NOTE

WHAT WOULD YOUR FOUNDING FATHERS THINK? WHAT INDIA'S CONSTITUTION SAYS—AND WHAT ITS FRAMERS WOULD SAY—ABOUT THE CURRENT DEBATE OVER A UNIFORM CIVIL CODE

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I. INTRODUCTION

It has been described in India as "three words that can make our political class quail."[1] The phrase is "Uniform Civil Code," and the concept it represents sounds simple: The Indian Constitution directs the central government to work toward establishing a Uniform Civil Code that applies to all Indian citizens.[2] Yet the government has not enacted a code in the nearly sixty years since India adopted its constitution, and this remains a divisive issue in Indian politics.

India's diversity is staggering, with a population of over 1.17 billion people,[3] twenty-two national languages, and 844 additional dialects.[4] It is a secular nation[5] in which more than 80 percent of the people are Hindus;[6] where if merely 2 percent of the population practices a particular religion, it means that faith has approxi-

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1. Editorial, *Divorced From Reality*, HINDUSTAN TIMES, Oct. 25, 2007, *available at* http://www.hindustantimes.com/News-Feed/edits/Divorced-from-reality/Article1-254177.aspx.

2. INDIA CONST. art. 44.

3. *See* CENT. INTELLIGENCE AGENCY, *India*, *in* THE WORLD FACTBOOK (2010), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/in.html. The CIA estimated India's population to be 1,173,108,018 in July 2010. *Id.*

4. India at a Glance, http://india.gov.in/knowindia/india_at_a_glance.php (last visited May 8, 2010).

5. INDIA CONST. pmbl.: amended by the Constitution (Forty-Second Amendment) Act, 1976.

6. According to the most recent, official Census of India in 2001, 80.5 percent of the population—827,578,868 people—classify themselves as Hindus. Census of India by Religious Composition (2001), http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx.

mately 20 million adherents;[7] and where Islam, the largest minority religion, is followed by 13.4 percent of the population, over 138 million people[8]—a group that, by itself, would be the tenth most populous country in the world.[9]

With so much diversity, it is difficult to achieve uniformity. Thus India continues a system in which personal law—law relating to family matters, such as marriages, divorces and inheritances—is not uniform for all, but instead may still be governed by a person's religion.[10] For example, Islamic law, rather than a generally-applicable, religion-neutral statute, might determine the amount of money a husband owes his wife in maintenance when a Muslim couple divorces.

Naturally, opinions differ on this issue within India. There are those who say a Uniform Civil Code is a necessity in a secular nation, to ensure equal treatment under the law for all citizens.[11] There are those—many of them members of minority religions—who fear the motives of their opponents in the majority and believe that their traditions deserve protection in a secular nation that guarantees them religious freedom.[12] There are civil courts that must rule on what practices are religious and what practices are secular, with the consequences of those decisions sometimes extending far beyond the parties in the courtrooms. And there are politicians ready to take advantage of the disagreement. The consequences include communal tensions, fear, distrust, and alienation, all of which prevent India from fully realizing the vision its founders had for the nation at its inception.

This Note explores the current debate in India over the necessity of—and perhaps even the constitutional requirement of—a Uniform Civil Code to replace the existing system, in which personal law can vary based on religion. This Note focuses on Muslim per-

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7. *See id.* In the 2001 Census of India, 19,215,730 people—1.9 percent of the population—classified themselves as Sikhs. *Id.*

8. *Id.* India had 138,188,240 individuals self-identify as Muslims in the 2001 Census of India. *Id.*

9. *See* U.S. Census Bureau, International Data Base, Country Rankings (2009), http://www.census.gov/ipc/www/idb/ranks.php (identifying Russia as the ninth most populous nation in 2009 with approximately 140 million people and Japan as the tenth most populous nation in 2009 with approximately 127 million people).

10. *See, e.g., infra* notes 63-64 and accompanying text.

11. *See* Kavita R. Khory, *The Shah Bano Case: Some Political Implications, in* Religion and Law in Independent India 149, 159, 162 (Robert D. Baird ed., 2d ed. 2005).

12. *See* Granville Austin, *Religion, Personal Law, and Identity in India, in* Religion and Personal Law in Secular India: A Call to Judgment 15, 21 (Gerald James Larson ed., 2001); *id.* at 152-53, 162.

sonal law, the source and subject of much of the debate. It also explores what India's Constitution has to say on the issue, in an attempt to determine whether the drafters of that document—the country's founders—would have supported or opposed contemporary calls for the institution of a Uniform Civil Code.

Part II examines the development and goals of the Indian Constitution, paying particular attention to Articles 25 and 26—which pertain to religious freedom—and to the Indian conception of secularism. It also describes Article 44, which establishes a Uniform Civil Code as a directive principle of state policy. Part II closes by exploring some of the difficulties Indian courts have had in dealing with religious issues, and the consequences of their decisions, including communal tensions and growing demand among some Hindus for a Uniform Civil Code.

Part III examines the text and structure of the Indian Constitution and the intent of its framers concerning a Uniform Civil Code, and explains why the state goal of a Uniform Civil Code must be subordinate to the constitution's guarantee of religious freedom. Part III shows that the current political situation in India and the alienation many Muslims currently feel would make the imposition of a Uniform Civil Code inconsistent with the founders' vision of India, not to mention inappropriate and unwise. Therefore, this Note argues that although a Uniform Civil Code should remain an aspirational goal, India should not enact one now or in the near future.

II. Discussion

A. *The Objectives of the Indian Constitution*

Political considerations drove India's successful revolt against British colonial rule and subsequent establishment as a new nation.[13] Although the founders did hope to reorganize the country's social and economic structures, their principal goal was to create a new political community through collective participation.[14] They hoped that by creating "a single citizenship" they would reduce factionalism and force the national government to work for the common good.[15]

13. *See* Sarbani Sen, The Constitution of India: Popular Sovereignty and Democratic Transformations 38 (2007).

14. *Id.*

15. *Id.* at 39.

At the same time, however, political realities meant that the framers could not ignore particular interest groups. After India became an independent state in 1947, the Indian Constituent Assembly came together to discuss and vote on a constitution, eventually enacting the Indian Constitution on November 26, 1949.[16] Members of the Constituent Assembly who came from religious and social minorities argued that the country's political identity could not be unitary.[17] The founders understood that minorities had to be given an opportunity to participate as citizens of the new nation—not to maintain separate minority identities or merely to prevent oppression, but so they could "feel that they have as honourable a part to play in the national life as any other section of the community."[18] With this goal, the Assembly sought to accommodate minorities. Some Hindus, for example, wanted a prohibition on religious conversion in the constitution, but after Muslims and Christians argued that propagating their religion was central to their faiths, no such provision was included.[19]

The founders believed that over time, narrow group identities would fade and a broader national political identity would emerge.[20] The constitution, as one founder noted in the Constituent Assembly Debates, would have a dual purpose: "It must recognize the existence of the minorities to start with. It must also be such that it will enable majorities and minorities to merge some day into one."[21]

B. *Religious Freedom and Indian Secularism*

Articles 25 and 26 of the India Constitution delineate the freedoms of religious belief and practice, as well as the limits on them. Article 25 states that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."[22] That freedom, however, is "[s]ubject to public order, morality and health,"[23] and does not prevent the state from making any law "regulating or restricting any economic, financial, political

16. Robert D. Baird, *Religion and Law in India: Adjusting to the Sacred as Secular*, *in* RELIGION AND LAW IN INDEPENDENT INDIA, *supra* note 11, at 7, 14-15.

17. SEN, *supra* note 13, at 98.

18. *Id.* at 99 (quoting 5 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT 247 (1999)).

19. Baird, *supra* note 16, at 15.

20. SEN, *supra* note 13, at 99.

21. *Id.* (quoting 7 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT 39 (1999)).

22. INDIA CONST. art. 25, § 1.

23. *Id.*

or other secular activity which may be associated with religious practice"[24] or "providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."[25]

Article 26 gives every religious denomination "the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law."[26] These rights are also subject to governmental regulation for "public order, morality and health."[27]

Section 2, clause (b) of Article 25—providing for laws that further social welfare and reform or open public Hindu institutions to all classes—is an indication that religious freedom must give way to other fundamental rights expressed in the constitution, such as equality before the law and the elimination of untouchability.[28] For example, Hindu temples cannot be closed to untouchables on the grounds that religious tradition dictates it (out of a fear that untouchables are unclean and will pollute the shrine).[29] The constitution, then, grants religious freedom only to the extent that religion does not conflict with the constitution. When such a conflict exists, the religious tradition must be modified.[30] Those aspects of the tradition that do conflict with the constitution can be classified as secular, rather than religious, and removed outside the scope of the constitution's protection of religious freedom.[31]

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24. *Id.* art. 25, § 2, cl. a.

25. *Id.* art. 25, § 2, cl. b.

26. *Id.* art. 26.

27. *Id.*

28. *See* Baird, *supra* note 16, at 17-18. Untouchability is one feature of traditional Hinduism, which divided society into different classes, or castes. Members of the lowest caste, or those who were considered so low that they were outside of the caste system entirely, might be considered untouchables, often based on their occupations. As untouchables, their touch was considered polluting to people from higher castes, and, as a result, untouchables were subject to many social restrictions, such as exclusion from Hindu temples. *See Untouchable*, ENCYCLOPAEDIA BRITTANICA, http://www.britannica.com/eb/article-9074376/untouchable (last visited May 9, 2010). Although it still exists in practice, under the Indian Constitution, "'[u]ntouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law." INDIA CONST. art. 17; *accord* P.B. GAJENDRAGADKAR, THE CONSTITUTION OF INDIA: ITS PHILOSOPHY AND BASIC POSTULATES 42 (1969).

29. Baird, *supra* note 16, at 18.

30. *Id.*

31. *See id.* at 19.

The word "secular" did not originally appear in the Preamble to the Indian Constitution—which described India as a sovereign, democratic republic—or in the articles guaranteeing religious freedom.[32] The founders deliberately omitted the word, fearing that its use would imply the anti-religious tone associated with secularism in Christian countries.[33] The Indian concept of secularism is not irreligion, but rather respect for all religions, none of which is identified with the state.[34] Only during the emergency rule imposed by Indira Gandhi's government in 1976 was the preamble amended to place "secular" before the phrase "Democratic Republic,"[35] to emphasize that professing any religion will have no effect on state affairs,[36] and perhaps to emphasize the country's secular nature in the face of growing communal tensions.[37]

The framers of the Indian Constitution established individual freedom as the document's primary concern.[38] Its objective, as stated in the preamble, was "freedom and dignity of the individual, social, economic and political justice and equality of status and opportunity for all, regardless of caste, creed or religion."[39] P.N. Bhagwati explained:

> The framers of India's Constitution were convinced that if there was freedom for everyone to profess and practise the religion of his or her own choice and there was a spirit of tolerance towards those who profess and practise other religions, and religion was confined to affairs strictly religious and was not allowed to intrude into the social, economic and political life of the people which should be guided solely by secular considerations and every individual was regarded as an entity entitled to the same basic rights irrespective of his or her religion, there would be no conflict between religion and secularism.[40]

The founders, then, foresaw individual freedom leading to religious tolerance and communal harmony, a society in which citizens would not allow religious beliefs to interfere with the social, economic, or political life of the nation.[41]

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32. P.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, *in* RELIGION AND LAW IN INDEPENDENT INDIA, *supra* note 11, at 35, 36.

33. *Id.* at 37; GAJENDRAGADKAR, *supra* note 28, at 40.

34. Bhagwati, *supra* note 32, at 37; GAJENDRAGADKAR, *supra* note 28, at 40.

35. Bhagwati, *supra* note 32, at 37.

36. *See* Ruma Pal, *Religious Minorities and the Law*, *in* RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT, *supra* note 12, at 24, 24.

37. Bhagwati, *supra* note 32, at 37.

38. *Id.* at 40.

39. *Id.*

40. *Id.* at 40-41.

41. *Id.* at 41.

The Indian conception of secularism differed from the United States' understanding. Both shared the view that the state should not interfere with religious matters, support a particular religion, or discriminate in favor of or against a particular religion.[42] But while the Supreme Court of the United States has determined that the Establishment Clause of the First Amendment to the U.S. Constitution is intended to create a "wall of separation" between church and state, the framers of the Indian Constitution did not completely accept the idea of such a wall.[43] India's founders were skeptical of the Establishment Clause, believing that if taken to the extreme it might become hostile to—and therefore deny—religious freedom.[44] Furthermore, they knew that removing religion from government purview entirely would essentially serve as a constitutional protection for the social injustice that existed in the name of religion and that they were determined to end through reform.[45]

The country's two most prominent religions, Hinduism and Islam, had a place in almost all aspects of Indian life; these religions were not limited to spiritual issues, as religions were in Western societies.[46] To confine religion and prevent it from infringing on citizens' social, economic, and political lives—that is, to let a secular state emerge—the Indian government had to have the power to interfere with religious freedom that Articles 25 and 26 granted it: to maintain public order, morality, and health; to pro-

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42. *Id.*

43. *Id.* at 41-42. The First Amendment to the United States Constitution states, in relevant part, that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The phrase "wall of separation" came originally from a letter by Thomas Jefferson, in which he described what he believed to be the effect of the Establishment Clause—a wall of separation between church and state. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878). The Supreme Court of the United States first cited this letter and phrase in *Reynolds v. United States*, where it held that a law prohibiting bigamy did not violate the First Amendment right to free exercise of religion. *See id.* at 164-67. The Supreme Court first used the phrase in its modern Establishment Clause jurisprudence in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), upholding a New Jersey law that allowed taxpayer funding of transportation to religious schools. Although the Court split 5-4 on the decision, all nine justices seemed to agree on the existence of such a wall. *See id.* To conclude the majority opinion, Justice Black wrote: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.* Joined by three other justices in dissent, Justice Rutledge wrote: "Neither so high nor so impregnable today as yesterday is the wall raised between church and state . . . ." *Id.* at 29 (Rutledge, J., dissenting).

44. Bhagwati, *supra* note 32, at 42.

45. *Id.* at 43.

46. *Id.*

tect other fundamental rights; and to provide for social welfare and reform.[47]

C. *Article 44—Toward a Uniform Civil Code*

Part IV of the Indian Constitution, "Directive Principles of State Policy," contains advisory articles for the Indian Parliament.[48] Among them is Article 44, which states that "[t]he State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."[49] Article 44, like other Directive Principles, is not justiciable but is "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply [it] in making laws."[50] The basis for Article 44 is the notion that a secular nation must have secular laws; civil law must be the same for all Indians so that a more unified and integrated nation develops.[51] Article 44, then, calls for the secularization of law so that all citizens are equal under the law, regardless of religion, caste, or gender.[52]

At the time of independence, however, Indian personal law—governing marriage, divorce, inheritance, family property—was determined by religion.[53] When drafting the constitution, the Constituent Assembly considered including a justiciable Uniform Civil Code, embodying general laws that applied to all people regardless of religion, to come into effect over five or ten years.[54] Ending differences in personal law would, according to Assembly member Minoo Masani, "get rid of these watertight compartments . . . which keep the nation divided."[55] The proposal died in committee, however, before being resurrected in Article 44 as a non-justiciable Directive Principle.[56] The reluctance to include an actionable Uniform Civil Code in the constitution reflected the concern of secular nationalists that Muslims and members of other minority religions should feel safe and welcome in India. "They

47. *Id.*
48. Baird, *supra* note 16, at 19.
49. India Const. art. 44.
50. *Id.* art. 37.
51. Baird, *supra* note 16, at 19-20.
52. *Id.* at 20.
53. *Id.*
54. Susanne Hoeber Rudolph & Lloyd I. Rudolph, *Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context*, *in* Religion and Personal Law in Secular India: A Call to Judgment, *supra* note 12, at 36, 50-51.
55. *Id.*; *accord* Granville Austin, The Indian Constitution: Cornerstone of a Nation 80 (1966).
56. Rudolph & Rudolph, *supra* note 54, at 51.

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."[57]

Muslims in the Constituent Assembly opposed Article 44, arguing that the matters regulated by personal law were matters of religion and therefore could be regulated only with the consent of the religious groups affected.[58] The article was adopted, however, reflecting the belief that legislation in the area of personal law was necessary. Such legislation would attempt not to interfere with religion, but to redefine what was in fact "religious" if necessary for the sake of national unity.[59]

The Indian Parliament has not changed Muslim personal law since independence.[60] It did, however, pass a group of laws collectively known as the "Hindu Code Bill" in 1955 and 1956—the Hindu Marriage Bill, Hindu Succession Bill, Hindu Minority and Guardianship Bill, and Hindu Adoptions and Maintenance Bill.[61] The Hindu Code primarily addressed gender issues and equal treatment of Hindus regardless of caste.[62] As a result, monogamy, divorce, and inheritance have been codified for Hindus[63] but remain personal religious matters for Muslims.[64] Polygamy, for example, is illegal for Hindus in India but legal for Muslims.[65] The Hindu Code Bill was considered a step toward a Uniform Civil Code, and the government tried to move Muslims toward acceptance of secularization of Muslim personal law. P.B. Gajendragadkar, a former chief justice of the Supreme Court of India, explained:

> Whether or not polygamy should be allowed, what should be the line of succession, what should be the shares of different heirs,

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57. *Id.*
58. Baird, *supra* note 16, at 21.
59. *Id.*
60. *Id.* at 22.
61. *Id.* at 23.
62. *Id.*
63. Although the Hindu Code codified and reformed Hindu personal law, it did not secularize it. *See* MADHU KISHWAR, *Stimulating Reform, Not Forcing It: Uniform Versus Optional Civil Code*, *in* RELIGION AT THE SERVICE OF NATIONALISM AND OTHER ESSAYS 233, 234 (1998); John H. Mansfield, *The Personal Laws or a Uniform Civil Code?*, *in* RELIGION AND LAW IN INDEPENDENT INDIA 139, 144-45 (Robert D. Baird ed., 1993) ("Although the code's values are predominantly secular, it retains a few traditional elements that may be of symbolic importance. Religious ceremonies, for instance, are still effective to bring about valid marriages and conversion to a religion other than Hinduism is ground for divorce.").
64. *See* Baird, *supra* note 16, at 23.
65. *Id.*

> what should be the law of divorce, are matters which should be determined not by scriptural injunctions, but by rational considerations. These are matters "secular" in character and are outside the legitimate domain of "religion" as contemplated by Articles 25 and 26 of the Constitution.[66]

Politics, however, have prevented the Indian Parliament from enacting similar reforms in Muslim law, though Parliament has suggested that it is open to reforming personal law for minority communities if asked.[67] Hindus responded to the Hindu Code Bill by demanding similar reform and codification of Muslim personal law, but the government believed such action would undermine secularism and alienate Muslims.[68] This discrepancy illustrates the distinct conceptions of Indian secularism: For Muslims it means the freedom to follow their religion without state interference, whereas for other Indians it requires uniform laws that apply to all citizens.[69]

D. *Courts Rule on Religion, and Problems Arise*

Although the Indian Constitution does discuss certain religions by name, it does not define religion, leaving the courts to decide, in a given case, whether a practice is religious and protected under Articles 25 and 26 or merely secular and therefore not immune from government regulation.[70] The Supreme Court of India introduced the concept of "essentiality" in the 1954 case *Commissioner, Hindu Religious Endowments, Madras v. Sirur Mutt*, (1954) S.C.R. 1005 (India).[71] The court held that it would determine on a case-by-case basis and "with reference to the doctrines of that religion itself" whether specific practices were essential to a faith and therefore religious.[72] For example, in *Sirur Mutt*, the court held that determining which rituals were necessary in a temple was religious but that the expenses of the rituals were secular and could therefore be subject to government control.[73]

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66. *Id.* at 23-24 (quoting P.B. GAJENDRAGADKAR, SECULARISM AND THE CONSTITUTION OF INDIA 125-26 (1971)).

67. *Id.* at 23.

68. *Id.*

69. *Id.*

70. Baird, *supra* note 16, at 25.

71. *Id.*

72. *Id.* at 25-26 (quoting Comm'r, Hindu Religious Endowments, Madras v. Sirur Mutt, (1954) S.C.R. 1005, 1025 (India)).

73. *Id.* at 26. In deciding what constitutes matters of religion, the Supreme Court in *Sirur Mutt* noted the following:

> A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well

Deciding whether a practice is religious or secular has been difficult at times. In *Saifuddin Saheb v. State of Bombay*, A.I.R. 1962 S.C. 853 (India), the court held that excommunication from a Muslim denomination was essential to the practice of faith and therefore religious, making unconstitutional a law that abolished excommunication on secular civil rights grounds.[74] The minority opinion appeared to recognize that the distinction between religious and secular matters was not simple and instead found that excommunication was not "purely religious" because it had civil consequences.[75] The minority view was that the court did not have to make a judgment about the "purely religious aspects" of excommunications, but was responsible for judging actions which affected the civil rights of members of the community; whatever religious implications the judgment had should not have concerned the court.[76]

The majority in *Saifuddin Saheb*, however, found the law invalid because it impinged on the constitutional grant of freedom of religion, which included the right of communities to regulate themselves in religious matters.[77] Excommunication was essential, the majority reasoned, because it was a means of maintaining discipline and solidarity in a religious community.[78] The majority did not address whether every case of excommunication was based on religious grounds, but it reasoned that the overbroad law made it impossible to maintain the strength and continuity of the religion by invalidating excommunication on any ground.[79] The case illustrated the potential inadequacies of the Supreme Court's attempts at religious-or-secular categorization. The majority ignored the secular civil rights concerns of excommunication while the minority ignored the law's effect on religion.[80]

> being, but it would not be correct to say that religion is nothing else, but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25.

Sirur Mutt, (1954) S.C.R. at 1023-24.

74. *See* Baird, *supra* note 16, at 28-29.

75. *Id.* at 29 (quoting Saifuddin Saheb v. State of Bombay, A.I.R. 1962 S.C. 853, 865 (India) (Sinha, C.J., dissenting)).

76. *Id.*

77. *Id.*

78. *Id.* at 29-30.

79. *Id.* at 30.

80. *Id.*

The court has used other techniques to assist in resolving disputes when categorization of an issue as religious or secular seems inadequate. One is reification, or "the treatment of an historical process characterized by diversity and change as a single objective entity."[81] In *M.H. Quareshi v. State of Bihar*, (1959) S.C.R. 629 (India), the Muslim petitioners claimed that laws preventing the slaughter of cows violated their fundamental rights under Article 25, because it was their custom to sacrifice a cow on Bakr Id, a Muslim holy day.[82] The court ignored the petitioners' specific custom and treated Islam as a reified doctrine, searching for Islamic scripture that made sacrificing a cow mandatory.[83] It found a translation that stated it was optional for Muslims to sacrifice a cow or a camel or a goat and concluded that sacrificing a cow was therefore optional for the petitioners.[84] The court concluded that because sacrificing a cow was optional, it was not essential and therefore not protected religious practice under Article 26.[85]

The Supreme Court has also used the concept of superstition when the categories of religious and secular are inadequate. In *Sastri Yagnapurushadji v. Muldas Brudardas Vaishya*, (1966) 3 S.C.R. 242 (India), the appellant members of a sect argued that they were not Hindus but instead belonged to a separate religion, and that the Bombay Hindu Places of Public Worship Act therefore did not apply to their temples.[86] The court ultimately concluded that the appellants were Hindus, with one factor in its decision finding that the appellants' sect was founded on superstition.[87] The court determined the essential tenets of Hinduism, considered what the members of the sect ought to believe if they were true to the sect's founder, and concluded that although the appellants were sincere, they did not understand their own faith.[88] According to the court, the appellants' concern, while genuine, was "founded on superstition, ignorance, and complete misunderstanding of the true teaching of Hindu religion and of the real significance of the tenets and philosophy taught by" the sect's founder.[89]

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81. *Id.*

82. M.H. Quareshi v. State of Bihar, (1959) S.C.R. 629, 649 (India).

83. Baird, *supra* note 16, at 30-31.

84. *Id.* at 31.

85. *Id.*

86. *Id.* (citing Sastri Yagnapurushadji v. Muldas Brudardas Vaishya, (1966) 3 S.C.R. 242, 272 (India)).

87. *Id.*

88. *Id.* at 32.

89. *Id.* at 31-32 (quoting *Yagnapurushadji*, (1966) 3 S.C.R. at 273-74).

To an outside observer, this distinction in Indian jurisprudence between what is religious and what is secular might seem confusing or ill-considered, a doctrine that allows or perhaps compels courts to perform duties—such as determining the essential tenets of a religion, or finding which religion a group of people belong—that seem to go beyond the scope of the judiciary. The doctrine, however, is firmly established in Indian law—in the constitution, in legislation, and in the courts.[90] But there is political opposition to it from right-wing Hindus, who believe that the constitution favors minorities over the country's Hindu majority and must be modified.[91]

The conflicting views were expressed most notably in the aftermath of *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844 (India), commonly known as the *Shah Bano* case. Ahmed Khan divorced Shah Bano, his wife of forty-four years, and returned the 3,000-rupee marriage settlement he had received from her family, as dictated by Islamic law.[92] Instead of accepting the settlement, Shah Bano sued her former husband for maintenance under the Criminal Procedure Code of India and was awarded 180 rupees per month.[93] Ahmed Khan appealed to the Supreme Court of India, arguing that as a Muslim, he had to obey Islamic law, which only required him to pay maintenance for three months.[94] The Supreme Court, however, affirmed the lower court's decision granting Shah Bano continued maintenance, ruling that Section 125 of the Criminal Code required a husband to pay maintenance to a wife with no means of support.[95]

Two aspects of the decision generated controversy and thrust the case into the national discourse. First, the court indicated that its decision to grant continued maintenance was consistent with Islamic law.[96] This meant the Supreme Court was interpreting Islamic law, which angered Muslims—particularly clergy members, who argued it was inappropriate for a secular court to interpret religious law, and that the decision set a precedent under which secular judges could overrule clerical interpretations of Islamic law.[97] Second, Chief Justice Chandrachud's opinion urged the

90. *Id.* at 34.
91. *See id.*
92. Khory, *supra* note 11, at 151.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 152.
97. *Id.*

government to introduce a Uniform Civil Code that would replace Muslim personal law:

> It is also a matter of regret that Article 44 of our Constitution has remained a dead letter . . . . A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies . . . . It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.[98]

Muslims saw this as a challenge to their practice of Islamic personal law.[99] It is also worth noting that all five Supreme Court justices who decided the case were Hindus.[100] The religious composition of the court had never been an issue before, even in cases interpreting personal law, but it contributed to the Hindu-Muslim tension surrounding this case.[101]

Although the strength of their opposition varied, most Muslims opposed the decision, seeing it and the call for a Uniform Civil Code as a threat to their religious independence and identity.[102] There were some members of the Muslim community—mainly advocates of women's rights—who supported the decision, but even among educated, urban Muslim women there was ambivalence.[103]

The government, led by Prime Minister Rajiv Gandhi and the Congress Party, initially supported the Supreme Court's decision, but within a year of the judgment it reconsidered its position in the face of growing Muslim protests against the decision and electoral losses in regions with significant Muslim populations.[104] Ultimately, the government introduced legislation that essentially overruled the Supreme Court's decision in *Shah Bano*, making Section 125 of the Criminal Procedure Code inapplicable to Muslim marriages.[105] The bill matched Muslim clerics' interpretation of Islamic law on the subject, and both houses of Parliament passed

98. *Id.* at 151-52.

99. *Id.* at 152.

100. Pal, *supra* note 36, at 31.

101. *See id.* The Supreme Court of India consists of the Chief Justice and no more than twenty-five other judges appointed by the President of India. Supreme Court of India, Law, Courts and the Constitution, http://supremecourtofindia.nic.in/new_s/constitution.htm (last visited May 9, 2010). Judges sit in small benches of two or three, "coming together in larger Benches of 5 and more only when required to do so or to settle a difference of opinion or controversy." *Id.*

102. *See* Khory, *supra* note 11, at 152-53.

103. *Id.* at 155.

104. *See id.* at 155-57.

105. *Id.* at 158.

it.[106] Prime Minister Gandhi argued that the bill would advance secularism by protecting fundamental rights of religious communities, but many Hindus believed it weakened national unity and fostered separatism by allowing Muslims to place religion over country.[107] Meanwhile, Muslims—even those who opposed the bill—felt alienated by the Hindu reaction to it.[108]

That reaction might be best exemplified by the Hindu nationalist Bharatiya Janata Party (BJP), which claimed that minorities were being favored at Hindus' expense.[109] The BJP, an opposition party at the time of the *Shah Bano* decision and ensuing legislative reaction, went from holding just two seats in Parliament in 1984 to controlling eighty-six seats after elections in 1989.[110] Its ascendancy continued. It briefly controlled the government in 1996—for less than two weeks—before coming to power more conclusively in 1998.[111]

At the core of the party's philosophy is Hindutva, which to supporters simply means that Hindus should be proud of Hindus, but which critics see as a gateway to religious fanaticism.[112] The BJP has long called for an end to Muslim personal law and the implementation of a Uniform Civil Code.[113] Many of the BJP's top leaders are also members of the Rashtriya Swayamsevak Sangh (RSS), a group dedicated to orthodox Hinduism and against the Gandhian vision of India as a secular nation in which Muslims and members of other faiths are equal to Hindus.[114]

The BJP also advocated building a Hindu temple in the city of Ayodhya on the spot where a 16th-century mosque stood and thus desecrated, the BJP claimed, the site where a temple once stood to mark the birth of the Hindu god Rama.[115] That movement boiled

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106. *Id.* at 158-59.

107. *Id.* at 159.

108. *See id.*

109. *See* Bernard Weinraub, *Hindu Nationalists' Power Solidifies*, N.Y. TIMES, June 17, 1991, at A9.

110. *See id.*

111. *See* Editorial, *India's Hindu Government*, N.Y. TIMES, Mar. 19, 1998, at A20. The BJP lost control of the Indian government after elections in 2004. *See* John Lancaster, *Hindu Nationalists Regroup After Loss: Movement That Inspired Indian Party Denies Its Political Power Has Ebbed*, WASH. POST, June 6, 2004, at A22.

112. John F. Burns, *Hindu Party's Rising Election Hopes Trouble Many Indian Traditionalists*, N.Y. TIMES, May 5, 1996, at 8.

113. *See id.*

114. *See id.* Mohandas K. Gandhi's assassin, in fact, was an RSS member who believed Gandhi pandered to Muslims. *Id.*

115. *See* Gregory C. Kozlowski, *Muslim Personal Law and Political Identity in Independent India*, *in* RELIGION AND LAW IN INDEPENDENT INDIA, *supra* note 63, at 75, 88-89. Archaeolo-

over in December 1992, when Hindu nationalists destroyed the Ayodhya mosque and sparked communal violence across the country.[116] Subsequent riots across India between Hindus and Muslims left 2,000 people dead.[117] The BJP-led government in the state of Gujarat was also accused of not doing enough to prevent Hindus from killing over 1,000 Muslims in 2002, after Muslims killed fifty-nine Hindus by setting fire to their train.[118]

III. Analysis

The *Shah Bano* case and its aftermath again raised the question that has been asked periodically since the adoption of the constitution: Why hasn't more been done to bring about the goal of a Uniform Civil Code, as expressed in Article 44?[119] One commentator, Ruma Pal, criticized the *Shah Bano* decision as "not necessary at all" and argued that it demonstrated the need for a Uniform Civil Code by stating the following:

> It would not impinge on the freedom of an individual's conscience, nor on the expression of it. It has been suggested that "their (the minorities') anxiety about their personal law does not relate to the laws themselves but rather to their privileged position as minorities in a country." Successive governments have acquiesced in this argument either for political gains, fear of political loss, or from a misunderstanding of the words "religious tolerance." They have not sufficiently realized that differences in the law create a feeling of disparity and, inevitably, resentment.[120]

Some argue that the discrepancy regarding personal law between Hindus and Muslims would not matter if not for militant Hindu groups who try to use it for political gain by winning elections and discrediting Muslims as not true Indians.[121] As a result, they say, Muslims have only strengthened their identification with Islam and its personal law.[122] Muslim personal law is already inter-

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gists and historians have said that the mound on which the mosque sat was actually a Buddhist stupa, and they note that there is disagreement among Hindus as to where in or around Ayodhya Lord Ram was actually born. *Id.*

116. *See* Rudolph & Rudolph, *supra* note 54, at 53-54.

117. *Q&A: The Ayodhya Dispute*, BBC News, Nov. 15, 2004, http://news.bbc.co.uk/2/hi/americas/1843879.stm.

118. *See* Amy Waldman, *Hindu Nationalists Win Landslide Vote in Indian State*, N.Y. Times, Dec. 16, 2002, at A3.

119. *See* Mansfield, *supra* note 63, at 140.

120. Pal, *supra* note 36, at 32-33 (quoting J. Duncan M. Derrett, Religion, Law, and the State in India 546 (1968)).

121. Austin, *supra* note 12, at 15.

122. *Id.*

preted in and applied by India's secular courts, however, which begs the question: Why do Muslims fear a Uniform Civil Code?[123] The first reason, according to author Granville Austin, is that it would allow Hindus to legislate on Islam.[124] Second, it would likely lead to some reformation of the law, as occurred when Hindu personal law was codified.[125] Finally, codification would take away much or all of the authority of Muslim religious leaders who interpret personal law, because interpretation would no longer be solely their responsibility.[126] Muslims in India, Austin writes, are a community "whose votes are courted but whose interests are ignored, and sometimes attacked." They feel threatened, and thus they want to strengthen what they see as the secular character of the country under the constitution and protect their personal law, "their last line of defense."[127]

Should India adopt a Uniform Civil Code? An examination of the Indian Constitution—its text and structure, as well as the intent of the founders who created it—suggests that while India should continue to strive toward the goal of a Uniform Civil Code, this is not the proper time in the nation's history to implement it.

A. *Articles 25 and 26 versus Article 44—Text and Structure*

Articles 25 and 26, addressing freedom of religion, are located within Part III of the Indian Constitution, which is devoted to "fundamental rights."[128] In establishing the constitution and the fundamental rights within Part III as supreme over other laws, Article 13 declares that "[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."[129]

As noted above in Part II-B, the religious freedom defined in Articles 25 and 26 may be constrained by other constitutional considerations. Both Article 25 and 26 are subject to "public order, morality and health";[130] Article 25 additionally allows the govern-

123. *Id.* at 22.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 21.
128. *See* INDIA CONST. pt. III.
129. *Id.* art. 13, § 2. For more information on the purpose, basic features, and relevant cases relating to Article 13, see P.M. BAKSHI, THE CONSTITUTION OF INDIA 13-16 (8th ed. 2007).
130. INDIA CONST. arts. 25-26.

ment to regulate "any economic, financial, political or other secular activity which may be associated with religious practice" and to open Hindu religious institutions in the name of social welfare and reform.[131] The inclusion of the right to religious freedom among the fundamental rights in Part III, however, strongly suggests that these rights cannot otherwise be abridged, save perhaps by constitutional amendment, which Article 13 permits.[132] Supporters of a Uniform Civil Code could argue that the activities covered by personal law, such as marriage, divorce, and inheritance, are merely "secular activit[ies] which may be associated with religious practice,"[133] and that a Uniform Civil Code would therefore be constitutionally permissible under Article 25. But the legislative reaction to the *Shah Bano* decision, which overrode the Supreme Court's decision and exempted Muslim divorces from Section 125 of the Criminal Procedure Code, indicates at the very least that there are many lawmakers who believe activities such as divorce and maintenance are bound up in the practice of Islam, incapable of being separated and categorized as secular.

Article 44 is located within Part IV of the Indian Constitution, the section dedicated to "Directive Principles of State Policy."[134] In describing the application of the principles in Part IV, Article 37 states that "[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[135] On the basis of that text, the Directive Principle of Article 44 ("The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India"[136]) might appear to be just as fundamental to India's constitutional scheme, and there-

131. *Id.* art. 25, § 2.

132. *See id.* art. 13, § 4: inserted by the Constitution (Twenty-Fourth Amendment) Act, 1971 ("Nothing in this article shall apply to any amendment of this Constitution made under article 368."). The Supreme Court of India, however, has indicated that while fundamental rights are not exempt from constitutional amendment, they may be among such "basic features" that they cannot be amended. BAKSHI, *supra* note 129, at 13-14 (citing Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789 (India) (noting that a constitutional amendment relating to a basic feature, such as the elimination of judicial review, would be void)). While religious freedom would not seem to be a "basic feature" of the constitutional system of government in the same way as judicial review, the Supreme Court's recognition that some fundamental rights may be basic features is more evidence that the fundamental rights in Part III can only be altered via extraordinary means.

133. INDIA CONST. art. 25, § 2, cl. a.

134. *Id.* pt. IV.

135. *Id.* art. 37.

136. *Id.* art. 44.

fore just as imperative, as the fundamental right to religious freedom guaranteed in Articles 25 and 26.

A fundamental right, however, must be considered more integral than a fundamental principle, and therefore must be considered preeminent over a fundamental principle that conflicts with it. A fundamental right, by the nature of that phrase, must be held essential, inviolable. A principle, in contrast, implies some flexibility; it should be followed, but perhaps only to the extent necessary or possible. This distinction between the characterization of the interests articulated in Articles 25 and 26 and the characterization of the interests articulated in Article 44 suggests that the Indian Constitution places a higher priority on the fundamental right to religious freedom than the fundamental principle of developing a Uniform Civil Code.

Significantly, under Article 37, the Indian Constitution's Directive Principles are not judicially enforceable, in contrast to the fundamental rights within Part III.[137] The Supreme Court of India noted the distinction when it first considered the effect of the Directive Principles on Fundamental Rights in *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 525 (India).[138] The court struck down as unconstitutional a government program that reserved admission spots at medical colleges on communal lines, rejecting the government's argument that the program was valid under the Directive Principle expressed in Article 46, which directs the government to promote the educational interests of members of certain lower castes and tribes. In doing so, the court noted as follows:

> The Directive Principles of the State policy, which by article 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III which . . . are expressly made enforceable by appropriate writs, orders or directions under article 32. The Chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter on Fundamental Rights. In our opinion that is the correct way, in which the provisions found in Parts III & IV have to be understood. However, so long as there is no infringement of any fundamental right to the extent conferred by the provisions in Part III, there

137. *Compare id.* art. 37 (noting that the provisions in Part IV "shall not be enforceable by any court"), *with id.* art. 32, § 1 ("The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [Part III] is guaranteed.").

138. *See* M.P. DUBE, ROLE OF SUPREME COURT IN INDIAN CONSTITUTION 155 (1987).

> can be no objection to the State acting in accordance with the Directive Principles set out in Part IV . . . .[139]

The Supreme Court later expanded on this opinion when it held that Fundamental Rights and Directive Principles should be construed harmoniously when they appear to conflict, such that both are given as much effect as possible, but the court continued to maintain that fundamental rights had priority.[140]

In litigation under Article 44 specifically, the court has rejected public interest suits seeking writs for the introduction of a Uniform Civil Code or declarations that certain religion-based personal laws were unconstitutional.[141] For example, in *Maharshi Avadhesh v. Union of India*, (1994) Supp. (1) S.C.C. 713 (India), the court dismissed a petition seeking mandamus against the government to introduce a Uniform Civil Code, expressing the view that the matter was a legislative concern.[142] That a Uniform Civil Code is not justiciable—a view supported by the decisions of the Supreme Court—indicates that it is only a policy concern. It is no doubt an important and even fundamental policy concern, as evidenced by its designation as a Directive Principle in the constitution. But when policy conflicts with a fundamental right, certainly policy must yield. If the framers of constitution had wished to give the goal of a Uniform Civil Code primacy within the constitutional scheme, or at least equivalency with fundamental rights, surely they would have placed it in Part III of the constitution rather than in Part IV.

Thus, the text and structure of the constitution, together with decisions of the Supreme Court grounded in that text and structure, suggest that the policy goal of a Uniform Civil Code should yield to the fundamental right of religious freedom, including the

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139. State of Madras v. Srimathi Champakam Dorairajan, (1951) S.C.R. 525 (India); *accord* Bakshi, *supra* note 129, at 85 ("[T]he Directives do not confer any enforceable rights and their alleged breach does not invalidate a law, no[r] does it entitle a citizen to complain of its violation by the State so as to seek mandatory relief against the State.").

140. *See In re* Kerala Educ. Bill, A.I.R. 1958 S.C. 956 (India) ("The Directive Principles have to conform to and run subsidiary to the chapter on Fundamental Rights. Nevertheless, in determining the scope and ambit of the Fundamental Rights relied on by or on behalf of any person or body the court may not entirely ignore these Directive Principles of state policy laid down in Part IV of the Constitution but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."); Dube, *supra* note 138, at 156-57 ("A harmonious interpretation must be placed upon the constitution, and so interpreted it means that the state should certainly implement the directive principles but it must do so in such a way as not to take away or abridge fundamental rights . . . .".

141. *See* Bakshi, *supra* note 129, at 88-89.

142. Maharshi Avadhesh v. Union of India, (1994) Supp. 1 S.C.C. 713, 714 (India).

right of Muslims to apply personal law based on Islam to their family lives.

B. *Articles 25 and 26 versus Article 44—Founders' Intent*

There is also ample evidence in the proceedings of the Constituent Assembly[143] that the drafters of the Indian Constitution intended to support faith-based personal law over a Uniform Civil Code. Following independence in 1947 and the partition of British India into India and Pakistan—the latter becoming an Islamic state—the debate over a Uniform Civil Code revolved around the government's power to regulate family relationships and the need to protect the culture and identity of minorities.[144] Muslims in India needed reassurance that the new country—a democracy, in which the vast majority of citizens were Hindus—would grant them religious freedom.[145] While the members of the Constituent Assembly hoped to integrate the nation's Hindu majority into one community, they also sought, through the preservation of personal laws, to assure Muslims and other religious minorities that their religious and cultural identities would survive.[146] The history of the Constituent Assembly's debates on the subject indicates no intention to force a Uniform Civil Code upon any community strongly opposed to one.[147] Rather, the founders hoped that change within religious communities would lead members of those communities to see that a Uniform Civil Code would serve their interests.[148]

Of course, there were differing opinions on the subject within the Constituent Assembly, and there were some members of the Assembly who perhaps would have preferred to end personal law and establish a Uniform Civil Code upon adoption of the constitution, or relatively soon thereafter. In a discussion of Directive Principles on November 23, 1948, members of the Muslim League party proposed amendments guaranteeing that the principles would not affect the personal laws of minorities, but the amend-

143. The Constituent Assembly was the body that met for the first time on December 9, 1946 to create a constitution to govern India. *See* SHIBANIKINKAR CHAUBE, CONSTITUENT ASSEMBLY OF INDIA: SPRINGBOARD OF REVOLUTION 58, 60-61 (2d ed. 2000).

144. Flavia Agnes, *The Supreme Court, the Media, and the Uniform Civil Code Debate in India*, *in* THE CRISIS OF SECULARISM IN INDIA 294, 294-95 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007).

145. *See id.* at 295.

146. *See id.*

147. Mansfield, *supra* note 63, at 140.

148. *Id.*

ments were rejected after assembly members K.M. Munshi, A.K. Ayyar, and B.R. Ambedkar strongly promoted a Uniform Civil Code.[149] Assembly member Mohammed Ismail tried twice more to seek protection for Muslim personal law during debates on religious freedom, but was rejected both times.[150]

The balance of the history of the Constituent Assembly's debates, however, indicates that as a group, the assembly wanted to preserve personal law, or at least make a Uniform Civil Code subordinate to religious freedom. When Ismail's proposals were rejected, for example, the Constituent Assembly had already accepted the development of a Uniform Civil Code—but only as a Directive Principle of state policy.[151] When discussion of the Directive Principles restarted on November 19, 1948, proposals to replace the word "directive" with "fundamental" were rejected after Ambedkar stated that the government would try to implement the Directive Principles.[152] The same day, however, an amendment proposed by K.T. Shah "obliging" the government to implement the principles was rejected.[153] Earlier, when some members of the Fundamental Rights Subcommittee had demanded the guarantee of a Uniform Civil Code within ten years, they were rebuffed, and the Uniform Code was only adopted as policy.[154] The Minority Rights Subcommittee, meanwhile, indicated that it wanted a Uniform Civil Code to be voluntary for minority religions.[155]

Furthermore, when B.N. Rau drafted a report of the Fundamental Rights Subcommittee for the Advisory Committee, his draft introduction to the section on fundamental rights stated that any present or future law inconsistent with the rights guaranteed "in this constitution" would be invalid.[156] Munshi, however, pointed out that the subcommittee had decided that the clause in question should read "in this part," rather than "in this constitution."[157] Rau's draft was seen as an attempt to make justiciable rights in other parts of the constitution beyond the fundamental rights that would be guaranteed in Part III; the Advisory Committee rejected

149. CHAUBE, *supra* note 143, at 149; *see also* 7 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT, *supra* note 21, at 546-52.

150. CHAUBE, *supra* note 143, at 149.

151. *Id.*

152. *Id.* at 174 (citing 7 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT, *supra* note 21, at 473-76).

153. *Id.*

154. *Id.* at 149.

155. *Id.*

156. *Id.* at 173-74.

157. *Id.* at 174.

it and changed Rau's draft.[158] Similarly, Rau proposed in October 1947 that no law passed by the government under the auspices of the Directive Principles of social policy should be held invalid on the ground that it was inconsistent with the judicially enforceable fundamental rights, but the Drafting Committee rejected his proposal.[159]

C. *Founders' Overall Intent*

In considering whether India should eliminate Muslim personal law and institute a truly Uniform Civil Code, it is instructive to remember the goals of India's founders and their reasons for establishing the government as they did. Additional evidence of India's founders' intent, beyond their words and actions during the Constituent Assembly, lies in their acknowledged goals for the constitution. The founders wanted to eliminate factional politics and to foster the emergence of a national identity, which they believed would lead to better government for the nation overall. For that to happen, they believed, minority groups had to be protected, to at least some extent, and given an opportunity to participate in the life and governing of the country. Participation, over time, would lead to them identifying themselves as Indian, and not simply as members of their particular group.

The current drive to end Muslim personal law and implement Article 44 of the constitution is spearheaded not by Muslims, but largely by Hindus, including members of militant, right-wing Hindu nationalist groups, such as the BJP.[160] Establishing a Uniform Civil Code at their behest would not serve the goals of India's founders. Such a change in the law would not be due to the sublimation of religious identity among Muslims for national identity. Rather, it would be the result of factionalism, instead of a signal of its decline. It is only logical to expect Muslims to be wary, rather than welcoming, when Hindus—especially right-wing Hindu nationalists whose history with Muslims is checkered—seek to modify Islamic traditions without their consent. Furthermore, it is only natural for Muslims in such a situation to identify themselves as Muslims, rather than as members of a nation in which Hindus out-

158. *Id.*

159. *Id.*

160. *See, e.g.*, Ramachandra Guha, Editorial, *Cracking the Code*, HINDUSTAN TIMES, Dec. 13, 2007, at 10, *available at* http://www.hindustantimes.com/News/bigidea/Cracking-the-code/Article1-262979.aspx; Neena Vyas, *No Going Back on Hindutva: Rajnath*, HINDU, June 21, 2009, at 1, *available at* http://www.hindu.com/2009/06/21/stories/2009062156430100.htm.

number them roughly six to one. It happened in the aftermath of *Shah Bano*, so why would it not happen again?[161]

The right-wing Hindus who seek such a change might think it would lead to a national identity, but they equate Hinduism with the national identity; their view of the Indian identity is not a secular one. Indian secularism, in the founders' view, meant respect for all religions, rather than irreligion. Overruling the personal law of a religious minority at the behest of the religious majority is hardly consistent with respect for all religions. To members of the minority with fears that the majority is trying to force them to assimilate and thus wipe out their unique identity, it would seem, instead, like the tyranny of the majority.[162]

It may be true that passage of the Hindu Code was unpopular among Hindus,[163] but Hindus are the dominant religious group in India and constitute a commanding majority of the population. Thus, it was at least realistic for them to prevent or repeal the Hindu Code through the political process. Muslims, being a minority, would not have such an option and would be left to suffer the tyranny of the majority. And if Hindus, as members of the majority, were alienated by the codification of their personal law, they can hardly expect Muslims, as members of the minority, to be happy at the prospect of government-imposed changes to their personal law.

As stated above, India's founders did not subscribe to the view that a "wall of separation" should keep government and religion strictly apart.[164] They did not want absolute separation to lead to hostility. The government, they believed, should be able to inter-

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161. *See* Agnes, *supra* note 144, at 296-97 (noting that Muslims who supported a Uniform Civil Code on the basis of gender equality were alienated when right-wing Hindus demanded one, and that after Ayodhya, support for a Uniform Civil Code within minority communities was seen as a betrayal of identity politics); MADHU KISHWAR, *Pro-Women or Anti-Muslim? The Shah Bano Controversy*, *in* RELIGION AT THE SERVICE OF NATIONALISM AND OTHER ESSAYS, *supra* note 63, at 206, 208-09 ("Even many of those Muslims who have all along favoured reform in Muslim personal law or advocated the need for a common civil code, are feeling rightly concerned. They are afraid that in the guise of sympathy for Muslim women, many non-Muslims, notably Hindus, may seize the occasion to spread even more hatred and contempt for the Muslims in an atmosphere already charged with anti-Muslim sentiment.").

162. *See* RELIGION AT THE SERVICE OF NATIONALISM AND OTHER ESSAYS, *supra* note 63, at xviii-xix.

163. *See* Mansfield, *supra* note 63, at 161 ("[T]he adoption of the Hindu Code in 1955-56 may not have significantly undermined [Hindus'] sense of worth or alienated them from the state. But the matter is not free from doubt . . . . [T]he attitude of Hindu organizations . . . towards the existing Hindu Code is unclear.").

164. *See supra* notes 43-44 and accompanying text.

fere with religion, or confine it to its most essential practices, to prevent it from affecting the country's social, economic, and political life—the areas from which they believed a secular national identity would emerge. Thus, Articles 25 and 26 of the constitution give the government the right to restrict religious freedoms in the interest of public order, morality, or health, and Article 25 retains for the government the right to pass laws regulating or restricting economic, financial, political, or other secular activity associated with religion.

If the government can act to restrict religion and activities associated with religion when greater public concerns are at play, then that suggests the government should also be able to act to protect religions, if necessary, to address those same concerns. Furthermore, if India's founders were concerned about hostility toward religion, it follows that hostility toward a specific religion—particularly a minority one, such as Islam—would have concerned them also. They very likely would have supported protection for that religion, and very likely would have even favored restricting a majority religious group's political activity directed at a minority religion. Recall that Article 25 allows the government to regulate or restrict "any economic, financial, political or other secular activity which may be associated with religious practice."[165] The BJP's campaign to end Muslim personal law, combined with its Hindu nationalist vision of India, arguably qualifies as political or secular activity associated with religious practice. Protecting the minority religion from the majority religion, then, would seem to be consistent with the Indian Constitution and the intent of its creators. The government ought to be able to intervene in matters such as this to protect a religious group, or, by extension, not intervene and maintain the status quo of Muslim personal law, rather than enacting a Uniform Civil Code.

Although it is not justiciable, India's founders did consider Article 44 of the constitution to be fundamental; they wanted civil law to be the same for all Indians, so that an integrated, unified nation would develop. Those who would call for a Uniform Civil Code, as Chief Justice Chandrachud did in his *Shah Bano* opinion, could certainly argue that it would conform to the founders' vision of India. It is an admirable goal, and makes sense: The law should treat everyone in a secular democracy equally, and should not vary according to religion. The problem—and it is a significant one, given the

165. India Const. art. 25, § 2, cl. a.

tension existing between Hindus and Muslims in contemporary India—is that this is not the time to make such a switch.

The founders decided that making minority groups feel safe and welcome in their new country—by recognizing the personal law dictated by their religions and thus respecting their distinct cultures—was initially more important than an entirely uniform body of law. The Indian government should work toward that goal first. Respect from the government would lead to greater participation and engagement from Muslims in the life of the nation, which, over time, would lead to a national identity and the shedding of insular group identities. This has not happened yet, at least in the case of Muslims, but that does not mean it will not happen eventually.

That the founders made national unity and integration aspirational in Article 44 and put a higher priority on accommodating religious minorities, only reinforces the argument that the government may act to protect minority groups. But by setting up the constitution and the government as they did, India's founders effectively established and accepted different personal law for different religions, even as they hoped eventually to move past such narrow group identities. The government, by its own choice, was entangled in religion from the country's beginning and chose to treat different religions differently. Hindus who call for a Uniform Civil Code essentially call for more entanglement, this time to lead to uniform treatment of religions. Muslims, in contrast, feel that the government should not get involved at all, but should leave them alone to practice their own religion and customs, without any state interference. This suggests that Muslims currently do not feel completely comfortable or welcome in India, or at least would not feel that way if a Uniform Civil Code overrode their personal laws without their consent.

IV. Conclusion

India should ultimately adopt a Uniform Civil Code. Any argument that relies on the intentions of India's founders must also acknowledge that they believed the country should have one. Equality for all citizens under the law is a worthy goal, and it would prevent the nation's judiciary—and, indeed, all of the branches of government—from getting tangled up in matters of faith.

The current situation in India, however, does not lend itself to a Uniform Civil Code. The country's founders would not have wanted to introduce a Uniform Civil Code at this moment, and the

volatility of Hindu-Muslim relations at this moment make such a decision imprudent. Instead, India should work to make minority groups, particularly Muslims, feel welcome and accepted within its borders. Only then will it be able to move closer to the vision of its founders: becoming a country in which narrow group identities fade and a national identity emerges.