WHAT'S LOVE GOT TO DO WITH IT?
Anti-Love Jihad Laws and the Othering of Muslims in India

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"India cannot cease to be one nation, because people belonging to different religions live in it. [. . .] In no part of the world are one nationality and one religion synonymous terms; nor has it ever been so in India."[2]

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2. MOHANDAS K. GANDHI, HIND SWARAJ 39–40 (Rajpal & Sons 2010) (1909).

I. Introduction

Post-colonial India was built on the Nehruvian vision of a secular pluralist society. India's freedom fighters were all too aware of the dangers of religious tension and sectarian violence; they wanted to ensure minority rights and to preserve India's legacy of pluralism and socio-religious diversity and to counter the legacy of the caste system compounded with a complex British colonial chapter.[3] In particular, they were intent on protecting the rights of the Muslim minority. It was this vision that led to the creation of India's commitment to democracy, secularism, and religious tolerance. However, today's India suffers from a deep democratic deficit: secularism is in crisis, and minority rights are under constant threat as religious minorities, especially Muslims, are under attack.

The ruling Hindu nationalist Bharatiya Janata Party's (BJP) project is anything but secular or harmonious. A self-proclaimed guardian of Hindutva,[4] the BJP has strategically rallied populist support by singling out the Muslim community, often within a narrative of threat to national security and the Hindu nation's longevity.

In the grand scheme of the BJP's systematic persecution of the Muslim community in India—including casting out Muslim minorities from the Amendment to the Citizenship Act,[5] and, most

3. *See* Neera Chandhoke, Rethinking Pluralism, Secularism and Tolerance: Anxieties of Coexistence 1–18 (Sage Publications India Pvt Ltd 2019).

4. The term "Hindutva," is multilayered and its definitions differ across historical contexts, denoting, at times, the mere state of being Hindu, the Hindu nation, or the geographical, cultural, and religious dimensions of Hindu believers. The term has gained momentum in Indian politics to connote Hindu nationalism and is often associated with far-right nationalist movements and parties that position themselves as guardians of the Hindu nation's values and longevity, such as the Bharatiya Janata party, the Rashtriya Swayamsevak Sangh (RSS), and the Vishva Hindu Parishad (VHP).

5. The Citizenship (Amendment) Act, 2019, § 2. *See also* Chandhoke, *supra* note 3, at 144.

notably, revoking the autonomous status of Kashmir[6]—the campaign against the so-called "love jihad" conspiracy may seem to be a less egregious aspect of this strategy. But at a discursive level, the campaign is arguably the most preliminary tool of the BJP's Hindu nationalist vision. The theory, which has only imploded in popularity since Prime Minister Narendra Modi's first election in 2014, alleges that Muslim men are luring Hindu women into marriage to coercively convert them to Islam and usher in a Muslim demographic takeover of India. To date, at least eleven states have tabled or enacted so-called anti–forced conversion bills.[7] These laws are

6. The Kashmir region has been a disputed territory among several sovereign states—Pakistan, India, and China—since the partition of the Indian subcontinent in 1947. The resulting political contest is often regarded as one of the most violent legacies of British colonialism in the subcontinent. Following the exit of British rule, Kashmir, a Muslim-majority "princely state" sought to remain independent despite both the newly formed Pakistan's and India's claim to the territory. Intriguingly, it is the Muslim demographic composition of the region that constituted the core argument of both claims: unsurprisingly, Pakistan, today the second largest Muslim-majority country, laid claim to most Muslim-majority states of the former British Raj, while India saw in the integration of Kashmir an opportunity to test and display its multireligious secular vision. Fearing that Jammu and Kashmir's Hindu king would acquiesce to Indian conquest, Pakistan launched a series of tribal militias in the region. The military move would prove to be catastrophic for Pakistan, as the King would turn to India's help for military reinforcement. The latter agreed on the condition that the King sign the Instrument of Accession to India. The Instrument would nonetheless grant Kashmir autonomous status in all affairs bar foreign relations, communications, and defense. In 1952, Kashmir's autonomous status would be enshrined into the Indian Constitution in the form of Article 370. Under Article 370, only the Jammu and Kashmir constitutional assembly can decide if any further powers or territory would be ceded to or shared with the Central government. But on 5 August 2019, the Government of India, headed by a BJP-majority, issued a Presidential Order indirectly amending Article 370 of the Constitution and effectively subordinating Jammu and Kashmir to all provisions of the Constitution of India. Only the next day, a further Order rendered all clauses of Article 370—except for Clause 1—inoperative. Moreover, by virtue of the Jammu and Kashmir Reorganisation Act, 2019, the state of Jammu and Kashmir has since been "reorganized" into two distinct union territories: the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. For a broader discussion on the history of the Kashmir dispute and the related recent developments under the Modi government, *see From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir*, 134 Harvard L. Rev. 2530 (2021).

7. Off. of Int'l Religious Freedom, U.S. Dep't of State, India 2021 International Religious Freedom Report (2021), https://www.state.gov/wp-content/uploads/2022/03/india-2021-international-religious-freedom-report.pdf [https://perma.cc/XX3R-FVTZ]. *See also* The Wire Staff, *Haryana Becomes 11th State to Table 'Love Jihad' Law, Congress Protests in Assembly*, The Wire (Mar. 5, 2022), https://thewire.in/communalism/

often complemented by a long detainment process, hefty fines and even imprisonment. Moreover, such laws have typically succeeded or preceded other Islamophobic legislative initiatives.[8]

To better understand the simultaneous banality and violence of the love jihad conspiracy, consider the Tanishq advertisement fiasco. In Fall 2020, one of India's largest jewelry brands, Tanishq, posted a forty-three second advertisement on YouTube featuring a Muslim family surprising their Hindu daughter-in-law with a Hindu-style baby shower. The advertisement, which was intended to promote the brand's "Ekatvam" line—the Hindi word for "unity"—included the following narration: "She is married into a family that loves her like their own child. Only for her, they go out of their way to celebrate an occasion that they usually don't. A beautiful confluence of two different religions, traditions and cultures."[9]

The last line is likely a nod to India's reputation as "the longest surviving symbol of Hindu-Muslim unity in the world."[10] But for many BJP members and their followers, the tagline was curiously

haryana-becomes-11th-state-to-table-love-jihad-law-congress-protests-in-assembly [https://perma.cc/4HAZ-VLCK].

8. Consider, for example, the latest developments in the BJP-controlled state of Karnataka. On December 23, 2021, Karnataka's lower house passed the Protection of Right to Freedom of Religion Bill. The Karnataka Protection of Right to Freedom of Religion Act, 2022. The proposed Bill attaches a penalty ranging from three to five years with a fine of ₹ 25,000, or, with respect to violation of provisions relating to minors, women or members of a scheduled caste or tribe, from three to ten years and a fine of no less than ₹ 50,000 for a person found guilty of converting a spouse from one religion to another by misrepresentation, undue influence, coercion or force, allurement or any fraudulent means. Shortly after, in early 2022, government run colleges began imposing purportedly "neutral" dress codes that effectively served to prohibit female students from attending classes or entering the premises while donning the hijab. The colleges submit that such bans merely mirror the existing government order prescribing dress codes in public secondary and postsecondary education institutions. Predictably, the bans have led to state-wide protests and unrest, resulting, as of yet, with the Karnataka High Court's judgment upholding the constitutionality of the government order and the colleges' application of said order. *See, e.g.*, *Hijab Ban: Karnataka High Court Upholds Government Order on Headscarves*, BBC News (Mar. 15, 2022), https://www.bbc.com/news/world-asia-india-60300009 [https://perma.cc/2DSF-CGXA].

9. Yuthika Bhargava, *Tanishq Withdraws Advertisement on Inter-Faith Marriage Following Social Media Criticism*, Hindu (Oct. 13, 2020, 12:30 PM), https://www.thehindu.com/news/national/tanishq-withdraws-advertisement-on-inter-faith-marriage-following-social-media-criticism/article32841428.ece [https://perma.cc/2DSF-CGXA].

10. Geneva Abdul, *Jewelry Ad Featuring Interfaith Couple Sparks Outrage in India*, N.Y. Times (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/world/asia/india-ad-love-jihad-tanishq.html [https://perma.cc/GV55-CEUY].

interpreted as a declaration of war on Hindutva. Within hours of the advertisement's release, prominent members of the party took to social media and public platforms to accuse the brand of promoting love jihad.[11] Expectedly, these comments served to rally the Hindu nationalist and far-right bases, which have been embroiled in increasing violent attacks on Indian Muslim communities since Modi's election.[12] Following a social media-led boycott campaign of the brand, Tanishq quickly revoked the advertisement, although not without defiantly issuing a statement condemning the backlash to the advertisement as "contrary to its very objective."[13]

But it would be a mistake to dismiss the Tanishq affair as an isolated case of misguided mass hysteria; on the contrary, in India's BJP era, such reactions are not the exception but the norm. Only a few months later, it was Netflix's turn to draw the BJP's (and the Hindu nationalists') ire for displaying a kissing scene between a Hindu female protagonist and a Muslim male protagonist.[14] In 2017, during the production of the Bollywood film, *Padmaavat*,[15] Hindu extremist group Karni Sena vandalized the film set in the BJP-controlled Rajasthan state.[16] The incident resulted in the director being assaulted, while crew members received death threats.[17] In the weeks that followed, protests broke out across several

11. *Id.*

12. Since the election of the BJP in 2014, India has seen a rise in agrarian protests as well as communal riots and violence targeting religious and ethnic minorities, particularly Indian Muslims. For more information, *see* Ravi Agrawal, *Why India's Muslims are in Grave Danger*, Foreign Policy (Mar. 2, 2020, 4:04 PM), https://foreignpolicy.com/2020/03/02/india-muslims-delhi-riots-danger [https://perma.cc/7L4J-MY58]; Greeta Pandey, *Beaten and Humiliated by Hindu Mobs for Being a Muslim in India*, BBC News (Sept. 2, 2020), https://www.bbc.com/news/world-asia-india-58406194 [https://perma.cc/D7W4-PLHR].

13. Abdul, *supra* note 10.

14. Emily Schmall, *With a Kiss, Netflix Gets Tangled in India's Religious Tensions*, N.Y. Times (Nov. 23, 2020), https://www.nytimes.com/2020/11/23/world/asia/india-netflix-kiss.html [https://perma.cc/RN22-SUXF].

15. Though no doubt an important figure of Indian folklore, there is no evidence of the historicity of Queen Padmavati. Rather, the figure derives from a 16th-century Sufi poem by Malik Muhammad Jayasi. *See* Charmy Harikrishnan, *So, Who Was Padmavati?,* Economic Times (Nov. 26, 2017, 1:23 AM), https://economictimes.indiatimes.com/magazines/panache/so-who-was-padmavati/articleshow/61798184.cms [https://perma.cc/2PH6-SR4U].

16. FP Staff, *Padmaavat: From Set Vandalism to Karni Sena Protest and Supreme Court Ruling, a Timeline of Controversies*, Firstpost (Jan. 24, 2018, 11:30 AM), https://www.firstpost.com/entertainment/watch-padmaavat-from-set-vandalism-to-karni-sena-protest-and-supreme-court-ruling-a-timeline-of-controversies-4315635.html [https://perma.cc/KJP8–8B4Z].

17. Nadira Khatun, '*Love-Jihad' and Bollywood: Constructing Muslims as 'Other'*, J. Religion & Film, Dec. 14, 2018, at 19.

BJP-governed states, and the lead actors faced serious threats of mutilation.[18] Following numerous delays and four BJP states' censorship of the film, the saga culminated with the Supreme Court of India issuing a judgment permitting the release of the film nationwide.[19]

Perhaps most ironic, however, is that *Padmaavat* has been universally panned as yet another artistic stereotyping of Muslims as barbaric and sexual deviants.[20] Sanjay Leela Bhansali's modern cinematic spin of the legend constructs Queen Padmavati's story largely through the male Hindu nationalist gaze. The film effectively romanticizes Padmavati's "jauhar"—the historical Hindu practice of mass self-immolation by women, or otherwise, execution by their husbands or male relatives, in India, to avoid capture by invading Muslim armies—after Muslim Sultan Alauddin Khilji had slain her husband, Rajput king Ratan Singh.[21] In her final speech, Queen Padmavati urges her compatriot women to succumb to the same fate, declaring, "those who lust for our body, would not even get their hands on our shadows, our bodies will be reduced to ashes, but our pride and honour will remain immortal, and that will be the biggest defeat of Alauddin's life."[22]

The celebration of Queen Padmavati's body, and, most importantly, its extinguishment, is a recognition that the Hindu nation begins and ends with the female body. The effect is to transform women's bodies and sexuality within the Hindu imagination as "a site for both claims to community homogeneity and honour."[23] Ultimately, the social construct of the female body as the symbol of the Hindu nation justifies the male guardianship of Hindu women's sexuality and determines or, at the very least, limits their marital choices.

Paradoxically, as women's sexuality is intended to be relegated to the private sphere—that is, under the supervision of the males of the family or the community—it is simultaneously overmagnified in the public sphere, as nationalism here would require

18. FP Staff, *supra* note 16; Khatun, *supra* note 17, at 20.

19. FP Staff, *supra* note 16.

20. Khatun, *supra* note 17, at 12–13; Rakhshanda Jalil, *How Bollywood's Padmaavat Distorted a Sufi Love Poem*, Al Jazeera (Feb. 1, 2018), https://www.aljazeera.com/opinions/2018/2/1/how-bollywoods-padmaavat-distorted-a-sufi-love-poem [https://perma.cc/5GJH-VM22].

21. Jalil, *supra* note 20.

22. Khatun, *supra* note 17, at 23, quoting Padmaavat (Bhansali Productions & Viacom 18 Motion Pictures 2018).

23. Khatun, *supra* note 17, at 12, quoting Charu Gupta, *Hindu Women, Muslim Men: Love Jihad and Conversions* Econ. and Pol. Wkly., Dec. 19, 2009, at 13.

a hyperawareness of the female body, as evidenced by the sexualized response to an innocent interfaith baby shower advertisement. At a political level, this symbolism is doubly advantageous, as it instrumentalizes Hindu women's bodies as a perfect pretext for the policing of impurifiers—in this case, particularly Muslim men. The symbolism manufactures the fiction of love jihad through populist rhetoric and propaganda, which normalizes the depiction of the Muslim as the Other and, consequently, cements the binary of Muslim and Indian.

Elsewhere, I have argued that inadequate attention has been paid to the role of nationhood and honor in India's abysmal women's rights record across all religious and ethnic groups.[24] As such, it is relatively unsurprising to see India's ruling far-right nationalist party exploit a readily available discursive landscape. The humble aim of this Article is to provide a fresh analysis of recent legislative and jurisprudential developments relating to the so-called counterattack on love jihad through the lens of nationhood and the control and conquest of the female body. This Article argues that the instrumentalization of the Hindu woman's marriage as the territory for Hindutva prosperity serves to cast out non-Hindu communities, notably Muslims, as non-Indian, while further entrenching the patriarchal notions of sexuality and paternalism that have enabled the enactment of anti-love jihad laws in the first place. The remainder of the Article is structured as follows. Part II provides a brief overview of the purported preoccupations behind the anti–love jihad campaign. Part III lays out notable legislative initiatives in India aiming to combat coerced conversion through marriage as a response to the love jihad conspiracy. It also highlights important ideological similarities between such laws and the Citizenship Amendment Act of 2019 (CAA). Part IV dissects the seminal *Hadiya* case, while setting out a feminist constitutionalist analysis of Justice Chandrachud's, as he was then, judgment. Finally, Part V concludes the Article with the contention that more political and academic attention must be given to the politicization of women for supremacist goals in today's India.

II. The Fiction of Love Jihad

Though far from perfect, India's journey as a secular democracy constitutes one of the more successful postcolonial chapters in

24. *See* Vrinda Narain, Reclaiming the Nation: Muslim Women and the Law in India (1st ed. 2008); *see also* Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities and Contradictions*, 25 S. Cal. Interdisc. L.J. 107, 124 (2016).

legal pluralism and multiculturalism—a success made more impressive considering the country's demographic weight. And yet both India's carefully crafted secular democracy and multiethnic unity have never been more vulnerable. Since 2014, with the rise of the Hindutva party and the election of the BJP government with Narendra Modi as Prime Minister, there has been a sharp rise in religious violence in India. Hindu extremist vigilantes have launched attacks on religious minorities and Dalits, often taking advantage of law enforcement and government complicity in BJP-governed states. BJP-fueled populism has taken a disproportionate and catastrophic toll on India's Muslim communities, with Muslim Indians being subjected to unprecedented rates of communal violence, lynching, property bulldozing, harassment, and marginalization.

Though equally an important engine of the patriarchy, love jihad lies at the center of this growing anti-Muslim political and social climate. Love jihad is a crude anti-Muslim conspiracy theory advanced by the Hindu Far-Right—notably, the Rashtriya Swayamsevak Sangh (RSS), and its affiliates such as the Vishva Hindu Parishad (VHP) and the BJP—essentially purporting that Muslim men are luring Hindu women through false promises of love and marriage in order to convert them to Islam and effect a Muslim demographic domination.[25] To date, there is no reliable evidence of this conspiracy in a country where Hindus account for over eighty percent of the population compared to a fourteen percent Muslim representation.[26] In fact, the demographic evolution of India can only be described as a *contra*-Muslim takeover. The latest Pew numbers show that even though fertility rates remain highest among Muslims, with an average 2.6 children per Muslim woman, in comparison to 2.1 children per Hindu woman, the fertility rate gap among all religious groups has significantly narrowed in the last decades.[27] Only in 1992, fertility rates among Muslim women averaged 4.4, while Hindus accounted for the second highest fertility rate at 3.3.[28] Strikingly, this would mean that the Muslim fertility

25. For more details on the role of these political factions in the propagation of "love jihad" fears, *see, e.g.*, Charu Gupta, *Allegories of 'Love Jihad' and Ghar Vāpasī: Interlocking the Socio-Religious with the Political*, 84 Archiv Orientální 291, 291–316 (2016); Mohan Rao, *Love Jihad and Demographic Fears*, 18 Indian J. of Gender Stud. 425, 425–30 (2011); Kenneth Bo Nielsen & Alf Gunvald Nilsen, *Love Jihad and the Governance of Gender and Intimacy in Hindu Nationalist Statecraft*, Religions, Dec. 2, 2021, at 1068.

26. Stephanie Kramer, *Religious Composition of India*, Pew Rsch. Ctr. (Sept. 21, 2021), https://www.pewresearch.org/religion/2021/09/21/population-growth-and-religious-composition [https://perma.cc/RX44–9WNK].

27. *Id.*

28. *Id.*

rate declined by nearly two children per woman under the age of twenty-five in a single generation.[29] In the last seventy years, the slowdown in population growth has been more pronounced among religious minority groups than in the Hindu community.[30]

III. The (D)evolution of India's Legislative Landscape

A. *Anti–Coerced Conversion Laws*

Yet, the fiction of love jihad has not detracted BJP-dominated legislatures from enacting statutes to combat supposed coerced conversions. In theory, such laws do not exclusively apply to Muslim and religious minority subjects—often purporting to prohibit *any* and *all* coerced conversion through marriage. But the practical implications of these laws tell a different story. Since the enactment of the state of Uttar Pradesh' *Prohibition of Unlawful Religious Conversion Ordinance* in November 2020, at least 208 men have been arrested—all Muslim—with fifty-one arrests, including forty-nine prison detentions, made prior to the Ordinance's one-month anniversary.[31] Under the law, interfaith couples who wish to get married are required to inform the district magistrate two months in advance.[32] Unlawful conversion carries a nonbailable sentence of up to ten years imprisonment and vaguely defines the crime as conversion through "misrepresentation, force, undue influence, coercion, allurement, or by any fraudulent means," or marriage solely for conversion purposes.[33] The ambiguity of the provisions leaves Muslim men and interfaith couples acutely vulnerable to police harassment and criminal charges.[34]

The Uttar Pradesh ordinance is neither the first nor last law of its kind. In 1967, Orissa was the first state to enact a freedom of religion statute effectively prohibiting interfaith unions;[35] a year later, Madhya Pradesh fell in step with its own anti-conversion act.[36] Since then, the following eight other states have officially

29. *Id.*

30. *Id.*

31. Hannah Ellis-Petersen & Ahmer Khan, '*They Cut Him into Pieces': India's 'Love Jihad' Conspiracy Theory Turns Lethal*, Guardian (Jan. 21, 2022), https://www.theguardian.com/world/2022/jan/21/they-cut-him-into-pieces-indias-love-jihad-conspiracy-theory-turns-lethal [https://perma.cc/N4T7-PM3C].

32. The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, § 8(1) (Nov. 27, 2020) [hereinafter The Uttar Pradesh Prohibition].

33. *Id.* § 3.

34. Ellis-Petersen & Khan, *supra* note 31.

35. The Orissa Freedom of Religion Act, 1967.

36. The M.P. Dharma Swatantrya Adhiniyam, 1968.

implemented an anti-conversion statute: Arunachal Pradesh in 1978;[37] Gujarat in 2003;[38] Himachal Pradesh[39] and Chhattisgarh in 2006;[40] Jharkhand in 2017;[41] Uttarakhand in 2018;[42] Uttar Pradesh in 2020;[43] and, most recently, Karnataka in December 2021.[44]

Several states, such as Manipur,[45] have also taken steps to enact anti-conversion ordinances, while others have seen previously dormant so-called religious freedom laws revitalized under the far-right Hindu-nationalist leadership. For example, in 2020, the ruling Madhya Pradesh BJP had argued that its 1968 *Freedom of Religion Bill* was outdated and incapable of adequately combatting the increasing pace of love jihad.[46] A new Freedom of Religion ordinance was passed in January 2021, carrying minimum jail terms of two, three and five years with a minimum penalty of 50,000 Indian rupees.[47] The law requires that a priest solicited for a conversion reports the request to the district administration.[48] In January 2021, Madhya Pradesh recorded a monthly average of one arrest per day, or twenty-three arrests in the twenty-three days since the law's enactment.[49] Of the 107 men arrested between January 2021 and January 2022, 78 were Muslim and 29 were Christian.[50]

37. The Arunachal Pradesh Freedom of Religion Act, 1978.

38. The Gujarat Freedom of Religion Act, 2003.

39. The Himachal Pradesh Freedom of Religion Act, 2006.

40. The Chhattisgarh Freedom of Religion (Amendment) Act, 2006.

41. The Jharkhand Freedom of Religion Act, 2017.

42. The Uttarakhand Freedom of Religion Act, 2018.

43. The Uttar Pradesh Prohibition.

44. The Karnataka Protection of Right to Freedom of Religion Bill, 2021, Bill No. 50 of 2021 (Dec. 21, 2021).

45. *Manipuri Body Calls for Protection of Ethnic Religions,* Times of India (May 22, 2012, 5:40 AM), https://timesofindia.indiatimes.com/city/guwahati/manipuri-body-calls-for-protection-of-ethnic-religions/articleshow/13372632.cms [https://perma.cc/Q9GU-456E].

46. Rajendra Sharma, *Law Against 'Love Jihad': Madhya Pradesh Govt Tables Freedom Ordinance 2020*, Times of India, https://timesofindia.indiatimes.com/city/bhopal/law-against-love-jihad-govt-tables-freedom-of-religion-ordinance-2020/articleshow/81197839.cms [https://perma.cc/2Q7B-QUC2] (last updated Feb. 25, 2021, 7:56 AM).

47. The Madhya Pradesh Freedom of Religion Act, 2021.

48. *Id.* § 10(2).

49. Ravish Pal Singh, *MP: 23 Cases Registered Under New Anti-Conversion Law, Bhopal Tops List*, India Today, https://www.indiatoday.in/india/story/mp-23-cases-registered-under-new-anti-conversion-law-bhopal-tops-list-1768393–2021–02–12 [https://perma.cc/X5TT-A3XE] (last updated Feb. 12, 2021, 12:29 AM).

50. Shruti Tomar, *Heartbreak, Wasted Policing, Injustice: 'Love Jihad' Law Fuels Hate*, Hindustan Times (Jan. 10, 2022, 12:40 AM), https://www.hindustantimes.com/india-news/heartbreak-wasted-policing-injustice-love-jihad-law-fuels-hate-101641752363076.html [https://perma.cc/5GN2–2VGY].

The purported neutrality of anti–love jihad laws is meritless because, like any legislation, these laws do not operate in a political vacuum. It is important to grasp their limitless consequences within an increasingly ethnically charged India. The political landscape that has fermented support among many Hindu Indians for such laws is by no means spontaneous. On the contrary, it is the accumulation of decades of divisive rhetoric on the definition of nationhood in post-colonial India. The project may be summarized as an undoing of the Gandhian "dream" for a multireligious India, united as *one* nation through Indian-*ness*,[51] to establish instead an ethnoreligious state where Indian-*ness* and citizenship are contingent on one's religion. Within this context, the implications of the Citizenship Amendment Act should not be underestimated.

B. *Citizenship Amendment Act*

It is important to understand that the love jihad political panic is merely one aspect of a broader system of de-nationalizing religious minorities, particularly Muslims. Recall that postcolonial India adopted secularism as the fundamental organizing principle of its new democracy in a bid to mediate the tensions between religious groups. State secularism was intended to serve as a harmonizing instrument of religious and ethnic diversity by ensuring impartial, consistent, and equal application of and access to the laws and the Constitution. Whereas Hindu women's bodies are instrumentalized as the gatekeepers of the nation, and, hence, through the enactment of anti–coerced conversion bills, Muslims are effectively cast out from the nation, the nationalist project also relies on explicitly redefining Indian-*ness* as non-Muslim. This has been broadly achieved through the CAA,[52] which has yet to be implemented as its rules and regulations are still being drafted. The CAA is arguably BJP India's most straightforward initiative to deprive Muslims of political and civil representation, and astonishingly the first law in secular India to explicitly use religion as a criterion for citizenship.[53]

51. Gandhi, *supra* note 2, at 39–40; *see also*, Mohandas K Gandhi, *In Memoriam*, Young India (Jan. 5, 1928).

52. The Citizenship (Amendment) Act, 2019.

53. *Id.* § 2, amending § 2(1)(b) of The Citizenship Act, 1955 (India): "Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of subsection (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act."

Indeed, the Amendment paves an administrative path for Indian citizenship for persecuted religious minorities from Afghanistan, Bangladesh and Pakistan who are Hindus, Sikhs, Buddhists, Jains, Parsis, or Christians, and who entered India on or before December 31, 2014.[54] Yet the Act excludes Muslims from such eligibility, including the Rohingya community fleeing to India, whose forced displacement from and mass persecutions in Myanmar are widely documented. Surrealistically, the government's counter affidavit argues that "the Indian parliament, which doubtlessly has the legislative competence, is not required to take into consideration as to which other communities are treated as minorities in the said three named countries."[55] It further adds:

> [C]lassification of particular neighbouring countries is directly relatable to the foreign policy of the nation and cannot be questioned on the ground of under-inclusiveness. . . . [T]he CAA is not meant to be an omnibus solution to issues across the world and the Indian Parliament cannot be expected to take note of possible persecutions that may be taking place across various countries in the world.[56]

The argument is wholly meritless, given that the government fails to rationalize its inclusion of beneficiary minorities. That is, why has the BJP taken note of these particular persecutions taking place elsewhere, while ignoring blatant instances of persecution occurring in that same region? To counter accusations of Islamophobia by merely citing foreign policy without rationalizing the latter renders the argument tautological.

Moreover, the CAA was enacted amid the BJP's zealous proposal for the implementation of a National Register for Citizens (NRC), which places the burden of proving one's citizenship on the individual "in a country where more than fifty percent of the population is illiterate and doesn't maintain records."[57] One can easily see how the NRC, complemented by the CAA and the policing of marriage, risks leaving a number of Muslim Indians stateless.[58] Predictably, the Amendment's constitutionality is contested, with over 140 petitions filed in the Supreme Court of India.[59] The bulk of

54. *Id.*

55. Preliminary Counter Affidavit on Behalf of the Union of India at para. 22, Indian Union of Muslim League v. Union of India (No. 1470).

56. *Id.* at para. 39.

57. The Wire Staff, *CAA Distinguishes Between People Based on Religion, Is Unconstitutional: Former SC Judge*, The Wire (Mar. 22, 2021), https://thewire.in/rights/caa-religion-unconstitutional-former-sc-judge [https://perma.cc/NTR6-H6LV].

58. *Id.*

59. Krishnadas Rajagopal, *140 Pleas Against Citizenship Amendment Act*

these petitions allege incompatibility with Article 14 of the Constitution, which provides that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."[60] Though the Supreme Court has refused to stay the CAA, a substantive ruling on the CAA's constitutional validity is pending.[61]

Indian courts' interpretations of the Amendment may be the most defining litmus test of the country's democratic health. As former Supreme Court judge, V Gopala Gowda, notes, it is difficult to imagine a less ambiguous corpus of provisions and jurisprudence than India's prohibition of state discrimination based on religious status. In its landmark judgment in *S.R. Bommai v. Union of India*, the Supreme Court recognized Indian secularism as "more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions,"[62] that is, "the State is enjoined to *accord* equal treatment to all religions and religious sects and denominations."[63] Defining secularism as part of the "basic structure"[64] of the Constitution, of which its provisions "prohibit the establishment of a theocratic State and prevent the State either from identifying itself with or favouring any particular religion or religious sect or denomination," the decision is bittersweetly prophetic as it foretells the ills of religious populism.[65] Notably, it warns:

> A political party that seeks to secure power through a religious policy or caste orientation policy disintegrates the people on grounds of religion and caste. It divides the people and disrupts the social structure on grounds of religion and caste which is obnoxious and anathema to the constitutional culture and its basic features.[66]

C. *Constitutional Provisions*

India's Constitution—the longest in the world—reflects a firm allegiance to individual rights and liberties, delicately balanced against an unwritten constitutional morality committed to social

Hang Fire in Supreme Court, Hindu (Dec. 6, 2020, 8:16 PM), https://www.thehindu.com/news/national/concern-over-delay-in-hearing-pleas-against-caa-in-sc/article33264290.ec [https://perma.cc/QYL4-VTPS].

60. India Const. art. 14.

61. R. Balaji, *CAA Hearing in Supreme Court Put Off Again*, Telegraph (Dec. 7, 2022, 4:47 AM), https://www.telegraphindia.com/india/caa-hearing-in-supreme-court-put-off-again/cid/1902389 [https://perma.cc/C4H2-H2YL].

62. S.R. Bommai v. Union of India, AIR 1994 SC (1918) at para. 304.

63. *Id.* at para. 146.

64. *Id.* at para. 153.

65. *Id.* at para. 146.

66. *Id.* at para. 190.

cohesion, state nondiscrimination and dignity. As noted above, India's brand of secularism cannot be simplistically understood as passive areligious governance. On the contrary, the Constitution's most taxing exercise is to ensure that Article 25, which guarantees to all persons equally the freedom of conscience and the right to freely profess, practice and propagate one's religion subject to public order, morality, and health, does not cannibalize other rights and freedoms—an exercise which often demands reforming certain laws or practices. To that effect, Article 25(2)(b) empowers the state to provide for social welfare and reform [or throw open] Hindu religious institutions of a public character to all classes and sections of Hindus (defined to include persons professing the Sikh, Jain or Buddhist religion).[67] The Constitution itself espouses this reformative character. Article 17 abolishes the practice of untouchability[68] in any form, providing that the enforcement of any disability arising out of untouchability shall be an offense punishable by law.[69]

In a nod to India's legal pluralism, Article 26 guarantees that every religious non-Hindu denomination or any section thereof shall have the right to manage its own affairs in matters

67. India Const. art. 25 ("Freedom of conscience and free profession, practice and propagation of religion—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political, or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.").

68. The history of India's grouping or caste system is complex, and its exact origins remain debatable. Broadly speaking, the historic practice of grouping, and, consequently, untouchability in India is believed to derive from Hindu Vedic scriptures and poems, where certain populations are deemed to belong to the lowest caste by virtue of their impurity, compelling higher caste groups to abstain from "touching" or interacting with them to avoid being rendered impure. At a sociopolitical level, the implications of this religious precept include the segregation and apartheid of "untouchables," or Dalits, members of India's lowest caste. The segregation of Dalits is further amplified by the requirement of caste endogamy, that is, the requirement that one marries exclusively within one's own caste. For more information on the practice of untouchability, *see Untouchable*, Encyclopedia Britannica, https://www.britannica.com/topic/untouchable [https://perma.cc/5ESB-HYBE] (last updated Apr. 1, 2023).

69. India Const. art. 17 ("Abolition of Untouchability.—'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.").

of religion, subject to public order, morality, and health.[70] In the recent Supreme Court landmark judgment of *Indian Young Lawyers Association v. State of Kerala*,[71] in which a 4–1 majority held that the Hindu Sabarimala temple entry ban on women of menstruating age was *ultra vires* the Constitution, the Court reiterated that Article 26 cannot circumvent the rights and freedoms enshrined in Part III Fundamental Rights.[72] Though no right can be said to be absolute, the Court noted that unlike Articles 25 and 26, Article 14 (which guarantees equality and equal protection under the law), Article 15 (which guards against discrimination based on, *inter alia*, religion, race, caste, sex, and place of birth), and Article 21 (which protects the right to life and personal liberty) are not conditioned to the other provisions of Part III Fundamental Rights.[73] In a decision vehemently decried by India's ruling BJP and which has since provoked mass protests across the country, the Court ultimately reasoned that "the right to religious freedom was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty, and personal freedom recognized in the other provisions of Part III [Fundamental Rights]."[74] It would hence render the Constitution's language meaningless to extinguish women's right to equal worship, guaranteed under Articles 14 and 15, through the mechanism of Article 25 (and, in the case of non-Hindu sex discriminatory practices, Article 26).

It is important to note that while Articles 14, 15, 17 and 21 operate as guardians of citizenship, "the quintessential DNA that powers life and vitality in a democracy," they equally serve to ensure that the Constitution cannot be exploited by the majority as a tool to exert its tyranny upon the minority.[75] Of course, such a shield is only available where the Constitution is functionally operative, that is, where the judiciary remains independent from both the executive and legislative branches, and where the latter two are bound by the former's judgments.

70. India Const. art. 26 ("Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.").

71. Indian Young Lawyers Ass'n & Others v. The State of Kerala & Others, (2019) 11 SCC 1 (2018) (India).

72. *Id.* at para. 9 (per Chandrachud, J., concurring).

73. *Id.* at para. 7 (per Chandrachud, J., concurring).

74. *Id.*

75. The Wire Staff, *supra* note 57.

It is for this reason above that I argue that, as the populist far-right movement further entrenches itself in the political fabric of the country, the future of India as a pluralist and secular democracy, as well as the future of women's rights, is largely contingent on the courts' responses and the strength of their commitment to the Constitution. If the case analysis below is any indication, perhaps we are witnessing the beginning of a judicial resistance to a masculinist, supremacist state's monopoly of the definition of nationhood, and by implication, of Indian-*ness*.

IV. Shafin Jahan v. Asokan K.M. and Ors

A. *Factual Background and Judicial History*

In recent years, few cases have amassed the degree of national public attention that *Shafin Jahan v. Asokan K.M. and Ors*[76] has. The saga, colloquially known in India as the *Hadiya* case, has been diligently followed by major news outlets, commented on by prominent figures and, expectedly, instrumentalized as a rallying cry by several Hindu nationalist groups, the ruling BJP being no exception. In line with the major theme of love jihad, the facts of the case are as alarming as they are absurd.

At the time of the relevant events, Akhila was a twenty-four-year-old homeopathic medicine student at the Sivaraj Homeopathy College in the town of Salem in Tamil Nadu. Akhila had moved to Tamil Nadu from Kerala to pursue her university studies. Impressed by her Muslim collegemates' discipline and character, Akhila began to study Islam, devoting significant time to reading and watching material on the religion.[77] According to Akhila, she had practiced Islam for three years before announcing her formal conversion. Following her conversion, she adopted the name Hadiya.[78]

On January 6, 2016, Hadiya's parents filed a police complaint against Hadiya's two roommates and their father, Aboobaker, alleging that the three had abducted Hadiya. Earlier that day, the family had been informed that Hadiya had showed up to her university donning the hijab. With no developments on Hadiya's whereabouts, Hadiya's father, K. M. Ashokan, filed a *habeas corpus* petition at the Kerala High Court.[79]

76. Shafin Jahan v. Asokan K.M. & Others, AIR 2018 SC 1933 (India) [hereinafter *Hadiya*].

77. An Affidavit on behalf of Akhlia Asokan @ Hadiya at para. 5, Shafin Jahan v. Asokan K.M. & Others, Special Leave Petition (CRL) no. 5777/2017 (Supreme Court of India Criminal Appellate Jurisdiction, Feb. 8, 2018).

78. *Id.* at paras. 5–6, 11.

79. *Id.* at para. 7.

Hadiya eventually appeared before the court on January 19. She testified that she had left her home and refrained from contacting her parents after her father had caught her performing the Islamic prayer (*salah*) and communicated his stern disapproval.[80] Hadiya stayed at her friends' house in Malappuram district, Kerala, and had attempted to register in a religious institution, where she was refused admission.[81] Following another attempt at another Islamic study center, she was ultimately admitted as a candidate contingent on her signed and filed affidavit attesting that her conversion to Islam was free of coercion.[82]

But her stay at Aboobaker's residence would prove to be short-lived, and Hadiya would transfer to another Islamic educational center, where she would meet social worker Sainaba.[83]

On January 25, the Kerala High Court dismissed Ashokan's petition, finding that "the alleged detenue is staying in the . . . institution on her own free will. It will be left open to the petitioner and her family members to make visit to her at the above institution, subject to regulations if any regarding visiting time."[84]

Undeterred, Hadiya's father would file another habeas corpus petition, this time alleging that Hadiya's conversion was the result of malicious indoctrination and that she was at serious risk of being transported out of the country for fundamentalist activities and married off to a Muslim man.[85] The court issued an interim order placing Hadiya under protective police surveillance pending a decision on the merits of the petition.[86] Though the order was merely intended to ensure that Hadiya did not travel outside of the country or that her whereabouts become unknown to authorities, according to Hadiya, she was prohibited from leaving the house or welcoming visits from individuals of her choice.[87] Despite having initially permitted Hadiya to stay at Sainaba's residence, the court subsequently ordered, on December 19, that Hadiya be moved to

80. *Id.* at para. 5.
81. *Id.* at para. 6.
82. *Id.*
83. *Id.* at para. 7.
84. *Hadiya*, at para. 9 (per Misra, C.J., majority opinion).
85. Additional Affidavit by the Respondent no. 1 in Response to the Counter/Reply of the 7th and 8th Respondents, at paras. 3, 5, Shafin Jahan v. Asokam K.M. & Others, Special Leave Petition (CRL) no. 5777/2017 (Supreme Court of India Criminal Appellate Jurisdiction, Feb. 20, 2018).
86. *Hadiya*, at para. 11 (per Misra, C.J., majority opinion).
87. An Affidavit on behalf of Akhlia Asokan @ Hadiya, *supra* note 77, at para. 13.

a college hostel in Salem to continue her studies, despite Hadiya's insistence that she stay with Sainaba.[88]

Unexpectedly, three days later, Hadiya appeared before the court with Shafin Jahan, a Muslim man whom she had married on December 19, the day the court directed that she be transferred out of Sainaba's residence and to a new college hostel.[89] Hadiya's lawyers submitted that the two had met through an online Muslim matchmaking site, where Jahan had sent a marriage proposal. The couple's marriage was subsequently solemnized according to Islamic law.[90]

Whether the marriage was a calculated response to Ashokan's, and consequently, the court's, interference in Hadiya's domestic and residency choices, or whether the marriage was primarily a romance affair, is ambiguous and, most importantly, irrelevant. Hadiya has unequivocally testified numerous times that she had married Jahan of her own *accord*, and that despite her father's unsubstantiated insistence that she is due to be transported outside of the country—likely to Syria—she possessed no passport or means or willingness to do so.[91]

Yet, in May 2017, more than a year since the filing of the second petition, the High Court of Kerala annulled the marriage, concluding that "a girl aged 24 years is weak and vulnerable, capable of being exploited in many ways" and that out of concern for "the welfare of a girl of her age," she must be placed under the custody of her father, adding "as per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married."[92] Curiously, the High Court also commented that "her marriage being the most important decision in her life, [it] can . . . be taken only with the active involvement of her parents."[93]

The problem with above arguments is that while the former completely voids the purpose of age of consent to marriage, set by the Prohibition of Child Marriage Act, 2006 at eighteen for women and twenty-one for men,[94] the latter creates a baseless law. Indeed, it is difficult to make legal sense of the reality that a twenty-four-year-old woman's decision to marry has caused national frenzy imploding in a long legal process that ultimately voided the marriage despite no evidence of coercion. Unsurprisingly, the

88. *Hadiya*, at para. 12 (per Misra, C.J., majority opinion).
89. *Id.* at para. 13.
90. Aff. on behalf of Akhlia Asokan @ Hadiya, *supra* note 77, at para. 11.
91. *Id.* at para. 25.
92. *Hadiya*, at paras. 2, 7 (per Chandrachud, J., concurring).
93. *Id.* at para. 14 (per Misra, C.J., majority opinion).
94. The Prohibition of Child Marriage Act, 2006 §§ 2 and 3.

infantilization of Hadiya and, by extension, Hindu(-born) women has been largely overlooked in the press in favor of narratives on love jihad and the inherent fundamentalism of Islam. An editorial for the Indian Express makes a noteworthy exception, however.

Written following the Supreme Court's restoration of Hadiya's marriage in 2018, the editorial's author validly asks: where is the legal dubiousness in an adult woman's marriage to an adult man when the Constitution unambiguously permits it? Though the author celebrates the Supreme Court's decision, they lament that it had to "take 10 months of being shuttled from court to court, of being incarcerated in her parental home against her wishes, of being separated from her husband, for Hadiya's inalienable right to personal freedom to be affirmed."[95] For Indian women, "this has been a disquieting spectacle. They have watched the judiciary endorse a poisonous and patriarchal understanding of the rights of the family over a woman's freedom."[96] Most relevant for the present purposes, the editorial concludes on a wise yet sobering note: if "Hadiya's freedom is to be celebrated . . . her tribulations should be a reminder to the judiciary of the dangerous course that it nearly embarked on."[97]

Perhaps, however, the reasons for the complete disregard of the legality and constitutional guarantee of Hadiya's right to marriage become clear when one considers that within the Hindu nationalist imaginary, this case is not about Hadiya; it is a claim to Hadiya and, by implication, a claim to nationhood. Women's bodies, within this context, constitute the perimeters of the nation, and their framing as such, in turn, justifies their control and supervision. From this patriarchal nationalist perspective, the choices of Hindu-born women in interfaith unions are invalidated on the grounds of incapacity and intellectual deficiency, as was the case with Hadiya's conversion and marriage, or decried as traitorous—a defiling of sexual and national honor, the latter modeled on Padmavati's sacrifice.

It is important to understand here that both the paternalism and the fatherly control validated by the Court not only serve to reimagine Indian Muslim men as sexual predators, and in turn objectifies the Muslim male body as a political weapon. But also, "by conjuring inter-religious relationships as threats to society's wellbeing," these constructs presuppose, and implicitly endorse, "an

95. *Hadiya's Freedom*, Indian Express, https://indianexpress.com/article/opinion/editorials/hadiyas-freedom-5091268 [https://perma.cc/4P6Z-9WXX] (last updated Mar. 9, 2018, 10:05 AM).

96. *Id.*

97. *Id.*

idealized moral order centered on the . . . patriarchal Hindu family with the civic duty to defend Hindu culture and the Indian nation."[98]

The conjunction of marriage and patriotism—that is, the manufacturing of a link between the preservation of the "pure" Hindu family and national interest—dangerously confronts "values like autonomy, secularism, and individualism, which provide a foundation for liberal conceptions of citizenship."[99] Hence, it is unsurprising to see the enactment of so-called anti–love jihad laws coincide with the overall regression of India's secular and democratic governance. Rather, such developments merely signify that the patriarchal family model, necessitated by the love jihad panic, has been adopted by the State, now the grand protector of Hindu sisters and daughters and, thus, the Hindu nation.

What this narrative of guardianship or protection signals for gender relations is grim. The regression of the secularist liberal model of citizenship in favor of the nationalist Hindu model is a gendered crisis as nationhood is, under the latter imaginary, synonymous with the female body. There is nonetheless a glimmer of optimism to be found in the latest chapter of this saga. Though the Supreme Court's ruling and reinstatement of Hadiya's marriage and autonomy is determined in large part on a standard of correctness relating to the courts' *habeas corpus* jurisdiction and the application of the *parens patriae* principle, it also reveals important doctrine on equal citizenship for all sexes. Notably, Justice Chandrachud's concurring opinion orients the discourse away from a disingenuous political debate on the accuracy of love jihad, to a court's obligation to ensure that politics cannot be instrumentalized as a vehicle to infantilize women and consequently extinguish their constitutional rights to union and freedom.[100] The remainder of this Article is dedicated to the analysis of India's apex court's judgment in *Shafin Jahan v. Asokan K.M. and Ors* and its implications for populism and the future of women's rights in India.

B. *Supreme Court Majority Opinion*

While the Supreme Court of India in the BJP era has certainly come under controversy, at the same time, since 2017, there have been a number of judgments that have upheld or enforced women's rights and have set precedents that may prove crucial in resisting

98. David James Strohl, *Love Jihad in India's Moral Imaginaries: Religion, Kinship, and Citizenship in Late Liberalism*, 27 Contemporary S. Asia 27, 29 (2019).

99. *Id.*

100. *Hadiya*, at paras. 17, 21, 24 (per Chandrachud, J., concurring).

the growing authoritarianism witnessed in the country since 2014.[101] It is important to note, however, that the *Hadiya* case's journey before the Supreme Court had not started on a promising note.

The case was heard by a three-judge bench initially headed by Chief Justice Jagdish Singh Khehar. During the hearing process, the Chief Justice had ordered a National Investigation Agency (NIA) inquiry into Hadiya's conversion to determine whether the marriage was in fact the result of love jihad.[102] The controversial order was baffling: the highest court of the land greenlit a profound invasion of a woman's (and, incidentally, a community's) privacy by the executive branch of the State, despite the latter's explicit insistence that she embraced Islam free of coercion and the complete lack of evidence to contradict her statements. More worryingly, the catalyst for this investigation were the submissions of a father alleging love jihad, a conspiracy theory with no credible basis advanced by the Executive, the very entity tasked with conducting the investigation. As discussed above, the sanctioning of such investigations brings into question the functional existence of women's marriage rights where the mere denouncement of their consent by a male relative suffices to justify the investigative intervention of the State.

Ultimately, the NIA's findings would bear no incidence on the Court's final ruling. Chief Justice Khehar would retire during the hearing to be replaced by Chief Justice Dipak Misra.[103] The latter, well aware of the controversial nature of the investigation, would proceed to formulate the majority opinion with no mention of the inquiry other than to note that "the NIA in respect of any matter of criminality may continue in accordance with law. The investigation should not encroach upon their [Hadiya's and Shafin's] marital status."[104] In any case, the report on eleven alleged love jihad marriages concluded that "[a]s far as the NIA is concerned, the matter stands closed as the agency has not found any evidence to suggest that in any of these cases either the man or the woman was coerced to convert," effectively corroborating Hadiya's claims.[105]

101. *See* Shayara Bano v. Union of India, AIR 2017 SC 4609.

102. Order, Criminal Miscellaneous Petition no. 71492/2017 in Special Leave Petition (CRL) no. 5777/2017 (Supreme Court of India Criminal Appellate Jurisdiction, Aug. 20, 2017).

103. *Justice Dipak Misra to be Next Chief Justice of India After JS Khehar Retires*, Hindustan Times (Aug. 8, 2017, 8:35 PM), https://www.hindustantimes.com/india-news/justice-dipak-misra-to-be-next-chief-justice-of-india-after-js-khehar-retires-govt/story-XhkoDzX6Cv8H5Jic4gDS8K.html [https://perma.cc/N9KK-8M4Q].

104. *Hadiya*, at para. 56 (per Misra, C.J., majority opinion).

105. *NIA Finds No Evidence of 'Love Jihad' After Kerala Probe*, The Wire (Oct. 18, 2018), https://thewire.in/politics/nia-love-jihad-kerala-hadiya [https://

The majority's judgment is remarkable in its stern rebuke of the High Court's reasoning. Contrary to the latter, the majority ruling recognizes the respondent's full mental capacity and her choices, referring to her throughout the judgment as Hadiya rather than Akhila. Importantly, it highlights the political colors of the High Court's judgment, writing that "[i]n the instant case, the High Court . . . has been erroneously guided by some kind of social phenomenon that was frescoed before it. The writ court has taken exception to the marriage of the respondent No. 9 [Hadiya] herein with the appellant [Shafin Jahan]"[106] and that the "High Court further erred by reflecting upon the social radicalization and certain other aspects" when "in the instant case, it was absolutely unnecessary."[107] For the majority, the High Court has illegitimately created an exception to constitutional rights out of a mere sense of paranoia, describing the High Court as feeling "perturbed" when "there was nothing to be taken exception to."[108] It adds:

> Initially, Hadiya had declined to go with her father and expressed her desire to stay with the respondent No.7 [Sainaba] before the High Court and in the first writ it had so directed. The adamantine attitude of the father, possibly impelled by obsessive parental love, compelled him to knock at the doors of the High Court in another Habeas Corpus petition whereupon the High Court directed the production of Hadiya who appeared on the given date along with the appellant herein whom the High Court calls a stranger. But Hadiya would insist that she had entered into marriage with him. [. . .] But, the High Court unwarrantably took exception to the same forgetting that parental love or concern cannot be allowed to fluster the right of choice of an adult in choosing a man to whom she gets married. And, that is where the error has crept in. The High Court should have, after an interaction as regards her choice, directed that she was free to go where she wished to.[109]

A key takeaway from the Supreme Court's analysis of parental custodianship as relating to *habeas corpus*, and as shall be discussed below the doctrine of *parens patriae*, is that such principles are submissive to the Fundamental Rights[110] of the Indian Constitution and their application, as such, can only constitute the most restricted exceptions. If the Constitution is understood as, *inter alia*,

perma.cc/6LLN-9DUH].

106. *Hadiya*, at para. 28 (per Misra, C.J., majority opinion).

107. *Id.* at para. 29.

108. *Id.* at para. 28.

109. *Id.*

110. India Const. part III.

a shield against State violation of civil rights or against the majority's persecution of minority or historically disadvantaged groups, such as women, one can easily understand the Supreme Court's bewilderment with regard to the nonchalance by which this particular writ of *habeas corpus* was granted. Indeed, the Court sternly characterizes the High Court's "Non-acceptance of her [Hadiya's] choice"[111] as "wholly fallacious"[112] and "creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights."[113]

Presumably, the fallacy stems from the mootness of constitutional guarantees where fatherly custodianship of an adult is treated as the norm rather than an exception that must meet a specific set of criteria. Indeed, the Supreme Court elaborates:

> If there was any criminality in any sphere, it is for the law enforcing agency to do the needful but as long as the detenue has not been booked under law to justify the detention which is under challenge, the obligation of the Court is to exercise the celebrated writ that breathes life into our constitutional guarantee of freedom.[114]

No doubt, it is difficult to challenge the soundness of the latter statement, but this soundness is contingent on the existence of democratic and restrained executive institutions, notably police forces.[115] The overbreadth and vagueness of anti–love jihad laws serve to grant near unlimited police powers to the relevant state authorities vis-à-vis Muslim men.[116] In such cases, the detention of Muslim grooms is lawful precisely because such laws are enacted within a political context that characterizes interfaith marriages between Muslim men and Hindu women, and the subsequent conversion of the latter, as *necessarily* coerced. I am not convinced, in light of the above, that the Supreme Court, in refusing to stay the ordinances against so-called forced conversions in Uttar Pradesh and Uttarakhand, back in early 2021, has itself steered clear from such circular fallacies.[117]

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111. *Hadiya*, at para. 54 (per Misra, C.J., majority opinion).

112. *Id.* at para. 29.

113. *Id.* at para. 54.

114. *Id.* at para. 29.

115. Amarnath Amarasingam, Sanober Umar, & Shweta Desai, *"Fight, Die, and If Required Kill": Hindu Nationalism, Misinformation, and Islamophobia in India*, 13 Religions 380, 385–86, 406 (2022).

116. *Id.* at 400.

117. *Supreme Court Refuses to Stay 'Love Jihad' Laws in UP, Uttarakhand; Issues Notice*, Hindustan Times (Jan. 6, 2021, 12:59 PM), https://www.hindustantimes.com/india-news/supreme-court-refuses-to-stay-laws-which-punish-marriages-based-on-religious-conversion-issues-notices-to-uttar-

In voiding the impugned order to annul the marriage, the Supreme Court also considered the High Court's invocation of the doctrine of *parens patriae*. Latin for "parent of the nation," *parens patriae* is a public policy doctrine that grants the State the power to intervene against a negligent parent, legal custodian, or informal caretaker, and to assume the responsibility of parenthood of the subject in need of protection. Historically, the doctrine has been applied in cases of children or dependent adults (whether due to a physical impairment or a mental impairment, or both). Indeed, in its survey of the common law jurisprudence on *parens patriae*, the Supreme Court notes that though the definition of *parens* is dynamic, both in time and place—connoting in one jurisdiction the King, while in another the People, etc.—its core is relatively consensual, that is, the State's "legitimate interest . . . in providing care to its citizens who are unable to care for themselves."[118]

In the Supreme Court of Canada's landmark decision, *E. (Mrs.) v. Eve*,[119] where a nine-judge bench unanimously rejected a mother's request to consent to a tubal ligation operation for sterilization purposes to be performed on her mentally delayed daughter Eve, Justice LaForest elaborates that the exercise of *parens patriae* "is founded on necessity."[120] Here, necessity is understood to contrast with relativistic standards such as cultural or religious morality. As such, though the jurisdiction of *parens patriae* cannot be defined and its scope "is carefully guarded and the courts will not assume that it has been removed by legislation," it "must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others."[121]

This shift away from a standard of morality to necessity for the demonstrable best interest of the subject rather than the parent has also been adopted by Indian courts. In *Anuj Garg and Others v. Hotel Association of India and others*,[122] the Supreme Court of India found Section 30 of the Punjab Excise Act, 1914 *ultra vires* Articles 14, 15 and 19(1)(g) of the Constitution to the extent that it prohibits employment of any woman in any part

pradesh-uttarakhand/story-92IFE16wQVhxl02NbZuxcP.html [https://perma.cc/F6TR-HFSL].

118. *Hadiya*, at para. 40 (per Misra, C.J., majority opinion) (citing Heller v. Doe, 509 U.S. 312 (1993)).

119. E. (Mrs.) v. Eve, [1986] S.C.R. 388 (Can.).

120. *Id.* at 389.

121. *Id.*

122. Anuj Garg & Others v. Hotel Ass'n of India & Others, AIR 2008 SC 663 (India).

of such premises, in which liquor or intoxicating drugs are consumed by the public. In its judgment, the Court notes that, in the context of the enactment of Section 30, though the justificatory invocation of the *parens patriae* power of State is not impossible, "it is not entirely beyond the pale of judicial scrutiny . . . *Parens patriae* power has only been able to gain definitive legalist orientation as it shifted its underpinning from being merely moralist to a more objective grounding i.e., utility."[123] It further notes that "the subject matter of the *parens patriae* power can be adjudged on two counts: (i) in terms of its necessity, and (ii) assessment of any tradeoff or adverse impact, if any . . . This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge."[124]

Applying the above reasoning to the facts of the case, the Supreme Court noted that in an era of heightened access to information, adults are well-equipped to assess the security risks of a profession and their best interest, concluding that absent constitutional restrictions, "a citizen of India should be allowed to live her life on her own terms."[125] But it is for its *obiter dicta* that *Anuj Grag* is often lauded as one of India's finest instances of judicial activism. Commenting on the importance of self-determination to integrity and equal citizenship, the Court noted:

> The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to self determination is an important offshoot of gender justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violencefree being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix.[126]

To highlight the disingenuity and counterintuitiveness of the security argument, the Court notes that Section 30 has been enacted within a factual matrix that insufficiently addresses sexual violence, preferring instead to heighten women's security by limiting their presence in the public sphere rather than creating safer public spaces. Specifically, it notes:

> Women would be as vulnerable without state protection as by the loss of freedom because of [the] impugned Act. The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for

123. *Id.* at paras. 27–28.
124. *Id.* at paras. 29–30.
125. *Id.* at para 30.
126. *Id.* at para. 33.

> pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society . . . Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the state as well as law modeling done in this behalf.[127]

There are important parallels to be drawn between the enactment of Section 30 of the Punjab Excise Act, 1914 and the recent avalanche of so-called anti–forced conversion laws. Though such prohibitions are said to advance women's safety and security, it is difficult to be swayed by their purported feminist objectives when their drafters have remained passive to the abysmal state of women's rights in India.[128] In both cases, rather than deprive women of the freedom of employment or marriage, a commitment to the advancement of women's security would have seen legislators enhance access to justice for victims of sexual violence or marital abuse of all faiths, and improve socioeconomic equality among sexes and castes so as to not leave women vulnerable to destitution-driven employment and marriage "choices." Indeed, it is astounding to see that in a country that is home to the largest number of child brides—223 million, or one-third of the global total[129]—it is the union of interreligious adults that has become the object of concern and overzealous regulation.

Returning to the application of the *parens patriae* doctrine to the facts of the *Hadiya* case, the majority concluded that the High Court erred in its exercise of the powers to curtail the freedom and choices of an adult who does not suffer of any kind of mental incapacity and who is "categorical in her submissions and unequivocal in the expression of her choice."[130] *Parens patriae* powers may not be exploited to extinguish individual identity in the name of societal will or customs. While "social values and morals have their space . . . they are not above the constitutionally

127. *Id.* at paras. 35–36.

128. *See, e.g.*, The Wire Staff, *Kerala Opposition Parties Want Sabarimala Temple to Continue Bar on Women From Entering*, The Wire (Oct. 2, 2018), https://thewire.in/rights/sabarimala-temple-entry-women-bjp-congress [https://perma.cc/VWB2-AHQX]; *see also* World Economic Forum, Global Gender Gap Report 2021: Insight Report 10, 18, 19, 27, 31, 36–37 (2021), https://www3.weforum.org/docs/WEF_GGGR_2021.pdf [https://perma.cc/8EWS-N7D9].

129. UNFPA-UNICEF, Global Programme to End Child Marriage: India 2 (2020), https://www.unicef.org/media/111381/file/Child-marriage-country-profile-India-2021.pdf [https://perma.cc/43BC-Q5JJ].

130. *Hadiya*, at para. 52 (per Misra, C.J., majority opinion).

guaranteed freedom. The said freedom is both a constitutional and a human right. . . . Faith of a person is intrinsic to his/her meaningful existence."[131]

In its concluding paragraphs, the majority notes that the Constitution does not merely confer rights, it must also hold institutions accountable for their realization. A liberal application of *parens patriae* that treats Hindu-born adult women as mentally incapable of assessing their best interests, and hence akin to children, deprives them of their individuality as guaranteed by the Constitution:

> Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.
>
> [. . .]
>
> The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept.[132]

C. *Justice Chandrachud's Concurring Opinion*

In a concurring judgment that can only be described as blunt and reprimanding, Justice Chandrachud, though in agreement with the majority on the results, dedicates much of his writing to highlighting the catastrophic implications of the High Court's decision to annul the marriage and grant the writ of *habeas corpus*. These implications operate at two levels: first, with regard to the rule of law and the public's faith in the administration of justice; second, with regard to the sanctioning of the control of women's bodies by male relatives alleging the vulnerability or mental incapacity of the adult female subject with no supporting evidence.

Concerning the former, Justice Chandrachud laments the High Court's curious moralistic investment in alleviating a father's grief over his daughter's marital decision. Specifically, he writes that "[t]he schism between Hadiya and her father may be unfortunate. But it was no part of the jurisdiction of the High Court to decide

131. *Id.* at para. 53.
132. *Id.* at paras. 53–54.

what it considered to be a 'just' way of life or 'correct' course of living for Hadiya. She has absolute autonomy over her person," while courts are expected to be impartial applicators of the law.[133] Mirroring the aforementioned editorial, Justice Chandrachud argues that such a straightforward case should have never proceeded further than Hadiya's appearance before the High Court where she attested that she was not under illegal confinement:

> There was no warrant for the High Court to proceed further in the exercise of its jurisdiction. . . . The purpose of the habeas corpus petition ended. It had to be closed as the earlier Bench had done. The High Court has entered into a domain which is alien to its jurisdiction in a habeas corpus petition.[134]

Moreover, it is clear that the High Court "did not take kindly to" Hadiya's sudden appearance with her spouse during the hearing proceedings without any prior notice.[135] The High Court never elaborates as to why it feels entitled to such information or why the secrecy of the marriage is treated as an indicator of its coerced nature, and this is likely the case because such an entitlement is legally baseless and largely moralistic. To put it bluntly, "[h]ow Hadiya chooses to lead her life is entirely a matter of her choice. The High Court's view of her lack of candour with the court has no bearing on the legality of her marriage or her right to decide for herself, whom she desires to live with or marry."[136] To the extent that the laws of the land grant an adult the right to marry a consenting adult, the timing and legal solemnization of the union is to be selected by the future spouses, and a bride's lack of consultation with her parents in her marital affairs cannot constitute a ground upon which the legality of her marriage is questioned.

In a bizarre attempt to force a father's conceptualization of the good life onto his adult daughter, the High Court has transgressed its *habeas corpus* jurisdiction and, in the process, undermined its status as an apolitical adjudicator and guardian of civil and constitutional rights. The *Hadiya* case is a disturbing instance of a court cannibalizing age of consent and marriage laws, as well as Fundamental (constitutional) Rights, merely to push a political outcome in line with its conviction of what constitutes the good Hindu daughter.

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133. *Id.* at para. 16 (per Chandrachud, J., concurring).
134. *Id.*
135. *Id.*
136. *Id.*

D. *Thinking Beyond* Hadiya

If the above signals a procedural crisis and the erosion of a justice mechanism for those whose way of life falls short of the moralistic visions of the judiciary, it should be noted that such bodily control has been disproportionately felt by women, in large part because women's bodies are perceived as an extension of male and communal honor and morality. The transformation of women's body as *public* moral property is at the heart of Justice Chandrachud's second critique of the High Court's annulment of the marriage, namely that the High Court has approached Hadiya's marriage as a family decision, headed by the patriarch, rather than a purely personal choice. Specifically, Justice Chandrachud writes:

> The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme.[137]

Here the toxicity of anti-conversion politics is made clear: the State, in interfering in women's marriage autonomy, is capitalizing on an existing framework of male guardianship, proprietorship and control. Historically, women's romantic and sexual autonomy has largely been constrained by masculinist norms of family (or community) honor, which requires a complete annexation of women's privacy by patriarchs (ironically transforming women into public property). The effect is to usher in the transformation of the State, and its institutions, including courts, as the protective brother of the sisters and daughters of the Hindu nation.

It is important to pause and consider the implications, at a national and personal scale, of this idealized Hindu family on women. Anti–love jihad politics frame the State as a Godfather of Hindutva—a hero who is commendably defending India from an illusionary watershed of invaders. Honorable sisters see their citizenship and allegiance to the Hindu nation measured according to their social and biological reproduction and contribution

137. *Id.* at para. 19.

to its population. Gone is the recognition of women's multiple subjectivities in religion, culture, and citizenship. Relatedly, as we can situate anti-conversion politics squarely within the global context of right-wing nationalism, Muslims and minorities, too, are deprived of dual or multiple identities—that is, the acknowledgement that one can be both Muslim and Indian. Instead, the narrative inherently demonizes Muslims as the Others who seek to spread within and overtake the Indian body and must hence be pushed out at all costs.

Most importantly, it is a blow to the subjective Indian identity as a whole. As Justice Chandrachud argues:

> Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.[138]

And yet, with the incessant roll out of anti-conversion statutes, it appears that society, understood as the political majority, has become the final verdict bearer of marital identity. What this means for India's future as a secular democracy is not entirely certain, though all the signs point to a bleak future. As Justice Chandrachud alludes, it is difficult to see how a secular democracy can survive in an environment where the State, as an extension of the patriarchal sphere, becomes the *judge* of one's choice to practice, or not, a particular faith. He notes that "whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere."[139] Given the stark contrast between the Supreme Court's loyalty to the Constitution and legislatures' blatant disregard thereof, the pressing question becomes how long can the Supreme Court withhold from being called to offer relief against democratically enacted anti-love jihad laws firmly rooted in a divisive political terrain?

138. *Id.* at para. 21.
139. *Id.*

V. Conclusion

Though purported to be neutral, anti–love jihad laws and the Citizenship Amendment Act are not about administrative regulations of national security and marriage or the citizenship granting process—they are about the current abandonment of women's and minorities' rights by the State, which, in abiding to a fictional conspiracy and capitalizing on masculinist notions of nationalism and honor, leaves them incapable of accessing rights enjoyed by Hindu men. It is not merely a question of treating Muslims and women in India as second-class citizens—this is also about leaving said groups *stateless*, as the latter have no claim to the protection of the State in the private sphere, while the former are directly endangered by the State by virtue of their minority political representation.

It is important to note, however, that for both Indian women and Indian Muslims, the discrimination and subjugation they experience have largely been related to the State's definition of nationhood and Indian-*ness*. Particularly, as Hindu women's sexuality is rendered indissociable from the prosperity of Hindutva, their freedoms are appropriated by male relatives or the masculinist State. Though it may be premature to declare the death of democracy in India, the backsliding of democratic institutions in the country has grabbed international headlines and figures prominently in scholarship since 2019.[140] Yet, little attention has been paid to the strategic weaponization of Hindu women's bodies in the creation of the narrative of Hindutva under threat and the demonization of ethnic and religious minorities, particularly Muslim Indians. A reorientation from the present dangerous path, both in academia and in practice, is unlikely to be fruitful without factoring in the role of patriarchal honor in the BJP's and related parties' success.

What is certain is that, absent an urgent and effective sociopolitical retrospection, anti-love jihad laws are unlikely to be the last of their kind. On the contrary, they merely foreshadow a more sophisticated mechanism of citizenship and rights rollback for minorities and women. It is time for India to assess the dangers

140. *See, e.g.*, Ashutosh Varshney, *How India's Ruling Party Erodes Democracy*, 33 J. Democracy 104, 104–18 (2022); Sarah Repucci & Amy Slipowitz, The Global Expansion of Authoritarian Rule 8, 16 (Freedom House, 2022) https://freedomhouse.org/sites/default/files/2022–02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf [https://perma.cc/P9H7-T73V]; V-Dem Institute, Autocratization Turns Viral: Democracy Report 2021 6, 9, 14, 19, 20–22, 31 (2021), https://www.v-dem.net/documents/12/dr_2021.pdf [https://perma.cc/PRQ8-AYF2].

of its present trajectory, for the losses of this path far exceed its gains. It is time to reminisce on the constitutionalist and international human rights legal principles that held a pluralist India together despite the skepticism of many, both within the country and beyond. The chauvinistic ultra-right nationalism of the ruling party has succeeded so far in large part because it has sold the myth that the erosion of secular democracy for one group shall not entail consequences for the dominant groups. But this narrative grossly misunderstands constitutions; where a constitution is rendered moot to one citizen, it is rendered moot to *all* citizens. And *that's* what love's got to do with it.