«Muslim Caste» under Indian Law: Between Uniformity, Autonomy and Equality

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The role, interpretation and regulation of caste in India have been a subject of both controversy and confusion. Affirmative action or reservations based on caste identity is only one of the many forms through with Indian law recognizes caste. Indian law also recognizes caste group practices, particularly in cases of customs and personal laws. Consequently, important scholarly work has attempted to unravel the diverse legal regimes that accommodate and limit caste practices. Despite this focus on caste, scholars have remained mostly silent on how Indian law treats caste among non-Hindu communities, particularly Muslims. Over the last decade, Muslim caste or caste-like social stratification has increasingly gained policy and judicial attention because of the debates around affirmative action for Muslims. Beyond these debates, Indian law also recognizes caste or caste-like group identity among Muslims in other cases. This paper will provide a review of Indian law's recognition, treatment and interpretation of Muslim caste. It will also contrast this with how it approaches Hindu caste. In doing so, it will argue that a focus on the topic demystifies the notion of caste. It also reveals the Indian judiciary's rather inconsistent attitude towards Muslim caste.

Keywords: India, Caste, Islam, Affirmative action, Personal law

1. *Introduction*

Caste is a notoriously difficult subject to study for legal scholars. One cause for this notoriety is the magnitude and eccentricity of the subject – both in terms of the legislative policy on caste and the Indian courts'

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oeuvre on the subject. The jurisprudence of caste extends to all dimensions of adjudication, including property relations, family law, anti-discrimination and affirmative action. To draw an overarching picture traversing the breadth of this jurisprudence has remained a task only a few scholars have embarked[1].

Interestingly, what simultaneously makes the study of law and caste challenging is the slipperiness of the very meaning of "caste". The definition of caste – legally, sociologically, historically – has been at the centre of dispute (Guha 2013; Viswanath 2014; Fuller 1996; Bhat 2017: 57-60). Perhaps the most prominent definition is to approach caste as an arrangement of endogamous groups according to their rank and status in the Hindu religious order (Marriott 1965; Dumont 1981; Shah 2004). Caste groups in India often correspond to occupations in the intricate political economy of the country. The system was traditionally maintained through strict rules of social intercourse, especially inter-marriage and inter-dining. A prominent view, though a generalization, sees the caste system to comprise of four traditional ranks or *Varna*: the *Brahmins* (the priestly class), the *Kshatriyas* (the warrior or soldier class), the *Vaishyas* (the mercantile class) and the *Sudras* (the lower classes). At the very bottom of this scheme are the "Untouchable" castes, the *Atisudras*, or my preferred word – the *Dalits*. The *Dalits* have historically been subjected to grievous exclusion from public spaces and religious institutions, prevention from accessing public resources, the practice of untouchability, and in many cases, punitive forms of social boycott (Mendelsohn and Vicziany 1998: 5; Shah 2006; Human Rights Watch 2007).

These definitions notwithstanding, identifying where a particular caste group falls in the hierarchy of caste order has not always been easy. Scholars have noted that caste lines are fuzzy and caste groups have often climbed the status ladder in the past (Rudolph and Rudolph 1984; Kothari and Maru 1965). Historically, even the identification of the "Untouchable" castes was a challenging enterprise owing to the variation across the country (Dushkin 1967). Add to this an additional problem: as the following pages will show, political and judicial authorities have

[1] The most prominent account of caste and Indian law is Marc Galanter's work on the subject (Galanter 1984, 1993b). Other scholars have also made noteworthy contributions to the intersection of caste and affirmative action (Jenkins 2012; Dushkin 1967; Dhavan 1977; Kannabiran 2012), conversion (Adcock 2014) and 'Untouchability' (Galanter 1969; Narula 2008).

often puzzled over whether "caste" should be understood as dictated only by ranking in the Hindu religious doctrine, or whether caste groups be understood as occupational groups without a necessary (and exclusive) reference to the religious doctrine.

This paper attempts to provide an overview, with all its unavoidable limitations, of the relationship between law and caste in India. It does so from a unique vantage point that has remained underexplored in the study of Indian law – Muslim caste under Indian law. Most of the legal scholarship on caste, particularly the scholarship on affirmative action or reservations as they are called in India, has focused on caste as a fundamentally Hindu problem. In this paper, I review Indian law in regulating caste among Muslims. The primary focus of this review will be the career of the Indian courts, particularly the Indian Supreme Court, in interpreting Muslim caste, determining its boundaries, and assessing the legality of state regulation.

Religions like Islam and Christianity, of course, do not formally recognize caste hierarchy. But historical conversions into these religions often involved the conversion of caste groups, sub-groups, villages and communities. Moreover, convert groups often retained their occupations and more importantly, their social ties, relationships and hierarchies vis-à-vis other groups and castes. The same applies in cases where individuals have converted to Islam or Christianity. Consequently, Indian courts have frequently puzzled over whether Muslims, or for that matter Christians, have retained their caste identity.

The most commonly occurring nomenclature for what I call Muslim caste is *baradari* or *biradari*. Other Indian words like *zaat* or *jaat* are also often used. A word like *biradari* can mean many things. It can mean caste identity (indicating belonging to a caste community or group), caste group or community, caste *panchayat* or village council, or a more diffused label for members of the neighborhood. Like in the case of Hindus (Cohn 1965; Randeria 2006), Muslim caste associations are also sites of community dispute resolution, mediation and "civil society" activity. The words *zaat* or *jaat*, on the other hand, are more direct references to rank or status. The oft-repeated phraseology is that of *Ashraf*, *Ajlaf* and *Arzal* – corresponding with upper castes, lower castes and "Untouchable" castes respectively (Nazir 1993; Ansari 2009; Fazal 2007). The veracity and empirics of these distinctions has been the subject of some important sociological scholarship, which I take up in the second half of this review.

In this paper, I am less concerned with the anthropological inquiries into these facets of Muslim caste. What I am more centrally concerned with are not sociological matters, but legal regulation and interpretation. I will focus on how caste affiliation among Muslims has been interpreted and conceptualized under Indian law. This paper deals with two different interpretations of Muslim caste in the Indian jurisprudence. The first interpretation is in the form of "horizontal" caste, referring to membership in horizontally placed social groups without the focus on hierarchy among them. The second is what I will call "vertical" caste, referring to membership in a hierarchical status order or, in other words, denoting social stratification. This typology corresponds with how Indian judges have simultaneously viewed caste both as a "voluntary association" comprised on «well defined yet fluctuating group of persons governed by their own rules and regulations for certain internal purposes»[2], as well as «a unique and devastating system of gradation and degradation»[3]. Marc Galanter has proposed a taxonomy of four models that reflect the judicial conceptualization of caste in India: sacral (the caste group as «a component in an overarching sacral order of Hindu society»), sectarian (the caste group «as an isolable religious community distinguished from others by idiosyncratic doctrine, ritual, or culture»), associational (the caste group as «an autonomous association with its own internal order and rule-making powers»), and organic (the caste group «as occupying a particular place in a social order made up of many such groups») (Galanter 1993b: 142-43). Galanter noted that in cases dealing with caste group autonomy and customary practices among caste groups, the courts viewed caste closer to the associational and sectarian conceptions; and in cases of affirmative action closer to the sacral and organic. As expected, some of these do not cleanly fit Muslim or Christian caste. Therefore, I adopt the typology of horizontal and vertical as the views of Muslim caste in different sets of adjudicatory contexts. Horizontal caste and vertical caste raise difference issues for legal regulation. The courts often interpret Muslim caste as horizontal in cases dealing with family or personal law adjudication, and in cases dealing with group membership

[2] G. M. Arumugam v. S. Rajgopal (1976) A.I.R. SC 939 (per Bhagwati J).

[3] K.C. Vasanth Kumar v. State of Karnataka (1985) A.I.R. SC 1495 (per Chinappa Reddy J).

and autonomy. On the other hand, caste hierarchy and thus vertical caste become relevant in cases on affirmative action.

There are two advantages of approaching Indian law from the vantage point of Muslim caste. The first is rather obvious: it opens up an overlooked yet fascinating domain of legal regulation of social relationships. Secondly, it de-naturalizes the assumptions of much of the scholarship on caste and affirmative action. The bulk of scholarship treats it as given that caste represents a legitimate node of what Jacobsohn (2005) calls "ameliorative" state intervention, because it reflects religiously ordained historical subordination of marginalized groups (Jacobsohn 2005: 94)[4]. While this sounds accurate in the case of Hindu caste, Muslim caste both challenges and complicates this story. It does so by questioning our presumed definitional association between caste, religion and subordination. The main argument I will pursue is that while caste has a diminished visibility among Muslims compared to Hindus under Indian law, it is compellingly present. Nevertheless, Indian courts have had a mixed record in creating an allegiant and consistent jurisprudence on Muslim caste. This jurisprudence is both derivative (from Hindu caste) and contradictory (on its own terms). This is particularly so in the case of Muslim caste in affirmative action cases.

In Part 2, I will discuss the content and implications of the Indian courts horizontal caste approach. An important facet of horizontal caste is the legal protection of group autonomy, particularly the right of caste groups to maintain their rules of membership and excommunication (Galanter 1993a). In this respect, there does not seem to be much difference between Hindu and Muslim caste autonomy. Therefore, in my discussion on horizontal caste, I will concentrate on the historical and legal antecedents of the Indian personal law system. Parts 3-5 elaborate on the Indian courts' rather uneven jurisprudence on equality and affirmative action for Muslims. While these debates reflect the relevance of vertical caste, they also reflect the Indian judiciary's conflicted relationship with Muslim caste – the root of which is the persistent question of the role of religious doctrine in defining caste.

[4] This presumption is writ large in most legal, particularly comparative legal scholarship on caste-based affirmative action in India (Cunningham and Menon 1999; Prior 1996; Chandola 1992).

2. *The Vanishing of Horizontal Caste*

Indian law does not treat Muslims as a single legal community. The history of the personal law system, which determines family law in India, reflects a tension between treating Muslims as a single legal community and the recalcitrant re-emergence of Muslim caste.

The personal law system, which was famously put into place during the British colonial period, creates separate legal regimes dealing with family law matters for different religious communities (Mansfield 1993; Parashar 1992; Galanter and Krishnan 2000). While legislations, religious scriptures and commentaries of jurists are the main sources of law in this system, customs of sub-religious groups continue to supply courts with adjudicatory norms (Subramanian 2008; Galanter 1968). Customs are derived primarily from the practices of caste communities. Consequently, horizontal caste affiliation is central to personal law adjudication. While caste or sub-group affiliation is relevant in both Muslim and Hindu personal law, the divergences between the two lend insight to the historically evolving particularities of Muslim caste.

The major difference between the Muslim and Hindu personal law regimes is that while the latter has been mostly codified, the former remains predominantly uncodified (Mahmood 1995). This is despite the fact that Muslim Personal Law is formally instituted, to the exclusion of other legal norms, by a state enactment – the Shariat Act of 1937[5]. Crucially, the codification of Hindu law during the early 1950s explicitly left open a space for customs and usages, including those related to caste. The Shariat Act, on the other hand, did not make the application of Muslim Personal Law "subject" to customs, but did permit their application through a different route.

Before the enactment of the Shariat Act, family laws of Muslims were heavily dominated by customs, and hence their caste affiliation. Islamic law was used in a narrow minority of cases compared to those related to civil and customary laws (Jalal 2000: 151). Even in Muslim majority provinces, customary law appeared to be of more significance than Islamic law. Muslim women usually got the short end of the straw, with their shares under Islamic law declined in favour of customary practices (Jalal 2000: 121). As the historian Ayesha Jalal reports, a colonial officer

[5] The Muslim Personal Law (Shariat) Application Act, 1937 (Act No. 26 of 1937).

in late nineteenth century argued that «one out of a hundred Muslims in the Punjab was governed by the strict provisions of Islamic law» (Jalal 2000: 152). The Shariat Act sought to displace these diverse customary laws and make Muslim Personal Law – what the Act called Shariat – applicable to Muslims as a "rule of decision".

There were multiple motivations for this. There had been a long-held belief among prominent Indian Muslim political actors that a "return" to pristine Islam and the rejection of non-Islamic customs was essential to regain political and social esteem (Minault 1997). Customs were seen to come in the way of creating a composite Muslim community that could serve a more coherent mobilization based on religious identity. Bringing Muslims together as a legal category – by sharing legal norms, particularly in family law matters – consolidated Muslim identity within the legal system and allowed Muslim politicians to speak in the name of the community (Gilmartin 1990; Parashar 1992). The Act was also sought to represent not only Indian Muslim unity, but also its ability to "self-rule" in the context of the rising tide of nationalism (Newbigin 2009, 95). Many participants in the debates leading up to the displacement of customary laws among Muslims also saw Muslim Personal Law as a considerable reform in favour of women's rights in the family and community (Minault 1997: 6). Particularly in agricultural provinces, there was a custom of keeping the agricultural tracks intact by keeping women bereft of inheritance – contrary to Islamic law that mandates property distribution to females – through customs. Other participants of the debate were vary of the uncertainty and ambiguity of customary rules[6].

The shift from customary laws to personal law is important in two ways for our discussion. Firstly, this shift reduced the significance of caste and sub-group affiliation of Muslims for the purposes of legal regulation. Muslim Personal Law was not uniform for all the Muslims, and thus the Shariat Act did not necessarily introduce absolute clarity of applicable norms in a case. Moreover, as many participants in the debates on the introduction of the Shariat Act also pointed out, Muslims had conflicting conceptions of what the *Shariat* entailed. One of the Muslim

[6] Many of these debates have been reproduced in the Indian Supreme Court's order in Shayara Bano v. Union of India, Writ Petition (C) No. 118 of 2016, http://supremecourtofindia.nic.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf, order dated 22.08.2017.

members had argued that the Shariat Bill was "unenforceable" as Shariat meant different things to «different sects of people» (Jalal 2000: 384). But legal pluralism under Muslim Personal Law was different from the earlier custom-based one. The pluralism under Muslim Personal Law was not determined by caste, status or birth, at least not technically; but by faith in and association with a particular school of Islamic thought. Though caste and community did play an important role in historically determining which sect a Muslim would belong to, the value of birth and community was diminished in favour of choice and faith.

The second consequence was the divergence in the relevance of horizontal caste affiliation among Muslims and Hindus. Hindu law was not "reformed" till as late as early 1950s after the end of British colonialism. Till this time, customary law, and thus caste and group affiliation, dominated Hindu law. The reforms in early 1950s maintained a significant space for customs among Hindus[7]. For example, the Hindu Marriage Act of 1955, which sought to "amend and codify" the law related to marriage among Hindus, left many of its rules subject to customs and usages. This was in contrast from the personal law regime put in place for Muslims. The Shariat Act limited its application to a list of mentioned subjects. For example, the Act made Muslim Personal Law applicable to Islamic trusts, but excluded "charities and charitable institutions and charitable and religious endowments". And despite the rhetoric around the rights of women to inherit property, it also left out one of the main culprits – agricultural property. The latter in particular may have been a compromise with the strong political sentiment in the agriculturally dominant Punjab (Jalal 2000: 384). Testamentary succession like wills, legacies and adoption were left uncovered by an automatic coverage of personal law. Thus, the Indian courts continue to apply customary rules related to abortion, where available, despite adoption not being recognized under Muslim Personal Law[8]. Outside the explicitly mentioned subjects, the Act left the coverage of Muslim Personal Law subject to a voluntary declaration by a Muslim (Mahmood 1972: 169).

[7] For an elaboration, see the discussion in Subramanian (2014).

[8] Moulvi Mohammed v. S. Mohaboob Begum, AIR 1984 Mad 7; Shaukat Ali v. Union of India, Central Administrative Tribunal (Jodhpur Bench), Original Application No. 290/00318/15, order dated 12.07.2016.

Subsequent to its enactment, the Shariat Act and Muslim Personal Law have taken a life of their own, undergoing numerous amendments and changes in Pakistan and Bangladesh (Agarwal 1994: 58, 232). While the Act itself was not significantly amended in India, its application now depends on the numerous central and state-level laws affecting the role of Muslim Personal Law in family law adjudication.

Rather than giving an exhaustive account of the evolution of Muslim Personal Law, I will discuss two judicial attitudes that touch upon Muslim caste. Indian courts have consistently made a distinction between an individual converting to Islam, and what the Supreme Court has called the historical "wholesale conversion of a case or a community" from Hinduism to Islam[9]. It is only in the latter that the Muslim caste has been understood to retain its "original" habits and traditions, which will continue subject to either the Shariat Act or any other legislation explicitly displacing the customs. For example, communities like Khojas, Bohras and Cutchee Muslims who converted as a caste to Islam continued to retain their pre-Islamic caste usages and customs subject to specific legislation applying Muslim Personal Law to these communities[10].

The second is a general judicial tendency to read the application of the Shariat Act narrowly – and thus allowing for a role of customs and caste. Take the case of *Abdurahiman*, where the Madras High Court was faced with a matter related to property inheritance among the matrilineal Muslim community of Malabar Moplah called Marumakkathayam. The question was whether by specifying intestate succession in section 2, the Shariat Act had displaced this custom. Rajamannar CJ held that the 1937 Act did not purport to make Muslim Personal Law applicable to all matters among Muslims and did not abrogate customs and usages not strictly covered by the Act. While Section 2 of the Act did mention intestate succession, Muslim Personal Law would only apply with respect to property that was available for intestate succession. In other words, the court held that the Act did not convert commonly owned property under community customs into property open to intestate succession. Customs that rendered the property in a state of common ownership, and there-

[9] The Controller of Estate Duty, Mysore, Bangalore v. Haji Abdul Sattar Sait (1972) A.I.R. SC 2229 (per Shelat J). For an older case stating this position, see Fidahusein v. Mongbibai, (1936) 36 Bom. L.R. 397.

[10] For cases related to Khojas, see Ashraffalli Cassim v. Mahomedalli Rajaballi (1947) I.L.R. Bom. 1; Ata Mohammad v. Mohd. Shafi (1944) A.I.R. Lah. 121.

fore not capable of devolution on intestacy to the heirs of the deceased holding such property, would escape the application of the 1937 Act[11]. As expected, this position has the potential of radically diminishing the impact of the Act in bringing Muslims under one personal law. To some extent, the various state-level and some federal laws have addressed this by extending Muslim Personal Law beyond the ambit provided under the Shariat Act[12].

Therefore, Indian law reflects a diverse and complicated presence of Muslim caste in family law matters. This is a terrain of considerably diminished presence of caste and custom tempered by legislation.

3. *The Sociology of Muslim Caste and Social Stratification*

Till now, I have explored how Indian law interprets Muslim caste as horizontal caste in cases related to family law. I argued that despite a historical tendency towards the immateriality of sub-Muslim group affiliation under Indian law, some elements of horizontal caste, particularly in the cases dealing with family laws and customary practices, are still alive. Apart from horizontal caste, the other important interpretation of Muslim caste under Indian law is vertical caste: caste identity as reflecting caste status rather than merely horizontal group affiliation. Vertical caste is predictably most pertinent in India's famed equality and affirmative action policy and jurisprudence. In this part, I will give some introductory remarks on the Indian affirmative action regime and the sociological literature on Muslim social stratification, before moving on to the related political and judicial debates in the next two parts.

The Indian Constitution provides the right of equal protection (Article 14) and the right against discrimination on the grounds *inter*

[11] Puthiya Purayil Abdurahiman v. Thayath Kancheentavida Avoomma, (1956) 1 M.L.J. 119. See also Mariyumnia v. Kunhaisumma (1958) Ker. L. Times 627; Lakshmanan v. Kamal (1959) A.I.R. Ker. 67 (F.B.). For a judgment that states the contrasting position and has been overruled, see Mukkattumbrath Ayisumma v. Vayyaprath Pazhae Bangalayil (1952) A.I.R. Mad. 425.

[12] For example, see the Cutchi Memons Act, 1938, which extended Muslim Personal Law in matters of succession and inheritance to the Kutchi Memom caste; and The Muslim Personal Law (Shariat) Application (Tamil Nadu Amendment) Act, 1949, which added additional areas for the application of Muslim Personal Law. For more details, see Mahmood (1995).

alia of religion and caste (Article 15). It also institutionalizes an ambitious program of affirmative action, specifically for three categories of citizens: the "Scheduled Castes", the "Scheduled Tribes" and the "other socially and educationally backward classes" (or "backward classes"). The categories of Scheduled Castes and backward classes are relevant for our discussion.

While the constitutional text does not explicitly define Scheduled Castes, the category is meant to capture the erstwhile Untouchable castes. This category was meant to be a continuation of the category of "Depressed Classes" under the colonial constitution. The Constitution instituted an ambitious regime of reservations for this category, in the form of political representation and quotas in public employment and education. The test that has often been employed by the government in the enumeration of Scheduled Castes under Article 341 of the Constitution has been that of socio-economic backwardness due to the historical practice of untouchability (Dushkin 1967). In its first enumeration in 1950, the central government explicitly excluded non-Hindus from the category. While Sikhs and Buddhists have subsequently been included in 1956 and 1990 respectively, Muslims and Christians continue to be excluded. Consequently, the Schedule Caste category does not include those members of Schedule Castes who had converted to Islam and Christianity. It also excludes those Muslim and Christian communities that were historically engaged in analogous occupations and are socio-economically comparable to the included castes. These Muslims and Christians, who have increasingly started to identify themselves as *Dalit* Muslims and *Dalit* Christians, have challenged this exclusion (Ahmad 2003; Fazal 2017). I discuss this in Part 4, with a specific focus on how courts have interpreted Muslim caste.

The backward classes category was introduced in 1951 through a constitutional amendment. Unlike Schedule Castes, the test for the identification of backward classes has historically been elusive – and subject to intense political and legal controversy. The only test available from the constitutional text is: social and educational backwardness, and lack of representation in government services. But the text did not resolve a further issue: what should be the role of caste in the identification of the beneficiaries under this category?

Since 1950, the courts were invited to determine this role of caste. While initially, the Supreme Court was reluctant to treat caste as «a sole

or dominant test»[13] for this determination, by early 1990s it accepted the centrality of caste stratification in the *Indra Sawhney* case (Galanter 2005; Dhavan 1997)[14]. Muslim caste has become relevant to this debate on two occasions: in the identification of Muslim groups as part of backward classes, and the contemporary judicial reluctance to accept Muslim affirmative action. I discuss this in greater detail in Part 5 below.

Before moving on to these specific debates, I need to situate the evolving legal landscape in the background of the sociological debates on Muslim caste and social stratification. Scholars have noted social stratification among Muslims, particularly the division between the *Ashrafs* (literally the "noble", who are said to be the descendants of Muslim immigrants or converts from Hindu upper castes), *Ajlafs* (literally the "commoners", who are said to be the converts from Hindu low castes) and *Arzals* (literally the "despicable", who are said to be the converts from the Untouchable castes) (Robinson 1974, 24). By the late 1960s, sociologists started to pay closer attention to these distinctions. Most prominently, sociologist Imtiaz Ahmad argued that Muslim social stratification in India is better understood as constituted by birth-dependent status of «a number of small units» (Ahmad 1966: 271). He proposed that Muslim social stratification should be approached as forms of "internal grouping" rather than generalized ethnic categories. In an influential turn of phrase, Ahmad argued that,

> …the Muslim population is divided into a number of social groups which are analogous to caste among Hindus. These *caste-analogues* are small and named groups of persons characterised by endogamy, hereditary membership, and a specific style of life which some times includes the pursuit by tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system. The members belonging to different caste analogues are to some extent expected to behave differently and to have different values and ideals. The…real units of social stratification are the caste-analogues and the day to day relationships between different individuals in any local community are determined by their membership of the caste-analogue rather than the broad categories. In the study of Muslim social stratification, it is the caste-analogue which constitutes a more significant analytical unit (Ahmad 1966, 274). (Emphasis added)

[13] M. R. Balaji v. State of Mysore (1963) A.I.R. SC 649.
[14] Indra Sawhney v. Union of India (1993) A.I.R. SC 477.

In one of the subsequent compilations on the sociological literature on the topic, Ahmad noted that «there is a notion of hierarchy among the Muslims, though it is hard to say how far the criterion of ranking amongst them can be said to conform to the Hindu model» (Ahmad 1978: xxiii). He argued that since the «notion of ritual purity and pollution» is not elaborate among Muslims, caste status among Muslims could be inferred from criteria like occupation, claims of descent and heredity, extent of social intercourse, hypergamy, seclusion of women and frequency of prayers (Ahmad 1978: xxx-xxxiii). Ahmad and others developed these themes of Muslim caste analogue or caste-like Muslim stratification, leading to a fairly well developed literature on caste status among Indian Muslims (Z. Ahmad 1962; Ali 2002; Aggarwal 1966; Ahmad 1973).

The importance of this literature, especially from the point of view of legal regulation, must be underlined. This scholarship aimed to present Muslim caste as a system of hierarchy akin to Hindu caste. There were some obvious ways in which this view of caste would impact law. It has visibly impacted the framing of affirmative action policy. As I will argue below, it has also become increasingly unfeasible to argue that Muslim caste as status does not exist. In other words, this scholarship has contributed to making the vertical caste view both possible and plausible. Interestingly, it has also complicated a straightforward relationship between caste and religious doctrine. Muslim caste is caste analogue since it is not contingent on religious dogma but on sociological existence of status.

4. *Muslims and the Scheduled Caste Category*

The most prominent contemporary controversy around the regulation of Muslim caste as vertical caste is the exclusion of the community from the Scheduled Caste category (Bhat 2017: 168; Sajjad 2014: 274; Ahmad 2003). As I mentioned in the previous section, the Indian Constitution under Article 341 empowers the central government to enumerate all the caste groups it deems to fit the category. In the first enumeration in 1950, often called the "1950 Order", the central government explicitly excluded non-Hindu religions from the ambit of the Schedule Castes. The order read: «no person who professes a religion different from the Hindu religion shall be deemed to be a member of a Scheduled Caste». This was an

unusual requirement for two reasons. Firstly, no such exclusion existed in the previous regime of Depressed Classes[15]. Secondly, there existed no evidence, on record or otherwise that suggested changing religion had any compelling impact on the socio-economic conditions on the convert. Moreover, *Dalit* communities often included persons of various religious faiths without affecting their horizontal caste membership or social status. The anomalous nature of the religious exclusion seemed to have been perceived over a period of time. In 1956, Sikhs were included in the regime; and in 1990, the bar was removed for Buddhists as well. But the exclusion continues to be in place for both Muslims and Christians.

The reason for the religious bar is rather elusive (Galanter 1984: 310). It is clear that the exclusion is not so much based on the empirical evidence of socio-economic marginalization of low caste groups among Muslims and Christians, than a combination of definitional fiat and political ideology.

On the surface of it, the category of Scheduled Caste may appear to be rather self-evident. But as scholars like Lelah Dushkin (1967) and Galanter (1969) have noted, it reflects deep historical and empirical ambiguities. The Constitution does not explicitly define Scheduled Castes. Rather, the definition has emerged over time: castes that suffer from the historical practice of untouchability. "Untouchability" itself is not self-evidently clear: does this refer to the religiously sanctioned practice of exclusion from religious spaces along with public resources, or a wider set of exclusionary practices independent of religious sanction? These ambiguities have come to occupy the centre of the debates on the religious exclusion.

A review of the parliamentary debates shows that political actors have approached the category to denote competing conceptions of caste (Bhat 2017: 183). At one end of the spectrum, politicians, primarily belonging to the Hindu right-wing parties, have insisted that since "non-Indic" religions like Islam and Christianity do not recognize the caste system, *Dalit* communities among Muslims and Christians cannot be included in the Scheduled Caste category. Evidently, what matters for this side of the debate are not the range of the social disabilities historically associated with Untouchability, but the religious doctrine

[15] The only exclusion pertained to "Indian Christians", but no other community was excluded from the ambit of the category.

of the community in question. At the other end are political actors who have insisted that caste must be understood as a secular and sociological phenomenon. Consequently, it is not religious doctrine that should play a predominant role, but the empirical evidence of comparable socio-economic marginalization of non-Hindu groups (Bhat 2017: 184-87).

This competition between political interpretations of caste is alive in contemporary India. For the first time in 2006, a government constituted study used the phrase *Dalit* Muslims and empirically verified the socio-economic conditions of this section of Muslims. The report argued that *Dalit* Muslims were not only comparable to the *Dalits* of other religious persuasions, but in fact were more marginalized on many other accounts. In the words of the report,

> [The] body of evidence when taken as a whole is unambiguously clear on the fact that there is no compelling evidence to justify denying SC status to DMs and DCs. If no community had already been given SC status, and if the decision to accord SC status to some communities were to be taken today through some evidence-based approach, then it is hard to imagine how DMs and DCs could be excluded (Deshpande 2008: 81).

By 2007, two more government constituted committees recommended the removal of the religious bar[16]. One of them had been specifically asked to look into the question of affirmative action for Muslims and other religious minorities, and make necessary recommendations. And it offered a resounding recommendation that,

> … all those social and vocational groups among the minorities who but for their religious identity would have been covered by the present net of Scheduled Castes should be unquestionably treated as socially backward, irrespective of whether the religion of those other communities recognizes the caste system or not (Misra Committee Report 2007: 149).

Each of these policy developments provide the background for a series of petitions that have been filed by various *Dalit* Muslim and *Dalit*

[16] Ministry of Minority Affairs, Report of the National Commission for Religious and Linguistic Minorities (Government of India 2007) (Misra Commission Report); Prime Minister's High Level Committee, Social, Economic And Educational Status of the Muslim Community in India: A Report (Government of India 2006), http://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf, accessed 2 September 2017 (Sachar Committee Report).

Christian organizations in the Supreme Court against their exclusion[17]. The arguments are on expected lines. The petitioners have argued that excluding Muslims and Christians is purely based on religion, is discriminatory and violates the Constitution's secular principle.

This policy and empirical background is significant for us to assess the constitutionality of the religious bar – something that the Supreme Court is bound to decide sooner than later. It also plays an important role in complicating the larger trajectory of the Court's jurisprudence on the relationship between religion and the Scheduled Caste category.

The courts have had to resolve a particular kind of puzzle: do individuals retain their Scheduled Caste status if they convert back to their religion (ordinarily, Hinduism) after converting out of it in the past? The judicial position does not neatly fit the political discourse that I have described above. The judicial response to this question can be conveniently divided into two phases, based on their conceptualization of caste among Christians (and by extension, Muslims). In the first phase, the courts ruled that an individual's *Dalit* caste would altogether cease to exist on conversion to a religion like Christianity. The reason for this was that religions like Christianity and Islam did not recognize the caste system. In the words of an early Madras High Court judgment, «the general rule is conversion operates as an expulsion from the caste… a convert ceases to have any caste»[18]. Note that this loss of caste had nothing to do with either the perception within the convert's community or the empirical grounds of marginalization. This was solely based on the doctrine of the convert's new religion. Note also that this position was not only related to an individual converting out of a Scheduled Caste. Its implications were applicable even to those groups or castes among Muslims or Christians who had historically converted, as a group, but had retained all elements of their caste like occupation and marginalization. In other words, and in our terms, the court did not endorse vertical caste among Muslims or Christians.

[17] Mohd. Sadiq v Union of India (2006) Writ Petition (C) No. 46 of 2006; Akhil Maharastra Khatik Samaj v Union of India (2008) Writ Petition (C) No. 13 of 2008; Centre for Public Interest Litigation v Union of India (2004) Writ Petition (C) No. 180 of 2004.

[18] Michael v. Venkataswaran (1952) A.I.R. Mad. 474 (per Rajamannar CJ). See also In re Thomas (1953) A.I.R. Mad. 21; Rajagopal v. Armugam (1969) A.I.R. SC 101.

The jurisprudence saw a shift in 1975, when the Supreme Court in *Arumugam* adopted a distinct interpretation of vertical caste[19]. It ruled not as much the ceasing of caste, but an "eclipse" of caste. According to the Court,

> It is true that ordinarily on conversion to Christianity, [the convert] would cease to a member of the caste, but that is not an invariable rule. It would depend on the structure of the caste and its rules and regulations….

The Supreme Court accepted the existence of vertical caste for those who happen to be Muslims and Christians. The Scheduled Caste status was interestingly linked with a test that evaluated (continued or renewed) caste affiliation to the behavior of the "Hindu" caste group. With *Arumugam*, the test for "retaining" caste after conversion – and more importantly, at re-conversion into Hinduism – became a question of "fact". This position has been consistently applied since[20], most recently restated by the Supreme Court in *K.P. Manu* that conversion into religions like Islam and Christianity do not extinguish caste affiliation if evidence shows that the caste group in question does not extern the individual.[21] The only impact of such conversion is that the Scheduled Caste status of the convert will get eclipsed owing to the 1950 Order. This eclipse shall be removed the moment the individual converts back into Hinduism.

There is some continuity between this approach and the Supreme Court's approach in *Soosai*[22], the only case where it has addressed the constitutionality of the religious bar. The petitioner in the case belonged to the Adi-Dravida community and was a convert to Christianity. There was adequate evidence that the Adi-Dravida community satisfied the empirical requirements of the *Arumugam* test, that is, the community did not make any distinction between its members on the basis of religious faith. Nevertheless, *Soosai* was not decided in favour of the petitioner. Pathak J held that the burden of providing evidence was on the Christian converts. They had to show that,

[19] G.M. Arumugam vs S. Rajgopal (1976) A.I.R. SC 939

[20] Principal, Guntur Medical College, Guntur v. Y. Mohan Rao (1976) A.I.R. SC 1904; Kailash Sonkar v. Maya Devi (1984) A.I.R. SC 600; S. Anbalagan vs B. Devarajan (1984) A.I.R. SC 411.

[21] K.P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate (2015) S.C.C. OnLine SC 161.

[22] Soosai v. Union of India (1985) Supp. S.C.C. 590.

they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State… It is not sufficient to show that the same caste conitunes after conversation. It is necessary to establish further that the disabilities and handicaps suffered from such caste membership in the social order of its origin – Hinduism – continue in their oppressive severity in the new environment of a different religious community[23].

Since, according to Pathak J, «no authoritative and detailed study dealing with the present conditions of Christian society have been placed on the record», he ruled in favour of constitutionality.

What emerges from this review is a rather contradictory judicial practice. *Arumugam* onward, there is a tendency for courts to accept vertical caste among Muslims and Christians. Perhaps this view is inevitable in light of the extensive sociological evidence that I pointed out in this and the previous parts. But this view has not automatically translated into a more serious scrutiny of the religious exclusion under the 1950 Order. The reasoning in the judicial orders is not enough to point us to the precise reasons for this. One possible inference can be that the courts have continued to interpret *Dalit* Muslim and Christian claims as horizontal caste and not vertical caste. This has not been enough for them to reject the religious bar.

5. *Muslims in Backward Classes*

In the previous section, I pointed out a rather ambivalent attitude of the courts, legislature and policy makers towards Muslim caste in the context of the Scheduled Caste debate. While there has been a general tendency towards accepting the empirical reality of Muslim caste, it has not been able to accommodate claims of *Dalit* Muslims on those grounds. This ambivalence is deeper when one glances towards the broader debate on Muslim affirmative action. This debate has seen a sharp prominence particularly in the last decade owing to a series of policies at the state and central levels introducing affirmative action, including reservations for Muslims *as a group*. In these debates, the Muslim community has been sought to be identified as a group in the "other backward classes"

[23] *Soosai* at ¶ 8.

category. Predictably, the contours of the debate have been whether a religious group can be the target of the constitutionally mandated affirmative action regime (Alam 2014; Hasan 2011).

As I mentioned above, the test for the identification of the backward classes is social and educational backwardness. Historically, the central legal and political controversy has been around the use of caste identity in the determination of the beneficiaries of this identity. The dividing line in the debate was how to interpret "class" in the category. In a series of cases, the Supreme Court expressed its disfavor for relying – or at any rate, relying too heavily – on caste for this determination. The controversy reached a zenith when the central government decided to implement the report of the second Backward Classes Commission or the Mandal Commission Report in 1991[24]. The Report provided a compelling and data-driven defense of the role of caste to determine the reservation beneficiaries. It supported two functions of caste in the determination of backward classes: using caste groups as potential beneficiaries of affirmative action and caste status as one of the tests to determine social backwardness of a group. The reservation policies implementing the Mandal recommendations came up for constitutional adjudication in *Indra Sawhney*. The Supreme Court overwhelmingly endorsed the recommendations of the Report. The majority of judges ruled that caste identity more often than not reflected deeply entrenched socio-economic marginalization. There was an intricate relationship, according to the majority, between caste, occupation, poverty and social backwardness. Consequently, caste groups could – and should – be used a quota beneficiaries provided there is evidence of their social and educational backwardness.

In this debate, Muslim caste had only a marginal role. The debate was driven by the political claims of Hindu lower castes or backward castes for representation in the state (Jaffrelot 2003; Choudhry 2015). Nevertheless, there were some crucial aspects of the debate that touched upon Muslim caste. Most significantly, the majority in *Indra Sawhney* was inclined, like never before, to articulate caste in terms of socio-economic marginalization and not merely as status in the Hindu religious order. This interpretation of caste, which I have called subordinated caste (Bhat 2017), reflects conceptualizing caste identity as encoding forms of

[24] Report of the Backward Classes Commission (Government of India, 1980) (hereinafter Mandal Commission Report).

social, political and economic marginalization. In *Indra Sawhney*, caste was conceived as a sociological phenomenon, often shared among non-Hindu religions. Perhaps as a way to respond to the dissenting judges, who felt that using caste as a method of identifying affirmative action beneficiaries would leave out (non-Hindu) religious minorities and thus offend the country's secular principle, the majority judges insisted that caste, as a form of subordination, existed across the religious divide. Consequently, using caste as a basis for identification of backward classes did not exclude non-Hindus. In his concurring opinion, Sawant J noted that,

> … the change of religion did not always succeed in eliminating castes. The converts carried with them their castes and occupations to the new religion. The result has been that even among Sikhs, Muslims and Christians casteism prevails in varying degrees in practice, their preachings notwithstanding... Casteism has thus been the bane of the entire Indian society[25].

This recognition of Muslim caste, and dare I say vertical caste, was in line with the Mandal Commission Report. The Report had invoked and endorsed the sociological literature of Muslim caste analogues[26]. In its recommended list of backward castes, it had included 82 Muslim groups among its proposed list of OBCs. But this interpretation of Muslim caste remained highly derivative. Despite the recognition of Muslim caste analogues, the Report stated that since Islam (and Christianity) did not recognize caste hierarchy, caste could not be accepted as the basis of identifying backward classes among Muslims[27]. The Report recommended the inclusion of only those Muslim castes whose analogous Hindu castes had been included in the backward class category. Thus, despite the appearance that Mandal, in contrast with the *Dalit* Muslim debate, had endorsed Muslim caste, its conceptualization of Muslim caste was both partial and derivative.

What was left of Muslim caste after *Indra Sawhney* remains unclear. The case endorsed caste-based affirmative action, and in this scheme, permitted the state to include Muslim caste groups. Reservations schemes, both at the central and state levels, have included many Muslim caste groups. But Muslim organizations have consistently argued that many

[25] *Indra Sawhney* ¶ 399 (per Justice Sawant).
[26] Mandal Commission Report, vol. 1, §§ 12.11-16.
[27] Mandal Commission Report, vol. 1, § 12.16.

deserving Muslim groups continue to be excluded from these schemes (Sachar Committee Report 2006: 200). Since the Indian equality jurisprudence leaves the enumeration of backward classes to the state (Singh 1995), Muslim castes demanding inclusion have to address their claims not to the courts but to the political branches.

More recently, vertical caste has made a circuitous re-entry in the debates on affirmative action – this time in the context of Muslim affirmative action. Starting with a series of quota policies introduced by the state of Andhra Pradesh in 2004, the central government and a few state governments have introduced affirmative action for Muslims as a group. Each of these has invited the judiciary to assess their constitutionality. This debate need not have invoked Muslim caste at all. In fact, Muslim quota cases could have been resolved by only looking at the empirical basis of such policies, that is, whether Muslims in the state are socially and educationally backward. But interestingly, in cases where the courts have struck down Muslim affirmative action, they have done so by holding that the existence of Muslim caste establishes the illegality of such policies.

The most explicit example of this judicial strategy is the series of cases on the Andhra Pradesh quota policies. In each of these cases, the Andhra Pradesh High Court has struck down Muslim affirmative action policies[28]. But the judges have been divided in their reasons. Primarily, there have been two grounds. Some judges have taken the view that the state government has not paid adequate attention to the empirical details that were mandated by *Indra Sawhney* to institute the quota policies. Simultaneously, other judges have struck down the policies on the ground that the Constitution does not permit affirmative action to target religious groups at all. The reason for this, according to these judges, is that the existence of Muslim caste shows that Muslims are not a "homogeneous" class of citizens, and therefore cannot be the legitimate target of affirmative action. Rather than religious identity, these judges have insisted that only caste groups, Hindu or otherwise, can be the targets of affirmative action provided it is shown that they are socially and educationally backward. The most prominent example of this is Raghuram J's opinion in

[28] T. Muralidhar Rao v. State of Andhra Pradesh (2004) 6 A.L.D. 1 (L.B.); Archana Reddy v. State of Andhra Pradesh (2005) 6 A.L.D. 582; T. Muralidhar Rao v. State of Andhra Pradesh (2010) 2 A.L.D. 492; R. Krishniah v. Union of India (2012) 5 A.L.D. 688 (D.B.).

Archana Reddy. The judge held that the Muslim community could not be considered a single collective. Vertical caste among Muslims meant that the religious community was a "heterogenous social class" and unqualified to be a target of quota policies.

The treatment of Muslim caste in Muslim affirmative action and *Dalit* Muslim debates presents a picture of contradiction (Bhat 2018). The courts appear inclined to interpret Muslim caste vertically, even sometimes to the exclusion of Muslim affirmative action. On the other hand, the judicial practice in the evolving *Dalit* Muslim debate till now reflects a perplexing attitude towards Muslim caste: the courts appear to approach Muslim caste as horizontal despite the appropriateness of the vertical approach.

6. *Conclusion*

My aim in this paper was to provide a review of Muslim caste under Indian law. As my account shows, the presence of Muslim caste in Indian law reflects the same ambiguities of definition that scholars studying Hindu caste have noted. Like the larger landscape of law and caste in India, Muslim caste has also been interpreted in contrasting ways: as horizontal caste related to the concerns of customs and usages, and vertical caste related to the concerns of equality and discrimination.

Unlike in Hindu caste, the Indian courts have had a more inconsistent record in the case of Muslim caste. This is particularly in the country's affirmative action regime. This regime has historically become more responsive to caste-based subordination. But the imagination of caste subordination appears to keep Hindu caste as its vantage point. From this vantage point, Muslim caste is an outlier. The absence of religious sanction of caste in the case of Muslims has made the legal conceptualization of Muslim caste both derivative and erratic.

This unevenness of policy and law has added more flavour to the politics of Muslim caste. The last two decades have seen the rise of the low caste Muslims (Ansari 2011; Sajjad 2014). Legal politics of inclusion has increasingly become its central motif (Bhat 2017). This politics has been attuned to not only claiming inclusion, but also redefining the terms of this inclusion. And as the numerous cases on Muslim caste near

a judicial hearing, the Indian Supreme Court will be asked to re-consider the relationship between Muslim social stratification, caste and religion.

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