

Legal Change and Gender Inequality: Changes in Muslim Family Law in India

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Group-specific family laws are said to provide women fewer rights and impede policy change. India's family law systems specific to religious groups underwent important gender-equalizing changes over the last generation. The changes in the laws of the religious minorities were unexpected, as conservative elites had considerable indirect influence over these laws. Policy elites changed minority law only if they found credible justification for change in group laws, group norms, and group initiatives, not only in constitutional rights and transnational human rights law. Muslim alimony and divorce laws were changed on this basis, giving women more rights without abandoning cultural accommodation. Legal mobilization and the outlook of policy makers—specifically their approach to regulating family life, their understanding of group norms, and their normative vision of family life—shaped the major changes in Indian Muslim law. More gender-equalizing legal changes are possible based on the same sources.

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INTRODUCTION

The application of distinct family laws to specific cultural groups is a way in which cultural diversity is recognized. Multicultural institutions often provide unequal rights to citizens, violate individual rights, impede policy change, and restrict cultural exchange. Some argue that such outcomes are inevitable aspects of multiculturalism. Such criticisms are particularly leveled at plural family law systems.¹ This is because the norms of most groups give the genders unequal rights in family life, or at least did so when plural family law systems initially took shape. Policy makers particularly incorporated gender-unequal norms into group law during crucial phases of state-formation when they did not consider gender equality an important goal (Kandiyoti 1991; Glendon 1989; Hooker 1975).

Multicultural institutions and policies are particularly important in accommodating India's cultural diversities along axes such as religion, language, caste, sect, and region. The use of distinct family laws to govern various religious groups and some tribal groups is one of the ways in which culturally inflected interests are represented. The colonial state introduced a somewhat centralized system of plural family laws, in which the powers of adjudication were shared by the state courts and various community courts. The postcolonial political elite retained much of colonial-era family law to accommodate the cultural minorities, especially Muslims. There were tensions between this choice and constitutional commitments to promote gender equality, as all of India's family law systems provide unequal gender rights in many respects. Although the Indian constitution included a directive to homogenize family law in the indefinite future, leading to a Uniform Civil Code (UCC), policy makers have not followed this course. The judiciary also resisted appeals to systematically reform the various family laws with reference to constitutional rights and transnational human rights law.

The plural family law system is the most widely criticized of India's multicultural institutions. One of the criticisms of this system is that it provides limited scope for legal change. The claim that group law is unable to keep abreast of social change seems to apply particularly to the laws of the cultural minorities. This is because policy makers claim that the concerned groups ought to initiate changes in these laws, but conservative religious and political elites are often regarded as the relevant group representatives and they are usually unwilling to initiate such changes (Sunder Rajan 2003; Jacobsohn 2003; Menon 1998; Cossman and Kapur 1996; Parashar 1992).

The major family laws underwent greater change over the last generation than its critics suggest. The changes came primarily through judicial initiative

1. Okin et al. (1999) offered a controversial version of this claim, to which many offered critical responses in the same volume. Parekh (2006) presented a more balanced account.

and secondarily through legislation. Although the legislature focused on changes in the laws of the Hindu religious majority in the first postcolonial decade, the legal changes since the 1970s also extended to the laws of the religious minorities and reduced the extent of gender inequality in these laws. They produced convergence in some features of the different group laws, although these legal systems continued to differ in many of their provisions and rested on somewhat different jurisprudential foundations.

Criticisms of Indian family law particularly focus on Muslim law for various reasons. Muslim elites voiced the most assertive demands for the continued recognition of group law during the transition from colonial rule and thereafter,² and the laws governing Muslims are less codified than those applied to India's other major religious groups. Thus, earlier religious texts and traditions are standards of reference much more often in debates about Muslim law than about India's other family law systems. This leads such critics to assume that Muslim laws give women the least rights and change the least. However, Muslim laws neither give women fewer rights than India's other family law systems in every respect, nor are they more resistant to change. For instance, Muslim women had greater rights to control shares of ancestral property than Hindu women did in much of India until Hindu inheritance law was changed in 2006.³ (However, Hindu daughters have rights to greater shares of their parents' "self-earned" property than Muslim daughters.) Additionally, it is easier for Muslim women than for Hindu women to get divorce decrees in community courts. Moreover, Indian Muslim law changed over the last generation to give women permanent alimony, to restrict men's right to unilaterally repudiate their wives, and to give earlier wives the right to get a divorce if their husbands practice polygamy.

The experience of Indian Muslim law does not appear unusual when viewed in a comparative perspective. Religious law is dynamic in many societies when incorporated into contemporary state institutions. Women gained greater rights over the last half century even while religious law and religious norms remained influential in diverse countries such as Italy, Chile, Tunisia, India, and Indonesia. Moreover, the versions of Islamic law, which contemporary states recognize, vary considerably in the rights they grant women. While some contemporary Islamic states give women greater rights than in India (e.g., Tunisia, Libya, Jordan, Bangladesh, Indonesia), others give women fewer rights (e.g., Algeria, Nigeria, Sudan, Iran, and until recently, Morocco).

2. See the contributions of Muslim political elites to the relevant sections of India's Constituent Assembly debates in *Constituent Assembly Debates Official Report* (1999, vol. 7, 540–52, 829–39).

3. The Hindu Succession Act was earlier amended along these lines in four states: Andhra Pradesh (1986), Tamil Nadu (1988), Karnataka (1990), and Maharashtra (1994). (The legal abolition of the joint family in Kerala in 1975 had a similar effect on the inheritance prospects of Hindu and Christian daughters.) Even after this change was extended to the rest of India in 2006, the rights of Muslim daughters to ancestral property remained stronger than those of Hindu daughters.

It is worth noting that Muslims account for the majority of the population in all the countries just mentioned. Similarly, Islamic law grants women greater rights in India than in some other Muslim-minority countries (e.g., Sri Lanka, Britain) but fewer rights than in others (e.g., Israel). This negates the frequently expressed view that the constraints are greater to promoting women's rights within Islamic law in countries where Muslims are a minority or where the *ulama* (Muslim religious scholars, the most influential of whom serve as religious leaders) are allowed more influence over state-recognized Islamic law.

The variations in the versions of Islamic law that policy makers recognize, the practices that Islamic law governs, the entities engaged in Islamic adjudication, and the interaction of Islamic law with other sources of law do not correspond with the percentage of Muslims in the population. Islamic law governs only family life in countries like India and Sri Lanka but extends to aspects of crime and commerce in other countries such as Nigeria and Pakistan. The main adjudicative bodies are state courts in which the judges are mostly non-Muslim and mainly trained in Western law in Britain; state courts in which judges are Muslims trained in Islamic law in Malaysia; community courts in Israel; and both state courts and community courts in India. Moreover, the extent of women's rights does not correspond with the *madhab* (school of Islamic law/jurisprudence) that governs particular groups, since the earlier texts of these schools are interpreted very differently, especially in contemporary state institutions. For instance, the school of *Maliki* law gives women many more rights in Tunisia and Libya than in Algeria, while the school of *Hanafi* law gives women more rights in Jordan and Iraq than in Pakistan and India.⁴ Legal mobilization influences women's rights under Islamic law. So do policy makers' orientations, especially these elites' approach to regulating family life, their normative vision of family life, their valuation of cultural accommodation in family law, their understanding of Islamic legal and cultural repertoires, and the extent to which they wish to contain the authority of Muslim religious elites (Yilmaz 2005; Berman 2002; An-Na'im 2002; Charrad 2001; Mir-Hosseini 2000).

This article outlines the major changes in Muslim law in India over the last generation and the sources which fed these changes. It explains these changes with reference to the patterns of legal mobilization and three features of policy makers' outlook: their approach to regulating family life, their understanding of group norms, and their normative vision of family life. Policy makers' valuation of cultural accommodation in family law and their

4. The four main schools of Sunni jurisprudence are the Shafi'i, Maliki, Hanafi, and Hanbali schools. The Hanafi school applies to the majority of Indian Sunnis, among whom smaller numbers are governed by the Shafi'i school and the more recent Ahl-i-Hadith school, which claims to be guided solely by Islam's founding texts, the Quran and the Hadith. The main Shia school of jurisprudence is the Ithna Ashari, which governs the majority of Indian Shias. The Musta'lian Isma'ili school governs some Indian Shias.

inclination to contain Muslim religious authority have not changed much since India's independence in 1947, so they have not influenced the recent legal changes.

Many observers claim that the passage of the Muslim Women's Protection of Rights Upon Divorce Act (MWPRDA) in 1986 arrested efforts to reform Indian Muslim law by overturning a prominent instance of such reform: the Supreme Court judgment in *Mohammad Ahmed Khan v. Shah Bano Begum* (1985). This article corrects this misperception by demonstrating that the state courts have been amending Muslim alimony and divorce laws from the 1970s to present day and indeed that the Supreme Court actually upheld the *Shah Bano Begum* judgment in its subsequent landmark verdict on Muslim alimony in *Danial Latifi v. Union of India* (2001). However, the article confirms that there are limits to change in Indian Muslim law. It shows that changes have been introduced in Muslim law when policy makers found credible justification in group laws, group norms, and group initiatives but not when such justification has been found lacking. That is, gender-equalizing changes were introduced but without abandoning concerns of cultural accommodation. Reformers did not change Muslim family law or the family laws of other religious minorities—for example, Christians and Parsis—when they found justification *only* in the sources of law applicable to all Indians. So, policy makers did not introduce the far-reaching changes for which the Indian constitution might offer support.

Section I outlines the major features of Indian family law, its sources, and the most important changes introduced since the 1970s, especially in Muslim law. Section II identifies the limitations of two interpretations of these changes. Section III describes the changes in Muslim law in the state courts and the sources of judicial reform. Section IV identifies the variables that caused changes in Muslim law and elaborates on the changes in legal mobilization and the outlook of policy makers that shaped these changes. Section V points to the interactions of law reform with the orientations of the organizations engaged in the formation of Muslim law. Section VI summarizes the argument and indicates its implications for likely future changes.

I. INDIAN FAMILY LAW: OUTLINES AND RECENT CHANGES

System of Adjudication

Different family laws apply to most of India's religious groups (Hindus, Muslims, Christians, Parsis, and Jews) and some groups classified as tribes.⁵

5. Hindu law governs Hindus as well as Sikhs, Buddhists, and Jains, but it is not applied to tribal groups, some of whom the census considers Hindu.

The legislatures and courts share law-making authority. The powers of adjudication are shared by state courts (whose personnel are not recruited according to group membership) and community courts such as caste associations, village councils, tribal councils, popularly recognized judges, prayer groups, and churches. The judges in the state courts are primarily trained in Western law, particularly in common-law traditions rather than in religious law. Among the state courts, only the high courts of each state and the Supreme Court may overrule sections of statutes. The decisions of the Supreme Court set the definitive precedent for all other state courts, and those of the high courts set precedents within the relevant state alone. Only a higher bench of the Supreme Court, composed of more judges, can override a prior Supreme Court decision.⁶ High Court benches may depart from the precedents of other benches of that court with fewer or the same number of members.

Community courts do not rely on the same sources as the state courts and do not necessarily follow the precedents set by state courts. But the verdicts of community courts may be appealed in state courts, which uphold some of these verdicts and overrule others. Litigants approach either state courts or community courts initially; many approach community courts first as they have better links with them, and the cost and duration of cases tends to be lower in these courts. This is particularly true of the residents of smaller towns and villages. The social power of litigants influences judgments more directly in community courts than in state courts. Community courts vary in their level of institutionalization, ranging from irregular meetings presided over by powerful men with local influence who rely on the threat of force to the court systems of large religious institutions with many branches and some ongoing authority. While community courts reduce the load on state courts, some see them as threats to state authority.

Three kinds of community courts play important roles in Muslim matrimonial cases: local mosque *jama'ats* (councils); popularly recognized *qazis* (judges), a few of whom are appointed by the executive branch; and the more formally organized *dar'ul quzats* (courts) that are part of prominent Muslim religious institutions (e.g., the Darul Uloom Deoband and the Darul Uloom Manzar-e-Islam of Bareilly, both in Uttar Pradesh). The judges in the *dar'ul quzats* are formally trained in Islamic jurisprudence, especially the school of Islamic law upheld by the institution; most litigants recognize the same legal school. The largest *dar'ul quzat* network is part of the Imarat-e-Shariah, an institution formed in 1917 that also provides religious education and medical services. It is based in Phulwari Sharif in Bihar and has many branches in the eastern Indian states of Bihar, Jharkhand, Bengal, and Orissa.

6. A bench with a single judge may consider a Supreme Court case; its judgment may later be overruled by benches with three, five, or seven judges.

Some Changes in Family Law

In the first postcolonial generation, legislative change focused on Hindu law as it was considered more appropriate for a predominantly Hindu legislature to change the laws governing Hindus but not those applicable to the other groups. Changes continued to be introduced thereafter in Hindu law, in the criminal laws pertaining to family life and in the institutions engaged in family law adjudication. Hindu daughters were given easier access to their shares of ancestral property, indigent divorcees were given alimony rights, and more stringent measures were adopted to punish those who demanded dowry, received dowry, or inflicted domestic violence. Moreover, family courts were established in many cities and towns to expedite matrimonial adjudication (Agnes 1999; Menski 2001; Parashar 1992; Dhanda and Parashar 1999; Epp 1998).

The changes since the 1970s extended beyond Hindu law. The major changes of this period gave Hindus, Christians, and Parsis the right to divorce for a wider range of fault-based reasons, as well as on the basis of mutual consent. Moreover, they gave these groups quicker access to divorce on the grounds most frequently cited in divorce petitions such as cruelty, desertion, or adultery. Additionally, unilateral male repudiation was less readily recognized among Muslims, and Muslim divorcees gained permanent alimony rights.

The Major Sources of Family Law

The state courts draw from the following sources in family law cases: (1) transnational “Western” law, (2) constitutional rights, (3) criminal laws relevant to matrimonial life, (4) transnational Islamic law, (5) statutory group-specific law, (6) uncodified group legal tradition, (7) other group norms, (8) emergent group practices and initiatives, and (9) subgroup laws and customs.

(1) *Transnational Western law*: The most relevant features of transnational “Western” law are the principles of the growing transnational human rights regime and private international law. The Indian government signed various transnational human rights agreements, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷ Rights organizations built networks with transnational human rights institutions, and innovative lawyers used transnational law (Byrnes, Connors, and Lum Bik 1996; Cook 1994; An-Na’im 1987–1988). However, the globalization of law faced domestic constraints. When it signed the CEDAW in 1980, as well as when it ratified it again in 1993, the Indian government added the reservation that it would continue its policy of

7. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed April 6, 2008).

“non-interference in the personal affairs of any community without its initiative and consent” (Merry 2006, 104–13). While the legislature did not change family law in light of CEDAW, lawyers referred to CEDAW standards in many family law cases, though without much effect.

(2) *Constitutional rights*: Many landmark family law judgments referred to the fundamental rights in the Indian Constitution to amend statutes or to depart from judicial precedent. The articles of the Indian Constitution cited most frequently were Article 14 (guarantees equality and equal protection), Article 15 (prohibits discrimination on various grounds including sex and religion), and Article 21 (protects life and personal liberty, and has been interpreted by the courts to also provide the rights to privacy and to live in dignity). However, changes were not introduced based on constitutional rights alone. The ruling of the Bombay High Court in *Narasu Appa Mali v. the State of Bombay* (1952)—that unequal rights across religious groups and gender, which Indian family law provided, were beyond the scope of constitutional tests—shaped the approach of courts thereafter.

(3) *Criminal laws relevant to matrimonial life*: A good example is provided by Section 125 of the Criminal Procedure Code (Cr. P. C.), requiring men to support their wives, which became a major point of reference in alimony cases after it was amended in 1973 to require husbands to maintain their “ex-wives” too. Judges varied in the relative value they attached to the criminal laws relevant to all Indians and to group-specific laws and traditions. The two came into conflict with each other in Muslim alimony cases. Until the above-mentioned criminal law amendment, the courts had given Muslim divorcees maintenance only for *iddat* (a three-month period, after divorce is initially pronounced, when men must support their ex-wives). Thereafter, some decreed permanent alimony, following criminal law, while others restricted maintenance to the three-month period, following precedents in Muslim law.

(4) *Transnational Islamic law*: From the late 1970s, judgments and lawyers’ pleas have alluded more frequently to transnational Islamic law. They have particularly referred to Islamic state law in countries where women enjoy greater rights than in India, such as Tunisia, Libya, Jordan, Iraq, Indonesia, and Malaysia, and sometimes to the innovative interpretations of Muslim scholars in India and other countries.⁸

(5) *Statutory group-specific law*: Statutes govern many aspects of family life among Hindus, Sikhs, Jains, Buddhists, Christians, and Parsis. They govern fewer features of family relations among Muslims and none among Jews.

8. Islamic law gives Muslim women more rights in Malaysia than in India in many respects such as inheritance rights and constraints on unilateral male repudiation. But it influences aspects of criminal law in Malaysia, unlike in India, and Islamic criminal law is particularly gender-unequal in peninsular Malaysia’s eastern provinces of Kelantan and Terengganu, where the Islamists are powerful. See Hooker (1983); Horowitz (1994); Siraj (1994).

(6) *Uncodified group legal tradition*: Precolonial legal texts influence many aspects of family law in the state courts. Mitakshara and Hanafi texts are the main nonstatutory sources of Hindu and Muslim law in India. Mitakshara law governs the majority of India's Hindus, while Hanafi law governs the majority of India's Muslims. Case law developed in the colonial courts through a synthesis of religious and common-law traditions. Judges and lawyers mainly rely on updated textbooks of colonial family law; they most often cite Ameer Ali (1929), Mulla (1968), and Fyzee (1999) in Muslim law cases. The state courts also recognize some laws specific to minority sects or schools of law. Among Muslims, the Ithna Ashari (also called Jaf'ri) school of law governs the majority of Shias, the Mustal'ian Ismai'li school governs a minority of Shias, the Shafi'i school governs a significant minority of Sunnis while the Ahl-e-Hadith school governs a smaller minority of Sunnis. Shia women are allowed to retain their *mehar* (dower) after divorces they initiate, contrary to the recognized practice of foregoing dower under the same circumstances among Sunnis, who are the majority of Indian Muslims. Courts do not often allow women governed by Shafi'i law to retrospectively repudiate marital alliances to which they did not consent, while allowing those governed by Hanafi law to do so until the consummation of their marriages or until they turn eighteen.

Muslim community courts (especially the *dar'ul quzats*) rely more often on precolonial legal texts. The Hanafi courts mainly consult the *Hidayah* (Guidance, the classic Hanafi juridical text of the twelfth century authored by Burhan-ud-din Ali ben Abu Bakr al-Marghilani) and the *Fatawa-e-Alamgiri* (the Compendium of Alamgir, composed in the seventeenth century from the texts of various Islamic jurisprudential schools at the request of the Mughal emperor Aurangzeb to guide the courts of the Mughal empire).⁹

(7) *Other group norms*: The Qur'an, the Bible, and many early Hindu texts provide guidelines for individual moral action. They are also considered the foundations of later traditions of religious law. Some intellectuals and activists argue that some of the guidelines in these texts should influence legal regulation in contemporary contexts and such arguments inspired many legal changes over the last century.¹⁰ All schools of Islamic law claim that they are based on the *sharia*, the moral guidelines indicated by the Qur'an and the practices of the early Islamic community, which practicing Muslims

9. See Fyzee (1964). Based on interviews with Maulana Jaseemuddin, Chief Qazi, Imarat-e-Shariah, August 1–2, 2006, in Phulwari Sharif, Bihar; and Maulana Mohammad Burhanuddin Sambhali, Chief Qazi, Darul Uloom Nadwatul Ulama, August 10, 2006, in Lucknow, Uttar Pradesh. The author conducted all the interviews cited in this article and has transcripts or notes of these interviews.

10. Stowasser (1994) and Kvam and Ziegler (1999) discuss reformist interpretations of the founding texts of the Semitic religions. Hooker (1983), Mir-Hosseini (2000), Charrad (2001), An-Na'im (2002), and Yilmaz (2005) document the influence of such interpretations on Islamic law in many countries.

take to be described in the *hadith* (oral traditions regarding the Prophet Muhammad's statements, actions, and endorsement of others' actions). However, they vary in their *ijtihad* (interpretation) of these sources, as well as the freedom they give the religious literati and observant Muslims to incorporate novel interpretations into *fiqh* (substantive law) and *usul al-fiqh* (jurisprudence/legal theory/method of legal reasoning).¹¹ Some recent reforms in Indian Muslim law in the state courts were based on interpretations of Islam's founding texts which differ from those of most Hanafi *ulama*.

(8) *Emergent group practices and initiatives*: Courts sometimes draw from emergent group practices and initiatives. For instance, some drew from the extensive practice and acceptance of divorce in Protestant churches and among Christian laity to give Christians more extensive divorce rights in the 1990s.

(9) *Subgroup laws and customs*: In less systematic ways, courts also consider long-lasting customs specific to caste, sect, or region legitimate grounds for departure from some of the laws of the religious groups to which these subgroups belong.

The first source is said to be universally applicable, and the second and the third apply to all Indians. The last six govern only particular religious or cultural groups, although some claim that the ethical considerations underlying them have universal relevance. As none of the sources provides a definite answer to every matrimonial dispute, and these sources frequently suggest different judgments, there is considerable room for judicial interpretation.

The sources of family law judgments changed over time. In the colonial and early postcolonial periods, these verdicts drew mostly from statutory law, texts of Anglo-Indian religious law, and case precedent. Judges did not engage in much independent interpretation of uncodified traditions. This was specifically true in Muslim law cases as judges' knowledge of Islamic traditions and transnational Islamic law was limited and conservative Muslim elites opposed novel interpretation, especially by those they did not consider experts in Islamic law. The choice not to engage in independent interpretation also drew authority from the injunctions of Sunni orthodoxy against the reinterpretation of Islam's founding texts. It had two implications relevant to subsequent change. First, the courts restricted the obligation of Muslim men to support their ex-wives only for the three-month *iddat* period, and made the ex-wife's natal kin or *waqf* boards (religious or community welfare trusts) responsible to provide for her thereafter if she became indigent. They did so although verses of the Qur'an suggest that the husband provide for

11. The Shia and the Ahl-i-Hadith *ulama* usually grant religious scholars and others the right to engage in *ijtihad* more readily than do the majority of Sunni *ulama*. A variety of Sunni *ulama* and partly Westernized intellectuals have engaged more extensively and consciously in *ijtihad* since the nineteenth century.

the ex-wife's future or require such provision according to some interpretations. Second, the courts recognized the so-called triple *talaq* (men's immediate unilateral and irrevocable repudiation of their wives), typically pronounced by the husband with the verbal or written statement "talaq, talaq, talaq" ("I divorce you," repeated thrice). The courts recognized this triple *talaq* procedure, although unilateral male repudiation was deemed *raja'i* (revocable) in the early Islamic community, by some influential Hanafi jurists and some schools of Islamic law governing many Indians (the Ithna Ashari, Musta'lian Isma'ili, and Ahl-i-Hadith schools). Other schools of Islamic law preferred different divorce procedures. All schools of Islamic law prefer that the husband's initial pronouncement of divorce be considered revocable for a three-month period, during which they recommend efforts at spousal reconciliation. The restriction of the obligation of men to support their ex-wives to a three-month period worked against the interests of Muslim divorcees, as their heirs and natal kin were often unable or unwilling to support them thereafter. The prospect of the husband's unilateral repudiation taking immediate effect could make marital relations seem very unstable, especially for women of limited independent means. Only a small minority of Muslim women enjoy the right to unilaterally terminate their marriages: those whose husbands gave them the *talaq-e tafwid* (delegated divorce right) in their *nikahnama* (marital contracts) (Carrol 1997).

Over the last generation, some judges in the higher courts became more familiar with transnational Islamic law, Islamic legal and normative traditions, and recent reformist interpretations of these traditions. The increased reliance of rights organizations on such sources in propaganda and litigation, the growth of links between these organizations and the legal elite, and the increased involvement of some of India's legal elite in transnational legal networks contributed to this change. Moreover, some judges became more inclined to promote gender equality. As a result, some recent landmark judgments gave women more rights by drawing from Islamic legal and normative traditions and transnational Islamic law. Some judgments that granted permanent alimony drew from a Qur'anic verse and Islamic law in the state courts of Tunisia, Jordan, Iraq, Indonesia, and Malaysia, and those that ended the immediate recognition of unilateral male repudiation drew from Qur'anic verses and recent commentaries.

II. INTERPRETATIONS OF INDIAN FAMILY LAW

Many scholars argue that the recognition of cultural diversity in Indian family law seriously inhibited gender-equalizing change, especially in the laws of the religious minorities. Indeed, Parashar (1992, 160) claims that "there has been no reform of Islamic personal law in the independent state of India," and Singh (1994, 375) writes that most of India's family laws "have either

remained static or have changed in retrogressive ways.” Reform is said to have been inhibited by the authority of conservative elites and the close links that many felt between group identity and group law (Parashar 1992; Sunder Rajan 2003; Kapur and Cossman 1996; Jacobsohn 2003). This interpretation suffers from many problems.

First, the above understanding ignores the changes in Muslim, Christian, and Parsi law over the last generation. Second, it inaccurately suggests that Hindu law gives women greater rights than other Indian family laws. Contrary to this claim, Muslim and Christian women had greater rights to control shares of ancestral property than Hindu women did in much of India, until Hindu inheritance law was changed in 2006. Third, this approach does not recognize or explain the partial convergence of India’s different family law systems since the 1970s. For instance, divorce became more readily available to both Hindus and Christians and on much the same grounds—mainly cruelty, desertion, adultery, or mutual consent. Fourth, this view does not adequately recognize the increased challenges to the gendered visions of conservative minority religious elites. Challenges emerged from women’s organizations and rights organizations among both Muslims and Christians. They urged some Muslim religious elites to oppose the immediate recognition of unilateral male repudiation and pressed Christian churches to accept more equal and extensive divorce rights (Dhanda and Parashar 1999; Menski 2001; Gandhi and Shah 1992).

Finally, this interpretation assumes that religious laws and group-specific family laws are hard constraints to gender-equalizing change. Evidence from various countries does not support this premise. Women gained greater rights after decolonization in many countries where family laws were rooted in religion. State elites found such legal changes a means to gain greater autonomy from religious elites and kin structures in Tunisia, Jordan, and Iraq (Charrad 2001; Joseph 2000; Joseph and Najmabadi 2005). Such changes helped the state elites demonstrate their commitment to modernization in a wider range of countries, including countries with plural legal systems like Malaysia, Indonesia, Sri Lanka, and India (Hooker 1983; Agnes 1999; Goonesekere 2004). While these changes fell well short of the aspirations of the feminists of the time, this was due more to the limits to which policy makers prioritized gender equality than because family laws were partly based on religious traditions. The subsequent growth of women’s organizations and other rights’ organizations led policy makers to grant women further rights in some of these countries while retaining religious or plural legal systems.

Shankar (2002, n.d.) attributes the onset of reform in Indian Muslim law to an increase in judicial autonomy. She claims that the judicial elite were not in accord with the political elite’s prioritization of cultural accommodation over gender equality—indeed that judiciaries in all liberal democracies prioritized individual rights to political equality over practices based on group culture. Once the judicial elite gained sufficient autonomy from the political

elite in the 1990s, the Indian judiciary is said to have promoted women's rights in family law. This argument is seriously flawed.

First, Shankar claims that judicial autonomy increased from 1996, when multiparty coalition governments ruled India, but the judicial reform of non-Hindu law actually started two decades earlier. The coalition governments have been reasonably stable since 1999, and one of them significantly changed Christian divorce laws in light of judicial suggestions, some of which date from the 1960s; another revised Hindu inheritance laws based on reforms made by five state governments (the state reforms date from the 1980s). Although the judiciary gained greater powers of judicial review starting in the 1960s, it had enjoyed considerable autonomy in its interpretation of family law since India's independence in 1947. It had particularly great autonomy in the adjudication of Muslim law cases because of the limited codification of Muslim law. The most important legislation regarding Muslim law, the Muslim Personal Law Application Act of 1937, merely stated that the Sharia governs Muslims in family matters without specifying which version of Islamic law it recognized. Of the other two Muslim law acts (the Dissolution of Muslim Marriages Act and the MWPRDA), the latter took effect only in 1986. So, much of the content of India's Muslim law was left to the judiciary's discretion (Mahmood 1997; Agnes 1999; Verma 2002; An-Na'im 2002).

Second, judiciaries accepted sharp inequalities across race, gender, and religious group in various liberal democracies. The acceptance of racialized slavery and then racial segregation in the United States is particularly notable (Kluger 2004; Cottrol, Diamond, and Ware 2003). In India, judges accepted unequal rights across religious group and gender in family life since *Narasu Appa Mali v. the State of Bombay* (1952), although they had the autonomy to rule otherwise. They did so because they valued cultural accommodation in family law, much as the legislators did, and because they felt it was more appropriate that the executive and the legislature decide whether and when to override recognized cultural norms to promote equality. Third, the reform of minority law was mainly grounded in the group-specific sources of law.

III. CHANGES IN MUSLIM LAW

Alimony

Through the colonial and early postcolonial periods, the courts required Muslim men to provide for their ex-wives only for three months, in addition to returning their dower, which the man's family typically controlled while the couple was married. Maintenance was decreed for longer periods only in exceptional cases when marriage contracts required this (*Muhammad Muinud-din v. Jamal Fatima* 1921). The period through which the man was obliged

to support his ex-wife was dependent upon when the courts ruled the divorce took effect. Courts varied in when they ruled unilateral male repudiation (the most frequent form of divorce among Indian Muslims) took effect, which was when witnesses attested that the man pronounced divorce (even if in the wife's absence), when the man wrote a divorce statement, when the woman was informed of the divorce, or when the man stated in court that he had repudiated the woman. The men were then required to provide maintenance until three months after the date on which the divorce took effect.¹²

The amendment of Section 125 of the Cr. P. C. in 1973, requiring men to pay permanent alimony, was meant to apply to all religious groups. But Section 127(3)(b) of the Cr. P. C. deducted any amount the husband may have already given his ex-wife—following the requirements of the personal law governing the couple—from the payment the husband owed. This clause was introduced in response to the demands of some Muslim legislators for the deduction of the dower from the maintenance obligations of Muslim men (Parashar 1992, 164–68).¹³ However, some Muslim men argued that the clause meant that they were obliged to support their ex-wives only for three months.

The state high courts varied in their responses to such pleas between 1973 and 1985. The husbands were required to pay permanent alimony in more of these cases until 1985, and three judgments of the Supreme Court from 1979 to 1985, including one by a Constitution Bench, lent this interpretation authority.¹⁴ The courts required Hindu husbands to pay permanent alimony in all maintenance cases after 1973, in contrast with their varying responses in similar cases involving Muslims. In some, but not all, cases, they deducted the maintenance payments that Hindu husbands had already made, based on statutory or uncodified Hindu law, from the further amount the husband owed the wife.

12. The divorce was dated when the man declared that he divorced the woman in *Sarabai v. Rabiabai* (1905), *Ma Mi v. Kallander Ammal* (1927), and *Ahmad Giri v. Masarat Begha* (1955); on the date of the man's written divorce statement in *Asmata Ullah v. Khatun-unmisa* (1939), *Chandbi v. Bandesha* (1961), *Mohammad Haneefa v. Pathummal Beevi* (1972), and *Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh* (1999); when the woman learned of the divorce in *Kathiyamma v. Urathel Marakkar* (1931) and *Abdul Khader v. Aziza Bee* (1944); and the day the man told the court that he had divorced the woman in *Syed Jamaluddin v. Valian Be* (1975) and *Shaikh Jalil v. Bibi Safrunnisa* (1977).

13. Conservative Muslim legislators did so although Islamic legal traditions clearly distinguish the husband's obligation to pay dower from his maintenance obligations. Judges nevertheless distinguished between the two obligations in *Hamira Bibi v. Zubaide Bibi* (1916), *Syed Sabir Husain v. Farzand Hasan* (1938), *Mohammad Ahmed Khan v. Shah Bano Begum* (1985), and *Abdul Khader v. Smt. Razia Begum* (1990).

14. Some of the high court cases following this pattern were *Khurshid Khan Amin Khan v. Husnabanu* (1976) and *Mehbubabi Nasir Shaikh v. Nasir Farid Shaikh*, (1976). The relevant Supreme Court judgments were *Bai Tahira v. Ali Hussain Fisalli Chothi* (1979), *Fuzlunbi v. Khader Vali* (1980), and *Mohammad Ahmed Khan v. Shah Bano Begum* (1985). The courts required the payment of maintenance for just three months in other cases such as *Rukhsana Parvin v. Sheikh Mohammad Hussain* (1977) and *Aluri Sambaiiah v. Shaikh Zahirabi* (1977).

The verdicts between 1973 and 1985, granting Muslim women permanent alimony, relied on the argument that legislators meant the criminal law requiring permanent alimony to apply to all Indians, as well as on interpreting verses of the Qur'an to require husbands to provide permanent maintenance.¹⁵ The use of the first standard appeared to give criminal law primacy over Muslim law. But the reference to the Qur'an justified permanent alimony with reference to Islamic norms. For instance, the Supreme Court's *Shah Bano Begum* judgment relied on the interpretations of some Qur'anic verses offered by Arthur Arberry (renowned British scholar of Arabic and Islamic studies) and Allamah Khadim Rahmani Nuri (the author of a widely cited commentary on the Qur'an) to require husbands to provide for their ex-wives and rejected the claims that this was a requirement only for the particularly righteous rather than for all Muslim men. Additionally, the judgment added that Islam disregarded women's dignity, that a UCC should be introduced, and that

instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the State's legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India. (*Mohammad Ahmed Khan v. Shah Bano Begum* 1985, 959)

Conservative Muslims responded to this judgment with the most extensive legal mobilization seen in India since the 1950s. They opposed the following features of the judgment: commonly applicable laws overriding provisions of group law, the courts presuming to interpret the Qur'an rather than following recognized commentaries, the recommendation that the legislature introduce a UCC, and the characterization of Islam as incompatible with women's dignity.

The Indian Parliament passed the MWPRDA in 1986 to contain conservative Muslim mobilization against the 1985 *Shah Bano Begum* judgment. Although conservative Muslim leaders participated in framing this act and supported it, some of the act's provisions did not clearly fit their position that Muslim husbands should be required to pay alimony only through the *iddat* period.¹⁶ While Section 3 restricted the husband's maintenance

15. The relevant verses in the Qur'an read: "For divorced women, maintenance should be provided on a reasonable scale" (Sura 2 (Baqara): 240–42) and "Let the divorced women dwell where ye dwell, according to your means, and do not harm them, to reduce them to straits" (Sura 65 (Medinah): 5).

16. Makhan Lal Fotedar, who was an adviser to Prime Minister Rajiv Gandhi, is said to have pressed the conservative Muslim leaders into accepting the act's ambiguous wording, using the threat that the act would not be placed before parliament unless it was approved in the form that the Law Ministry had drafted it. Interview: Yusuf Hatim Muchhala, Convenor, All India Muslim Personal Law Board (AIMPLB) Legal Committee, July 1, 14, and 31, 2007, in Delhi.

obligations to the *iddat* period, Sections 3(1)(a) and 4 called for the husband to pay for his ex-wife's "fair and reasonable provision" (perhaps in addition to maintenance) for an unspecified length of time "within the *iddat* period." The intent of legislators, as reflected in the positions taken by most of the act's supporters and opponents in the Indian Parliament, was to restrict the husband's economic obligations to his ex-wife to just three months.¹⁷ However, the act lent itself readily to the interpretation that the husband should make a lump-sum payment to support his ex-wife for an indefinite period within three months of pronouncing divorce. So, the passage of the MWPRDA did not end contestation in the courts over Muslim alimony regulations.

Lawyers contested the MWPRDA's possible restriction of the husband's maintenance obligations to the *iddat* period in a number of maintenance cases filed on behalf of Muslim divorcees between 1986 and 2001. They did so with reference to the wording of the MWPRDA, which they took to dictate permanent maintenance, the alleged incompatibility of inadequate provision for indigent women with the constitutional rights to life and dignity (Article 21) and the presumed incompatibility of authorizing different alimony rights according to religious group membership with the rights to equality and non-discrimination (Articles 14 and 15). In addition, they reiterated the claims made in similar cases filed before the MWPRDA's passage regarding the legislative intent behind the 1973 amendment of Article 125 of the Cr. P. C.

The high courts responded differently to these permanent alimony claims, much as they had before the MWPRDA was passed. Minimalist courts interpreted the MWPRDA to require nothing of the ex-husband but maintenance during *iddat* and the payment of dower, resisted interpreting the Qur'an otherwise, and left it to legislators to resolve tensions between such alimony guidelines and the Constitution.¹⁸ Some of them drew more from uncodified Muslim law than the MWPRDA to restrict alimony rights (*Usman Khan Bahamani v. Fathimunnisa Begum* 1990), while others granted maintenance for just three months, even if the marriage was conducted before

17. However, some women legislators who supported the act did suggest that the act would enable satisfactory provision for Muslim divorcees. Some conservative Muslim leaders say that they foresaw the dangers in the draft wording and suggested to Rajiv Gandhi, then Indian Prime Minister, that the phrase "for the *iddat* period" replace "within the *iddat* period" to clarify the period for which provision was required. Interviews (all conducted in Delhi): Dr. Qasim Rasool Ilyas, Secretary, AIMPLB, April 10, 2003; Maulana Jalaluddin Umri, Vice-President, Jamaat-i-Islami Hind, April 10, 2003; Yusuf Hatim Muchhala, Convenor, AIMPLB Legal Committee, July 14, 2007; Zafaryab Jilani, AIMPLB lawyer, July 23, 2006; Syed Shahabuddin, former President, Muslim Majlis-e-Mushawarat, July 24, 2006.

18. See *Ramzan v. Smt. Salma* (1987), *Abid Ali v. Mst. Rasia Begum* (1988), *Mohamed Ibrahim v. Ramzan Begum* (1993), *Mrs. Nazimunnissa Begum v. Abdul Majeeth* (1994), *Shaikh Dada Saheb v. Shaikh Mastan Bee* (1995), *Noor Jehan v. State of Maharashtra* (1996), *Abdul Haq v. Yasmin Talat* (1998), and *Aziza Khan v. Dr. Amir Hussain* (1999). Some courts allowed divorcees to enjoy parts of their husband's immovable property until the husband paid the dower (*Md. Nayeem Khan v. Union Law Secretary, Government of India* 2002).

the passage of the MWPRDA (*G. M. Jeelani v. Shanswar Kulsum* 1992), though not if lower courts had ruled in favor of permanent alimony before the MWPRDA was passed (*M. H. Hameed v. Arif Jan, alias Shahida Begum* 1990; *Abdul Khader v. Smt. Razia Begum* 1990). In most of these cases, the courts did not direct the divorcee's heirs or *waqf* boards to support the woman, although the MWPRDA called for one or the other to assume maintenance responsibilities after *iddat*. In the few cases in which the courts required this, they did not ensure that this responsibility was fulfilled (*Syed Fazal Pookaya Thangal v. Union of India* 1993; *Sadique Ali v. Apar Sessions Naiyai Dheesh* 1995).

Other courts ruled in favor of more generous provisions for Muslim divorcees. The majority of them found justification for their verdicts in the MWPRDA's call for "fair and reasonable provision," which they took to apply to the period until the divorcee's remarriage or death, the claims to protect Muslim women's rights in the act's preamble, and by reading the act in light of the Constitution's guarantees of the rights to life, dignity, and equality.¹⁹ Some courts considered such provision compatible with the Qur'an (for instance, *Arab Ahmedhia Abdullah v. Arab Bail Mohmuna Saiyadbhai* 1988; *Danial Latifi v. Union of India* 2001), and others took the MWPRDA to supersede uncodified Muslim law in this context, if the latter indeed restricted alimony rights to the *iddat* period (*Ali v. Sufaira* 1988; *Aliyar v. Pathu* 1988). Yet other courts grounded permanent alimony decrees for Muslim divorcees on the argument that the mandate of Section 125 of the Cr. P. C. (that husbands provide permanent maintenance) overrode the MWPRDA (*Abdullah Rauf Khan v. Halemon Bibi* 1989; *Noor Saba Khatoon v. Mohammad Quasim* 1997). In some of the cases in which women were given maintenance beyond *iddat*, the maintenance payments were well in excess of the maximum amount decreed under Section 125 of the Cr. P. C. for non-Muslim divorcees, which was five hundred Indian rupees per month (about \$10 U.S.). This was crucial as, with the passage of time, inflation had rendered 500 rupees per month insufficient for an individual's maintenance.

The Supreme Court resolved the differing signals given by high courts in *Danial Latifi v. Union of India* (2001), in which the lead lawyers who had represented Shah Bano Begum earlier successfully argued that Muslim men owed their ex-wives permanent alimony even after the passage of the MWPRDA. This made the alimony claims of Muslim women potentially stronger than those of non-Muslim divorcees as the judgment placed no ceiling on maintenance payments for Muslim divorcees. Only a legislative amendment to Section 125 of the Cr. P. C., passed later in 2001, removed

19. Some of the high court judgments along these lines were *Ahmed v. Aysa* (1990), *Abdul Khader v. Smt. Razia Begum* (1990), *Jaitunbi Mubarak Shaikh v. Mubarak Shaikh* (1993), *Kunhammed Haji v. K.Amina* (1995), *Kaka v. Hassan Bano* (1998), *Shaikh Babbu v. Sayeda Masarat Begum* (1999), *Karim Abdul Rehman Shaikh v. Shehraz Karim Shaikh* (2000), *Abdul Latif Mondal v. Anuwara Khatun* (2001), *Hasenara Begum v. Fazar Ali* (2002).

the ceiling on maintenance payments and brought the alimony rights of non-Muslim women on par once again with those of Muslim women. Nevertheless, books published as late as 2003 said the MWPRDA was “regressive” (Sunder Rajan 2003, 148–49), and an important political philosopher claimed it should be called the “The Protection of Muslim Husbands’ Rights on Divorce Bill” (Okin 2001).

The court’s full bench in the *Danial Latifi* case justified permanent alimony with reference to the MWPRDA, the Qur’an, the Indian Constitution, and Islamic law as applied in Tunisia, Jordan, Iraq, Indonesia, and Malaysia. It proclaimed the *Shah Bano Begum* judgment a definitive precedent even after the passage of the MWPRDA, although the MWPRDA seemed intended to overrule the latter judgment. Justice S. Rajendra Babu, the author of the main *Danial Latifi* judgment, indicated that the bench was unlikely to have decreed permanent alimony in this case on the basis of constitutional provisions alone, but litigants and prior judgments had made the bench aware that the MWPRDA lent itself to being interpreted in favor of the verdict and that verses of the Qur’an could be read to favor permanent alimony.²⁰ This restrained exercise in judicial reform resisted pleas to invalidate sections of the MWPRDA, although this act seemed intended to deny Muslim women permanent alimony, as well as to rule some features of uncodified Islamic law irrelevant. The court’s restraint in the *Danial Latifi* case was in contrast with the calls of earlier Supreme Court Benches for a UCC in *Shah Bano Begum* and *Sarla Mudgal*. It was in keeping with the court’s approach in more recent cases in which activist lawyers demanded widespread changes in family law: *Ahmedabad Women’s Action Group v. Union of India* (1997) and *Lily Thomas v. Union of India* (2000). These later judgments underlined that the courts were willing to amend features of group-specific law but not to introduce far-reaching changes based on constitutional principles.²¹

20. Interviews in Delhi: Justice S. Rajendra Babu, former Chief Justice of India and Chair, National Human Rights Commission, July 2–3, 2007; Justice Shivaraj Patil, former Supreme Court judge, on *Danial Latifi* bench, June 21, 2007; Justice G. B. Pattanaik, former Supreme Court judge, on *Danial Latifi* bench, June 30, 2007; Justice M. B. Shah, former judge on Gujarat high court and Supreme Court, author of *Arab Ahmedhia Abdullah* (1988), the first high court judgment to award permanent alimony to a Muslim divorcee after the passage of the Muslim Women’s Act, July 5, 2007. Interview in Chennai: Justice Doraiswamy Raju, former Supreme Court judge, on *Danial Latifi* bench, August 7, 2007. Justice Rajendra Babu said that some members of the bench might have been inclined to overrule aspects of the Muslim Women’s Act based on constitutional rights, even if reasons for reform were not found in the wording of the act and Islamic norms. But, he added, it could have been difficult to achieve consensus on the bench under these circumstances, and the political elite might have found it difficult to support such a judgment in the face of the strong opposition it was likely to have faced from many Muslims.

21. Interviews in Delhi (all are lawyers): Sona Khan, April 28 and May 1, 2003; Indira Jaising, July 20, 2006; Kirti Singh, April 11, 2003.

The *Danial Latifi* judgment did not evoke conservative Muslim mobilization for the legislature to overrule it, as the *Shah Bano Begum* and *Sarla Mudgal* judgments had, partly because of its restraint. Conservative mobilization was also deterred by the changed political context since *Shah Bano Begum* in 1985—by the greater strength of Hindu nationalism, the increase in violence against Muslims, and the Bharatiya Janata party (BJP) leading the national coalition government. The lack of concerted conservative opposition to the *Danial Latifi* judgment makes it unlikely that Muslim women will lose their rights to permanent alimony in the higher state courts. The knowledge of judges and lawyers in the lower courts is uneven about such recent landmark judgments, however, and some lower courts continue to restrict maintenance for Muslim divorcees to a three-month period.

If, in the future, the judiciary interprets the MWPRDA's requirement that Muslim men provide "fair and reasonable provision" to their ex-wives to give them shares in matrimonial property, this would place Muslim divorcees in a stronger position than non-Muslim divorcees. (The Protection of Women from Domestic Violence Act, which the parliament passed in 2006, gives all Indian women the right to reside in the matrimonial home. But this is still far short of a right to share in all matrimonial property.) The considerable sums that the courts awarded a few Muslim divorcees with wealthy ex-husbands suggest that this might be possible. The language of the MWPRDA lends itself to such an interpretation, while Section 125 of the Cr. P. C. (which governs non-Muslims, and in light of the conflicts in case law already discussed, perhaps Muslims too) does not.

Unilateral Male Repudiation

Courts often assessed the validity of unilateral male repudiation when considering the claims of Muslim women for maintenance from their husbands. This was because until 1973 all courts recognized maintenance rights beyond a three-month period only if the marriage continued to exist in the court's view, and many courts took that position even thereafter, especially between 1986 and 2001. The man often minimized his obligations in such maintenance cases by declaring that he had already divorced the woman or that he was divorcing her immediately. The effects of the courts accepting the validity of unilateral male repudiation varied. Women litigants lost post-*iddat* maintenance in all cases until 1973 and in many cases between 1986 and 2001. But in some cases after 1986, the MWPRDA was interpreted to require the men to give their ex-wives substantial provision for the future, while leaving the women free to marry someone else. The invalidation of unilateral male repudiation sometimes favored men, as it did in *Furzund Hossein v. Janu Bibee* (1878), in which the man gained the right to his wife's conjugal company.

The judiciary initially recognized unilateral male repudiation unconditionally and later introduced some conditions for its validity. Adjudication on this issue was based on uncodified Muslim legal traditions, the Qur'an, and colonial precedent, not on legislation or the constitution. Indeed, there was no legislation about male repudiation. Judges recognized unilateral male repudiation to be irrevocable in colonial times, although this neither concurred with their normative vision of durable marital bonds nor with the practices valued in the early Islamic community and by all schools of Islamic law. A judgment in 1905 standardized the rationale for this position, saying that the irrevocability of the triple *talaq* was "good in law, though bad in theology" (*Sarabai v. Rabiabai* 1905, 537). The courts followed this precedent until 1978, varying only on whether the divorce may be pronounced in the wife's absence and the standards of proof (from none to oral or written evidence).

Some judges expressed misgivings about the ready availability of unilateral male repudiation, yet recognized the practice on the claim that Islamic tradition provided no alternative (*Sarabai v. Rabiabai* 1905, *Asha Bibi v. Kadir Ibrahim* 1909). In doing so, they based their decisions on the rules of the Hanafi school, which governs most Indian Muslims, rather than promote the durability of the conjugal family by drawing from other schools (the Ithna Ashari, Musta'lian Isma'ili, and Ahl-i-Hadith), which govern a significant minority of Indian Muslims.²² Colonial judges did not resort to such eclecticism, although *talfiq* (an eclectic method of borrowing from other Islamic legal schools) was widely recognized for a long time in Islamic jurisprudence, if done judiciously by highly trained Islamic jurists. Muslim religious elites occasionally resorted to *talfiq* to help frame reformist legislation, notably in drawing from Maliki law to provide women greater divorce rights in the Dissolution of Muslim Marriages Act of 1939, but not to restrict unilateral repudiation (Zaman 2002).

Some judges ruled in the 1970s that the *talaq-ul ba'in* was incompatible with Islamic traditions. Justice Krishna Iyer opined so in an *obiter dictum* in *A. Yusuf Rawther v. Sowramma* (1971), and Justice Baharul Islam further ruled

22. Courts sometimes recognize the different treatment of the triple *talaq* in Shia jurisprudence, if urged by lawyers, but do not do so in a systematic fashion. This is in contrast with the more systematic application of different inheritance laws to Shias. Some Shia *ulama* and the recently formed Shia Personal Law Board demand that courts recognize the distinctiveness of Shia law more systematically. The triple *talaq* seems to be widely practiced among Indian Shias, much as it is among the Sunnis, although the schools of Shia law do not support this practice. Interviews in Lucknow: Shiko Azad, founder, Shia Personal Law Board, August 10, 2006; Maulana Kalbe Sadiq, Vice-President, AIMPLB and the most prominent Shia leader of the AIMPLB, August 11, 2006. Interviews in Delhi: Yusuf Hatim Muchhala, Convenor, AIMPLB Legal Committee, July 1, 14, and 31, 2007; Justice Aziz M. Ahmadi, former Chief Justice of India and the most prominent Shia judge, July 17, 2007; Maulana Aqeel al-Gharavi, Shia religious scholar, AIMPLB member, and Vice President, Muslim Majlis-e-Mushawarat, July 30, 2007.

in *Jiauddin Ahmed v. Anwar Begum* (1978) that the triple *talaq* is revocable. The latter judgment quoted relevant verses from the Qur'an, and some commentators, to conclude that:

the correct law of *talaq* as ordained by the Holy Qur'an is that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's. If the attempts fail, *talaq* may be effected. (*Jiauddin Ahmed v. Anwar Begum* 1978, 388)

It established two conditions for the validity of repudiation—the husband indicating a reasonable cause and an attempt having been made at reconciliation.

The verdict against the irrevocable nature of the triple *talaq* initiated not only similar verdicts from some other high courts but also declarations of support from some conservative Muslim religious institutions (Jamaat Ahl-i-Hadith) and political organizations (Muslim Majlis-e-Mushawarat). Conservative Muslim elites were less unanimous in their opposition to the restriction of unilateral repudiation than to permanent alimony because the Qur'an provided a clearer basis for the first than for the second (Jamaat Ahl-i-Hadith 1994; Shahabuddin 1992; Mahmood 1998; All India Muslim Personal Law Board 2002).²³ As a result, the All India Muslim Personal Law Board (AIMPLB), the most important defender of Muslim law precedent, did not intervene in the cases in which the validity of the triple *talaq* was contested. Smaller associations of Muslim religious elites or lawyers defended the maintenance of precedent in some of these cases but had fewer resources at their disposal.²⁴ The support of some conservative Muslim elites lowered the obstacles to the consolidation of Muslim divorce law reform.

The high courts responded differently to cases regarding the validity of unilateral male repudiation from 1978 until the Supreme Court delivered

23. Interviews in Delhi: Maulana Abdul Wahab Khilji, former General Secretary, Jamaat Ahl-i-Hadith, May 4, 2003; Syed Shahabuddin, former President, Muslim Majlis-e-Mushawarat, July 24, 2006; Justice Badr Durrez Ahmed, author of a judgment against the triple *talaq*, August 1, 2007. Interviews in Chennai: Habeebulla Basha (lawyer), January 24, 2003; Justice S. A. Kader, February 2, 2003; Justice A. Abdul Hadi, February 24, 2003.

24. For instance, the Islamic Shariat Board (based in Kerala) intervened in *Shamim Ara*, and the Tamil Nadu Advocates Meelad Forum intervened in *Parveen Akhtar*. Interviews in Delhi: Justice Ramesh Chandra Lahoti, former Chief Justice of India and author of the *Shamim Ara* judgment, June 26, 2007; Justice P. Venkatarama Reddi, former Supreme Court judge, who sat on the *Shamim Ara* bench, July 2, 2007; Dr. Tahir Mahmood, prominent scholar of Islamic law and religious law in India, Member, Law Commission, former Chairman, National Commission for Minorities, and former member, National Human Rights Commission, April 5, 2003 and July 21, 2006. Interviews in Chennai: Zaffarullah Khan (lawyer), February 6, 2003; Habeebulla Basha (lawyer), January 24, 2003; Bader Sayeed (lawyer) January 20, 2003; P. V. S. Giridhar (lawyer), February 6, 2003; K.A. Sukkur (litigant), February 18, 2003; Justice S. A. Kader, February 2, 2003.

its definitive verdict in *Shamim Ara* in 2002.²⁵ (The first two judgments restricting the acceptance of unilateral male repudiation were not widely noticed and the next one was issued over a decade later, in 1993.) Even after recent increased awareness among some judges about Islamic traditions, judges remained far more aware of legislation. Hence, more judges were willing to decree post-*iddat* maintenance based primarily on the MWPRDA or Section 125 of the Cr. P. C. than to invalidate divorces pronounced through the triple *talaq*. Thus, there were twenty-two reported cases of high court decrees of post-*iddat* maintenance in the fifteen years between the passage of the MWPRDA and the definitive Supreme Court judgment in 2001, but only ten reported cases in which the triple *talaq* was deemed revocable in the twenty-four years between the first such high court decree and the Supreme Court judgment in 2002. Between 1978 and 2002, the high courts accepted the irrevocability of the triple *talaq* in the majority of cases in which it was challenged, in contrast with their permanent alimony decrees in a little over a half of such cases between 1986 and 2001 (see notes 18, 19, and 25). This was the case even though conservative opposition to legal reform was weaker regarding repudiation than regarding alimony.

The *Shamim Ara* judgment settled the question for the formal courts in 2002, repeating the conditions specified in *Jiauddin Ahmed v. Anwar Begum* (1978) for the validity of male repudiation. Neither this judgment nor the preceding high court judgments clarified how courts would interpret these conditions before they accepted the validity of male repudiation, partly because these verdicts invalidated divorce claims. They did not indicate what would be considered good reasons for a Muslim man to want to divorce his wife—for instance, whether they would be the same grounds on which Muslim women are permitted judicially mediated divorce (in which case divorce could be equally accessible to men and women) or if men could repudiate for a wider range of reasons. These verdicts left unclear the course courts should follow if they determined that appropriate efforts had not been made to effect spousal reconciliation—whether to merely refuse to recognize the repudiation or to appoint mediators to attempt reconciliation. The lower courts will need to address these questions over the next few years, while

25. The following judgments deemed the *talaq-ul ba'in* invalid in this period: *Rukia Khatun v. Abdul Khaliq Laskar* (1981), *Zeenat Fatema Rashid v. Md. Iqbal Anwar* (1993), *Motiur Rahman v. Sabina Khatun* (1994), *Rahmat Ullah v. State of U. P.* (1994), *Shaikh Mobin v. State of Maharashtra* (1996), *Saleem Basha v. Mumtaz Begum* (1998), *Kadar Mian v. Jahera Khatun* (1998), *Sairo Bano v. Mohd. Aslam Ghulam Mustafa Khan* (1999), *Zulekha Begum alias Rahmathunnisa Begum v. Abdul Raheem* (2000), *Shamim Ara v. State of U. P.* (2002). The triple *talaq* was still considered irrevocable in the majority of such cases, including *Ramzan v. Smt. Salma* (1987), *Abid Ali v. Mst. Rasia Begum* (1988), *Sayed Newaj Ali alias Neti v. Rasida Begum* (1991), *Jaitumbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh* (1993), *Sheikh Saber Ali v. Smt. Sahnim Banu* (1996), *Aziza Khan v. Dr. Amir Hussain* (1999). The lower courts seem to have accepted the triple *talaq* in a higher proportion of cases.

basing judgments upon the *Shamim Ara* precedent. However, my interviews show that some judges and lawyers in the lower courts were either unaware of or misunderstood this landmark judgment.

The courts regarding the triple *talaq* as revocable made for partial convergence with Hindu divorce law. While Hindu law statutes do not recognize unilateral divorce, a legislative amendment in 1964 enabled litigants to base their divorce claims on their own choice to live apart from their spouses for two years, after decrees of judicial separation, or for the restitution of conjugal rights. This meant that disaffected spouses could unilaterally end their marriages, though only after living separately for two years (reduced to one year in 1976), an option used almost entirely by men.²⁶ The constraints placed on the validity of unilateral male repudiation may have a similar effect by requiring the passage of some time before Muslim men can unilaterally gain divorces.²⁷

Patterns and Limits of Change in Muslim Law in the State Courts

The courts justified the changes they introduced in Muslim law over the last generation with reference to features of statutory Muslim law, Islamic legal and normative traditions, and transnational Islamic law. They also alluded to constitutional rights, but departed from precedent only when they felt that group law and group norms also offered plausible support.

Judges' perceptions of group norms limited the extent of legal change. Their perceptions restrained judges from invalidating unilateral male repudiation altogether, allowing either woman-initiated no-fault divorce through judicial mediation or unilateral female repudiation, giving separated and divorced women shares in matrimonial property, and extending daughters' shares of familial property equal to those of sons. These perceptions led judges to recognize the inheritance rights of agnatic kin despite the ongoing nuclearization of families.²⁸ Islamic normative repertoire limited reform in all these respects.

26. Section 23(1)(a) of the Hindu Marriage Act required judges to ensure that people petitioning for divorce were not taking advantage of their "own wrong," such as refusal to follow a judicial order to resume cohabitation. However, judges only began to pay more systematic attention to this requirement from the 1980s, granting divorce only if they found that the petitioner had not caused the couple to live apart (Menski 2003, 450; 2001, 115–19).

27. I am grateful to Werner Menski for alerting me to convergence in this regard.

28. Some Indians of all religious groups favor their daughters over their siblings and nephews as successors due to family nuclearization. As a result, some Muslim couples with daughters but no sons register their marriages under the Special Marriage Act (as all Indian couples may, but very few do), to be able to will their property to their daughters alone. Interviews in Chennai: Justice S. A. Kader, February 2, 2003; Bader Sayeed (lawyer), January 20, 2003; Zaffarullah Khan (lawyer), February 6, 2003. Interview in Delhi: Sona Khan (lawyer), April 28 and May 1, 2003.

However, cultural accommodation was not the sole constraint to legal change. This is illustrated by the more modest scope of Islamic law reform in India than in Tunisia, Libya, Jordan, Iraq, Bangladesh, Indonesia, or Malaysia. Moreover, the Indian courts rejected many lawyers' pleas based on reformist interpretations of Islamic tradition. Some of the reformist demands justified in terms of Islamic tradition, which policy elites did not accept, are a ban on polygamy, a requirement that male repudiation take effect only upon judicial approval, and the extension of rights to inherit agricultural land to women in all states. Additionally, the courts did not recognize the matrilineal inheritance practices of some Muslim groups that live in Kerala. These demands were not accepted because they were not backed by sufficient mobilization and litigation, judges did not consider them part of a widely shared sense of group tradition among Indian Muslims, or judges' normative vision of family life did not urge them to accept these demands.

The limited accommodation of demands made on the basis of group tradition shows that there is considerable room for further gender-equalizing change within the constraints set by cultural accommodation. The diversity of Indian Muslim traditions and the imaginative ways in which scholars and activists appropriate and transform cultural traditions indicate that the bounds set by tradition will keep shifting.

IV. EXPLAINING THE PATTERN OF CHANGE IN MUSLIM FAMILY LAW

Why did Indian Muslim law change as it did over the last generation? The following factors influenced the patterns of adjudication and legislation: (1) *legal mobilization*, especially by women's organizations and other rights organizations for women's rights and cultural pluralism, and by community organizations to promote visions of group identity and to uphold particular versions of group law; and (2) policy makers' *orientations toward the regulation of family life*, their *understanding of group norms and group initiatives*, and their *normative vision* of family life. Changes in these factors over the last generation contributed to gender-equalizing changes in the laws of India's religious minorities.

Legal Mobilization

Changes in social practice and public opinion do not determine legal change because the influence of groups and opinions over policy varies. Legal change depends specifically on legal mobilization; that is, on the movements for social change that mobilize the law in new directions, the patterns of litigation associated with these movements, the nature of

implementation of court decrees, and the visions of the concerned activists (McCann 1994; Rosenberg 1991).

Women's organizations increased in number and membership, and more of them became autonomous of political parties and religious elites starting in the 1970s. Until then, the main women's organizations had been affiliated with political parties and had focused on urging their parties to introduce gender-equalizing legislative changes. This strategy enjoyed limited success as these organizations had limited influence over voting patterns and their representatives enjoyed limited voice within political parties. This outcome urged women's organizations to become more autonomous of political parties, engage in more grassroots mobilization, and gain greater direct input into policy making. Other rights' organizations also grew and built networks with legislators, judges, and bureaucrats (Gandhi and Shah 1992; Epp 1998).

Legal mobilization increased among women's organizations, rights' organizations, and community organizations starting in the 1970s. Women's organizations made this shift as they gained considerable influence over the legal elite and the bureaucracies engaged in gender-relevant policy making. Intellectuals associated with these organizations became members of the Law Commission and the newly formed Women's Commission and thereby pressed their demands. Women's organizations also attended more to litigation to urge the judiciary to grant women more rights, and many of them established legal aid cells to help women facing matrimonial problems. This led to the resolution of some disputes through informal arbitration and in community courts, and gave more women good legal representation if they approached the state courts (Mazumdar 1999; Gandhi and Shah 1992).

Some community organizations also paid greater attention to family law. Various conservative Muslim elites formed the AIMPLB in 1972 to defend judicial precedent in Muslim law, to prevent the introduction of a UCC, and, more immediately, to block the uniform adoption law that the parliament was then considering, despite the absence of provisions for adoption in Islamic law. The AIMPLB coordinated conservative Muslim legal mobilization thereafter and intervened in crucial matrimonial cases (All India Muslim Personal Law Board 2001).²⁹

Hindu nationalists particularly criticized gender-unequal practices among Muslims and some gender-unequal features of Muslim law, but did not mention the prevalence of similar practices among Hindus and the recognition of some of these practices in Hindu law. They gave increased attention to a demand for a UCC as a means to consolidate the Indian nation behind their cultural vision of *Hindutva* (Hindu-ness). They especially did

29. Also see the All India Muslim Personal Law Board Web site, at <http://www.aimplboard.org/introduction.html> (accessed April 6, 2008).

so after the Supreme Court's 1985 permanent alimony verdict in *Shah Bano Begum*, though without devising concrete proposals.³⁰

More direct and extensive challenges to the authority of conservative Muslim elites emerged over the last generation. Associations of Muslim women and liberal Muslims grew and demanded extensive changes both in Muslim law and in many gendered practices. Most of these associations were based in major cities but had activists in smaller towns. The All India Muslim Women's Rights Network, the Muslim Women's Forum, the *Awaaz-e-Niswan*, the Committee for the Protection of the Rights of Muslim Women, the Tamil Nadu Muslim Women's *Jama'at* Committee, STEPS Women's Development Group, the *Bazm-i Shama-i Niswaan*, the Progressive Muslim Association, the Hindustani Muslim Forum, and the Muslim *Satyashodhak Samaj* were among these organizations.

These organizations advocated the reforms that the state courts later granted in alimony and divorce laws. But their demands were more ambitious, including the invalidation and perhaps the criminalization of polygamous marriages, an end to the recognition of unilateral male repudiation or the inclusion of the woman's right to unilateral repudiation in all marital contracts, the extension of inheritance rights in agricultural land to women in all Indian states, the abandonment of the requirement that Sunni women forego their dower if they initiate divorce claims in community courts, a substantial increase in dower amounts, giving women control over their dower after their marriages rather than leaving the dower in the control of their husbands' natal families, an end to the practice of dowry, giving women the right to reject marital alliances forged by family patriarchs against their will or when they were minors, community courts becoming more open to women's pleas for divorce (both in the form of *khul'* (with the husband's consent) and *faskh-i-nikah* (without the husband's consent)), and the inclusion of women in prayer groups and thus in mosque councils (or the establishment of separate mosques for women). Some of them incorporated their proposals into model marital contracts for Muslim couples to adopt. The first such initiative came from the Women's Research and Action Group in Mumbai in 1993, beginning a debate among Muslims about the appropriate rules to govern marriages.

Four new organizations were formed in 2005 to offer perspectives different from that of the AIMPLB regarding Muslim law. In response to representatives of the influential Darul Uloom Deoband dominating the AIMPLB, two alternative boards emerged, which claim to represent the followers of the Darul Uloom Manzar-e-Islam of Bareilly—the All India Muslim (Jadeed) Personal Law Board and the Shias' All India Shia Personal

30. Ram Jethmalani and Arun Jaitley, who were the law ministers when the Hindu nationalist BJP led the national coalition government, admitted that they had no concrete plans for a UCC. Interviews in Delhi: Ram Jethmalani, July 24, 2006; Arun Jaitley, April 15, 2003.

Law Board. These organizations have significant support in northern India, especially in Uttar Pradesh. Moreover, two other boards emerged to represent the concerns of Muslim women. One board, the Muslim Women's Personal Law Board is active in parts of Uttar Pradesh and Delhi, and established a women's court that considered some matrimonial cases; the second board, the Shia Women's Personal Law Board, is currently inactive (*Deccan Herald* 2005; Ali 2005; *Radiance Viewsweekly* 2005; Sikland 2005; Sharma 2005).³¹ The new organizations weakened the claim of the AIMPLB to represent Muslim opinion, although the AIMPLB is much stronger than these other organizations.

The growth of reformist mobilization among Muslims urged conservative Muslim elites to engage with community reformists in order to retain their support among Muslims. Moreover, the increased influence of Hindu nationalism pressed these elites to cultivate greater respect for Muslims among non-Muslims. The most influential Islamic religious organizations, the Darul Uloom Deoband and the Darul Uloom Manzar-e-Islam, launched a social reform movement in the 1990s in which they highlighted their opposition to some practices that they did not consider rooted in Islamic tradition, notably dowry and caste endogamy. Many influential Muslim religious scholars formed the Islamic Fiqh Academy in 1989 to build a loose consensus on social practices and adjudicative approaches. This academy adopted flexible approaches to legal reasoning. It readily accepted *ijtihad* (the interpretation of Islamic law in view of contemporary circumstances), contrary to the tendency of most Sunni *ulama* to largely rely, until recently, on authoritative commentaries on the Qur'an, the major texts of specific *madhabs* (schools of Islamic law), and *qiyas* (reasoning by analogy). It advocated that women gain the rights to reject marital partners chosen by family patriarchs and to inherit agricultural land in all Indian states; that the dower be specified in gold, silver, or shares of property; and that provisions in marital contracts—allowing the practice of dowry or absolving husbands of alimony obligations—be deemed invalid.³² This represented a departure from the positions taken

31. *Deccan Herald* (2005); Sharma (2005). Interviews in Lucknow: Shiko Azad, founder, All India Shia Personal Law Board, August 10, 2006; Maulana Mohammad Burhanuddin Sambhali, President, Fiqh Committee, AIMPLB, August 10, 2006; Maulana Khalid Rashid, Naib Imam, Firangi Mahal, August 10, 2006; Shaista Amber, President, All India Muslim Women's Personal Law Board, August 11, 2006. Interviews in Delhi: Abdul Rahmin Quraishi, Secretary, AIMPLB, July 22, 2006; Syeda Saiyadain Hameed, former President, Muslim Women's Forum, July 16, 2006; Dr. Sughra Mehdi, President, Muslim Women's Forum, July 18, 2006. Interview in Chennai: Daud Sharifa Khanam, President, STEPS Women's Development Group.

32. Islamic Fiqh Academy (<http://ifa-india.org/english/importantDecisions.html>, accessed April 10, 2008); Islamic Fiqh Academy 2004; Qalandar (<http://www.islaminterfaith.org/march2005/article2.htm>, accessed March 5, 2006, site no longer active). Interviews in Delhi: Maulana Amin Osmani, Vice-President, Islamic Fiqh Academy, July 18 and 29, 2006; Maulana Khalid Saifullah Rahmani, President, Islamic Fiqh Academy and Convenor, AIMPLB Nikahnama Committee, July 16, 2007; Dr. Tahir Mahmood, scholar of Islamic law and Member, Law Commission, April 5, 2003 and July 21, 2006.

by the conservative *ulama*, although the leaders of the Islamic Fiqh Academy emerged from this group.

The AIMPLB formally consulted reformist Muslim women activists for the first time in 2002. Although the women activists were disappointed with the Board's failure to sustain such consultation, the AIMPLB began to demand that all Muslim women be given inheritance rights in agricultural land and a share in family agricultural income. Additionally, in 1999 it published a booklet specifying the forms of family life and Islamic adjudication it favored, as well as publishing a model marital contract in 2005.³³ The booklet did not support major changes in adjudicative precedent; for instance, it expressed the preference that unilateral male repudiation be initially deemed revocable, but did not support the invalidation of the triple *talaq*. The initial draft of the AIMPLB's model marital contract gave women the right to unilateral repudiation, added to the conditions under which women may seek divorce in community courts, required the approval of community courts if men were to legitimately engage in bigamy, gave wives the right to a separate home if their husbands married someone else while married to them, and gave divorcees the right to retain all the gifts they received while they were married. These provisions were included to respond credibly to the more gender-equal marital contracts that reformist organizations had proposed earlier. However, these clauses of the initial draft were deleted after internal debate because of the resistance of more conservative *ulama*. Moreover, the board's model *nikahnama* did not influence adjudication in India's largest *dar'ul quzat* network, associated with the Imarat-e-Shariah, whose leaders are part of the AIMPLB.³⁴

Some other conservative Muslim organizations supported more extensive reform than did the AIMPLB. For instance, the Shia Personal Law Board advocated divorcees being given alimony until they become self-sufficient and entitling women to seek divorce on grounds such as husbands restricting their efforts to gain education or employment. The Muslim Majlis-e-Mushawarat (a political organization) and the Jamaat Ahl-i-Hadith (a minor religious school) highlighted their opposition to unilateral, irrevocable male repudiation via the triple *talaq*. As a result, the AIMPLB did not

33. Interview in Delhi: Syeda Saiyidain Hameed, former President, Muslim Women's Forum, July 16, 2006. Interview in Lucknow: Maulana Ateeq Ahmed Bastvi, Convenor, Darul Qaza Committee, AIMPLB, August 10, 2006. See All India Muslim Personal Law Board (2002); *Telegaph* (2005); Hameed (2001).

34. Indeed, Maulana Jaseemuddin, the Chief Qazi of the Imarat-e-Shariah, admitted that the central *dar'ul quzat* of the Imarat-e-Shariah did not have a copy of this model marital contract. Interview in Phulwari Sharif, Bihar: Maulana Jaseemuddin, Chief Qazi, Imarat-e-Shariah, August 2, 2006. Interviews in Delhi: Maulana Nizamuddin, President, Imarat-e-Shariah, July 23, 2007; Maulana Khalid Saifullah Rahmani, Convenor, AIMPLB Nikahnama Committee and President, Islamic Fiqh Academy, July 16, 2007. Interview in Lucknow: Begum Naseem Iqtedar Ali, only female member, AIMPLB Executive Committee, August 11, 2006.

intervene in the crucial case in which the irrevocability of male repudiation was contested in the Supreme Court, contrary to the board's usual practice of defending conservative precedent (Jamaat Ahl-i-Hadith 1994; Shahabuddin 1992; Mahmood 1998; Sikand 2005a).³⁵

Hindu nationalist growth also influenced conservative Muslim leaders by forcing them to shift their attention from Muslim law to responses to Hindu nationalist attacks against Muslims and their places of worship (notably the Babri Masjid, a mosque, in Ayodhya, northern India, which was destroyed in 1992). Even the AIMPLB shifted its attention over the last decade from defending Muslim law precedent to preventing the construction of a Hindu temple at the former site of the Babri Masjid.³⁶

Changes in organizations not primarily based among Muslims also contributed to Muslim law reform. Many women's organizations, other rights' organizations, and reformist lawyers' associations came to value cultural accommodation more since the 1980s in response to the growth of Hindu nationalism, the attendant increase in attacks on non-Hindus, and the increased emphasis of Hindu nationalists on the need for a UCC. They specifically recognized the relevance of cultural accommodation in family law and ceased to consider a UCC feasible in the foreseeable future. So, in the 1980s, these organizations shifted their immediate goal from the introduction of a UCC to the reform of group-specific family laws. Some of the activists of these organizations explored the richness and variation in Islamic traditions to rebut Hindu nationalist criticisms of these traditions and to incorporate their more gender-equal features in family law. The reliance of these organizations on the more gender-equal features of group tradition restricted the conservative elites from effectively opposing these reforms as attacks on group identity (Mazumdar 1999; Agnes 1999; All India Democratic Women's Association 2000).³⁷ The complaints of reformist lawyers referred more often to the more gender-equal features of group norms and transnational Islamic law.

35. Interviews in Delhi: Maulana Abdul Wahab Khilji, former General Secretary, Jamaat Ahl-i-Hadith, May 4, 2003; Syed Shahabuddin, former President, Muslim Majlis-e-Mushawarat, July 24, 2006.

36. Interview in Lucknow: Maulana Syed Mohammad Rabey Hasni Nadwi, President, AIMPLB and Rector, Darul Uloom Nadwatul Ulama, August 10, 2006. Interviews in Delhi: Dr. Qasim Rasool Ilyas, Convenor, AIMPLB Babri Masjid Committee, April 10, 2003; Maulana Jalaluddin Umri, Vice-President, Jamaat-i-Islami-Hind, April 10, 2003; Maulana Mehmood Madani, President, Jamiat ulema-i-Hind, July 7, 2007; Maulana Abdul Wahab Khilji, President, All India Milli Council, May 4, 2003.

37. Interviews in Delhi: Jyotsna Chatterjee, former President, Joint Women's Programme, July 19, 24 and 31, 2006; Subhashini Ali, Vice-President, All India Democratic Women's Association, August 4, 2006; Maimoona Mollah, Convenor, Muslim Women Sub-Committee, All India Democratic Women's Association, April 1, 2003; Pramila Loomba, National Federation of Indian Women, June 16, 2007; Mary Khemchand, former President, Young Women's Christian Association, August 14, 2006.

The Outlook of Policy Makers

Intentionalist analysis recognizes that policy makers are autonomous of social change and legal mobilization, and highlights the significance of the ideas familiar to policy elites and the ends these elites value (Watson 1982–1983; Horowitz 1994; Rueschemeyer and Skocpol 1996). The increased inclination among the judiciary to change family law, the growing awareness of some policy makers regarding the legal and normative traditions of the concerned groups, and the normative vision of family life among the policy elite influenced the changes introduced in the family laws of India's religious minorities.

Orientations Toward the Regulation of Family Life

The changes in legal mobilization and the experience of the authoritarian interlude of the mid-1970s (called the Emergency) urged greater judicial activism in support of the rights of weaker groups, including women. As a result, judges changed family law more often. They did so to promote the ends they valued, which did not always coincide with the promotion of gender equality. As many legislators remained resistant to women's empowerment, legislative reform was more restrained than judicial reform.

Understanding of Group Norms and Group Initiatives

Policy makers continued to feel that the family laws of the religious minorities had to recognize group norms and be linked to group demands. So, the nature of change in these laws depended on policy makers' understanding of group norms and group initiatives. The increased emphasis of reformist mobilizers and reformist litigation on the normative traditions of the religious minorities and the growth of transnational legal networks made some policy elites more aware of Islamic traditions. Such policy makers became especially aware of the reformist interpretations of these traditions, particularly those interpretations that some governments had recognized.

These individuals did not account for the majority of the judiciary or the legal policy bureaucracy, but they played important roles in legal change. They included both observant Muslims who felt that the social climate gave them more space to draw on their reformist understandings of Islamic tradition, and non-Muslims whose knowledge of Islamic tradition had grown. Justice Baharul Islam is a good example of a Muslim reformist judge. Justice Islam developed his reformist interpretation of authoritative Islamic texts through his extensive reading of the relevant scholarship. He provided the first High Court judgments invalidating unilateral male repudiation and later

became a Supreme Court justice. Justice V. R. Krishna Iyer, a non-Muslim, belonged in the latter category. He was the first judge to observe, from a bench of the Kerala High Court, that irrevocable unilateral male repudiation was contrary to early Islamic traditions, and later authored the first two Supreme Court verdicts in favor of permanent alimony for Muslim women.³⁸ Justice Krishna Iyer was a widely known forerunner of judicial activism, whose judgments advanced the rights of various underprivileged groups, including prisoners, urban squatters, and tribal forest dwellers. He had extensive contact with rights activists during his long career in the judiciary. This helped him develop considerable knowledge of transnational law and some awareness of Islamic tradition. As a result, he incorporated his reformist understanding of the conditions for the validity of unilateral male repudiation as an *obiter dictum* in his judgment in *A. Yousuf Rowther v. Sowramma* (1971) while he served in the Kerala High Court. Other central figures in landmark Muslim law cases, like Justice S. Rajendra Babu (who authored the authoritative Supreme Court judgment on permanent alimony), were neither consistent reformists nor particularly knowledgeable about Islamic traditions. However, they carefully crafted verdicts grounded in group norms by drawing from the record of pertinent judicial reform that had accumulated by the time of their verdicts and basing their rulings on interpreting the statutes of Indian Muslim law in light of constitutional rights.³⁹

The sources cited in some recent landmark judgments indicate the growth of understanding of Islamic legal and normative traditions among some legal elites. Reformist interpretations of Islamic law find more extensive mention in recently authored textbooks of Indian Muslim law, such as Verma (2002), Kader (1998), and Mahmood (1997), than in those that the state courts most often used in Muslim law cases through much of the twentieth century (cf. Ameer Ali 1929; Mulla 1968; Fyzee 1999). The benches of the higher courts referred with some frequency to the more recently authored textbooks and directly consulted some of these authors in Muslim law cases.

The BJP led the national coalition government from 1998 to 2004, and Hindu nationalism's influence has been significant among the legal elite for over a decade (Cossman and Kapur 2002). Those with Hindu nationalist sympathies were not attentive to non-Hindu norms; nevertheless, some of them enabled the reform of non-Hindu law, sometimes claiming that these

38. The relevant judgments of Justice Baharul Islam were *Jiauddin Ahmed v. Anwar Begum* (1978) and *Rukia Khatun v. Abdul Khalique Laskar* (1981). Those of Justice Krishna Iyer were *A. Yousuf Rawther v. Sowramma* (1971), *Bai Tahira v. Ali Hussain Fisalli Chothia* (1979), and *Fuzlunbi v. Khader Vali* (1980). Krishna Iyer (1992) provides a glimpse of the author's understanding of Islamic law.

39. Interview in Delhi: Justice S. Rajendra Babu, July 2–3, 2007. Interview in Kochi: Justice V. R. Krishna Iyer, August 29, 2006. Interview in Chennai: Justice K. Chandru, December 15, 2002.

changes were steps towards a UCC. The most prominent Hindu nationalist who piloted non-Hindu law reform was Arun Jaitley, the law minister from 2000 to 2004. In 2001, he pushed through the legislative changes in Christian law that significantly increased divorce rights and equalized them across gender.⁴⁰

The Hindu nationalist sympathies of some judges urged them towards reformist judgments, in the course of which they attacked Muslim practices and called for a UCC. This was true of the Supreme Court judgment in favor of permanent alimony in *Shah Bano Begum* and the judgment of the Allahabad high court against the irrevocability of the triple *talaq* in *Rahmat Ullah v. State of U. P.* (1994).⁴¹ However, Hindu nationalist inclinations urged other legal elites to block Muslim law reform as a means to reinforce their critique of Muslims. The Attorney General of India is said to have acknowledged that this was one reason why he opposed efforts in 2001 to urge the Supreme Court to grant Muslim women permanent alimony in *Danial Latifi*, when the BJP led the national government.⁴²

Normative Vision of Family Life

Of the demands raised with reference to group tradition, judges and legislators accommodated only those that promoted the forms of family life they especially valued. Policy makers' *normative vision of family life* changed, to give greater value to the heterosexual, monogamous, nuclear family and conjugal autonomy. Conjugal autonomy is the autonomy that individuals enjoy from kin elders, social elites, and community norms in their choice of mates, regarding the nature of their conjugal relationships and the duration of these relationships. Policy makers' normative vision of family life was based substantially on the predominant orientation of family law in North America and Western Europe in the late nineteenth and early twentieth centuries (Glendon 1989; Goode 1993; Diduck 2003).

Policy makers' normative vision shaped Hindu law even in the 1950s but acquired significant influence over Muslim law only starting in the late

40. Interviews in Delhi: Arun Jaitley, April 15, 2003; Jyotsna Chatterjee, former President, Joint Women's Programme, July 19, 24 and 31, 2006; Dr. John Dayal, President, All India Catholic Union, July 26 and 29, 2006; Dr. Julian Francis, Legal Counsel, National Council of Churches of India, July 24, 2006; Jos Chiromel, Legal Counsel, Catholic Bishops Conference of India, August 5, 2006; Rev. Richard Howell, President, Evangelical Fellowship of India, August 19, 2006 and July 4, 2007; Justice Vikramjit Sen, July 24, 2007.

41. See *Rahmat Ullah v. State of U. P.* (1994). Interview in Delhi: Dr. Rajeev Dhavan (lawyer in *Rahmat Ullah*), April 1 and 3, 2003 and July 8, 2006.

42. Interviews in Delhi: Sona Khan (lawyer in *Danial Latifi*), April 28 and May 1, 2003; Dr. Tahir Mahmood, April 5, 2003 and July 21, 2006.

1970s. The vision underlying the Hindu law reform proposals of the modernist legislators of the first postcolonial decade, such as Jawaharlal Nehru (India's first postcolonial prime minister) and B. R. Ambedkar (the first law minister), was similar to the outlook driving the later reforms of non-Hindu law.⁴³ Only some of these proposals were adopted in the 1950s due to the need to accommodate conservative resistance. Polygamy was banned, intercaste marriages were accepted, the previously stringent restrictions on marital partners were relaxed, divorce rights were introduced, and the inheritance rights of many Hindu women were increased. But the control of joint-family coparcenaries over much of ancestral property was retained, and divorce was made possible only after a period of judicial separation in most contexts.

The reformist vision expressed in the policy debates of the 1950s influenced further gradual changes in Hindu law and in some criminal laws relevant to family life between the 1950s and the late 1970s. Not only was mutual consent divorce made available, divorce became available immediately to Hindus on the grounds of cruelty, desertion, or adultery. The criminal law was amended to give divorcees rights to permanent alimony. Judges set lower standards for findings of cruelty and adultery. This reflected a shift from emphasizing the maintenance of the nuclear family to valuing conjugal autonomy. The preference to maintain the nuclear family remained salient, however, and restricted legislators and judges from granting divorces under conditions of marital breakdown in the absence of mutual consent. Policy makers did not promote conjugal autonomy systematically either, as shown in their continued recognition of a right to the conjugal company of a reluctant spouse.

The vision of desirable forms of family life reflected in Hindu law and criminal law since the 1970s influenced the changes introduced in Muslim law. It led to the requirement in Muslim law of permanent alimony, the restriction of the right to unilateral male repudiation, and the recognition of the divorce claims of earlier wives if their husbands engaged in polygamy. These changes had the potential to strengthen the position of women in marriages and upon divorce. However, a variety of other demands justified in terms of group tradition were not accepted. Although they valued monogamy and required it among non-Muslims, policy makers did not ban Muslim polygamy, as they considered the right to engage in polygamy part of a sense of group tradition among Indian Muslims. They were wary of closely regulating divorce because they were aware of the legal system's limited capacity to regulate this practice and so wished to grant social institutions some autonomy to do so. As a result, they did not require the judicial approval of male repudiation among Muslims, much as they recognized customary

43. See the Hindu Code Bill debated in the Indian Parliament from 1948 to 1951. See Constituent Assembly of India (Legislative) Debates (1948, 1949) and Parliamentary Debates (1950, 1951), all listed under "Statutes Cited."

divorce among all religious groups, albeit inconsistently. As their normative vision of family life did not urge them to enable the division of family property, they did not extend rights to inherit agricultural land to Muslim women in all Indian states.

Some features of policy makers' normative vision may restrain the future promotion of gender equality. Among these are the maintenance of the nuclear family (which abridges women's access to divorce) and state non-intervention in familial authority relations (which constraints action in favor of free choice of conjugal partners and against domestic violence). The recent reform of Hindu law to enable daughters to claim their shares of ancestral property shows that policy makers have become less opposed to the division of family property. This suggests that Muslim women may soon gain the right to inherit agricultural land.

V. EFFECTS OF LAW REFORM ON ACTIVIST ORIENTATIONS AND SOCIAL PRACTICE

Reformist organizations did not demobilize after some of their demands were met, as the changes fell well short of their aspirations. Rather, there are signs that legal mobilization changed activist notions of what Islamic law ought to be. Such mobilized aspirations maintain pressure for further gender-equalizing change and continue to challenge conservative elites.

Conservative Muslim opposition to the reform of state law became weaker. Some conservative Muslim elites accepted the reforms for which they found a credible basis in Islam's founding texts, such as the constraints on the validity of unilateral male repudiation. A larger proportion voiced their opposition to the practice of triple *talaq* without either supporting judicial reform along these lines or urging community courts to follow this precedent set in state courts. They also supported other social changes, such as increases in the amount of the dower and the abandonment of the practice of dowry, though without effectively promoting these changes. Even these limited and half-hearted changes showed the weakening of conservative opposition to reform.

In response to their losses in the state courts, conservative Muslim elites urged Muslims to take matrimonial disputes to the community courts, over which they had far more influence, particularly the more institutionalized *dar'ul quzats*. The AIMPLB urged this preference since its inception but gave this added emphasis from 1993 onward, after more than a decade of judicial reform. Some conservative Muslim elites also demanded that the state give Sharia courts exclusive jurisdiction over Muslim family law cases. These Sharia courts would perhaps be an expanded network of the current *dar'ul quzats*. If this happens, state courts would have no role in Muslim law cases but would share the adjudication of other family law cases with community

courts.⁴⁴ Legislators are unlikely to accept this demand, as much of India's political elite shows no inclination to give Muslim institutions greater autonomy. In recognition of this, some conservative Muslims accept the dual authority of state courts and community courts, but demand that state courts recognize all community court verdicts and direct the police to aid their implementation. The state courts are most likely to continue considering appeals of community court verdicts. However, the efforts to urge Muslims to seek community courts may meet with some success, as community courts are more embedded among less privileged social groups, and the cost and duration of cases are lower in these courts than in state courts.

The limited number of court cases since the recent reformist judgments, and the patchy knowledge of these judgments among judges and lawyers in the lower courts, makes it difficult to estimate the likely effects of these reforms on patterns of adjudication in the lower courts. Tracing the impact of judicial reform on matrimonial relations is further complicated as litigants in family law cases initially approach either the lower state courts or community courts. Community courts vary more in their approaches than do the formal courts and do not follow the precedents of state courts (Imtiaz Ahmad 2003; Vatuk 2001). If the ongoing efforts of conservative Muslim elites to urge Muslim litigants to community courts succeed, the recent judicial reforms may have a relatively limited effect on the way many matrimonial disputes among Muslims are resolved. Litigants who are disappointed with the verdicts of community courts may then approach the formal courts. Nevertheless, if Muslims resort to community courts often, verdicts along the lines of the recent reformist judgments would at least be delayed. The state courts have limited powers of implementation, and the executive and the police show no strong commitment to the effective implementation of the recent reforms. So, the changes in state law are likely to only slowly influence gender relations in society.

VI. PATTERNS, SOURCES, AND EFFECTS OF CHANGE IN INDIAN MUSLIM LAW

This article showed that the crucial factors shaping changes in Muslim law in India's state courts were legal mobilization, both within and beyond

44. While the AIMPLB's first President, Maulana Qari Muhammad Tayyeb, consistently raised this demand, some AIMPLB leaders have stressed it more over the last two years. But some other conservative Muslim elites fear that this arrangement may lead to greater state control over Muslim religious institutions (*Communalism Watch* 2005; Sikand 2005b; *Dhimmi Watch* 2007). Interview in Lucknow: Maulana Mohammad Burhanuddin Sambhali, Convenor, AIMPLB Fiqh Council, August 10, 2006. Interviews in Delhi: Dr. Qasim Rasool Ilyas, Secretary, AIMPLB, April 10, 2003; Maulana Jalaluddin Umri, Vice-President, Jamaat-i-Islami-Hind, April 10, 2003.

the Muslim community, and changes in policy makers' orientations. The features of the policy makers that mattered most were their orientations toward the regulation of family life, their understanding of Muslim norms and initiatives, and their normative vision of family life. As cultural accommodation remained a crucial consideration in family law, policy makers only introduced gender-equalizing legal changes if legal mobilization, litigation, and transnational legal networks brought to their attention a credible basis for change in group law, group norms, and group initiatives. Judges and legislators introduced only those changes that they felt were sorely needed, rejecting various demands grounded in group tradition. Their visions of the desirable forms of family life especially deterred them from giving women greater access to property.

The changes that took place in some features of Muslim law resulted in partial convergence with India's other major family laws—Hindu law and Christian law. There was convergence in divorce rights and alimony rights, though not in inheritance rights. As visions of group norms shape legal change and Muslim law rests on rather different jurisprudential foundations, the partial convergence we have seen is unlikely to start the homogenization of family law.

The basis of policy making influenced the choice of many reformers to press their demands in terms of group norms. However, the limits of policy change did not restrain reformist ambition. The piecemeal changes weakened direct conservative resistance to changes in state law, but they also encouraged conservative efforts to urge litigants away from state courts. These trends suggest that both the pressures for further gender-equalizing legal change and the efforts to urge the avoidance of state courts are likely to get stronger.

The patterns of change since the 1970s suggest that some changes in policy makers' visions may soften the constraints within which Indian Muslim law is made. These are changes in policy makers' visions of group norms, desirable forms of family life, and patterns of regulation of family life. Ongoing legal mobilization will contribute importantly to these changes.

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672 LAW & SOCIAL INQUIRY

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