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Pakistan or the Cemetery!: Muslim Minority Rights in Contemporary India

Anthony Chase

"PAKISTAN OR THE CEMETERY!": MUSLIM MINORITY RIGHTS IN CONTEMPORARY INDIA

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If religion. . .continues to interfere with everything, then it will not be a mere question of divorcing it from politics, but of divorcing it from life itself.

Jawaharlal Nehru

The rule of the majority is basically a communal majority and not a political majority. It is for the majority to realize its duty not to discriminate against minorities. Whether the minorities will continue or will vanish must depend upon this habit of the majority. The moment the majority loses the habit. . .the minorities can have no ground to exist.

Dr. B.R. Ambedkar, "father of the Indian Constitution"

Hindu sentiments in this country cannot be subjugated for long. This has been proved today.

Ashok Singhal, participant in the destruction of Babri Masjid mosque

To have loved one horizon is insularity; it blindfolds vision, it narrows experience.

Derek Walcott

I. INTRODUCTION: THE SITUATION OF MUSLIMS IN INDIA

Violence between India's Hindus and Muslims—communal violence in the Indian phrase[1]—has reached levels not seen since the midnight hour of the partition of India and Pakistan. A minority even

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[1] See Cynthia Keppley Mahmood, *Rethinking Indian Communalism*, 33 Asian Survey 735 (1993). Mahmood points out the usefulness of this term, which subsumes a wide variety of adjectives (ethnic, religious, etc.), by simply thinking in terms of communities whose identities may be defined in various ways.

before partition, Muslims at present make up just 11.4% of the Indian population.[2] With the exception of Kashmir,[3] the Muslim population is scattered throughout India; unless protected by the state, it is in no position to guard itself from the widespread communal riots which overwhelmingly victimize their community. According to figures available through 1982, roughly three times as many Muslims as Hindus have been killed in communal violence.[4] Reliable figures as to the total numbers killed each year are hard to come by, as estimates vary rather drastically. Nonetheless, two things are certain: communal violence has been a part of the Indian fabric since independence, and the number of people killed in communal violence has increased dramatically over the last few years.

This bloody situation deserves attention on a purely humanitarian level. It is, however, also a situation of clear human rights violations. In many cases, not only has the Indian state failed to provide protection from communal rioting, but it has also been directly linked to this rioting. The human rights violations perpetrated by the State have been well documented in Kashmir. Indian police have also acted against Muslims during communal riots in cities throughout India,[5] in particular, those which swept Northern India after the destruction of the Babri Masjid mosque in Ayodhya, killing some 3,000 Muslims.[6] Paul Brass notes that "in most major riots police firings are directed disproportionately at Muslims and many of those killed in these riots are killed in the police firings themselves, rather than by Hindu rioters."[7]

Less dramatic, but symbolically important to the Muslim sense of place in the Indian political order, is that the names of all Indian states are Hindi, the Indian national anthem is in Hindi, and the country is constitutionally named Bharat, symbolizing its pre-Islamic past. Perhaps this is not unfair—after all, India is a predominantly Hindu country—but Muslims also hold only three to four percent of positions in state and central administrations and have a generally low rate of participation in Indian economic and political life, not to mention lower rates of income and literacy.[8] In education, out of a total of 3,604

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[2] Unless otherwise noted, for all demographic and statistical information in this article, *see* Myron Weiner, *India's Minorities: Who Are They? What Do They Want?*, in THE INDIAN PARADOX: ESSAYS IN INDIAN POLITICS (Ashutosh Varshney ed., 1989).

[3] Kashmir, as a rather distinct situation, will not be specifically dealt with in this paper.

[4] PAUL R. BRASS, THE POLITICS OF INDIA SINCE INDEPENDENCE 198 (1990).

[5] Patricia Risso, *Indian Muslim Legal Status*, 16 J. S. ASIAN & MIDDLE E. STUD. 2, 63 (1992).

[6] BRASS, *supra* note 4, at 200.

[7] *Id.*

[8] I.H. Malik, *Beyond Ayodhya: Implications for Regional Security in South Asia*, 24 ASIAN AFFAIRS 292 (1993).

degree colleges in India, only fifty-four are managed by Muslims; technical institutions in the country are just 3.5% Muslim.[9] Thus, human rights violations extend beyond communal violence to more routine discrimination. Combined with the symbolic exclusion of Muslims, it could be argued that together these are a violation of the human right to political participation. In any case, they certainly reinforce a sense of social division and add to Muslim alienation from a Hindu dominated state and society.

This raises the question of how these human rights violations should be addressed. In a situation in which these violations seem to be feeding off popular sentiment, can calling the Indian state to account for human rights violations actually help calm a situation which is already running out of control? The answer to this is, simply, yes. To begin with, such an accounting could help keep the situation in India from further polarization. It is also true that an expanded definition of human rights norms may contribute to reconciling communal passions. Ultimately, a reshaping of the Indian state- centralized structure—but not necessarily a radical one—may also be necessary in order to accommodate and calm these passions and pressures.

The project of the post-colonial state has been to try to steamroll the multiple identities of Indians, as part of the belief that the Indian polity "must include a new integrated cultural identity. . .to make it compatible with 'modern' society."[10] If nothing else is clear, it is that this project has failed. Thus, the question of Muslim minority rights is twofold: one, how to stop the spiral of violence; two, how to solve on a long-term basis the instability in Indian politics, for which communalism is presently the primary touchstone, but which is actually much more deeply rooted in the structure of the Indian state. I would put forth two initial propositions in this regard:

1) Can human rights norms be moved away from a predominantly individualistic foundation toward collective protections; or are such expansive collective rights irreconcilable with human rights and democracy?

2) Can a degree of devolution of Indian state central power to regional and local configurations give these governing structures greater flexibility coinciding with the political and social identities of Indians; or is such a devolution of power irreconcilable with the maintenance of a center strong enough to guarantee adequate protections for minorities from local intolerances?

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[9] M. ALI KETTANI, MUSLIM MINORITIES IN THE WORLD TODAY 125 (1986).

[10] ASHIS NANDY, AT THE EDGE OF PSYCHOLOGY: ESSAYS IN POLITICS AND CULTURE 52 (1980).

I will begin looking at these questions in a general vein: a brief historical sketch, a look at the contemporary political situation in India, and the fundamental arguments which will orient the overall analysis. An examination of the specifics of Muslim status in India will follow, including the constitution of Muslim identity in India, and the protections granted by the Indian Constitution and international law. I will attempt to take this overview of the status of Muslims in India and see how it has played itself out in the Shah Bano case, which was a catalyst for much of the communal conflict of the last few years. I will conclude by attempting to integrate the particulars of the Indian situation with the general arguments suggested in the first section of the paper.

Communal violence in many parts of the world, including India, is often portrayed as historically eternal and inevitable. In fact, India has undergone tumultuous social, economic and political change over the last centuries, never more than since 1947. Communal identities and relations can be properly viewed only in the specific historical contexts of these changes. Even early in this century, despite the British communalization of the Indian polity, communal relations were not divisive; cross-communal interaction and syncretism have long been a fact of Indian life. Hindus and Sikhs in the Punjab, and Muslims and Hindus in Kashmir, have lived amicably for long periods of history. Distinctive heritage, culture or religion does not by itself produce conflicts; it can, however, inform communal identity and divisions which often serve as the parameters of social, economic, and political competition, which ultimately results in conflict.[11] Such parameters, however, are constantly shifting, and are therefore amenable to political coalitions, compromise, and diffusion of communal division. Thus, the idea that communal separation and violence are eternal must be rejected for two reasons: it is simply ahistorical, and it closes off original thinking as to political solutions for the present cycle of violence.

The British Raj affirmed communalism as the basis of Indian politics,[12] and communal conflict exploded at partition in 1947. Partition can be traced to a dispute over political guarantees for Muslims in post-independence India. The bitterness of this dispute remains a

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[11] *See* Maya Chadda, *India's Ethnicity, State and Regional Security: A Case of Interlocking Balances,* 15 J. S. Asian & Middle E. Stud. 31 (1992).

[12] There is considerable academic debate over the question of Hindu and Muslim communal identity. There is some sentiment that as distinct identities they are in a sense a creation of British colonialism. *See* the Wilson Quarterly Summer, 1991 issue for several articles debating this issue.

key complicating factor in the minority rights granted to those Muslims who remained in India after partition. It had the effect of leading even those sympathetic to a decentralized state to reject strong protections for regional, linguistic, and religious communities. The affirmation of India's political unity gained precedence over the rights of particular groups. Hence, although India is formally a federal state, it has strong unitary, centralizing features which it essentially adopted wholesale from the British.[13] Even though there is some degree of provincial autonomy, extensive powers are left to the Center, including emergency powers which grant the central Government the authority to dismiss elected state governments and replace them with administrations run directly from New Delhi. The new Indian state also rejected such pre-Independence structures as separate electorates and reserved representation for Muslims (though castes did retain reserved representation); proportional representation was also rejected.[14]

The nationalist elite's ideal was that joint electorates would allow for the Indian nation to unite politically, and at the same time would protect cultural rights (i.e., the right to promote and preserve a language and script). Secularism was to be the state ideology of India, providing the moral "basis of public life."[15] Furthermore, this secularism was seen as needing a strong, centralized state in order to allow it to prevail over the obsolescent religious values of its populace.

One major compromise of this principle was made: the right for Muslims to retain a separate code of Personal Law, which was agreed to by Congress in return for the votes of the orthodox Muslim bloc, the Jamiyyat-ul-Ulama.[16] This compromise is the exception to what Brass calls the "rule" of the Indian state that there be no "concessions to demands for any form of political recognition of a religious com-

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[13] *See* BRASS, *supra* note 4 at 2, 11.

[14] *Id.* at 5. Brass further specifies the center-province relationship of the Indian state as follows: 1) There are separate lists of legislative power for the Center and the states, including a concurrent list in which the Center may claim priority, with residuary powers left to the Union, powers held in reserve for emergencies and other situations in which the Center can legislate on matters contained in the state list; 2) the power of the Center to create new states and to revise the boundaries of or even eliminate existing federal units; 3) the retention by the Center of control over the most lucrative sources of taxation and the authority to collect certain taxes on behalf of the states and to distribute the revenues among them; 4) the power of the Center to take over the administration of a state and declare President's Rule under specified conditions that have been interpreted very broadly; 5) the power to declare a national emergency that, in effect, may convert the country into a unitary state. *Id.*

[15] T.N. Madan, *Whither Indian Secularism*, 27 MOD. ASIAN STUD. 674 (1993).

[16] BRASS, *supra* note 4, at 191.

munity. . .[as] a separate state within the Indian Union or separate electorates or any form of proportional representation in elected or government bodies."[17]

Nehru, however, was caught in a contradiction. While he refused to encourage communalism, he had little other choice but to rely on Hindu majoritarianism to obtain his political goals. In fact, it can be argued that this "Hindu Card" had always been an implicit source of congressional support, though in the early years Congress was circumspect in its invocations of Hindu themes. Instead, Congress relied more on a Hindu majoritarian identification with Indian nationalism. If this is true, then the opposition between the secular nationalism of the Congress and religious nationalism of the BJP—the party most connected with Hindu communal politics—is a false one. Each are part of the desperate search of the modernizing state for a national identity on which to legitimize its rule and, hence, have had recourse—explicitly or implicitly—to the force of Hindu identity and religious discourse. Gandhi, on the other hand, did not reject religion, but rather its use as the political unifier of a centralized Indian state which he saw as a repudiation of India's diversity. This rejection of singular nationalism—secular or religious—in favor of an alternative conception of the Indian polity is something which seems increasingly practical, rather than idealistic.

Nehru's reliance on implicit communalism was clearly ambiguous, and coincided with the continued condemnation of communalism as the bane of Indian democracy. The Congress Party's communalism was made much more explicit when both Indira and Rajiv Gandhi used the Hindu Card to maintain their power. Where implicit communalism may have been a source of Congress Party support during Nehru's era, this was now legitimized by the Gandhis as a national issue; communal politics had entered the mainstream. In part, this was due to the logic of the Hindu majoritarianism which had always supported the Indian state, and in part to the leadership failures of the Gandhis. Indira Gandhi, after first attempting to split the Sikh movement by supporting its militant arm, shifted tactics and used her crackdown against Sikhs as a rallying cry for Hindus. Chattopadhyay reports that Indira Gandhi perceptibly "cast away her secular pretence and play[ed] a Hindu Card. The new strategy. . .aimed at pushing the religious minorities to adopt

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[17] *Id.* at 7.

aggressive postures so that a concomitant backlash is generated in the majority Hindu community."[18]

Rajiv Gandhi went even further with "a confrontational approach which was part of a process that carried him well to the right of the BJP. . . . His hard-line rhetoric resembled Rashriya Swayamesevak Sangh (RSS) Party claims that the loyalty to India of Communists, Muslims, and others was in doubt."[19] Enquiries have found evidence of Congress involvement in the pogroms which killed 2,400 Sikhs after Indira Gandhi's assassination, but Rajiv has refused to order an official investigation.[20] Mahmood reports that "there is now no doubt that the Congress party's use of anti-Sikh rhetoric after the assassination of Mrs. Gandhi directly inflamed Hindu sentiments, and that the entire Punjab debacle was tightly interwoven with Congress' political aims."[21] What is also certain is that Rajiv rode a wave of Hindu communalism to election victory in 1984. Though Muslims were not at the time making any particular demands as a bloc, hostility to the Sikhs carried over to Muslims in "an atmosphere of hostility to minority demands and behavior [as] the Congress appealed to Hindu nationalism and communalism in this [1984] election."[22]

Thus, one sees that the brave declarations of Indian secularism (which was made official by Indira Gandhi in 1976, when India became the "Sovereign Socialist Secular Democratic Republic") were not all that they seemed. The religious elements of Gandhi's thought, despite Nehru's belief that they were backward and obscurantist, were probably more in line with the realities of the Indian polity. Nehru and, certainly, Indira and Rajiv Gandhi's use of Hindu political support to shore up their hold on central power was more insidious, and can be seen to have played at least some role in legitimating the exclusivist communal politics of the Bharatiya Janata Party (BJP).

Ironically, in the end, by co-opting the Congress' somewhat contradictory appeals to communalism with a more unreserved invocation of Hindu nationalism, it may have been the BJP which gained the most political support from this communalization of India. Based in a bitter

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[18] Suman Chattopadhyay, *Democratic Processes and the Watershed Elections of 1989 in India, in* NATIONALISM, DEMOCRACY, AND DEVELOPMENT IN SOUTH ASIA 34 (Sugata Bose & Ayesha Jalal eds., 1994).

[19] James Manor, *Parties and the Party System, in* INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE-SOCIETY RELATIONS 84 (Atul Kohli ed., 1988).

[20] *Id.* at 84.

[21] Mahmood, *supra* note 1, at 725.

[22] BRASS, *supra* note 4, at 199.

sense among Hindus that the Indian secular state has ignored them, this nationalism is augmented by factors which include: a fear of Islam and Pakistan; resentment of the separate legal status which sets Muslims apart from the rest of the Indian nation; anger at the terrorism directed against Hindus in the Punjab and Kashmir; and more tawdry motivations such as the economic opportunism of Hindu business people who see the possibility of ousting Muslim competitors.[23]

The BJP structured a powerful religious-political platform on the basis of defining the Indian nation through symbols drawn from Hindu texts, beliefs and practices.[24] Under the umbrella of the militant Hindu "cultural" organization Rashriya Swayamesevak Sangh (RSS), the BJP has called for the establishment of a Hindu rashtra (homeland); recognition of Bharat Mata (the "divine mother" of the Hindu nation) as a kind of national deity; compulsory national Hindu holidays; the "reconversion" of Muslims and Christians; the Hinduization of tribal peoples; and, most controversially, a uniform legal code revoking the right of Muslims to their own Personal Law based on Shari'a principles.[25] At its most benign, the BJP program would deny all minority protections to Indian Muslims. Its more brutal side is succinctly stated by BJP partisans: "Pakistan Ya Qabristan!" (Pakistan or the Cemetery!).[26] The BJP's Hindutva ideology led to the most famous mass action of Hindu communalism, the December 1992 destruction of the Babri Masjid by BJP-RSS partisans, symbolizing their rejection of the place of Muslims in India.[27]

The turmoil of Ayodhya and subsequent rioting led to many predictions of the imminent fall of the Indian state. As will be seen, however, the situation is not quite so dramatic. The BJP's supposed Hindu majority is quite splintered and it seems unlikely that the BJP can overcome this fragmentation and march unobstructed to central power. The immediate danger is not so much that the Indian state will "crack-up," but that its state ideology, under pressure from the BJP, will become one of an unreserved Hindu nationalism combined with a reinvigoration of the state's centralizing impulse. This could have menacing consequences for Indian Muslims.

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[23] Barbara Stoler Miller, *Presidential Address: Contending Narratives—The Political Life of the Indian Epics*, 50 J. ASIAN STUD. 786 (1991).

[24] BRASS, *supra* note 4, at 15.

[25] Weiner, *supra* note 2, at 117.

[26] Hindu nationalist slogan quoted on page 3 of April 1993 issue of Libèration.

[27] Khushwant Singh, *The Coming Indian Crack-Up*, FAR EASTERN ECONOMIC REVIEW, Sept. 9, 1993, at 28.

The defensiveness of a Muslim minority in the face of this—communalist or not—is understandable. The Muslim minority was warned after independence by Patel (second in the Congress hierarchy to Nehru) that they must "prove" their loyalty to the state. Since then, short of surrendering their identity, the Muslim community has remained quite passive, giving up the separate electorates and reserved legislative seats which the British had granted and clinging only to their separate Personal Law status. There are still only a few small Muslim political parties and the Muslim vote has traditionally gone to Congress in a vote for the status quo. Since the provocations of the Gandhis in the 1970's, the Muslim vote has fragmented, but they have no viable alternative to the Congress.

II. MINORITY RIGHTS AND INDIA'S MUSLIMS: THE ESSENTIAL QUESTIONS

In examining the status of India's Muslim minority, one must ask why the following question is a matter of concern: should the majority of Indians eventually support a Hindu nationalist movement, is that not their affair? Beyond concern for basic human rights protections, why should there be international interest in the political situation of Indian Muslims?

One answer to this is that human rights and minority rights are interlinked. For some communities, the establishment of minority rights may be necessary in order for individual human rights to be realized. For example, there is a fundamental human right to political participation.[28] An individual Muslim, however, may define his or her political identity in terms of Muslim communal identity. Thus, that individual may be able to participate effectively only if Muslims as a group are not politically dominated by larger blocs of voting communities, something that may be assured only if guarantees of a certain level of minority group representation are built into a State's political structure.

Similarly, the right to free use of one's language is a basic human right. Such a right,[29] however, may only be meaningful if a language—such as Urdu—is kept alive by allowing for minority language educational institutions and, in the case of a relatively poor community such as Indian Muslims, by giving state funding to such institutions. This

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[28] For a full discussion of this right based in Article 21 of the Universal Declaration of Human Rights and Article 25 of the Covenant on Civil and Political Rights *see* HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1992).

[29] *See* HANNUM, *supra* note 28, at 111 (details restrictions on this right).

continuum between human and minority rights is also shown by the human right to nondiscriminatory laws.[30] The right to a subset of separate laws—such as the right of Muslims in India to a separate Muslim Personal Law—takes this right a step further. Simple nondiscrimination may still reflect the dominant norms of a particular group; a right to some separation from the dominant legal system may more fully satisfy the ideal of legal equality. Most importantly, perhaps, it is a human rights violation to force a Muslim to give up his or her religious-cultural identity[31] and this individual human right is of particular importance to a minority group under pressure to acquiesce to majority domination.

At best, human and minority rights should be mutually reinforcing. On the one hand, providing for the fundamental protections which can best keep the present cycle of violence from spinning out of control, and on the other, providing for political autonomy which, in the long term, may be the only way to keep a minority community's relations with the state and its diverse political communities in a stable equilibrium. Thus, if the international community has a legal interest in maintaining human rights standards, it can be argued that this may best be done by moving human rights norms in the direction of including more minority protections.

Establishing the specific minority rights protections which could or already do extend out of preexisting human rights will set norms that give Indian Muslims a valuable tool against the capriciousness of the majority community. Absent such norms, the price for Muslim immunity from communal violence would seem to be complete disengagement from their religious identity, as even Muslim political passivity has not spared them the scapegoat role for Hindu nationalists. The other alternative—seemingly more likely—would be an increasingly militant Muslim community, organized for battle with Hindus and, thus, engaging in a dialectic by which India would become increasingly defined by communal politics. Such "remedies" for communal violence signify the failure of the Indian state to ensure the individual rights of its Muslim citizens.

The question that arises, however, is whether the remedy of more specific minority rights protections might also, in the end, exacerbate communal conflict. Communitarian schemes institutionalize communal division and give power to those factions most attached to exclusive,

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[30] *See* International Convention on the Elimination of All Forms of Racial Discrimination (CERD), GA Res. 2106 A (XX), Dec. 21, 1965.

[31] Art. 27 International Covenant on Civil and Political Rights.

singular communal identities, rather than those who would seek to accent the pluralism and diversity of individual identity. The result, clearly, is a rigidification of communal identity to the ultimate detriment of the goal of a tolerant civil society, and the values of a democratic society which, by definition, is based on the individual. Individual rights may not be sufficient in a situation such as India, it is also clear, however, that a simplistic emphasis on minority rights may worsen this situation. What must be sought is a system of cross-cutting rights in which individual rights and individual identity are not sacrificed at the altar of the community.

A second reason for international interest in the situation of Indian Muslims is that the BJP vision of a monolithic, exclusive nationalism is paradigmatic of a global explosion of mono ethnic-linguistic-religious nationalisms. These nationalisms have destabilized many parts of the world and, however distinct from the fascisms of the 1930's and 1940's, often scarily echo the violently exclusivist rhetoric of those movements. The danger of this exclusivist ideology comes from the contradiction between its rhetoric and the reality that in virtually all states diverse ethnic, linguistic and/or religious communities directly challenge any ideological insistence on a singular, exclusivist nationalism, thus setting the stage for violent confrontations.

The question for India and other states is how this type of contradiction can be reconciled and structured in a workable political system. A radical devolution of power from the center is often claimed to be the magic solution to such problems. In fact, however, as Federal-State relations in the United States show, a strong central enforcement power is often necessary to maintain basic civil and democratic rights for all citizens. While the strongly centralized Indian state may be termed a failure by some, central state institutions may still be necessary to prevent local intolerances from victimizing minority communities.

I would suggest the following five arguments as a framework through which to examine the complexities of the Muslim minority's relationship to Hindu nationalism.

1) Nations are not and can not be codeterminate with states. In a world of interconnected, layered, and multiple communities, the notion that each self-defined nation is entitled to a state has little precedent in international law and is a recipe for continuous conflict. Such pure nations, as a rule, simply do not exist and the attempt to create them will often be a bloody affair.

There is a common analytical confusion between communal solidarities and nationalism. If the state is seen as codeterminate with a "nation" or some sort of majority communal identification, there is a

danger of the sort of exclusivist politics which result in bloody transfers of populations or pogroms. For example, a country such as India embraces many communal solidarities, local, regional, national, and extranational. The insistence by any one of them on exclusively defining the Indian state ideology will, on the one hand, alienate other communities from the state and, on the other, turn such resistance into a quasi-treasonous position in the eyes of the dominant community.[32] Beyond values of tolerance and diversity, such exclusivism is simply impractical in a stubbornly pluralistic world.

India's Muslim minority is one element of this pluralism but, in fact, the situation is considerably more complex than a simple majority/minority split. This is demonstrated by a quick look at the demographics of a state such as Assam, which is a good example of India's diversity. Assamese, officially, are 60% of Assam's population. They are, however, fearful that their Bengali minority, augmented by illegal immigration from Bangladesh, may soon become a majority. This ethnic rivalry, however, is also a religious rivalry in that much of the Bengali population is Muslim, hence there has been an element of "Hindu" reaction among the Assamese. There is also an economic element to this situation. The Assamese resent the relatively privileged level of the Hindu Bengali population and what they feel is the lack of development aid provided by the central government.[33]

Assam typifies the multiple levels of identity in India, making it all the more contradictory that the BJP and RSS are finding popular resonance for their claim that the Indian nation is based on just one identity. The clash in India between a singular communal identity, demographic diversity and cultural plurality is of more than just academic interest; it is a stark and dangerous reality in many countries.

2) While the notion of a Hindu nation is historically unfounded, the underlying motivations and political demands of Hindu or other religious ideologies—often caricatured as fundamentalist—must be taken seriously if strife is to be defused. The easy dismissal of religious political identities is not only arrogant, it threatens to exacerbate conflict by refusing to recognize fundamental political realities.

Hindu nationalism and other so-called fundamentalisms are often denigrated, in a common social science truism, as simply being about power, not religion—as if the two have ever been separate! Stating the

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[32] Mahmood, *supra* note 1, at 735.

[33] Jyotirindra Das Gupta, *Ethnicity, Democracy, and Development in* INDIA'S DEMOCRACY (Atul Kohli ed., 1988).

obvious—that such groups are interested in power—does not mean that they can not legitimately represent the interests of many people who have a right to be taken seriously in the political sphere. Nor does it mean that such ideologies are necessarily reactionary, in fact, they are often the most diverse and dynamic of ideologies, hence their mass popularity.[34] While it is true that such movements are very much about politics, the metaphysical catalyst given by religious symbolics inform the substance as well as the style of such ideologies and account for their popular resonance.

In particular, the assumption that liberal democracies are necessarily secular is historically inaccurate. The place of religion in the public sphere, to one degree or another, has been strong in many, if not most, liberal states—witness the history of the United States.[35] It is also at odds with what is the reason for being of participatory democracy: the engagement of the passions and values of individuals and groups with their political communities.

This argument is a result of a logical slippage between a condemnation of institutional domination of a religion—secularization—and an outright condemnation of religion—in which case secularism itself becomes an exclusive value system, as it was for Nehru. Conflict comes from the attempt of particular ideologies to exclusively dominate a political system, not from the ideology in and of itself. The danger is that by the outright exclusion of religious values from political discourse, one exacerbates a sense of exclusion and creates a reaction which results in religious ideologies such as that of the BJP which are exclusivist.

In the case of India, Nehru's statement that "if religion. . .continues to interfere with everything, then it will not be a mere question of divorcing it from politics, but of divorcing it from life itself" is the sort of cavalier attitude which has proven quite short-sighted. Nonetheless, this belief continues to be implicit in the attitudes of many well-mean-

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[34] This point is best illustrated by reference to the Iranian Revolution, where Islamic politics included such variants as Islamic socialism and barefoot Islam which represented novel variants of Islam in accord with an Iranian polity radically transformed by the Shah's modernizing policies. *See* HAMID DABASHI, THEOLOGY OF DISCONTENT (1993).

[35] Is it not Tocqueville who lauded American democracy because of its basis in a polity defined by intermediate organizations, most particularly churches? For a more contemporary example of this, one might cite Martin Luther King Jr., who said in his "Letter from a Birmingham Jail" that a "just law is a man made code that squares with the moral law or the law of God." I HAVE A DREAM (1991). This affirmation of the superiority of religious law is in line with a great deal of American tradition. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

ing opponents of the BJP; Bipan Chandra, for example, states that "there can be no compromise with communalism. . .it is a form of fascism."[36] Whether or not one agrees with its particulars, as a typology, communalism per se has nothing to do with fascism.[37] The attempt to exclude a priori from the public sphere strongly held individual and communal beliefs, which are a source of meaning and legitimacy in social life, seems more the product of a particular political prejudice than a reasoned, democratic position. It is also, of course, quite impractical.

Nehru and the Congress thought Gandhi was an obscurantist for his reliance on religious themes; time has shown that it was Gandhi who was the more realistic. It is important to distinguish from the absolutist value of keeping religion out of the public sphere and the more realistic premise of keeping religion from dominating the public sphere. The latter strategy is much more likely to succeed in assuaging the extreme polarization that one now sees in India.

What is at question in India is not engineering religion out of existence, nor of excluding it from the public sphere, each of which are impractical and, in fact, more likely to intensify the emotion of communal feeling. To Nehru's insistence that the public sphere should be immune from religious identity, perhaps the sharpest rejoinder comes from Gandhi's statement that "those who say religion has nothing to do with politics do not know what religion means."[38] Secularism in India has been the attempt by a minority to impose extreme rationalizing values on a majority; this is political folly in the face of religion's tremendous normative power.[39] Modernity coexists with political-religious symbols in many societies and it is a mistake to necessarily couple modernity with secularism.

Religious ideologies are not a rearguard action against inevitable secularism; such ideologies are based less on nostalgia for the past and more on a dynamic—if sometimes reactionary—political programs for

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[36] Bipan Chandra, *Communalism and the State, in* COMMUNALISM IN INDIA 136 (1991).

[37] This is not to say that particular communalist movements could not themselves have fascistic organization. The RSS, for example, which has been organizing since 1925 as a "cultural organization" and provides cadres for the BJP, in some ways resembles a fascist organization. On the other hand, the RSS still values the "nation-society" over the prototypical fascist veneration of the State. *See generally* Cristophe Jaffrelot, "La Place de l'Etat dans l'Ideologie Nationaliste Hindoue."

[38] T.N. Madan, *Secularism in Its Place*, 46 J. ASIAN STUD. 7 (1987).

[39] *See id.* Madan overstates his case, but nonetheless brings out the absurdities in Nehru's secularization project. *Id.*

the future. Instead, the question should be one of harnessing the passions of people, religious and otherwise, in a structure which will allow these passions to engage in the political system without dominating it, thereby dominating other communities. To do this, what should be sought is a political system which gives political space to India's minorities, but which also addresses the concerns of its Hindu majority.

3) As individuals define themselves and are defined in terms of communities, minority and human rights should be seen as quite interconnected. Minority group protections start with essential human rights protections, i.e., state sanctioned violence against people based on their religion or ethnicity violates basic human rights norms. An individual's place within a political community cannot be defined solely in terms of the individual-state relationship which serves as the paradigm of human rights. It ignores the complex formation of an individual's political identity and is not necessarily an aid to a minority faced with a majority determined to exclude them from political power.

Fundamental human rights and minimal traditional minority rights (i.e., cultural, linguistic, religious) do not ensure any degree of political autonomy from a dominant state. Since World War II, states have been more resistant to minority rights than human rights. This is because the political protections of minority rights can be seen to threaten the legitimacy and stability of a particular group's claim to central power and "encourage fragmentation or separatism and undermine national unity and the requirements of national development."[40]

Dramatic advances beyond the existing minimal guarantees to minority rights do not seem to be forthcoming. Nonetheless, a push to move human rights into a greater accord with the group basis of political identity does seem to be occurring, and this would seem to be the most promising avenue for the extension of minority protections. In addition to Article 27 of the International Covenant on Civil and Political Rights (ICCPR), recent years have seen the drafting of the following instruments: International Labour Office (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries; the Document of the 1990 Copenhagen Meeting of the Conference on Security and Cooperation in Europe (CSCE) (as well as the creation of the office of the CSCE High Commissioner on National Minorities); the General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic

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[40] *See* HANNUM, *supra* note 28, at 71.

Minorities; and the Draft Declaration on the Rights of Indigenous Peoples.

The type of extension of human rights to collective protections is the most likely manner of extending the minority rights already in place. One must also consider, however, whether such minority rights fundamentally conflict with notions of the role of the individual in a democracy. By valuing the group over the individual, the civic obligations of the individual, as well as the basis of the progress which has been made in individual human rights protections, are devalued. More fundamentally, group identities are rigidified such that they deny the multiple and shifting identities (including the individual self) that allow for democracy to function as something other than a negotiation structure between pre-ordained communal groups.

4) Democracy is quite tough on minorities. This is counterbalanced by the fact that democracy does not equal absolute rule of the majority. In virtually all democratic states, there are mechanisms to keep simple majorities from dominating the political process, most often through parliamentary representation stacked to favor particular regions or minorities.

India, strangely enough, is to a great degree an exception to this. In the bitter aftermath of partition and the coming to power of a putatively Pan-Indian nationalist movement, virtually all religious minority protections were rejected. For example, India is one of the few democracies to have a bicameral parliament in which both chambers are popularly elected. This reflects the post-independence concern with national unity over the privileging of any particular communities.[41] Modifying this system to give greater political protections to minorities would help ensure that the Indian state will not become the agent of a majority bent on excluding particular minorities from India.

Why should a majority choose to limit its democratic power? For one reason, the BJP definition of India as split between Muslims and Hindus is a grossly simplified version of the Indian polity. Agitation against the centralized Indian state is strong among linguistic and regional groups throughout India, with many movements for greater autonomy based on language or region. One approach to keep the Indian state from its much feared implosion would be to allow such groups guarantees of the protection of the central government. This will help Muslims, of course, but in the long term it will also aid other

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[41] Castes, however, are the exception. Lower Castes were made the beneficiary of privileged status in an attempt to rectify the inequalities of India's hierarchical social structure.

Indian minorities and ultimately, aid the Hindu majority by keeping the state stable.

A second reason, which follows from the first, is that in reality it is very hard to say that there is any majority community in India. There are four types of minorities in India: linguistic, religious, caste, and tribal. To give one detailed example of this, West Bengal has a population of 44.3 million (as of 1971), 20.6 million (46.5%) of whom are scheduled tribes, scheduled castes, or religious minorities. There are approximately three million linguistic minorities, of which Weiner estimates one-half do not overlap with other minority categories, making "minorities" virtually 50% of Bengal. Of course, Bengalis consider themselves a minority in the context of the Indian nation.[42]

Given the multiple social identities of Indians, most of India's Hindu "majority" are, at the same time, members of a minority community. Thus, India's real majority is a combination of any number of minorities. It can be argued that the interests of the majority of Indians, including Hindus, are best served by a government with multiple centers of power, keeping any single group from dominance, but guaranteeing certain fundamental rights for citizens of each of these communities.

5) Another approach to reconciling communal passions to inherently pluralistic states is to devolve power away from the center toward regional and local political communities. Such a strategy is particularly apt in India, as it would be in accord with Gandhi's original vision of a radically decentralized state in which "the state would be built up from the village, with the latter as the central political focus and with the satisfaction of the basic needs of its people as the aim of all social and political institutions."[43]

Nehru and the Congress flatly rejected this vision in favor of the sort of centralized concentration of power which was to characterize virtually all post-colonial states. The official ideology of the Indian state came to rest on a monolithic concept of sovereignty borrowed from Britain which denied the multiple social identities and "layered sovereignties" of India's pre-colonial past. This was seen as the only way to develop a modern, liberal, secular society.

The Muslim League which, ironically, is commonly identified with the secession of Pakistan, was the group pushing the hardest for Indian national unity, but at the price of guaranteed rights for each of the

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[42] Weiner, *supra* note 2, at 103.
[43] BRASS, *supra* note 4, at 33.

"nations" contained therein. The Congress, a supposedly Pan-Indian independence movement, adopted the mantle of exclusive representative of Indian nationalism and ultimately pushed for the sectioning off of Muslim majority territory so that it could be assured of inheriting the full power of the British Raj.[44] One wonders if the model originally proposed by the Muslim League, that of a decentralized, multi-sovereign state, in the end was not more suitable to political stability and equality than the attempts by a movement such as the Congress to identify the state with a singular nationalist movement, and to concentrate all power at this nexus. In any case, the centralizing projects of many post-colonial states have left a debris of conflict and strife indicating that this sort of concentration of power may actually sharpen and exacerbate divisions, leading to the sorts of confrontations one now sees in India.

The BJP would hope to reinvigorate the Congress' centralized Indian state, which by now is widely recognized as decrepit and discredited. This has been described as seeking "centralization by propagating an ideology that bestows a single identity on the country."[45] It is hard to see how this will successfully supersede the reality of India's fragmented polity. In fact, despite the BJP's pan-Hindu rhetoric, its main support has come from upper castes anxious to maintain their social and economic status.[46]

A more practical and feasible alternative to the monolithic, centralized post-colonial state would be a type of decentralized polity which will allow for the overlapping communities of India to have political control of their destinies and a stake in political stability. There are various methods which can be used to do this: from a decentralized unitary state, federalism, regionalism, devolution of power to locally elected bodies and electoral systems such as separate electoral rolls, separate blocs of seats, proportional representation systems and group veto powers.[47] Accommodating alternative ideological frameworks rather than the centralizing impulse of the BJP could allow for a stabilized Indian state, but on a model which creates political space for the diverse communities of India including, most importantly, the

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[44] *See* AYESHA JALAL, THE SOLE SPOKESMAN (1985).

[45] BASU ET. AL., KHAKI SHORTS AND SAFFRON FLAGS 114 (1993).

[46] *See generally* Mahmood, *supra* note 1, at 734; *see also* Pradeep Chhibber & Subhash Misra, *Hindus and the Babri Masjid*, 33 Asian Survey 7 (1993) (discussing full demographic information on the social basis of Hindu communalism).

[47] *See generally* Claire Palley, CONSTITUTIONAL LAW AND MINORITIES, Minority Rights Group, Report No. 36 (1993).

Hindu community. As has been mentioned previously, such a restructuring must still leave room for the guarantee by the central state of certain fundamental rights, stopping particular communities from imposing intolerant majoritarian policies.

To examine the above arguments in the context of India, one needs to look in some detail at the guarantees which presently exist for India's Muslim minority; whether or not these offer sufficient protections, or if they have perhaps backfired by creating resentment and reaction among the majority Hindu population. One might also ask how such guarantees which now exist and those that might come into being are sustainable if the majority community refuses to respect them. Is it reasonable to give eleven percent of the population a guaranteed share of power; is this fair to other citizens who do not happen to be part of what could then be perceived to be a privileged minority? Is this not a recipe for exacerbating conflict?

What is at stake in Hindu nationalism is the ideological definition of the Indian state. This ultimately has less to do with the particulars of Muslim demands for minority rights and more to do with whether the majority ideology continues to see a place for Muslims within the Indian state. A majority community tends to define national aspirations, and one must ask whether the logic of Indian nationalism leads to the exclusion of Muslims from the notion of the Indian state. This exclusion will eventually become codeterminate with an imagined Hindu nation, against all historical precedent.

To address such issues, one needs to confront the basic question of what constitutes Muslim identity in India. While Muslims are eleven percent of India's population, this population is quite fragmented, with many regional and linguistic differentiations. One wonders to what degree Islam is even a basis of political identity in India: are Muslims historically a cohesive community which has acted as a political bloc? At the same time that the fragmentation of India's Muslim community must be recognized, however, the normative character of Islam needs to be recognized as well. At key moments in Indian history, Islamic symbols have served to mobilize—albeit temporarily—a unified Muslim community. To give two examples, one sees this in the Khilafat movement—the mobilization during World War I on behalf of the Ottoman Empire by India's Muslims—and Muslim mobilization prior to partition. Each were demonstrations that, at particular moments and over particular issues, Islam is a unifying factor for India's Muslims; a unity which is reinforced by events such as communal riots which emphasize the threat of a Hindu majority. Thus, Islam continues to be

a normative factor in Muslim social identity, at the same time that many other factors alter and fragment this unifying identity.

III. THE INDIAN CONSTITUTION

As we have seen, Nehru's vision of the Indian state ultimately triumphed over the radical decentralization proposed by Gandhi. With this came the drafting of a constitution which contained contradictory clauses in terms of Muslim minority rights. These rights are acknowledged, but are left somewhat undefined. This type of imprecision in defining group rights—while harmful just by the fact of its imprecision—is not surprising in that Dr. Ambedkar, the prime mover behind the Indian constitution, declared the individual rather than the group to be its basis.[48] Minority rights were subsidiary and somewhat limited. This individual basis for constitutional law is in line with Nehru's secularist, unitary ideology which dictated that law be applicable to individuals, not groups.

The constitutional protections granted to groups are primarily cultural, including the right of religious minorities to establish and administer educational institutions (Article 30), and for voluntary participation in religious instruction in State institutions (Article 28), the right to maintain and use languages, scripts and cultures (Article 29.1), freedom of religion (Article 25), as well as freedom from discrimination (Article 14, 29.2). Positive state obligations to minorities are framed in terms of general rights which, as will be seen, are still subsidiary to the central power of the State.

A policy of protecting minorities from majority pressures through proportional representation was considered, but rejected after bitter debate. Both houses of the Constituent Assembly are representative, with no upper house based on regional or communal grounds and the final wording held that "no person shall. . .be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."[49] This was supplemented by an electoral law that forbade appeals to religion, religious sentiments, and religious symbols.[50]

Dhavan describes this system as one in which religious groups were:

> relegated to operate in civil society, denied political representation and the full State support given to non-religious

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[48] Rajeev Dhavan, *Religious Freedom in India,* 35 AM. J. COMP. L. 209 (1987).

[49] *Id.* at 213.

[50] *Id.*

groups. They were accorded freedom of speech and con-
science and a right to equality that most other groups enjoyed
as a matter of fact. . .without many of the limitations. . .The
Constitution effectively segregated [religious groups] and de-
politicized them.[51]

It is also worth mentioning Dhavan's statement that Indian "courts
have generally expanded limitations and marginalized rights" of relig-
ious groups.[52] This type of limiting is called for by the Constitution
itself, as is illustrated by the full text of Article 25:

> Subject to public order, morality and health and to the other
> provisions of this Part,[53] all persons are equally entitled to
> freedom of conscience and the right freely to profess, practice
> and propagate religion.

This is in line with the reformist agenda of the Congress. Freedom
of religion is given as a right, but one subsidiary to the greater needs
of the nation and open to restriction when it fits the "morality" of
the State.

The only right which goes beyond non-discriminatory and cultural
clauses is, as mentioned before, the right of Muslims to maintain a
separate system of Personal Law. In principle, Article 44 of the Consti-
tution calls for a uniform civil code to "evolve," overruling this excep-
tion.[54] The Constituent Assembly passed a resolution in 1948 rejecting
the contention that Muslim Personal Law is inseparable from Islam
and, therefore, protected from legislative interference. Efforts to im-
plement Article 44, however, have been strongly resisted by the Muslim
community. In a trade-off for Muslim electoral support, Congress has
never moved to set Article 44 in motion.

The courts have attempted to attack this separate domain of per-
sonal law, most notably in the Shah Bano case in which the Indian
Supreme Court ruled that India's secular law took precedence over
Islamic law regarding the maintenance rights of divorced Muslim women.
It is interesting to note that the Court openly recognized that such
increased support was obligatory per Islamic law. Rather than limiting

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[51] *Id.* at 217.

[52] *Id.* at 225.

[53] Other provisions forbid untouchability, and allow for the confiscation of land, even if part
of a religious endowment.

[54] There is one concession to Hindu communalism in Article 47 of the Indian Constitution,
which holds that steps will be taken to protect cows from slaughter—a positive state action to
enshrine a Hindu religious stricture in a "secular" Constitution.

itself to this ruling, however, in what Dhavan calls "an accusatory posture," the court held that the extra payments should be made under Indian secular law. Risso mentions that "Muslim women were and still are concerned that a uniform code would reduce the rights to property and inheritance that they have in Islamic personal law;"[55] it should be pointed out, however, that while Islamic law is theoretically more generous in this respect than Hindu law, it is often interpreted in a rather harsh manner which leaves the woman with very little. Nonetheless, the court's decision seemed to have less to do with the justice of the woman's claim and more with an attempt to assert the primacy of the universal code, as it could have made the same ruling simply in terms of Muslim Personal Law. In the end, Shah Bano herself asked the court to reverse its decision.[56]

Congress, fearful of a backlash among Muslim voters, interceded to overrule the Court's decision with its Muslim Women's Bill. Ironically, this bill is drafted in such a way that Muslim women are stripped of many of the entitlements they would have had under Islamic law as it was previously interpreted. This bill has, itself, created a huge backlash against such special protections:

> Rajiv Gandhi was seen by many Hindus, both communal and secular, to have surrendered to an insistent coalition of orthodox ulema for the sake of expediency to win the 'Muslim block vote.' The stage was set for Hindu militants to demand some balancing concession by government to the majority community.[57]

Many date the resurgence of the BJP and the Babri Masjid controversy to this event.[58]

Thus, the Shah Bano case points out the contradictions of the Indian state structure and constitution. On the one hand, the mass mobilization of the Muslim community against the ruling shows the pressure which that community is feeling from what it perceives to be a Hindu onslaught. Further, the Muslim community's ability to pressure Rajiv Gandhi into passing a bill far more biased against women than what had previously been in place shows that this polarization of

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[55] Risso, *supra* note 5, at 60.

[56] *See* ASHGAR ALI ENGINEER, THE SHAH BANO CONTROVERSY (1987).

[57] Theodore P. Wright, *The Babari Masjid Controversy in India*, *in* ISLAM, POLITICS, AND SOCIETY IN SOUTH ASIA 181 (Andre Wink ed., 1991).

[58] Romila Thapar, *Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity*, 23 MOD. ASIAN STUD. 650 (1989).

communal feeling has, predictably, aided the most extreme elements on each side. On the other hand, it is interesting to note that those in the RSS-BJP who remonstrated most loudly that there must be one civil code for all Indians were also those who protested in the 1950's and 1960's when Hindu Personal Law was reformed and made part of common civil code. Aside from this hypocrisy, it is also interesting to note that the family law in the common civil code is, in fact, a reformed version of Hindu Personal Law.[59] This indicates, once again, the identification of the norms of the "secular" Indian state with the norms of the dominant Hindu community to which Muslims are being asked to conform.

It is rather certain that continuing the attack on Muslim Personal Law will lead only to further polarization of India. Shah Bano shows the difficulty of a court legislating on communal matters and attempting to impose the universalism of Article 44. The attempt to carry out to its full extent the fundamentally unitary, secularist bent of the Indian Constitution and state ignores the manifold ways in which communal identities can assert themselves in the political, social, and legal domains. This is particularly significant when the ruling Congress party also finds it necessary to unofficially rely on such identities for political support.

One must ask, however, why it is unfair to have a common code which reflects the norms of the vast majority of the citizens of a state. Would this not prevent the perception of special privileges which is quite certain to lead to resentments and possibly exacerbate conflict? There is no adequate answer to this question, which is the result of tensions created by conflicting rights and demands. It must be recognized, however, that some degree of conflict may be inevitable; the attempt must be made to avoid overreliance on legal categorization and to channel such conflict into the give-and-take of its political sphere. The protections of individual human rights can be interpreted and extended in a manner which includes community practices, but care must be taken to avoid too rigid a system of legally defined minority rights. An overemphasis on group rights plays into the hands of those who assert power on the basis of blind loyalty to a particular community and rejects the cooperation and coexistence necessary for a tolerant and democratic society. One can hope, however, that in a more decentralized state the tensions among rigidly defined commu-

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[59] Madhu Kishwar, *Pro-Women or Anti-Muslim: The Furor over Muslim Personal Law, in* ENGINEER, *supra* note 56.

nities would be defused in the political sphere, at the same time that
a carefully calibrated balance of individual and group rights will be
ensured by the State. If different communities have a certain amount
of autonomy, these particularities would not be seen as special privi-
leges which instigate resentment and conflict. They would be the norm
for all communities of a certain size. At the same time, fundamental
rights would continue to be guaranteed from the center.

IV. INTERNATIONAL LAW

Since 1945, the international community has emphasized human
rights rather than minority rights. Of course, as has been seen, these
are linked and, for example, the important provisions for non-discrimi-
nation in the Indian Constitution are legally as protective of groups as
they are of individuals. The Indian Constitution also provides the rights
to religion, culture and language which are minimum human rights
standards. The standards are equally applicable to minority groups
which, in fact, can only be exercised in a collectivity. These rights are
directly addressed in the General Assembly Declaration on the Rights
of Minorities and in Article 27 of the Covenant on Civil and Political
Rights. Article 27 provides that:

> In those States in which ethnic, religious or linguistic minori-
> ties exist, persons belonging to such minorities shall not be
> denied the right, in community with the other members of
> their group, to enjoy their own culture, to profess and prac-
> tice their own religion, or to use their own language.[60]

Though the Indian State legally recognizes these minimum rights,
as I hope has been seen, this is not sufficient as an answer to India's
communal problem. Calling the Indian State to account for its human
rights violations—however necessary—would also seem to be inade-
quate to prevent continuing violations. One partial remedy could be a
conservative extension of human rights norms to coincide more pre-
cisely with the needs of minorities. I have previously mentioned several
areas in which there is a fairly natural continuum between established
human rights and more expansive minority protections. Linguistic

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[60] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.
Indian ratification of this Treaty was on April 10, 1979 with no reservations. However, in a
declaration it is stated in relation to Article 1 that self-determination applies "only to the people
under foreign domination and that these words do not apply to sovereign independent States or
to a section of a people or nation—which is the essence of national integrity."

rights are, in terms of India, another example of the possible useful-
ness of such an extension.

India's Muslims are predominantly Urdu speakers and there is no
doubt that the Indian State respects the basic human right as guaran-
teed by Article 27 for Urdu speakers to freely use their language. It is,
however, quite common for well-educated Indians to be illiterate in
their native Urdu, as state schools use Hindi, English, or even regional
languages, but not Urdu. Because the Urdu speaking population is
scattered throughout India, Urdu does not even have the status of
regional languages spoken by less than half as many people.

This may, possibly, be a link to discrimination against Muslims, as
it serves to educationally disadvantage those for whom Urdu is a first
language. More to the point, however, it is clearly a source of friction
and part of the symbolic exclusion of Muslims from the public sphere.
This exclusion can not only be seen as discriminatory, but also seems
to impinge on Urdu speakers' right to popular participation as well as
their ability to "enjoy their own culture," as the literary traditions of
Urdu can not be maintained if even educated Urdu speakers are not
literate in their native tongue. Thus, beyond the basic right to free use
of language, one can possibly extrapolate rights, such as the right to
education in one's own language, which more fully address the needs
of India's Muslim minority. This is an example of how, implicit in existing
human rights, the possibility exists of defining more meaningful rights
for a minority. These rights, however, need to be concretized and made
explicit, as well as limited, such that Urdu does not become the sole
language of Muslims, which could have the effect of further dividing
Indian society and excluding Muslims from integration and opportunity.

The General Assembly Declaration on the Rights of Persons Be-
longing to Minorities, one of the few significant post-World War II
minority rights documents, does take a more far-reaching approach to
making concrete such positive obligations of states. Of course, as a U.N.
Resolution, the Declaration is not binding on States. The Declaration
holds in Article 4.2 that "States shall take measures to create favour-
able conditions to enable. . .minorities to express their characteristics
and to develop their culture, language, religion. . .;" Article 4.3 holds
that "States should take appropriate measures so that, wherever possi-
ble,. . .persons belonging to minorities have adequate opportunities to
learn their mother tongue or to have instruction in their mother
tongue."[61]

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[61] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or
Linguistic Minorities, adopted in Res. 1992/16.

A fuller elaboration of the rather weak injunction that states "should" allow "adequate opportunities" for learning and instruction in a minority's native tongue could address the second class status of Urdu and remove at least one source of friction between Hindus and Muslims. A key BJP demand is that Hindi be made the national language, though it is the language of only twenty-five percent of Indians.[62] This is the sort of action which could exacerbate minor friction over language into a major source of conflict. This could be usefully addressed by international legal norms which, for example, on the principle of the right to popular participation, could be construed to preclude the imposition of one national language in such a way that languages which are spoken by a defined percentage of the population are excluded from the public sphere, as is the BJP's intention.

V. Balancing Rights and Demands

Theodore Wright argues that the fundamental problem in India is a "majority backlash." Wright concedes that virtually all special protections the Indian State grants go to castes and regional minorities, not to Muslims. Nonetheless, Wright insists that Hindus have had their "hard-won comparative advantage whittled away by arbitrary, anti-modern group benefits,"[63] and that Muslims would be best served by recognizing that they "are a threatened minority and enter into a contract with the Hindu majority to abide by the rules set by the majority in order to ensure their survival in a hostile environment."[64] Wright makes a rather illogical jump to an extreme conclusion, but it is true that Muslims are a minority and that their separate Personal Law (their only "privilege" and one that has no particular effect on Hindu "advantages") is a flash point of conflict.

This backlash points to a serious issue with minority rights, which is the degree to which such rights devalue the rights of an individual and of a majority. If one is to maintain a state's legitimacy, one needs to maintain a sense for all individuals that they have fair representation in the state. Recognizing the needs of various communities runs the danger of reducing the Indian polity to a balancing act among squabbling communal sectors. The difficulty of keeping such a balance is nowhere better demonstrated than in Yugoslavia, where a system of

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[62] Weiner, *supra* note 2, at 105.

[63] *Id.* at 184.

[64] *Id.*

extreme decentralization eventually went out of balance, with no center strong enough to keep the state from exploding.

In speaking of such a situation of conflicting rights and demands there are no easy answers. One can only begin by insisting that the Indian State should be based on a type of nationalism which encompasses and exalts its diverse citizens and communities, rather than a singular nationalism which excludes them. There must be an attempt to create state structures which encourage the participation and engagement of all citizens, rather than being based on devotion to a limiting ideology. The BJP would hope to recreate national unity, but at the cost of excluding certain communities. To some, this is the last chance for the decrepit Indian state to right itself. The question at hand is whether the very existence of a pluralistic Indian State, with tolerance for religious minorities, has been put in question by the power of such explicit appeals to Hindu nationalism.

It is helpful to remember, in this regard, that Hindu nationalism is very much of a minority phenomenon of Hindu elites. For all of the attention it has garnered, there is no sign that it will gain central power. This does not mean that this movement should be disregarded. It is important as a symptom of the root cause of India's troubles, which is found in the exhaustion of the Nehruvian centralized state with its tradition of impatience with alternate loyalties interposing themselves between the individual and the State.

An alternative to the BJP can be based in an understanding that this sort of exclusivist nationalism is a politically impractical and potentially bloody undertaking. As shown by Gandhi, there is no essential reason why religious politics need to be exclusivist and, perhaps, more progress would be made if religion and the modern state were recognized as compatible with each other. If communal passions are to be accommodated within one state, however, there is a need to protect that state from the domination of one community. International human rights standards are basic to this, but must be seen in a more expansive light such that minority communities gain meaningful protections. A reconfiguration of the centralizing model of the Indian State may be the best way to structure such protections into the Indian State, though this will be quite difficult to achieve in practice.

Such a reconstruction could have two complementary elements. One, an increased voice at the center for minority communities through a schema such as proportional or reserved representation. On a second track, a decentralization of the Indian State would allow for multiple centers of power within India—thus giving political power to any

number of political communities within India, depending on regional, local, or particular configurations. Such a reconfiguration of the Indian State would hope to accommodate the various minorities of India, its Hindu majority, as well as the changing and overlapping combinations of each of these.

The extreme solution of Muslim obeisance to Hindus, which Wright suggests, is quite impractical and would likely lead to a violent reaction by India's Muslims. On the other hand, an over-reliance on minority rights may further instigate a Hindu reaction. A simple decentralization of power, in turn, would leave a scattered Muslim minority quite vulnerable to communal violence. The balance which must be struck among these various elements is precarious, but it is certainly preferable to the exhausted Congress party, corrupt and betrayed by its leaders, or the BJP alternative with its continuance of the centralizing project of the post-colonial era to a more exclusivist end. The key to the proposed balancing act would be different loci of power, all with considerable autonomy, but combined with guarantees of fundamental rights from both the national and international level.

VI. CONCLUSION

While conflict between Muslims and Hindus is by no means inevitable—in fact, it is the exception rather than the norm of Indian history—it is on a worrisome spiral. It is helpful to remember that, nonetheless, there continues to be much communal cooperation[65] and that this, too, has a long tradition. At present, there are several hopeful signs that such cooperation can take precedence over conflict. Instead of a continuing bidding war of anti-Muslim sentiment between the BJP and Congress, as seemed to be the trend for some time, in certain states (Uttar Pradesh, notably) Muslims have entered coalitions with lower caste political parties (remember that BJP's followers are primarily upper caste) which give them each a share of real political power for the first time since partition.[66] The challenge of India is to maintain an integrated society and egalitarian, democratic politics while resolving conflicts in a non-violent way. This project would be aided by the realization that exclusivist ideologies, religious or secular, are harmful social myths which are inherently unstable because they elevate values

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[65] BRASS, *supra* note 4, at 25.

[66] *Voice of the Voters: Major Parties Chastened in State Polls*, FAR EASTERN ECONOMIC REVIEW, Dec. 16, 1993, at 22.

to the realm of the absolute, placing them in conflict with inherently pluralistic societies. Such values should not, however, be considered demons to be tamed, but rather the very basis of a political engagement and commitment. The trick is how to reconcile the passion of such values with the pluralism and diversity of virtually all states. The essential step is to allow the space for such political communities to express their values and identities while, at the same time, using human rights, minority rights, and flexible state structures to ensure that such values can not dominate the equivalent rights of other groups. Until those in political power are committed to stand against communal exclusivism and integrating centralism, however, such a society will remain a distant ideal.