

POPULISM IN THE WORLD'S LARGEST DEMOCRACY: WHITHER MINORITY RIGHTS IN INDIA?

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I INTRODUCTION

Recent political developments in Asia, Europe and America have rekindled debate around the term 'populism'. Although having existed for a long time, the term has been successful in evading conceptual clarity. Over the years, there have developed different strands of populism with some of the most popular being populism as a political strategy, as an ideology and as a discursive style.¹ Additionally, the term has been variously applied to imply political movements, parties, attitudes and policies. However, a common trend that emerges from the study of different kinds of populism is the creation of an existential crisis in the minds of the people.² The basis of such a framework rests on the creation of two homogeneous and antagonistic groups in the form of 'friend' and 'foe' in society.³ Populists use the weapon of 'perceived or imagined danger' that presumably threatens the social structure, values and customs of the people.⁴ It attempts delegitimization of the ruling dispensation who are the corrupt elites of the country and who have robbed the common folk of their wealth,

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¹ Michael Oswald, *The Palgrave Handbook of Populism* (Springer Nature 2021).

² Jan-Werner Müller, *What Is Populism?* (Penguin UK 2017).

³ C Mudde and CR Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017) <<https://books.google.co.in/books?id=QFrODQAAQBAJ>>.

⁴ Catarina Kinnvall, 'Populism, Ontological Insecurity and Hindutva: Modi and the Masculinization of Indian Politics' (2019) 32 *Cambridge Review of International Affairs* 283.

culture and prosperity. Accordingly, it demands action to deal with the impending crisis and thereby calls for support for populist leaders/parties.⁵

A characteristic example of populism in North America is found in Donald Trump's presidential campaign. The former US President minced no words in blaming the Democrats for the state of affairs.⁶ He systematically and persistently targeted the 'open borders' policy of the corrupt elites that allowed Mexican immigrants to bring crime and drugs and Muslim immigrants to commit terrorist attacks in America. Thus, invoking fears of a threat to the American people and arousing feelings of "us" versus "them".⁷ Following Cas Mudde's interpretation of populists who redefine 'people' as honest and virtuous and certain sections of the population as 'others',⁸ Donald Trump labelled Americans as peace-loving and law-abiding citizens against immigrant criminals and foreign terrorists. He claimed to be speaking on behalf of ordinary Americans who are disgusted with the incompetent dispensation, arrogant intellectuals and liberals' politics.⁹

The surge of populism is not exclusive to America. Lately, Europe has been caught in the crosswinds of populist movements. Some of the prominent among them are the Brothers of Italy (Fdl), Hungary's President Viktor Orban's Fidesz party, Poland's ruling Law and Justice Party (Pis), and France's National Rally party. Unlike its Latin American counterpart, the populism in Europe is largely of right-wing character. In contrast to its calls for inclusivity, right-wing populism attempts to exclusion of persons who are not the "people" of the nation. In this regard, several scholars¹⁰ have pointed to the anti-pluralist attitude of the populists towards sections of people which they label as "others". Its conception of a homogeneous population leaves little space for diversity and plurality. The question of minorities challenges the idea of a homogenous state and pure people and therefore minorities are the ideal targets.¹¹

As such, just like the American populism, Europe's populist leaders have aroused anti-immigrant sentiments among the people and called for a closed economic structure. The singling out and targeting of minorities is ubiquitous in Europe's

⁵ D Stockemer, *Populism Around the World: A Comparative Perspective* (Springer International Publishing 2018) <<https://books.google.co.in/books?id=Q3hvDwAAQBAJ>>.

⁶ DJ Trump, *Crippled America: How to Make America Great Again* (Threshold Editions 2015) <<https://books.google.co.in/books?id=xX07tQEACAAJ>>.

⁷ Michael Kazin, 'Trump and American Populism: Old Whine, New Bottles' (2016) 95 *Foreign Affairs* 17.

⁸ Mudde and Kaltwasser (n 3).

⁹ Ronald Inglehart and Pippa Norris, 'Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash' [2016] SSRN Electronic Journal <<https://www.ssrn.com/abstract=2818659>> accessed 7 January 2024.

¹⁰ Nadia Urbinati, 'The Populist Phenomenon' (2013) 51 *Raisons politiques* 137; Takis S Pappas and Hanspeter Kriesi, 'Populism and Crisis: A Fuzzy Relationship' [2015] *European populism in the shadow of the great recession* 303; Stefan Rummens, 'Populism as a Threat to Liberal Democracy'; Koen Abts and Stefan Rummens, 'Populism versus Democracy' (2007) 55 *Political studies* 405.

¹¹ David Turton and Julia Gonzalez, *Cultural Identities and Ethnic Minorities in Europe* (Universidad de Deusto 1999).

populist movements. Antony Alcock, who has traced the historical relationship of minorities to Europe, characterises the present state as that of hostility and othering of minorities.¹² Not surprisingly, the question of immigration, refugees and minorities has assumed centre stage in Europe's political discussions. While some scholars¹³ have traced the increased acceptance of exclusionary policies to recent economic challenges faced by the European Union (EU) others¹⁴ see it as a colonial legacy. Whatever underlies the exclusionary policies of Europe's populist leaders, there is little doubt that minorities are the scapegoat in this game.

II RISE OF POPULISM IN INDIA

On October 31st, 2018, in a grand ceremony held on the banks of the Narmada River, the world's tallest statue was unveiled in the world's largest democracy. Unveiled by India's Prime Minister, Mr Narendra Modi, the statue is of none other than the "Iron Man of India," Sardar Vallabhbhai Patel.¹⁵ But there is a reason why the statue stands taller than other stalwarts like Mahatma Gandhi or Jawaharlal Nehru. For one, Gandhi and Nehru are not regarded as true patriots by Hindu nationalists (many of them regard Gandhi and Nehru as responsible for the division of the country).¹⁶ Second, as a pro-Hindu leader, the statue is symbolic of the Hindu populist ideology of the Sangh Parivar¹⁷ in general and Narendra Modi in particular.¹⁸ Although, the current Indian populism has been epitomised by Modi, the roots of populism in India lay deeper. The present section will analyse the rise of populism in India and its historical background.

Come 2014 and there was a change of fervour and colour of the Indian Republic. From celebrating cultural diversity to the preservation of cultural homogeneity and from inclusive polity to the saffronisation of institutions, the year 2014 marked a decisive moment in India's political history. It was not only that one of the main opposition parties in the country has won general elections, but has also won the

¹² Antony Alcock, *A History of the Protection of Regional Cultural Minorities in Europe: From the Edict of Nantes to the Present Day* (Springer 2000).

¹³ Ruth Wodak, Brigitte Mral and Majid KhosraviNik, *Right-Wing Populism in Europe: Politics and Discourse* (A&C Black 2013); Ayhan Kaya, *Populism and Heritage in Europe: Lost in Diversity and Unity* (Routledge 2019).

¹⁴ Sharon Pardo and Hila Zahavi, *The Jewish Contribution to European Integration* (Rowman & Littlefield 2020).

¹⁵ Abhishyant Kidangoor and Kevadiya Colony, 'India Unveils the World's Tallest Statue Amid Controversy' (*TIME*, 31 October 2018) <<https://time.com/5434131/worlds-tallest-statue-unity-india-patel/>> accessed 10 March 2024.

¹⁶ Sammyh S Khan and others, 'Lessons from the Past for the Future: The Definition and Mobilisation of Hindu Nationhood by the Hindu Nationalist Movement of India' (2017) 5 *Journal of Social and Political Psychology*.

¹⁷ Sangh Parivar is a loosely organised affiliate network of pro-Hindu and ultra-nationalist organisations that primarily include the RSS, BJP, Bajrang Dal, Vishwa Hindu Parishad and Shiv Sena.

¹⁸ AG Noorani, 'Patel's Communalism—A Documented Record' (*Frontline*, 27 November 2013) <<https://frontline.thehindu.com/cover-story/patels-communalisma-documented-record/article23559347.ece>> accessed 10 March 2024.

elections with a landslide victory, a complete majority in the lower house of the Parliament. From a mere 2 seats in 1984 to 282 in 2014, the Bharatiya Janata Party or BJP has come a long way and in a very strong manner.¹⁹ As a pro-Hindu political party, BJP started off as Bharatiya Jana Sangh (BJS) in 1951 as a political affiliate of Rashtriya Swayamsevak Sangh (RSS).²⁰ Advocating Hindutva, an ideology that considers Indian culture in terms of Hindu values and staunchly calls for the creation of a Hindu nation, the party sought to garner Hindu votes in the name of Hindu religion. However, it could not secure to form a government until 1999 only losing to Congress again 2004 and 2009.²¹

The stupendous resurgence of BJP in the present times after setbacks in 2004 and 2009 is largely attributable to its charismatic leader, the current Prime Minister of India, Mr Narendra Modi. Several scholars²² point to his populist style of presentation and governance as the reason behind the massive electoral victories of the BJP, which the party has never seen in its odd 40-year history. However, the real reasons behind the resounding rise of the BJP lay deeper. A spate of corruption scandals, insensitivity towards the common man and weak Congress leadership²³ gave the BJP the much-needed opportunity to tap into people's disappointment. The party promised what the people were looking for and gave it a religious fervour.²⁴

BJP's governance style under PM Modi portrays twin essential elements of populism: anti-elitism and anti-pluralism.²⁵ An analysis of BJP's election campaign points to the regular calls to the people to elect a leader who truly represents them and replaces the dynastic and corrupt Congress government.²⁶ The use of words like 'brother,' 'sister,' 'friend,' and 'mother' repeatedly by Mr Modi reflects populist-style direct connectivity with the people.²⁷ The party's anti-elitist approach is further reflected in its call for the end of dynastic politics in India and removing the corrupt

¹⁹ Pradeep Gaur, 'BJP's Journey from Two Seats in LS in 1984 to Winning Two Back-to-Back Majority' (*mint*, 23 May 2019) <<https://www.livemint.com/elections/lok-sabha-elections/bjp-s-journey-from-just-two-seats-in-lok-sabha-in-1984-to-winning-two-back-to-back-majority-1558614968935.html>> accessed 10 March 2024.

²⁰ RSS is a non-political Hindu nationalist paramilitary organization founded in 1925 by K.B Hedgewar that is the main forebearer of Hindutva ideology.

²¹ Lars Tore Flåten, *Hindu Nationalism, History and Identity in India: Narrating a Hindu Past under the BJP* (Routledge, 2016) (*'Hindu Nationalism, History and Identity in India'*).

²² Subir Sinha, "'Strong Leaders", Authoritarian Populism and Indian Developmentalism: The Modi Moment in Historical Context' (2021) 124 *Geoforum* 320; Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton University Press 2021); Paula Chakravartty and Srirupa Roy, 'Mr. Modi Goes to Delhi: Mediated Populism and the 2014 Indian Elections' (2015) 16 *Television & New Media* 311; Pradeep Chhibber and Rahul Verma, 'The BJP's 2014 Modi Wave: An Ideological Consolidation of the Right' [2014] *Economic and Political Weekly* 50.

²³ Mohan Singh Saggi, 'Nationalism And Emergence Of BJP In India: A Critical Analysis' (2023) 34 *Journal of Namibian Studies: History Politics Culture* 2382.

²⁴ Raja M Ali Saleem, 'Hinduism, Hindutva and Hindu Populism in India: An Analysis of Party Manifestos of Indian Rightwing Parties' (2021) 12 *Religions* 803.

²⁵ Johannes Plagemann and Sandra Destradi, 'Populism and Foreign Policy: The Case of India' (2019) 15 *Foreign Policy Analysis* 283.

²⁶ Chakravartty and Roy (n 19).

²⁷ Jean-Thomas Martelli and Christophe Jaffrelot, 'Reading Modi, through His Speeches' *Indian Express* (2017).

elite. The party has projected and targeted the Congress party, leftists, English media and academicians as “elites”. At the same time, the party has recharacterized the definition of the “people,” “elite” and the “other”. It has depicted the Hindu community as the people of the country, while the minority community especially the Muslim minority along with illegal immigrants have been labelled as the “other”.²⁸

However, populism is not new to India. Narendra Subramanian²⁹ traces the apparent origins of populist forces in modern India to the Father of the Nation, Mahatma Gandhi's anti-modernist rhetoric. However, populism became prominent only during the reign and under the leadership of Prime Minister Indira Gandhi. Ms Gandhi combined anti-elitist rhetoric with her popular poverty alleviation schemes to build a base among the masses.³⁰ At this point, it is important to note that during the same time, some local parties effectively utilised populist style to bring forth lower caste movements³¹ and gain power.³² However, what distinguishes Modi's populism is its complete negation of religious pluralism as part of body politic. His party's traditional anti-minority rhetoric has helped Mr Modi in building his populist style which scholars refer to as Hindu populism.³³ In fact, Modi's populist ideology is firmly grounded in the Hindutva framing of the Indian minority Muslims as antagonistic to Indian Hindu culture.³⁴ The characterisation of Indian Muslims as foreign invaders and Hindus as people of the land aims to create a homogenised Indian population on the basis of religion against the common enemy: minority Muslims. The painting of historical events in black and white further legitimises the cause of the Hindutva i.e., the creation of an exclusive homeland for the Hindus. Whereas the truth is far from reality. In reality, historically, the battles have been mostly fought along expansionist lines rather than religious lines. This is manifested in the support by both Hindus and Muslims to kings and emperors.³⁵

During this time, the party has been quite effective in targeting minorities and polarising people in the country. The populist's symbolic creation of an existential crisis is manifested by the party's claim of an overpopulous Muslim population together with claims of Islamisation of India. It is important to note here as rightly

²⁸ Duncan McDonnell and Luis Cabrera, 'The Right-Wing Populism of India's Bharatiya Janata Party (and Why Comparativists Should Care)' (2019) 26 *Democratization* 484.

²⁹ Narendra Subramanian, 'Populism in India' (2007) 27 *The SAIS Review of International Affairs* 81.

³⁰ Louise Tillin and Christophe Olivier Jaffrelot, 'Populism in India', *Oxford Handbook of Populism* (Oxford University Press 2017).

³¹ Subramanian (n 26).

³² Gerard Heuze, 'Populism, Religion, and Nation in Contemporary India: The Evolution of the Shiv Sena in Maharashtra' (2000) 20 *Comparative Studies of South Asia, Africa and the Middle East* 3.

³³ Saleem (n 21).

³⁴ Prashant Waikar, 'Reading Islamophobia in Hindutva: An Analysis of Narendra Modi's Political Discourse' (2018) 4 *Islamophobia Studies Journal* 161.

³⁵ Kalim Siddiqui, 'Hindutva, Neoliberalism and the Reinventing of India' (2017) 4 *Journal of Economic and Social Thought* 142; Thomas Blom Hansen, 'Bridging the Gulf: Global Horizons, Mobility and Local Identity among Muslims in Mumbai' [2001] *Community, empire and migration: South Asians in diaspora* 261.

pointed out by Raja Saleem³⁶ that Modi's populism differs from its European counterpart to the extent that it is religious in character. As a thin-centred ideology, the combination of religion with populism has offered immense scope for growth and political mileage to both Modi and the BJP. The divisive nature of religious politics has provided the much-needed fuel to kindle religious populism in India.

III SECULAR CREDENTIALS OF THE MODI GOVERNMENT

Given the fact that Modi's populism is deeply rooted in the anti-Muslim rhetoric of the Sangh Parivar, it will not be wrong to refer it as Religious Populism.³⁷ To that end, the secular credentials of the Modi government and the state itself become questionable. Prof. Rajeev Bhargava has aptly brought out the values or characteristics of a secular state. According to Prof. Bhargava, religious liberty is an important value of a secular state and with religious equality, it forms a crucial whole in the religious sphere.³⁸ Since a secular state is committed to establishing general liberty and equality, the state is bound by the doctrine of equal citizenship. Further in the modern state, the benefits of citizenship are not limited to physical security but rather extend to material well-being including education and healthcare. Such benefits are simply an extension of the freedom of religious liberty making them equally available to all.³⁹ The constitution of India⁴⁰ guarantees equality of citizenship in the form of equality before the law (Article 14), non-discrimination (Article 15) and equality of opportunity (Articles 16 and 29(2)). As such, a secular state is bound to observe and guarantee the benefits of equal citizenship and therefore any interference in religious affairs shall be held to violate the core values of secularism.⁴¹

Herein, it is noteworthy to examine the nature of Indian secularism which is distinct from its Western counterpart. Western secularism is based on the idea of complete divorce of the state from religion.⁴² For the sake of religious liberty, Western secularism demands the complete exclusion of religion from state affairs and state conduct.⁴³ On the contrary, the Indian constitution does not create a wall of separation. Rather, the state has been endowed with powers to interfere with and regulate religious practices. This is evident from the combined reading of Articles 17, 25(2)(b) and 30(2) of the Indian constitution. These provisions symbolise a significant departure from the Western form of secularism.⁴⁴ Thus, unlike its Western counterpart, the Indian state can interfere in religious affairs to the extent it is necessary

³⁶ Saleem (n 21).

³⁷ Efe Peker, 'Religious Populism, Memory, and Violence in India' (2019) 17 *New Diversities* 23.

³⁸ Rajeev Bhargava, 'The Distinctiveness of Indian Secularism', *The Future of Secularism* (Oxford University Press 2006).

³⁹ *ibid.*

⁴⁰ The Constitution of India, 1950.

⁴¹ Bhargava (n 35).

⁴² Donald Eugene Smith, *India as a Secular State*, vol 2231 (Princeton University Press 2015).

⁴³ *ibid.*

⁴⁴ Bhargava (n 35).

for bringing about suitable reforms or supporting minority educational institutions. Such interference or regulation owes its legitimacy to reasonable restrictions against religious practices provided in the constitution in the form of public order, morality, health and other provisions relating to fundamental rights. Any restriction on religious rights must meet the requirements of reasonability.⁴⁵

Thus, constitutional safeguards require the imposition of reasonable restriction wherein the state is duty-bound to reveal the reasons behind restrictions or interference in religious freedoms.⁴⁶ Circumventing any of the reasonability requirements poses a direct threat to minority rights in general and religious freedom in particular. It further endangers the secular character of the Indian polity.⁴⁷ After 2014, secularism in India has taken a backseat with explicit state promotion of a particular religion at times at the cost of others.⁴⁸ From a ban on cow slaughter⁴⁹ to stopping state aid to madrassas⁵⁰ to rechristening Muslim-named places,⁵¹ Modi's populism has degraded India's secularism. In several instances, right-wing groups⁵² and members of the ruling BJP⁵³ have openly called for the establishment of a Hindu Rashtra in India.⁵⁴

In a more direct assault on religious freedom, several right-wing groups supported and backed by the state have objected to and interfered in prayers by Muslims in open spaces.⁵⁵ Instances of protests against open praying by Muslims have come mostly

⁴⁵ Triloki Nath Madan, 'Indian Secularism: A Religio-Secular Ideal', *Comparative secularisms in a global age* (Springer 2010).

⁴⁶ James Andrew Huff, 'Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws' (2008) 10 Rutgers JL & Religion 1.

⁴⁷ *ibid.*

⁴⁸ Christophe Jaffrelot, 'Indian Secularism and Its Challenges', *Forms of Pluralism and Democratic Constitutionalism* (Columbia University Press 2018).

⁴⁹ Suhrit Parthasarathy, 'Modi Government's Cattle Slaughter Ban Is Brazenly Unconstitutional' (*The Wire*) <<https://thewire.in/politics/modi-cattle-slaughter-ban-unconstitutional>> accessed 10 March 2024.

⁵⁰ Asad Rizvi, 'UP Government Ends Honorarium to Madrasa Teachers, Move to Adversely Affect 1 Million Students' (*TheWire*) <<https://thewire.in/education/up-government-ends-honorarium-to-madrasa-teachers-move-to-adversely-affect-1-million-students>> accessed 10 March 2024; Ashish Srivastava, 'Central Govt Stops Scholarship for Madrasa Students in Classes 1 to 8' (*India Today*) 8 <<https://www.indiatoday.in/education-today/news/story/central-govt-stops-scholarship-for-madrasa-students-2302576-2022-11-28>> accessed 10 March 2024.

⁵¹ Sanjay Pandey, 'Wards with Muslim Names Rechristened in Yogi Adityanath's Home Town Gorakhpur' (*Deccan Herald*) <<https://www.deccanherald.com/india/wards-with-muslim-names-rechristened-in-yogi-adityanaths-home-town-gorakhpur-1141887.html>> accessed 10 March 2024.

⁵² Eviane Leidig, 'Hindutva as a Variant of Right-Wing Extremism' (2020) 54 *Patterns of Prejudice* 215.

⁵³ Special Correspondent, 'Haryana BJP MLA Vows to Make India a "Hindu Rashtra"' *The Hindu* (2 May 2022) <<https://www.thehindu.com/news/national/other-states/haryana-bjp-mla-vows-to-make-india-a-hindu-rashtra/article65375610.ece>> accessed 3 February 2024.

⁵⁴ Nikita Sud, 'Reform, Revival and the Call for Hindu Rashtra' in Nikita Sud (ed), *Liberalization, Hindu Nationalism and the State: A Biography of Gujarat* (Oxford University Press 2012) <<https://doi.org/10.1093/acprof:oso/9780198076933.003.0006>> accessed 10 March 2024.

⁵⁵ Ziya Us Salam, 'Targeting Namaz: Hindu Right Wing Outfits Obstruct Muslim Worshippers in Gurugram' [2021] *Frontline* <<https://frontline.thehindu.com/the-nation/communalism/targeting-namaz-hindu-right-wing-outfits-obstruct-muslim-worshippers-in-gurugram/article37515153.ece>> accessed 3 February 2024.

from Gurugram, an industrial hub located on the outskirts of the national capital. But the calls for the ban are not limited to fringe elements. The state too has supported the ban with intentions to prohibit it through a law.⁵⁶ It is noteworthy, however, that such restrictions have no place in India's democratic constitution⁵⁷ that guarantees freedom of religion and expression. Besides, religious and cultural practices have been performed publicly in India since time immemorial. As such any state restriction will have to meet the requirement of reasonable restrictions in the interest of public order, morality, health and other fundamental rights. A blanket ban on open praying, to that extent, vitiates constitutional guarantees on religious freedom and minority rights.

IV THE RISE OF POPULISM AND THE DECLINE OF MINORITY RIGHTS IN INDIA

The Constitution of India identifies minorities on two grounds: language and religion.⁵⁸ The Government of India has recognised six communities as minority communities: Muslims, Sikhs, Christians, Buddhists, Jain and Zoroastrians (Parsis). Thus, the determination of minorities at the national level has been done on the basis of religion. Whereas, states have been endowed with the power to determine linguistic minorities in their respective jurisdictions. Interestingly, however, the Constitution of India nowhere defines the term "minority" and has been left for the courts to decide.⁵⁹ In a number of cases,⁶⁰ the court has taken the numerically inferior definition as the guiding criterion to define minorities. However, ambiguities remain. The judgment of the Supreme Court in *T.M.A. Pai Foundation vs State of Karnataka*⁶¹ has specified the State and not the whole of India as the geographical entity for determining the minority status under Article 30. The court has however not clarified how states carved on a linguistic basis can be the unit for identifying religious minorities.⁶²

The Constitution of India guarantees a number of minority rights in the form of fundamental rights to its minority citizens. Article 14, along with its associated rights, Articles 15 and 16 guarantees non-discrimination and equal legal status to minorities. Crafted in a negative language, they only protect minority rights indirectly. The true nature and the scope of minority rights in India is identifiable from the debates of the

⁵⁶ Dawn.com, 'Offering Namaz in Open Spaces Will Not Be Tolerated: Chief Minister of India's Haryana State' (*DAWN.COM*, 14:47:53+05:00) <<https://www.dawn.com/news/1663194>> accessed 3 February 2024.

⁵⁷ SN Sahu, 'Denying Muslims the Opportunity to Offer Namaz in Open Violates Cultural Liberty' (*The Wire*) <<https://thewire.in/communalism/denying-muslims-the-opportunity-to-offer-namaz-in-open-violates-cultural-liberty>> accessed 10 March 2024.

⁵⁸ D Das Basu, *Human Rights in Constitutional Law* (Prentice-Hall of India 1994) <<https://books.google.co.in/books?id=GfMwAAAACAAJ>>.

⁵⁹ Manoj Kumar Sinha, 'Minority Rights: A Case Study of India' (2005) 12 *International journal on minority and group rights* 355.

⁶⁰ *In re Kerala Education Bill, 1957* [1959] 1SCR995; *Aldo Maria Patroni And Anr. vs E.C. Kesavan And Ors.*, AIR [1965] KER7

⁶¹ *T.M.A. Pai Foundation and Ors vs State of Karnataka and Ors* [1994] AIR 2372

⁶² Ranu Jain, 'Minority Rights in Education: Reflections on Article 30 of the Indian Constitution' (2005) 40 *Economic and Political Weekly* 2430.

Constituent Assembly. The Constituent Assembly recognized both individual as well as group rights.⁶³ These were crafted in the form of individual freedom of conscience and free profession, practice and propagation of religion under Article 25 of the Constitution. Whereas, group rights were identified as cultural and educational rights of minorities under Articles 29 and 30 of the Constitution.⁶⁴ Read together, Articles 25 to 30 lays down a series of rights in favour of and for the development of Indian minorities. The following section shall discuss various religious and minority rights in light of their dilution following the rise of populism in India.

A. *Erosion of Religious Freedom*

In a country like India where religion and caste are the major driving issues, it is impossible to think of a democratic constitution devoid of religious freedoms. Article 25 of the Indian constitution grants the freedom of conscience and free profession, practice and propagation of religion. Importantly, the freedom to propagate one's religious beliefs forms the core and a recognised religious right. However, the issue of religious conversion has complicated the exercise of this right.⁶⁵ For a long time, the raging debate over the genuineness of conversions has engulfed India. This has enabled many States in India to come up with 'Freedom of Religion Acts' that limit religious conversions and penalise conversions effected through fraud, misrepresentation or allurement. Many scholars⁶⁶ point to the inconsistent nature of these legislations with the constitutional guarantee of free profession and propagation and secular character of the Indian polity.

Secular democracies are rooted in the idea of 'minimal State intervention in religious affairs'.⁶⁷ India's secularism is different from its Western counterpart wherein the state is not completely divorced from religion. Rather the state respects and maintains a healthy relationship with all religions. At the same time, the state does not promote and has any religion of its own. Any deviation from this principle is tantamount to disturbing the constitutional ethos of a secular democratic republic and cannot be justified on grounds of a novel form of secularism. The idea of a novel form of secularism loses steam when there is nothing left of secularism.⁶⁸ Religion as a private affair must be left to the individuals unless the State considers its subjects dumb

⁶³ Speeches during the discussion of the Objectives Resolution; for instance, Shri Purushottamdas Tandon, CAD, I, pp. 66–7; Vijayalakshmi Pandit, CAD, II, p. 261.

⁶⁴ Rochana Bajpai, 'Minority Representation and the Making of the Indian Constitution' [2008] *Politics and ethics of the Indian constitution* 354.

⁶⁵ Sarah Claerhout and Jakob De Roover, 'Religious Freedom and the Limits of Propagation: Conversion in the Constituent Assembly of India' (2019) 10 *Religions* 157.

⁶⁶ Irfan Ahmad and Peter van der Veer, 'Muslim Bare Life in Contemporary India', *The Nation Form in the Global Age: Ethnographic Perspectives* (Springer International Publishing 2022); Huff (n 43); Laura Dudley Jenkins, 'Legal Limits on Religious Conversion in India' (2008) 71 *Law and Contemporary Problems* 109.

⁶⁷ Ayelet Harel-Shalev and Noa Levy, 'Some "Side Effects" of Religious Diversity: Exploring Religious Conversion in the Indian Secular State', *Religious Diversity in Asia* (Brill 2019).

⁶⁸ Himanshu Shekhar Mishra, 'Conversion: A Point of Confusion for Secularists and Others', *Secularism Under Siege* (Routledge 2023).

and devoid of logical understanding. Also, the argument⁶⁹ that conversion in itself amounts to a denial of religious freedom falls flat in the face of a change of heart of a person,⁷⁰ a reflection of his/her personal belief and autonomy and constitutional limitations against its interference. The argument that anti-conversion laws are neutral in their application can hardly be justified. Propagation and conversion form the core of the minority religions in India i.e., Islam and Christianity, unlike Hinduism.⁷¹

Although anti-conversion laws have existed in India since the 1930s, the populist rhetoric of the Modi government in the form of “us” versus “them” has narrowed down the conversion space in the country. Besides, fraud or allurement, the BJP-ruled states like Uttar Pradesh, Madhya Pradesh and Himachal Pradesh have added new grounds for invalidating and penalising conversions. For instance, taking strong exception to conversions for marriage, the new laws prohibit and ban conversions on account of marriages. These laws significantly increase the penalties in cases of violation with vague definitions and explanations. Besides, the new laws shift the burden of proof on the accused and declare such marriages null and void in case of non-fulfilment of various requirements of prior notice and disclosure.⁷² Although the right to propagate one’s religion does not include the right to convert,⁷³ the ultimate effect of anti-conversion laws is the denial of minority’s right to exercise their right of religious propagation,⁷⁴ a tenet close to both Christian and Muslim minorities.

B. *Encroachment of Religious Spaces*

Another minority right that has come under a lot of pressure lately is the associated right to freely practice one’s religion. For more than 300 years, the Mughals, who were Muslims, ruled over India and constructed many religious and historical monuments. Some of these monuments are alleged to be built on the ruins of Hindu temples and structures. However, that is only one side of the story. Many scholars point to the building and funding of Hindu temples by Muslim rulers.⁷⁵ Additionally, Hindu rulers were equally responsible for the destruction of many temples.⁷⁶ Thus, the establishment or destruction of temples had more than just religious connotations. Temples were the symbols of political hegemony and sovereignty.⁷⁷ They epitomised

⁶⁹ Swami Dayananda Saraswati, *Conversion Is Violence* (Sruti Seva Trust Coimbatore, India 1999).

⁷⁰ Laura Dudley Jenkins, *Religious Freedom and Mass Conversion in India* (University of Pennsylvania Press 2019); Michael J Perry, ‘A Right to Religious Freedom-The Universality of Human Rights, the Relativity of Culture’ (2004) 10 *Roger Williams UL Rev.* 385.

⁷¹ Robert D Baird, ‘Traditional Values, Governmental Values, and Religious Conflict in Contemporary India’ [1998] *BYU L. Rev.* 337.

⁷² Manish, ‘Evaluating India’s New Anti-Conversion Laws’ (2021) 6 *CALJ* 32.

⁷³ *Rev. Stainislaus vs State Of Madhya Pradesh & Ors* 1977 SCR (2) 611.

⁷⁴ Nilay Saiya and Stuti Manchanda, ‘Anti-Conversion Laws and Violent Christian Persecution in the States of India: A Quantitative Analysis’ (2020) 20 *Ethnicities* 587.

⁷⁵ Barbara D Metcalf and Thomas R Metcalf, *A Concise History of Modern India* (Cambridge University Press 2006); Romila Thapar, ‘Banning Books’ (2014) 13 *India Review* 283.

⁷⁶ Sunil Khilnani, *Incarnations: A History of India in 50 Lives* (Random House India 2017).

⁷⁷ Richard M Eaton, ‘Temple Desecration and Indo-Muslim States’ (2000) 11 *Journal of Islamic Studies* 283.

the wealth and ability of a ruler to secure his dominion and his subjects. Not surprisingly, therefore, they were the target to threaten a ruler or signify the end of an empire.⁷⁸ The modern understanding of past temples solely as religious spaces therefore do not reveal their true identity. Viewed from religious scepticism, the description is often portrayed in the form of irreconcilable differences between Hindu and Muslim communities.⁷⁹

Such scepticism is manifested in the populist rhetoric of reclaiming the lost heritage of India. This has been translated into numerous petitions being filed before various courts in contention of converting hundreds of mosques into temples. The Babri masjid-Ram Janmabhoomi dispute was the first of the many disputes regarding the reclamation of Hindu religious structures from Muslims. The dispute and the resultant razing of the mosque led to countrywide rioting and communal killings. Finally, the dispute was resolved by the Supreme Court in 2019 in favour of the Hindus. The present petitions and disputes now relate to Hindu claims of Gyanvapi Masjid in Varanasi, Shahi Eidgah Masjid in Mathura, Shamsi Jama Masjid in Badaun and hundreds of similar petitions by right-wing Hindu groups.⁸⁰

It is pertinent to note at this point that the Places of Worship (Special Provisions) Act of 1991⁸¹ puts a bar on the conversion of places of worship from one religious denomination to another or from one religion to another. Coming in the backdrop of the destruction of Babri Masjid, it lays down that the religious character of a place of worship shall remain the same as it was on 15th August 1947. In order to curb innumerable petitions for the conversion of religious places, Section 4(2) further bars the court's jurisdiction in entertaining or continuing any suit, appeal or other proceeding. While introducing the bill in Parliament, the then Home Minister S B Chavan aptly brought out the purpose of the legislation where he argued that the Act would prohibit and prevent disputes similar to Babri Masjid from coming to the fore.⁸² The underlying purpose of the Act is to protect the freedom of religion guaranteed in the Constitution of India in the form of freedom to practice and manage religious affairs.⁸³ Even in the absence of the Act, conversions of religious places would violate constitutional freedoms of right to religion and free profession.⁸⁴ Further, it raises

⁷⁸ *ibid.*

⁷⁹ Amartya Sen, 'The Threats to Secular India' (1993) 21 *Social Scientist* 5.

⁸⁰ Hannah Ellis-Petersen, 'Thousands of Mosques Targeted as Hindu Nationalists Try to Rewrite India's History' *The Observer* (30 October 2022) <<https://www.theguardian.com/world/2022/oct/30/thousands-of-mosques-targeted-as-hindu-nationalists-try-to-rewrite-indias-history>> accessed 17 January 2024.

⁸¹ Places of Worship (Special Provisions) Act, 1991.

⁸² Business Standard, 'Preserving the Identity of Religious Places: What Is Places of Worship Act?' (19 May 2022) <https://www.business-standard.com/article/current-affairs/understanding-gyanvapi-dispute-what-is-places-of-worship-act-1991-122051900529_1.html> accessed 20 January 2024.

⁸³ Articles 25 and 26 of the Constitution of India, 1950.

⁸⁴ 'The Challenge to Places of Worship Special Provisions Act, 1991 Is Misconceived' (*NewsClick*, 13 September 2022) <<https://www.newsclick.in/The-Challenge-Places-Worship-Special-Provisions-Act-1991-Misconceived>> accessed 20 January 2024.

questions on the secular character of the Indian polity which has been declared in the *Kesavanand Bharati*⁸⁵ case as the basic structure of the Indian constitution.

However, in clear violation of the law and constitutional guarantees, many Indian courts have entertained petitions claiming entry or conversion of the religious character of the structures.⁸⁶ This has the underlying implication of interfering with the freedom to practice and manage religious affairs. To such an extent, the Indian judiciary cannot absolve itself from the accusations of constitutional infringements. Bound by the constitutional safeguards, the courts must honour its commitment towards securing liberty, equality and fraternity.

C. *Xenophobia and Hate Crimes*

Another worrying trend that has emerged lately is the self-styled vigilante justice system in India. Influenced by Mr Modi's populist rhetoric and filled with xenophobic sentiments, many members of the right-wing groups have indulged in hate speech and hate crimes. In the name of cow protection, many right-wing members have openly targeted Indian minorities especially Muslims on charges of cow slaughter. There has been a ten-fold increase in hate crimes after the Modi government came to power.⁸⁷ A 2019 study by hate crime analyst, Fact Checker, reveals that more than 90% of hate crimes have taken place in the previous 5 years. Further, 99 persons succumbed to these hate crimes and 703 were injured.⁸⁸

Aparna Vaidik⁸⁹ has conducted a comprehensive study of mob lynchings in India. According to her, lynchings in India are done to restore honour to the majority community that blames the minorities especially the Muslims for the historical wrongs done to them. The idea of mob justice in India is very similar to the lynchings of the coloured people in America.⁹⁰ Although lynching is not something new in India,⁹¹ but its tremendous increase in recent years points to its political legitimisation.⁹² The characterisation of victims of lynchings as "they" or "others" underlie the populist

⁸⁵ *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.* (Writ Petition (Civil) 135 of 1970).

⁸⁶ Justice Govind Mathur, 'Gyanvapi Mosque: Courts Must Remember the Purpose of Places of Worship Act' (*The Quint*, 16 May 2022) <<https://www.thequint.com/news/law/gyanvapi-mosque-case-courts-must-remember-the-purpose-of-places-of-worship-act>> accessed 20 January 2024.

⁸⁷ Ishan Gupta, 'Mob Violence And Vigilantism In India' (2019) 23 *World Affairs: The Journal of International Issues* 152.

⁸⁸ J Maria Agnes Sasitha, 'Youth Perception on Hate Crimes, Hate Speeches and Nationalism in Contemporary India' [2021] *Crime Prevention and Justice in 2030: The UN and the Universal Declaration of Human Rights* 41.

⁸⁹ Aparna Vaidik and Aakhya Isha, *My Son's Inheritance: A Secret History of Lynching and Blood Justice in India* (Aleph Book Company 2020).

⁹⁰ *ibid.*

⁹¹ Rakesh Chandra, 'The Menacing Growth of Mob Lynching: A Study in Indian Legal Perspective' (2018) 4 *Journal of Legal Studies and Research* 134.

⁹² Asim Ali, 'What Lynchings in 19th Century US Can Teach Us About "New India"' (*The Wire*) <<https://thewire.in/communalism/lynching-19th-century-america-new-india>> accessed 17 January 2024.

sentiment propagated by Mr Modi and Sangh Parivar.⁹³ Thus, the denial of the right to life enshrined in Article 21 of the Indian constitution, and arguably considered to be the most important fundamental right, to the Muslim minority population is normalised.

D. *Restrictions on Religious Liberty*

The modern society has always judged the way one's dresses. This cannot be truer for women. Women wearing traditional clothes are often considered backwards and oppressed. On the other hand, our society celebrates the Western dress style as a symbol of liberation and success in the world. In this context, the Muslim veil otherwise called Hijab has been a centre of a lot of debate and controversy. Often seen as a manifestation of patriarchal social norms prevalent and unique to the Muslim world, the practice of wearing a Hijab has been condemned, ridiculed and lambasted. At the same time, the practice has been prohibited on grounds of violating the secular character of the polity. Recent years have seen many countries banning hijab in public in order to maintain uniformity and create feelings of fraternity amongst their citizens.

In India, the issue of banning hijab in public came to the fore in and around February 2022. Following a Government Order (GO), a government school in the Udupi district of Karnataka banned Muslim girls donning hijab from entering schools. Following protests by many Muslim school girls and counter-protests by right-wing members, the issue was brought before the High Court of Karnataka. Underlying the dispute is the clash between the state's duty to maintain uniformity and public order on the one hand and its obligation not to interfere in the individual's exercise of freedom of religion and free profession. Associated with the issue is the crucial question: Whether banning hijabs in public amount to a denial of fundamental freedom of free profession, practice and propagation of religion? In this respect, it becomes crucial to enquire into the religious character of the hijab or the ruling of covering the female body in Islam.

According to Lane (1984), a hijab can be understood as a thing that veils, conceals, hides, covers, or protects because it prevents seeing, or beholding.⁹⁴ It also signifies some form of barrier or partition. In the Quranic language, it is mostly used in a metaphysical sense.⁹⁵ For instance verse (38:32) of the Qur'an states "...Until (the sun) was hidden in the hijab (of Night)" signifying the symbolic covering of the sun by the night. On the other hand, there are specific verses in the Qur'an that emphatically declare the covering of bodies by Muslim women. Verse (24:31) states: "And tell believing women to cast down their eyes and guard their private parts and not show their finery, except the outward part of it." A combined reading of the two verses reveals that covering of female body is mandatory for Muslim women and anything

⁹³ Irfan Ahmad, 'Modi's Polarising Populism Makes a Fiction of a Secular, Democratic India' (*The Conversation*, 12 July 2017) <<http://theconversation.com/modis-polarising-populism-makes-a-fiction-of-a-secular-democratic-india-80605>> accessed 17 January 2024.

⁹⁴ Tabassum F Ruby, 'Listening to the Voices of Hijab' (Elsevier 2006).

⁹⁵ B Syed Ibrahim, 'Women in Islam: Hijab' [1999] Aalim: Islamic Research Foundation (IRF).

that hides another is referred to as “hijab”. Thus, covering of the body by Muslim women by pieces of cloth or otherwise is central to the practices in Islam.

To that end, the decision of the Karnataka High court⁹⁶ seems to have a flawed understanding of the importance of the Hijab in Islam.⁹⁷ To understand it simply as a religious symbol will be a gross misunderstanding of its relevance in Islam. Rather, the hijab or for that matter covering women’s bodies is essential to the practices in Islam.⁹⁸ Thus, any refusal of it cannot be seen other than as a violation of freedom of free profession and practice of religion. However, the notion of denying the Hijab in public to Muslim women is not limited to the flawed understanding of the practice. Rather, the idea is rooted in the homogenising tendency of the populist regime. The call for support of the GO banning hijabs by the right-wing groups and statements made in favour of it by the BJP legislators point to the communal overtones of the so-called neutral order. To that respect, the ban has little to do with uniformity in public appearances. Rather it is aimed at projecting a clash of civilizations along the lines of “us” versus “them”,⁹⁹ projecting the minority Muslim population as a stumbling block in the country’s progress and attainment of secular character. Deeply embedded in the populist discourse of the Modi regime is its desire to highlight every minority activity as a separatist tendency and the hijab ban is simply a way of doing that.

E. *Linking Citizenship with Religion*

On 11th December 2019, the Parliament of India enacted into law a highly contentious legislation titled “The Citizenship Amendment Act, 2019”¹⁰⁰ or CAA. The legislation fast-tracked Citizenship for six religious communities – Hindus, Christians, Sikhs, Parsis, Jains, and Buddhists – coming from three neighbouring countries – Pakistan, Afghanistan and Bangladesh – on or before 31st December 2014. What was implicit in the legislation was the explicit exclusion of Muslims from the list of religious communities eligible for the grant of Indian citizenship. Even before the Bill was enacted by the Parliament, there were widespread protests in the country mostly led

⁹⁶ Smt Resham and Another vs. State of Karnataka and Others, WP No. 2347/2022.

⁹⁷ ‘Essentially Flawed: The Hindu Editorial on the Karnataka High Court’s Hijab Verdict’ *The Hindu* (16 March 2022) <<https://www.thehindu.com/opinion/editorial/essentially-flawed-the-hindu-editorial-on-the-karnataka-high-courts-hijab-verdict/article65231490.ece>> accessed 21 January 2024.

⁹⁸ Sayyid Saeed Akhtar Rizvi, *Hijab: The Dress of Modesty in Islam* (Bilal Muslim Mission of Tanzania 1992); Geoff Harkness, ‘Hijab Micropractices: The Strategic and Situational Use of Clothing by Qatari Women’ (Wiley Online Library 2019).

⁹⁹ Aminah Beverly McCloud, ‘Muslim Women in America: The Challenge of Islamic Identity Today’ (2008) 19 *Journal of Islamic Studies* 295.

¹⁰⁰ The Citizenship Amendment Act, 2019.

by Muslim men and women.¹⁰¹ However, many scholars, intellectuals and students alike criticised the Bill for its anti-Muslim and anti-constitutional overtones.¹⁰²

Evident in the law is the differential treatment set out for Muslim immigrants. However, such differentiation is not new to India. Curiously enough, the origins of citizenship law in India have an unsecular character. Even at the time of the commencement of the constitution, Muslim immigrants were discriminated against in the granting of Indian citizenship. The introduction of the Permanent Resettlement Permit system in 1948 ensured to a great extent that Muslim immigrants are not allowed in the country. The permit system required returning Muslims from West Pakistan to obtain a permit from the Indian high commission in Karachi or Lahore that were extremely hard to get.¹⁰³ Whereas, no permit system was introduced in East Pakistan from where there was a huge influx of Hindus. To some extent, the introduction of the permit system is understandable given the problem of rehabilitation of refugees prevailing at that time. However, those problems have abated and as such differential treatment of Muslim immigrants seems suspicious. As such, several scholars have highlighted the unconstitutional and anti-minority nature of the amendment. The foremost among the various rights that the CAA seems to violate is the right to be treated equally before the law. Laid down in Article 14 of the Indian Constitution, it is one of the most cherished rights in India and serves as a bulwark against state discrimination and arbitrary action. In other words, Article 14 guarantees that equals must be treated alike and unequals must be treated differently. Read closely, it bestows upon the state to make a 'reasonable classification' amongst its subjects for the purposes of achieving substantive equality in society. Thus, Article 14 goes beyond formal equality and enjoins the state to establish substantive equality. But the CAA fails to meet the requirements of reasonable classification and rather ends up being a 'class legislation'¹⁰⁴ which is unconstitutional and prohibited.

The foremost requirements to pass the test of 'reasonable classification' are intelligible differentia and rational relation to the object. The object of the amendment has been given to be to protect persecuted religious minorities in the three neighbouring countries.¹⁰⁵ The law completely fails to meet both requirements to the

¹⁰¹ Zarir Hussain and Abhirup Roy, 'Protests Erupt as India Looks to Block Citizenship for Muslims' (*The Sydney Morning Herald*, 10 December 2019) <<https://www.smh.com.au/world/asia/protests-erupt-as-india-looks-to-block-citizenship-for-muslims-20191210-p53im1.html>> accessed 22 January 2024.

¹⁰² Ankur Biplav, 'Congress, IIT Students Protest "Anti-Secular" CAB, Partisan Politics' *The Hindu* (11 December 2019) <<https://www.thehindu.com/news/cities/mumbai/congress-iit-students-protest-anti-secular-cab-partisan-politics/article30280973.ece>> accessed 22 January 2024.

¹⁰³ Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2007).

¹⁰⁴ Brij Mohan Dutta, 'A Critical Analysis of Citizenship Amendment Act, 2019 (CAA)' (2022) 28 *International Journal of Business Excellence* 505.

¹⁰⁵ Dharmendra Pradhan, 'Passing the Morality Test: CAA Secures Dignity for Those Who Have Suffered Religious Persecution in the Subcontinent' *Time of India* (1 August 2020) <<https://timesofindia.indiatimes.com/blogs/toi-edit-page/passing-the-morality-test-cao-secures-dignity-for-those-who-have-suffered-religious-persecution-in-the-subcontinent/>> accessed 22 January 2024.

extent that a differentiation on the basis of religion goes against the very purpose of the legislation. There has been a history of religious persecution by other neighbouring countries. Secondly, the arbitrariness of the amendment is explicit in its injudicious selection of countries given that countries like Myanmar and Sri Lanka have a history of persecuting their minority population. Further, the argument that by virtue of Article 11, the Parliament has unlimited powers to regulate citizenship laws falls flat in the face of the reading of Article 13(2) of the Constitution. Article 13(2) declares in no uncertain terms that any law contrary to fundamental rights is void.¹⁰⁶ Notably, the right guaranteed under Article 14 is available to every individual within the territory of India. Thus, even foreigners or illegal immigrants have the right to be treated equally before and are entitled to equal protection of laws.¹⁰⁷

In light of the above explanation, the exclusion of Muslims is nothing but a reflection of the deep-seated ‘othering’ philosophy of the Populist Modi regime. The Hindu-Muslim communal divide is the driving force behind the populist Modi/Hindutva narrative in India.¹⁰⁸ In reality, the CAA has more than anti-minority overtones. It tends to bend and hit the secular character of the Indian republic by granting citizenship rights on the basis of religion.

V INDIA AND INTERNATIONAL LAW ON MINORITIES

Minority rights form the cornerstone of almost every international human rights agreement.¹⁰⁹ United Nations (UN) have stood firm on various occasions in the protection and preservation of minority rights. In particular, Article 27 of the International Covenant on Civil and Political Rights (ICCPR),¹¹⁰ and Article 30 of the Convention of the Child¹¹¹ are read as minority rights. Further, Article 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR),¹¹² Article 26 of the Universal Declaration of Human Rights (UDHR),¹¹³ the 1948 Genocide Convention,¹¹⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹¹⁵ though not explicitly providing for minority rights, are supplemental to the international minority rights protection regime. However, the most significant instrument is the 1992 United Nations

¹⁰⁶ S Choudhry, M Khosla and PB Mehta, *The Oxford Handbook of the Indian Constitution* (OUP Oxford 2016) <<https://books.google.co.in/books?id=s5EDDAAAQBAJ>>.

¹⁰⁷ *ibid.*

¹⁰⁸ Avishek Ray, ‘Pan-Hindutva and the Discursive Practices of Digital (Counter) Publics Around# SupportCAA1’ (2022) 28 *Nationalism and Ethnic Politics* 92.

¹⁰⁹ Nehaluddin Ahmad, ‘Protecting the Rights of Minorities under International Law and Implications of COVID-19: An Overview of the Indian Context’ (2021) 10 *Laws* 17.

¹¹⁰ The International Covenant on Civil and Political Rights, 1966.

¹¹¹ The Convention on the Rights of the Child, 1989

¹¹² The International Convention on Economic, Social and Cultural Rights, 1966.

¹¹³ Universal Declaration of Human Rights, 1948.

¹¹⁴ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

¹¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities.¹¹⁶ Although not legally binding, it is the guiding source of all standards and principles for the protection of minority rights in member states. Read together, the international minority rights regime protects the rights of minorities to live peacefully without discrimination in an environment conducive to the growth and protection of their identity.

The International Court has, on various occasions, signified the essence of minority rights in the protection and promotion of human rights. Thus, in the famous *Barcelona Traction* case, the court highlighted the obligations *erga omnes* character of certain state obligations like the prohibition against aggression, genocide, slavery and racial discrimination.¹¹⁷ In *Georgia v. Russian Federation*,¹¹⁸ the court ordered the parties to refrain from any act of racial discrimination against persons, groups of persons or institutions...and to ensure, without distinction as to national or ethnic origin and the right of persons to freedom of movement and residence. As such, the protection of minority rights forms an important part of many international treaties and judgments. The states are duty-bound to provide a basic level of protection to minorities living in their territories. Such protection does not start and ends with a non-discriminatory attitude but includes the creation of an environment conducive to the growth and development of a minority's culture and identity. On the contrary, the policies and actions of the Populist Modi government have effectively denied rights to its minorities.

In the case of CAA, the distinction on grounds of religion and country of origin stands in direct conflict with the rights guaranteed under ICCPR. Article 26 of ICCPR prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Notably, the scope of the Article is not limited by the grounds mentioned in the Article. Rather, it extends to include other rights guaranteed under the covenant.¹¹⁹ As per the Human Rights Committee, the right to equality and non-discrimination is equally applicable in the context of naturalisation.¹²⁰ Thus, separate mechanisms for the grant of citizenship violates the equality guaranteed under the ICCPR.

Likewise, laws prohibiting religious conversions, beef consumption, and cultural distinctiveness run afoul of rights guaranteed under international law. Article 18, ICCPR lays down in clear terms that freedom of religion includes the freedom to have

¹¹⁶ United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 1992.

¹¹⁷ *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain) (Second Phase) (Merits)* [1970] ICJ Rep 3, 32, para 33

¹¹⁸ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, International Court of Justice (ICJ), 1 April 2011, <https://www.refworld.org/jurisprudence/caselaw/icj/2011/en/78557> [accessed 10 March 2024]

¹¹⁹ Michelle Foster and Adil Hasan Khan, 'Citizenship (Amendment) Act 2019 and International Law' (2021).

¹²⁰ Human Rights Committee, Views: Communication No. 2001/2010, 113th sess, UN Doc CCPR/C/113/D/2001/2010 (19 March 2015) 11–12 [7.2]–[7.3].

or to adopt a religion or belief of his/her choice. That the right to convert is very well part of the right to religious freedom was also brought by the report¹²¹ by Heiner Bielefeldt, the United Nations Special Rapporteur on freedom of religion or belief. The report by the United Nations Special Rapporteur on freedom of religion or belief mentioned that anti-conversion laws are particularly targeted against Christians and Muslims and lack clear standards for determining improper conversions.¹²² The controversial hijab ban (similar to a French law that banned the burqa in public) infringes the freedom to manifest one's religious beliefs and practice one's religion in public and to that extent is violative of the right to equality guaranteed under Articles 18 and 26, respectively, of ICCPR.¹²³ Already, in *Miriana Hebbadj v. France*¹²⁴ and *Sonia Yaker v. France*,¹²⁵ the United Nations Human Rights Committee (UNHRC) has held the French burqa ban violative of Article 18 and Article 26 of the ICCPR.¹²⁶

Thirdly, the construction of temples in place of mosques is yet again problematic in nature. Although, religious freedoms enshrined under UDHR or ICCPR do not explicitly prohibit conversion of religious buildings,¹²⁷ the infringement of religious rights on account of the act can hardly be debated. The fact that destruction/conversion of religious buildings amounts to infringement of religious rights has been confirmed by UNHRC in the case of Sudan.¹²⁸ Additionally, the conversion of religious places impinges on the cultural rights of minorities guaranteed under ICESCR. Article 15 of ICESCR guarantees the right to take part in cultural life without discrimination. Under such a scenario, the state is duty-bound to undertake measures towards the conservation, development and diffusion of culture in the country. India being a party to ICESCR must fulfil its obligations under the treaty in letter and in spirit.

The rise in anti-minority rhetoric over the last years in India and the state's inaction paints a grim picture of the status of protection of minorities in India.

¹²¹ Heiner Bielefeldt, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (United Nations 2015).

¹²² Asma Jahangir (Special Rapporteur on freedom of religion or belief), Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Mission to India, U.N. Doc. A/HRC/10/8/Add.3 (Jan. 26, 2009).

¹²³ 'France: Banning the Niqab Violated Two Muslim Women's Freedom of Religion - UN Experts' (OHCHR) <<https://www.ohchr.org/en/press-releases/2018/10/france-banning-niqab-violated-two-muslim-womens-freedom-religion-un-experts>> accessed 10 March 2024.

¹²⁴ *Miriana Hebbadj v. France*, Doc. CCPR/C/123/D/2807/2016.

¹²⁵ *Sonia Yaker v. France*, Doc. CCPR/C/123/D/2747/2016.

¹²⁶ IJRC, 'UN Human Rights Committee Condemns "Burqa Ban," Countering European Court' (*International Justice Resource Center*, 14 November 2018) <<https://ijrcenter.org/2018/11/14/un-human-rights-committee-condemns-burqa-ban-countering-european-court/>> accessed 10 March 2024.

¹²⁷ Michael P Goodyear, 'Heaven or Earth: The Hagia Sophia Re-Conversion, Turkish and International Law, and the Special Case of Universal Religious Sites' (2022) 19 *UCLA Journal of Islamic and Near Eastern Law* <<https://escholarship.org/uc/item/47g3x937>> accessed 6 February 2024.

¹²⁸ Foster and Khan (n 116).; Human Rights Committee, U.N. Doc. CCPR/C/SDN/CO/5, at 49-50 (Nov. 19, 2018).

Whether it was the Dharma Sansad hate speech¹²⁹ or a political call for shooting the traitors,¹³⁰ hate speech in India has largely gone unpunished.¹³¹ Although there is no standard definition of hate speech, in most circles it is accepted as an expression of vilifying others on the basis of race, religion, ethnicity or any other distinctive criterion. The essence of hate speech as a crime lies in promoting discrimination, intolerance and violence against a section of people.¹³² To that extent, hate speech signifies the manifestation of deep-rooted malaises and prejudices against certain identifiable groups of people and requires effective prohibition.¹³³ The prohibition on hate speech has international backing in the form of Article 19 of ICCPR which allows for regulation of speech in the interests of public order. Further, Article 20 of ICCPR specifically provides for the banning of war propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In a similar manner, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 1948 prohibits genocidal calls for violence and puts a bar on free speech to that extent. That free speech can very well promote racial, religious, and ethnic hatred and violence is widely accepted.¹³⁴ The extensive use of the radio station RTLM for organising violence against Tutsis in the Rwanda genocide is a case in point.¹³⁵ However, the most prominent international law in this respect is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Article 4(a) of CERD identifies four aspects of hate speech: based on racial superiority, based on racial hatred, incitement to racial discrimination and incitement to racially motivated violence. Further, Article 4(c) of the Convention prohibits racial discrimination by state authorities and institutions. To that end, the populist Modi government has not only failed to deter and punish hate mongers but has actively participated in and promoted the hate campaign thereby completely failing to meet its international obligations.

Article 51(c) of the Indian Constitution clearly lays down that the state shall foster respect for international law and treaty obligations. Although part of Directive Principles of State Policy and hence unenforceable, being fundamental to the governance of the country, the state is duty-bound to apply the provision in making

¹²⁹ “‘Dharma Sansad’ Hate Speech: Three Armed Forces Veterans Move SC Seeking SIT’ (*The Wire*) <<https://thewire.in/communalism/dharma-sansad-hate-speech-three-armed-forces-veterans-move-sc-seeking-sit>> accessed 10 March 2024.

¹³⁰ “‘Shoot the Traitors’ Slogan Raised at Union Minister Anurag Thakur’s Rally, Delhi CEO Seeks Report’ (*The Indian Express*) <<https://indianexpress.com/elections/delhi-in-election-rally-union-minister-anurag-thakur-leads-chants-of-shoot-the-traitors-6238005/>> accessed 10 March 2024.

¹³¹ Sharanya Hrishikesh, ‘Why People Get Away with Hate Speech in India’ *BBC News* (13 April 2022) <<https://www.bbc.com/news/world-asia-india-61090363>> accessed 10 March 2024.

¹³² Silvana Neshkovska and Zorica Trajkova, ‘The Essentials of Hate Speech’ (2017) 14 *Teacher* 71.
¹³³ *ibid.*

¹³⁴ Alexander Tsesis, ‘Dignity and Speech: The Regulation of Hate Speech in a Democracy’ (2009) 44 *Wake Forest L. Rev.* 497.

¹³⁵ Cherian George, ‘Hate Speech Law and Policy’, *The International Encyclopaedia of Digital Communication and Society* (John Wiley & Sons, Ltd 2014) <<https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118767771.wbiedcs139>> accessed 8 March 2024.

laws.¹³⁶ In *Kesavananda Bharti*,¹³⁷ the Supreme Court held that it must interpret the language of the constitution in the light of Article 51 and as such in the light of the United Nations Charter and other solemn promises that India has made at the international level, to the extent they are not intractable.¹³⁸ As per the court's interpretation, fundamental rights and directive principles are not mutually exclusive. Rather they are like two wheels of a chariot, one no less important than the other.¹³⁹ To that extent, many international legal norms have been used to fill gaps in fundamental rights¹⁴⁰ and thereby provide effective remedies to the victim. The precautionary principle, for instance, is one such legal norm that has been used to strengthen domestic environmental jurisprudence.¹⁴¹

In light of the above discussion, it is crystal clear that India is duty-bound to foster respect for international minority rights that are part of various international norms and treaties including but not limited to ICCPR, ICESCR, CERD and UDHR. To the extent that the state of India is unable or unwilling to safeguard minority rights, it has not only failed to meet its international obligations but has deliberately broken the solemn promise of equality and liberty.

VI CONCLUSION

To conclude, there is a marked resurgence of right-wing populism throughout the world, a phenomenon not seen since the end of the Second World War.¹⁴² It marks a combination of development politics and religious nationalism aimed at securing political monopoly and dominance. A closer analysis of the populist forces around the world reveals a common tendency to appeal directly to voters to throw out the political elite that has ruled and ruined the country for years. Whether it is US President Donald Trump or India's Prime Minister Narendra Modi, there are conspicuous similarities in their functioning and winning of elections. Targeting the political elite and tapping into the feelings of the disgruntled masses on issues of corruption, religion and inequitable development is the general modus operandi of populist leaders throughout the world. By projecting charismatic leadership and speaking in the common man's language, populist leaders have been able to change political tides in their favour. Once in power, populist leaders have manifested authoritarian political setups often showcasing society on divisive lines. One of the striking features of the populist strategy is the projection of the state as a homogeneous entity having one cultural and ethnic identity.

¹³⁶ Choudhry, Khosla and Mehta (n 103).

¹³⁷ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

¹³⁸ Choudhry, Khosla and Mehta (n 103).

¹³⁹ *Minerva Mills v Union of India* (1980) 3 SCC 625 [56].

¹⁴⁰ V Hegde, 'Indian Courts and International Law' (2010) 23 *Leiden Journal of International Law* 53.

¹⁴¹ *Vellore Citizen's Welfare Forum v Union of India* (1996) 5 SCC 647

¹⁴² Nitasha Kaul, 'Rise of the Political Right in India: Hindutva-Development Mix, Modi Myth, And Dualities' (2017) 20 *Journal of Labor and Society* 523.

Such an idea inherently involves scapegoating and othering of minorities. The targeting of minorities has been effected on varied grounds; from race to religion to nationality. As such, populist leaders have advocated for travel bans, restrictions on immigration and more autonomy. India is no exception to populist attacks on minorities.

Under Modi's populism, India as a Hindu nation is a reflection of the Hindu supremacist and masculinist ideology projected through the strongman, Narendra Modi. Under such a structure, Muslims and other minorities are depicted as "Others" in the country's body politic and cultural ethos. Intertwined with this is the promotion of the idea of the rising economic power of India through continuous efforts and under the brilliant leadership of the Indian Prime Minister Narendra Modi. A combination of the two has been referred to as Janus-faced populism with one being articulated as economic nationalism and the other as religious nationalism. The economic component is signified through the signs of economic growth and development. Articulated through numbers, it is symbolised through notions like the fastest-growing free economy in the world. On the other hand, religious nationalism proceeds along the lines of the Hindu majority representing the true people of the country and the othering of minorities in the form of invaders or missionaries. Although, the BJP-RSS has a history of creating a communal divide for polarising votes and winning elections on the back of it, such a strategy has been perfected by Narendra Modi. Modi's populism represents a classic case of socio-political divide along religious lines blending elements of economic growth and national security. In effect, a crucial element of Modi's populism involves designing state policies along religious lines. Such policies serve twin purposes: generation of the feeling of Hindu solidarity and polarisation of votes in favour of the BJP. The ultimate effect is the erosion of religious liberties and the denial of minority rights in India. That religious freedom in India has gone from bad to worse under the Modi regime is no secret.¹⁴³ Although India is not new to populism or communal divide, the magnitude of discrimination is something never seen before.

¹⁴³ Astha Rajvanshi, 'U.S. Releases Scathing Report on Religious Freedom in India' (*TIME*, 16 May 2023) <<https://time.com/6280298/india-religious-freedom-us-state-department-report/>> accessed 9 March 2024.