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Judicial Complicity with Communal Violence in India

Sara Ahmad

INTRODUCTION

Communal violence – or violence between groups which define themselves by their differences from each other¹ – is one of the foremost human rights problems today.² But the violence of the past 20 years differs from that of previous decades. Responsibility for current sectarian violence lies not with specific extremist groups but with governments which leverage inter-group hatred to gain power.³ Such systemic sources of communal violence threaten basic principles of democratic government and non-discrimination.⁴

Present-day communal violence originates in identity politics.⁵ Identity politics stress the group nature of rights, experience and identity, whether based on race, sex, caste, class, language, religion or national or regional origin.⁶ In many cases, the political-cultural

¹ HUMAN RIGHTS WATCH, *PLAYING THE "COMMUNAL CARD": COMMUNAL VIOLENCE AND HUMAN RIGHTS* vii (1995).

² *Id.*

³ *Id.* at vii-viii.

⁴ *See id.*

⁵ *Id.* at x.

⁶ *See* Valentine M. Moghadam, *Preface* to *IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE* ix, ix (Valentine M. Moghadam ed., 1994) ("identity politics" refers to discourses and movements organized around questions of religious, ethnic, and national identity); *see also* Vincent Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power. What Future for the State?*, *DAEDALUS*, Spring, 1995, at 23, 44-45; Leonard Stern, *Cultural Collision: Why the Jewish-Black Alliance Has Come Apart at the Seams*, *THE OTTAWA CITIZEN*, Jan. 22, 1995, at B1. Stern characterizes the operative assumption of identity politics as the assumption that a specific trait has some essentialist value. *Id.*

movements which engage in identity politics seek fundamental juridical changes, political power and, sometimes, cultural hegemony.⁷

Minority and women's rights advocates embrace identity politics because it has increased awareness of the legitimacy and unique experience of different groups such as women or Asian-Americans.⁸ In contrast, however, the sectarian strife that has repeatedly torn India, Ireland, Sri Lanka and Pakistan illustrates its potential dangers. The experience of these countries demonstrates that identity politics not only fragments groups but also may render them "autistic."⁹ The rhetoric of identity politics allows groups to enclose themselves in their own myths of self-righteous victimhood so that they cannot hear or learn from anyone other than themselves.¹⁰ By over-valuing their own identity, group members distort the identity of non-group members¹¹ and lose recognition of the common public interest which they share with those non-group members.¹² This perceived lack of common ground undermines civic values, frustrates dialogue and facilitates inter-group hostility. Such hostility manifests itself in communal violence.¹³

Governments engage in identity politics when they (1) claim the existence of a national monolithic identity; (2) use that identity as a rationale for judicial decisions against persons who do not share that identity; (3) excuse harassment of targeted communities; (4) fail to prosecute perpetrators of communal crimes; or (5) promote or direct violence against non-majority or non-member communities.¹⁴ These actions incite communal thinking and sectarian violence.

In India, government officials and political parties have engaged in identity politics, with disastrous consequences for majority and mi-

⁷ Moghadam, *supra* note 6, at ix. Moghadam distinguishes such movements from the movements of identity politics that are more expressive than political, and which represent the abandonment of the secular for the spiritual. For a more detailed discussion, see *id.*

⁸ See generally Bill Ong Hing, *Beyond The Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 900 (1993); see also Catherine A. MacKinnon, *From Practice to Theory, Or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 20-22 (1991).

⁹ See Michael Ignatieff, *Nationalism and the Narcissism of Minor Differences*, THE OTTAWA CITIZEN, July 2, 1995, at C1.

¹⁰ See *id.*

¹¹ See *id.*

¹² Cf. Vincent Cable, *Insiders and Outsiders; Politicians Must Learn to Satisfy Our Search for Belonging*, says Vincent Cable, THE INDEPENDENT (London), Jan. 23, 1994, at 19; Stern, *supra* note 6.

¹³ See HUMAN RIGHTS WATCH, *supra* note 1, at vii.

¹⁴ See *id.* at xv-xvi.

nority communities alike.¹⁵ These groups have used identity politics to promote separatist and exclusionary agendas which condone violence against non-group members.¹⁶ This form of communalism has made it extremely difficult for Indians today to relate to each other as Indians.¹⁷

Despite the active role the Indian judiciary has played in the struggle to end communal violence and related crimes,¹⁸ several recent court decisions evince the influence of identity politics on judicial thinking. These decisions undermine both the judiciary's independence and its commitment to the civil liberties of majority and minority communities.

The communal thinking in these decisions has taken several forms. First, courts have fueled communal sentiment by holding certain religious practices of minorities "un-Indian," and thus unconstitutional.¹⁹ These courts define the Indian identity in monolithic terms or in terms of the culture of the Hindu majority,²⁰ and, therefore, implicitly grant less than full rights and recognition to persons of "un-Indian" (*i.e.*, non-Hindu) communities.²¹ In addition, they reinforce stereotypical notions of membership in majority and minority communities and destroy awareness of the multiple identities Indians have as political, social and religious actors. Second, some courts have adjudicated claims implicating the relationship between secular law and religious law in favor of secular law, not out of concern for minorities under their religious law but in the interest of national integration.²² The perceived threat that national integration represents to the way of

¹⁵ See generally *id.* at 18-29. But cf. Radha Kumar, *Identity Politics and the Contemporary Indian Feminist Movement*, in *IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE*, *supra* note 6, at 274, 275 (arguing that the series of identity movements which seek to dominate national Indian society are undermined by the enormous range and variation of identities and identity politics). Kumar concedes, however, that such movements have had considerable success.

¹⁶ See generally HUMAN RIGHTS WATCH, *supra* note 1, at 18-29.

¹⁷ M. Moazzam Ali, *Death of the Gandhi-Nehru Model of Secularism and Minority Rights - Need for Resurrection Through New Constitutional Provisions*, in *MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY* 21, 26 (Tahir Mahmood ed., 1991).

¹⁸ See, e.g., *India. A System Shakes*, THE ECONOMIST, Mar. 23, 1996, at 35; *India: Indian Press Review for Thursday, March 24*, Reuters News Service - India, available in LEXIS, World Library, ALLWLD File.

¹⁹ See, e.g., *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531.

²⁰ See *id.*

²¹ See HUMAN RIGHTS WATCH, *supra* note 1, at xv.

²² See, e.g., *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945; *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531; the unreported *Rahmat Ullah* decision (described in John Rettie, *Divorce Ruling Puts Indian Judge at Odds With Muslims*, THE GUARDIAN, Apr. 30, 1994, at 15).

life of minorities in India has exacerbated communal sentiment. Third, the government's failure to adequately punish Hindu perpetrators of communal violence and its aggressive prosecution of non-Hindu perpetrators of such violence have inflamed ethnic sensibilities and diminished confidence in the political system.

Section One of this paper details the difference between current and past communal violence and summarizes the constitutional provisions which pertain to communal violence in India. Section Two examines several Indian judicial decisions, illustrates why these decisions have triggered communal reaction, and highlights alternative constitutional arguments which would have supported these decisions and possibly mitigated ensuing communal violence. Analysis of these cases demonstrates that the emergence of systemic communalism undermines both the secular underpinnings of the Constitution and the potential for peaceful pluralism in the country. Section Three concludes that in order to more effectively deter communal violence, judicial decisions which may have a communal impact should underscore their neutral constitutional rationales and emphasize the obligations of citizenship in a democracy.

I. HISTORY OF COMMUNAL VIOLENCE IN INDIA

A. Communal Violence, Pre-1970s

In India today, the greatest amount of sectarian conflict originates in tensions between Hindus and Muslims.²³ A variety of explanations for the conflict exist. They include: (1) the Muslim invasions of India one thousand years ago;²⁴ (2) forcible conversion of some Hindus to Islam; (3) the cultural and religious differences between Hindus and Muslims; (4) the psychological effect of the partition of the Indian subcontinent into a predominantly Hindu India and a predominantly Muslim Pakistan; (5) the poverty of Muslims who remained in India after the partition; and (6) the establishment of Hindu political supremacy in India.²⁵ However, historians often attribute the communal violence of this century to the British colonization

²³ See HUMAN RIGHTS WATCH, *supra* note 1, at 19. Ethnic, religious and caste tensions exist between a number of groups in India, but the focal point of this Comment is the Hindu-Muslim conflict.

²⁴ Vyvyan Tenorio, *Hindu-Muslim Friction Confronts Gandhi with Fresh Challenge*, THE CHRISTIAN SCI. MONITOR, Mar. 17, 1986, at 14; Rajiv Desai, *Rajiv Gandhi Struggles to Modernize His India*, CHI. TRIB., Nov. 17, 1986, at 15.

²⁵ Pravin J. Patel, *Communal Riots in Contemporary India: Towards a Sociological Explanation*, in CRISIS AND CHANGE IN CONTEMPORARY INDIA 370, 371-73 (Upendra Baxi and Bikhu Parekh eds., 1995).

of India.²⁶ Before the British came to India, Indian politics was a world of minorities.²⁷ Caste, occupation, language and regional differences influenced identity²⁸ and defined concepts of community.²⁹ In addition, limited infrastructure localized identity because it hindered the formation of national, monolithic communities of Hindus or Muslims.³⁰ Consequently, for example, landlord groups composed of members of various religions often formed alliances against the local peasantry.³¹ Identity was also fluid enough to permit movement between caste or religious groups.³² Thus, many people performed rites of several different faiths and observed different religious customs at different times in their lives.³³

The British altered identity formation by codifying caste and religious affiliation in census and other official records.³⁴ These records permanently categorized the religious identities of individuals.³⁵ The British also fueled the communalization of Indian politics by eliminating earlier social patterns in the distribution of power.³⁶ They created government positions which Hindu Brahmins, the more literate classes, filled in large numbers.³⁷ In response, Muslims fearful of Hindu rule petitioned the British to establish separate electorates in order to create a base of Muslim power.³⁸ Consequently, in 1909, the British passed the Morley-Minto reforms, which granted Indians a limited right to vote but required that each religious community vote in separate electorates.³⁹ Hence, where political power had previously resided in localities, Hindus and Muslims now had to organize and

²⁶ See Tenorio, *supra* note 24.

²⁷ Sudipta Kaviraj, *Religion, Politics and Modernity*, in *CRISIS AND CHANGE IN CONTEMPORARY INDIA*, *supra* note 25, at 295, 305.

²⁸ HUMAN RIGHTS WATCH, *supra* note 1, at 19-20. See also Sucheta Mazumdar, *Moving Away from a Secular Vision? Women, Nation, and the Cultural Construction of Hindu India*, in *IDENTITY POLITICS & WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE*, *supra* note 6, at 243, 248-49.

²⁹ Mazumdar, *supra* note 6, at 248. Mazumdar notes that for the vast majority of people, village affiliation, as formulated by caste, defined identity. *Id.* at 249.

³⁰ HUMAN RIGHTS WATCH, *supra* note 1, at 19.

³¹ *Id.* at 19-20.

³² *Id.* at 20 n.5.

³³ *Id.* "Thus, for example, many Punjabis viewed themselves as members of local castes which were Hindu and Sikh or Hindu and Muslim." *Id.*

³⁴ *Id.* at 20.

³⁵ *Id.* at 20 n.5.

³⁶ See Parmanand Singh, *The Problem of Minorities and the Constitution - A Prefatory Note*, in *MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY*, *supra* note 17, at 7.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

lobby nationally, along religious lines to gain political power.⁴⁰ By transforming the fluid and localized conception of the social universe into the modern image of mapped and counted voters, the British engineered a modernist reconstruction of the Indian polity which helped to reorient identity along sectarian lines.⁴¹ Many theorize that these political and cultural changes led to the ensuing communal violence in the period during and after British rule.⁴²

B. Communal Violence, 1970s-1990s

Thus, the myth that hatred and violence from time immemorial explain communal violence in India today is untenable.⁴³ Rather, identity politics, communal thinking and sectarian violence are the direct result of government actions that have exploited group differences to win legitimacy and power.⁴⁴ In fact, the experience of India parallels a global trend, wherein "[The] proximate cause of communal violence is government exploitation of communal differences."⁴⁵

The incidence of communal riots in post-partition India correlates with the emergence of government-sponsored identity politics. Aside from the period immediately following independence, communal riots occurred infrequently during the 1950s and 1960s.⁴⁶ Since then, however, the number of communal riots in India has grown at an unprecedented rate.⁴⁷

⁴⁰ HUMAN RIGHTS WATCH, *supra* note 1, at 17. Singh, *supra* note 36, asserts that Lord Minto endorsed the Muslim petition because it would act as a counterpoise to nascent Indian nationalism. *Id.* at 7. The separate electorates for Hindus and Muslims aroused political consciousness among other groups fearful of the Hindu majority, and hence, these groups subsequently demanded their own separate communal electorates. *Id.* at 7-8.

⁴¹ See Kaviraj, *supra* note 27, at 300.

⁴² See Singh, *supra* note 36, at 9-10.

⁴³ See HUMAN RIGHTS WATCH, *supra* note 1, at viii. Media accounts and policy debates continue to describe conflicts around the world as ethnic conflicts, in which each rival group has a monolithic and unchanging definition. *Id.* at x. Such notions of identity rarely exist in fact. *Id.* For example, prior to the intervention of Europeans in Rwanda, Hutu and Tutsi were not ethnic definitions but rather were labels for changeable economic status: one was Hutu when poor, and Tutsi when more prosperous. *Id.* at xi.

⁴⁴ See *id.* at viii.

⁴⁵ *Id.* at viii. Cf. *Clerics Believe Religion Is Being Abused*, THE IRISH TIMES, Nov. 28, 1995, at 2 (describing how religious symbolism and sentiments are being used for social and political ends).

⁴⁶ Patel, *supra* note 25, at 370, 371.

⁴⁷ *Id.* See also Anthony Chase, "Pakistan or the Cemetery!": Muslim Minority Rights in Contemporary India, 16 B.C. THIRD WORLD L.J. 35, 35 (1996); Shalendra D. Sharma, *Indian Democracy and the Crisis of Governability*, 18-SPG FLETCHER F. WORLD AFF. 147, 148 (1994) (book review).

Modern communalization of Indian politics by government officials began during the 1970s when Indhira Gandhi's Congress Party lost support from its traditional electoral base.⁴⁸ To regain political support, Mrs. Gandhi tried to appeal to conservative Hindus by beginning state functions with Hindu rituals and by using Hindu symbols at political rallies.⁴⁹ Concurrently, by seeking support from conservative Muslims and ignoring the views of secular and progressive Muslims, the Congress Party encouraged the creation of a monolithic conservative Muslim identity.⁵⁰ This trend continued under Prime Minister Rajiv Gandhi, who also supported Muslim conservatives, campaigned in 1984 for the rule of the Hindu God Ram over India, and permitted the increasingly vitriolic speech of the Hindu right-wing.⁵¹ Since this time, overt use of upper-caste-Hindu symbolism has helped define national culture as Hindu culture,⁵² thereby simulating a national identity which only further divides the country along religious lines.

These actions set the stage for the Bharatiya Janata Party (hereafter BJP) to campaign on a platform favoring governance of the country according to principles of Hinduism.⁵³ The BJP won 15 percent of the vote in the 1989 national elections and gained control of four state assemblies, including Uttar Pradesh, the most populous state in India.⁵⁴ Other parties such as the Vishwa Hindu Parishad (World Hindu Council) (hereafter VHP), which aims to give Hinduism the dominant place in India, have grown in number and strength.⁵⁵ Today, every

⁴⁸ Chase, *supra* note 47, at 40-41; Sharma, *supra* note 47, at 150-51. Chase describes Mrs. Gandhi's crackdown against the Sikhs as "a rallying cry for Hindus." Chase, *supra*, at 41.

⁴⁹ HUMAN RIGHTS WATCH, *supra* note 1, at 21. See also Chase, *supra* note 47, at 40. Today, Hindu revivalist bodies such as the Rastriya Swayamsevak Sangh (National Volunteer Organization) and the Viswa Hindu Parishad (World Hindu Council) coordinate nationwide rallies and public meetings. Rajiv Tiwari, *India: Tridents Spearhead Hindu Revivalism*, Inter Press Service, Sept. 3, 1986, available in LEXIS, World Library, ALLWLD File.

⁵⁰ See HUMAN RIGHTS WATCH, *supra* note 1, at 21.

⁵¹ *Id.* See generally Bharat Wariavwalla, *Gandhi Zig-Xags In An India of Mutual Hindu-Muslim Mistrust*, L.A. TIMES, Aug. 9, 1987, § 5, at 2.

⁵² Mazumdar, *supra* note 28, at 247.

⁵³ HUMAN RIGHTS WATCH, *supra* note 1, at 22 n.7. For a discussion of the rise of the BJP, see Edward A. Gargan, *Hindu Rage Against Muslims Transforming Indian Politics*, N.Y. TIMES, Sept. 17, 1993, at A1; Christopher Thomas, *Riding the Chariot of Fire*, THE TIMES (London), Mar. 16, 1991, at Features; David Housego, *Indian Elections; Hindu Party's Rise Unsettles Moslem North*, FIN. TIMES (London), May 14, 1991, at 4.

⁵⁴ HUMAN RIGHTS WATCH, *supra* note 1, at 22.

⁵⁵ See Mazumdar, *supra* note 28, at 245; M.R. Narayan Swamy, *Hindu Group Sets Religious Agenda For Elections*, Agence France Presse, Jan. 19, 1996, available in LEXIS, World Library, ALLWLD File.

party plays the communal card at elections,⁵⁶ thereby crystallizing differences and hostilities between groups.

C. Constitutional Provisions Relevant to Communal Violence

The provisions of the Indian Constitution reflect a delicate balance between fundamental rights and the state's duty to safeguard public order and nondiscrimination.⁵⁷ The Preamble underscores the nation's commitment to secularism and people's commitment to secure to all its citizens:

justice, social, economic, political; *liberty of thought, expression, belief, faith and worship; equality of status and of opportunity*; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation.⁵⁸

Consonant with the Preamble, the State guarantees to all persons equal protection of the laws⁵⁹ and prohibits State discrimination against any person on grounds of religion, race, caste, sex or place of birth.⁶⁰

Concurrently, Article 25 ascribes to all persons in India – subject to public order, morality, and health – the right to freedom of conscience and to freely profess, practice, and propagate religion.⁶¹ Article 26 permits every religious denomination – subject to public order, morality, and health – to manage its own affairs in matters of religion and to establish institutions for that purpose.⁶² Thus, while the body of secular law consisting of the Constitution, the Code of Criminal Procedure and other statutory law governs the behavior of all persons in India, Articles 25 and 26 permit individuals and groups to order

⁵⁶ Singh, *supra* note 36, at 15.

⁵⁷ India is a union of states. INDIA CONST. pt. I (The Union and Its Territory), art. 1(1). Executive power lies with the President of the Union. *Id.*, art. 52-53. Parliament consists of the President and a bicameral legislature. *Id.*, art. 79.

The Indian judiciary consists of the Supreme Court of the Union, *id.* at 124(1), state courts including subordinate courts, *see id.*, art. 233(1), and a state High Court. *Id.*, art. 215. The Supreme Court has original jurisdiction over disputes between states and over disputes involving the Union. *See id.*, art. 131. The Supreme Court also has broad appellate jurisdiction which includes jurisdiction over any judgment, decree or final order of a High Court of any territory (1) when the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution, *id.*, art. 132; (2) when the High Court certifies that the civil matter is of general importance and one which the Supreme Court should decide, *id.*, art. 133; and (3) when the High Court decision involves a death sentence in a criminal case or involves a question fit for appeal for the Supreme Court. *See id.*, art. 134(1).

⁵⁸ INDIA CONST. pmb. [emphasis added].

⁵⁹ INDIA CONST. pt. III (Fundamental Rights), art. 14.

⁶⁰ INDIA CONST. pt. III (Fundamental Rights), art. 15.

⁶¹ INDIA CONST. pt. III (Fundamental Rights), art. 25.

⁶² INDIA CONST. pt. III (Fundamental Rights), art. 26(a)-(b).

their personal affairs according to the dictates of their religion. Hence, Islamic law governs the personal affairs of Muslims, Christian law the personal affairs of Christians, Hindu law the personal affairs of Hindus, and tribal codes the personal affairs of tribals.⁶³ Personal affairs include matters relating to marriage and dissolution of marriage, infants and minors, adoption, wills, intestacy and succession, and matters pertaining to the family's structure.⁶⁴

The problem posed by personal laws is that their very existence implies unequal protection of the laws and creates potential for state discrimination on grounds of religion. The difficult question is therefore whether provisions of the secular Constitution trump personal law provisions when there is a conflict between them. The Supreme Court first addressed this issue in a case concerning the conflict between the Hindu prohibition against bigamy and the limited Islamic right to polygamy.⁶⁵ In these cases, the Muslim personal law permitting polygamy was allegedly void because it fell within the scope of Article 13.⁶⁶ Article 13 states that "laws in force" at the time the Constitution went into effect and which conflict with the Constitution's fundamental rights provisions are void.⁶⁷ The Supreme Court did not agree. It instead held that Article 13 does not apply to personal laws. First, the Constitution's drafters did not intend to bring personal laws within the application of Article 13.⁶⁸ Second, other constitutional provisions implicitly recognize the continued existence of personal

⁶³ M.R. Narayan Swamy, *Indian Supreme Court Orders Universal Law for Hindus, Moslems*, Agence France Presse, May 11, 1995, available in LEXIS, World Library, ALLWLD File. Hindu personal law also applies to Sikhs, Buddhists, and Jains, who together constitute four percent of the population. *Id.*

⁶⁴ INDIA CONST. pt. XI (Relations Between the Union and the States), art. 246, Seventh Schedule, List III, §5. For Muslim women, personal matters include maintenance, guardianship of children and dower. Muslim Personal Law (Shariat) Application Act, 1937, §2 (Act 26 of 1937), India A.I.R. Manual (1979). Note, however, that the scope of each personal law differs. For example, adoption has a prominent place in Hindu personal laws but receives no recognition in Muslim personal law. TAHIR MAHMOOD, *AN INDIAN CIVIL CODE AND ISLAMIC LAW* 26 (1976).

The personal law of Muslims varies by sect. Muslims are Sunni or Shia. SIR D.F. MULLA, *PRINCIPLES OF MAHOMEDAN LAW* 24 (16th ed. 1968). Moreover, there are four main schools of Sunni law: the Hanafi school, the Maliki School, the Shafii School and the Hanbali School. *Id.* Because the majority of Indian Muslims are Hanafi School Sunnis, *id.*, this Comment focuses on the provisions of Hanafi Law.

⁶⁵ See, e.g., *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom 84, 87. For a discussion of the conflict between Constitutional fundamental rights and personal law provisions, see TAHIR MAHMOOD, *MUSLIM PERSONAL LAW* 88-94 (2d ed. 1983).

⁶⁶ *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom 84, 88.

⁶⁷ INDIA CONST. pt. III (Fundamental Rights), art. 13(1).

⁶⁸ See *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom 84, 89.

laws.⁶⁹ Third, if the courts recognize discrimination on the basis of the *existence* of different personal laws, personal laws in India could not exist.⁷⁰ Thus as far as the Court is concerned, the mere existence of different personal laws does not violate the non-discrimination and equal protection provisions of the Constitution.⁷¹

However, the State has ample leeway with which to modify and regulate personal law provisions. For example, on countless occasions the State has engaged in legislative or judicial reform of religious practices.⁷² In addition, the Constitution itself permits the State to do so in several ways. The State may provide for social welfare and reform and establish public Hindu religious institutions open to all classes and sections of Hindus.⁷³ It may also regulate activities involving any economic, financial, political, or other secular activity which may be associated with religious practice.⁷⁴ In addition, notwithstanding Article 26, Article 44 encourages the state to create for all persons in India a uniform civil code⁷⁵ which could supersede personal laws.

II. JUDICIAL COMPLICITY WITH COMMUNAL VIOLENCE

In the past ten years, three kinds of judicial decisions have tended to provoke hostile communal attitudes and to spark acts of sectarian violence. They include (1) decisions which hold that certain religious practices are un-Indian; (2) decisions which, out of concern for national integration, undermine the rights under Articles 25 and 26 to profess and practice religion; and (3) decisions which resolve cases involving communal crimes on the basis of over-riding political considerations. Each type of decision has challenged the constitutional relationship between religious and secular law.

⁶⁹ *Id.*

⁷⁰ *Gurdial Kaur v. Mangal Singh*, A.I.R. 1968 Punj. 396, 398. However, in *Gurdial Kaur v. Mangal Singh*, the judge did not hold that the personal law provision in question was a law in force under Article 13(1). He simply held that it did not violate the non-discrimination clause of the Constitution. ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY 207 (1992).

⁷¹ MAHMOOD, *supra* note 65, at 90. But see PARASHAR, *supra* note 70, at 202-213. (challenging the rationales of the Bombay High Court in *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84, and arguing that the Constitution's drafters did not envisage religious personal laws as extra-constitutional laws).

⁷² For a general discussion of reforms in Hindu and minority personal laws, see PARASHAR, *supra* note 70, at 200; see also H.A. GANI, REFORM OF MUSLIM PERSONAL LAW 144, 146 (1988) (arguing that personal laws have been repeatedly reformed, by the State, by the courts and by the British).

⁷³ INDIA CONST. pt. III (Fundamental Rights), art. 25(2)(b).

⁷⁴ INDIA CONST. pt. III (Fundamental Rights), art. 25(2)(a).

⁷⁵ INDIA CONST. pt. IV (Directive Principles of State Policy), art. 44.

A. Decisions Based On A Nationalistic View Of The Indian Identity

Judicial decisions which endorse a narrow, rigid view of the Indian identity contravene principles of Indian secularism and fuel xenophobic communal attitudes. In 1994, the Supreme Court re-emphasized the fact that the Constitution prohibits the state from identifying itself with or favoring any particular religion or religious sect or denomination.⁷⁶ Judicial opinions which favor a monolithic view of the Indian identity are therefore unconstitutional. Nonetheless, the decisions discussed below illustrate the influence of communal thinking on the judiciary and suggest one way in which the judiciary can trigger communal animosity.

Increasingly in India today, the terms "true Indian," "un-Hindu," or "true Muslim" surface in judicial decisions.⁷⁷ Typically, the "true Indian" argument appears with respect to cases where religious law conflicts with other religious or secular law.⁷⁸ For example, when the pressure brought to bear on one divorced Muslim woman induced her to renounce the Supreme Court order for maintenance which she had won,⁷⁹ Muslim fundamentalist groups hailed her for having become a *true* Muslim woman.⁸⁰

"True Indian" arguments have been made in cases involving Hindu men who challenge the exclusive right of Muslim men to have more than one wife.⁸¹ For example, in *Sarla Mudgal v. Union of India*,⁸² four women sued for bigamy after their husbands converted to Islam in order to marry again without first divorcing them.⁸³ The

⁷⁶ S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918, 2000.

⁷⁷ See Mazumdar, *supra* note 28, at 243; Suzanne Goldenberg, *Indian Nationalists Poised for Success*, THE GUARDIAN, May 6, 1996, at 8; Rajmohan Gandhi, *How India Can Survive*, WORLD PRESS REV., MAR., 1994, at 52; *India: Illusions Desert Voters in Unwanted Poll*, THE GUARDIAN, May 15, 1991, available in LEXIS, World Library, ALLWLD File.

⁷⁸ Cf. *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531; see also Goldenberg, *supra* note 77, at 8; Gandhi, *supra* note 77, at 52.

⁷⁹ Kumar, *supra* note 15, at 283.

⁸⁰ *Id.* The decision in *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945, is discussed at length *infra* at Section II.B.1.

⁸¹ Islamic law permits marriage to more than one woman (and at most, to four women) at a time. MULLA, *supra* note 64, at 251. The Quran makes it virtually impossible to do so, however. The husband should "mete out absolutely equal treatment to all his wives in all objective matters." K.N. AHMED, *THE MUSLIM LAW OF DIVORCE* 611 (1978). "Thus he has to provide equal maintenance, servants, presents and accommodation to all his wives; he is also under an obligation to pass equal time with each wife turn by turn." *Id.*

⁸² *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531.

⁸³ *Id.* at 1533; see also Alka L. Handoo, *Civil Code Call Stirs Horner's Nest*, NEW STRAITS TIMES (Malaysia), July 19, 1995, at 12.

Supreme Court held that the second marriages violated Hindu personal law and were therefore invalid.⁸⁴ In his concurring opinion, one justice further noted that the conversions were made only to escape the consequences of bigamy.⁸⁵

But rather than squarely condemn the defendants for their conversions to Islam, the Court unambiguously laid the blame for fraudulent conversions to Islam on the plurality of personal laws in India.⁸⁶ It called on the government to enact a uniform civil code for people of all religions.⁸⁷ The Court further noted that State reforms of Hindu, Buddhist, Jain and Christian personal laws showed that these groups "had forsaken their sentiments for the cause of national unity," while other communities had not done so.⁸⁸ In addition, the Court implicitly distinguished between "true Indians" and those who engaged in religious practices which deviated from rituals of the majority:

Those who preferred to remain in India after [the partition of India], fully knew that the Indian leaders did not believe in [a] two-nation or three-nation theory and that in the Indian Republic there was to be only one nation – [the] Indian Nation – and no community could claim to remain a separate entity on the basis of religion.⁸⁹

Understandably, the Court's call for a uniform civil code was instigated by the the "totally unsatisfactory state of affairs" without one⁹⁰ and the need to check the abuse of religion.⁹¹ However, in the existing socio-political climate, calls for a uniform civil code only exacerbate communal sentiment because the proposed code promoted by the Congress Party resembles Hindu laws.⁹² Furthermore, the most

⁸⁴ *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, 1537. The Supreme Court examined a variety of cases involving conversion with subsequent remarriage, and concluded that dissolution of a marriage celebrated under one personal law does not occur when a party to the marriage converts to another religion. *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, 1536.

⁸⁵ *Id.* at 1540 (Sahal, J., concurring).

⁸⁶ *Id.* at 1533. "Till the time we achieve the goal – uniform civil code for all citizens of India – there is an open inducement to a Hindu husband who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim." *Id.*

⁸⁷ *Id.* at 1539.

⁸⁸ *Id.* at 1538.

⁸⁹ *Id.* at 1539.

⁹⁰ *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, 1538 (quoting Justice O. Reddy's opinion in *Jordan Diengdeh v. S.S. Chopra*, A.I.R. 1985 S.C. 935).

⁹¹ See *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, 1540 (Sahal, J., Concurring).

⁹² Madhu Mehra, Remarks at the Conference on Women Resisting Violence; A Sub-Regional Preparatory Meeting for the 1995 Beijing Conference on Women (June 11, 1995) (transcripts available from Dr. Hameeda Hossain; 7, New Bailey Road; Dhaka 1000, Bangladesh); see also GANI, *supra* note 72, at 109 (quoting an interview of Asghar A. Engineer). One operating assumption of those in favor of scrapping personal laws is that the Hindu personal law on which the proposed Code is based is secular because it has been reformed much more than other

vocal supporters of the code are Hindu fundamentalists.⁹³ Consequently, many minorities fear that a uniform code will allow non-minorities to define the rights of minorities and impose "Hindu" rights and obligations on non-Hindus.⁹⁴

Given this environment, the *Sarla Mudgal* decision provoked communal animosity in two ways. First, by suggesting that bigamy is un-Indian, the Court implied that Muslims in India are un-Indian. Second, whatever the merits or demerits of bigamy, Muslims interpreted the Court's pronouncement not as a statement about the plight of women but as a statement about the perceived problems which Muslims pose to national unity and social reform.⁹⁵ In this light, minorities viewed the call for a uniform civil code as a threat to their constitutionally protected right to manage their own religious affairs.⁹⁶

The non-discrimination and equal protection clauses of the Constitution,⁹⁷ in conjunction with the guarantees of freedom of conscience,⁹⁸ prevent the state from giving a particular religion or sect preference over others.⁹⁹ Hence, courts should instead base their decisions on "secular" arguments and policy considerations independent of sectarian notions of "true Indian" identity.

The Court in *Sarla Mudgal* could have done so in several ways. For example, the Bombay High Court had previously held that religious practices which undermine public order, morality, or health

personal law. Madhu Kishwar, *Pro-Women or Anti-Muslim? The Furore Over Muslim Personal Law*, in *THE SHAH BANO CONTROVERSY* 52, 55 (Asghar A. Engineer ed., 1987). For a discussion of the range of problems Hindu women suffer under Hindu personal law, notwithstanding such reform, see *id.* at 55-56.

⁹³ Asghar A. Engineer, Introduction to *THE SHAH BANO CONTROVERSY*, *supra* note 92, at 18; see also Anika Rahman, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473, 480 (1990). The VHP, the RSS, and other similar organizations have vociferously demanded the imposition of a common civil code. Engineer, *supra* note 92. Engineer argues that whatever the merits may be of such a code, when the demand for it comes from communalist Hindus, it arouses deep suspicions among the Muslim intelligentsia that what is being demanded is a Hindu code. *Id.*

⁹⁴ Swamy, *supra* note 63.

⁹⁵ In the context of social and economic changes, women and family life often become repositories of cultural identity. See Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 812 (1992).

⁹⁶ Rahman, *supra* note 93, at 480. One author notes that Muslim sentiment concerning a uniform civil code was unfounded. GANI, *supra* note 72, at 45. He asserts that laws enacted to reform Hindu personal law have not ousted the place of Hindu personal law in the lives of Hindus. *Id.* Further, one version of the Code under consideration would allow individuals to choose whether the Code or personal law would govern their personal affairs. *Id.*

⁹⁷ INDIA CONST. pt. III (Fundamental Rights), art. 14, 15.

⁹⁸ INDIA CONST. pt. III (Fundamental Rights), art. 25, 26.

⁹⁹ S.R. Bommai v. Union of India A.I.R. 1994 S.C. 1918, 2000.

must give way to the good of the people of the State as a whole.¹⁰⁰ In, several bigamy decisions, Indian courts had held that a Hindu or Christian who converts to Islam to remarry is not exercising his freedom of conscience and converts fraudulently.¹⁰¹ The Court in *Sarla Mudgal* could have argued that such fraudulent conversions are a "growing menace"¹⁰² contrary to both public order and morality and are an injustice to both Hindu and Islamic law.¹⁰³ They also violate the spirit of the constitutional guarantee of freedom of conscience.¹⁰⁴ Given that these fraudulent conversions could potentially worsen group relations, the Court had ample justification for regulating a personal law issue such as bigamy on constitutional grounds.¹⁰⁵

Another example more pointedly demonstrates the emergence of problematic "true Indian" rationales. In December 1992, Hindu fundamentalist forces destroyed the Muslim Babri Mosque in Ayodhya.¹⁰⁶ Immediately afterward, two judges of the state's High Court reinforced the claim of Hindu groups to the contested site of

¹⁰⁰ *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom 84, 86.

¹⁰¹ *See id.* *See also* *In Re Nagarassayya*, 1988 Mat. LR 123 and *B. Chandra Manakiamma*, 1988 A.P. LJ 1848 (discussed in Tahir Mahmood, *Freedom of Conscience and Conversion to a Minority Religion - Legal Parameters and Social Realities*, in *MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY*, *supra* note 17, at 78, 81 n.41).

¹⁰² Handoo, *supra* note 83.

¹⁰³ Tahir Mahmood, *Islamic Law in the Indian Court 1988*, IX *Islamic C.L.Q.* 57 (1989).

¹⁰⁴ Tahir Mahmood, *Freedom of Conscience and Conversion to a Minority Religion - Legal Parameters and Social Realities*, in *MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY*, *supra* note 17, at 79.

¹⁰⁵ The Bombay High Court has said of Articles 25 and 26:

If religious practices run counter to public order, morality or health, or a policy or social welfare upon which the State has embarked, then the religious practices must give way. . . If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social welfare and reform and if it is a measure of social reform the State is empowered to legislate with regard to social reform under Art. 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate religion.

State of Bombay v. Narasu Appa Mali, A.I.R. 1952 Bom. 85, 86-87.

¹⁰⁶ HUMAN RIGHTS WATCH, *supra* note 1, at 28. In the latter months of 1992, various political parties and religious and cultural groups publicly called on Hindus to demolish the Babri mosque in Ayodhya, Uttar Pradesh, and to build a Hindu temple in its place. In their view, the site was the birthplace of the Hindu God Ram, and the building of the temple was therefore a fundamental step in the establishment of *Hindutva*, or Hindu rule. *Id.* Over 150,000 militants answered the call and came to Ayodhya to destroy the mosque. HUMAN RIGHTS WATCH, *supra* note 1, at 23. In mid-December of 1992, they gathered in Ayodhya and destroyed the sixteenth century mosque, attacked Muslims in the neighborhood, looted Muslim shops and burned their homes. *Id.* at 18. In the two days following the destruction of the mosque, 14 Muslims were killed and 267 houses, 23 mosques, and 19 grave sites were destroyed in Ayodhya. *Id.* at 23.

The local, state and central governments allowed the destruction of the mosque, despite discussions in the weeks before December 6 of the need for protection of the mosque and warnings of its imminent destruction. *Id.* State and local police forces in Ayodhya were actually reduced in early December, and the state government instead deployed a police force known for its communal bias. *Id.*

the mosque. They reached their decision in part because an illustrated copy of the Constitution signed by members of India's Constituent Assembly in 1949 contained a picture of the Hindu God Ram.¹⁰⁷ The judges found that Ram was therefore "a constitutional entity" and a "figure constitutionally accepted as the Lord by the builders of this nation and its culture."¹⁰⁸ The same court, in a later decision, modified the ban the government had placed on all worship at the site and allowed Hindus to offer prayers at a reasonable distance from the makeshift temple constructed on the site of the old Mosque.¹⁰⁹ The decision followed violence in a nearby town in which residents and police prevented several hundred Muslims from marching to Ayodhya to pray near the destroyed Mosque.¹¹⁰ The Supreme Court refused to pass any order on the plea of Muslim organizations to stay the Allahabad High Court order.¹¹¹

A state organ which gives a God of a particular religion constitutional status clearly violates the non-discrimination and equal protection clauses of the Constitution. Moreover, the fact that courts have historically refused to decide the issue of which group has a better claim to the Ayodhya site underscores the impropriety of the judges' decision. In 1885, the same court had rejected a similar petition demanding that the state build a temple in the Mosque's outer yard because the Mosque was built on the birthplace of Ram.¹¹² Again, in 1949, when Hindu idols were placed inside the Babri Mosque, the courts held that neither Muslims nor Hindus could enter the build-

After the destruction of the mosque, Uttar Pradesh security forces participated in the attacks against Muslims; Uttar Pradesh government officials were well aware of the *Hindutva* organizations which organized the departure of thousands of Hindu militants by train. *Id.* at 25.

In Bombay, the violence which ensued in the days after December 6 involved clashes mostly between Muslims and the police. *Id.* at 24. Muslims who publicly demonstrated against the events in Ayodhya were stopped by the police and later attacked by both the police and supporters of Hindu rule. *Id.* During the same period, the police did not stop Hindus demonstrating in support of the destruction of the mosque. *Id.* In addition to firing on the demonstrators, the police entered households, burned down homes, tortured those arrested, and fired on defenseless residents. *Id.* Transcripts of recordings of police radio conversations demonstrate their complicity: "Don't burn anything belonging to a Maharashtran. But burn everything belonging to a Muslim." *Id.* at 25. [Maharashtra is the state in which Bombay is located]. Large-scale communal riots ensued. *Id.*

¹⁰⁷ Hamish McDonald, *India: Backlash in Bombay*, FAR E. ECON. REV., Jan. 21, 1993, at 16.

¹⁰⁸ *Id.*

¹⁰⁹ *Indian Court Allows Hindus to Pray at Makeshift Ayodhya Temple*, Agence France Presse, Jan. 1, 1993, available in LEXIS, News Library, ALLWLD File.

¹¹⁰ *Id.*

¹¹¹ *Major News Item in Leading Indian Newspapers*, The Xinhua General Overseas News Service, Jan. 23, 1993, available in LEXIS, World Library, ALLWLD File.

¹¹² See HUMAN RIGHTS WATCH, *supra* note 1, at 22.

ing.¹¹³ Ownership of the site was still in dispute when the Mosque was razed.¹¹⁴

The non-discrimination and equal protection clauses of the Constitution,¹¹⁵ previous court opinions which refused to discuss the ownership issue,¹¹⁶ and the nation-wide communal violence which followed the destruction of the Mosque¹¹⁷ all suggest that the Allahabad High Court should have refused to adjudicate ownership of the land in Ayodhya. The Supreme Court recently adopted this position and refused to answer a presidential request for an advisory opinion on whether a Hindu temple existed at the site of the demolished Mosque before its creation some 400 years ago.¹¹⁸ The Court thereby effectively diminished the potential for communal interpretation of its acts and communal reaction to a judicial decision. Moreover, given the way the reference was framed, only one group could have been satisfied with the decision.¹¹⁹ The Congress Party had hoped that by seeking the Court's view on the historical facts of the dispute, it might avoid making a decision which would alienate either Hindus or Muslims.¹²⁰ The Court's refusal to hear the case demonstrated that the "mess politicians make must be cleaned up by them, not the courts."¹²¹

B. Decisions Which Undermine The Rights Under Articles 25 and
26 to Profess and Practice Religion and Manage
Religious Affairs

Judicial decisions affecting the Article 25 and Article 26 prerogatives of individuals to practice their religion and to manage their religious affairs exacerbate communal violence. More specifically, it is the courts' reasoning in these decisions, not the outcomes, that has triggered the ensuing communal reaction.

¹¹³ *Id.*

¹¹⁴ Cf. *India-Politics: Supreme Court Ruling Revives Ayodhya Dispute*, Inter Press Service, Oct. 25, 1994, available in LEXIS, World Library, ALLWLD File.

¹¹⁵ INDIA CONST. pt. III (Fundamental Rights), art. 15.

¹¹⁶ See discussion in HUMAN RIGHTS WATCH, *supra* note 1, at 22.

¹¹⁷ See *id.* at 23-27.

¹¹⁸ *India-Politics: Supreme Court Ruling Revives Ayodhya Dispute*, Inter Press Service, Oct. 25, 1994, available in LEXIS, World Library, ALLWLD File.

¹¹⁹ See *id.* Two judges on the bench ruled that they found fault with the reference because it favored one religious group over the other. *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

1. *The Shah Bano Decision*

In *Md. Ahmed Khan v. Shah Bano Begum*¹²² (hereafter *Shah Bano*), the Supreme Court addressed the plight of destitute divorced Muslim women. Shah Bano, a 56 year old woman, had been married 42 years to Mohammed Ahmed Khan, a prominent lawyer with an annual income of approximately 60,000 Rupees, when he drove her out of their home.¹²³ Shah Bano sued Khan for maintenance of 500 Rupees per month under Section 125 of the Code of Criminal Procedure (hereafter the CrPC).¹²⁴ Generally, Section 125 is not a provision for divorced women but a provision for the maintenance of destitute women, children, and parents.¹²⁵ However, Section 125 permits any woman to sue her husband for maintenance before or after a divorce if the husband has sufficient means and has neglected or refused to maintain her.¹²⁶ Khan responded to the maintenance suit by divorcing Shah Bano.¹²⁷ Even though under Islamic law, divorced Muslim women have a right to maintenance only for the first three

¹²² *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945.

¹²³ *Id.* at 946-47.

¹²⁴ *Id.* at 947. Section 125 reads:

§ 125. Order For Maintenance of Wives, Children and Parents.

(I) If any person having sufficient means neglects or refuses to maintain -
(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. . .

Explanation: - For the purposes of this chapter

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

India Code Crim. Proc. ch. IX, §125(1) (1973)(available in India A.I.R. Manual (1989)).

¹²⁵ Kishwar, *supra* note 92, at 54.

¹²⁶ See India Code Crim. Proc. ch. 19, §125(1) (1973) (available in India A.I.R. Manual (1989)). The maximum amount of 500 Rupees per month is inadequate for both shelter and subsistence. Kumar, *supra* note 15, at 274, 276.

¹²⁷ *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945, 947.

months following a divorce,¹²⁸ the lower courts ordered Khan to continue to pay Shah Bano maintenance.¹²⁹

Khan appealed to the Indian Supreme Court. He argued that, after the divorce, he not only had maintained Shah Bano for over two years but also had paid her *mahr*,¹³⁰ or dower.¹³¹ Khan argued that he therefore fell within the Section 127(3)(b) exception to Section 125,¹³² which allows a Magistrate to cancel a maintenance award if he is satisfied that the divorced claimant has received adequate payment of

¹²⁸ AHMED, *supra* note 81, at 719.

Maintenance of the wife and children is one of the primary Islamic obligations of the husband on marriage. ASAF A.A. FYZEE, *OUTLINES OF MUHAMMADAN LAW* 211 (4th ed. 1974). The wife has a right to maintenance, even if she has the means to maintain herself and her husband does not have the means to maintain her. *Id.* at 211-12. This right is subject to the condition that the husband has neglected or refused to maintain his wife. *Id.* at 213.

Women lawfully entitled to maintenance include women lawfully married to a man and divorcées during the *iddat* period (usually, the three month period following the divorce). AHMED, *supra* note 81, at 719. A divorcée who is pregnant at the time of divorce has a right to maintenance until the delivery of her baby. *Id.* The purpose of the *iddat* period is to ensure that the problems between the parties cannot be reconciled and to ensure the paternity of children born in the months after the divorce. FYZEE, *supra*, at 107-08. The wife's right to maintenance ends at the end of the *iddat* period, when the divorce becomes irrevocable. ASGHAR A. ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* 130 (1992).

For a discussion of the Islamic right of a Muslim woman to be maintained when her husband tries to evade giving her her share of his property, see Asghar A. Engineer, *S.C. Judgement on Maintenance: Forces Behind the Agitation*, in *THE SHAH BANO CONTROVERSY*, *supra* note 92, at 35, 38-39.

¹²⁹ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 947. The lower court awarded Shah Bano 25 Rupees per month, and the state High Court increased the payment to 179 Rupees per month. *Id.*

¹³⁰ Mahr is an amount of money or property a Muslim woman is entitled to receive from her husband in consideration of marriage, and as a token of love, truthfulness and sincerity. ENGINEER, *supra* note 128, at 111.

¹³¹ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 947.

¹³² 127. Alteration in allowance. – (1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

...
(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that –

...
(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, –

(1) in the case where such sum was paid before such order, from the date on which such order was made,

...
(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

India Code Crim. Proc. ch. IX, §127 (1973), (available in India A.I.R. Manual (1989)).

maintenance under her personal religious law.¹³³ Khan further argued that the CrPC provisions conflicted with Islamic law, under which he had an obligation to maintain Shah Bano for only three months after divorcing her.¹³⁴

After reviewing Quranic verse and its interpretations by Islamic scholars, the Supreme Court held that the *mahr* which Khan had paid Shah Bano was a sum payable to her in consideration of marriage. Therefore, Khan's payments of *mahr* did not qualify him for the Section 127(3)(b) exception because the *mahr* was not "a sum payable to the wife on . . . divorce" but "an obligation imposed as a mark of respect for the wife."¹³⁵ Thus, Shah Bano had not received from Khan the whole sum due her upon divorce.

On the basis of its review of Quranic verse, the Court also held that it was "not only incorrect but unjust" to limit a Muslim husband's obligation to maintain a divorcée to the *iddat* period – the three-month post-divorce period¹³⁶ – and not to extend the obligation to divorcées unable to maintain themselves.¹³⁷ Moreover, the Court held that because Islamic provisions for maintenance did not address the situation of destitute divorcées,¹³⁸ there was no conflict between the provisions of Islamic law and those of the CrPC.¹³⁹ The Court also noted that where personal law conflicts with Section 125, the latter prevails.¹⁴⁰ Finally, the Court called for the enactment of a uniform civil code for all peoples of India.¹⁴¹

The Court's decision to require a Muslim husband to maintain his divorced wife beyond the *iddat* period was a landmark in the fight for social justice for women. The decision also clearly reflected the court's concern that secular law (such as the criminal code) applies uniformly to all citizens.¹⁴² Not surprisingly, however, the *Shah Bano* decision provoked sharp reaction from Muslims throughout the coun-

¹³³ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 952. Khan thus argued that payment of maintenance during the *iddat* period, coupled with *mahr*, fulfilled a husband's Islamic obligation to maintain his wife. Kishwar, *supra* note 92, at 52-53. Shah Bano disagreed. She argued that the whole sum owed in customary law includes *mataa*, or "a fair and reasonable provision" upon divorce, and that she had not been paid *mataa*. *Id.* at 53.

¹³⁴ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 949-50.

¹³⁵ *Id.* at 953.

¹³⁶ See also AHMED, *supra* note 81 (and discussion of *iddat* period at note 128).

¹³⁷ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 950.

¹³⁸ *Id.*

¹³⁹ *Id.* at 951.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 954.

¹⁴² Rahman, *supra* note 93, at 479.

try.¹⁴³ They asserted that the Supreme Court had interfered with Islam in its interpretation of (1) the meaning and role of *mahr*; and (2) the scope of a husband's Islamic obligation to maintain his wife.¹⁴⁴ In their view, only Muslim theologians could interpret the Quran.¹⁴⁵ In addition, Muslims and other minorities feared that the uniform civil code which the decision heralded would reflect the dominant Hindu community's narrow nationalism.¹⁴⁶ The most vocal proponents of a uniform code had been Hindu communalists desirous of eliminating Islamic cultural traditions.¹⁴⁷ Thus, in their view, a uniform civil code would force total assimilation of minority groups and a loss of separate identity.¹⁴⁸

Elements of the decision justified these fears. Though the call for a uniform civil code clearly was made in the context of concern for the way in which women have been traditionally subjected to unjust treatment, the Court went on to state:

A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. . . . We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have meaning.¹⁴⁹

Thus in addition to its concern regarding justice for women, the Court's desire for national integration also prompted its call for a uniform civil code.¹⁵⁰ The decision also implied that a uniform code would require that minority groups forego "disparate loyalties" to their religion.¹⁵¹ In this manner, the language of its decision undermined the Court's concern with both the supremacy of secular law and justice for women.

As with other instances of judicial antagonism toward communal feelings, the Court overstepped its bounds. The judiciary has ample

¹⁴³ Kumar, *supra* note 15, at 278; K.R. Malkani, *A Participant's Response*, in MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY, *supra* note 17, at 165, 166; Tenorio, *supra* note 24; Gargan, *supra* note 53; Steven R. Weisman, *Dispute Over a Moslem Divorce Ensnarls Gandhi*, N.Y. TIMES, Feb. 9, 1986, at A3; Venugopala Rao, *India: Storm Brews Over Rights of Divorced Moslem Women*, Inter Press Service, Feb. 27, 1986, available in LEXIS, World Library, ALLWLD File.

¹⁴⁴ See PARASHAR, *supra* note 70, at 175.

¹⁴⁵ Rahman, *supra* note 93, at 479.

¹⁴⁶ Singh, *supra* note 36, at 14.

¹⁴⁷ Engineer, *supra* note 93, at 18.

¹⁴⁸ Singh, *supra* note 36, at 14.

¹⁴⁹ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 954.

¹⁵⁰ Kumar, *supra* note 15, at 277.

¹⁵¹ *Id.*

authority to interpret statutes codifying different aspects of Islamic law¹⁵² and, in fact, has done so repeatedly in the past.¹⁵³ However, in the *Shah Bano* decision, the Court imposed an Islamic obligation on Muslim men unrecognized by Islamic jurisprudence or relevant statutes.¹⁵⁴

Well aware of the strong reaction its judgment would provoke from Muslim leaders, the Supreme Court appealed to Quranic and other Islamic sources generally accepted by Muslims everywhere in order to convince Muslims of the justice of Section 125 awards to divorcées.¹⁵⁵ Regrettably, this tactic destroyed the distinction between maintenance awards granted on divorce pursuant to personal law and maintenance awards designed to prevent destitution, which are granted on divorce pursuant to Section 125.¹⁵⁶ Instead of noting the difference between these two distinct kinds of maintenance, the Court stated that it was *unjust* to limit a Muslim husband's maintenance obligation to the *iddat* period.¹⁵⁷ The Court thereby suggested that Islamic marital obligations and social obligations designed to help

¹⁵² Baharul Islam, The Supreme Court Judgement (Divorced Muslim Women), in SHAH BANO 55, 56-57 (Janak R. Jai ed., 1986) (documenting the sources of judicial power to interpret the Quran). See also, e.g., Dissolution of Muslim Marriages Act, 1939, (Act 8 of 1939), India A.I.R. Manual (1989); Bengal, Agra and Assam Civil Courts Act, 1887, (Act 12 of 1887), India A.I.R. Manual (1989); Muslim Personal Law (Shariat) Application Act, 1937, (Act 26 of 1937), India A.I.R. Manual (1979).

¹⁵³ The Supreme Court has ruled that religious practices which constitute an essential part of the religion are immune from state regulation, see M.H. Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731, but that courts must decide what constitutes an essential part of religion or religious practice. Saifuddin Saheb v. State of Bombay, A.I.R. 1962 S.C. 853. On this basis, Indian courts have interpreted a variety of personal law provisions. For a discussion of these decisions, see M.R. Kazimi, *Right to Practice Religion - Judicial View of Constitutional Principles*, in MINORITIES AND STATE AT THE INDIAN LAW: AN ANTHOLOGY, *supra* note 17, at 48, 51-52.

¹⁵⁴ Some debate exists as to the extent of a husband's obligation to maintain his divorced wife. The *Shah Bano* decision revolved around the interpretation of a Quranic verse which states: "And the divorced women, too, shall have (a right to) maintenance in goodly manner. This is a duty of all who are fearful of God." (quoted in ENGINEER, *supra* note 128, at 129). The only point of agreement among Islamic scholars is that the verse does not specify a period of time over which the obligation is due. See ENGINEER, *supra* note 128, at 129-32.

Commenting on *Shah Bano*, Engineer argues: "The granting of maintenance beyond the period of *iddat* may not have been provided for in the Shariat [Islamic Law], but. . . there is no clear injunction in the Shariat against it. On the contrary, the Quran makes it obligatory on the pious to do *ihsan* (benevolence) to the divorcée. It is repeatedly asserted. And what is *ihsan* if not giving more than what is obligatory? The Supreme Court might have used rather offensive language (which could have been condemned), but the substance of its judgement is certainly in keeping with the true spirit of [the] Quran." Asghar A. Engineer, *Shariat Not a Closed System*, in SHAH BANO 61, 64 (Janak R. Jai ed., 1986).

¹⁵⁵ Asghar A. Engineer, S.C. Judgement on Maintenance: Forces Behind the Agitation, in THE SHAH BANO CONTROVERSY, *supra* note 92, at 35, 35-36.

¹⁵⁶ Kumar, *supra* note 15, at 276.

¹⁵⁷ Md. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 950.

destitute women were one and the same. In this manner, the Court created a conflict between Section 125 and the religious rights of Muslim men.

2. *The Rahmat Ullah Decision*

An unreported decision which provoked similar communal reaction involved a Muslim whose land holding exceeded the amount permitted by the Uttar Pradesh Land (Ceiling and Regulation) Act.¹⁵⁸ Mr. Rahmat Ullah, the owner of the land in question, attempted to avoid penalties for violating the Act by declaring that he had been divorced for 15 years and had transferred title of part of his land to his ex-wife.¹⁵⁹ Therefore, in his view, his land holding did not violate the Act because both he and his ex-wife were each entitled to the maximum land holding.¹⁶⁰ However, the Allahabad High Court held that the divorce was invalid because Ullah and his ex-wife continued to live together in the same house.¹⁶¹

The Court also held that the form of divorce Ullah had used to terminate his marriage was unlawful in India.¹⁶² Ullah executed a triple *talaq* divorce,¹⁶³ which occurs when a Muslim husband repeats "talak," or "I divorce you," three times to his wife.¹⁶⁴ The Allahabad High Court held triple *talaq* divorce unlawful for lack of proof of judicial dissolution of the marriage.¹⁶⁵

As with the *Shah Bano* decision, the *Ullah* decision would have caused little comment had the judge's written opinion not exceeded the scope of the issue. In dicta, he stated that wherever Islamic law conflicts with the secular law, the latter takes precedence.¹⁶⁶ The court's oversimplification of the complex relationship between Articles 25 and 26 and other constitutional provisions elicited a communal reaction. Iqbal Masud, a liberal columnist in India, complained that

¹⁵⁸ John Rettie, *Divorce Ruling Puts Indian Judge at Odds With Muslims*, THE GUARDIAN, Apr. 30, 1994, at 15.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The Act considers a married couple to be a single owner. *Id.*

¹⁶¹ *Id.*

¹⁶² John Rettie, *Land Issue Triggers Divorce Ruling; Decision by Indian Judge Sparks Heated Debate Among Muslims*, THE GAZETTE (Montreal), Apr. 30, 1994, at B7.

¹⁶³ *Id.*

¹⁶⁴ Such a *talaq* is irrevocable and is lawful, though sinful, under Hanafi law. FYZEE, *supra* note 128, at 154. Most Muslim countries have banned triple *talaq* divorces, but the practice continues in India. Neena Bhandari, *India-Women: Legal Rights Fail to Protect Women*, Inter Press Service, May 15, 1995, available in LEXIS, World Library, ALLWLD File.

¹⁶⁵ Rettie, *supra* note 158.

¹⁶⁶ *Id.*

all Muslims, traditional or liberal, resented the blatantly "self-righteous and patronizing attitude implicit in [the court's] exhortation."¹⁶⁷ Masud asserted that the Court's lecture about the need for Muslims to "emerge from medievalism to modernity" annoyed the average Muslim, who considered non-Muslim India as caste-ridden, superstitious, and medieval as Muslim India.¹⁶⁸

3. *Consequences of the Decisions*

Both the *Rahmat Ullah* decision and the *Shah Bano* decision had several harmful effects. First, in the minds of some Muslims, the language of these decisions suggested a judicial inclination to infringe on Muslims' religious autonomy based on majoritarian notions of identity. As such, the decisions undermined the government's stated commitment to pluralism. Second, Muslims mobilized in response to a perceived threat to their constitutional right of religious autonomy.¹⁶⁹ Many Muslim organizations simply used the *Shah Bano* Judgment as a tool to gain political power among Muslims.¹⁷⁰ This united Muslim front adopted a rigid, reactionary interpretation of Islamic law and, hence, of the rights of Muslim men and women. Many Muslims asserted, for example, that Islamic provisions concerning maintenance and divorce were immutable and beyond the jurisdiction of secular courts. In this manner, the movement by Muslims to preserve religious autonomy undermined the heterogeneous and evolutionary nature of Islamic interpretation of women's rights and undid the work of progressive Muslims and women's advocates who had sought and won amendments to Islamic laws.¹⁷¹ Indeed, only one year before the *Ullah* decision, one Muslim sect had already denounced triple *talaq* divorce as un-Islamic.¹⁷² Even the Muslim Personal Law Board, created to protect Islamic laws from legislative or other reform and to seek removal of "un-Islamic provisions" in existing laws affecting Muslims,¹⁷³ had agreed that triple *talaq* divorce was "a criminal act" under Islamic law.¹⁷⁴ Both the *Shah Bano* and *Rahmat Ullah* decisions thus triggered a political, not a religious, reaction.¹⁷⁵

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ PARASHAR, *supra* note 70, at 173.

¹⁷⁰ GANI, *supra* note 72, at 79-80.

¹⁷¹ See PARASHAR, *supra* note 70, at 184.

¹⁷² Rettie, *supra* note 158.

¹⁷³ TAHIR MAHMOOD, MUSLIM PERSONAL LAW 145-46 (1st ed. 1977).

¹⁷⁴ Rettie, *supra* note 158. However, in another ruling the Board justified the use of triple *talaq* as a long-standing tradition. *Id.*

¹⁷⁵ Engineer, *supra* note 93, at 10-11.

Third, the outcry over the *Shah Bano* decision prompted the Prime Minister to pass The Muslim Women (Protection of Rights on Divorce) Act of 1986 (hereafter the Muslim Women's Act).¹⁷⁶ Despite its name, this Act revoked the *Shah Bano* judgment and effectively deprived Muslim women of the protection all other Indian women have under Section 125.¹⁷⁷ Notwithstanding vigorous parliamentary debate in which reformist Muslims, women's advocates, and many of the opposition parties argued that the bill would be unfair to women,¹⁷⁸ Gandhi issued the bill to limit loss of Muslim political support¹⁷⁹ by demonstrating that a secular country would not allow a minority community to feel that it was unable to practice its own religion.¹⁸⁰ However, in so doing, he reinforced the inaccurate image of a homogeneous Muslim community and a monolithic Islamic jurisprudence.¹⁸¹ Moreover, he effectively sacrificed support for women's rights to political expediency,¹⁸² thereby lending legitimacy to the idea that women had only a religious identity and no secular rights.¹⁸³

4. *Alternative Rationales for the Decisions*

Some of the communal reaction to the *Shah Bano* and *Rahmat Ullah* decisions might have been avoided had the courts reached their holdings on alternative rationales. For example, the Supreme Court in *Shah Bano* could have accomplished the same result by relying on

¹⁷⁶ Rahman, *supra* note 93, at 480-81.

¹⁷⁷ *Id.* at 481. The Act requires that destitute divorced Muslim women apply for maintenance from their relatives or from the Waqf Board. The Muslim Women Act, §4 (1989) (*available in THE SHAH BANO CONTROVERSY*, *supra* note 92, at 85-87). The Waqf Board is an Islamic religious charity or trust created for a specific purpose. GANI, *supra* note 72, at 39. The Waqfs have no fund for the maintenance of divorced women. *Id.* Spokesmen for several State Waqf Boards have complained that they are unable to meet the obligations created by the Act. *Id.*

¹⁷⁸ *India: Moslem Divorce Bill Passed By Parliament*, Inter Press Service, May 6, 1986, *available in* LEXIS, World Library, ALLWLD File; *See also* Weisman, *supra* note 143; Rao, *supra* note 143.

¹⁷⁹ Tenorio, *supra* note 24; Wariavwalla, *supra* note 51.

¹⁸⁰ *India: Moslem Divorce Bill Passed By Parliament*, Inter Press Service, May 6, 1986, *available in* LEXIS, World Library, ALLWLD File.

¹⁸¹ PARASHAR, *supra* note 70, at 184. As one commentator noted, "Only the government and that particular section of Muslims on whose advice it has formulated the controversial bill on divorced Muslim women's rights can pretend that it reflects the majority opinion in the Muslim community. Hasan Suroor, *Most Muslims in U.P. Opposed to Bill*, in *THE SHAH BANO CONTROVERSY*, *supra* note 92, at 141, 141-42. "[L]iberals find it odd that an avowedly secular prime minister who is so passionately hooked on the 21st century is allowing himself to be manipulated by the communalists in both communities by pandering to Hindu reaction in Ayodhya and to Muslim fundamentalism in Shah Bano's case." *Id.*

¹⁸² Kumar, *supra* note 15, at 279.

¹⁸³ *Id.* at 280. *See also* Nusrat B. Ruhi, *Revival of Islamic Fundamentalism?*, in *THE SHAH BANO CONTROVERSY*, *supra* note 92, at 48, 48-49.

principles inherent in the Constitution rather than engaging in a direct interpretation of the Quran. In fact, only the rationales used in *Shah Bano*, and not its outcomes, were new. Several Indian Supreme Court judgments before *Shah Bano* had used the CrPC provisions to grant monthly maintenance awards to divorced Muslim women in order to prevent the emergence of the social problems of destitution and prostitution.¹⁸⁴ In these cases, the Supreme Court had underscored the distinction between maintenance awarded under personal law and maintenance awarded to prevent destitution.¹⁸⁵ The distinction was useful because it eliminated the theoretical conflict between the two grounds for maintenance. Moreover, in effect, the distinction emphasized the multiple and fluid nature of Indian identity.

In addition to these precedents, the Court in *Shah Bano* could also have relied on constitutional provisions to uphold Section 125 maintenance awards to women. The Article 25 freedom of religion and the Article 26 right to manage one's religious affairs may be abridged for reasons of "public order, morality and health."¹⁸⁶ Thus, the Court could have ordered maintenance payments because destitution and prostitution threaten public health and morality. Similarly, the Court could have held that Muslim husbands violate public policy when they divorce their wives who have justly sued for maintenance because such actions constitute an exercise of religious rights in derogation of the public order, health and morality. The Court could then have awarded Shah Bano maintenance beyond the *iddat* period because she would have been entitled to such maintenance as Khan's wife. Moreover, though Article 25 guarantees every individual religious freedom, it does not guarantee the right of groups to impose their views on even one individual.¹⁸⁷ Hence, Article 25 guarantees religious freedom to minorities (*i.e.*, women) within minority groups.¹⁸⁸ Finally, the Court in *Shah Bano* could have defended Section 125 as a special provision for women and children, within the pur-

¹⁸⁴ See *Bai Tahira v. Ali Hussain Fissalli Chothia*, A.I.R. 1979 S.C. 362; *Fuzlunbi v. K. Khader Vali*, A.I.R. 1980 S.C. 1730; *Zohara Khatoon v. Md. Ibrahim*, A.I.R. 1981 S.C. 1243; *Mehra*, *supra* note 92.

¹⁸⁵ See *Bai Tahira v. Ali Hussain Fissalli Chothia*, A.I.R. 1979 S.C. 362, 366; *Fuzlunbi v. K. Khader Vali*, A.I.R. 1980 S.C. 1730, 1736; *Zohara Khatoon v. Mohd. Ibrahim*, A.I.R. 1981 S.C. 1243, 1248.

¹⁸⁶ INDIA CONST. pt. III (Fundamental Rights), art. 25, 26.

¹⁸⁷ PARASHAR, *supra* note 70, at 172 (quoting a letter of Hameedulla Beg which was reprinted in *Radiance*, 23-29. xi. 83).

¹⁸⁸ *Id.*

view of Article 15(3).¹⁸⁹ In *Gupteshwar Pandey v. Ram Peari*, a state High Court had already upheld Section 125 against a constitutional challenge on precisely that ground.¹⁹⁰ The Court in *Shah Bano* could have relied on these precedents to establish the civic duty of every Indian, regardless of religion, to support divorced women unable to maintain themselves.¹⁹¹

Similarly, in the *Rahmat Ullah* decision, the Allahabad High Court might have avoided causing the concern it engendered had it held the triple *talaq* divorce fraudulent and thus contrary to public policy. Moreover, while the decision was a victory for women fighting for removal of religious constraints on their lives, the same Court could have created a much more powerful precedent for women had it used constitutional provisions to support its decision. For example, the Court could have relied on its jurisdiction to regulate a number of religious activities, including activities involving "public order, morality and health," under Article 25(I),¹⁹² or on its power to provide for "social welfare and reform,"¹⁹³ or on its power to address the particular problems faced by women and other disadvantaged groups in India.¹⁹⁴ Clearly, the court had strong constitutional grounds with which to address the situation of groups disadvantaged by personal law provisions, but it chose not to employ them.

C. Decisions Reached On The Basis Of Overriding Political Considerations

Courts which decide cases involving communal crimes on the basis of political considerations provoke communal attitudes and sectarian violence. For example, in 1993 a special Uttar Pradesh court released seven right-wing Hindu political leaders held on charges of criminal responsibility for the demolition of the Babri Mosque.¹⁹⁵ The court stated that the government had invoked a little-used law which requires that prisoners not be moved from jail if moving them might

¹⁸⁹ INDIA CONST. pt. III (Fundamental Rights), art 15(3) ("Nothing in this article [on non-discrimination] shall prevent the State from making any special provision for women and children").

¹⁹⁰ *Gupteshwar Pandey v. Ram Peari Devi* A.I.R. 1971 Pat. 181, 182.

¹⁹¹ While the Court recognized that Section 125 served this purpose, *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945, 948, it chose not to rest its holding on this ground.

¹⁹² INDIA CONST. pt. III (Fundamental Rights), art. 25.

¹⁹³ INDIA CONST. pt. III (Fundamental Rights), art. 25(2)(b).

¹⁹⁴ INDIA CONST. pt. III (Fundamental Rights), art. 15(3).

¹⁹⁵ *Indian Court Frees Hindu Leaders in Mosque Case*, Reuters Limited, Dec. 20, 1993, available in LEXIS, World Library, ALLWLD File.

threaten public order.¹⁹⁶ Therefore, because the men would not appear for a hearing, the court was forced to release them unconditionally.¹⁹⁷ Party sources said the release resulted from a deal between Prime Minister Rao's Congress Party and the BJP, which had caused considerable political agitation as a result of the arrests.¹⁹⁸ Hence, the government yielded to communal pressure and ignored the need for a just resolution of the Babri Mosque episode.

Despite the judiciary's efforts in the struggle to end communal violence,¹⁹⁹ the Uttar Pradesh decision more closely resembles the failure of the executive branch to prosecute indiscriminately those who commit communal crimes. For example, the government has not yet prosecuted any of the militants who destroyed the Babri Mosque in Ayodhya on December 16, 1992, and attacked Muslim neighborhoods, shops, and homes.²⁰⁰ The majority of those who led or participated in the attacks and were readily identifiable were not detained or prosecuted.²⁰¹ However, a number of Muslims demonstrating against the attacks were arrested for allegedly terrorist activities.²⁰² Commissions set up by the government to investigate the riots have not yet held anyone accountable for these events,²⁰³ despite thousands of affidavits and hundreds of interviews.²⁰⁴

In contrast, the government aggressively prosecuted those involved in the 1992 bombings in Bombay.²⁰⁵ In March 1992, twelve bomb blasts, allegedly organized by Muslim militants, killed 357 people and injured 700 in Bombay.²⁰⁶ A criminal investigation began immediately. The police portrayed the attacks as a Muslim attack against the city.²⁰⁷ In stark contrast to their inaction over the

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See, e.g., *India. A System Shakes*, THE ECONOMIST, Mar. 23, 1996, at 35; *India: Indian Press Review for Thursday, March 24*, Reuters News Service - India, available in LEXIS, World Library, ALLWLD File.

²⁰⁰ HUMAN RIGHTS WATCH, *supra* note 1, at 22.

²⁰¹ *Id.* at 18. Of the 2278 cases filed in relation to this violence, 90 are ongoing, 1333 were closed for lack of evidence, and 848 cases were filed against the accused, but no trials have begun. *Id.* at 26.

²⁰² *Id.*

²⁰³ *Id.* at 18. The inactivity of the police is not unprecedented. During the killing of 2700 Sikhs in Delhi in 1984, the police failed to protect the Sikhs under attack. Ten years later, no one has been prosecuted or punished for the violence. *Id.* at 19 n.2.

²⁰⁴ *Id.* at 26.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 27.

²⁰⁷ *Id.*

Ayodhya riots, the police immediately detained 400 people, the majority of which were Muslim, and vigorously pursued the investigation.²⁰⁸ In seven months, they completed their investigation, collected testimony from 3,741 witnesses, and filed a 9,400 page charge sheet against those believed to be responsible.²⁰⁹

In the context of executive failure to indiscriminately prosecute criminal offenders, the Uttar Pradesh Court's decision on Ayodhya was unfortunate. This type of judicial waffling in cases involving communal crimes further strengthens the formation of communal identities. Furthermore, it undermines judicial independence and confidence in the political system.

III. AN ALTERNATIVE APPROACH TO CASES WITH COMMUNAL IMPLICATIONS

The cases discussed may represent few problematic decisions among thousands of others that are arguably well-decided cases. However, the sensitivity of religious groups to the treatment of personal affairs underscores the need for aggressive endorsement of the neutral constitutional principles which underly decisions involving personal law. All of the cases analyzed demonstrate that the courts could have reached the same holdings on the basis of constitutional provisions, common-law precedent or public policy, and thus could have avoided directly interpreting religious texts or propounding controversial notions of Indian identity. Indeed, the decisions discussed above are problematic less for their holdings and more for the nature of the rhetoric used to present the Courts' rationales.

Given today's climate, disinterested decision-making is the appropriate approach to use. Without question, the decisions in the cases discussed would trigger communal reaction even if courts avoided arguably suspect grounds. The depth and extent of group enmity suggests that judicial decisions simply will not solve the problem of communal hostility and violence. However, the real challenge today is to identify ways to anticipate and transcend such polarization and to disrupt the formation of communal identities.²¹⁰ To this end, neutral judicial decision-making may increase awareness of the different political, social, and religious identities all Indians have, protect the perception of the judiciary's independence, and deter some of the violence which previous decisions have provoked.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Kumar, *supra* note 15, at 290.

Moreover, this type of decision-making increases confidence in the judicial system and bolsters the notion of citizenship in a democracy.²¹¹ For this reason, "the constitutional state [must] carefully keep both the shared political culture and common civic identity separated from the subcultures and cultural identities. . .entitled to coexist within the polity."²¹² Neutrality in this context means de-coupling the majority culture from the political culture with which it was originally fused.²¹³

As demonstrated above, though such neutral decision-making may require restraint in the direct interpretation of religious law, it does not curtail the ability of courts to act as the counter-majoritarian bulwark and to protect groups which do not have the political power to protect themselves in the political process. In addition, if direct judicial interpretation of religious texts triggers communal violence, as in the *Shah Bano* case, a somewhat restrained approach to textual interpretation may foster progressive ecumenical interpretation of religious law.

For example, though human judgment may be responsible for Quranic interpretation detrimental to women, it is also responsible for reform and evolution in Islamic law.²¹⁴ Two Islamic principles, *qiyas* and *ijma*,²¹⁵ facilitate the use of human judgment in the application of Islam to new problems and situations and have thus contributed to the diversity of interpretation and doctrine in the Muslim community.²¹⁶ *Qiyas* is a method of legal analogical reasoning described as an extension of a Quranic ruling in one situation to another situation that is similar in reason or cause but for which no Quranic guidance exists.²¹⁷ *Ijma*, or the unanimous agreement of the jurists of a particular age on a specific issue, is an Islamic principle which permits resolution of is-

²¹¹ Jurgen Habermas, *Race and Remedy in a Multicultural Society: Address: Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849, 851-53 (1995).

²¹² *Id.* at 851.

²¹³ *Id.* at 852.

²¹⁴ Bharathi A. Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U.L. REV. 1949, 1969 (1995).

²¹⁵ *Id.* at 1969.

²¹⁶ JOHN ESPOSITO, *WOMEN AND MUSLIM FAMILY LAW* 121 (1982). On the basis of these principles, Egypt, Pakistan, and Syria have enacted reform legislation to more equitably meet the changing social and economic needs of women and the family in modern Islamic society. *Id.* at 102, 116-26. Esposito notes that jurists have used *ijma* inconsistently, on an *ad hoc* basis, *Id.* at 100, 102, but highlights the value of *qiyas* and *ijma* as the basis for a reasoned but dynamic Islamic jurisprudence. *Id.* at 102-3.

²¹⁷ *Id.* at 7.

sues according to the general Islamic purposes of justice and equity.²¹⁸ Islamic law is thus not divine; both *ijma* and *qiyas* introduce a human element into its interpretation.²¹⁹ These principles permit a process of moving from individual opinion to community approval to accepted practice (and then to difference of opinion when conditions change).²²⁰ It is precisely this evolutionary process which resulted in the Muslim Personal Law Board ruling which held that a triple *talaq* divorce is a criminal act in Islam.²²¹ In India, some women's advocates have suggested that this kind of evolution may be the only effective way to improve the plight of women, given the extent to which religion defines women's rights in practice.²²² In this manner, some restraint in the direct interpretation of religious texts may encourage reform of personal law by adherents of the religion themselves.

For similar reasons, to some extent, judicial decisions on communal questions absolve the people of their political responsibility to resolve these issues themselves. Hindus and Muslims must engage in extensive public debate in a variety of forums to determine how to solve majority-minority problems²²³ and to discuss the meaning of Indian nationhood and secularism.

However, in a nation like India, the difficulties of sustaining effective dialogue on such issues are evident.²²⁴ Ultimately, the nation's size and diversity suggest that its judiciary may be one branch of government truly able to effectuate this end. If so, the judicial role in propounding a doctrine of neutral principles which reinforce the layered identities of Indians must be underscored. Judicial decisions can encourage a heterogeneous public to affirm differences through

²¹⁸ *Id.*

²¹⁹ Engineer, *supra* note 93, at 2-3.

²²⁰ ESPOSITO, *supra* note 216, at 121. See also Sullivan, *supra* note 95, at 811.

²²¹ See Rettie, *supra* note 158; (see also discussion *supra* at note 174, and accompanying text).

²²² Venkatraman, *supra* note 214, at 1996 (religious justification for suppressing women's rights must be critically examined by adherents of the religion themselves). One scholar notes that the Shah Bano agitation "interrupted developing critiques of personal law and moves toward some form of uniform civil code." Kumar, *supra* note 15, at 281-82. Before *Shah Bano*, two feminist petitions for a uniform civil code had received wide support from feminists throughout the country: Mary Roy's plea against Christian personal law, and Shahnaz Sheikh's petition against Muslim personal law. Sheikh argued that the Muslim personal law should be declared in violation of Articles 13-15. *Id.* at 281.

²²³ See HUMAN RIGHTS WATCH, *supra* note 1, at xvii.

²²⁴ The Supreme Court in *Shah Bano* emphasized this point when it noted that no religious community had in fact moved towards reforming religious provisions or towards synthesizing them with the secular Constitution: "A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue." *Md. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945, 954.

their religion and culture and concurrently foster links between members of different groups as citizens in a democracy.²²⁵ In this manner, the judiciary may impede the formation of communal sentiment and increase awareness of the multiple and fluid identities which Indians have always had and shared.

²²⁵ See Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1225 (1991).