Religion and Personal Law in Secular India

A Call to Judgment

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Living with Difference in India

Legal Pluralism and Legal Universalism in Historical Context

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Modern India has provided a setting for the contest between legal pluralism and legal universalism. Legal pluralism recognized and legitimized the personal law of India's religious communities. Legal universalism engenders calls for a uniform civil code. By modern India, we mean the India of the East India Company (ca. 1757–1857), the British Raj (1858–1947), Congress nationalism (1885–1947), and independent India (1947–present). We will visit times, places, and events in search of discourses and practices that shaped legal recognition of personal law and the debate over instituting a uniform civil code.

In particular we will visit the contest, mainly in Bengal but in memory and discourse standing for "India," between the particularistic Orientalists and the universalistic Utilitarians during the East India Company era; the trauma of the 1857 rebellion and its aftermath, Queen Victoria's 1858 proclamation accepting difference; the fracture of partition as it was foreshadowed in Sir Sayyid Ahmad Khan's many-nations doctrine; Muhammad Ali Jinnah's two-nation doctrine; the Indian National Congress's universalist one-nation doctrine; the cohabitation in Congress's secularism between equal recognition of all religions and special privileging of minority religion, particularly Islam; and the rise (and faltering?) of the Hindu nationalist ideology of homogeneity in the 1980s.

Splitting the Difference: Between Uniformity and Pluralism

Legal pluralism has been one way to give expression to India's continuously and variously constructed multi-cultural society. Legal universalism has been associated with liberal and nationalist ideas about equal, uniform citizenship. Speaking analytically, legal pluralism posits corporate groups as the basic units, the building blocks, of a multi-cultural society and state. Particular legal rights and obligations attach to collective identities such as Hindu, Muslim, Christian, Sikh, Jain, Buddhist, and Parsi, and to *sampradayas* (sects) and *quoms* (communities) such as Dadupanthis, Kabirpanthis, Sunnis, Shi'as, etc. Legal universalism treats individuals as the basic unit of society and the state and imagines homogenous citizens with uniform legal rights and obligations.

Indian law and politics have vacillated between these two positions. The Supreme Court, in the landmark case of *Balaji v. State of Mysore* (1963), tried to quantify the proportionate weight that should be accorded to each.[1] The case involved group rights in the form of quotas in university admissions and government jobs for Dalits (ex-untouchables) and for OBCs (Other Backward Classes, an administrative euphemism for lower castes). Article 16(4) of the Constitution on the one hand guarantees the "equality of opportunity in matters of public employment." On the other hand, it provides that

> nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

The Court split the difference; it limited permissible reservations to 49 percent. Beyond 49 percent the Court held would be a *fraud on the Constitution* (emphasis in the original) because it would impinge upon the constitutional mandates providing for equality before the law (Article 14) and prohibiting discrimination (Article 15). In other words, *Balaji* in 1963 weighted legal pluralism in the form of group rights at 49 percent and legal universalism in the form of equal citizenship at 51 percent.

The institutional progenitors and philosophical lineages of legal pluralism and legal universalism were differentially mobilized and reinforced by company, colonial, nationalist, and post-colonial political actors. The rise of Hindu nationalism and the articulation of *hindutva* (Hinduness) ideology in the 1980s and 1990s lent new meaning and urgency to the tension between pluralism and universalism. The tension is likely to continue for the foreseeable future in a multi-cultural society and state that has to accommodate on a daily basis the contrasting imperatives of integration and diversity. Neither is likely to drive out the other.

Legal pluralism is not simply a question of values. It is also a ques-

tion of power, of who gets what when and where. "Universality" in the law is not only valued by enlightenment liberals and Fabian socialists, it is also the strategy of centralizing modern states. Pluralism in the law is both a norm and the strategy of those who favor dividing, limiting, and sharing sovereignty in federal and pluralist states that allow for diversified geographically and culturally defined communities.[2]

The Company Discovers and Legitimizes Difference: Cultural Federalism and Legal Pluralism

Cultural federalism is a term we have coined to suggest that India has dealt with diversity in ways that recognize legal identities on the basis of cultural as well as territorial boundaries. The Ottoman millet "system," under which leaders of the Greek Orthodox and of Christian, Armenian, Jewish, and other communities were given civil as well as religious authority over their respective flocks, represents a significant historical example of cultural federalism. As we shall see, early East India Company doctrine and practice followed similar principles. In independent India, cultural federalism is given expression in Article 29 of the Constitution, what might be called the multi-cultural clause, which protects the interests of minorities by granting them the right to "conserve" their "language, script and culture," and Article 30, which gives minorities the "right to establish and administer education institutions."[3] These provisions are in tension with the universalistic proposals of Article 44, a non-justiciable Directive Principle of State Policy that enjoins the state to "endeavour to secure for the citizens a uniform civil code throughout the territory of India."

So why did Warren Hastings, who in 1774 became the East India Company's first Governor-General; Sir William Jones,[4] a company judge in Bengal and one of the first Englishmen to master Sanskrit; and the stellar scholars, also servants of the company, who made up the founding generations of the Asiatic Society of Bengal, adopt a policy of cultural federalism and legal pluralism? Why did they decide to apply "the laws of the Koran with respect to Mohammedans and that of the Shaster with respect to Hindus"? Why did Jones construct a world composed of Hindus and Muslims? Why and how did he construct the categories "Hindu" and "Muslim," categories that, in changing guises and with changing meaning and consequences, are present today at the close of the twentieth century?

A post-colonial perspective leads to reading nineteenth- and twentieth-century categories and outcomes into the mentalities and intentions of

eighteenth-century actors. The motive becomes imperial power, the tactic religious division. Power becomes as unsubtle a determinant of thought as is control of the means of production.

We read the ideas and actions of Hastings and his Asiatic Society colleagues, including their construction of Hindu and Mohammedan, as shaped by two concerns: the sources and meaning of "civilization" conceived of within the framework of eighteenth-century European understandings of world history; and, for Hastings in particular, a powerful sense of being a *local* ruler. Hastings, Jones, and their Asiatic Society colleagues, all trained in European classical traditions, developed a "civilizational eye." They came to understand legal pluralism in terms of large, coherent cultural wholes defined by great languages and their classic texts. In their cultural imaginations, Hastings and Jones treated Sanskritic and Persian civilizations as equivalent to those of Greece and Rome. Their sense of being local rulers led them to do what they thought local rulers did, rely on the laws of the peoples under their authority to administer justice. Anachronistic efforts to read divide-and-rule communal politics into company policy need to be modified by attention to the civilizational perspective and the self-understanding of company servants as local rulers.

English eighteenth-century representatives of the East India Company acted as agents of the Mughal emperor. At least nominally, they understood themselves as agents, not principals. At this state of the British relationship to India, their mentality, as Uday Mehta, writing about "liberalism and empire," might have put it, was more Burkean than Lockean,[5] more attuned to pluralist multi-culturalism than to liberal universalism. Hence they recognized and accepted the existence and value of different civilizations on the Indian subcontinent. A "Burkean" consciousness accounts for what we characterize as Warren Hastings's policy of cultural federalism, a policy which made each group subject to its own laws. In a much-quoted memorandum Hastings ordered that

> in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mohammedans and those of the shaster with respect to the Gentoos [Hindus] shall be invariably adhered to; on all such occasions the Moulvies or Brahmins shall respectively attend to expound the law, and they shall sign the report and assist in passing the decree.[6]

Recent scholarship on the eighteenth century questions the company's emphasis in the Hastings era on religious and caste groups to

construct Indian society. The result entrenched the categories religion and caste in the mentalities and practices of succeeding generations.[7] For the purposes of our argument, which groups are featured is less important than that self-regulating groups[8] with cultural markings, rather than unmarked standardized individuals, were thought to constitute society.

An Indian Theory of Self-Regulating Groups

Henry Thomas Colebrooke, leader of the second generation of Asiatic Society of Bengal Orientalists, distinguished Sanskritist, author of *Digest of Hindu Law* [1798], and founder of the Royal Asiatic Society, joined other scholars in the belief that in India the laws of groups preexisted the state. He cites an injunction from Bhrigu, a mythical lawgiver, that calls on each category of person to litigate controversies according to its own law:

> The frequenters of forests should cause their differences to be determined by one of their own order; members of a society, by persons belonging to that society; people appertaining to an army, by such as belong to the army . . . husbandmen, mechanics, artists . . . robbers or irregular soldiers, should adjust their controversies according to their own particular laws.[9]

Sanskrit law texts held that the king should oversee the self-regulating society rather than create laws for society. The *Manusmriti*, initially translated from Sanskrit into English by Sir William Jones, holds that "the king [was] created as the protector of the classes and the stages of life, that are appointed each to its own particular duty, in proper order." Nor were such injunctions found solely in the Hindu texts favored by the early British Orientalists such as Jones and Colebrooke. Richard Eaton shows numerous exemplars of legal understandings in sixteenth-century, Mughal-ruled Bengal, where Muslim administrators enforced laws particular to specific communities.[10] Such an understanding of Indian society supported the view that Indian society was constituted by groups.

Legal Uniformity and Individual Rights Enter the Contest

Group concepts flourished under company rule as long as Jones and his Orientalist brethren held sway. Their view of the value of Indian civilizations and social formations and practices was challenged and

largely overturned with the arrival in 1828 of Lord William Bentinck, the first of a series of liberal and utilitarian Governors-General. Liberal individualist themes now competed with earlier Orientalist constructions of India as a society constituted of groups. Liberal utilitarians in the era of Bentinck and Thomas Macaulay strove to liberate Indians from domination by groups, to unravel individuals from the grip of family, caste, and religious community, to strengthen individual choice against collective decision. Until Victoria's 1858 proclamation reversed its course, the Benthamite thrust posited that individualism and universalism were a requirement for progress and civilized living.

It was Governor-General Dalhousie's egalitarian policy of "treating all natives in much the same manner" that helped bring on the 1857–58 rebellion.[11] Corporate structures, James Fitzjames Stephen observed, would "decay because they represent a crude form of socialism, paralyzing the individual energy and inconsistent with the fundamental principles of our rule."[12] A series of legislative acts, none of them very consequential outside a small circle of urban-based cosmopolitan elites, advanced this individualist vision. Several were designed to establish rights independent of the joint family, the customary holder of property: the Freedom of Religion Act of 1850 saved converts, upon conversion, from losing their identity as Hindus, an identity they needed to secure property rights in the joint family;[13] the Widow Remarriage Act of 1856 asserted a woman's rights in the face of customary demands of the joint family in many upper castes; the Gains of Learning Act made it possible for a son educated by his joint family to appropriate the subsequent income to himself instead of having to share it with the family.[14] The introduction of wills substituted choice, by means of a legal instrument, for the prescriptive claims of the joint family.[15]

Individualism and legal universalism gained a formidable ally when in 1835 Thomas Babbington Macaulay joined Bentinck's government as law member of the council. Macaulay, who unashamedly admitted having "no knowledge of either Sanskrit or Arabic," alleged in a rightly notorious passage

> that all the historical information which has been collected from all the books written in the Sanskrit language is less valuable than what may be found in the most paltry abridgements used at preparatory schools in England.

He wrote a minute on education that convinced a majority of Bentinck's council to overturn the Orientalist support for Indian learning and languages. Macaulay's vision was to assimilate all mankind into the higher civilization of the educated Victorian. His goal was to form "a class of

persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect."[16] In 1835 Bentinck's council agreed to allocate its educational funds to teaching Western learning to young Indians in the English language. Macaulay's project of anglicized uniformity was deepened in 1857 when Sir Charles Wood's 1854 Education Dispatch recommending inter alia the establishment of English medium universities in the three presidency cities—Bengal, Madras, and Bombay—was acted upon. By 1885 English higher education had produced a national Indian elite who had "studied the classics of English literature and . . . followed . . . the course of politics in Europe [including] the rise of nationalism. . . ."[17] They were on the road to liberal universalism. In 1885, seventy-two of them met in Bombay to form the Indian National Congress. They imagined, or most of them did, that India would be *a* nation, constituted by individuals acting on majoritarian principles.

The Reaction against Liberal Universalism

A new discourse began after the 1857–58 revolt. The revolt had destroyed British confidence; loss of control, not only military but also cultural, was unexpected and sudden. "Henceforth, the British in India would always walk in fear. . . . [n]ow the British stepped back permanently into their neat little compound, fenced and right-angled, of facts and rules."[18]

Queen Victoria's 1858 proclamation repudiated and reversed the utilitarian and evangelical-inspired liberal universalism of company policy, a policy that extended from Bentinck and Macaulay in the 1830s through Dalhousie in the 1850s. But the retreat functioned to moderate rather than eliminate the processes of rationalization and universalization already set in motion.

Non-intervention was thought an appropriate remedy for the causes believed to have led to the 1857 revolt, utilitarian and evangelical-inspired "reforms" and "annexations" under the doctrine of "lapse."[19] The Queen, who in 1877 was made Queen-Empress of the British Empire in India, pledged to respect and protect India's alien diversity, including its religious practices. The proclamation declared "it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with religious belief or worship of any of our subjects on pain of our highest displeasure."[20]

Queen Victoria's 1858 non-interference proclamation was, of course, a doctrine, not a practice. Gordon Johnson argues that Henry Maine's cautious, conservative approach to legal reform can be taken to epitomize the way post-1858 British rule in India managed change while pursuing a doctrine of non-intervention.

> As Law Member [1862–69], Maine passed no striking laws. . . . Although . . . responsible for over two hundred separate Acts, his colleagues are remarkably unanimous in their welcome of his low key approach. Sir Richard Strachey found that Maine's virtue lay in that "he limited itself to the actual requirements of his time" while Courtney Ilbert . . . praised Maine for abstaining "from passing a great many measures of doubtful utility." Here was no adventurous law-giver as Macaulay had been thirty years before.[21]
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> While Maine was nominally complying with the non-intervention order, his Acts gave legislative form to civil usages and religious practices of particular groups of Indians, and here, while there were some notable exceptions as regards marriage, the overall tendency was to put into statute form customary laws and to do so in ways which were prevalent at the time. . . .

The effect of his tinkering was to universalize and standardize the law's relationship to society, and to move legal pluralism outward and upward from the diversely constituted periphery toward a more uniform national level. It set the stage for the struggle in the 1990s between minority rights based on legal pluralism and the various perceived requirements of the Directive Principle's Article 44 "to secure a uniform civil code for the citizens" of India. Victoria's retreat from the utilitarians' efforts to rationalize Indian administration and to codify Indian law left Indian society with a viable group life, but stood in tension with an incompatible universalizing discourse.

Group Rights as Defense against Majoritarianism

Sir Sayyid Ahmad Khan, the pre-eminent Muslim modernist reformer, contributed mightily to the British resurrection of a corporate theory of Indian society. He found the formal creation of Indian nationalism in 1885 by anglicized liberal universalists a threat and a challenge. From his perspective Muslims had much to fear from claims that there was *an* Indian nation. Few Muslims had responded to Macaulay's call to become "English in taste, in opinions, in morals, and in intellect," or

to Sir Charles Wood's call to be educated in English language learning. Sir Sayyid typified the ambivalence of his time as he encouraged Muslims to join Anglo-Victorian universalism on the one hand while creating a protective arena for Muslim group rights on the other.

Muslim "backwardness" had many causes, one of which was that the British, having wrested power from the Mughals in whose name the East India Company had ruled India, feared and distrusted (even while emulating) their former Muslim masters. The 1857–58 rebellion was in part an effort by Indian Muslims and others to oust the British and to place Bahadur Shah II, a Mughal emperor, back on the throne. Sir Sayyid tried to deal with a debilitating psychology of past greatness and with the nostalgia and inertia that marked the downward mobility of Muslim lineages and families who remembered being the rulers of India. His goal was "to lure his community from its tents of Perso-Arabic mourning for the demise of Mughal glory into the market place of vigorous competition with Hindus, Parsis, Christians for ICS [Indian Civil Service] positions and the privileges of Anglo-Indian power."[22]

To that end, on Queen Victoria's birthday in 1875, two years before she was declared Queen-Empress of India, Sir Sayyid established the Muhammadan Anglo-Oriental College at Aligarh.[23] The young Tory from Cambridge who became the college's second principal, Theodore Beck, modeled it on the British public school—games, little magazines, a liberal curriculum. Sir Sayyid hoped to create an alternative anglicized elite that could hold its ground with, even best, the elite that Macaulay's and Wood's educational reforms had brought into being. By gaining positions in the ICS, the "steel frame" that governed India for the British crown, Muslims too would have seats at the table.

Sir Sayyid found it difficult to accept Congress's one-nation theory. For him India was "inhabited by different nationalities." In 1883 in a debate in the Governor-General's Council on the Central Provinces [now Madhya Pradesh] Local Self Government Bill, he warned the Council that

> in borrowing from England the system of representative institutions, it is of the greatest importance to remember the socio-political matters in which India is distinguishable from England. . . . India . . . is inhabited by vast populations of different races and creeds. . . . The community of race and creed makes the people one and the same nation . . . the whole of England forms but one community . . . in India . . . there is not fusion of the various races . . . religious distinctions are still violent. . . . education in its modern sense has not made an equal or proportionate progress among all sections of the people. . . . So long as . . . [such] differences form an important element in the socio-political life of the country, the system of election, pure and simple [i.e., majority rule], cannot be adopted.

Without a homogenous nation, and India for the foreseeable future, in Sir Sayyid's view, could not be a homogenous nation, safeguards such as reserved seats, separate electorates, "weightage," and nominated members were necessary to insure "due and just balance in the representation of the various sections of the Indian population."[24]

Muhammad Ali Jinnah, the father of Pakistan and its Qaid-i-Azam (great leader), was a figurative son of Aligarh, i.e., the kind of anglicized, modern Muslim that Sir Sayyid Ahmad Khan sought to create. Like Sir Sayyid, he prospered under British policy and rule. And he too, fearing a Hindu majority, searched for mechanisms that would allow a Muslim community to have its fair share of seats in the chambers of government. Sir Sayyid had spoken of "many nations"; in 1937 Jinnah began speaking of two, Pakistan and India. With partition into two successor states in 1947, 10 percent (35 million then, 110 million now) of India's population were Muslims. How, without raj-like safeguards, was the new state to recognize and legitimize differences and protect minority rights in a parliamentary democracy with universal suffrage and majority rule?

Communal Reservation as Group Entitlement

In pre-independence India, the answer to the question of how to reconcile minority rights with majority rule was communal reservations. Until the second half of the nineteenth century, the colonial government's policy had expressed the group principle mainly through legal practice in the arena of personal law. As representation of Indians was timidly and haltingly introduced into local and provincial governments in the 1880s, the principle took on political form. If India consisted of groups, groups would be the basis of representation.

The political expression of this vision was a policy of legislative reservations that emphasized the group nature of Indian society. From the first inclusion of Indians in governing councils at the state and national level after 1858, corporatist principles dictated the units: landowners, university bodies, municipalities, and eventually minority religious entities—Muslims, Christians, Sikhs.[25] In the south, the battle over representation took a different form. Because indigenous resistance

to Brahminic dominance surfaced early in the twentieth century, caste rather than religious community became the contested group identity in politics and bureaucracy. The British introduced reservations for "forward" and "backward" non-Brahmin castes into legislatures, civil services, and educational institutions in south India beginning in the second decade of the twentieth century.[26]

The most important embodiment of the group principle before independence was a scheme to give "safeguards" to minority religious communities by providing them with separate electorates and reserved seats.[27] By privileging these categories for purposes of representation, the British both shaped and reflected the idea that religious identities trumped all others. In the process, they invented the principle that religious groups were homogeneous. Separate electorates had the effect of deterring appeals to cross-cutting cleavages, appeals which might allow individuals to escape corporatist domination and isolation. First institutionalized in the Morley-Minto constitutional reforms of 1909, reservations based on religious community, i.e., for Muslims, continued in the Montagu-Chelmsford reforms of 1919 and in the constitutional framework created by the Government of India Act of 1935.

Nationalists regarded "safeguards" which included both reservations of seats and "weightage," extra seats for minorities, as a policy designed to divide and rule Indians. The principle spread. During the negotiations preceding the Government of India Act of 1935, untouchables lobbied for similar group recognition, for separate electorates, and for reservations. They succeeded in having seats reserved for untouchables but failed to gain separate electorates after Gandhi's 1932 "fast unto death" against what he regarded as a British scheme to divide and weaken nationalism.[28] The potential for divisiveness of group reservations was realized in 1947 when India at independence was partitioned into two successor states, India and Pakistan.

The idea of group protection also infiltrated nationalist policy and practice. Paradoxically, it was the nationalist faction most wedded to equal citizenship grounded in territorially organized individuals, the rationalist modernists allied with Jawaharlal Nehru, who encouraged a decision-rule within the Congress Party and in Congress-controlled legislatures that gave groups the right to veto decisions affecting their interests. The rule was first adopted in the Congress Party's constitution, then incorporated in the Lucknow pact of 1916, which for a time united the Indian National Congress and the Muslim League on nationalist objectives. The rule provided that if three-fourths of the minority community, e.g., Muslim members, opposed a policy deemed to affect their interests, the policy could not go forward.[29] The decision-

rule recognized the limits on majority rule in democracies. Minorities can threaten exit if denied voice.[30]

Between Group Identity and Individual Rights: The Constituent Assembly

We have tried to show how at independence in 1947 India's constitution makers had available alternative and competing norms stressing group particularism on the one hand and individualist universalism on the other. Historical processes and events had endowed these concepts with changing meaning and consequences over time. Independence in 1947 and the Constituent Assembly that sat until 1950 provided the high-water mark of liberal universalism. Since then, with the powerful exception of the rise of Hindu nationalism in the 1980s, difference and group identity expressed in the legitimation of legal pluralism, multicultural ideology and minority rights have gained ground.

In 1947, nationalist opinion held that group-based norms and practices, such as separate electorates, reserved seats, and weightage, found in British efforts to bring representative government to India in the reform acts of 1909, 1919, and 1935, were responsible for the partition of the subcontinent. The nationalists who ran the Constituent Assembly were likely to be socialists like Nehru, pluralist inclusivists like Gandhi, or liberal constructivists like Sapru and Rau, not primordialists or essentialists like raj officials or Hindu nationalist and Muslim nationalist politicians. Many nationalists believed that the religious and caste categories found in British censuses and official discourse and law were not natural or primordial, but the products of the raj's historical circumstances and fertile imaginations. The incentives offered by officially created groups and the reservations extended to them inhibited appeals to cross-cutting cleavages and cemented solidarities based on religion and caste. The many other identities and interests active and available on the subcontinent were marginalized by official raj sociology.

The Nehruvians, who were hegemonic in the Congress Party and in the Constituent Assembly, were doggedly determined to deny that religious identities trumped all others and to see to it that the 1935 Government of India Act, which served as the basic text for the new constitution, was purged of provisions recognizing and privileging group identity. Reserved seats and separate electorates for Muslims, Sikhs, Christians, and other minorities were eliminated. The only exception to the elimination of group rights was reservation by proportion of the population for the scheduled castes (ex-untouchables) and tribes.[31]

After independence, partition, and the departure of the British on 15

August 1947, the remaining Muslim members in the Constituent Assembly were uncertain about what to expect and what course to follow. Sixty percent of unpartitioned India's Muslims were now in Pakistan. Did the great vulnerability of the remainder require the continuation, even the strengthening, of minority safeguards, or did it suggest that the Muslims should ingratiate themselves with Congress leaders by offering to surrender to them? Vallabhbhai Patel, the deputy prime minister and home and states minister, who in retrospect appears as a Hindu nationalist, "quietly and privately put a great deal of pressure on the minorities to relinquish special privileges"[32] but "was too considerate of minority fears—and too much the strategist—to force the issue. . . . [Publicly he said that] the giving up of reservation should not be forced on any minority."[33] "The [Muslim] community," Granville Austin tells us, "was deeply split by the issue. Ultimately it would decide . . . to forego even reservations in the Legislature, hoping by its sacrifice to ensure fair treatment from the Hindu majority."[34]

It was not until May 1949 that the Constituent Assembly took its final decisions on the reservation of seats in legislatures. H. C. Mookerjee was a Christian member who, unlike others of his community in the Constituent Assembly, believed that the minorities, his own and others, should voluntarily give up reservations. It was Mookerjee who, on behalf of the relevant Advisory Committee, moved the resolution to abolish reservations for minorities. Scheduled castes and tribes were spared. All that minorities need, he urged, for protection from democratic majorities is the fundamental rights guaranteed to all citizens in Part III of the Constitution. Its Articles 14 through 29 provide inter alia for equality under the law, prohibiting discrimination, protecting freedom of speech, life, and personal liberty, and guaranteeing freedom of conscience and freedom to profess, practice, and propagate religion.

Mookerjee urged minorities to stop thinking in terms of sub-national minority groups. "I have all along held," he said, "that India is one nation." His resolution carried "with nearly everyone present agreeing or saying they did."[35]

Partition had taught not one, but two lessons. One was that minority safeguards, particularly reservations, can harden cleavages that lead to secession, the other that the Muslims in partitioned India would continue to feel endangered by what many perceived as a Hindu majority. They needed reassurance that their corporate identity was recognized and that their corporate life was secure. This second lesson of partition convinced Nehru and those he led in the dominant Congress Party that Muslims in partitioned India needed special guarantees. These took the

form of allowing the Muslim community to preserve and practice their personal law.

Group Rights for Lower Castes

Looking back on the era of partition and constitution making from the perspective of the ideological excitement and political competition of the 1980s and 1990s, two kinds of groups continue to support legal pluralism against the constitutional injunction to implement legal universalism in a uniform civil code. Those groups are lower castes who seek reservations and religious communities who seek protection for their personal law.[36]

First, caste. As we have seen, reservations of legislative seats for scheduled castes and tribes survived in Articles 330 and 332 of the Constitution. These provisions had their progenitors in the British privileging of "backward" castes, expressed in their protection, via "communal awards," of non-Brahmin castes in the south beginning in the 1910s.[37] Positive or protective discrimination on behalf of "backward classes" that began with the Scheduled Castes and Tribes was extended nationally in the 1990s by wide-ranging reservations on behalf of "OBCs" (Other Backward Classes, an administrative euphemism for lower castes)[38] in the countryside where 75 percent of India's voting population lives. Their high levels of participation in national and state electoral politics have radically transformed the sociological profile of India's national Parliament, state assemblies, and their cabinets. The rise of the OBCs first in state and then in national politics has tended to marginalize the upper-caste, upper-class elites who dominated Congress Party politics in the Nehru/Indira Gandhi dynasty era.

A second "Backward Classes Commission"[39] chaired by B. P. Mandal was established to try to implement what the Constitution seemed to promise, reservations for "Other Backward Classes." Reporting in 1980, the Mandal Commission presented the country with an anthropological index organized by states specifying 3,743 backward castes. These were the castes said to qualify as beneficiaries under the constitutional clauses urging special care for "backward" citizens.[40] The Commission estimated that backward castes listed in its report constituted 52 percent of the population. It recommended, however, that only 27 percent reservations be set aside for the OBCs listed. Reservations totaling 52 percent when added to the 22.5 percent already reserved for scheduled castes and tribes would violate the Supreme Court's standard in *Balaji* that reservations totaling more than 50 percent would be a

fraud on the Constitution, in part because exceeding 50 percent would violate the equal rights clauses of the Constitution.

Even before the Mandal Commission made its recommendations, many Indian states had already enacted legislation providing reservations in educational institutions and government jobs for "backwards." When Prime Minister V. P. Singh's government began to implement the Mandal Commission recommendations in 1990, the Bharatiya Janata Party withdrew its support from his coalition government and soon after launched a *padyatra* (national pilgrimage) on behalf of *hindutva* (Hinduness). There were riots and immolations mainly by disgruntled upper-caste, upper-class students, the government fell, and a mid-term election followed. In 1991, a Congress government under Prime Minister Narasimha Rao took office. It too began cautiously to implement the Mandal Commission's recommendation. Today OBC politics and reservations have been, if not fully normalized, at least accepted as part of the rules of the game. Legal pluralism in the form of reservations for particular lower castes seems well-established as the twentieth century gives way to the twenty-first.

Minority Rights for Religious Communities: The Uniform Civil Code

Religious collectivities also claimed exemption from universal rules. Having wiped out reservations of legislative seats on the basis of religion, the Constituent Assembly proceeded to write Article 29, which guarantees the right to maintain distinct cultures. "Any section of the citizens of India . . . having a distinct language, script [Gurmukhi was a script used by Sikhs; Urdu by Muslims] or culture [a euphemism for religion] shall have the right to preserve the same." Article 30 guaranteed the right of religious minorities to establish educational institutions and barred the state, which supports private educational institutions, including religious ones, from discriminating against them.[41] The Articles raise the question of whether it is constitutionally permissible to have different laws for different groups defined according to religion. Not really, the Constituent Assembly wanted to say. It almost said it. It almost asserted that a uniform civil code supersedes the varieties of personal law. But at the last minute, it held its hand.

At the urging of "liberals" such as Minoo Masani, Amrit Kaur, and Hansa Mehta, the Constituent Assembly considered including a uniform civil code in the justiciable provisions of the Constitution. Such a code, embodying general laws applicable to all individuals regardless of religion, would have been mandated to come into force over a five- to

ten-year period.[42] By abolishing the differences in personal law it would "get rid of these watertight compartments . . . which keep the nation divided."[43]

The provision died in committee but was eventually included in the "Directive Principles of State Policy," non-justiciable Articles [36 through 51] included in Part IV of the Constitution. They articulate the imagined social revolution of the Nehruvian nationalist generation. It expresses purposes and goals but creates no rights. The hesitancy to include an actionable uniform civil code in the Constitution reflected the concern of the Nehruvian secular nationalists for the sensibilities and needs of India's religious minorities. They wanted to insure that Muslims particularly but also Sikhs, Christians, Parsis, Jains, and others in secular India would not only feel safe but at home. They were to be not only citizens with equal rights but also members of religious communities whose different cultures and identities would be secure and honored through the continued existence and viability of their personal law.

The Uniform Civil Code as Historical Process

One way to think about the uniform civil code is as a process that has gone on for more than 150 years and has been continually challenged. For much of that period, in the hands of British reformers before independence and nationalist secularists since independence, the tendency appeared to be in the direction of greater homogeneity. Since the 1970s, forces of difference and identity appear to have strengthened the heterogeneity of religiously based personal law.

Homogeneity was served powerfully in the nineteenth and twentieth centuries by three processes: changes in who administered the law; expansion of universal law by processes of codification; and the reformation and homogenization of personal law.

First, administration. The British began with a partial commitment to having the law interpreted by Hindu and Muslim religious adepts, attaching pandits and maulvis to their courts.[44] But these indigenous court advisors were dispensed with in 1864.[45] British magistrates or British-trained magistrates became the sole executors of personal law, soundlessly introducing principles of evidence and interpretation that smoothed out difference. The hierarchical organization that links all courts in India into a single system leading today to the Supreme Court also favored homogeneity.[46] The court *system* was universalized long before the law.[47]

The great wave of legal codification by the British in the nineteenth century swept away the particularities of criminal law (via the Penal Code of 1860), preserving neither Muslim nor Hindu penalties.[48] A series of civil law acts passed between 1865 and 1872 were based mainly on British civil law, exempting, however, the realm of personal law—marriage, divorce, succession, adoption, property, and definition of family.

Finally, the reformation of the personal law itself led toward uniformity within each of the compartments. To assert legally that there is one undifferentiated "Hindu" and "Muslim" personal law was itself a significant act of homogenization. The personal law of Hindu lower and upper castes differs markedly, as does law between regions which have different kinship systems. "Muslims" too is an amalgam of sectarian identities with different rules and practices.[49] When the Shari'at Act was passed in 1937 to regularize and rationalize Muslim law, it wiped out the particular personal laws of several Muslim communities that constituted minorities within Indian Islam: the Khojas and Cutchi Memons of Gujarat and the Muslims of North West Frontier Province, all of whom followed Hindu laws of inheritance, and the Malsan Muslims, who followed matriarchal laws of inheritance.[50]

Just as the practice of the British courts narrowed the number of precepts accepted as Muslim or Muhammadan law, Muslim hierarchical organization gave a kind of finality to *Shari'at* which it could not attain when authority was localized and distributed among many *madrasas* as well as individuals.[51]

If we understand the uniform legal code as a historical process instead of a one-time legal enactment, this is the story of the homogenization process. But there is a parallel story of the survival and reassertion of legal pluralism. The sensational 1985 Shah Bano case encapsulates the intense contemporary tension between the uniformity-making process and the pluralist counterforce.

Shah Bano, a divorced Muslim woman, sued her husband for maintenance. The court held her entitled to maintenance under Article 125 of the Code of Criminal Procedure, which had often been previously invoked, including in cases of Muslim women, to prevent female vagrancy by forcing husbands to support wives whom they had divorced. The Supreme Court decision was rooted in cases dating back to the raj that had not occasioned Muslim challenge. This point matters, suggesting that the acceptance of the homogenizing process is premised on the trust and distrust prevailing among contesting groups at particular moments in historical time. The decision was welcomed with jubilation by women's groups and was seen as a step in the direction of a uniform

civil code. But the Muslim community *in this instance,* at a historical moment that saw a rising spiral of Hindu nationalism, interpreted the court's decision in favor of Shah Bano as violating Muslim personal law, which mandates that when the marriage contract is terminated by divorce, the husband's financial obligations cease and are to be taken up by blood relatives or Muslim religious bodies.[52] Muslim protests and electoral reaction were sufficiently strong that the Rajiv Gandhi government, which had originally welcomed the decision, reversed course and passed legislation protecting the Muslim personal law in cases of Muslim divorce.

The Shah Bano case highlights the fact that the uniform civil code arena is likely to represent a process rather than an enactment, a continual negotiation more than a unilinear progression. Much of that process is likely to consist of the gradual accumulation of court decisions and particular pieces of legislation pointing in contradictory directions. In a careful review of cases litigated since the reform of the Hindu Code in the 1950s, Vasudha Dhagamwar, an activist legal scholar, traced a process of accumulation through the debates and litigation surrounding the Bombay Hindu Bigamous Marriages Act, the Hindu Marriage Act of 1955 (an element of the "Hindu Code"), the Bombay Excommunications Act, the various versions of the Indian Adoption Bill, and the cases arising out of the Code of Criminal Procedure of 1973 which led to the Shah Bano case. Dhagamwar believes that the process since independence has been to erode the forces promoting uniformity.[53]

Legal Pluralism as Multiculturalism: A Uniform Civil Code vs. Minority Rights

When Rajiv Gandhi's Congress government in 1986 gave support to Muslim personal law by passing a Muslim Women (Protection of Rights on Divorce) Act, his action raised a political storm.[54] Sections of the Hindu nationalist Bharatiya Janata Party asserted that minorities were being pampered and privileged at the expense of the "majority community," a euphemism for Hindus. The Bharatiya Janata Party's post–Shah Bano advocacy of a uniform civil code had placed the contest between legal uniformity and legal pluralism at the center of Indian political debate. It was a contest which fanned the flames of Hindu nationalism that leaped ever higher between 1985 and 1992. On 6 December 1992, thousands of Hindu nationalist youths wearing saffron headbands and wielding pickaxes destroyed the sixteenth-century Babri Masjid (mosque built by the Mughal emperor Babur) while the prime minister of India stood helplessly by. They did so on the ground that it dese-

crated the site on which a temple to Lord Ram had stood. The internationally televised event became the symbol of a monumental crisis in India's self-definition as a secular state.

These events raise a number of questions. One is, how did Indian public discourse about difference move from the harmony of civilizations to the "clash of civilizations"? Was the shift occasioned by the rise of Hindu nationalism an aberration or is it likely to endure?

As we write, the flames of Hindu nationalism appear banked. In its quest to become the dominant party in a diverse multi-cultural land, the Hindu nationalist Bharatiya Janata Party has responded to the 1996 and 1999 elections by off-loading its communal, anti-minority planks.[55]

Advocacy of a uniform civil code has been abandoned. The party has attempted to distance itself from extremist fringes. It has shown movement toward the policies that governments in a multi-cultural society find prudent to embrace, recognizing and valuing difference rather than denigrating or eradicating it.

Representative of a new discourse that makes a uniform civil code compatible with the continuing existence and integrity of personal law is S. P. Sathe's argument that "the Constitution doubtless visualizes the emergence of a uniform civil code but does it mean a single law for all? . . . Within one nation there can exist a number of legal systems. In fact federal government," he continues, "means the coexistence of such multiple laws. . . . This means that Maharashtra may have its own family law different from that of Karnataka. In the U.S. each state has its own matrimonial law."

A uniform law, Sathe argues, "does not necessarily mean a common law but different personal laws based on uniform principles of equality of sexes and liberty for the individual. . . ."[56]

The struggle between legal uniformity and legal pluralism remains at the center of public debate. We see the contest as an open-ended story about balancing the uniformity of a civil code that protects individual rights with the diversity of personal laws that protects minority rights. Hopefully it will be the story of an unstable but viable equilibrium that combines the legal equality of human rights with a post-civilizational "multi-culturalism." The language of multi-culturalism exhibits a family resemblance to the language of India's eighteenth-century Orientalists, in their common belief that difference would be recognized and valued rather than denigrated or eradicated.

The idea of a uniform civil code carries no single meaning over historical time. Its advocates change, and change sides. Semioticists might

call it a multivalent signifier. We identify five possible meanings for the uniform civil code.

One. The British implicitly moved toward a uniform civil code without calling it that. At the cultural level, making the law more uniform, standardizing it, was an expression of rationalization and modernization. Uniformity of rules and regulations made it easier for those in charge of the "steel frame" to administer justice, provide law and order, and collect the revenue. Legal uniformity was in keeping with the formal organizations of the raj's administrative state. It made the law more legible for bureaucrats who were strangers to India's diversity and villages. And it was believed to facilitate control. These rationales were equally congenial to those charged with ruling the post-colonial state.

Two. For modernist, rationalist nationalists a uniform civil code seemed to promise national integration. It would do for twentieth-century India what nineteenth-century nationalism was thought to have done for European states, dissolve or erase differences. It would help bring into being a nation whose people shared an identity congruent with state boundaries.

Three. For civil rights activists, those speaking for the marginalized and powerless, women, children, cultural and ethnic minorities, and lower classes, a uniform civil code signified the expansion of rights to categories of persons oppressed by patriarchal, gerontocratic, collective, and oligarchic forms of social domination and control.

Four. For religious minorities, the uniform civil code signified an effort to erase the personal law of diverse communities. It posed a threat to their cultural identity, even to their cultural survival.

Five. For Hindu nationalists, a uniform civil code promised a legal means to eliminate cultural differences and the "special privileges" accorded to "pampered minorities." It would also have rectified what they perceived as an injustice, the reform in the 1950s of Hindu personal law (the "Hindu Code Bills")[57] without reforming the Muslim personal law,[58] making it possible in principle (but rarely in practice) for Muslim men to have four wives and to divorce at will.

At independence, about 1947–1950, the first three meanings of the uniform civil code were dominant. In the last decade, especially since the destruction of the Babri Masjid in December 1992, the last two meanings have come to the fore, seeing the uniform civil code as a means to diminish if not eradicate cultural pluralism. The foregrounding of these two meanings has changed the politics surrounding the uniform civil code by problematizing prior alignments. In contemporary Indian politics, civil and human rights activists who favor legal

uniformity are accustomed to opposing the anti-Muslim *hindutva* politics of Hindu nationalist politicians. Yet they find themselves on the same side with respect to a uniform civil code. They think of a uniform civil code as protecting and promoting the fundamental rights found in the Indian Constitution and human rights found in international law. Feminists who typically oppose Muslim patriarchal controls are obliged to recognize that wiping out a repressive Muslim personal law is also an act of identity destruction. How to be pro-civil and human rights and pro-feminist without being anti-Muslim? Where to go?

We have suggested that a uniform civil code can be conceptualized as a process rather than as a specific outcome, a process in which legal uniformity and legal pluralism jockey for dominance, not for the whole field. The liberal and progressive dream that it is the fate of difference to fade and for humanity increasingly to repair to a common mold,[59] and the additional dream of rationalists that it is the fate particularly of religion to fade away in face of the triumph of modern science, have receded in the last two decades not only in India but the wider world. In India, the opposition between legal pluralism and legal uniformity is not likely to yield a smooth progressive historical narrative in which society moves inexorably from the first to the second. Whether regarded as benign or malign, identity formation, in the form of religiously based personal law, seems to be alive and well.

The debate about the uniform civil code versus personal law need not be a zero-sum conflict. "To put the choice as one between the personal law system and a uniform civil code is to pose the issue too sharply," John Mansfield argues. He holds that it may be sensible to make distinctions and to adopt a "particularizing approach," such as "has been going on since 1772."[60] He bases his prescription on the importance of preserving difference, preserving, that is, the identity of ethnic or religious groups within a territorial state even while moving toward greater uniformity of rights.

Notes

1. The Supreme Court in *Balaji v. State of Mysore*, AIR 1963 S.C. 649 (664) stated that "There can be no doubt that the Constitution-makers assumed . . . that while making adequate reservation under article 16 (4) [which permits reservations in government employment or government funded institutions such as universities for 'any backward class of citizens'] care would be taken not to provide for unreasonable, excessive or extravagant reservation—therefore . . . reservations made under article 16 (4) beyond

the permissible and legitimate limits would be liable to be challenged *as a fraud on the Constitution* (underlining in the original)." Durga Das Basu, *Introduction to the Constitution of India*, 16th ed. (New Delhi: Prentice Hall of India, 1994), p. 93. For constitutional provisions and detailed commentary on them based on case law, including a discussion of percentages, see Durga Das Basu's humorously named *Shortage Constitution of India*, 11th ed. (New Delhi: Prentice Hall of India, 1994), p. 81.

The limits have been generally interpreted as meaning that reservation should not exceed 50 percent, although, at the time of this writing, Tamilnadu state legislation setting higher limits was protected from judicial review by being placed in the ninth schedule of the Constitution, a schedule that immunizes legislation from court intervention. However, the judiciary under the Keshavananda rules [*Keshavananda v. State of Kerala*, AIR 1973 S.C. 1641], which give the Court jurisdiction in cases where the "basic principles" of the Constitution are threatened, could, presumably, intervene against Tamilnadu.

The Report of the Backward Classes Commission in 1980 estimated that Other Backward Classes deserving of reservations constituted 52 percent of the population, but recommended only 27 percent reservations because, together with the 22 percent already reserved for Scheduled Castes [ex-untouchables or Dalits] by the Supreme Tribes, the total would be just under the limit set by the Supreme Court in *Balaji*. Government of India, *Report of the Backward Classes Commission*, vol. 1 (New Delhi, 1980), pp. 63 and 92.

2. This is an argument that Partha Chatterjee advances and problematizes in "Secularism and Toleration," *Economic and Political Weekly*, 9 July 1994, pp. 1768–77. Many of the issues he raises there were examined in the context of legal decisions by John H. Mansfield, "The Personal Laws or a Uniform Civil Code?" in Robert D. Baird, ed., *Religion and Law in Independent India* (Delhi: Manohar, 1993), pp. 139–177.

For a wide-ranging comparative study of pluralism and democracy, particularly in Islamic countries, see Alfred Stepan, "The World's Religious Systems and Democracy: Crafting the Twin Tolerations," paper delivered at the Mansfield College/Political Quarterly Conference on Religion and Democracy, Oxford, 10–12 Sept. 1999.

Conflict among multi-culturalism framed as minority rights; popular sovereignty framed as democratic majoritarianism; and equal citizenship framed as individual rights and legal equality, were featured in papers prepared for The Second International Liechtenstein Research Program on Self-Determination held at the Woodrow Wilson School of Public and International Affairs, Princeton University, 10 June 1995. See particularly papers by Daniel A. Bell, "Comments on Min Xin Pei's . . . A Strategy for Improving Minority Rights in China" [where he argues that "*a priori* there is no reason to believe that representatives of majority interests will respect the rights of minorities," and cites the murder by the Chinese

government of one-fifth of the Buddhist population of Tibet as evidence], and Michele Lamon's "Cultural Dynamics of Exclusion of Community in France, the United States, and Quebec." Conference papers were published in Wolfgang Danspeckgruber and John Waterbury, eds., *Self-Determination in Our World* (New York: Oxford University Press, 1998).

3. Article 29 provides that "any section of the citizens of India . . . having a distinct language, script [read Gurmukhi for Sikhs and Urdu for many Muslims] or culture [the identity and way of life, the 'ethnicity,' inter alia of Muslims, Sikhs, Christians] shall have the right to conserve the same." According to Durga Das Basu, Article 29 protects "the cultural, linguistic and similar rights of any section of the community who might constitute a 'minority' from the . . . democratic machine . . . being used as an engine of oppression by the numerical majority." D. D. Basu, *Introduction*, p. 367. Article 25 guarantees to "any denomination and any section thereof" the right to "manage its own affairs in matters of religion," which of course leaves the question, relevant to the Shah Bano case (below), of what is religion.

4. We use the "Sir" in identifying William Jones to recognize the somewhat "miraculous" moment in his life, on the eve of his departure to India to take up a judgeship in Bengal, when he acquired the title. He would serve the East India Company under the Bengal presidency of Governor Warren Hastings, soon [1784] to become the company's first Governor-General in India. After Jones had been impatiently and anxiously waiting for three years, King George III, thought by some to be mad, personally intervened on his behalf to secure his appointment.

   See Garland Cannon, *Letters of Sir William Jones*, 2 vols. (London: Oxford University Press, 1970), vol. II, pp. 515–517, as quoted in O. P. Kejariwal, *Asiatic Society of Bengal and the Discovery of India's Past* (Delhi: Oxford University Press, 1970), pp. 32–33.

5. See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999). According to Mehta, "Burke reflected on and wrote about various major sites of the empire—Ireland, America, and India . . . [he saw that] the British empire was neither predominantly Protestant nor Anglophone. [After the Seven Years' War, 1756–63] it . . . included French Catholics in Quebec and millions of Asians who were neither Christian nor white. . . . Burke's writings make it undeniably clear that he reflected with great seriousness on the situation in which the exercise of power and authority was implicated with considerations of cultural and racial diversity, contrasting civilizational unities, the absence of . . . consensual government, and alternative norms of political identity and legitimacy" (pp. 154–155).

   If difference was all for Burke, if persons were always and inevitably marked, for Locke sameness was all. Human nature was the same everywhere and always. For Mehta, Locke's ideas in *Two Treatises on Government* capture "liberal universalism," a world of "transhistorical, transcultural,

and most certainly transracial" principles and persons. "The declared and ostensible referent of liberal principles is quite literally a constituency with no delimiting boundaries: that is all humankind. The political rights that it articulates and defends, the institutions such as laws, representation, contract all have their justification in a characterization of human beings that eschews names, social status, ethnic background, gender and race . . . liberal universalism stems from . . . what one might call a philosophical anthropology . . . the universal claims can be made because they derive from certain characteristics that are common to all human beings" (pp. 51–52).

   Timothy Shah used his paper "The Religious Origins of Liberalism, 1604–1704" as the takeoff point for a similar critique of liberal universalism. Mansfield College/Political Quarterly Conference.

6. From *Proceedings of the Committee of Circuit at Kasimbazaar*, 15 August 1772, quoted in Bharatiya Vidya Bhaven, *History and Culture of the Indian People*, vol. 8, p. 361. For a longer discussion of Warren Hastings's role in the initial defining of difference, see Lloyd I. Rudolph and Susanne Hoeber Rudolph, "Occidentalism and Orientalism: Perspectives on Legal Pluralism," in Sally Humphreys, ed., *Cultures of Scholarship* (Ann Arbor: University of Michigan Press, 1997), pp. 219–251.

7. For alternative categories that mattered in the seventeenth and eighteenth centuries, notably regional lineages, see the work of Christopher Bayly, e.g., *Rulers, Townsmen and Bazaars; North Indian society in the age of British expansion, 1770–1870* (Cambridge: Cambridge University Press, 1983).

   For categories more generally see J. C. Masselos, "The Khojas of Bombay: The Defining of Formal Membership Criteria during the Nineteenth Century," in Imtiaz Ahmed, ed., *Caste and Social Stratification among Muslims in India* (Delhi: Manohar, 1978), pp. 97–116, and Harjot Oberoi, *The Construction of Religious Boundaries* (Delhi: Oxford University Press, 1994).

   Amrita Shodan shows how Bombay province's law collectors moved in the 1820s from looking at a variety of legal sources—court cases, Shastris, heads of castes, common people, others knowledgeable about the law—to concentrating mainly on castes as the units of legal practices. The form of inquiry in turn intensified the propensity for courts to treat caste as *the* form of community that generated law. ("Legal Representation of Khojas and Pushtimarga Vaishnavas," Ph.D. dissertation, Department of South Asian Languages and Civilizations, University of Chicago, 1995, p. 15.)

   For a critique of categories from a Saidean perspective, see also Ronald Inden, *Imagining India* (Oxford: Basil Blackwell, 1990). In the introduction of our *Modernity of Tradition: Political Development in India* (Chicago: University of Chicago Press, 1998), we speak of the "imperialism of categories" to critique Western scholars' imposition of "home" concepts on Indian civilizational experiences (p. 7).

8. For the centrality of self-regulating social groups in defining state–society

relations in Indian historical experience and thought, see Lloyd I. Rudolph and Susanne Hoeber Rudolph, "The Subcontinental Empire and the Regional Kingdom in Indian State Formation," in Paul Wallace, ed., *Region and Nation in India* (New Delhi: Oxford University Press and IBH Publishing Co., 1985).

9. Henry Thomas Colebrooke, "On Hindu Courts of Justice," in *Transactions of the Royal Asiatic Society of Great Britain and Ireland,* vol. 2 (London: Parbury, Allen, 1830), 174, 177.
10. Richard Eaton, *The Rise of Islam and the Bengal Frontier* (Berkeley: University of California Press, 1993).
11. Stanley Wolpert, *A New History of India* (New York: Oxford University Press, 1992), p. 242.
12. Leslie Stephen summarizing his brother's views in the *Life of Sir James Fitzjames Stephen* (London: Smith, Elder, 1895), p. 285.
13. Ibid.
14. Gains of Learning Act was brought before provincial legislatures but was not passed until 1930.
15. Wills began to be effective as early as 1792 in Bengal, in Bombay in 1860, and in Madras in 1862. See Sir Francis Dúpre Oldfield, "Law Reform," in H. H. Dodwell, ed., *Cambridge History of India* (1st Indian reprint, no date), vol. VI.
16. Macaulay as quoted in Wolpert, *India,* p. 215.

    The high point of the Bentinck era's liberal universalism was probably Article 47 of the East India Charter Act of 1833, which was more honored in the breach. It proclaimed: "No Native of said Territories . . . shall, by reason of only his religion, place of birth, descent, colour, or any of them be disabled from holding any place, Office, or Employment under the said Company." Wolpert, *India,* p. 213.
17. Reginald Coupland, *The Indian Problem; Report on the Constitutional Problem in India,* 3 vols. in 1 (New York: Oxford University Press, 1994), vol. 1, p. 23.
18. Marian Fowler, *Below the Peacock Fan: First Ladies of the Raj* (New York: Penguin Books, 1988), p. 150. Fowler's romantic pen contrasts Lord Auckland's (George Eden, Governor-General 1836–42) sister Emily Eden's easy familiarity and admiration for Indians and things Indian with Charlotte Canning's (wife of Lord Canning, Governor-General before and during the 1857 revolt and Viceroy from 1858 until 1862) alienation from and fear of India. Emily Eden's connections to India were not precisely subalternate, but she "had played chess with Dost Mahomed and taught English to Pertab Singh. . . . The Eden sisters [Fanny as well as Emily] had caught glimpses of Mughal magic and magnificence, of Peacock Thrones ablaze with light, enough to fire their imaginations, enough to see by. . . ." After 1857 such "easy conviviality between Indian ruler and English was . . . gone forever. . . . They sensed that the Indians hated them; and so they ruled with an iron hand, but one which trembled a little" (p. 150).

19. The classic text for "reform" is the late Eric Stokes's *The English Utilitarians in India* (Oxford: Clarendon Press, 1959). Part III, "Law and Government," and the "The Penal Code" are specially relevant to our theme.

    "Lapse" was a doctrine practiced particularly by Governor-General Dalhousie [1848–1856], barring succession in princely states of adopted heirs. It rationalized even if it did not legitimize an East India Company policy of "annexation," a de facto resort to war, against estates without natural heirs. Narratives of the 1857 rebellion feature the "annexations" of Jhansi and Oudh, thought to be triggering events. For a comprehensive and insightful account of the motives and consequences of annexation, see Michael H. Fisher, ed., *The Politics of the British Annexation of India, 1757–1857* (Delhi: Oxford University Press, 1993).
20. As quoted in Wolpert, *India,* pp. 240–241.
21. Gordon Johnson, "India and Henry Maine," in Mushirul Hasan and Narauani Gupta, eds., *India's Colonial Encounter: Essays in Memory of Eric Stokes* (Delhi: Manohar, 1993), p. 31.

    Johnson makes clear that "Maine's contemporaries recognized that his influence spread far beyond the making of laws. His serious writing—particularly *Ancient Law and Village Communities East and West*—had a profound effect on how Indian society was observed and understood." Among other things, Maine saw India with an ethnographic eye, arguing ". . . strongly against there being any uniform or clearly stated set of Indian law: rather the whole was a mess of shifting customs which varied from place to place and over time" (pp. 33 and 34).
22. Narrative based on and quotes from Wolpert, *India,* p. 264.
23. See the late Irene A. Gilbert's essay on Aligarh's founding, operation, and consequences, "Autonomy and Consensus under the Raj: Presidency (Calcutta); Muir (Allahabad); M.A.O. (Aligarh)," in Lloyd I. Rudolph and Susanne Hoeber Rudolph, eds., *Education and Politics in India* (Cambridge, Mass.: Harvard University Press, 1973), pp. 171–206.
24. Coupland, *Indian Problem,* vol. 1, pp. 155–156.
25. Ibid.
26. Eugene Irshick, *Politics and Social Conflict in South India: The Non-Brahman Movement and Tamil Separatism* (New Delhi: Oxford University Press, 1969).
27. For an account of the gradual expansion of representation, see Coupland, *Indian Problem,* vol. 1, pp. 47, 128, 138, 151.
28. The fast was seen by Dr. B. R. Ambedkar, leader of the untouchables and subsequently the law minister who guided the drafting of free India's Constitution, as an attempt by conservative Hinduism to deny autonomy to untouchables. The fast was the opening drama for Gandhi's extended campaign throughout the 1930s against the practice of untouchability—a cam-

paign that is seen by today's radical *Dalits* as paternalistic and demeaning, but which led to the special privileges for "scheduled castes" in the Constitution. For some aspects of the debate, see Rudolph and Rudolph, "Traditional Structures and Modern Politics: Caste" in *The Modernity of Tradition*, pp. 136–145.

29. Coupland, *Indian Problem*, vol. 1, p. 48.
30. See Albert Hirshman's *Exit, Voice and Loyalty* (Cambridge, Mass.: Harvard University Press, 1970) for more on these concepts and how they can be applied.
31. See Articles 330 and 332 reserving seats in national and state legislature for scheduled tribes and scheduled castes. Unless renewed and extended, the reservations were to expire in ten years after the coming into force of the Constitution in 1950. (They have been renewed by amendment in each ten-year period since 1950.)
32. Granville Austin, *The Indian Constitution* (New York: Oxford University Press, 1966), p. 151.
33. Ibid., p. 152.
34. Ibid., p. 151. See pages 151–154 for a discussion of the ambivalent quality of some of this support.
35. Ibid., p. 154.
36. Another voice in support of legal pluralism is regionally dominant linguistic groups ("sons of the soil") who have demanded to be privileged in employment as against immigrants from other regional linguistic areas. The most notorious example is that of the Shiv Sena in Maharashtra, who began by attacking Tamils and of late has been attacking Muslims from Bengal and Bangladesh. We will not deal with this form of legal pluralism here.
37. See Irshick, *Politics and Social Conflict*.
38. For a careful account of the history of reservations and their legal standing see Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (New Delhi: Oxford University Press, 1984). See also our *Modernity of Tradition*, notably pp. 137–154. A codicil to the universalizing language of Article 16, "Equality of opportunity in matters of public employment," states that "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State" [Article 16 (4)]. A similar codicil envisioning protections to "socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes" attaches to Article 15, which prohibits "discrimination on grounds of religion, race, caste, sex or place of birth." 15 (1).
39. The first Backward Classes Commission was chaired by Kaka Kalelkar, who concluded that "backwardness could be tackled on the basis or a number of bases other than that of caste." Transmittal letter, in Government

of India, Backward Classes Commission, *Report of the Backward Classes Commission* (Delhi: Manager of Publications, 1955), vol. 1.

40. The Constitution avoids using the term *caste*, and refers rather to "backward classes," evidence of the founders' interest in privileging criteria other than caste. Special provisions for "socially and educationally backward classes" are exempted from the prohibition, under Article 15, of discrimination on grounds of religion, race, caste, sex, and place of birth. These provisions are again exempted from the guarantee, in Article 16, of equality of opportunity in public employment. Article 340 provides for the appointment of a commission to investigate the conditions of the backward classes and recommend remedies. See also Government of India, *Report of the Backward Classes Commission* ("Mandal Report"), vol. 1 (New Delhi, 1980), pp. 63 and 92. The Supreme Court declared the Mandal reservations valid in 1993.
41. The high bar, sometimes referred to as "a wall of separation," between the state religious institutions including educational institutions that characterizes U.S. practice does not govern Indian law and practice, nor did it British, which includes grants-in-aid to religious institutions subject to certain standards.
42. For a detailed discussion of the Constituent Assembly debate see Vasudha Dhagamwar, "Women, Children and the Constitution," in Robert D. Baird, ed., *Religion and Law in Independent India* (New Delhi: Manohar, 1993), pp. 218–221.
43. Minoo Masani, cited in Granville Austin, *The Indian Constitution*, p. 80.
44. These adepts were messengers of the written texts of high culture law, in the case of Hindus of "Brahmanic" law. They disprivileged the local usage and customs of the lower castes who constituted the vast bulk of the population. Rudolph and Rudolph, "Legal Cultures and Social Change," in *Modernity of Tradition*, pp. 274–279.
45. W. H. Menaghten, *Principles and Precedents of Hindu Law* (Calcutta: University of Calcutta Press, 1829), vol. I, p. vi.
46. See Gregory C. Kozlowski, "Muslim Personal Law and Political Identity in Independent India," in Baird, *Religion and Law in Independent India*, p. 81.
47. However, it is important to recognize that the official court system accounts for only a part of adjudication of disputes under personal law. Much adjudication still takes place in caste councils among Hindus and by the decision of religious scholars among Muslims. See, for example, Gregory C. Kozlowski's account of the cases handled by the *mufti* of a Hyderabadi *madrasa*, "Muslim Personal Law," pp. 82–85.
48. Although elements of excommunication as a penalty survived.
49. See inter alia Katherine Ewing's "Introduction: Ambiguity and Shari'at—A Perspective on the Problem of Moral Principles in Tension"; David Gilmartin, "Customary Law and the Shari'at in British Punjab," in Katherine

Ewing, ed., *Shari'at and Ambiguity in South Asian Islam* (Berkeley: University of California Press, 1988), pp. 1–24 and 43–62; and Kozlowski, "Muslim Personal Law," particularly "Creating Muslim Personal Law," pp. 79–82.

Special mention should be made of the essays in Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Bombay: Orient Longman, 1987), and of Tahir Mahmood's study, *An Indian Civil Code and Islamic Law* (Bombay: N. M. Tripathi, 1976).

50. Dhagamwar, "Women, Children and the Constitution," p. 219.
51. Kozlowski, "Muslim Personal Law," p. 81. For similar discussion see Katherine Ewing, "Introduction: Ambiguity and Shari'at—A Perspective on the Problem of Moral Principles in Tension" and David Gilmartin, "Customary Law and the Shari'at in British Punjab," both in Ewing, ed., *Shari'at and Ambiguity*, pp. 43–62.
52. See a more detailed discussion of the case in its larger context in the struggle over secularism in Rudolph and Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (Chicago: University of Chicago Press, 1987), pp. 44–46.
53. Dhagamwar, "Women, Children and the Constitution," p. 255. For a recent discussion of a uniformity-promoting piece of legislation, see Mrinalini Sinha, "The Lineage of the 'Indian' Modern: Rhetoric, Agency, and the Sarda Act in Late Colonial India," forthcoming in Antoinette Burton, ed., *Unfinished Business: Gender, Sexualities, and Colonial Modernities*.
54. The immediate sign of a storm was the loss of a mid-term election in a Muslim constituency in Bihar. For details, see Rudolph and Rudolph, *Lakshmi*, end note 66, pp. 419–420.
55. By late 1995, with the eleventh Parliamentary election just three or four months away, strains began to appear within the Bharatiya Janata Party over its commitment to a uniform civil code. Not only were some in the party reluctant to drive away Muslim votes so vital for success in Uttar Pradesh, India's largest state, but also moderate and fundamentalist Hindus were having second thoughts about a uniform civil code. It had dawned on many of them that a uniform civil code was not the same thing as "their" Hindu Code and that its effects might not be confined to preventing Muslims from having several wives and from divorcing them at will. A uniform civil code could jeopardize, they realized, the Hindu undivided joint family, a legal fiction that can reduce tax liabilities and make it possible to discriminate against female members of the family by, inter alia, depriving them of equal property rights. The 1998 and 1999 elections, which made the Bharatiya Janata Party reliant on many secularist coalition partners, further made Hindu planks undesirable.
56. S. P. Sathe, "Uniform Civil Code: Implications of Supreme Court Intervention," *Economic and Political Weekly*, 2 September 1995. Imtiaz Ahmad's "Personal Laws: Promoting Reform from Within," *Economic and Political Weekly*, 11 November 1995, makes a similar argument. Ahmad has played a key role in bringing together Muslim intellectuals and 'ulama'. So has Mushirul Hasan, whose "Muslim Intellectuals, Institutions, and the Post-Colonial Predicament," *Economic and Political Weekly*, 25 November 1995, provides a learned and persuasive case for introducing laws and practices commensurate with "Indian Islam." Saabeeha Bano in "Muslim Women's Voices; Expanding Gender Justice under Muslim Law," *Economic and Political Weekly*, 25 November 1995, argues on the basis of results of an opinion survey among Muslim women in Delhi that the gender justice objectives that a uniform civil code might realize can be achieved by a process of reform of personal laws.

John H. Mansfield concludes his article "The Personal Laws or a Uniform Civil Code?" (in Baird, ed., *Religion and Law in Independent India*) with the observation that a uniform civil code should not entirely eliminate diverse personal law because of the importance of preserving the identity "of . . . ethnic or religious group[s] within a territorial state [and their] being able to maintain [their] distinctive identity and through this . . . members' sense of existing and having meaning" (pp. 175–176).

For versions of the debate about politics and of the battle over a uniform code, see "Uniform Civil Code; Striking Down a Right," *India Today*, 15 June 1995; Abida Samiuddin, "Status of Hindu and Muslim Women: A Comparative Study," *Mainstream*, 8 July 1995; and "Uniform Civil Code: A Calculated Gambit," *India Today*, 31 July 1995.

"Our Modern Hate: How Ancient Animosities Get Invented," *The New Republic*, 22 March 1993, dealt inter alia with the tension in India between multi-culturalism and Hindu nationalism.

57. See Harold Levy, "Indian Modernization."
58. For a relatively detailed discussion of the "Hindu Code," see Dhagamwar, "Women, Children and the Constitution," p. 234 ff.
59. For a debate along these lines see Martha Nussbaum, ed., "Patriotism or Cosmopolitanism," *Boston Review* XIX, no. 5 (October/November 1994). For an application of the debate to India see the contribution to the debate by Lloyd Rudolph, "The Occidental Tagore."
60. Mansfield, "The Personal Laws or a Uniform Civil Code?" in Baird, ed., *Religion and Law*, pp. 175–176.