SECULARISM AND THE DEBATES OVER THE UNIFORM CIVIL CODE

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CERTIFICATE

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Chapter I

Introduction

It is often argued that the association of community identities in contemporary Indian politics is more pronounced today because the nation-state system is not indigenous to Indian politics and it did not evolve out of any existing Indian ideology.[1] So in examining the debates over the uniform civil code and legal reform of family law, it is not possible to avoid another very crucial debate : the role of secularism in India as a modern nation-state. These issues compliment each other in three ways. India is criticized by many for not behaving like a secular state because it recognizes and enforces various religious personal laws, because it exercises differential treatment between communities in terms of codification an legal reform of personal laws, and finally because it has given priority to community rights at the cost of individual rights in enforcing personal law. However it is not suffice determine whether or not India has deviated from secularism simply by not separating church and state in this matter. The definition of secularism is much more complex and needs to be examined within the philosophical and political context in which it was conceived, as well as through an examination of the Indian state's executive an legal behavior since independence. The concept of India as a secular state entered into debate in 1948 when Professor K.T. Shah twice to no avail introduced a bill to include the terms "secular" and "socialist" in the Preamble of the Constitution as part of the definition of the modern Indian

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[1]. Hasan, 1994, p.vii.

nation-state. He exclusively defined secularism as the absolute separation of church and state so that they would not be able to interact with each other, even in the case of aiding religious organizations to provide services like religious education for its members. Shah's reasons for this sharp division was that if it was not enacted, accusations of favoritism of specific communities and heightened communal strife would ensue. [2] The 44th Constitutional amendment was finally passed in 1974, guaranteeing the secularization of law so that all citizens would be granted equal rights by the state.[3] During the Constituent Assembly Debates several reasons were offered by members for rejecting Shah's proposal. But they basically fell into two lines of argument : firstly that secularism is a Western concept conceived out of a different social and political situation, and therefore could not be applied to the Indian context; and secondly if India is to define itself as a secular state, it would then be necessary to develop a working definition of secularism which is compatible with the Indian social and cultural context. More specifically, those who opposed constitutionally defining a secular Indian state felt that secularism is not applicable to India because of what they claimed were its "Western Christian" origins. As such, it would be unaccommodating to the needs of most Indians who are very religious in their personal lives an associate and assert their religious identity in the public sphere. Furthermore, they

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[2].Baird, 1981, p.393

[3]. Baird, 1981, p. 419.

expressed the fear that because it would not be politically neutral, the state would be partial to the "unbeliever or the minority community". [4]

Proponents of the second line of argument did not object to the use of the term itself, but instead to the concept which should be adopted. In their arguments against its inclusion in the Constitution, they used the term 'secular' to argue in support of a concept they would approve , which would be compatible with the Indian context.

However, the first line of argument that secularism is a Western construct and therefore cannot be applied to India neglects the fact that secularism emerged in the West at a time when conflicts between religious groups within the simultaneously emerging nation-state were unmanageable and could not be contained by religious doctrine. The nation-state, in consisting of more than one religious community, could only resolve conflicts between these communities through non-religious state apparat.[5]

The second line of argument was to a great degree a result of the fact that because Nehru himself did not have a clear working definition of secularism to offer to the Constituent Assembly, it came to mean different things to different people. It was clear that India was not to be a

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[4]. Bhargava, 1994, p. 1787.

[5]. Bhargava, 1994, p. 1787.

theocracy. Nor was it to exercise preferential treatment towards any religious community. However, boundaries were not drawn in terms of what a secular state should and should not do or be[6], especially in terms of its treatment of religious personal law. And this becomes intrinsic in the state's treatment of women.

Due economic and social realities such as unequal educational opportunities, unequal salaries, and unequal access to financial security, [7] and property ownership, women have no choice but to rely on their families for financial security. And yet by reinforcing religious personal laws, the state is also discriminating against women from within the scope of their families.

Sex and gender equality is guaranteed by Articles 14 and 15 of the Constitution. Article 13 also makes all laws which contradict the provisions of fundamental rights in the Constitution null and void.[8]

While the enactment and reform of Hindu personal law was usurped by the state in its passage of the Hindu Code Bill, the personal laws of minority communities have not been interfered with as progressively because leaders of these communities - who are usually self-appointed and then recognized

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[6]. Baird, 1981, p.p. 395-396.

[7]. Parashar, 1992, p.17

[8]. Parashar, 1992, p.18.

by the state - not only claim that their religion does not permit interference from any outside authority in deciding how members of the community should live. They also claim that there has been no desire for change expressed from within these communities.[9] However, the fact that women from these communities have reverted to the state in pursuit of equal protection under the law clearly refutes what these leaders purport. They base their argument on the Constitutional right to freedom of conscience as stipulated in Articles 25-28, in arguing that these fundamental rights allow a person the right to be governed by their own religious personal law.[10] What has subsequently developed is the belief that secularism is synonymous with minority community rights, at the cost of minority and majority individual rights. [11]

Though Articles 25 and 26 secure the fundamental right to freedom of religion, their scope differs in that Article 25 addresses is the rights of the individual, whereas Article 26 addresses the rights of the religious community. It was during the Shirur Matt case in 1954 that the Supreme Court first explored the constitutionality of both these Articles in that it realized that although Article 26(b) guarantees communities the right to manage their own religious affairs, not all matters which a community claimed to be religious were exclusively,

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[9]. Parashar, 1992, p.19.

[10]. Parashar, 1992, p. 19.

[11]. Hasan, 1994, p. xviii

religious in nature. The Constitution also had no stipulations which made clear how and by whom it should be decided what would be considered an essential religious practice and what would not. So even though the Attorney General contended that Article 25 (2)(a) designated all religious activities which could also be deemed secular be regulated by the state, the Supreme Court decided that determining essentiality would require referring to and interpreting religious doctrine.[12] However, by leaving it up to community to interpret religious doctrine, the power of the court to promote social reform by prohibiting practices like polygamy would seriously diminish. And this would in turn contradict the purpose of Article 25(2)(b) [13]. It would also defeat "the role of the state as a social reformer "[14] Furthermore, since the Constitution does not recognize any religion specifically, it does have as its first obligation the promotion and protection of its own stipulated fundamental rights, even if they may come into conflict with any personal laws [15]Nowhere in the Constitution is a community granted the power to usurp its members' fundamental Constitutional individual rights in the name of the freedom of religion or preservation of culture.[16]

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[12]. Parashar, 1992, p. 218.

[13]. Parashar, 1992, p. 220.

[14].Parashar, 1992, p. 229.

[15]. Parashar, 1992, p.227.

[16]. Singh, 1994, in Hasan et al., p. 96.

It can also be argued that Shah's opponents were reacting to his definition of Secularism as the absolute separation of church and state, and therefore they failed to examine the complexities out of which it emerged and what it came to mean, particularly in the West. They failed to understand that it emerged as a modern concept in reaction to the modern construct of the nation-state, and so it is therefore a distinct nation-state ideology which advocates the separation of religion and politics in their "institutionalized" forms.[17] It contends that the nature of religion and that of the state are different in that religion as an ideology is a highly personal matter of conviction and belief. Whereas, the state is a coercive entity. And because they both demand absolute allegiance by their members, if they are both institutionally intertwined, they will clash. [18] A.A.A. Fyzee made a clear distinction between law and religion by recognizing that although in Islamic law, for instance, the Shariah makes law and religion interchangeable and thus the same, this intermeshing results in an anomaly, especially in the context of the modern nation-state, because law by its very nature can be changed whereas religious text cannot. More specifically law - especially secular law can be changed, without necessarily invalidating the ideology on which it is founded. However, religious textual law, if changed, can be challenged on the basis of contradicting the ideology on which

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[17]. Bhargava, 1994, p. 1784.

[18]. Bhargava, 1994, p. 1785.

it is founded.[19]

And in the Indian context, religion should be separated from the state because it enforces only one set of ultimate ideals and values within its own philosophical context; yet "at no point in time in the history of humankind has any society existed with one an only one set of ultimate ideals".[20] Going further, within the Indian context, "secularism must not only justify the separation of religion from politics, but also offer a sketch of how the two must relate after separation".[21]

The debate over secularism in India arose as a result of these aspects not being pursued or even examined by the government. As previously mentioned, the contradiction in the state's administration of personal law - as well as other realms of legislation - lies in the fact that within liberal democratic doctrine, collective rights of cultural groups over that of individuals are not acknowledged. [22] This is so because the preservation and protection of collective rights leads to contradictions with liberal democratic theory, these being : "Could a collective cultural right be used as an instrument to perpetuate thoroughly illiberal practices within the group? Would individual members of the group have the right to leave the

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[19]. Baird, 1981, p. 402.

[20]. Bhargava, 1994, p. 1787.

[21]. Bhargava, 1994, p. 1784.

[22]. Chatterjee, 1994, p. 1773.

group? If an individual right of exit is granted, would that not in effect undermine the rights of the group to preserve its identity?.... if a right of exit is denied, would we still have a liberal society?"[23]

Furthermore, community identity being incorporated into the purview of law is a remnant of colonialism in that although family customs have always existed within communities and have been protected by the various pre-colonial systems of governance, it is the colonial association of knowledge of these customs through religious scriptures and the subsequent linking of these scriptures with practiced tradition that transformed scriptural custom into laws as we know them today.[24] In other words, "opinions pronounced on particular cases became rules applicable to all cases".[25] So Indians were compelled to redefine the boundaries of their of customs because they were forced to adapt to a foreign "legal" framework. The result has been an Indian nation-state which has politicized religious personal law.

With regards to the codification and subsequent reform of Hindu personal law, there have been some gains by way of state intervention and enforcement. The Deshmukh Act of 1937 expanded

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[23]. Chatterjee, 1994. p. 1774.

[24]. Mukhopadhyay, in Hasan et al, 1994, p. 108.

[25]. Mukhopadhyay, in Hasan et al, 1994, p. 113.

the rights of Hindu women, however slightly, by making Hindu widows equal heirs with their sons' in their husbands' property.[26] Other reforms which were passed were the Hindu Marriage Act of 1955, the Hindu Succession Act of 1956, The Hindu Adoption and Maintenance Act of 1956, and the Dowry Prohibition Act of 1961. [27] In addition, the Madras government also passed the Madras Devadasis (Prevention of Dedication) Act of 1947, and the Madras Temple Entry Authorization Act of 1947, allowing Untouchables to enter temples.[28]

What followed, however, was the popular belief that a secular uniform civil code could be brought about via a non-secular means, i.e. opposition to Article 44 which directs the Indian state to endeavor to secure a uniform civil code. [29] The secularization of law through a non-secular means, which Nehru hoped would eventually happen, did not. His policy was rather a continuation of the British colonial legal procedure in the 19th century.

When Hindu and Muslim reformers approached the colonial government in the 19th century, the government made clear its priority to enact reforms in way a which would uniformly apply

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[26]. Som 1994, p. 170.

[27]. Som, 1994, p. 171.

[28]. Chatterjee, 1994, p. 1770.

[29]. Hasan, 1994, p. 49.

to all.[30] Furthermore, when reformers from the two communities made proposals for change, the content and method of their discourse was such that it became a divisive tool maintain community difference. So even if their aim was to increase women's rights within their communities, their approach could also allow for the reduction for such rights within their respective communities, in order to preserve the community. In other words, the community was the first priority and the only framework in which the status of women was addressed.[31] What resulted was the state reserving the right to choose spokespersons of communities and interfere to maintain these communities the only way the state knows how -- the law.[32] Returning to the Constituent Assembly Debates over the Hindu Code Bill and reforms, members of the Hindu Law Committee expressed the desire to maintain a Hindu aspect and culture while enacting reform. [33] Like many Indians at the time who sought to redefine secularism in an Indian context, the members of the Committee did not base their working definition "in ignorance of the European or American meanings of the word". [34] Instead , their premises were modern concepts of rights and gender equality, rather than religious text. Yet leaders like the Swamiji of the Jai Guru Society in Uttar Pradesh expressed his concern for maintaining

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[30]. Lateef, in Hasan et al, 1994, pp. 40-41.

[31]. Lateef, in Hasan et al, 1994, pp. 42-45.

[32]. Hasan, 1994, p. xiv.

[33]. Baird, 1981, p. 433.

[34]. Chatterjee, 1994, p. 1769.

a "Hindu spirit" and culture. [35]

Yet reform within a religious context became problematic in the post-colonial period for the same reasons for which it was so prior to independence. One of the reasons for this was that such reform was done with the consensus and or approval of religious spokespersons and self purported community leaders. When the Special Marriage Act of 1954 was being debated, Muslim leaders objected that such and act would allow those within their community to circumvent their personal laws and choose to be governed by this Act. [36] Apparently they were more concerned with maintaining their hegemony over individuals within their community than with preserving religious law itself. In 1975 the government amended the Special Marriage Act so that two Hindus marrying under the Act would be governed by the Hindu Succession Act instead of the Indian Succession Act. This demand was not a vociferous one from the Hindu community as it was quietly made by a few self-appointed leaders. [37] The government has never clarified what constitutes a community and under what criteria are leaders and their demands recognized as those of the community.

Another discrepancy with a state institutionally maintaining personal laws in that in a multifarious state like

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[35]. Baird, 1981, p. 433.

[36]. Parashar, 1992, p. 11.

[37]. Parashar, 1992, p.10.

India, there are many religious groups, and within these major groups, there are many sub-groups. So the possible codification and legal reform of personal laws would result in the state either maintaining a plethora of personal laws - Hindu law is divided into the Mitakshara, Dayabhaga and Marumakkattayam schools; and within Islam there are the Sunni and Shia schools, which are further divided into various schools. [38] - or invalidating some smaller communities' personal laws in order to conform with that of an 'umbrella group's'. The passage of the Shariat Act forces some Muslim communities - such as the Mapilla in Malabar or those in Lakshadweep who abide by 'non-Islamic' personal laws, be they Hindu or tribal in origin - to abandon their own traditions and abide by what the state defines to be Islamic. In 1950 the Madras government passed the Madras Animal and Bird Sacrifices Abolition Act, which impinged on a tradition of some sects of lower castes in Tamil Nadu. So state interference - sometimes with the intention of reform, but usually for the purpose of showing political sensitivity to a community by legally recognizing and enforcing their traditions - can in effect diminish and devalue regional an religious diversity by forcefully conglomerating a community-faith, which is exactly what religious and political leaders who argue for such laws as the 1986 Act purport to be fighting against. [39]

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[38]. Baird, 1981, p. 419.

[39]. Chatterjee, 1994, p. 1770

Minority members of the Constituent Assembly raised the fear of dominance of the majority culture if a uniform civil code was enacted. Mahboob Ali Baig Sahib Bahadur argued that in a secular state communities should have the right to maintain themselves and practice their faith without interference from the state. Further, religious personal law should be applied to people in accordance with the communities to which they belong. [40] The concern of Bahadur and other minority representatives was that if a concept of universal rights and citizenship were to be employed in a diverse country like India, it would enforce a majority identity on minorities by stressing homogeneity with the majority.[41]

However if the state demands that its citizens abide by the personal laws of the communities into which they were born, in order for these laws to be reformed, these citizens would not only have to appeal to the religious leaders of their designated communities, but also to the state. And it is possible that although members of their religious community may support reform, members of state may not. Ironically during the debates over the Hindu Code Bill, the Hindu Mahasabha - who vehemently opposed state intervention and reform - found support from some Muslim representatives such as Bahadur previously mentioned because they too had a vested interest in keeping personal law out of reach of the state; if Hindu law was going to be regulated and reformed by the state, then eventually so would Muslim law.

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[40]. Baird, 1981, p. 404.

[41]. Bhargava, 1994, p. 1774.

When the state does interfere and thereby "forge" identities and communities, women are especially caught in the fray because their identity is not up to themselves to define, but rather up to the state. So they don't decide how much religion should be a part of their lives, the state does. This leaves them in a perplexing position in that because the validity of the state authority is not questioned, if the state decides something to be Islamic or unIslamic, then women are not only forced to accept, it but may actually start believing the state; and are then forced to make a moral decision between their identity as Muslims and their concerns as women. This explains why many Muslim women protested against the first Shah Bano decision on grounds that it was unIslamic[42].

Hence, with the encoding of Islamic law into state law, if women want to reform or invalidate these laws, they will have to endure the state system. They will not have the option of either trying to change customs within their communities, or leaving their communities if customary laws cannot or will not be changed. Instead, women will have to subjugate themselves to the will of a patriarchal state power to acquire any legal rights[43].

There are instances where the state can use its absolute power to override personal law. In Bai Tahira v. Ali

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[42]. Hasan, 1994, p.vi.

[43]. Metcalf, in Hasan et al, 1994, p.11.

Hussain (1973), the court ruled in the divorced wife's favor for maintenance as granted by Section 125 P.C. Although it felt that the payments made by customary law should be considered in consonance with maintenance, it also felt that such payment should not override and or cancel maintenance granted by the court, especially since mehr was decided at the time of marriage, when divorce was not contemplated[44]. So even if the state addresses such cases through the purview of Muslim personal law, it may also be able to override its power over the community.

Yet to what extent should the state assume the role of encoding personal law? There are aspects of Hindu and Muslim customary law which would not allow for inter-community marriage. And even by passing the Special Marriages Act, it is clear that the state is skewed towards traditional North Indian Hindu customs and beliefs in that first cousins cannot marry, and only Hindus marrying under this Act are governed by their personal laws of inheritance. So the question arises as to the possibility of legally recognizing all personal laws while at the same time being able to preserve the rights of those who don't it wish to follow them.[45]

Furthermore if the state encodes and enforces all personal laws, it could result in a state in which women's fundamental civil rights are not only violated but that this

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[44]. Singh, in Hasan et al, 1994, pp. 99-100.

[45]. Chhachhi, in Hasan et al, 1994, pp. 82-83.

violation is sanctioned and perhaps endorsed, by the state; i.e. cases of public lashings in Kerala [46].

That personal law is found on religion makes religion one of the causes of women's inequality[47]. This is why it is impossible to enact reforms without challenging the autonomy of religion. Lotika Sarkar notes that by exempting Muslim personal law from scrutiny under Section 125 CrPC the government was "being made a party to the misuse of religion" by exempting Muslim men from their financial obligation[48]. Yet was it "misuse" if religious tenets were actually cited to bolster their arguments for exclusion? If the state's codification and reform of personal laws is more in reaction to political aspirations than gender justice, then how can gender justice and equality be achieved this way? Archana Parashar acknowledges that the dubious and precarious nature of religious reform as such may not guarantee gender equality.[49] I would go one step further and argue that not only does this means steer away from gender equality, but it keeps women from having equal access to the state. She also contends that reform of personal law has to be sought to secure gender justice. The bases of her claim is the adaptable nature of Hindu and Muslim customs and legal

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[46]. Chhachhi, in Hasan et al, p. 88.

[47]. Lotika Sarkar, in Parashar, 1992, p.8

[48]. Sarkar, in Parashar, 1992, p.10

[49]. Parashar, 1992, p. 35

history[50]. But can this be expected of a non-theocratic, culturally and religiously diverse state? And does the nature of religion as an institution allow this? While customary law carries with it a certain level of flexibility, such flexibility has its limits. Though she contends that it is the state, both colonial and independent, which has led to the disparate treatment of personal laws[51], such a claim - while to a great extent true - does not exonerate religious law from its inherent inequalities.

Although not achieving the ends of gender equality, what the Shah Bano case has succeeded in doing is that it re-opened the debate over the uniform civil code, and perhaps more importantly the debate over secularism in the Indian context, as well as its role in regulating the relationship between the state and its citizens, either individually or as groups[52].

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[50]. Parashar, 1992, p. 47

[51]. Parashar, 1992, p. 48.

[52]. Khory, in Baird et al, 1993 p. 122.

Chapter II

Secularism, Law Reform and Rights

A. The Constituent Assembly

The debates over secularism in India officially started after independence when Professor K.T.Shah twice to no avail proposed that the term be included in the Constitution as part of the definition of the Indian state. His first attempt was on November 15, 1948 during the Constituent Assembly Debates. Under Amendment No.98 he moved that India define itself as a secular, federal, socialist union of states[1]. He argued that throughout the Debates it had been asserted by almost all the members that India was and should be a secular state. He also sought to clarify the relationship between individual citizens and citizens and the state, and to restrict this relationship to matters of the mundane so as to ensure equality and justice before the law. However Ambedkar opposed Shah primarily over the issues of also defining India as a socialist state and therefore predetermining and possibly limiting its economic development[2]. Shah's second attempt was on December 3, 1948, through Amendment 566 to read : "the state in India being secular shall have no concern with any religion, creed or profession of faith; and shall observe an attitude of absolute neutrality in all matters relating to the religion of any class of its citizens or other persons in the union[3]. He felt that although the state could

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[1]. Constituent Assembly Debates; November 15, 1948, p. 399

[2]. Constituent Assembly Debates; November 15 1948, p. 399.

[3]. Constituent Assembly Debates; November 15, 1948, ; 399.

involve itself in the welfare of religious institutions, it should not involve itself in matters of profession and belief. Although Shah's amendment was very quickly negatived he found support from Tajamul Husain of Bihar who continued the debate after the rejection of the amendment. Husain proposed Amendment 572 which sought to change clause (1) of article 19 to read : "Practice religion privately" instead of" practice and propagate religion. "He argued that religion was a matter between an individual and his creator and that public propagation of it was a "nuisance". Husain also proposed that the explanation of Article 19 (1) be replaced with : "no person shall have any visible sign or mark or name, and no person shall wear any dress whereby his religion may be recognized".

Naziruddin Ahmed was one of the first to object on grounds that such a provision might also apply to names, as they are very often a 'sign of religious identity', and therefore there would be no limits to its application. However Husain argued that names should also be subjected to this provision in that because they designated a caste and religious identity, they led to the social stigma of caste inequality.

Shah, however, brought the debate back to the role of the state via the institution of religion by proposing that a proviso be added to Article 19(1) to restrict the right to propagate religion in institutions which were even partially funded by the government, as the granting of such rights in the past had been abused by public institutions to influence young

impressionable minds to convert, though not for their own benefit, but for those converting them to be able to control and exploit them.

Shah and Husain found support from Lokanath Misra of Orissa, though on communal grounds. Misra argued that Article 19 was a mistake as there was no constitutional precedent to protect the right to propagate religion. He also felt that religion in the public sphere should be "tabooed" as its intervention with the state is what led to partition. What made Misra's argument communal was his perception of what secularism was and was not. He believed that if "Islam had not come to impose its will on this land, India would have been a perfectly secular state and a homogenous state". He continued, "I thought the secular state of partitioned India was the maximum of generosity of Hindu-dominated territory for its non-Hindu population." In other words, if Islam had not spread through South Asia, then the issue of separation of church and state would not have emerged, as it became necessary to accommodate the needs of religious minorities. So secularism was not to define the relationship between the state and the individual, regardless of the level of religious homogeneity or heterogeneity, rather it was to reflect the dominant 'culture' of the majority. This became apparent as Misra viewed the right to propagate would result in the complete annihilation of Hindu culture"[4].

[4]. Constituent Assembly Debates; December 3,1948, p.815-824.

Although H.V. Kamath supported the inclusion of secular in defining the Indian state, he did not agree with Shah, Husain, or Misra as to the rights regarding religion which could and could not be granted by a secular state. More specifically, he did not feel that spiritual instruction in public institutions would necessarily conflict with secularism. He introduced a subclause to Article 19 (1) to read : "(2) The state shall not establish, endow or patronize any particular religion. Nothing shall however prevent the state from imparting spiritual training or instruction to the citizens of the Union[5]".

Propagation was supported as a right to be protected by the state by Pandit Lakshmi Kanta Maitra of West Bengal, L.Krishnaswami Bharathi from Madras, and K.Santhanam. Bharathi argued that as long as propagation was not engaged in with the interference of the state, it would not interfere with its secular nature, Santhanam felt that the right to propagate was part of the right to freedom of speech. He argued, though, that such a right was abused when used to induce mass conversions through financial or political pressure[6].

However, Shah's perception of secularism was very specific in that he bolstered his arguments for its inclusion through very defined proposals of how the state should relate to the individual. He proposed that Article 19(2)(a) read :

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[5]. Constituent Assembly Debates; December 3, 1948 pp.824-825.

[6]. Constituent Assembly Debates December 3, 1948 pp.831-835.

"Nothing in this Article shall affect the operation of any existing law or preclude the state from making any law (a) regulating, restricting or prohibiting any economic, financial, political or other secular activity which may be associated with religious practice. "He added that Article 19 (2)(b) should read ".... for social welfare and reform or for throwing open Hindu, Jain, Buddhist, or Christian religious institutions of a public character to any class or section of Hindus, "He added that religious institutions of more 'cognate' denominations be accessible to the public[7].

Mohamed Ismail Sahib at this point reintroduced his previously proposed amendment to Article 44 to exclude the state from "(a)regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice". He sensed the need to reiterate this issue as the present discussion sought to regulate secular aspects of religious institutions, and as such personal law might be affected. In response, he also sought to add a third clause to Article 19 which would read;" (3) Nothing in clause (2) of this Article shall effect the right of any citizen to follow the personal law of the group or community to which he belongs or professes to belong." Sahib made a distinction between civil law and personal law by arguing that a uniform civil code covers matters outside the realm of the family and community such as evidence, contracts, and transfer of property. He contended that

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[7]. Constituent Assembly Debates; December3, 1948 pp.827-828.

because past acts by the state regarding Muslim personal law did not seek to change it, and only made it more lucid and widely applicable, they should be sustained and should not be looked at as a reason or impetus for change[8].

Ambedkar, however, negatived Shah's and Husain's proposals, and only accepted the amendment to Article 19(2), substituting the word 'preclude' with the world 'prevent.'[9]

Yet the debates over secularism and its confines were not restricted to the discussion over Shah's two attempts to include it into the *Preamble of the Constitution. Rather, it was* brought up during debates over various other issues. During the Constituent Assembly Debates Mahavir Tyagi claimed to be committed to a secular state which was a 'state of God'[10]. In reference to religious instruction in state-funded schools, Ismail Sahib argued that it was not un-secular if it was granted at the behest of students or their parents, while Tajamul Husain was opposed to it as he believed it to be antithetical to secularism[11]. While Ismail Sahib argued that religious instruction in public schools would foster better relations between communities by creating a space for dialogue, Shah defined the role of a secular state to deal with situations in

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[8]. Constituent Assembly Debates; December 3, 1948; pp.827-828.

[9]. Constituent Assembly Debates; December 3, 1948; p.pl838-839.

[10]. Baird, 1981, p. 399.

[11]. Dhagamwar, 1993, p. 231; in Baird, 1993.

their "objective realities"[12]. K.V. Kamath stated : "But to my mind, a secular state is neither a Godless state nor a [sic] irreligious nor an anti-religious state[13]. Concern was voiced by some that a secular state would discourage Indians from incorporating religion into their lives. For this reason they felt the state should take it upon itself to ensure this would not happen. K.M. Munshi felt the state could take part in the religious life of its citizens and still maintain its secularism[14]. This argument was extended to mean that the state could maintain secular principles and still sponsor religious activities. Even those who opposed Shah's bill argued against reservations of government posts for minorities and historically oppressed groups, under the aegis of secularism. Chaudhari Ranbir Singh and Renuka Ray both felt that such reservations went against the grain of secularism as they would lead to sectarian politics[15].

Hence it became clear that because unlike Shah's first attempt to include the term 'secular' in the Constitution, his second attempt offered a very specific view of the word itself, it was this specific meaning that the Constituent Assembly was rejecting, and not the idea in its entirety[16].

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[12]. Dhagamwar, 1993 p. 232-234; Baird, 1993.

[13]. Baird, 1981, p. 394.

[14]. Baird, 1981, p. 399.

[15]. Baird, 1981, p. 397.

[16]. Baird, 1981, p. 393

B. Nehru, Secularism, and the Constitution

Although Robert Baird contends that because secularism did not have sharply defined limits, it led to a multifarious discourse on the nature of nation-building throughout the Constituent Assembly Debates, I would rather argue that the term itself is finite. Instead this multifarious discourse was the result of its limitations not being understood by members of the Constituent Assembly, and more likely Nehru himself[17]. Nehru defined secularism as a state ideology which gives all faiths equal opportunity, as long as this ideology does not conflict with "the basic conceptions of our state". This differed from the American model which kept religion and the state separate[18]. Nehru's secularism was more reflective of cultural and societal interaction than state behavior in that he based his definition on Asoka's belief to "honour your neighbour's religion as you hcnour your own"[19]. He also felt that secularism had to be a mechanism for modernizing India[20]. Simultaneously Nehru believed that secularism, and perhaps the political life of India in general, should be based on a composite Indian culture[21]. However, he wasn't clear of what this culture actually was, and whether or not it was flexible enough to allow for change, or would it and should it remain static. What he also neglected was

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17. Baird, 1981, p. 404.

18. Misra; pp 166-167; in Dhavan and Paul, 1992.

19. Hasan; p. 189; in Dhavan and Paul 1992.

20. Misra, p.165, in Dhavan and Paul, 1992.

21. Misra, p.163 , in Dhavan an Paul, 1992.

that modernization requires change, an in so doing it almost always restricts the jurisdiction of religion. Furthermore, even in the subsequent Lok Sabha Debates, secularism was deemed to be a necessity for achieving socio-economic justice[22]. So it was never explicitly denied, but rather it was accepted only as an adjunct of some other factor necessary for nation-building.

In juxtaposing secularism in the general framework of modernization, it wasn't revered for its own qualities and its potential application in India. The American model intended to enact "a wall of separation" between the state and religion in which the latter was not banned from the life of the citizen, but from the state. However, Indian leaders were afraid that if they propagated such a concept in India, it might eventually be construed as denial of religious freedom itself[23]. More specifically, while Ambedkar had pointed out that Hinduism and Islam covered every aspect of life and so a concept of secularism would have to draw a line between the sacred and the mundane[24], he failed to realize that with the coming of the British and the replacement of Indian judicial systems with the British form of jurisprudence Indians had adapted to these new fields of law, or new ways of legislating and arbitrating various aspects of their life. So they were capable of drawing this line at some point.

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[22]. Baird, 1981, p.403.

[23]. Bhagwati, p.14, in Baird, 1993.

[24]. Bhagwati, p.15, in Baird, 1993.

Furthermore, Gandhi seemed to be more clear about what secularism was to mean in the modern state in that even though he was an anti-modernist, he felt there should be a separation of church and state[25], and that religion should have no place in politics[26]. Justice Beg has also argued that if all human behavior in this world could be called secular as it related to the mundane then all religious activity could be considered secular. Therefore, religious activity of a 'mundane' nature had to be reconceptualized[27].

This lack of clarity on the subject is reflected in the fact that the framers of the Constitution were not schooled in the process of constitution framing itself. It was an alien and a new way of thinking for them. Rather, they were nationalists and nation-state builders first and foremost, and did not concern themselves as much with the process of nation building. So they incorporated into the Constitution directive principles like Article 44 as promises to be fulfilled as and when the state felt the political and economic climate of the country was ready[28]. Yet would they be able to argue on the same criteria with regards to laws prohibiting discrimination against lower castes, for instance?

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[25]. Misra, p.177, in Dhavan & Paul, 1992.

[26].Hasan, p.188, in Dhavan & Paul, 1992.

[27]. Rekhi, p.192, in Baird, 1993.

[28]. Agarwala, p.110, in Mahmood, 1975.

Although it has been speculated that the framers of the Constitution might not have felt the need to include "secular" in the Constitution because it was obvious that the state was trying to develop a system which could legitimize both the state and religion simultaneously[29], it could also be argued that "secular" was not included in the Preamble because doing so would force them to explicitly define the limits of religion in terms of state power and behavior. And while it has also been argued that it is the individual who is given absolute primacy in the Constitution, and further that the framers were clear in limiting religion to affairs which were strictly religious, and not to allow it to interfere in social, economic, and political life[30], what was to be strictly religious was never clearly defined. And it is exactly this point of vagary which has allowed religious personal law to prevail and deny women equal opportunity and rights within and with-out their families, thus putting the individual in a secondary position.

The word "secular" only appeared in clause (2) of Article 25 until 1976, as such according to R.K. Tripathi, giving state jurisdiction into previously religiously controlled spheres[31]. What is evident then is that because 'secular' was prevented from being included in the Preamble, but not in clause (2) of Article 25, which allows the state to regulate secular

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[29]. Bhagwati, p.9, in Baird, 1993.

[30]. Bhagwati, p.12, in Baird, 1993.

[31]. Misra, p.169, in Dhwan's, Paul, 1992.

activities associated with religion, the framers were not prepared to officially call India a secular state, and yet it was assumed to be nothing but[32].

Even though Article 26 addresses corporate rights of religion, it doesn't subject these rights to other Constitutional provisions or state jurisdiction as explicitly stated in clause(2) of Article 25; thus implying individual freedom having to submit to corporate rights, instead of the reverse. And because of this short-sightedness in establishing Article 26, the state has had to take it upon itself to determine what would be necessary for religious institutions to sustain themselves, rather than make these institutions subject to fundamental rights[33]. So what has resulted is the state regulating religious institutions from within, and subsequently to a certain degree giving it state power, rather than making it subject to the Constitution, and thus restricting it from without.

Despite the claim that part of the philosophical basis for secularism in India is that it would enable the state to be equidistant from factors of all faiths[34], this hasn't been the case. Neither has the state been equal in the degree of its interference in different religions. For instance, when Article

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[32].Dhagamvar, p.229, in Baird, 1993.

[33]. Misra, p.170, in Dhavan, & Paul, 1992.

[34]. Tyabji, 1994, p.1798.

25 was first being debated, it did not include the rights to propagate religion. This exclusion was opposed by both Hindu and Christian Constituent Assembly members, and so the right to propagate was ultimately included. The first draft of Article 25 also included a provision which limited the jurisdiction of cultural organizations to meet religious, cultural, and educational needs and demands of their respective communities. This provision was excluded from the final draft[35].

C. The State and the 'Community'

Furthermore, the fact that what constituted a community and what were its rights via the state were not well defined became most clear in the debates over issues like conversion and the limit of protecting it under the rights to propagate religion. J.D.M. Derrett argues that in India, religious affiliation does not have to do with personal belief as it does with social belonging[36]. More specifically, it was decided in G. Michael V. S. Ventakeswaran AIR 1952 Madras 427 that "If a person is born into a particular religion ...the mere fact that he is of an unorthodox type ..... would not take him out of the category...[37] One can argue, then that Indians are at least distinguishing between the sacred and the mundane, though they themselves are not aware of it, and though this distinction may

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[35]. Bhagwati, p.16, in Baird, 1993.

[36]. Neufeldt, p.313, in Baird, 1993.

[37]. Mahmood, 1993, p.94.

not be secular in nature. However, K.T.Shah, one of the few Constituent Assembly members to actually make this distinction consciously, proposed an article in December 1946 to the Assembly President which would guarantee "the right to freedom of conscience, which includes freedom of belief, worship, or profession of any religion, faith or doctrine, as well as the negation any such belief"[38].

P.B. Gajendragadkar felt that conversions should be registered with the government to keep a check on abuses of the right to propagate religion[39]. K.M. Munshi proposed that those under the age of 18 not be allowed to convert without parental consent, and that conversion resulting from force, bad influence or material inducement be criminally liable[40]. However, if an individual is converting out of his own volition, why should it be the concern the government?.

F.R. Anthony opposed K.M. Munshi during the Constituent Assembly debates on the issue, arguing, that every parent had a right to convert and raise their children in the religion of their choice. He was one of the few members besides Reverend Jerome D'Souza and Ambedkar who referred to conversion as a right[41].

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[38]. Neufeldt, p. 315, in Baird, 1993.

[39]. Neufeldt, p. 314, in Baird, 1993.

[40]. Neufeldt, p. 315, in Baird, 1993.

[41]. Neufeldt, p.317, in Baird, 1993.

While Tajamul Husain argued that religion was a private affair, and that conversion only led to interference with this privacy[42], other opponents to conversion were much more communally motivated, Algu Rai claimed that conversions trampeled on the rights of the majority[43]. Ananthasayanam Ayyangar was much more specific in that he argued that if granted as a right, conversion would be anti-secular as it would lead to an increase in the demand for legislative seats to growing numbers of minorities[44]. R.V.Dhulekar argued that conversion created separatist tendencies as - like the conversion of Hindus to Islam - they were not based on reason. Yet if the government started putting conditions restricting the choice to convert, then it would in essence make freedom of religion an alienable, non-fundamental right. That these issues were raised more so with the intention of a communal agenda than one of rights is obvious due to the fact that while various state acts in Orissa, Madhya Pradesh, and Arunachal Pradesh, have imposed limitations on conversions to "non-indigenous" faiths, there seems to be no such limitation concerning reconversion to Hinduism or Hindu missionary activity like that taken up by the VHP[45]. And yet ironically "secular" was finally included in the Preamble during the Emergency in 1976 so as to evade accusations of state-

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[42]. Neufeldt, p. 318. in Baird, 1993.

[43]. Nenfeldt, p.317, in Baird, 1993.

[44]. Neufeldt, p.318, in Baird, 1993.

[45]. Neufeldt, p.331 in Baird, 1993.

F. The State and the Individual

Yet debates over secularism have to be separated from those over communalism or fundamentalism in order to understand its full potential[103].

Secularism in not particularly Christian or Western because its emergence as an ideological buffer between warring groups was inevitable[104]. Furthermore, secularism did not emerge as an ideology from a process of secularization alone, but from other social factors[105]. This can also be seen in the Indian context in that Islam, for instance, makes a clear distinction between morality and the law and the judicial process started by the British of defining religious and non-religious are contributors towards secularization, whether or not this was intended. Secularism is the end product of a process of secularization which does not acknowledge itself as such, but is rather a process of social change leading to modernity[106]. So its doctrine depends on and is defined by its manifestation, and not the doctrine from which it originated. Srinivas elaborates the definition of secularization to be "what was previously regarded as religious is now ceasing to be such, and it also implies a process of differentiation which results in the various

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[103]. Bharucha, 1994, p.2925.

[104]. Bhargava, 1994, p.1787.

[105]. Beteille, 1994, p.561.

[106]. Phukan, 1994, p.1224.

aspects of society, economic, political, legal n moral becoming increasingly discrete in relation to each other"[107]. Secularization does not mean the absolute elimination of religion, but rather that some areas previously controlled by religious institutions now cease to be so. It means the rechannelling of the extent and intensity of religion in other spheres of life[108]. So although many view Gandhi's use of Vaishniva terminology and religious idioms as an attempt to return to a glorious Hindu past, they were really aimed towards promoting secularism and separation of religion from the state, yet not necessarily public life altogether[109]. Specifically, "(a) it permits the practice of any religion, within the limits set by certain other basic rights which the state is also required protect..... (b) the state shall not give preference to one religion over another and (c) the state shall not give preference to the religious over the non-religious[110]. It is also within the democratic state that cultural diversity and the rights to pursue one's culture can and should be protected[111]. However, by providing a framework of rules, secularism keeps check on contending and conflicting goods and makes them attainable in a controlled manner[112]. Political secularism also

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[107] Beteille, 1994, p.561.

[108]. Beteille, 1994, p.561.

[109]. Shah, in Mahmoo, 1975, p.84.

[110]. Chatterjee, 1994, p.1771.

[111]. Chatterjee, 1994, p.1773

[112]. Bhargava, 1994, p.1788.

comes with its own set of ultimate ideals in that in trying to distinguish between the right and the good, it ignores that the right and the good presuppose each other[113].

Secularists view religious belief as problematic because it requires the believer to unequivocally accept its dogmatism[114]. And this is where the danger lies in giving religion state power as an institution. It does mandate that some ultimate ideals be inaccessible to the state[115]. Yet this does not mean that state action will not somehow affect these ultimate ideals. For instance, modernization has not only led to the changing of attitudes towards religious orthodoxy, but has also allowed for people to express their belief more easily i.e. frequency of pilgrimages[116].. So absolutely modern does not necessarily mean absolutely secular or absolutely irreligious. Furthermore, the devaluation of purity and caste discrimination by most modern day Hindus was a product of secularization, and yet probably resulted in the strengthening of Hinduism as an institution by conglomerating all Hindus into a more homogenous group[117].

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[113]. Bhargava, 1994, p.1787.

[114]. Beteille, 1994, p.566.

[115]. Bhargava, 1994, p.1787.

[116]. Beteille, 1994, p.561.

[117]. Beteille, 1994, p.561.

Yet Beteille also criticizes Madan for denouncing the relevance of secularism as a process instituted by the minority elite to modernize the majority[118]. I would add that by turning the issue into one of the majority versus the minority, one forgets the possibility of the tyranny of the majority. While Madan and other anti-secularists, for instance, argue that the Constitution only reflects the will of the minority elite, they forget that religious texts were also written by an elite class, often a minority within a community. So its being developed by an elite should not automatically dismiss a doctrine which conceives a new way of life[119]. Intellectuals in every society are going to a be a minority. So while secularists may be a minority, anti-secular intellectuals are also a minority[120]. This could also be so because the majority of people have not been provided with a clear definition of secularism by the ruling minority.

Furthermore, Beteille argues that sociologists denouncing secularism forget that their field of study evolved as a process of the secularization of the study of religion. So while they are free to hold their own opinion on secularism, they are nevertheless forced to question the fate of their profession had it not been for secularism and or secularization[121].

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[118]. Beteille, 1994, p.560.

[119]. Beteille, 1994, p.560.

[120]. Beteille, 1994, p.560.

[121]. Beteille,194, p.p.559-560.

And while Beteille argues that to discount something on the basis of its geographical or cultural origins ignores its relevance to the present Indian situation[122], one also has to be reminded that India's history far from reflects endogamy and isolation.

G. The Secularization of Law

What has to be realized is that secularism is a nation-state ideology, and therefore it is the state which has to be analyzed in its operationalization of this ideology[123]. Particularly in the realm of law and social change. More specifically, social scientists don't delve into the intricacies of law and legal theory because they see it as a dependent variable in situations of conflict[124].

The British replaced legality with authority and established a structure in which what was legal was established by legal precedent. That is, past cases set the rule of thumb to be applied in all future cases, and were therefore the "authority". This also made legal development possible only through cases, and rendered the development of customs contrary to religious doctrine obsolete[125]. Furthermore, in order for law

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[122]. Beteille, 1994, p.560.

[123]. Bharucha, 1994, p.2928.

[124]. Rekhi, in Baird, 1993, p.181.

[125]. Menon, 1994, p.15.

to be flexible in interpretation, such flexibility had to somehow be institutionally encoded, thus contradicting the very basis of law as an institution in that it seeks to make uniform, stable and static. Therefore many critics of legal reform argue that instead of looking towards law to rectify societal inequality, law has to be examined as a mechanism which can actually perpetuate inequality[126].

Following the 1857 rebellion, the British adhered to a laissez faire policy with regards to religious life and only interfered to enact reform when it was politically expedient for them[127]. Although the British claimed to be non-interfering in religious law, by encoding it they did not only interfere, but took away the religious nature of such laws[128]. Therefore, codification and reform were done more out of the convenience of the state. And although a system of law is not alien to Muslims or Hindus, the British system of procedure and evidence gave personal laws new dimensions, and therefore a new character[129].

While other realms of law, which were equally religiously inspired, were modified and unified by the British, family law was not. This could be because the other realms of law were areas in which people from different communities interacted

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[126]. Menon, 1994, p.16.

[127]. Shah, in Mahmood, 1975, p.83.

[128]. Parashar, 1992, p.72.

[129]. Parashar, 1992, p.72.

the most, and so they had to be unified. Whereas family law did not witness as much inter-community interaction. Archana Parashar also argues that the distancing of religion on people's lives can serve the end goals of capitalism and industrialization best[130]. Yet it is the Indian state's bolstering of religious leaders that has served to quell a rising proletariat. And although Parashar notes that law reform can serve to change attitudes because it reflects the consensus of the ruling elites[131], this can also work negatively in that Muslim men who prior to the 1986 Act would've given their ex-wives maintenance, would now opt out of doing so because they are not only legally exempt from a previous financial obligation, but also because by passing the act the government has essentially conveyed that is not necessarily morally wrong to refuse to pay maintenance. Furthermore, Parashar argues that the modern system of law has been criticized for being an outside imposition and therefore futile in changing social perceptions and inequalities[132]. While this may be true to a great extent, what has to be more delved into is the role of a power structure in either enacting or counteracting change in behavior and belief.

Law reform has been criticized for not being effective because it doesn't reflect the general attitude of the

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[130]. Parashar, 1992, p.44.

[131]. Parashar, 1992, p.44.

[132]. Parashar, 1992, p.p.30-31.

populace[133]. However, the purpose of reform is then lost if it is to reflect such an attitude, as it is this attitude which is often the cause of the inequality sought to be reformed. Upendra Baxi, likewise, argues that legal change does not guarantee social change[134]. Yet this doesn't mean that legal reform should be abandoned. If outlawing murder, for instance, does not curb its frequency, does that mean its prohibition should be repealed? Secondly, if only a few avail of laws which prohibit social inequality, the fact is that the law enables them to practice and enforce a right which previously they didn't have[135]. Similarly, critics of secularism argue that it is adhered to by a small minority, and so is irrelevant with regards to social change. But then is a liberal democracy to protect the rights of the majority at the cost of the minority or is it to protect the minority from the tyranny of the majority? Though critics measure the efficacy of secularism through that of the efficacy of law reforms such as those regarding Hindu personal law[136], could the same argument be made regarding laws guaranteeing fundamental rights or prohibiting untouchability? If these laws are not effective should they also be repealed?

Returning to colonial law reform, while it is asserted that the British introduced concepts which greatly clashed with

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[133]. Parashar, 1992, p.31.

[134]. Baxi, in Mahmood, 1975, p.32.

[135]. Agarwala, in Mahmood, 19975, p.129.

[136]. Agarwala, in Mahmood, p.124.

the religious doctrine of South Asia[137]. It can also be said that the British system simultaneously gave these texts more power in the realm of personal law. So as Nandy argues, the evangelizing of faiths in South Asia is a legacy of the British which created polarities such as true faith versus distortions[138].

Upendra Baxi attributes the inefficacy of legal reform to the vagueness in the ideology behind it as well as the lack of operationalizing an infrastructure in which to enact and enforce such reform[139].

India followed the pattern of many colonial countries in seeking the law to enact and reform social change[140]. Yet this is not exclusive to countries with a colonial past. Even in western countries social change has always been sought through the law. This is more a characteristic of the nation state. So while Parashar argued that it is inevitable to seek change via the state, this does not discredit law reform altogether. In other words, just because the law itself has traditionally served the needs of the advantaged against or at the cost of the disadvantaged does not adequately prove that law is itself

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[137]. Singh, in Meagher, 1988, 50.

[138]. Nandy, 1988, p.178.

[139]. Singh, in Meagher, 1988, p.50.

[140]. Sarkar, in Parashar, 1992, p.9.

ineffectual for the disadvantaged[141].

With reference to women and law reform, Parashar argues that particular political strategies of feminist theory are irrelevant to the third world because of its lack of affluence and industrialization[142]. I would, however, argue that on the contrary it is the lack of these strategies which has created the political and theoretical dilemma in which Indian women find themselves. While Lotika Sarkar argues that Western feminism is important to India because of the lack of Indian feminist theory, she maintains that it has to be applied to India with some caution[143]. Yet feminist theory in the West was also at one time a radical shift in thought in that it also challenged fundamental Judeo-Christian values. The abortion debate in the U.S. is a case in point.

Simultaneously, many feminists in the West are critical of the efficacy of legal reform[144]. Yet it is this legal reform which has allowed them to engages in the discourse of change. And though women are not a homogenous group and those representing different class backgrounds often engage in and or benefit from the subjugation of women from other classes, this does not justify the state's differential treatment of women from within

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[141]. Parashar, 1992, p.30.

[142]. Parashar, 1992, p.294.

[143]. Sarkar, in Parashar, 1992, p.9.

[144]. Parashar, 1992, p.34.

the family. Parashar also criticizes socialist feminists for ignoring the role religion in India plays in the subjugation of women[145]. But the problem is also that this role is usurped by the state. In other words most secularists in India identify religion as an institution of stagnation[146] . I would extend this claim to argue that it is the state's institutionalization of religion that has made it stagnant. Bhargava argues that religion and the state should be separated due to the coercive nature of the state[147] So even though religion as doctrine can be oppressive, it is the state's institutionalization which operationalizes this oppression.

The conflict between the state and religion in India does not just lie in the conflict between the state's obligation to the individual and the community. More so it stems from the state's concept of the individual and subsequently its commitment not just to formal equality, but also substantive equality[148]. The courts make three distinctions in dealing with religion: "sacred - profane, religion - ethics, and religion - communitarian"[149]. Articles 25 and 26 secularize socio-economic reform in that they confer upon the state the power to enact laws

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[145]. Parashar, 1992, p.42.

[146]. Beteille, 1994, p.564.

[147]. Bhargava, 1994, p.1785.

[148]. Larson, in Baird, 1993, p.667.

[149]. Rekhi, in Baird, in 1993, p.p.181.182.

in areas which were previously governed by religion[150]. Article 29 guarantees the right to preserve language and Article 30 guarantees the rights of minorities to build and maintain educational and cultural institutions[151]. While Article 29 is not expressly subject to the other provisions of Part III regarding fundamental rights, it excludes any rules which may be discriminatory or oppressive in nature.

Article 16 of the Universal Declaration of Human Rights recommends governments to : "(a) Take all possible measures to ensure equality of rights and duties of husband and wife in family matters; (b) Take all possible measures to ensure to the wife full legal capacity, the right to engage in work outside the home and the right, on equal terms with her husband, to acquire, administer, enjoy and dispose of property[152]. It has been a tendency that women find it easier to combat the state or society in general then the inegalitarianism in their own families[153] Perhaps this is so because the state has made this easier. [i.e.. a judgment of the Delhi High Court, which was later concurred with by the Supreme Court "stating introduction of constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root of that relationship....in the privacy of the home and married life, neither Article 21 (right

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[150]. Baird, 1981, p. 418.

[151]. Bhagwati, in Baird, 1993, p.20.

[152]. Read in Anderson, 1963, p.211.

[153]. Menon, 1994, p.25.

to life) nor Article 14 (Right to Equality) has any place" (1984 AIR 66, Delhi, Haksar, 1986 : 58)

And though critical of law reform, Parashar supports special laws prohibiting dowry and sati, as the absence of such laws would make these acts as well as murder committed under the aegis of these acts much easier[154]. It would then be fair to conclude that criminalizing these acts, though having little effect in decreasing their frequency, is important as it paves the way for punishment and prevention.

During independence, K.T.Shah moved for an amendment to guarantee individual life and liberty, which could only be denied by due process of law, and that every individual should have protection under the law[155]. Similarly, endemic in the state was the process of "transforming the consciousness of the people "by approaching problems in a scientific nature"[156].

However, while some believe in rational reform of laws, others believe that such reform should be subject to change in popular custom and culture[157]. Trubek and Galanter argue that in order to enact effective social reform in non-Western societies, it is first necessary to state the ultimate goals and

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[154]. Parashar, 1992, p.26.

[155]. Tyabji, 1994, p.1798.

[156]. Meagher and Silverstein, in Meagher, 1988, p.9.

[157]. Meagher and Silverstein, in Meagher, 1988, p.17.

then study the particular society to see if a Western legal system of reform will bring about these goals[158]. The question arises, though as to whether or not the point is to change the society in question or make this change subject to certain static conditions. While those advocating cultural specificity do not abandon law reform altogether, they offer no substantial alternative. And their opponents feel that this method is too slow. Yet what their opponents are actually against is the fact that this mode enacts very slow economic change. They are equally hesitant to accept the social and political change associated with rapid economic reform The culture specific school is apt at identifying the problem, but goes no further nor offers solutions. So while the third world is argued to be more receptive to gradual change[159]. When and how this gradual change will actually materialize is not made clear.

Galanter makes a distinction between an empirical legal approach and a formal one, in that the latter only allows people to be classified in one category, and so their rights can only be addressed in that category. Whereas, the empirical approach allows people to belong to more than one category, and where categories may conflict or overlap, to address issues pertinent to the case and needs of the parties concerned[160]. However this approach can also lead to disparities with regards to personal

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[158]. Meagher and Silverstein, in Meagher, 1988, p.p.22-24.

[159]. Menon, 1994, p.25.

[160]. Bhargava, 1994, p.1785

law in that they have become institutionalized in the sense that not practicing them can result in some form of punishment[161]. Furthermore, a step away from cultural specificity has already been made in that the Constitution of India not only includes secularism but emphasizes equality and liberty[162].

Said identifies the politics of culture as the assertion of a dominant set of ideas. And with the protection of culture by the state, culture becomes a hegemonic system where ground rules are set for exclusion from groups as well as discrimination within groups[163]. In other words, it has more to do with protecting a hierarchy and power base than an abstract way of life. Furthermore, this abstract way of life is forever changing, and the very process of protecting it via the state can actually lead to its antithesis-stagnation[164]

In addition, Rajni Kothari argues that the critique of modernity focusses heavily on the majority verses the minority, which are in themselves modern constructs both definitionally and substantatively[165]. What has also resulted besides this circular logic is the belief that the majority and minority are monolithic and non-differential.

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[161]. Beteille, 1994, p.560.

[162]. Das, 1990, p.8.

[163]. Das, 1990, p.9.

[164]. Larson, in Baird, 1993, p.65.

[165]. Tyabji, 1994, p.1798.

And while secularism is believed to be part of the larger framework for political and economic development[166], I would go further and claim that gender justice is also part of this larger framework, as it is its absence which prevents women from participating equally in the national political economy.

The liberal doctrine tolerates collective rights by granting members of groups the right to leave these groups if they aren't happy with their situation[167]. However, the Indian state does not allow this right of exit. So though it can be argued that citizens have been given equal rights by equal legal recognition of religious differences[168], there is a difference between recognition and enforcement, and it is the enforcement which has called into question the contradictions in India's version of secularism and liberal democratic rights. Chatterjee may argue that if groups demand separate forums to discuss the validity of its practices, these forums must exercise the same degree of fair representation as the state[169]. Yet by doing so he makes collective rights conditional and not fundamental, and perhaps justly so.

Liberal toleration usually assumes three forms : (1) contractualist (individuals don't know until they are born what

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[166]. Chatterjee, 1994, p.1775.

[167]. chatterjee, 1994, p.1775.

[168].

[169]. Chatterjee, 1994, p.1775.

religious category they will fall into, and will thus have to exercise mutual toleration), (2) consequentialist (the consequences of intolerance are worse than those of tolerance), (3) respect for persons. While the first two either do not address consequential problems or are at best pragmatic solutions to long term problems, the third places limits on tolerance, It does not allow respect for practices which perpetuate disrespect to individuals[170].

The first priority of the secular state is to apply principles of liberty for the protection of universal rights, and not be subject to the interpretation of religious doctrine[171]. So whether or not reform by the state can be justified by religion is and should remain irrelevant in the state apparatus. While Chatterjee himself argues that the Hindu Code Bill could've be justified on secular grounds[172], that it was not contributed not only to its limitations, but to the communalization of the whole issues of family law reform. Similarly while Dhagamwar contends that the abolition of untouchability was essential for the "health of Hinduism"[173], this point is and should be irrelevant. If the state is abolishing an institution on secular grounds, its intention and end results should also be secular.

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[170]. Chatterjee, 1994, p.1771.

[171]. Chatterjee, 1994, p.1770.

[172]. Dhagamwar, in Baird, 1993, p.230.

[173]. Chatterjee, 194, p.1769.

Chatterjee also argues that the founders of the country had no misconceptions about the meaning of secularism, but rather how to apply it to the Indian context[174]. Then was their object to change or maintain this context ? On the same note, while Schwartz argues that law can only regulate behavior if it is a reflection of society's notions of proper behavior[175], what then is being regulated, the law or the behavior?

Furthermore, contrary to popular belief law reform has become an endemic part of Indian social and political life even at the most remote levels. This much is evident in field work done in a North Indian village conducted by Lindsay and Gordon[176] For instance, to protect their land holdings against land ceiling acts, families have legally partitioned them among siblings. Subsequently, these partitions become very confrontational and bitter court battles within the families[177]. And though the disadvantaged tend to view the efficacy of the judiciary with skepticism, they simultaneously seek primarily the judiciary as a means to increase their bargaining power in local politics[178]. It could also be argued that its use also brings into the national forum the larger issues of rights.

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[174]. Schwartz, in Meagher, 1988, p.173.

[175]. Lindsay and Gordon, in Baird, 1993, p.370.

[176]. Lindsay and Gordon, in Baird, 1993, p.371.

[177]. Lindsay and Gordon, in Baird, 1993, p.380.

[178]. Lindsay and Gordon, in Baird, 1993, p.382.

While critics of land reform legislation like P.C. Joshi focus on the failures of these acts because of the way landowners can legally manipulate them in order to evade them, what he neglects is that the passage of these acts in and of themselves has led to an increased awarèness among the disadvantaged of their rights both legally and socially. Additionally, most scheduled castes are skeptical of the law's ability to protect their rights. Yet it is within this very discourse that their rights have first been acknowledged as such[179] . Pauline Kolenda confirms this point in her field work in Western U.P. in noting a change in attitude towards caste stratification in that increased awareness through a combination of politics and education has led to change in the belief that caste discrimination is not "correct[180]." So through law , moral frameworks have changed, though the degree is another matter.

Furthermore, if one is to seek a common ground between proponents and opponents of secularism based on tolerance, then to operationalize such behavior will be very difficult. In other words, how can a secularist negotiate with a fundamentalist, who rejects the former's whole mode of reasoning? Therefore there has to be a single, basic framework which is not derived from negotiations between the two, but an already established set of ideals[181].

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[179]. Lindsay, and Gordon, in Baird, p.383.

[180]. Bharucha, 1994, p.2926.

[181]. Bhargava, 1994, p.1789.

Though it is claimed that Hinduism has a strong sense of tolerance towards other faiths, and subsequently if state enacted can lead to intention-neutrality, it cannot fulfill procedural neutrality. Neutrality has to take into consideration an ultimate good. It demands that partiality have some basis in reason. It also means the state's protection of the ideals of neutrality, and those who support those ideals[182]. According to this reasoning, because theologians do and have acted for the mundane and not the sacred[183], they should not be granted state power, and this becomes apparent in the case of personal law.

Section 125 CrPC was intended not only for divorced wives, but also elderly parents, children, and adult children who were disabled. However, that minority groups and theologians have consistently contested it when it was used to refer to divorced women, makes the issue of maintenance a women's issue. Furthermore, the government passed the 1986 Act in reaction to Shah Bano being granted maintenance under Section 125 CrPC, following pressure from the Ulema. It is clear then that government capitulation to minority demands can affect any realm of law, and also ignore the humanitarian grounds on which 125 CrPC was initially enacted.

And though many 'secular' laws relating to marriage and

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[182]. Beteille, 1994, p.564.

[183]. Das, 1990, p.p.24-25.

sexuality may have their origins in Judeo-Christian thought and patriarchy[184], this point does not justify the abandonment of secularization of law altogether. While law is commonly seen synonymously with the state, law is itself often autonomous[185]. This point is evident in the existence of such laws holding the state liable for its actions, such as fundamental rights. And finally, contrary to what Nandy and other anti-secularists might argue "the state is not a pre-given instrument of oppression"[186]. To argue the opposite would be saying that gender oppression did not exist before the state. On the contrary, it is within the purview of the state that the concept of rights emerged.

A fundamental right is "a restriction on sovereignty for the benefit of the individual"[187]. Up until the 17th century, rights were addressed via communities. It was only then that rights became individual-based. It was also then that man's right to choose was the crucial factor in measuring his autonomy[188]. Fundamental rights has its basis in liberal democratic theory, whereas directive principles have their basis in socialism. In India the two clashed in that Article 19 (1)(f)and (6) were amended in 1951 so as to allow the government

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[184]. Parashar, 1992, p.37.

[185]. Barrett, Women's Oppression, 1980, p.246, in Parashar, in 1992, p.45.

[186]. Gledhill, in Anderson, 1963, p.81.

[187]. Menon, 1994, p.p.2-3.

[188]. Gledhill, in Anderson, 1963, p.81.

to accquire industries in order that wealth would not be monopolized, thereby serving a greater economic goal[189]. Carol Smart makes the distinction that while a right may be legalized, it may not be manifested as a commonly practiced reality. But if it is not legalized, those it would've addressed will continue to be oppressed[190].

Although Article 25(2) allows the state to intervene in religious institutions to protect other fundamental rights[191], this clause doesn't compel the state to do so, therefore leaving fundamental rights up to the will of the state rather than the Constitution.

D.E.Smith describes the secular state as having three different relationships : "(1) religion and individual (freedom of religion),(2)the state and the individual(citizenship), and (3) the state and religion (separation of state and religion)" He also goes on to say that such a state, while dealing with citizens as individuals grants both individual and corporate freedoms of religion[192]. This has led to a dilemma in India in that it is because corporate freedom of religion is granted without interference from the state, the individual ends up being addressed by the state with specific reference to religious

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189. Menon, 1994, p.10.

190. Coward, in Baird, 1993, p.33.

191. Bhagwati, in Baird, 1993, p.8.

192. Bhagwati, in Baird, 1993, p.10.

affiliation And although Bhagwati argues for a set of common principles to govern society, he posits them to be subservient to the will of the group[193]. Yet it can also be argued that the state has a vested interest in relegating individuals to the mercy of their community.

Subnational identities are dependent upon adequate representation being given to the leaders of such communities[194]. So it is the fault of the central government for creating a space for communitarian leaders to emerge. This becomes obvious in the fact that in the 1957 elections the government relied on bolstering a specific Muslim identity to counteract the growing popularity of the political left. So the Congress party started the process of communalizing politics by creating a specific Muslim political identity and then validating its sectarian nature. The state then identified such identities as pseudo-secularist, therefore limiting the debates over secularism to religious tolerance[195] and evading the crucial relationship between the state's to the citizen.

Furthermore, arguments for collective rights and against universal citizenship border on cultural relativism. And recognition of cultural differences does not mean one should

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[193]. Tyabj, 1994, p.1798. .

[194]. Tyabji, 1994, p.p.1799-1800.

[195]. Chatterjee, 1994, p.1774.

forgo a "universalist framework of reason"[196]. When groups demand autonomy without reason, they are essentially asking others to be tolerant of often intolerant frameworks[197]. For instance in deciding the Auroville case of 1982, Justice Reddy opined that where the definition of religious groups may be vague, the court should rely on the claims of the community in question as well as testimony from outsiders[198]. Yet this is not only very subjective, but leaves ample opportunity for such community to be opportunistic and use the law for its own ends , regardless of constitutional provisions. It also subjects identity to consent from with-out rather than definition from within. Chatterjee invokes Foucault to argue that the "modern form of power, whether inside or outside the domain of the state, is capable of allowing for an immensely flexible braiding of coercion and consent"[199]. This has been apparent with regard to the rise of communitarian leaders. So while Chatterjee argues that proponents of a universalist framework often fail to address where power and identity are asserted[200], I would argue that universalists are reacting to this context of power. They have become aware of the dangers of the conglomeration of power of community leaders granted to them by the state. It is equally important to note that those who would argue for the protection

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196. Chatterjee, 1994, p.1775.

197. Minor, in Baird, 1993, p.304.

198. Chatterjee, 1994. p.1774.

199. Chatterjee, 1994, p.1774.

200. Chatterjee, 1994, p.1774.

of culture and community do not provide alternative institutions of rights or manifestations of identity[201]. And this is where the liberal left in India contradicts itself. In arguing for the 'right' to preserve culture, they often neglect the devaluation of rights that occurs as a result.

The issue of cultural rights cannot be addressed solely through a theoretical analysis of group interests, as it is more a product of political passions[202]. In addition, according to international human rights law, the state and the individual are the two entities that are addressed and allowed to interact with each other within the discourse on rights[203] Sacerdoti (1983) argues that human rights in the international arena include the prohibition against any state action which may destroy or threaten existing traditions and cultures of any group, as well as the rights of individuals who are members of minority groups to maintain their culture, language, religion, etc[204]. While the latter implies choice as it is a right, the former could in effect negate the latter, as was obvious with the 1986 Act, which left Muslim women without the choice to adhere to personal law.

It has likewise been argued that the protection of community rights can often impinge upon individual rights because

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[201]. Das, 1990. p.1.

[202]. Das, 1990, p.2.

[203]. Das, 1990, p.3.

[204]. Das, 1990. p.7.

there is no finite definition of community[205]. Furthermore, human rights enable the individual to claim rights against state power. However, if community rights achieve the same status, there is no guarantee that individual rights will be maintained[206]. This is so because by claiming rights over individuals, the community, assumes the same role as the state to which it claims to be in opposition[207]. So it becomes all consuming in that it claims rights, and simultaneously has the power to negate rights. Its demand for complete ownership makes it as totalitarian as it accuses the state of being. What is emerging as a result of the interaction between the state and the community is a new definition of the community dependent upon the reconstruction of the public sphere of law and history[208].

Furthermore, the debates between culture and rights has also assumed that culture is male and therefore what the patriarchy defines it to be[209]. So if the state is to interfere with family laws in order to ameliorate women's position, then the focus has to be women and not culture[210].

Liberal democratic theory does not recognize

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[205]. Das, 1990. p.29.

[206]. Das, 1990. p.57.

[207]. Das, 1990, p.59.

[208]. Das, 1990, p.38.

[209]. Das, 199, p.26.

[210]. Chatterjee, 1994, p.1773.

collective rights of communities[211]. The concepts of rights is also irrelevant to secularism as it is ethical secularism which defines the separation of church and state through its own system of ultimate ideals[212]. However, while Bhargava argues that ethical secularism demands that religious believers give up those values of religious significance, I would disagree in that he himself says that the believer has merely to redefine his values in non-religious terms[213].

And finally, the volume of cases filed under Section 125 CrPC by women specifically, for maintenance makes clear that family and culture are not the protective institutions most would like to believe, thus creating a need for an alternative, possibly the state. And while Bilgrami argues that if a uniform civil code had been the result of negotiations between communities and had reflected the most progressive elements of each community's personal laws much communalization over the issue would've been avoided, I would disagree. To limit family law reform to the "best" of each religious law not only limits the extent of reform possible within a liberal democratic state, but also makes rights negotiable, rather than fundamental and inalienable.

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[211]. Bhargava, 1994, p.1786.

[212]. Bhargava, 1994, p.1787.

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Chapter III

Hindu Law and the State

A. Hindu Law Before Colonialism

To call pre-colonial Hindu law a uniform, unified legal system would be an anomaly as there existed no single legal text in which to refer. The Dharmasastras of Gautama, Baudhayana Apastamba, Harita and Vasishtha, while establishing duties and moral obligations, are clearly no more than interpretations of these moral obligations[1]

The Gautama Dharmasutra obligates the king to implement and preserve laws and customs of various communities, but he does not have the power to impose his will[2]. In ancient times, spiritual leaders did not want the king to have powers to administer penance as that would give him power in spiritual matters[3]. While the royal court dealt primarily with criminal and certain civil matters the caste courts and tribunals handled marital disputes and other family matters[4]. This process continued under Mughal rule[5].

Because the Smritis were compiled over a long period of time with little coherency between the authors, different interpretations and subsequently different schools of the

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[1]. Kishwar, 1994, p.2148.

[2]. Kishwar, 1994, p.2148

[3]. Lariviere, p.356, in Baird, 1993.

[4]. Rocher, p.113, in Anderson, 1968.

[5]. Kishwar, 1994, p. 2145.

thought evolved[6]. The writers of the smritis were also not in agreement on whether or not to support the Sastras or customary practices. However, most evidence suggests a wider adherence to customary practices than to the Sastras[7].

Although it has been argued that the Dharmasastras were not an immutable set of laws, but a situation-and time-specific code of conduct[8], it did presume an immutable framework based on gender and caste differentiation. Hindu marital rites have their origins in the laws of Manu and the Dharmasastras[9]. According to the laws of Manu, a wife has to be faithful to her husband even he is degenerate. However, if a wife is unfaithful, her husband has the right to outcast her and even take a second wife[10]. And though the laws of Manu obligate a husband to maintain a faithful wife, he also reserves the right to take on a second wife if after a number of years - his first wife does not bear sons[11]. However, a wife is allowed to dissolve the marriage if she was deserted and has waited a number of years - depending upon caste and whether or not she has children. She could also abandon her husband if he was impotent or out-caste,

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6. Parashar, 1992, p.2145.

7. Mukund, 1992, p.ws-3.

8. Kishwar, 1994, p.2147.

9. Rocher, in Anderson, 1968, p.94.

10. Rocher, p.p.94-95.

11. Rocher, Anderson 1968, p.p.96-97.

just as a husband could abandon his wife is if she was impure[12]. However, Yajnyavalkya stated that even if a wife is virtuous, if her husband discards her, she is entitled to one-third of his property[13]. So while Manu obligates a husband to maintain a faithful wife, such an obligation is not legally enforceable.

The Dayabhaga school of Jimutavahana and the Mitakshara school of Vijanesvra emerged in the early twelfth century. The former granted inheritance rights to widows, while the latter granted stridhan to be passed from mother to daughter first. It was on this basis that the British courts established women's rights to inheritance with regards to Hindu personal law. Consequently what developed were two concepts of woman's inheritance : stridhan, and women's estate in which widows inherited but had no power of alienation[14]. While the Baudhyayana declared women unfit to inherit property, the Dayabhaga school and the Benares and the Mithila sub-schools of the Mitakshara school did acknowledge inheritance rights of five classes of women : widows, daughters, mothers, paternal grand mothers, and paternal great grandmothers. The Bombay and Madras schools expanded this category[15]. However, the Dayabhaga School excludes widows without sons, barren daughters, and unchaste daughters. This is not so in the Mitakshara school, in which

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[12]. Rocher, Anderson, 1968, p.p.102-103.

[13]. Bhattacharji, 1991, p. 510.

[14]. Mukund, 1992, p.WS-2.

[15]. Devi, in Sarkar and Sivaramayaya, 1994, p.p.174.

unmarried daughters are given preference over married daughters[16].

Tamil Nadu and Kerala are the only two states which bear witness to women owning and supervising land[17]. Prior to the Hoysala/Vijayanagar rule, there is more recorded evidence of endowments and sales of land by women, thus suggesting greater property rights for women. Discrepancies over land and inheritance were handled by caste councils. So women's rights were dependent on their caste. The diaries of Ananda Ranga Pillai note several cases where widows were disinherited, maltreated, and denied maintenance. The stridhan that daughters inherited from mothers was land referred to as manjal kani, on which cash crops could be grown, and daughters continued to control this land after marriage. It has been speculated that cross cousin marriages and marriages with maternal uncles were commonly practised so as to keep this land in the family[18]. Chettiar women did not have properly rights as they were of the trading and money-lending community. Though they were given a large cash settlement at the time of marriage and also handled the money-lending while their husbands were away on business[19].

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[16]. Devi, in Sarkar Sivaramayaya, 1994, p.175.

[17]. Mukund, 1992, p.WS-6.

[18]. Mukund, 1992, p.ws-5.

[19]. Mukund, 1992, p.ws-6.

Yet Devadasis appear to be the only class of women who owned property irrespective of the men of a patrilineage. They were not prostitutes in the modern sense. They were sacred keepers of the arts, and for this they benefitted from grants made to temples or to them personally. They were see as adjuncts to a patriarchal society rather than a threat to the patriarchal family. They were allowed to adopt daughters and bequeath their property to their daughters[20]. They were considered the sole guardians of their children and their daughters given full inheritance rights, while their sons were only entitled to maintenance[21].

In the northern schools, wives not only had limited rights to property, but minimal if any - power to determine their families, as well. Some Mitaskhara schools granted the wife the power of Karta in her husband's absence[22] With regards to adoption, both the Krithima and Dattaka school allowed a man to adopt a son if he didn't have sons of his own, as sons needed to carry on the family lineage and perform funerary and other religious rites. Neither school allowed for the adoption of daughters[23]. Dattaka adoptions required a ceremony of giving up the child by the natural parents or guardians and the taking of

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[20]. Nair, 1994, p.3159.

[21]. Nair, 1994, p.3161.

[22]. Kishwar, 1994, p.2157.

[23]. Manohar, in Mahmood, 1975, p.69.

the child by the adoptive parents[24]. The Madras school allowed widows to adopt with the permission of sapindas or undivided coparceners. In the Bombay school and the Jain community, widows could adopt with the permission of their husbands. These regional differences stem from varying interpretations of the Vasishtha. Furthermore in medieval India, men could adopt without their wives' consent but the wife was not granted the same rights. A father could also give his child up for adoption without the mother's consent. Again, the mother did not have the same right. Mothers and widows were only granted this right if given permission by their husbands. So orphans and children born out of wedlock could not be adopted as there was no one to give them in adoption. The Maharashtra school was the only school which did not restrict the age of males to be adopted. An adopted son was given the same rights as a natural born son. But he was not allowed to marry anyone n his adoptive family. Dyamushyanana was a son whose natural and adoptive parents made an agreement that he could inherit from both of them[25].

Where the texts of Hindu 'law' can be considered as such is the distinction they made between that which was morally acceptable and that which was allowed, though not morally approved of. For instance, while the authors of the Sutras did not morally approve of sons born out of wedlock they did

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[24]. Kishwar, 1994, p. 2153.

[25]. Manohar, in Mahmood, 1975, p.p.70-71.

acknowledge them and vest them with limited rights of succession[26]. So morality and legality were differentiated, and 'legal' intervention did not rest solely on the divine.

However, its moral framework was based on 'divine', immutable principles, especially with regards to women. The Brahmanas explicitly refer to sons as a blessing and daughters as a curse[27]. If a woman was emulated, it was only in her role as a mother, and that too only to the extent of respect, but not to the extent of granting equal rights[28].

B. Colonial Hindu Law Before Reforms

Warren Hastings decided to base family law on religious texts because this division of law was what existed in England, where marriage and family laws were based on Biblical tenets. Similarly the British associated all Brahmins with the priesthood and Pandits with Bishops' officials, as was followed in England. Yet these conditions did not reflect the Indian realities. The British started training Pandits for their assigned role by establishing Sanskrit colleges in Benares and Calcutta. However, in doing so, they excluded other 'Hindu' schools of thought[29].

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[26]. Parashar, 1992, p.51.

[27]. Bhattacharji, 1991, p.507.

[28]. AIDWA, 1995, P.4.

[29]. Kishwar, 1994, p. 2145.

Halheid's Gentoo Code, referring to Hindu personal law, was based on a Persian translation of a set of codes composed in Sanskrit by a committee of Pandits[30] While it has been argued that these Pandits were encoding these laws in order to prevent them from being encoded by the British, and thus peril under a foreign legal culture,[31] because they were arbitrarily fabricating many of these codes, it could equally be argued that their intention was more so to tighten the boundaries around their community, so as to secure their own power base. For without this community there would be no power base.

After realizing the Pandits' faulty and contradictory interpretations, people like William Jones took it upon themselves to translate Hindu texts[32]. However, they were subject to faulty interpretations by the British as well as self-serving Pandits who were known for producing laws which may not have had any sanction in religious text. Hence, the courts relied on such works as William Jones's Ordinances of Manu (1979), Colbrooke's Digest of Hindu Law (1815), F. McNaughten's Consideration Upon Hindu Law (1824), Mayne's Treatise on Hindu Law and Usage (1878)[33] and W.H.McNaghten's Principles and Precedents of Hindu Law (1829). The British based Hindu personal law on the Sastras, with limited acknowledgement to local custom.

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30. Mahmood, 1986, p.97.

31. Mahmood, 1986, p.98.

32. Kishwar, 1994, p.2146.

33. Mahmood, 1986, p.97

Yet, Regulation II 1772 of Warren Hastings only mentioned religious text. The British, then, actually made the religious moral authority of those texts synonymous with legality and enforced this new "textual law" often without considering local custom which may have contradicted these texts. This inconsistency was slightly ameliorated by a statute passed in 1781 which included "laws and usages". However this amendment was only applied in Calcutta[34]. In 1827 the President of Bombay passed Regulation IV which gave customary law primacy over textual law[35]. So although in 1858 Queen Victoria proclaimed that based on their commitment to Christianity, the British would not interfere in religious belief or worship[36], their whole process of codifying and enforcing Hindu 'law' transformed it into something it previously was not, and was therefore very much so an interference.

C.Colonial Hindu Law Reform

The British Legal System introduced concepts of justice and equality, and positive rights[37], despite the fact that at that time British society did not fully adhere to these concepts themselves. Early modernization in India was not so vociferously resisted because it was restricted to the

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[34]. Sivaramayya, in Mahmood, 1975, p.146.

[35]. Sivaramayya, in Mahmood, 1975, p.149.

[36]. Jordan, in Baird 1993, p.260.

[37]. Chew, 1988, p.18.

cosmopolitan[38]. When reform did become more ubiquitous rather than suppressing westernization, the movement sought to westernize suppression[39]. For instance, although the concept of dissolution of marriage gave women an opportunity to end marriage which they before did not enjoy, that it was taken by the British reflected norms of the British in the nineteenth century in that only "aggrieved spouses" were to be granted a divorce[40].

According to Tanika Sarkar, the household and the family were the only autonomous space Indians had. Partha Chatterjee goes further to argue that it was this "personal space" where national sovereignty was established[41]. It is precisely because this "space" was established and sought to be protected that reformers approached select issues, rather than addressing the status of women through the multifarious forces that contributed to their subjugation, such as religious custom, and more particularly, the family[42].

Yet this phenomenon was not only a reaction to colonialism, but just as well a reflection of it; it was to protect the 'Hindu' family but according to the definitions and norms of nineteenth century England. Sir Thomas Munro argued in

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[38]. Chew, 1988, p.22.

[39]. Chew , 1988,p.46.

[40]. Kishwar, 1994 p.2150.

[41]. Nair, 1994, p.3157.

[42]. Chew, 1988, p.34.

the House of Commons that changes in customary and religious law should be brought about by communities themselves. Frederick Pincott also felt that the Royal House should not interfere with religious customs of Indians[43]. Pincott also opposed reforms on grounds that they would lead to instability of English rule in India [44]. Lord Lansdowne felt that where religion, morality, and personal safety conflict, it was religion which should be given last priority, as long as the fundamental tenets of religion were not being sacrificed in the process[45]. It can be argued that his reasons were not only because of the fear that reform would bring about reaction amongst Indians which would disquiet the Empire, but also that by enacting reforms which were sometimes more progressive than corresponding laws in England, the English would not be able to justify their rule as a mechanism for "civilizing the natives". For instance, in Britain the age of consent for girls was also a controversial issue. Though it was 13 years, of age, reformers tried to raise it to 16 years of age, but were not able to do so[46]. This confirms M.N.Srinivasan's claims that the reform movement was a process of westernization and not modernization, because while the former is ethically neutral the latter is not[47].

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[43]. Kosambi, 1991, p.1864.

[44]. Kosambi, 1991, p.1867.

[45]. Kosambi, 1991, p.1865.

[46]. Chew, 1988, p.67.

[47]. Chew, 1988, p.20.

The patriarchal emphasis on female spiritual purity in nineteenth century Bengal was actually a mechanism to control female sexuality. And contrary to popular belief, among the women in the secluded Antahpur, sex was openly discussed and joked about[48]. Education for women was a European concept which had no precedent in India. And yet perhaps because of this Indian women, though limited in number, were able to study fields not yet open to European women[49]. Yet reformers sought to restrict women's education by reinforcing traditional domesticity[50], thus proving to be a process of modernization which was at the same time determined to curtail certain aspects of development endemic in modernity. David Kopf argues that tradition was used by intellectuals to "discover historical guidelines in their heritage appropriate to a society in transition"[51]. As such, schools, were established for women which taught Sanskrit, Bengali, some arithmetic, cooking, and housewifery. Religious study was emphasized and an annual award was given for the best performance of puja[52]. Even staunch reformist Bankim Chandra Chattopadhyya felt that women's education should not involve the same rigorous curriculum as that of men; rather it should increase their awareness and enable them to attain the highest

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[48]. Chew, 1988, p.33.

[49]. Chew 1988,p.24.

[50]. Chew, 1988, p.24.

[51]. Chew, 1988, p.18.

[52]. Chew, 1988, p.55.

point of religious morality[53].

Hindu personal law reform in the nineteenth century sought to ameliorate the position of Hindu women, yet not for their own sake. Their position was used as a criteria for success in the struggle between tradition and modernity[54]. So even in the most progressive of movements the burden of proof, so to speak, was on women's behaviour, rather than on male behaviour towards women. Baran De argues that modernization failed in India because it did not "prepare India for the tasks of modernity". It did not develop the same infrastructure found in Europe such as the abolition of religious orthodoxy, economic interdependence and "crystallization of bourgeoisie class consciousness and in the early nineteenth century with working class consciousness which was a reaction to the moral and utilitarian hardening of the bourgeoisie....England's work in India was not modernization in the sense of betterment of values[55]. This becomes apparent in the process of reform that was sought. Ishwar Chandra Vidyasagar sought scriptural support for reform because since their was 'no economic base for modernization, educating people to enlighten them proved futile[56].

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[53]. Chew, 1988, p.42.

[54]. Chew, 1988, p.2.

[55]. Chew, 1988, p.23.

[56]. Chew, 1988, p.24.

Women's seclusion and practice of sati increased social standing, as it was associated with the traditional upper-class[57]. Yet reasons for the observance of sati were not restricted to status, but greed as well. Because the Dayabhaga system allowed widows to inherit their husbands' property, between 1815 and 1818 exactly 2,366 widows were "satied" in Bengal, most of whom were from Calcutta[58] The British endeavour to prohibit sati started in 1805 when Lord Wellesley, the Governor General of India, consulted the court of the Nizamat Adalat not only to abolish sati, but also the use of intoxicants to induce widows who were not psychologically or emotionally capable of acting out of their own will. The first circular of the Nizamat Adalat claimed that sati was sanctioned by some Hindu texts. But there were mitigating circumstances under which sati would not be sanctioned namely : pregnancy, being under the age of puberty, having children who were still infants (unless another guardian was designated), menstruation, and or intoxication. The most important criteria for a sati to be sanctioned was that it had to be completely voluntary on the part of the woman. Subsequently the colonial government outlawed any sati which violated any one of these conditions. And though they might have felt the practice to be barbaric, they did permit voluntary satis[59]. So although they were imposing a state judicial system which was alien to India, they did recognize some

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[57]. Chew, 1988, p.19.

[58]. Bhattacharji, 1991, p.509.

[59]. Dhagamwar, 1992 p.p. 290-291.

degree of cultural sensitivity, if only for the sake of appearance and political expediency. However, transformation of Hindu tradition into a state system of laws proved to be difficult as it became apparent that Hindu tradition was not uniform. At the government's request, the Nizamat Adalat wrote a second sati draft in September of 1817 in which a different group of religious authorities were quoted to say that sati was not sanctioned by the Sastras, thereby challenging the claims of the religious authorities in the first circular. In response, the government raised the minimum age to fifteen years and made requisite the notification of police so they could determine the legality of the sati : According to the circular, in no instance was a women who was prevented from performing and illegal sati to be prosecuted by the law even if she maintained it to be purely voluntary on her part. In such cases her relatives were to be prosecuted, as they were believed to be primarily guilty party[60]. This stipulation acknowledged the more often than not reality that most women were either physically coerced or strongly persuaded and manipulated. The same circular also sought to prevent illegal satis by proposing that in such cases any property that a widow might have inherited following her husband's death would be left to the discretion of the government. Yet, ironically it was the British government which refused to enact these reforms on grounds that they did not want to interfere with family law and tradition[61]. In other words,

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[60]. Dhagamwar, 1992, p.292.

[61]. Dhagamwar, 1992, p.293.

they were willing to exploit state power to enforce and preserve some degree of tradition, but not support the legal reforms of that tradition, even if the demand to do so came from a section - however small of the community involved. Eventually the government did abolish sati completely by passing the Sati Regulation Act XVII of 1829. But its opponents contested on grounds of religious freedom[62], which they interpreted to mean a collective freedom, as opposed to individual freedom. Approximately six year later, the British government succumbed to these demands by reinstating the legality of voluntary sati. In response, activist groups, such as the Joint Action Committee Against Sati and the Sati Virodhi Sangharsha Morcha objected on the basis of lack of clarity over the issue of voluntary action. They purported that no matter what a widow claimed, sati was never voluntary because not only did all if not most satis involve physical and or mental coercion, but that the only alternative to a widow was a life of dishonour, servitude, and often violent subjugation from her in-laws[63]. Yet these reformers from "within" were not very different from the British in that they were not motivated primarily out of stopping cruelty and violence against women, but conglomerating and consolidating a community and that too, on the criteria the British established for defining tradition and community. Ram Mohan Roy bolstered anti-sati arguments with evidence from the Shastras, rather than

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[62]. Dhagamwar, 1992. p.294.

[63]. Dhagamwar, 1992, p.296.

denouncing the actual violence of the act itself[64].

The Hindu Widows Remarriage Act of 1854 was initiated by a proposal made by Lord Macaulay to the Sudder Courts of Calcutta, Allahabad, Madras, and Bombay. The courts were pessimistic about legalizing widow remarriage to the point where the Sudder Court of Calcutta maintained that widow remarriage "involved guilt and disgrace on earth and exclusion from heaven". Eighteen years later, Vidyasagar submitted a petition with 1000 signatures requesting that the act be passed. This met with such contempt that Brahmins from Poona accused his supporters of not being true Hindus. The government nevertheless drafted a bill and voted. The bill passed ten to one. It was reasoned that because widows were no longer permitted to commit sati, they would have to be permitted to remarry. In 1855 the bill was again proposed which though allowing remarriage, divested widows of rights of inheritance from their deceased husbands upon remarriage. They were, however, permitted to inherit from the children of their deceased husbands[65]. The select committee felt that widows should not be allowed to inherit from their children, either. They also felt that if widows converted to Christianity, their inheritance rights should be maintained. However, if they remarried a Hindu, than their rights should be divested. The members finally agreed that if widows were allowed to remarry, the marriage should not be a Hindu marriage, but a civil

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[64]. Chew, 1988, p.p.32-33.

[65]. Sarkar, 1988, p.56.

marriage; and that widows should nevertheless be allowed to keep what ever their husbands expressly bequeathed to them and or their stridhan. The bill was finally passed in July of 1856. It met wide support from residents of Dacca on grounds that it did not conflict with the Sastras[66]. Vidyasagar cited the Shastras to sanction widow remarriage by arguing that in the Kaliyuga it was difficult for widows to remain celibate, so they should be allowed to remarry so as not to be forced to choose between their instinctive passions and spiritual virtue[67]. So again, reforms from "within" started by the British of equating these texts with traditional values and practices not only focused on religious text, thereby continuing the process started by the British, but they also relied on the texts to consolidate and forge a community in order to control women's sexuality and movement. And it was this control and women's role that was used to distinguish the community, thus resulting in a vicious cycle of the two depending on each Other. For instance, a High Court decision which granted a woman accused of adultery being able to still retain her inheritance rights, resulted in massive public criticism in which the fear was expressed that dharma was becoming extinct as women's chastity was not maintained[68].

As previously stated, reformers only proceeded if they could find scriptural support in the Sastras. Vidyasagar did not

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[66]. Sarkar, 1988, p.57

[67]. Chew, 1988, p.58.

[68]. Chew, 1988, p.40.

support laws regarding the age of consent as he could not find scriptural support for them. He and other reformers also frequently harkened back to the vedic period when women enjoyed more freedom, yet without delving into the reasons for this freedom and its demise[69]. Again, they also sought to change the extremity of practices without challenging the patriarchal foundation for these practices[70]. The child bride's right to protection by consent was politicized in that it was pitted against the husband's religious and customary conjugal rights[71]. The controversy led to three main lines of argument : 1) the orthodoxy who believed there was no real need for change as child marriage was religiously sanctioned and also was in accordance with the existing social conditions, 2) reformers who cited support from the Sastras and 3) reformers who thought the issues should be left to public opinion. While the controversy was initially social and religious in nature, it wasn't long before it became part of the larger politicized nationalist struggle. That religious texts were often inconsistent and vague on the matter led to the orthodox faction claiming the obligation of pre-pubertal marriage and intercourse after every menstrual period, as well as reformists arguing that such claims were not meant to be obligatory[72]. The reformists' claim also implied that religious texts were clearly not meant to be referred to as

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[69]. Chew, 1988, p.10

[70]. Kosambi, 1991, p.1857.

[71]. Kosambi, 1991, p.1858.

[72]. Kosambi, 1991, p.p.1859-1860.

strictly legal texts in that interpretations made a distinction between morality and the law. And only when the reformists argument shifted from the welfare of the girl-bride to that of society in general was their claim taken more seriously[73]. Bombay advocate Daji Bhikaji Khare abandoned the anti-legislation lobby, realizing that change could not be left up to the community as it was those in power within the community who were the most resistant to change. The government finally supported the legislation by shifting the argument into one between religion and morality[74]. The Age of Consent Bill passed in 1891 sought to set a minimum age of cohabitation with females at 12 years of age[75]. Following its enactment, public outcry against it intensified to the extent where a resolution was passed in Solapur to send a deputation to Britain and gain support to force the Indian government to repeal the Act. This proved to be somewhat advantageous to the orthodoxy in that the minimum age for marriage in Britain for girls was 12 years of age, thus setting a limit of just how far reforms could be extended in India. It was also decided in a case in Britain that a husband had rights over his wife, regardless of consent or age[76]. In pushing through the Native Marriage Act of 1872, Keshub Chandra Sen had solicited doctors advice for a suitable age for marrying girls. While they advised 18-19 years of age due to public

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[73]. Kosambi, 1991, p.1863.

[74]. Kosambi, 1991, p.1864.

[75]. Kosambi, 1991, p.1857.

[76]. Kosambi, 1991, p.1859.

opinion, the act set the minimum age, at 14 years for females. However, the act only applied to those who chose to marry under it. So those married under religious or customary law were not subject to it[77].

In realizing conflicts between texts, the government often chose texts in which women were less favoured. For instance, according to Vijaneswara, Mitakshara law defines stridhan to include wealth from inheritance and property partition. However, in 1912, the Privy Council disregarded the and maintained that such wealth would not pass onto a woman's heirs upon her death, but onto the heirs of the persons from whom she inherited[78].

Contrary to the Brahmo Samaj in Bengal, the Mysore Brahmo Samaj was hesitant to support reforms like widow remarriage, and limited their activities to lectures and talks. And not only was the colonial government inadequate in enacting reforms, so were local governments like the Mysore princely state. And when doing so, caste and class differences were hardly addressed[79]. This was particularly problematic in the case of Devadasis. In 1891 the Vrithanta Chintamani noted that some Devadasis of Madras were themselves very wealthy, owned their own property and paid large sums of taxes. It also expressed the

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[77]. Chew, 1988, p.63.

[78]. Kishwar, 1994, p.2149.

[79]. Nair, 1994, p.3158.

fear that the colonial government wanted to abolish the Devadasi system as it was a matriarchal, matrilineal system of female empowerment. Upper-caste unease with the Devadasi system was a result of criticism from British missionaries[80] By 1911, Mysore had ceased to provide patronage to Devadasis, who were subsequently forced to seek other means of livelihood. And although they were a landed class, it was the British system of encoding and hegemonizing select Hindu texts which posed female ownership of property as a problem. It was also the disempowerment of the Maharaja by the state bureaucracy which led to the demise of the Devadasi system. The state government also mandated that as soon as Devadasi positions became vacant, they were not to be filled. Consequently, there was a decline in Devadasi rituals performed in temples. The Mysore state government relied on agamiks to provide textual support for Devadasi abolition. When this was not possible, the government cited female chastity as a value emphasized by the Sastras. And so by providing sexual favours, the Devadasi was portrayed as a violator of dharma, thus making the state appear as dharma's saviour in abolishing Devadasi practice. The government also ruled in various cases that land belonging to Devadasis were to be designated family and or temple property, despite the fact that it was the Devadasi and or her female heirs who paid taxes on this land[81]. So female ownership of property became "disrespectful" because it was a result of more liberal female

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[80]. Nair, 1994, 3159.

[81]. Nair, 1994, p.p.3161-3164.

sexuality, whereas lack of female ownership of property was "respectful" as it was the result of female chastity and piety. Devadasis were then reduced to the proletarian sex trade, and were subsequently then seen as a danger to society rather than as an adjunct. And the state was now able to grant women property rights which were not a threat to the patriarchal family[82].

While it has been argued that the prohibition of Devadasi dedication was a result of the secularization of law which gives the government the power to prohibit certain religious acts[83]. On the contrary the government's intention was to redefine appropriate religious expression in reaction to British missionary criticism and further that Devadasi abolition was not bolstered by non-religious arguments of rights or even public order, but instead religious parity and dharma. So appropriate religious expression was determined religiously, rather than secularly.

By outlawing Devadasi dedication, the government was at odds in that its practice was seen as part of civil law which was governed by religious text and custom. Yet issues like prostitution were addressed as criminal matters. The government was also reluctant to pass legislation for child protection which would exempt Devadasis from its purview, as doing so would in effect demarcate a line between prostitution which was and was

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[82]. Nair,1994, p.3164-3165.

[83]. Jordan, p.258, in Baird 1993.

not approved. Bills regarding both these issues were proposed to various governments, and rejected on grounds that rescue homes for these children would be managed by Christian missionaries. The Devadasi issue was again raised in 1922 by advocate Hari Singh Gour who believed that Devadasis were prostitutes, and as such were antithetical to Hinduism. He argued that their dedication prevented them from exercizing the choice to lead a more moral lifestyle. In response, the government amended the penal code to prohibit prostitution under the age of 18. In 1927 Ramadas Pantalu from Madras proposed a bill to prohibit dedication of unmarried minor girls as Devadasis. The government responded by stating that the issue should be addressed by the IPC amendment rather than special legislation. Because the central government refused to pass laws specifically outlawing Devadasis, provincial legislatures took it upon themselves to do so[84]. In 1929, Muthulakshmi Reddy had moved a bill to outlaw the dedication of women to temples. The Mysore state government passed the bill in 1947 without having to subject itself to criticism of religion in danger[85]. Yet before the bill was passed, religion was the primary, if only, factor in the debate. Reddy pleaded that Devadasis conflicted with Hindu concepts of purity. Devadasis responded by sending memorials to the legislature citing texts to support their status as worshippers of Vishnu and Shiva. They also claimed that their service was originally intended to be chaste and that only those practising

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[84]. Jordan in Baird 1993, p.p.260-262.

[85]. Jordan in Baird 1993, p.p.263-264.

prostitution should be punished [86]. So Devadasis had to a great extent acquiesced to the new governmental pressure by redefining their role within the confines of what the government considered to be religiously acceptable in order to salvage whatever social and financial power they could[87].

Hari Singh Gour secured the Special Marriage (Amendment) Act of 1922, which legalized intermarriage between Hindus, Buddhists, Sikhs and Jain. Rai Saheb Harbilas Sharda Secured the Child Marriage Restraint Act of 1929. Deshmukh Saheb secured the Hindu Women's Rights to Property Act of 1937. Due to Vidyasagar's efforts, widow remarriage was legalized in 1856. Keshub Chandra Sen is responsible for the Native Marriage Act of 1872 which raised the minimum age of marriage to 14 years for females and 18 years for males, made monogamy mandatory and legalized inter-caste marriage[88]. Yet very little actually changed for women, and what did change was stringently controlled and restricted[89]. This was so because the primary goal was not the upliftment of women, but rather the synthesis and sustenance

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[86]. Nair, 1994, p. 3158.

[87]. Jordan in Baird, 1993, p.264.
On the contrary in 1910 Bangalore Nagarathnamma, a Devadasi herself, published her version of the eighteenth century Radhika Santwanam by Muddu Palani, which basically outlined female sexual pleasure. Reformists responded in a furore over the book's explicity. In response, the government IPC, (Nair, 1994, p.3164).

[88]. Mahmood, 1986, p.100.

[89]. Chew, 1988, p.15.

of the community[90]. The upliftment of women was not seen as a necessity in and of itself, but a necessary factor in the larger movement for independence[91].

D. Hindu Law Reform During and After Independence

The government's purpose in passing the Hindu Code Bill (HCB) was to move away from piece meal legislation passed during the late and early nineteenth and twentieth centuries and towards a comprehensive code for all. In February 18, 1939 Akhil Chandra Dutta introduced a bill to amend the 1937 and 1938 HCL reports so that daughters would be granted inheritance rights. Most of the provisional governments were against it, and those who showed support felt it should not be rashly passed as "piecemeal" legislation. On November 22, 1940 Datta requested a select committee be appointed to look into the matter. The government did not think it was good idea and instead proposed that a small group of learned Hindu lawyers further probe into the issue[92]. On April, 22, 1941, the Federal court decided that both the Hindu Women's Rights to Property Act 1937 and the amended Act of 1938 would not apply to agricultural land, but instead to other property. In considering whether 'unchaste' widows should be excluded from the Act the HLC cited many women who felt they

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[90]. Chew, 1988, p.22.

[91]. Chew, 1988, p.4.

[92]. Hindu Law Committee (HLC) Report Appendix VI Home Dept. Resolution 25th January 1941.

should"[93]. The HLC contended that the reforms the acts sought to enforce affected other aspects of joint family succession, which were not adequately dealt with such as should a widow have the right to divest a widowed daughter-in-law by adopting a son? Should a widow of a coparcenary son who has separated his residence from the family have the same rights of inheritance to his father's self acquired property as sons who are still living jointly as coparcenaries? The HLC also felt that provisions were not made to address the rights of widows of lower castes or to curtail will-making power so as not to disinherit widows or daughters. Members also admitted the shortcomings of relying on religious texts to enact reforms, such as the fact that these texts either did not address specific situations. or when they did they contradicted each other. For instance, the author of Mitakshara law bolsters his argument for a son-less widow to inherit her husband's property by invoking Yajnyavalkya and rejecting the Manusmriti as the latter would not allow for her to inherit. Yet he cites the Manusmriti with regards to the right of a daughter's son to inherit from his maternal grandfather as Yajnyavalkya makes no mention of such right[94]

So while the contradictions in the texts themselves could allow for such broad and often contradictory interpretation to support progressive reform,relying on them had their limits in that if none of them addressed a particular situation, the

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[93]. HLC Report, 1941, p.p.2-5.

[94]. HLC Report, 1941, p.p.2-5.

reforms if strongly supported could not be justified by religious doctrine. And though the HLC heeded the pleas of women's organizations to revamp and codify personal law according to gender justice, the Committee maintained that the means had to be moderate through a codification of Hindu law first[95]. So the committee's first priority was to amalgamate the community.

While Manu hardly recognizes women's rights to inheritance Yajnyavalkya and Brihaspati argue that since women are the surviring half of their husbands, they cannot be divessted of property rights. In the 9th century A.D. Visvarupa also wrote that widows of sons and grandsons should have inheritance rights as they represent the surviving halves of their husbands[96]. Though Manu does support inheritance rights for daughters, many who completed the HLC's questionaire did not support her equal rights with that of sons as she was given preference to her mother's property as per the 1937 and 1938 Acts. Whereas, sons had no such rights in his in-law's property[97]

The committee recommended that a widow's chastity be made a ground for disqualification only when her husband made such a stipulation in his will, or when it was questioned in court proceedings to which husband and wife were both parties.

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[95]. HCL, Report, p.5.

[96]. HLC, Report p.9-11.

[97]. HLC, Report, p. 13.

While a widow's right to inherit as a coparcenary was enacted by the Acts, no court to this date classified whether this right left her as tenant-in-common, or as an actual coparcener with rights of survivorship[98]. The federal court took the view that the 1937 Act was not properly passed as it did not go through the proper channels of the general and provincial legislatures[99]. On federal 18, 1939 , Akhil Chandra Dutta introduced a bill to amend the 1937 and 1938 acts so that daughters would be granted inheritance rights. Most of the provincial governments were against it, and those who showed some support felt it should not be rashly passed as "piece meal" legislation[100]. In allocating rights of succession to daughters, religious duties and services of sons were taken into account in that the sons were still given double the share of daughters because they had to settle the daughters' marriages in the absence of their father, offer pindas to their ancestors and perform shradhas[101]. To those outside the HLC, preservation of patriarchy was more important than adherence to textual law. For instance, Pandit Bulagi Ram Vidyasagar, President of the Anti Hindu Code Committee of Amritsar was opposed to reform of the Mitakshara laws, but also felt that even if the Mitakshara recognized a minimal right of inheritance of daughters, such rights should not be granted.[102] Furthermore

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[98]. HLC Report, 1941, p.14.

[99]. HLC Report 1941, pp.15.

[100]. HLC Report 1941, Appendix VI.

[101]. HLC Report 1941, Appendix-I in the Federal court, p.26.

[102]. HLC Report, 1947, p.7.

some of these organizations were more intent on the communal preservation of the community than on the reform of personal law. Organizations like the Maheshwari Sabha, for instance, who were either against the Bill or dubious about it, felt that only Hindu members of the legislature should be allowed to vote on it[103]. With regards to the distribution of agricultural land, the HLC felt that such land should be handled by laws specific to agriculture[104]. The committee also justified giving the daughters half a share of the sons in the father's property by giving her double the share of the son in the mother's property[105].

The HLC was commissioned to address marital rights. One of the ground on which mandatory monogamy as opposed was that those Hindu men who would wish to marry again would covert to Islam. On the other hand Mrs. Ambujammal of Madras felt that if it was not secured, many Hindu women would become Christian to secure it. The HLC refuted such claims by pointing to the Madras Marumakattayam Act which enforced monogamy upon certain communities, which as a result did not practice a high rate of conversion to evade the Act[106]. Apparently communal preservation of the community was given first priority on both sides of reform. The argument put forth for divorce also ran on communal

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[103]. HLC Report, 1947, p.7-8.

[104]. HLC, Report, 1947, p.9.

[105]. HLC, Report 1947, p.10.

[106]. HLC Report, 1947, p.19.

lines in that it was claimed that many Hindus convert to Christianity or Islam in order to obtain a divorce[107]. In response the HLC proposed provisions for divorce, but also claimed that even where divorce was accepted by custom or legally allowed, it has been rare and infrequent, and practised only in extreme cases[108]. Again, the priority was not law reform for its own sake, but for the sake of hegemonically preserving the community. The HLC supported the enactment of civil marriages within the code so as to give a right to Hindus to divorce and simultaneously keep them from converting to other religions[109].

The HLC was urged by many to exclude converts and their descendants from inheriting from Hindu relatives and argued that if one should want to reconvert to Hinduism in order to inherit he would have to do so before the process of succession began and would have to be able to prove that he is actually Hindu for a minimum amount of time. The committee found itself in a dilemma in that if this restriction were not imposed, thenm logically it would follow that non-Muslim relatives of Muslims would then be able to inherit from their relatives which is not permitted in Muslim personal law[110]. While the committee supported the right of widows to full estates, they also felt that widows should have to appeal to the courts to determine whether or not they had

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[107]. HLC Report, 1947, p.22.

[108]. HLC Report, 1947, p. 24.

[109]. HLC Report 1947, p.32.

[110]. HLC, Report, 1947, p.27-29.

genuine need to sell land from their inherited estates[111]. So even if a woman was granted full ownership as per HLC's own suggestion, she would be subject to restriction not applied to men.

Dr. Dwarkanath Mitter seemed to be the only member voicing dissent from the Bill, his reason being that the majority of the respondents to the Committee's questionnaire objected to reforms. This majority argued that there was no religious sanction for reform and unification, and further that an ill-representative government was in no position to enact reform[112]. The respondents objected to daughters' rights to inheritance as such would result in excessive fragmentation of family land and introduce "outsiders into the family". Others argued that such rights would also "Islamicize" Hindu customs[113]. They also felt that widows should not be given absolute rights of inheritance of their husbands' estates, as this would take land away from the family[114]. Mitter himself objected to mandatory monogamy as it was unnecessary since most Hindus were monogamous[115]. He was also opposed to intercaste marriages and provisions for divorce in sacramental marriages as they were contrary to religious texts and also created undue hardships for divorced women. As such, he

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[111]. HLC Report, 1947, p.31.

[112]. HLC Report, 1947, Appendix IV, p. 49.

[113]. HLC, Report, 1947, Feb. 29, 1945.

[114]. HLC Report, 1947, Feb. 29, 1945, p.139.

[115]. HLC Report, 1947, Feb, 29, 1945, p.151.

felt that divorce should be handled by the civil marriage acts[116].

However, despite Mitter's objections, the Committee proposed a Bill to be effective from January 1, 1948. This Bill among other thing sought to exempt agricultural land from intestate succession, as well as land which was customarily inherited by a single heir. Hindus governed by the Marumakkattayam Aliyasantanam, or Nanmbudri systems of the South were also to be exempted from the Bill's provisions for intestate succession[117]. The Bill would require saptapadi for sacramental marriages to be recognized as such[118].

In cases where an assessor would have to be appointed by the court to ascertain the validity of petition for nullity or dissolution of marriage, or separation, he would have to be a Hindu[119]. A husband would retain guardianship of his wife. A mother would only be given primary guardianship over a child if the child was illegitimate[120]. Hindu men would retain the power

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[116]. HLC Report, 1947, Feb. 29 1945, p. 175.

[117]. HLC Report, 1947, Feb. 29, 1945, p.181-183.

[118]. HLC Report, 1947, Bill of Hindu Code effective Jan.1, 1948, p.52.

[119]. HLC Report, 1947, Bill of Hindu, Effective Jan.1, 1948, p. 64.

[120]. HLC Report, 1947, Bill of the Hindu Code Effective Jan.1, 1948, p.70.

to permit or forbid their wives from adopting after their death[121]. A widow would also relinquish the right to adopt if she were to remarry, or if the son of her husband were to pass away, leaving a widow and or a son[122].

Although the Bill did not intend to enact reforms significantly different from reform laws in existence, it did spark extensive and inconclusive debate amongst the Constituent Assembly. Mitakshara law only recognizes the father, son, grandson, and great grandson as coparcenaries. It, however recognizes the right to personal property and the right to will such property away. Ambedkar sought to codify the Dayabhaga system which would allow one to hold personal property and also to dispose of it as he so chooses. He also wanted to give widows, daughters, and widows of deceased sons equal rights to inheritance, as well as granting daughters half the son's share in the father's personal property. As of this time both the Dayabhaga and Mitakshara schools only permitted women to inherit depending on their financial or marital status. According to the Dayabhaga system, the father inherited before the mother. Ambedkar sought to reverse this. He also wanted to consolidate the various classifications of stridhan into one and advocated sons to receive one half of the daughter's share in stridhan[123].

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[121]. HLC Report, Bill of Hindu Code Effective Jan. 1, 1948, p.71.

[122]. HLC Report, Bill Report, 1947, Bill of Hindu Code Effective Jan, 1, 1948, p.p. 73-74.

[123]. CADL Vol. V, No. 4, April, 9th 1948, Column, 3629- 30.

Furthermore, instead of revamping the traditional provisions for maintenance, which obligated beneficiaries to maintain dependents of the deceased, he wanted to obligate husbands to maintain their wives, even if they were living separately. He also sought to validate marriages of castes. Ambedkar was also a strong proponent of mandatory monogamy and felt that a dissolution of marriage should be permitted on four grounds : 1) impotency, 2) sapinda, 3) lunacy, and 4) fraud. At the same time children of these marriages were not to be classified as illegitimate. He proposed to legalize seven grounds for divorce : 1) desertion, 2) conversion or apostacy, 3) soliciting or engaging in prostitution or adultery, 4)lunacy, 5) fatal leprosy, 6) venereal disease and 7) cruelty. He further advocated that a husband be required to secure his wife's permission for adoption and that widows be allowed to adopt if their husbands left written permission via a deed or will[124].

Responses to Ambedkar's proposals varied from partial or conditional acceptance to acrimonious opposition. Dr. B.Pattabhi Sitaramayya, while theoretically supportive of broadening inheritance rights for daughters, felt they would be difficult to implement as the majority of Indians were very poor, and such rights would only partition family property even more. Yet he felt widows should be allowed to adopt if they were given oral permission by their husbands. His reasoning was that widows usually intended to adopt to accomplish what their husbands

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[124]. CADL, Vol. V No,4 April 9th 1948, Column 3630.

couldn't - to continue the family lineage[125].

Naziruddin Ahmad opposed the Bill categorically, as it was not in agreement with the findings of the HLC report. He also contended that massive litigation would ensue if women pursued these newly acquired rights. What would then result was the fragmentation of the Hindu joint family, and leave Hindus in the same poverty stricken state as Muslims[126].

Hansa Mehta felt that though an improvement, the Bill was still a far cry from the principles of gender equality as enshrined in the fundamental principles of the Constitution. She proposed that daughters and sons have an equal share in the mother's and father's property, and that husbands and wives should have equal shares in each other's properties. She also raised the point that the fear of land fragmentation was only raised with reference to daughter's inheritance rights, and yet it could also happen if there was more than one son. To prevent land fragmentation, she suggested it either be sold or collected[127]. Yet even Mehta could not avoid invoking the non-secular in that while the Bill proposed that in cases of desertion, the deserted spouse had to wait five years before being granted a divorce, Mehta cited the Narada smriti to argue that a woman only had to wait five years if she had children. Otherwise, she only had to wait three years. Mehta, however,

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[125]. CADL Volume V, No.4, April, 9th 1948, Column 3637- 38.

[126]. CADL, Vol. V, No.4, April, 9th 1948, Column , p. 3640.

[127]. CADL, Vol. V, No.4, April 9th 1948, Column 3640.

still maintained a more progressive stance than the others in that she felt both parents should be co-guardians of their children. She added that adoption should be based on secular law, as India was a secular state. And children should not be adopted solely for the well-being of the family lineage[128].

Shri Ram Sahai of Gwalior State opposed Mehta's arguments for inheritance rights on grounds that they contradicted the Dharmasastras, and also that more rights would be conferred upon women as they would then have rights in their own patrimony as well as their in-laws' estates, whereas men would not have such rights in their wives' or in-law's properties[129].

Begum Aizaz Rasul supported the Bill and acknowledged that despite provisions in the Shariat Act to the contrary, most Muslim women were denied their inheritance rights. So if this Bill was enacted, Hindu and Muslim woman would be at par, if only on paper[130].

Rohini Kumar Chaudhuri argued that the Bill should be entitled the Hindu Women's Code, as it addressed them only, and this contradicted secular principles. He opposed the Bill as it did not consider India's multifarious customs and usages and felt

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[128]. CADL, Vol. V No.4, April 9th 1948, Column 3643.

[129]. CADL, Vol. No. 4, April 9th 1948, Column 3644.

[130]. CADL, Vol. V April 9th, 1948, Column 3646.

there should instead be a more comprehensive code for all communities[131].

Dr.S.P.Mukerjee argued that the Bill should be made mandatory for all Indians. He also felt that most of the opposition came from Muslim members like Ahmad. He accused the government of deliberately ignoring reform in Muslim personal law. Yet Mukerjee was also ambiguous about the scope and extent of the Bill. For instance, although he opposed legalized divorce and felt monogamy should be enforced on all citizens, he simultaneously argued for the code to be optional[132].

Shri B.V.P.Sinha opposed Mookerjee's arguments against change. In his arguments against polygamy he cited the Yajnyavalkya, Manu, and Apasthambha which allowed a husband to take a second wife under mitigating circumstances. He also cited the Narada and Parashar to bolster his claims for wives' rights to take on a second husband. He was in favour of divorce as not permitting it would compel people to convert; hence outlawing it would lead to the demise of Hindu society. He was a proponent for a uniform Hindu law to maintain Hindu society and ethos[133].

Yet even ardent reformers had their limits. Ambedkar conceded that agricultural property should be left up to the

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131. CADL, Vol. V No4, April 9th 1948, Column 3648

132. CADL, Vol. V No. 4. April 9th 1948, Column 3649.

133. Parliamentary Debates, Vol. XV, Part II, Sept. 17, 1951.

during the colonial period because the reformers themselves were lawyers who were educated in English law, and therefore viewed the issue of personal law through the same scope as the British[137]. The reformers asserted the need for uniformity in Hindu personal law without explaining why. Those who questioned them on the matter were dismissed by Nehru and other self-proclaimed progressives as reactionaries. It was believed by some opponents of the Bill that community-based law would be easier to implement[138]. Rohini Kumar Chaudhari gave the example of the Khasi community which grants full inheritance of the parental home to the youngest daughter.

Furthermore, no reason was given as to why the Hindu Minority and Guardianship Act of 1956 was passed when there was already existent the Guardians and Wards Act. The Act of 1956 also introduced the British concept of 'natural guardian', which made a distinction between 'care and custody' and absolute guardianship[139]. So this 'reform' was not intended for the purpose of reforms, but to conglomerate a community and set it apart from others, and consequently communalize the entire issue of family law reform and gender justice. And the British process which was incorporated served to conglomerate two different patriarchies. While amendments were proposed to grant mothers custody of children up to the age of 12 or 14 years, Pataskar

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[137]. Parliamentary Debates, Vol. XV, Part II, Sept. 18, 1951.

[138]. Kishwar, 1994, p. 2146.

[139]. Kishwar, 1994, p. 2147.

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[138]. Kishwar, 1994, p. 2146.

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with maintenance payments would also not be a criminal offense, thereby compelling the wife to drag the husband to court, rather than seeking restitution via the police in such instances[141].

As early as 1945 the HLC recommended that women be made coparceners. Under Ambedkar the Rau Committee sought to abolish the Mitakshara coparcenary system and replace it with the concept of inheritance by succession. This met with tremendous opposition and the Mitakshara system recognizing only males as coparceners was kept intact. Those who fell under the matrilineal systems of the south were also sought not to be exempt from this new code. When K.C.Sharma suggested that women be made coparceners in 1956, Pataskar rejected this proposal. The Hindu Succession Act that was passed allowed state governments to enact legislation preventing land fragmentation, even if such laws deprived daughters of inheritance. Men and women were also to have different its of heirs. For instance. while a woman's in-laws were given priority over her parents, a man's in-laws were not even mentioned. This digressed from the traditional stridhan system as practised and or encoded in various sastras which were not mentioned. While there was extensive debate over the rights to residence and maintenance of daughters who were deserted, the same was not even mentioned of sons. And though this right was opposed by Pataskar, it was eventually incorporated[142].

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[141]. Kishwar, 1994, p.2153.

[142]. Kishwar, 1994, p.2153-2154.

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[141]. Kishwar, 1994, p.2153.

[142]. Kishwar, 1994, p.2153-2154.

Another disputed issue was the right of the father to will away as much property as he wished. Though not even recognized by Mitakshara law, Pataskar bolstered his argument for such provision by arguing that those who don't wish to be governed by it would be able to opt for the existing Mistakshara system[143].

Because the Hindu Code Bill was justified and advocated by various members of the HLC and Ambedkar, despite popular opposition, it could be argued that this was the first sign that gender rights were to be equated with human rights which should not be subjected to the will of the majority at the cost of the minority. And despite his inegalitarian view, Pataskar, like Ambedkar, also showed an inclination towards equating gender rights with fundamental individual rights in that he sought to pass the Hindu Code Bill because even though he admitted that most women would not support these reforms, they were nevertheless necessary for society, and perhaps more so to protect those few women who would avail of them.

That the first report attempted to justify reform on the basis of ancient Hindu tradition and custom[144] proves that while religion may establish a moral framework and derive laws from this framework, change of these laws into various customs is of human agency and therefore reform cannot be efficacious via religious doctrine and institutions.

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[143]. Kishwar, p.p. 2154-2155.

[144]. Kishwar, p.p.2154-2155.

In modifying the Bill prepared by the HLC, the Joint Committee relied on the interpretation of Golap Chand Sarkar Shastri to argue that Vedic texts had all along been misinterpreted by the courts, and further that these texts should be given absolute supremacy as they did not exclude daughters from equal inheritance rights as sons[145].

Opponents of the Bill argued that because the British did not undertake such drastic reforms, the independent government should not be able to do so either. They also maintained that the state's interference would only stagnate the natural evolution of Hindu Law[146]. Yet there seems to be no evidence that this natural evolution would lead to a gender egalitarian society. Renuka Roy herself admitted that the denigrated position of women was the result of this natural evolution. Proponents of the Bill argued that since other aspects of Hindu law addressed in ancient texts had been replaced by modern state law with no opposition, there was no reason for laws regulating the family to remain stagnant[147]. Reforms were eventually accepted because proponents made clear the intention of changing customs rather than text[148]. Ambedkar opposed allowing customary practice to co-exist with enacted laws as

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[145]. Kishwar, 1994, p.2156-2157.

[146]. Parashar, 1992, p.85.

[147]. Parashar, 1992, p.88.

[148]. Parashar, 1992, p.58.

doing so would diminish the power of Parliament[149]. While attempts were made to retain customary practice, there was never any debate on why some were saved and some were not[150].

Though the HCL agreed that a wife becoming a concubine to another man would be sufficient grounds for a husband to petition for divorce, they could not come to any consensus as to whether or not a wife should be allowed to so petition if her husband kept a concubine[151]. Despite Renu Chakravarty's arguments for cruelty and desertion made to be grounds for divorce and not just judicial separation, Pataskar and others refuted on grounds that unnecessary divorces would ensue[152]. Chakravarty also pleaded against maintenance being subjected to women's chastity in that in order to evade maintenance, false charges could very easily be fabricated against women. Yet Pataskar, although acknowledging this as a very real possibility, maintained the chastity clause, as it was usual in such cases[153].

The Joint Committee and the HLC provided various reasons for a widow's right to absolute ownership of her husband's estate such as if she is capable of disposing of her

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[149]. Parashar, 1992, p.93.

[150]. Parashar, 1992, 94.

[151]. Parashar, 1992, p. 95..

[152]. Parashar, 1992, p.99.

[153]. Parashar, 1992, p.107.

stridhan property as she wished , then she should be granted the same right to do so with her husband's estate. Yet none of the arguments cited issues of gender equality and justice[154].

Opponents of the Bill also felt that it was not fair that the consensus of those who stood to benefit from the reforms (women) were being heard, but not that of tnose who stood to lose (men)[155].

While everything from global consensus to the Constitution to the Smritis were invoked to plead for daughters rights to inheritance, these factors were not considered in determining the degree of her share[156]. Although the right of sons to partition natal homes upon inheritance was not limited, the right of daughters to do so was in that only unmarried, divorced or widowed daughters had a right of residence in the natal home, and still had no absolute rights to partition it. The government justified this clause by arguing that once a daughter was married, she'd be more inclined to act in the interests of her husband, and so could not be trusted[157].

Though Pataskar purported not to be relying on the Smritis as the sole criteria for adopting a daughter, he

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[154]. Parashar, 1992, p.110.

[155]. Parashar, 1992, p.117.

[156]. Parashar, 1992, p.118.

[157]. Parashar, 1992, p.119.

simultaneously argued that this right did not conflict with any religious tenets[158]. He also argued that while adoption by husbands was relevant to the maintenance of society, that of wives was not and so should not be inclined[159]. He reinforced the view that fathers should remain the natural guardians of legitimate children, whereas mothers should remain the natural guardians of illegitimate children[160].

The AIWC also fell in line with the government's piece meal attempts at personal law reforms in that they also ignored issues of matrimonial property and women's economic independence[161]. For instance, women's divorce rights were limited in that although they could petition for divorce on more grounds than in the past, they weren't given equal property rights with regards to natal or matrimonial property. Yet they were to be equally liable for maintenance upon divorce[162].

Furthermore, even though polygamy was prohibited, only the wife could file a charge against her husband to that effect. So if she did not or could not sue her husband, he was not to be held criminally liable for bigamy[163].

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158. Parashar; 1992, p.121.

159. Parashar, 192, p.122.

160. Parashar, 1992, p.129.

161. Parashar, 1992, p.130.

162. Parashar, 1992, p.130.

163. Parashar, 1992, p.131

Moreover, the passage for the Hindu Code Bill proved that reforms via personal law raised rather than resolved issues of community and communalism. While some repeatedly objected to the participation of non-Hindus in Hindu law reform, the government did not reprimand such accusations, but rather silently condoned them[164]. In other words, the government action as well as inaction only served to communalize the issue. And when Buddhists in Madras protested to being included in the purview of the Bill and wanted to be governed by Burmese Buddhist law instead, the government responded by arguing that due to the lack of protest from other Buddhist communities in the country, they would all be governed by the Hindu Code Bill[165]. Had the government instead proceeded towards a uniform civil code it could have invoked sovereign jurisdiction as a reason for governing family laws of various communities within the state boundaries. Yet, because it proceeded to define communities via state enacted personal laws, it created a discourse which left no option for groups or individuals to define themselves. The government also justified its inclusion of Sikhs on the legal technicality of stare decisis, a decision made in the recent past which till then had not been altered[166]. So not only was the government's intention hegemonic and Hindu chauvinist, but its pattern of hegemony was inconsistent.

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[164]. Parashar, 1992, p.132.

[165]. Parashar, 1992, p.133.

[166]. Parashar, 1992, p.136.

Ambiguity on the part of the government reflected the fact that Nehru himself, although a staunch reformist, was not clear about the process of reform. He himself said ",no people, no group, no community, no country has ever got rid of its disabilities by the generosity of the oppressor.....the women of India will not attain their full rights by the mere generosity of the men of India, they will have to fight for them and force their will on the men folk before they can succeed. Rather than initiating drastic or revolutionary reform at the top, Nehru believed that change would have to be a product of a gradual process of education and modernization[167].

While the Karachi Congress of 1931 predominantly supported the fundamental rights resolution, most of its members were later vehemently opposed to the idea of a uniform civil code or a Hindu Code Bill. In 1931, they wanted to prove to the British that at some level they were more progressive and therefore capable of self-rule[168]. However, after independence, their sexist and misogynist prejudices became very clear in the debates over the Hindu Code Bill[169]. So women in the nineteenth century as well as during the struggle for independence were used merely as pawns for men's political mileage. Because of such widespread opposition, Nehru decided to pass the Hindu Code Bill in four separate acts. However, due to the real politic,

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[167]. Parashar, 1992, p.136.

[168]. Parashar, 1992, p.108.

[169]. Parashar, 1992, p.p.102-103.

Ambedkar resigned in 1951, frustrated not only with the political opportunism expressed by politicians in the pre- and post-Independence periods, but with Nehru's lack of sincerity on the issue and the lack of support he got from him throughout the debates[170]. The intention, then to steer away from piece meal legislation actually led to it in the end.

Groups opposing the Hindu Code Bill were conservatives in the Congress like Vallubhai Patel and Rajendra Prasad, Hindu fundamentalists like Deputy Speaker Ananthasayanam Ayyangar who advocated polygamy in cases where couples were not able to have children, the Hindu Mahasabha and its women's wing, Sikh representatives who did not want to be included in the Hindu fold, Muslim representatives like Naziruddin Ahmed, and women representatives like Sucheta Kripalani who felt the Bill was not extensive enough in reform[171]. Because, only Hindu personal law was sought to be reformed and that too, only for Hindus, N.C.Chatterjee argued, "Why not frame, if you have got the courage and wisdom to do it, one uniform civil code? Why are you then proceeding with this communal legislation?"[172] Prasad felt the issue should be determined by the national elections[173]. Monogamy was opposed on many grounds, the most vocally expressed of which was communal in that if solely imposed on Hindus, it

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[170]. Som, 1994, p. 167.

[171]. Som, 1994, p. 168.

[172]. Som, 1994, p.169.

[173]. Som, 1994, p.171.

would allow the Muslim population to multiply faster than the Hindu population[174]. It was also not clear what constituted being essentially Hindu. For instance, Hindu Mahasabha' ites like S.P. Mookerjee were opposed to more liberal customs in the South[175].

Women also bought into their own oppression in that the Akhil Bharatiya Mahila Hindu Mahasabha sent a representative to Viceroy Lord Warrell to request him to remove feminist activist Renuka Roy from the Bill's proceedings. Feminists, too, had their limits in that Renu Chakravarty cautioned against exaggerated feminism which would only impede the cause[176].

Nehru believed that while the repercussions of modernity on the family "rampant" in the West were unavoidable in the process of modernization, he did not feel that they should serve to evade reform[177]. He also realized that conservatives like the Hindu Mahasabha were exploiting the issue of communalism for their own political gains[178]. Yet he was the one who gave them the issue to exploit by framing the entire debate on reform on religious, communal, and communitarian grounds.

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[174]. Som, 1994, p.171.

[175]. Som, 1994, p.p.172-173.

[176]. Som, 1994, p.174.

[177]. Som, 1994, p.p.174-175.

[178]. Som, 1994, p.176.

There are also doubts as to Nehru's sincerity in that he not only succumbed to the political pressures of those conservatives like Prasad, but also rarely if ever publicly supported Ambedkar's efforts[179]. While Ambedkar, sought to radically change Hindu society by steering away from a 'Hindu ethos', Nehru felt that it was this very 'ethos' which could enable Indians to adapt to change[180]

Because of Nehru's piece meal tactics, major loopholes remained in the Bill, such as the fact that while the Hindu Marriage Act required all marriages to be registered, marriages not registered were simultaneously not to be declared invalid. Furthermore, while daughters who were married, widowed, or separated were allowed to reside in their natal home, they weren't allowed to partition it until the sons agreed to partition their share[181], And though Nehru saw to the Bill to be a symbolic step towards reform as it was optional and not mandatory, those with the option were male , while those most affected were female.

Hindu "tolerance", according to Dumont like all other strategies of "tolerance" by other religious institutions, always presumes a hierarchical ranking[182] and a biased and subjective

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[179]. Som, 1994, p.180.

[180]. Som, 1994, p.179

[181]. Som, 1994, p.182.

[182]. Som, 1994, p.183.

framework of judgment. While Baird maintains that law makes the distinction between the legal and the religious[183], it can also be argued that religion too makes a distinction between the legal and the religious, more specifically religiously moral. The Hindu Code Bill distinguishes between Hinduism as a religious and legal category. For instance, the Hindu Succession Act of 1956 applies to anyone who is not a Muslim, Christian, Parsi, or Jew, as well as those who otherwise would not have been governed by Hindu law[184]. So Hindu law as such has nothing to do with personal religious conviction. In no "Hindu" texts is there any mention of a greater Hindu consciousness or Hinduism[185] Modern discourse has, however, assumed that these texts represented historical reality, while these texts were actually followed by a minority of people. This is what left the Constituent Assembly and the courts with the task of defining "Hinduism" and "Hindu", and to what and when such terms should apply[186] And in so doing it has actually served to exclude certain customary laws of certain groups by defining and categorizing groups on the basis of inclusion or exclusion of Hindu law. So now it is the onus of the individual to prove that Hindu law should not be applicable to him. Hence the individual has to redefine him self within the confines of the state.

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[183]. Som, 1994, p.p. 186.

[184]. Som, 1994, p.187.

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[186]. Som, 1994, p.189-190.

The priority of the government in passing the Hindu Code Bill was to conglomerate and hegemonize a majority community, rather than to reform family law for the benefit of women. For instance under the Hindu Marriage Act of 1955, if after marriage one spouse converts to another faith, the other spouse reserves the right to sue for divorce on grounds of apostasy. According to the Hindu Succession Act of 1956, if both parents convert to another faith, then automatically so do the children. Consequently the children cannot inherit from a Hindu relative unless they reconvert. The Hindu Minority and Guardianship Act of 1956 stipulates that if either parent has renounced Hinduism, he automatically relinquishes his right to guardianship. And the same condition is applied to a husband's guardianship rights over his wife. According to the Hindu Adoptions and Maintenance Act of 1956, if a Hindu husband wants to adopt, he needs his wife's permission only if she is Hindu. Hindus can also only adopt Hindus. And if the person adopting has a Hindu son, grandson, or great-grandson, then he cannot adopt a son. But if none of these three are Hindu, then he can adopt a son who is Hindu. The same rule applies to the adoption of daughters[187]

The Hindu Marriage Act of 1955 does not require consent for a marriage to be valid[188]. So conceivably a woman can be forced into a marriage without being able to dissolve it

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[187]. Smith, in Baird, 1993, p.337.

[188]. Baird, 1993, p.42.

on such grounds later. The Act also recognizes customary divorce via the gram panchayat, caste panchayat, or in writing in a tyaga-patra or farkat-nama [189]. Under the Act, neither spouse can apply for divorce before one year from the marriage date. The court can hear petitions for divorce within a year of the marriage date to determine if there is extraordinary hardship placed upon the petitioner; however, this is subject to the discretion of the court[190]. Orders for divorce may be amended if the favoured party being the wife has not remained chaste, or if the favoured party being the husband has had sexual intercourse with another woman outside of wedlock[191]. However being unchaste can be construed in many ways leaving room for points of vagary and various criteria being used to judge the wife. Yet the husband can engage in anything short of intercourse and he is not to be remanded. And the reforms that have been made seem futile if customary law, even if unreformed, can be enforced by the state. What becomes clear is the state's intention for reform not for reforms sake, but for reform at the political and electoral convenience of the state.

E Hindu Law Reform Since Independence

The government's quest for defining what constitutes essentially religious has led to several legal anomalies, as

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[189]. Baird. 1993, p.43.

[190]. Baird, 1993, p.p.42-46.

[191]. Mahmood, 1986, p.23,

well. For instance if a Hindu male becomes a renunciant, socially his wife is still considered a sumangali, or auspicious women. Yet because he dies a "civil death", she is granted inheritance rights to his property like those of a widow. She also reserves the right to sue for divorce because her husband is not fulfilling his conjugal duties[192]. So in trying to incorporate religious tenets within a modern legal framework, the government has not made up its mind how renunciation should be legally defined. In Krishan Singh V.Mathura Ahir AIR 1980 SC 707 it was decided that if custom allowed Sudras to become sanyasis, then it would be legally permitted and as such would also comply with Part III of the Constitution[193]. Hence the Court's focus on customary law and collective rights in order to protect an individual's rights made it clear that the priority was not this individual right.

And due to the fact that contrary to the pre-colonial period, most Devadasis and basavis today are from lower castes, and further that female chastity and sexual subordination has been emphasized in the colonial and post-colonial period in order to demoralize Devadasi dedication, it is not surprising that these women suffer from very low self-esteem, especially given the lack of respect that was previously accorded to Devadasis[194]. Hence the prevalence of fundamental 'Hindu' ideals

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[192]. Mahood, 1986, p.24-25.

[193]. Diwan, 1983, p.32.

[194]. Diwan, 1983, p.164.

remnant of a colonial past.

Over a century after Sati was banned by the British, in response to the sati committed by Roop Kanwar in 1986 in Rajasthan, two acts were passed in 1987 - the Rajasthan Act and the Central Act - both of which prohibited Sati. Both these acts differ from the various Acts passed during the colonial period in that they recognize the widow as the primary guilty party to be charged, and mandate that she be punished with imprisonment and or fine. Secondly, by recognizing sati only as a voluntary act, any relatives or in-laws who may have played a role are seen as second parties to the crime and are to be charged with the lesser offense of abetment. Furthermore if a women is rescued and charged with attempted sati, the burden of proof to clear her name is placed upon her. This violates the very premise under which criminal law was intended to be practised in a liberal nation-state, which was in theory designed to protect the individual from the tyranny of the state[195]. So though sati is prohibited, the 1987 Acts define the women to be the primary responsible and guilty party rather than seeing her as the victim. And while the women is charged with attempted suicide, those aiding or abetting her would be charged with aiding or abetting murder[196]. So the state is not clear as to whether or not to legally define sati as suicide or murder.

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[195]. Diwan, 1983, p.350.

[196]. Diwan, 1983, p.356.

In the 59th report of the Indian Law Commission it was opined that cruelty should be made grounds for divorce and not just for judicial separation. The Commission also felt that divorce should be granted within a minimum of one year of its application, and that trial proceedings should commence no later than six months after the petition is served[197]. It also recommended that only spouses should be allowed to file for divorce, and not third parties[198]. At present, several communities in Rajasthan allow a woman to end her marriage, with the condition that her new husband would have to pay their ex-husbands a bride price. Yet this still assumes that a women only leaves a marriage to enter into another one. And because the Hindu Code Bill makes provisions for customary divorce[199], It is conceivable that if a wife seeks a divorce under the Bill's provisions, her husband can refute it by claiming that the couple fall under customary law, and so the Bills, provisions for divorce do not apply. In any case, the outcome is left up to the discretion of the judge[200].

Chapter IV of the Special Marriage Act of 1954 mandates that all those legally defined as Hindus coming from joint families are automatically severed from their families upon marrying under this Act. However, under special provisions this

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[197]. Narayanan, in Baird, 1993, p.282.

[198]. Narayanan, in Baird, 1993, p.286.

[199]. Jordan, in Baird, 1993, p.271.

[200]. Dhagamwar, 1992, p.p.299-301.

rule was repealed. So all others besides Hindus marrying under this Act fall under the Indian Succession Act of 1925[201].

Under the Hindu Succession Act a coparcener can relinquish his right to the coparcenary property. He can also convert his self-acquired property into coparcenary property, thereby preventing his mother, wife and daughters from inheriting a part of his coparcenary share[202].

With regards to land reforms, redistribution and land ceiling laws are based on allotments to family units where the husband is seen as part of that unit. If his wife owns land independently, that is then determined to be surplus land other than marital family property, which she is forced to forfeit[203]. Additional allotments of land are also given by the government to adult sons but not daughters.

The government has also assumed all Hindu families to be joint families, and consequently has based laws on succession and inheritance on this assumption. Yet studies dating as far back as 1956 show that in rural areas. There have been just as many nuclear Hindu families as joint ones. Nuclear families were also more common among lower castes than higher castes[204].

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[201]. Das, 1990, p.37.

[202]. Sarkar, CWDS, 1988, p.98.

[203]. Sarkar, CWDS, 1988, p.99.

[204]. Kishwar, 1994, p.2150.

To circumvent land ceiling legislation limiting the amount of land a family can own, many joint families partition the family land among male siblings[205]. So if family wealth is to be preserved, flouting customary family law is hardly an issue. To impose such legislation, the Congress Working Committee proposed that a family legally constitute of a husband, wife and their minor children. But as this conflicted with inheritance rights under the Hindu Code Bill, new concepts were numerously devised[206]. And since the passage of the Bill, Haryana has twice passed legislations to disinherit daughters from agricultural property. This sentiment prevails in Punjab, as well[207]. Only in Kerala do unmarried adult daughters count as separate units[208].

In 1976, Kerala legally abolished the joint family system. Andhra Pradesh and Tamil Nadu, in 1986 and 1990 respectively, amended the Hindu Succession Act to grant daughters the same rights to coparcenary property as the sons[209]. The Hindu Succession Act does give special concessions to communities following the Marumakkattayam and Aliyasantanan systems in Kerala[210]. Yet matrimonial kinship does not necessarily lead to

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[205]. Kishwar, 1994, p.2151.

[206]. Diwan, 1983, p.321.

[207]. Agarwal, 1995, p. A-43.

[208]. Agarwal, 1995, p. A-45.

[209]. Sivaramayya, in Mahmood, 1975, p.160.

[210]. Sivaramayya, in Mahmood, 1975, p.160-161.

more gender just, beneficial society for women, as these groups gear inheritance and caste identity with the patrilineage. Even amongst the lower castes in South India like the the Untouchable Pillars, a women's labor and finances are regarded as her husband's property[211]. The status of women in upwardly mobile non-Brahmin classes of Tamil Nadu is declining. There are now fewer bride-wealth marriages with close kin and more dowry marriages with strangers. As a result, women are for the first time being described by these groups as financial liabilities[212]. This is perhaps a strategy to "Brahmanize" by adopting patrilineal practices[213]. Even though women are granted equal inheritance rights in Tamil Nadu, in order to manipulate sisters not to claim these rights, brothers have become very generous with their traditional gifts to their sisters' children. However, it is clear that brothers are more afraid of losing the landed property which is obviously worth more than their prestations, as many sisters forgo their rights to property inheritance in return for their brothers' prestations. This tradition also works against women as those without brothers have harder time getting married[214]. So the most "progressive" traditions in India are in reality another way of defining women's dependency on the family.

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[211]. Sivaramayya, in Mahmood, 1975, p.p.166-167.

[212]. Sarkar and Sivaramayya, 1994, p.5

[213]. Agarwal, 1995, p. A-46.

[214]. Sarkar and Sivaramayya, 1994, p.5.

In the 59th report of the Indian Law Commission, the Hindu Code Bill was described as a measure of regulating personal law, which was also described as a secular and social issue[215]. What it actually became, though, was a non-secular means to non-secular, communitarian, and communal end by allowing the state to arbitrarily define a community and its boundaries, and using as the sole criteria for this boundary the status of women within their families.

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[215]. Agarwal, 1995, p.A-42.

Chapter Four

Muslim Personal Law (MPL)and the State

A. The Nature of Muslim Personal Law

There has been much debate on the nature of Muslim law and its capacity to adapt to modernity and its accompanying change in value systems. Compared to Hindu legal history, the history of Islamic jurisprudence shows a legal system more akin to what we would associate a modern legal system to be. However, like ancient Hindu law, Islamic law is still based on the unchangeable moral framework of the Koran and the Hadith.

Western law is based on Roman law of Justinian legislation, which was based on legislation of the Antonine era after the Pagan period, but before Christianity. This was secular law in that its source was not the divine power of God, but the mortal and changeable power of [1]. Islamic law, on the other hand, is divine in its foundation, and so it cannot be fundamentally changed [2]. According to the Ashari school: "God does not command certain actions because they are intrinsically good, nor forbid certain behavior because it is inherently bad; instead, actions are good or bad because God commands or forbids them[3].In other words, morality is not based on man's perception of what is right and wrong, but God's opinion of what is right and wrong. Furthermore, there is no virtue in the action itself, but in how God perceives the action. Hence, little room for

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[1].(Anderson, 1959, p.2)

[2].(Anderson, 1959, p.3)

[3].(Anderson, 1959, p.9)

mortal change.

It is obvious that Islamic law is not uniform because different schools dominated at different times. Before the Ashari school of present came to rule, the Mutazali school stressing rationality prevailed, but was subsequently deemed heretical[4]. Contrary to popular belief, the Koran, though a source, is not the primary foundation for Islamic jurisprudence. It lays down a value system for its followers to aspire to, but does not explicitly lay down the groundwork for a legal framework[5].

While the Sharia does provide a moral framework, historically scholars of fiqh - the application of Islamic texts to individuals - have held conflicting views. For instance, there are recorded instances of differences of opinion between Abu Hanifa, the founder of the Hanafi school, and his closest disciples Imams Abu Yusuf and Muhammed[6]. The Sharia was developed from the Koran, but relies more so from what was believed to be the living traditions of the Prophet himself. And when neither was adequate to address a situation, the jurist was to use his own judgment. [7]. This process was soon questioned because of its arbitrary nature allowing the jurist to err and not follow what God had intended. Consequently, a belief for the

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[4].(Anderson, 1959, p.9)

[5].(Anderson, 1959, p.11)

[6].(Kozlowski, in Baird, 1993, p.79)

[7].(Anderson, 1959, p.12)

need for a consensus of jurists arose[8].

Sharia law is also divergent and contradictory on many issues in that it is the product of various schools to "define the will of Allah"[9]. These interpretations were solidified by 900 AD into four distinct Sharia schools [10]. Egyptian jurist Mohammed al-Khadari maintains that the Koran establishes three fundamental principles for developing fiqh: 1) convenience, 2)minimizing trouble, and 3) gradualism. [11].

What made Islamic law a system of jurisprudence in the modern sense of the term is that it made a distinction between morality and the law, or rather what was morally approved of and what was morally frowned upon but still permitted in the sense that no punishment or retribution would be incurred. And it is this distinction which can on the one hand be invoked to argue for reform of personal law in favor of women, but at the same time can also be used to enforce women's subjugation. For instance, the principle of impartiality with reference to a man's right to have more than one wife simultaneously dependent upon religious sanction and morale, but could not be enforced or interfered with by the Islamic judiciary[12]. Although the Sharia

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[8].(Anderson, 1959, p.13)

[9].(Coulson, 1963, p.241)

[10].(Coulson, 1963, p.241)

[11].(Engineer, in Sarkar and Sivaramayya, 1994, p.51)

[12].(Anderson, 1959, p.p.41-42)

deems unilateral declaration of divorce on the part of the husband as a sin, it is still legally sanctioned[13]. So Islamic jurisprudence makes a clear distinction between morality and the law. Even though theoretically the Khul and Mubara forms of divorce recognize a wife's consent, in practical terms it is common for a husband to demand forfeit or repayment of mehr for such a divorce in order so that he may remarry. And though the Koran morally forbids the husband from making such a demand[14], this moral is not legally enforceable. And though the Koran does not expressly limit maintenance to the period of iddat[15], it also does not expressly legally obligate a husband to provide maintenance beyond that.

Provisions for polygamy are aimed at controlling women's sexuality in that it is sanctioned in such cases as a wife's inability to have children, or if she is terminally ill[16].

There are four types of talaq: Talaq al-sunna which is of two types - Ahsan and Hasan, and Talaq al-bid'a which is of two types - three declarations and one irrevocable declaration. Whereas talaq al-sunna is approved, talaq al-bid'a is legal but

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[13].(Anderson, 1959, p.52)

[14].(Anderson, 1959, p.p.52-53)

[15].(Engineer, 1994, p.300)

[16].(Engineer, 1994, p.300)

not morally approved[17]. Yet talaq al-bid'a has become the most commonly practiced as it is most convenient for men[18].

And while the Prophet looked upon divorce as a sin, he did not make it illegal[19]. So it not only prevailed, but came to be looked at by men as a right, as rights are associated with what is legally permitted and not necessarily morally acceptable.

Historically Muslim law does recognize the authority of the state in that in its doctrine of siyasa it "defines the position of the political authority vis-a-vis the Sharia law and in particular affords him the power to make administrative regulations defining the jurisdiction of his courts[20].

While reformers from within like Engineer invoke the principle of ijtihad, or creative interpretation, to bolster their arguments[21], they ignore that this principle was prohibited after the ninth century.

Therefore, though the views of those who dismiss the

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[17].(Fyzee, 1964, p.151)

[18].(Fyzee, 1964, p.155)

[19].(Mahmood, 1986, p.74)

[20].(Coulson, 1963, p.241)

[21].(Engineer, 1994, p.297)

Koran as being a source of inequity in Muslim personal law cannot be reconciled with those who may see in it a source of change and reform[22] if the former is expected to accept the latter, what results is a widespread belief of cultural relativity in which a defined value system or moral framework regarding gender equality is ignored. And little if anything changes.

And though many proponents of reform from within MPL base their argument on the more liberal and egalitarian attitude the Prophet conveyed towards women of his time, it is also fair to claim that this progressive attitude on the part of the Prophet was not primarily for the upliftment of women, but for the unity of society at the time. And so women's position was only sought to be ameliorated to the extent that it benefitted the patriarchate of pre-Islamic Arabia. While it has also been argued that verse 4.34 of the Koran, which confers superiority of men over women was only a temporary mandate to allow women to adjust themselves to a patriarchal society[23] how is this to lead to a fundamental change in the status of woman when the source of their inequality is being preserved? One tradition often cited by orthodox Muslims to bolster their argument that women are morally, religiously, and intellectually weaker claims that the Prophet says this is so because menstruation prevents them from participating equally in religious activity[24].

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[22].(Ahmad,1976,p.xxviii)

[23].(Engineer, 1994, p.p.51-52)

[24].(Lokhandwala, 1987, p.18)

The equating of the testimony of two women for every man stems from the prevalent conditions of pre-Islamic society where women did not have as clear an understanding of contractual and business relationships as men because of lack of exposure. So another woman's opinion was seen as necessary in case the first one were to err in her testimony. However, this reasoning has set the precedence for the current situation in which in many Muslim countries a woman is only allowed to testify in civil and criminal cases[25].

While the Koran praises women who are pious and devout, it advises that those who are morally lax to be chided and chastised by their male folk. And though the Prophet felt that violence against women was unjustifiable, he also advised women to adjust themselves to a patriarchal society[26]. So even though he believed in ameliorating the position of women in society, he did not see the need to fundamentally change the society in order to achieve this, but instead women. Although the Prophet was critical of the pre-Islamic Arab patriarchy, he could not envisage the Koran completely denouncing societal norms as doing so would prevent its acceptance from this very society[27]. Subsequently what has resulted is that because the status of women in the Koran, as printed, merely reflects the patriarchy

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[25].(Lokhandwala,1987,p.19)

[26].(Lokhandwala,1987,p.22)

[27].(P.Engineer,1987,p.84)

of pre-Islamic Arabia, and at the same time the Koran carries with it the importance of a source of spiritual morality, Islam as an institution has relegated women to the norms as mandated in the Koran. So while it sought to regulate social reality, it did not seek to eradicate it.

Though Zamakshari maintains that the two verses regarding polygamy refer specifically to orphaned girls and thus are only meant to protect orphaned females from the men marrying them for misappropriating their properties[28] it is ironic that protecting a victim requires increasing the power of the perpetrator over the victim.

Throughout the history of Islamic law in the Middle East there were extensive reforms with regards to the law of obligations as specified in the Majalla and other business and juristic practices. But up until 1915, these reforms had never broached family law, which instead continued to be addressed by Islamic courts according to the immutable principles of the Koran[29]. The Sharia has throughout its development emphasized control over women's sexuality rather than their own moral, spiritual, and intellectual behavior[30]. When reformers felt that religious text was not meeting their goals, they sought to interpret them subjectively with how they thought the text could

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[28].(Engineer,1994, p.55)

[29].(Anderson,1959,p.25)

[30].(Metcalf,in Hasan,1994,p.5)

apply to modernity[31]. As far as family law is concerned reforms were enacted in some countries, but varied in degree between each country. Further, many Muslim countries opted to pick and choose at their convenience from the different schools which aspects of family law to keep in tact and which to reform. They did not adhere to the principles of one particular school over another[32]. This could allow for the most progressive laws and reforms, but it could also allow for the most regressive and archaic as well, depending on the governments and the schools of thought invoked. In 1915, the Ottoman Empire passed two laws for family law reform. One was based on the Hanbali school in which wives who were deserted could claim judicial relief. The other was based on the Hanafi school which gave wives the right to dissolve marriages if their husbands had life-threatening contagious diseases. Following this, in 1917 the Empire passed a law of Family Rights which encoded various family laws, excluding testate and intestate succession[33].

However the most radical of reforms in civil laws were not passed according to Koranic injunctions. The abolition of concubinage and slavery are not the result of reforms enacted by religious courts, but those of civil and criminal courts[34].

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[31].(Anderson,1968,p.225)

[32].(Anderson,1968,p.225)

[33].(Anderson, 1959,p.26)

[34].(Anderson,1968,p.224)

While the Koran only sanctions polygamy if each wife is treated equally, the punishment meted out for not doing so is other-worldly; specifically, the husband will come on the day of resurrection with only half his body[35]. So if a man has more than one wife, there is no punishment in this world that would deter them from ill-treating them.

Although the Hanafi school allows and adult woman to give herself in marriage, her guardian during her minority can legally object to the marriage if the groom is not of the same social status, or his dower is inadequate[36].

A couple can only remarry after divorce if certain conditions are met: 1) the wife has observed iddat, 2) the wife has been lawfully married to another man following iddat, 3) this marriage has been consummated, 4) the second husband has pronounced divorce, and 5) the wife has observed iddat following this divorce[37]. So even if the first husband regrets having declared divorce, it is the wife who has to shoulder the burden of legalizing a remarriage.

A husband has the power to grant a third party or even his wife the power to pronounce divorce and demand maintenance.

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[35].(p.Lokhandwala,1987,p.17)

[36].(Anderson,1968,p.222)

[37].(Fyzee,1964,p.157)

A husband has the power to grant a third party or even his wife the power to pronounce divorce and demand maintenance[38]. Though this is seen to be advantageous for women, it is not a freedom she is entitled to by birth, but rather has to rely on her husband's will to enjoy.

Similarly, while khul is a type of divorce which can work to the advantage of the wife in that she is only expected to forego her mehr[39] it can actually deter a wife from initiating a divorce is she has no financial means of supporting herself without her mehr, or a husband who wants a divorce without paying mehr can hypothetically make his wife so miserable that she will be compelled to initiate a divorce.

The father as the natural guardian of the children can indulge in jabr, whereby he can give his minor children away in marriage without their consent[40]. So if a daughter exercises her right to contest such a marriage afterwards, she is in a sense contesting a right conferred upon her father by Islamic jurisprudence. Furthermore, her right is not a preventive right.

While the Dissolution of Muslim Marriages Act of 1939 allows Muslim women the right to claim divorce upon the husband's failure to pay maintenance, she bears the burden of proving that his failure to do so was not a result of her failure to fulfill

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[38].(p.158-159, Fyzee, 1964)

[39].(p.163, Fyzee, 1964)

[40].(p.208, Fyzee, 1964)

her marital obligations[41]. So hypothetically, a husband can mistreat his wife so she is compelled to leave, refuse to maintain her, and respond to her charges by claiming her failure to perform her marital duties. The Act also does not diminish the right of the husband to declare divorce.

A woman can dissolve her marriage if at the time she was under the age of 15. But she has to do so by the age of 18, and she must prove the marriage has not been consummated[42]. So clearly a woman's sexuality is not only sought to be the property for her husband, but also there is little provision for acknowledging marital or statutory rape.

A father is required to maintain a widowed or divorced daughter rather than her father-in-law[43]. So widows are considered a liability by both Hindus and Muslims.

Despite women's rights granted in the Koran, purdah prevents her from the mechanism to educate herself of these rights as well as the arena to exercise these rights[44]. So theoretical doctrine means nothing to her as purdah has perpetuated conflicting ground realities.

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[41].(p.171-172, Fyzee, 1964)

[42].(p.174, Fyzee, 1964)

[43].(p.214, Fyzee, 1964)

[44].(p.245, Saiyed and Khan, 1976)

B. The State and Community : Interdependence and Contradiction

In India, Muslim Personal Law was often influenced and overrun by local customs and regional norms. This explains why despite Koranic injunctions to contrary, most Muslim communities in South Asia have denied women the right to inherit family property[45].

The Mughals never enforced a single, rigidly defined code of MPL. Rather, Islamic and imperial officials by and large were made to reinforce the sovereignty of the monarch. For instance, the qadi's primary responsibility was to mention the ruler's name during the Friday prayers. Kotwals and revenue officers adhered primarily to the dictates of the sovereign rather than the Sharia[46]. (p.80, Kozlowski)

In encoding and enforcing the Sharia, the British actually created Muslim "laws" which previously did not exist[47]. It was the British legal system's codification of the Sharia which actually served to limit the number of acceptable customs and consolidate many varying schools of thought and communities into more compact, centralized authorities[48].

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[45].(p.80, Kozlowski)

[46].(p.80, Kozlowski)

[47].(p.80, Kozlowski)

[48].(p.81, Kozlowski)

During the colonial period, MPL was usually administered by non-Muslims. The few jurists who were Muslims were not trained in MPL and did not have an ancestry of theological training in the Sharia[49].

The English began the process of encoding MPL in 1864 by abolishing the qadis' courts and replacing them with English - administered civil courts. They then relied upon who they appointed to be muftis to interpret MPL. After some time, they usurped the muftis' role and took it upon themselves to interpret and administer MPL. After being criticized for their faulty versions of MPL, such as the Hidaya by Hamilton, by MPL scholars like Maulavi Muhammad Rashid of Burdwar, they stopped and simply educated themselves on MPL, and then arbitrarily applied it where they saw fit[50]. The qadis were actually theologians with only a cursory knowledge of MPL. Their power was reinstated by the Kazi Act of 1880 by Syed Ahmad Khan. It was they who finally gave the stamp of approval on the colonial government's version of MPL[51]. Up until 1850, the courts referred to religious doctrine of both Hindus and Muslims. But where these doctrines were ambiguous with regard to certain situations, the courts then referred to Roman Law, laws of other countries, English common and statute law, and

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[49].(p.81, Kozlowski)

[50].(Mahmood, 1986, p.p.51-52)

[51].(Mahmood, 1986, p.55)

natural law, or "justice, equity, and good conscience[52].

In 1884 Khoja leaders tried to pass a bill called the Khoja Succession Act, 1884 to deny non-Khoja widows of Khojas the right to inherit. The bill failed[53].

The Cutchi Memons Act of 1920 allowed Cutchis to be governed by MPL in all cases except inheritance and succession, in which case they were to be governed by Hindu joint family law. The act was repealed by another act in 1938, under the same title, which required that they be governed by MPL in these two previously excluded areas[54].

When Act X of 1891 was initiated to amend the IPC and CrPC of 1882 to raise the age of cohabitation, from 10 to 12 years, other communities opposed it. But by and large the Muslim community supported the bill[55]. When the Age of Consent Bill was being debated in the 1920's, opinions expressed by Muslims fell into three basic categories: 1) opposition of interference in their religion, 2) those who felt the change would be brought about more effectively through increasing educational standards and gradual progress than formal legislation, and 3) those who

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[52].(Derrett, 1963, p.140)

[53].(Sivaramayya, 1975, p.150)

[54].(Sivaramayya, 1975, p.151)

[55].(Lateef, 1990, p.60)

supported the bill[56]. Yet Muslim leaders objected to the bill not because they opposed its stand on the issue, but because the bill was intended to apply to every community uniformly and hence would diminish marks of distinction in the public and political sphere[57].

Reformers usually established theological schools (madrasahs) as their bases for discourse and action. This resulted in the de-emphasizing of individuals and the emphasizing of institutions[58].

Most Muslim reformers during the colonial period sought to justify social reform through religious tenets[59]. While Sayyid Mumtaz Ali (1860-1935) felt women were equal to men, and argued that purdah should be modified to allow women to accompany their husbands outside the home, he maintained the pattern of many Hindu reformers in that he believed that it should be according to the generosity of men that women should be uplifted [60]. Ameer Ali was the first reformer to develop the notion of the ideal Muslim woman as the epitome of spirituality and morality and perpetuated the image of the Prophet's daughter

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[56].(Lateef, 1990,p.67)

[57].(Lateef, 1990, p.68)

[58].(Kozlowski, 1993, p.81)

[59].(Lateef, 1990, p.76)

[60].(Metcalf, 1994, p.11)

Fatima as the embodiment of this ideal[61].

Women's education was also given its first formal impetus when in 1906 the Aligarh Zenana Madrassa was opened for girls, which promoted a mixed academic and domestic curriculum[62].

During the 1930's Maulana Ashraf Ali Thanavi "worked" with Muslim converts in Punjab and Central India to eradicate non-Islamic and pre-Islamic practices. This led to the Shariat Act of 1937. Out of fear of Muslim women converting to other religions in order to dissolve their marriages, Thanavi also sought an Islamic precedent for allowing Muslim women to seek divorce in his al-Hilat al-Najizah li'l Halilat al-'Ajizah, which led to the Dissolution of Muslim Marriages Act of1939[63]. Though this Act cursorily appears to be a progressive step towards gender equality within the community, it only served to tighten the boundaries of the community even more and base these boundaries on the role of women in their families. So the state has historically been used to conglomerate a community.

However many of these efforts to synthesize and conglomerate a community were, they failed as most Muslims chose

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[61].(Metcalf,1994,p.14)

[62].(Devji,1994,p.p.22-23)

[61].(Mahmood,1986,p.56)

to abide by the British version of MPL[64]. This could be because the British version allowed more room for customary law - often less advantageous to women than Koranic principles and the Sharia - to override the Sharia. The ulema were opposed to provisions for customary law being able to override the Sharia[65]. Perhaps they were afraid that such provisions would weaken their power base as they would not force Muslims into a single community. Prior to the passage of the MPL Shariat Application Act of 1937, it was the ulema who showed concern that Muslims in NWPF and Punjab were not adhering to the Sharia, but instead to customary law. Mufti Kifayatullah drafted a bill to this effect applicable to NWFP, which was passed in 1935[66].

Though on the one hand Muhammad Ahmad Kazmi argued for the bill to secure inheritance rights for women as per the Sharia, those like Muhammad Yamin Khan sought to exempt zamindars from the purview of the bill in order to prevent their land from being partitioned. Jinnah supported the bill, but felt it should be optional[67].

Although family wakfs have either been abolished or restricted in Egypt, Lebanon, Syria and Tunisia, religio-political leaders argued strongly for it on grounds that the

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[64].(Mahmood,1986,p.56)

[65].(Parashar,1992,p.150)

[66].(p.p. 146-147, Parashar, 1992)

[67].(Parashar, 1992, p.p.148-149)

Prophet would've thought it more pious to provide for one's family and lineage rather than indigent strangers[68]. The Mussalman Wakf Validating Act was passed in 1913 to allow for Muslims to prevent joint family property from being partitioned. Muslim families have used MPL to their financial advantage in that even though under MPL a daughter is vested with some inheritance rights, if a family does not want to partition the joint family property, it can and has availed of Wakf ala'l awiad, gifts and other family arrangements[69]. According to the MPL Shariat Application Act of 1937, custom and usage with regards to wills, legacies, and adoption which may contradict what the Act stipulates on these matters are still legally permitted. This provision was introduced by Jinnah to protect the interests of Nawabs and Zamindars so that their customary powers would not be curtailed by the Act and they would have the option of abiding by the Act or local custom[70].

Since 1947 the only aspects of the Sharia applicable to Muslims were those regarding personal status, thus following the pattern of most modern Muslim states[71].

In delving into what constitutes essentially religious,

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[68].(Kahkashan, 1993, p.162)

[69].(Sivarmayya, 1975, p.148)

[70].(Mahmood, 1986,p.42)

[71].(Kozlowski, 1993, p.79)

the courts have undoubtedly entered into a quagmire regarding the boundaries of a community. For instance, while most Muslims do not regard Ahmadiyas as fellow Muslims, in Narantakath Avullah v. Parakkal Mammu 1923 AIR Madras 171 Sir Zafrullah Khan convinced the court that Ahmadiyas were to be legally regarded as Muslims. And although Justice Krishna Iyer upheld this view in Bijore Emmanuel v.State of Kerala (1986)3 SCC 615, Justice V.Khalid strongly disagreed. Yet that Justice Iyer had to base his decision on an examination of the internal dynamics of the Ahmadiyas[72] not only denies them the right to define themselves, but in using as criteria the Koran also conveys that the state has the right to decide what is and is not Islamic, rather than emphasizing the state's role to protect the individual's right to freedom of religion based on the individual's own definition of how the religious institution applies to him.

The realities of regional differences between various Muslim communities have also been ignored because personal law and family structure have so far been examined through the purview of the Koran, as it is often seen as the primary and sole source of Muslim personal law and life. However ground realities beget an opposite picture; family structure amongst Muslims does not lie so much in the Koran as it does in the socio-economic conditions in which people live[73]. So it is fair to argue that gender inequality does not have its origins in religiously based

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[72].(Mahmood,1993,p.97)

[73].(Ahmad,1976,p.x)

law and custom, but rather the larger societal structure in which communities exist[74].

The Mapillas of Kerala observe the nikah, or the marriage contract, as do most Muslims. However to them what makes a marriage valid and binding is the kalyanam. And the Sunni Surati Vohras(Bohras) also are known to observe many Hindu practices indigenous to the region[75]. Despite efforts by conservative clergy, Meos refuse to practice various forms of endogamous marriages sanctioned by the Sharia[76].

The Muslims of Lakshadweep are descendants of Hindus who migrated from the Kerala coast in the 9th and 10th centuries A.D. They were converted to Islam in the 14th century by Arab traders. In the 16th century, governance of the islands was transferred from the Hindu Raja of Chirakkal to the Arakkal rulers of Cannanore, who were Muslim. They are separated into three or four castes which have their origins in the Hindu castes of Kerala - Nayar, Nambudri, Mukuvan, and Tiya. They also observe the Marumakkattayam system of Kerala. Yet conflicts over marriage, divorce and property transfer within the matrilineage are dealt with by the taravad's kazi and island council. Islam plays a major role in ibadat, or worship, and mu'amlat, or worldly transactions. The Sharia is not as frequently invoked,

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[74].(Ahmad,1976,p.xx)

[75].(Ahmad,1976,p.xxv)

[76].(Ahmad,1976,p.xxvi)

and when it is, it is not rigidly adhered to. Property is divided into two categories: velliarcha(Friday) and thingalarcha(Monday). Property is thought to be permanently occupied by women as they reside in their natal homes with their children even after marriage. However, the property is managed by the karnavaran, or the eldest male member of the family. Women's consent is an absolute necessity for property transactions. However, women do not inherit from their husbands. After his death, his property devolves back to his mother's tavazhi. A man can only request the division of matrilineal property if he wishes to take permanent shelter in his wife's home, and so wanted to combine his share of inheritance with his wife's property. This is most often the source of conflict as such property of the husband's is usually velliarcha property, which is collectively owned; as opposed to the thingalarcha property, which the owner is free to do with what he likes. When thingalarcha property is bequeathed to children, sons and daughters get equal shares. And quite often daughters receive more than sons. Those few islanders who are aware of the contradictions between the Sharia and Marumakkattayam justify matrilineal property as wakf property[77]. So Islam is used to sanction a practice of non-Islamic origin, rather than the reverse, thus giving the custom primacy. Though the islanders practice the irrevocable form of talaq and divorce is quite common, because the marital residence depends upon the wife's natal household, she has more power to express her desire

[77] (Dube,1994,p.p.1273-1282)

to end a marriage[78].

Muslims in Goa are governed by the Portuguese laws of family and succession, but they can observe them to the extent that doing so does not conflict with MPL. Muslims, like other communities in Pondicherry, are either governed by the French Civil Code, in which case they are referred to as renoncants, or they are governed by central government laws regarding their religious personal law[79].

In Kashmir the central government's Shariat Act does not apply. Instead, customary law applies, and is enforced by the state high courts. The Jammu and Kashmir Muslim Dower Act of 1920 allows the state courts to decrease the amount of specified dower when its payment is demanded. The Jammu and Kashmir Dissolution of Muslim Marriages Act of 1943 follows the Hanafi schools with regards to 'option of puberty', which is contrary to the central government's corresponding Act of 1939. The state requires that all Muslim marriages be registered. There exists no option of a civil marriage. So the people of the state are forced to follow their religious personal law. Further, the state's constitution provides no directive principle for a uniform civil code[80].

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[78].(Dube,1994,p.1284)

[79].(Mahmood,1986,p.33)

[80].(Mahmood, 1986, p.p.35-36)

Mehr is exempt from the Dowry Prohibition Act[81]. For Muslim women, this can be positive and negative in that the government recognizes that to outlaw mehr would diminish whatever financial security a Muslim women might have if she is divorced or abandoned. But by not outlawing it, a sense of complacency also develops in the government that there is no need to probe into MPL and its patriarchal abuses because under MPL women are ensured some financial security.

The Dawoodi Syedna and the Bohra Syedna, in order to counteract reform movements both from within and with-out have appealed to Sunni Muslim leaders, though relations between these communities are otherwise strained. (Engineer, 1988, p.9.) So they are not interested in uniting to form one conglomerate Muslim community , but rather to maintain their own power base within their "sub-communities". Bohras otherwise don't involve themselves in national political issues affecting Muslims at large, such as the UCC or personal law reform, because divorced women in their community are maintained by the Jamat[82]. (Engineer, 1988, p.9) The issues not addressed are not only whether a divorcee receives maintenance, but who is responsible for providing it, and who she should be at the mercy of, as well as her right to matrimonial property.

The state has also shown its priority to be political

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[81].(Diwan,1983,p.78)

[82].(Engineer, 1988, p.9.)

expediency and opportunism in that when members of the Alavi community approached Indira Gandhi to enact reforms, she responded in their favor. But when Dawoodi reformists did the same, she declined as she was receiving funds from the Syedna, who was also promising votes[83]. The state is hence the deciding factor in ensuring these leaders' hold over their respective communities.

This manoeuver also has little to do with party politics in that in their quest for power, Bohra priests try to secure a good rapport with the ruling party. Although Dawoodi Bohras have traditionally supported the Congress-I, when the Janata Party came into power, the Dawoodi Syedna's brother Yusuf Najmuddin made efforts to establish a relationship with them[84]. The Congress Party extended its support to religious leaders by denying campaign tickets to reformers within these communities[85]. So again, the state plays a vital role in perpetuating regressive practices within communities. The Aga Khan extends support to the ruling party by not permitting Khojas to vote otherwise. Similarly, Dawoodi religious leaders will support wider conservative Muslims' interests only so far as they come in line with working against the government in the intervention in community affairs such as family law.[86]. So then

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[83].(Engineer, 1988, p.12)

[84].(Engineer, 1988, p.13)

[85].(Engineer, 1988,p.13-14)

[86].(Engineer, 1988, p.15)

the state and religious leaders are mutually dependent. When the Janata Party came into power in 1977, the Dawoodi Syedna refused to pass a firman instructing his followers to vote for it because it supported Dawoodi reformists[87].

The Bohra Syedna also demands that his followers support the government of the country where they are living, as doing so is stated in the Koran. If they want to oppose the government, they should do so outside the country[88]. So clearly the religious leaders are capable of a flexible interpretation of the Koran in order to meet their non-religious needs.

And despite his claims of adequately looking after the needs of his community, the Bohra Syedna gives sizeable donations to the Congress Party to secure his power base, while a substantial section of the community lives in poverty[89]. So these religious leaders are primarily politicians. And in order for reformists to be able to change the way the leaders operate, they have to approach the state. That religious leaders have looked to the state for their power base is endemic in South Asian politics. Bohra Syedna Tahir Saifuddin, by showing his support for the British Raj, was appointed the first Sirdar of the Deccan. Out of his support for the Muslim League, he ordered his constituents to vote for Jinnah, thereby securing his

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[87].(Engineer, 1988,p.56)

[88].(Engineer, 1988,p.56)

[89].(Engineer, 1988, p.57)

election[90].

The Dawoodi Bohra Syedna has not gotten involved in the fray over the Muslim Women's (Protection of Rights on Divorce) Act 1986 because Bohras have their own procedure for accommodating divorced women. But he personally felt the Act should have been passed, as it was anti-reformist and would not allow reformists to interfere with MPL[91]. So it is clear that he picks and chooses his platform according to his political convenience.

The power of the Syedna is known to reach mafioso proportions in that when a member of the community gets involved in social or political activity of which the Syedna does not approve, he has his hoodlums attack the member and thereby scare him out of his involvement. And a few times he has actually attempted assassinations against various members[92]. The Syedna has even been known to associate with communal parties like the Shiv Sena[93]. The drastic measures by some leaders to maintain their power base have often been assisted by the state in that if members of a community do not abide by what the leaders say, they can and also have brought false criminal charges against

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[90].(Engineer, 1988, p.62)

[91].(Engineer, 1988, p.63)

[92].(Engineer, 1988, p.81-82)

[93].(Engineer,1988,p.84)

them and taken police action[94]. It is then clear that the state conglomerates these communities to secure their own power at the national level, and that the leaders of these communities both depend on the state and are simultaneously necessary for the state to do so.

However, this process of communities seeking legitimation from the state started in the colonial period. When the Khoja Shia Isna-Ashari Jamat wanted to function openly and come out of hiding for fear of persecution from the Aga Khan, and so approached the colonial government for land in order to do so. But because they had less than 100 members at the time, as per the minimum required by the British to grant government land, they were forced to take aid from an Iranian steam owner[95]. This is a clear example of the state's intervention to secure the economic interests of a community actually serving to emphasize the boundaries of that community even more. And when the Isna-Asharis did declare themselves openly, the Aga Khan used his political power to terrorize, assault, and ostracize them[96].

Jinnah, an Isha-Ashari himself, took advantage of the Aga Khan's demand for a separate electorate in that even though he belonged to a sect which opposed the Aga Khan, he supported

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[94].(Engineer, 1988, p.p.180-181)

[95].(Engineer,1988,p.250)

[96].(Engineer, 1988, p.250).

the Aga Khan's concerns when it suited his own political needs[97].

In 1973, proponents and opponents of Section 125 CrPC bolstered their argument by citing MPL. In reaction, the law minister passed an amendment to Section 127 CrPC, allowing the court to use its own discretion to wave maintenance obligations under Section 125 CrPC[98]. If a child is illegitimate, its father is required to pay a maximum of Rs.100/month for its maintenance. The mother, in such cases, is considered the primary responsible party to maintain the child.[99]

Though MPL gives women limited rights to custody, the courts have overridden MPL by taking the welfare of the child into account[100]. However, even if a mother is given custody, she does not have the power to sell the interest of her minor children's immovable property[101]. Females qualified for custody are so then disqualified if they remarry outside the relations prescribed of the child, move far away from the child's father's residence, convey dubious moral standards, and or neglect the

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[97].(Engineer, 1988, p.250)

[98].(Parashar, 1992 p.167).

[99].(Fyzee, 1964, p.174)

[100].(Hidayatullah, 1990, p.224)

[101].(Hidayatullah, 1990, p.288)

child in question[102]. Yet little mention is made of the father's conduct for disqualification of custody. A father can remarry and still retain custody[103].

Although the Shafi'i and Maliki schools only allow women to marry with their father's consent, as per the law in India, once a Muslim girl reaches majority, she no longer needs her father's consent. [104]

While under MPL if a wife renounces Islam, she is not automatically granted dissolution of marriage, if the husband renounces Islam, the marriage is automatically dissolved[105].

Even when legal discourse has taken place within the context the Sharia, historically it was led by men in a traditionally patriarchal setting in which religious leaders and scholars addressed the actions of their constituents as those of individuals and not as an institution dictating immutable law to its community. "The Shariat .... did not recognize the legal status or agency of abstract groups[106].

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[102].(Hidayatullah, 1990, p.289-90)

[103].(Hidayatullah,1990, p.292)

[104].(Diwan, 1983, p.57)

[105].(Kelkar, 1994, p.204)

[106].(Lateef, in Hasan et al p.25)

D. Current Debates Over MPL

It is the modern Indian state which has made MPL more defined, rigid, and enforceable. Previously the role of the Shariah in public and private life was subject to the will of the sovereign. The Indian state has succeeded in making MPL what is in the modern sense by assuming that Muslims make up a single, well defined community, and that all Muslims follow only one personal law. It is on these assumptions that the legislative and judicial systems have acted to reinforce this modern rigidity[107]. For instance, fatwas are acceptable evidence in secular courts[108].

While the Indian courts have relied primarily on the Koran to decide matters pertaining to MPL[109] this has not been in conformity with Islamic judicial history. And though it has been argued that the states' non-interference has led to many non-Islamic practices being recognized as Islamic[110] if the state does interfere to eradicate these practices, then it would have to grant state recognition to one single religious authority. And in doing so would interfere with the individual's right to freedom of religion.

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[107].(Kozlowski, 1993, p.77)

[108].(Kozlowski, 1993, p.82)

[109].(Mahmood, 1993, p.104)

[110].(Mahmood, 1993, p.109)

Meos are moving further away from their pre-Islamic customs and adopting practices such as purdah and mehr[111]. This could be the result of Islamization in reaction to communalism. This change is linked to economic necessities in that many Meos have been reluctant to adopt purdah because women are essential to agricultural labor[112]. Amongst upper class Muslims in Madhya Pradesh the customs of purdah has been seen as a way to define boundaries of kinship and familiarity in that women observe purdah amongst different circles depending upon the level of intimate relations[113]. So regardless of the state's presence, placing the onus of groups identity on women's shoulders has prevailed.

Although more educated and financially secure than Muslim women in other rural parts of India, the Jamaati women of Maharashtra are still seen as a potential liability in that when their husbands leave the country to work abroad, they stay with their parents. Subsequently they are denied the rights to inherit from their parents, though they may inherit from their husbands' families in the event of his death[114]. Yet their brothers are never viewed with the same level of liability.

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[111].(Ahmad, 1976, p.p.xxix-xxx)

[112].(Ahmad, 1976, p.xxxii)

[113].(Jacobson, 1976, p.208)

[114].(Saiyed and Khan, 1976)

The Jamiyat al-ulama and the Muslim Personal Law Board have their stronghold amongst the Urdu-speaking Muslim population of North India. And though they do collaborate with other Muslim organizations in other parts of India, the general Muslim population in these parts are not primarily Urdu-speaking and literate, and so don't have access to their literature. They were hardly affected by the Muslim League prior to independence, and were also not affected by the Ayodhya dispute until after the Babri Masjid was demolished. At that point, the dispute became part of the larger Indian Muslim psyche[115].

It has been the state which has supported the aggrandizement of religio-political leaders as the sole spokespersons of the community, rather than listening to more liberal opinions within the community[116]. So perhaps the source of the problem is not the community in and of itself, but the state's reverence given to it.

In Bombay, family courts only have jurisdiction over Hindus. So Muslim women either have to approach the High courts, or qazis and maulvis[117]. However, this cannot lead one to conclude that establishing state-sponsored Muslim family courts will necessarily ameliorate the plight of Muslim women, much less bring about gender justice within the family. If anything, such

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[115].(Hasan,M.,1994,p.444)

[116].(Hasan,M.1994,p.449)

[117].(Agnes,1994,p.1170)

a move would perhaps only further communalize the issue of family law reform. That Muslims are seen by the state as a "monolithic community" with identical, unanimously decided interests is reinforced by laws like the 1986 Act because such laws are demanded by a limited section of Muslim clergy or spokespersons and then enforced by a state apparatus. This has continued the vicious cycle of communities defining and redefining their boundaries via the state, and the state seeing itself as protecting these newly "synthesized" communities[118].

Many Muslims prefer to settle personal matters through muftis in madrasahs because of the lower cost, and also because the scholars are more often in tune with the mundane problems most Muslims face[119]. These muftis, however, quite often do not adhere to the Sharia or to the Koran in rendering decisions, especially in cases involving disadvantaged members of society. And yet, this flexibility does not create public and political turmoil[120]. Then perhaps women prefer to take recourse through a mufti because the process is cheaper, more expedient, and the result is not as orthodoxed. While men prefer to approach the civil courts knowing full well the disadvantages incurred upon women because of the lengthy, costly bureaucracy, as well as the fact that because of the political climate of the country, a civil court would be more likely to adhere strictly to the

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[118].(Hasan,Z.,1994,p.ix)

[119].(Kozlowski,1993,p.82)

[120].(Kozlowski,1993,p.84)

Sharia. Hence a good argument for not vesting civil courts with the power to encode and enforce religious personal law.

The Imam of Shah Bano's local mosque - a Barelvi - supported her decision to forego maintenance, though he resented the fact that she was persuaded to do so by scholars of the Deobandi school who were not part of the local community[121]. So even within what the state defines as the monolithic Indian Muslim community, Shah Bano's rights became a tug-of-war between various religious leaders. While Muslim clergy objected to secular jurists being allowed to interpret MPL and override the decision of the ulema in the Shah Bano case[122] in citing MPL in his claim for exemption from Section 125 CrPC, her husband was essentially asking the court to do exactly this. If he was approaching a secular court with a religiously based claim, then as a court of law, it would be compelled to review his claim. Where the court did greatly err was in analyzing his claim through the purview of Islam rather than fundamental rights. In doing so, it conveyed to the public that as a non-theocratic court of law it has the right and capacity to interpret religious text and determine what is essential to that particular religion.

Yet the state was not the only guilty party to the communalization process. In reaction to the court's decision in her favor, conservative religio-political leaders argued that religious law could not be interfered with by the state, as the

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[121].(Kozlowski,1993,p.87)

[122].(Khory,1993,p.124)

Shariat Acts of 1937 and 1939 were representative of MPL and so therefore they should apply. Yet it was through the state that these laws were passed and could be enforced[123]. So these leaders welcome state interference when it suits them.

Some questions raised during the Shah Bano case were : 1) why was the provision of the CrPC for children to maintain parents not enforced in cases of divorce only the husband is sought to provide maintenance? 2) If the CrPC allows for interference of MPL in deciding maintenance, why was the judiciary seeking to undo it? 3) Why is the judiciary also ignoring the Shariat Act of 1937 which is applicable to all Muslims[124]? Firstly, why should Shah Bano's children be responsible for maintaining her when her husband is the one who ended the marriage and thereby created the situation? The second and third questions assume that the state should enforce MPL, but not have any say in what exactly constitutes MPL.

There were differences of opinion in the Muslim community in that the Islamic Shariat Board of Kerala sent a memorandum to the PM in Feb.1986 stating that eminent Muslim theologians throughout the world would support the Supreme Court decision favoring Shah Bano[125].

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[123].(Lateef,1996,p.28)

[124].(Mahmood, 1986, p.91)

[125].(Das,1990, p.22)

Shah Bano withdrew her claim for maintenance at the bequest of some Ulema. It was clear she was a pawn of a male power struggle between her sons and her ex-husband[126]. However, she was also made a pawn by the clergy as she was forced to choose between her rights as a human being and her identity as a 'true' Muslim.

While it is true that Justice Tilhari's judgment of April 1994 not to recognize unilateral talaq as a legal divorce in deciding a case regarding the Urban land ceiling act may have been communally and discriminatorily motivated - given the fact that he also pronounced the judgment to allow darshan at the site of the previous Babri Masjid[127] - this should not discount the issue of gender injustice prevalent in MPL itself. Similarly if the Muslim orthodoxy and secularists react oppositely to the decision, than one has to ask if their reactions are politically motivated in terms of party manifestos, or driven by a genuine concern for the people they claim to represent. In any case, it should not be the court which plays the political game.

While some scholars and activists may feel that Justice Tilhari was not in a position to address MPL in the case[128] what his judgment did prove was that family law cannot always

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[126].(Das, 1990, p.28)

[127].(Navlakha, 1994, p.1264)

[128].(Agnes, 1994, p.1169)

confine itself to the privacy of the family. Inevitably it intersects with other realms of law. It is true that the wife involved, Khatoon Nisa, is doubly disaffected in that her husband does not admit her as his wife and so as a Muslim divorcee she is not entitled to maintenance. Simultaneously because Justice Tilhari claims she is still legally married, she is disenfranchised of her right to the land she acquired following her divorce. (Agnes, 1994, p.1169) However, this is not solely the fault of Justice Tilhari but rather the entire procedure of encoding religious personal law being in conflict with the Constitution and other realms of law in a liberal nation-state.

The judgment of Justice Tilhari fails in not raising the issue of gender bias in the land ceiling act, which does not allow a married woman the right to retain her own separate property, and instead combines such property with that of her husband[129]. Women from minority communities are at a disadvantage in that while HPL makes provisions for judicial separation, MPL does not. Nor does the state make concession for these women who are customarily divorced[130]. This though leads to a dilemma in that if the process to encode personal laws of each community is to continue it follows from this case that other realms of law have to be amended to accommodate each personal law.

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[129].(Agnes, 1994, p.1170.)

[130].(Agnes, 1994, p.1170)

A secular approach is seen by many reformers from within as western and therefore alien[131]. Reformers from within also often reject comparative studies on MPL reform in other countries[132]. Yet such studies would prove that to enact one singular MPL would dismiss the misconception that there is actually one single MPL. Because it has been argued that Muslims in India are not concerned with MPL reform in other countries and believe it does not affect them[133], it can then be concluded that Indian Muslims see themselves not as part of a larger Muslim world body or entity, but as Muslims of a particular demographic and cultural setting. It follows that MPL reform does not just involve being Muslim, but specifically being an Indian Muslim.

Reformers from within are also guilty of perpetuating the view of a single solid, unified Muslim community[134] Reformers from within as well as fundamentalists bolster their arguments on the right to preserve their culture and language[135]. But these rights are subject to fundamental individual rights granted by the Constitution.

While some advocates of reform from within admit that the conflicts in interpretation often work to the detriment of

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[131].(Baxi, 1975 p.31)

[132].(Baxi, 1975)

[133].(Baxi, 1975, p.33)

[134].(Kozlowski, 1993, p.91)

[135].(Mahmood, 1993)

women[136], they do not explain how reform from within will eradicate this problem.

Tnough some may argue that Sharia Law is inherently progressive and open to reform it has its origin in patriarchal and sometimes plainly misogynist pre-Islamic values. For instance, the concept of mehr stems from the belief that marriage is a contract whereby the husband is purchasing sexual rights over his wife[137]. While reformers from within like Fyzee argue that polygamy is only a permissive right which would not be in conflict with any state law prohibiting it[138] the standard he implicitly sets for legal reform is religious doctrine and not liberal democratic fundamental rights. While polygamy has been explained by many as a necessity in pre-Islamic Arabia to prevent widespread adultery and sexual perversion[139] such justification fails to acknowledge that while such deviant acts were committed by men, polygamy does not seek to change the behavior of men. Further, it does not prevent such behavior on the part of the husband, but rather gives him a legal sanction to continue it. As of yet, most Muslim reformers have focussed on the abolition of polygamy and talaq al-Bidah, as well as provisions for maintenance. They base their arguments for such change on more liberal readings of the Sharia. However, basing claims for change

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[136].(Khory, 1993, p.127)

[137].(Coulson, 1963, p.255)

[138].(Fyzee, 1964, p.212)

[139].(Mahmood, 1986, p.70),

on immutable religious doctrine like the Sharia has its limitations in that these same reformers are opposed to reform in inheritance laws, as such changes are antithetical to the [140] So they are not concerned with change for its own sake, but change which can still be called Islamic in nature.

While it has been argued that resistance to reform of MPL is not a resistance against change itself, but to the formalizing of such change through the legal process[141] perhaps this so because formal change would not only keep the debate a public one, but would also pave the way for bringing women into the public sphere. The opposition to MPL reform is not only a resistance to formal reform, but also because the Sharia has evolved into one of the few aspects unifying all Indian Muslims and enabling them to remain different them from the rest of the population[142]. (Lateef, 1990, p.14) Yet that the Shariat has been observed in different degrees by different Muslim communities shows that reliance on it as a unifying political symbol is also precarious.

While reformers from within have maintained more credibility in the public eye because they appeal to the general masses[143] they have done so at the cost of substantial reform.

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[140].(Singh,1994,p.101)

[141].(Lateef,1990,p.11),

[142].(Lateef, 1990, p.14)

[143].(Lateef, 1990, p.79)

Furthermore, the leadership of the community has been rather elitist in that it has been used by the state to portray a symbolic unity of the community without tacking controversial issues within the community or without[144]. And while it has also been argued that the Indian state cannot and should not reform MPL on its own initiative because of its failure to protect Muslims during communal violence[145] how is enforcing MPL going to achieve justice for Muslims in such situations?

Though it has been argued that the observance of customs are necessary for group cohesion in order to further the struggle for the group's political and economic ends[146] what exactly are these ends and how do the means necessarily lead to and justify these ends, has always been assumed without being clarified.

As it has been widely believed that the upliftment of the community has to be addressed before that of a part of the community[147] there is no guarantee that doing so would necessarily pave the way for reforms with regards to women's status. If anything, such an argument presumes the improvement women's status to be subject to and dependent upon the welfare of men.

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[144].(Lateef, 1990 p.161, 1990).

[145].(Baxi, 1975 p.41),

[146].(Latef, 1990, p.102),

[147].(Lateef, 1990)

Arguments for reforms from within rely on the fact that the HCB was passed by the Constituent Assembly which was predominantly Hindu[148]. The same proponents also feel that change in MPL should come from the community itself[149]. Yet women like Shah Bano did do exactly this.

And while those Hindus most acrimonious about the inequities in MPL are hardly aware of those prevalent in the past and present HPL[150] the issue then should be to make them more aware rather than silencing the debate on MPL.

Although current reformers such as Husna Subhani of the All India Muslim Women's Association argue for reform from within in MPL in contributing to the success of Muslims' political struggle[151] it is this process which has not only impeded change, but also led to the communalization of the issue.

The persistent analysis of inequities in the Koran and other religious doctrines seems futile as many members of Muslim communities have learned and acquired these inequities not from the written word, but from practice[152]. so to them it does not

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[148].(Kannabiran, 1994, p.1509-1510).

[149].(Kannabiran,, p.1510)

[150].(p.1264, Navlakha,1994)

[151].(p.450, M.Hasan,1994),

[152].(p.244, Saiyed E. Khan, 1976)

matter where the inequity stems, but that it has been a part of the community's living tradition.

And though many activists bolster their argument for reforms or a UCC by citing that most Muslim women do not side with the ulema on MPL issues[153] whether or not this is true should be irrelevant to the issue of fundamental rights because not only does it relegate rights to the will of the majority, thus jeopardizing the rights of a minority within the group, but it also implies that such rights can be taken away and are thus not alienable.

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[153].(p.127, Khory)

Chapter Five

Conclusion

The Debates Over the Uniform Civil Code

A. The Constituent Assembly Debates

Although the Uniform Civil Code was raised several times throughout the Constituent Assembly Debates, it was officially discussed on November 23, 1948 when it was proposed as Article 35 of the Constitution.

Mohamed Ismail Saheb of Madras wanted a proviso to be added stating : "Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law". [1]. He equated community or collective rights with fundamental rights. While not denouncing the need for a secular state, he felt it should not interfere with a person's way of life. He also maintained that this amendment should be applied to the minority and majority alike, and if not, then national harmony would be jeopardized.

Naziruddin Ahmed proposed the following proviso to be added : "Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law." Though he recognized that his proposal conflicted with Article 19's purpose of controlling and or eradicating" pernicious practices which may accompany religious practices", he similtaneously maintained

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[1]. (CAD, 23 November, 1948, p.p.540-541)

that personal law did not fall within this scope[2].

Mahboob Ali Baig Sahib Bahadur of Madras also proposed a proviso to be added, stating, :"Provided that nothing in the Article shall affect the personal law of the citizen". He bolstered his contention by arguing that a Civil Code had nothing to do with personal law, as the latter was completely dependent on religion, and further that in a secular state, the government had no right to interfere in the cultural and religious life of its citizens[3].

B.Pocker Sahib Bahadur from Madras supported Mohamed Ismail Saheb's proposal. Although he claimed to be speaking primarily for Muslims, he bolstered his contention by citing those Hindu organizations which were opposed to a uniform civil code (UCC). He proposed that this article be made a directive principle rather than a fundamental right and further that the proposed proviso not be subject to the voting of the Article[4].

Hussain Imam of Bihar was also opposed to a UCC. His reasoning was that because India was so diverse, regionally ethnically, and developmentally, there could not be uniformity in personal laws. He maintained that this could only be brought

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[2]. (CAD, 23 November, 1948, p.p.541-543)

[3]. (CAD, 23 Nov. 1948, p.p.543-544)

[4].(CAD, 23 Nov. 1948, p.p.544-546)

about when the economic and social conditions of all Indians were uniform, and further that the government of a secular state should not interfere in personal law as a secular state was not anti-religious nor irreligious, but non-religious[5]. In other words, the state was not to be all-encompassing. The state was to be relegated to the public sphere, and religion to the private sphere; and the family was the private sphere.

On the contrary, K.M. Munshi argued that regardless of whether or not the proposed amendments were added to the Article, Article 19 of the Constitution confers upon the state the power to enact social reform, even if it may impede on religiously based family law. He also felt that the equating of personal law with religious identity was most emphasized by the British, and that such process should be stopped as it was not only contradictory to a secular state, but gender justice, as [6]

Shri Alladi Krishnaswami Ayyar of Madras was also a proponent of a UCC, but he mostly emphasized national integration and uniformity of law as a step towards national [7].

Ambedkar felt, too, that since all other realms of law had been codified and unified, there was no reason personal law should be excluded. He also maintained that if it was passed,

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[5].(CAD, 23 Nov. 1948, p.546)

[6].(CAD,23 Nov,1948, p.p.546-548)

[7].(CAD, 23 Nov,1948,p.p.549-550)

there was no guarantee of it being inplemented in the future as a mandatory civil code.

B. Current Debates

While the the current debates over the UCC have grown in intensity and frequency in the last decade, contrary to popular belief, to a considerable degree they reiterate the attitudes expressed by Constituent Assembly Debates.

Those opposed to a UCC invoke issues like preservation of culture, the right of religious and cultural groups to live the way they choose, and respecting the sanctity and privacy of the family. While those advocating a uniform civil code stress national integration and improving the status of woman of all communities.

While some reform on the part of the state has served to improve the status of women - namely the Hindu Code Bill - it has done so at the cost of tightening the boundaries of this "community", and making women's roles in intrafamily relations a criteria for this boundary[8]. It has also contributed to the communalization of politics in that in order for Hindus to be united as a community, they had to be united against an "other". So what resulted was discourse distinguishing Hindu women versus "other" women.

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[8].(Mann, 1994 p. 114, in Hasan et al.)

Within the context of minority politics such interferences on the part of the state has allowed the state to deal with and address minorities via their religion rather than through their political, economic and social interests and rights[9]. Subsequently, debates on the status of women via their communities has led to tit-for-tat politics between communities. By enacting the 1986 Act, the central government felt it was appeasing "popular Muslim sentiment" and quashing "their" anger and resentment towards the opening of the Babri Masjid for poojas. Hence, women's rights and concerns take a side line. (p.52, Hasan)

Yet the mere fact that the issue of preservation of religious culture arises when the roles and rights of women are questioned shows the level of sexism and mysogany within communities. With regard to Hindu personal law, legal prohibition of discrimination against untouchables wasn't opposed to nearly as vehemently as the Hindu Code Bill. And the same can be said in reference to Muslim personal law in India. The issue amongst conservative Muslims is not whether their culture is being jeopardized at the hands of the state, but rather the rights of power of men over women. If they really wanted to preserve their culture, they would've appealed for the codification of such customary or Koranic injunctions which also hold husbands to

[9].(p.xii, Hasan)

certain marital obligations[10]. In many cases of divorce of Muslim couples, in an attempt to evade or postpone payment of mehr, husbands often process their cases through civil courts rather than Shariat courts, knowing well that the bureaucratic process inevitably gives them 10-12 years before they are forced to recompensate their wives. And often due to lack of funds, the wives forfeit their claims[11].

I would like to conclude by saying that India - if it is to sustain itself as a nation-state - has to pursue a form of secularism compatible with liberal democracy. This does not mean that all aspects associated with secularism should necessarily be applied. The principle of absolute political neutrality, for instance, would be impossible to implement because it assumes economic and social uniformity and equality of all groups and communities, and therefore calls for helping or hindering each religious group or community equally in their struggle to secure their individual-based political and economic interests and rights. It also assumes impartiality on the part of the state which doesn't exist in any society[12].

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[10].(Metcalf, 1994, p.12, in Hasan et al)

[11].(Mann, 1994, p.155, in Hasan et al)

[12].(Bhargava, 1994 p.1788)

However, the only way the state can pursue social reform is if its seeks an ideology compatible with this kind of social reform and takes into consideration the ground realities of societal inequality, rather than facetiously dismissing this ideology because it may be antithetical to the existing societal structure. After all, it is this societal structure which is the source of this inequality.

In looking at the debates over the uniform civil code, I maintain the need for a secular means to a secular end, and the need for that end. The fact that the state has allowed those personal laws which greatly disadvantage women to flourish exemplifies the state's own intention of legitimizing discrimination against women. If upper caste Hindus demanded that the state recognize and enforce personal laws calling for the subjugation and denial of equal rights for untouchables, a debate on the matter would be sharply contested on grounds that such laws discriminate against a specific community[13].

Furthermore, being vested with the right to live by one's personal law also implies having the choice not be exercize that right. In other words, if it is a right which can be enforced by the state against the beneficiary's will, then it is no longer a right, but rather a rule one has to live by. And finally, by leaving it up to the community to interpret religious text to determine a personal law which should be enforced by the

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[13].(Parashar,1994, p.19)

state, realistically it ends up being men in the community who interpret the text, and obviously they have a vested interest in preventing change[14]. Although secular law reform cannot definitely bring about gender just laws, it is fair to argue that religiously based law reform can definitely not bring about gender just laws. This is so not only because of the nature of religious doctrine and institutions, but also because these two have served to sanction and preserve the family. More specifically, the family and religious institutions depend on each other for legitimation. This is not meant to exonerate the state as it has not only interfered with, but also politically and legislatively empowered religious institutions to preserve the patriarchal family. Most proponents of the UCC claim that its absence only continues to violate the fundamental rights guaranteed to all citizens in the Constitution. Though this may be true, what they neglect is the fact that the Indian Constitution itself contains contradictions and loopholes which allow the state to evade the enactment of a UCC, and interfere with religious institutions for the state's own political ends.

However, limiting the analysis of the problem to the role and behavior of the state neglects the source of gender inequality - the family. While some have called on the need to rethink the state and its role in sustaining patriarchy, the source of this patriarchy gets ignored. So perhaps it is also time to rethink the family?[Menon (1994) gives an insightful

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[14].(Parashar,1992, p.229)

analysis in gender politics and the law. However she contradicts herself in arguing that women have a harder time tackling the inequalities in their families than those within the state apparatus. Yet simultaneously she feels that it is because of this and the politicization of the family that it is the state which has to be "rethought". Although one cannot deny the state's role in politicizing the whole issue of law reform, it cannot be logically concluded that deconstructing the state will necessarily pave the way for a more gender just society.]

So far both sides of the issue have addressed women's rights via the family or the community to which she belongs, without looking at her rights regardless of her community affiliation. So she is treated not as a citizen, but a citizen of a particular community. And this is what has served to communalize the issue. The independent Indian state has addressed Hindu personal law through legislative means, and Muslim personal law through the political and electoral process. This has not only impeded women who would otherwise support reform of personal laws and or a UCC, but for the fact of being accused of communalism. It can then be speculated that the state intentionally set out to treat women differently based on their religious personal laws, because doing so would prevent a unified women's movement, as women from within a community in question are forced to choose between exerting their rights as women and citizens, and their allegiance to the community. Women outside the community in question are compelled to assert the rights of all women regardless of which community they belong to, often at

the cost of being accused of communalism or insensitivity to the needs of the community in question; or acquiescence for fear of being accused of such sentiments.

In both the Shah Bano and the Sarla Mudgal cases of 1985 and 1995 respectively, the judges expressed the need for a UCC, yet not primarily for the upliftment of women in their families. Their primary focus was national integration. In other words, just as women's role within the family was to be the mark of distinction for a community, so was it to be the sole criteria for communally unifying or preventing the communal unification of a country. This is why Shah Bano finally capitulated to the demands of the clergy and foresook her right to maintenance.In the Shah Bano case, Justice Chandrachud so generously elaborated the plight of Muslim women, yet expressly stated that the case was not of constitutional importance. Similarly there have been suggestions and proposals by some women's groups for an optional uniform civil code, in which women could opt to be governed by personal law or a uniform gender just law. Yet, this suggestion does not solve the problem of communalization of the issue, but evades it. It also implies that women's rights are to remain subordinate to the political welfare of their community, however that might be defined. So women would continue to shoulder the burden of bearing the public mark of distinction for their community. Furthermore, and perhaps more importantly, such an option reinforces a negative right in that if a woman chooses not to avail of a gender just code, then she is exercizing a right of choice. But if that choice is reinforced by the state to the

detriment of the woman, then it ceases to be an enabling right. Such a proposal also ignores the ground realities that under such circumstances, women would be coerced by their families into opting for their religious personal law, and thus only serving to reinforce what law reform purports to eradicate - the patriarchal family and its inherent inequalities. What then is needed is an open dialogue focussing on women's rights as women, not as members of communities where their concerns are hijacked by politically loaded and simultaneously vague and abstract terms like "culture", "community", and "identity".

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