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Opening Doors to Muslim Minorities in the Workplace? From India's Employment Quota to EU and Belgian Anti-Discrimination Legislation

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OPENING DOORS TO MUSLIM MINORITIES IN THE WORKPLACE? FROM INDIA'S EMPLOYMENT QUOTA TO EU AND BELGIAN ANTI-DISCRIMINATION LEGISLATION

Katayoun Alidadi*

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I. INTRODUCTION

Subsequent immigration fluxes since the Second World War have transformed Europe into a multi-cultural and multi-religious society where 'locals' and immigrants,[1] mostly 'guest workers-turned-citizens' and their offspring, live side by side. India, on the other hand, has a longstanding experience with multi-religiosity[2] and multi-ethnicity amongst its highly diverse population.

Religion remains present today in the workplace in a myriad of ways in both Europe and India. In Europe, more and more workers are demanding recognition of their religious identities in the workplace and this seems "so challenging to many polities precisely because it reflects a style of religious commitment that contradicts the norms of secularization."[3] There is an ensuing dilemma for policy and opinion-makers between, on the one hand, holding on to the normative framework and refusing to accommodate claims derived from profound societal changes and, on the other hand, 'deconstructing' the existing framework to a certain extent without allowing individuals with religious and other identity-based claims to become "law-makers unto themselves."[4] In the case of Muslims, the challenges have gained large visibility.

The focus on socio-economic participation in addressing the position of religious minorities is justifiable. Considering the importance of employment as a means of subsistence, individual and social progress, as well as being a central aspect of one's identity, workplace religious discrimination in all its forms is paralyzing towards Muslim participation in the work force and in society. Effective protective legal mechanisms –

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[1] Using the term "immigrant" brings with it certain connotations as opposed to "minority." Generally immigrants accept the culture of the new country and integrate themselves. In contrast, national minorities aim to preserve their culture. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

[2] Hinduism, Buddhism, Jainism and Sikhism originated in India; Zoroastrianism, Judaism, Christianity, and Islam originated outside India, but shaped India's diverse culture. *See* Barbara Harriss-White, *India's Religious Pluralism and its Implications for the Economy* (Queen Elizabeth House, University of Oxford, Working Paper No. 82, Feb. 2002) (discussing India's religious minorities, and the effect of religious pluralism on the economy).

[3] Kenneth D. Wald, *Religion and the Workplace: a Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 474 (2009).

[4] Alain Supiot, *Orare/Laborare*, 30 COMP. LAB. L. & POL'Y J. 641, 652 (2009) (citing Reynolds v. United States, 98 U.S. 145, 166-67 (1878) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect, to permit every citizen to become a law unto himself. Government could exist only in name in such circumstances.").

which can differ substantially from nation to nation depending on the concrete background and social dilemmas - are crucial in this regard, and thus a comparative examination is helpful to open up horizons.

An adequate system of minority protection is said to be based on two pillars.[5] Anti-discrimination legislation, together with relevant human rights such as the freedom of religion and expression, forms the first pillar. The second, and more controversial, pillar is that of specific minority rights such as affirmative action,[6] which have a group dimension. It has been argued though that certain interpretations of anti-discrimination provisions, because they would allow, imply or mandate special minority measures, "would go a long way in providing minority protection."[7]

With considerable differences in history, population, size, and culture, both Europe and India have struggled to find solutions for the educational and economical 'backwardness' of their respective minority Muslim populations. The European Convention on Human Rights, which in article 9 guarantees the freedom of thought, conscience and religion and in article 14 the right not to be discriminated against in the enjoyment of Convention rights, is in light of the case-law of the now-defunct European Commission of Human Rights and the European Court of Human Rights of limited use when it comes to tackling discrimination and accommodating for religious practices in the workplace.[8] Recently, the European Union (EU) has entered as a new actor in this regard. In 2000, the EU adopted a landmark Directive to combat, amongst others, religious discrimination in the workplace, but the implementation has been left to the member states. Directives set forth the goals to be reached but provide the member states leeway in adopting measures that fit within their national frameworks. In this paper, the focus will therefore be on the example of Belgium, one of original EU member states that remains politically central, and this both in Part II (with regard to the data that re-

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[5] Kristin Henrard, *Minorities and Socio-Economic Participation: The Two Pillars of Minority Protection Revisited*, 2009 International Journal on Minority and Group Rights 16, 549-76 [hereinafter Henrard, *Minorities and Socio-Economic Participation*].

[6] *See* KRISTIN HENRARD, EUROPEAN COMMISSION, EQUAL RIGHTS VERSUS SPECIAL RIGHTS? MINORITY PROTECTION AND THE PROHIBITION OF DISCRIMINATION 14 (2007), *available at* http://www.migpolgroup.com/public/-docs/124.EqualRightsVsSpecialRights_EN_06.07.pdf [hereinafter HENRARD, EUROPEAN COMMISSION].

[7] *Id.* at 6.

[8] LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 86-87 (2008) ("The question of whether Convention rights apply at all within the workplace is contested within the case-law, and the ECTHR has not taken a consistent view on this issue.").

veals the need for proactive measures)[9] as well as in the implementation of the EU Employment Equality Directive.

Collective minority rights take a more prominent place in the Indian model than in the European context. In an attempt to deal with the legacy of the Indian caste system, India's central and state governments have adopted "one of the most comprehensive affirmative action programs."[10] A percentage of posts, not exceeding fifty percent as per the Supreme Court,[11] in civil service, the public sector, and state and private educational institutions (except the minority institutions), is reserved for so-called backward communities and the Scheduled Castes and Tribes ("OBCs," "SCs/STs")[12] Reservations, also referred to as "compensatory discrimination," or quota, are a form of affirmative action under Indian law for the benefit of historically oppressed groups. Entrance (and sometimes promotion) requirements are relaxed in different ways for individuals who prove[13] they belong to one of these administrative categories,[14] with still large numbers of backlog vacancies.[15]

This paper argues that the prevalent protection strategy in Europe and India with regard to the respective Muslim minorities in the workplace has been essentially divergent. I argue that the respective focus on anti-discrimination legislation in Europe and on affirmative action

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[9] Discussing the socio-economic situation of Muslims in all EU member states would not be helpful for the argument advanced. However, when useful, information regarding specific EU member states will be noted.

[10] Karthik Nagarajan, Note, *Compensatory Discrimination in India Sixty Years After Independence: A Vehicle of Progress or a Tool of Partisan Politics?* 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 483,484 (2009).

[11] Balaji v. State of Mysore (1963), 1962 SCR SUPL. (1) 439 (India), at 470 ("we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.").

[12] SCHEDULED CASTS & SCHEDULED TRIBES POPULATION, GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, OFFICE OF THE REGISTRAR GENERAL & CENSUS COMMISSIONER (2001), *available at* http://www.censusindia.gov.in/-Census_Data_2001/India_at_glance/glance.aspx. "Scheduled Caste" is a euphemism for sub-castes collectively referred to as Dalits (a self-designated term that in Sanskrit means "oppressed" or "broken"). *Id.* The Dalits (also called "untouchables," "outcastes," and, more recently, "slumdogs") are the most marginalized segment of India's population. Dalits made up an estimated 165 million according to the 2001 census. *See id.*

[13] An individual may prove that he or she belongs to one of the administrative categories by submitting a declaration (similar to an affidavit). For an example of a declaration, see http://www.rrbbpl.nic.in/Download/-dec_form_obc.pdf.

[14] GOV'T OF INDIA, MINISTRY OF PERS., PUBLIC GRIEVANCES AND PENSIONS, DEP'T OF PERS. AND TRAINING, BROCHURE, *available at* http://www.pers-min.nic.in.

[15] *Id.*, at 5-6(describing the special recruitment drives to fill the backlog vacancies for SC/ST/OBC, especially the 2004 recruitment drive (74,008 backlog vacancies)).

in India can be explained by the respective adherences to different notions of equality. Europe, where equality as "equality of opportunity" is predominant and the concept of "equality of results" is contentious, has mainly relied on anti-discrimination norms for minority protection in the workplace. This anti-discrimination strategy also fits in the liberal-democratic tradition of focusing on individual freedoms and rights. In contrast, India has been more comfortable adopting affirmative action in the workplace in the form of employment quota, referred to as "reservations", to address the plight of historically grossly disadvantaged groups, a strategy that fits within the "group membership and group preferences in India"[16] and the "hypersensitivity" to difference under Indian law.[17] Carrying the legacy of Hindu segregated society and centuries of structural inequalities, India has become increasingly comfortable with a structure that goes further in *aspiring* for more equal outcomes,[18] although Muslims, in a idiosyncratic manner, remain partially excluded from SC reservations.[19]

A. Organization of Paper

This paper starts out by considering the perceived conflicts and contradictions between religious identity and employment status in today's working world in Part I. Part II aims to contextualize the debate on workplace protection for Muslim minorities by providing useful data with regard to the composition and background of the Muslim minorities in Belgium and India, as well as their respective socio-economic situations. The dire socio-economic position of Muslim minorities in both Belgium and India, which this data points to, explains the need for remedial action, whether it be in the form of anti-discrimination norms or positive or affirmative action. In Part III, I first introduce the reader to the intricate debate on Indian quota in public sector employment, which has drawn frequent controversy because of the exclusion of Muslims from the most disadvantaged category of SC because of their religious adherence to Islam. Next, the principal protective measure against religious discrimination in the European and Belgian workplace, the EU

[16] *See* MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA, 103-39 (1989).

[17] Werner Menski, *Indian Secular Pluralism and its Relevance for Europe, in* LEGAL PRACTICE AND CULTURAL DIVERSITY 31, 38 (Ralph Grillo et al. eds., 2009).

[18] *See* Indian Supreme Court Justice K.K. Mathew in State of Kerala v. Thomas, (1976) 1 S.C.R. 906 (India) at 954 noting that "[e]quality of result is the test of equality of opportunity." For a similar argumentation, see Anne Phillips, *Defending equality of outcome*, JOURNAL OF POLITICAL PHILOSOPHY, 12 (1) (2004), 1-19.

[19] *Id.*

Employment Equality Directive[20] and its Belgian implementation and enforcement, are analyzed and compared with the India case. This is followed by some Concluding Observations.

II. CENTRALITY OF THE WORKPLACE AND PERCEIVED CONTRADICTIONS WITH RELIGIOUS IDENTITY

In the workplace, similar to what applies to the public space in the strict sense, [21] the same challenge to deal with diversity, and yet to uphold a necessary level of unity or solidarity, seems to be present. A multi-religious workplace presents particular challenges, including how to provide equal employment opportunities and recognize workers' freedom of religion and religious identity while avoiding conflict and remaining profitable. As each society has its own history, political ideology and experience with religious minorities, we can expect the policies and coping mechanisms to vary from society to society.

In the context of religious rights in the workplace, France and the United States are often taken as the points of reference on opposite sides of the spectrum.[22] Under French law, workers are said to have no religious rights, as employers have no legal obligation to accommodate religious practice.[23] In contrast, in the United States there is substantial room for expression of religious identity with obligations for private employers to reasonably accommodate their workers' religious needs unless doing so would amount to undue hardship.[24] In between these extremes, however, there exists a wide array of positions that differently balance reli-

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[20] This paper will use the term "Employment Equality Directive" (or simply "Directive") while "(Employment) Framework Directive" is also commonly used to refer to EU Directive 2000/78/EC.

[21] *See generally* CULTURAL DIVERSITY AND THE LAW: STATE REPONSES FROM AROUND THE WORLD (Marie-Claire Foblets et al. eds., 2010).

[22] Wald, *supra* note 2, at 475.

[23] *Id.*; In reality the picture of the French context is much more nuanced: see deliberation of 28 March 2011 of the French Equality Body on the place of religion and religious accommodation in the private sector workplace: HAUTE AUTORITÉ DE LUTTE CONTRE LES DISCRIMINATIONS ET POUR L'EGALITÉ, L'EXPRESSION DE LA LIBERTÉ RELIGIEUSE AU TRAVAIL, http://www.halde.fr/L-expression-de-la-liberte,14543.html

[24] Civil Rights Act of 1964, 42 U.S.C. § 2000(e). Arguably, Canada offers even more accommodation than the United States, where the *de minimis* standard provides for an extensive interpretation of the term "undue hardship," and limits the possibilities for reasonable accommodations under the Civil Rights Act. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). For a discussion of the Canadian approach, see José Woehrling, *L'Obligation d'Accommodement Raisonnable et l'Adaptation de la Société à la Diversité Religieuse*, 43 MCGILL L. J. 325 (1998).

gious with other interests in the workplace, with each jurisdiction seeking to concretize the narrative it adheres to in the public sphere, ranging from assimilation and tolerance to multiculturality or interculturality. It is on two mid-spectrum examples, Belgium and India, that this paper focuses.

In the West, "[p]aid employment is generally considered to be a central defining feature of ourselves as individuals."[25] Employment status has come to be determinative of identities and social status and aside from being an economic necessity, it can meet social, moral, and psychological needs. It is often said to be a central life activity, "superordinate" to all other non-work activities.[26] So while religion is clearly part of a believer's identity, the modern workplace also awards employees a particular identity. The relation between these two identities is complex, but they should not be regarded as mutually exclusive as forcing a choice between religious identity and participation in the workplace is to put many employees in an untenable situation.

While few now regard work as a *religious* calling, society continues to attach a moral dimension to work.[27] As Max Weber asserted, the ideology of work under capitalism is founded on the Protestant work ethic, but capitalism secularized the duty to work.[28] However, the value and importance of duty and commitment seem to have remained universal human values. The Islamic Work Ethic ("IWE"), based on the Quran and Hadith, sees hard work as a virtue and holds praise for those who strive to earn a living.[29] Since work or engaging in economic activities is regarded as obligatory under IWE, a Muslim experiencing discrimination or unemployment in the workplace faces quite a dilemma.

The issue today in Europe seems to be how to reconcile demands of the labour market with religious beliefs and duties of certain employees, with the premise that work and religion, if not in contradiction, are at least in competition. Under the Market paradigm, which the workplace focuses on, the worker is equated with "human capital," a resource in the production process subject to matching managerial techniques.[30] Under this paradigm, religion is a fish out of water in the workplace. However,

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[25] MIKE NOON & PAUL BLYTON, THE REALITIES OF WORK 49 (2d ed. 2002).

[26] *Id.* at 61.

[27] *Id.* at 57.

[28] *Id.* at 57.

[29] Darwish A. Yousef, *Islamic Work Ethic – A Moderator Between Organizational Commitment and Job Satisfaction in a Cross-Cultural Context*, 30 PERS. REV. no. 2, 152-53 (2001).

[30] Supiot, *supra* note 3, at 649.

for a long time, work itself was attributed religious quality.[31] The role of labor in a devout believer's life in Christianity is well known.[32] According to Saint Augustine, "religious vocation should not serve as a pretext for laziness and living off other people's labor."[33]In this conception, work and prayer differed but were complementary.

The relationship between work and religion was, however, transformed fundamentally at the beginning of the Modern era, with the concepts of work and prayer radically split into separate spheres.[34] This has fundamentally altered the question surrounding the role of religion in the workplace in the West, which now starts from the presupposition that two contradictory spheres must somehow be reconciled. This is closely related to the debate on the relation between Islam and secular liberal values. In Islam, liberal or Western distinctions between the public and private sphere of religion often cause problems.[35] It is argued that "liberal states may in fact be worse for Muslims than avowedly Christian or Jewish states because they relegate religion to the private sphere, banish God from public morality, and give protection to immoral acts, or because of the special regard for 'the People of the Book' accorded Christians and Jews in the Qur'an."[36] For Christians on the other hand (and to a lesser extent, for Jews), secularism can be regarded as a "natural and logical consequence of both their religion and their experience with clerical rule."[37] This fundamental issue of the accommodation of Muslims in liberal democracies translates itself into challenges of accommodating Islamic practice in 'secular' work practices in Europe.

While the Western concept of work has been transformed, other civilizations have another view on the meaning of work. Under the traditional Indian caste system, an individual is equated with the type of work assigned to him.[38] The caste structure of Hindu society divides people in distinct birth groups of individuals in particular occupation(s) with par-

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[31] *Id.* at 641.

[32] *Id.* at 641, n. 1(referring to the Rule of Saint Benedict, ch.48, § 1: "Idleness is the enemy of the soul; and therefore the brethren ought to be employed in manual labor at certain times, at others in devout reading.").

[33] *Id.* at 642.

[34] *Id.* at 641, 644.

[35] Andrew F. March, *Are Secularism and Neutrality Attractive to Religious Minorities? Islamic Discussions of Western Secularism in the "Jurisprudence Of Muslim Minorities" (Fiqh Al-Aqalliyyat) Discourse*, 30 CORDOZO L. REV. 6, 2821 (2009).

[36] *Id.* at 2830.

[37] *Id.* at 2834.

[38] Supiot, *supra* note 4, at 643.

ticular rules of behavior.[39] While there are thousands of castes and sub-castes, the population is traditionally divided into 4 hierarchical groups: the *Brahmins* (originally the priests), the *Kshatriyas* (the warriors), *Vaishyas* (tradesmen) and the *Sudras* (servants and artisans).[40] The casteless, the *Dalits*, find themselves in an extremely vulnerable position with no possibility for upward mobility, which explains that integration and accommodation in professional positions were excluded.[41] In today's India, even after the formal dismantlement of the caste system,[42] employment and derived status inequalities are still strongly connected to caste and religion, ironically in part through the same compensatory discrimination schemes designed to uplift and emancipate the disadvantaged.[43]

It has been argued that in India, which is "by any standards a highly religious country,"[44] religion has not dissolved as a force in the economy and not been relegated to private life amongst others because of state encouragement under the distinctive Indian politics of secularism.[45]"Secularism" in the Indian sense carries with it an entire different connotation than in the Western world.[46] Indian Secularism can be defined –and thus contrasted with European secularism- as a "state policy of equal public respect for all religions, rather than the state promotion of a public culture opposed to or skeptical of religion."[47] Werner Menski speaks in terms of "equidistance of the state from all religions."[48]

III. SETTING THE CONTEXT: MUSLIMS, A RELIGIOUS MINORITY IN EUROPE AND IN INDIA

A. Introduction

More than 300 million Muslims, or one-fifth of the world's Muslim population of 1.57 billion, live in countries where Islam is not the majori-

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[39] *Id.*

[40] K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 314 (Tony Weir trans., 3d ed. 1998).

[41] *Id.*

[42] *See* INDIA CONST. art. , § 17("Untouchability" is abolished and its practice in any form is forbidden.).

[43] *See* Supiot, *supra* note 4, at 643 (referring to CHRISTOPHE JAFFRELOT, INDIA'S SILENT REVOLUTION: THE RISE OF THE LOWER CASTES IN NORTH INDIA (2003)).

[44] Harriss-White, *supra* note 2.

[45] *Id.* at 6-7, 34.

[46] *See generally* Menski, *supra* note 17.

[47] Harriss-White, *supra* note 2, at 7.

[48] Menski, *supra* note 17, at 36.

ty religion.[49] The largest Muslim minority population in the world exists in India.

It is well known that Muslims in Belgium, most of them immigrants, are disadvantaged in particular when it comes to employment.[50] In India, where there are many examples of highly successful Muslim Indian icons, Muslims as a whole have not done much better. The High Level Committee appointed to investigate the social, economic, and educational status of the Muslim community of India, the so-called Sachar Committee, determined a literacy level far below the national average, the highest school drop-out rates, and great under-representation in the premier colleges of India.[51] It comes as no surprise then that employment participation is low to extremely low, both in regular jobs as well as in the management and professional cadre.[52] Muslim's presence in Indian government[53] is "abysmally low" at all levels compared to their population share, while "in a pluralistic society a reasonable representation of various communities in government sector employment is necessary to enhance participatory governance."[54] The fact that unemployment rates among Muslim graduates is the highest of all socio-religious communities, is disconcerting.[55]

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[49] THE PEW RESEARCH CENTER FORUM ON RELIGION AND PUBLIC LIFE, MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 1 (2006) [hereinafter PEW RESEARCH STUDY], *available at* http://pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf.

[50] *See* Federale Overheidsdienst Economie, *Hoe vreemd is vreemd op de arbeidsmarkt: Over de allochtone arbeidskrachten in België* [*How Strange is Strange in the Labor Market Over Immigrant Workers in Belgium*], *in* STATISTISCHE STUDIËN, no. 111, (Liesbet Okkerse & Anja Termote eds. 2004) [hereinafter STATISTISCHE STUDIËN].

[51] RAJINDAR SACHAR, GOVERNMENT OF INDIA, PRIME MINISTER'S HIGH LEVEL COMMITTEE, REPORT ON SOCIAL, ECONOMIC, AND EDUCATIONAL STATUS OF THE MUSLIM COMMUNITY IN INDIA 52, 58, 69 (2006) [hereinafter SACHAR REPORT].

[52] *Id.* at 94, 104.

[53] *Id.* at 163 ("In India, government/ public sector employment is still the preferred employment for most people due to a variety of reasons. Apart from having a long term regular income and retirement benefits providing economic security, the higher positions in government jobs offer the employee privileged positions in society . . . . The perquisite of an official residence or housing is another reason . . . .").

[54] *Id.* at 163, 171.

[55] *Id.* at 74.

B. Muslims in Europe and Belgium

1. Composition and Background

There are some 38 million Muslims in Europe (50 countries and territories in the Pew Research Study), making up about 5% of the total population and slightly more than 2% of the worldwide Muslim population.[56] Russia has the largest Muslim population of 16 million, and in fact most European Muslims live in Eastern and Central Europe. While Muslims in Western Europe are mostly relatively recent immigrants (or their offspring), Muslims in Russia, Albania (80%), Kosovo (90%), Bosnia-Herzegovina (40%) and Bulgaria are indigenous.[57] This means that 6 in 10 European Muslims are indigenous. In Western Europe, Germany is home to an impressive 4 million Muslims.[58] France has a higher percentage of Muslims but an overall lower number.[59]

While, Europe's encounter with Islam is not new,[60] the diverse minority Muslim presence in Europe today is by and large a result of immigration waves after the Second World War.[61] For the first time in history, Muslims as a substantial minority migrated to non-Muslim countries and set up house in search of better prospects for themselves and their families.[62]

There are no precise statistics on the number of Muslims living in Belgium, and "guestimates" of 350,000 and 400,000 have been made.[63]

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[56] PEW RESEARCH STUDY, *supra* note 49, at 21.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2 ("This report estimates that France's Muslim population is between 3 million and 4 million based on recent immigrant data and a Generations and Gender Survey projected forward to 2009.").

[60] Europeans have had contacts, both peaceful and hostile, with the Muslim world for over one thousand years. Parts of Europe were under Muslim domination for centuries, mainly the Iberian Peninsula (with Granada being "reconquested" in 1492) and the Balkans (which were part of the Ottoman Empire for Centuries). After the Spanish *Reconquista*, all Muslims were forced to leave or convert, but in Bosnia and Albania there still exist Muslim communities that developed in the Ottoman period.

[61] *See* OLIVIER ROY, DE GLOBALISERING VAN DE ISLAM [GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH] 53 (2003).

[62] *Id.*

[63] The Belgian government relied on a 350,000 figure for the purpose of the first election of a representative organ for the Muslim community in Belgium on December 13, 1998. The 400,000 figure was issued by the King Baudouin Foundation. *See* KING BAUDOUIN FOUNDATION, HASSAN BOUSETTA & BRIGITTE MARÉCHAL, ISLAM EN MOSLIMS IN BELGIË: SYNTHESENOTA [ISLAM AND BELGIUM: LOCAL CHALLENGES AND GENERAL CONCEPTUAL FRAMEWORK] 8 (2004).

The Pew Study estimates Belgium to be home to about 281,000 Muslims, thus constituting 3% of its population.[64] The Belgian census distinguishes between Belgians and individuals holding a different nationality, but does not register religious affiliation.[65] However, many Muslim immigrants have obtained the Belgian nationality, enabled through increasingly flexible nationality legislation since 1984, and there are also Muslim converts.[66] It is clear though that Islam has become the second largest religion in a historically and still predominantly Catholic country.[67]

Most Muslims in Belgium[68] are from Moroccan, Turkish, and Algerian descent, which can be explained by the immigration waves the country has known.[69] In the aftermath of the Second World War, the Belgian government attracted foreign workers to come work in the Wallonian steel and mining industries.[70] "Many Muslims in Europe arrived as guest workers to do unskilled or low-skilled work."[71] Initially these "guest

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[64] PEW RESEARCH STUDY, *supra* note 49, at 31 (estimate based on European Social Survey 2006 and not on census information; the small sample size of this source make estimates less reliable, so number could be over or underestimated).

[65] KING BAUDOUIN FOUNDATION, *supra* note 63, at 8.

[66] *See* CENTRE FOR EQUALITY OF OPPORTUNITIES & OPPOSITION TO RACISM [hereinafter CEOOR], STATISTISCH EN DEMOGRAFISCH VERSLAG 2008: MIGRATIES EN MIGRANTEN POPULATIES IN BELGIË [STATISTICAL AND DEMOGRAPHIC REPORT 2008: IMMIGRANTS AND IMMIGRATION POPULATIONS IN BELGIUM] 126, 129 (2009).

[67] *See* FACULTEIT GODGELEERDHEID [Faculty of Religions], KATHOLIEKE UNIVERSITEIT LEUVEN, WERELDRELIGIES (IN BELGIË) [WORLD RELIGIONS (IN BELGIUM)], http://theo.kuleuven.be/page/icrid_religies/#andere (last visited Jan. 19, 2011) (according to a 1999 European survey, only 63 % of the Belgian population regards himself as member of a religious community, 57 % is member of the Catholic Church. Only 1,7 % and 0,3 % of Belgians consider themselves protestant or orthodox. In the 1990 value survey 68% considered himself part of the Catholic Church, in 1981 the number was 72%. This shows a steady decline in religious affiliation within Christianity.).

[68] Similarly, France's Muslim minority is dominated by North African (Mahrebi) Muslims, which is a consequence of the colonial era. For that reason, it has been said that European Muslims represent a "postcolonial minority culture." The earliest Muslim presence in Britain is also linked to the British India colonial project, while the dominance of Turkish Muslims in Germany can be explained by the early economic and diplomatic relations with the Ottoman Empire. The colonial background of European Muslims explains why it took so long for Europeans to realize Islam was in Europe to stay. *See* JOCELYNE CESARI, WHEN ISLAM AND DEMOCRACY MEET: MUSLIMS IN EUROPE AND IN THE UNITED STATES 12 (2004).

[69] Katayoun Alidadi, *The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws*, 5 UCLA J. ISLAMIC & NEAR EASTERN L. 1, 15-16 (2006); Jocelyn Cesari, *The Securitisation of Islam in Europe*, 15 CHANGING LANDSCAPE OF EUR. LIBERTY & SECURITY 1, 2 (2009) , *available at* http://aei.pitt.edu/10763/1/1826.pdf ("Most Muslims are immigrants or have an immigrant background.").

[70] KING BAUDOUIN FOUNDATION, *supra* note 63, at 6.

[71] OPEN SOCIETY INSTITUTE, MUSLIMS IN EUROPE: A REPORT ON 11 EU CITIES 113

workers" came from the Mediterranean (Italy, Spain, Greece) but subsequent large-scale recruitment was directed towards Turkey (1964), Morocco (1964), and Algeria (1970).[72] The oil crisis in 1974 was a turning point, and meant the official end of the government-led labor migration.[73] However, most of the "guest workers" became permanent residents, often acquiring a Belgian nationality.[74] The influx of new immigrants continued mainly through family reunification and asylum.[75] Transnationalism seems to run deep among some Belgian Muslims, meaning that relations with the country of origin often are tight, with regular visits, cultural and religious attachments and shared social practices which can also be found in the countries of origin,[76] while for the 2nd and 3rd generation Muslims born in Europe the ties with the countries of origin tend to be looser.[77]

2. Socio-Economic Situation of Muslims in Europe and Belgium

The socio-economic situation of Muslims in Belgium is problematic, with Islam being present especially among disadvantaged communities in urban areas.[78] Jocelyne Cesari notes that "[t]he automatic association of ethnicity, Islam and poverty was widespread in Europe long before September 11, 2001, just as was the resurgence of xenophobia and race-oriented nationalism."[79]

Overall, the employment participation rate among Muslim Europeans is lower than that of the majority population [80] and there seems to

(2009) [hereinafter OPEN SOCIETY].

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] The continued influx of Muslims via reunification was a European trend. *See* CESARI, *supra* note 68, at 3 (noting that reunification of families meant a transformation of the relations between Muslims and Europeans as immigrant workers were now physically at least integrated into the larger community (move from worker's dormitory to public housing) and had daily interactions outside the workplace with various services and institutions).

[76] *See* S. REP. NO. 3-27/5, at 13 (2003/4) (Advisory Comm. Rep.) (Belg.) (stating that, in general, Moroccans living in Belgium visit Morocco at least once a year and retired first generation Moroccans often spend half of the year there).

[77] ROY, *supra* note 61, at 51.

[78] KING BAUDOUIN FOUNATION, *supra* note 63, at 5, 9.

[79] CESARI, *supra* note 68, at 22.

[80] OPEN SOCIETY, *supra* note 71, at 109. There are various ways of measuring labor-market participation, such as economic activity rate, employment rates, and unemployment rates. Data in this area is rarely collected on the basis of religion, so it is necessary to rely on data on ethnic minorities or foreign nationals that are predominantly Muslim.

be a "religion penalty" as well an "ethnic penalty".[81] While "the close correlation between religion and ethnicity for some ethnic groups makes it difficult to separate the influence of ethnicity and religion," cross-referencing both characteristics shows that within one ethnic group, Muslims find themselves in a further disadvantageous position.[82] For instance, Muslim Indians in Europe have a lower participation rate than Indian Hindu's, Sikhs, and Christians.[83] For women who wear the veil, the "religion penalty" is tangible.[84]

Compared to other European countries, Belgium's labor force consists of a high share of foreign workers.[85] Compared to the local population, the immigrant population has a lower participation and employment level.[86] A disproportionately high percentage of immigrants are unemployed in Belgium and it takes longer for them to find work.[87] Significantly, 38% of Turks and Moroccans, and 29% of 'other non-Europeans' living in Belgium, were unemployed in 2002 and 2003.[88] This is in contrast to 7% of the local population and 12% of the Europeans.[89] According to more recent data, the labor market participation rate of Moroccan and Turks at 29% shows a worrisome gap compared to 65% of autochthonous Belgians.[90]

The employment level of women with foreign nationalities in the Belgian labor market is extremely low: less than 40% compared to almost 60% for Belgian women.[91] Turks and Moroccans are over-represented in the lowest echelons of the labor market, but even higher skilled immigrants have a higher chance of being unemployed.[92] Most are employed in trade, the restaurant business, and construction, often conducting manual labor under temporary contracts.[93] They are less em-

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Id.

[81] *Id.* at 119.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 132.

[85] STATISTISCHE STUDIËN, *supra* note 50.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* (numbers are for 2002 and 2003).

[90] OPEN SOCIETY, *supra* note 71, at 110, (labor market participation is brought down when a segment of the population, in particular women, do not participate in the labor force).

[91] Symposium, *Nieuwkomers: Welk perspectief op werk?*, 1 CEOOR 1, 4 (2007).

[92] CEOOR, http://www.diversiteit.be/?.&setLanguage=3 (last visited Mar. 16, 2011).

[93] *Id.*

ployed in the service sector.[94] To avoid or to 'solve' potential conflicts in the workplace, employers decide not to extend the temporary contract of an ethnic minority worker, or to terminate his or her long-term contract.[95]

Belgium is hardly exceptional in this regard. In the UK, the ethnic minority population has a higher unemployment rate than the white population, with recession periods disproportionately affecting them.[96] In France, the unemployment rate for young second-generation Moroccan and Algerian immigrants is twice the national average (40% as opposed to 20%).[97] As a general trend, Muslim immigrants seem to be forced into less-skilled, unstable and low-paying jobs. High unemployment rates and marginal or low paid jobs susceptible to unemployment have lead to high poverty among Muslims.[98] To no surprise, Muslims are called the "underclass of Europe."[99]

3. Discrimination in the EU Labor Market: Survey of Muslims

Muslims reported high levels of discriminatory treatment and criminal victimization, including racially motivated crime in a recent EU-wide survey conducted by the European Union Agency for Fundamental Rights ("FRA")[100] on the perceived discrimination and criminal victimization by Muslims in Europe.[101] On average, one out of three respon-

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[94] *Id.*

[95] CEOOR, ANNUAL REPORT: DISCRIMINATION 13 (2008) [hereinafter DISCRIMINATION REP.].

[96] RAVINDER SINGH DHAMI ET AL., DEPT. FOR WORK & PENSIONS, DEVELOPING POSITIVE ACTION POLICIES: LEARNING FROM THE EXPERIENCES OF EUROPE AND NORTH AMERICA, RESEARCH REP. NO. 406, 88-89 (2006).

[97] OPEN SOCIETY, *supra* note 71, at 111.

[98] *Id.* at 112; BEA VAN ROBAEYS & NATHALIE PERRIN, ARMOEDE BIJ PERSONEM VAN VREEMDE HERKOMST BECIJFERD – DEELVERSLAG VAN "ARMOEDE BIJ PERSONEN VAN VREEMDE HERKOMST" 7 (2006), *available at* http://www.kbs-frb.be/uploadedFiles/KBS-FRB/Files/NL/PUB_1635_Armoede_vreemde_orig-ine_becijferd.pdf (noting that in Belgium, 59% of Turks and 56% of Moroccans live under the poverty line compared with 10% of native Belgians and 15% of other Europeans).

[99] CESARI, *supra* note 68, at 9.

[100] The European Union Agency for Fundamental Rights [hereinafter FRA] is a body of the European Union (EU) based in Vienna since March 2007. *See* About the FRA, FRA, http://fra.europa.eu/fraWebsite/about_fra/-about_fra_en.htm. The FRA offers EU institutions and member states with assistance and expertise relating to fundamental rights. *Id.*

[101] *See generally* FRA, EU-MIDIS SURVEY, DATA IN FOCUS REP. NO. 2, 2 (2009), *available at* http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_MUSLIMS_EN.pdf (noting that the survey is the first to make an EU-wide study of immigrant and ethnic minority groups' daily encounters with discrimination) [hereinafter FRA SURVEY]; *see generally id.* at 4 (noting that the survey solicited responses from North-African and Turkish

dents declared to have been a victim of discrimination in the past 12 months.[102] In Belgium, 33% of the surveyed North-African Muslims and 20% of the Turkish Muslims reported discrimination. Notably, young Muslims (16 to 24 years) experience more discrimination than other age groups. On a somewhat brighter note, those who have lived in the country for a longer period, experienced less discrimination.[103] Of the nine areas of discrimination in everyday life (such as housing, goods and services, etc.) considered in the survey, employment emerged as the most significant area for discriminatory treatment (when looking for work 18%; at work 13%).[104] The FRA calls the results "alarming as…paid employment [is] key to [the] integration and social inclusion" of Muslims.[105]

The survey also showed that the overwhelming majority of respondents did not report their experiences of discrimination to an organization or at the place where it occurred.[106] Further, the groups most vulnerable to discrimination in the EU remain uninformed about legislation forbidding discrimination against people on the basis of their ethnicity.[107] In particular, 51% of the surveyed Turkish Muslims in Belgium and 42% of the surveyed North-African Muslims were unaware about the prohibition of discrimination on basis of ethnic origin in the labor market.

In practice it is difficult, if not impossible, to distinguish between religious discrimination and racism, and multiple and intersectional discrimination is recurrent. In the FRA survey, only 10% of the European Muslims thought the perceived discrimination to be related to their religious conviction, while 51% were of the opinion that discrimination for religious motives was 'high' to 'fairly high.'[108]

Several studies of the Belgian labor market by both international organizations (e.g., ILO, OECD) and Belgian Institutes and Universities

communities in Belgium).

[102] *Id.* at 5.

[103] 25% of Muslims born in the country experienced discrimination compared to 45% of those living in the country for one to four years. **Need source – also, conflicting BB rules – percentages use numerals however it is at the start of a sentence…**

[104] FRA SURVEY, *supra* note 101, at 3.

[105] *Id.*

[106] *Id.* (so-called 'dark numbers' issue)

[107] *Id.* at 10-11 (stating that on average, 37% of respondents thought that no anti-discrimination legislation existed and 22% were unsure of whether it did or not).

[108] FRA SURVEY, *supra* note 101; on multiple and intersectional discrimination, see FRA, EU-MIDIS SURVEY, DATA IN FOCUS REP. NO. 5: MULTIPLE DISCRIMINATION, 2 (2011), *available at* http://www.fra.europa.eu/fraWebsite/attachments/EU_MIDIS_DiF5-multiple-discrimination_EN.pdf

have shown that the discrimination of jobseekers and employees on the basis of origin is widespread and persistent.[109] In 2008, the Belgian Equality Body, the Centre for Equal Opportunities and Opposition to Racism, was consulted 2,207 times by perceived victims of discrimination, 57.3 % of that on basis of racial and ethnic motives and 8.3 % for reasons of belief or religion, with one out of five of the total notifications (380) in the labor and employment field.[110]

Immigrant job seekers in Belgium are often indirectly discriminated against, for instance through strict language requirements for positions. By requiring a 'native speaker' (of Dutch of French) in a job ad, many job seekers from immigrant backgrounds, even those with superior language skills, feel they are disqualified.[111] Discriminatory preferences, whether real or perceived, by company customers are often taken into account by businesses.[112]

C. Muslims in India

1. History and Background

India has the third-largest population of Muslims worldwide, after Indonesia and Pakistan.[113] Just under 161 million Muslims, or 10.3 % of the world's Muslim population,[114] live in India, making up 13.4 % of In-

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[109] DISCRIMINATION REP., *supra* note 95, at 98-99.

[110] *Id.* at 97.

[111] CEOOR,, NOTA BETREFFENDE DE MOEDERTAAL ALS CRITERIUM IN WERKAANBIEDINGEN [NOTE ON THE MOTHER TONGUE AS A CRITERION IN OFFERS] (2008), *available at* www.diversiteit.be/diversiteit/files/.../081016nota%20def-%20moedertaal.pdf [hereinafter CEOOR, NOTE ON THE MOTHER TONGUE AS A CRITERION IN OFFERS];] CEOOR, DISCRIMINATIE OP DE ARBEIDSMARKT OMWILLE VAN HERKOMST, HUIDSKLEUR, NATIONALITEIT [DISCRIMINATION IN EMPLOYMENT BECAUSE OF ORIGIN, COLOR, NATIONALITY] 15 (2009), *available at* http://www.kruispuntmi.be/uploadedFiles/VMC_Toolbox/Methodieken/Werk/Discriminatie_op_de_arbeidsmarkt/Discriminatie_op_de_arbeidsmarkt.pdf

[112] *See* Case C-54/07, CEOOR v. Feryn, 2008 E.C.R. I-5187. The European Court of Justice, in response to questions from the Brussels Labor Court regarding European Directive 2000/43/EC, found a Belgian employer liable for discrimination when it publically proclaimed its intention not to hire employees of foreign origin. *Id.* The Belgian Court of Labor in Brussels followed the ECJ ruling that the basis of the intention to discriminate (clients' discriminatory preferences) did not justify discrimination on the part of the employer. *See The Feryn Case: Belgian Court Follows the ECJ's Interpretation,* EQUINET, Sept. 9, 2009, *available at* http://www.equineteurope.org/-438_3.html.

[113] PEW RESEARCH STUDY, *supra* note 49.

[114] *See generally* SACHAR REPORT, *supra* note 51, at 192 (noting that the Indian Census of 1901 listed Indian Muslims as belonging, both in whole and in part, to 133 different social groups).

dia's population based on the 2001 Indian Census with self-identification.[115] Uttar Pradesh alone has more than 30 million Muslims, and in Kashmir, Muslims are in the majority.[116] International migration plays only a minor role in the growth of the Muslim Indian population.[117]

The topic of Islam in India is fascinating and complex, but for the purpose of this paper it suffices to briefly sketch the background. India had encounters with Islam through trade relations with Arabia, even before the Muslim invasions.[118] The world's second oldest mosque (*Cheraman Jama Masjid*) and India's first, was built in 629 A.D in Kodungallur in the State of Kerala in the Southwest tip of India.[119] Sufis (Islamic mystics) played an important role in the spread of Islam in India as well as a crucial role later on in the conversion of Hindus, although conversion to Islam is a highly debated topic where opinions amongst scholars differ.[120]

The Muslim conquest in the Indian subcontinent mainly took place from the 12th century onwards.[121] The Mughal Empire,[122] established by

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[115] *Id*. at 19. While only 10-13% of the total worldwide Muslim population is *Shia*, "[m]ost *Shias* (between 68% and 80%) live in just four countries: Iraq, Iran, Pakistan, and India." PEW RESEARCH STUDY, *supra* note 49, at 1. In India, it is estimated that *Shias* make up 10-15% of the country's population and number between sixteen and twenty-four million. *Id.* at 10.

[116] SACHAR REPORT, *supra* note 51.

[117] *Id.* at 41.

[118] *See generally* HENRY M. ELLIOT, THE HISTORY OF INDIA, AS TOLD BY ITS OWN HISTORIANS: THE MUHAMMADAN PERIOD (Adamant Media Corporation 2006) (1869).

[119] *Id.*

[120] *See generally* RICHARD M. EATON, THE RISE OF ISLAM AND THE BENGAL FRONTIER, 1204-1760(1993) (explaining four conventional theories of "Islamization" in India).

[121] *See generally* HISTORY OF CIVILIZATIONS OF CENTRAL ASIA VOLUME IV: THE AGE OF ACHIEVEMENT (M. S. Asimov & C. E. Bosworth, eds. 1998), *available at* http://unesdoc.unesco.org/images/0011/001116/111664eo.pdf.

[122] *See generally The Mughal Empire*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e1573 (last visited Oct. 18, 2010) (noting that the Mughal Empire was one of the greatest in Indian history, achieving "some of the highest expressions of Islamic culture" and architecture). The Taj Mahal is a prime example of Mughal architectural achievement, as are the Qutab Minar and the Red Fort; the portrayal of the Muslim Empire in pre-modern India to pupils has been a recent source of debate, with textbooks ordered rewritten after the departure of the Hindu nationalist Bharatiya Janata Party (BJP) from the administration. *Indian School Textbooks to Be Scrapped Because of Anti Muslim Bias*, BUZZLE.COM, http://www.buzzle.com/editorials/6-25-2004-55919.asp (last visited Oct. 17, 2010) (explaining that the former government's "'saffronisation' of history . . . depicted India's Muslim rulers as barbarous invaders and the medieval period as a dark age of Islamic colonial rule which snuffed out the glories of the Hindu empire that preceded it"); Samsul Adabi, *Muslim Minority in India*, NEWPACES BLOG (Feb. 2, 2010, 9:04 PM),

Barbur in 1526, was the largest and longest existing Muslim state, with highlights under four great emperors: Akbar (1556 – 1605), Jahangir (1605 – 27), Shah Jahan (1627 – 57), and Aurangzeb (1658 – 1707).[123] The Muslim population of India was concentrated in the Northwest, but never consisted of more than 20-25 % of the population, which made the Mughal Empire different than other Muslim states where Muslims made up the majority.[124]

Under the influence of the Hindu caste system, the Muslim community in India developed social stratification and was internally subdivided into four groups, often placed in two large categories of 'ashraf', meaning noble, and 'ajlaf' or 'degraded and unholy.'[125] A third category, the 'arzal' or the very lowest classes of Muslims, was counted in the 1901 Census.[126] "The ashraf are "those without any social disabilities," the 'ajlaf' are akin to OBCs among Hindus while the arzals are the "very lowest castes…" equivalent to SCs among Hindus."[127]

Muslims have been an integral part of India throughout history and in that regard differ greatly from Muslims in the West, most of whom are relatively recent immigrants. Gradually annexed by the British East India Company from the early eighteenth century, India was colonized by the British who deposed the last emperor in 1857.[128] Some assert that Hindus

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http://newpaces.com/mem-bers/profile/2/blog-view/blog_161.htm ("In 2004, several Indian school textbooks were scrapped by the National Council of Educational Research and Training after they were found to be loaded with anti-Muslim prejudice.").

[123] *The Mughal Empire*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e1573 (last visited Oct. 18, 2010).

[124] *Id.*

[125] SACHAR REPORT, *supra* note 51, at 192.

[126] *Id.*

[127] *Id.* at 193; *see generally* Yoginder Singh Sikand, *Caste in Indian Muslim Society*, ASIANISTS' ASIA, Aug. 5, 2004, *available at* http://stateless.freehosting.net/Caste%20in%20Indian%20Muslim%20Society.htm (elucidating the distinctions between Muslims through the historical evolution of the Muslim community in India). "Although the Qur'an insists on the radical equality of all Muslims, caste (*zat, jati, biraderi*) remains a defining feature of Muslim Indian society, with significant regional variations. While the severity of caste among the Muslim Indians is hardly as acute as among the Hindus, with the practice of untouchability being virtually absent, caste and associated notions of caste-based superiority and inferiority still do play an important role in Muslim Indian society . . . . Following from this, the existence of caste-like features among non-Hindu, including Muslim, communities in India is thus generally seen as a result of the cultural influence on these communities of their Hindu neighbours or of Hinduism itself." *Id.*

[128] *See* Kallie Szczepanski, *The Mughal Empire in India*, *available at* http://asianhistory.about.com/od/india/p/mughalempireprof.htm ("The last emperor of India, Bahadur Shah, was forced into exile in Burma by Britain during the so-called 'Sepoy Rebellion,' or First Indian War of Independence" to make way for the British Raj.).

were promoted, and Muslims in India were ignored and reduced to second-class citizens.[129]

With growing demands for self-rule, and under the leadership of the "Father of the Nation," Mahatma Gandhi in the 1920s and 1930s, the end of British rule became imminent after the Second World War.[130] The process was hastened by the victory of the Labour party in Britain in 1945.[131] Many Muslims were involved in the Indian Independence movement.[132] The Muslim League, led by Mohammed Ali Jinnah, supported the Muslim cause, as it was feared Muslims would be disadvantaged in a Hindu majority country.[133]

In the end, independence from Britain meant a religious split in two separate countries.[134] Pakistan (West and East Pakistan, the latter becoming Bangladesh in 1971), a Muslim majority country, and India, a secular state with a Hindu majority and significant religious minorities, both became independent in 1947, with the Two-Nation Theory or The Ideology of Pakistan as the basis for the Partition.[135] This stated that Muslims and Hindus were two separate nations by every definition, and therefore Muslims should have an autonomous homeland in the Muslim majority areas of British India.[136] The split was imperfect, however, with millions of Muslims deciding to stay back in India while others migrated to what

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[129] *See* Samina Mallah, Op-Ed., *Two-Nation Theory Exists*, PAKISTAN TIMES, May 7, 2007, *available at* http://pakistantimes.net/2007/05/07/-oped2.htm (noting that "[a] comprehensive analysis of the state of Muslims under British rule is documented by a British author, William Hunter, in his monumental work, Indian Musalman, published in 1871, in which he explains [that in his time] . . . 'all sorts of employment, high or low, great or small [were] being gradually snatched away from the Mohammedans [Muslims], and given to other races particularly Hindus.'"); *see also* Syed Tahir Mahmood, *From William Hunter to Rajinder Sachar: Reports & Reports but no Results*, MILLI GAZETTE, Nov. 19, 2006, *available at* http://www.milligazette.com/dailyupdate/2006/200611195_condition_muslims_india.htm.

[130] Mallah, *supra* note 129.

[131] Andrew Whitehead, *Sixty Bitter Years After Partition*, BBC NEWS, Aug. 8, 2007, *available at* http://news.bbc.co.uk/2/hi/south_asia/6926057.stm.

[132] *See* generally RAY SANTOMOY, FREEDOM MOVEMENT AND INDIAN MUSLIMS (New Delhi: People's Publishing House, 1983).

[133] Whitehead, *supra* note 131.

[134] *See id.* (observing that Britain's "attempts to devise a constitutional formula" to preserve India's unity with "safeguards for the large Muslim minority" were unsuccessful).

[135] Whitehead, *supra* note 131. Britain's attempts to find a constitutional formula to preserve India's unity with safeguards for the large Muslim minority was unsuccessful. *Id.*

[136] Mallah, *supra* note 129 (referring to the presidential address by poet-philosopher Muhammad Iqbal in 1930 to the Muslim League introducing the two-nation theory in support a home for the Muslims of South Asia).

they regarded as their side of the boundary line.[137] The violence and huge loss of life accompanying the panicked mass migration left its mark on the fledgling nations.[138] The Kashmir issue would further the sense of conflict.[139]

India has witnessed sporadic large-scale violence in the last two decades with the coming of Hindu nationalism.[140] The destruction of the 16th Century Babri Masjid in Ayodhya in 1992 by militant Hindu's has served as a symbol of the Muslims-Hindu clashes.[141] 2001 saw a high profile attack on the Indian Parliament by Islamic militants, and outbreaks of religious violence such as those occurring during the infamous 2002 Gujarat Riots -in retaliation to the Godhra Train Burning- with approximately 2,000 Muslim deaths following suit.[142] In turn, Islamic extremists are believed by some to be behind the 2006 Mumbai train bombings.[143] Tensions and out-right violent conflicts between different religious groups have thus become a major part of India's political predicament.

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[137] Ahmad Faruqui, *Jinnah's Unfulfilled Vision* , ASIA TIMES ONLINE, Mar. 19, 2005, *available at* http://www.atimes.com/atimes/South_Asia/-GC19Df04.html (reviewing STEPHEN COHEN, THE IDEA OF PAKISTAN (2004)); *see* Asghar Ali Engineer, *Muslim Indians: Reservation Or No Reservation?*, CTR. FOR STUDY OF SOC'Y & SECULARISM, *available at* http://www.csss-isla.com/arch%2077.htm (explaining that while upper and middle class Muslims left India for Pakistan upon Partition, poor and illiterate Muslims stayed behind because they had no role in creating the country and, thus, no incentive to leave).

[138] Whitehead, *supra* note 131.

[139] *Id.* (noting that India and Pakistan were at war within months of Independence and that, in general, "tension with Pakistan has put strain on the Indian tradition of secularism in public life and religious tolerance.").

[140] *See* UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, COUNTRIES OF PARTICULAR CONCERN: INDIA (2010), *available at* http://www.uscirf.gov/-index.php?option=com_content&task=view&id=2128&Itemid=1 (India was placed on the list of "countries of particular concern" in 2004 following the rise of religiously motivated violence. The decision was controversial because India has a democratically elected government and working institutions.). The United States Commission on International Religious Freedom (USCIRF) was created by the International Religious Freedom Act of 1998. *See* UNITED STATES COMM'N ON INT'L RELIGIOUS FREEDOM, AUTHORIZING LEGISLATION & AMENDMENTS (2010), *available at* http://www.uscirf.gov/about-uscirf/authorizing-legislation.html..

[141] Christophe Jaffrelot, *India: Caste Stronger Than Religion?*, 32 INT'L INST. FOR ASIAN STUD. NEWSL. 18, Nov. 2003, *available at* http://www.iias.nl/nl/32/IIAS_NL32_18.pdf (mentioning that the Barbri Masjid, named after the first Moghul emperor Babur, was built by the Moghuls in Ayodhya, a town Hindus consider to be the birthplace of the God Ram, and destroyed by militant Hindus because they claimed a Hindu temple had once existed at the same location).

[142] *Id.*

[143] *Id.*

2. Socio-Economic Position of Muslim Indians: Bleakness Re-revealed in the Sachar Report

In 2005, a High Level Committee called "the Sachar Committee" (named after Justice Rajindar Sachar) was appointed by Prime Minister Manmohan Singh. The Committee's purpose was to investigate the social, economic, and educational status of the Muslim community of India and to identify areas of intervention.[144] It delivered its 403-page report to Parliament, after some time extensions, on 30 November 2006.[145] The report revealed the socio-economic position of millions of Muslims in India to be abhorrent, indicating that at the very least, India's minority protection has failed to ensure the advancement of its largest minority group.[146]

In contrast to what is the case with European Muslims, the public perception of the socio-economic status of Muslim Indians has been skewed because of the iconic successful Muslims in Indian society, notwithstanding the existence of earlier qualitative reports that highlighted the dismal socio-economic state of much of India's Muslim population that called for urgent remedial measures.[147] The importance of the Sachar report thus lies in the fact that it rang the alarm bell once again and reintroduced the plight of Muslims in the public eye, and in all levels of politics.[148] Contrary to other Commissions and Committees, several of the Sachar Committee's recommendations, mainly in the education and finance field, have in fact been implemented within a relatively short amount of time.[149]

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[144] *See* SACHAR REPORT, *supra* note 51.

[145] *Id.*

[146] *Id.*

[147] *See* Mahmood, *supra* note 129 (It is noted that the Sachar Report is not the first of its kind; in 1978 and 1980, high-level committees with similar mandates as the Sachar Committee were set-up and issued similar findings. Furthermore, the Gopal Singh Committee, appointed by Indira Ghandi, issued a report in 1983 that failed to be executed even upon its delayed release to the general public.). Engineer, *supra* note 137 (noting that several reports issued by the National Minorities Commission – those from 1995, 1996, and 1999 – recommended corrective measures to remedy results showing the number of Muslims in the employment sector to be disproportionately low).

[148] *See* Ranjit Hoskote, *The Price of Exclusion*, THE HINDU, Dec.31, 2006, *available at* http://www.hinduonnet.com/thehindu/mag/2006/12/31/stories/-2006123100450100.htm.

[149] *See* NAT'L COMM'N FOR MINORITIES, PRIME MINISTER'S NEW 15 POINT PROGRAMME FOR WELFARE OF MINORITIES (2010), *available at* http://ncm.nic.in/points_programme.html; *see also* MINISTRY OF MINORITY AFFAIRS, REPORT ON SOCIAL, EDUCATIONAL, AND ECONOMIC STATUS OF THE MUSLIM COMMUNITY: FOLLOW-UP ACTION ON THE RECOMMENDATIONS OF THE SACHAR COMMITTEE, *available at*

According to the Sachar Committee report, Muslim Indians lag behind other socio-religious communities and even the traditionally disadvantaged SCs/STs.[150] The share of Muslims in the public sector is found to be " abysmally low at all levels."[151] In no state does the representation of Muslims in the government departments match their population share.[152] In urban areas, only 27% of Muslims are engaged in regular work compared to 40%, 36% and 49% for SCs/STs, OBCs, and Hindu-upper class workers respectively.[153]

In the employment field, the Sachar Committee found Muslim regular workers to be the most vulnerable with no written contract and no social security benefits.[154] Similarly, Muslim immigrants in Belgium, with only temporary contracts and low-paid jobs, often also see themselves forced in arrangements with little job security.[155] Muslim Indians receive lower daily earnings in both public and private jobs compared to other socio-religious communities, and a large number of Muslim workers are engaged in self-employment and street vending and, in the case of Muslim women, in home based work: all situations with little economic security.[156] The living standards of Muslims are low with a substantial portion of families in urban settings living in one-room accommodations. The Committee dubbed its findings "a shocking testimony to six decades of institutional neglect and bias that has left the country's Muslims far behind other Socio-Religious Communities (SRCs),"[157] exemplified by a clear and significant inverse correlation between the proportion of the Muslim population and the availability of educational infrastructure and banking facilities in small villages.[158]

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http://minorityaffairs.gov.in/newsite/sac-har/Sachar_website_june09.pdf; *see Sachar Report:Govt's Follow-up Strategy Focuses on Education*, INDIAN EXPRESS.COM, Sept. 1, 2007, *available at* http://www.indianexpress.com/news/sachar-report-govts-followup-strategy-foc/213745/.

[150] *Cong-NCP Goes all out to woo Dalit, Muslim Voters*, TIMES OF INDIA, Oct. 10, 2009, *available at* http://timesofindia.indiatimes.com/city/mumbai/-Cong-NCP-goes-all-out-to-woo-Dalit-Muslim-voters/articleshow/5110884.cms. The fact that the media mention Dalits and Muslims in the same breath is illustrative of the negatively perceived status of Muslims in Indian society. *See id.*

[151] SACHAR REPORT, *supra* note 51, at 167.

[152] *Id.*

[153] *Id.* at 93.

[154] *Id.*

[155] STATISTISCHE STUDIËN, *supra* note 50.

[156] *See id.* at 22 (explaining that the Sachar Report identifies Muslims as having difficulty in procuring bank credit for their enterprises); SACHAR REPORT, *supra* note 51, at 91, 96.

[157] *See* SACHAR REPORT, *supra* note 51, (Executive Summary at 2).

[158] *Id.* at 141-43, 270.

The Sachar Committee made various recommendations to eliminate discrimination, increase equity and equality of opportunity, enable social exclusion, and address the perception of discrimination.[159] The Committee recommended: an online database to track the status of each community; the setting up of an Equal Opportunity Commission to look into grievances of deprived groups; incentives to a diversity index to ensure equal opportunities in education; governance; private employment and housing; and the use of targeted programs to raise a significant presence of Muslims in departments that have regular contact with the public, or execute sensitive tasks.[160] The lack of available bank credit was noted with recommendations to direct credit toward Muslims.[161] Some of these recommendations have been, or are in the process of being, implemented (including equal opportunity commission, additional facilities for education and coaching to Muslims, low rate interest from nationalized banks).[162]

The Sachar report also raised once again the sensitive issue of reservations for Muslims.[163] Muslims are disqualified from the reservation schemes set up for SCs, but not for STs and OBCs. While the Sachar report fell short of explicitly recommending the extension of the SC reservations to Muslims, it did recommend that "anomalies" in the reservation constituencies be addressed to equalize minority communities with similar social and occupational status.[164] The public opinion in India is divided on reservations. Interestingly, opponents argue that reservations, or a separate quota for Muslims in employment, were just a means to achieve formal or identical equality, while the aim should be "substantive equal outcome." Others argue that good educational facilities combined with non-discriminatory practices are adequate for Muslims to compete in regular admission competitions. Proponents differ in opinion as to which Muslims, only Dalit Muslims or every Muslim, should bene-

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[159] SACHAR REPORT, *supra* note 51.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *BJP Leader Criticises Sachar Report*, THE HINDU, Dec. 2, 2006, *available at* http://www.hindu.com/2006/12/02/stories/2006120205450400.htm (observing that state president P.K. Krishnadas of the Hindu nationalist Bharatiya Janata Party (BJP) described the Sachar Report as "distorted, politically motivated and dangerous" and said that reservations on the basis of religion would harm India since the "Muslim community has never been discriminated against . . . and [h]istory tells us that India was once ruled by Muslims.").

[164] SACHAR REPORT, *supra* note 51, at 241 (noting that no constitutional amendment would be necessary to include Muslims, it would suffice to amend the 1950 Presidential Order).

fit from SC reservations.[165]

The question remains as to why the situation of Muslims is so dismal in present-day India. Some point to historical reasons that most of the Muslims in India are converts from various Dalit, OBC, and artisan castes, and thus were poor before conversion and remained so after.[166] Also, with the Partition, upper and middle class Muslims left for Pakistan, leaving behind mainly deprived and illiterate Muslims in India.[167] Others say that the British left a legacy of social injustice towards the Muslims, and that official inaction continues today.[168] In any case, the Sachar Committee indicates that discrimination certainly also plays a role. Also, one could ask whether the benefits of the Muslim educational institutes have been kept to the Muslim elite, with the Muslim OBCs not being able to take advantage. India's Constitutional framers, fearing divisive tension,[169] made no reservations for Muslims, or other religious minorities in educational facilities, but did allow religious and linguistic minorities to establish educational institutions of their own with a high degree of autonomy.[170]

IV. LEGAL PROTECTION AND ADVANCEMENT FOR MUSLIM MINORITIES IN THE INDIAN, AND EUROPEAN AND BELGIAN WORKPLACE

For centuries, Indian society excluded whole segments of the population from desirable positions based on caste, irrespective of skills and talent.[171] Today, India's under-privileged continue to face brawny barriers. Reservations for disadvantaged groups, which are said to constitute "systematic departure from norms of equality," are justified in various

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[165] *See* Engineer, *supra* note 137 (stating that some Muslim leaders oppose reservation for Dalit Muslims and deny the existence of a Muslim caste system in an effort to have reservations apply to the entire Muslim community).

[166] *See id.*

[167] *Id.*

[168] Mahmood, *supra* note 129.

[169] *See* Zoya Hassan, *Reservations for Muslims*, INDIA-SEMINAR (2005), *available at* http://www.india-seminar.com/2005/549/549%20zoya%20has-san.htm.

[170] Kevin D. Brown & Vinay Sitapati, *Lessons Learned from Comparing the Application of Constitutional Law and Federal Antidiscrimination Law to African Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACK LETTER L.J., Spring 2008, at 48 (referring to T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 S.C.C. 481 (India) which held that minority educational institutions can conduct own courses and choose which students to admit even if they are government funded institutions); *see* INDIA CONST. art. 30, § 1.

[171] L. DUMONT, HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS, (U CHI. PRESS, MARK SAINSBURY TRANS., 1980), especially chapter IV on "The Division of Labour."

ways, such as reasons of personal fairness, general welfare and "historical restitution or reparation to offset the systematic and cumulative deprivations suffered by lower castes."[172] Another reason justifying the adoption of such elaborate compensatory discrimination in India can be found in the ideology of the majority religion. Hinduism has been said to be "uniquely devoid of a core of egalitarian doctrine; it was uniquely based upon principles of inequality, relative purity and exclusion."[173] Perhaps the consequences of this ideology can only be tempered and social mobility enabled with distributive politics that in a Western egalitarian setting would seem exorbitant.

Unlike what India's founding fathers foresaw, reservations have become anything but the intended temporary tool to uplift those oppressed.[174] In their present form, reservations have in fact become "self-perpetuating"[175] and a "commonly used strategy by which political parties can win caste-based voting blocs."[176] The Sachar Report has shown that millions of Muslims are part of the grossly underprivileged in Indian society; sometimes even worse off than the Dalits. Muslim Indians have in various respects been deprived compared to other socio-religious communities in India,[177] and remain excluded from the reservations for Scheduled Castes based on the theory that Islam does not know castes.[178]

Since Muslims have settled in the West more recently, there is no talk of a historic oppression comparable to the Indian case even though discrimination is clearly a barrier to the workplace and other domains of public and social life.[179] EU anti-discrimination legislation aims to prevent the persistence of disadvantage, amongst others, because of religious adherence and practice. The effects-based concept of indirect discrimination under EU law recognizes that embedded and structural roots of discrimination must be tackled in European society and in particular in

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[172] GALANTER, *supra* note 16, at 185.

[173] Harriss-White, *supra* note 2.

[174] Nagarajan, *supra* note 10, at 509 (noting that "no castes have been removed or are likely to be removed from 'backward' lists regardless of their social, educational, and political advancement" although that would be a clear indication that reservations are having an effect towards more equality).

[175] GALANTER, *supra* note 16, at 195

[176] Nagarajan, *supra* note 10, at 509

[177] SACHAR REPORT, *supra* note 51, at 237.

[178] Besides the fact that this is not the reality in India, there are several other problems with this reasoning and its consistency within the reservations framework; *see* GALANTER, *supra* note 16, at 119-127 (discussing the exclusion of Buddhists, before Buddhists were included in the Scheduled Caste Order).

[179] FRA SURVEY, *supra* note 101.

the workplace.[180] Under the EU framework, positive action is allowed under certain conditions, but not mandated and interpreted strictly. Thus, the European focus is on prevention and tackling discrimination that takes place today rather than eradicating the consequences of past disadvantages for religious or other disadvantaged groups.

A. Minority Protection: Beyond Formal Equality

While there is no generally agreed upon legal definition of "minority,"[181] it is accepted that it requires "stable ethnic, religious or linguistic characteristics which are different from the rest of the population, a numerical minority position, non-dominance and the wish to preserve the own, separate cultural identity."[182]

In both Belgium and India, Muslims form a numerical minority and are not socio-economically dominant as discussed in Part II. Notwithstanding internal differences within Muslim communities among others with regard to ethnic origin, religious beliefs and practices (albeit in varying forms) set the Muslim population apart from the majority. The wish to preserve the separate cultural identity has been expressed on several occasions, and has been the source of tension. Thus, Muslims in Europe and in India constitute a "minority" in the legal sense of the term, meriting protection both in the form of anti-discrimination provisions as well as specific measures in favor of preservation of their identity as a group.

The importance of an effective employment participation policy[183] towards Muslims cannot be overestimated, as employment is a vital driver of social integration.[184] Minority protection is a particular human

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[180] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, European Network of Legal Experts in the Nondiscrimination Field 5 (2008), *available at* http://www.migpolgroup.com/publications_de-tail.php?id=125

[181] LI-ANN THIO, MANAGING BABEL: THE INTERNATIONAL LEGAL PROTECTION OF MINORITIES IN THE TWENTIETH CENTURY 1-2 (2005) (noting that "the conceptual and practical utility" of such universal definition is limited).

[182] Henrard, *Minorities and Socio-Economic Participation*, *supra* note 5, at 550; *see also* KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 30-31 (2000) [hereinafter HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION].

[183] In this regard we note that social welfare provisions such as unemployment benefits provide a safety net for lower skilled Muslims in Europe but also serve as deterrents/disincentive to work and prevent social mobility. This is in contrast to the United States.

[184] *See* Council Directive 2000/78, art. 9, 2000 O.J. (L303) 16 (EC) ("Employment and occupation are key elements in guaranteeing equal opportunities for all and contri-

rights topic designed to operate within the existing state framework,[185] and thus strongly relates to the question of Muslims in the labor force in Europe and India. As stated in the Introduction, effective protection of Muslims as a religious minority should stand on two strong shoulders, with the so-called dilemma between equal rights and special rights taking a central place in that protection.[186] First, the anti-discrimination pillar, which is often enshrined in the Constitution as well as in legislation, is important for the entire Muslim community as it seeks to address inter-group fairness and equality. Legislative measures and the corresponding attention in the media could also act as a driver of changing cultural attitudes. Through a second pillar, the group dimension is protected with minority-specific measures that enable or promote language, culture, and religion. But in order to address intra-group inequality, which is sometimes neglected, it is important to allow measures that target particularly vulnerable groups, irrespective of the relevant minority characteristic. In other words, there is a need for proactive measures to address the problematic socio-economic situation of a segment of the Muslim population. The emancipation of the lower segments of a minority can have deep effects on the public perception, and ultimately, the identity within the entire group.

Both Belgium and India have ratified the International Labour Organisation's 1958 Discrimination (Employment and Occupation) Convention nr. 111,[187] and thus agreed to "pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination."[188] However, I argue that by adopting landmark directives in 2000, Europe has focused on the first pillar seeking to create "equality of opportunities" for all, including Muslim workers. The concept of indirect discrimination allows to go beyond formal equality, but the concrete effects depend on the implementation and application of the anti-discrimination provisions in the member states. However, when it comes to positive action, the European

bute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.").

[185] THIO, *supra* note 181, at 16.

[186] *See* generally HENRARD, EUROPEAN COMMISSION, *supra* note 6.

[187] *See Ratification Dates for Convention No. C 111, available at* http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111 (The convention was ratified by Belgium in 1977 and by India in 1960.).

[188] INT'L LABOUR ORG., DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION NO. 111 2 (1958), *available at* http://www.ilo.org/wcmsp5/groups/-public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.-pdf.

framework exhibits hesitation and second thoughts, visible in the restrictive case-law of the European Court of Justice on positive action under the Gender Directive.[189] In contrast, India has set up an extensive reservation program in educational facilities and government employment which aims to facilitate, to a certain extent, the equality of results. Unfortunately, the reservation program created 60 years ago as a temporary means to address the dismal position and protection of India's most vulnerable classes, has become a politicized battlefield, with the Muslim remonstration against ill-treatment under the existing scheme, gaining momentum. In what follows, I first introduce the reader to the Indian framework of compensatory discrimination before turning to, and contrasting this approach to, the EU Employment Equality Directive and its implementation in Belgium.

B. Compensatory Discrimination in the Indian Public Workplace

1. Derived from a Constitutional Mandate

The Constitution of India, arguably the most comprehensive constitution in the world, contains over 395 articles and numerous annexes, and came into force on 26 January 1950.[190] It has been amended over 90 times. The preamble of the constitution defines India as a sovereign, socialist, secular, democratic republic. The Indian state project strongly adheres to pluralism and multiculturalism.[191] Part III of the Constitution, Fundamental Rights, entrenches "the more permanent values cherished by the society,"[192] amongst others the desire to work towards an egalitarian society, with emancipation of the lower castes promoted through an extensive system of positive discrimination.[193]

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[189] *See generally* Marc De Vos, *Positive Action and EC Discrimination Law: Concepts and Acquis in* DIVERSITY, EQUALITY AND INTEGRATION: BEYOND THE LAW, A COMPARATIVE STUDY 51, 51-77 (Roger Blanpain ed., 2008) [hereinafter De Vos, *Positive Action and EC Discrimination Law*].

[190] Burt Neuborne, *The Supreme Court of India*, 1 (3) INT'L J. CONST. L. 476, 479 (2003); The Indian constitution-drafting process has been said to have been elitist in nature as opposed to the more participatory process some countries have gone though since the 1990s, *see* Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49, at 58.

[191] *See* INDIA CONST. arts. 343-351 (For example, provisions for the preservation and protection of minority languages appear in the Constitution Part XVII, entitled "Official Language.").

[192] V.S. Deshpande, *Nature of the Indian Legal System*, *in* THE INDIAN LEGAL SYSTEM 1, 7 (Joseph Minattur ed., 1978).

[193] Nagarajan, *supra* note 10, at 488-89. (this extensive system was in fact devised by the British: "'Backward class movements'" began protesting against the dominance of

Article 14 establishes equal protection and Article 15 (1) contains the non-discrimination principle on basis of religion, race, caste, sex, and place of birth, with specific application in access to goods and services and the public arena.[194] Article 15 has been amended twice to allow for special measures for the advancement of "any social and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[195] Article 16 proclaims the principle of equality of opportunity[196] and non-discrimination in public employment, but –in departing from that principle- allows for reservations for backward classes which are underrepresented in the state civil service.[197] The same article also allows for reservations for Scheduled Castes and Tribes "which, in the opinion of the State, are not adequately represented in the services under the State".[198] Following the Supreme Court's decision in *Balaji v. State of Mysore* (1963) in that the sum of reservations generally cannot exceed 50%,[199] an amendment was adopted to clarify that this 50% rule is not violated when unfilled reserved vacancies are carried over in succeeding

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the Brahmins in British-sponsored jobs and educational institutions as early as 1853. These protests prompted the British to introduce measures that aimed to limit Brahmin monopoly of influential positions in the administrative sector. Efforts to limit Brahmin dominance of employment and educational opportunities were met with limited success." In 1927, government legislation reserved 41.7% of jobs for non-Brahmin Hindus, 16% for Muslims, 16% for Anglo-Indians and Christians, 16% for Brahmins, and 8% for Scheduled Castes. The Poona Pact of 1932 symbolized a national recognition that reservations would be a "countervailing mechanism against the social discrimination instinct of Indian society.") *Id.*

[194] INDIA CONST. arts. 14, 15, § 1.

[195] Article 15 was first amended in 1951 and then again in 2005 (93rd Amendment) for the accommodation of discriminated individuals. INDIA CONST. art. 15, § 4, *amended by* The Constitution (Amendment) Act, 1951, No. 1, Acts of Parliament, 1951; INDIA CONST. art. 15, § 5, *amended by* The Constitution (Amendment) Act, 2005, No. 93, Acts of Parliament, 2005.

[196] In State of Kerala v. Thomas, (1976) 1 S.C.R. 906 (India), at 952 (7(a)) Indian Supreme Court Justice K.K. Mathew contrasted arts. 14 and 16 ("Whereas the accent in Art 14 is on the injunction that the State shall not deny to any person equality before the law or the equal protection of the laws, that is, on the negative character of the duty of the State, the emphasis in Art. 16(1) is on the mandatory aspect.")

[197] Indra Sawhney v. Union of India, A.I.R. 1996 S.C. 597 (The Indian Supreme Court found in upholding twenty-seven percent reservations for OBCs in government jobs, that the backwardness contemplated by Article 16, § 4 meant mainly social backwardness.).

[198] INDIA CONST. art. 16, § 4 ("Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens.")

[199] *But see* Papri Sri Raman, *Tamil Nadu's Quota Stir an Assertion of its 69 Percent?* (April 1, 2007), http://news.boloji.com/200704/03508.htm (arguing there are still exceptions, i.e., Tamil Nadu has a 69% reservation policy in educational institutions and jobs, with a law seeking to place it beyond the purview of the Supreme Court).

years.[200]

The Indian Constitution includes several non-enforceable "Directive Principles," that declare economic justice and social equality to be policy aspirations.[201] These Principles are not enforceable in a court of law, although they are "part of a programme for future development."[202] Article 38 states that the state must strive to minimize inequalities in income, status, and opportunity between individuals and amongst groups, and article 46 urges the state to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."[203]

On basis of the Constitutional mandate, India has embarked on the daunting, perhaps impossible, project of reducing caste-based inequalities inherent to Hindu society that had continued under the British rule. It should be noted that even though the Constitution aimed to dismantle the caste system,[204] it indeed created new categories through the reservation system for Scheduled Castes ("SCs"), Scheduled Tribes ("STs") and "other backwards classes" ("OBCs"). The categories have been defined and understood more or less along the same lines of the old castes, bringing "casteism" to the forefront. Consequently, caste-related issues continue to dominate the limelight 60 years after India's independence.[205] It has been argued that by endorsing the "methodically flawed and politically tainted" identification of "socially and educationally backward classes" entitled to reservations, the Supreme Court too has helped perpetuate caste-consciousness in India.[206] In *State of Kerala v. Thomas*, In-

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[200] INDIA CONST. art. 16, § 4(B).

[201] For example, the proclaimed ideal of a uniform civil code for all Indians (art. 44), which "[t]he framers of the Constitution apparently felt that national integration would not be complete unless everyone in India is governed by uniform laws which do not distinguish between persons on the grounds of religion, etc." Deshpande, *supra* note 192, at 17. Attempts have been viewed by Muslim Indians as an attempt to dilute their cultural identity and strongly resisted. *See* ALL INDIA MUSLIM PERSONAL LAW BOARD, http://www.aimplboard.org/introduction.html (last visited Oct. 18, 2010) (noting that attempts have been viewed by Muslim Indians as an attempt to dilute their cultural identity and strongly resisted).

[202] Menski, *supra* note 17, at 38.

[203] INDIA CONST. arts. 38, 46.

[204] Article 17 abolished the practice of "untouchability" by making it a punishable offense. INDIA CONST. art. 17.

[205] Smita Narula, *India: "Hidden Apartheid" Caste Discrimination Against Dalits*, HUMAN RIGHTS WATCH (Feb. 13, 2007), http://www.hrw.org/-en/news/2007/02/12/india-hidden-apartheid-discrimination-against-dalits (listing various atrocities against Dalits in modern India).

[206] Nagarajan, *supra* note 10, at 516.

dian Supreme Court Justice K.K. Mathew stated that the "[e]quality of result is the test of equality of opportunity," and that "[t]he concept of equality of opportunity [in art. 16 of the Constitution] in matters of employment is wide enough to include within it compensatory measures to put the members of the Scheduled Castes and Scheduled Tribes on par with the members of other communities which would enable them to get their share of representation in public service."[207]

2. The Stakes are High: Reservations for Scheduled Castes

The goal of the Indian compensatory discrimination framework is to give fair representation to the weaker sections of society in legislative assemblies, educational institutions, [208] and public employment. Reservations are constitutionally enshrined and seek to address India's historically entrenched societal and occupational segregation. Similar to positive action in Europe, the issue of reservations frequently evokes adverse public sentiment. In particular with regard to university spots, the reservation issue has repeatedly mobilized protesters.[209] It has also become a focus in a revived ethno-religious struggle, with Hindu nationalists mobilizing against Muslims as a diversion technique for the internal division within the Hindu population.[210]

When it comes to Scheduled Castes, the Constitution foresees the reservation of seats in the central and state legislative bodies,[211] urges

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[207] State of Kerala v. Thomas, (1976) 1 S.C.R. 906 (India) at 954; *see* Nagarajan, *supra* note 10, at 493 (referring to Marc Galanter, *Symbolic Activism: A Judicial Encounter with the Contours of India's Compensatory Discrimination Policy*, *in* JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOR OF JUSTICE V.R. KRISHNA IYER 229, 231 (Rajeev Dhavan et al. eds., 1985).

[208] Educational reservations, i.e. quotas, under Indian law are more stringent than the controversial affirmative action programs in the admission policies of American Colleges and Universities, *See* Brown & Sitipati, *supra* note 175.

[209] In 2006, large-scale anti-caste-based-reservation protests took place in India over opposition to the decision of the Central Government to reserve 27% of seats in central and private institutes of higher education for Other Backward Classes. *See, e.g.*, *Anti-Quota Protests Spread*, REDIFF NEWS (May 14, 2006) http://in.rediff.com/news/2006/may/14quota.htm; *see, e.g.*, *Nationwide Anti-Quota Stir Continuesl* ZEENEWS (May 22, 2006), http://www.zee-news.com/news297169.html.(last visited Jan., 19 2011).

[210] Nirmala Carvalho, *The Hindu Nationalist VHP Threatens Protests to Defend Their Privileges*, ASIANEWS.IT (Jan. 28, 2010), http://www.asia-news.it/news-en/The-Hindu-nationalist-VHP-threatens-protests-to-defend-their-privileges-17476.html (last visited Jan., 19 2011).

[211] INDIA CONST. art. 330 (this article begins Part XVI, entitled "Special Provisions Relating to Certain Classes"). These provisions were meant to be temporary, but are regularly extended for 10-year terms.

reservations in educational institutions,[212] and mandates reservations in state and central civil service.[213] The Constitution also established a National Commission for the Scheduled Castes to monitor the Constitutional and other safeguards for SCs, to inquire into specific complaints (with the same powers of a civil court), advise and evaluate on the progress of the SC development, submit annual reports, and make recommendations.[214] Article 341 of the Constitution states that the President may, by public notification, specify the "castes, races or tribes or part of or groups within castes, races or tribes" which shall be deemed SC in relation to a particular State.[215]

The government has done this through the Constitution (Scheduled Castes) Order 1950 (C.O. 19), which lists hundreds of castes per state and territory.[216] The Constitution Order, in its 3rd paragraph, states "[n]otwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste."[217]

The initial text of the Order did not include the Sikh and Buddhists religions; those were added in 1956 and 1990 respectively.[218] This essentially means that Muslim and Christian[219] Dalits are excluded from the SC reservations, and conversion to Christianity or Islam legally disqualifies Dalits from the benefits of reservation for Scheduled Castes. Understandably, this has caused controversy, especially after the Sachar report corroborated on the abominable socio-economic position of Muslim Indians.[220]

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[212] *Id.* art. 15, § 4, art. 46.

[213] *Id.* art. 16, § 4A, art. 335, *amended by* The Constitution (Eighty-second Amendment) Act, 2000 (stating that claims of the Scheduled Castes and the Scheduled Tribes "shall be taken into consideration consistently with the maintenance of efficiency of administration" in the making of appointments in civil service. Added in 2000 was the clarification that this would not prevent "relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion" of Scheduled Castes and Scheduled Tribes.).

[214] *Id.*. art. 338, *amended by* The Constitution (Eighty-Ninth Amendment) Act, 2003.

[215] *Id.* art.341, *amended by* The Constitution (First Amendment) Act, 1951.

[216] *Id.* art. 338, *amended by* The Constitution (Eighty-Ninth Amendment) Act, 2003.

[217] *Id.*

[218] *Id.*

[219] Dalit Christians account for nearly two-thirds of the twenty-seven million Christians in India. Jakob Carlsen, *India: No Podia Compartir el Agua de los Perros*, DANOS HOY NUESTRA PAN DE CADA DIA, http://www.flm-asamblea.org/explore/lwf-stories-of-daily-bread/india-she-could-not-share-dogs-water (last visited Mar. 21, 2011).

[220] *See* Subodh Ghildiyal, *Quota for Dalit Christians/Muslims?*, THE TIMES OF INDIA, May 27, 2006, *available at* http://timesofindia.indiatim-es.com/india/Quota-for-

There are currently reservations of 15% for SC in public sector employment and higher education.[221] The issue is not just whether Muslim and Christian Dalits should receive a piece of the pie, but also whether that pie itself should be enlarged.

The Sachar Committee suggested that it will be "most appropriate" to absorb the lowest category "arzal" Muslims[222] suffering maximum social deprivations, among the scheduled castes by amending the Constitutional Order and bringing Dalits of all the religions under one umbrella. Since previous attempts to include other Dalits in the list of Scheduled Castes has failed,[223] the government appointed a Commission with Indian Justice Ranganath Mishra as the chair to specifically look into this issue. Recently the Mishra Commission similarly recommended to "de-link the Scheduled Caste status from religion and make the Scheduled Caste net fully religion-neutral like that of the Scheduled Tribes,"[224] arguing that "caste is in fact a social phenomenon shared by almost all Indian Communities irrespective of their religious persuasion."[225] Many of the particular castes are found simultaneously in various religious communities and equally face problems of social degradation and mistreatment both by their co-religionists and the others."[226]

The position of the National Minority Council (NMC) is also that Muslim Dalits should for "moral, logical, empirical and practical" reasons be included in the reservation scheme for SCs/STs.[227] A sociological study commissioned by the NMC found that "Muslim and Christian Dalits are continuously discriminated against and excluded, and the intense social humiliation they face differs from those faced by their counterparts

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Dalit-Christians/Muslims/articleshow/1577114.cms.

[221] *Id.*

[222] Muslim Indians are internally subdivided into three groups –ashraf, ajlaf and arzal. DR. MAHENDRA GAUR, INDIAN AFFAIRS ANNUAL 13 (2007).

[223] *Amend the Constitution (Scheduled Castes) Order, 1950 to Ensure Equal Rights to All Dalits,* Directions for filing *Urgent Appeal,* ASIAN CTR. FOR THE PROGRESS OF PEOPLES, (June 22, 2006), http://www.acpp.org/-uappeals/2006/060622s3.html.

[224] Ansari, M Naushad, *Reservation for Dalit Muslims,* THE MILLI GAZETTE (Mar. 18, 2007), *available at* http://www.milligazette.com/news/839-reservation-for-dalit-muslims.

[225] *Id.*

[226] MINISTRY OF MINORITY AFFAIRS, REPORT OF THE NATIONAL COMMISSION FOR RELIGIOUS AND LINGUISTIC MINORITIES,153 (2007), *available at* http://www.mfsd.org/mishrareport/NCRLM%201E.pdf at 153 [hereinafter MINORITY AFFAIRS REPORT].

[227] Press Release, National Commission for Minorities, Reservations Must for Dalit Muslims & Dalit Christians: NCM Study (Apr. 3, 2008), *available at* http://ncm.nic.in/pdf/press%20release%203.4.08%20reservation.pdf [hereinafter NCM Study].

in other religions." The National Commission for Scheduled Castes (NCSC) shares this position.

Nonetheless, paragraph 3 of the Constitutional Order 1950 remains in effect at the Central level,[228] with the issue currently being litigated in the Supreme Court.[229]

Zoya Hassan, a Professor at the Jawaharlal Nehru University, points to three main reasons why Muslims were initially excluded from the reservations for SCs.[230] First, it would jeopardize secularism.[231] Second, since there was no parallel caste system amongst Muslims and Christians, there was no similar basis of oppression and discrimination to justify special measures.[232] Third, national unity would be put at risk, reminiscent of the partition with Pakistan.[233] Hassan also notes that "reservations ultimately were a casualty of Partition."[234] While the British had separate representation provisions for Muslims in various legislative bodies, the Constituent Assembly rejected the idea of continuing reservations for Muslims.[235] The terms Scheduled Castes and Scheduled Tribes were "renegotiated and redefined," and religious minorities were excluded because unlike lower castes, they were not seen as part of the Hindu community.[236] Hassan argues that it is thus social discrimination of a group within the Hindu caste system, rather than the concept of "minority," that is the legitimate drive for affirmative action programs in India.[237] Conservation and promotion of cultural diversity of minorities is seen as a separate sphere from the justice and equity sphere of affirmative action.[238]

Nonetheless, adherents of the two other religions born in India,

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[228] In the year 2000, the Bihar State Assembly passed resolution for granting SC status to Dalit Christians and Dalit Muslims; in the year 2006 Uttar Pradesh State Assembly passed resolution for the same; in the year 2009 Andra Pradesh State Government had passed resolution in its assembly for granting the SC status to Dalit Christians and Dalit Muslims. Franklin Caesar Thomas, *The Struggle of Dalit Muslims and Dalit Christians for Scheduled Caste Status*, INDIAN MUSLIM NEWS, Oct. 8, 2009, *available at* http://www.blogtopsites.com/outpost/c622ad9e6509626e5eda8816d98f2415

[229] Ctr. for Public Interest Litigation vs. Union of India & Ors (S.C. 2007), Writ Petition (Civil) No.180/2004.

[230] Hassan, *supra* note 169.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

Sikhs and Buddhists, were successful in advocating their inclusion in the reservations scheme in 1956 and 1990.[239] Following the inclusion of non-Hindu's in SC reservations, the argument for exclusion of Muslim and Christian Dalits, namely that those religions do not know castes, is untenable. After all, Sikh and Buddhist religions, in theory at least, do not know castes either. [240] It has been said that opening reservations up to Dalit Muslims and Christians would encourage conversions.[241] This argument is also indefensible as it would involve a government policy unjustifiably restricting the freedom of religion, which includes the freedom to change religion. This is thus an area where India's "equidistance" form of secularism[242] is seriously compromised.

It can be argued that the exclusion of Muslim and Christian Indians from SC reservations under paragraph 3 of the Constitutional Order 1950 not only violates the freedom of religion and non-discrimination on basis of religion clauses of the Indian Constitution,[243] but also several International instruments[244] which India has committed itself to. The exclusion is also not justified in practice: while Islam, like Christianity, has egalitarian religious ideals, the Muslim minority in India is "highly differentiated in complex ways, according to sect, to internal, caste-like stratification."[245]

Perhaps what has convoluted the debate is that some Muslim groups have advocated for the whole Muslim population to be included in the SC category.[246] While the Indian Muslim community as a whole could be a relevant group meriting certain forms of minority protection, e.g. in the area of religious discrimination, extending reservations to the entire group does not seem justified. Rather, the beneficiary subgroup (a minority within a minority) must be determined by a mix of social and economic factors. Also, as a matter of strategy advocating for the entire

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[239] *Id.*

[240] MINORITY AFFAIRS REPORT, *supra* note 226 (noting that even though Christianity and Islam do not recognize the caste system or "untouchability," the reality in India is different).

[241] *Id.*

[242] Menski, *supra* note 17, at 36.

[243] *Id.; see also* INDIA CONST. arts. 14-15, 25.

[244] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res 217 (III), arts. 2,18 (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, 21st Sess., Supp. No. 16, art. 3, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) (stating the government will "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant").

[245] Harriss-White, *supra* note 2.

[246] *Id.*

group is not advisable as inclusion of all Muslims in SC reservations is politically highly unlikely because of strong nationalist opposition.[247] Hassan argues that, even if there is a fear that "unless Muslims get on the backwardness platform, they would have to compete for a diminishing proportion of unreserved seats with the larger pool of Hindu upper castes," Muslims should not seek quota for the whole Muslim community because governments are willing to extend reservations to Muslims on the basis of caste, but not religion.[248]

Understandably, this strategy to try to have all Muslims recognized as SC's is not in the benefit of Muslim Dalits. A religious community as large and diverse as India's Muslims is economically heterogeneous. The Muslim population in India includes prosperous business owners and icons, on one end, millions of less-fortunate living in a dismal socio-economic state, on the other end. It must be said that given the vast diversity of India, their status also varies by region. Minority protection can involve protection of the entire religious group, but the plight of the most vulnerable subgroup takes a special place in the quest for intra-group equality. Reservations aim to realize economic and social progress within socio-economic disadvantaged groups, thus the relevant subgroup within Muslims should be determined on a basis independent from religion. The emancipation of the poorest Muslims arguably could be hampered by including the entire religious community as the elite Muslims may usurp the benefits, leaving those really in need, empty-handed as the elites of the Muslim community can be expected to monopolize the benefits of even token representation in government jobs.[249] Therefore, if the idea is to create real opportunities for upward social mobility for vulnerable members of any religion, it will be imperative to include a justified subsection of the Indian Muslim population within the logic of the existing reservations structure.

3. Reservations for Scheduled Tribes

There exists less discussion on reservations for Scheduled Tribes, as this involves a more defined group: isolated tribal communities in certain pockets of India who mainly live off of forestry.[250] Also, the Constitution

[247] *Id.*

[248] Hassan, *supra* note 169 (arguing the 50% maximum for reservations established by the Supreme Court in 1992 will necessarily limit what can be foreseen without an (unlikely) constitutional amendment).

[249] *Id.*

[250] *Id.*

(Scheduled Tribes) Order 1950[251] does not make distinctions on basis of religion. The reservations for STs are currently 7.5%.[252] In addition to the 15% for SCs, this leaves a maximum of 27.5% for the OBCs, as the Supreme Court has held that the sum of reservations should not exceed 50%.[253]

4. Dividing the Biggest Piece of the Pie: Reservations for Other Backward Classes

The Indian Constitution enables both the central and the state governments to adopt programs and policies to address discrimination against "Other Backward Classes," which are socio-economic disadvantaged groups other than the Scheduled Castes and Scheduled Tribes.[254] Article 340 of the Constitution allows the president to appoint a Commission to investigate the Conditions of the socially and educationally Backward Classes, and make recommendations on how to remove barriers to improve their situation.[255] The first Backward Classes Commission was established in 1953 to identify social and educational backward communities (apart from SCs/STs) deserving of compensatory discrimination.[256] On the basis of four criteria, namely: caste; education; public sector employment participation; and position in trade and business, it identified 2,399 'backward' castes.[257] Kaka Kalelkar, the chair of the Commission, criticized the methodology, saying indigent Muslims and Christians would be excluded because their religions do not officially recognize a caste system.[258]

The Commission's recommendations were never implemented and state governments freely tailored reservation policies for disadvantaged sections of their populations on the basis of caste.[259] The Supreme Court tried to reduce the factor of caste in the determination of OBCs by the States.[260] In *Balaji v. State of Mysore*,[261] the Supreme Court held that

[251] INDIA CONST. art. 342, *amended by* The Constitution (First Amendment) Act, 1951.
[252] *Id.*
[253] *Id.*
[254] INDIA CONST. art. 15(4), 16(4), 46 & 340(1).
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Compare* Chitralekha v. State of Mysore, 1964 A.I.R. 51 S.C. 1825 (India) (reaf-

caste, while being a relevant factor, could not be the sole determining criterion for backwardness.

In 1978, the second Backward Classes Commission, known as the Mandal Commission, was appointed. The Commission, ignoring Supreme Court holdings, used the term "caste" synonymously with "class" and used eleven criteria for determining 3,743 castes to be socially and economically backward.

The Mandal Commission's list of castes classified as backward also included Muslim groups (with half of the Muslim population categorized as backward).[262] The Mandal Commission's recommendation for reservations for Muslims was a policy shifting point and a major improvement for the "backward caste Muslims." States were directed to implement provisions based on state-determined proportions.[263] The fact that the Mandal Commission did not determine the whole Muslim population as backwards is equally important as it implicitly, but clearly, acknowledged caste stratification among Muslims. However, both the "casteist" focus and the methodology used by the Mandal Commission have been criticized.[264] While the Commission claimed that 52% of India's population was part of the OBC category, the National Sample Survey of 1999-2000 sets the number at 36%, including 4% Muslim OBCs.[265] The report also lay dormant until 1990 when the central government decided to implement the recommendation that 27% of vacancies in government employment be reserved for OBC communities.[266]

In *Sawhney v. Union of India*,[267] the Supreme Court of India upheld the 27% quotas for OBCs in public sector employment, with the specification that the so-called "creamy layers"(i.e. privileged sections) of OBCs needed to be excluded from the reservations. The Court also rejected a 10% quota for the poor among the upper castes.[268]

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firming that "under no circumstance [can] a 'class' be equated to a 'caste.'"), *with* A. Periakaruppan v. State of T.N., 1971 A.I.R. 58 S.C. 2303, 2309-10 (noting that "a caste has always been recognized as a class" and downplaying the strict parameters of "that earlier case"); *see also* Nagarajan, *supra* note 10, at 496.

[262] Hassan, *supra* note 169.

[263] *Id.*

[264] ARUN SHOURIE, FALLING OVER BACKWARDS AN ESSAY AGAINST RESERVATIONS AND AGAINST JUDICIAL POPULISM (2006).

[265] Surjit, S.Bhalia & Sunil Jain, *Quota: Just How Many OBCs Are There?*, REDIFF BUSINESS (May 8, 2006) http://in.rediff.com/money/-2006/may/08quota.htm.

[266] *Id.* (noting that the 50% ceilings set by the Supreme Court, with 22.5% of all reservations for SC/ST, leaves 27.5% for OBCs).

[267] Indra Sawhney v. Union of India, (1992) A.I.R. 80 S.C. 447 (India).

[268] *Id.* at 578.

In 2006[269] the government's decision to extend the 27% reservations for OBCs to government-managed educational institutes was met with vehement protests by upper-caste students and professionals. Nonetheless, the legality was confirmed by the Supreme Court in *Ashoka Kumar Thakur v. Union of India.*[270]

OBC determination continues to be dominated by caste-based notions of backwardness even though Muslims have been included in the OBC list. Critics argue that reservations reinforce and harden the legitimacy of caste distinction.[271] Therefore, even proponents of reservations call for a reassessment of the understanding of backwardness that transcends caste and takes into account other contemporary realities of oppression that are just as abhorrent as caste-prejudice.[272]

Reservations should not just be based on caste, but largely on relative poverty (urban-rural differences, regional differences). This would lead to Muslims or Christians or even other religious, cultural, linguistic or other minority groups not being a priori excluded. Establishing clear and fair criteria would diminish the role of the religious factor in the debate. By skewing the view on caste, a predominant characteristic of Hindu society, the multi-religious nature of the Indian project has been ignored.

The OBC reservation scheme, more than the SC scheme, is said to have been ineffective in helping the genuinely needy among the OBCs because the upper echelons have usurped the benefits that should go to the really needy bottom group.[273] This was understood early on, with a member of the Mandal Commission stating that if too many castes are included, arguably the measures will "not percolate to less unfortunate sections among them" and "an egalitarian society will remain a myth."[274] Today, what makes matters worse is that reservations have become an instrument in partisan politics.[275] It has been said that Muslim OBCs

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[269] Central Educational Institutions (Reservation in Admission) Act, No. 5 of 2007, INDIA CODE 2007.

[270] Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1, 3 (India) (reaffirming the "creamy layer" exception).

[271] B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480, 496 (1980).

[272] *Id.*; Hassan, *supra* note 63.

[273] *See* Nagarajan, *supra* note 10, at 517 ("additionally the reservation system for OBCs has lead to the continued suppression of the Dalits.").

[274] *See* Nagarajan, *supra* note 10, at 500 (statement of L.R. Naik, sole Supreme Court member of the Mandal Commission).

[275] *Id.*

have been left mainly empty-handed.[276] It has therefore been argued that backward Muslim groups should obtain a separate guaranteed minimum quota, pointing to some examples in Indian state where such policies have been effective in proportionally increasing Muslim participation in public employment.[277]

5. Reservations versus Merit and Efficiency

In merit-based competitions, upper caste Indians traditionally have an advantage because of superior education.[278] In the private sector their position has not been effected by reservations.[279] In India's changing economic landscape, the share of government jobs are decreasing compared to private market jobs, thus affecting the relevance of reservations in government-jobs.[280] India's economic "miracle years" have only amplified the income and wealth gap amongst a population that for the most part remains in dire poverty.[281]

Article 39 of the Constitution, a Directive Principle, urges the state to direct its policies so that "the operation of the economic system does not result in a concentration of wealth."[282] Opponents of reservation policy argue that it promotes inefficiency and lower standards in an already immense Indian bureaucracy,[283] and that merit should be the criterion to divide jobs.[284] In the Supreme Court's jurisprudence, efficiency in public

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[276] Syed Shahabuddin, *Reservation of Muslims: Constitutional and Socially Necessary in National Context*, THE MILLI GAZETTE, *available at* http://www.milligazette.com/Archives/2004/01-15Oct04-Print-Edition/011510200471.htm; Hasan, *supra* note 167 (arguing that Muslim OBCs are "not getting the actual benefits of this provision . . . the continued under-representation of Muslims in the central services. In 1981, they were 2.98% among a total of 3883 IAS officers, while in 2000 they were marginally less at 2.83%.").

[277] Hasan, *supra* note 167 (noting that this exists in certain States, e.g., some Muslim groups now receive specific reservations in Kerala, Tamil Nadu and Karnataka.).

[278] E.J. Prior, *Constitutional Fairness or Fraud on The Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 70 (1996).

[279] *Id.* at 71.

[280] *Id.* at 70.

[281] Achin Vanaik, *The Puzzle of India's Growth Rate*, THE TELEGRAPH (June 22, 2006), http://www.tni.org//archives/archives_vanaik_growth.

[282] Rungta, S. K., *Training and Employment of People with Disabilities: India 2002*, GLADNET COLLECTION (2004), http://digitalcommons.ilr.cornell.edu/gladnetcollect/467, at 4.

[283] *See* Paul Lansing & Sarosh Kuruvilla, *Job Reservation in India*, 37 LAB. L.J. 653, 654 (1986).

[284] Derek Brown, *India: Gandhi Waits In The Wings*, THE GUARDIAN, Nov. 12, 1990, at 25 (stating that many jobs and positions in higher education in India are obtained through bribes).

administration has taken a "backseat" to the goal to emancipate the disadvantaged communities.[285] There have been some voices for compensatory discrimination in the private sector as well.[286] The private sector has not favored this option, all though various companies have set in place their own affirmative action hiring programs.[287]

Arguably there is a need for legal provisions to tackle discrimination in the private sector[288] because it seems unlikely that the reservations scheme will be extended. A recent field experiment to test name-related prejudices in Indian corporations found that corporate India "unselfconsciously and prejudicially" discriminates against Muslims and Dalits.[289] Applications for entry level jobs with identical qualifications and experience by individuals with distinct Dalit or Muslim names were less likely to get a response or interview.[290] Unfortunately, it can be argued that the public sector reservations have perpetuated the stigma on the lower classes, leading to stereotypes that the lower caste individuals are less qualified and less meritorious, thus in fact increasing the need for anti-discrimination measures for the private sector.

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[285] *See* Nagarajan, *supra* note 10, at 498 (citing ARUN SHOURIE, FALLING OVER BACKWARDS AN ESSAY AGAINST RESERVATIONS AND AGAINST JUDICIAL POPULISM (2006)).

[286] *See* Sukhadeo Thorat, *Why Reservation is Necessary*, SEMINAR – WEB EDITION, http://www.india-seminar.com/2005/549/549%20sukhadeo%20thor-at.htm; *see also* Paranjoy Guha Thakurta, *Indian Firms Must Hire 'Dalits'* Says Gov't, IPS (Mar. 28, 2006), http://ipsnews.net/news.asp?idnews=32667; *see also* G. Ramachandran, *Reservation in the private sector – A rational, ritualistic placebo*, THE HINDU BUSINESS LINE (Aug. 27, 2004), http://www.thehindubusinessline.in/2004/08/27/stories/2004082700211000.htm.

[287] *Id.*

[288] SACHAR REPORT, *supra* note 51, at 240 (noting that one of the recommendations of the Sachar Committee was to strengthen the legal tools to combat perceived and actual discrimination and offer relief; specifically, by setting up an Equal Opportunity Commission where (among others) Muslims can turn with their grievances against employers and other individuals).

[289] S. Anand, *Not Quite Like Us*, TEHELKA (Nov. 24, 2007), *available at* http://www.tehelka.com/story_main36.asp?filename=cr241107not_quite.asp.

[290] *Id.* ("The odds of a Dalit and Muslim applicants invited for an interview were two-thirds and one third, respectively, of the odds of a high-caste Hindu applicant with identical qualifications.").

C. The EU and Belgium: Anti-Discrimination and Positive Measures under the Employment Equality Directive

1. Religious Freedom and Religious Discrimination

The principles of non-discrimination and equality before the law and the freedom of religion are included in several international instruments to which European member states have acceded.[291]

When it comes to the protection of religious interests in the workplace, there are two principal European frameworks to look to: the freedom of religion, guaranteed under article 9 of the European Convention on Human Rights (ECHR) and national constitutions, on the one hand, and protection against religious discrimination under the EU Employment Equality Directive and its implementation by EU member states, on the other hand.[292] While the concepts religious freedom and religious discrimination are interrelated, the interaction between the two frameworks is not entirely clear.[293]

However, the EU anti-discrimination framework has been far more effective. This is mainly due to the case-law of the now-defunct European Commission of Human Rights and the European Court of Human Rights ("ECtHR") in the area of religious rights in the employment context. While it has been stressed that the freedom of thought, religion and conscience is one of the "foundations of a democratic society" and one of the "most vital elements that go to make up the identity of believers and their conception of life,"[294] in the area of employment, the Strasbourg institutions have not been readily willing to find interference with the right to manifest religious beliefs under art 9.2 ECHR (restrictions necessary in a democratic society for listed reasons).[295] Examples are when an employee's work schedule does not accommodate for observance of religious holidays or Sabbath.[296] The freedom to leave one's job or to choose

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[291] *See* Council Directive 2000/78, art. 4, 2000 O.J. (L303) 16 (EC) (referring to International Labour Organisation's Convention No. 111). Also, In 2000, the Charter of Fundamental Rights of the European Union included in article 21(1) a general prohibition of "[a]ny discrimination based on any ground, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation [. . .]. 2000 O.J. (C 346) 1.

[292] *See generally* VICKERS, *supra* note 8.

[293] *Id.* at 1.

[294] Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) at ¶ 31(1993).

[295] VICKERS, *supra* note 8, at 96.

[296] Ahmad v. United Kingdom, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1982);

a different profession has been considered as adequate protection for an employee's human rights. The 'choice principle' or the 'free to resign principle'[297] has thus been the cornerstone of the interpretation of art. 9 by the Strasbourg institutions in the area of employment.[298] This jurisprudence has been criticized for its formalism.[299] In addition, the so-called 'margin of appreciation' doctrine that leaves it to the Council of Europe member states, with their particular national and societal contexts, to regulate in such sensitive and controversial issues as religious manifestation and religious pluralism has had a somewhat chilling effect when it comes to religious manifestations such as wearing certain religious dress.[300]

While the qualified right to manifest religion (in worship, teaching, practice, observance, and dress) seems to be of limited use in the employment relations context, it may be of considerable indirect use by determining the proper parameters of the protection against religious discrimination. Under the Employment Equality Directive, religious

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Stedman v. United Kingdom App. No. 29107/95, 23 Eur. H.R. Rep. CD 168 (1997) (the application to ECtHR was "manifestly ill founded" under Art 27(2) ECHR.); Konttinen v. Finland, App. No. 24949/94, 87 Eur. Comm'n H.R. Dec. & Rep. 68, 75 (1996) (Seventh-day Adventist employee dismissed for refusing to work on the Sabbath. The Commission found the claim manifestly ill-founded: "In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. ...having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as *the ultimate guarantee of his right to freedom of religion*.").

[297] C. EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (OUP, 2001) 103, 127;P. Cumper, *The Accommodation of 'Uncontroversial' Religious Practices*, in RELIGIOUS PLURALISM AND HUMAN RIGHTS IN EUROPE: WHERE TO DRAW THE LINE? (M.L.P. LOENEN & J.E. GOLDSCHMID. T, EDS., INTERSENTIA 2007), at 208, notes that this 'choice' principle (religious employee is free to resign and find another job) was not the approach the ECtHR took on in an employment dispute involving sexual orientation (Smith and Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (1999)).

[298] VICKERS, *supra* note 8, at 87-88.

[299] EVANS, *supra* note 297, 127; VICKERS, *supra* note 8, at 87; *see* Copsey v WWB Devon Clays Ltd., [2005] EWCA (Civ) 932 (Eng.), (where all three judges of the Court of Appeal criticized the decisions in *Ahmed v. United Kingdom*, App. No. 8160/78, 4 Eur. H.R. Rep. 126 (1982), *Konttinen v. Finland*, App. No. 24949/94, 87 Eur. Comm'n H.R. Dec. & Rep. 68, 75 (1996), and *Stedman v. United Kingdom*, App. No. 29107/95, 23 Eur. H.R. Rep. CD168 (1997), finding them to be logically unsatisfactory, excessively harsh and limiting of the right to religious freedom).

[300] Sahin v. Turkey, App. No. 44774/98, 41 Eur. H.R. Rep. 8, ¶ 101 (2005) ("Where questions concerning the relationship between State and religions are at stake, on which the opinion in democratic society may reasonably differ widely, the role of national decision-making body must be given special importance."); Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001) (public school teacher fired for wearing a headscarf, Swiss decision upheld).

interests must be protected in the employment setting and this must be interpreted to comply with the principles under the ECHR.[301]

2. Employment Equality Directive: Setting the Bar

Since the EU's equality and non-discrimination law has known a "step-by-step organic development through an ever expanding array of case-law and secondary legislation without an overarching conceptual framework,"[302] the answer to the question of which equality model is adhered to under this branch of law is evolving. The European Court of Justice ("ECJ") in its definition of discrimination over the last 40 years has adhered to a formal or Aristotelian concept of equality,[303] but it has been argued that "[a] blend of form and substance lands the ECJ's equality concept in the middle ground of "equality of opportunity."[304] Indeed, in *Kalanke,* involving a German quota system automatically favoring women in case of a tie-break situation, the ECJ explicitly favored equality of opportunity, with measures that seek to remove actual obstacles, over what it saw as evolving towards an equality of results.[305] In the spectrum of equality models, "equality of opportunity" is considered to be a that middle ground between, on the one hand, the "formal" equality model (also called "liberal" or "symmetrical", which is based on individual justice and personal merit) and, on the other hand, the wide-ranging concept of substantive equality (also, "asymmetrical" or "group justice", which focuses on "disadvantages, group impact, actual results, material equality and desired outcome.")[306]

Initially, the European Union project was primarily concerned with setting up a common market, which can explain why the EC treaty contained no general prohibition of discrimination.[307] However, the EU insti-

[301] Treaty on European Union, art. 6(2), July 29, 1992 O.J. (C 191) 35 (EU); Council Directive 2000/78, art. 1, 2000 O.J. (L303) 16 (EC); VICKERS, *supra* note 8, at 119.

[302] De Vos, *Positive Action and EC Discrimination Law, supra* note 189, at 52.

[303] *Id.* at 52-3 (the definition of discrimination used in several cases is "application of different rules to comparable situations or the application of the same rule to different situations").

[304] De Vos, *Positive Action and EC Discrimination Law, supra* note 189, at 53.

[305] Case C-450/93, Kalanke v. Bremen, 1995 E.C.R. I-3051; see *supra* note 18 for the association of these two concepts by Indian Supreme Court Justice K.K. Mathew.

[306] De Vos, *Positive Action and EC Discrimination Law, supra* note 189, at 52; *see also* Marc Bell & Lisa Waddington, *Reflecting on Inequalities in European Equality Law,* 28 EUR. L. REV. 349 (2003).

[307] Two specific forms of discrimination that were closely tied to the economic project, were prohibited: discrimination based on nationality and gender wage discrimination. These prohibitions can be explained by the fact that nationality discrimination

tutions have increasingly moved towards a human rights perspective, with EC (now EU) equality and non-discrimination law developing throughout the years. In 1997, Article 13 was inserted in the EC Treaty (now article 19 of the consolidated version of the EU Treaty[308]), empowering the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." The Council has adopted three directives thus far on basis of Article 13 (the so-called "Article 13 Directives"): the Racial Equality Directive;[309] the Employment Equality Directive (also called the Employment or General Framework Directive);[310] and the Equal Treatment Directive.[311]

The principle of non-discrimination on the ground of religion or belief in employment is included in the Employment Equality Directive of 2000,[312] which forms the common framework for assessing religious discrimination in both private and public sector[313] workplaces in the EU

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contradicts the idea of the free movement of persons in the common market and practices of gender-wage discrimination has the potential for distorting competition because goods may be more expensive in countries with equal pay legislation. *See generally* Gwyneth Pitt, *Religion or Belief: Aiming at the Right Target?*, *in* EQUALITY LAW IN AN ENLARGED EUROPEAN UNION, UNDERSTANDING THE ARTICLE 13 DIRECTIVES 202, 229 (Helen Meenan ed., 2007).

[308] Official Journal C 115, 09/05/2008 P. 0001 – 0388; Article 19 EUT (ex Article 13 TEC).

[309] *See generally* Council Directive 2000/43, 2000 O.J. (L 180) 22 (EC) (this directive implements "the principle of equal treatment between persons irrespective of racial or ethnic origin").

[310] *See generally* Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC) (this directive establishes "a general framework for equal treatment in employment and occupation").

[311] *See generally* Council Directive 2004/113, 2004 O.J. (L 373) 37 (EC) (this directive implements the "principle of equal treatment between men and women in the access to and supply of goods and services"). For gender equality a positive and proactive approach is foreseen under the Amsterdam Treaty (thus article 13 directives have been said to stand on "weaker grounds"). *See* generally Pitt, *supra* note 307.

[312]The Employment Equality Directive sets a framework for combating direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation in the employment setting . Because of the close interrelatedness of religion with race and ethnicity, the Racial Equality Directive could also be relevant for the same victims of discrimination. Directive 2000/43, 2000 O.J. (L 180) 22 (EC) (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin).

[313] Council Directive 2000/43, art. 3, 2000 O.J. (L 180) 22 (EC). It is not discussed whether formal bans that are in place for certain public sector employment are compatible with the Directive. Council Directive 2000/78, art. 2(5), 2000 O.J. (L 303) 16 (EC). ("This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.").

member states. Prohibition of discrimination for reasons of religion seek to guarantee the freedom of religion, vis-à-vis the state (vertically) and between private parties (horizontally). This Directive sets minimum standards and allow member states to go beyond and provide greater protection.[314]This Directive has been implemented -albeit not uniformly[315]- in national legislation in all EU member states. While the Directive provides EU member states with a largely unified discrimination terminology, interpretations of differing national anti-discrimination legislation vary considerably. In this paper, the focus will be on the Belgian case study.

The Directive prohibits direct and indirect discrimination as well as harassment and instruction to discriminate on the basis of a number of protected grounds including religion or belief.[316] The distinction between direct and indirect discrimination, [317] which does not appear in the EU Treaty itself, has developed through ECJ case-law since the 1960s.[318] That distinction, created to enhance the effectiveness of the legal framework, has become a essential part of EU anti-discrimination law.[319]

"Direct religious discrimination" occurs where one person is treated less favorably than another on the basis of religion or belief, [320] while "indirect religious discrimination" occurs where "an apparently neutral provision, criterion or practice" places persons of a particular religion or belief at a particular disadvantage compared with other persons. Direct discrimination cannot be justified unless there is a "genuine occupational requirement," and provided that the objective is legitimate and the re-

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[314] *See generally* Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC) (this directive establishes a general framework for equal treatment in employment and occupation).

[315] For more on the implementation, *see* VICKERS, *supra* note 8, at 69.

[316] As an exception, in limited cases when a characteristic related to religion or belief constitutes "a genuine and determining occupational requirement," a difference in treatment may be justifiable under the Directive. Council Directive 2000/78, art. 4(2), 2000 O.J. (L 303) 16 (EC) (with reference to the rights of churches to require employees to follow the relevant ethos).

[317] Direct discrimination is comparable to the concept of disparate treatment as indirect discrimination comes close to the disparate impact notion under US employment discrimination law. *See* Hazen Paper Co. v. Biggens, 507 U.S. 604 (1993).

[318] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination*, European Network of Legal Experts in the Nondiscrimination Field 5, 12 (2008), *available at* http://www.migpolgroup.com/publications_de-tail.php?id=125 (noting that the concept of indirect discrimination was not invented by the European Court of Justice, but has its roots in other international human rights treaties).

[319] *Id.* at 5.

[320] Council Directive 2000/78, art. 2, 2000 O.J. (L 303) 16 (EC).

quirement is proportionate.[321] The indirectly discriminatory impact of, for instance, a uniform or dress code can be justified if the measure is proportionate (appropriate and necessary) in light of a legitimate aim.[322] For justification under either form of discrimination, the courts are thus called upon to assess whether the restriction on an individual's religious freedom, e.g. through a company dress code, is proportionate to this legitimately pursued aim.

The justification of an indirect discrimination follows the three-prong test that the Court of Justice had developed in its 1986 landmark judgment, *Bilka-kaufhaus GmbH v. Hartz*.[323] Once infringement is established (i.e. it is proven that a rule affects a certain group in a far greater way compared to other groups), the respondent needs to prove that the rule is based on "objectively justified factors unrelated to any discrimination on the [particular protected discrimination] ground."[324] In the *Bilka* judgment, the challenged company action was purportedly due to economic reasons.[325] Whether there was any infringement was to be left up to the national court.[326] According to the *Bilka* ruling, it has to be assessed whether "the measures chosen …correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued[,] and are necessary to that end."[327] The proportionality of the measure clearly has a central place in the justification test.

Unlike the Racial Equality Directive, which has a broad scope beyond employment, protection from discrimination on basis of religion or belief under the Equal Employment Directive is (for now) confined to the employment field. Some authors have criticized this as being "illogical" considering the move in EC law from a market integration model of social policy to one based on social citizenship.[328] In stark contrast, other scholars have argued that the prohibition of discrimination on grounds of religion should not be protected alongside other grounds because of the

[321] Council Directive 2000/78, art. 4, 2000 O.J. (L 303) 16 (EC).

[322] Council Directive 2000/78, art. 2(2)(b)(i), 2000 O.J. (L 303) 16 (EC).

[323] Case C-170/84, Bilka-Kaufhaus GmbH v. Weber Von Hartz, 1986 E.C.R. 1607 (involving a German department store company, Bilka-kaufhaus GmbH, excluding part-time employees from its occupational pension scheme; the effect of the policy being much greater on women than men, as women are more likely than men to work part-time to meet family duties).

[324] *Id.* at 1627.

[325] *Id.* at 1628-29.

[326] *Id.*

[327] *Id.*

[328] Pitt, *supra* note 307, at 229.

"potential for conflict" in employment settings.[329] The European Commission on its end has proposed a new directive that would enlarge the scope of the Employment Equality Directive.[330]

3. The Coming of Age of the Belgian Anti-Discrimination Legislation

At the time of the adoption of the Employment Equality Directive, Belgium did not provide any *legal* protection against religious discrimination,[331] although it did have an anti-racism act[332] and a collective labour agreement[333] which prohibited discrimination amongst others on the basis 'personal characteristics', including religion or belief in recruitment and selection procedures.

Belgium[334]first implemented the Equal Employment Directive in 2003. After the annulment of key provisions by the Cour d'Arbitrage (now Constitutional Court), Parliament had to start over and adopted the Law of May 10, 2007 aimed at Fighting Certain Forms of Discrimination ("(Belgian) Anti-Discrimination Law") which forms the current framework for legal protection against religious discrimination in the workplace.

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[329] Aileen McColgan, *Class Wars? Religion And (In)Equality In The Workplace*, 38 INDUS. L.J. 1, 1 (2009).

[330] *Commission Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, at 1, COM (2008) 426 final (July 7, 2008).

[331] *See* Bell & Waddington, *supra* note 306.

[332] Wet tot bestraffing van bepaalde door racisme of xenophobie ingegeven daden [Law on the Punishment of Certain Acts inspired by Racism or Xenophobia] of July 30, 1981, Belgisch Staatsblad [B.S.] Official Gazette of Belgium, August 8, 1981, 9928 (as amended in 2007, 2003, 1994 and 1993).

[333] Art. 2bis of the Collectieve Arbeidsovereenkomst Nr. 38 van de Nationale Arbeidsraad betreffende de Werving en Selectie Van Werknemers [Collective Labor Agreement of the National Labor Council on the Recruitment and Selection of Employees] of December 6, 1983 (as amended), Belgisch Staatsblad [B.S.] Official Gazette of Belgium, July 28, 1984, 10735.

[334] For our purposes here, we will focus on federal legislation, even though the Regions are competent for some employment related matters and have the responsibility to implement the Employment Equality Directive within their competency and jurisdiction. For an overview of anti-discrimination legislation adopted by the Walloon, Brussels, and Flemish regions and Francophone, Flemish, and German- speaking communities, *see Overview of the belgian antidiscrimination legislation*, CENTRE FOR EQUAL OPPORTUNITIES AND OPPOSITION TO RACISM, http://www.diversiteit.be/?action=onderdeel&onderdeel=189&titel=Overzicht++van+de+antidiscriminatie+wetgeving&setLanguage=3 (last visited March 10, 2011). In addition, there are collective labor agreements that include anti-discrimination provisions, e.g., Collective Bargaining Agreement nr. 38.

Back in 2000, debates were already in full swing in the Belgian legislature, with the adoption of an anti-discrimination law being delayed in anticipation of the EU Directives in this field.[335] The Belgian Anti-Discrimination Law needed to observe the EU Directive, but also sought to go beyond the protection level of the European directive in combating discrimination.[336] The original texts were thus partially amended, resulting in legislation which some commentators believe was confusing.[337] It has been said that in understanding Belgian equality legislation the electoral success of extreme right is a major element, just as the Austrian election of Jörg Haider's FPÖ played a crucial role in the adoption of EU Equality Directives.[338] Even though the aim was to eradicate all forms of discrimination, the criterions of language and political conviction were excluded under the law in an attempt to prevent extreme right from abusing the law to spread racist speech.[339]

This strategy backfired. The resulting Anti-Discrimination Law of February 25, 2003 was soon challenged in front of the Belgian Constitutional Court by different groups,[340] who argued, among others, that the Law violated the freedom of speech, freedom of association and the principle of equality.[341] They also found the provisions too vague and unclear to apply, which was highly problematic since criminal sanctions were provided for.[342] The Constitutional Court agreed with some of the arguments and consequently annulled various provisions in 2004.[343] As a consequence of the annulment of several provisions of the law, the Anti-Discrimination Law became "an open Statute with different means of en-

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[335] DAJO DE PRINS, STEFAN SOTTIAUX & JOGCHUM VRIELINK, HANDBOEK DISCRIMINATIERECHT 441 (2005).

[336] *Id.* at 443.

[337] *Id.* at 448-9.

[338] BRUNO BLANPAIN, *Equality in Belgium: A Story about Diversity*, *in* DIVERSITY, EQUALITY AND INTEGRATION: BEYOND THE LAW, A COMPARATIVE STUDY 137, 138 (2008).

[339] *Id.* at 139.

[340] The petitioners included the far right Vlaams Belang party and an Antwerp Professor. *Storme betwist antidiscriminatiewet bij Grondwettelijk Hof* [Storme Denies Anti-Discrimination Law in Constitutional Court], GAZET VAN ANTWERPEN, (Dec. 3, 2007), http://www.gva.be/dekrant/experts/-johndewit/storme-betwist-antidiscriminatiewet-bij-grondwettelijk-hof.aspx.

[341] Marc De Vos, *New Anti-discrimination Law Under Fire*, EUROPEAN INDUSTRIAL RELATIONS OBSERVATORY ON-LINE (EIROnline) (Jan. 08, 2003), http://www.eurofound.europa.eu/eiro/2003/07/feature/be0307303f.htm [hereinafter De Vos, *New Anti-Discrimination Law Under Fire*].

[342] *Id.*

[343] Cour d'arbitrage [CC] [Constitutional Court] decision no. 157/2004, Oct. 6, 2004, *available at* http://www.const-court.be (Belg.); DE PRINS ET AL. *supra* note 335, at 445.

forcement that became theoretically applicable to every differentiation, that could not be objectively and reasonably justified."[344] Thus, the annulment of a large number of provisions made the law largely unworkable. Meanwhile, the Law's application had de facto been on hold pending the case and the resulting legal uncertainty.[345] Therefore, the Belgian legislature started afresh, adopting a new Anti-Discrimination Law in 2007 to take into account concerns raised by the Constitutional Court and the petitioners. The 2007 Law was also challenged on various grounds,[346] but this time the Constitutional Court confirmed its legality, with some minor exceptions calling for revisions.[347]

The Anti-Discrimination Law of 2007 prohibits the same four types of discrimination as the Directive. The "protected characteristics" are much broader than in the Employment Equality Directive, and notably 12 protected grounds are listed. Besides religion or belief, the Law covers: sex; claimed race; colour; national origin; national or ethnic descent; sexual orientation; civil status; birth; wealth; age; current or future state of health; disability; and physical characteristics. In the scope of application, it is also clear how Belgium goes beyond the minima set by the EU. In addition to the different employment setting, religious discrimination is among others actionable if it takes place in the access to publicly available goods and services, health care, social security, and access to and participation in social, cultural or political activities accessible to members of the public.[348] Certain provisions of the Law, however, only apply in the employment setting. The Law does not apply in purely private settings.

The Law also provides that another Belgian law can distinguish between individuals on the basis of listed protected characteristics, without there being a question of a prohibited discrimination.[349] In that case, the

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[344] Blanpain, *supra* note 338, at 139.

[345] *Id.* at 140.

[346] *Storme betwist antidiscriminatiewet bij Grondwettelijk Hof* [Storme Denies Anti-Discrimination Law in Constitutional Court],GAZET VAN ANTWERPEN, (Dec. 3, 2007), http://www.gva.be/dekrant/experts/john-dewit/storme-betwist-antidiscriminatiewet-bij-grondwettelijk-hof.aspx; Press Release, *Citizens Fight New Belgian Anti-Discrimination Laws Before the Constitutional Court*, L. & JUST. BLOG (Dec. 2, 2007, 10:59 PM), http://lawjustice.blogspot.com/2007_12_01_archive.html.

[347] *See generally* De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189.

[348] Wet ter Bestrijding van Bepaalde Vormen van Discriminatie [Act Against Certain Forms of Discrimination] of May 10, 2007, BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], May 30, 2007, 2d ed., 29016, www.staatsblad.be, at art. 5, § 1 [hereinafter, Anti-Discrimination Law].

[349] *Id.*

Constitution and international norms do apply. It should be noted that Belgian labor law provides regulations with regard to the use of the country's national languages in employment, as well as the duration of working time, the timing of holidays, etc., which could be regarded as, at least, indirectly discriminatory towards certain religious minority employees and Muslims in particular.[350]

Two issues that frequently come up in the European context are accommodations for religious dress and time-off on minority religious holidays and for prayer-time.[351]Considering the different justification regimes of direct and indirect discrimination, a central question is whether the rejection or dismissal of an employee based on wearing religious dress or symbols should be considered as direct religious discrimination or rather indirect discrimination on the ground of religion.[352] Under the Anti-Discrimination Law, a direct difference in treatment based on religion in employment relations can only be a justified if the characteristic in question constitutes "an essential and decisive occupational requirement" because of the nature of an occupational activity or the conditions of its performance.[353] In contrast, the discriminatory impact of a facially neutral norm or practice can be justified by showing that the restriction on religion is proportionate in light of a legitimately pursued aim.[354]

Because of the dearth of Belgian case-law in this area,[355] the answer is not entirely clear, but the available case-law points to a restrictive trend, at least with regard to religious Muslim dress (Muslim headscarf), where the commercial interests trump employee's interest in religious

[350] Anti-Discrimination Law, art. 8.

[351] VICKERS, *supra* note 8, at 198-200. In Belgium, these cases are rarely litigated. *See generally* Ilke Adam & Andrea Rea, *Culturele diversiteit op de werkvloer. Praktijken van redelijke aanpassing in België* [Cultural Diverstity in the workplace. Practices of reasonable accommodation in Belgium], INST. FOR. EUR. STUDY (Sept. 2010), http://www.ies.be/files/Studie-Culturele-diversiteit-op-de-werkvloer-NL-TOUT.pdf [hereinafter Cultural Diversity in the Workplace]; for a discussion of this study and its meaning for the reasonable accommodation debate in Belgium, see Katayoun Alidadi, *Studie over redelijke aanpassingen voor religie op Belgische werkvloer* [Study on Reasonable Accommodations for religion in the Belgian workplace], DE JURISTENKRANT (Belg.), Jan. 12, 2011, at 6-7.

[352] Emmanuelle Bribosia, Isabelle Chopin & Isabelle Rorive, Rapport de synthèse relatif aux signes d'appartenance religieuse dans quinze pays de l'Union européenne 13 (2004).

[353] Anti-Discrimination Law, at art. 8, § 1.

[354] Anti-Discrimination Law, at art. 9.

[355] "Only a handful of discrimination matters have been pleaded before the Labour Courts and victims have not been very successful in obtaining damages." Blanpain, *supra* note 338, at 152.

manifestation in the workplace.[356] In these cases, direct discrimination on the basis of religion is swiftly rejected, and under the indirect discrimination justification test, the difference in treatment is considered proportionate to the stated legitimate goals the company is pursuing (e.g. a neutrality policy). The situation is much more clear in the Netherlands, where according to the Dutch Equal Treatment Commission ("ETC"),[357] the Dutch Equality Body which issues non-binding opinions in concrete disputes and following requests for opinions, there is a direct discrimination[358] on the basis of religion when the employer directly refers to the headscarf[359] or other particular atire, while it concerns an indirect discrimination when the prohibition is based on a broader dress code.[360]

4. Towards More Substantive Equality for Religious Minorities: Indirect Discrimination and Reasonable Accommodations

Indirect discrimination is a complex concept which recognizes that certain rules, requirements or practices which appear neutral on their face, i.e. they do not treat individuals different on basis of religion, race, ethnicity or disability, nonetheless have as effect that individuals with certain personal characteristics are disadvantaged in comparison with other comparable individuals who do not possess the particular trait. [361]

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[356] *See* Katayoun Alidadi, *Werkgever mag hoofddoek verbieden op basis van ongeschreven regels* [Employer can prohibit headscarf based on unwritten rules], DE JURISTENKRANT (Belg.), May 26, 2010, at 1-2 (commenting on the unpublished decision of April 27, 2010 by the Antwerp Labour Tribunal). The decision has been appealed to the Antwerp Labour Appeal Court and is likely to be affirmed, based on the appeals court's summary judgment hearing. *See* Labour Court of Appeals 14 January 2008, *S.R.K.* 2009, nr. 2, 93-97; Labour Tribunal Charleroi, 26 October 1992, *Chr. D. S.*, 1993, 84-85; *See* Katayoun Alidadi, *Muslim Women Made Redundant: Unintended Signals in Belgian and Dutch Case-law on Workplace Dress in Employment and Unemployment Contexts* (forthcoming, 2011).

[357] For a discussion of these opinions, *see* Eva Brems, *Nieuwe Discriminatiegronden in de Wet Bestrijding Discriminatie, in* DE WET BESTRIJDING DISCRIMINATIE IN DE PRAKTIJK 56-58 (2004). The decisions of the Dutch Equal Treatment Commission are generally voluntarily followed by the parties, and in the rare cases that parties do to the court, the opinions have generally been upheld.

[358] In the Netherlands, the term "difference in treatment" is distinct from "discrimination" (prohibited difference in treatment), while in the case law of the European Court of Justice the two terms are used interchangeably, as is done in this paper.

[359] Dutch Equal Treatment Commission (ETC) opinion 1995-31(cleaning staff); ETC 1999-103 (intern in a school); ETC 1999-18 (intern in a school); ETC 1997-14; all opinions by the ETC are available on their website, but are in Dutch only; see www.cgb.nl.

[360] ETC 2001-53 (clerc); ETC 1996-85 (packaging); ETC 1996-16 (doctor's assistant); ETC 2002-125; ETC 2002-123.

[361] Council Directive 2000/43, art 2, para. 2 (b) 2000 O.J. (L 180) 22 (EC).

For instance, a uniform code banning any and all head-covering will disproportionately impact Muslim women who for religious reasons may want to wear a headscarf or Jewish men who want to wear a kippa.

The concept of indirect discrimination has been a vital tool in combating structural discrimination and promoting equality of opportunity in Europe. However, much depends on how the national courts assess the proportionality element in the justification test, and it has been argued that the current "'proportionate means' test gives respondents, tribunals and courts too much latitude in providing objective justification for what would otherwise be indirect discrimination."[362]

Another concept closely related to indirect discrimination, and highly relevant to religious employees and minorities, is that of reasonable accommodations. Reasonable accommodations can be considered a modality of the right to equality and nondiscrimination.[363]Developed as a corollary of the prohibition of indirect discrimination, the reasonable accommodation concept finds its original and most prolific base in the workplace. [364] Under the Directive, the right to reasonable accommodations in the workplace only applies for disability, and not for religion or the other protected grounds.[365] Only a limited number of member states have decided to extend reasonable accommodations for religious reasons, going beyond the Directive.[366]

In the United States, where reasonable accommodations originated, reasonable accommodations were initially adopted in 1972 for religious practices and observances in the workplace under Title VII of the Civil Rights Act of 1964. [367] The right to reasonable accommodations was later

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[362] *Response to 'Promoting Equality of Opportunity and Implementing EU Equality Obligations in Northern Ireland: Updating the Sex Discrimination Order'*, EQUALITY COMM'N FOR N. IR., www.equalityni.org/archive/word/-UpdateSDOResponse0705.doc (last visited Feb. 10, 2011).

[363]Emmanuelle Bribosia & Isabelle Rorive, *Le voile à l'école: une Europe divisée*, 60 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 951 (2004).

[364] Woehrling, *supra* note 24, at 330-36.

[365] Council Directive 2000/78, art. 5, 2000 O.J. (L 303), 16 (EC) (establishing a general framework for equal treatment in employment and occupation).

[366] Bribosia, *supra* note 363, at 366 (refers to Sweden as the prime example for an EU state with legal provisions for reasonable accommodations for religious minorities in the workplace). At this time, the Commission is financing a research project entitled "RELIGARE-Religious Diversity and Secular Models in Europe- Innovative Approaches to Law and Policy," led by the Catholic University Leuven, to examine how the EU, in the midst of expansion and migration fluxes, should deal with claims for recognition of religious identity in family life, workplace, public space, and financing of churches; *See generally* RELIGARE PROJECT, http:// www.religareproject.eu (last visited Feb. 10, 2011).

[367] Gretchen S. Futrell, *Bring Your Dogma To Work Day: The Workplace Religious Freedom Act Of 2007 and the Public Workplace*, 7 FIRST AMEND. L. REV. 373, 382-84

extended under the Americans with Disabilities Act (ADA).[368] The ADA has been highly influential, amongst others, leading to the some member states and then the EU adopting a similar duty for disabled individuals.[369]

The report issued by the Canadian Consultation Commission on Accommodation Practices Related to Cultural Differences received wide attention in Belgium.[370] While the federal Belgian government has not adopted a legally protected right of reasonable accommodations for religious motives, a Flemish Decree, applicable to the Flemish government, Flemish educational institutions and economic intermediaries such as temp-agencies and outplacement agencies, does require reasonable adjustments for all protected characteristics including religion or belief.[371] This provision seems to have gone unnoticed and has not generated any significant case law thus far. On a brighter note, employers seem to have become more proactive by avoiding discrimination in their organizations, taking measures to increase diversity, and also providing accommodations (time off for prayers, dress code, etc.) on a case-by-case basis for religious employees.[372]

Debates on reasonable accommodations for religious practices are in full swing in Belgium at this time,[373] with the Belgian Equality Body, the Centre for Equal Opportunities taking position against the adoption

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(2009).

[368] For the evolvement of reasonable accommodation for religion in the workplace in the United States, *see id.*

[369] Council Directive 2000/78, at art. 5.

[370] Woehrling, *supra* note 24; Bribosia, *supra* note 363; Gerard Bouchard and Charles Taylor, *Building a Future; The Time for Reconciliation*, CONSULTATION COMM'N ON ACCOMMODATION PRACTICES RELATED TO CULTURAL DIFFERENCES, http://www.accommodements.qc.ca/index-en.html.

[371] Bribosia, *supra* note 363; Vlaams Decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt [Flemish Decree Concerning the Proportional Participation in the Labour Market] of May 8, 2002 [Official Gazette of Belgium], July. 26, 2002 (noting that it was because of an oversight that the duty to take reasonable adjustments was not limited to disability alone).

[372] CENTRE FOR EQUAL OPPORTUNITIES AND OPPOSITION TO RACISM, NOTE ON THE MOTHER TONGUE AS A CRITERION IN OFFERS, *supra* note 334 (noting the Centre has also commissioned a study on good practices of reasonable accommodation practices (harmonization practices) in the workplace in an attempt to enrich and broaden the debate.); Cultural Diversity in the Workplace, *supra* note 351.

[373] For example, presentations and debate events on reasonable accommodations organized in the frame of the federally-instigated and sponsored "Rondetafels van de Interculturaliteit" ("Roundtables on Interculturality"), a federal government initiative in 2009-2010 aimed at exchanging good practices and discovering new possibilities to promote an interculturality in Belgium. The Roundtables have consistently drawn large, diverse, and sometimes reticent and concerned crowds eager to learn more and potentially change their minds on the topic.

of a legally enforceable duty by employers.[374]Accepting religion-driven accommodations, and thus actively facilitating and promoting integration in the work force, would require a significant switch of mentality compared to widely accepted anti-discrimination principles and remains controversial in Europe and Belgium.[375] Nonetheless, it can be argued that reasonable accommodations could be a useful vehicle for progress as it would allow for better participation of religious minorities such as Muslims in the Belgian workplace in light of the fact that many workplace laws, regulations, company policies, and customs are based on the dominant Christian calendar, dress codes, and traditions, and the concept of indirect discrimination has not been able to realize its full potential due to restrictive case-law.[376]

5. The Individual Justice Model and Enforcement of Anti-Discrimination Laws: Achilles' Heel and the EU's Legal Strategies

The formal equality or individual justice model relies on victims of discrimination to bring litigation, but this has its shortcomings as in practices these individuals face various barriers in their access to justice.[377] As discrimination is often difficult to prove and to tackle in practice, specific procedural rules seek to facilitate and promote its enforceability.[378] The Employment Equality Directive and the Belgian Anti-Discrimination Law dedicate various provisions to the access to justice and enforcement issue, recognizing the need for usable and practicable legal tools. The Directive requires member states to "provide for effective, proportionate and dissuasive sanctions" and "adequate judicial protection against victimization."[379] For Belgium this has included making discriminatory agreements invalid, providing for criminal sanctions, shifting the burden of proof in court cases to the alleged discriminating party, and creating the possibility for a summary proceeding.[380]

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[374] Cultural Diversity in the Workplace, *supra* note 351 (position stated during press conference presenting the study by Adam & Rea).

[375] *See generally* Cultural Diversity in the workplace, *supra* note 351.

[376] *Id.*

[377] Bell & Waddington, *supra* note 306, at 351.

[378] *See generally id.* at 352.

[379] Directive 2000/78, pmbl. (30) and (35), 2000 O.J. (L 303) 16 (EC).

[380] Anti-Discrimination Law, art. 15-22.

The sharing of the burden of proof in civil cases under the Directive was seen as an important way to lower the threshold for a petitioner.[381] Under the Belgian rules, when the victim (or another organization or the Centre for Equality of Opportunities, on the victim's behalf) alleges certain facts that raise the presumption of discrimination on basis of a protected characteristic, then the burden shifts to the respondent/ alleged perpetrator, who must prove a lack of discrimination.[382] Facts leading to the presumption of direct discrimination include: (1) information on certain patterns of unfavorable treatment of individuals with a certain characteristic (e.g. appears from repeated notifications to the Centre of Equal Opportunity), and (2) information indicating that the victim's situation is comparable to that of a person of reference.[383] Facts that lead to a prima facie case of indirect discrimination include: (1) general statistics on the situation of the group the victim belongs to, or general knowledge, (2) the use of an intrinsically suspicious criterion, and (3) elementary statistics indicating an unfavorable treatment.[384]

In case of discrimination under Belgian law, the victim is entitled to moral damages in the amount of €650, potentially increased to €1,300 in grave circumstances or when it cannot be shown that the same measure would have been taken on basis of non-discriminatory reasons (e.g. denied access to a bar because of prior experiences).[385] For employees, as far as material damages are concerned, there is a choice between the actual proven damages and a lump sum in an amount of 6 months gross salary (3 months, if same measure would have been taken on basis of non-discriminatory reasons).[386] The court can also order the discriminatory action to be ceased.[387] Arguably these modest lump sum payments do not negate the many practical and other barriers in the access to jus-

[381] The shifting of the burden of proof was an eyesore for the Belgian petitioners in 2003.They found it unacceptable that "[c]itizens who are unable to prove they have not been acting in breach of the new laws, may be condemned to pay lump sum indemnities…. without it being necessary for alleged victims of discrimination to prove they actually incurred damages." They also argued that even though formally this concerns civil cases, penalties (lump sum fines) can be imposed and thus fair trial standards should apply, under which case the burden of proof cannot be shifted. NCM Study, *supra* note 227.

[382] Anti-Discrimination Law, art. 28, § 1; Council Directive 2000/78, art. 10, 2000 O.J. (L 303) 16 (EC).

[383] Anti-Discrimination Law, art. 28, § 2.

[384] *Id.* § 3.

[385] *Id.*

[386] *Id.* § 2.

[387] *Id.* art. 20.

tice,[388] let alone form an incentive for victims to pursue discrimination cases.

The EU approach has thus been to "amend and improve the individual justice model" rather than to explore "alternative approaches to achieve equality."[389] Still, if enforcement remains solely in the hands of the victims, who rarely have the time, money and motivation to pursue legal action, clearing some legal hurdles might still not do the trick and it would be justified to explore alternative avenues that depart from the formal justice model.

Setting up independent agencies to assist victims and bring claims on behalf of them was seen as one way forward. Notably, under article 13 of the Racial Equality Directive, member states must designate an agency, a so-called Equality Body or "a body for the promotion of equal treatment of all persons," to provide independent assistance to victims of racial discrimination, to legally pursue claims on behalf of the victims, to conduct country surveys on discrimination, and to publish reports and make recommendations. Under article 20 of the Gender Directive 2006/54/EC (recast), a body with similar competencies for discrimination on the basis of sex must also be set up. There is no similar requirement under the Employment Equality Directive to establish a body competent for religious or other discrimination, but many states have made their existing Equality Bodies competent for other protected grounds as well.[390] For instance, the Belgian Centre for Equality of Opportunities is also competent to assist victims of religious discrimination.[391]

While these legal tools to aid in the enforcement of anti-discrimination rules have their merit, the more fundamental question remains whether anti-discrimination legislation in practice can create real and equal opportunities for vulnerable minorities, resulting in distribu-

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[388] *See* generally EU AGENCY FOR FUNDAMENTAL RIGHTS (FRA), ACCESS TO JUSTICE IN EUROPE: AN OVERVIEW OF CHALLENGES AND OPPORTUNITIES (Publications Office of the European Union, 2011), available at http://fra.europa.eu/-fraWebsite/attachments/report-access-to-justice_EN.pdf.

[389] Bell & Waddington, *supra* note 306, at 352; *See also* De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 53 ("It is a testimony to the ECJ's intellectual creativity and to the EC's flexibility that Community law has been able to address formal equality's shortcoming without abandoning it and the individual justice it stands for.").

[390] Gay Moon, *Enforcement Bodies*, *in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 872 *et seq.* (2007).

[391] Wet tot Oprichting van een Centrum voor Gelijkheid van Kansen en voor Racismebestrijding [Act of Parliament establishing the Belgian Centre for Equal Opportunities and Opposition to Racism] of Feb. 15, 1993 (as amended), BELGISCH STAATSBLAD [B.S.] [Official Gazette of Belgium], Febr. 19, 1993, 3764.

tion of scarce jobs and genuinely diverse workplaces. Or whether, on the contrary, we should accept that normal market principles do not operate effectively in this context, so that "special measures" are indispensable to lend a helping hand to disadvantaged groups. This leads us to the topic of positive action, which unlike in the Indian case has largely been untapped domain in Europe. One reason could be that "[a]ccording a group of individuals special rights on the basis of their distinguishing traits contradicts the uniform grant of equal rights to all individuals, on the basis of individual liberalism."[392]

6. Positive Action in Europe and Belgium: Controversial and Restricted

Positive action "has strongly divided supporters and opponents who both claim to defend a truly equal society."[393] While it is associated with the substantive equality model and material outcome, the notion "positive action" in fact covers a wide array of measures of which hard quota and reverse discrimination are only the extremes.[394] The adopted working definition for the concept of positive action by a recent EU financed research project on positive action, PAMECUS, was "proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past and present dis-

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[392] THIO, *supra* note 181, at 16 (citing Joel E. Oestreich, *Liberal Theory and Minority Rights*, 21 HUM. RTS. Q. 108 (1999)).

[393] De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 51. In this context it can be noted that the European Commission recently funded a research study titled "PAMECUS" to better understand the potential role of positive action measures. This study was undertaken to help the EC develop a framework for better understanding the role that positive action measures can play in practice in preventing or remedying discrimination and gain an insight into the kind of practical positive action measures already being taken in the EU (and in the EFTA-EEA countries), as well as the possible costs and benefits of the positive action measures. PAMECUS compares the experiences in the EU with those in Canada, the United States, and South Africa. Unfortunately, the Indian experience was not included in this research endeavor, although arguably, this would have brought particular insights. *Report of the Directorate-General for Employment, Social Affairs and Equal Opportunities of the European Commission on International Perspectives on Positive Action Members*, at 34 (Jan. 2009), *available at* http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=180&furtherPubs=yes [hereinafter *Report on International Perspectives*].

[394] De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 54; Christopher McCrudden, *Rethinking Positive Action*, 15 INDUS. L.J. 219, 223-225 (1986). Positive action can, amongst other things, include diversity policies, accommodation programs, and target policies. *See also Report on International Perspectives*, *supra* note 393, at 6.

crimination or disadvantage."[395] In this perspective, positive action is said to be a way to achieve full equality instead of awarding "special rights" that depart from the principle of equal treatment, but this distinction seems subtle.

A division between "backward-looking" versions (meant to compensate past disadvantages) and "pro-active, forward-looking" positive action can also be drawn.[396] One can expect most positive action schemes to include the aim of remedying past injustices and thus be "back-ward-looking" to a certain extent. India's compensatory discrimination schemes are to a large extent justified by historic arguments, but even in the European context, the poor socio-economic situation of Muslim minorities that can be traced back a few decades, could be used to justify measures to compensate for past (as well as present) disadvantages in the workplace.

Within the EU legal framework, member states are not obliged[397] to proactively take any positive measures but positive action is allowed within certain limits. The Employment Equality Directive states that "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages."[398]

The Directive further clarifies that in any case it "does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training…"[399]

Hard quota à la Indian employment reservations would not pass le-

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[395] Uduak Archibong, *A study on positive action in the European Union, Canada, United States and South Africa*, HEINRICH BÖLL STIFTUNG 9, *available at* http://www.migration-boell.de/pics/Uduak_Archibong__A_study_on_positive_action_in_the_European_Union.pdf (last visited March 22, 2011).

[396] De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 55.

[397] The ECJ has rejected any compulsory positive action in Case C-170/84 Bilka – Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 01607 ("An obligation such as that [. . . which] goes beyond the scope of article 119 (now 141 (4)) and has no other basis in community law as it now stands.").

[398] Council Directive 2000/78, art. 7.1, 2000 O.J. (L 303) 16 (EC). It should be noted that there is a broader provision regarding positive action for disabled people allowing for more far-reaching measures. *See* Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Antidiscrimination Laws*, 18 COMP. LAB. L.J. 62 (1996).

[399] Council Directive 2000/78, pmbl. (17), 2000 O.J. (L 303) 16 (EC) (without prejudice to the obligation to provide reasonable accommodation for people with disabilities).

gal muster in the European context. A look at the relevant case-law confirms this. As there is no case-law from the ECJ as of yet on positive action under the Employment Equality Directive,[400] we have to turn to case-law with regard to gender discrimination.[401] From that case-law it appears that positive actions, "as derogation[s] from an individual right," are interpreted strictly.[402] The ECJ has rejected positive action schemes based on gender, which through automatisms *at the selection stage*, lead to "equal results."[403] What is allowed, however, are quota *prior to the point of employment selection*.[404] Positive actions at the time of selections have to be "flexible in nature and guarantee an objective and individual assessment of all candidates."[405] That is one reason employment reservations in place for decades now in India in the public service, go beyond the limits of allowable measures that the ECJ has drawn out.

Positive actions also need to be objectively justified in light of particular career difficulties of the promoted group. In *Abrahamsson*, the ECJ struck down a Swedish scheme that treated female candidates for university positions preferentially because of the lack of "clear and ambiguous criteria such as to prevent or compensate for disadvantages in

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[400] There is also no relevant case law on a similar provision under the Racial Equality Directive. Council Directive 2000/43, art. 5, 2000 O.J. (L 180) 0022 (EC). *See also* De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 70.

[401] Case law under the Equal Treatment Dir4ective, Council Directive 76/207/EEC, art. 2(4), 1976 O.J. (L 039) 0040, has different wording than the currently applicable Consolidated Version of the Treaty on the Functioning of the European Union art. 141, Dec. 29, 2006, 2006 O.J. (C 321) 110, but the difference in wording does not imply a different level of scrutiny. *See generally* De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 68; Case C-407/98, Abrahamsson & Anderson v. Fogelqvist, 2000 E.C.R. I-5539. For a more elaborate discussion of positive action law in the field of gender, *see* De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189; OLIVIER DE SCHUTTER, *Positive Action*, *in* CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW 757 (Dagmar Schiek, et al. eds.,2007).

[402] Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3078. The Court stressed that "as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly."

[403] *Report on International Perspectives*, *supra* note 393, at 23; *see also* Henrard, *Minorities and Socio-Economic Participation*, *supra* note 5, at 30 (referring to ECJ case showing that quotas are not accepted).

[404] *Report on International Perspectives*, *supra* note 393, at 23; *see also* Henrard, *Minorities and Socio-Economic Participation*, *supra* note 5, at 23 (citing Case C-158/95, Badeck v. Hessischer Ministerprasident, 2000 E.C.R. I-01875, in which a quota requiring fifty percent of training spots be for women and requiring that at least fifty percent of interviews to be with women was upheld).

[405] *Id.* at 23 (citing Case C- 409/95, Marshall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-06363).

the professional career of members of the underrepresented sex."[406] Therefore, again, Indian employment reservations for the highly heterogeneous categories of Scheduled Castes, Tribes or Other Backward Classes, which do not address *particular* but rather general and historical disadvantages in the workplace, would not stand the ECJ positive action test.

When it comes to positive action for religious groups, Northern Ireland due to its particular history has played a vanguard role in Europe. Northern Ireland's Fair Employment (Northern Ireland) Act (FEA) 1989, is considered an example of a good positive action practice in Europe.[407] A report for the British Department of Work and Pensions, authored by Tariq Modood among others, reviewing some positive action examples in the EU and North America, reads: "[t]he developments in Northern Ireland suggest that the introduction of proactive equality instruments accompanied by the political will to bring about social change can have an observable impact on employment equity."[408]

Article 15 of the Employment Equality Directive contains a specific provision covering North Ireland's particular situation:

> 1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, *differences in treatment* regarding recruitment into that service, including its support staff, *shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation*.
>
> 2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, *the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation*. (emphasis added)[409]

The wording of article 15 strongly suggests that applying the same or similar measures in recruitment treatment based on religion elsewhere in Europe (where the specific justifications of Northern Ireland's historic situation is absence) would run counter to EU anti-discrimination principles. Thus, other member states are not able, let alone encouraged, to take on similar measures for religious groups.

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[406] Case C-407/98 Abbrahamsson & Anderson v. Foqelgvist, 2000 E.C.R. I-5539.

[407] *Id.*

[408] DHAMI ET AL., *supra* note 96, at 3. The authors argue that this is particularly pertinent for Britain, where Muslims complain of religious discrimination, and are the most disadvantaged groups in the labor market.

[409] Council Directive 2000/78, art. 15, 2000 O.J. (L 303) 16 (EC).

Belgium has little experience with regard to positive action for religious minorities.[410] The Belgian Anti-Discrimination Law foresees the possibility to adopt positive action, which under law are not considered to constitute direct or indirect discrimination on basis of listed criteria.[411] A number of criteria for possible positive actions are listed in the Law, namely there has to be (1) a clearly established inequality, (2) the eradication of this inequality is to be regarded as a desirable goal, (3) the positive action measure is to be temporary and should end as soon as the goal is achieved, and (4) the positive action should not unnecessarily limit the rights of third-parties.[412] These requirements were almost *verbatim* taken from a 1994 judgment of the Constitutional Court.[413] The Law requires a royal decree to determine specifically in which situations and under which conditions positive action measures can be adopted,[414] because in the opinion of the government a private actor could not assess these conditions on a "macro-level".[415] However, such royal decree has yet to be adopted, meaning that private employers at the federal level cannot adopt positive action for racial, ethnic, or religious minorities.[416] The federal Belgian state has not thus not yet shown political will to take concrete proactive measures to increase the participation of ethnic-religious minorities in the work force.[417] However, the Flemish Decree regarding Proportional Participation in the Labour Market[418] allows the Flemish

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[410] Even though Belgium does not have much experience with positive action for religious minorities, it does have a widespread system of "reservations" for linguistic groups in certain assemblies and the federal civil service. Thus, there is experience with, and acceptance of, the notion of positions being awarded on bases other than meritocratic criteria. *See* 2007 CONST. art. 67 (Belg.) (with regard to the seat assignment in the Senate). There are also linguistic community and gender quota in the Belgian High Judicial Council. *See* DE SCHUTTER, supra note 401, at 788 (discussing Human Rights Committee Communication 943/2000, 81st Ses., July 5-30, 2004 CCPR/C/81/D/943/2000 (Aug. 17, 2004)).

[411] Anti-Discrimination Law, art. 10 § 1. The challengers of the anti-racism and anti-discrimination laws in 2003 had also argued that art. 5 of the 2003 Anti-Discrimination Act violated the principle of equality, something the Constitutional Court did not follow. *See* Grondwettelijk Hof [GwH] [Constitutional Court] decision no 157/04, Oct. 6, 2004, *available at* http://www.const-court.be (Belg.).

[412] Anti-Discrimination Law, art. 10, § 1.

[413] Cour d'arbitrage [Constitutional Court] decision no 9/94, recital B.6.2, Jan. 27, 1994, published in Belgisch Staatsblad [B.S.], Belgian State Gazette, March 23, 1994, 8059; Blanpain, *supra* note 338, at 148.

[414] Anti-Discrimination Law, art. 10, §§ 2-4.

[415] Blanpain, *supra* note 338, at 148.

[416] *Id.* at 149.

[417] *Id.* at 148-49.

[418] Decree of the Flemish Community concerning proportional participation in the labour market of May 8, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium],

government to offer employers subsidies to promote equal participation and diversity in their staff, but the measures all concern "soft incentive programmes that unlike quota do not involve an unequal treatment of members of majority groups."[419]

De Vos warns for the risks of hard quota: "a pure substantive approach … runs the risk of interchanging quality for quality while reinforcing divisions or reintroducing individual inequality through the backdoor." [420] Despite the fragility and dangers of (at least hard) positive action measures, it can be argued that anti-discrimination norms are simply not enough in the European context, and various data suggest that there are inherent limits to the approach to create a "level equal playing field".[421]Studies have revealed discriminatory practices in both private and public sectors, but often discrimination is unapparent or even unconscious.[422] For instance, negative stereotypes held by managers in charge of the selection process disadvantage minorities severely.[423] Research on discrimination in the labor market traditionally looked at explicitly subjective attitudes and stereotypes of employers, but more recent studies seek insight regarding implicit prejudices which can lead to discriminatory attitudes among employers. Covert experiments on racial discrimination where identical resumes from two fictitious candidates (one white, another a minority candidate) are sent to hiring companies show discrimination at the recruitment level.[424] A Swedish study[425] found

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July 26, 2002.

[419] Blanpain, *supra* note 338, at 150-151; Another way for the Flemish Government to create more equal opportunities is to follow the lead of the United States: award government contracts to employers who adhere to an equal opportunity policy or aim to have a diverse work force. In the US, Executive Order 11,246 required contractors of federally funded projects (above $50,000) to take affirmative action to ensure that applicants are not discriminated on basis of race, color, religion, sex, or national origin. These employers are required to have an affirmative action program with numerical goals and timetable for meeting the target participation of minorities. Exec. Order No. 11,246, 41 C.F.R. 60 (1965).

[420] De Vos, *Positive Action and EC Discrimination Law*, *supra* note 189, at 53.

[421] Bell & Waddington, *supra* note 306, at 352; POSITIVE ACTION MEASURES IN THE EUROPEAN UNION, CANADA, UNITED STATES & SOUTH AFRICA (PAMECUS), SYNTHESIS REPORT 6 (Feb. 2009), *available at* http://www.br-ad.ac.uk/T4-health/new_site/pamecus/files/PAMECUS%20Volume%201%20-%20Synthesis%20Report.pdf.

[422] RICHARD JENKINS, RACISM AND RECRUITMENT: MANAGERS, ORGANISATIONS AND EQUAL OPPORTUNITY IN THE LABOUR MARKET 240 (1986).

[423] *Id;* BELGIAN CENTRE FOR EQUALITY OF OPPORTUNITIES AND OPPOSITION TO RACISM, ANNUAL REPORT DISCRIMINATION 2008, p. 13(for instance, "Blacks are lazy," "Foreigners are untrustworthy.").

[424] BELGIAN CENTRE FOR EQUALITY OF OPPORTUNITIES AND OPPOSITION TO RACISM, *"Cast Me" Campaign*, (Aug. 31, 2009), http://diversiteit.be/in-

that employers clearly have more negative attitudes towards Arab-Muslim men in a sense similar to attitudes towards obese individuals, and that they associate both Muslims and obese people with a lower work performance.[426] The parallel between Islam and obesity is an interesting metaphor as it indicates that Muslims carry a certain weight with them that somehow makes them less efficient and less valuable as employees. This type of research shows that Muslim job applicants are facing particular disadvantages in the recruitment processes, as they have to fight the potential prejudices an interviewer might have. Stereotypes and implicit assumptions about Muslims thus operate on a subconscious level that anti-discrimination as a legal tool, is unable to stand against.

Positive action remains controversial in Europe and is not viewed favorably by large sections of the population. To achieve social equity, the EU has not yet obliged member states to actively institute better treatment for certain groups, but appears to be moving towards a somewhat more proactive equality policy, evidenced by the broad mainstreaming provision in the EU Treaty which indicates that policy makers need to make equality a priority throughout EU initiatives.[427] The potentials of positive action are currently being explored at the EU level and in the various member states,[428] and within the EU, Britain and the Netherlands[429] are said to be vanguards with regard to actively promoting race

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dex.php?action=artikel_detail&artikel=295; BELGIAN CENTRE FOR EQUALITY OF OPPORTUNITIES AND OPPOSITION TO RACISM, *"Cast Me" Campaign Video*, http://www.discriminatieophetwerk.be/index.php?pageId=1 (the Belgian Centre recently launched a raising awareness campaign to bring covert discrimination of immigrant young jobseekers at the recruitment level to public attention).

[425] Jens Argerstrom et al., *Institute for Labor Market Policy Evaluation, Ethnicity and obesity, evidence of implicit work performace stereotypes in Sweden* (IFAU – Institute for Labour Market Policy Evaluation, Working Paper No. 2007:20), *available at* http://www.ifau.se/upload/pdf/se/2007/wp07-20.pdf.

[426] *Id.* at 4.

[427] The Consolidated Version of the Treaty on the Functioning of the European Union art. 10, Sep. 5, 2008, 2008 O.J. (C 115) 53 states, "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." *But see* Mark Bell, *EU Anti-Racism Policy - the Leader of the Pack?*, *in* EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES (Helen Meenan ed., 2007) (arguing that advancement on the anti-discrimination front has not been matched in other areas as mainstreaming).

[428] *See, e.g.*, DHAMI ET AL., *supra* note 96.

[429] The 1994 Law on the Encouragement of Proportional Labour Participation by Ethnic Minorities in the Netherlands allows for positive action to reduce under-representation of ethnic minorities in the work force, and in 2001 the Dutch government agreed on covenants between government and trade associations (provisions so the private sector would take measures voluntarily). *See* DHAMI, *supra* note 96, at 42-43.

equality.[430] However, the understanding[431] of positive measures and its support by the wider society is an essential condition for the implementation of position action programs in Europe.[432]

V. CONCLUDING OBSERVATIONS

Europe today is faced with new challenges of cultural and religious diversity. India, with its longstanding multi-religious diversity, is similarly confronted with claims from its Muslim minority. To address the often problematic situation of certain minority groups in the labour market, various initiatives such as anti-discrimination legislation, reasonable accommodations and affirmative action related to the workplace can be adopted, for fairness, political, economic and national reasons,[433] to better integrate and increase participation of individuals belonging to those groups in the workplace, to empower disadvantaged sections of the work force, and even to appease minorities.

With historic, cultural and political backgrounds so divergent, drawing lessons from the European experience for the India setting and vice versa is no easy task. Adequate minority protection presents the uncomfortable dilemma of equal rights versus special rights. Europe, with its aim to realize equality of opportunities for all in the workplace, has mainly adhered to non-discrimination and equal treatment to address the socio-economic backwardness of European Muslims. In contrast, India's compensatory discrimination scheme, not designed for religious minorities but rather to eradicate the backwardness of historically social and economically disadvantaged groups such as the Dalits, is a prime example of awarding special rights to minorities.

It can be argued that this European adherence to the non-discrimination and equal treatment principle is embedded in the general tradition of emphasizing individual liberties and rights in Europe while the Indian institution of (employment) reservations fits in the tradition of focusing on group rights in India. There is no doubt that in addition to

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[430] *Id.* at 2.

[431] PAMECUS, *supra* note 421, at 35 ("[A] negative consequence of introducing positive action within organisations was backlash from individuals who did not fully understand the rationale behind positive action and saw it as 'favouritism' towards particular groups.").

[432] *Id.* at 6.

[433] *See* SACHAR REPORT, *supra* note 51 (calling the problem of educational and economical backwardness of Muslim Indians a national problem, with immediate remedial action being in the *national interest*, e.g., (young) Muslims can help ameliorate the aging work force problem and introduce new perspectives.).

and besides fighting discrimination today in Europe, a proactive take is indispensable to rehabilitate unjust situations stemming from a pattern of negative discrimination and to create real social change that allows for Muslim's individual and collective social mobility. Equal opportunities can only lead to equitable results under certain circumstances. Unconscious discrimination and stereotyping, something that affects many Muslim job seekers, obstruct genuine equality notwithstanding the presence of anti-discrimination legislation.

The Indian model differs from the European one in that it recognizes that individual rights in the form of workplace anti-discrimination do not adequately safeguard group identity and social mobility. The merit of the Indian model also is that it introduces the perspective that special rights, through positive measures, are sometimes justified in light of the scope and extent of deep-rooted societal biases against disadvantaged groups. But the Indian example is also evidence and warning that positive measures can take on a life of their own when perpetuated, institutionalized, and politicized. For one, the challenges and sensitivity in delineating affirmative action to the appropriate beneficiary groups are clear. The issue regarding which constituencies benefit from the reservation scheme has been tumultuous with many groups organizing to get a piece of the pie. Ironically, it has been stated that India is the "only nation in the world where people fight to be called backward rather than forward."[434] This is the contradictory effect of the overreaching of positive action on Indian society; instead of being a temporary measure that ends when the emancipation of the historically disadvantaged portion is at a reasonable level, reservations have found secondary purpose on election platforms and have been repeatedly abused by politically influential castes to the detriment of those genuinely indigent.[435] The fact that the special rights in law and in fact have disadvantaged the most vulnerable Muslim Indians must also be a warning for jurisdictions thinking about instituting far-reaching employment quota for any minority.

It can be argued that the various policies that have been implemented in the labor field to accommodate religious minorities fit into the country's choice for a multicultural, or at least religiously tolerant, society. Policies cannot be severed from their backgrounds and context clearly

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[434] NR Narayan Murthy, *Personalities*, OBC RESERVATIONS, http://obcreservation.net/ver2/anti-reservation-mainmenu-97/personalities-mainmenu-78.html (last visited Feb. 19, 2011).

[435] Nagarajan, *supra* note 10, at 486, 509 (explaining this abuse is "most noticeable at the state level and now threatens to extend to the central level" with groups lobbying to be included in the list, even though they are not disadvantaged).

matters. Policies, in order to be effective, require some level of approval by the constituency. The media plays an important role in the process, and societal reactions will sooner or later have to be dealt with.[436] Still, there is room for the law to be innovative, advancing and emancipating. Law should not only be the reflection of what the society accepts at a given time, but also what that society should aspire to be. In the end, how a society treats its most vulnerable groups in law and in practice reveals a great deal about a state project.

[436] *See, e.g.*, Bouchard-Taylor commission, *supra* note 370.