutions were never thought to be working at cross-purposes. Indeed, it was the constitution itself, more than anything else, which honed diverse social aspirations to a refurbished and fine-tuned Westminster-style representative form of government. The underlying Indian *mantra* that achieved this in large measure was 'Unity in Diversity.'

As 'the charter of Indian unity,' the constitution is all encompassing in providing a wide institutional and normative framework within which questions of diversity have been, and continue to be, negotiated and accommodated.[28] The constitution responds to

[28] As Austin observes, "Within its limits are held the negotiations over the working of the federal system. The realignment of state boundaries on linguistic lines was done within its definition of Indian nationalism. The question of the Official Language has been debated in Parliament within the framework of a compromise designed to preserve national unity. The constitution has established the accepted norms of 'national' behaviour." (Austin 1966: 309)

issues of identity and difference with varied nuances of equality. The Fundamental Rights of the constitution, contained in Part III, are complemented by principles of social legislation in Part IV called the Directive Principles of Social Policy. Together these two account for the egalitarian mode that the liberal democratic system of India aspires to achieve in relation to both individuals and groups. Depending on the context, equal treatment carries varying connotations.

Originally, the constitution guaranteed seven sets of rights: Right of Equality, Right of Freedom, Right Against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, Right to Property, and the Right to Constitutional Remedies. In general, all these "Rights lay down that the state is to deny no one equality before law." (Austin 1966: 51) Of these, the guarantee of the right to property was deleted by the Constitution (Forty-Fourth Amendment) Act in 1978.[29] The remaining six Rights, contained in various articles of Part III, are justiciable.

The Directive Principles, on the other hand, are non-justiciable but lay down parameters and goals for future legislation. The principles are broadly culled from Gandhian precepts and socialist values: in sum, a charter intended for social progress. If some of the rights in the constitution reflected formal equality, a major part of the Directive Principles gave concrete shape to substantive equality. But the Principles, some

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[29] Removed from the ambit of fundamental rights, the only protection such a right has now is contained in Article 300-A, which provides that "no person shall be deprived of his property save by authority of law."

of which bore a distinctively Indian and Gandhian essence, also pointed towards a higher good, the *telos* of an ethical-cum-socialist communitarianism.

Article 14 of the constitution states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15, an extension of the right of equality, prohibits the state from discriminating on grounds of religion, race, caste, sex or place of birth. Clause 2 of the article states "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public." This clause was important to do away with caste- and religion-based social discrimination. However, clauses 3 and 4 add "nothing in this article shall prevent the State from making any special provision for women and children" and "the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[30]

Article 16 lays down the principle of equality of opportunity in matters of public employment with a non-discrimination clause. Clause 3 of the same adds: "Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence

[30] Clause 4 was added by the Constitution (First Amendment) Act, 1951.

within that State or Union territory prior to such employment or appointment." As an important qualification to the principle of equality of opportunity[31], clause 4A states that it will not prevent the state "from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State." Clause 4B, inserted recently by the Constitution (Eighty-first Amendment) Act, 2000, categorically provides the "carry-forward rule"[32]. It reads " Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year." Unrelated to reservations in the sense of quotas and in public employment, Clause 5 makes a further exception to the principle of equal opportunity by allowing that the incumbent of an office, wherever the law provides, in connection with the affairs of any religious or denominational institution or any member

[31] Judicial interpretations vary on whether such special provisions, understood generally within the rubric of affirmative action policies, are exceptions or an amplification of the principle of equality of opportunity.

[32] See Galanter (1984: 407-9) for more on this rule and how it figured as a significant question especially in *Devadasan vs. Union of India.*

of the governing body can be a person professing a particular religion or belonging to a particular denomination.

Article 17, making a direct reference to the ritual and social discrimination of the 'untouchable' castes, seeks to abolish the practice of untouchability. It reads: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of "Untouchability" shall be an offence punishable in accordance with law."

Article 25 relates to freedom of religion, or more appropriately, freedom of conscience and free profession, practice and propagation of religion. Clause 1 of the article reads: "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, practise and propagate religion." Clause 2 is more in the nature of what the state might do to curtail the freedom: "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." Clause 2 essentially restricts those practices that the state from time to time may consider inappropriate either from the point of view of religious exclusion, as in the case of lower castes, or progressive legislation affecting all or some religious groups. An important explanation of this article recognizes the wearing and carrying of '*kirpans*', or swords, by Sikhs as a constituent aspect of the profession of Sikh religion. The article also explains

that by Hindus, the reference in clause 2 (b) will include persons belonging to the Sikh, Jaina, and Buddhist religions as well.

Article 26, pertaining to freedom to manage religious affairs, is more in the nature of a collective freedom of religion. It states: "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right- (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law."

Articles 27 & 28 on 'Freedom as to payment of taxes for promotion of any particular religion' and 'Freedom as to attendance at religious instruction or religious worship in certain educational institutions' respectively establish the secular basis of the state. Art. 27 states: "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." While clause 1 of Art. 28 establishes that "no religious instruction shall be provided in any educational institution wholly maintained out of State funds," it is qualified by clause 2 which reads: "Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution."

Articles 29 and 30 introduced together as Cultural and Educational Rights are the crux of minority rights in the Fundamental Rights section. Titled "Protection of interests of minorities," Article 29 (1) states: "Any section of the citizens residing in the territory

of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." Clause 2 is more in the nature of a non-discrimination disclaimer that provides: "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." Article 30 on Right of minorities to establish and administer educational institutions categorically emphasizes: "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." Clause 2 of the same reads: "The 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."

Articles 29 and 30 together constitute the special rights for religious minorities, although the former might apply to other communities as well. As Massey (1999) argues, although Article 29 provides "protection to the interests of minorities, it does not refer specifically to the minorities whose numerical strength is less." In referring to "any section of the citizens," who may have a distinct language, script or culture, it may effectively "belong even to the majority community." As an example, Massey critically observes that even "members of the Hindu community living in Punjab or Nagaland will receive protection for their linguistic or cultural rights, by virtue of being 'so-called minorities' in these States." (Massey 1999: 83)

By common consent, however, both these articles stipulate respect for the religious and cultural autonomy of the minorities. The recognition of the minorities'

cultural autonomy is justified on grounds of equality as evidenced in Justice Khanna's observation in *The Ahmedabad St. Xavier's College Society v. State of Gujarat*, 1974:

> The idea of giving some special rights to the minorities is not to have a kind of privileged or pampered section of the population, but to give to the minorities a sense of security and a feeling of confidence...Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of these institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea, but should become a living reality and result in true, genuine equality, an equality not merely in theory, but in fact...(AIR 1974: SC 1389)

However, the Directive Principles of State Policy lay down two more articles, one of which stands in tension with the cultural autonomy of religious minorities with regard to personal laws (Art. 44) and the other seeks to promote the interests of the weaker sections of the society, especially the Scheduled Castes and Tribes (Art. 46). The latter, Article 46, entreats the state to promote the educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections and protect them from "social injustice and all forms of exploitation." This, it is worthwhile to state, supplements Article 16 on equality of opportunity. Article 44 of the constitution relates to a Uniform Civil Code for the citizens. A controversial stipulation, it enjoins upon the state to try "secure for the citizens a uniform civil code throughout the territory of India."

Part XV (Arts. 324-329) of the constitution details election matters. In doing away with separate electorates, Art. 325 specifically mentions, "There shall be one general

electoral roll for every territorial constituency." Part XVI on Special Provisions Relating to Certain Classes (Arts 330-342) contains provisions regarding special representation rights in legislatures of the Anglo-Indian community (Arts. 331 & 333) and the Scheduled Castes and Tribes (Arts. 332 & 334), setting aside the term reservations for the latter. Similarly, with regard to jobs in the government sector, special provisions pertain to the Anglo-Indian community (Art. 336) and reservations for Scheduled Castes and Tribes in Article 335 which states: "The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."[33] Art. 338 also specifies that there shall be a National Commission for Scheduled Castes and Tribes which would largely function as a monitoring and advisory body to inquire into and protect the distinct interests of these communities.[34]

In Part XVII (Arts. 343-351) the constitution dwells upon the status of languages and provisions for linguistic minorities. While Article 347 creates a special proviso for official recognition of a language spoken by a section of the population throughout or in any part of a state or province, Article 350A stipulates that the state shall endeavour "to

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[33] Although Article 335 stipulates the criterion of efficiency in accommodating relevant claims, by a later amendment, it is now amplified to intend: "Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

[34] Almost along similar lines, the Government by an executive decree on Jan. 12, 1978, created a National Commission for Minorities. See, Massey (1999: 84-87).

provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups."

Multicultural Constitutionalism

The constitution of independent India is paradoxically both a deviation from and a derivation of the colonial model. It rejects explicitly the policy of balance between groups and avoids a full-fledged microcosmic view of representation[35] in legislatures and services. However, like the colonial model, it retains some aspects of the principle of microcosmic representation, or group representation in the form of quotas, especially for the Scheduled Castes and Tribes, and by symbolic extension to the Anglo-Indian community. One of the major thrusts of disparity between the colonial and postcolonial constitutional systems, however, lies in how the latter model treats difference. Equal treatment in the postcolonial constitution required that dissimilar forms of difference be *differently* treated. In other words, caste and tribal differences, according to the founders, merited special representation rights, whereas religious and linguistic differences acquired cultural and educational autonomy. Cutting across this dichotomy, however, were territorial self-government rights for tribes and linguistic groups and a special status for Kashmir in an asymmetrical federal association.

[35] Although a microcosmic view of representation closely resembles proportional representation, the sense in which it is used here suggests a rough and functional principle of proportionality attained through majoritarian representative institutions that through quotas in legislative constituencies circumscribes outcomes.

As the discussion above amply demonstrates, it is clear how religious minorities were outvoted on the question of political safeguards, a synonym for special representation rights. From the perspective of religious minorities, cultural and educational autonomy granted to religious groups, of which personal laws was an important facet, was a *second best* outcome of the deliberative process, especially for Muslims who lost a privileged position in the transition to post-independence situation.

The final outcome in the constitution regarding provisions for different groups almost exhausts the taxonomical list on cultural rights prepared by Jacob T. Levy (1997) where each category of cultural right-claims constitutes a cluster of entitlements backed by sameness of normative logic and policy response across contexts. Levy's list includes: *exemptions* from laws (which the Sikhs enjoy, e.g., Art. 25); *assistance* or affirmative action (for Scheduled Castes and Scheduled Tribes); *self-government* rights for minorities (in Kashmir, tribal states and autonomous district councils); *external rules* restricting nonmembers' liberty (respecting land rights of Kashmiris and tribal communities in the North-East); *internal rules* for members' conduct enforced by the community (followed non-formally; not constitutionally approved); *recognition/enforcement* of traditional legal code (personal laws for Muslims, Christians, Parsis, and Hindus); *representation* of minorities (of SCs, STs, and Anglo-Indians); *symbolic* claims to acknowledge the worth or status of various groups (best exemplified by a comprehensive national holidays calendar that includes significant days considered holy by almost all religions).

As a compendium of various difference-sensitive rights that coexist with a common citizenship model, India's constitution anticipates much of what gets discussed

today under the broad contours of multiculturalism in contemporary liberalism. It will be interesting to observe that most of the claims made by the minorities in India during constitutional deliberations were made in the absence of a common citizenship model. By contrast, in most liberal democracies today where common citizenship rights already exist, group claims are made in the public sphere, or, in other words, against the broader community. The Indian situation is not unique, but informs the constitutional process in many postcolonial multiethnic societies. But the deliberative outcome in the Indian case resulted also from the atypical and unusual precondition that trumped the case of minorities even before discussions could take place. To say that there was no Rawlsian 'veil of ignorance' would be an understatement. But, as Yash Ghai (2000) astutely observes, it matters when the constitution is framed and whether or not the time is 'ripe' for building a presumption of "universality" into the negotiating process. "At the time of the Indian independence," Ghai recognizes, "there was no internationally accepted body of norms or procedures. Nor was there a consensus that constitutions had to include a bill of rights."[36] (Ghai 2000: 1135)

Although the American Bill of Rights was a tempting exemplar for many founders, the liberal spirit that pervaded the American constitution did not find many

[36] By the 1990s however, Ghai goes on to argue, there are both a substantial body of norms and consensus that favours inclusion of a bill of rights in national constitutional systems, a trait that affects the Fijian constitution of 1995 and explains the difference of approach in the Canadian context between the Bill of Rights of 1960 and the 1982 Charter. (Ghai 2000: 1135) In a comparative study of a few deeply divided societies—India, Canada, South Africa, and Fiji—Ghai more generally concludes that a framework of rights provides a flexible and successful way of "mediating competing ethnic and cultural claims." (Ghai 2000: 1099)

takers in the subcontinent.[37] In any case, a complete liberal individualist approach was a non-option given both the procedural and pragmatic compulsions to devise an inclusive political community. A quasi-liberal spirit, one that precariously balances rights of individuals with those of communities, permeates and informs the Indian constitutional experiment. Indian constitutionalism, it will be safe to concur, is deeply embedded in a 'thickly' constituted multicultural society. In a different vein, one might also claim that the document strikes a mean between the discourses of the elites and the non-elites in the Indian society.

In so far as norms of democratic justice apply, the collective rights of groups in the Indian case comprise a complex mix of institutional safeguards and normative protections designed as checks against political majoritarianism. But as a *sine qua non* of counter-majoritarian strategy, the constitutional entrenchment of group-specific rights in the Indian case must be periodically mandated by democratic procedures, chiefly by the political majority, to give it continued democratic legitimacy (e.g., the need to reaffirm group representation rights or reservations every ten years). Whereas constitutional entrenchment would normally imply political insulation from ordinary legislative options and judicial protection, the constitutional founders did stake out a wide area for future legislative options in many matters of significance for minorities, which, of course

[37] This was at the heyday of the unparalleled significance and uncritical acceptance of the American constitutional model, especially the Bill of Rights. But, as Robert Vipond (1999: 177) notes, "The American model travels less well now, even though there has been something of a renaissance in comparative constitutional studies." The declining significance of the American model, it needs pointing out by way of qualifying Vipond's observations, is *because* of a renaissance in comparative constitutionalism, which now finds the American model as one amongst many standards. For helpful comparisons between the Indian and American models, see Stepan (1999), Sorabjee (1990), and Jacobsohn (1996).

includes the case of personal laws. Paradoxical as it may sound, it was the Parliament, following the Shah Bano controversy of 1985, which restored the *status quo ante* in regards to personal laws after the Muslim minority felt the Supreme Court had transgressed its legitimate rights. But one needs to address whether or not, and to what degree, do rights of minorities require constitutional entrenchment.

In spite of recent theoretical support for various forms of multicultural accommodation of group-specific rights where desirable, a grey area that confronts political theorists is whether or not to acknowledge group differences in the constitution itself. This debate plays itself out mostly in those contexts where a strong individualist strand of rights exists but where group rights also constitute a viable political option. The dilemma is whether or not some group rights should be written into the constitution. Many scholars shaped by postmodern affections rile against difference-blind provisions in a constitution but are equally skeptical of entrenching group-sensitive provisions.

Such skepticism is sustained by two kinds of fears: (a) an entrenchment of group-specific rights in the constitutional document will ossify differences and may exacerbate group conflict, and (b) that this mode, in not recognizing the constantly mutable and contingent nature of identities, will not be flexible enough to accommodate differences that will emerge in the future. Both fears are interrelated. The first fear in part is related to a genuine concern that individual autonomy will be compromised, and by drawing boundaries between groups the likelihood of conflicts between them will rise, rather than diminish. The second fear emerges out of a genuine concern that incorporating such group-specific rights effectively denies a level-playing field to the changing matrix of

group interaction and disadvantage. In order to attempt a satisfying response to these fears, it will be imperative to draw conclusions from the two cases of group-specific rights introduced in the following two chapters. In the subsequent chapter I focus on and evaluate the moral claims of the Muslim minority to recognize their cultural difference.

Chapter Three

CULTURAL RECOGNITION AND RELIGIOUS PERSONAL LAWS

The state, in India, is not autonomous and separate from the society. This is strikingly evident in the state's policy to allow religious groups, including the Hindu majority, the freedom to retain their different laws and practices. The Indian state does not have a uniform legal system, or what's commonly called in India "a uniform civil code": it allows religious groups to have their own separate personal laws governing matters such as marriage, divorce, inheritance, custody of children and guardianship, while requiring all Indians to conform to a common criminal code.

Is it fair to call this a reasonable secular practice? Is the continued allegiance to religious personal laws anachronistic in terms of the needs of the nation-state? Can personal laws promote notions of a common Indian identity? Will not a common civil code, uniformly applicable to all, remove practices of discrimination and oppression meted out to disadvantaged sub-groups within larger religious groups on a permanent basis? In other words, how effective is the application of personal law in terms of values such as equality or, more specifically, gender quality? Questions and doubts such as these have long agitated Indian minds, being raised initially in the aftermath of the Indian

partition and independence, especially during the constitutional debates in the Constituent Assembly of India and later, during attempts to codify and reform Hindu law. In the last two decades such questions and doubts have gained increased salience in the country's political discourse.

Amongst the Indian intelligentsia cutting across religious boundaries there is a near-unanimous view favouring adoption of a common civil code for all religious communities. The Indian constitution, too, resonates this hope under the Directive Principles of State Policy: "The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."(Art.44; Part IV) The harboring of such optimism, however, was qualified by the *pragmatic* consideration to continue with the existing arrangement of separate personal laws. This duality was, and still remains, manifest, to an extent, in India's political leadership.[38] The bulk of the Indian political discourse on secularism to date has usually considered the proposed legislation of a

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[38] Jawaharlal Nehru, the first Prime Minister of India, realized the nature of this ambivalence, in spite of his deep conviction that the enactment of a uniform civil code was necessary to realize the ideal of secularism. His approach to this problem was evident in one of his exchanges with a member of Parliament who, during the debate on Hindu Code Bill, wanted to know why a uniform civil code, instead of reform in Hindu laws, was not enacted:

> Mr. Nehru: Well, I should like a civil code which applies to everybody, but...
> Mr. More: What hinders?
> Mr. Nehru: Wisdom hinders.
> Mr. More: Not wisdom but reaction hinders.
> Mr. Nehru: The honourable member is perfectly entitled to his view on the subject. If he or anybody else brings forward a Civil Code Bill, it will have my extreme sympathy. But I confess I do not think that at the present moment the time is ripe in India for me to try it push it through. I want to prepare the ground for it and this kind of thing [i.e., the Hindu Code Bill] is one method of preparing the ground.

Times of India, Sept.16, 1954; cited in Smith (1963: 290). For a critical analysis of Nehru's position, see Reba Som (1994).

common civil code as a legitimate secular goal, something that the Indian state needs to achieve at the earliest possible date. Indeed, a common civil code receives support from a host of conflicting, and often contradictory, ideological positions. For once, secularists, progressives, feminists, liberals, Hindu revivalists and almost all politicians of the major political parties have come to occupy the same platform in vociferously demanding a common civil law. This does not suggest, naturally, that their common demand originates from similar concerns or ways in which they look at the Indian society.

One of the concerns of this chapter is to show that a secular state need not deny the different religious communities the right to have their own separate laws and practices. In drawing on both theoretical and contextual arguments it will be argued that the present arrangement of having separate personal laws in India is not only a pragmatic choice, but a *political* choice that appropriately respects the aspirations of the religious communities, especially those of the Muslims, that grows out of a liberal concern for recognition of cultural minorities, especially when they are disadvantaged, and that serves to promote unity and to provide a bulwark against majority communalism. A continuity of this practice need not imply a departure from secular and liberal principles.

It will be important first of all to build on the context of the case. The analysis must begin with a discussion of the institution of personal laws and how personal laws have come to constitute an *intrinsic* constituent of the Muslim identity. Next we turn to a discussion of the illuminating but controversial legal dispute in recent Indian constitutional history, the Shah Bano case. This case was a turning point in national debates on the status of India as a secular state and the rights of the minorities therein.

Apart from having renewed our interest in relocating secular discourse in India, this case touches on a very delicate aspect of the Indian political community: the *cultural and political security of the Muslim minority* in a Hindu-majority society.

Subsequently, we will take up for consideration the issue of religious *versus* women's rights and the conflicting goals of justice. I will argue that, on balance, justice requires a form of group-differentiated citizenship in India that includes respect for Muslims' demand for separate personal laws.

Personal Laws in India

A cursory knowledge of the nature and growth of modern nation-states militates against the view that different groups can enjoy different laws. Nationalism, primarily in its modern version, endorses uniformity of legal practices; a nation-state is believed to require a uniform set of laws for all its citizens, their particular differences notwithstanding. However, within this general framework there is wide variation. Postcolonial nation-states in different contexts have, for different reasons, politically mandated legal pluralism. India is one such example.

As noted in the previous chapter, the institution of personal laws was legally administered in the East India Company's judicial directive of 1772. In application, Warren Hastings' Judicial Plan of 1772 was initially employed in the *mofussil* courts of Bengal, Bihar, and Orissa, areas that were then under the direct control of the East India Company. Later, through various regulatory acts and proclamations the initial application to the provinces of Eastern India and *mofussil* courts was modified and extended to

include other territories and presidency courts keeping in view the divergence of local customs, practices and legal institutions.[39] With successive enactments in legislatures and establishment of the judicial system the institution of the personal law grew in significance following the Company's policy and the British practice of not interfering with religious belief and practice and supporting traditional institutions, customs and rights of the different communities that inhabited the subcontinent.[40] The considerations behind the policy of non-interference that the Company generally, and Hastings in particular, introduced are best illustrated by Hastings' communication to the Company directors which states: "(a) It would be a *wanton tyranny* to require the obedience of Indians to other laws of which they were wholly ignorant and of which they had 'no possible means to acquire knowledge'; (b) the Islamic and Hindu laws 'shall be found to contain nothing hurtful to the authority of the government or to the interests of the society'; and (c) those laws were 'consonant to the ideas, manners and inclinations of the people for whose use intended.'"[41]

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[39] For a background to the personal law system, see Patra (1962), Derrett (1968), Mahmood (1977) and Parashar (1992).

[40]Although the approach of British colonial policy generally toward indigenous laws and institutions differed widely from say, French or Dutch policies inasmuch as the British were far more accommodative of indigenous institutions, the British were even more circumspect in introducing their own legal traditions or tampering with the existing indigenous laws in the Indian case due to a reverence for its ancient civilization. See, Bernard Cohn (1996: 58; and more generally, chapter 3) for British conceptions of pre-colonial models of Indian statehood. Cf. Michael Anderson (1993) for a view that it was more than either reverence or concession to native practices. The British support for personal laws derived its rationale from the conditions of an extractive colonial state. "Systems of personal laws served to consolidate the authority of certain community groups [such as the landed gentry]," Anderson argues, "and thus incorporate community-based forms of surplus extraction." (Anderson 1993: 168)

[41] Cited in Mahmood (1977: 6-7).

In affirming non-interference in cultural matters of their diverse subjects, the East India Company's policies of separate adjudication meant that Hindus and Muslims were to be governed by their own laws in any dispute that pertained to inheritance, succession, marriage, and caste and other religious usages, practices and institutions. It was initially assumed that the reference to Hindu laws applied to 'the laws of the Shastras' and Muslim law to 'the laws of Koran.' The focus on scriptural law was modified later to refer just to 'Hindu laws' and 'Mohammedan laws.' (Pearl and Menski 1998: 37) It may be noted that in seeking to establish a dual system of personal laws, the Company treated both the laws equally.[42]

Personal laws are different from territorial laws: the former apply to and are attached to persons or communities. Before the advent of the British no distinction was made between the two. (Parashar 1992: 46) However, personal laws do not cover all aspects of religion, and as such are distinct from comprehensive religious laws that usually resist creating boundaries between the private and public spheres, and may additionally include civil and criminal legal principles.

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[42] Smith (1963: 273); Parashar (1992: 64). Donald E. Smith (1963) suggests that the revolutionary legal principle of equality before law was applied by the Company to the internal hierarchical structure of the two distinct personal laws, to do away with caste distinctions within Hindu law and the distinctions between Muslims and *Kafir* (infidel) in Muslim law. Smith optimistically concludes from this, "The radically new principle of the equality of all before the law was to lay a solid foundation for the establishment of a common citizenship in a secular state." (Smith, 1963: 273)

The government attempted codification in a number of legal areas in the early nineteenth century.[43] This was a period of legal reforms that drew heavily on the Benthamite principle. India became the "testing-ground for the Benthamite principle of codification" and Lord Macaulay in 1833 appealed to the British Parliament regarding the need for a uniform penal code. (Smith 1963: 275-6) Elaborating on his proposal, Macaulay observed: "Our principle is simply this—uniformity where you can have it—diversity where you must have it—but in all cases certainty." (Cited in Smith 1963: 276) As a result of the work of a few law commissions and following the abolition of the East India Company and the consequent assumption of direct control by the Crown of British India in 1858, a spate of codes were enacted: the Code of Civil Procedure (1859), the Penal Code (1860), and the Code of Criminal Procedure (1861). For those not covered under the Hindu or the Muslim inheritance and succession laws—religious communities that existed outside the pale of the two major communities—the Indian Succession Act (1865) applied. Most of these codification attempts left the personal laws untouched, save those that were carried out to modify Hindu personal laws in the spirit of social reform: The Caste Disabilities Removal Act (1850), Hindu Widows' Remarriage Act (1856), Age of Consent Act (1891), abolition of Sati (1929), Hindu Women's Right to Property Act (1937), Hindu Women's Rights to Separate Residence and Maintenance Act (1946).

Muslim personal laws were neither codified nor reformed for much of the 19th century. It was only in the early twentieth century that concerted attempts were made to

[43] It is, however, misleading to speak of Indian laws as 'common law systems.' The various codification attempts were "a hybrid system of common law principles in civil law shape." (Pearl and Menski 1998: 38)

re-establish the authority of Muslim personal law over diverse customary practices among various Muslim groups (Mapillahs, Cutchi Memons, Muslims in Punjab and North-West Frontier Province) that had often followed local Hindu customs in relation to inheritance and succession rights. Having succeeded in bringing the different Muslim groups under the aegis of Muslim law in different local acts, the Muslim Personal Law (Shariat) Application Act of 1937 was passed by the Central Legislative Assembly that applied now to all Muslims. The term Shariat—or *shari' a*—usually denotes Muslim personal law. The Shariat Law did not codify Muslim law as such but secured the right of a Muslim to be governed by the religious law, in contrast to the application of customary usage in British courts.

However, there are different schools of jurisprudence within Muslim personal law. Sunnis and Shias—the two major groups that divide Muslims—follow different juristic schools. Sunnis constitute the majority of Indian Muslims and subscribe to four main Sunni schools of law: Hanafi, Shafi, Maliki, and Hanbali. Of these the Hanafi school of Sunnis in India has the largest number of adherents. Although these different schools of law allow different interpretations of the Koran, the differences themselves are not huge. (Anika Rahman 1993: 474) But, in the immediate aftermath of the passage of the 1937 Shariat Act, in deference to the Maliki school's more liberal grounds of divorce for women, the Muslim Dissolution of Marriages Act of 1939 was passed which effectively allowed Muslim women commonly subscribing to the Hanafi system to be considered in accordance with the Maliki school.

Despite reforms carried out in Hindu personal laws, it was not possible to carry out reforms in Muslim personal law either in the late colonial or postcolonial period mainly for two reasons: 1) The Muslims were unwilling to reform their laws in a legislature they considered to be controlled by the majority; and, 2) the clergy i.e., the *ulema*, considered itself to be the sole competent authority in matters regarding legal interpretations.

For instance, when the Indian Parliament in 1954 debated on widening the scope of the secular Special Marriage Act that would have allowed marriages between persons practising different religions without requiring them to deny their faiths, members of Muslim League strongly resisted such a change.[44] For the Parliament to even enact a secular law[45] was viewed by Muslim representatives as a possible encroachment in their own religious law.[46]

Aspects of Muslim Identity

It is not uncommon on the part of South Asian scholars to indicate that questions of group identities are predominantly shaped by the colonial encounter. The perceptions of the colonial administrators and their policies indeed proved crucial in building an institutional framework that *politicized* corporate identities and interests. However, the

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[44] The Muslim legislators' opposition effectively meant the continuance of the Special Marriage Act of 1872, which provides for marriages between persons neither of whom profess to belong to any religion.

[45] Smith (1963: 278) calls it a "uniform civil code in embryo."

[46] See, Parashar (1992: 160-2) and Mahmood (1977: 118-21). Muslims generally perceived this as preparing grounds for a uniform civil code.

process was not a one-way street. Organizing themselves on communitarian lines, identity groups, especially the Muslim community, fell back on their common cultural ties to shore up the communal attachments that bound them politically. What prompted such a process? A sense of loss and resulting agony in having lost their preeminent position of pre-colonial times, distrust of the British and western notions of political community, and fears and realization that they constituted a minority in post-independence India, augmented in recent years by the rise in popularity of Hindu nationalism. Living in an environment of fear and insecurity caused largely by recurrent communal riots, the Muslims' existential ethos, and their memory of past, are tied to feelings of discrimination and alienation.

In postcolonial India, the interests and symbols around which the Muslim community rallied are the status of Urdu language (Brass 1994: 179-82), the status of the Muslim personal law, the status of the Aligarh Muslim University, under-representation in legislatures and government jobs, (Brass 1994: 233-4) the Babri Masjid, and most importantly, their physical security. Although more than a third of Muslims speak Urdu (written in a Persian-Arabic script), concentrated mainly in the north Indian provinces of Uttar Pradesh and Bihar, Urdu is not recognized in these states as the second official language. In general there is a long-standing apathy towards the language that Muslims in north India speak. Although many of their cultural symbols, including the language of Urdu, help mobilize them to voice their concerns and demands at different levels, we focus here on the personal laws that have constituted a core aspect of Muslim religious identity.

Farzana Shaikh writes: "Certainly any understanding of what Muslims conceive of as the 'good', whether moral or political (and the distinction is unreal for Muslims for whom the very purpose of all human activity is moral) depends upon our ability to grasp something of the nature of the *Shari' a* itself." Shaikh alludes to the famous Muslim poet Muhammad Iqbal to claim that the *Shari' a* is like 'an inner core' without which the community is like 'scattered dust.' (Shaikh 1989: 11)

Are Muslims a disadvantaged group?

Muslims comprise the largest minority group in India: its population is roughly 110 million, or about 12 per cent of the Indian population.[47] Though not a homogeneous group with division along caste, class, and cult lines, more than half i.e., approximately 52 per cent, live below the poverty line with a monthly income of Rupees 160 and almost half are illiterate. Muslims constitute only a meagre 1.6 per cent of the total Indian college graduates, and 4.4 per cent of Indians who are employed by the government. These facts certainly raise some substantive issues concerning the nature of distributive justice in India. What's pertinent to our present concern, however, is to acknowledge that the largest minority group in India is relatively *disadvantaged* in comparison to the Hindu community, possibly due to the systemic discrimination it may have faced in the larger society.[48]

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[47] See, Moonis Raza (1994: 25).

[48] Recent estimates of Shariff (1995), and Razzack and Gumber (2000) all point to the relative disadvantage that Muslims face vis-à-vis other, especially the Hindu community.

Although a few of their leaders have occupied positions of high authority in the social and political hierarchy (two of whom, Dr. Zakir Hussain and Mr. Fakhruddin Ali Ahmad, were past Presidents of the Indian Republic), the Muslim community, by and large, if not excluded, considers itself alienated from the political community. The growing popularity of Hindu right-wing parties in contemporary India have exacerbated their painful memories and heightened their sense of insecurity. In the present political climate, the ordinary Muslim's sense of patriotism, for instance, has been questioned and challenged.[49]

Before a discussion of the *Shah Bano case*, which touched the high point of alienation that Muslims faced in post-independence India, an important point regarding the self-perception of Muslims as a community needs be mentioned. This relates to the Muslims' initial reactions to their sense of inclusion in a secular political community. Interpreting their situation in a decolonized free India with a newly drafted constitution that was based on the principles of democracy, secularism and welfare state, the Muslims saw themselves as *co-partners* in a mutual contract—analogous to the idea of *mu'ahadah*, i.e., the mutual contract concluded by Prophet Mohammed between Muslims

49 It is noteworthy (and somewhat ridiculous) that Hindus feel a sense of hurt when some Muslims celebrate, or display signs of jubilation, if Pakistan—considered as India's arch rival by Hindu right-wingers and jingoists—wins a one-day cricket match against India! But this attitude is generally symptomatic of a suspicion of Muslims' sense of loyalty to the nation. Hindu nationalists use many such examples to press their claim that Muslims are unpatriotic, and their political loyalties lie elsewhere.

and Jews of Medina. The constitution, in other words, was seen as a covenant between Muslims, Hindus and other groups.[50]

This way of interpreting themselves as a co-partner with other groups did not entail, however, a positive acceptance of the idea of the secular state. There were two reasons for this. First, the idea that a political community, or the state, could separate itself from religious precepts was something that Muslims considered to be Western in origin, un-Islamic, and not acceptable in their present situation. Second, (an argument that is partly derived from the above) due to the limitations of *Urdu* (the language that Muslims speak in India) to accommodate or translate effectively modern English terms, the word 'secular' was not appropriately translated in the Muslim media, leading to a belief that the Indian state was *against* religion. Notwithstanding these misperceptions during independence, the idea that the Muslims *perceive* themselves, by and large, as a distinct group and a co-partner in the Indian polity should not be lost sight of in any analytical exposition, including ours, that addresses and examines issues concerning their present status and security.

The Shah Bano Case

The legal dispute surrounding the Shah Bano case involves a conflict between the provisions of criminal code (the Code of Criminal Procedure, 1973), which applies to all

[50] Although sketchy, I consider this to be an important insight offered by Ziya-ul Hasan Faruqi (1966).

Indians, and Muslim personal law.[51] In this case, Shah Bano Begum, a Muslim woman married for forty-three years to Md. Ahmad Khan, a lawyer, having been driven off her home by the latter, filed a claim for maintenance at the rate of Rupees 500 per month (approx. Cdn.$ 17) under Section 125 of the Criminal Procedure Code (hereafter CPC). As a response to the legal suit, Ahmad Khan divorced Shah Bano by an irrevocable *talaq*. In his defence Khan pleaded that since he had already divorced Shah Bano, he was not required to provide further maintenance to her, having provided for it already at the rate of Rupees 200 per month for about two years and a dower, or *mahr*, of Rupees 3000 during the period of *iddat*,[52] in accordance with Muslim personal law. The lower court, however, took a decision that required Ahmad Khan to pay a princely sum of twenty-five rupees per month. When Shah Bano filed for a revision in the High Court (of Madhya Pradesh), the amount of maintenance was raised to Rs.179.20 per month. Ahmad Khan subsequently appealed the High Court decision to the Supreme Court and the latter not only enhanced the amount of maintenance to Rupees 500 per month—the maximum that could be awarded to a divorcee under Section 125 of Criminal Procedure Code—but also,

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[51] For a detailed exposition of different views and perspectives and documentation, including the Supreme Court judgment and Muslim Women's Act, 1986, see Ashgar Ali Engineer (1987), and for other representative views, Janak Raj Jai (1986). Other works that constitute the background for this case include Rahman (1990), Pathak and Rajan (1992), Chhachhi (1991) and Parashar (1992).

[52] Under Muslim Personal Law, a woman, if divorced, can claim maintenance from her husband in two ways: the first is a claim for maintenance during *iddat*, roughly corresponding to 3 months, or three menstrual periods—the period for which the woman must wait before remarrying; the second claim is related to *mahr*, which is a wife's entitlement through marriage to a sum of money or other property. See, Rahman, (1992: 474-76). The Muslim law diverges from the Criminal Code in insisting that maintenance be paid for a specific period only.

in a landmark and controversial decision, questioned the validity of personal laws, specifically Muslim law.

With regard to the conflict between the Criminal Code and the Muslim law, the Supreme Court judgment held that Section 125 overrides personal laws in the event of such conflicts and irrespective of the religious affiliations of the parties concerned.[53] In rejecting the efficacy of Section 127 (3) (b) of the CPC, which formed the basis of the defence of Ahmad Khan, the court decreed that *mahr*, or dower, is not a sufficient sum payable by the husband to the divorced wife towards maintenance.[54] It did not stop at that, and went on to question the basis of Muslim law, specifically with regards to its treatment of destitute divorcees. This concern led the court to interpret Muslim law, including the holy Quran. Drawing on the works of Muslim theologians, jurists and the translators of Quran, the court interpreted that maintenance of a divorced woman does not cease with the period of *iddat*, but continues beyond that as *mata*,[55] contained in Aiyats 241 and 242 of the Quran (considered to be relevant verses for such an interpretation). In this sense, the court felt that a proper approach to, and an interpretation of, Muslim personal law and the holy Quran reveal that there is no basic conflict between the provisions of CPC and Muslim law.

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[53]AIR 1985 S.C. 954. The text of the judgment is also reproduced in Engineer (1987: 23-34).

[54] This section provides for the cancellation of any orders made under section 125, if the Magistrate is satisfied that the divorced woman has received the amount due to her in accordance with her personal law.

[55]Besides *mahr*, and maintenance during *iddat*, the two valid claims that a Muslim woman can make, *mata* constitutes a claim (possibly a third) whose validity is questioned by Muslim theologians and jurists. Some consider it as a duty; others base it on common sense. In any case, there are differences of opinion as to which translation is correct and authoritative.

The court in its judgment also held as a matter of regret that Art.44 of the constitution (relating to the legislation of a uniform civil code) had remained a dead letter:

> 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 that 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 country and, unquestionably, it has the legislative competence to do so. (AIR 1985 S.C. 954).

Although progressives, secularists, feminists and even some Hindu right-wingers hailed the judgment, it created a furor among Muslims. The members of the Muslim Personal Law Board—which was an intervener on behalf of Ahmad Khan in the *Shah Bano case*—were irked by what they felt as an encroachment upon their personal law, and a contravention of the *shariat* that they considered inviolate. Their specific objections related to the Supreme Court's *ijtihad*, an unwarranted interpretation of, and interference in, their religious beliefs.[56] In the view of critics, the court was guilty of injuring the sentiments of Muslims, and of lowering their self-esteem. These concerns were shared by Muslims generally and led to a series of protests, countrywide agitations, and, by some accounts, some of the biggest political rallies in post-independence India.

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[56]*Ijtihad* is a tradition, which permits juristic interpretations of the *Quran* by learned Muslim clergy. The Supreme Court's interpretation of *the Quran* was viewed as an unwarranted and improper *ijtihaad.* This view finds expression in Nadvi (1986).

The Shah Bano judgment did not conclude that the system of personal laws per se was *un*just; it only challenged those aspects that it found to be inadequate. It decisively erred, however, in two respects: 1) its declared right to interpret the canonical texts which implicitly cast aspersions on Muslim communal practices, and 2) its insistence upon reviving the promise of a uniform civil code in the constitution. In both these aspects, the Supreme Court's verdict, decided by a five-member non-Muslim bench and authored by then Chief Justice Chandrachud, overstepped and crossed some fine lines of (judicial) discretion and prudence normally expected of an institution that ordinarily vests itself with the protection of the interests and rights of various groups and individuals in a multi-ethnic society.

The government, after having initially displayed signs of support for the judgment, backtracked and gave in to the demands of Muslims to protect their personal law. This, the government sought to do by passing the Muslim Women (Protection of Rights on Divorce) Act of 1986.[57] This Act entitles a divorced Muslim woman a "reasonable and fair provision and maintenance.... to be made and paid.... within the *iddat* period" and "an amount equal to the sum of *mahr*." (Cited in Engineer 1987: 87-88) In what seems to be an important codification of Muslim law, the Act excluded, with some qualifications, the Muslims from the purview of s.125 of CPC and ensured that the exceptions made under s.127 of CPC restricted the scope of maintenance to the period of *iddat*, and *mahr*.

In its statement of objects and reasons, the Act further stipulated that:

[57] The text of the Act is contained in Engineer (1987: 85-88).

> Where a Muslim divorced woman is unable to maintain herself after the period of *iddat*, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives, the Magistrate would ask the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.[58]

In other words, this legislation shifted the burden of responsibility for the continued maintenance of a divorced woman from the estranged husband to the divorcee's natal family, or, where the family failed to live up to its duty, to the larger community. The upshot of this legislation was that the divorced woman's right to claim maintenance beyond *iddat* was restricted. But, what if the husband was willing to provide for maintenance beyond *iddat*?

In an amendment that was brought to the legislation during parliamentary debate a new provision was added, i.e., the collective options of *both* the spouses to be governed by the provisions of sections 125 to 128 of the CPC. This option meant that where both the spouses agree to be governed by the Criminal Code, the court or the Magistrate would

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[58]Cited in Engineer (1987: 87-88). The term *wakf* refers to the permanent dedication of a Muslim of any property for any purpose recognized by the Muslim law as religious, pious, or charitable. The *wakf* Board refers to the individuals who are charged with maintaining the *wakf*. See, Rahman (1990: 481-82).

make no references to personal law. As is evident, the unilateral option of the divorced woman to be governed by the relevant sections of the Criminal Code, and not her personal law, cannot be entertained by the court. Is this a curtailment of a divorced woman's right? Does this throw up questions of gender injustice? We will examine these questions shortly.

It needs to be noted, however, that in passing this Act the government sought to accommodate the concerns and fears raised by the Muslims that their identity was at stake. The Muslims, quite naturally, welcomed the Act as a step in the right direction.[59] But was the Indian government placating the Muslims, or appeasing them for political and pragmatic considerations? Most of the critics of the Act and those who had hailed the court judgment were inclined to view this as a game of political opportunism played by the Congress government. Considering that Muslims constitute a substantial vote bank, large enough to determine the fortunes of political parties, allegations of political opportunism that were advanced do indeed carry more than a grain of truth.[60] However, these accusations, even if true, do not help us to understand why the state, or the particular government in question, should not respect and protect the articulated interests

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[59] The All India Muslim Personal Law Board (Poona Unit), for instance, passed a resolution hailing the Muslim Women's Bill, which it believed, "will close down the doors of intrusion in the *shariat,* which were made open by the Supreme Court's judgment." (Engineer 1987: 208). In asserting that almost the whole Muslim population supported the Act, Nadvi writes that this legislation "is a great triumph - political as well as religious - for the defenders of the *sharia*". (Nadvi 1986: 7).

[60]Mushirul Hasan (1988), however, dispels the common notion that Muslims vote *en bloc.* Drawing on empirical works he suggests that owing to competitive electoral processes, their communal solidarity has broken down, and that, generally, they have gravitated more toward nationalist, secular, political parties.

of a group, especially when the group is a disadvantaged minority. That requires further argument. Feminists, for example, argued that the above Act did not treat Muslim woman *fairly*, keeping in view the privileges and rights that were enjoyed by Hindu women. In other words, the Act was seen as creating a double inequality: the first between a Muslim man and a woman, and the second between a Muslim woman and her Hindu counterpart.

Any analysis of the issue of gender injustice cannot, however, ignore the specificity of the minority status enjoyed by Indian Muslims. We need to address both in order to arrive at what is just and fair in the given situation. The issue of women's rights, though important, cannot simply override the question of the rights of a religious minority and vice versa. In the *Shah Bano* case we see that these rights are pitted against each other.[61]

However, before we even begin to address the issue of the disagreement and its nature in relation to the community and its members, it needs be established first whether a case can be made for personal laws.[62]

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[61]With the passage of the Muslim Women's Act, the legal and political debate that ensued shifted its emphasis to the conflict between religious and women's rights. (Rahman 1990: 482)

[62] It needs to be stated however that many Muslim women did not take this Act to be violative of their rights. Indeed, many of them had turned in large numbers earlier to protest against the Supreme Court judgment. Ironically, Shah Bano, on being explained by the community's leaders about the possible impact the judgment may have on the status of Indian Muslims, believed the judgment to be contrary to the *shariat* and in an open letter to Muslims dissociated herself from it. In her letter she demanded of the Indian government to: (1) withdraw the court judgment that went in her favour; (2) keep Muslim women out of the purview of s.125 of CPC; (3) ensure that Art.44 of the constitution did not apply to Muslims; and (4) stop forthwith interference in personal laws. In the same, she also made an appeal to "all the *Ulema* of India that they should establish a 'safeguard for the Shariat Board' for the benefit of divorced women, through which they should be helped to get their *shariat rights* by settling the disputes concerning dower, divorce, maintenance, etc." (my emphasis) Shah Bano's Open Letter to Muslims, in Engineer (1987: 211-12).

Cultural Recognition and Justifications of Personal Laws

The following account will touch upon the historical, normative and legal-institutional modes of justifying personal law arrangements. One way to characterize the parallel institutions of personal laws in India following the brief history we charted of their colonial formation is to highlight a thick version of pluralism understood in terms of separable and separate identity groups with distinct cultural practices that work as a foil against which the postcolonial, modern and democratic state is constructed. In this sketch, histories of symbiotic and peaceful relationships mark the separate but interconnected coexistence of different communities that occupy the same territorial space. Under modern conditions of a liberal democracy that does not display any overarching universalizing structures or ideals, one of the ways in which the schema can best be defended is as a form of 'legal pluralism.' Lloyd and Susanne Rudolph (1998 2000), India scholars for decades, represent this view.[63] The justification of personal laws for the Rudolphs follows from presumptions of 1) groups as essential building blocks of the Indian society and polity, and 2) acknowledgment of India's intellectual and institutional legacies that respect diversity. (Rudolph and Rudolph 1998)

As a leitmotif of pre-colonial and colonial times, a loose "cultural federalism" did manifest itself in relations between self-regulating groups. It was, however, during the colonial period that a modest introduction of universalizing ethos, of individual rights and common citizenship model in some aspects of law (criminal, commercial) shared

[63] T. K. Oommen, an Indian sociologist, also holds a similar view: "cultural pluralism in India necessitates the recognition and operation of legal pluralism." (Oommen 1990: 41)

common space and coexisted with group-based existence and citizenship. Starting in the late colonial period, but reflected stridently during the making of the constitution for an independent state, and painfully evident after independence, the tensions between the two discursive strands of universalism (uniform laws, common citizenship) and particularism (personal laws, differentiated citizenship) have played out differently but, over time, have increased frictions between them. The Shah Bano case, the Rudolphs argue, is symptomatic of a 'historical process'.[64]

For the Rudolphs, the legal pluralist model, drawing upon a complex and long history of the institution of 'cultural federalism,' provides the best chance of success for a truly multicultural polity in India.[65] Because the legal pluralist model is mediated by a healthy dose of a liberal ethos, the model is 'thinner' than the Ottoman millet system where, in the absence of any liberal ethos of freedom and equality informing an individual's life, the rights of groups are held to be non-negotiable claims that trump the freedom of sub-groups or individuals.[66] It is true that the millet model, of which there

[64] As the Rudolphs argue, "[t]he Shah Bano case highlights the fact that the uniform civil code arena is likely to represent a process rather than a single enactment, a continual negotiation more than a unilinear progression." (Rudolph and Rudolph 2000: 19)

[65] See also Stanley Wolpert (1999) and Harold Gould (1998) for similar historical constructs of multicultural/secular models that generally stressed a peaceful modus vivendi approach between communities, especially Hindus and Muslims and different racial groups that migrated to India.

[66] See Kymlicka (1992) for a critical assessment and contrast of millet-type group rights model that competes with the Rawlsian version of tolerance and diversity. Kymlicka notes that the groups in question in the former type, "do not want the state to protect each individual's right to freely express, question and revise her religious beliefs. On the contrary, this is precisely what they object to." (1992: 39) Being intrinsically illiberal, the millet system according to Kymlicka is "a federation of theocracies." (1995: 157)

exist some contemporary parallel cases,[67] occupies one end of the spectrum of group rights model but no liberal democracy today would defend such a model exclusively on normative grounds. Wherever such arrangements exist, they are to be construed as *exceptions* made under conditions of state promises of accommodations to such groups and insulating them from the larger society under specified zones of non-interference.

The liberal multicultural model expounded by some contemporary political theorists, foremost among whom is Kymlicka (1995), is designed to create a strong case for compatibility between liberal values of freedom and equality and the protection of disadvantaged group cultures. In what is now regarded as the famous 'context of choice' argument, Kymlicka posits that cultures provide contexts of values, beliefs and institutions that make an individual's choices meaningful. Freedom involves making choices from the range of options provided us by our cultures—more appropriately, 'societal cultures', that are understood to provide their "members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." (1995: 76) In Kymlicka's scheme, it is important to protect societal cultures so that the members comprising it continue to enjoy the valuable framework of choice. However, given the fact minority cultures are especially vulnerable in the cultural marketplace, symbolic recognition notwithstanding, certain forms of recognition justified on grounds of equality of respect are owed the disadvantaged minority cultures. The particular forms such

[67] See Kymlicka (1992: 38-9) for a few closely corresponding examples—American Indian tribes, Pueblos, religious sects like Mennonites, Amish, a few Muslim groups in British society.

recognition can take will vary from place to place, but overall in multiethnic and deeply divided societies[68] such commitments will translate into acknowledging the legitimacy of group-differentiated citizenship.

However, it is equally important to note that Kymlicka's conception of group-differentiated citizenship is heavily predicated on the liberal requirement to not allow rights-carrying groups any leeway to stifle internal dissent, as this would constitute a defeat of the very liberal principles that such cultural protection aims to protect. Hence, external protections are necessary but internal restrictions are not permissible, as the latter would severely compromise members' autonomy to revise their conceptions of what is good and worthwhile to pursue and an equally prized option to exit a group culture following the exercise of such autonomy. The difference between these two ways of conceiving groups demands helps us in classifying liberal and illiberal cultures.

There is another significant import in Kymlicka's arguments regarding worthwhile societal cultures. Intimately connected to Canadian reality, Kymlicka's conception of societal cultures speaks of self-government and language rights of national minorities. Kymlicka is generally more sympathetic to questions of language. He usually treats religious cultures as illiberal and denies that these properly constitute societal cultures.

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[68] Kymlicka alludes to deep divisions in the Canadian context but does not otherwise provide instances affecting non-Western contexts. For an example of the application of liberal multicultural principles in non-Western contexts, see Joseph Carens (1993) analysis of the ethnic conflict in Fiji.

Although a lot of work[69] in the Indian context has been inspired by Kymlicka's approach outlining a normative sensitivity to issues of the rights of minority cultures, a wholesale import or application of his principles in the Indian context will not go very far. There are two elements in Kymlicka's theory—internal restrictions and a narrow version of societal cultures—that do not neatly fit into Indian reality. One could in fact roll back to the point of posing an entirely different but relevant question: Given India's thick pluralist mosaic, does the impeccably liberal account of multiculturalism that Kymlicka endorses even remotely appeal to the Indian situation? I do not think so. But the principles of multicultural accommodation that his account invokes, and the three different forms of group rights—self-government, polyethnic, and special representation—may with some skeptical adjustment be stretched to appear as a normative background, if not a yardstick, to conditions of deep diversity that exist in many multi-ethnic societies. And different accounts of multiculturalism, liberal, quasi-liberal, communitarian, or otherwise, may negotiate these issues in a manner that are sensitive to contextual conceptions of justice.

The touchstone offered by Kymlicka on external protections will remain a potent ground for justifying the rights of minority cultures: "Liberal principles are more sympathetic to demands for 'external protections', which reduce a minority's vulnerability to the decisions of the larger society...External protections are legitimate

[69] Bhargava (1994, 1999), Chatterjee (1994), Mahajan (1998), Chandhoke (1999), Jayal (1997), Cossman and Kapur (1997) and others. Others—Carens (2000), Jacob Levy (1997), Spinner-Halev (2001), Parekh (1992a, 2000), and Ghai (2000)—have in different ways invoked features of liberal multiculturalism to draw parallels to specific Indian examples.

only in so far as they promote equality between groups, by rectifying disadvantages or vulnerabilities suffered by the members of a particular group." (1995: 152) Despite important limitations, Kymlicka's arguments of group equality and a mix of self-government with polyethnic rights provide a potent source of support for the cultural autonomy of Muslims, including their rights to retain personal laws.[70] In fact, owing to their relative disadvantage vis-à-vis the Hindu majority with constant threats from the larger society to aspects of their cultural distinctiveness, the case for their cultural rights is *overdetermined.*

A normative justification for Muslims' cultural right to retain personal laws becomes all the more necessary owing to a steady erosion of the principles that surround minority protections in India's constitution. A related, but slightly different point, is the acknowledgment that the constitutional provisions are not explicit in affirming or recognizing Muslims' right to their separate personal laws. This is a *grey* area of constitutional interpretation. It is not clear from constitutional provisions what exactly is the import of all relevant articles of the constitution relating to this aspect. An initial survey of how these laws endured for so long starting from 1772 during much of the colonial period proves their enduring quality but does not categorically state whether or not they are part of existing laws as such. Two years after the constitution came into force, in 1952 the Bombay High Court in *State of Bombay vs. Narasu Appa Mali* (AIR

[70]Despite Kymlicka's refrain to only include particular groups, Modood (1998) makes a good case for extending recognition to immigrant religious groups in Britain. "Most theorists of difference and multiculturalism," Modood protests, "exhibit very little sympathy for religious groups; religious groups are usually absent in their theorizing and there is usually a presumption in favour of secularism." (1998: 390) See also Parekh (1992, 2000).

1952 Bom. 84) held that "laws in force" prior to the adoption of the Constitution as in Arts. 13 (1) and 372 do not include personal laws. However, Art. 44 that establishes a felt need to legislate a uniform civil code is by an indirect implication read back to infer that personal laws are indeed in existence, precisely because of which the founders see a need to move towards uniform legislation.

But the main problem lies in relating the existence of personal laws with the non-discrimination and equality provisions, Arts. 14 and 15 of the Fundamental Rights. Given these provisions and the gentle nudge of Art. 44 toward universalizing family laws, the safest nest the laws find are in Arts. 25 and 26 that guarantee religious liberty generally, and Art. 29 more appropriately relating to the rights of minorities to maintain their distinct cultures.[71] However, post-Shah Bano a normative justification along the lines discussed above is required. But to do this one needs iron out differences and various conflicts of rights that unfortunately pit women as a sub-group against the Muslim community, although I must hasten to note the incomplete and putative nature of arranging such identities.

Religious Rights vs. Women's Rights

The question of a conflict of rights between the community and its members revolves around what equal treatment implies. In pursuing the concerns, anxieties, and the seemingly intransigent positions of both Muslims and women, we must address the

[71] For a more detailed exposition of the constitutional status of personal laws, see Mansfield (1993).

ulema's perceptions of the conflict of rights, which generally shaped Muslim reactions against the Supreme Court judgement.

Does the Muslim Women Act, in protecting Muslim personal law, deny equal rights to women? Although some Muslim women leaders maintain that help (in the form of maintenance) from a divorced husband is *haram* (prohibited) for a woman and that a Muslim marriage, unlike a Hindu Marriage, is a contract, the mutual obligations of which terminates with its dissolution, it is still not clear as to why the wife does not enjoy equal partnership in a marriage between equal persons (Parashar 1992: 187).[72] Had Muslims accepted the liberal interpretation of the Quran to recognize *mata* as a just claim for the divorced woman, the charge of gender injustice, especially in the context of alimony, might not have been entertained.[73] Muslims, it is true, after the Shah Bano episode, became overzealous in claiming protection of their separate cultural identity and, to a certain extent, deflected issues of gender justice when it urged the government to pass the Muslim Women Bill without further waste of time. In their demand for protection, the clergy spoke on behalf of the Muslim community as a whole, sidestepping the issue of an individual's rights.

The *ulema's* position goes somewhat like this: 'It is our religion. These are matters concerning belief including the ways by which we organize our principles of

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[72] Parashar's reference relates to the views of Najma Heptullah (the present Deputy Chairman of Rajya Sabha, or Upper House of Indian Parliament) and Abida Ahmad.

[73] "If *mataa* were a rule accepted by all Muslim theologians, there would be less conflict between the rights some Muslim women demand and the rights granted to them under the *Shariah*. However, *mataa*," Rahman argues, "represents a minority viewpoint." (Rahman 1990: 496)

justice. Our religious identity affects us deeply and hence, the need for protections. So far as women are concerned, our religion adequately equips us to treat them justly. Our community, as a whole, is morally obligated to maintain divorced women. Though religious, we have our own sense of justice: Leave us to ourselves.'

In this imaginary interlude that I construct on behalf of the *ulema* and which largely reflects their position since the judgment, there are issues that we need not to lose sight of. First is the concern of the clergy to maintain a separate identity. Demands for protecting the Muslims' distinctive identity, it must be said, have been a recurrent feature in Indian politics. Although these demands were considerably strengthened during the 1985-86 events, they were not absent earlier, i.e., both before and after Indian independence.[74] In spite of the fact that Muslims did not explicitly negotiate the terms of their political membership in independent India, one can fairly assume, given their perceptions about a mutual contract between themselves and other non-Muslim groups (discussed above), that their ideas of membership were predominantly group-based and defined, usually, in terms of religious solidarity.

The concern for this group solidarity has, if anything, been reinforced due to a changed political climate in post-independence India. Feelings of alienation came naturally to a minority group that saw itself as the butt of criticism, slander, and joke, beside the huge costs in terms of precious human lives that it had to pay during communal riots. Faced with constant threats and pressures to become more 'Indian' in

[74] On this I consider the following works to be fairly balanced in their approach: Derrett (1966), Smith (1963), and Anderson (1976).

their outlook, the Muslim community grew more defensive and rigid in responding to what it perceived as an intimidating environment. The *ulema*'s religio-political discourse cannot hence be separated from this context: it both shapes, and is shaped in turn, by the Muslim predicament. To simplistically accuse them of being reactionary or orthodox does not help. The primacy that is placed on cultural/religious rights needs to be understood in the context of a political climate that remains antagonistic to Muslim identity.

Second, with regard to a divorced woman's right for maintenance, the clergy conceded that it was a responsibility to be shared by the larger community. In maintaining this, it did not de-emphasize the divorcee's right as such but sought to moderate it *vis-à-vis* her claims on the husband. If marriage, as per Islamic belief, is a contract and not a life-long union, then it makes sense not to constrain the choices of the partners beyond its termination. Some might argue, however, that what is at stake is a woman's freedom and how her post-marital choices are constrained by the choices of her spouse, who even determines as to when the marriage is to terminate. This is a valid and justifiable argument. While I do not take upon myself the task of defending the *ulema* entirely on this, or those aspects of discrimination that may be embedded in Islam or other religions to a greater or lesser degree, I wish to evaluate and place the problem in a perspective that is sympathetic to the interests of the country's largest minority.

With regard to discriminatory practices toward women, let's say in private life, it serves no purpose to single out a particular religion or culture.[75] Indeed, most cultures are

[75] It's important to dispel cultural stereotypes. Carens and Williams, for instance, question the

discriminatory toward women and to that extent need adequate reforms. But reforms, in order to be effective, need to take place in an environment that is at least unintimidating, and at best, tolerant. With regard to the specific injustice toward divorced Muslim women, it may be said that the Muslim community has assumed the responsibility to treat the disadvantaged with fairness.

In asking for, and welcoming, the Muslim Women's Act, the community has succeeded in not only preserving its distinct identity of maintaining a separate personal law, but has also enjoined upon itself its fair share of responsibility. The Act fundamentally accepted that a divorced woman should be provided for, and Muslims, in their turn, have accepted the contingent responsibility. So long as they do not disrespect this arrangement, and are fair and just to their members, it will not be proper to insist on reforms, nor to level unhelpful criticisms.[76]

The *ulema*, then, did not wish to override the issue of women's rights; all it did, because of its concern to protect the distinctive status of Muslims, was to give more weight to the issue of religious right, or specifically, to the protection of personal laws. But, should we listen to the *ulema* on this? In other words, is its leadership legitimate and representative of Muslim opinion? Some progressive Muslims usually charge the *ulema* with safeguarding vested interests and of harboring a reactionary outlook. While part of

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nature of the usual stereotypical criticisms that are leveled against Islam for being discriminatory toward women and argue that these patriarchal features also form a part of the traditions of Christianity and Judaism. See, Carens and Williams (1996). Such patriarchal features let me add, form part of the Hindu tradition as well. This view should not mean, however, that these practices are permissible; what it means, instead, that these practices are common to most religious communities and it serves little purpose to choose one community to attack.

[76]For this view see, Parekh (1992: 539).

this may be true, the popular appeal that the *ulema* enjoy cannot be ignored. For a community that is forced by circumstances to be inward looking and perennially concerned about its physical security, the leadership of *the ulema* signals the wisdom in staying united.

This, however, does not seek to relativize the role of *ulema* in Indian history; one needs to recognize their contribution to the society as well. It will be too simplistic to regard them as "standard bearers of Muslim orthodoxy and conservatism whose concerns were limited to regulating the religious and educational life of the Muslim community."[77] Regarding the legitimacy or otherwise of the *ulema's* leadership, suffice it to say that Muslims have historically rallied to their support. An outsider's opinion as to who should lead the people doesn't help in understanding the way people choose their leaders and especially where these choices do not lead to an infringement of democratic principles.[78] The *ulema*, may it be added, also reflect the genuine concerns and interests of their constituents. In other words, the issue of cultural identity that affects Muslims is articulated by the *ulema*. Some might, of course, argue that in subtle ways—in ways that the Muslims do not recognize perhaps—certain aspects of their cultural identity, have been arbitrarily and socially 'constructed' and are not as homogeneous as they appear to be. The ways in which our cultural identities are shaped entail complex processes; too

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[77] Hasan (1986: 1078). Hasan's views serve as a corrective to popular misconceptions about the Muslim clergy.

[78]Defending the Fijians' loyalty to their traditional chiefs, Carens (1992) makes a similar point: "(P)eople have a right to choose their leaders, even bad leaders." (Carens 1992: 630) Too often critics overlook the continued legitimacy and relevance of traditional institutions under modern democratic settings.

complicated to go into in detail here but suffice it to mention that it does not make sense to dismiss cultural lives lived from within as 'constructed' identities.[79]

What is essential to our present purpose is to recognize that Muslims' demand for preserving their separate identity, whether or not articulated by the *ulema*, is to recognize their group status and distinctive life style. As a *disadvantaged minority* community[80] they have a special claim for protection. Their religious right to maintain their own personal law ought to be considered as a group aspiration to maintain a separate identity. A concern for women's rights is important and, as we have seen above, the Muslims as a group commit themselves to respect it. This commitment needs to be *trusted* because it affirms principles of justice and equity prevalent in the larger society.[81] A lack of trust,

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[79] There is a risk, though, in admitting too much of a unitariness of a culture keeping in view how such identities may actually grow fascist or racist in their orientation. This may be the danger of a certain form of Hindu nationalism as it has emerged in recent years. Yet to take a position of deriding all cultural identities and treating them similarly is turning oneself away from *objective* facts. Further, a distinctive cultural, or group way of life is different from a communal ideology. In their enthusiasm to criticize communalism, some Indian scholars confuse the two and mount a simplistic critique of all cultural lifestyles. Such an approach informs even the work of a prominent Indian historian, Romila Thapar (1989). The extremes of this approach are discernible in Thapar's own words: "Minority communities pick up their cue in a similar reconstruction of history [like Hindus] seeking to project a unified community stance in all historical situations. The fear of being overwhelmed by the majority community is expressed even in opposition to the making of homogeneous civil laws. These are treated as threats to a specific culture and practice, and there is a tendency to preserve even that which is *archaic* in an effort to assert a separate identity." (Thapar 1989: 230; my emphasis)

[80]Despite their economic and cultural disadvantage, the Muslims, unlike the lower castes, do not enjoy any special claims, nor are covered by compensatory programmes. Some even go on to argue that the Muslims' economic backwardness (especially in terms of being able to get jobs) is related to the fact that *Urdu*, their language, does not enjoy the state patronage it deserves. See, Hasan (1988: 833).

[81] As Parekh reasons, "The law might require that a divorced wife must be provided for, and leave it to different communities to decide whether her husband, his family or his community as a whole should arrange for her maintenance, so long as the arrangements are full proof and not

on the other hand, and among other things, may lead to a weakening of relationship between the cohabiting communities.[82]

But in reposing its faith on the principle of trust, how long can multicultural justice ignore the demands of fairness made on the cultural community by its members?[83] The necessity to adjust different claims of equal respect and recognition owed to both women and Muslims cannot be wished away. Multicultural policies should be broadly accommodative in a *transformational* manner.

But, what of the option of a common civil code for all Indian citizens irrespective of ascriptive differences? This option constitutes in a way the challenge of equality and equal citizenship.

Equal Citizenship and Uniform Civil Code

One way of arguing for a uniform civil code would be to assert that it protects the national interest—the *unity* and stability of the nation—given the divisive separatist forces at play in Indian society. One constantly hears a complaint that everyone is a

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open to abuse or arbitrary alteration." (Parekh 1992: 539) Parekh, however, doesn't elaborate on how we need to ensure those arrangements are free of abuse.

[82]This concern is well articulated in Carens and Williams (1996: 5-6).

[83] Okin (1998: 666) writes: "Culture and gender are complexly interrelated, in ways that make gender inequality more than just one among the many forms of culturally mandated inequality that might conflict with liberal multiculturalism." One such gender inequality Okin adduces to in a footnoted reference to the Indian practice is laws in the private domain, more particularly personal laws. (1998: 667) The personal law legal arrangement is something Okin believes is jealously guarded by religious or cultural minorities. Mounting a critique of liberal multiculturalists who defend patriarchal cultures, Okin conclusively argues, "In cases where more patriarchal cultures claim group rights within less patriarchal societies, women do not necessarily benefit from the granting of such rights." (1998: 683)

Hindu, Muslim, or Sikh and no one claims to be an Indian. A second argument could go somewhat like this: to achieve *equality* in a land of diversity, without consideration for other factors, it is essential that all citizens follow one particular law as this will minimize the chances of discriminations determined by differences that separate them. A third argument will invoke the principle of *secularism* to say that a truly secular state needs to have one and a common secular code. Achieving this will ensure that irrespective of religious differences, which may or not be discriminatory, the state will be seen as favouring no particular religion.

The Shah Bano affair brought all of these arguments to the fore highlighting the different nuances of equal citizenship in each of them. For a society that is faced with threats of disintegration where religion has proved to be a major fault-line, it makes no sense to talk of a homogenized universal citizenship that recognizes only one culture: the 'official or state culture.' Such a view is articulated, and most enthusiastically placed on India's political agenda, by right-wing nationalists (including the Hindu nationalists). This view goes somewhat like this: 'In order to be true Indians, we need to believe in an undivided, unified India, a *uni*-national society that grants citizenship to all and withdraws the existing 'concessions' to sub-national groups or regions (including self-government status to Kashmir and personal laws for religious minorities). We need to introduce a uniform civil code that will help the religious minorities (especially the Muslims) integrate, and join the national mainstream'.

This argument assumes that as long as we cling to our particularistic loyalties, and use them for political ends, our common nationality is suspect. The legal identity of being

an Indian, it is argued, is not enough; one needs to erase particularistic affinities of religion and ethnicity in the public sphere. This calls for a commitment to the national culture and of accepting the idea of universal and homogenized citizenship.

Implicit in this view are two presuppositions: (1) that cultural preferences are relegated to the private sphere; and (2) that a dominant state model is a prerequisite for progress and development. Both of these presuppositions are premised on the felt necessity of the processes of modernization and nation building, which formed the consensus for this thinking in post-colonial societies.

How deeply flawed this approach has been is evident from experiences in contemporary post-colonial societies. Rather than being able to contain political divergences, the strong, homogenizing state has created further fissures. Controlled mostly by the majority group or community (or its elite), this type of state usually comes down heavily on the minorities and contains the potential of both physical and cultural violence toward the latter. Plural societies like India, which are ethnically and culturally diverse, cannot be assumed to be *uni*-national; they need to recognize that homogenizing and *uni*-national policies, more vigorously pursued by the majority, could be detrimental to minorities' interests, alienating them thereby and acerbating the existing dissensions in the political community.[84] Given the nature of its assumptions, this view is flawed on its own terms.

[84] Kymlicka, for instance, believes that "if there is a viable way to promote a sense of solidarity and common purpose in a multination state, it will involve accommodating, rather than subordinating national identities." (1995: 163)

The second view that constitutes the challenge of equality could be used in two ways: 1) equality between religions, and 2) gender equality. Both approaches can make use of the charge of discrimination to advocate a uniform code. But this does not mean that both of these cannot be invoked together. For instance, a Muslim woman could argue that in contravention to Art.14 of the constitution (which guarantees equal citizenship irrespective of social differences), the fact that she has to be governed by her personal law means that she suffers a double inequality: one, based on gender vis-à-vis her husband (male) and the other, based on religious equality vis-à-vis her Hindu counterpart.[85]

What is central to the gender argument is the claim that the introduction of a uniform civil code will be in the best interests of women.[86] This will help unroll a genuine nationwide empowerment process. However, women may not take kindly to, and may dissociate themselves from, the rationale of national integration (the first argument) arguing in the process that it is an inadequate ground for demanding a uniform code.[87]

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[85]The reference, here, is to the *Shehnaaz Sheikh* case. References to similar legal cases which concern the nature of discrimination towards women is contained in Balasubrahmanyam (1985).

[86] For instance, Balasubrahmanyam writes: "There is of course a tacit agreement that women should unite in the demand for a common civil code...However, since the struggle to achieve this is going to be long and hard, it seems necessary for the movement to adopt also the more immediate objective of creating public opinion in favour of more liberal interpretations of existing laws concerning different religions." (1985: 1261) I agree with the second view, but not because it is a pragmatic choice under the given circumstances of Muslim recalcitrance.

[87]"So long as the link between the UCC and national integration is the foremost consideration, it will not be easy for the State to override the objections of these members of the religious communities." (Parashar 1992: 243) Parashar also admits the need for reforms in personal laws but considers the state, and not the communities, as the proper agency for any such reform. (1992: 229)

Positing the problem of personal laws vs. uniform code on an either/or terms does disservice to both the minority communities and women. However, that said, religious groups may need to *reform* some of their practices, especially those that seriously impinge on women's chances to lead an honourable existence. The communities should volunteer to carry out reforms on their own and at a pace to be determined by them.[88] And in the interim the state can adopt an optional code for those who do not wish to be governed by personal laws. This will not only ensure the autonomy of the *dissenting* individual but will also pave the way for options of exit for those who need them.

A Qualified Defence of Personal Laws

In a CSDS poll conducted in 1996, where among other questions, respondents were asked, 'Should there be separate civil codes for each community?' Of those polled 45 per cent agreed, and 35 per cent disagreed. Of the 45 per cent who agreed, Hindus voted by 42 per cent, Muslims by 67 per cent, Christians by 54 per cent, and Sikhs by 51 per cent. Two conclusions follow from this: 1) More respondents voted to retain personal laws, and 2) All minorities—though the Muslims outvoted others far in excess—voted by more than 50 per cent retention of the personal law arrangement.

Clearly the wish to retain their sovereignty in matters of family law has not diminished for the minorities. Democratic participation has indeed reinforced claims of collective cultural autonomy. However, a thickly constituted pluralism is as much at risk

[88] I agree with Parekh's views on this: "(M)inority communities must be allowed to develop at their own pace and in a direction of their own choosing.... Basic social reforms cannot be dictated from outside, at least in a liberal society, and the communities cannot be harried or blackmailed into making them." (Parekh 1991: 198)

of ossifying identitarian politics and hurting common citizenship, as are the opposing trends of individualism that put minorities at risk. The liberal-communitarian conundrum informs the personal law/uniform code debate. On historical, normative, and constitutional grounds, the case to retain personal laws could be argued as a fit one for minority rights, one that is a *political* and not a pragmatic choice. However, keeping in view objections that such legal systems disadvantage women, a *preference* for an optional, not a uniform code should be seriously considered.[89]

In the meantime, however, certain High Courts have embarked on an ingenious method of judicial activism in cases relating to alimony. In the *Shakila Pervin* case, for example, Justice Basudev Panigrahi has expanded the scope of the Muslim Women's Act, especially section 3 stating "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband" to mean a lump sum amount that sustains her throughout life.

Although sensitive to the collective claims of the Muslims to retain their personal laws, a more balanced choice for an optional code alongside the personal law regime is a position that I find attractive in principle. By an optional code, I mean the gender-just secular code that coexists with separate personal laws. An optional code system will require that individuals within communities express their preference to be governed by either. However, there are various other issues that will require to be sorted out: 1) when

[89] From a different perspective, more ontologically weighted than mine, Bhargava (1999) also agrees to a similar view. For an interesting theoretical perspective on how best to synthetically combine multicultural accommodation and interests of women in a joint governance model, see Shachar (2000).

in conflict, which one—the secular code or the personal laws—override the other? 2) In the event the divorced partners choose two different codes, which law should apply? These are thorny issues and they will need to be fleshed out in actual practice giving due consideration to the notions of equal citizenship that is just to both cultural communities and women unfairly burdened by personal laws. To conclude, in this two-track system the rights of the Muslim minority will be recognized in a manner that is fair to them.

If the case for cultural recognition of the Muslim minority was the central theme in this chapter, in the next chapter I explore and evaluate the moral relevance of caste disadvantage and the politics of redistribution.

Chapter Four

CASTE DISADVANTAGE AND AFFIRMATIVE ACTION

Challenges to and interpretations of what constitutes equal citizenship in India are not only related to recognition of Muslims' cultural distinctiveness, but also connect to cultural disadvantage faced by lower caste members as well. During India's constitutional deliberations, equal citizenship for lower caste members meant assuming responsibility to initiate positive policy initiatives to offset historic disadvantages faced by them. Such initiatives underscored the need for affirmative action policies for Scheduled Castes and Scheduled Tribes. Since the early 1990s, by a revision to the initial list of group beneficiaries, affirmative action policies have been extended to include other backward castes (OBCs) as well. As affirmative action in India is constitutionally mandated and exists by way of quotas, the extension involves numerical goals in filling educational seats, government and public sector jobs from the listed group beneficiaries—SCs, STs, and OBCs.

The theme of affirmative action usually triggers controversies and evokes passionate reactions and heated debates amongst both adherents and detractors.[90]

[90] It is interesting to see how clearly the battle lines of a debate surrounding support to affirmative action has been drawn in recent times. Is it a mere coincidence that opposition to affirmative

Irrespective of the context in which it is invoked, the philosophical content of the idea is essentially contestable and complex. As Rosenfeld observes, "the affirmative action debate is not between persons who are 'pro-equality' and others who are 'anti-equality.' Both the most ardent advocates of affirmative action and its most vehement foes loudly proclaim their allegiance to the ideal of equality." (1991: 2-3)

The Indian polity, especially in the early 1990s, experienced a similarly sharp polarization of views on affirmative action (hereafter AA) and produced a lot of acrimony and ideological polemics and little balanced and objective analysis. This chapter will reflect on the moral permissibility of AA in the Indian context and in so doing will examine what constitutes the proper grounds for, as well as the reasonable and legitimate limits of, this policy. It will set out a defence of the need for AA on the basis of *group disadvantage*, and evaluate *relative* claims of groups as a corrective to notions of equal citizenship.

Addressing Caste Disadvantage

Most liberals will unambiguously agree that caste system, owing to its hierarchical ordering of social relations, is indefensible in a society that values an individual's

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action is growing in almost all political communities, and not just in India? Or, does it tell us something about a larger shift in the political landscape? Are we witnessing the dawn of a new age that is growing skeptical of interventionist public policies while attuning and adjusting itself to unfettered market forces? Was there a time—let's ask the counterfactual—when state intervention and redistributive policies were largely welcomed by citizens? Although it is premature to hazard observations on all these questions, it is interesting to know that especially in the American context where we find in recent times the most concerted and successful attempts to torpedo the continuation of affirmative action policies—California's Bill 209 being one of the latest—the periods when these policies were largely welcomed were during "serious national crises" like the American Revolution, the Civil War, and World War II. See, Wilson (1977).

autonomy, freedom and equality. In standard liberal democratic parlance, caste is a morally arbitrary characteristic that should not be allowed to infringe on the enjoyment of equal citizenship rights. In seeking to do away with the practice of untouchability we have already noted how during the making of India's constitution, the nation's founders sought to expunge it from definitions of citizenship. However, even before the making of the constitution, it was clear to the national leaders such as Gandhi and Ambedkar that the social practice of untouchability, being deeply embedded in India's social relations cannot simply be wished away. Quite clearly then, the social acknowledgment of untouchability is considered not only morally repugnant, but contrary to the basic liberal tenets.

The problem of untouchability and how to address it has had a remarkable bearing on debates in modern India especially between Gandhi and Ambedkar during the nationalist movement in the 20th century. Gandhi, who was known to have opposed Ambedkar during the Second Round Table Conference in 1930 on the issue of separate electorates for the untouchables (or the Depressed Classes as they were called then), took a different view of the emancipation of the untouchables than Ambedkar. Gandhi's approach to the caste question was that of a Hindu reformer who in spite of not wishing to do away with the caste system entirely (or more appropriately its functional aspect of *varnashrama dharma*, the four-fold *varna* theory of caste), fought his whole life nevertheless against the social exclusion of the untouchables. Identifying himself with the untouchables whom he gave a new name, *Harijans* (or 'children of God'), Gandhi tried his best to include them within the Hindu fold and thereby provide the nationalist front

with its much-needed unity. His attempts did not find favour either with the orthodox religious leadership who were largely opposed to his call for reform, or those like Ambedkar who demanded that the issue be solved politically within the ambit, and the requirements of, liberal democracy.

Although Gandhi favoured (especially after the Poona Pact of 1932) the idea that untouchables needed some basic social and political rights in order to maintain their dignity and self-respect, he was more disposed to the idea of how the larger society may assume urgent moral responsibilities toward redressing the scourge of untouchability at the social level. Because he stressed the moral duties of the larger Hindu community, Gandhi's approach was eventually seen as 'patronizing'—a charge that persists to this day whenever a distinction is made between substantive political empowerment of dalits and policies of social patronage that emanate from a high-brow upper-caste Gandhian approach. Akin to a communitarian thinker who places the good of the community over the idea of rights, Gandhi did not appreciate the centrality of rights in a political discourse.

In the face of a communitarian, holistic thinking that emphasized the duties of the larger society, what were the untouchables supposed to do? Haven't they already lived in, and served, a more oppressive social system for centuries that justified its normative existence by reference to the larger values of Hinduism and the rules and duties of interdependence between castes? In a critique of Gandhi's philosophy and approach toward the problems of the untouchables, Ambedkar in his work *What Congress and Gandhi Have Done to the Untouchables* (1946) charged Gandhi with hypocrisy,

dishonesty and insincerity. Ambedkar like Gandhi was educated in the West but by membership belonged to the untouchable Mahar community of Maharashtra. Known for his fiercely liberal and secular outlook, Ambedkar mounted both a critique of the discriminatory elements in Hindu religion and the politically deprived status of the untouchables. Although Ambedkar was a strong believer in liberal democracy, he nevertheless realized the limits of a difference-blind rights framework and was instrumental, as the Chairman of the Drafting Committee of India's Constitution, in introducing extensive schemes of affirmative action and representation rights for the untouchables (who were to be later called the Scheduled Castes). In a time when the untouchables had few leaders, Ambedkar was responsible in giving a new dimension and salience to the 'political', and successful in converting the problem of caste disadvantage from the ritual and the social to the political. This was a crucial difference between him and Gandhi, and one that constitutes India's postcolonial public philosophy.

Defining Affirmative Action

Affirmative action usually entails a state's preferential policy toward particular groups. However, not all preferential policies can be justifiably adjudged as affirmative action. Although the rationale for affirmative action varies from place to place, it largely seeks to address structural inequalities between different groups in societies. In a positive sense, broadly speaking, it invokes ideas of *fairness* toward disadvantaged groups and of redress for unjust inequalities by way of temporarily redistributing or reallocating scarce goods.

Preferential policy, though used as a substitute for AA, is a broader term and may

include either considerations of fairness, political accommodations of groups, or claims of distinct groups in particular territories.[91] For instance, preferential policies may be designed to politically satisfy dominant ethnic majorities or minorities such as the ones for Sinhalese in Sri Lanka, Bumiputeras in Malaysia, Marathas in Maharashtra, Assamese in Assam, or whites in South Africa. Although the political justifications for this may vary these may be used by a powerful majority or a minority either in a democratic or non-democratic set-up (e.g., whites in South Africa) as an accommodationist measure to further entrench the groups' position at the expense of others. Affirmative action is not concerned with these instances or the logic behind them, but as will be indicated later in the chapter accommodationist preferences, when justified on grounds of justice, can compromise the normative mandate of AA.

In contrast to preferential policy then, affirmative action may be defined as a *formal effort to provide increased employment and educational opportunities for underrepresented and disadvantaged groups at a level sufficient to overcome past patterns of discrimination and present structural inequalities.*[92] As a policy it seeks to ensure inclusion of disadvantaged groups that were hitherto excluded from full participation in citizenship. Once this is achieved, its rationale ceases to exist. In aiming to ensure justice for historic deprivations and to secure inclusion into full citizenship

[91] The distinction that I draw between affirmative action and preferential policies is meant to highlight the contrasting rationale between what is *fair* (as in the case of AA) and that which may or may not be so (as in the case of preferential policy). For my discussion of preferential policies, I use Horowitz (1985) and Sowell (1990). In the Indian context, the differences between the two forms of preferential policies that I highlight are covered as two distinct types of "preferential policies" in Weiner and Katzenstein (1981).

[92] This is a revised version of AA used in *Congressional Digest* (1996).

rights, AA needs to be *both* forward- and backward-looking.

Marc Galanter (1984) chooses the term 'compensatory discrimination' instead of AA to categorize India's preferential policies. He is quite right to suggest that names are not neutral. The purpose of discriminating on a compensatory basis is "not exclusion and relegation but inclusion and recompense both for historic deprivations and to offset present handicaps." (1984: 3) This discrimination, however, is a temporary affair, and should cease when inclusion of the excluded groups is achieved. Galanter, like any other advocate of AA policies, is aware that he is discussing a society with a long history of social inequality in which the idea of historical compensation becomes a morally compelling goal. The intuitive sense of justice that he employs is evident too in his painstaking and largely successful defence of such policies.

A careful reading of Galanter will also tell us that he considers the needs of SCs and STs to be more urgent than those of OBCs. However, it is not clear from Galanter's analysis what sort of inclusion and/or recompense is due to the OBCs and how that affects what he defines as 'compensatory discrimination'. Where a numerical majority—in this case the OBCs who constitute approximately 52 per cent of India's population—corners a substantial part of goods claiming compensatory justice it is hard to draw a line between what counts as preferential policy (understood in the sense discussed above) and that which strictly needs to be justified as compensatory discrimination. This ethical dilemma complicates, in the Indian situation, concerns relating to fairness to groups and policies surrounding distributive justice.

In the course of my arguments I will also point out how the Second Backward

Classes Commission Report (popularly known as the Mandal Commission Report) in recommending an extended scheme of preferences for OBCs, has taken a radical departure in its justifications for AA from the normative principles that undergirded previous constitutional discourse. One of the questions this chapter will pose is to ascertain the nature of justice involved in AA policies or reservations on a large scale. While the group disadvantage argument justifies AA in favour of SCs and STs, the same logic becomes suspect when extended to the OBCs. An enhanced quota, it may further be argued, may impinge on the equal opportunities of individuals and groups in a *relative* context. Demonstrating this requires evaluating the moral claims of OBCs for inclusion and greater representation in a scheme that, following Galanter, warrants compensatory treatment.

Affirmative Action in India

Two principles grounded the colonial policy of equal representation in political offices and jobs that led to communal or representational quotas: (1) the policy of balance between competing communities, or interests, and; (2) the policy to divide the nationalist front by creating differences. The constitutional scheme of preferences that came to fruition during 1947-50 was, on the contrary, based on a commitment to social justice.[93] As a democracy in search of both formal and substantive equality, India had to address on an urgent basis the cause of the historically disadvantaged groups. Whereas the requirements of formal equality meant the equal protection of law against discrimination

[93] See, Andre Beteille (1991a: 205-6).

on morally invidious grounds, the requirements of substantive equality meant recognizing the needs of the more disadvantaged.[94] Both of these commitments—one to individuals stripped of their differences, and the other to groups—run parallel in the constitution.[95] At a broader level, they complement each other very much like the contents and provisions of the fundamental rights and the directive principles. Some rights have inscribed into them reasonable limits and restrictions.

Articles 15(4) (added by the 1st. Amendment), 16(4), 46, 330, and 332—discussed above (Ch. 2)—form the crux of the affirmative action policies in India's constitution. Art. 335, which since the constitution came into effect has been a subject of controversy and differing interpretations of the judiciary, qualifies the AA provisions by adding a rider that claims of SCs and STs for federal and provincial jobs are to be taken into consideration "consistently with the maintenance of efficiency of administration."

Broadly, three types of preferences are sanctioned by the constitution. First, are reservations—and in the sense used here these denote a broader category than AA—

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[94] Not all commitments to groups and especially to minorities can be said to fall under the requirements of substantive equality understood especially in an egalitarian redistributive sense. Historical promises/treaties, recognition of cultural differences, political compromises, constitutional assurances regarding self-government rights, etc. may form alternative bases of rights granted to groups as we have just seen in the discussion of the question of separate personal laws.

[95] See, Rudolph and Rudolph (1987). However, Beteille's (1991a) reading of the constitution puts more emphasis on the rights of the individual. "In the Indian Constitution the individual is the principal, though not the sole, bearer of rights and responsibilities, and citizenship is an unmediated relationship between the individual and the state." (Beteille 1991a: 222) His readings of the articles of equality (14-17) are meant to stress "the centrality of *individual* rights, treating religion, race, caste, sex, etc. as possible impediments to their full exercise." (Beteille 1991a: 223; emphasis original). The only exceptions that Beteille would allow to such a view of the constitution are the special provisions related to affirmative action. See, more generally, Beteille (1991a) Chapter 9.

which cover (a) special representation rights of SCs and STs by way of reserved seats in legislatures, and (b) quotas in government jobs and educational institutions. The reservation device, as Galanter notes is also used to a lesser extent in "the distribution of land allotments, housing, and other scarce resources." (1984: 43) Second, preferences target a few groups—SCs, STs, and women—with regard to provision of certain expenditures, services and ameliorative schemes such as scholarships, grants, loans, land allotments, health care, and legal aid. In the course of fulfilling its developmental goals and mandate, anti-poverty measures including rural development schemes, also target some of the usual beneficiaries of AA. Third, certain preferences take the form of special protections that safeguard vulnerable groups from oppression and exploitation, like measures to prohibit forced labour, and others.

In explicitly stating such sweeping and enabling AA provisions, the constitution thus seeks to strike a balance between formal and substantive equality. From the above account it is partially clear, however, that the state's moral commitments are more towards the SCs and STs than what it loosely defines as backward classes generally. It ought to be noted here that the founders of the constitution did not give a comprehensive view of social backwardness and who merits inclusion in it. This was left to the future governments to define and identify such groups for AA policies. But otherwise in its dual commitments to both individuals and groups, the constitution brings into a sharper focus the tension between individuals and groups as proper objects of state policies including those of AA.

Liberal Justifications for Affirmative Action

Liberal defences of AA usually encounter the challenge of justifying AA in terms of a common citizenship model. Since such policies require a departure from a framework of rights of individuals toward a conscious recognition of societal inequalities between groups, most arguments with regard to AA do have to take cognizance of the conflict entailed in the individual rights-group rights model. But arguments of liberal equality are not confined to the conflict of rights alone. At issue are other normative considerations such as the appropriate role of the state in ameliorating conditions of social equality; the nature of social justice itself; the morality of concerns regarding past injustices and the need to redress them; the present inequalities that are strengthened by continuing intentional, unintentional, or systemic discrimination; the question of opportunities; the proper means of redistribution; access to resources; fairness of institutions; and so on. Many of these concerns may also be interrelated and intertwined and reflect differently on how we conceive notions of justice toward groups, which bears a necessary relationship to issues of group and individual rights.

The starting point for any analysis for AA is usually nondiscrimination, a goal that both supporters and detractors of AA construe as justified and worth defending. However, nondiscrimination in itself is not a sufficient ground for advocating AA, although the facts of social discrimination are compelling grounds to consider the need for AA. In what follows I will discuss the nondiscrimination, equal opportunity, and the group disadvantage arguments on behalf of AA. All of these three views may be said to lie on a continuum between the two ends of individual and group rights: the

nondiscrimination argument rests entirely on the individual rights principle and common citizenship model, the idea of equal opportunity maintains an uneasy relationship between commitments to individuals and groups, and the group disadvantage argument, as its very name suggests, lies squarely on the other extreme i.e., in the realm of group rights and group-differentiated citizenship.

What is most important in this tripartite scheme is to show the gradual evolution of the rights discourse that has historically informed questions of AA. Too often we tend to get lost in how particular authors tackle questions of AA, forgetting the way they keep confirming the dominant concerns of their times. The scheme presented below will hopefully engage more fruitfully issues of equality and their gradual broadening to incorporate AA. To achieve this, one needs to compare and correlate different contexts. I draw selectively on the theoretical insights of scholars and jurists writing both from Indian and American perspectives. Aside from the commonality of views set against diverse settings, this reveals a common pattern of how AA justifications have evolved: both contexts lead to similar evolutionary processes.

The Nondiscrimination Argument

This principle holds that all persons are to be treated with equal consideration. Because differences between individuals based on religion, race, caste, sex, language, and ethnicity (or, the different bases of ascription) are irrelevant for purposes of public policy and depend on morally arbitrary criteria, the state should ensure non-discrimination while distributing goods and opportunities, including if possible policies that seek to redress

past discrimination. Since this logic uses a universalistic language, the appeal of this principle is difficult to miss.[96] Hedged by the notion of individual rights, this principle is a guarantee of ideas such as common citizenship and formal equality. Armed with this kind of a difference-blind logic, the state seeks to protect each citizen equally. The state, and especially the judiciary, is bound, on this view, by a certain form of *neutrality* and *objectivity*.

The intellectual forerunner of a difference-blind view, especially in the American context, is Justice John Marshall Harlan's aphorism, postulated in his dissent more than a hundred years ago in *Plessy v. Ferguson*, that "our Constitution is color-blind." *Plessy* cannot however be credited for establishing social equality between races: since *Brown v. Board of Education* in the present century, a difference-blind antidiscrimination view has come to be seen as a crucial element in both social and political equality.[97] This reasoning has increasingly become commonplace in American legal parlance now and consistent with this interpretation, the Supreme Court has applied the strict scrutiny test, an extreme variant of judicial review, to strike down what it calls "invidious" racial classifications.[98] Such reasoning has constituted the legal, constitutional, and the moral fibre of American disquisition on attempts to disqualify color- or race-conscious policies.

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[96] See, Owen Fiss (1977: 105).

[97] See, Andrew Koppelman (1996: 1-2).

[98] The most recent decisions informed by a color-blind logic are *Richmond v. J. A. Croson Co.*, (1989) and *Adarand Constructors, Inc., v. Pena*, (1995). In both of these, the Court struck down affirmative action programs thereby narrowly circumscribing the use of race as a factor in public policy. See, Scott Cummings (1997: 193). Contrast this to the 'benign' classifications used in earlier judgments to justify AA.

What are the Indian parallels to these expressions of difference-blind logic? The prominent Indian expositions on equal rights and common citizenship as reflected, say, in Article 14, the provisions of the removal of untouchability in Art. 17, or the different provisions of the Part IV of the constitution, together with a belief in the wall of separation thesis between religious and political matters, rely on a classical pronouncement of secularism. The reasoning runs somewhat like this: because the Indian state is secular it should not recognize differences based on religion or *jati*. But this view, as Galanter has rightly noted, is deeply mired in the process of first of all identifying the broad contours of group membership.[99]

How can a principle that is based on equal treatment be used to support special advantages for some on criteria that are held to be morally repugnant in the first place? In other words, how can a policy favour some on the basis of caste if caste as a distinction is held to be morally arbitrary? Shouldn't such a policy be considered to be impinging on the requirements of formal equality? Galanter is aware of this dilemma and accordingly argues, "[c]ompensatory discrimination may be viewed as an extension of the norms of equal treatment, an extension invited by our awareness that even when invidious discriminatory standards are abandoned there remain subtle and tenacious forms of discrimination and structural factors which limit the application of new norms of equality." (1984: 552-53) When we speak of the new norms of equality we are obviously referring to the idea of substantive, as distinct from formal, equality. The idea of equal treatment, a fuzzy constitutional norm, may encompass both the above. Galanter's

[99] See, Galanter (1965).

arguments operate at two simultaneous levels: on the one hand, the idea of equal treatment is extended to include AA policies; on the other, such an extension is made possible by a realization that persistent patterns of discrimination and inequality require a necessary articulation of a substantive conception of equality.

From a different angle, the limits of the non-discrimination principle as a tool to combat group exclusion and injustice are suggested by Owen M. Fiss (1977) and Iris Marion Young (1990). They argue, taking slightly different routes,[100] that an officially sanctioned policy of color- and caste-blind formal equality is not enough in redressing severe forms of inequality and that we need to take into account how groups get excluded by processes which are unjust to begin with. Young, for instance, argues that discrimination is not the chief injustice that marginalized groups face; for the latter, "[o]ppression, not discrimination, is the primary concept for naming group-related injustice." (1990: 195) The argument of antidiscrimination, in assuming equal treatment, brings into a sharper focus the moral claims of both those who are included and those who are excluded from preferential policies. It tells us very little about how membership in a disadvantaged group may prove crucial to a policy based on *differential*, and not equal treatment. This logic is very much an American justification; "an extension," as Galanter rightly notes, "of classical individualistic non-discrimination principles." (1984: 553) The nondiscrimination argument is a weak, or possibly, non-existent defence of AA. Although a laudable goal, it does not tell us much about how to take stock of the

[100] Young, because of her project of identifying all forms of group injustices, is slightly more relativistic than Fiss.

continuity of discriminatory practices and what exactly the principle amounts to in relation to concrete policies designed to offset substantive and structural inequalities between groups.

The Equal Opportunity Argument

At one level, the equal opportunity argument is closely tied to the antidiscrimination one. This is where both recognize and stress the ideal of individual rights. In a *narrow* sense, both encapsulate equal treatment between individuals. What this implies is recognizing and protecting legal equality or equal political rights designed on the one hand, to create a *level playing field* by guarding against discrimination, and on the other, to create formal *access* to conditions favourable to realizing the full development of human potential. The moment we expand the second part of our argument by taking it as a sort of concern relating to the moral imperatives of equalizing conditions of existence we realize quite naturally that mere formal access to social goods and opportunities does not suffice. This calls for, hence, not just a regime of equal rights guaranteed by law, but an active involvement in removing obstacles to *equalize prospects or chances of success.*[101] This enlarged vision is a wider and more robust version of equal opportunity. Following their roles to realize formal and substantive equality, we may call them *formal* and *substantive* equal opportunity.[102]

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[101] Edwin Dorn argues that since equal opportunity refers to scarce goods, we cannot speak of legally enforceable rights as we would, for instance, while referring to equal protection guaranteed by the Fourteenth Amendment. See, Edwin Dorn (1979: 111).

[102] Note, however, that Rawls distinguishes them as *formal* and *fair* equality of opportunity. Formal equality of opportunity, understood as ensuring equal legal access to all advantaged social

Depending on how narrowly or widely one defines equal opportunity, there are distinct responses to AA. The narrow or the weak view, for instance, is what I have called above formal or (the-careers-open-to-talents) meritocratic equality of opportunity, an idea that holds that, absent discrimination, offices will be open to talent. This restricted view, however, does not address the advantages persons have by virtue of differences in their upbringing, family resources, and everything else that contributes to a privileged starting point in life. This way of looking at what equal opportunity implies is hardly a justification for AA: instead, it argues how AA policies negate the possibility of careers being open to talents. Indeed, this cuts across moral principles that seek to establish AA.

In its stronger version, equality of opportunity promises individuals equal life chances to fulfill their goals.[103] Despite the fact that an expanded view strongly endorses a redistributive strategy, including AA policies, this has not helped evolve a singular approach that may translate equal life chances for all without succumbing to principled contradictions. In other words, the term "equal life chances" implies very broadly both

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positions, Rawls argues, does not guarantee that every person has a fair chance to attain them. To give others a fair chance in terms of the fair equality of opportunity principle entails in the Rawlsian scheme that "those with similar abilities and skills should have similar life chances." Hence, the second part of Rawls' difference principle establishes that social and economic equalities are to be so arranged so that they are "attached to offices and positions open to all under conditions of fair equality of opportunity." See, Rawls (1971: 73, 83).

[103] Cf. Gutmann and Thompson (1996). Extending a perspective of deliberative democracy, Gutmann and Thompson argue that "fair opportunity" does not mean equal life chances, nor "equal chances for jobs and other similar goods...it requires that each *qualified* applicant receive *equal consideration* for the job." (1996: 311; my emphasis) But their understanding of equal consideration falls somewhere between a well-developed antidiscrimination and a meritocratic equality of opportunity. An ideal of equal consideration of interests may, in Gutmann and Thompson's analysis, have nothing to do with opportunity *per se*, but spell out in general what constitutes a well-developed theme for a ground-level impartiality.

equal means and equal prospects of success. The two senses are, however, dissimilar in actual application and depending on the context we either refer to *means-* or *prospect-*regarding equality of opportunity. Let me unpack these concepts. Means-regarding equal opportunity refers to the possession of identical instruments or boxes of tools on the part of, let's say, two individuals or groups to attain an end-good, or goal. Prospect-regarding equal opportunity, on the other hand, emphasizes identical probability on the part of both to attain the same good. Whereas the first is content with providing the means for success, the latter is interested, not in the equal enjoyment of instruments that are crucial for, but in the equal possibilities of success.[104] A conservative account of equal opportunity usually captures the meanings associated with the means-regarding variety, which in turn does not always guarantee even chances of success between persons competing for scarce goods. Justified in a competitive market-driven society operating under a given system of values, it lays emphasis on merit and efficiency; means-regarding equality can only ensure that all competitors possess the wherewithal, i.e., the instruments or the boxes of tool, to attain a scarce good.

Justifications for equal opportunity often conflate the two meanings. Much of legal scholarship, especially the American vintage, has sought to justify AA on the basis of equal opportunity understood in a sense where the state undertakes certain special programs to ameliorate the conditions of those, for instance, who have borne the brunt of past discriminatory practices. But there remains a certain ambiguity regarding the proper

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[104] See, for this view, Douglas Rae (1981: ch. 4). For discussions below on this dichotomy, I follow Rae's analyses.

classification of such policies. While recent rhetoric is usually informed by a notion of equalizing prospects, the practice falls somewhere between equalizing means and prospects.

The classic statement that justified the policy of AA by broadening the referent of equality in American rhetoric is that of Lyndon B. Johnson who, responding to the civil rights movement, argued that the policy of color-blindness and political freedom for blacks is not enough:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates...We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory but equality as a fact and as a result.[105]

Despite its ambiguity with regard to what it actually connotes, equality of opportunity is a powerful idea. It has a dimension with a very radical import, one that enhances the chances of all citizens to compete equitably for scarce goods. For serious proponents, the road to equalizing opportunities, of contemplating a fair starting point in individual lives, inevitably ends up in equalizing conditions in natal families. Logically, this is tantamount to a radical redistribution of resources, something that may be appealing and even morally required under ideal conditions, but at a huge cost to the

[105] Lyndon B. Johnson (1965: 126). For a historical analysis of the changing rhetoric of equality in the American context, see Condit and Lucaites (1993).

liberty and autonomy of the family as James Fishkin argues.[106] Under non-ideal circumstances, however, the state assumes a temporary responsibility not to equalize unequal conditions between all (which is seemingly impossible), but to equalize rates of success between unequals. This aspect of equal opportunity best captures what we earlier discussed as prospect-regarding equality of opportunity.[107] And it is this variant that is used as a public justification for *stronger* versions of AA.

Echoes of this logic in the Indian context reverberate in the constitutional debates and judicial discourse especially in the second quarter of the country's independence. At issue is the debate over Article 16: whereas Art. 16(1) generally makes the case for a provision of equality of opportunity, Art. 16(4) circumscribes the article to make room for state intervention for reservation of jobs for "any backward class of citizens." Reservation of jobs for backward classes, hence, constitutes in the constitutional discourse, an *extension* of the principle of equal opportunity to attain a desired representation of positions for people less advantaged. But this did not stop the opening of the floodgates by the judiciary to probe whether or not Art. 16(4) is consonant with, or an exception to, the general provisions of equal opportunity.

Many legal wrangles, as late as *Indira Sawhney v. Union of India* (1993), have deliberated on this question. The judicial consensus so far seems to be supportive of the constitutionality of Art. 16(4) and the view that it is not an exception, but substantially

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[106] See generally, James Fishkin (1983).

[107] Douglas Rae (1981) defines it thus: "Two persons, j and k, have equal opportunities for x if each has the same probability of attaining x." (Rae 1981: 65)

qualifies the import of equality of opportunity contained in Art. 16(1). Whereas in earlier judgments—especially, *Devadasan v. Union of India* (1964)—Art. 16(4) was argued to be an exception to the main provisions of Art. 16, in a judicial debate that was locked by the competing claims of the inviolability of basic fundamental rights and the role of the state to ameliorate the conditions of the less privileged, latter-day interpretations starting from *State of Kerala v. N. M. Thomas* (1976) have largely accepted the close conformity between what counts as equality of opportunity and AA. But this "doctrinal shift," as Galanter notices especially in Justice Mathew's judgment, involves stretching the meaning of equality of opportunity to include "not only formal equality with fair competition, but "equality of result."[108] This argument, which we will later see as the staple of the Mandal report, in a certain sense also pre-empts the latter: For the 'expanded' version of equal opportunity in Justice Mathew's arguments, the one which justifies reservations, also enables a 'categorical' expansion in the sense that reservations may be extended to "all members of the backward classes," and not just confined in scope to the SCs and STs.[109] Galanter argues that *Thomas* "opens [a] Pandora's box: compensatory classification is available—perhaps incumbent—to succour all the disadvantaged." (1984: 393) But what is more, *Thomas* succumbs to a pattern of

[108] Galanter (1984: 386). Justice Mathew argues: "If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried *viz*, even up to the point of making reservation." Cited in Galanter (1984: 386).

[109] Galanter (1984: 387). Justice Krishna Iyer, however, is at variance with Justice Mathew's views. The former is more circumspect about who qualifies under Art. 16(4); stating that not all backward caste groups qualify to be recognized within its ambit, he argues that the legitimate classification can only be made on behalf of the "harijans," a group which faces "social disparity [that is] grim and substantial." Cited in Galanter (1984: 387).

"patronage and dependence" which then becomes responsible to treat members of Scheduled Castes as the "*passive* recipients of government largesse, rather than as active participants in their own improvement."(1984: 391; my emphasis) In order to enable them to become active participants a useful *reconceptualization* of Article 16 should have dwelt on "age-waivers, fee concessions, travel allowances, coaching schemes, lowering of minimum marks, and other provisions that typically accompany reservations and often exist apart from reservation *per se*."(1984: 389)

Such provisions would have brought about, what we argued before, an equalization of *means*: of providing the less endowed the wherewithal to compete equitably for scarce goods. The Indian judiciary and the state have, however, opted for the less cumbersome method: equalizing prospects of success between caste groups. This rhetoric at a certain level, by juxtaposing itself to what it pejoratively denounces as formal equality of opportunity, has tended to take the expansionist view, that of *equality of results*. It is tempting to subject this trend to a probing analysis. Suffice it to be noted at this point, however, that a version of equal opportunity that equalizes prospects of success between two blocs or categories of groups justifies itself by a rough measure of compensation to offset historical injustices, whereas, a policy of equalizing means of success may not be so backward-looking, and need not moreover endorse the stronger versions of AA.[110] However, we first need to be satisfied about the rationale for what

[110] As a non-compensatory and possibly stronger defence of AA, equality of opportunity looks not at the past, but at the future. This view is concerned with the evolution of an egalitarian society in the positive sense; whereas, the compensatory defence is still locked in the past and hence, essentially backward-looking. See, Bowie and Simon (1998: Ch.9).

justice requires in cases where there are huge disparities between groups of people. How should we, in other words, compensate disadvantaged groups that experience unequal circumstances? Under what circumstances may we utilize a prospect-regarding equality of opportunity between groups or alternatively equality of results to offset handicaps faced by members of the disadvantaged ones?

The Group Disadvantage Argument

With features that are attractive both to the Indian and American situations, the group disadvantage argument is presented most cogently by Owen M. Fiss. This argument, as its name suggests, has less to do with a conception of rights that are individual-based, and more with the social conditions of group existence. There are obvious problems in identifying social groups if by groups we mean collectivities that have a sense of belongingness and interdependence. Such criteria, though important, are subjective in nature and are largely dependent on how groups define themselves. However, very often membership in certain groups, especially those that experience concrete social disadvantages, is something that may be imposed from the outside, the larger society, and may not necessarily be an internal affair. Hence, aside from the subjective and internal, in the context of disadvantaged groups, we come to terms also with their objective and external aspects. When we are referring to the objective aspect we are basically looking into the experiential conditions of disadvantages that are fairly *concentrated* and *cumulative*.

The theoretical structure underlying Fiss' work underscores the rationale for using

the group disadvantage principle, as against the anti-discrimination principle, as the real mediating principle of the Equal Protection Clause in the American constitution. This, Fiss argues, helps to broaden the referent of equality while taking a fuller account of social reality regarding the disadvantages of racial membership. On Fiss' account, blacks merit to be viewed as a disadvantaged group and hence by that logic are eligible for preferential considerations. But, why just blacks? Fiss pleads that blacks are indeed a very special type of group; they are "America's perpetual underclass": a group that suffers from being very worse-off, in addition to having had to endure being at the lowest rung for several centuries. Fiss reasons:

> It is both of these characteristics—the relative position of the group and the duration of the position—that make efforts to improve the status of the group defensible. This redistribution may be rooted in a theory of compensation—blacks as a group were *put* in that position by others and the redistributive measures are *owed* to the group as a form of compensation. The debt would be viewed as owed by society, once again viewed as a collectivity. (1977: 127; original emphasis)

A rough but appropriate parallel to the blacks' situation is that of the dalits in India who comprise 16.5 percent of the population or roughly 138.2 million people as per the 1991 census. Dalits in India, like the blacks, are in a sense the worst-off group that has occupied the lowest rung in the social hierarchy for centuries. According to the 1991 census, the literacy rate among the dalits is 37.41 per cent compared to the general literacy rate of 52.21 per cent. A vast majority of dalits—81.28 per cent—live in rural areas, and almost 50 per cent of them are landless agricultural laborers. Their present lot compounds historical factors of exclusion, centuries of sub-human existence, and a clear

statement of lack of self-respect. Clearly any redistributive strategy, including AA, cannot in the Indian context wish away the reality of these complex, enduring, structural inequalities. Keeping in mind these normative considerations, the Constituent Assembly set about the task of devising a complex array of preferential policies for the dalits. Invoking the same principle, Galanter concedes the usefulness of 'compensatory discrimination' to offset disadvantages that are concentrated and cumulative.

The idea of compensation evokes, too, the logic of substantive equality, one that closely borders on the idea of equality of results. Owing to the unequal circumstances that disadvantaged groups find themselves in, the mere presence of a policy of non-discrimination and equal treatment does not suffice. Where disproportionate shares of goods have already been cornered by the more advantaged groups, a more equitable redistribution becomes morally imperative. However, this redistribution does not involve a start-from-scratch process under an ideal setting that keeps in view the needs of all groups or individuals. The redistributive strategy under non-ideal circumstances that interests us here, on the other hand, acknowledges the messy realities of accumulated injustices meted out to particular groups that still experience in the present situation gross inequalities of a cumulative nature. A part of this strategy is to mitigate the conditions of the disadvantaged groups on a fast-paced, short-term track so as to bring about a noticeable change in their fortunes, changes that equalize outcomes between unequal groups. A justification for AA on an equal outcome approach involves not only egalitarian considerations *per se*, but also the added normative requirement of compensating for past wrongs. When making a case for compensation for disadvantaged

groups we bridge the important divide that separates equality of opportunity from that of equality of results. It is somewhat like recovering what Lyndon Johnson implied in his famous foot-race aphorism that fairness requires more than a commitment to impartial treatment, "not just equality as a right and a theory but equality as a fact and equality as a result." (Rainwater and Yancey 1967: 126) When used to offset intended and discernible disadvantages recognizable in particular groups, justifications for AA undergo a shift from what we had earlier discussed as prospect-regarding equality of opportunity to equality of results.

Aside from an argument to reinforce the compensatory theme, there are other plausible ways of presenting different versions of equality of results. The latter also represents arguments made on behalf of quotas and proportional equality. Quotas, the stronger version of AA, specifically relate to numerical set-asides, of particular allocations to jobs, places in universities, or seats in legislatures. It may be both proportional or disproportional to the relative percentage of the beneficiary group to the total population. When the former, quotas become indistinguishable from a sense of proportional equality:[111] both use the equal outcomes approach to distribute goods on a proportional basis. Let's say if beneficiary groups j and k constitute 18 and 25 per cent of the general population, then on an equal outcomes rationale both of them deserve 18 and

[111] For a defence of this view and an argument based on proportional group equality in the Indian context, see M. P. Singh (1991).

25 per cent of jobs, seats, etc.[112] This logic is usually strong where absent quotas both j and k occupied considerably less—let's say, 3 and 5 per cent—than what they and others thought were due to them. However, the logic of proportional equality can be extended to the whole of the population as was done comprehensively in the Communal Government Orders of Madras in 1927 and 1947 to cover all caste groups on a proportional basis so as to benefit the non-Brahmin majority.[113] But where unused for a long period, accumulated quotas could be so huge that they simply might be disproportional in size to the relative population of the group.

What is pertinent to our discussions above is the fact that equal outcomes may have different connotations depending on how—as compensatory distributions, quotas, proportional equality, or a combination of any of these two—is sought to be used. Where the principle of group disadvantage mediates any of these on a *reasonable* scale, it may be morally permissible to justify such AA policies. But what makes equality of results *un*reasonable? What are the limits of such group-based justice?

Political Fairness and the Limits of Quotas

The implementation of the Mandal Commission report, which implied an extension of quotas by 27 per cent for the benefit of the OBCs over and above the existing level of

[112] Such a constitutional justification, as noted above, already exists for reservation of legislative seats for SCs and STs at both the federal and provincial levels in accordance with the terms of Art. 330(2) and 332(3).

[113] See, Galanter (1984: 365). For an account of caste mobilization and early reservation in South India, see Parikh (1997: 80-84). On the costs that this policy has entailed, see Kumar (1992: 294-98).

quotas at 22.5 per cent already mandated for SCs and STs, raised a political storm in 1990. The then Janata Dal government headed by V. P. Singh was accused of pandering to the OBC vote bank. A crossfire of political and academic debates surrounded concerns regarding the extended scheme of AA for OBCs. At the surface level, the debate concerned the moral appropriateness of AA: those who did favour AA defended the caste-based quotas, with or without extensions; those who did not favour AA of any sort argued against a regime of unfair quotas, the unfairness of which they thought was intensified by extensions to less deserving groups. At another and what may be construed as deeper level serious questions were raised regarding Mandal's criteria for determining caste backwardness. Save some,[114] most were not interested to analyze Mandal's normative justifications that made a case for quota extensions. Central to the Report's recommendation is the background understanding of social justice and what that entails for AA.

In opting for an 'expansive' view with regard to who belongs to the middle stratum of the caste hierarchy, the Report identifies 3, 743 castes, which following the 1931 census is roughly 52 per cent of the population, as backward. Using a controversial toolkit of caste backwardness,[115] it favoured proportional equality between those that it considered as backward and the rest that were fortunate enough to be 'forward.' But since the Supreme Court in its landmark decision in the *Balaji v. State of Mysore* (1963) case

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[114] See Marc Galanter, (1984: Preface to the 1991 Edition) and Beteille (1991b).

[115] For a brief but incisive criticism of Mandal's use of caste criteria, see Galanter (1984: 1991 Preface: xviii).

had decreed an upper ceiling of 50 per cent as the limit for the total quantum of reservations,[116] the Report was constrained to recommend only 27 per cent of reservation for OBCs, so that together with the quotas for SCs and STs it did not exceed the 50 per cent limit. Had there been no such upper limit the Report, relying on the rationale of proportional equality, would have in all likelihood recommended a further increase of 52 per cent reservations. How does the Report justify its argument for proportional equality?

The key *mantra* of the Report lies in a wishy-washy notion of equality of results. Following the work of Herbert J. Gans (1973), the Report makes a tripartite distinction between equality of opportunity, equality of treatment, and equality of results. Using the narrow view of equality of opportunity (see above), it says that Art. 16(1) is in fact a libertarian, and not an egalitarian, principle and, in any case, this conception does not take us far in giving due consideration to the needs of the disadvantaged. Similarly, equality of treatment by its implication of uniformity of justice doesn't differentiate between the advantaged and the disadvantaged. Hence, the only true egalitarian ideal that ensures justice to the disadvantaged, according to the Report, is the idea of equality of results.[117] That begs the question, how is equality of results to be realized? Equalizing resources, or rights, or both? With regard to rights, we have already observed above how

[116] Although the Supreme Court in this case argued for lesser percentages of approximately one-third shares as 'reasonable', both the provincial governments and the High Courts have taken the 50 per cent limit as a permissible "flat maximum." (Galanter 1984: 402-3)

[117] Long after he had ceased to be in power, ex-Prime Minister V. P. Singh in a lecture delivered at Harvard University on September 29, 1995 defended his policy of implementing AA for OBCs echoing the same logic that the Report had expounded on: "If equality has indeed to be realized then we have to ensure equality of results and take concrete measures for the same. Mere provision in the Constitution that we are equal does not make everyone equal. Till power is shared equally inequality will remain." (Singh 1996: 11)

under a group disadvantage principle certain stronger versions of AA could be justified. We will consider the efficacy of that for OBCs shortly. But let me first address the issue of equalizing resources. Under ideal circumstances, this would be a laudable scheme and would involve, as Dworkin's work (1981) suggests, a comprehensive system of distributive justice that compensates for unequal circumstances. Is this feasible? And does it merely involve short-term compensations such as AA? Gans himself answers these questions in ways, which the Mandal Commission neither acknowledges nor incorporates in its Report. Shortly after dismissing the two other conceptions of equality, Gans moves on to analyze the infeasibility and unattractiveness of the ideal of equality of results:

> Equality of results can produce sameness; when everyone is equal with respect to a given resource, every person has the same amount of that resource, and if all resources were equalized, everyone would be uniform on all counts. Such uniformity is neither desirable nor achievable; a society in which everyone had an equal amount of the same resources would probably be deathly boring, but in any case it is not achievable. For one thing, human beings differ in many characteristics, and not all these differences can be erased by an equality of resources. For another, in a society with a division of labor, sameness is impossible because people fill so many different roles. (Gans 1973: 65)

The question that interests us next is to consider whether or not the OBCs are disadvantaged enough to merit AA? Is their situation comparable to those of the SCs and the STs? Although the Report does argue about certain indicators about social and educational backwardness in general, a large part of its conclusions as regards who merits inclusion in this category is derived from subjective assessments that are

methodologically flawed and suspect.[118] What is difficult to sustain from the group disadvantage principle is the inclusion among OBCs of prominent well-entrenched, powerful, land-owning, dominant castes, euphemistically called the "creamy layer." Writing much before the Report was implemented, Andre Beteille (1981) did point out that the "moral basis" of the claims for special treatment for daiits was quite different from those that were made in favour of the OBCs. The same difference holds true even today. Since not all OBCs experience the same disadvantages, and those who do more than the rest do *not* compare well with groups whose disadvantages are fairly *concentrated* and *cumulative*, the rationale for AA is truly suspect.

What about the other issue regarding *empowerment* that is used on behalf of OBCs? This view as pointed out by V. P. Singh above entails an equalization of power. Does equality of results necessitate a sort of proportional equality to enhance equal outcomes between merely unequal blocs/groups? While this argument is fundamentally flawed in terms of what democratic justice might require, let us engage it on its own terms—that of equality. Strict equalization of outcomes for different groups implies that we are engaging the notion of prospect-regarding equality of opportunity between blocs. Is this fair? I have already argued above why this seems compelling as a justification for AA. Absent considerations of compelling disadvantage, what consequences arise if we extend the logic to many more groups and create a larger bloc of AA beneficiaries? That, I argue, is grossly *unfair*: when the size of the bloc gets larger, unequal prospects *within* the blocs increases. This is a common sociologically-based refrain against AA policies in

[118] See, Galanter (1984: 1991 Preface: xviii-ix) and Radhakrishnan (1996).

general: the argument here is that instead of benefiting the more deserving within the bloc, an expanded bloc creates more opportunities for the less deserving to corner the benefits. Furthermore, once vested interests get ossified, such arrangements tend to diverge from policies that also aim to enhance the means-regarding equality of opportunity between individuals.[119] However, the real risk of stretching the ideal of equality of results seems to me to be a compromise with even a substantive version of equality of opportunity within and across blocs. The purpose of the above exercise was to caution against the detrimental consequences that are unleashed by unreasonable numerical games of quotas, which instead of mitigating inequalities create other (and possibly more severe) forms of unequal deprivations.[120]

What does the Constitution require us to do in this context? In a very interesting observation, Galanter reminds us that the Constitution requires us to ameliorate the conditions of the SCs and STs. This he likes calling our "national commitments." An expansion of these constitutional commitments entails dissolution (or dilution) of "the original and distinctive national commitment to the core beneficiary groups, the

[119] "The broader the class of beneficiaries and the more expansive the benefits, the greater the danger that the essentially transitional arrangements contemplated by the Constitution will ossify into permanent arrangements." (Galanter 1984: 1991 Preface: xxii)

[120] This is the reason why I further argue that there are moral limits to what political compromises should achieve. Political compromises arrived between groups sometimes drastically fail to address what's fair and the line between what counts as AA and preferential policies tends to get erased. Hence, a compromise formula of let's say 37.5 per cent doesn't address questions of fairness. Compare the views of E. J. Prior (1996) who advocates a lowering of the quotas for OBCs to pacify all groups. However, Prior is right to argue in my view that the Report's "proportional reasoning is unsound and not substantiated by the Constitution." (Prior 1996: 96)

Scheduled Castes and Scheduled Tribes."[121] One of the ways to ensure that this dilution does not take place is to lay down principled justifications like the group disadvantage argument for what needs to be defended as stronger versions of AA.

It will be instructive for our purposes to revisit the Constituent Assembly debates to find out the nature of deliberations that characterized the issue of quotas. Defending a version of prospect-regarding equality of opportunity in access to public services and government jobs between different caste communities, Dr. B. R. Ambedkar, the dalit Chairman of the Drafting Committee in the Constituent Assembly, argued against extensive quotas, as this would compromise the principle itself.

> Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. (CAD Vol. 7: 701)

It is evident from Ambedkar's comments above that he drew a line on the limits of quotas. Political fairness toward disadvantaged groups requires that where quotas exceed its mandate, it needs be mediated by narrower versions of equal opportunity arguments. This is not only found defensible in India's constitutional interpretation as part of its original commitments but can normatively relate to the precarious balance that exists in political theory between liberty and equality.

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[121] Galanter (1984: 1991 Preface: xxi-xxii). This argument informs Galanter's overall analysis.

Chapter Five

CONCLUSION

In debates on liberal multiculturalism today it is commonplace to acknowledge that difference-blind institutions and policies do not effectively translate into fair outcomes for disadvantaged groups. In spite of the supposed neutrality that a difference-blind approach entails, it is admittedly "tilted towards the needs, interests, and identities of the majority group" which in turn "creates a range of burdens, barriers, stigmatizations, and exclusions for members of minority groups." Rights that compensate for such 'unfair disadvantages' can, as a result, only be fair. However, what precisely justice requires by way of protections of the legitimate interests of disadvantaged groups can only be worked out "case-by-case in particular contexts, not assumed in advance." (Kymlicka and Norman 2000: 4; also Carens 2000)

Group Rights and Contextualist Arguments

Kymlicka and Norman (2000) contend that debates on the fairness of minority rights is an almost closed chapter with the onus now lying upon the detractors of such claims to

prove why their accounts are more fair or just than those of the defenders.[122] They underscore that there is both a greater recognition and acceptance of the idea of minority rights in "Western democracies" today than in the past. To speak of western democracies, however, as a monolithic term can be pretty misleading. At least in the North American setting the Canadian approach to multiculturalism differs in wide measure from the American version. In both theory and practice, Canada has been more accommodative to the politics of difference than its southern neighbour. However, to be fair to the American approach, it might be said that the social fact of racial identity in American political life has meant that the colour-blind liberalism has held a more powerful sway in theory and practice. Facts about social pluralism in the two cases have compelled different normative trajectories in the two countries. Liberal multiculturalism is made richer by virtue of sharing experiences and drawing upon normative inferences across societies.[123]

In this regard, certainly, Kymlicka, Taylor, Parekh, and Carens distinguish themselves by using non-American examples in their explorations of liberal multiculturalism. Of them only Parekh and Carens have, however, drawn upon non-

[122] The new debates over multiculturalism in Western democracies, Kymlicka and Norman argue, connect to the "virtues and practices of democratic citizenship." (Kymlicka and Norman 2000: 5)

[123] I am conscious here of the charge of taking cultural relativism much too lightly. Although one can reasonably accept some of the indistinguishable facts of cultural difference across and within societies, this does not preclude sharing of cross-cultural experiences and learning from each other. Part of my own attempt here has been to show how cross-cultural understandings of what justice requires in different multiethnic societies enrich our understandings of multicultural accommodations. See, also Carens (2000).

western examples to enrich understandings of liberal multiculturalism.[124] It hardly needs to be stressed here that in many non-western contexts the issue of the fairness of protections of minorities and significantly disadvantaged groups is far from settled.[125] The idea of respecting and especially protecting cultural identity still faces philosophical and political opposition in many multiethnic non-western societies. The matter assumes critical significance inasmuch as these societies are simultaneously engaged in processes of nation-building and democratization.

The Argument So Far

Overall, my attempts so far have been to probe morally compelling issues that pertain to liberal justifications of rights for disadvantaged groups in the Indian context. I argue that Indian Muslims deserve cultural recognition that amounts to respecting their personal laws and that the untouchables or Dalits deserve affirmative action policies as part of redress for their low socio-economic status. In my Introduction (Chapter 1), I lay out an appeal to rethink the theoretical literature on multiculturalism by using the Indian example. I do this to accomplish two objectives. First, in the wake of a growing body of literature on liberal multiculturalism in western societies today, I want to emphasize the salience of group differences for non-western societies as well. Second, by focusing on the Indian example, I stress that many non-western societies today, in addressing group

[124] While Parekh (1992, 2000) draws upon Indian examples, Carens (1992, 2000) successfully reins in the Fijian case. In both, flexible and 'thicker' versions of liberal pluralism combined with an open-minded, reflective critique of liberalism help them cast their nets wider.

[125] Indeed, with some qualifications, the same would hold true for many western contexts as well.

differences, cannot ignore aspects of socio-economic justice or, in other words, the politics of redistribution.

To recapitulate, I argue that there is much to be gained in simultaneously addressing both the politics of recognition and redistribution. Of the different groups in the Indian context, I find it a useful strategy to interrogate two most compelling cases of group disadvantage: those of Muslims and the untouchables. In my analysis, Muslims constitute a culturally disadvantaged and the untouchables socially and economically disadvantaged groups. Although both constitute underclasses in India's social structure, their needs and interests are different. In contrast to other principal identity groups based on language and tribe that have been territorially accommodated, Muslims and untouchables require non-territorial accommodation policies. Keeping in view the fact that the brunt of ethnic violence in post-Independence India has been borne by these two disadvantaged groups, it is imperative to address their claims for differentiated status in Indian politics. This becomes acutely necessary when a denial of their difference is caused by an appeal to a common citizenship model on the one hand and the growing popularity of Hindu nationalism on the other. I contend that neither the idea of a universal, difference-blind liberalism nor the indigenous Indian notion of composite nationalism can do justice to the concerns of the disadvantaged groups. Justice toward groups in the Indian context requires that we pay explicit attention to differences.

Any account of what justice requires by way of suitable accommodations toward the identified disadvantaged groups cannot be adequate without a fuller understanding of how questions surrounding difference were addressed by the founders of the nation. In

chapter 2 on Constitutional Protections, I make a two-dimensional inquiry that includes both historical and normative explorations. The historical review spanning the colonial and the constitution-making periods helps inform us how questions of citizenship and diversity were negotiated and resolved within the constitutional framework. The normative inquiry juxtaposes the post-Independence constitutional model to contemporary discussions of liberal multiculturalism. With regard to the first dimension, our analysis of the colonial period explicates how representation along group lines was created and the manner in which the process of colonial identification of groups and their differences became salient for later constitutional deliberations particularly in the post-Independence period. Before the Constituent Assembly of an independent India could even set itself the task of drafting a constitution for its people, it was required to address questions of difference. This requirement also met the Congress' interest in crafting a 'unity in diversity' approach in India's constitution. The actual process of deliberations through a series of bargaining and negotiations in the various committees and in the floor of the Constituent Assembly resulted in a framework of protections for minorities that were different from the colonial model.

The Minority Rights sub-committee proposed a set of political, economic, cultural, religious and educational safeguards for the different minorities in the new constitution. Although the sub-committee maintained the need to retain some of the political safeguards that the minorities enjoyed in the colonial period, particularly relating to the representation rights of religious minorities, no consensus in the Assembly could be achieved on this. The Assembly, despite some opposition from members of the

Muslim minority, voted to do away with the colonial policy of separate electorates. The argument advanced to justify this stand was made on grounds of national unity.

The assembly did not rest at this. During the final stages of deliberations the Minority Rights Report's recommendations (prepared by the Minority Rights sub-committee) of reserved seats for minorities in joint electorates and for jobs on a proportional basis were also substantially altered. In the final outcome, representation rights in the form of reservations of seats in legislatures and jobs in services were confined only to the Scheduled Castes (of both Hindu and Sikh following) and Scheduled Tribes.

On the question of the autonomy of the religious minorities, the colonial policy of protecting the personal laws of different religious communities was the only ground on which agreement between members could be achieved after adding a constitutional rider in the Directive Principles of State Policy to the effect that the state would try to achieve a common civil code for all its citizens. The demand for separate personal laws constituted a major stipulation of the Muslim minority. It is important to note, however, that the Muslims would have preferred representation rights, and that in granting personal laws to religious minorities, the Assembly was providing the minorities with something they saw as the second-best available alternative. Overall, the founders' responses to diversity in the constitutional schema were divided between individual- and group-based conceptions of citizenship. Exhorting a quasi-liberal spirit, equal treatment in the postcolonial constitution required that dissimilar forms of difference be *differently* treated.

In the normative overview of India's constitutional experiment, I argue that the multicultural character of India's constitution exhibits many features of contemporary multiculturalism. In contrast to rival views that group-sensitive provisions should not be written into or entrenched in the constitution, the Indian experiment contains within it accommodations of various groups.

Chapter 3, Cultural Recognition and Religious Personal Laws, investigates the moral basis of Muslims' demands for cultural autonomy. The discussion is set against the backdrop of the recent Supreme Court judgment (the Shah Bano Case) in which the judiciary intervened in regard to Muslims' right to retain their separate personal laws raising thereby fresh legal doubts about the continuance of this practice. After giving a brief background of the practice of separate personal laws and its emergence as a colonial institution, I discuss how Muslims have come to view the practice as constitutive of their collective cultural identity.

Despite, or because of, their importance for Muslims' collective identity, personal laws have been a source of distrust between the Hindu and Muslim communities and a symbol that has been used deftly by Hindu nationalist forces in recent times. The constitutional ambivalence with regard to the provision of the uniform civil code at an unspecified future date has encouraged both the judiciary and rightist forces to see a uniform code as a necessity for national integration and secular nation-building. The appeal and promise of the common citizenship model is often invoked by those opposed to personal laws in hopes of realizing the goal of the uniform civil code.

In my analysis I draw upon historical, normative and constitutional sources to examine the justifiability of personal laws as a form of recognition of Muslims' cultural difference. Of the three approaches analyzed it is observed that the first two weigh in favour of the Muslims. In spite of the constitution's strong commitments to diversity, I conclude that with regard to the subject of personal laws, there is a grey area in constitutional interpretation that does not guarantee that Muslims can retain their cultural rights as a trump against the majority. The historical perspective informs us of the attractiveness of the idea of legal pluralism as a way of addressing inter-group relations in the sub-continent. The normative angle draws upon the contemporary discussion of multiculturalism and uses it to show why the maintenance of separate personal laws is a morally appropriate way of providing recognition to Muslims' cultural difference.

While much of the foregoing analysis concentrates on how Muslims as a minority community fare vis-à-vis the Hindu majority, the legal dispute surrounding the Shah Bano case raised another crucial matter related to intra-group justice. Both the judiciary and those sympathetic to considerations of gender justice regard the practice of Muslim personal laws as *un*just to Muslim women, denying them equal privileges in divorce settlements and alimony rights. The normative indictment following this way of looking at cultural difference raises questions about the authenticity of cultural representation and about the practices of Muslim men towards women. I argue the need to trust the commitments of the Muslim community, and particularly its religious leadership, the *ulema*, in owning up collective responsibility to take care of the needs of its unjustly treated women. However, I also acknowledge the limits to what extent such trust can be

reposed. In what would be fair to all communities—majority and minority alike—I argue for an optional code that would meet the interests of those willing to opt out of the confines of personal law jurisdiction. This would successfully meet the liberal requirement of allowing individuals the option of exit and meet criticisms of unfairness toward women as a group within the broader community. Overall, in analyzing the moral claim of Muslims to retain their personal laws, I argue that the Muslims' demand for recognition of their distinctive culture is fair and ought to be respected.

In chapter 4 I examine the problem of caste disadvantage and suggest that affirmative action for the untouchables (Dalits) is a requirement of justice. In defining affirmative action as a state-mandated policy aimed at ensuring the political inclusion of significantly disadvantaged groups, I justify its necessity for untouchables who have remained for centuries at the periphery of the social system bearing the burden of discrimination and (consistent patterns of) structural inequalities. Equal treatment of disadvantaged castes entails recognizing their cultural disadvantage vis-à-vis the upper castes and finding an appropriate redistributive remedy. While making a case for untouchables (and the Scheduled Tribes) for positive action on the part of the state, I also make a distinction between affirmative action on the one hand and preferential policy as an accommodationist measure toward powerful or dominant groups on the other.

In acknowledging the clear and unambiguous stipulations of the constitution that allows the Indian state to embark upon a fairly extensive policy of affirmative action, I also note the ambiguities in specifying and identifying the beneficiaries. The ambiguities are determined by a lack of fixity in defining who exactly constitutes the 'backward

classes' and what the state and larger society owe them. Owing to this indeterminacy, the last (2nd) Backward Classes (or Mandal) Commission recommended in its Report that affirmative action policies should be extended to include (Other Backward Classes) OBCs as well. In following the logic of proportional equality and the existing constitutional guarantees of quotas for Scheduled Castes (15 per cent) and Scheduled Tribes (7.5 per cent), the Mandal Commission recommended an extension of quotas by a further 27 per cent for all federal jobs.

Since Mandal, academic debate in India has largely questioned the fairness of caste-based preferential policies with some supporting the Mandal Report's recommendations' extension of job reservations, and others arguing against reservations of any sort. A third line of inquiry disputes Mandal's criteria for determining caste backwardness. My approach, on the contrary, has been to engage normatively the implications of the different conceptions of equality articulated in discussions on affirmative action including the Mandal Report.

In drawing upon the standard justifications of, and responses to, affirmative action—of nondiscrimination, equality of opportunity, and group disadvantage—I argue that group disadvantage trumps the other two. In this connection, I make a stronger case for the untouchables as more deserving of affirmative action policies than the OBCs by contending that, barring a few cases, most OBCs do not justify being treated properly as disadvantaged groups. The fact that reservations in India exist by way of quotas, considered a stronger version of affirmative action, compromises the case of OBCs further. As a remedy against political populism that thrives on ensuring vote banks by

way of distributing scarce goods in society, I urge the moral necessity of correcting the improper uses of (less compelling) equality arguments by reintroducing the limits of the justification of group disadvantage.

Clearly, the argument made is for sustaining and supporting the case of the untouchables as against those of the OBCs. In the context of affirmative action, this is setting limits on how far we can go in accommodating the deserving claims and ruling out from serious contention those claims that are not deserving. In a context where the criteria of affirmative action policies are based on groups (caste), the idea of group disadvantage should set rightful grounds for, and limits of, such policies.

Moral Relevance of Group Disadvantage: Caste and Religion

Cultural recognition of Muslims' distinctive status and affirmative action policy (reservations) for untouchables are two strong cases of group rights that I argue for in the Indian case.

As two significantly large ascriptive communities with a combined population of roughly 280 millions (but demographically scattered throughout the country) the political fortunes of untouchables and Muslims in post-Independence India have been more or less similar. Cohabiting an adverse political climate particularly in the preceding two decades, the two groups in question have been victims of increasing inter-group violence and growing resentment in the public sphere. Both the untouchables and Muslims in their own specific ways are significantly disadvantaged, each requiring reasonable accommodation and fair and equal treatment by norms of group-sensitive liberal justice.

There is clearly a very compelling need to address injustices toward these groups without losing sight of the historical significance of their political construction in the pre-colonial, colonial and postcolonial phases. The status that they eventually enjoy in relation to other citizens and groups is of utmost importance for the security and stability of the political system.

As disadvantaged groups, both the untouchables and Muslims experience negative stereotyping and discrimination, in short misrecognition of their status and lack of respect from the wider community. A general policy of non-discrimination or nonrecognition by the state is not enough to ensure full citizenship and respect that they deserve from others. On the contrary, it further compounds the problems of misrecognition that members of these groups face from the wider community. Equal treatment requires recognizing their collective status and appropriate means to do away with their group disadvantage emanating from cultural and economic inequalities. In other words, justice requires appropriate policies of recognition of their differential status and commitments that underscore the need to treat differently dissimilar forms of difference.

Some argue for the merits of a secular approach that cuts across caste and religious divides. The upshot of the approach that I undertake argues that the core of secularism is actually helped both by 1) dissolving hierarchies (for example, of caste categories by stressing its relevance in requiring fair solutions to those disadvantaged by way of appropriate state-sponsored positive action strategies); and 2) accommodating diversity (for example, by acknowledging the cultural disadvantage of religious minorities vis-à-vis the majority and re-emphasizing their cultural difference for policy

purposes). Both attest to, in different ways, the social bases of self-respect without which it is difficult to imagine how a just social and secular order is indeed possible.

Justice Toward Groups: Bivalence of Recognition and Redistribution

The Indian case illustrates the need to exercise careful attention and circumspection before attempting to conflate all forms of diversity into a uni-dimensional model of the recognition-of-cultural-difference category. Even with regard to the above category, as I have noted in the Introduction, there is no quick-fix solution as such and that much would depend on the concrete nature of, and the complex interplay between interests, institutions, and norms of fairness. Though tempting, the solution of cultural recognition by itself is not a sufficient guarantee to do away with all forms of group disadvantage; there indeed are good reasons for distinguishing between various forms of social and cultural diversity that are sensitive not only to the recognition aspects of group identity but attend to group interests that are otherwise and equally salient.

Although most liberals sympathetic to claims of cultural difference will not have much problems in endorsing, howsoever skeptically, the rights of Muslims in India to adhere to their own personal laws (possibly with limits), the question of affirmative action is rarely defended on grounds of group difference alongside respect for cultural difference. Liberal multiculturalists usually regard affirmative action, by virtue of responding to mainly economic disadvantage, as falling outside the scope of their research. Owing to an understanding that affirmative action is after all a policy aimed at *integrating* the excluded or disadvantaged (Kymlicka 1995) into the mainstream society

toward fuller citizenship and in any case may only be a *one-time* or *temporary* arrangement, multicultural liberals are liable to treat this category as more properly assistance rights (Levy 1997) that are necessary *accretions* to the existing individual rights framework.

Following the work of Fraser (1997) and the specificities of non-western societies in general and India in particular, I argue for the wisdom in addressing both the injustices of recognition and redistribution. Being significantly disadvantaged, both Muslims and untouchables, in the Indian case are what I would call "bivalent communities" that is, they suffer injustices of both recognition and redistribution.[126] On a recognition-redistribution spectrum the Muslims in India will lie closer to the recognition end and the untouchables toward the redistribution mode. Although both of them suffer significant bivalent disadvantages, the Muslims are a special case of qualifying for cultural recognition and the untouchables for redistributive benefits. The *bivalent* nature of justice is essential to redress the different injustices that these two disadvantaged groups in India face today.

As exemplified in the Indian case, an understanding of the different types of group disadvantages and corresponding strategies of fairness will hopefully contribute toward enriching the political theory of multiculturalism by enhancing prospects of more research on cross-cultural studies and aiding helpful comparisons between the western and non-western cases.

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[126] I borrow this phrase from Fraser (1997) who uses it to describe gender and race as "paradigmatic bivalent collectivities." (1997: 19)

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