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Personal Laws under Colonial Rule

Why were personal laws left out of codification processes and with what consequences for the status of women? How was the relationship between custom and law, tradition and modernity, faith and community redrawn as a result of this 'exceptionalizing'? And how did women respond in the 20th century to the question of plurality versus unified personal law?

Two developments in the Indian subcontinent since 1986 have highlighted the ways in which women's rights have been poised between community and state. On the one hand are the breakthroughs made by Indian feminism in legal reform, strategic uses of the law and generation of sophisticated understandings of how the law operates or has operated in the past, to both mirror and challenge existing hierarchies. On the other hand has been the meteoric rise, particularly since the 1980s, of the Hindu right which, by often adopting the language of 'feminism', has called for a recalibration of earlier feminist demands. The certainties of the immediate pre-independence days and the optimism about the emancipatory outcomes of law reform since 1947 have been radically recast by feminists themselves. Feminists increasingly express caution regarding the imposition of one uniform law for all, since they recognize that uniformity does not promise gender justice. The wariness also arises from the vastly altered political circumstances under which the demand for a uniform civil code is now being made, not necessarily as a tool for ensuring gender justice, but as a weapon with which to target Muslim men (and women).

We start with an observation that remains as true today as when personal law reform was first discussed in the 1920s. Indira Jaising has said:

> In reality, whether we want it or not, there is a common civil code that operates for all women. All family codes—be they Hindu, Muslim, Christian or Parsi—

> discriminate against women…. Women have no rights under family laws. This is common code of discrimination and disinheritance.[1]

Marriage and family formed the core of colonial Hindu (as well as other personal) law. Despite its frequent assertions to the contrary, by 'denominating marriage and family as the primary subjects of religious law, the colonial state both claimed to be attending to the effective significance of these matters for Indians, and also subjected them to state scrutiny and jurisdiction'.[2] By the 1930s, personal law had already changed dramatically, since it was subject to 'new modes of rationality as seen in the development of case law, legal reporting, citational practices and the like'.[3]

The discussions about personal law help us to recognize that the Hindu, Muslim, Christian, Jain or Parsi 'family' is not a natural form, but has been constantly shaped and reshaped in different parts of India, at different times. We have already seen the changes that came about in working-class families in the late 19th and 20th centuries and the transformation of the matrilineal family in the same period. So the nuclear, patrilineal, patriarchal family (in which descent is traced and property inherited through men) only gradually took root, partly through the operations of Anglo-Indian law.

We still need to return to the context in which women themselves recognized the injustices and inequalities of 'personal' laws and proposed solutions. We also need to understand why feminist views have changed quite dramatically over the last one hundred years, as we take stock of successes, reverses and contexts. What will ensure greater equality and justice for women: Uniformity? Plurality? More state law or less?

Early Demands for a Uniform Civil Code

A large part of the discussion since the 1920s concerned women's rights under Hindu law. During her presidency of the AIWC in 1931, Muthulakshmi Reddy urged that steps be taken 'to amend the present state of Hindu Law relating to women to make it equitable' and the resolution was

[1] Indira Jaising, *Aawaz-e-Niswan*, 1999, p. 21, as cited in Razia Patel, 'Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice', *Economic and Political Weekly* 44, no. 44 (31 October 2009), pp. 44-49, esp. p. 47.

[2] Rachel Sturman, 'Marriage and Family in Colonial Hindu Law', in *Hinduism and Law: An Introduction*, ed. Timothy Lubin, Donald R. Davis Jr and Jayanth K. Krishnan, pp. 89–104 (Cambridge University Press, 2010), esp. p. 89.

[3] Ibid., p. 103.

unanimously passed.[4] A decade later, Malinibai Sukthankar of the NCWI, in her report on the legal status of Indian women, voiced strong support for the range of bills relating to law and marriage due to come before the legislature, suggesting that 'the (next and equally) important item for the Conference is to make a comparative study of the laws of different communities relating to women with a view to evolve *a uniform legal basis for women irrespective of their creed, social position and faith*'.[5]

Between Reddy's cautious call for reform and Sukthankar's bolder plea for a uniform civil code, there lay a decade of legislative initiative, and bitter debate, which convinced Indian feminists that the retention of a plurality of personal laws in the name of 'protecting religion' was unambiguously detrimental to the social and legal status of women. The AIWC listed a broad range of legal, social and political disabilities in a 'Memorandum to the League of Nations on the Status of Women in India', when the colonial government failed to consult women's organizations on the question of personal law reform.[6]

What Was Personal about Personal Law?

'Personal laws' referred to a range of religion-based family laws governing marriage, separation, inheritance, maintenance and adoption, wholly instituted and implemented by men, which vitally affected the status of all Indian women. The effect of these laws defined, controlled and, in most cases, limited the rights of women within and outside families. In the process of codifying Hindu and Muslim law, the Code of Civil Procedure (1859), the Indian Penal Code (1860) and the Criminal Procedure Code (1861) marked the sphere of family laws as 'religious', leaving them uncodified, partly since 1857 made the colonial regime wary of intervening in matters that were deemed 'religious' and 'personal'. By the late 19th century, the sphere of the family was in turn recast as uncolonized in the nationalist imagination and, as already seen, guarded from any interference by colonial authorities or even liberal Indians.

By the 20th century, Indian feminists recognized the centrality of gender justice to any discussion of personal laws and were impatient with 'religious'

[4] Aparna Basu and Bharati Ray, *Women's Struggle: A History of the All India Women's Conference, 1927–1990* (Manohar, 1990), p. 46.

[5] *Report of the Conference on the Legal Status of Indian Women* (National Council of Women in India, 1943), pp. 15–16 (emphasis added).

[6] AIWC (1936, p. 334), as cited in Jana Everett, '"All the Women Were Hindu and All the Muslims Were Men": State, Identity Politics and Gender, 1917–1951', *Economic and Political Weekly* 36, no. 23 (9 June 2001), pp. 2071–80, esp. p. 2076.

laws, especially following the reforms of the 1930s. Thus, the *Women's Role in Planned Economy* sub-committee report stated in the 1940s:

> No national plan can entertain such communal diversities which result in inequalities among men and women governed by the same state. We, therefore, recommend that a common civil code for the whole country based on the fundamental principle of equality between man and man and between man and woman be evolved incorporating the best points of the personal laws…. A modern state almost invariably has a common civil as well as a common criminal code.[7]

The colonial state unhesitatingly applied a uniform criminal code to India, which introduced harsh penalties for property-related crime while 'trumpeting its leniency and improved morality over precolonial India'.[8] Within criminal law the British did not develop the same fine gradations for crimes against people's bodies as were developed for crimes against property, clearly indicating the priorities of the colonial state.[9] Yet, as Archana Parashar points out, the categories 'religious laws' and 'personal laws' became interchangeable; in the process, it was forgotten that before British rule, all other aspects of law for Hindus and Muslims were as religious as the personal laws.[10] Many of the 19th-century social reform acts reached into and reshaped families. There was also the modification of Indian social life through other legislation, such as the Caste Disabilities Removal Act of 1850 demonstrating that 'the religious sanctity of a practice was not sufficient by itself to prevent the government from interfering with it'.[11]

Finally, the British did not uniformly apply a policy of non-interference in personal laws to members of other religious groups such as Jews, Parsis and Armenians; given their small numbers, there was no comparable anxiety on the part of the colonial administrators to 'save' the personal laws of these minorities. Indeed, a plea from the Parsis that their personal law be recognized in matters of succession was rejected by the third Law Commission until a Parsi Law Commission, appointed in 1864, finally recognized such a right.[12]

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[7] *Women's Role in Planned Economy* (Vora & Company, 1947), pp. 118–19.

[8] Michael Anderson, 'Classification and Coercion: Themes in South Asian Legal Studies in the 1980s', *South Asian Research* 10, no. 2 (November 1990), pp. 158–77, esp. p. 168.

[9] Vasudha Dhagamwar, *Law, Power and Justice: Protection of Personal Rights Under the IPC* (N.M. Tripathi, 1974), p. 135.

[10] Archana Parashar, *Women and Family Law Reform in India* (Sage Publications, 1992), p. 66.

[11] Ibid., pp. 71–72.

[12] Ibid., pp. 65–66.

The paradoxes that marked the administration of law must be understood against the shifts that occurred in economy and society. The colonial Indian economy passed through broadly three stages: from a period of predatory mercantilism (from the earliest days of the EIC in India in the 17th century to the late 18th century) to the period when it actively encouraged property rights and forms of capitalist enterprise appropriate to its (revenue) extractive regime through the 19th century. The late colonial state was increasingly challenged by the moral-intellectual leadership of the Indian national movement and by Indian capitalist enterprise, which recognized the structural antagonisms of colonialism and demanded no less than a transfer of power. In the first phase, a declining mercantilist interest in India and an increasing interest in revenue collection prompted changes to further commercial land relations, for which status-based concepts of property were not useful. In the later stages, the colonial state tried to secure its power, create a market in land, transform the meaning of ascriptive categories and create dependable allies.[13]

This process did not necessarily replace 'traditions' and 'customs' with modern legal institutions. Indeed, 'custom was frequently described in terms of organic social harmony which permitted its validation as it was incorporated into the protocols of state administration'.[14] Thus, the latter two phases were marked by a greater reluctance to challenge tradition, even as selective changes were made. As many as 20 bills were sent from Madras and Calcutta to Delhi before the Hindu Gains of Learning Act was finally passed in 1930. The primary contestants for post-colonial power, the urban and rural elites, were gradually welded into a working coalition under the leadership of the Congress, producing an uneasy accommodation between feudal landed interests and a nascent bourgeoisie. Elaborate arrangements were made, for instance, to prevent land from being partitioned, by making the law of primogeniture applicable to ancient and prestigious families.

By the first decades of the 20th century, the gradual expansion of the legislative process to include wider sections of the Indian people produced a number of modifications to personal laws. In the process, Hindu women were given more rights even as 'Muslim women were subjected to a more rigorous control of the high culture Islamic law'.[15] Colonial support for the reform of

[13] Ritu Birla, *Stages of Capital: Law, Culture and Market Governance in Late Colonial India* (Duke University Press, 2009), p. 5.
[14] Anderson, 'Classifications and Coercion', p. 65.
[15] Parashar, *Women and Family Law Reform*, p. 75.

personal laws of both major communities was out of an anxiety to reconcile traditional power wielders with the advocates of reform.

Therefore, what were called 'personal laws' at the moment of independence were often modified laws amounting, in some cases, to state enactments.[16] At the heart of such personal laws, as in no other set of laws, lay the pervasive and sanctioned discriminations against women, which 'naturalized' hierarchical relationships and inequalities within and beyond families. Members of the two major communities, the Hindus and the Muslims, were progressively Hinduized and Islamized respectively, which brought them closer to strict renderings of the law according to textual authorities and reduced the importance of customary laws. The two minority communities, the Parsis and the Christians, were also subjected to reforms of their marriage, divorce, property and inheritance laws, but the other minor communities, such as the Sikhs and the Jains, were considered Hindus. Reform measures that specified and affected gender relations in various communities will be considered in the rest of this chapter.

The Invention of Christian Personal Law

Personal law for Christians was paradoxically itself a creation of the colonial regime, to rescue converts to Christianity from social oppression. Christian personal law, such as it prevails in India today, consists of statutes which were enacted in the second half of the 19th century. Nandini Chatterjee has argued that the indeterminate status of converts to Christianity led to the search for 'universal' laws, though in effect they only applied to Christians, thus giving Christians a personal law of their own in several 19th-century enactments.[17]

The Indian Succession Act of 1865

Christians ranged from those belonging to older established Christian traditions (such as Syrian Christians) to those who were more recent converts to Christianity. No single law could apply to such a heterogenous group. For instance, could Christians appeal to (Hindu) custom after conversion? This question arose during the important nine-year legal battle *Abraham v. Abraham* (1863). A woman of Anglo-Portuguese origin, Charlotte

[16] Ibid., p. 76.

[17] Nandini Chatterjee, 'Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India', *Modern Asian Studies* 44, no. 6 (November 2010), pp. 1147–95, esp. p. 1179.

Fox, married Mathew Abraham, a member of the Paraiya Tamil caste who had converted to Roman Catholicism. Mathew Abraham amassed wealth from a liquor business but died without a will in 1842 in Bellary, leaving businesses and assets worth 30,000 rupees.[18] The principle battle that came before the Bellary court in 1855 was between the widow Charlotte Abraham and her two sons on one side and Mathew Abraham's brother Francis on the other. Although both parties were formally Christians, which law applied to them? Charlotte argued the family had made a radical break with Hindu custom following conversion, which entitled her to the property under English law, while Francis argued that converts retained their caste customs even after conversion. As co-sharing brother, and member of a customary Hindu joint family, he was entitled to that right. Charlotte won the case in the highest court in 1863, when the Privy Council refuted Francis's claims and granted that the Abraham family largely followed English customs.[19]

Soon thereafter, the Indian Succession Act (Act 10) of 1865 was passed, followed by the Indian Christian Marriage Act (Act 15) of 1872. This attempted to impose uniformity on inheritance law in India, but in fact also applied only to Christians since the Hindus and Muslims were exempt and Parsis did not permit intestate succession. This 'universal law' modelled on English succession law therefore became Christian personal law. It resulted in the 'erasure' of caste practices, which were considered alien to Christianity, and English law was extended to Christians in India.

When the Government of India explored the prospect of extending it to all communities, Parsis accepted only the section on wills and Muslim leaders completely rejected the law as making inroads into religious law; besides there were already well-defined testamentary powers for Muslims, and the Koran recognized oral wills, while the Indian Succession Act required registration of wills.[20] Hindus responded that property shares were clear-cut and did not require wills. Instead, a Hindu Wills Act was passed in 1870, which allowed families to bequeath property for religious and charitable purposes.[21] In effect, the Indian Succession Act became the 'personal' law of Christians, with

[18] Chandra Mallampalli, 'Meet the Abrahams: Colonial Law and a Mixed Race Family from Bellary, South India, 1810–1863', *Modern Asian Studies* 42, no. 5 (September 2008), pp. 929–70; Chandra Mallampalli, *Race, Religion and Law in Colonial India: Trials of an Interracial Family* (Cambridge University Press, 2011), p. 188; N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1177.

[19] Mallampalli, *Race Religion and Law in Colonial India*, p. 188; N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1178.

[20] N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1179.

[21] Ibid., p. 1180.

complaints made well into the 20th century that it deprived them of claims under Hindu inheritance laws. Nevertheless, many cases were filed regarding 'proof of custom', an appeal to caste-Hindu inheritance laws by non-Hindus, though the vexed question of whether all custom was 'Hindu' was never satisfactorily resolved.[22]

The Special Marriage Act of 1872

A marriage act passed in 1852 permitted civil marriages to be registered if at least one party was Christian, there was no living spouse and conditions of minimum age were observed. The new Indian Marriage Act (Act 5) of 1865 had greater impact, decreeing new ages for marriage (13 and 16 respectively for women and men). The 1872 Indian Marriage Act also brought in, on the request of many Indian Christian priests, clauses requiring parental consent for children below the age of 21.[23]

The Special Marriage Act was passed in 1872, after four years on the anvil, in response to a call from progressive Brahmos such as Keshab Chandra Sen to legalize inter-caste marriages (encouraged by Brahmos) and raise the marriage age for girls and boys to 14 and 18 respectively. Brahmos repudiated the Hindu caste order and declared themselves beyond the purview of Hindu family laws. In its final form, it affected only Brahmos, leaving out of its purview the members of all other communities. Ironically, Sen was severely critcized for flouting the bill when he got his 13-year-old daughter married to an underage Maharaja of Cooch Behar in 1878.[24] Nevertheless, the Special Marriage Act permitted not only inter-caste marriage but also overrode degrees of prohibited marriage, namely second-cousin marriage.[25] It allowed marriage based on adult consent, including inter-caste marriage, which could have encouraged the remarriage of many widows.[26]

[22] N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1165; Chandra Mallampalli, 'Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness', *Law and History Review* 28, no. 4 (November 2010), pp. 1043–65, esp. p. 1049.

[23] N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1186.

[24] Rochona Majumdar, *Marriage and Modernity: Family Values in Colonial Bengal* (Duke University Press, 2009), pp. 152–201.

[25] Deen Ahmadullah, 'Prohibited Relationship under the Special Marriage Act: A Lacuna', in *Family Law and Social Change*, ed. Tahir Mahmood, pp. 61–68 (Tripathi, 1975), esp. p. 61.

[26] Tanika Sarkar, 'Wicked Widows: Law and Faith in Nineteenth-century Public Sphere Debates', in *Rebels, Wives, Saints*, by Tanika Sarkar, pp. 121–52 (Seagull Books, 2009), p. 124.

More than 50 years later, Hari Singh Gour tried to get 'a civil marriage law, without reference to race, religion, or social distinction, [as] exists in all European countries passed'. This bill was thrown out and seen through another session, but was finally passed only in 1954 and 'permitted any two persons as citizens of India to marry according to its provisions'.[27] Sen's vision of a uniform marriage law was realized in this limited form only after eight decades.

The Indian Divorce Act of 1869

After 1852, the Government of India began receiving petitions from 'Indian converts to Christianity, complaining about their inability to re-marry when deserted'.[28] Indian Christian men were particularly disadvantaged since the act enjoined strict monogamy, unlike other Indian men, for whom polygamy was legal. The Native Converts' Marriage Dissolution Act of 1866 was the result, though the requirement of producing the deserting spouse was a hurdle that could not be overcome.

The Indian Divorce Act of 1869, the first statutory divorce act of the country, permitted Christians to seek dissolution of marriage on grounds similar to those prevalent in Britain. Yet even such acts proposed reforms that blatantly discriminated against women. Thus, under section 10, a husband could petition for divorce on the grounds that the wife was guilty of adultery, but the wife could petition on the grounds of adultery only in conjunction with other specified reasons. Women had to prove that a husband had converted to another religion or was guilty of incest, bigamy, marriage to another woman, rape, sodomy, bestiality, cruelty or desertion, in addition to adultery, to be granted divorce.

Only in 1983 did the Law Commission of India declare that the 'blatantly discriminatory' element be removed and propose that new grounds for divorce, namely by mutual consent, be introduced. In response to the writ petitions of two women, Mary Sonia Zacharia and E. J. Ammini, who declared that some of the provisions of section 10 of the Indian Divorce Act violated articles 14, 15 and 21 of the Indian constitution, the Kerala High Court handed down a significant judgment in mid-1995, making it possible for a Christian woman in Kerala to seek divorce on any one of the grounds of cruelty, desertion or adultery. This landmark judgment brought Kerala Christian women on par with Indian women of other communities;

[27] Ahmadullah, 'Prohibited Relationship under the Special Marriage Act', p. 63.
[28] N. Chatterjee, 'Religious Change, Social Conflict and Legal Competition', p. 1188.

and in 2001, changes to the Indian Divorce Act brought gender-based discrimination to an end, allowing for divorce on equal terms and on mutual consent.[29]

Married Women's Property Act of 1874

Certain laws exempted the two major communities and were applicable to Christian and Parsi women and the minuscule community of Jews. One such act was the Married Women's Property Act of 1874; section 2 of this act specifically excluded Hindus, Muslims, Buddhists and Sikhs, since they were governed by their personal laws.[30] The act permitted married women to administer their self-earned money and protect their benefits from a life policy of trust made in their names by the husband against his creditors.[31] Just as the English Married Women's Property Act of 1870 had successfully put an end to the principle of coverture, whereby a man and his wife were considered as one legal entity, the Indian act diminished the enormous economic disparities between men and women within marriage.

Even a law which was intended to benefit propertied women, however, operated in ways that tended to increase the burden of women, by making them responsible and liable for post-nuptial as well as ante-nuptial debts if they had been married after 1865. This served to relieve the husband of any charge of mismanagement.

The rights of Christian and Parsi women to separate property were further expanded by the Indian Succession Act of 1925, which gave equal property rights to daughters and sons and the same rights over property to the surviving spouse. It no longer distinguished between patrilineal and matrilineal relatives. In 1929, the Indian Succession Act was further amended to stress the separation of interest in property acquired before marriage and each single partner's full powers of disposal after marriage, although the act did not apply if one of the partners was non-Christian, non-Parsi or non-Jew at the time of the wedding.

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[29] Kusum, 'The Indian Divorce (Amendment) Act 2001: A Critique', *Journal of the Indian Law Institute* 43, no. 4 (October–December 2001), pp. 550–58.

[30] Law Commission of India, *Sixty Sixth Report on the Married Women's Property Act of 1874* (Government of India, 1986), p. 23.

[31] Angeles Almenas Lipowsky, *The Position of Women in the Light of Legal Reform: A Socio-legal Study of the Legal Position of Indian Women as Interpreted and Enforced by the Law as Compared and Related to Their Position in the Family and Work* (Franz Steiner Verlag, 1975), p. 54.

Travancore and Cochin Succession Acts

The last two acts did not cover the Christians of the princely states of Travancore and Cochin, where a large percentage of them lived, who were governed by their distinct set of personal laws. These laws were uniquely against women. Section 33 of the Indian Succession Act of 1925 said that if the intestate left a widow and lineal descendants, one-third of his property belonged to the widow and the remaining two-thirds went to his lineal descendants, whether sons or daughters. If there were no lineal descendants and the father was dead, the mother and sisters were entitled to inherit his property under section 44.

However, women were severely disadvantaged under both the Travancore and Cochin acts. Under section 17 of the Travancore Succession Act of 1911, the widow got half the estate if there were no lineal descendants of the intestate, with the rest going to his father, mother, paternal grandfather or the lineal descendants of father and paternal grandfather. The widow inherited the whole estate only in the absence of such kin. Under section 11 of the Cochin Succession Act of 1921, a widow got a share equal to two-thirds of the share of a son; if there were only daughters, then the widow got the equivalent of the daughters' share. As under the Travancore act, in cases when the widow inherited the whole estate, she did not forfeit it by death or remarriage.

The most controversial aspect of the two acts referred to the rights of the daughter. Under the Travancore act, the daughter's share in an intestate's property was only her *stridhanam*, which was one-fourth of the value of the son's share or 5,000 rupees, whichever was less. Section 20(b) of the Cochin act similarly gave the daughter a share limited to one-third of the son's share.

Mary Roy's Challenge

This blatant discrimination was finally challenged in 1986 by Mary Roy, who was denied her share in sizeable family property. As a woman who had married a non-Christian without traditional *stridhanam*, Mary Roy then divorced and supported herself and her children by teaching. She challenged the Travancore act as a violation of her constitutional right to equality and won a significant victory when the Supreme Court of India declared that the act was struck down with effect from 1951—that is, the date when the princely states of Travancore and Cochin joined the Indian Union.[32] The Indian Succession

[32] Nandita Gandhi and Nandita Shah, *Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India* (Kali for Women, 1992), p. 247.

Act of 1925 became applicable to Christians of the erstwhile Travancore and Cochin states.[33]

The Supreme Court struck down the Travancore act not on the grounds of right to equality within the family, but on technical grounds, namely that the very existence of such an act was an anomaly. The court did not declare the Travancore Christian Succession Act as violative of articles 14 and 15.[34] Nevertheless, the effect of that decision proved a major boost to the interests of women within families that had long denied them their inheritance.

The Kerala government filed a review petition which was rejected; members of parliament, notably P. J. Kurian, introduced a bill in 1986 to modify the judgment so as not to give it retrospective effect. Though it failed, the church synod, which stood to lose some part of its revenue due to the abolition of *stridhana*, engaged in a long pulpit campaign and offered to help men draft wills to contain the 'damage'. These campaigns invoked the threat to the 'traditional harmony and goodwill that exists in Christian families'[35] and invoked the spectre of nearly 60,000 Kerala nuns staking their claim for shares in the ancestral property. Although several Christian feminists strove to rewrite the laws and reform the community from within, the Church stood against it. The complicity between the Christian Church and the Indian state became clearer when the Law Commission accepted the views of the Church and not those of thousands of women who redrafted the alternative bill.

Early in 1993, the Kerala law minister introduced the Travancore–Cochin Christian Succession (Revival and Validation) Bill to cancel the retrospective effect of the Supreme Court verdict in the Mary Roy case, but it was refused presidential assent.[36] In fact, there was no flood of litigation after the Mary Roy decision, and she herself benefitted little from this landmark judgment. For a while, only two other women, Maria Kutty Thommen and Aley Kutty Chacko, had actually filed partition suits under the ruling. Between 1986

[33] Sindhu Thulaseedharan, 'Christian Women and Property Rights in Kerala: Gender Equality in Practice', Centre for Development Studies, Thiruvananthapuram, December 2004, http://www.cds.ac.in/krpcds/report/sindhu.pdf (accessed 11 July 2022).

[34] Tanja Herklotz, 'Armed with the Constitution: Feminist Litigation on Indian Family Law', in *Mutinies for Equality*, ed. Tanja Herklotz and Siddarth Peter Dsouza, pp. 115–32 (Cambridge University Press, 2021), esp. p. 120.

[35] P. J. Kurian's statement, quoted in Gandhi and Shah, *Issues at Stake*, p. 247.

[36] Thomas John, 'Succession Law in India and Obstacles in the Road to Gender Equality: The Experience of "Mary Roy v. State of Kerala"', *Student Bar Review* 18, no. 2 (2006), pp. 38–58, esp. p. 53.

and 2002, there were just 50 reported cases, partly since male heirs disposed of property exercising testamentary power, since the law is only operative on the property of those dying intestate.

Goa: Civil Code or Common Code?

Goa is often held up as the one state in India that has long had a 'uniform civil code', which was introduced as the Portuguese Civil Code in 1867 and is binding on all its citizens, regardless of religion. However, as feminists have pointed out, it is not in fact a uniform code but a common code. Importantly, it legalizes bigamy and polygamy among Hindus with no progeny, although it is claimed that it is a right that is rarely exercised.[37] The common code suffers all the infirmities of personal law: though the law appears gender-just, in bestowing rights to property on both sons and daughters, and prevents 'son preference' by the clause that parents cannot will away more than half the property, substantive inequalities exist. In the marital home, for instance, although the communion of assets implies that husband and wife jointly hold the right to properties acquired or inherited, effectively only men (unless they have an impediment) can manage and administer properties held in common. Ironically, the provision that children can relinquish their share of the property has usually been resorted to by women giving up their share to their brothers, usually under pressure. Although the registration of all marriages is compulsory, ignorance of the law often leads to what is effectively a religious ritual rather than a legal marriage, to the detriment of women's rights. In sum, the much touted 'civil code' does not ensure gender equality.[38]

The colonial state remained reluctant to dislocate patriarchal familial arrangements. These contradictions were revealed in the passage and implementation of the acts relating to smaller communities but were brought centre stage in questions pertaining to the majority communities. The range of contending interests—orthodox, liberal nationalist, revivalist nationalist and colonial—rarely placed the question of women's rights at the centre of their concerns, as seen in the initiatives taken to transform Muslim and Hindu personal laws in the 20th century.

[37] Ritu Dewan, 'Patriarchy and Property: Goa's Uniform Civil Code', *Indian Economic Journal* 71, no. 1 (January 2023), pp. 247–55, esp. pp. 250–51. What follows is drawn from this discussion.

[38] Albertina Almeida, 'Goa's Civil Code Shows that Uniformity Does Not Always Mean Equality', *The Wire*, 8 August 2016.

Muslim Personal Law Reform

The colonial judiciary, says Rohit De, 'conceptualized Anglo-Muhammadan law to be a more coherent code than Anglo-Hindu law and adjudicated disputes by referring to a narrower body of texts'. The primary legal authority for most courts included Burhan al-Din al-Marghinani's *al-Hedaya* a medieval manual of Hanafi law, or rather its English translation by Charles Hamilton, and a small corpus of other texts in addition to the Koran.[39]

This too posed contradictions. The Koran clearly acknowledged the right of women to the property of her parent or husband and her control of such property.[40] However, the 19th century was marked by not only juridical confirmation and enhancement of Muslim women's rights but outright denial as well. This unevenness was due to the fact that Muslim communities in India were historically constituted in ways that did not conform to strictly Islamic practices. Thus, the Cutchi Memons of western India retained essentially Hindu laws of succession long after their conversion as an Ismaili (Shiite) sect.[41] The Bombay High Court applied Hindu *Mitakshara* law to the Khoja Muslims, while deciding cases of inheritance and community property.[42] The practices of Muslim Jats of Punjab (which included polyandry and female infanticide) bore closer resemblance to their Hindu and Sikh counterparts in their anxiety to prevent the partition of property.[43] The Punjab Laws Act (Act 4) of 1872 gave custom the force of law, thereby reducing the Muslim woman's right to a marriage contract. Similarly, the Mapilla of the west coast region had followed the customary Marumakkathayam or Aliyasanthana matrilineal systems.[44]

Although 19th-century religious scholars urged their followers to stay away from Anglo-Indian courts, disputes involving land or inheritance

[39] Rohit De, 'The Two Husbands of Vera Tischenko, Apostasy, Conversion and Divorce in Late Colonial India', *Law and History Review* 28, no. 4 (November 2010), pp. 1011–41, esp. pp. 1014, 1019.

[40] Gregory Kozlowski, 'Muslim Women and the Control of Property in North India', in *Women in Colonial India: Essays on Survival, Work and the State*, ed. J. Krishnamurty, pp. 114–32 (Oxford University Press, 1989), pp. 114–15.

[41] Christine Dobbin, *Urban Leadership in Western India* (Oxford University Press, 1972), pp. 113–21.

[42] Amrita Shodan, *A Question of Community: Religious Groups and Colonial Law* (Samya, 2001).

[43] Dushka Saiyid, *Muslim Women of the British Punjab: From Seclusion to Politics* (Macmillan Press, 1998), pp. 6–19.

[44] K. Saradamoni, *Matriliny Transformed: Family, Law and Ideology in Twentieth Century Travancore* (Sage Publications, 1999).

invariably landed in British courts. These courts then had the option of asserting women's rights as per the scriptures, and several women recognized the advantage of taking complaints to them.[45] Similarly, British courts were able to enforce payment of amounts guaranteed to women at the time of marriage as *mehr*.[46] Since attention was also paid to customary practices, however, as in the case of the Memons, Jats and Mapilla, courts often upheld customary practices even when they went against Islamic scriptural law: thus the Khojas and Muslim Jats usually excluded female heirs altogether. Despite its reluctance in the early decades of the 20th century, the Government of India was compelled to pass the Cutchi Memons Act of 1920 in response to the demand that Cutchi Memons be free to adopt the Islamic law of inheritance as opposed to customary law. The new act did not go all the way in imposing a complete shift from customary law but instead gave Cutchi Memons the option of adopting the Islamic law of inheritance. Encouraged by the fact that large numbers of the community sought recourse to the new law, the leadership of the community demanded that Islamic law be made obligatory for all Muslims. This would pave the way for the Shariat Application Act of 1937.

A new Cutchi Memon bill, enacted in the form of the Cutchi Memons Act of 1938, established that 'all Cutchi Memons shall in matters of succession and inheritance be governed by the Muhammedan law'.[47] Several princely states such as Cochin, Travancore and Mysore passed similar acts shortly thereafter. Meanwhile, as already noted, there was a gradual absorption of the Marumakkathayam and Aliyasanthana Mapillas into a classical Islamic form of law, transforming their matrilineal traditions.

In balance, colonial readings of Islamic law contained contradictory promises, threatening to cut some women off from inheritance through the elevation of custom over scripture and yet others through an excessively narrow reading of the scriptures. Thus, *awqaf* endowments (to mosques, schools and other establishments), which were frequently the means by which property was kept in the family often to the advantage of female heirs, were, in a Privy Council decision of 1894, cast as property instituted wholly for religious or charitable purposes. At the same time, the persistent colonial tendency of understanding Indians as collective types and classes, rather than as individuals with discrete interests, cast the Indian Muslims as a monolithic

[45] Kozlowski, 'Muslim Women and the Control of Property', p. 127.
[46] Ibid., p. 130.
[47] Tahir Mahmood, *Muslim Personal Law* (All India Reporter, 1983), p. 21.

community whose interests could never be reconciled with those of the Hindu majority, and therefore required the special protection of colonial agencies. The consequences of this understanding in structuring the politics of representation, eventually leading to the partition of India, are too well known to bear repetition here.

But, as recent research shows, the narrow adherence to scriptures also benefitted women. The colonial state's preference for text-based knowledge to the actual practices of communities, or rigid interpretation of law by the colonial state, provided Muslim women opportunities to leave unhappy marriages. In part, 'they were also encouraged by the sympathetic attitude taken by the colonial judiciary, influenced in no small part by paternalism', and many women went to court 'to marry of their own will, or to escape difficult marriages'.[48] Islamic law in British India that allowed 'apostasy', which was held to be a treasonable offence under traditional Islamic law, became the route for women to dissolve an unhappy marriage. Ameer Ali (the first Indian member of the Privy Council) pointed out the irony of British Indian courts, which, by strictly adhering to the letter of the law, had ended up bestowing as a privilege on the Muslim wife what was intended to be a punishment.[49]

The dramatic political alliances and cleavages of the late 19th and early 20th centuries, and the gathering force of the Congress and the women's movement, produced new pressures for reforms of Muslim personal law as well. Group rights were hardened as a defence against majoritarian communalism.[50] Ironically, the two important reforms of this period, the Muslim Personal Law (Shariat) Application Act of 1937 and the Dissolution of Muslim Marriage Act of 1939, succeeded in Islamizing Indian Muslim law, as well as defining and limiting some of the rights women had enjoyed under customary law, without a commensurate change that would make them equal to Muslim men. Flavia Agnes has also concluded that the political unification of a Muslim community that had increasingly come under siege was the primary goal of the reforms.[51]

[48] De, 'The Two Husbands of Vera Tischenko', pp. 1038–39.

[49] Ibid., p. 1021.

[50] Susanne Hoeber Rudolph and Lloyd I. Rudolph, 'Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context', in *Religion and Personal Law in Secular India: A Call to Judgement*, ed. Gerald J. Larson, pp. 36–68 (Indiana University Press, 2001), p. 43.

[51] Flavia Agnes, *Law and Gender Equality: The Politics of Women's Rights in India* (Oxford University Press, 2001), p. 70.

The Muslim Personal Law (Shariat) Application Act of 1937

The right of female inheritance under Shariat ironically became, even as early as the 1860s, the reason for adhering to custom which denied them that right in Punjab and Northwestern Provinces.[52] Challenges to the primacy of customary law in Punjab raised demands for the appointment of *qazi*s (judges or magistrates of a Sharia court), even after their role had ended in 1864, to deal with the performance of marriages and other customs, but also to adhere strictly to the Shariat 'where conflicts over matrimony, divorce and inheritance arose between Muslim parties'.[53]

Later, following the rift that developed between Muslim and Hindu political leaders after the collapse of Khilafat politics in 1920–21, the *ulama*, clerics of the Jamiat Ulama-i-Hind, increasingly occupied centre stage as the sole interpreters of the Koran, often against Muslim representatives in the legislature, including M. A. Jinnah and H. M. Abdullah who raised cautious objections to the continuance of customary laws of primogeniture which were contrary to the Shariat and denied women their right to property. Eager to play a more central role, the *ulama* increasingly voiced concerns about Muslims who were not adhering strictly to rules of succession and inheritance as they were laid down in the Shariat. Both the *ulama* and the Muslim League wished to reduce the applicability of customary law among Muslims, since obedience to 'custom' was the convenient excuse used by rich landowners to bequeath their entire property to male heirs.[54]

The *ulama* had most success in urging all Muslims to adopt Shariat laws in the Northwest Frontier Provinces (NWFP). The 1930s movement launched by the Jamiat Ulama-i-Hind eventually led to the passage of the NWFP Shariat Act of 1935, which superseded custom as a source of law. The NWFP act was significant for a number of reasons: it clearly laid down all the areas in which Muslims were subject to the Shariat and provided for the possibility of reform through legislative intervention. Most importantly, as Tahir Mahmood has pointed out, it used the words 'Muslim personal law' and 'Shariat' interchangeably, thereby irrevocably linking religion to personal law.[55]

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[52] Robert Ivermee, 'Shari'at and Muslim Community in Colonial Punjab, 1865–1885', *Modern Asian Studies* 48, no. 4 (July 2014), pp. 1068–95, esp. p. 1085.

[53] Ibid.

[54] Saiyid, *Muslim Women of the British Punjab*, pp. 20–41; Parashar, *Women and Family Law Reform*, pp. 148–49.

[55] Mahmood, *Muslim Personal Law*, p. 23.

Ostensibly to improve the status of women, the Jamiat introduced a bill in the federal legislative assembly in September 1937, for which the support of a number of Muslim women's organizations was also sought. The statement of objects and reasons said:

> The status of Muslim Women under customary law is simply disgraceful. The Muslim women's organisations have condemned customary law as it adversely affects their rights and have demanded. that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of the Muslim-Personal Law will automatically raise them to the position to which they are naturally entitled.[56]

The discussion of the bill in the federal assembly appeared to strengthen the belief that Muslim women stood to gain most from its passage.[57] Though the bill was strongly supported by the religious elite, it was opposed by the landed elite who had frequently bequeathed property to adopted sons and others through wills and testaments. Not wishing to antagonize the Muslim landed elites, the Government of India home member emphasized that the Shariat bill would not affect agricultural property which fell outside the purview of the federal legislature.[58] As leader of the Muslim League, Jinnah suggested that the law be made optional rather than compulsory, since he was concerned about protecting the interests of the rural landlords who constituted the main support of the Muslim League.[59] This was conceded in a modified form: section 3 of the final enactment of the Muslim Personal Law (Shariat) Application Act of 1937 permitted individuals to choose between Shariat and customary law with regard to matters of adoption, wills and legacies. Other opponents of the bill urged the government to specify that 'laws that it had passed on various aspects of usage and custom would remain valid'.[60]

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[56] As cited in Nazreen Fazalbhoy, 'The Debate on the Muslim Personal Law', paper presented at the Third National Conference on Women's Studies, Chandigarh, 1986, p. 4. See also Mahmood, *Muslim Personal Law*, p. 25; Lucy Carroll, 'The Muslim Women (Protection of Rights on Divorce) Act 1986: A Retrogressive Precedent of Dubious Constitutionality', *Journal of the Indian Law Institute* 28, no. 3 (July–September 1986), pp. 364–76. This statement of objects presents a stark contrast to the preamble to the Mapilla Succession Act.

[57] Parashar, *Women and Family Law Reform*, p. 148

[58] Saiyid, *Muslim Women of the British Punjab*, pp. 32–33.

[59] Eleanor Newbigin, 'Personal Law and Citizenship in India's Transition to Independence', *Modern Asian Studies* 45, no. 1 (January 2011), pp. 7–32, esp. p. 27.

[60] Parashar, *Women and Family Law Reform*, p. 149.

However, in all other matters, Muslims were to be governed by the Shariat. The expectation that uniformity in Islamic law, however limited, would be advantageous to women was unrealized, and the gains remained largely symbolic.[61] There were three major coordinates within which this bill was debated and its provisions fixed. The bill was a compromise between the interests of the *ulama*, who were anxious to enlarge their role in an Islamized Muslim community; those of the Muslim League, anxious to protect its rich constituents; and, finally, the Government of India, eager to use the rural elite to counter the growing strength of the nationalist movement. Between these three contending interests, the cause of women received short shrift.[62] Although the proclaimed intent of this law was to rescue women from the uncertainties of customary law, women rarely participated, or were represented, in these debates. It was, once more, the anxieties of a community in transition, rather than unqualified liberal humanism, that prompted the passage of such an act.

Eleanor Newbigin suggests that British jurists' emphasis on religious scripture often served to strengthen Muslim women's claims to property, in particular their right to *mehr*, which was the property promised to a Muslim bride as part of the marriage contract, the payment of which, unlike dowry, was often deferred.[63] 'In a number of prominent cases, the colonial courts ruled in favour of a Muslim woman's right to *mehr*, granting her control over part of her husband's estate until this was paid',[64] thereby in principle at least acknowledging the legal personhood and property-owning capacity of Muslim women.

The Dissolution of Muslim Marriages Act of 1939

The second most important pre-independence legislation concerning Muslim personal law was the Dissolution of Muslim Marriages Act of 1939 (DMMA). Muslim women traditionally enjoyed the right of divorce (unlike women of other religions), which permitted them to seek the dissolution of their marriage by apostatizing from Islam.[65] Since Hanafi law, followed by most Indian Muslims and usually enforced, was more conservative than the

[61] Parashar, *Women and Family Law Reform,* p. 150.

[62] Dushka Saiyid, however, argues that the debates on the bill foregrounded the degraded status to which women had fallen as a consequence of adopting Hindu customs and culture. Saiyid, *Muslim Women of the British Punjab*, p. 35.

[63] Newbigin, 'Personal Law and Citizenship', p. 12.

[64] Ibid.

[65] Fazalbhoy, 'The Debate on the Muslim Personal Law', p. 5; Parashar, *Women and Family Law Reform*, p. 151; Mahmood, *Muslim Personal Law*, p. 47.

Maliki law on the issue of divorce, apostasy was the route that many Muslim women took to dissolve failed marriages.[66]

Rohit De's examination of all the cases between 1911 and 1938 reveals that the legal effects of women's apostasy were not challenged, since lawyers focused on the effects of the apostasy itself.[67] The *ulama* were increasingly troubled by this trend. They therefore decided to suggest a law which would empower Muslim judges to dissolve a marriage on the initiative of the woman in certain circumstances. Debates among legal and religious scholars in the 1920s and 1930s arrived at the conclusion that the adoption of specific provisions of the Maliki law on the subject would solve the problem of apostasy.[68] Meanwhile, Mrs Hamid Ali, with the help of certain Muslim women's organizations, produced an antenuptial agreement for inclusion in all marriage contracts, specifying the quantum of maintenance due to the wife.

The details of the bill were worked out by the Jamiat on the basis of work which had already been initiated as early as 1927 by the leading Deoband theologian, Maulana Ashraf Thanawi. As in the earlier act, the statement of objects and reasons cited concern for the 'unspeakable misery [caused by apostasy] to innumerable Muslim women in British India'.[69]

During the debate in the legislature, it was declared that true Muslim law did not permit automatic dissolution of marriage on mere apostasy, a principle that the government readily accepted. The bill made the principles of the Maliki law applicable to all Muslims. Although it was first emphasized that the law would not include the Shia Muslims, their inclusion too was later accepted by the government without protest. Such ready capitulation on the part of the state to the demands of certain sections of Muslims was not quite uniform, since it remained intransigent on other aspects of the bill. In its final shape therefore, the state refused to accept that only a Muslim judge could dissolve a Muslim marriage, on grounds that it produced unnecessary administrative difficulties. It thereby marked out its relative independence in reforming, but not overturning, religious personal laws. The government's decision not to allow only Muslim judges jurisdiction led to the Jamiat dubbing the revised bill un-Islamic. Though Maulana Ashraf Thanawi tried to persuade Jinnah to give it an 'Islamic framework', it was to no avail.[70]

[66] De, 'The Two Husbands of Vera Tischenko', p. 1021.
[67] Ibid., p. 1022.
[68] Mahmood, *Muslim Personal Law*, p. 46.
[69] Parashar, *Women and Family Law Reform*, pp. 152–53.
[70] Mahmood, *Muslim Personal Law*, p. 49.

There were significant regional differences in the support for and opposition to the bill. The movement for the DMMA and its apostasy provision was again led by the *ulama* from Punjab and the United Provinces, with opposition coming from the north and Bengal. Objections to the apostasy clause in the DMMA also came from south Indian Muslims because, as a judge from Madras said, Muslim women had long been given *khula*, or a form of ending marriages by consent, which made apostasy redundant.[71] Hindu legislators who supported the reform meanwhile indicated they would oppose any such reform in Hindu personal law.

Ironically, the new arguments against dissolving a marriage by apostasy were applied only to women—Muslim men continued to enjoy this right unhindered, a bias that undermined the advances made by women under this act in getting a marriage judicially dissolved. More important, as Parashar points out, the legislative initiatives authored by the *ulama* in the 1930s set the tone for an enduring use of Islam by religious leaders to legitimize their quest for political power, through conceding, if necessary, a certain degree of personal law reform.[72] Although courts have extended the meaning of the act in several ways, to include new definitions of cruelty and irrevocable breakdown of marriage,[73] other decisions have clearly declared that the rights previously enjoyed by Muslims seeking dissolution of marriage privately from a *qazi* have been struck down.

Hindu Personal Law and Reform

The rights of most Hindu women were governed by the *Mitakshara* and *Dayabhaga* systems of law. The *Mitakshara* system made a distinction between two kinds of property: joint family property and separate property. The first included ancestral property (namely property inherited from up to three generations in the paternal line) as well as any property that had become part of the joint property. Only male members of the family, up to four generations, were coparceners of this property, enjoying rights from birth. Despite strict restrictions, especially on immovable property such as land, every coparcener had the right to demand partition without affecting the right of the others to stay undivided. Under *Mitakshara* law, a man also had absolute rights to sell his self-acquired property and, if he had no male heirs up to

[71] De, 'The Two Husbands of Vera Tischenko', p. 1029.
[72] Parashar, *Women and Family Law Reform*, pp. 151–58; Saiyid, *Muslim Women of the British Punjab*, pp. 35–38.
[73] See, for instance, Mahmood, *Muslim Personal Law*, pp. 51–52.

the fourth generation, could treat his share of ancestral property as absolute property as well.

Under *Dayabhaga*, the man enjoyed absolute rights over all property, whether ancestral or self-acquired, including the right to gift, sell or mortgage it. Unlike the *Mitakshara* system, which conferred coparcenary rights at birth on sons, and where the interest in the property varied according to the number of survivors, the *Dayabhaga* system ensured no birth right and defined a fixed and non-fluctuating share for each heir.

Women's rights were extremely restricted under both systems, although they recognized the absolute control of a woman over her *stridhanam*. This was more or less confined to moveables, and there was considerable confusion, in texts and in practice, about whether it included immoveable properties such as land. Under *Mitakshara* law, women only had a right to maintenance, whether as wives, widows or unmarried daughters, while the expenses of a daughter's marriage also devolved upon the family. On the condition that she remained chaste, a widow could enjoy a limited (lifetime) interest in her husband's property but only in the absence of male heirs up to the fourth generation. This meant that the widow could not alienate the property except in times of dire necessity. The daughter figured as an heir only after the widowed mother, and she too enjoyed only a limited estate. The chances of a woman inheriting property under *Dayabhaga* were slightly better since women inherited both ancestral and self-earned property, although here too, widows and daughters followed male heirs up to the fourth generation.

Momentous changes in the 20th century, with lasting post-independence consequences, affected Hindu women in India. By the early 20th century, colonial authorities were compelled to manoeuvre between the rural and urban elites. The emergence of an independent women's movement and its growing criticisms of legislative initiatives as the prime mover in social change raised new challenges.

Indian women hardly constituted a homogeneous category: they neither demanded changes in one voice nor were they affected in equal measure by legislative changes of the period. The AIWC, the WIA and the NCWI—that is, those who took active part in the broader national movement and purported to speak for all of Indian womanhood—primarily represented the interests of the propertied or educated elite. Therefore, some of the most vociferous and bitterly contested demands related to a more equitable inheritance law by which women of the propertied classes could make limited gains. Such demands were made in the name of all Indian women, though they did not undo the class or caste privileges of the reformers and may even have affirmed them.

As Newbigin notes, 'Muslim families were considered to comprise property owning individuals, whereas the natural condition of a Hindu family was assumed to be "joint".'[74] Among Muslims, the *ulama* rather than the Muslim League or the Congress had taken the lead in reforming Muslim personal law. In the case of Hindu law reform, a small band of liberals in the parliament, rather than mainstream Congress nationalists, sowed the seeds of change. But reforms mirrored the Shariat Application Act in attempting 'to provide a comprehensive, codified set of property laws for Hindu women, that would bring into greater alignment regional customs and the practices of different schools of Hindu law'.[75]

H. S. Gour, H. B. Sarda and G. V. Deshmukh persisted in their efforts to reform Hindu law throughout the 1920s and 1930s. In contrast, the Congress, despite its claim of representing large sections of the Indian people, counted among its members several who were opposed to any change at all: opposing Gour's bill of 1928 which would entitle Hindu women to seek dissolution of marriage (which was finally defeated), Lala Lajpat Rai and Alluri Sitarama Raju objected to the 'unnecessarily quick pace of reforms'.[76]

Hindu Women's Right to Property Act of 1937

The earliest effort to effect changes in the Hindu *Mitakshara* law was made through the Hindu Law of Inheritance (Removal of Disabilities) Act of 1928 and the Hindu Law of Inheritance (Amendment) Act of 1929, which further extended the right to property granted by the Caste Disabilities Removal Act of 1850 and put women in the line of succession.[77] Women's property rights were further enhanced by the Hindu Women's Right to Property Act of 1937,[78] the most important single piece of legislation in British India, known as the Deshmukh Act after its author. The Deshmukh Bill, introduced shortly after Har Bilas Sarda's bill to grant Hindu widows a share in their husband's property, had suffered a resounding defeat in 1932 and therefore next confined itself only to Hindu women's inheritance rights.

[74] Newbigin, 'Personal Law and Citizenship', p. 14.
[75] Ibid., p. 27.
[76] Jana Everett, *Women and Social Change in India* (Heritage Publishers, 1985), p. 144.
[77] Angeles Almenas Lipowsky, *The Position of Women in the Light of Legal Reform: A Socio-legal Study of the Legal Position of Indian Women as Interpreted and Enforced by the Law as Compared and Related to Their Position in the Family and Work* (Franz Steiner Verlag, 1975), p. 21.
[78] *Towards Equality: Report of the Committee on the Status of Women in India* (Government of India, December 1974), p. 103.

The act, passed in 1937, substantially improved the inheritance rights of Hindu widows and introduced a man's widowed daughter-in-law and widowed granddaughter-in-law as heirs,[79] which had important repercussions in the post-independence period.[80]

The more radical aspects of the Deshmukh Bill were not included, and daughters were completely excluded from its purview. This exclusion produced a great deal of confusion, and despite the amendment passed in 1938, seven separate bills were introduced into the federal legislative assembly seeking to clarify the status of female inheritors. The unsatisfactory nature of piecemeal legislation, and the demand for a review of the legal process itself, forced the government to constitute a four-member committee headed by Calcutta High Court judge B. N. Rau to examine Deshmukh's recommendations, reconsider the bills intending to abolish women's limited estate and make polygamy a ground for separate maintenance and residence.[81]

Parashar says that the active involvement of women, especially of the AIWC, in demanding, debating and responding to legislative initiatives remained somewhat marginal to the reform process and rarely challenged the state's understanding of what was critical to reform.[82] To some extent, women remained satisfied with the promise of uniformity in Hindu law (rather than full-fledged sex equality) refining, rather than transforming, the new patriarchal relations forged by Indian nationalism.

But there were ample signs that the hegemony of new nationalist patriarchy was neither total nor complete. A discourse of women's rights as opposed to a discourse of women's duties to home and nation was clearly being articulated, rallying, for instance, around the Child Marriage Restraint Bill to become a new force in Indian politics.[83]

The Demand for a Uniform Civil Code

The demand for codification of law was articulated by the women's movement, as the piecemeal nature of proposed personal law legislation greatly

[79] Harold Levy, 'Lawyer Scholars, Lawyer Politicians and the Hindu Code Bill, 1921–1956', *Law and Society Review* 3, nos. 2–3 (November 1968), pp. 303–16, esp. p. 306.

[80] Mytheli Sreenivas, *Wives, Widows, and Concubines: The Conjugal Family Ideal in Colonial India* (Indiana University Press, 2008), pp. 60ff.

[81] Ibid.

[82] Parashar, *Women and Family Law Reform*, pp. 133–34.

[83] Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Duke University Press, 2006), pp. 190–96, 197–247.

disappointed members of the AIWC: an overwhelmingly male legislative assembly was unlikely to initiate radical changes. As Lakshmi Menon declared at the 1933 conference of the AIWC, 'If we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu Law. The members in the Legislative Assembly who are men will not help us in bringing any drastic changes which will be of benefit to us.'[84]

By 1934, the AIWC called for an unofficial committee to investigate and reform Hindu law[85] and, by 1940, made a demand for a uniform civil code.[86] Only comprehensive legislation could tackle the tightly interlocking questions of monogamous marriage, divorce and inheritance, and would mean recommending changes with far-reaching political consequences, which would strain the tenuous unities that had been built by the Congress.

Even so, at the urging of Renuka Ray, 24 November 1934 was declared a 'Legal Disabilities Day'. Though the intention was to garner public sympathy and support for reform, the AIWC aimed, then as later, at state officials and nationalist male elite. Thus, the National Planning Committee, set up under Jawaharlal Nehru, established one of 29 sub-committees on 'women's role in planned economy', of which women such as Sarojini Naidu, Hansa Mehta, Begum Shah Nawaz and Mrs Hamid Ali were members.[87] Basing themselves on the Karachi Congress resolution which guaranteed sex equality, the women's sub-committee called for a uniform civil code to replace the separate personal laws, although this could remain optional for a short transitional period. This, as well as the response of nationalist women to the Deshmukh Bill, exerted pressure on the government to appoint the B. N. Rau committee on the need for a Hindu civil code.

The Debate on Uniformity before 1947

Rachel Sturman has argued that the push towards a Hindu code bill signified

> an attempt to consolidate and embed a new model of Hindu law that operated in consonance with the political economy of representative government that emerged in India in the first half of the twentieth century. Crucially this

[84] Basu and Ray, *Women's Struggle*, pp. 46–47.
[85] Everett, *Women and Social Change in India*, p. 148.
[86] Ibid., p. 149.
[87] Ibid., p. 151.

> devolved around the reconstitution and 'rationalization' of the (usually Hindu) family, and women's property rights within it.[88]

Eleanor Newbigin even suggests a new periodization, since the debates about the Hindu Code Bill straddled the moment of independence. Both the colonial state and its successor, the independent Indian state, were interested in constituting the 'individual tax payer as a key subject of the evolving representative state'.[89] Newbigin thus sees the emergence of a new 'female economic subject' between 1930, the time of the depression, and 1937, when both the 'Hindu Women's Right to Property and the Shariat (Application) Acts of 1937 secured important new property rights for Hindu and Muslim women respectively'.[90] Women's rights to joint property challenged the all-male Hindu coparcenary and destabilized the Hindu undivided family (HUF) but did not go far enough. What were the new rights of the widow following the 1937 act, and how were families depriving her of it?[91] Could an inheriting widow, such as Vedathanni of Tanjore, Madras, claim exemption from income tax on the grounds of being a member of the HUF?[92] Did the 1937 act strengthen the rights of widows (that is, daughters-in-law) over unmarried daughters? The cases coming up before the courts had to reconcile contradictions between capitalist and non-capitalist spheres of the economy and widows' rights to limited estate and to an inheritable right to maintenance. Also, Indian women's organizations were faced with a dilemma: they could either accept property rights and religion-based politics or challenge both the colonial administration and the male Indian political elite.

The Rau committee in 1941 was confronted by this jurisprudential unevenness arising from piecemeal reform. In declaring the importance of granting greater rights to women, the 'the main emphasis of the first HLC [Hindu Law Committee] report was to legitimize the project of reform by reference to ancient Hindu tradition'.[93] Was this a tactical move to pre-empt resistance from the orthodox and conservative sections of scholars, lawyers,

[88] Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law and Women's Rights* (Cambridge University Press, 2012), pp. 37, 72. See also Ritu Birla, *Stages of Capital: Law, Culture and Market Governance in Late Colonial India* (Duke University Press, 2009), pp. 199–231.

[89] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India* (Cambridge University Press, 2013), pp. 10–11.

[90] Ibid., p. 109.

[91] Sreenivas, *Wives, Widows, and Concubines*, pp. 60–61.

[92] Newbigin, *The Hindu Family and the Emergence of Modern India*, 114–16.

[93] Parashar, *Women and Family Law Reform*, p. 90.

politicians and the general educated male public by appearing to represent 'the best of Hindu professional and scholarly opinion'?[94] The code which would give women more equal property rights, for example, referenced the *smriti*s, but there was an attempt neither to rigorously read and cite the *smriti*s nor to revamp traditional legalities to make them consonant with modern judicial systems. Opponents and critics of the codification alike framed their arguments in terms of scriptural validity. Further, the 'legal modernization' of Hindu law was easier achieved in the realm of property rights than in the realm of marriage law, which continued to be determined by upper-caste practices.

The Rau committee 'pledged to develop a Hindu Code Bill around two key commitments, legal consistency and the removal of gender prejudice from Hindu law'.[95] But it included no women, provoking protests from the AIWC and others.[96] The committee based its report on extensive interviews from women's associations, lawyers and legislators, heads of religious institutions and others. As already noted, women were impatient with the reference to scriptures but also made tactical use of those in their favour. The government clarified that the Deshmukh Act applied only to non-agricultural property, since agriculture was a provincial subject. This caused great alarm among women's groups that wanted the inclusion of agricultural property in an overwhelmingly agrarian country such as India.[97]

Newbigin suggests that government interest in codifying Hindu law was driven by fiscal pressures of the war, and not just by the need for legal uniformity, resulting in an alliance between colonial finance officials and reform-minded Hindu legislators.[98] Others, such as Rochona Majumdar, have viewed codification as arising out of the needs of the 'developmentalist' agenda in the incipient nation state, for which the recasting of the family form, rather than gender justice, was the primary goal.[99]

Despite several limitations, the Rau committee suggested wide-ranging reforms which amounted to the introduction of a uniform civil code for Hindus. Two bills were formulated relating to marriage and succession, both of which were referred to separate joint committees. There were also suggestions

[94] Levy, 'Lawyer Scholars, Lawyer Politicians and the Hindu Code Bill', p. 309.
[95] Newbigin, *The Hindu Family and the Emergence of Modern India*, p. 142.
[96] Chitra Sinha, 'Rhetoric, Reason and Representation: Four Narratives in the Hindu Code Bill Discourse', 2015, https://www.diva-portal.org/smash/get/diva2:874167/FULLTEXT02.pdf (accessed 15 July 2022).
[97] Everett, *Women and Social Change in India*, p. 153.
[98] Newbegin, *The Hindu Family and the Emergence of Modern India*, p. 130.
[99] Majumdar, *Marriage and Modernity*.

for an absolute estate for widows and the prohibition of polygamy. But the work on the draft code was seriously interrupted by the war years.

The HLC was reappointed in 1944 and presented a code in February 1947, with only one dissenting member, D. N. Mitter, pointing to both the size of opposition to the code (206 of those interviewed were for and 352 against the code) and also the substantial critiques that were raised.[100] The code covered five areas of family law reform: marriage and divorce, intestate succession, minority and guardianship, maintenance and adoption, and the *Mitakshara* joint family.[101] The main provisions of the code were as follows: 'A widow would get a share of her husband's property equal to a son's share, a daughter would get half of the son's share, polygamy was prohibited, inter-caste marriage was legalised, and grounds were established for the dissolution of marriage.' [102]

Both Hindu law committees faced a great deal of orthodox male opposition, defending both caste and male privilege.[103] Of the male witnesses who appeared before the committee, a majority were against any changes in the provisions of Hindu law. It is therefore all the more striking that an overwhelming number of women declared support for each of the changes suggested by both committees but particularly the latter.[104] The AIWC enthusiastically supported the provisions of the new bills.[105] Articles in *Roshni* stressed the fact that India would remain a subject race as long as its daughters were given no inheritance rights. Muthulakshmi Reddy, welcoming the report, emphasized that enforced monogamy was necessary in order to give women equal legal status.[106] The code became legislative reality only after independence, though it was hardly smooth sailing as we shall see in the next chapter.

Initiatives in Princely India

Even before the demand for laws to transform women's access to property gained momentum in British India, princely states such as Mysore and Baroda were able to take the initiative in reforming the legal status of women. Mysore was among the earliest to pass a bill in 1933 to amend the rights of

[100] Everett, *Women and Social Change in India*, p. 151.
[101] Parashar, *Women and Family Law Reform*, p. 80.
[102] Everett, *Women and Social Change in India*, p. 155.
[103] Newbigin, *The Hindu Family and the Emergence of Modern India*, pp.148–49.
[104] Everett, *Women and Social Change in India*, p. 157 (see table 14).
[105] Basu and Ray, *Women's Straggle*, p. 48.
[106] Everett, *Women and Social Change in India*, p. 155.

women to inheritance and within marriage, followed by the state of Baroda in 1937. The discussion of the Mysore bill provides another optic on modern state formation, for which marginal improvements in the legal status of women were an imperative. The Mysore act also conforms more closely to what Parashar has termed 'state-sponsored reform', since it was proposed and passed at a time when nationalist forces in Mysore were very weak and the women's movement virtually absent. Despite this, the passage of such a bill in Mysore was by no means easy.

What the Mysore government hoped to achieve was the regularization of the *Mitakshara* law which applied universally in Mysore. The state interest was therefore less in gender equality and more in the development of homogeneity and uniformity in the application of Hindu law, which had become 'unwieldy and ruinous'. Nevertheless, the ideological frame within which reforms were initiated deployed images of civilizational renewal. Thus, K. S. Chandrasekhara Aiyar, who chaired the committee appointed to examine the necessity for legal transformation of women's status in 1928, declared at the outset that

> it is not engaged so much in trying to provide helpless females with the means of subsistence or in assigning higher places in the order of succession to some heirs as compared to others, as in helping to put on a sound basis the important question of the Hindu Law rights of women.[107]

The move to give women some rights to property was mooted as early as 1927 by K. T. Bhashyam, a Congress member of the Mysore Legislative Council. While arguing that the scriptures and the practices that prevailed in south India did not urge discrimination against women, Bhashyam pointed out that 'in Mysore, we have had it explicitly laid down by more decisions than one that sex is no ground of disqualification for inheritance. The doctrine of women's exclusion from inheritance is now for all purposes a discredited doctrine'. However, he pointed out that judicial innovation was difficult in the absence of progressive legislation and introduced a draft bill known as the Hindu Law of Inheritance Bill in 1928.

The Mysore government, while refusing to allow discussion of Bhashyam's bill, appointed a committee headed by C. H. Chandrasekhara Aiyar which included Bhashyam, H. C. Dasappa, Ramchandra Rao Sindhia and five other

[107] *Proceedings of the Mysore Representative Assembly*, October–November (Government of Mysore, 1928), pp. 336–39.

advocates from Bangalore and Mysore; the committee also had one token woman, K. D. Rukmaniamma, the superintendent of Maharani's College.[108]

The committee report in 1930 began by noting that among the common objections voiced against women holding property rights was the fact that 'there was no demand for reform from women concerned'.[109] Indeed, only two of the 52 respondents to a committee's questionnaire were women, of whom one was from outside Mysore. The committee's report began by congratulating the Mysore state for having put an end to the *devadasi* system and, by extension, the *devadasi*s' rights to property. Thus, the committee unwittingly acknowledged the process by which the state had first absorbed to itself non-state laws, under which some women had enjoyed rights and freedoms, before it proposed to bestow property rights on Hindu women.

The methods of the Mysore committee recalled those of all the social reformers since the 19th century, who had consistently returned to Hindu textual authorities in order to propose changes in women's rights. Faulting the British administration for 'perpetuating the doctrine of ignoring women's claims' and even 'turning [the scriptures] to fresh uses calculated to restrict the rights of Hindu women',[110] the committee urged decisive changes in Hindu law to facilitate greater rights for women. Five aspects of women's rights under law were considered by the committee: inheritance, joint family incidents and adoption, maintenance, women's limited estate, and women's full estate.

After the first round of discussion in the legislative council, however, the report was placed before a Select Committee, consisting of some of the most conservative members of the legislative council, including two co-opted woman members, Kamalamma Dasappa and Mrs Sreenivasaraghavachari, although the latter was unable to attend its sittings and the former was reduced to a token presence. The Mysore State Women's Conference, in its meeting held on 11 December 1932, petitioned the Government of Mysore to postpone the final discussion on the bill because 'there are no women in the Legislative Council, and two were co-opted to the Select Committee of which only one attended and anyway had no voting rights', but this demand was not considered seriously.

It was clear right from the start that what was being attempted was a 'modernization' of the position of women under Hindu Law and not democratisation. In other words, the programmatic task of granting

[108] *Report of the Committee Appointed by the Government of Mysore: Women's Rights under Hindu Law* (Government Press, 1930).
[109] Ibid., p. 25.
[110] Ibid., p. 43.

limited rights to women had to be accomplished without any fundamental social transformation which would produce women as bearers of rights. Introducing the bill in the legislative council, S. P. Rajagopalachari assured members that as far as inheritance was concerned, 'the changes made are not of any revolutionary character'.[111] As far as the second part of the bill was concerned, which dealt with the provisions relating to self-acquired property and the right to adoption, he said: 'These are more or less affirmations of the existing law, and their clear enunciation will, I hope, set at rest much of the ruinous litigation which owing to the uncertainty or harshness of the law, is a sad feature of the Hindu social system.'[112] Thus, Rajagopalachari made clear that the bill did not attempt any radical departure from the existing law or 'violence to any cherished sentiment bound up with the growth of Hindu society'.

The Hindu Women's Rights Bill consisted primarily of five propositions: it brought women (such as the widow and daughter) into the line of succession of a man dying intestate, though only after the male issue to the third generation; gave women a right to partitioned property; considerably expanded the definition of *stridhanam* and granted women the enjoyment of full estate over such property; granted women a right to maintenance on a number of grounds; and granted rights to adoption.

Even before the appointment of the select committee, Belur Srinivasa Iyengar, one of the most implacable critics of the bill, said that section 14, which gave rights over *stridhanam* to daughters' daughters and sons of daughters before the sons, had to be altered to apply equally to sons and daughters. This was conceded in the final version of the bill, despite opposition from both the Mysore State Women's Conference and liberal members of the legislative council such as H. C. Dasappa.

Significant changes were made by the Select Committee, of which Iyengar was a member, yet nearly all the objections of the Mysore State Women's Conference to the Select Committee report were ignored. They requested reversion to the original provisions of the Chandrasekhara Aiyar committee report, which they found more pro-women than the Select Committee recommendations. In addition to objecting to changes in the line of succession to *stridhanam*, the conference asked that an unmarried daughter be entitled to half the share of a son and a married daughter to one-fourth the share of a son (where unmarried daughters were only given

[111] *Proceedings of the Mysore Legislative Council* (*PMLC*), 1931, p. 73.
[112] Ibid., p. 74.

one-fourth and married daughters nothing at all). Finally, the conference also demanded that the grounds cited in the original bill for maintenance of a wife be retained.[113]

Though their pleas went unheeded, H. C. Dasappa, opposing the institution of equal rights of sons and daughters to *stridhanam* when it had only been meant to be bequeathed to women, said:

> [T]he order of succession relating to *stridhanam* property is a thing which has come from time immemorial. It is a privilege which is peculiar to this class of property and that has been sanctified by the usage of centuries. But the select committee, composed as it was, I have now reason to suspect, with more of the elements which would put a brake on the progress of those rights rather than help forward the cause, have seriously made an inroad into the existing rights of Hindu women ... under the guise of giving them a few rights here and there, throwing before them a few crumbs here and there, they have practically taken away the whole loaf. That is what it comes to and it is unfortunate that in the select committee we had not a single lady member who had any right either to vote or append any vote.[114]

The most important of Iyengar's interventions related to the question of a wife's entitlement to maintenance. Section 25 of the bill as drafted by the Chandrasekhara Aiyar committee had suggested that a wife could refuse to live with her husband and claim separate maintenance for the following reasons:

a. when he was suffering from any venereal or loathsome disease.
b. when he kept a concubine in the house.
c. when he habitually misconducted himself with other women.
d. when he married a second wife.
e. when he renounced the Hindu religion.

Iyengar found the entire question of maintenance distasteful and voiced his opposition to any such violation of Hindu culture. Objecting strongly to the fact of a man taking a second wife as sufficient cause for separation and maintenance, he said:

> A Hindu can also marry as many wives as he can. That is a right which he has enjoyed for centuries together and the Mysore government wants now,

[113] *PMLC*, December 1932, pp. 411–12.
[114] Ibid., p. 517.

> by a stroke of the pen, to cut it down straight away and say that 'the moment you marry a second wife, the first wife will clear away and claim maintenance'. When the husband is suffering from a disease, should not the wife give him food and treat him? What did Chandramati do? What did Damayanti do? All those splendid things which our women did, you are now taking away from us.[115]

At Dasappa's insistence, the clause permitting a woman to claim maintenance if her husband married a second time was adopted. It was also at his insistence that the clause permitting a woman to claim maintenance when there was 'such gross neglect as to make her life with [the husband] miserable' was included.[116]

Other members of the representative assembly and the legislative council, especially representatives of the landed rural elite, firmly felt that granting women rights to property would lead to fragmentation of the land.[117] There were those who felt that the Chandrasekhara Aiyar committee had been too generous and was 'throwing temptation in the way of the litigiously minded people'; this generosity could not be 'at the expense of the rights of the male members of the family'.[118] In many ways, the original formulation had anticipated such objections and had taken care that 'no female relative shall be entitled to a share in property acquired by a person as long as he was alive'.

Despite these qualms, the watered-down provisions of the Chandrasekhara Aiyar committee were finally passed in 1933, as the Mysore Hindu Law Women's Rights Act, three years before the British Indian Act was brought into force. Nevertheless, the debate in Mysore anticipated some of the arguments that would be made against provisions of that act, permitting marginal changes in the property rights of women, without mounting a frontal attack on the system of patriarchy which produced the hierarchies in the first place.

As Parashar points out, despite this distinction, 'by the time India gained independence from English rule, the personal laws of different communities were labelled religious laws, but in some cases they were actually state enactments, while in others the contents of the rules had undergone substantial changes'.[119]

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115 *PMLC*, 1931, p. 106.
116 *PMLC*, 1932, p. 536.
117 *PMLC*, 1931, p. 113.
118 Ibid., p. 120.
119 Parashar, *Women and Family Law Reform*, p. 76.