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GENDER AND THE "FAITH" IN LAW: EQUALITY, SECULARISM, AND THE RISE OF THE HINDU NATION

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ABSTRACT

This article analyzes how concepts of gender, gender equality, and secularism have been addressed by the higher judiciary in India in cases dealing with matters of religion. The discussion focuses on three landmark decisions of the Indian Supreme Court on gender equality. The cases involve challenges to discriminatory religious practices that target women in the Muslim-minority and Hindu-majority communities. In each case, gender equality is taken up in relation to religion in ways that produce several outcomes for women that are problematic rather than ones that are unequivocally progressive or transformative. The judicial reasoning in each case resonates with the Hindu Right's approach to gender, gender equality, and secularism. Each concept is used to advance the Hindu Right's majoritarian and ideological agenda, which seeks to establish India as a virile "Hindu" nation. Ironically, interventions by progressive groups, including feminist and human rights advocates opposed to the Hindu Right's makeover of the Indian nation, have not proved to be disruptive of gender norms; nor have they pushed back the tides of Hindu (male) majoritarianism that are increasingly determining the terms of engagement on issues of gender and faith in law.

KEYWORDS: secularism, Hindu Right, gender, equality, freedom of religion, religious majoritarianism

INTRODUCTION

There has been an avalanche of landmark decisions on gender equality involving matters of religion by Indian courts in recent times. These decisions reveal the central role that gender and gender equality play in shaping the content and contours of faith in law. Allowing women access to temples[1] and *dargahs* (Sufi shrines),[2] decriminalizing adultery,[3] recognizing that sex with child brides is rape,[4] upholding interreligious marriage,[5] and finding that divorce via triple *talāq* is unconstitutional[6] are among the historic decisions affecting women's rights that are cascading off the judicial

1 Indian Young Lawyers Association v. The State of Kerala, (2019) 11 SCC 1.
2 Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust, (2016) 5 AIR Bom R 660.
3 Joseph Shine v. Union of India, (2019) 3 SCC 39.
4 Independent Thought v. Union of India, (2017) 10 SCC 800.
5 Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.
6 Shayara Bano v. Union of India, (2017) 9 SCC 1.

benches. These decisions are providing feminists and progressives alike with a sense of achievement and forward progression. They offer a sense that recognition of women's rights is reflecting a more enlightened time, an emergance from the dark shadow of a colonial past characterized by oppressive male dominance. There is cause for celebration and for good reason. Nevertheless, a close reading of some of these decisions reveals how gender equality does not emerge as an unequivocally progressive ideal. Instead, the decisions suggest that gender equality is being shaped against a normative ideal of gender and Hindu majoritarianism that limits the progressive impact of these decisions.

In this article, I examine the role of gender in three cases decided by the higher judiciary in India involving the right to gender equality and faith or religion. The first involves the pronouncement of divorce by a Muslim man to legally separate from his wife by thrice uttering the word *talāq* (divorce), which immediately brings an end to their marriage;[7] the second deals with the validity of a marriage between a Hindu woman and a Muslim man upon her conversion to Islam—what is problematically described as the "love jihad" (love revolution) case;[8] and the third addresses the right of menstruating Hindu women to worship before Ayyappa, the celibate deity of the Sabarimala temple, a shrine in the south Indian state of Kerala.[9] The outcomes in all three cases have been cast as landmark victories for gender equality. However, upon closer interrogation, I reveal how each case remains embedded in dominant gender, sexual, and religious arrangements that reproduce rather than challenge the existing normative order, thereby limiting their transformative impact. The normative content of gender equality is shown to reflect characteristics of Hindu male majoritarianism, including monogamy, heteronormativity, chastity or purity, and gender dualism. Furthermore, the judiciary's approach to secularism sets up gender equality in opposition to religion; an opposition that is particularly evident where the religion in question is Islam. This conception also triggers cries of "religion in danger" and threats of violence when gender equality is posited as an antidote to gender discrimination within the majority religion.

There has been little attention paid to the meaning of equality within the discourse of secularism. This neglect has become a dangerous silence when coupled with the rise of the Hindu Right, a right-wing nationalist movement that seeks to establish India as a Hindu state. The Hindu Right has been only too willing to exploit this silence in its quest to claim the terrain of secularism as its own and deploy gender equality in ways to facilitate this claim. It adopts a formal approach to equality based on sameness in treatment to argue in favor of treating all women the same. This position translates into treating all Muslim women the same as Hindu women, but not treating all Hindu women the same as men. It similarly argues that secularism based on equal treatment of all religions requires all communities to be treated the same; a position that enables the Hindu Right to attack the special protections accorded to religious minorities in the Indian Constitution as a form of appeasement, and as violating the constitutional guarantees of gender equality and secularism.[10]

7 *Shafin Jahan*, (2018) 16 SCC 368.

8 *Shayara Bano*, (2017) 9 SCC 1.

9 *Indian Young Lawyers*, (2019) 11 SCC 1.

10 The discussion has important implications at the global level where gender and the rise of populism and right-wing conservative forces in secular liberal democracies are producing similar tensions between gender equality and religion, although these play out somewhat differently in different contexts. For example, in the legal challenges to Islamic veil bans in Europe, where the arguments have reinforced both gender and cultural stereotypes, with the veiled woman invariably cast as a victim in need of rescue. See Lourdes Peroni, "Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising," *International Journal of Law in Context* 10, no. 2 (2014): 195–221. See also Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Cambridge, MA: Harvard University Press, 2013).

The article is organized into three sections. In the first part, I describe the Hindu Right's understanding of gender equality and secularism. I then turn to the decisions and analyze how the higher judiciary addresses issues of gender equality and secularism in challenges involving faith. I illustrate the ways in which judicial discourse finds resonance with the ideological agenda of the Hindu Right and the implications that this has on the rights of women in both the minority and majority religious communities. In the final part, I analyze how feminist and progressive interventions intended to disrupt gender and sexual arrangements have amplified the opposition between gender equality and religion. This opposition has enabled the Hindu Right's agenda, primarily in respect of their anti-Muslim and Hindu male majoritarianism agenda.

SECULARISM, EQUALITY, GENDER, AND THE HINDU RIGHT

The Hindu Right consists of three primary actors: the Bharatiya Janata Party (Indian Peoples Party), which is responsible for formulating and pursuing the political agenda of the movement; the Rashtriya Swayamsevak Sangh (National Volunteer Organization), which was established in 1925 to build a strong Hindu community to counter both British rule and Muslim separatism, and is responsible for developing and expounding the ideological doctrine of the Hindu Right; and the Vishwa Hindu Parishad (World Hindu Council), founded in 1964 to popularize the Hindu Right's religious doctrine and consolidate its support at a grassroots level. The Vishwa Hindu Parishad also includes the Bajrang Dal (Hanuman Gang), a militant youth wing established in 1984, and the Durga Vahini (Army of the Goddess), the women's wing established in 1991. Affiliate organizations include Shri Ram Sena (Army of the Lord), the moral police of the Hindu Right, established in the late 1960s. More recently, online "internet Hindus" and trolls have emerged as frontline activists in the propagation of the Hindu Right's ideology.[11] These groups are militantly and virulently anti-Muslim. The movement collectively promotes the ideology of Hindutva, which posits Hinduism not simply as a religion, but as a nation and race that is indigenous to India.[12] While support for women's equality and secularism would seem to contradict the

11 Sahana Udupa, "Internet Hindus: Right-Wingers as New India's Ideological Warriors," in *Handbook of Religion and the Asian City: Aspiration and Urbanization in the Twenty-First Century*, ed. Peter van der Veer (California: University of California Press, 2015), 432–49.

12 Jyotirmaya Sharma, *Hindutva: Exploring the Idea of Hindu Nationalism* (New Delhi: Penguin Books, 2011); Christophe Jaffrelot, "The Idea of the Hindu Race in the Writings of Hindu Nationalist Ideologues in the 1920s and 1930s: A Concept between Two Cultures," in *The Concept of Race in South Asia*, ed. Peter Robb (London: School of Oriental and African Studies, 1995), 327–54. Hindu nationalists sought to retrieve an authentic past from Hindu traditions and practices as the basis for constructing the identity of the Indian nation-state. See Christophe Jaffrelot, *The Hindu Nationalist Movement in India* (New York: Columbia University, 1998). The understanding of Hindutva was initially set out in the writings of V. D. Savarkar, the ideological leader of the Hindu nationalists during the struggle for freedom from colonial rule. He later became leader of the Hindu Mahasabha, a Hindu communalist party that was intensely involved in the independence struggle. Savarkar conceived of Hindutva as an ethnic community possessing a territory and sharing the same racial and cultural characteristics. See Vinayak Damodar Savarkar, *Hindutva: Who Is a Hindu?* (1923; repr., New Delhi: Sahitya Sadan, 2003). Subsequently, M. S. Golwalkar, who was the second, longest-serving, and most influential Sarsanghchalak (supreme leader) of the Rashtriya Swayamsevak Sangh, consolidated the ideology of the Hindu Right through the concept of cultural nationalism, which was, in part, based on purging India of all non-Hindu influences. See Madhav Sadashiv Golwalkar, *Bunch of Thoughts* (Bangalore: Vikram Prakashan, 1966). See also Madhav Sadashiv Golwalkar, *We, or, Our Nationhood Defined* (Nagpur: Bharat Publications, 1939). Savarkar's views on Hindutva and Golwarkar's writings concerning cultural nationalism continue to represent the ideological foundations of the contemporary Hindu Right.

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core ideology of the Hindu Right, they have attributed meanings to these concepts which make them consistent with their broader ideological project. This includes restoring women to a position of equality ostensibly reserved for them in Indian traditions—where their roles as mothers and wives in the family are exalted—and reinforcing assumptions of the natural and essential differences between women and men. The Hindu Right deploys gender in pursuit of its nationalist and ideological agenda—which is to establish India as a Hindu *rashtra* (state) and denigrate the Muslim minority.[13]

Secularism

Globally, the concept of secularism has been a contested one, despite the predominant and popular assumption that it is based on neutrality—that is, the separation of religion and state. It has also been defined as the state's equidistance from and equal treatment of all religions in the public sphere.[14] Talal Asad has contested these pervasive definitions of secularism, instead arguing that 'secular' is a problematic term based on the flawed assumption that it is a neutral, non-religious epistemology.[15] Asad demonstrates how secularism has less to do with the disappearance of religion but in fact depends on and is circumscribed by the conceptual boundaries of religion in the West and the former colony. Secularism and religion are co-constructed rather than oppositional. Relations of power construct religious ideology, its traditions and practices, producing "religiously defined knowledge,"[16] with secularism implicated in and constituted by religion, both in and through its management and regulation of religion.[17] Similarly, Saba Mahmood argues that secularism is a universalizing project promoted through the (Christian) colonial encounter with the "Other" to incorporate her into its 'civilized' world view. She demonstrates how religious knowledge has been managed in and through secular governance and is responsible for violence against minorities, in addition to their increasingly precarious circumstances.[18] She states that secularism's "claim to religious neutrality notwithstanding, the modern state has become involved in the

13 Angana P. Chatterji, Thomas Blom Hansen, and Christophe Jaffrelot, eds., *Majoritarian State: How Hindu Nationalism Is Changing India* (London: Hurst, 2019); Sikita Banerjee, "Gender and Nationalism: The Masculinization of Hinduism and Female Political Participation in India," *Women's Studies International Forum* 26, no. 2 (2003): 167–79; Prem Kumar Vijayan, *Gender and Hindu Nationalism: Understanding Masculine Hegemony* (London: Routledge, 2019); Thomas Blom Hansen, *The Saffron Wave: Democracy and Hindu Nationalism in Modern India* (Princeton: Princeton University Press, 1999).

14 Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007); Rajeev Bhargava, "Reimagining Secularism: Respect, Domination, and Principled Distance," in *Freedom of Religion: Secularism and Human Rights*, ed. Nehal Bhuta (Oxford: Oxford University Press, 2019), 21–51, arguing in favor of a principled distance between the state and religion.

15 Asad considers the role of power and how religion is contingent and constructed by authorizing discourses, including secularism. Religion is thus not separate and distinct from secularism but constitutive of the parameters of secularism. See Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993). See also Craig Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen, eds., *Rethinking Secularism* (New York: Oxford University Press, 2011).

16 Talal Asad, "Anthropological Conceptions of Religion: Reflections on Geertz," *Man* 18, no. 2 (1983): 237–59. Talal Asad, "The Idea of an Anthropology of Islam," in *Occasional Paper Series* (Washington, DC: Center for Contemporary Arab Studies of Georgetown University, 1986).

17 See also the contributions in Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter G. Danchin, eds., *Politics of Religious Freedom* (Chicago: University of Chicago, 2015).

18 Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2016).

regulation and management of religious life to an unprecedented degree, thereby embroiling the state in substantive issues of religious doctrine and practice."[19] Secularism has thus become the technique by which the modern state regulates religious life.

The layered and complex analysis of secularism by critical scholars is pertinent to postcolonial India, where the content and meaning of secularism has been partly informed by its colonial antecedents. The colonial power reified and essentialized the practices of religious communities to both govern and regulate them, identifying practices and traditions that were deemed central or essential to the constitution of each faith, and setting up categorized and fixed communities and faiths that were previously fluid, heterogeneous, and ambiguous. Similarly, the categories of Hindu and Muslim emerged and were produced by the colonial power with the "discovery" and compilation of Indian customs and traditions that came to be regarded as a corpus of authoritative texts, which were then clearly defined and legally translated through family law.[20] Religion therefore emerged as a central political identity and formed the basis of the colonial power's subsequent partition and foundation of the postcolonial states of India and Pakistan. The colonial power further secularized native life through the legal categorization of religion as private and part of the personal domain, while at the same time deploying religion as a means by which to regulate the different communities.[21] This historical background informed the development of what was called the essential religious practices test by the higher judiciary in the post-independence period.[22] In its application, the test has restricted the right to religious freedom of religious minorities and non-mainstream Hindu sects, and it has been used to establish the parameters and content of mainstream Hinduism, which has also been influenced by Hindu nationalists who argue that their Hindtuva political agenda is coterminous with Hinduism.[23]

Secularism in Indian constitutional law is not based on the separation of religion and state or state neutrality in India. Instead, the postcolonial state has continued to play a central role in constructing religion through the enactment of laws that have shaped the contours of religion for different religious communities, thus continuing the colonial practice of setting the limits on what constitutes religion in the ongoing life of Indians.[24] The state derives its power from a distinct understanding of Indian secularism that is based on the equal treatment of all religions, and

19 Mahmood, *Religious Difference*, 2.

20 Marc Galanter, "The Displacement of Traditional Law in India," in *Law and Society in Modern India*, ed. Rajeev Dhavan (Delhi: Oxford University Press, 1994), 15–36; Bernard S. Cohn, "Law and the Colonial State in India," in *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), 55–75; Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford: Stanford University Press, 2014).

21 Mahmood, *Religious Difference*, 60–62; Sudipta Kaviraj, "On Thick and Thin Religion: Some Critical Reflections on Secularisation Theory," in *Religion and the Political Imagination*, ed. Ira Katznelson and Gareth Stedman Jones (Cambridge: Cambridge University Press, 2010), 350–52.

22 See Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, (1954) SCR 1005; Sri Venkataramana Devaru v. State of Mysore, (1958) SCR 895; Durgah Committee v. Syed Hussain Ali, (1962) 1 SCR 383; Saifuddin Saheb v. State of Bombay, (1962) Supp (2) SCR 496; Shastri Yagnapurushdasji v. Muldas Bhudardas Vaishya, (1966) 3 SCR 242.

23 Ronojoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism* (Washington, DC: East-West Center Washington, 2007).

24 Gary J. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton: Princeton University Press, 2003); Upendra Baxi, "Siting Secularism in the Uniform Civil Code: A 'Riddle Wrapped Inside of an Enigma'?" in *The Crisis of Secularism in India*, ed. Anuradha Dingwaney Needham and Rajeswari Sunder Rajan (Durham: Duke University Press, 2007), 267–93.

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tolerance, ostensibly shorn of its colonial and western underpinnings.[25] This model acknowledges the presence of religion in secularism and the role of the state in ensuring the equal treatment of religion. In other words, secularism in India is not the opposite of religion, nor is it what remains when religion is subtracted.[26]

The Hindu Right has increasingly and somewhat paradoxically tried to cast itself as the true inheritor of Indian secularism based on the equal treatment of all religions. Central to its ideology of Hindutva, which posits Hinduism not simply as a religion, but as a racial and nationalist project, is the installation of religion (that is, Hinduism) and culture as primary attributes of nationalism and citizenship identity.[27] Muslims and Christians are posited as outsiders to the history of the nation because their faiths are said to have originated outside of India, and hence they are constructed as foreigners, aliens, and invaders.[28] If they fail to assimilate, they are perceived as dangerous and a threat to the very identity of the Hindu nation, subject to being incarcerated, deported, or even eliminated. Elimination of difference is fundamental and this plays out in the context of secularism that, according to the Hindu Right, has its roots in Hindutva.[29] This understanding is pursued in the Hindu Right's understanding of gender equality.

Gender Equality

The discursive strategies of the Hindu Right seek to redefine the relationship between religion and politics in Indian society, in part, by bringing a very particular understanding of equality to the popular understanding of secularism. These strategies have also played out in relation both to the rights of Muslim women and the treatment of the Muslim community and to the rights of Hindu women in relation to Hindu men.

The precise meaning of *equality* within the discourse of the Hindu Right depends on the context in which it is being deployed. In much of its contemporary political rhetoric, the Hindu Right deploys a formal understanding of equality. In the context of the attack on minority communities and the discourse of secularism, *equality* refers to the requirement of formal equal treatment—that is, sameness in treatment. Any special protections of the rights of religious minorities is cast as appeasement and as a violation of the true spirit of secularism. This approach is distinct from a substantive approach to equality, where special protections adopted for alleviating historical

25 Brenda Cossman and Ratna Kapur, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law* (Oxford: Oxford University Press, 2001); Donald Eugene Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963); Neera Chandhoke, *Beyond Secularism: The Rights of Religious Minorities* (New Delhi: Oxford University Press, 1999); Partha Chatterjee, "Secularism and Tolerance," in *Secularism and its Critics*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 1998), 345–79; Cassie Adcock, *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom* (Oxford: Oxford University Press, 2013); Rochana Bajpai, "The Conceptual Vocabularies of Secularism and Minority Rights in India," *Journal of Political Ideologies* 7, no. 2 (2002): 179–97; Rajeev Bhargava, ed., *Secularism and Its Critics* (New Delhi: Oxford University Press, 1998); Saumya Saxena, "Court'ing Hindu Nationalism: Law and the Rise of Modern Hindutva," *Contemporary South Asia* 26, no. 4 (2018): 378–99; Deepa Das Acevedo, "Secularism in the Indian Context," *Law and Social Inquiry* 38, no. 1 (2013): 138–67.

26 Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, *The Crisis of Secularism in India* (Durham: Duke University Press, 2007).

27 Sharma, *Hindutva*.

28 Savarkar, *Hindutva*; Ziya Us Salam, *Of Saffron Flags and Skullcaps: Hindutva, Muslim Identity and the Idea of India* (New Delhi: Sage, 2018), 12.

29 "Secularism Has Its Roots in Hindutva: Advani," *Indian Express*, April 12, 2020, https://indianexpress.com/article/india/politics/secularism-has-its-roots-in-hindutva-advani/.

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disadvantage are treated as temporary special measures and as integral rather than as an exception to equality.

Equality, as deployed by the Hindu Right, is done so in a way that presumes a set of differences between Hindu men and Muslim men. The nationalist resistance to colonial rule together with the freedom struggle gave rise to a hegemonic masculinity—namely, the Hindu male protector.[30] Nationalism was asserted alongside the articulation of a virile, heteronormative, powerful Hindu masculinity focused on protecting the nation and its women. This understanding is asserted against the predations of the colonial ruler and the West of the Other (namely, the Muslim).[31] This embrace of Hindu masculinity is also an expression of Hindutva's racial project, which posits Hindus as a race indigenous to India while simultaneously casting the Muslim as an outsider whose fealties lie elsewhere, and hence presents a threat to the very identity and existence of the Indian nation. Based on this logic, Muslims are not entitled to equality unless they demonstrate their loyalty by relinquishing any claims to special treatment, surrendering their cultural differences, and assimilating into the norms of the Hindu nation.

In the context of women, equality has become a foundational discourse in the Hindu Right's attack on minority rights and in its agenda for women. It foregrounds gender equality within its Hindu nationalist campaigns, using it to argue in favor of sameness of treatment between women of different religious communities. At the same time, it uses equality to affirm the difference between (Hindu) men and women and to justify the difference in treatment between them. This discursive strategy is most evident in the struggle over the reform of personal laws. One of the issues long advocated by the Hindu Right has been the demand for a secular uniform civil code, the object of which is to unify all personal laws that currently govern issues of marriage, divorce, guardianship, property, and other familial matters, and which is argued as important to securing gender equality.[32] In this process, the Muslim community's opposition to a civil code—distilled as a deep suspicion of its anti-Muslim and majoritarian moorings—is interpreted as an opposition to women's equality.

In the 1980s, the Shah Bano case became the focus of the Hindu Right's campaign for the reform of personal laws and the enactment of a uniform civil code.[33] Shah Bano, a seventy-three-year-old Muslim woman divorced by her husband of forty years, brought a petition for maintenance from her husband under the Code of Criminal Procedure, 1973.[34] According to Muslim personal law, she would only have been entitled to maintenance for the period of *iddat*—that is, three months after the divorce. In April 1985, the Supreme Court held that she was entitled to maintenance under section 125 of the Code and voiced its opinion that such maintenance would not be contrary to the Quran. The Hindu Right backed Shah Bano, invoking the right to equality and, in the

30 Chandrima Chakraborty, *Masculinity, Asceticism, Hinduism: Past and Present Imaginings of India* (Ranikhet: Permanent Black, 2011); P. K. Vijayan, "Outline for an Exploration of Hindutva Masculinities," in *Translating Desires: The Politics of Gender and Culture in India*, ed. Brinda Bose (New Delhi: Katha, 2002), 82–105; Sikita Banerjee, *Make Me a Man!: Masculinity, Hinduism, and Nationalism in India* (Albany: State University of New York Press, 2012).

31 Sikata Banerjee, *Muscular Nationalism: Gender, Violence, and Empire in India and Ireland, 1914–2004* (New York: New York University Press, 2012).

32 The Constituent Assembly enabled the personal laws of each community to govern private/family matters. It deferred the discussion of a uniform civil code to govern all Indians by placing the issue in Article 44 of the Directive Principles of State Policy, which directed states to gradually move toward the adoption of a uniform civil code: India Const. art. 44 (Directive Principles).

33 Mohammad Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

34 Code Crim. Proc. § 125.

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process, attempted to demonize Muslim men. More orthodox and conservative groups within the Muslim community responded with outrage against the decision, with cries of "religion in danger." Many within the Muslim community suspected that the judgment was intended to undermine Islamic law in accordance with the agenda of the Hindu Right. The Congress government at the time, initially supportive of the Supreme Court's decision, subsequently reversed its position and responded by enacting the Muslim Women's Act, 1986, which provided that section 125 of the Code of Criminal Procedure would not apply to divorced Muslim women.[35] The women's movement, along with progressive Muslim organizations, campaigned against the bill. The Hindu Right also campaigned vigorously against the bill, which, in its view, was simply another example of the government pandering to minorities.[36]

The demand for a uniform civil code is articulated within the discourse of secularism and formal equality. The Hindu Right deploys equality to claim the sameness of all women, and that all women must be equal. This move presents Hindu men as the legitimate protectors of *all* women, including Muslim women. At the same time, when the Hindu Right argues that all women must be treated equally, they mean that Muslim women should be treated the same as Hindu women, despite the continuing legal discrimination faced by Hindu women on several fronts including marriage, maintenance, and inheritance. There is no argument in favor of treating all women the same as privileged and entitled Hindu men.[37] In the discourse of the Hindu Right, equality does not mean treating women the same as men, but becomes an affirmation of the essential difference between women and men, based on their biology and their different roles in the family and society. In relation to Hindu women, this position is based on restoring women to the position that they once occupied in the ostensible golden age of Hindu culture, before the degeneration of Hindu society, which they claim took place at the hands of foreign invaders (both Muslims and the white man). Both in relation to women and Muslims, Hindutva seeks to protect and expand the dominance of majoritarian males.

THE INDIAN SUPREME COURT: GENDER AND "FAITH" IN LAW

I now turn to examine recent judicial pronouncements, in relation to gender equality, which involve religious issues and how they are reproducing a normative understanding of both gender and religious majoritarianism.

Triple Talāq, Protectionism, and Hindu Majoritarianism

In 2017, a constitutional challenge was brought by Shayara Bano, a Muslim woman and mother of two, backed by the Indian Muslim Women's Movement (Bhartiya Muslim Mahila Andolan), to the

35 Muslim Women's (Protection of Rights on Divorce) Act, No. 25, Acts of Parliament, 1986.

36 According to the Act, which effectively codifies the Muslim personal law of maintenance, a divorced woman's husband is obliged to return her *mehr* (dower) and pay her maintenance during the period of *iddat*. If the divorced woman cannot support herself at the end of that period, then her children, parents, or relatives entitled to inherit her property are responsible for her support. If they cannot support her, the responsibility then falls to the State Wakf Boards. See Lakshmi Arya, "The Uniform Civil Code: The Politics of the Universal in Postcolonial India," *Feminist Legal Studies* 14, no. 3 (2006): 293–328; Nivedita Menon, "A Uniform Civil Code in India: The State of the Debate in 2014," *Feminist Studies* 40, no. 2 (2014): 480–86; Flavia Agnes, "From Shah Bano to Kausar Bano: Contextualizing the 'Muslim Woman' within a Communalized Polity," in *South Asian Feminisms: Contemporary Interventions*, ed. Ania Loomba and Ritty A. Lukose (Durham: Duke University Press, 2012), 33–53.

37 Paola Bacchetta, *Gender in the Hindu Nation: RSS Women as Ideologues* (New Delhi: Women Unlimited, 2004).

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practice of triple talāq. The challenge was to section 2 of the Muslim Personal Law Application Act of 1937.[38] This section declares that the personal law shall apply to the adjudication of cases between Muslims that encompass matters relating to the "dissolution of marriage, including talāq." The petitioner's central assertion was that the section violated her fundamental rights to equality under Articles 14 and 15 and her life and liberty under Article 21 of the Constitution.

In determining whether the petitioner's right to equality had been violated, the Supreme Court involved itself in determining whether the practice of triple talāq was essential to Islam and protected by the fundamental right to freedom of religion enshrined in Articles 25 and 26 of the Constitution.[39] The "essential religious practices test" was developed in the post-Independence period and largely elaborated upon in the decisions of Justice P. B. Gajendragadkar, Chief Justice of India from 1964 to 1966, who sought to expunge the superstitious and irrational elements from different religions.[40] This test has been used by courts to ascertain those aspects of religion that do not fall within the State's purview and hence are not entitled to absolute protection. In trying to demarcate the line between religion and the secular functions of religious denominations in which the State could interfere, the courts have been drawn into theological reasoning. The consequence is that they effectively determine the content of religious beliefs and, in the process, construct tradition and religious identity, both of which become frozen and fossilized.

The practice of triple talāq was opposed not only by women's organizations, but more importantly by Muslim women who were not allowed a similar right and suffered disadvantage resulting from this unilateral and abrupt pronouncement.[41] The practice was backed by the All India Muslim Personal Law Board, which argued that triple talāq was a legitimate way to end a marriage and any

38 Muslim Personal Law (Shariat) Application Act, No. 26, Acts of Parliament, 1937. The Act was adopted by the British colonial power to fulfill what it regarded as the longstanding desire of Muslims to ensure that Shariat law would continue to apply as the personal law to Muslims, and "that Customary Law should in no case take the place of Muslim Personal Law," as stated in the "Statement of Objects and Reasons" of the Act.

39 These constitutional guarantees contemplate both individual and collective rights to the freedom of religion that extend well beyond the limited right to worship. Article 25 of the Constitution enshrines the right to individual freedom of conscience and to freely profess, practice, and propagate religion, subject to "public order, morality and health," and to the fundamental rights enshrined in Part III. Part III includes Article 14, which guarantees equality before the law, and Article 15, which provides that there shall be no discrimination on the grounds of religion, race, cast, sex, and place of birth. At the same time, Articles 25(2)(a) and 25(2)(b) permit the state to regulate the "economic, financial, political, or other secular activity associated with religious practice" and to specifically intervene in Hindu religious institutions. Article 26(a) guarantees the rights of religious denominations, or any section thereof, to manage religious affairs, subject to "public order, morality and health." Clause 26(b) guarantees every religious denomination the right to manage its own affairs in matters of religion. The expression "matters of religion" includes "religious practices, rites and ceremonies essential for the practicing of religion." The right under Article 26 is a group right and available to every religious denomination. Articles 25 and 26 accord primacy to public interest over religious claims and hence provide a wide margin of appreciation for the state to sponsor reforms.

40 See *Durgah Committee*, (1962) 1 SCR 383; *Shastri Yagnapurushdasji*, (1966) 3 SCR 242. While initially the doctrine of essential practices was tested on the basis of a community's own beliefs and popular practices, as Sen points out, Justice Gajendragadkar gradually "whittle[d] the protection of essential practices to those that the court would deem suitable." Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (New Delhi: Oxford University Press, 2010), 28, 42–72. See also Ronojoy Sen, "The Indian Supreme Court and the Quest for a 'Rational' Hinduism," *South Asian History and Culture* 1, no. 1 (2010): 86–104; Ratna Kapur, "A Leap of Faith: The Construction of Hindu Majoritarianism in Secular Law," *South Atlantic Quarterly* 113, no. 1 (2014): 109–24.

41 Jyoti Punwani, "Muslim Women: Historic Demand for Change," *Economic and Political Weekly* 51, no. 42 (2016): 12–15.

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interference with the practice would constitute an interference with the right to religious freedom.[42] The case was used for political purposes by the Bharatiya Janata Party, which has headed the central government since 2014. The party's support for a ban on the practice serves its interests in denigrating the Muslim community, specifically Muslim men, and remains consistent with the party's political and ideological position and the constitutional commitment to gender equality. The party argues that triple talāq violates both secularism and equality: secularism is violated because the Muslim community is being treated differently; equality is violated because Muslim women are treated differently compared to Hindu women. In the process, the Hindu Right brandishes its liberal credentials and sets up gender equality in opposition to the right to freedom of religion (for Muslims). Secularism and equality are both used to reinforce the shape of the Muslim woman as weak, subordinate, and victimized—while simultaneously advancing an assimilationist agenda under the dictates of Hindu majoritarianism and Hindu male supremacy. In so doing, the discourse of equality is being used to undermine substantive equality and substantive secularism—as discussed earlier. The Muslim woman was placed in the awkward and risky position of choosing between her right to formal equality (backed by the Hindu Right) or her religious freedom (associated with conservative Muslims and male control of religious institutions). This tension was contrary to the central objective of the petitioners who, as Muslim women, painstakingly sought to steer the case in the direction of the right to gender equality while at the same time preserving their right to religious identity and expression.

In August 2017, in a 3–2 plurality decision, the Supreme Court set aside the practice of triple talāq. A central question was whether triple talāq was subject to fundamental rights scrutiny under Article 13(1) of the Constitution, which provides that any laws inconsistent with or derogating from the fundamental rights chapter, including those that were "in force in the territory of India immediately before the commencement of this Constitution" shall be held as void.[43] Justices Rohinton Nariman and U. U. Lalit found that all forms of talāq recognized and enforced by Muslim personal law were codified in the Shariat Act, 1937, and thus subject to Article 13.[44] Justice Nariman focused entirely on the doctrine of arbitrariness in Article 14 of the Constitution, which invalidates legislation if it is "disproportionate, excessive or otherwise . . . manifestly unreasonable," to set aside the practice.[45] He further held that the practice could not be protected under Article 25 as it did not constitute an essential religious practice—the only practices that are protected by Articles 25 and 26. Drawing upon the line of cases establishing what constitutes an essential part or practice of a religion, Justice Nariman held that the practice was not integral to Islam, stating that, "Triple Talaq is only a form of Talaq which is permissible in law, but at the

42 The All India Muslim Personal Law Board is a nonstatutory, nongovernmental organization that was established in 1972. The board monitors the application of Muslim personal law, in particular, the Shariat Act, 1937. It has been heavily criticized for presenting itself as *the* authority on Muslim personal law (Sunni law), for being a largely male, neo-conservative, and nonconsultative body whose views tend to fossilize Islamic religious practices, and for failing to address contemporary issues such as the rights of women, transgender persons, and other minority members within the community in a progressive way. The board has been challenged in some of its edicts by the All India Muslim Women's Personal Law Board, established in 2005, and more recently by the Bharatiya Muslim Mahila Andolan (The Indian Muslim Women's Movement), which spearheaded the challenge to triple talāq in the Indian Supreme Court.

43 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 43 (Nariman, J.); India Const. Art. 13(1). The Muslim Personal Law Board argued that the Act was intended only to do away with custom or usage in conflict with Muslim personal law and was not meant to enforce Muslim personal law which was already enforceable in the Indian courts. They therefore claimed that triple talāq, which is part of Muslim personal law, was not governed by the Act.

44 *Shayara Bano*, (2017) 9 SCC 1 at ¶¶ 47–48 (Nariman, J.).

45 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 87 (Nariman, J.).

same time, stated to be sinful by the very Hanafi school which tolerates it . . . . [T]herefore, this would not form part of any essential religious practice . . . . [I]t is equally clear that the fundamental nature of the Islamic religion . . . will not change without this practice."[46]

In his concurring opinion, Justice Kurian similarly struck down the practice, although he arrived at his conclusion via a separate route. He held that the practice was not codified under the 1937 Act, and instead assessed whether "triple talaq had *any* legal sanctity?"[47] After a brief discussion of the Quran's instructive verses on talāq, Justice Kurian held that they accorded "sanctity and permanence to matrimony." While talāq was permissible, attempts at reconciliation were an essential step that, if successful, also enlivened the possibility of revocation;[48] however, Justice Kurian stated, "In triple talaq, this door is closed."[49] He thus held that triple talāq was not part of the uncodified Islamic law and therefore was illegal. Justice Kurian avoided any discussion of Muslim women's claims to equality rights.

In the dissenting opinion, then chief justice Jagdish Khehar, writing on behalf of himself and Justice Abdul Nazeer, reviewed the Quranic verses on marriage and talāq, and reiterated how "the termination of the contract of marriage, is treated as a serious matter for family and social life."[50] The verses indicated that efforts be directed at bringing couples back together. Without setting out much evidence, he held that triple talāq was part of the uncodified personal laws of the Sunni Hanafi school prevalent in India and was thus protected from interference, except to the extent provided under Article 25.[51] In fact, he even suggested that the personal law was immune from a fundamental rights challenge, because "the Personal Law has been elevated to the stature of a fundamental right" and as such is "enforceable as it is."[52] He thus held that the Court could not "nullify and declare as unacceptable in law what the Constitution decrees us not only to protect but also to enforce . . . Interference in matters of personal law is clearly beyond judicial examination."[53] It was for Parliament to amend the Act and not for the courts to intervene in this area, even when the practice of triple talāq was undesirable.

The decision received global attention as a victory for women's rights and gender justice; and there was euphoria on the streets, with Muslim women also celebrating the decision. At one level, the intervention by Muslim women becomes an example of resistance to the dominance and consolidation efforts of both Hindu and Muslim men. It simultaneously marks a successful bid to be included within the terms of gender equality, while at the same time affirming cultural difference. However, on closer scrutiny, questions arise as to whether this decision is a much-lauded victory for gender equality or instead offers few sound jurisprudential grounds upon which to

46 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 54 (Nariman, J.). Justice Nariman relied specifically upon the Supreme Court's ruling in Javed v. State of Haryana, (2003) 8 SCC 369, where the Court stated at ¶ 60, "What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform."

47 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 1 (Kurian, J.) (emphasis added).

48 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 12 (Kurian, J.).

49 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 12 (Kurian, J.).

50 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 135 (Khehar, C.J.).

51 *Shayara Bano*, (2017) 9 SCC 1 at ¶¶ 321, 332–33, 337–38 (Khehar, C.J.).

52 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 352 (Khehar, C.J.).

53 *Shayara Bano*, (2017) 9 SCC 1 at ¶¶ 388–89 (Khehar, C.J.).

advance women's rights to equality. Rather, arbitrariness and the "essential religious practices test" are provided as the two major grounds for setting aside the practice.

The plurality ruling against the practice is based partly on how other faiths have eradicated discriminatory practices such as polygamy—a position which preferences the monogamous, heteronormative marital relationship.[54] The Court also reiterated that the marital tie is sacrosanct in Islam and should not be dissolved easily. Justice Nariman stated that the reasons for this are obvious: "Divorce breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage."[55] In this respect, the decision remains firmly embedded in preserving the stability of the heterosexual, marital unit. It approvingly states that Islam considers matrimony as sacrament and discourages the marital tie from being "broken capriciously and whimsically by a Muslim man without any attempt at reconciliation . . . to save it."[56] At the same time, somewhat paradoxically, Muslim husbands still retain the unilateral right to divorce their wives by pronouncing talāq over a period of a few months.

In addition, while Muslim women led the challenge to the practice of triple talāq, throughout the judgment, the Muslim woman is repeatedly referred to in protectionist language. She is represented as a long-suffering victim who needs to be rescued either by the courts or the legislature. For example, the treatment of Muslim women under customary law is referred to as "oppressive" and "disgraceful."[57] In citing judgments discussing the practice of triple talāq, the Court included references to the "harsh realities" of Muslim women that serve as a "reminder to the court that unless the plight of sufferers is alleviated in a larger scheme through legislation by the State, justice will be a distant dream."[58] There are also repeated references to the "plight" and "suffering" of Muslim women who experience a worse fate compared to women of other faiths.[59] The Shariat Act is described as having "put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community."[60] In casting the petitioner as a victim, all the judges simply affirmed the prevailing position that Muslim women need to be rescued from Muslim men; an understanding that coincides with that of the Hindu Right and its attempts to further demonize and stigmatize Muslim men. The Muslim is categorized and iterated as a political-social-cultural problem to be solved, rather than as a political-social-cultural subject whose problems need solving.

54 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 221 (Khehar, C.J.), citing from the attorney-general's submissions, the State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84, where Chagla C.J. stated at ¶ 9, "Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution." See also Nariman J. at ¶ 37; Kurian J. at ¶ 15, citing Justice Krishna Iyer's decision in A. Yousuf Rawther v. Sowramma, AIR 1971 Ker 261, in which he quotes from the Quran (IV:34) at ¶ 8, stating, "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him."

55 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 37 (Nariman, J.).

56 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 104 (Nariman, J.).

57 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 143 (Khehar, C.J.). See Shariat Act, 1937, "Statement of Objects and Reasons."

58 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 174.3 (Khehar, C.J.).

59 See, for example, *Shayara Bano*, (2017) 9 SCC 1 at ¶ 208 (Khehar, C.J.), where Justice Khehar refers to counsel's submission that "the protection of Muslim women's rights, which needed to have continued even after independence, had remained stagnant, resulting in insurmountable sufferings to the Muslim women, specially in comparison with women of other faiths." See also ¶ 342. See further Kurian J. at ¶ 16, quoting from Khalid J.'s decision in Mohd. Haneefa v. Pathummal Beevi (1972) SCC OnLine Ker 80, ¶ 7.

60 *Shayara Bano*, (2017) 9 SCC 1 at ¶ 3 (Kurian J.).

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More specifically, the historical, cultural, and political causes of the Muslim woman's exclusion and discrimination remain unaddressed. A similar concern has been expressed in relation to the Islamic veil bans in Europe, where Muslim women have argued that the focus on rescuing women from the veil is informed by a savior mentality that obscures the political, historical, and even economic explanations for Muslim women's oppression and discrimination.[61]

Not only is the decision woefully inadequate in providing any sensible or useful guidance on gender discrimination, its protectionist and paternalistic posture also reflects the Court's continued inability to comprehend women, Muslim and non-Muslim, as bearers of rights entitled to full equality as Indian citizens. While the shaping of gender within a protectionist discourse in judicial decisions is not anomalous, it is acutely evident in the context of the Muslim woman. At no point in the *Shayara Bano* decision are either the structural aspects of gender discrimination or the normative dimensions of gender seriously addressed.

The Court's decision in the triple talāq case encouraged the government to propose a bill outlawing the practice and treating it as a criminal act carrying a punitive sentence of three years and a fine. After several attempts, the bill was eventually enacted into law in 2019 with triple talāq being pronounced a criminal offense.[62] The ordinance and bill reflect the persistent efforts of the Hindu Right to persecute Muslim men and constrain Muslim women within the logic of the Hindu Right's ideology and vision of a Hindu nation, while also reproducing and confirming the marital, heteronormative order. The rush to criminalize Muslim men is indicative of how the Hindu Right intends to pursue an assimilationist agenda through coercive means and, simultaneously, to further stigmatize and criminalize Muslim men.

"Love Jihad," Carcerality, and Gender Equality

The Hindu Right has long feared that Muslim men would convert and marry Hindu women in order to reproduce and increase the Muslim population. This fear has been problematically branded as "love jihad" (love revolution) and instrumentalized as a weapon for demonizing and attacking the Muslim community and staging the rescue of Hindu women.[63] The issue became a public sensation when actor Kareena Kapur, a Hindu and well-known heroine of Bollywood cinema, married actor Saif Ali Khan, a Muslim, in 2012. The Vishwa Hindu Parishad immediately accused the couple of love jihad and called upon followers to launch a moral crusade against such cases to save vulnerable Hindu women from the imagined threats of "hypersexualized" Muslim men to the Hindu family and the Hindu nation.[64] The hysteria generated by such calls not only produced a litany of false cases but also triggered vigilante campaigns that surveyed and forcibly separated couples in seemingly interreligious relationships.[65] In addition, websites containing

61 Abu-Lughod, *Do Muslim Women Need Saving?*, 31.

62 The Muslim Women (Protection of Rights of Marriage) Act, No. 20, Acts of Parliament, 2019.

63 Aastha Tyagi and Atreyee Sen, "*Love-Jihad* (Muslim Sexual Seduction) and *Ched-Chad* (Sexual Harassment): Hindu Nationalist Discourses and the Ideal/Deviant Urban Citizen in India," *Gender, Place and Culture: A Journal of Feminist Geography* 27, no. 1 (2020): 104–25. The historical legacies of these campaigns can be traced to the 1920s protests by Hindu revivalists against alleged abductions of Hindu women by Muslim men. See Charu Gupta, "Hindu Women, Muslim Men: Love Jihad and Conversions," *Economic and Political Weekly* 44, no. 51 (2009): 13–15.

64 David James Strohl, "Love Jihad in India's Moral Imaginaries: Religion, Kinship, and Citizenship in Late Liberalism," *Contemporary South Asia* 27, no. 1 (2019): 27–39.

65 Strohl, "Love Jihad", 28–29; Shazia Nigar and Shishupal Kumar, "Operation Juliet: Busting the Bogey of 'Love Jihad'," *Cobrapost*, October 4, 2015, http://cobrapost.com/blog/operation-juliet-busting-the-bogey-of-love-jihad-2/900.

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advice for young Hindu women on how to protect themselves from love jihad and remain vigilant have proliferated. The normative desire driving these campaigns is linked not only to an idealized understanding of the moral role and identity of Hindu women but also to the patriarchal Hindu family and its integral link to the identity of the Hindu nation. In the name of defending the nation and its women, any steps are justified.[66]

In 2017, the conversion to Islam and subsequent marriage of a Hindu woman, Hadiya (formerly Akhila), to a Muslim man, became the most prominent case of love jihad to come before the courts. In 2014, Hadiya, who at the time was a twenty-four-year-old medical student from Kerala, converted to Islam of her own volition. Two years after her conversion, she married Shafin Jahan, a Muslim man. In December 2016, her father, Asokan, filed a writ of habeus corpus in the Kerala High Court alleging that his daughter had been coerced into converting and was on the verge of being recruited by the Islamic State in Syria. In exercising its *parens patriae* jurisdiction, the Court directed the police to ensure Hadiya's safety through continued surveillance and that she remain in the country during the pendency of the proceedings. It further directed that Hadiya cease residing with her friend, Sainaba, a Muslim woman. Agreeing to resume her studies in homeopathy, the Court directed that she shift her residence to the university hostel. At a subsequent hearing, Hadiya appeared before the Court with Shafin Jahan, declaring that he was her lawfully married husband. The Court promptly ordered the police to investigate the education, family background, and antecedents of Shafin Jahan. After receiving the report in May 2017, the Kerala High Court concluded that Shafin Jahan was associated with persons having extremist links and a "girl aged 24 years is weak and vulnerable" and easily exploited.[67] The Court annulled the marriage, holding it to be a sham.[68] It stated, "Ms. Akhila is the only child of her parents. There are no other persons in this world, who would consider the welfare and wellbeing of their daughter to be of paramount importance than her parents."[69] Shafin Jahan promptly challenged the lower court's order in the Supreme Court on the ground that it, inter alia, violated the autonomy of an adult woman and was "an insult to the independence of women in India."[70]

The Supreme Court directed the National Investigation Agency, or NIA—the primary mechanism established by the central government in 2008 to combat terror in India—to launch an investigation into the Hadiya case.[71] The NIA was to assess whether Hadiya had been brainwashed and whether her marriage was an isolated case or part of a larger operation to force Hindu women to convert and marry Muslim men with the intention of recruiting them for terror operations. Civil rights groups expressed their alarm at the Supreme Court's directions and the expansion of the proceedings in ordering the probe. In the meantime, Hadiya remained incarcerated at her parent's home, ostensibly for her own protection.

The Court took cognizance of the NIA's preliminary arguments, as well as those of Hadiya's father, and stated that in cases where "there is material with regard to a pattern of indoctrination, the choice of the person should not be treated as absolute for guiding the jurisdictional spectrum of

66 Gupta, "Hindu Women, Muslim Men," 14.

67 Asokan K.M. v. Superintendent of Police, 2017 SCC OnLine Ker 5085 (Writ Petition (Crl) No. 297 of 2016), at ¶ 56.

68 *Asokan*, 2017 SCC OnLine Ker 5085 at ¶ 56.

69 *Asokan*, 2017 SCC OnLine Ker 5085 at ¶ 55.

70 *Shafin Jahan*, (2018) 16 SCC 368. See also Lata Singh's case where the Supreme Court of India upheld the individual autonomy of an adult woman who left home to marry a man of her choice: Lata Singh v. State of Uttar Pradesh, AIR 2006 SC 2522.

71 Shafin Jahan v. Asokan K. M., (2018) 16 SCC 409.

habeas corpus."[72] The parties urged that, in light of the husband's antecedents, interaction with the lady "should not be… allowed" until this larger issue was decided. Hadiya thus remained in the custody of her parental home.[73]

It was not until November 2017 that Hadiya was directed to come before the Court, where she declared that her marriage was consensual and asserted that she wanted her freedom. The Court permitted her to continue her medical studies but instructed her to reside in the university hostel, and not with her husband or even on her own. The Court further ordered that the NIA probe continue.[74]

Ultimately, in its final ruling, the Court set aside the lower court judgment and upheld the validity of the marriage. Having found that a "grevious miscarriage of justice" had occurred in Hadiya's case, Justice Chandrachud said that the Court had a duty "to ensure that the valued rights of citizens are not subjugated at the altar of a paternalistic social structure."[75] He further held that the lower court had overreached its jurisdiction in annulling the marriage and appeared to have prescribed what it thought was a "'just' way of life or 'correct' course of living for Hadiya."[76] Justice Chandrachud held that Hadiya had every right to choose whom she wished to marry and that such a choice could not be affected by matters of faith. Referring to the Supreme Court's ruling which held that the right to privacy is a fundamental right, Justice Chandrachud further held that courts have no role in approving or disapproving of intimate personal decisions, and that rights concerning what to wear, what to eat, what to believe, and whom to marry were essential to an individual's autonomy and their right to life.[77] He stated that the strength of the Constitution lay in the plurality and diversity of culture that it was duty bound to uphold.

The broader implications of this judgment and the Court's emphasis on the constitutional guarantee of an individual's choice, autonomy, and self-determination have the potential to resist Hindutva's homogenizing efforts regarding marriage, family, faith, equality, and secularism. The decision fully recognizes the agency and autonomy of all women to make decisions about marriage, faith, and other intimate matters without interference. At the same time, the courts subjected the choice of a Hindu woman to convert to Islam and marry a Muslim man to an extraordinary level of scrutiny and surveillance. The central paradox is that the judicial approach undermines a woman's right to choose and infantilizes her precisely at the point when her choice, in the court's view, appears to undermine her autonomy. The underlying assumption is that to choose a faith where women are assumed to be invariably oppressed is to choose subordination over autonomy. The judiciary regards this as no choice at all. Gender equality is defined by and aligned with majority political ideals and thus axiomatically associated with the autonomous, non-Muslim, female subject. In the context of Muslim women, or the choice to become a Muslim woman, gender continues to be framed within the language of paternalism and (Hindu male) protectionism.

The Kerala High Court expressed its "displeasure" over Hadiya's choices and validated the feelings and intentions of her parents. Asokan, Hadiya's father, expressly stated that Islam was a "religion of terrorism."[78] Stressing that marriage is "*the* most important decision in her life" and should not be taken without the active involvement of her parents, the Kerala Court not only diminished

72 Shafin Jahan v. Asokan K. M., 2017 SCC Online SC 1259 at ¶ 2 (habeus corpus order).
73 *Shafin Jahan*, (2017) SCC Online SC 1259 at ¶ 2.
74 Shafin Jahan v. Asokan K. M., (2018) 16 SCC 411 (Petition for Special Leave to Appeal (Crl.) No. 5777 of 2017.
75 *Shafin Jahan*, (2018) 16 SCC 368 at ¶ 56 (Chandrachud J.).
76 *Shafin Jahan*, (2018) 16 SCC 368 at ¶ 81 (Chandrachud J.).
77 K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
78 *Asokan*, 2017 SCC OnLine Ker 5085, ¶ 4.

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her autonomy and infantilized her, but also reinforced the idea that a sensible, mature, Hindu woman from a Hindu family would not opt for conversion to Islam nor marry a Muslim man.[79] This assumption frames the Court's construction of Hadiya's subjectivity, referring to her as either a "detenue" or by her Hindu name, Akhila, throughout the judgment. She is cast as untrustworthy for her delay in informing the Court of her marriage, while at the same time being perceived as vulnerable to brainwashing or indoctrination by her Muslim husband and the Muslim community.

In the Supreme Court, the struggle was cast as one almost entirely between Hadiya's husband and her father. As in the triple talāq case, regardless of Hadiya's unequivocal assertion that both her conversion and marriage were of her choosing, her choice remained subject to intense legal and male scrutiny and surveillance throughout the proceedings. The question remains why the Supreme Court deployed the state surveillance apparatus to investigate the circumstances of Hadiya's marriage. By inviting the NIA to assist it in carrying out an investigation, with the validity of the marriage between Shafin and Hadiya not part of that investigation, the Court signaled that a Muslim woman's rights are contingent not on her status as an autonomous Indian citizen but on the security threat to the Hindu nation purportedly posed by her marriage. While the Court attempted to move away from infantilizing an adult woman who, it held, is entitled to marry whomsoever she wishes, at the same time, it implicitly reinforced the dominant understanding of women as victims, especially a converted Hindu woman, acting under false consciousness and therefore requiring greater scrutiny. It is again somewhat paradoxical that Hadiya, a mature, highly educated young woman, remained confined to her parent's home until the Supreme Court decided whether the lower court had engaged in judicial overreach. Implicit in this protectionist intervention is an anxiety about Hadiya's decision to embrace Islam and marry a Muslim man. As is evident in the triple talāq case, the Court regards Muslim women as worse off than their counterparts in other faiths. In the process, the Muslim man is treated with heightened suspicion, and Islam is seen to harbor a more sinister element, thereby not constituting an obvious choice for a Hindu woman to embrace. Shortly after the decision upholding her marriage, Hadiya was clearly of the view that she had been subjected to intense legal and social scrutiny simply because she had embraced Islam.[80]

There is no doubt that the final judgment in Hadiya's case introduced a counter-hegemonic wobble with the potential to push back the tides of Hindu majoritarianism in the legal arena. But the language of paternalism manifest throughout the proceedings circumscribes judicial respect for women's personal and sexual autonomy more generally, and the capacity of a Muslim woman to exercise her right to choose more specifically. The Court's interventions and scrutiny of the choices of a Muslim woman, especially of a Hindu woman turned Muslim, using the intelligence and surveillance apparatus of the state is problematic. Ultimately, it serves to reinforce the myth propagated by the Hindu Right over an unsubstantiated claim that hordes of Hindu women are converting to Islam and being duped into marriage to Muslim men by feigned declarations of love.[81]

79 *Asokan*, 2017 SCC OnLine Ker 5085, ¶ 56 (emphasis added).

80 "'All This Because I Embraced Islam,' Says Hadiya after Meeting PFI Chief," *Manorama Online*, March 10, 2018, https://english.manoramaonline.com/news/kerala/2018/03/10/hadiya-husband-visit-popular-front-chief-to-thank-him.html.

81 Siddhartha Mahanta, "India's Fake 'Love Jihad,'" *Foreign Policy*, September 4, 2014, https://foreignpolicy.com/2014/09/04/indias-fake-love-jihad/.

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Sabrimala Shrine and Menstruating Hindu Women's Right to Worship

The Sabarimala case is distinct from the two cases discussed earlier insofar as it involves the question of gender equality in relation to a practice associated with the majority Hindu community. I offer this case by way of comparison with the above two cases to amplify the complex and contradictory understanding of gender equality in Indian constitutional discourse in general and its role in advancing the Hindu Right's ideological agenda in particular.

The Sabarimala case emerged from a complaint against young women trekking in the Sabarimala hills and offering prayers at the Sabarimala shrine, a temple in Kerala. The complaint was brought by a devotee of Ayyappa, the shrine's central deity. Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, prohibits certain persons from entering the temple or offering worship. These include women "at such time during which they are not by custom and usage allowed to enter a place of public worship."[82] The Travancore Devaswom Board, one of the statutory boards responsible for temple governance—and consisting entirely of men—read the rule as being applicable to menstruating women, specifically those between the ages of ten and fifty, whose presence at the shrine was considered offensive given the fact that the central deity was celibate.[83] These women were also regarded as incapable of complying with the rule requiring worshipers to perform forty-one days of penance before prostrating before the deity.[84] While the temple authority was tasked with ensuring women's overall safety, presumably from sexual harassment, somewhat contradictorily, they seemed to regard the prospect of menstruating women entering the premises as terrifying and threatening, capable of contaminating and corrupting the celibate Lord Ayyappa.

The Kerala High Court held that the prohibition did not discriminate against women as an entire class. The prohibition applied only to women of a particular group: those between the ages of ten and fifty.[85] It accepted the temple board's view that the deity's being a Nasik Brahmachari (a celibate) necessitated that "young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women."[86] Relying on the testimony of men who claimed to have knowledge about the practice followed by the temple and on reports of astrologers who were ostensibly able to discern the wishes of the deity, the Court concluded that "the deity does not like young ladies entering the precincts of the temple."[87] These reports were considered by the Court as conclusive of the wishes of the deity to "prohibit woman [*sic*] of a particular age group from worshipping in the temple,"

82 Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (hereafter the 1965 Rules).

83 For a discussion on temple governance in Kerala and elsewhere in India, see Deepa Das Acevedo, "Gods' Homes, Men's Courts, Women's Rights," *ICON: International Journal of Constitutional Law* 16, no. 2 (2018): 558–64.

84 Rule 3(b) of the 1965 Rules was framed to exercise the powers conferred under section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (hereafter the 1965 Act).

85 S. Mahendran v. Secretary, Travancore Devaswom Board, AIR 1993 Kerala 3, ¶ 44(3). The Court held that while the temple was open to any section or class of Hindus, section 4(1) of the 1965 Act entitled the trustee or other persons in charge of the public place of worship to make regulations for the maintenance or order and the decorum of the site (¶ 26). As there is a duty placed on the board, which "arranges the conduct for the daily worship and ceremonies at the temple, in accordance with its usage, it has a statutory duty to endorse the usage prevalent at the temple" and has no right to alter or modify the same (¶ 27). See also Acevedo, "Gods' Homes, Men's Courts, Women's Rights."

86 *S. Mahendran*, AIR 1993 Kerala 3 at ¶ 41.

87 *S. Mahendran*, AIR 1993 Kerala 3 at ¶ 36.

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and therefore "the same has to be honoured and followed by the worshippers and the temple authorities."[88]

In 2006, a public-interest litigation petition filed by six women lawyers belonging to the Indian Young Lawyers Association, and supported by several feminist and civil society groups, challenged the constitutional validity of the ban primarily on the ground that it violated women's equality rights. They also requested that the Court lay down guidelines "in matters of general inequality related to religious practices in places of worship."[89] The case was referred to the Constitution Bench of the Supreme Court. The litigation arose in the context of an emerging temple entry movement focused on gaining access for women to temples and shrines in different parts of India.[90] The Travancore Devaswom Board regarded the case as an interference in the religious practices of the devotees, which included the belief that avoiding contact with women of a certain age is integral to the ascetic deity's path toward renunciation.[91] The board viewed the practice not as embedded in gender discrimination but as a continuation of an age-old essential practice. The board was also of the view that the devotees of Ayyappa formed a separate religious denomination and hence were entitled to manage their own religious affairs and determine their own rules and practices under Article 26 of the Constitution.[92]

In a 4–1 majority decision, the Constitutional Bench struck down rule 3(b) on several grounds, including that it violated the right to equality of women and undermined Hindu women's rights to worship at the shrine contrary to their fundamental rights to freedom of religion under Article 25. The majority held that the devotees of Ayyappa were not a separate religious denomination but were "just Hindus."[93]

The majority ruled that any religious practice based on discrimination lost its status as an essential religious practice for this very reason. Then chief justice Dipak Misra, together with Justice A. M. Khanwilkar, set the tone for the majority ruling by holding that "Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practise and profess one's religion . . . Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality."[94]

88 *S. Mahendran*, AIR 1993 Kerala 3 at ¶ 36. The Court's ruling needs to be situated within the essential practices doctrine developed by the Supreme Court, particularly the Shirur Mutt case. The Shirur Mutt case also validated the vast bureaucratic set up for regulating religious institutions.

89 *Indian Young Lawyers*, (2019) 11 SCC 1, ¶ 1. The association was joined by Happy to Bleed, a social movement directed at removing the stigma around menstruation, and the All Indian Democratic Women's Association, the women's wing of the communist party of India. The parties supporting the ban included the Travancore Devaswom Board; the managers of the temple; the chief thanthri or head priest of the Sabrimala Temple; and the district magistrate. The state government was also included as a party to the case and continued to take contradictory stands for the duration of the case because of a change in the government at the state level.

90 Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust; Vidya Bal v. State of Maharashtra, AIR 2003 SC 1386. The issue of temple entry has been an ongoing one in the context of caste and untouchability in India. See Marc Galanter, "Temple-Entry and the Untouchability (Offences) Act, 1955," *Journal of the Indian Law Institute* 6, No. 2/3 (1964): 186–95.

91 For an elaborate description of temple governance, see Deepa Das Acevedo, "Temples, Courts, and Dynamic Equilibrium in the Indian Constitution," *American Journal of Comparative Law* 64, no. 3 (2016): 560–64.

92 The criteria for establishing a separate religious denomination include distinct religious practices and rituals, and not mere differences from practices carried out at Hindu temples. *Indian Young Lawyers*, (2019) 11 SCC 1 ¶¶ 16, 17, 89–93 (Misra C.J.). They must "be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and . . . must be labeled, branded and identified by a distinct name" (¶ 94).

93 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 96 (Misra C.J.).

94 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 3 (Misra C.J.).

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However, on the issue of gender inequality in the Hindu faith, Justice Misra stated, "In no scenario, can it be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple."[95] The Justices further held that the rules violated a Hindu woman's right to worship under Article 25(1), to "freely practice their religion and exhibit their devotion toward Lord Ayyappa."[96] In holding that the Hindu religion was nondiscriminatory in essence, and that women devotees had a right to enter into the temple, the faith emerges as enlightened and nondiscriminatory.

Adopting a slightly different line of reasoning in his concurring opinion, Justice Chandrachud held that religion could not be used as a justification for denying women the right to worship. He held that the individual right to freedom of religion was not absolute. Not only was it constrained by state laws regulating or restricting economic, financial, political, or other secular activities that may be associated with religious practices, but also by those regarding health, morality, and public order, as per the reasonable restrictions clause of Article 25(2). More significantly, the right to freedom of religion was also subject to the right to equality guaranteed under Articles 14 and 15, which prohibits discrimination on the grounds of sex, among other factors.[97] He stated, "[T]he individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III."[98] In his view, the use of menstruation as a reason for denying women the full right of entry was used to intensify discrimination.[99] On the issue of whether the bar fell within the 'essential practices test,' Justice Chandrachud held: "Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratham [penance] is to stigmatize them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognize such claims."[100]

Justice Chandrachud adopted a substantive approach to equality that takes into consideration the historical and structural discrimination that produces exclusion and disadvantage, stating, "Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions, but on the structures of oppression and domination which exclude these identities from

95 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 122 (Misra C.J.). This reasoning is based on a line of cases dealing with temple access. These cases found that there is a "true" nondiscriminatory essence to faith which, when correctly interpreted, produces no conflict with equality. See, for example, *Sri Venkataramana Devaru*, (1958) SCR 895, which struck down exclusions of Dalits, lower caste groups, from entering the Brahmin, upper caste temples on the ground that the true nature of temple worship is nondiscriminatory. See further *Shastri Yagnapurushdasji*, (1966) 3 SCR 242, where a similar practice that excluded lower caste groups entering specific temples was struck down as being based on "superstition, ignorance and complete misunderstanding of the true teachings [of the] Gita . . . of Hindu religion" (¶ 55 (Gajendragadkar, C.J.)).

96 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 144.3 (Misra C.J.).

97 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶¶ 209–11 (Chandrachud, J.).

98 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 209 (Chandrachud, J.).

99 The Justice also provided a broader interpretation of Article 17 of the Constitution, which prohibits untouchability, as one of the reasons for striking down the prohibition. *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 301 (Chandrachud, J.).

100 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 299 (Chandrachud, J.).

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participation in an equal life. An indispensable facet of an equal life, is the equal participation of women in all spheres of social activity."[101]

In her lone dissent, Justice Indu Malhotra, the only female judge on this bench, held that the constitutionality of religious practices could not be tested exclusively against the right to equality or rationality. In her view, it was up to worshippers rather than the courts to determine the essential practices of a religion. She held that a balance had to be found between religious beliefs and non-discrimination. Justice Malhotra was also of the view that the Ayyappa devotees formed a separate denomination and hence were entitled to manage their own religious affairs, and determine their own rules and practices under Article 26 of the Constitution.[102] She held that the prohibition did not violate the equality clause, as it did not affect all women, but only women within the age bracket of ten to fifty.[103]

At one level, the case is a victory for equality rights for women, especially given Justice Chandrachud's adoption of a substantive approach to equality based on historical disadvantage and systemic discrimination. However, unlike the other cases discussed, gender equality is not set up in direct confrontation with faith. The majority adopts a more nuanced approach by deploying two important arguments. First, it held that the Ayyappa devotees were not a separate denomination and that the shrine was a Hindu temple. Second, it adjudicated on whether the practice was essential to the faith, concluding that it was neither essential to, nor even part of the Hindu faith.

Through these two maneuvers, the Court seemed to avoid the conflict between gender equality and the majority religion. By reiterating the exemplariness of Hinduism in not discriminating against women's rights to worship, the Hindu faith comes out unscathed, unlike the Court's treatment of Islam. The problem is that in determining whether the rule was an essential part of the Hindu faith, the Court was imbricated in a form of theological reasoning. In addition, despite its efforts to avoid a confrontation with Hindu devotees, the Court was ultimately unable to overcome the perception amongst devotees that it had aligned itself entirely on the side of gender equality and against religion.

At one level, Sabarimala could be read as a straightforward case of formal equality: women should be treated the same as male worshippers and physiology cannot be a legitimate ground for exclusion. However, as discussed, in the context of religion, gender equality becomes highly contested. And within the context of the majority religion, this contest plays out between those who support gender equality regardless of religion and those for whom the reference point of equality is religion. It is this polarization that was manifest in the storm of protests that erupted in response to the implementation of the Supreme Court judgment among devotees, including female devotees, with the Hindu Right lending its unconditional support.[104] As discussed above, the

101 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶ 420 (Chandrachud, J.). Rohinton J. also supported the equal treatment of all women guaranteed under Article 15(1) of the Constitution and Article 25(1), which guarantees the right of women to practice their religion. The latter right would be meaningless if they were denied access to the temple to worship the deity (¶¶ 196–97 (Rohinton J.)).

102 *Indian Young Lawyers*, (2019) 11 SCC 1 ¶¶ 494–95 (Malhotra J.).

103 The Court has agreed to refer the case to a larger bench: Kantaru Rajeevaru v. Indian Young Lawyers Association, Writ Petition (C) No. 373 (2006); Review Petition (C) No. 3358 (2018). Chetana Conscience of Women, a non-profit group that works for women's empowerment, filed an intervention in the review petition challenging the Supreme Court's judgment. It unconditionally supported the dissent of Justice Malhotra and the view that the practice did not result in the exclusion of women absolutely or universally, and that female devotees of Ayyappa were also of this view.

104 Jose Devasia, "BJP's Kerala President Calls for Protests as Women Enter Sabarimala Temple," *Reuters*, January 2, 2019, https://in.reuters.com/article/india-temple/bjps-kerala-president-calls-for-protests-as-women-enter-sabarimala-temple-idINKCN1OW0AH.

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Hindu Right favored equal treatment of Muslim women with Hindu women, but not women with Hindu men.

Women's rights activists who attempted to enter the shrine were faced with violent threats, attacked, and even ostracized by their families.[105] Several review petitions were filed in light of the public response to the case and there were familiar cries of 'religion in danger.' The Court somewhat controversially referred the case to a larger bench, which has agreed to review it.[106]

The Supreme Court's decision did not disrupt the normative architecture that structures gender, nor did this even appear to be the goal of those who challenged the practice. The case reflects the struggle of excluded women to realize their desire for recognition and full equality with men through a wholesale pursuit of rights within the existing paradigm, rather than being transformative of gender. And even though the case defends a Hindu woman's rights to pray at the shrine, the fact that the main petitioners were not devotees, and feminist activists fostered the perception that the Court had aligned itself entirely on the side of gender equality and against religion.

PROBLEMATIZING FEMINIST ENGAGEMENTS WITH GENDER

Feminist legal scholarship has unpacked the normative, naturalized assumptions on which the categories of gender, sex, and sexuality are based. These include an interrogation of gender dualism and the idea that there are only two biologically distinct genders—male and female; gender hierarchy and the assumption that women are naturally weak and vulnerable, and entirely dependent on—and the property of—men who are cast as their protectors, breadwinners, and saviors; sex as a natural, physiological, and stable category; and sexuality as essentialized and presumptively based on reproductive heterosexuality. The scholarship has specifically struggled to dislodge these categories from the grip of the *real*, *authentic*, or *natural*—conceptualizations that have reproduced gender stereotypes and, in the context of the rise of the Hindu Right, been deployed to advance its ideological agenda of India as a Hindu nation.

Significant inroads have been made in articulating gender as a social construction and in exposing the gendered nature of law—in terms of both procedure, substance, and its differential impact on women. This understanding has enabled feminists to challenge a broad range of issues, including discrimination and violence in the home, sexual violence and harassment, and inequality and sex discrimination in the workplace. However, there remains a constant risk of interventions falling into and reproducing the biological traps that cause gender to become fixed and frozen. And in the context of gender equality and religious freedom, the term *gender* has been deployed by progressive groups, including feminists, and the higher judiciary in ways that leave the normative inscriptions of the category of gender largely unchallenged. While feminists, leftists, human rights advocates, and other progressives all have a stake in promoting gender equality and secularism,

105 Jose Devasia, "Entering Sabarimala: No Regrets, Says Indian Woman Ostracised for Defying Hindu Temple Ban," *Stuff*, January 31, 2019, https://www.stuff.co.nz/tarana/110278966/entering-sabarimala-no-regrets-says-indian-woman-ostracised-for-defying-hindu-temple-ban?rm=a; Ramesh Babu, "Minutes Away from Sabarimala Temple, Two Women Sent Back after Top Priest's Threat," *Hindustan Times*, October 19, 2018, https://www.hindustantimes.com/india-news/on-day-3-two-women-including-journalist-head-for-sabarimala-temple-under-police-protection/story-H5rs2JKwgXokVZxqieePaK.html.

106 Gautam Bhatia, "What Is a 'Review'," *Indian Constitutional Law and Philosophy* (blog), November 14, 2019, https://indconlawphil.wordpress.com/2019/11/14/what-is-a-review/; Gautam Bhatia, "The Supreme Court's Humpty Dumpty Jurisprudence on the Question of Referral," *Indian Constitutional Law and Philosophy* (blog), March 3, 2020, https://indconlawphil.wordpress.com/tag/humpty-dumpty/.

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their interventions in these areas are having an impact on the shape of gender in law, and at times producing some of the tensions witnessed in the cases discussed. There are at least three reasons why the normative order of gender and sexuality have remained largely intact in law.

First, feminists have been involved in shaping gender largely within a victimized and protectionist framework. This is partly influenced by the anticolonial period when women's rights advocates were caught between their revolutionary cravings and the necessity of establishing their anti-Western, nationalist credentials to counter allegations of being Western and imperialist by cultural nationalists among others.[107] This tension involves both denying allegations of being Western and establishing a uniquely Indian feminism based on the notion of an authentic Indian woman; one who is distinct from her Western counterparts. The focus on the victim subject and sexual violence has helped feminism retain its anti-Western nationalist credentials and distinguish Indian women and culture from the *West* in part because it dissociates from female choice especially in sexual matters, which have been regarded as foreign contaminants. This legacy has informed some strands of contemporary feminist politics. But the focus on sexual violence and women's victimization has reinforced a framework whereby all sides, including conservative and orthodox forces, can be involved with women's rights without advancing women's rights. Interventions on violence against women, while no doubt important, have been linked to seeking redress through the criminal law, carcerality, and a reliance on the state.

A second and related point is that the focus on violence and women's victimization has failed to adequately address alterity and the politics of difference. In drawing attention to this neglect, especially of religion and religious difference, some segments of the feminist movement and the left have responded defensively, resisting any questioning of their secular credentials and, more importantly, asserting their monopolistic hold on gender as a universal category. While there have been increasing efforts to address issues of religious difference, these have not disrupted feminism's universalized assumption about gender as a stable category equated with woman, female, and feminine, constructed along a male-female binary, and their general theory of women's subordination to men. In this approach, the gender category of *woman* remains distinct, stable, and closed and regulated, disciplined, and managed in ways that do not necessarily emancipate women but in fact perform a governance function. This is a logic that is easily amenable to the agenda of the Hindu Right, which has been able to successfully appropriate the gender agenda and retune the campaign to align with its own ideological agenda and political formations of gender—where it is not just any man who is to blame for the inequalities, discrimination, and violence experienced by women—it is the Muslim man. And this logic, as discussed in this article, finds resonance in the higher judiciary's recent decisions on gender equality.

Third, over the course of several decades, there has been an overwhelming assumption that gender equality is a progressive end goal. Not necessarily so. As illustrated through the discussion of the cases, the assertion that certain practices violate gender equality does not disrupt the normative gender order and religious majoritarianism that shapes gender. My discussion puts into question the idea that gender equality is always and invariably a progressive and emancipatory project for all women that can be realized partly through the removal of discriminatory and harmful cultural practices. The analysis exposes how gender equality is a discursive terrain, where competing understandings about gender and religion are produced. As demonstrated in the context of Muslim women's rights, male and female bodies not only continue to be overwhelmingly understood within

107 This is distinct from the femonationalism in the Anglo-American world, where right-wing ideologies are finding common cause with some strands of contemporary feminism. See Sara R. Farris, *In the Name of Women's Rights: The Rise of Femonationalism* (Durham: Duke University Press, 2017).

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rights discourse as naturally different, but they are also consistently displaced on a Hindu/Muslim or Hindu/Other divide.

The role of progressive groups, including feminist and human rights advocates who are opposed to the Hindu Right's makeover of the Indian nation, are, ironically, deeply implicated in its understanding of gender as advanced in and through the discourse of secularism and gender equality. Feminist legal advocacy in India has focused overwhelmingly on women's victimization in the context of violence, a combination of a sameness approach to equality and a protectionist approach to gender, and operated with the presumption of gender as a universal category.[108] These techniques have been appropriated by the Hindu Right to pursue its assimilationist, anti-Muslim, and Hindu Nationalist project.

Feminist interventions have also aggravated rather than alleviated the tension between gender equality and religion as was evident in the Sabarimala case. The petitioners were not devotees, nor concerned with the issue of religion per se, but only that gender inequality be challenged regardless of where it is found. While in and of itself a laudable goal, this strategy provoked a backlash. The arguments of the defenders and opponents of the practice were remarkably reminiscent of both the nineteenth century debates on *sati* (widow immolation) and the backlash produced by feminist campaigns against it after Roop Kanwar's sati in Deorala Rajashtahan, a western state in India, in 1987.[109] In appearing opposed to faith, feminists have had to fend off critiques of being anti-national and pro-Western. At the same time, there has been a reluctance on the part of feminists and leftist and progressive groups to engage with faith out of fear that it may mark them as religious, anti-secular, or unsecular. This reluctance has enabled right-wing and orthodox forces to occupy the terrain and shape the contours of faith and religion in ways that align with their own ideological agendas. In ceding this terrain, feminists have missed an opportunity for asserting the heterogeneous and pluralistic features of faith, and to develop a radical politics of faith that such a framing offers. In setting up gender in opposition to religion in the Sabarimala case, feminists enabled orthodox voices including the Hindu Right to argue that their interventions threatened the *Hindu* faith, in particular, practices designed to protect a celibate deity from ruination.

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108 Ratna Kapur, "Gender Equality," in *The Oxford Handbook of the Indian Constitution*, ed. Sujit Choudhry, Madhav Khosla, and Pratap Banu Mehta (Oxford: Oxford University Press, 2016), 742–55; Ratna Kapur, "Un-veiling Equality: Disciplining the 'Other' Woman through Human Rights Discourse," in *Islamic and International Law: Searching for Common Ground?*, ed. Anver M. Emon, Mark Ellis, and Benjamin Glahn (Oxford: Oxford University Press, 2012), 265–90; Siobhán Mullally, "Debating Gender Equality in India: Feminism and Multicultural Dilemmas," in *Gender, Culture and Human Rights: Reclaiming Universalism* (Portland: Hart Publishing, 2006), 193–218.

109 See Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998), discussing how the concerns of women were secondary to the issue of the native's autonomy to decide matters of faith and the role of the colonial power in adjudicating on such matters. Roop Kanwar's public sati, which was followed by the glorification of sati campaign as the site of immolation became a pilgrimage spot, was orchestrated by pro-sati supporters. The issue became integrally connected to Rajput community identity, with the Hindu Right stepping in to protect and uphold Rajput "tradition," where sati was defended as a cultural tradition and sanctioned by religious scripture. Segments of the women's movement in India organized marches to denounce the practice and demanded legal intervention. The Rajasthan state government moved to introduce the Rajasthan Sati Prevention Ordinance, 1987, followed by the central government enacting the Commission of Sati (Prevention) Act, 1988. It is not at all clear that the passage of the Act was a feminist victory. See Lata Mani, "Multiple Mediations: Feminist Scholarship in the Age of Multinational Reception," *Feminist Review*, no. 35 (1990): 32–38. See also Flavia Agnes, "Protecting Women against Violence: Review of a Decade of Legislation, 1980–89," *Economic and Political Weekly* 27, no. 17 (1992), WS19, WS24–WS33.

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CONCLUSION

In the cases discussed, gender is being shaped by the secular courts in and through gender equality in ways that reinforce the gender binary, sexual normativity, and Hindu male majoritarianism. Gender remains exclusively aligned with the category of an essentialized woman, rendering those who do not conform as ineligible to equality rights and outliers to the idea of the Hindu nation. Similarly, in terms of secularism, the courts are engaging in the construction of religion and faith in law in a manner that reinforces gender and cultural stereotypes. In the first two cases involving the rights of Muslim women, including a Hindu woman who converted to Islam, the decisions reinforce assumptions about Muslims, in particular Muslim men, as the embodiment of a threatening alterity, and always as incommensurable with secularism and gender equality. Their religion continues to be projected as subordinating, violent, and intolerant and subject to intense surveillance. These cases advance the identity of India as a Hindu Nation, and Muslims as perpetual "Others" who never belong—or belong only on the terms prescribed by Hindu majoritarianism, which include dominant gender, sexual, and cultural norms. They reinforce the Hindtuva agenda based on gender essentialism and a demand on Muslims to either assimilate into the normative nationalized subject imagined by Hindutva or be demonized as backward, anti-national, dangerous, and insufficiently modern. In contrast, in the Sabrimala case, the Court deploys gender equality and the essential religious practices test to affirm the gender credentials of the Hindu faith, declaring the practice in question as neither essential nor Hindu. The polarized response to the case is another instantiation of the fraught nature of this terrain.

By way of a first step toward fundamental change, I suggest that at least two strategies need to be further developed and pursued by scholars and advocates alike. The first is to accept the presence of religion in Indian secularism and engage with it directly. The effort should be to unmask the narrow and myopic version of the faith being advanced by the Hindu Right's cultural nationalism in and through the discourse of secularism. This acknowledgment gives rise to a second related strategy, which is to develop a more complex approach to gender and faith that attests to the fluidity of both. Such an opportunity presented itself, but was not availed of, in the Sabarimala case. The Court accepted and focused on a deradicalized and normative version of the Ayyappa legend—as the adopted son of a Hindu royal couple and the palace machinations to sideline or eliminate him.[110] Ultimately, his divine aspect is revealed and a temple constructed to worship him. This anaemic rendition of the story eclipses the more radical and subversive aspects of the Ayyappa legend. A careful reading of the legend may have offered a different route to the same outcome without producing the binary opposition between gender equality and faith. Ayyappa was the son of the union between Siva and Vishnu, two male gods. His closest companion during his life was Vavar, a Muslim. At the behest of Ayyappa, a mosque was built for Vavar at Erumely, about 50 kilometers from Sabarimala. In addition, a shrine dedicated to Vavar adjoins the Sabarimala shrine and a visit to Vavar's shrine forms an integral part of the pilgrimage to Sabarimala. Ayyappa also wanted to do away with death, birth, and reproduction, which were regarded as impediments to self-realization.[111] The colorful legend of Ayyappa illustrates that worship at the shrine did not envisage exclusively *Hindu* devotees nor is it confined within a heteronormative reproductive framework. Its eclectic history speaks to the fluidity of gender, sexuality, and attraction for persons of all faiths, creeds, sexual minorities, and castes from all over the country.

110 See, for example, Justice Nariman's version of the story that erases the radical aspects of gender, sexuality, and faith which are central to the legend. *Indian Young Lawyers*, (2019) 11 SCC 1 at ¶ ¶ 224–27 (Chandrachud J.).

111 Madhavi Menon, *Infinite Variety: A History of Desire in India* (New Delhi: Speaking Tiger, 2018), 81–83.

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The story of Ayyappa not only transcends gender binaries and normative sexuality, the pilgrimage itself speaks to how the tradition is not confined to a *Hindu* faith. The Court failed to draw on its own conclusions in recent decisions on gender and sexuality, which include its fluidity.[112] Had it done so, it could have acknowledged that Ayyappa is a celibate god who "enjoys the company of other men" rather than reflecting a tradition that is attempting to oppress or subordinate women. As Menon has pointed out, in the age of MeToo, to have a god who is simply not interested in women can be liberating.[113] She adds that there is no legend or story that Ayyappa was against women or against menstruating women. The rule itself was invented by the temple priests, who have used homosociality to sanction egregious anti-women practices. Menon asks, "Ayyappa is interested in men. So why is he being dragged into a battle about women?"[114]

The analysis demonstrates how Hindu majoritarianism and essentialist assumptions about gender are shaping the content and contours of equality, secularism, and faith in law. Pushing back the tides of Hindu male majoritarianism requires nothing less than developing a more complex and nuanced understanding of the work that gender and faith do in and through these discourses, rather than assuming that a commitment to gender per se amounts to doing progressive work.

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112 Such eclecticism was recognized by the Court in two decisions: *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, striking down the provision criminalizing sodomy, leading to the decriminalization of homosexuality in India; *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, acknowledging the fluidity of gender and recognizing the fundamental rights of trans persons in India.

113 Madhavi Menon, "His God, Her's Too: Ayyappa Legends Showcase Him as Pro-Men, Not Anti-Women," *Indian Express*, October 30, 2018, https://indianexpress.com/article/opinion/columns/his-god-hers-too-sabarimala-temple-ayyappa-kerala-5424289/. See "Shiva Purana: The Birth of Kartikeya," trans. Kumkum Roy, in *Same-Sex Love in India: Readings from Literature and History*, ed. Ruth Vanita and Saleem Kidwai (New York: Palgrave, 2000), 77–80; Ruth Vanita, "Ayyappa and Vavar: Celibate Friends," in Vanita and Kidwai, *Same-Sex Love in India*, 94–99.

114 Menon, "His God, Her's Too."