# NOTE TO USERS

# Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Women's Rights in India

Gopika Solanki, Department of Political Science
McGill University, Montreal
July 2007

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Doctor of Philosophy (PhD)

*Your file Votre référence*
*ISBN: 978-0-494-38646-0*
*Our file Notre référence*
*ISBN: 978-0-494-38646-0*

# ABSTRACT

Multi-religious and multi-ethnic democracies face the challenge of constructing accommodative arrangements that can both facilitate cultural diversity and ensure women's rights *within* religio-cultural groups. This thesis is an investigation of the Indian state's policy of legal pluralism in recognition of religious family laws in India. The Indian state has adopted a model of what I have termed "shared adjudication" in which the state shares its adjudicative authority with internally heterogeneous religious groups and civil society in the regulation of marriage among Hindus and Muslims.

Combining theoretical frameworks of state-society relations, feminist theory, and legal pluralism, and drawing from ethnographic research conducted in state courts, caste and sect councils, and "doorstep law courts," I pay analytical attention to state-society interactions at the interface of religious family laws. State and non-state sources of legal authority construct internally contested and heterogeneous notions of the conjugal family, gender relations, and religious membership, and they transmit them across legal spheres. These dynamic processes of communication reconstitute the interiors of religious, state, and civic legal orders, and they fracture the homogenised religious identities grounded in hierarchical gender relations within the conjugal family.

Within the interstices of state and society—which are used imaginatively by state and societal actors—the Indian model points towards an open-ended and process-oriented conception of state-society relations that encompasses not only the binary of conflict and cooperation, but also communication between state and society. The "shared adjudication" model facilitates diversity as it allows the construction of hybrid religious identities, creates fissures in ossified group boundaries, and provides institutional spaces for ongoing

inter-societal dialogue between religious groups, civil society, and the state. This pluralized legal sphere, governed by ideologically diverse legal actors, can thus increase women's rights in law, and despite its limitations, the transformative potential of women's collective agency effects institutional change.

# RÉSUMÉ

Les démocracies multireligieuses et culturellement plurielles s'affrontent au défi de construire des arrangements accommodant qui à la fois facilitent la diversité culturelle et assurent les droits de la femme *au sein* des groupes religieux/culturels. Ma thèse examine la politique de l'État indienne du pluralisme légal dans la reconnaissance des lois religieuses de la famille en Inde. L'État indien a adopté un modèle de ce que j'appelle « la juridiction partagée » dans lequel l'État partage son autorité juridictionnelle avec des groupes religieux intérieurement hétérogènes et la société civile dans la réglementation du mariage des Hindous et des Musulmans.

En combinant des appareils théoriques inspirés des relations État/société, de la théorie féministe et du pluralisme légal et en puisant dans les recherches ethnographiques effectuées dans les tribunaux d'État, les conseils de castes et de sectes et les tribunaux « doorstep law » (de nature parfois très informelle), j'accorde une attention particulière dans mon analyse aux interactions entre l'État et la société sur l'interface des lois religieuses de famille. Les sources étatiques ou non-étatiques de l'autorité légale construisent des notions hétérogènes et intérieurement contestées de la famille conjugale, des relations entre les sexes et de l'appartenance religieuse; et elles les transmettent au-delà des sphères légales. Ces processus dynamiques de communication reconstituent les intérieurs des ordres religieux, étatiques et civils/légaux et engendrent le fractionnement des identités religieuses homogénéisées ancrées dans des relations hiérarchiques entre les sexes au sein de la famille conjugale.

À l'intérieur des interstices de l'État et de la société, des interstices qui sont utilisées de manière créative par les acteurs étatiques et sociaux, le modèle indien indique une

conception des relations État/société qui est ouverte et axée sur les processus et qui englobe non seulement la binarité conflit/coopération, mais aussi la communication entre l'État et la société. Le modèle de « la juridiction partagée » facilite la diversité, puisqu'il permet la construction d'identités religieuses hybrides, crée des fissures dans les frontières ossifiées des groupes et fournit des espaces institutionnels pour un dialogue inter-social continu entre les groupes religieux, la société civile et l'État. Cette sphère légale pluralisée gouvernée par des acteurs avec des idéologies diverses peut accroître les choix légaux des femmes; et en dépit de ses limites, le potentiel transformatif du pouvoir collective féminin peut amener des évolutions institutionnelles.

# CONTENTS

# LIST OF TABLES

# LIST OF FIGURES

# ACKNOWLEDGEMENTS

It has been a challenging, arduous, and in the end, exhilarating journey, and I am grateful to a wide range of people who have made it possible. I owe first thanks to my supervisor Narendra Subramanian, whose insights on the construction of ethnic identities has intrigued me intellectually as I have worked on my dissertation. I thank him for his patience and constructive comments. I am indebted to Alan Patten for his mentoring in the early stages of the doctoral program and for his consistent support. My reading course with Alan was instrumental in building the theoretical foundations of this project. I would like to acknowledge Hudson Meadwell for valuable feedback and for synthesising insights and ideas contained in the dissertation and channelling them into exciting areas of future work. I am grateful to Juliet Johnson, Jacob Levy, and Khalid Medani for their instructive questions and for their generosity in engaging with my work during key moments. Many findings of this dissertation were shared in various conferences, and I have benefited immensely from comments, encouragement, and suggestions of Itty Abraham, Tani Barlow, Srimati Basu, and Sylvia Vatuk.

Fieldwork for me was the highlight of this endeavour—a productive, engaging phase—and I am immensely grateful to respondents who shared their experiences and stories. During the course of countless conversations, a broad range of people engaged with my research and offered insights; familiarised me with customs, laws, and procedures; invited me to celebrate rituals, festivals, and meetings; asked me about my politics and shared theirs; and offered me hospitality. I am very grateful to women litigants, who took extra time from their packed daily routines to share their stories. Their quest for and belief in "justice" and their strength in its pursuit enriched me in many ways.

In particular, I would like to thank various members and officials of the Meghwal *panchayat.* Pushpaben Waghela, Lalitbhai Waghela, and Vishrambhai Waghela accompanied me to interviews with various litigants, and I am deeply grateful to them for sharing their insights into the workings of the Meghwal *panchayat.* I also appreciate the help of Leeladharbhai Gadda, Shirish Malde, Sushilaben Shah, Kanubhai Galia, Shirinben Maneckia, Mohammadbhai, Iqbal Maniar, Harounbhai Musawala, and Yasmin Sheikh.

I would like to acknowledge Vandana Nanaware and Pratibha Jagtap of the Special Cell for Women and to Hasina Khan, Naseem Sheikh, and Yasmin Sheikh from Awaaz e Niswaan for discussing individual cases and letting me accompany them in their field visits. Discussions in the Mumbai-based feminist collective Forum against Oppression of Women have influenced my political engagement with this issue. Within this context, I would like to acknowledge the struggles of many feminist groups, including Awaaz e Niswaan and the Forum Against Oppression of Women, towards democratic, just, and equal families.

Friends in Canada and India have been invaluable in this pursuit. I have leaned on Nimisha Dalal, Sandhya Gokhale, Shalini Mahajan, Chayanika Shah, and Dipali Vyas many times for their warmth and understanding. Madhav Bhatkuly and Debjani Das have been with me in spirit despite their absence. In Montreal, Shree Mulay, Daya Varma, Peter White, and Giselle Amantea have provided collegial hospitality; and Dolores Chew and Mrityunjoy Mohanty, warm solidarity. I thank Mustapha Ettobi for translating my abstract in French. I would also like to thank Shehzad Hussain, Spyros Kotsovilis, and Fatima Seedat for their encouragement; Manal Jamal for her stories and laughter; Arnika Fuhrman for a beautiful friendship; and Evelyn Rodinos for constant nurturing. Many ideas of this

thesis were discussed in conversation with Suranjan Weeraratne, and I thank him for his generosity and patience. In particular, I would like to thank Nasreen Chowdhory for communicative journeys and a sustaining friendship.

My family has been a source of strength in every way. My brother Chetan Solanki kept me grounded with his love, empathy, and wit. Without him, it would have been impossible to finish this project. I would like to thank Shweta Patel, Nandini and Dhiru Mehta, and Ashoka Valia for their support; and Kaushik Datta for shared years. I am grateful to Jethabhai Valia and Jyotsna and Harshad Valia for their strength, care, and wisdom beyond academic knowledge.

Most of all, I would like to acknowledge my grandfather, Keshubhai Valia, whose work with vulnerable members of the society, including women, has inspired me. He co-founded and nurtured one of the first women's organisations in Saurashtra, and the central concerns of this dissertation have been influenced by the numerous stories of women I have heard over the years. Similarly, I owe a deep personal debt to my grandmother, Ramaben, and to my mother, whose academic interests and support of women's rights have shaped my politics and research agendas over the years. This thesis is dedicated to my mother, Asha Valia, and to my grandparents, Ramaben Valia and Keshubhai Valia, for it all began with them and without them, this thesis would not have happened.

*To My Mother, and Bapuji,*

*And the Memory of Ba.*

# ABBREVIATIONS

| | |
|---|---|
| AIMPLB | All Indian Muslim Personal Law Board |
| BJP | The Bhartiya Janata Party |
| BMC | previously, Bombay Municipal Corporation; now called Brihad-Mumbai Municipal Corporation |
| Cr.P.C. | Criminal Procedure Code |
| HAMA | Hindu Adoption and Maintenance Act, 1956 |
| HMA | The Hindu Marriage Act, 1955 |
| IPC | Indian Penal Code |
| MWA | The Muslim Women's (Protection of Rights on Divorce) Act, 1986 |
| OBC | Other Backward Classes |
| SC | Supreme Court |
| UCC | Uniform Civil Code |

# GLOSSARY

| | |
|---|---|
| *Adivasi* | Generic term to describe a tribes-person |
| *Asmita* | Dignity |
| *Barots* | Clan genealogists and poets |
| *Bhailog* | Local mafia |
| *Burqa* | Veil |
| *Chamars* | The name of an oppressed caste |
| *Chawl* | A residential building that is structured like barracks; each family has a room, but they share toilet facilities with others |
| *Chhappaniyo dukal* | The famine of 1856 |
| *Chowky* | Beat office of the local police station |
| *Dada* | Strongman |
| *Dargah* | The site of the Muslim shrine |
| *Dashavatar* | The story of the ten reincarnations of the Hindu god Vishnu |
| *Dher* | Derogatory name for an oppressed caste |
| *Faisla* | Decision |
| *Fiqh* | The product of human understanding that sought to interpret and implement the Sharia |
| *Faskh* | Judicial dissolution of marriage for causes stipulated in Islamic law |
| *Fatwa* | Legal opinion |
| *Ghar-gharna* | Second marriage that is not ritualistically celebrated in public |
| *Gharsansar* | Domestic matters |
| *Gnati* | Caste |
| *Hadith* | Commentaries on the Quran |
| *Holi* | Spring festival |

| | |
|---|---|
| *Homa* | Invocation before the sacred fire |
| *Iddat* | A period of three months and ten days |
| *Ijtihad* | Interpretive science of juridical reasoning |
| *Imambara* | A locality in central Mumbai with a high concentration of Muslim families |
| *Jamaat* | Assembly, collective |
| *Jamaatkhana* | A council hall of the community |
| *Kamadiya* | Accountant |
| *Khula* | A form of divorce initiated by the wife |
| *Khum* | One-fifth of the savings of every individual |
| *Lakh* | One hundred thousand |
| *Lok Adalat* | People's court |
| *Lok Sabha* | The lower house of parliament |
| *Madhabib* | Classical schools of law |
| *Mahar* | The name of an oppressed caste |
| *Mahila Aghadi* | The women's wing of Shiv Sena, the Hindu right wing party |
| *Mahila Mandal* | A women's group |
| *Mangalsutra* | A necklace made of black beads worn by married Hindu women in India |
| *Masjid* | Mosque |
| *Mehar* | Dower |
| *Melawala* | A social gathering |
| *Mohalla* | Residential area |
| *Mufti* | Juriconsultant |
| *Mukhi* | Treasurer |
| *Mulla* | Religious teacher or leader |

| | |
|---|---|
| *Muta* | Temporary marriages contracted under the Shia law. This marriage does not create the right of inheritance between the husband and the wife, but the children are legitimate and could inherit from both parents. |
| *Nats* | Acrobats |
| *Nawab* | An aristocrat |
| *Nikah* | Marriage |
| *Nikahnama* | A marriage contract |
| *Nyay Panchayat* | Forum for justice |
| *Panch* | A group of five elders of the community |
| *Panchayati Raj* | Decentralised governance |
| *Pateliyas* | Middle men |
| *Pir* | Sufi preceptor |
| *Pooja* | Prayer |
| *Pucca* | Made of cement |
| *Qazi* | Judge, officiating officer representing religious authority |
| *Saakh* | Social practice |
| *Samaj* | Collective |
| *Sanskar* | Culture |
| *Sapinda* | Nearest heir or blood relative |
| *Saptapadi* | A ceremony in Hindu marriage that involves walking seven rounds around the sacred fire |
| *Sharia* | The divine law |
| *Shehnai* | A traditional wind instrument made of metal |
| *Stridhan* | Gifts given to a married woman at the time of her marriage or during the course of her marriage |
| *Sunna* | The Prophet's deeds and teachings |

| | |
|---|---|
| *Talaq* | Divorce |
| *Talaq ahasan* | A single pronouncement of divorce made during a period of menstruation followed by sexual abstinence during *iddat* |
| *Talaq e tafwid* | Delegated divorce |
| *Talaq hasan* | Three pronouncements made during successive *tuhr*s during which time no sexual relations take place |
| *Talaqnama* | Deed of divorce |
| *Talaq ul bidaat* | Three pronouncements made during a single *tuhr* in one sentence or a single pronouncement made during a *tuhr* clearly indicating an intention to dissolve the marriage irrevocably |
| *Tuhr* | The perid between menstrual cycles |
| *Turis* | Shehnai players |
| *Vanakars* | Weavers |
| *Varghoda* | The groom's party |

# CHAPTER ONE

## *Introduction*

Multi-religious, multi-ethnic, and culturally plural postcolonial democracies debate over who should govern the family as states and religious groups struggle to regulate the family. There are several reasons why states and groups aim to regulate the conjugal family: states realise their liberal, secular projects by infiltrating and fashioning individual subjectivities. States also strive for social cohesion, the transmission of property (Glendon 1981, 1989), and the delegation of welfare responsibilities (Menski 2001). In addition, the regulation of family is often yoked to the nation-building projects of states (Heuer 2006; Loos 2006; Woods 2004). Furthermore, the demarcation of kinship boundaries forms the basis of the state; it creates race, caste, and religious groups (Cott 2000; Loos 2006); and enables the state to perpetuate itself (Hanley, 1989; Stevens, 1999, 2004). Similarly, religious and cultural groups identify religious or customary laws as markers of group identity and seek autonomy to govern the family. Groups, too, seek to perpetuate themselves and attempt to impact upon or subvert the statist vision of the nation by regulating the family (Yuval-Davies 1989; Woods 2005).

In this context, the key question is whether states should adopt legal centralism[1] and enact uniform laws to govern the family[2] or provide autonomy to religious or cultural

---

[1] Legal centralism is the idea that all law emanates from the state and is adjudicated and enforced by state institutions. Societal normative orders cannot generate "law" as it is distinguished by its efficacy as a form of social control, institutional enforcement, precision, unity, self-consistency, and doctrinal elaboration (Hart 1965; Tamanaha 1993; Woodman 1999, 12).

[2] For example, states such as Turkey, Thailand, and Ethiopia have enacted uniform civil codes. However, the Turkish uniform code has not succeeded completely in wiping out religious practices (Starr 1986; Ihsan 2005). Ethiopia has also tried legal unification through codification, but the civil code was scrapped after the Socialist Revolution in 1974. There was widespread dissatisfaction with the civil code even before that, as the code enacted entirely new laws that were unfamiliar to the judges; problems of high illiteracy coupled

groups through the adoption of legal pluralism.[3] The ongoing processes of state-formation require that postcolonial states balance economic development, social cohesion, and political stability, as well as create national consciousness by outlining shared meanings among their citizens through legislation, adjudication, and the enforcement of laws.[4] To serve these ends, the states seek to modernise key institutions such as the family and marriage, and shape ethnic, religious, sexual, and gender identities through law. However, postcolonial states are confronted with diverse societal groups that also seek to retain

---

with the survival of other laws made the exercise of codification a failure on the ground (Allott 1970, 208-209; Hooker 1975; Menski 2006, 481-484).

[3] The idea and the practice of legal pluralism, i.e. the coexistence of multiple systems of law, exists at many levels in time, space, and knowledge, and many competing versions of legal pluralism remain under discussion. Some scholars characterise the intermingling of supra-state law and official state laws, seen in the case of the European Union, as an example of legal pluralism. Others take different forms of official laws—administrative law (Arthurs 1985) and military law—at the level of the state to exemplify legal pluralism. Thus, the coexistence of different types of law within the realm of the state or between supra-state bodies and nation-states is seen as a typology of legal pluralism. Another body of literature focuses on the coexistence of state laws, including colonial laws, along with non-state legal orders (Hooker 1975, 1976, 1984). Some scholars have extended the aforementioned perspectives to non-colonised and developed societies and have focused on the interactions between these legal orders (Auerbach 1983; Chiba 1985a, 1985b, 1986a, 1986b, 1995, 2002; Engel 1987; Fitzpatrick 1983a, 1983b, 1986; Galanter 1981, 1985; Greenhouse 1998; Griffiths 1985a, 1985b, 1986a, 1986b; Moore 1973, 1978; Santos 1977, 1995; Sugarman 1983), while others have highlighted the intertwining nature of international, national, and local legal orders (Santos 1987, 1995). I draw on the latter body of work as it captures the specific nature of the legally plural situation presented in my study. I draw on Griffiths' definition of legal pluralism, which he defines as "that state of affairs, for any social field in which behaviour pursuant to more than one legal order occurs" (Griffiths 1986, 2). Griffiths defines two types of legal pluralism: the strong variant is one in which the state law is one among the body of laws, and the second is one in which state law identifies and orders non-state laws. Drawing from Griffiths' definition, I adapt the second typology of his definition as it is compatible with a wide range of empirical cases: I define legal pluralism as a policy in which the state recognises and regulates non-state laws.

[4]State-formation in Western Europe was a gradual process involving the homogenisation of population, secularisation, territorial demarcation, the centralisation of taxation, legal uniformity, and the monopolisation of force (Tilly 1975, 1988). However, state-formation is a non-linear process, and the recent trend has been towards decentralisation and differentiation of the state (Offe 1996; Warren 2003). The processes of state-formation in postcolonial states have been diverse. In some cases, the "overdeveloped postcolonial state" (Alavi 1979) has followed policies of "authoritarian high modernism" to centralise authority, overcome local orders, and penetrate society (Scott 1998). However, a number of scholars have argued that postcolonial state-formation was marked, not by zero-sum conflict between the state and other social groups, but by the incorporation and accommodation of local orders into the state (Barkey 1994; Corrigan and Sayer 1985; Hansen and Stepputat 2001; Nugent 1994; Shastri and Wilson 2001). In the case of Latin America, Lopez-Alvarez has argued that paths to state-formation combined conflict and incorporation. Herbst has suggested that the limited penetration of the state has been a continuous feature of state-formation in Africa and that outlaying regions have never been incorporated into the centre of the rule (Herbst 2000).

control over the governance of family laws,[5] which are seen as markers of community identities. As a result, most postcolonial societies evince ongoing negotiations between states and societal groups on the content of laws and the extent of community autonomy in the governance of the family.[6]

The assertion of religious family laws as symbols of community identity by societal groups has many implications for women's rights within the family. Women are implicated in the conception of community as women's productive, reproductive, and cultural labour is used to maintain and perpetuate religio-cultural communities. Their dress, behaviour, appearance, and sexuality are controlled to define, separate, limit, and control group boundaries (Sapiro 1993; Shachar 2001; Yuval-Davis 1997). Also, these laws regulate the distribution of resources within the family and define women's rights to own, access, and control these resources (Mukhopadhyay 1998; Sachar 2001). Concerns about women's rights in the family are pivotal to the debates on the regulation of family laws.

The state-society contestations over the governance of the family have an impact on relationships between states and religio-cultural groups as well as those within religio-cultural groups. For instance, the non-recognition of Islamic religious laws has led to

---

[5] Religious family laws are also called "personal laws," and I use these terms interchangeably. The term "personal laws" came into existence in colonial times as these were laws a person carried within across regions. Personal laws include laws governing group membership (determining who is a group member and defining the exit option in law through a change in group membership through conversion, marriage, voluntary subjection, or negation). They also regulate inter-group interactions. Different states have evolved laws regarding which areas (e.g. family laws or criminal laws) under which circumstances (e.g. geographical boundaries) would be governed by group norms.

[6] Post-independence, Tanzania codified its various laws while the Tunisian state undertook reforms in family laws. Morocco also attempted codification of Islamic laws and abolished the autonomy of Berbers in the governance of the family as a reaction to the French policy of legal pluralism. These measures are all largely seen as a reaction against the colonial policies of legal pluralism (Menski 2006; Moors 2003; Charrad 2001). However, unlike Turkey and Ethiopia, Tunisia codified Islamic laws and did not transplant or opt for uniform civil codes modelled along the lines of French, German, or Swiss civil codes.

agitations for the recognition of Islamic laws in South Africa (Amien 2006; Moosa 2002). In India, the state's decision not to codify Muslim religious family law has been contested across religious boundaries by Hindu nationalists and secular modernists alike. In Malaysia, debates over the jurisdictional expansion of Islamic courts spearheaded by the UMNO (United Malays National Organization) government in 1980s and over the introduction of the *Hudud* (Islamic Criminal Codes) Bill by the right wing PAS (Parti Islam Se-Malaysia) government in Kelantan in 1993, have been opposed by non-Malay parties representing the interests of other religious groups (Hamayotsu 2003, 57; Ibrahim 2000; Kamalai 2000; Peletz 2002). Indonesia has witnessed conflicts over expanding the scope of Sharia in different provinces (Bowen 2003; Butt 1999; Lev 1978; Lindsay 1999). The expansion of the Sharia in the northern part of Nigeria is one of the reasons for violence between Christians and Muslims in Nigeria and in Sudan.

While state failure to recognise group claims can lead to conflicts, states that adopt multicultural policies[7] are not necessarily exempt from these contestations as public recognition is often unevenly circumscribed across religious, caste, and indigenous groups. The recognition of religious family laws also shape and freeze religious and ethnic identities,[8] and these can also contribute to inter-group rivalries. As a result, multi-religious and multi-ethnic democracies face the challenge of constructing policies that can facilitate

---

[8] The argument that state-initiated policies of classification, categorisation, and enumeration of the populace freeze group identities is made by numerous scholars (Corrigan and Sawyer 1985; Scott 1998). In the Indian context, the colonial state's legal policies and the postcolonial state's continuation of the system of religious family laws have eroded heterogeneous religious identities and marked boundaries between religious communities (Cohn 1996; Dirks 1992, 2002; Mukhopadhyay 1998; Pandey 1992).

equality *between and among* diverse ethno-religious groups while ensuring gender equality *within* these groups in the matter of religious family laws.

**Who Shall Govern the Family?: Outlining Two Approaches**

Two strands of theoretical debates inform the issue outlined above. The first strand, which is society-centred, suggests group autonomy for cultural groups, especially minorities, in the regulation of the family. Chatterjee has argued for "strategic politics of difference" outside the domain of the state. He argues that cultural communities can refuse to be homogenised in the name of dominant reasonableness by developing an "inner democratic forum." The proceedings of this forum should follow codes of transparency, publicity, and representation (Chatterjee 1994). Discussing the nature of ethnic conflict in Sri Lanka, Scott has argued for the cultivation and institutionalisation of cultural political spaces in which groups can "formulate their moral-political concerns... in the language of their respective traditions" (Scott 1999, 185). He calls for the creation of modalities through which communities can engage in intra-cultural dialogue of mutual recognition and negotiate claims and counter-claims about the meaning of their traditions (Scott 1999). While Scott's approach does not prevent reification of group boundaries and does not place gender equality at its centre, it does reclaim the centrality of society-centred politics in his project.

Some proponents of state-centred arguments, on the other hand, suggest that the state should be the only locus of law in matters related to personal laws within multicultural democracies. In the context of this problematic, Rawls has argued for an "overlapping consensus" in which a diversity of conflicting comprehensive doctrines would endorse the same political conception: justice as fairness in the public domain of

culturally diverse, plural societies (Rawls 1996).[9] With regard to debates on the recognition and reforms of religious family laws, scholars argue that religious family laws cement group boundaries and do not reflect religious principles enshrined in classical laws. They also point out that the possibility of internal reform in religious laws is limited as they are not compatible with equality guaranteed in national constitutions or universal rights enshrined in international human rights conventions. Feminists also resist the idea of cultural autonomy in family matters as groups are imbued with patriarchal values and norms and violate the individual rights of women. Feminists have thus criticised states' adoption of cultural pluralism as states' privileging of group rights over women's rights in the family (An'Naim 2002; Cook 1994; Dhagamwar 1974, 2005; Jayal 2001; Joseph 2005; Kukathas 1992; Howland 1999; Mahajan 2006; Moghadam 1994; Moors 2003; Nussbaum 1995; Okin 1997, 2005; Philips 2003, 2004; Sangari 1996, 2004; Welchman 2004).

Other state-centric proponents of cultural autonomy argue for special group rights for cultural communities, especially minorities (Kymlicka 1993, 1995; Parekh 2000; Young 1989, 1990).[10] Spinner-Halev also supports group rights, but he argues against state intervention as it violates the group's right to shape its collective identity (Spinner-Halev 1994). These arguments have been criticised because these arrangements have led to the

[9] Thus, the Rawlsian project locates cultural difference in the private realm. Furthermore, cultural difference is almost seen as inessential—a matter of voluntary association. Rawls' political liberalism has also been criticised for being grounded in universal reason. It has been argued that Rawls has failed to resolve the question of incommensurability of values in societies. Critics argue that Rawls' conception of political liberalism exaggerates the degree of "overlapping consensus" in any society, that it poses rationalistic and legalistic solutions to deal with value pluralism, and that it creates an excessively formal public sphere that is emptied of political indeterminacy and contingencies (Gray 1995).

[10] Young argues that liberalism creates a public sphere that is falsely universal, homogeneous, and abstract. This public realm excludes the voices, experiences, and perspectives of these groups from the formal public realm. She argues for special rights for disadvantaged groups and minorities. Similarly, Kymlicka makes a case for three sets of group rights for minorities. These include special representation rights, self-governing rights, and polyethnic rights. He suggests differentiation between two kinds of rights: one that involves the claim of a group against its own members and one that involves the group's claim against the larger society. He argues that liberalism can only accommodate the ideas of "freedom within groups" and "equality between groups" (Kymlicka 1995, 152).

ossification of group boundaries, and they ignore intra-group hierarchies (Deveaux 2006; Okin 1989; Philips 1994, 1995; Kukathas 1992). Scholars suggest that the state should provide conditions in which reforms of religious family laws can be initiated (Deveaux 2000, 2006; Hallaq 2001, 2004, 2005). However, both state-centred and society-centred approaches maintain the critical tension between group autonomy and gender equality and do not discuss how awarding group rights can prevent the ossification of community boundaries.

In the context of the regulation of family laws, feminists have sought to incorporate intra-group equality while assuring the accommodation of cultural groups by advocating a model to regulate the family. Shachar advocates the "joint governance" approach wherein the state and cultural groups split juridical authority in the regulation of family laws (Shachar 1999, 2001). The institutional arrangement advocated by Shachar segregates the demarcating function of family law, used to define group membership, from the distributive function, which ensures the division of intra-household resources within the family. Shachar further suggests that demarcating aspects of family laws should fall under the purview of cultural groups while the distribution of property between family members would be governed by the state. According to Shachar, the bifurcated legal authority would give legitimacy to both the state and the group. Thus, juridical autonomy enjoyed by either the state or the cultural group in one sphere of family law is seen as a positive step to ensuring cultural accommodation while providing intra-group equality. Shachar also suggests that legal pluralist policies in several spheres prevent reification of group boundaries (Shachar 2001).

Shachar's proposal directs us toward accommodative arrangements between states and societies that balance group rights with gender equality by adopting legal pluralism in the governance of the family. Variants of Shachar's normative proposal exist in many postcolonial societies: in practice, most postcolonial democracies accept the policy of cultural pluralism in the governance of the family and tailor different models of legal pluralism[11] to govern the family by sharing authority between states and sections of ethno-religious groups within the society. My dissertation examines the nature of state-society interactions in the governance of the family, and it assesses its impact on the constructions of religious groups and gender relations within the family.

**Research Questions**

How do accommodative arrangements advocating shared adjudication between state and society in legally plural democracies impact upon the interactions between and within religious groups and other societal bodies? And how do they shape women's rights in the family?

What is the nature of state-society interactions in the adjudication of religious laws in legally plural societies?

**Case Selection**

While most postcolonial states have witnessed contestations over the granting of cultural rights in the governance of religious family laws, India is an important case to examine since India has witnessed contestations between and within religious groups in the

[11] Crafting these arrangements requires that states make decisions regarding the recognition of tribunals applying group laws as well as the possibility of reform in some areas under community authority, especially ones that are against the legal norms of modern states (Allott 1970; Derret 1963; Griffiths 1986b; Hooker 1975).

regulation of religious family laws. Furthermore, women's roles and rights in the family have been terrains over which some of these arguments been have played out. The Indian state has crafted a broad range of accommodative arrangements to govern the family. The Indian state recognises both religious and customary laws, and the nature of autonomy granted to groups is unevenly circumscribed across groups. The state does not establish religious or customary courts, and it retains the exclusive authority to enforce the distribution of property. The state has also enacted secular laws to govern interreligious marriages, and it has provided an option to its citizens to opt out of religious laws.

More specifically, I have chosen the Indian case because the Indian model of legal pluralism in recognition of religious family laws falls at the centre of the spectrum of legally plural arrangements adopted by various states.[12] In the Indian case, the conflict over the governance of the family has been sharpest when it comes to the governance of marriage and divorce; in this matter, the Indian state has adopted what I call a model of "shared adjudication" in which the state splits its adjudicative authority with social actors and organisations in the regulation of marriage and divorce among a section of religious

[12] Ihsan identifies six types of relationships between official and unofficial laws across a continuum. The set of legal arrangements across an imagined analytical spectrum would have legal centralist arrangements at one end and complete legal pluralism at the other extreme. Between the two extremes exist possibilities such as parallel systems of state and local laws, codification of local laws, partial recognition of local laws, and the incorporation of local actors into the state legal system (Ihsan 2005, 25-26). All four possibilities are encompassed within the Indian case. Most other states have crafted a range of institutional arrangements with society-based groups in the regulation of family matters. Four typologies capture legally plural arrangements made by postcolonial states. Leaning towards extreme legal pluralism is the Lebanese case in which communities have complete autonomy in the governance of the family. In fact, the state does not recognise interreligious marriages (Joseph 2005). The second typology includes states such as South Africa and Botswana that recognise customary laws but not religious laws and have allowed customary tribunals; states such as Bangladesh and Sri Lanka recognise both customary and religious laws and allow customary courts. The third typology includes Israel, Malaysia, and Indonesia, which have institutionalised religious courts. The fourth typology leans towards legal centralism, drawn out in case of Tanzania, which has attempted the codification of law through state-society interactions with local elites but has not accepted customary authority (Allott 1970, Menski 2006). This typology also includes states such as Tunisia, which has codified its laws and Morocco, which establishes a hegemonic Islamic law on different communities through codification. Following decolonisation, Morocco abolished Berber customary laws and codified Islamic laws. The state allowed rabbinical courts to govern the Jews, but Christians are governed by Islamic laws except in matters related to repudiation (Moors 2003).

and caste groups and other actors.[13] In doing so, the Indian state adopts what I call a "restrained autonomy" in the governance of the family; that is, the Indian state allows societal actors and institutions to govern marriage, but the state does not relinquish its authority to govern the family.

## A General Outline of the Developments in the Indian Case

The state law of pluralism practiced in the Indian case is a result of colonial legacies as well as postcolonial policies adopted by the Indian state.[14] At the time of

[13] For instance, Section 29, sub section (2) of the Hindu Marriage Act, 1955 allows customary divorce and as such, both state courts and societal bodies act as legal agents in matters of marriage and divorce. While this provision was meant to allow caste authorities to regulate customary divorce in castes that have historically practiced divorce, my data show that many other societal agents also adjudicate in divorce under this provision. Muslim Personal Law in postcolonial India is based on local custom, Islamic laws, and precepts; customary laws are made by sect-based organisations, state-law enactments, and judicial precedent. The state courts administer the uncodified Muslim Personal Law as well as state-enacted laws. In general, state law recognises uncodified Islamic laws when it comes to marriage and divorce but privileges statutory law in matters of maintenance and post-divorce financial settlement.

[14] In the period prior to colonisation, the laws were divided as territorial laws, administered by the state (these included laws on taxation, treason, and certain criminal acts) and personal laws (which dealt with other matters) that were administered by community and caste councils, or *panchayats*. The laws were not fixed and were subject to change and different interpretations. Community boundaries were not rigid, and there were overlapping customs and laws among different Hindu and Muslim communities. The religious family laws emerged as a separate category of laws as a result of colonial policies. According to Washbrook, during the early stages of British rule the mercantilist state sought to consolidate the ownership of property and as a result, introduced changes in the civil and criminal laws. The laws introduced during this period were based on the philosophy of "possessive individualism" whereby the individual was freed from external controls that limited property and wealth through the market as at that time, in India, property was seen to be in the trust of the owner; the land was not seen as a commodity, and many rights over land were governed by communitarian rights. The state also established judicial courts and imported judges from England. However, as Washbrook points out, alongside the colonial state's attempts at developing public laws, there was also a hidden attempt to define the "private law" of the subjects. While the philosophical underpinnings of the public law were to free the individual to join the market, the basis of personal law was a vision of a society wherein the individual was subject to the customary laws and obligations of a community. Hence, family laws were the laws excluded from the state project of law reform (Washbrook 1981). Other scholars suggest that the colonial state created a myth of non-intervention in family matters of religious communities to ensure legitimacy; in reality, state courts routinely adjudicated matters of religious family laws (Sturman 2005). Cohn has also argued that the colonial project of documenting the governed populace and codification of Hindu and Muslim laws led to the emergence of separate religious family laws (Cohn 1996). The judges in state-established courts also borrowed from textual sources and sought opinions of Brahmins and Maulavis in the case of Hindu and Muslim laws, respectively. These processes privileged Brahminical interpretations of religious law over customary usage and fixed religious laws and identities (Cohn 1996; Mani 1990).

independence, there were overlapping jurisdictions in the category known as *family laws*. Formal jurisdiction in this area included laws enacted by the colonial state as well as the Constituent Assembly. The Princely states had their own laws and caste *panchayats* (councils); customary tribunals and religious clergy, too, ruled on family laws (Derret 1963, 1968, 1973; Smith 1963; Galanter 1989; Nair 1996; Parashar 1992).

Post-independence, the Indian state sought to pursue economic development, social cohesion, and national unity. The decades of the 1950s, 1960s, and 1970s were hailed as the Indian state's success in achieving these goals. The Indian state's policies of linguistic federalism, secularism, affirmative action for the Scheduled Castes and Tribes, repression of secessionist movements, and a socialist planning process along with reasonable economic growth in these decades contributed to relative harmony and peace between various mobilised groups in society (Weiner 1970; Brass 1994).

The issue of whether to enact a uniform civil code for all citizens was debated in the 1950s and came up again in the 1970s, within this ethos of a democratic resolution of difference. The thrust of the arguments in favour of the uniform civil code was that the newly formed and slowly industrialising Indian state required the construction of a modern, political community. This in turn necessitated transferring people's particularistic attachments from their pre-modern communities to the nation-state. Questions of women's equality in the family and minority accommodation were other concerns informing these debates. However, there was opposition to this move by the state from different sections of all communities.

There were six parties taking part in the debate.[15] Between the 1950s and 1970s, the meaning of uniform civil code meant different things to the different groups. On the part of

[15] I have adapted the typology from Rudolph and Rudolph 2001, 36-68.

the state, a uniform civil code represented the conflict between an image of a unified political community and the practice of accommodation through bargaining and compromise implicit in the governance of a plural society. The Hindu right, which opposed the agenda of gender equality in the process of law-reform, saw the uniform civil code as a tool to construct a Hindu nation in which Muslims and other minorities would assimilate, and their identity-markers would be erased. Modernists from both the Hindu and the Muslim communities saw the uniform civil code as the actualisation of the state's commitment to secularism and as a tool to foster national unity. The conservative and moderate sections of the minorities saw the uniform civil code as a majoritarian device to ensure political assimilation. For the Indian women's movement, the uniform civil code was seen to be synonymous with both the achievement of women's equality within the family and the abolition of pre-modern and backward community authority resistant to the ideals of women's equality (Everett 2001; Gandhi and Shah 1990; Mukhopadhyay 1998; Parashar 1992; Rudolph and Rudolph 2001).

The state conceded to the multicultural rule of law at this juncture to secure the support of religious-cultural minorities. The state did not enact a uniform civil code[16] but added a proviso in the non-justiciable Directive Principles of the Indian Constitution that the state should endeavour to enact a uniform civil code.[17] In addition, the state reformed

[16] The uniform civil code is applied to the Union Territory of Goa.

[17] By pursuing this policy of law reform, the Indian state hoped that these concessions to the multicultural rule of law would secure the support of the minorities and the *adivasis* for new governance. The state's policy of reforming the Hindu law appeased the pro-reform lobby, for it sent the message that the Indian state was serious about modernising the majority Hindu community through law reform. The dilution of the content of Hindu laws and of the Special Marriage Act, 1956 was meant to win over the anti-reform lobby (Derret 1963, 1973; Smith 1963; Everret 2001; Parashar 1992). Other scholars have argued that the policy reflects a consensus between the Hindu and Muslim elites—personal law reform is seen to be a matter internal to the Muslim community. Scholars studying ethnic conflict have also argued that there exists a pact between Hindu and Muslim elites in which the Hindu elite do not interfere in matters related to recognition,

the law of the Hindu community but did not push for women's equality.[18] Through the codification of Hindu law, the state constructed the category "Hindu" and subsumed Buddhists, Jains, Sikhs, and Scheduled Castes and Scheduled Tribes under this typology. The Hindu law legalised divorce, allowed inter-caste marriage, permitted customary divorce,[19] recognised customary authority, and gave women limited inheritance rights. The state did not reform religious family laws of minorities.[20] The state enacted the Special Marriage Act, 1956 to govern interreligious marriages and thus provided a secular option for citizens.

The policy of the Indian state to leave Muslim laws largely uncodified has led the Hindu right to assert, time and again, that the minorities, especially Muslims who are the

---

codification, and reforms of Muslim personal laws and in exchange, Muslims respect the cow-protection lobby among Hindus (Brass 1994).

[18] The Indian state's policy to reform Hindu law was a result of striking a compromise between conservative and modernist lobbies during the process of reforming the Hindu law in 1955. The Congress government faced resistance to reforms within the Hindu law by the Hindu nationalists as well as by the conservative lobby within the Congress Party. The Congress government watered down women's rights to balance these opposing factions (Parashar 1992). Besides, reforms within the Hindu law were not radical and many of these "reformist" laws were versions of laws practiced in one form or another in different parts of India, including those ruled by the princely states (Nair 1996).

[19] By doing so, the Indian state adopted a "shared adjudication" model in which the state and caste authority could adjudicate in customary divorce. This provision was supposedly to be limited to castes that "traditionally" allowed divorce. This provision was meant to appease the conservatives who were against legalising divorce in the Hindu Marriage Act, 1955 and who saw customary divorces as immoral practices of lower castes that should not be imitated or adopted by upper castes who forbade divorce. However, my data show that this section is used by litigants and different societal actors to negotiate divorce.

[20] Muslim Personal Law had been partially codified in the 1930s, resulting in two enactments: the Shariat Act, 1937 and the Dissolution of Muslim Marriages Act, 1939. During colonial rule, the nationalist elites had constructed the realm of the family as private, away from the intervention of the colonial state. Post-independence, the postcolonial state was deemed as a legitimate authority to intervene in this matter. However, in the aftermath of the partition, the Muslim elite used the same rhetoric to oppose unification or codification of Muslim laws (Chatterjee 1993, 1994). In response, the Indian state adopted the policy of accommodating minorities until they were ready to merge into a unified political community. The codification and reform of the Hindu law were seen to be a step towards reforming the Hindu religion through state intervention. The modernist lobby within the Congress Party supported by the All India Women's Congress, which pushed the reformist agenda (Parashar 1992), and a modernist section of Hindus were in favour of state-initiated reforms in religious matters, including personal laws (Chatterjee 1993, 1994). This approach was legitimate in the interest of creating a just social order (Jacobsohn 2003). It is also suggested that many Congress leaders were Hindus and could therefore push for reforms within the Hindu law. Another explanation is that the state reformed the Hindu law as a first step towards enacting a uniform code, and they hoped that other religious communities would reform their laws and perhaps accept a uniform civil code at their own pace (Derret 1963, 1968).

most visible opponents of the uniform civil code, are not members of the political community (Chatterjee 1994; Subramanian 1998). The policy has also led feminists and modernists to question the state's commitment to gender equality. Scholars argue that the policy of recognition of religious laws exists in opposition to freedom of religion and secularism (Agnes 1999; Bhargava 1998; Dhagamwar 1974; Galanter 1989; Parashar 1992; Mukhopadhyay 1998; Rudolph and Rudolph 2001).[21] The state's position was that the policy had "fixed" religious laws and identities (Cohn 1987; Kaviraj 1997; Mukhopadhyay 1998).

The fragility of the Indian state's project of national unity, social cohesion, and secularism has slowly become pronounced since the late 1970s. Between 1975 and 1977, India went through a period of authoritarianism. The 1980s and 1990s saw an escalation of communal conflicts, the resurgence of majority fundamentalism, caste wars, and regional separatist movements (in Assam, Punjab, Darjeeling district of West Bengal, and Kashmir). All these have pointed to the Indian state's failure to achieve its goal of national unity (Freitag 1989; Brass 1994).

Debates over the Indian state's policy of legal pluralism had been muted until the 1970s,[22] but it gained momentum in the mid-eighties. In 1985, the Indian Supreme Court

---

[21]For instance, in the case of *State of Bombay v. Appa*, the petitioner argued that under the system of religious laws, Muslims were allowed to contract polygamous marriages while the practice was banned among Hindus. The petitioner stated that Hindus should not be disallowed polygamous marriages contracted to mitigate failure to produce a male heir, which was integral to the Hindu religion. The court opined that polygamy for reasons of producing a male heir was not central to Hindu religious practice as adoption was allowed in Hinduism. The court also held that the state's commitment to secularism was compatible with incremental social reforms and that these social reforms could be undertaken by different religious communities at varying paces (see *State of Bombay v. Appa*, AIR Bombay 84 (1952). See also *Srinivas Aiyar v. Saraswathi Ammal*, AIR 1952 Madras 193). (For a detailed discussion see Larson 2001; Jacobsohn 2003; Menski 2003.)

[22] The issue was debated between 1972 and 1984, when the state attempted to introduce a uniform adoption bill. This was opposed by a section of *ulemas,* the clergy, as un-Islamic. In 1973, the state amended sections of the Criminal Procedure Code, and conservative Muslim leaders argued that divorced Muslim husbands should be exempted from the reach of Section 125, Criminal Procedure Code, as this section allowed

passed a judgement in the case of Shah Bano who had approached the court for maintenance after a divorce under Section 125 of the Criminal Procedure Code, 1973, which is uniformly applied across religious cleavages. Her husband argued that he was not obliged to pay her maintenance beyond the period of *iddat,* a period of three months and ten days, under Muslim Personal Law. The court awarded Shah Bano the maintenance but opined that the Indian state should enact a uniform civil code (Mohammad Ahmed Khan v. Shah Bano Khan, 1985, SC 945). This statement led to heated debates within the communities. The following assembly election saw the governing party's defeat in the state; this led the Congress government to pass the Muslim Women's (Protection of Rights upon Divorce) Act, 1986, which would govern the economic rights of divorced Muslim women.[23]

The developments after the Shah Bano case and the enactment of the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 marked a critical moment in the trajectory of legal developments on this issue. The debate in the Shah Bano case moved beyond the question of the recognition of religious laws: the controversy also revolved around the degree and limit of recognition that could be granted to the Muslim community in matters of governance of the Muslim conjugal family. The debate raised the question of

---

divorced women across religious communities to file for maintenance. The law minister allowed a compromise. He suggested that a Muslim man who had paid a settlement to his wife after divorce could be exempted from Section 125, Cr. P.C (Parashar 1992, 167).

[23] The most common reason cited for this act of the Congress Party is linked to the decline in the Congress Party's support in the 1980s. In order to revive its sagging vote-bank and to win over conservative Hindus, the Congress Party unlocked the doors of a temple devoted to the Hindu God Ram in a disputed site at Ayodhya, in North India. Following widespread criticism of this move, and in a desire to regain the support of Muslims, the Congress government backed Muslim conservative leaders' demands for more autonomy in matters related to personal laws following the Supreme Court's judgement in the Shah Bano case (see Hasan 1998).

whether the Muslim community could ask for exemptions from provisions of uniform criminal laws.

The Indian women's movement, Muslim moderates and intelligentsia, secular modernists, as well as large sections of civil society protested against the state's enactment of the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 in order to problematise the community's assertion of autonomy at the cost of women's rights within the family. The Hindu right gained considerable mileage from the Indian state's so-called appeasement of minorities by agreeing to their demands for increased group autonomy. The right has since further demonised the Muslim minority as backward, parochial, pre-modern, and resistant to the formation of a political community (Agnes 1999; Hasan 1996; Parashar 1992; Mukhopadhyay 1998; Sunder Rajan 1996). A small section of moderates saw the critical intertwining of gender justice versus minority rights the Shah Bano case highlighted. However, a majority of feminist analyses of the laws after the Shah Bano case have highlighted the state's policy of privileging cultural accommodation at the cost of Muslim women's equality in the context of religious family laws. It was also argued that this policy has further sharpened the difference between the family laws of Hindus and those of Muslims and that Muslim women are compromised by dual patriarchies: the community and the state.

The political landscape of the 1990s saw an unprecedented rise of the Hindu right. The destruction of the Babri Mosque in December 1992 and the riots that followed changed the political landscape of the country. In the late nineties, the Hindu right led a coalition government. During the reign of the BJP-led coalition (1999-2004), more than 2500 Muslims were killed in the state of Gujarat by Hindu fundamentalists, with the active

abetment of the BJP-ruled state of Gujarat in Western India in 2002. In the context of virulent and aggressive Hindu majoritarianism, and the demonising of Muslims post-September 11, debates on uniform civil code in the political landscape are muted but simmering below the surface.

There were legislative changes in personal laws of Parsis and Christians during this time,[24] and the Hindu Succession (Amendment) Act, 2005 has led to pro-women changes in the inheritance laws of Hindus since the Congress government returned to power in 2004.[25] While in power, the BJP did not attempt to enact a uniform civil code, but since its defeat in national elections in 2004, Hindu nationalists have sought to increase their control over the family by virulently opposing religious conversions, interreligious and inter-caste marriages, and upholding the Brahminical[26] family, which celebrates a rigid gender hierarchy within the family.[27] The Hindu right has a two-pronged approach to reshaping the family and defining religious community. In states that are governed by the BJP, the state has institutionalised extra-legal practices to constrain parties from contracting interreligious and inter-caste marriages.[28] In addition, the Hindu nationalists

---

[24] Among the minorities, the personal law of the Parsi community was amended in 1991 at the behest of the Parsi elite. As a result, Parsi women obtained equal rights to inheritance under the amended law (Agnes 1999). The Christian community, too, has arrived at an agreement after wide-ranging discussions on changes in their personal laws (Agnes 2002; Jacob 2001; Subramanian 2004).

[25] The Hindu Succession (Amendment) Act, 2005 removed inequalities in the inheritance of agricultural land and made Hindu women's right to inherit agricultural land equal to those of Hindu men across all states. The latter development is valuable as states such as Delhi, Haryana, Himachal Pradesh, Jammu and Kashmir, Punjab, and Uttar Pradesh had enacted state-level tenurial laws that were gender unequal. See Sonu Jain, "Women Didn't Receive Rights without Struggle," *Indian Express* (13 September 2005).

[26] The Hindu nationalists seek to enforce a gender-based division of labour within the family and advocate modesty in dress and appearance. Women's sexuality is strictly controlled, and Hindu women are warned against the lascivious intent of violent Muslim men (Basu 1995; Sarkar 1995, Kapur and Cossman 1998).

[27] The Hindu nationalists hold supremacist, exclusivist, and paternalist notions of caste hierarchy. While "lower" castes are incorporated into the fold of the Hindu right, they are "sanskritized" (Jaffrelot 1998; Jenkins 1998; Shah 1998).

[28] For instance, in Gujarat, the BJP, the ruling party, issued a circular requiring couples to furnish their parents' consent for the registration of marriage. This "rule" contravenes provisions of both the Hindu Marriage Act, 1955 as well as the Special Marriages' Act, 1956. In 2003, succumbing to the propaganda of the Vishwa Hindu Parishad, a cultural affiliate of the BJP, the state government had made it mandatory to

have turned to their cultural organisations and affiliates to enforce its vision of the Hindu family through Hindu militant organisations and private strongmen[29] across states. In general, the Muslim elite have been measured and careful in their responses to these debates.[30]

In the aftermath of violence in Gujarat, many modernists have abandoned the idea of a uniform civil code, recognising that such a move supports the Hindu nationalists' cry for a homogeneous public sphere dominated by majoritarianism values. For most Muslims and other minorities, any attempts at enacting a uniform civil code is an attempt to assimilate them into the political community against their wishes. While some modernists continue to tie the uniform civil code to secular values (Narain 2001), others argue that the pursuit of incremental social justice through state-led reforms in religions is compatible with the Indian state's understanding of secularism, and that the notion of "principled distance" permits different treatments of religious groups, which is compatible with the "ameliorative secularism" professed by the Indian state (Jacobsohn 2003, 285).[31]

---

solemnise interreligious marriages only with the prior permission of district collectors. See Rathin Das, "Gujarat Marriage Fiat Tied in Knots," *Hindustan Times* (21 July 2006).

[29] For instance, Babu Bajrangi, a BJP strongman, has forcibly "recovered" many Hindu women who marry Muslim men or men from other regions or castes. He and his cohort, with the help of the lower judiciary, kidnapped these women and forced them to divorce their husbands, and they have arranged their remarriage to Hindu men. See Basant Rawat, "VHP Crown for Gujarat Mob Leader," *The Telegraph*. Ahmedabad. 28 February 2004. Available from http://www.telegraphindia.com/1040229/asp/nation/story_2950417.asp. See also Dione Bunsha, "A Serial Kidnapper and his Mission," *The Hindu* 23, issue 25 (December 2006). Furthermore, the mobilisational strategies of the Hindu right entails the infiltration of the family through their cultural organisations, such as the RSS. This reorienting of RSS families into model families imagined by the Hindu ideologues is also one of the strategies used to change the ethos of the Hindu family (Sarkar 1995).

[30] In the post-Shah Bano case era, the Muslim leadership has not reacted to provocative and anti-Muslim judgements, which is exemplified in the case of *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531. In this case, the court was asked to rule whether a polygamous marriage of a former Hindu man contracted after conversion to Islam was valid. The court ruled that Hindu marriage undertaken under the Hindu Marriage Act, 1955 could not be dissolved on the basis of a second marriage contracted after conversion to Islam. The judge also advised the enactment of the uniform civil code to prevent such misuse of the law. See *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531.

[31] There is no consensus on the reading of Indian secularism among scholars. For an excellent discussion of the Indian model of secularism in a comparative perspective, see Jacobsohn 2003.

The Indian women's movement has debated the issue of the uniform civil code throughout the 1990s. The Indian women's movement has painstakingly distanced its positions from the Hindu right's demand for a uniform civil code; it has reached a consensus on the need to support processes of intra-community reforms, and it has evolved innovative strategies to work for gender justice without negating the criticality of the assertion of difference.[32] However, the movement also points out that community processes are limited as religious laws are based upon patriarchal premises. Since the Shah Bano case, leading feminists and academics have highlighted miscellany in various laws applicable to Muslims across India and argued that economic rights of Muslim women are not protected in these laws (Agnes 1999; Ahmed 2002; Anveshi Law Team 1996; Forum Against Oppression of Women 1996; Gangoli 1996; Menon 1999; Sangari 1995).

There are several points of convergence in these debates. With the exception of a few,[33] most scholars suggest that the Indian policy of legal pluralism has privileged group rights, especially the group rights of Muslims, over gender equality. It is conceded that while women of all religious communities are denied equal rights in religious laws, Muslim women are the most discriminated against in religious family laws, especially under laws governing divorce and maintenance upon divorce. In addition, some scholars suggest that since the Shah Bano case, the Indian state has not been able to intervene in

[32] A section of the Indian women's movement has asked for a common civil code that is not modeled on the lines of the Hindu law but that places gender justice at its centre (See Forum Against Oppression of Women, *Visions of Gender Just Realities*, 1996), while another section of the women's movement has argued for the disengagement from the law and the state as the state is inherently patriarchal (The Anveshi Law Team, 1996). A section of civil rights groups have argued for the flexibility of the option to exit from personal laws (Working Group on Women's Rights 1998). However, these have been inattentive to the viability of the exit option for the more marginalised group members, such as women.

[33] A few scholars have established, through empirical research, that minority rights need not be entangled with women's rights and that the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 can be beneficial to women (Subramanian 2004, 2005; Vatuk 2006).

reforms of Muslim religious family law.[34] It is also said that the state's policy has cemented group identities and widened the gap between the laws of Hindus and those of Muslims.

The dilemma in the Indian case is to tailor law-reform that would balance both minority rights and women's rights.[35] Feminists see the processes of internal reforms as one such strategy but realise that their scope is often limited. Proposals by Forum against Oppression of Women and *Majlis* suggest piecemeal reforms in state laws as well as broadening the scope of law-reform by deepening women's citizenship rights.[36] However, both these proposals remain statist in their approach.

In my thesis, I approach the question by a different route by focusing on state-society contestations in the governance of religious family laws. I pay analytical attention to the degree and nature of legal pluralism enshrined in the governance of marriage among Hindus and Muslims, and I highlight the power and reach of state- and society-based sources of authority. These state-society negotiations to define and fashion the boundaries of religious groups' autonomous zones take place in two arenas: one is the legislative terrain in which changes take place either through the edicts of the state or in response to the demands of communities; the other is the process of adjudication, wherein law is

---

[34] Mahajan argues against the Indian state's intervention in reforms of Muslim Personal Law as it would generate an outcry against the "colonizing" state (Mahajan 2005). Mahajan's analysis does not take into account the history of state law developments in Muslim Personal Law. The Indian state has continued to intervene in Muslim Personal Law in the legislature and, more recently, in the adjudicative arena. Recently, the state has also refused to allow the establishment of parallel religious courts among Muslims, a demand that is occasionally raised by a small section of the Muslim clergy in India (*Outlook*, Web edition, Available from http://www.outlookindia.com. Accessed 22 May 2006).

[35] For a detailed discussion of this impasse, see Rajan 2003.

[36] Proposals that attempt to unravel the knot between gender justice and minority rights are brought forth by the Forum Against Oppression of Women and *Majlis*. The Forum proposal argues for an extension of civic and social citizenship for women, asks for reform within the legal system, and demands the reconfiguration of the definition of the family. Both the Forum and the *Majlis* argue for new laws on matrimonial property. This strategy does not challenge the autonomy of the communities; rather, it provides women with economic rights within marriage (Anveshi Law Team 1996; Forum Against Oppression of Women 1996; Gangoli 1996; Menon 1999; Agnes 1999).

produced (Zemans 1982). I turn to the micropolitics of adjudication in multiple legal forums since adjudicative sites are loci where laws are produced (Zemans 1982) and where law reforms take place. These adjudicative processes bring to light the contestations over the nature and degree of community autonomy and gender equality within adjudicative processes. These reveal how individual litigants and adjudicators view marriage and the conjugal family, religious membership, and women's rights in law.

**Review of Literature in the Indian Context**

The body of literature on religious family laws in India focuses on normative debates on group rights (Bhargava 1998; Jayal 2001; Mahajan 1998, 1999, 2004; Sunder Rajan 2000, 2003), legislative debates around personal laws, and analyses of legal precedents in religious family laws (Jaising 2005; Parashar 1992; Narain 1997, 2006). This literature also studies legal reasoning through the analysis of case judgements in state courts (Agnes 1999; Derret 1963, 1968; Galanter 1989; Mahmood 1991, 1997, 2005; Menski 2001; 2003). The literature does not take into account the nature of legal pluralism in the regulation of religious family laws, and it does not consider adjudication in informal legal forums. Both Mukhopadhyay and Sagde have studied the process of adjudication in matters related to marriage, divorce, maintenance, and inheritance among Hindu and Muslim women in formal courts (Mukhopadhyay 1998; Sagde 1996), but they have not studied the process in informal courts. Vatuk's work digresses from the trend of excessive focus on archival work. Vatuk has examined Muslim women's rights under laws related to marriage, divorce, and maintenance under Muslim Family Law in formal courts (Vatuk 2001, 2003) and in informal sites, focusing on the adjudication by the clergy (Vatuk 2005).

The theme of women's rights to matrimonial property under religious laws in formal courts has received the attention of some scholars (Mukhopadhyay 1998; Sagde 1996; Sturman 2005; Vatuk 2001, 2003). Scholars have also focused on the question of women's rights and, more generally, on access to property (Sharma 1980; Basu 1999, 2001). There have been several studies on women's access to, and control over, land rights (Agarwal 1994) and on Hindu widows' marginality in land rights under personal laws (Gulati and Gulati 1993; Chen and Dreze 1992). However, there are no studies on comparative constructions of matrimonial property in state courts and informal adjudicative bodies.

Anthropological literature on legal pluralism recognises the prevalence of parallel community forums; this literature studies the adjudication process in rural India, but it does not focus on personal laws and does not discuss the concerns of gender justice in the regulation of family matters (Baxi 1986; Cohn 1965, 1996; Galanter 1989; Mendelsohn 1989; Hayden 1999). Similarly, Erin Moore's ethnography is based on a Muslim woman's search for judicial alternatives to realise her rights focuses on adjudication under Muslim Personal Law in both state court and informal sect/caste council in a village (Moore 1998). Holden (2004) has studied customary divorces while Eckert (2005) has focused on the role of political parties as judicial actors. However, there are no comparative studies of judicial processes under different personal laws in formal and informal courts of law in urban areas.

**The Context of Inquiry**

I seek to examine the issue from a different entry point by focusing on neglected areas in both empirical and conceptual writings on religious family laws. I use the

analytical framework of state-society relations to study the processes of adjudication in laws of marriage and divorce among Hindus and Muslims. In contrast to the existing body of work on religious family laws in the Indian context, I focus on the Indian state's model of legal pluralism in the regulation of the marital family and focus on the state's accommodative arrangement in which the Indian state shares its adjudicative authority with societal actors in the governance of customary divorces among Hindus and Muslims. I call this the "shared adjudication" model.[37] Both state and plural societal bodies and actors adjudicate in religious family laws of Hindus and Muslims. As a result, the questions about the meaning of religious membership, rights, and obligations within marriage are shaped and refashioned within state law and courts as well as within informal bodies. I classify state and societal legal agents; I also analyse the interaction between official and unofficial laws and legal forums and discuss its impact on cultural pluralism and women's rights. I focus on adjudication[38] in formal and informal legal forums as these processes bring to light the plural constructions of the religious community and the marital family, and bring out the disagreements, conflict, and consensus over ideas of marriage and the rights and obligations of men and women within marriage in adjudication processes in plural legal locations.

I limit my investigation to examining Hindu and Muslim personal laws around marriage, divorce, and maintenance as these are pitted against each other in the debates around religious family laws. In any case, the Indian state allows shared adjudication in

[37] Section 29, sub section (2) of the Hindu Marriage Act, 1955 allows customary divorces in castes that have traditionally practiced divorce. However, this section is used by litigants and different societal actors to include a range of societal authority centres in negotiating divorce. The majority of "customary" divorces are notarised, and lower courts do not routinely verify caste "traditions" in state courts. Customary divorces are scrutinised against the provisions and principles of the Hindu law when challenged in courts.

[38] The term "adjudication" here refers to the processes of dispute resolution leading to an outcome in matters related to marriage and divorce. These processes are not always consensual and can take place in formal courts, informal arenas, or in both legal settings.

cases of marriage and divorce under both Hindu and Muslim laws. I also include cases of maintenance during marriage and post-divorce as these have an impact upon the economic rights of women within marriage and post-divorce, and these are linked to questions of marriage and divorce.

**Research Site**

I have chosen to locate the study in Mumbai, an urban metropolis in Maharashtra, in Western India. The state is the home base of a Hindu fundamentalist party, the Shiv Sena, and was affected by communal riots in 1992-93. The city has a vibrant civic sphere, and women's groups and human rights groups from the city of Mumbai have initiated many discussions and countrywide debates on personal laws. Another important reason for choosing Mumbai as a research site is that my study seeks to compare the traditional legal systems with the formal legal system of the state. The Family Court in Mumbai has existed since 1989 and is perceived to be one of the most efficient Family Courts in the country. The existence of community-based legal councils in a metropolis deserves attention, for the existence of parallel informal legal systems in a city like Mumbai, where the formal legal options are accessible and available, has implications for the questions at hand.

**Methods**

Drawing from Political and Legal Anthropology and Feminist Studies, I pay attention, not only to the law's intertwining with power and knowledge and its role in reinforcing or countering gender/race/class hierarchy (Cohn1987, 1996; Comarroff1981; Hirsh 1998; Lazarus-Black and Hirsh 1994; Scott 1985, 1998; Starr 1978, 1989, 1992, 2002). Moreover, I also examine also to the formation of adjudicative forums, the

unfolding of judicial processes, and their outcomes. I provide thickly descriptive accounts of the way in which state and non-state legal actors incorporate, apply, or subvert state agendas. I also focus on the ways in which litigants and adjudicators use law, not only as a resource, but also as a tool to rework cultural meanings of the family, gender relations in the family, and religious membership. Historians studying legal developments in Islam see law as an outcome of discussions and communication between jurists and judges that precede judicial decisions and opinions (Hallaq 2002, 2005; Tucker 1998), and recently, scholars have turned to analyses of case records and courtroom processes in Islamic courts to assess how law is produced and women's rights shaped (Hirsch 1998; Moors 1996; Stiles 2002, Welchman 2000). I broaden the scope of this inquiry to include other legal actors—women's organisations, civil society organisations, state officials, social networks—as well as individual litigants to understand their contribution to lawmaking. I also study the organisational politics influencing judicial outcomes.

While I have combined description with explanation, I have been alert to the politics of authoritative representation of empirical findings. I have attempted to capture "polyvocality" by interviewing different sections of religious and caste groups and of litigants. I have sought to represent their individual, nuanced, and contextualised positions on individual cases as well as on issues pertaining to religious family laws.

**Feminist Deliberations**

I stepped into a familiar terrain with this project. As a member of the Forum against Oppression of Women, I was involved in drafting the feminist proposal for gender-just laws entitled "Visions of Gender Just Realities." The Indian Women's Movements debated the issue of law reforms in 1996, and I participated in these discussions, holding the

position that wide-ranging reforms in state law were the only means to achieve gender equality in law, though community-initiated internal reforms were necessary. My work as a feminist social worker at the Special Cell for Women and Children in Mumbai entailed negotiating with a number of community leaders and actors in working towards women's rights in law. While I learned to bargain and cooperate with community leaders for women's rights, I viewed them as opponents, for I saw religious and caste groups as inherently patriarchal.

However, during my fieldwork, I found myself revisiting my previous assumptions as I conversed with various actors through my interviews and witnessed the prevalence of diverse family forms, regulatory practices, and understandings of the family, marriage, and religious membership among Hindus and Muslims; these conversations challenged my previous assumptions. My understanding of the functioning of formal and informal forums and the nature of legality exceeding beyond the realm of the state have shaped the change in my perceptions. The reworking of former certitudes in light of the empirical findings is evident in the central argument of this thesis.

My previous work helped me access a range of civil society organisations and state officials. However, accessing caste-based organisations and networks among Hindus was initially challenging as some members saw their caste laws and practices as "private" and away from the gaze of the outsider. In the aftermath of the systemic state-sanctioned and large-scale violence against Muslims in Gujarat in 2002, my religious and regional identity as a Gujarati Hindu became salient when I sought to interview individuals from Muslim sects and religious organisations, many of which were from Gujarat. I was screened and interviewed by group members among Hindus and Muslims, and while my politics and

background as a social worker in a secular women's organisation gave me a guarded entry into the "inner courtyards" of caste and sect organisations, interestingly, my essentialised identity allowed me greater access in unforeseen ways. During these interviews, I was invariably asked personal questions about my "family background," which always generated elaborate explanations about my Anthropologist parents' inter-caste and, more importantly to my respondents, hypogamous marriage. My parents' marriage was exclaimed over and dissected: most respondents were surprised or shocked when I assured them that my Gandhian grandparents on both sides accepted the marriage. This was dismissed as a social experimentation of "unworldly" academics. But interestingly, this made my caste and religious status fluid and malleable, and in the course of fieldwork, members of castes or sects belonging to Hindus and Muslims gave me their caste/sect identity by accepting me "as their own." I realised the shift when they began to refer to their caste laws (*amara kayda-kanoon*) as "our" caste laws (*aapna kayda-kanoon*) during our conversations.

**Sampling in State Courts**

I have analysed court records of cases filed under matrimonial laws of Hindus and Muslims. I have included cases resolved in the Family Court, Mumbai, as the largest number of cases is decided at this level. Section 22 of the Hindu Marriage Act, 1955 forbids the publication of records of trial courts. Permission to access court records was granted by the High Court on condition of maintaining the confidentiality of sources, and as a result, names of parties and other identifiable details have been changed in the study. I have chosen to analyse recent judgements (January 2002 to January 2003) due to their easy accessibility.

Cases of marriage and divorce in both Hindu law and Muslim law are processed in the Family Court, Mumbai. The Mumbai High Court denied me permission to attend hearings in state courts—either the Family Court or the Criminal Court—as these are deemed private. However, I was allowed to interview litigants whose cases have been decided. I have chosen to analyse these institutions through experiences of litigants and legal actors who were part of the process. The respondents were selected from recent court records of judgements given between June 2002 and January 2003 and that had no previous ties to each other in the sense that they did not share common lawyers or occupations and places of work or residence. I traced litigants from addresses available in court records. The initial sample was pared down as some respondents could not be traced—they had either moved houses or given addresses of distant relatives who had supported them through the legal process. Based on the information contained in court records, I telephoned the respondents to secure appointments in cases where I could locate a number. I also contacted respondents through their lawyers or directly approached them at their residences. Some respondents previously selected had to be eliminated from the study as many addresses were incorrect or difficult to trace. Some respondents could not be reached despite multiple attempts. A very small number of respondents refused to participate in the study.

Cases filed under the Muslim Women's (Protection of Rights on Divorce) Act, 1986 are determined by the Metropolitan Magistrate's Court in Mumbai. It was not possible to sample cases from court records in this case. There are no official statistics concerning the number of cases filed under the Muslim Women's (Protection of Rights on Divorce) Act, 1986, as cases are not exclusively recorded under this section in the

magistrate's court. I relied upon lawyers' records to trace these litigants. Inquiries to court clerks about the nature of cases filed under these acts showed that they were not aware of the existence of such acts. I've sampled these cases through lawyers' records instead.

**Data Collection in State Courts**

While most judicial analyses of case law in Hindu and Islamic laws in India are based on case records, I soon found that judicial records, if taken at face value and by themselves, were insufficient and, at times misleading, sources of data. Analysing case records also meant being alert to the legal construction of a case through which litigants' experiences are converted in legally relevant language. During fieldwork, I learned to look for hidden data and discrepancies in case records.[39] For instance, I found that case records of cases of mutual consent divorce bore almost no details of financial transactions through which one party "bought off" another. Besides, given that "fault" is the basis of contested divorce, proof of adultery was often "manufactured" in cases presented in courts. Respondents' financial details were routinely obfuscated in cases of maintenance. To overcome this, I have combined non-participant observation and open-ended interviews with the analysis of judicial records to understand factors that influence case proceedings. I have conducted 120 interviews of cases of adjudication in formal courts. These interviews and non-participant observations gave me an insight into how society-based actors influence decisions of litigants and the final outcome of cases. In state courts, I also discussed the details of cases with lawyers and members of court staff (especially court clerks, peons, and record keepers). These interviews gave me insights into court

[39] The issue of reading silences in Indian historiography through careful inter-disciplinary research has been addressed by Chakravarty 1988; Chatterjee 1993; Guha 1994.

procedures, the working of the legal system at the informal level, and "gossip" about lawyers, judges, prominent judicial cases, and "successful" strategies used by lawyers.

**Sampling and Data Collection in Informal Courts**

Sourcing of data and sampling cases from informal forums is challenging as the registration of divorce in India is not compulsory. Another option available to me in this study was to sample cases from notaries' offices as parties who operate the non-state forums for divorce may often notarise their divorces. However, initial interviews with some key respondents (lawyers, women's rights activists, and social workers) illuminated the fact that focusing on notarised divorce would not exhaust the range of categories. There are no official records on the number of divorces granted, and no list indicates numbers and types of legal actors and organisations who adjudicate in family laws. Initially, I approached more "visible" legal organisations—women's organisations, religious seminaries, and the clergy—and interviewed the litigants who had approached them. I then broadened my range to include newer actors.

The castes and sects whose members I interviewed have not documented their histories. I have relied on oral histories and archival records to supplement and crosscheck folklore about the history of migration and the evolution of caste-based organisations. In order to gain insights into the politics of caste- and sect-based socio-legal organisations, I attended weddings, intra-caste social gatherings (*melawalas*), festivals, and religious rituals *poojas* (prayers). These informed my understanding of the everyday functioning of socio-legal organisations and helped me comprehend intra-group factionalism, corruption, and lobbying. I was informed of recent sensational cases of marriage and divorce, and I

learned the meaning and experiences of social pressure: public shaming, ridicule, and social boycott.

When allowed, I have also attended adjudicative processes in informal forums. I attended case proceedings in caste councils, especially in the Meghwal caste council, Meghwal *panch*'s offices, and informal family adjudications among Meghwals and Sai Suthars and in what I call the "doorstep courts." I accompanied social workers and activists in field visits with social workers from Awaaz e Niswaan, the Special Cell for Women and Children, the Stree Mukti Sanghatana, and Maholla Committees. To study the adjudication of Muslim family laws, I attended counselling and adjudication sessions in a clergy's office in a mosque and sat in on proceedings in a religious organisation housed in a local charitable trust's office. I have constructed 65 cases of adjudication in informal forums among Hindus and 89 cases of adjudication in Muslim religious laws. Each case includes a constellation of interviews with a set of respondents: husband, wife, and formal and/or informal legal actors who intervened in cases.

The non-participant observation and interviews brought out disagreements and conflict as well as consensus over ideas of marriage, rights, and the obligations of men and women within marriage in adjudication processes in plural legal locations. The process helped me understand how individual litigants or organisations challenged ideas of marriage and gender hierarchy enshrined and instantiated in state or non-state laws and courts.

**Organisation of the Thesis**

While this chapter frames the backdrop of the case, the second chapter presents the analytical skeleton of the thesis: drawing from the theory of state-society relations, I argue

that the Indian state's model of "shared adjudication," in which state and non-state bodies adjudicate in the governance of marriage and divorce, points to an alternate route to facilitate diversity and increase women's rights under certain conditions. I contend that this model enables the formation of several normative universes in formal and informal legal arenas; as a result, the statist constructions of religious membership, marital family, and women's rights are made, unmade, or reformed in diverse legal sites. Consequently, this legal sphere prevents the construction of a hegemonic normative family premised upon institutionalised gender-hierarchy as a repository of community identity. In addition, I demonstrate that processes of adjudication draw out interactions, negotiations, and discussions between and among Hindus and Muslims, civil society, and the state over the nature of the regulation of the family, gender roles, and the meaning of religious membership. I argue that interactions between ideologically diverse authority centres create spaces for dialogue across difference. I also highlight how women access and create laws, discuss their agency, and outline the limits of agency.

The third chapter traces the processes of adjudication in Hindu and Muslim religious family laws in the Family Court of Mumbai. The chapter discusses inner contradictions between the state's attempts to govern the family through the centralisation of law and the diffusion of law and authority in state law and in courts. While the rigid distinction between the construction of the family among Hindus and Muslims is seen to be pivotal to differentiate the two groups, I show that Hindu and Muslim families are formed along similar, though not identical, lines in state law and courts. The second section of the chapter studies the success of efforts made by the reformist judiciary in curbing male privilege in marriage and divorce. This section also argues that Muslim

women get more economic rights in state laws than Hindu women do and that the creative combination of Hindu and Muslim religious family laws with sections of civil and criminal laws increase the bargaining power of women litigants in accessing economic rights. The creative boundary-stretching by legal professionals and litigants also opens up spaces for incremental reforms in law.

Chapter four analyses adjudication processes in caste and informal groups and networks among Hindus. I compare the formation and functioning of caste-based regulatory bodies, informal networks, and actors in adjudicating marriage and divorce among Hindus across caste hierarchy, and I discuss the interactions between caste-based groups, civil society organisations, and the state in micro-adjudicative sites. I argue that democratically-elected councils are more likely to encourage inter-cultural exchange by involving civic organisations and women's groups in debating law-reform. I demonstrate that while the codified Hindu law is an overarching body of law, considerable variations of forms and values about marriage, divorce, and matrimonial property exist among Hindus. I argue that the presence of multiple forums increases the bargaining options for Hindu women litigants.

The fifth chapter analyses the adjudication of Muslim religious family law in informal legal forums. Muslim Personal Law on the ground is an amalgamation of local, customary, religious, state, and international laws and customs, and it is made and unmade by interacting sources of lay, civic, religious, and state authority in various adjudicative sites. As a result, plural notions of the "Muslim family" and Muslim women's rights are constructed, debated, and destabilised on the ground. I highlight how individual litigant women, women's networks, and formal women's organisations challenge the patriarchal

constructions of gender roles in law. I also trace the processes of reform in law as Muslim religious organisations and litigants debate the process of internal reforms in Muslim laws with secular organisations—especially women's organisations—, state officials, and lawyers across religious boundaries.

The final chapter synthesises various arguments and discusses some anomalous findings. In contrast to the body of literature that emphasises the difference in nature of accommodation between Hindus and Muslims under the Indian policy of recognition of difference, my study emphasises the areas of commonality in the accommodation of Hindu and Muslim communities. Furthermore, I do not view sub-state actors as pre-modern "others" of the state who challenge the basis of the state, but I show how these groups and actors can, under certain conditions, both strengthen and challenge the basis of the state. While I hold that innovative accommodative measures promote group rights and increase avenues to negotiate women's rights, I admit that the Hindu nationalists' agenda of social engineering of Indian society through the manipulation of the family through informal channels can upset celebratory aspects of this model.

# CHAPTER TWO

*Theory and Arguments*

## Introduction

In this chapter, I discuss the "shared adjudication" model; that is, the manner in which the Indian state shares adjudicative power with religious/societal bodies and actors in the regulation of marriage and divorce among Hindus and Muslims. This model produces a justice that is multi-locational, and each adjudicative site—formal or informal—provides a forum for interaction between state and societal laws and legal actors. I trace the nature of state-society relations at the interface of personal laws in diverse state and non-state legal forums, and I assess their impact on cultural accommodation and women's rights in Hindu and Muslim personal laws.

This chapter is divided into three parts. In the first part, I classify state and non-state societal legal organisations and agents. The second part focuses on state-society relations in interpenetrative official and unofficial legal forums. I argue that state and non-state actors engage in conflict, cooperation, negotiations, and communication over the content of laws governing marriage and divorce in multiple adjudicative locales. As a result, the statist version of the conjugal family and the notions of rights and obligations in marriage and divorce are destabilised, transformed, adapted, or unmade in a variety of legal settings. The third part discusses how democracies might balance religious groups' demands of autonomy in the governance of the conjugal family regarding gender justice. I contend that overlapping and interpenetrative legal forums can potentially accommodate segments within religious communities, resist reification of group boundaries, promote

dialogue between communities, optimise women's legal options, and provide spaces for gender justice.

## Theoretical Framework: State-Society Interactions at the Interface of Personal Laws

I use the analytical framework of state-society relations to answer the following question: What is the nature of the interaction between state law and actors and societal laws and actors within and across state-authored and informal legal forums? Theoretical discussions of the state have tended follow Max Weber's definition of the state as an organisation with claims to territorial integrity and the monopolisation of force. Drawing from these basic tenets and complicating the notion of the state, literature on state autonomy defines the state not as reducible to societal forces but as a distinct actor rising above society: a structure of power that shapes social forces while remaining autonomous from them (Bright and Harding 1984; Evans, Rueschemeyer, and Skocpol 1985; Mann 1986; Migdal 1988; Nettl 1968; A. Smith 1983; C. Smith 1990; Tilly 1975). States that are influenced by societal elements are characterised as "weak states" (Kohli, Migdal and Shue 1994), lacking the capacity to instil order and to realise the agendas of the state.

While some argue that state and societal actors can cooperate in order to maximise developmental activities and gains (Evans 1995; Nugent 1994), the notion of state and society as oppositional elements striving to control the local populace underpins the discussions of state and society relations. Societal resistance often undermines the state projects of modernisation (Scott 1999). In other words, communities and societal actors are seen as resisting and undermining or adapting to state laws and agendas. Modifying this notion further, Migdal (2001) calls for a state-in-society approach by which the state is

imagined as a unified, territorially defined, and public entity but is materialised as embodying multiple practices wherein the state and societal actors interact and engage in contestations over "systems of meaning that imply boundaries quite different from those represented in the image of the state" (Migdal 2001, 26). As he elaborates this model, Migdal sites examples in which the state and various societal forces are engaged in struggles over authority in a variety of *social settings*. Through her discussion of religious courts in Israel, Woods demonstrates how social movements shape state laws in the judicial process and how social groups capture the state through the establishment of religious courts. Thus, she focuses on the impact of social forces on lawmaking in *formal courts* (Woods 2001, 2005). My study investigates the impact of state-society interactions both within the state institutions and in social legal forums.

The Indian case of legal pluralism suggests a coexistence of several normative orders and laws in the polity[40] and challenges the assumptions of state autonomy discussed above. Legal heterogeneity in the regulation of personal laws in India is not merely due to a weak state being captured by social elements, nor is it a result of a "hollowed state" that steps back from its task of making public policy and creates a two-tier system of justice in which the poor have no choice but to opt for alternate forums and inefficient lower courts (Galanter and Krishnan 2003; Galanter 2004). The legal model is the outcome of negotiations between various social actors, mainly political elites and the state.

The body of literature on legal pluralism classifies types of laws coexisting in states and depicts the kind of interaction and relationship between state and non-state or supra-

[40] The literature on the legal pluralism debates the definitions of law and norms (see for instance Tamanaha 1993, 2001). While I agree with Tamanaha's non-essentialised legal definition in which clusters of laws, practices, and customs coexisting in different combinations are held as "laws by people," I find the distinction between state and non-state laws analytically useful to isolate and trace state-society interactions in law.

state laws. Moore suggests that interactions between state laws and societal laws create a "semi-autonomous field" that generates rules from within but that is also vulnerable to exogenous sources of law and authority (Moore 1973). Chiba identifies a dichotomous classification between official laws ("state laws or laws authorized by the state") and unofficial laws ("not officially authorized but valid outside the state"); between indigenous law ("which originates from indigenous culture") and transplanted law ("received... or imposed by foreign cultures"); and between legal rules ("clearly formulated legal standards") and legal postulates ("ideas or ideology to base, orient and revise the legal rules") (Chiba 2002, 194). He points to the coexistence of laws as well as conflict between these legal orders in plural legal systems (Chiba 1989, 2002). Thus, interactive state and non-state laws can result in a range of legal arrangements in a given legal setting.[41] These interactions between different normative legal orders challenge the idea of state as the binary opposite of society.

In response to the challenge posed by the prevalence of legal pluralism, Migdal reconceptualises the state as an entity, not unified, but with "multiple forms of institutionalization" (Migdal 2005, 14), which can enter into "alliances with other societal actors." He distinguishes between "seeing state," imaging the state as a coherent organisation, and "doing state," which involves responses and interactions between state officials and societal actors in multiple sites (Migdal 2005, 15). The Indian case of legal pluralism represents a legal landscape in which formal and informal legal actors and organisations are interpenetrative. According to Santos, the interaction between legal orders is often conflicting, but it is also makes different legal orders permeable, open to reciprocal influences. According to Santos, "(o)ut of this porosity evolves... legal hybrids,

[41] For a typology of such an arrangement, see Ihsan 2004; Tan 1997, cited in Chiba 2002, 197.

that is, legal entities or phenomena, that mix different and often contradictory legal orders or cultures, giving rise to new forms of legal meaning or action" (Santos 2006, 46). In a legal hybrid, the boundary between state and society shifts as different actors engage in "doing state."

I marry the framework of state-society relations to the debates on legal pluralism in order to investigate the interactions between state and societal actors and institutions and assess their impact on cultural pluralisation and women's rights in law. How do state institutions and organisations interact with one another? What is the movement of laws within and between formal and informal actors and organisations? How does the interplay between state and non-state laws and actors impact the basis of the state? How does the model of shared adjudication illuminate debates on cultural pluralism and gender justice in matters of personal laws?

**Arguments**

I argue that the Indian model of legal pluralism in which the regulation of marriage and divorce is shared by the state, internally heterogeneous religio-cultural communities, and civil society, especially women's groups, provides spaces for intra- and inter-cultural accommodation, and it offers possibilities to bring about formal gender equality in law.

I contend that interacting state and societal legal organisations and agents are locked in a paradoxical movement, which I term the "centralisation of law and decentralisation of law." The Indian state seeks to consolidate its authority by infiltrating and shaping the conjugal family from above. However, in a legally plural system characterised by heterogeneous legal actors and institutions, state law and organisations are captured, appropriated, resisted, or transformed by societal agents. This interdependence

between state and societal legal orders demonstrates that the state law is, at times, determined by societal laws, that it often determines societal laws, and that state authority is consolidated in some instances and diffused in others. The movement of the centralisation of law as well as the decentralisation of law show how this variant of legal pluralism serves to further the agenda of the liberal democratic state to penetrate society as well as to restrain it. Similarly, it serves to fulfill the goals of societal actors and institutions as well as limit them.

The presence of multiple legal actors in the legal sphere results in the formation of various internally splintered and interacting normative worlds in which different images and practices of the family, the link between religion and law, and women's rights in the family are formed, discussed, negotiated, and fashioned by both state and societal agents. These interactions enable the transmission of plural ideas of the nature of the conjugal family and of gender across religious and cultural cleavages in different legal forums; they allow societal actors to appropriate and tailor their own selective images of the conjugal family and to generate meanings about religious membership. These open-ended interactions between state and society as well as within societal groups provide spaces to conduct and promote intra- and inter-cultural dialogue on law reform. The presence of multiple forums also increases the bargaining options for women.

Thus, in contrast to the body of literature on multicultural citizenship that maintains a critical tension between cultural autonomy and intra-group equality, I argue that in a pluralized legal field characterised by shifting centres of authority, cultural pluralism in recognition of family laws can facilitate women's rights in law. I claim that similarities rather than differences characterise the adjudication and governance of Hindu and Muslim

laws. I also demonstrate that while Hindu and Muslim women are not granted equal rights in religious family laws, Muslim women do not face greater discrimination. Indeed, Muslim women are awarded greater economic rights under the religious laws governing marriage and divorce. I argue that legal hybrids offer more avenues for gender justice in law.

**The Indian Model: Juristic Diversity in the Legal Landscape**

Both state courts and societal bodies and actors adjudicate in matters concerning marriage and divorce among both Hindus and Muslims in India. The body of literature on personal laws has focused on the analysis of legal precedents in higher courts (Gangoli 2003; Mahajan 2005; Mahmood 1997; Narain 1997; Parashar 1992; Shankar 2003) and on the adjudication processes in formal courts (Mukhopadhyay 1998; Vatuk 2001). These studies do not provide the taxonomy of organisations and actors who adjudicate in matters related to personal laws of Hindus and Muslims. This literature does not discuss the interaction within and between formal and informal systems. In contrast, my study analyses the adjudication process in both state courts and informal settings. One scholar has depicted state-society interactions between state court and a village council in rural India (Moore 1998).[42] My study investigates heterogeneous legal forums in a metropolis and develops the typology of organisations and actors that adjudicate in societal spheres in matters of personal laws. This dissertation analyses adjudication in both state-run forums as well as societal forums, and it analyses the interaction between state and societal legal forums as well as among societal legal forums.

[42] Vatuk indicates the interaction between the state and the clergy in her discussion of adjudication in Muslim Personal Law (Vatuk 2003).

### *Formal Legal Organisations and Actors: The Lower Courts*

The state-established Family Courts, civil courts, and criminal courts share jurisdiction in family matters, though the Family Court has emerged as the specialised court in recent years. The civil litigation rate[43] in Indian courts stands at 3.5 (Galanter and Krishnan 2003; Galanter 2004). My data shows much lower rate (0.0001)[44] in matrimonial adjudication in the Family Court of Mumbai. Studies on civil litigation in India suggest that low rates of litigation in India are due to the alienation of litigants from a lengthy, expensive, cumbersome, corrupt, and inefficient formal legal system, especially within the lower courts (Baxi 1986; Chodosh 2004; Galanter 1966, 1968, 2004; Galanter and Krishnan 2003; Khare 1972; Kidder 1973, 1974; Morrison 1974; Mendelsohn 1981). However, the Family Court in Mumbai is speedy, efficient, and the corruption level is low. Furthermore, the formal system is accessible to women: legal aid is available, and women litigants are exempted from paying court fees. Yet the litigation rate in family affairs is lower than in other courts. While mistrust of the courts in India drives some litigants away from the formal legal system, that in itself is an incomplete explanation for the trends in matrimonial litigation. After all, approaching the Family Court is the only avenue for divorce for individual litigants belonging to castes that did not allow customary divorce.

I argue that the low usage of courts is not captured merely by the explanations indicating the withdrawal of the state from the regulation of the family. My study indicates multi-centred and interdependent adjudicative locales in which state officials, including the police, participate in cases related to personal laws in state as well as in societal arenas, and societal actors and institutions uphold state law and mimic procedures used in the formal

[43] This refers to the number of cases filed in courts of first instances, per 1000 population.
[44] This refers to the number of cases filed in the Family Court of Mumbai, per 1000 population.

courts in informal adjudication. The interpenetration of state law and forums and societal laws and forums allows the state law to act as a backdrop for negotiations within society; this limits the use of state courts in matrimonial matters under the jurisdiction of Hindu and Muslim personal laws. In addition, the "shared adjudication" model allows societal actors to build their own legal organisations and forums that are accessed by litigants. This also accounts for the low usage of state courts.

### *Legal Organisations and Actors in Society: An Overview of Typologies, Structures, and Functions*

What organisational arrangements follow legal polycentricity (Petersen and Zahle 1995)? The state's policy of shared adjudication and the decentring of law has spurred societal legal actors to create innovative participatory conditions within the legal system by setting up organisational structures and procedures, developing competencies in law and legal procedures, appropriating legal symbols and rhetoric, initiating intra-community dialogue on family matters, committing to undertake legal reforms, and in some instances, working out conditions to limit the power of those who adjudicate in societal forums. This study examines the variation in societal organisations, associations, and agents that adjudicate in matters of marriage and divorce. Some of these legal organisations are active, some defunct, yet others are in the process of reinventing themselves. While some informal legal forums rely on coercion to enforce their dictates, others fall back on consensus. Some actors extend the limit of their authority while others intervene within state-circumscribed boundaries. These organisations, networks, groups, and individuals create a heterogeneous, multi-centred, and culturally plural legal landscape.

The following section gives an overview of diverse societal legal organisations and agents. Three typologies encompass legal actors and institutions adjudicating in the personal laws of Hindus and Muslims.

*Formal Organisations*

Societal organisations adjudicating in personal laws in Mumbai include structured organisations that are registered with the state[45] and are thus subject to the supervision of the state: these organisations are further sub-classified. The first sub-category includes *ethnic organisations* such as caste councils and sect councils (*panchayats*) whose jurisdiction in the governance of family law extends to members of a specific caste, sub-caste, or sect. This study demonstrates the variation in ethnic organisational structures among castes and sects of Hindus and Muslims. I investigate the interplay between caste-formation, lawmaking, and adjudication in three caste councils (*panchayats*) among Hindus and one sect council among Muslims. I delineate the similarities and differences in laws and operations of the *panchayats* among Hindus and Muslims of similar caste and occupational status, and I discuss the variation in each forum in accessing women's rights in family law.

To elaborate, I demonstrate that a caste group of Hindus called Meghwals has evolved what I call a "democratic participatory justice system" to regulate family matters. The legal hybrid includes elements of traditional justice system (the *panch* system), democratic procedures, and the formal legal system. The caste laws practiced among this

[45] The caste and sect councils (*panchayat*) as well as NGOs that fall under this category are registered under Section 18 of the Bombay Public Trusts Act, (XXIX of 1950) as "Charitable Trusts" and fall under the jurisdiction of the Commissioner of Charity, Mumbai. Under the Act, "public trusts" are trusts established for "a public religious or charitable purpose."

group awards more rights to women than do state courts. I also examine the traditional justice system of Sai Suthars, another Hindu sub-caste. The caste council of this group is not active, and divorces are largely negotiated among family and caste networks. This study also discusses the caste group of Kutchi Visa Oswals (henceforth KVOs), which seeks to wrest the control over family matters from the state and envisages the creation of an arbitration system that would "technicise"[46] justice by introducing advocates, social workers, mental health professionals, and family therapists as adjudicative committee members. This study also assesses the internal regulation among an Islamic sect, the Khoja Shia Ithna Asharis, which has maintained its traditional adjudicative system: a hybrid of Islamic laws and customary practices. These societal organisations engage in an ongoing process of dialogue on the trends in marriage and divorce within their sphere, and they familiarise themselves with developments in state law. They organise internal discussions among their members, facilitate periodical review committees on marriage and divorce in their respective caste or sect, and facilitate dialogue with legal professionals, social workers, and in many cases, women's organisations as well as other state actors such as the police. They also familiarise themselves with developments in state law and discuss the necessity of reforms within the caste/sect sphere.

This typology also encompasses *interest-based* organisations such as civil society organisations,[47] charitable trusts and religious organisations,[48] and women's groups.[49] These

---

[46] See Rosanna Langer, "The Juridification and Technicisation of Alternative Dispute resolution Practices," *Canadian Journal of Law and Society* 13 (1998): 169.

[47] These are professional organisations working on grassroots or advocacy work on a range of issues, including women's issues. They often provide legal aid to women litigants and carry out legal literacy campaigns.

[48] These organisations do not fall neatly into categories of "ethnic organisations" or "civil society organisations." Chatterjee has argued for a conception of political society to classify organisations that employ the rhetoric of "community" and organise around issues concerning "property" (Chatterjee 2004). However, these organisations fall outside this conception as well. These are affiliated to and funded by

organisations adjudicate in family matters, penetrate both formal and informal legal systems, provide their own normative discourse, act as moral guards of community organisations, and help individual litigants against the community, thus offsetting the remit of societal authority over individuals. Religious organisations, NGOs, and women's groups engage with other groups in the discussions of reforms in family matters.

*Informal Associations, Groups, and Networks*

Informal associations and networks such as *jamaats* (collectives), *mohalla* (residential) committees, and unregistered and loosely bound groups, including women's groups, also adjudicate in matters of family law among Hindus and Muslims. These are not registered with the state. These groups are less likely to socialise individual litigants into normative codes of conduct. These groups perform a "gatekeeping function" (Macauley 1986, 455) by filtering the members' access to the formal justice system. They can restrict litigants' access to courts or, conversely, assist the state in implementing laws or facilitating litigants' access to legal system. Their reach is in proportion to the accessibility and legitimacy of the state courts.

*Individual Legal Actors*

Individual litigants, notaries, lawyers, family members, middlemen, and strongmen comprise the third layer of adjudicative agents of informal intermediaries. Their reach is ad

---

religious or charitable trusts. Many of their activities are *civic* in nature, ranging from the organisation of blood drives to interventions in slum rehabilitation. However, they also claim to represent specific religious or cultural groups and employ the rhetoric of identity politics. Their members and beneficiaries are not limited to members of one religious community.

[49] The groups to which I refer are organisations that work on a variety of issues, including women's issues. The latter category refers to feminist organisations that work exclusively on issues related to women and are associated with autonomous women's movements in India. These also include women's groups that are affiliated with women's wings of leftist parties. These groups have consistently worked on the issue of reforms of personal laws since the 1970s (see for instance, Gandhi and Shah 1988).

hoc and, with the exception of lawyers, they do not count as lobbies in matters of law reform. Many societal actors lack training in formal law. The legal procedure involving individual legal actors often lacks transparency and can subvert the meaning of law and the legal process. Women litigants unsupported by affinal and social networks are more likely to be at a disadvantage when they are forced to deal with individual actors in legal processes.

**Interactions between State and Societal Organisations and Actors**

This section analyses the interaction between state courts and informal organisations and actors as well as the interaction among different organisations and actors in the legal landscape. I argue that state and non-state legal actors simultaneously strengthen and constrain one another in an interpenetrative legal setting. To elaborate, I demonstrate how multiple societal organisations and actors enter into competition with the state over governance of family laws and thus pose a challenge to the authority of the state in the legal arena. However, this competition does not capture the range of interactions between the state and societal legal actors. The data show that organisations and actors also cooperate, communicate, and negotiate with the state and devise the means to curb their informal authority. In a heterogeneous legal setting characterised by many competing power centres, legal organisations and actors also counter-balance the one another's power. I also suggest that informal legal organisations strengthen the state by mimicking state laws and procedures and by enforcing state laws.

### *The Question of Legal and Extra-Legal Authority and Accountability*

A body of literature on legal informalism argues that the presence of other forms and agencies of justice can undermine the basis of the liberal state and violate individual liberty (Abel 1982; Baxi 1982; Fiss 1984). Feminist analyses of the decentralisation of laws of marriage and divorce in the West also suggest that informal systems harm the interest of women in divorce negotiations given that mediation processes are not value-free nor gender neutral (Bailey 1989; Bottomley 1985; Bryan 1992; Grillo 1991; Langer 1996; Shaffer 1985; Singer 1992). The literature on women's rights in community courts in India agrees with this critique (Dhagamwar 1992; Nishat 2003).

My study suggests a more complex picture than discussed by these authors.[50] My study argues that it is not only the presence of multiple actors within the legal system, but the nature of organisations of these legal actors and the dynamic between them that helps predict their contribution to cultural pluralism. I show how communities exceed the remit of authority granted to them by the state and subject individuals to social boycott, "persuasion," shame, reprimand and ridicule by caste and sect authorities. Selective incentives and the rigid enforcement of caste endogamy is also used to ensure compliance. Thus, communities can coerce individuals, especially those more vulnerable to community pressure. I also show that formally organised legal bodies within segments of religious or caste groups strive to shape normative behavioural codes among its members and handling family matters; they are more likely to offer incentives to individuals and impose sanctions. The study also contends that the state legal system is more likely to lose ground

[50] However, recent studies indicate a shift in this debate. A number of authors acknowledge the reach of informal systems of justice and shift the discussion to reforming and fine-tuning alternate dispute systems to overcome the pitfalls of legal informalism (See Resnik 2003; Alberstein 2006).

when in competition with well-organised caste and sect councils (*panchayats*). I argue that non-democratic and well-organised caste and sect organisations are more likely to coerce individuals within the caste/sect than democratic organisations. Informal organisations mediate litigants' access to state law and formal legal procedure. Informal actors, such as lawyers, point their clients towards society-based informal justice systems. Strongmen also intimidate and harass various litigants, minimizing the authority of the state. Families and individuals often mediate in matrimonial matters and women unsupported by affinal networks are forced to compromise their rights. Thus, the presence of diverse actors often undermines the state.

However, I have found that the presence of other organisations and actors can also strengthen the state.[51] The individual use of societal actors, including strongmen, to enforce state laws is extended in the societal arena by informal actors. Lawyers use state law to negotiate their clients' rights in society, and lawyers as official bearers of caste, sect, or civil society organisations help the outreach of state laws. Civil society organisations use state law to bargain and negotiate women's rights in informal legal forums. Organisations at the societal level draw upon the rhetoric, techniques, and procedures of state courts; this brings the image of the state into informal legal locales.

In addition, in some instances, informal organisations also make themselves accountable to their constituents. For instance, I discuss the process of inner democracy within the caste council of Meghwals. Regular and transparent elections are a mechanism used by the sub-caste to ensure minimal internal accountability among the Meghwals.

[51] A number of studies on legal informalism, which came out in the 1980s in the United States, argue this (see for instance, Abel 1982; Delgado 1985; Harrington 1985; Hofrichter 1982a, 1982b; Langer 1998; Merry 1982, 1989; Tomasic 1982).

Secondly, the power of such caste- and sect-based organisation is often challenged from within by individual litigants and their families. These castes and sects are not homogeneous and are governed by multiple centres of authority. These actors use inner factionalism within castes and sects to arm themselves against coercion exercised by informal bodies. The threat of exit by individual sect or caste members is also a tool used to guard against informal pressure exercised by any one centre of authority.

Informal justice forums do not function in isolation from the state or other actors and institutions; as a result, the coercive power of informal organisations is also challenged from external factors. Plural adjudicative systems comprising state agencies, civil society organisations, religious and ethnic organisations, and state actors in the adjudication of personal laws offset the concentration of power; these diverse bodies are often used by group members as resources to resist or balance informal institutional authority. For instance, individual women litigants often use women's organisations to offset the power of caste and sect *panchayats*; they can assist the state courts. The presence of a vibrant civil society contributes to regulatory mechanisms at the societal level as well as at the level of the state. Thus, in a heterogeneous legal sphere characterised by different organisations, including civil society organisations, these offset each other's power. Such interactions between state and society as well as among societal organisations provide spaces for discussions and exchanges about the nature and content of family law across religious and caste boundaries.

## An Open-Ended Conception of State-Society Relations among Heterogeneous Legal Actors

The data discussed above show that in a legally plural society, justice is multi-locational, and each adjudicative forum—formal or informal—provides a platform for the interaction between state law and legal actors as well as societal laws and actors. This dynamic of simultaneous intervention is not captured merely by imagining state and society as locked in contests to establish hierarchical order: it has been argued that state-society relations can be simultaneously conflicting and cooperative (Nugent 1994). The Indian model, too, evinces a need for an open-ended approach that conceptualises state-society relations as both oppositional at certain times and interdependent at others.

The interpenetration of state law and societal laws and institutions creates a flow of legal actors, facilitators, and gatekeepers across formal and informal spheres, and the range of interactions between state and societal actors demonstrates a range that is broader than the two approaches delineated above. Teubner demonstrates how law responds to social systems: he defines legal pluralism as "a multiplicity of diverse communicative practices that observe social action under the binary code legal/illegal." (Teubner 1992, 1451).[52] Teubner suggests that when legal norms cross over from one boundary of discourse to another, their meaning changes. This process of boundary-crossing between legal orders enables communication between these legal orders, and these processes of communication result in the internal reconstruction of legal orders (Teubner 1992, 1447-1448, 1458-1460).

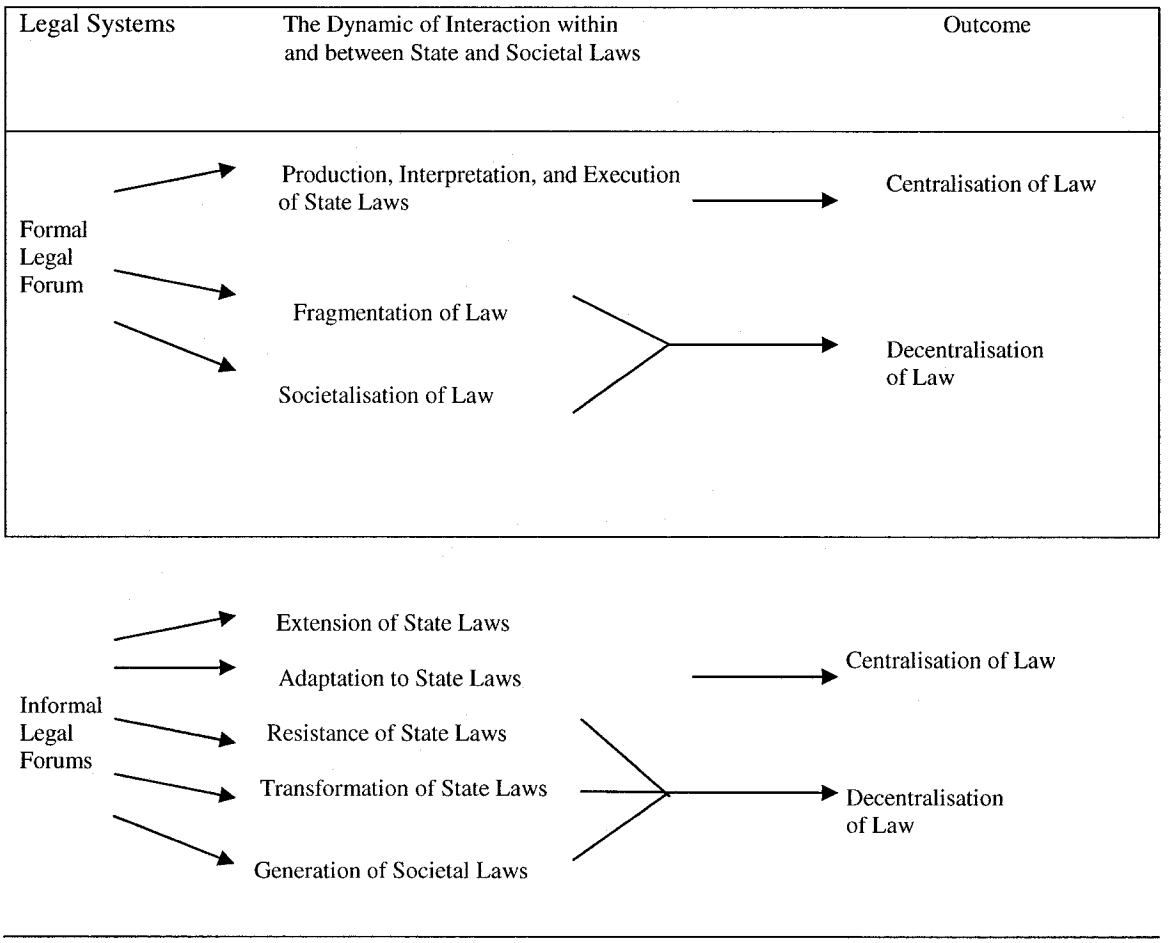
[52] Elaborating on "communicative practices," Teubner analyses the discourses and their structural coupling: "in ...market transactions, we have simultaneous but causal parallel processing of diverse legal and non-legal communicative chains that are operationally closed to each other. Each chain builds up structures of its own: concrete day to day interactions of transacting parties, communication within formalised contracts and organisations...and claims and counter claims within diverse and competing legal discourses official and unofficial...and each concrete communicative event will be processed in these different discourses which in spite of their mutual overlap... remain closed to each other. Over time... (t)hey do not causally influence each other... rather, they use each other as... perturbations to build up their own internal structures" (Teubner 1992, 1453).

Thus, official or unofficial legal orders mutually reconstitute themselves in the processes of interaction. Drawing from this, I suggest that state and societal actors are bound in the processes of communication and negotiations over the content and meaning of personal laws in mixed adjudicative sites. The Indian case also reveals that both state and societal actors and institutions intervene simultaneously in individual cases, and the boundaries between state and societal laws and actors blur in several adjudicative moments.

**The Paradoxical Movement between State Laws and Societal Laws**

The following section traces the interaction of laws within and between formal and informal legal forums. I contend that the interacting legal actors and institutions evince a paradoxical legal movement in both formal and informal legal systems. I term this tension the "centralisation of law and decentralisation of law" and demonstrate how state law is both determined by societal laws and determining of societal laws. The centralisation of law refers to the state's attempts to penetrate society, shape individual subjectivities, and influence lawmaking in various legal forums. The decentralisation of law suggests the fragmentation and pluralisation of law within both state and societal legal forums. As a result, personal law is made and unmade in a variety of settings.

**Figure 1. Dynamics of interaction: state laws and societal laws.**




### *The Centralisation of Law in the Formal Legal System*

The centralisation of law is evinced in the attempts of the state to infiltrate society, secure individual liberties, and shape the subjectivities of citizens through the generation, interpretation, and execution of personal laws in state courts. Through the regulation of personal laws, the state courts define the social institutions of marriage and divorce and ascertain the criteria of membership in caste or religious/cultural groups. State law and courts also restrict and circumscribe juridical power of societal actors, redistribute property rights between family members, and enforce the compliance of judicial verdicts and state

laws. The judges also restrict the power of societal actors to allow or derecognise customary divorces. For instance, data show that judges in the Family Court disallow *faskh,* judicially arbitrated Islamic divorce, by the clergy. Given that the codification of customs and lawmaking through judicial precedents have been features of the Indian legal system, the centralisation of law is a part of the lawmaking function of courts in India. Standardisation, systemisation, and routinisation of law in courts (Hydebrand and Carroll 1990) lead to judicial consistency and establish the hierarchy of courts as a judicial system.

***Fragmentation and Societalisation of Law in State Courts***

The decentralisation of law in state courts is the result of two movements within state legal institutions. One is the fragmentation of law, which arises from factors such as the failure of lower courts to follow judicial precedents, the arbitrariness of judicial discretion, the lack of coordination between courts, and the conflict of jurisdiction among lower courts. This leads to the internal fragmentation of state law, tempers the synergy of judicial precedent as the source of law, and results in the loss of judicial authority. Thus, the tension between the centralisation of law and the decentralisation of law within the state arena serves at times to consolidate or diffuse state authority as well as the agenda of the state within the state legal system.

The second movement leading to the dispersal of state authority in the formal legal system is the societalisation of law, which shows the diverse ways in which societal actors and institutions filter into the state judicial system. It refers to the recognition, institutionalisation, and legitimation of societal forms of law and legal structures within the state legal system. The state law recognises customary divorce, provides mandatory intervention of social workers in marital disputes, and seeks the intervention of societal

actors as mediators, witnesses, and consultants on societal laws. Thus, society filters into the state legal system in various ways, leading to the societalisation of law. Secondly, the judiciary relies on a wider socio-cultural and religious base to accommodate cultural communities. For instance, judges in the state system have tended to base their opinions on the creative interpretation of religious texts rather than on constitutional sources.[53] The judiciary is often asked to recognise or validate societal practices and customs related to marriage and divorce among sub-sections of diverse religious and caste communities.[54] In many cases, judges call upon caste or sect members as witnesses in order to seek their views regarding the prevalence of practices claimed by either party in litigation.[55] Thus, judges engage in a dialogue with sections of society in matters of family law within courts; consequently, society enters into the formal, legal system in myriad ways.

### *Centralisation of Law in Informal Legal Forums*

The centralisation of law—the tendency of the state law to serve as a tool to shape societal institutions and domestic affairs of citizens—persists in the societal arena as well. I demonstrate how societal actors, especially professional lawyers, notaries, and civil society organisations extend state law, as well as the values, procedures, rules, ceremony, rhetoric, and techniques of the formal legal system, into society. The centralisation of law is also reflected in the juridicisation of legal techniques, and the law forms in society as caste and sect organisations adopt procedures of state courts.

---

[53] See for instance Shamim Ara v. State of U.P. and Another, AIR SCW 4162 (2002).; Dagdu s/o Chotu Pathan v. Rahimbi Dagdu Pathan and Others (Aurangabad bench of Mumbai High Court, May 2002).

[54] For instance, while adjudicating on a case of dowry-related violence, the judge asked a delegation of caste members whether the practice of dowry was common to customs of that particular caste (Interview with Esha, Member of the Meghwal Caste Council. 25 November 2002, Mumbai).

[55] In one case, the judge asked caste members whether the practice of cross-cousin marriage was part of the integral custom of the caste. (Interview with V. K., 6 March 2003, Mumbai).

To elaborate, state laws and judicial precedents often form the backdrop of inter-lawyer negotiations and adjudication in caste and sect councils (*panchayats*) in Hindu and Muslim personal laws. Changes in state law affect the intra-group dialogue over reforms in community law as well. The adaptation of state law refers to the manner in which societal actors and institutions adapt to state laws imposed from above.[56] Informal organisations often seek to work alongside state courts in order to bolster their power and legitimacy in their communities. The centralisation of law is also apparent when societal actors uphold and enforce state laws in the everyday practice of law. Lawyers, caste factions, women's committees, residential committees, sects, and women's organisations all use state law to bargain for women's rights in everyday legal negotiations. At other times, state decisions are enforced by community authority or societal actors. Community forums often mimic or draw from state law, procedures, and rhetoric to establish community mediation and adjudication forums. Informal organisations at the societal level evolve judicial organisations and procedures, drawing from state legal procedures, traditional forms of adjudication, and innovative practices.

***The Decentralisation of Law in Society***

The decentralisation of law in society occurs through the generation and execution of societal laws at times remaining within the circumscribed boundaries of state law, at other times, exceeding the remit of authority granted by the state. Societal legal organisations and actors resist state law by withdrawing from state courts, boycotting the use of state courts, socialising group members to internalise norms of the societal group as

[56] For instance, the data show that polygamy was outlawed or restricted by some Hindu caste *panchayats* after the codified Hindu law prohibited the practice. Similarly, state courts' nod to polygyny among Muslims has compelled some Islamic sects like Ithna Ashari Khojas to declare the practice legally valid and "Islamic" despite the fact that their customary laws disallowed the practice.

opposed to the state, and sanctioning and normalising non-compliance with state law and legal procedures. Formal caste organisations and sect organisations are more likely to resist or challenge state laws and thus contribute to the process of the decentralisation of law.

Some societal laws and actors transcend the parameters established by state law. The adjudication process shows societal legal actors stretching the boundaries of state law through a creative interpretation of the spirit of the law or creating new laws to fill the silences in state law. Litigants also shape their legal claims beyond the parameters of state law. The decentralisation of law at the societal level also evinces how law is not only local but is imagined in spatially intersecting discourses of international human rights and cultural and folk myths and practices. Many women's organisations and religious organisations use the discourse of international human rights and cite legal developments in other countries to secure women's rights in personal laws in societal legal forums. Information about international legal trends and debates in other societies, especially in Islamic societies, also influence the manner in which law and rights are imagined and adjudicated.

**Characterising the Legal Landscape: Legal Flexibility, Fragmentation, and Change**

The constant tensions between the dynamic of the centralisation and of the decentralisation of law presents a legal situation in which the content of personal laws on marriage and divorce is subject to multiple interpretations from a variety of different legal sources. As a result, the law itself is formulated and reformulated in a variety of settings and is an outcome of negotiations between diverse actors. Similarly, the concept and meaning of the conjugal family is also an outcome of this process of negotiations. Given the situation, justice is uneven.

The following section relates how the dynamic of the centralisation and the decentralisation of law shapes conjugal families within the personal laws of Hindus and Muslims. Current discussions on personal laws view the formal legal system as a hermetically sealed legal entity; they do not consider the inconsistencies of law in the formal system and the interpenetration of formal and informal legal spheres and their impact on cultural pluralism and gender justice. I argue that contrary to prevailing analyses, the interdependent legal systems construct Hindu and Muslim families along similar, though not identical, lines.

### *Dispelling Myths about Contesting Areas in Hindu and Muslim Personal Laws: Not so Different After All?*

The Indian state does not normalise a standard family; it allows variation in family forms across religious and cultural groups. However, it standardises the family according to each personal law. Drawing exclusively from the analysis of judicial precedents in state courts, many scholars point to areas of dissimilarities between the rights given to the Hindu conjugal family as opposed to those given to the Muslim family, and they point to the greater discrimination of Muslim women under Muslim Personal Law (Gangoli 2003; Jaising 2004; Narain 2001; Parashar 1998; Sunderrajan 2003). In contrast, I argue that tensions between the centralisation and the decentralisation of law within formal and informal arenas has led to a particularised and fragmented legal situation in which the law itself is expanded and resisted, made and unmade, in diverse legal arenas. This dynamic makes it difficult to arrive at generalisable insights on the nature and outcome of the judicial process. This process allows the presence of heterogeneous family forms in law, of which some forms may be akin to both communities. My study argues that in some

instances, the legal sphere constructs the Hindu family along similar, though not identical, lines as the Muslim conjugal unit.[57] For instance, modernists and the Hindu right have pointed at reforms in Hindu law that allow polygyny among Muslims but forbid it among Hindus. However, polygyny is accepted and restrained in various ways in state and societal forums among Hindus and Muslims.

**Balancing Cultural Accommodation and Gender Justice**

This part of the chapter argues how this dynamic can accommodate cultural communities and provide spaces for gender justice. I argue that a polycentred legal setting that divides the legal authority between the state, civil society actors, ethnic groups and organisations, as well as various societal actors, offers multiple avenues of action to individual litigants on a case-by-case basis. A polycentred legal setting also leads to interactive opportunities between diverse state and non-state legal actors within and across religious and sect cleavages and thus offers avenues for dialogue within and between various religious groups. A fragmented legal situation also provides avenues of justice for women.

[57] I sketch state and societal regulation of polygyny among Hindus and Muslims. The practice of polygyny is criminalised under Hindu law and sanctioned under Muslim law. Through the centralisation of law, the Indian state has attempted to shape the Hindu family form, overriding societal practice that allowed polygamy among Hindus. But polygyny is difficult to prove in courts. Legal non-recognition of second or third wives among Hindus works against the economic interests of these wives, though in some cases, the reformist judiciary has awarded them economic relief (Menski 2001, 139-230). Hence, the dynamic of the centralisation and decentralisation of law within the state legal system leads either to the acceptance or to the penalising of polygamy on a case-by-case basis among Hindus. At the societal level, some Hindu castes that practiced polygyny have disallowed it by adapting to reforms within state law. Other castes allow conditional polygyny, and individual Hindus practice it routinely. Thus, the practice of polygyny exists among Hindus at the societal level. In the case of Muslims, the state law allows polygyny among Muslims (Towards Equality 1975; Menski 2001). Hence, there is regulation and acceptance but also restrains of the practice by enforcing Muslim wives' economic rights. Thus, Muslim women in polygamous marriages are offered greater protection in formal law. Similarly, while ultra-orthodox segments of the Muslim community safeguard the right of Muslims to practice polygamy and while individual Muslim men exercise their right to contract more than one marriage simultaneously, many sub-groups among Muslims restrain polygamy. Hence, the economic situation of bigamous wives among Hindus and Muslims show more similarities than difference.

### *Normative Heterogeneity and Cultural Accommodation: Making and Unmaking Religious Communities, the Conjugal Family, and Gender*

The Indian case of shared adjudication in personal laws evinces a legal setting characterised by dynamic interaction between various organisations, actors, and institutions. I draw from Cover's characterisation of the nomos to discuss the implications of the interplay between legal actors and organisations. Cover has argued that both states and non-states construct nomos, a normative universe wherein law and narratives are intertwined and create, through interpretive commitment, a legal/moral world of obligation and reality from which the rest of the world is perceived. The nomos, an outcome of a collective process, is jurisgenerative. It is backed by violence and does not require a state (Cover 1983). In the Indian model, we see several heterogeneous, splintered, and internally contested normative spheres construct, maintain, and sanction identical, overlapping, or conflicting ideas about the nature of belonging in religious communities, the composition of the conjugal unit, and the construction of gender within the family. Thus, the statist understanding of family, marriage, and gender are challenged, reformulated, or adapted in different settings. This creates spaces to accommodate difference, which can be explored further.

### *Preventing the Ossification of the Boundaries of Religious Groups*

Proponents of cultural accommodation, through the recognition of group rights for cultural communities, have grappled with the question that special group rights would lead to the ossification of community boundaries. It is argued that personal laws categorise, label, produce, and fix exclusive religious identities, establish the meaning of membership

in a religious group, and distinguish the majority community from the minority community (Cohn 1987, 1996; Pandey 1992; Shodhan 2001).

The state project is partially successful. However, we also find that while each personal law establishes the criteria of group membership in a religious community, we find that some sub-groups are diverse and resilient enough to maintain certain distinct niches to define themselves in terms other than those conferred by the state. The data also show how these group members negotiate different identities in everyday legal activities and subvert state agendas in actual practice. In other words, the state confers ascriptive identities from above, but the meanings of membership in a religious group are contested, transformed, and adapted in multiple locations. Moreover, the data also show that there exist different bases of power within segments of state-fashioned religious communities. The law practiced on the ground is not interpreted or adjudicated only by religious authority as per doctrinal interpretations. Indeed, adjudication in religious law is undertaken by a number of social and secular actors, organisations, and institutions. Hence, the link between religious identity and "religion-based" personal laws is somewhat tenuous on the ground.

We see that group identity, in its everyday manifestations, is tied to local socio-economic specificities and hierarchies through the intricate ties of caste and sect politics. At the same time, there are conceptions of broader, nation-wide religious moral communities formed through the modality of governance by religious laws. However, locally anchored and particularistic religious identities do not always coalesce with the idea of an overarching religious, legal, and moral order. As a result, heterodox notions of local

laws and what comprises "Hinduness" or "Muslimness" coexist in creative tensions with one another. This is another factor that prevents the homogenisation of religious identities.

### *Accommodating Intra-Group Difference and Facilitating Inter-Societal Dialogue*

The heterogeneous legal setting allows factions and different societal actors to adjudicate in marriage and divorce; this policy provides smaller segments of sects and castes with autonomy in privileging and justifying their own authority. In doing so, the state accommodates dissident factions and individuals from *within* religio-cultural communities. However, this model also provides spaces for society-centred initiatives for intra-group accommodation. We see that internally differentiated religious groups also interact with other power bases within religious groups over questions of the content of laws and what constitutes legal authority. These interactions allow intra-community differences and dialogue across differential positions within religious groups.[58]

This policy also creates spaces in adjudicative processes for inter-cultural and inter-community dialogue *between* diverse sections of religious communities, the state, NGOs, and especially women's organisations. Hindu lawyers engage with Muslim NGOs, religious leaders, and sects in negotiating rights for the clients; similarly, Muslim lawyers discuss cases with caste and sect leaders from both Hindu and Muslim communities (see also Vatuk 2003). Likewise, religious organisations and charitable trusts work with litigants from different religious communities. Civil society organisations, especially women's organisations, engage with individual women litigants on everyday legal

[58] For instance, I discuss the campaign around Muslim women's right to *talaq e tafwid* (prenuptial contract) that evens inequality in Islamic laws of divorce. This campaign has brought together large sections of Islamic bodies, actors, and organisations as well as civil society organisations and women's wings of political parties to experiment with internal reforms.

activities and also enter into dialogue and/or confrontation with community groups, religious bodies, and caste/sect organisations and individual actors. They also run campaigns, initiate discussions with members of civil society, lobby the state for changes in the law and legal structures, and engage with all adjudicators on matters of personal laws. Thus, these ongoing interactions facilitate cross-community engagement in matters related to religious family laws.

### *Making and Unmaking the Conjugal Family*

The overlapping and convergent normative legal worlds aid in the creation of plural ideas about the family and gender in the legal sphere. For example, the data show that while the state law puts forth a definition of legitimate marriage and outlines conditions for divorce, societal institutions advocate a range of possible connubial unions contravening the state's definition of marriage. In such a landscape, the "conjugal family" is shaped and reshaped by the state, segments of religio-cultural communities, civil society, and especially women's organisations. While the family largely continues to be imagined within patriarchal parameters, feminists and some caste members interject visions of a gender-just family that differ from the notions of family prevailing in state law and in the practices of the dominant castes. The multi-centred and interactive legal systems allow the transmission of different ideas of the family and identity across legal forums. These overlapping and fragmented normative worlds often enable litigants and members of society to imagine, fashion, discuss, choose, and dispute between diverse notions of the family, gender, and the meaning of religious affiliation within society.

The argument requires a caveat: while the polycentred legal setting allows plural images of the conjugal family to flourish, it is not my intention to argue that valuing

pluralism in family laws in itself provides gender justice. Multiple forums and actors in themselves do not sufficiently challenge gender roles within the family, and many normative ideals about the nature of marriage and divorce fall short of imaging and constructing outlines of non-patriarchal families and communities. However, aspects of regulation in the family among subaltern groups present images that are different from the dominant visions encoded in the state law and the laws of dominant castes. Plural images of the family offer individuals and communities a cultural "tool kit" (Swidler 1986) from which they selectively adapt aspects of the family and negotiate with other actors to validate these. As a result, statist norming of conjugal life and the conferring of identities are negotiated, challenged, stabilised or destabilised, and reformulated in a variety of legal settings.

**Hindu and Muslim Personal Laws and the Question of Gender Justice**

The literature on personal laws argues that the legislature has bargained away women's rights in the personal laws of Hindus and Muslims to accommodate religious communities. Another argument is also that Muslim women suffer more discrimination than do Hindu women in matters of personal laws (Narain 1997; Parashar 1992). Feminist scholars and activists have pointed out that women are denied formal and substantive equality under all personal and secular laws governing the family.

I suggest that the issue of reforms in laws related to marriage and divorce in Muslim law has shifted to the adjudicative arena. Recent judicial developments suggest that the accommodation of the Muslim community in matters of maintenance of divorced Muslim women post-Shah Bano case is beneficial to Muslim women (Agnes 2002;

Shankar 2003; Subramanian 2004; Vatuk 2006).[59] I argue that this law can potentially offer more rights to Muslim women post-divorce than those enjoyed by Hindu women. I also highlight the judicial trend that suggests that accommodation of cultures around issues of personal laws in itself need not be at the cost of gender justice. The data show that recently formal courts, especially higher courts, have sought to use religious-friendly interpretations within the respective personal laws and have also attempted to bridge the inequality between genders in the adjudication of Muslim Personal Law.[60] Given the interpenetration of legal systems, discussions of gender equality and justice require an understanding of the function and operation of both state and societal legal systems. The data indicates that legal reforms in higher courts at times do not reach the lower echelons of the legal system and are not always exploited by societal actors and institutions, which limits the impact of legal reforms in the adjudication process.

---

[59]Scholars working on the uniform civil code debate have argued that Muslim women's economic rights are compromised by the community and the state. Many others also hold that the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 denies equal economic rights to divorced Muslim women. Others argue that this Act is useful only when it is interpreted by pro-women judiciary (Gangoli 2003). In contrast, I argue that the Muslim Women's (Protection of Rights on Divorce) Act, 1986, grants more rights to Muslim women than Hindu women receive in the formal legal system, and the Act impacts societal negotiations for divorce as well, offering protection to women who receive compensation outside courts. However, the impact of the law is limited since both women's groups and civil society individuals have not realised the potential of the legal developments in the higher courts. This example also shows the limitations of interdependent systems of law as potential of legal reforms in the formal system is limited when it fails to reach wider society and fragmented judiciary.

[60] For instance, a contentious issue under Muslim Personal Law is the sanction given to unilateral divorce, especially *talaq ul bidaat*, or triple *talaq*. *Talaq ul bidaat* consists of three pronouncements (of divorce) made during a single *tuhr* in one sentence or a single pronouncement made during a *tuhr*, clearly indicating an intention to dissolve the marriage irrevocably (Mulla 1955, 267). Feminists have pointed out that this law harms the interests of Muslim wives. I show how judges in higher courts, sensitive to minority sensibilities on the matter, have based their opinions on religious interpretations of texts and have laid down criteria to regulate triple *talaq* and to restrain its misuse. But the fragmentation of law has prevented the trickle down of these legal developments to lower courts. However, societal actors such as lawyers use pro-women judicial precedents to negotiate women's rights outside courts. Several societal laws and religious sects such as the Ahl-e-Hadith forbid triple *talaq*, while some communities, religious schools, and individuals practice it. Thus, the regulation of this form of divorce is subject to state-society interactions and differs from case to case.

The body of literature on personal laws envisages the state as the guarantor of women's rights in law. Community bodies and organisations are seen as oppositional and anti-women (Dhagamwar 1992). My study shows that recent legal developments, specifically the enforcement of married women's right to the matrimonial home through the provision of the Family Court Act, 1984, have strengthened women's bargaining position in law. In many instances, state law guarantees more economic rights to women since it can be legally enforced. However, the data show that in some instances, societal laws can, counter-intuitively, accommodate liberal versions of the conjugal family and women's role as wives and offer more economic rights to some women. Furthermore, societal forums can be easily accessed, and they also provide speedy justice, especially in cases where the division of property is undisputable.

The findings suggest that the process of justice is uneven and that formal and substantive legal equality is elusive in laws governing marriage and divorce among Hindus and Muslims. However, a fragmented legal landscape requires different ways of thinking and strategising for gender justice in law. In the following section I discuss the everyday efforts made by women's groups and women litigants in the adjudicative arenas and discuss possible strategies for reform.

**Conceiving Agency and Its Limit**

The issue of gender justice within family law has been taken up by the Indian women's movement since the 1920s. The literature on personal laws highlights the agency of feminist groups in legislative processes (Gandhi and Shah 1988; Parashar 1992; Mukhopadhyay 1998; Pathak and Sunderrajan 1989); however, relatively little attention has been given to their participation and their vision of change in the adjudication process

besides their attempts at public-interest litigation in order to redress the inequality of the personal laws. I highlight neglected aspects of their agency.

Feminist groups engage in the adjudication process with the state and non-state actors, and in doing so, they discuss the reforms of personal laws with a variety of actors, the state, community authority, formal and informal organisations and networks, and social movements. They also support and participate in activities to reform laws from within the communities. Feminist groups engage academics and activists to debate on critiques of the family,[61] and they evolve newer images and definitions of the family. They transmit these images and ideas about different kinds of feminist families to other legal forums through their grassroots-level work. These groups consistently raise the issue of redefining the family and of extending rights to include lesbian, gay, and transsexual/transgender persons and families in many forums (see Visions of Gender Just Realities, FAOW, 1996). Feminist groups organise conferences, discuss law reforms in personal laws, swap their experiences, replicate strategies, form pressure lobbies, and devise collective strategies to engage with the state and other societal actors on the issue of legal reforms. Feminist groups also resist religious and community patriarchy, confront cases of corruption in the process of adjudication in family laws, and protect and support individual women litigants. Women's organisations run shelters, enable women to access legal aid, support the fight against domestic violence, and provide rehabilitation.

[61] See for instance "Marriage, Family and Community: A feminist Dialogue," a symposium organised by Larzish, which debated ideas of the family in Marxist, Queer, Feminist and Dalit politics.

### *The Agency of Litigant Women*

The fragmented and polycentred legal sphere subjects individual litigants to pluralist influences and bargaining possibilities. The legally plural system creates a situation in which litigants and group members are law-navigating as well as lawmaking subjects (Chiba 2002). In the following section, I discuss both the individual and the collective agency of women litigants and identify the incremental and transformative potential of collective agency[62] of litigant women in influencing these normative legal spheres, and I outline the constraints faced by them. Secondly, the availability of multiple forums of redressal allows women litigants, especially those supported by family and social and affinal networks, to utilise the various permutations and combinations of different forums to maximise their rights in law. However, women litigants' choices are often hampered by structural and practical constraints such as the lack of information about law and legal options, the lack of resources to pursue legal forums, coercion from communities and the family, the lack of family and affinal networks, domestic violence, violence and threats from strongmen, and religious fundamentalism.

### *Individual Women's Agency: Forum-Switching and Gender Justice*

The body of literature on the representation of women in law portrays them either as recipients of state laws or instrumentalist manipulators of law. Literature on personal laws position women, especially Muslim women, as doubly oppressed: they are marginalised by fundamentalists from within their cultural group and face discrimination from majority communities in matters related to family laws (Mahajan 2005; Narain 1997).

---

[62] I draw from Bina Agarwal's argument that the individual agency of women can bring about context-specific change. However, collective effort and organising is required to affect structural change (Agarwal 1991; Schweickart 1995, 229-248).

The literature suggests that women appropriate different legal constructions of gender roles in order to maximise their rights in law (Abu-Lughod 1990; Davis and Fisher 1993; Hirsch 1998; Moore 1998; Okeley 1991; Mariko 1991; Shah 2005). The literature on legal pluralism suggests that women litigants maximise their legal outcome by forum-shopping and navigate different legal arenas simultaneously (Griffiths 1997). For instance, my data show that 121 respondents out of 274 total respondents made use of, and thus intermixed, more than two legal forums. Given that women litigants' material rights within marriage are influenced by socio-legal representations as wives in state courts, women litigants appropriate or intermix forum-specific normative images of wifehood and use these strategically, often switching between the two normative worlds. In general, women traverse through different legal worlds, blend into the dominant ethos, and act out ideal-types without changing the dominant order.[63] This resistance and acting out an identity is meant to increase options rather than challenge or change the dominant ideal-types. Individual women also influence the state legal sphere in another way. While individual women's agency allows for conceptualising fleeting moments of resistance for individual gains, these do not allow space to visualise the transformative potential of women's agency within patriarchal legal structures. Neither does this conception of agency envisage challenging and changing patriarchal legal systems.

[63] For instance, I discuss a case of Shilpa, a woman from the KVO caste who had successfully contested her husband's divorce petition by constructing the image of a docile, religious Hindu woman who is ready to reconcile with her husband despite severe domestic violence. The court prioritised the sacramental notion of Hindu marriage and ruled against her husband's divorce petition even though the couple had been separated for sixteen years and had not lived together for more than three months. S.S. v. R.S. Family Court Records. 2002. Mumbai.

### *Structural Change through Individual Agency: Hindu and Muslim Women Litigants and Changes in Personal Laws*

Lawmaking in the state-authored law takes place in two arenas: legislative and adjudicative. The state law among Hindus was enacted in the 1950s, and there have not been any significant changes in the law since. In a similar vein, Muslim Personal Law reforms have largely taken place in the adjudicative arena. Hence, women's contribution to lawmaking has largely been through the mobilisation of law (Black 1973; Zemans 1982). In Hindu law, the agency of individual women through legal mobilisation and creative interpretation of law has yielded change incrementally through case-law developments in different state courts. Individual women litigants who approach the state court in cases of marriage and divorce bring in their experiences and versions of domestic roles within the family and thus challenge the dominant versions in some instances.[64] While state law does not grant divorce, state courts often have to rubberstamp customary divorces that take place within castes and groups that allow easy divorce; these cases challenge the ideology of state law and procedures. While the law on maintenance among Hindus and Muslims is based on the understanding of women as dependents, cases of women caste members who are viewed as primary earners within their caste laws throw different challenges to state law when their cases reach the courts.[65] These developments help envisage partial change in state structures.

---

[64] "Dispossession from the matrimonial home was the biggest hurdle faced by women litigants in case of marital violence or breakdown of marriage, as women do not own property in Indian society. Gradually, lawyers in the Family Court began to use a clause in the Family Court's Act, 1984, which disallows the husband, who is in most cases the property owner, from dispossessing the wife. Women who fear being thrown out of the house can secure an injunction and thus be assured of shelter" (Interview with Veena Gowda, Lawyer, 16 June 2003, Mumbai).

[65] "The court cannot recognise that we get more rights of maintenance in our caste laws... Husbands know that the courts are easy—they approach them...We work day and night and support the family and lose out when it comes to maintenance" (Interview with Pushpa Waghela, 17 October 2003, Mumbai). "State courts need to take cognizance of women's double labour in the family... A woman might have supported her

### *Women's Transformative Collective Agency in Contouring the Socio-Legal Processes in Society*

There are two ways in which women's agency is exercised: first, women participate in lawmaking exercises undertaken by their groups, and secondly, women participate in the everyday practice of adjudication in society. Both these processes allow spaces for change.

In castes and sects that follow democratic procedures of lawmaking, collectives of women members as caste/sect members contribute to the shaping of the normative world created by caste/sect laws as they participate in the lawmaking process as litigators, adjudicators, and litigants; however, few elite women participate in lawmaking in sects or castes that are undemocratic in their manner of functioning.[66] The data show that in castes that favour democratic discussions on the issue of reform in laws, women form sub-committees to incorporate women's experiences, expectations, and concerns, and they have sought representation in the "constitutional committees" of the caste. In addition, women often play supportive roles to their women kin members by creating and sustaining a social world through their productive, reproductive, and cultural labour. However, their participation does not equal male participation in numbers, and they have less control over the final content of each draft of laws and legal decisions. Collectives of women litigants and group members also confront societal authority, argue with religious authorities, and campaign against gender injustice in laws. They also establish groups to learn about religious laws and the history of women in religious communities, and they engage in discussions with a number of societal and state actors.

---

husband and earned and her contribution should be recognised when you calculate maintenance" (Interview with Vandana Nanaware, Social Worker, 16 June 2003, Mumbai).

[66] For instance, among Meghwals, women members have formed special sub-committees to incorporate women's experiences, expectations, and concerns and have sought representation in the "constitutional committees" of the caste since the 1970s. The caste forum organises law-review committees and holds bi-yearly meetings to discuss their legal concerns, and many Meghwal women participate in these processes. In contrast, very few women have participated in these processes among Khola Shia Ithna Asharis.

### *Women's Transformative Collective Agency: Everyday Processes of Adjudication and Visions of Change*

The transformative potential of women's collective agency is realised in their interaction with feminist groups in matters of regulation of personal laws. Individual women litigants as well as informal groups of women across castes and sects at times engage feminist groups in intra-caste lawmaking and adjudication processes. Feminist groups also function as watchdogs and check the abuse of authority by state officials as well as caste members. Feminist groups and activists from diverse religious and caste backgrounds are invited as resource persons to discuss developments on family laws. They are also asked to play facilitative tasks as mediators in family disputes within the caste. This allows an ongoing dialogue between caste officials, caste members, and feminists on the structure of marriage and divorce in caste laws and on the status of women within the family. Cover has argued that a legal/moral world functions around "alternity," the ideal of what is other than the case, thus creating tensions between reality and the vision contained in the counterfactual possibility. The legal/moral world contains the present and the imagined alternative combined with the application of the human will (Cover 1986, 9). These feminist groups enter into the process by bringing in their vision of the family that is egalitarian, gender just, and free of violence and exploitation, and they add this to the normative repertoire available to caste members. The pluralizing of caste/sect worlds by other actors also challenges patriarchal trends in imagining gender roles. While this may not transform the patriarchal control of the caste institutions and laws, this interaction interjects heterogeneous ideas of different values in family life and helps bring about partial change.

Secondly, groups and organisations of individual women challenge the clergy and caste and sect authority in matters of personal laws. Muslim women establish study classes to read and interpret the Quran and the Hadith and enter into dialogue with the clergy and religious organisations. Secular and other Muslim women's organisations also discuss the issues and challenges around reforms of Muslim Personal Law with other organisations and women's groups across the country. There is also the widespread movement around the issue of *nikahnama*, the prenuptial contract among Muslims, and numerous women participate in such movements, which have the potential to bring about structural changes in the community. These movements are supported by the broader Indian women's movement and some international women's organisations.

**Conclusion**

My thesis addresses the question of how states accommodate the demands of religio-cultural groups to regulate the family and how they take steps to ensure gender equality within these groups. My thesis analyses the Indian model of legal pluralism in the governance of marriage and divorce under Hindu and Muslim personal laws. The Indian model of legal pluralism allows adjudicative power-sharing between the state and various societal actors and organisations in the governance of marriage and divorce.

Using state-society relations as my analytical framework, my thesis examines the interaction between state and non-state laws and adjudicative authorities in multiple sites of adjudication in the governance of marriage and divorce within the personal laws of Hindus and Muslims. While the state law and courts normalise the family in different personal laws, interactions between state and non-state legal actors in micro-adjudicative sites demonstrate that the statist construction of the conjugal family and of gender are

affirmed, challenged, or destabilised in a variety of legal locales. I argue for an open-ended construction of state-society relations in which state and societal legal actors and organisations are engaged in conflicts and cooperation, as well as in communications and negotiations over the nature and content of laws regulating the conjugal family.

I argue that state and non-state sources of legal authority construct internally-contested and heterogeneous notions of the conjugal family, gender relations, and religious membership, and they transmit them across legal spheres. The coexistence of plural images of the family and of gender in law provides spaces for accommodation of intra-group factions, facilitates inter-societal interactions, and supports women's agency in matters of personal laws.

# CHAPTER THREE

*State Law and the Adjudication Process: Marriage, Divorce, and the Conjugal Family in Hindu and Muslim Personal Laws*

## Introduction

In this chapter I examine the adjudication process in Hindu and Muslim personal laws in state law and courts. I sketch the function of the Family Court in Mumbai, analyse the substantive and procedural aspects of matrimonial provisions in Hindu and Muslim personal laws, and give an overview of the relevant trends in matrimonial disputes. I trace the interaction between state and society within the formal legal system and assess its impact upon the construction of the conjugal family and women's rights in state law.

While academic discourses set up Hindu and Muslim laws as opposite and dissimilar to one another, I argue that there are many commonalities between judicial bargaining, interpretation, and treatment of cases filed under distinct provisions of Hindu or Muslim religious laws and that the data do not demonstrate a wide variation between rights accorded to Hindu and Muslim women; in fact, divorced Muslim women have more rights than divorced Hindu women in some instances.

## The Functioning of the Family Court

Operational since October 1989—after the enactment of the Family Courts' Act in 1984—the Mumbai Family Court adjudicates in matrimonial disputes filed under different personal laws.[67] Jurisdiction of the Family Court is fragmented.[68] In specific matrimonial

[67] The court can determine cases of divorce, annulment, restitution of conjugal rights, injunction in matrimonial property disputes, custody and access, and maintenance under Section 125, Cr.P.C., as well as under the Hindu Adoption and Maintenance Act, 1956 (see Family Courts Act, 1984, Chapter III, Section 7).

matters, the Family Court can exercise jurisdiction over any civil or district of metropolitan magistrate's court.[69] The Family Court Act, 1984 advocates for a consensus-based conciliatory approach to matrimonial disputes.[70] Professional social workers attached to the court provide counselling as well as conciliatory and, at times, investigative services.[71] Records of the court are confidential. The legal procedure followed by the court is a combination of informal and adversarial legal procedures. Inter-spousal conciliation is

---

[68] For instance, the Family Court adjudicates in matters related to divorce and maintenance under Section 125, Cr.P.C., but it does not adjudicate in cases under the Muslim Women's (Protection of Rights on Divorce) Act, 1986. These are heard in Matrimonial Magistrates' courts. The Family Court determines cases of maintenance under Section 125, Cr.P.C., but cases of domestic violence do not fall under its purview.

[69] See the Family Courts Act, 1984, Chapter III, Section 7, (a), (b): Jurisdiction: (1) Subject to the other provisions of this Act, a Family Court shall-(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

[70] The Family Courts Act, 1984, Chapter 4, Section 9, (1), (2), (3): It is the duty of the Family Court to make efforts for settlement (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit. (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement. (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Family Court to adjourn the proceedings. "The Mumbai family court follows a 'social work philosophy' in that its approach is aimed at solution of problems rather than mere litigation" (Interview with Ms. Madhvi Desai, Principal Social Worker attached to the Family Court, 12 June 2003, Mumbai).

[71] See Family Courts Act, 1984, Chapter II, Sections 5, 6. Section 5: Association of social welfare agencies, etc. The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of (a) institutions or organisations engaged in social welfare or the representatives thereof; (b) persons professionally engaged in promoting the welfare of the family; (c) persons working the field of social welfare; and (d) any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act. Section 6: Counsellors, officers and other employees of Family Courts (1) The State Government shall, in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit. (2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.

institutionalised in the Family Court.[72] If the conciliation is ineffectual, a trial takes place before the judge to dispose competing claims of the parties. The court has the discretion to postpone the proceedings in order to enable the parties to reconcile.

The court attempts to create a user-friendly environment.[73] The court encourages self-representation by litigants and is readily accessible to litigants.[74] Women litigants learn to represent themselves and find the subculture of the court facilitates the process. My data show that out of 120 litigants interviewed, 19 litigants had chosen to represent themselves; 63 litigants had represented themselves at least once, and 38 litigants had legal representatives during the entire duration of the court process.[75] Civil society organisations influence the court processes in the retrieval of *stridhan* and work alongside the court in some cases to bring about justice.[76] Hence, the legal system and societal influences operate

---

[72] Parties are required to attend pre-divorce, individual and couple counselling. Social workers also work out consent terms in defended divorces and other matters (Interview with Madhvi Desai, Chief Counsellor, Family Court, 17 June 2003, Mumbai).

[73] It was based in a multi-storey complex. Each floor houses a courtroom, offices of the judge and social worker, a waiting area for litigants, and other offices such as record rooms, registrar's offices, the bar room, the library, and a canteen. At present, the Family Court has one Principal judge and five additional judges.

[74] See also, The Family Courts Act, 1984, Statement of Objects and Reasons, Section 2, (e), (g).

[75] Data show that lower middle class women with a high school level education who are undertaking part-time work are most likely to represent themselves. Women with no education or primary level education and middle class women are less likely to represent themselves.

[76] They investigate at the behest of the court and present alternatives to help judges decide the case, as the case suggests. Women's organisations meet with the judges and social workers to present the cases of women. In one case, the husband of a woman, Sheela, deserted her and threatened to evict her from their residence in a slum. Sheela approached the local NGO which worked on issues around slum eviction. The social workers of this organisation referred her to a lawyer so that she could file for maintenance and took up her cause against her husband who was threatening to throw her out of the matrimonial home. The slum was being moved to another area and the Mumbai Municipal Corporation was giving "transit housing" to people. Sheela's dispossession from her home would have deprived her of her right to the transit house. At the legal end, the lawyer and the local NGO kept in touch about the legal strategies and the lawyer filed a case to prevent her from being disposed from her matrimonial home. While the case was ongoing, Sheela found out that her husband had married again. She brought this matter to the lawyer's notice who put in an application to prosecute her husband. The judge asked for proof; the social workers of the court and the local NGO visited Sheela's husband's second home to assess whether he had married again or not. The social workers spoke to the neighbours and gave evidence of the second marriage to the judge. In the end, the judge, the lawyer, and social workers of the organisation worked together to persuade the husband to transfer the matrimonial residence in Sheela's name. They also arranged a lump sum settlement (Interview with Irene Sequeira, Lawyer, 8 June 2003, Mumbai).

on one another or work side-by-side within the formal legal system. This also leads to the diffusal of law.

### The Disposal of Cases in the Family Court

The court follows an informal and confidential procedure and ensures the speedy disposal of cases, as evidenced by the data in the table below. The Mumbai Family Court's efficiency is seen as positive in the Indian context where the procedure of justice is excessively lengthy, cumbersome, and inefficient, and courts grapple with an immense backlog of cases (Chodosh 2004; Galanter and Krishnan 2003).

**Table 1. Total number of cases filed and disposed in the Family Court, Mumbai (1990-2001).[77]**

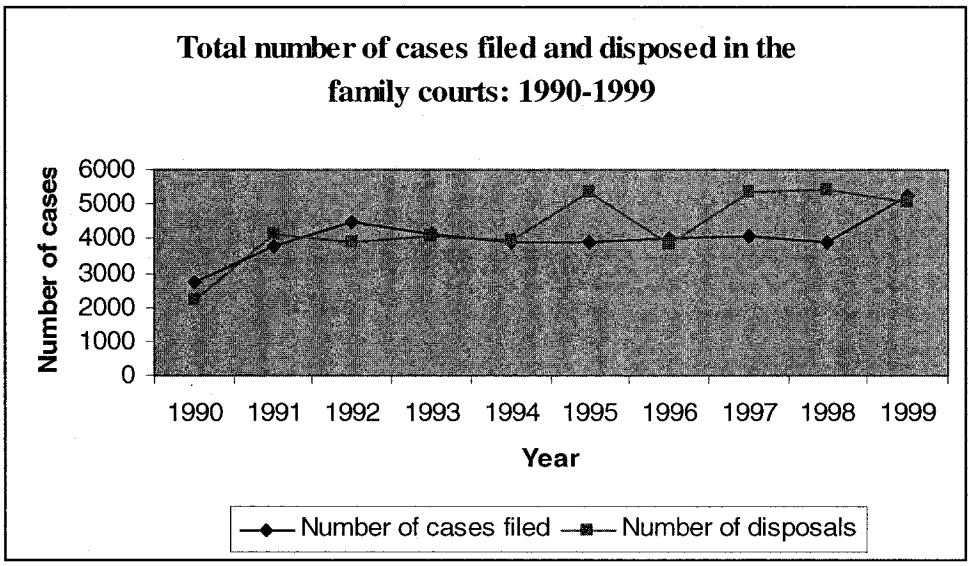
| Year | New Cases[78] | Disposed |
|---|---|---|
| 1990 | 2748[79] | 2227 |
| 1991 | 3772 | 4137 |
| 1992 | 4471 | 3894 |
| 1993 | 4143 | 4056 |
| 1994 | 3874 | 3972 |
| 1995 | 3893 | 5368 |
| 1996 | 4028 | 3820 |
| 1997 | 4085 | 5387 |
| 1998 | 3923 | 5403 |
| 1999 | 5223 | 5044 |
| 2000[80] | 4332 | 3657 |
| 2001[81] | 4589 | 3761 |

In contrast, the data show that the number of disposal is quite high in cases filed between 1993 and 1999. The rate of disposals has been lower in cases between 1999 and

[77] Compiled from Family Court Records, Mumbai, 2002.
[78] This includes revision orders as well as orders for execution of decrees and collection of arrears.
[79] The Family Court was established in 1989; the process of transferring cases from other trial courts had begun in 1989, but not all types of cases were transferred to the Family Court in 1990. The data exclude maintenance suits or proceedings related to property matters and custody and access matters.
[80] The figures showing revision orders as well as orders for execution of decrees and the collection of arrears are not available for the year 2000.
[81] Ibid.

2001 due to a sudden increase of the caseload in 1999 as cases under the Dissolution of Muslim Marriages Act, 1939 were transferred from the High Court to the Family Court during that year in order to make the formal legal system more accessible to all sections of society.

**Figure 2. Number of cases filed and disposed (1990-1999).** [82]




It is argued that the "technocratic model of justice" (Heydebrand and Seron 1990) that emphasises informal, efficient, and speedy relief can compromise democratic values of justice such as victims' rights, judicial impartiality, and due process of law (Fiss 1983, 1984; Heydebrand and Seron 1990; Resnik 2003). While the model adopted by the Mumbai Family Court is not always incompatible with justice, it evokes mixed responses in litigants. In most cases, women litigants respond favourably to the efficient and cost-effective service of the Family Court. A few women litigants, in contrast, argue that being

[82] Compiled from Family Court Records, Mumbai, 2002.

rushed into settlement denies them justice as the retention of court is in itself a strategy used by clients.[83]

### The Nature of Justice in the Family Court: Consensual Rather than Adversarial?

The procedure in the Family Court prioritises the reconciliation and resolution of cases through consensus, and many women litigants have reacted unfavourably to these procedures.[84] The graph below indicates the degree of informalisation of the court procedure in the Family Court. The graph shows that more than half of the cases are disposed of through other means—either reconciled or withdrawn. A large number of these cases are transferred to other courts. Some cases are dismissed due to a long absence of litigants from court as some litigants may retain the court in order to settle differences at the societal level.[85] The graph also shows that judicial decisions through an adversarial procedure make up less than one tenth of the total cases that are disposed. About one fifth of the cases are disposed of through mutual consent as they are also filed under mutual

---

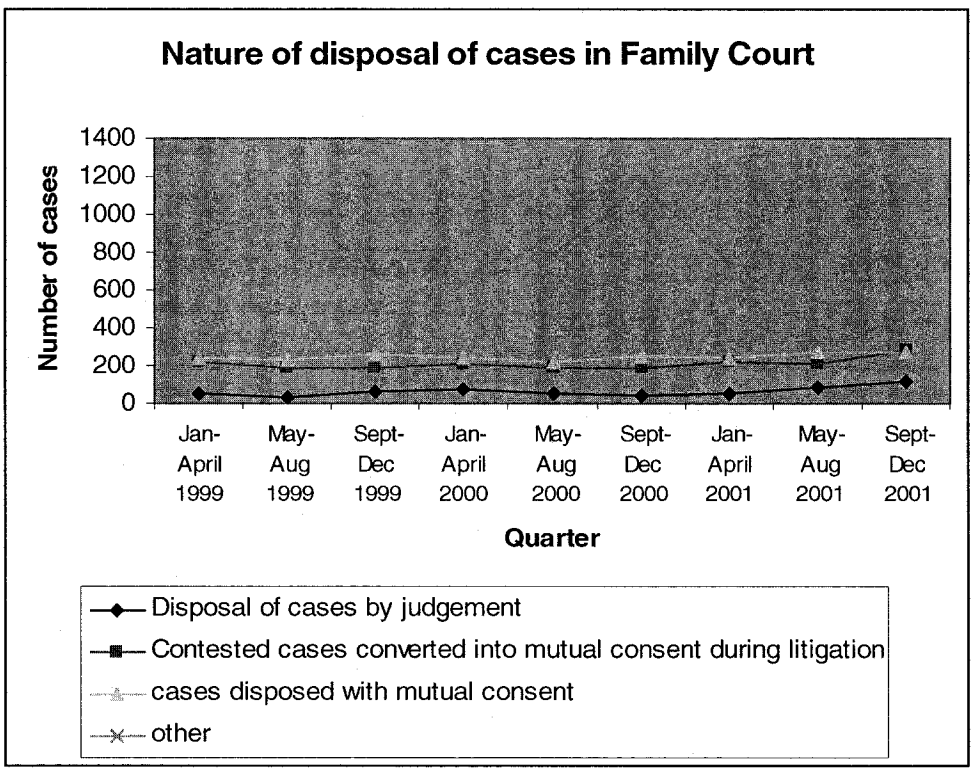
[83] A petitioner husband had filed for divorce. In response, the wife had contested the divorce, sought an injunction against the transfer or sale of the matrimonial house, and sought custody of the children. The wife was suspended from her work because of absenteeism due to domestic violence, but she has sought to challenge the suspension in the labour court; the case had been pending in the labour court for three years at the time of the interview. The judge and social worker at the Family Court, who wished to facilitate the settlement, were "advising" her to accept the partition of the matrimonial home and to forego permanent alimony. The wife was reluctant as the matrimonial home had been built from her savings, and she had supported her husband when he was in school studying for an engineering degree. The wife wished to know of the outcome of her case in the labour court before agreeing to this solution, as her employment status was a key factor in her considerations. "They (the judge and the social worker) tell me that the case has languished in court for five years... but if I accept their deal, how will I feed my daughters?" (Interview with S. M., 7 June 2003, Mumbai).

[84] A woman had filed for divorce after a severe episode of domestic violence. "His beatings led to my miscarriage and I went to court for divorce. In the first meeting, the social worker asked me if I wanted reconciliation! Would I want to reconcile with a murderer?" (Interview with H. M., 22 June 2003, Mumbai). Similar details were shared by other litigants (Interview with S. M., 7 June 2003, Mumbai).

[85] For instance, given that Muslim Personal Law permits unilateral male divorce, many Muslim women file cases of maintenance in court in order to provoke their husbands into giving them a divorce (Interview with Hasina Khan, Feminist Activist, Awaaz e Niswaan, 10 January 2003, Mumbai). Hindu women who have been denied divorce by husbands from their caste *panchayats* also use the courts in similar ways (Interview with Vishrambhai Waghela, 12 March 2003, Mumbai).

consent, and the Family Court serves as an administrative body in deciding these cases. About one fifth of cases are "converted" into mutual consent cases through the efforts of judges, lawyers, and social workers during the trial. Another reason for the disposing of a case is the parallel presence of informal organisations and actors as cases are simultaneously adjudicated in multiple forums; this also impacts upon the nature of justice in state courts as cases that are resolved in other forums are dropped form the state courts.[86]

**Figure 3. The nature of disposal of cases in Family Court.** [87]




[86] "I had filed a case for maintenance.... It took three years in the court and he never came even once. We had to look for other avenues- we approached our village council- they talked to his family" (Interview with D. Y., 23 March 2003, Mumbai). "I had filed for maintenance and it looked as though the decision was going to be in my favour—then his family approached us for a reconciliation. I agreed to give it one more try. After all, I have two children" (Interview with P. S., 24 June 2003. Mumbai).

[87] Compiled from Family Court Records, Mumbai, 2002.

The informalisation of adversarial procedures affects more vulnerable litigants, especially women since "the court deviates from application of substantive law and functions as an informal social work bureau."[88] Since the perceptions of social workers and of judges play a large role in negotiation settlements in cases, their anti-women biases have harmed the interests of several women litigants.[89] Judges in the Family Court often view their role as facilitators and advisors. For example, a petitioner husband filed for restitution of conjugal rights while accusing his wife of cruelty and desertion. Denying the decree to the petitioner husband, the judge noted that "(t)he parties are not represented by lawyers... I myself have tried for reconciliation but find that it is not possible" (Family Court Records, 1998).

*An Overview of Cases Filed in the Family Court*

The table below indicates the number and type of cases filed in Family Court under religious personal laws as well as under the secular law, the Special Marriage Act, 1956.

[88] Interview with N. A., 19 February 2003, Mumbai.

[89] Interview with I. S., 18 March 2003, Mumbai. In one case, a husband who had defaulted payment of maintenance complained to the social worker that his wife had come to the court accompanied by a prostituted woman. Both the judge and the social worker reprimanded the woman litigant and not the husband, who had defaulted his payment, despite the woman's protests. Similar perceptions shape the process of counselling in some cases (Interview with Y. M., 6 June 2003, Mumbai).

**Table 2. Number of cases filed in the Family Court, Mumbai (1989-2001).**[90], [91]

| Year | Matrimonial Remedies[92] | Injunctions (property matters) | Maintenance Suits | Custody and Access | Maintenance under Criminal Law, Section 125, Cr.P.C. | Total Cases[93] (excluding revision orders) |
|---|---|---|---|---|---|---|
| 1989 | 0463 | N.A. | N.A. | N.A. | 0139 | - |
| 1990 | 1845 | N.A. | N.A. | N.A. | 0663 | - |
| 1991 | 1839 | 105 | 042 | 059 | 0804 | 2849 |
| 1992 | 2035 | 104 | 024 | 073 | 1280 | 3516 |
| 1993 | 2184 | 081 | 091 | 053 | 1230 | 3639 |
| 1994 | 2051 | 067 | 047 | 046 | 1186 | 3397 |
| 1995 | 2055 | 072 | 167 | 056 | 1106 | 3456 |
| 1996 | 2153 | 094 | 229 | 053 | 0994 | 3523 |
| 1997 | 2234 | 086 | 235 | 045 | 0927 | 3527 |
| 1998 | 2285 | 056 | 250 | 033 | 0697 | 3321 |
| 1999 | 2936 | 108 | 293 | 073 | 1080 | 4490 |
| 2000 | 2888 | 088 | 303 | 144 | 909 | 4332 |
| 2001 | 3350 | 112 | 410 | 114 | 603 | 4589 |

(Source: Compiled from Family Court Records, Mumbai, 2002)

Cases from different courts were transferred to the newly functional Family Court during 1989-1990. The number of cases filed every year under matrimonial remedies shows a marginal increase between 1990 and 1999. The only significant increase is after 1999. However, this is due to procedural reasons as cases previously filed in the High Court (such as cases filed under the Dissolution of Muslim Marriages Act, 1939) were transferred to the Family Court in this year. The number of maintenance suits has jumped dramatically since 1995; this jump reflects a consistent trend. The favourable use of these provisions by women litigants can lead to an increased intake of these cases. The number

[90] Compiled from Family Court Records, Mumbai, 2002.

[91] I would like to thank Ms. Madhvi Desai, Chief Social Worker, Family Court, Mumbai for handing me a compilation of data for 1989-1999, which is presented in the table above. The data on subsequent years is compiled from rough figures complied by the Family Court and is subject to minor changes.

[92] The data is complied by the Family Court, Mumbai. Matrimonial remedies include cases filed under nullity of marriage, validity of marriage, divorce, judicial separation, and restitution of conjugal rights. This data includes cases *across religious lines* as well as cases filed under the Special Marriage Act, 1956.

[93] The data exclude revision orders, execution of decrees, and applications to recover arrears of maintenance.

of cases filed under Section 125, Cr.P.C. tends to fluctuate. However, it is difficult to arrive at definite conclusions since cases under this section are also filed in the Metropolitan Magistrate's Courts in Mumbai. Overall, the data do not point to a high legal mobilisation of the state courts by litigants.

## Low Usage of the Family Court in the Adjudication of Marriage and Divorce

**Table 3. Crude divorce rate, Mumbai (1990-2003).**[94]

| Year | Total Population of Mumbai (thousands)[95] | Total Number of Cases filed under Matrimonial Remedies[96] (including restitution of conjugal rights) | Crude Divorce Rate (including cases filed under restitution of conjugal rights) | Number of Cases filed under Matrimonial Remedies (excluding cases filed under restitution of conjugal rights)[97] | Crude Divorce Rate (excluding cases filed under restitution of conjugal rights) |
|---|---|---|---|---|---|
| 1990 | 12,669 | 1845 | 0.0001456 | 1581 | 0.0001247 |
| 1991 | 13,030 | 1839 | 0.0001411 | 1576 | 0.0001209 |
| 1992 | 13,391 | 2035 | 0.0001519 | 1744 | 0.0001302 |
| 1993 | 13,752 | 2184 | 0.0001588 | 1872 | 0.0001361 |
| 1994 | 14,111 | 2051 | 0.0001453 | 1758 | 0.0001245 |
| 1995 | 14,502 | 2055 | 0.0001417 | 1761 | 0.0001214 |
| 1996 | 14,893 | 2153 | 0.0001445 | 1845 | 0.0001238 |
| 1997 | 15,284 | 2234 | 0.0001461 | 1915 | 0.0001252 |
| 1998 | 15,675 | 2285 | 0.0001457 | 1959 | 0.0001249 |
| 1999 | 16,068 | 2936 | 0.0001827 | 2517 | 0.0001566 |
| 2000 | 16,512 | 2888 | 0.0001749 | 2476 | 0.0001499 |
| 2001 | 17,400 | 3350 | 0.0001925 | 2872 | 0.0001650 |

The data shown in the table above suggest little change in divorce rates in the formal legal system over the course of the decade in Mumbai. Figures presented in the fourth column show a rate of growth calculated on the basis of figures of matrimonial

[94] Compiled from Family Court Records, Mumbai, 2002.

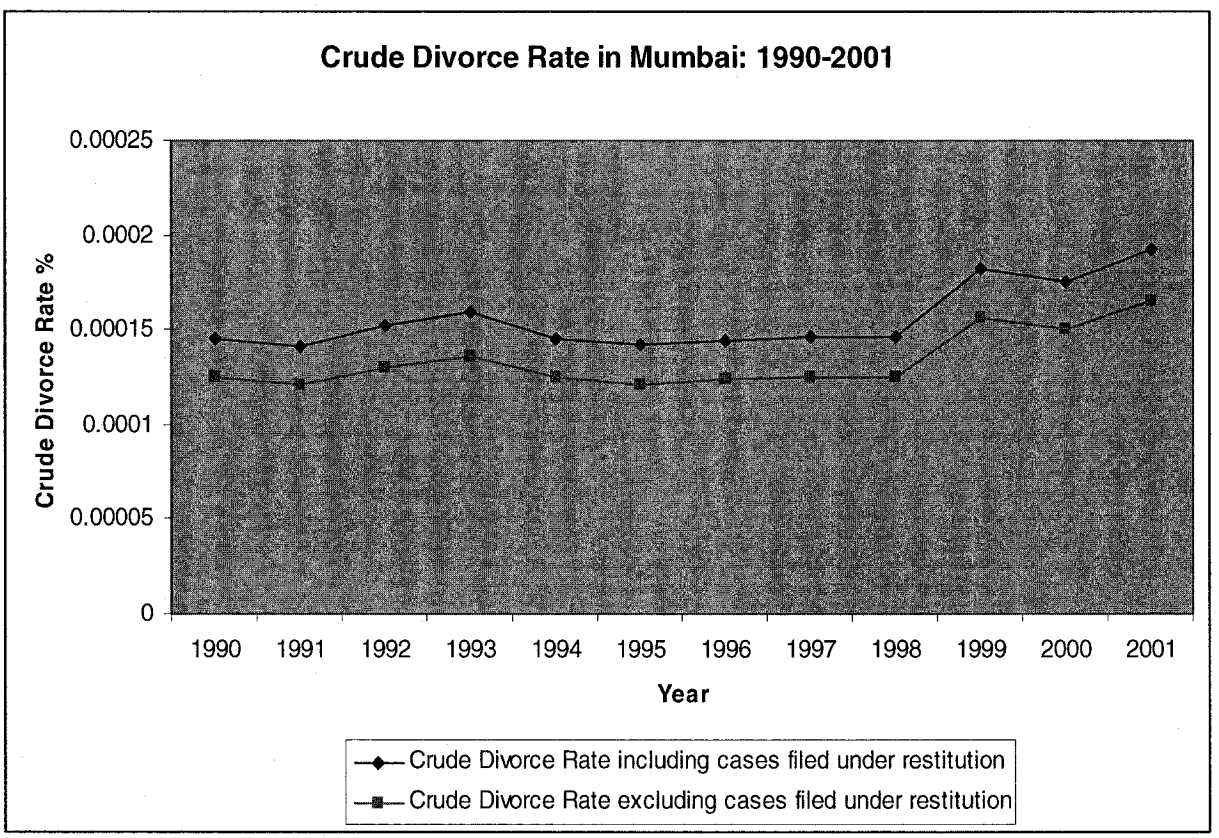
[95] The data on the population of Mumbai during 1990, 1995, 2000, and 2003 was sourced from the report, "World Urbanization Prospects: The 2003 Revision," Department of Economic and Social Affairs, Population Division, The United Nations (New York: United Nations Publications), 11, 78-79, 267. These figures serve as a basis for the calculation of population during the five-year interval. The assumption here is that the annual population growth rate remains steady across the five-year interval.

[96] The data is complied by the Family Court, Mumbai. Matrimonial remedies include cases filed under nullity of marriage, validity of marriage, divorce, judicial separation, and restitution of conjugal rights. This data includes cases *across religious lines* as well as cases filed under the Special Marriage Act, 1956.

[97] The data presented in this column isolate cases filed under the provision of the restitution of conjugal rights from the data complied by the Family Court. The cases of restitution of conjugal rights make up about fourteen percent of cases of matrimonial remedies every year. Data presented in earlier column are recalculated based on this assumption.

remedies prepared by the Family Court. However, the classification system evolved by the Family Court includes cases of restitution of conjugal rights in the overall figures of cases filed as matrimonial remedies. The final column therefore seeks to recalculate divorce rates based on revised figures after subtracting the cases filed under restitution of conjugal rights.

**Figure 4. Crude divorce rate, Mumbai (1990-2001).** [98]




The data show a very low rate of divorce in the Family Court; there are several explanations available in the literature. It is often argued that the Indian legal system is seen as lengthy, expensive, cumbersome, and corrupt, and this "crisis of the Indian legal

[98] Compiled from Family Court Records, Mumbai, 2002.

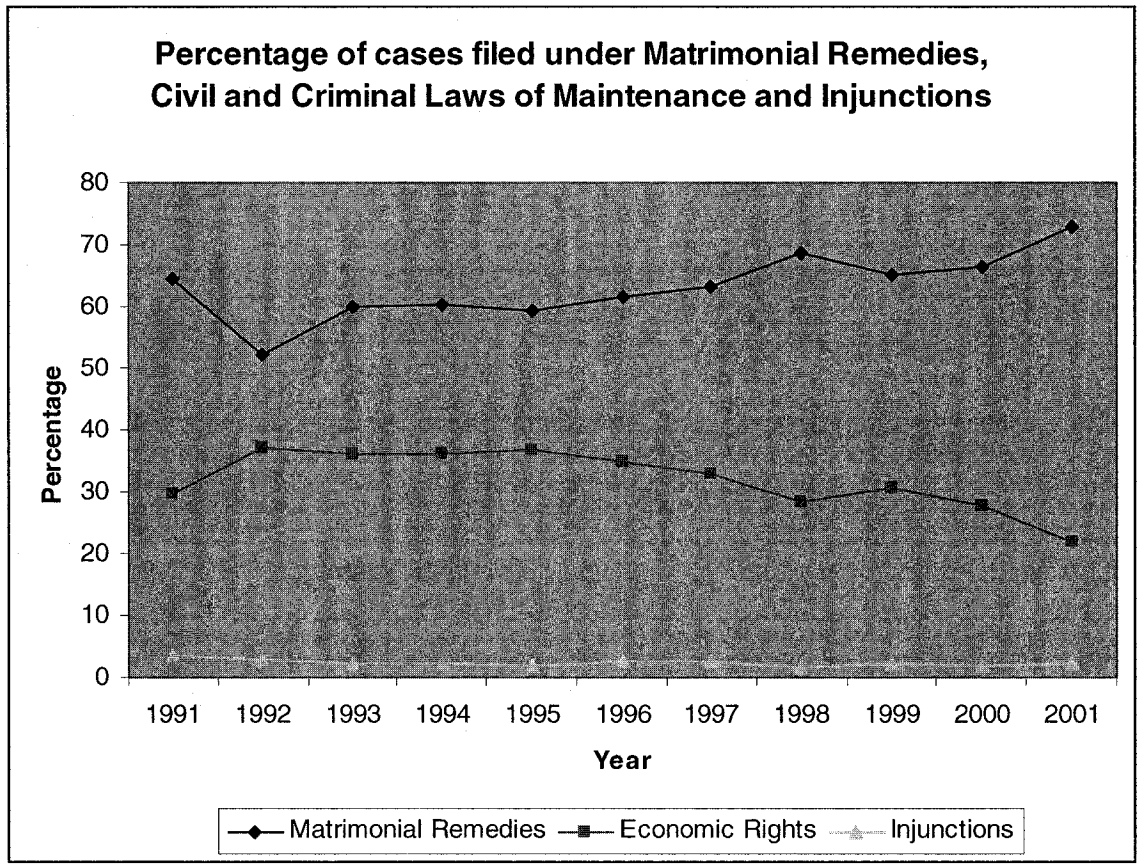
system" (Mendelsohn 1989; Galanter and Krishnan 2003) may prevent some parties from approaching the court, which accounts for the low divorce rates. This explanation is useful but insufficient given that the Family Court provides speedy justice in an informal setting, exempts women litigants from payment of court fees,[99] arranges legal aid, and fosters self-representation by clients. Furthermore, while litigants reported corruption in the Family Court, there was also the perception that the Family Court was "cleaner than other courts."[100] A second explanation is that divorce is a jural status, but parties may choose to be separated without approaching the courts for legal help (Rheinstein 1972). However, this does not adequately explain why parties, especially women, do not approach the court for post-divorce economic relief, as shown in the graph below.

The data in the following graph reveal that a majority of respondents who approach the court seek help for matrimonial remedies. The number of cases filed exclusively for economic rights comprise one third of the sample.

[99] See the article by Swati Deshpande, "HC Upholds Court Fee Waivers for Women in Some Types of Cases." *Times of India* (Mumbai). 29 March 2002. In a notification dated 1 October 1994, the Government of Maharashtra remitted the fees payable by women litigants in cases filed under any civil, criminal or family courts under cases filed under categories such as maintenance, property, and domestic violence.

[100] Interviews with F. A. and N. A., 5 May 2003, Mumbai. Between 2003 and 2005, one of the judges was "recalled" after allegations of corruption. Litigants complained of minor corruption among court officials. Many litigants complained of lawyers' demands for sexual favours. Litigants also spoke of unviable financial expenditure billed by lawyers and pointed to violations of legal aid norms by some lawyers (Interviews with D. P., 16 February 2003; H. M., 22 June 2003; P. W., 9 November 2002; P. S., 5 February 2003, Mumbai).

**Figure 5. Comparison of percentages of cases filed under Matrimonial Remedies, cases filed under civil and criminal laws of Maintenance, injunctions for suits.** [101]




In the following chapters, I argue that low rates of divorce under the state courts are partially due to the shared authority model of the Indian state. The state is one of the forums of legal termination of marriage, and the low number of cases in the Family Court corresponds to the high usage of other legal forums. In other words, the Indian state shares its legal authority with societal groups under the personal laws of both the Hindus and Muslims, and many legal parties prefer to approach these community bodies, which explains the lower registration of cases in the Family Court. Secondly, fewer economic

[101] Compiled from Family Court Records, Mumbai, 2002.

rights granted to parties at the termination of marriage also account for the low rates of legal mobilisation of divorce.

### Adjudication in Hindu and Muslim Personal Laws

This section discusses how state law and adjudication processes in Hindu and Muslim personal laws shape marriage, the conjugal family, and women's rights from above. I also discuss the state project of penetrating society, demarcating group boundaries, and protecting individual rights. This section is based on interviews with litigants and their family members, lawyers, social workers, NGOs, women's groups, and court personnel. The table below gives information on the respondents who had approached the state court.

**Table 4. Number of litigants interviewed.**

| Religion of respondents | Number of respondents who sought relief under matrimonial remedies | Number of respondents who filed for economic rights | Total |
|---|---|---|---|
| Hindu | 38 | 31 | 69 |
| Muslim | 15 | 36 | 51 |
| Total | 53 | 67 | 120 |

### Determining "Marriage," Outlining Boundaries of the Community, Protecting Individual Rights

Marriage ensures the reproduction of religious/ethnic groups, castes and/or sects; it entails entry of new members into the family and community and perpetuates the family. The institution of marriage also perpetuates and reinforces gender relations and the sexual division of labour within the family. Under state law, the issue of the validity of marriage

surfaces in decisions about the status of existing marriages, void marriages, nullity of marriage, the restitution of conjugal rights, polygyny, and maintenance. State law lays down criteria to determine valid Hindu marriage and shares its authority with societal actors in regulating both Hindu and Muslim marriage.[102] The state privileges heterosexuality in regulating marriage.[103] Hindu marriage is monogamous.[104] Hindu law contains elements of a contract and a sacrament (Menski 2003). For instance, the provision of mutual consent divorce and tacit consent to marriage[105] are contractarian characteristics of Hindu marriage. Express consent of parties is not required under Hindu law, but parties do not need to seek parental/familial approval or consent before performing marriage since the lack of consent renders a marriage invalid.[106] However, acceptance of child marriage as a valid marriage,[107] the lack of legislation on marital rape, and matrimonial remedies such as restitution of conjugal rights negate personal autonomy and consent as grounds of Hindu marriage.

---

[102] Registration of marriage is not compulsory under religious personal laws. The state upholds that marriage be a public affair requiring the presence of either a civic official or a religious authority. For instance, while enforcing Hindu law, the state defines what construes a valid Hindu marriage but not with rigid precision, allowing customary variance in the solemnisation of marriage. It is argued that the state often recognises informal marriages in practice (Menski 2003, 33). However, there is also considerable evidence countering this claim (Agnes 1994, 1999). The state also lays down criteria of prohibition against marriage between persons, once again allowing for customary divergence. The state allows for customary dissolution of marriage but aims to uphold individual rights in cases where customary laws violate provisions of Hindu law.

[103] Courts have held that marriage is between a male or a female, and a transsexual person is considered valid under the Hindu law, as is marriage between transsexuals (Diwan 1985, 107; Nijjar 1994, 110). The state does not register homosexual unions and indeed criminalises it as sodomy is an offence under Section 377, Indian Penal Code.

[104] Section 5, Hindu Marriage Act, 1955.

[105] Section 5 (ii) (a) of the Hindu Marriage Act, 1955 requires that a person be capable of giving valid consent.

[106] See the discussion on void and voidable marriages.

[107] Under Section 5 (iii), child marriage is valid but punishable. The punishment for child marriage is Rs.1000 or simple imprisonment for fifteen days, or both. The wife in such a marriage can obtain divorce under Section 13 (2) (iv) of the Act, if her marriage was solemnised before she was fifteen years of age and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. No corresponding relief is given to a male child (Nijjar 1994, 9).

Muslim marriage is a contract (Section 250, Mulla[108] 1955, 230) undertaken between persons of sound mind (Section 251, Mulla 1955, 230).[109] Muslim Personal Law prohibits marriages between agnates, and in some cases, cognates, foster children, and women undergoing *iddat*[110] (Mulla 1955, 232-235). However, the lack of legislation on marital rape and the provision of matrimonial remedies, such as the restitution of conjugal rights, conflict with the conception of marriage as a contract among Muslims.

It has been argued that the Indian state's regulation of religious personal laws fixes religious identities of its subjects and creates communities (Cohn 1996; Pandey 1992; Shodhan 2001). The state allows monogamous marriages between Hindus of different castes and thus facilitates the interaction among members of different sections of Hindu society. Similarly, Muslim Personal Law allows intermarriage among members of different sects of Muslims.[111] Interreligious marriages are regulated by the state under the provision of secular law, The Special Marriage Act, 1954. Thus, family laws define criteria for intermingling across groups as well as within religious groups.

The discussion of void and voidable marriages under Hindu and Muslim personal laws in the following section outlines criteria established by the state to regulate marriage and to police the boundaries of the community.[112] I show that while distinct provisions of

---

[108] I have privileged Mulla's "Principles of Mohemeddan Law" over other texts such as Fyzee (1965) since lower courts and, indeed, the Bombay High Court tend to pursue this text (Interview with Niloufer Akhtar, Lawyer, 3 June 2003, Mumbai).

[109] A Muslim marriage is comprised of an offer (made by a woman or her guardians), an acceptance of the offer (by the groom), and a payment of dower (Mulla 1955, 230-231).

[110] The period of *iddat* in the case of a divorced woman is defined as three menstrual courses after the date of divorce, if she is subject to menstruation; three lunar months after her divorce if she is not subject to menstruation; if she is pregnant at the time of divorce, the period between divorce and the delivery of the child or the termination of her pregnancy, whichever is earlier. *Iddat* is a period of three months and ten days.

[111] See Section 258, Mulla 1955, 234.

[112] In many cases of interreligious marriage, one of the parties in the marriage chooses to convert to another religion and marry under religious personal laws. In such cases, the state is often called upon to define the validity of the conversion. See D.Y. v. Y.R., Family Court Records, 2002; R.M v. A.M., Family Court Records, 2002.

Hindu and Muslim personal laws regulate the matter of what constitutes a valid marriage, the state courts use the Family Courts Act, 1986, which subsumes these distinctive provisions and standardises the criteria to determine valid marriage.

### *Void and Voidable Marriages: Streamlining Family Laws and Protecting Individual Rights*

The state regulates entry into marriage by prescribing the ceremony and establishing criteria for valid marriages. The Family Court can pass a decree of nullity of marriage under Sections 11 and 12 of the Hindu Marriage Act, 1955 (HMA) in cases of void and voidable marriages.[113] Under Hindu law, marriages are declared invalid on the basis of violation of kinship restrictions,[114] the existence of current marriage, and the use of force to override non-consent of the marriage partner.[115] Non-performance of religious ceremonies is also grounds for nullity of marriage, and there exist diverse legal precedents

[113] Section 11 of the Hindu Marriage Act lays down three grounds for voidable marriages: 1) neither party should have a living spouse at the time of marriage; 2) that the parties are not within a prohibited relationship; and, 3) they are not *sapinda*s of each other. Marriages between parties would be considered valid wherever customs applicable to parties allow the marriage among *sapinda*s and the degree of prohibited relationships, but not in cases of polygyny. Section 12 of the Hindu Marriage Act, 1955 lays down conditions for voidable marriage that include non-consummation, non-consent due to mental condition, evidence of force, fraud, and pregnancy of the wife at the time of marriage.

[114] Section 5 (iv) of the Hindu Marriage Act, 1955 allows for customary divergence. In a case involving marriage between fraternal kin-members, the couple sought advice from a lawyer, asking whether marriage between close cousins was permissible. The lawyer answered in the affirmative since such marriages, though rare, were not uncommon in their caste. However, both families objected to the marriage, and the couple decided to end the marriage. The same lawyer filed a case to nullify the marriage as this legal strategy represented "a swift way of ending the marriage opposed by the society" and the court declared the marriage null and void as it violated the prohibitory decrees under Hindu law. The Family Court does not investigate deeply into the validity of the custom in cases filed with mutual consent. However, in another case, the court had asked caste members to verify whether such a custom existed in their caste (Interview with A. M., 6 March 2003, Mumbai).

[115] In a case of inter-caste marriage, the petitioner woman filed a case under this Section to declare her marriage as void, claiming that she was forcibly led to enter into the marriage by her lower-caste lover. The judge opined in her favour (Interview with C. N., 8 November 2002, Mumbai).

discussing whether *saptapadi* (a ceremony in Hindu marriage that involves walking around the sacred fire seven times) is essential to Hindu marriage.[116]

Under Muslim Personal Law, a marriage may be valid, irregular, or void (Section 253, Mulla 1955, 231). There is a distinction between void marriage and irregular marriage in Muslim Personal Law:[117] an irregular marriage can be terminated by either party by the verbalisation of the intention to separate (Section 267, Mulla 1955, 237); a marriage undertaken without witnesses is irregular but not void (Mulla 1955, 232).

The Family Courts Act, 1984 serves as an overarching law obscuring specific provisions of religious personal laws in cases of interreligious marriages undertaken after the conversion of one of the parties after marriage. For instance, a bulk of cases under Section 7 (a) (b) of the Family Court's Act consists of interreligious marriages.[118] Parties seeking a decree of nullity in interreligious marriages after conversion of a party to another religion are processed[119] on the grounds of insufficient proof of conversion, non-

---

[116] A petitioner wife filed for nullity of marriage under Hindu law claiming that she and her husband had solemnised their marriage in a marriage bureau in the presence of the husband's mother and brother. According to the wife, the ceremony consisted of exchanging garlands in front of a Hindu deity in the presence of a Hindu priest who recited a few mantras. The marriage was also registered under Hindu law. The parties lived together for six months after marriage. The petitioner claimed that the marriage was invalid as there was no performance of *saptapadi*. The Family Court held the marriage as valid as the marriage was performed with the consent of both parties and in the presence of witnesses. There was no *saptapadi*, but the parties had failed to prove that *saptapadi* was essential to rites and customs prevalent in their communities. "There is always presumption in favour of validity of marriage when some sort of marriage ceremony is undergone by the parties." (See S.I. v. M.I., Family Court Records, 2002, Mumbai).

[117] As per Section 264, a void marriage is one that is unlawful in itself in the sense that prohibition against it is absolute and does not "create any civil rights or obligations between parties (Mulla 1955, 236). Irregular marriage, on the other hand, is not unlawful in itself. Prohibition to this marriage is temporary or relative and can be rectified (Mulla 1955, 236). For instance, a marriage contracted in the absence of witnesses can be deemed as irregular as this irregularity can arguably arise from an accidental circumstance (Mulla 1955, 236).

[118] The Indian state legalises interreligious marriages through the Special Marriage Act, 1954. However, in many cases, runaway couples find it easier to opt for religious personal laws through conversion of one of the parties, usually women, as the process is swift and private.

[119] In a case of interreligious marriage, a Hindu woman who had converted to Islam and married under Muslim Personal Law filed for nullity of marriage under Section 7 of the Family Court's Act, 1986. The judge held the marriage valid but did not consider the criteria of valid marriage under Section 253 (Mulla 1955, 230) of the Muslim Personal Law; rather, he considered the issue of validity of conversion (and had

performance of ceremonies, and the use of force to override non-consent of a party without referring to individual provisions of either Hindu or Muslim personal law.

The state seeks to guard individual rights against societal practice. In some instances, the state constructs marriage as a matter of choice and individual freedom, and it protects the individual rights of litigants from societal and parental pressure. Tensions between state and society appear in the foreground in cases filed under the validity of marriage under religious laws as well as under Section 7 of the Family Courts Act, 1984. The provision of invalidating marriage is psychologically attractive to couples who marry "emotionally," without considering their societal obligations and duties.[120] When faced with the prospect of societal pressure, they often wish for a speedy, "private" end to their marriage.[121] This is an area in which societal practices of parental approval/consent for marriage, adherence to caste endogamy, prohibition of interreligious marriages, and preference for retention of wealth within the family/caste circles conflict sharply with the notion of marriage as a matter of voluntary choice and individual right encoded in Hindu law.[122] While societal forces often try to manipulate the legal system to impose their ideas

---

filed an affidavit in the court attesting to the fact), the absence of force, and the performance of a valid ceremony as criteria upon which to base the judgment.

[120] Interview with Nissar Ahmed, Lawyer, 19 February 2003, Mumbai.

[121] In a case filed under nullity of marriage, the parties had met at a youth camp and decided to marry in a temple in a small village in the Himachal Pradesh. They went back to live with their respective parents in different cities and realised that their parents would not be agreeable to marriage. They met a lawyer and filed a case under Section 7 of the Family Courts Act, 1984, stating non-performance of ceremonies as grounds to nullify their marriage. Both the families remained unaware of the marital status of Aditi and Vikas (Interview with V. K., 6 March 2003, Mumbai). In a case of marriage between fraternal kin, both the families were aware of the marriage and the subsequent case, but this "episode" remained unknown to the extended family and kin members (Interview with A. H., 17 January 2003, Mumbai). There is a psychological reassurance to the parties that a marriage that is not sanctified by society is also not considered to be marriage by the state.

[122] In one case, a Hindu woman was forced to file a case seeking annulment of marriage to a Muslim man after being imprisoned by her family for a month. She was made to sign papers alleging that her husband had forced her into marriage. She agreed to file the case and then used the opportunity to meet her husband in the court and escape together. "If we could not escape, I was prepared to tell the judge my natal family made me lie and cheat and not my husband." The parties withdrew the case in a month's time (Interview with R. N., 16 March 2003, Mumbai).

of marriage,[123] the court often protects the individual rights of the parties in the face of familial attempts to override individual choices.[124] However, judges use considerable discretion in such cases, and as a result, the outcome of such cases is not predictable.[125]

The following section reiterates how the state standardises family law by resorting to provisions of the Family Court Act, 1984 and subsuming individual personal laws under this provision. The section also argues that there are pockets of similarity in the adjudication of Hindu and Muslim personal laws in the state court.

---

[123] Lawyers often tend to tailor the testimonies of their clients to prove non-consent to marriage as grounds for nullity. In a case of interreligious marriage, the petitioner, a Hindu woman, and the respondent solemnised the marriage according to Muslim rites after the petitioner converted to Islam. She was pressured by her family into filing a case under Section 7 of the Family Court's Act, 1986. Her petition states that "she was cheated by the respondent in a preplanned manner. The respondent 'purposefully befriended her, took her signature forcefully and fraudulently on the marriage registration form and affidavit of conversion, he threatened her and her family with dire consequences is she failed to cohabit with him." Case of R.N. v. A.M., December 2002, Filed under Section 7 of the Family Court's Act and filed for annulment under as per the Mohmmedan Law.

[124] In a case involving marriage between Deena, a Hindu woman, and Yusuf, a Muslim man, the wife sought to nullify the marriage under Section 7 of the Family Court's Act. Deena and Yusuf had solemnised their marriage according to Muslim rites after Deena, a Hindu, converted to Islam. They obtained an affidavit of conversion and registered the marriage with a *qazi*, as per Muslim Personal Law. When Deena announced the marriage to her parents, her parents imprisoned her in the house. When Yusuf attempted to reach her, he was taken to the police station by Deena's father. The police were sympathetic to her father's plight and "beat Yusuf up" and told him that his marriage was invalid as it was not registered in court. Deena's father refused to let Yusuf see her. Deena caved in and asked Yusuf to divorce her. Deena's father claims to have gone from "pillar to the post" trying to "undo her deed" for almost a year. Deena's father refused to give *khula* and refused to accept the unilateral divorce that Yusuf agreed to give Deena because "that would mean accepting her conversion." These options were not acceptable to Deena's father. In the end, Deena was coerced into filing for nullity of marriage under Section 7 of the Family Court's Act, 1986. Yusuf did not accept the summons of the court and did not present himself in court. The court held the marriage valid in an ex-parte judgment. The judge reasoned that the marriage had fulfilled the conditions of valid Islamic marriage, and the petitioner did not claim to be forced into the marriage. Deena's father is "seeking other legal opinions." The lawyer could also seek annulment of marriage, but that would have meant acceptance of both the conversion as well as the marriage by the court and society (Interview with D., 18 March 2003, Mumbai).

[125] In one case, a Hindu man from a privileged family background had married a Muslim prostitute who had converted to Islam. He had a valid conversion certificate as well as proof of marriage, but he claimed that he was forced into marriage by a pimp and was being blackmailed with the threat of social exposure. The court granted an ex-parte divorce in this case despite the fact that he did not produce evidence of threat and blackmail. In another similar case, the court refused to grant a decree of nullity to a Hindu woman as she had not proved threat and coercion (Interview with H.G., 6 June 2003, Mumbai).

## The Provision of Restitution of Conjugal Rights and the Standardisation of Hindu and Muslim Personal Laws

The Restitution of Conjugal Rights is a matrimonial remedy under Hindu and Muslim personal laws as well as under Section 7 (a) of the Family Courts Act, 1984. This provision contravenes consent and individual freedom as a basis of marriage. The decree calls upon the respondent to return home to the petitioner within a specified time period; however, this order of cohabitation is not legally enforceable, and failure to comply with the decree does not carry legal sanctions. In order to be awarded a decree, parties must demonstrate a sincere desire to resume cohabitation.[126] The provision is used by both male and female litigants to pave the way for divorce or judicial separation since disobedience of a decree of restitution is seen as a form of statutory desertion and thus grounds for divorce. Thus, restitution is not seen to be a remedy in itself, but it is seen as a stepping stone for other remedies.

The issue of whether the Family Court has the jurisdiction to try cases of restitution of conjugal rights under Muslim Personal Law was debated when a Muslim petitioner husband had filed a case for restitution of conjugal rights against his wife. The respondent wife argued that only the High Court had the jurisdiction to entertain cases filed for the restitution of conjugal rights under Muslim Personal Law.[127] However, the Family Court ruled that "(t)he Family Court has the jurisdiction to entertain suits of restitution of

[126] A petitioner husband filed for restitution of conjugal rights while alleging his wife of cruelty and desertion. Denying the decree to petitioner husband, the judge noted that "The parties are not represented by lawyers... I myself have tried for reconciliation but find that it is not possible... His claim of reconciliation is not genuine but filed with a view to obtain divorce if she does not comply with the restitution order... if he was sincere in calling her back, he would not have made serious allegations of cruelty against her" (Family Court Records, Mumbai, 1998). In another case, too, the petitioner husband, a lawyer, had filed a case of restitution of conjugal rights against his second wife. The wife accused the lawyer husband of "malafide intentions by involving her in lengthy litigation through his knowledge of law" and claimed that "he (had) beaten her... and (was) shedding crocodile tears by filing this petition." The judge refused to grant the decree. Case records, M.V. v. N.V., Family Court Records, 2002.

[127] Mulla's "Principles of Mohamedan Law" mentions restitution of conjugal rights as a remedy under Section 281 of Muslim Personal Law (Mulla 1955, 246).

conjugal rights filed under Section 7 (a) of the Family Court's Act (and given that) the Family Court is established with a view to (ensuring) speedy justice and... for restoring peace and harmony within the family... there was no reason why Muslims should not get any benefits of filing redressal of grievances regarding restitution of conjugal rights or any other matrimonial matter" (Family Court Records Mumbai, 1998).

Cases filed under this Section are processed using similar criteria for Hindu and Muslim litigants. For instance, this provision is often spuriously used by husbands to harass women and drag them into lengthy litigation. It is often used to control the wife's sexuality and property and to counter maintenance claims made by the wife.[128] Respondent husbands also use this remedy to counter wives' petitions for maintenance. While it is argued that in some cases wives can claim maintenance even if they fail to abide by the decree of restitution (Sagde 1996), case law developments seem to be more diverse.[129] The provision is used more by Hindu women in order to prove constructive desertion and to claim maintenance under Hindu law. However, the nature of adjudication makes similarities between the cases more striking.

[128] In a case filed under civil maintenance by the petitioner wife, the husband responded by filing for restitution of conjugal rights. The husband had deserted his wife for many years but filed for restitution as soon as she filed for maintenance (Interview with M. G., 12 April 2003, Mumbai). In another case, a Muslim husband filed for an injunction against the wife for the sale of property and then filed for restitution of conjugal rights (Interview with M. M., 3 January 2003, Mumbai).

[129] In one case, the wife had filed for maintenance under Section 125, Cr. P.C., and the husband filed for restitution of conjugal rights. The court gave an ex-parte order in this case in favour of the husband because the wife lived in another city and did not have the resources to travel. This adversely impacted her claim of maintenance (Interview with S. B., 14 March 2003, Mumbai).

## The Regulation of Polygyny under Hindu and Muslim Personal Laws

The Indian state has not instituted a standard family form. The state forbids polygamy, polyandry, and group marriage among Hindus.[130] The state recognises polygyny under Muslim Personal Law. This provision is seen as discriminatory and in violation of the rights of Muslim women and has been criticised by feminists, legal scholars, sections of the media and public as well as by the Hindu right.[131]

Polygyny among Hindus persists despite the state's attempts to prohibit the societal practice. Feminists have pointed to a higher prevalence of polygyny among Hindus ("Towards Equality" 1974) and have questioned the juridical apathy in regulating and punishing polygyny among Hindus. A section of feminists and other scholars have favoured more effective laws to curb polygyny among Hindus (Parashar 1992). However, many other feminist analyses have suggested a need to shift the focus of action from prosecuting men to protecting the rights of women in informal relationships (Agnes 2000, 207; Forum against Oppression of Women 1996; John and Nair 2000). It is also suggested that the provision and the enforcement of economic rights to women in such relationships would curb male polygyny (Forum against Oppression of Women 1996).

Menski offers an interesting insight: the Indian judiciary has taken a sophisticated approach in dealing with polygyny in the sense that it does not favour Muslim polygynists by refusing to implement the strict legal prohibition of polygyny across all religious lines (Menski 2003, 423). However, the state ensures that Hindu women who complain against

---

[130] Sections 5 (1) and 11 of the Hindu Marriage Act, 1955 prohibit polygyny as well as polyandry among Hindus. Polygyny is also punishable under Sections 494 and 495 of the Indian Penal Code. In order to prove polygyny, the petitioner would have to prove that spouses are legally married, that either spouse has entered into a second marriage during the subsistence of the first marriage, and that necessary ceremonies of the first marriage have been performed. Courts require strict proof of polygyny, prioritising the form as opposed to intent of marriage (Singh 1988).

[131] However, the focus of the Hindu right's ire has been the privileges extended to Muslim men rather than a concern for the plight of Muslim women.

polygyny are heard, and that the economic rights of women and children caught in polygamous relations are protected (Menski 2003, 425-426). The picture seems to be more ambiguous on the ground, and the state speaks in a polyphony of voices when it comes to this matter. For instance, the state has formed an ordinance ensuring strict compliance to monogamy among Hindus working in government service, with a note that the Government of India can permit a party to enter into such a marriage if it is satisfied that such a marriage is permissible under his personal law.[132] The state disallowed religious conversion of a Hindu man to Islam allegedly undertaken to take advantage of the provision of polygyny in a widely publicised case (Sarla Mudgal v. Union of India, AIR 1995 SC 1531).

At the level of the Family Court, the data show that polygyny among Hindus is difficult to prevent, even in cases where petitioner wives have managed to furnish proof of impending second marriages of the husbands.[133] Cases of polygyny also come to light when the second wife files for maintenance (Agnes 1995, 1999). Hindu wives are forced to move the court to affirm the validity of their marriage in light of polygyny.[134] Many instances of polygyny among Hindu men are cited in Family Court records, but lengthy and expensive

---

[132] Ministry of Personnel, P.G. and Pensions, Government of India's Letter No. 2012/98-AIS (III), 8 March 1999, as cited in *Muslim India*, 196 (April 1999): 174.

[133] A Hindu wife wishing to prevent a second marriage of the husband can do so under Section 9 of the Code of Civil Procedure, 1908, read with Section 38 of the special Relief Act, 1963 as there is no specific provision under the HMA to grant a temporary injunction to a wife against her husband's second marriage. However, Section 4 (a) of the Hindu Marriage Act, 1955 is also used for this purpose: a Hindu wife who has separated from her husband for more than five years came to know of her husband's intention to remarry without divorcing her. She managed to obtain a copy of his wedding card and filed for an injunction. She managed to stop the marriage from taking place at the scheduled time and place, but the husband remarried after that and even registered his second marriage. The wife managed to get a copy of the registration of his second marriage under Hindu law and filed a motion in court to validate her own marriage with the respondent. The court held the first marriage as valid. The first wife did not seek to file a criminal case against her husband because she wished to file for maintenance for herself and two children; filing a criminal case would have antagonised her husband, and she was scared that her two sons would lose rights to his property (Interview with D. P., 16 February 2003, Mumbai).

[134] In one case, a second wife was denied maintenance because the court did not recognise her marriage performed under customary rites (Interview with P. H., 6 May 2003, Mumbai).

court proceedings and different legal priorities prevent women from prosecuting their husbands for polygyny.[135] Hence, there is diffused evidence on the Indian state's desire to protect vulnerable women and children from polygyny.

Muslim Personal Law allows polygyny, and as a result more than one wife can file cases for maintenance for themselves and children under Section 125, Cr.P.C. They can also file for compensation after divorce under the Muslim Women's (Protection of Rights on Divorce) Act, 1986. The adjudication process throws up similarities in the courts' construction of polygyny committed by Hindus and Muslims. For instance, contracting a second marriage by the husband is recognised by the Family Court as grounds of cruelty and constructive desertion among both Hindus and Muslims[136] in cases filed under the Dissolution of Muslim Marriage, Act, 1939[137] as well as in cases filed under Section 125, Cr.P.C. Analyses of case judgments in cases filed under Section 125, Cr.P.C. reveal that Muslim husbands who practice polygyny tend to show a decreased ability to support first

---

[135] In a case for maintenance, a petitioner wife cited polygyny as a reason for leaving the matrimonial home. Compelling the petitioner wife to consent to husband's second marriage was cited as cruelty in a case of maintenance filed under HAMA (N.M. v. R.M., filed in 1998, Family Court Records, Mumbai). Four Hindu women who had filed for maintenance for themselves and their children reported that their husbands had married again, but they did not wish to pursue a criminal case against them as they did not see any hope of reconciliation, and they did not wish to approach the court to punish their husbands (Interviews with I. K., 3 March 2003, Ahmedabad; R.M., 5 April 2003; M.N., 14 February 2003; H.M., 3 May 2003, Mumbai). In another case of maintenance, the wife alleged that her husband had deserted her and was living with his second wife (Interview with N. J., 15 March 2003, Mumbai). In another case filed under Section 7 (d) of the Family Courts Act, 1984 for right to reside in the matrimonial property, the wife and social workers of a local NGO gave evidence of a second marriage of a husband. The wife had not filed a criminal case against the husband even in this case (Interview with Irene Sequiera, Lawyer, 8 June 2003, Mumbai). In another case, a woman sought to validate her marriage as legal because she wished to retain her sons' right to the inheritance of her husband's property: "I have two sons—I want them to have a share in their father's property as legal heirs. His children from the second marriage are illegal—this step today will benefit my sons someday" (Interview with D. P., 13 April 2003, Mumbai). Indeed, the denial of divorce to legally guilty men has also led to them contracting second "marriages" in several instances (Interviews with H. P., a husband who was denied divorce and has married again, 16 April 2003; D. G., 4 March 2003, Mumbai).

[136] Interview with Z. M., 6 March 2003, Mumbai, in a case filed under Dissolution of Muslim Marriage Act, 1939.

[137] Interview with J. N., Litigant, 6 April 2003, Mumbai.

wives in light of their increased liabilities of maintaining two families. However, judges have proven to be unsympathetic to this line of argument.[138]

**Divorce in Hindu and Muslim Personal Laws**

While adjudicating on cases of divorce, judges are required to balance contradictory visions about family, sexuality, and marriage instituted in the Hindu Marriage Act, 1955, the Dissolution of Muslim Marriage Act, 1939 as well as in the Family Courts Act, 1984. Both Hindu and Muslim personal laws allow for mutual consent divorce. However, the Family Court's Act, 1986 establishes procedures for reconciliation as a necessary part of divorce.[139] This emphasis on reconciliation contrasts sharply with the societal practice of easy divorce prevalent in some societal groups.[140] Hindu law is not monolithic, and, in most cases, the notion of divorce as harmful to public morality, the institution of the family, and women's status coexists rather uneasily with the notion of individual freedom. As a result, we see judges maximising cooperative decision-making through the facilitation of mutually agreeable solutions while upholding the judicial tradition of adversarial litigation.

Section 13 (a) of the Hindu Marriage Act, 1955 specifies the grounds for divorce under certain conditions. The guiding principle of this provision is that divorces are granted on the basis of the commission of a matrimonial offence. Hence, courts examine

---

[138] In such cases, judges are not sympathetic to Muslim husbands' responses to fight maintenance claims of first wives to support the second wife and a subsequent family (Interview with S. M., 7 May 2003, Mumbai).

[139] For instance, see Section 2 (e), Statement of Objects and Reason, the Family Courts Act, 1984. The Section makes it "obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply" (the Family Court's Act, 1986, 2).

[140] This vision of the state is not shared by many caste and sect groups that allow easy access to divorce. Cases from these castes, which have to be rubber-stamped by the court, are not subjected to judicial scrutiny if they are filed under Section 13 (b) of the Hindu Marriage Act, 1955 and if parties convince the social workers of their "caste traditions" (Interview with P.W., 13 September 2002, Mumbai).

the nature of the respondent's conduct before granting a divorce. Divorce by mutual consent is possible under Section 13 (b) of the Hindu Marriage (Amendment) Act, 1976.

The most common form of divorce in the Family Court is divorce by mutual consent. Divorce by mutual consent involves the severance of relationships, the settlement of custody matters, and post-divorce financial arrangements. In cases of divorce by mutual consent of parties filed under Section 13 (b) of the Hindu Marriage Act, 1955, parties present themselves before the judge and answer questions with respect to the jurisdiction of the court as well as the authenticity of the terms of agreement arrived at by mutual consent. However, the court needs to be convinced of the impossibility of reconciliation between the parties.[141] The core of the divorce procedure lies at the negotiations that take place before the social worker or between lawyers of both parties or between the parties themselves. Decisions about mutual consent divorce take place at the societal level through the intervention of societal level actors.[142] Post-divorce financial settlements are lowest in cases filed under mutual consent.[143] Spouses tend to avoid mutual financial obligations beyond divorce, and custodial parents tend to cover childrearing and educational expenses. Maintenance from non-custodial parent is rare.[144]

---

[141] "Both the social worker and the judge tried very hard to reconcile us... They told us that there seemed nothing wrong with this marriage. I was supposed to stay with a person I did not love simply because he was not an alcoholic or a gambler!" (Interview with S. P., 12 October 2002, Mumbai).

[142] In some instances, parties file under Section 13 (B), HMA to officially validate their customary divorce (Interview with G. M., 8 April 2003, Mumbai). In one case, parties had approached a women's organisation for counselling and decided to file for a mutual consent divorce as reconciliation was impossible (Interview with P. P., 8 June 2003, Mumbai).

[143] Analyses of cases reveal that the majority of parties who opt for mutual consent divorce have been married for a short duration and do not wish to apply for maintenance, or they tend to file for dissolution of marriage under this Section.

[144] In my interviews, I encountered four cases in which husbands had agreed to provide limited child support. In two of these cases, the women had to move the Family Court periodically to recover maintenance in arrears (Interviews with D. P., 4 January 2003; P. W., 9 November 2002, Mumbai). One of these litigants had stopped filing for arrears after five years due to the "hassle of litigation" (Interview with P. W., 9 November 2002, Mumbai).

While a significant number of cases are filed as "mutual consent" settlements in the pre-trial stage as per the aims of the Family Court, the data show a high number of cases being converted into "mutual consent" applications *during* the trial, which indicates the primacy given to judge mediated/brokered negotiated settlements in adversarial judicial procedure as an institutional policy of the Family Court. While this conversion of cases increases the productivity of the court and heightens the quality of judgments as the outcome is acceptable to both the parties (Galanter 1986), it can also result in the loss of rights for women.[145]

Judicial decisions in cases of divorce are given only in cases where parties have failed to arrive at a mutually acceptable settlement. In many instances, judicially proclaimed verdicts of divorce do not result in higher financial settlements for women. Most commonly cited grounds for cases of contested divorce include desertion and cruelty.[146] Adultery is often cited as grounds, but courts require stringent proof of adultery.[147] Desertion includes unjustified retreat from the company of a spouse without his

---

[145] "Familial and external circumstances, desire to move on to the next phase of life, litigation expenses and tiredness of litigation process, change in residence, family and caste pressures and judicial pressure" are some reasons why women opt to convert the original petition to a mutual consent divorce even when the conditions of settlement are not as just (Interview with Nissar Ahmed, 19 February 2003, Mumbai).

[146] In cases of contested divorces, cruelty consists of gendered and communal representations. While divorce petitions present a distorted picture of causes of breakdown of marriage, marital misconduct on the part of "Hindu" wives include acts such as the refusal of sexual intercourse; disrespectful behaviour towards members of the marital family, relatives, and extended family members; a demonstration of unconcern towards children; the negligence of household duties; frequent visits to the natal home; being "too modern" and "fun loving;" performance of black magic; failing to wear *mangalsutra*; and accusing a husband of adultery. Respondents' wives often deny these charges by reasserting that "the respondent remained an obedient and docile Hindu wife and daughter-in-law." Hindu men's acts of misconduct include alcoholism, physical violence—though it is difficult prove since very few cases are registered under Section 498 (A), IPC (Dave and Solanki 2001), restricting the wife's mobility, threats of violence to wife and members of her natal family, mental cruelty consisting of verbal abuse, failure to maintain the wife and children, and disrespect to the wife. The exclusion of the wife's name in the wedding card of her brother-in-law comprises an act of cruelty as it shows disrespect towards the daughter-in-law of the "Hindu" family.

[147] A petitioner wife had filed for maintenance for herself and her son citing adultery as grounds for desertion. She was able to prove adultery by showing photographs of her husband and producing neighbours and relatives as witnesses (the husband had lived in the marital home with his lover). The case proceeded for five years before the final decree was given (Interview with M. K., 22 April 2003, Mumbai).

or her consent and with the permanent intention of separation (Bromley 1992; Sagde 1996). The spouse who leaves the matrimonial home is not necessarily the deserting spouse. Cases revolve around the issue of whether the spouse who has left the matrimonial home has done so intentionally or whether she was driven out of the house.[148] The fact of establishing *animus deserendi*, reasonable cause for deserting another spouse, depends on the judicial discretion of proving what amounts to reasonable cause of leaving the matrimonial home. Once again, acts of cruelty and, at times, adultery are cited as reasons entitling the innocent spouse to divorce.

The Family Court adheres to the stand of the Hindu Marriage Act, 1955 that no guilty party should obtain a court divorce over the objections of an innocent party of the marriage. It has been argued that courts have been unwilling to grant divorce to petitioner husbands on the grounds of cruelty in recognition of Hindu wives' difficult situations post-divorce due to the stigma attached to divorce among some Hindus (Menski 2001, 2003).[149] (However, data show that the Family Court repudiates contested divorce and thus pays implicit attention to non-financial harm to women.) However, it does not address the issue of financial impoverishment of women due to divorce. Hence, the decision of Family Court judges emanates from the desire to prevent divorces rather than awarding legal protection to women. Data show that women who contest divorces filed by their husbands

[148] Given the prevalent practice of patrilocality, wives are often compelled to leave the matrimonial home

[149] Menski has argued that the court's refusal to grant divorces to men indicates the recognition of social and financial hardships faced by women post-divorce (Menski 2001, 2003). Many women who have been driven out of their matrimonial homes do not wish to opt for a formal divorce. However, there exist diverse opinions among women with respect to the question of the loss of formal marital status. Women also show an unwillingness to go to court to formalise divorce. For example, a woman had left the matrimonial home with her three children after coping with years of abuse and alcoholism on the part of the husband. She moved to a different city with her children and found work there. The husband filed for divorce; the wife did not appear in court even though she had received the summons. She argued that "she had resolved to survive alone and did not wish for any help from him. She also claimed that she did not care about her marital status—he could obtain an ex-parte divorce if he so wished" (Interview with Jayaben, Litigant's sister, 6 January 2003, Mumbai).

and win in court do not gain financially in most cases.[150] Women litigants face financial stress as a result of litigation, and most have to rely on the support of natal families and, in some cases, extended families and relatives.[151] Women litigants who contest divorce seek to validate their conduct and position in society, and the court's refusal of divorce revalidates this.[152]

In a contested divorce case, the petitioner husband filed for judicial separation in 1997. The respondent filed a criminal case against her husband under Section 498 (A), IPC after which the husband converted his petition into a petition for divorce under Section 13 (1) (a) on the grounds of cruelty.[153] The wife then filed for restitution of conjugal rights and interim maintenance. The Family Court did not grant divorce to the petitioner husband.[154]

---

[150] A woman filed for divorce on the grounds of cruelty after seven years of marriage. She received the decree after three years. No financial settlement was made. She received custody of her three-year-old son. The respondent husband got visitation rights (Interview with M. H., 6 March 2003, Mumbai). In another case, a deserted wife filed for divorce and obtained it as her husband had left for the US after marriage and had failed, for three years, to sponsor her (Interview with J. P., 12 January 2003, Mumbai).

[151] About 58 women litigants who filed cases in the state court lived with their natal families. Five of them lived with extended family members, and only four women lived independently as their parents had provided a home for them and their children.

[152] Petitions of divorce filed or contested by wives are often eloquent on the mental agony suffered by them as a result of marital separation. They cite lowered prestige at their work places and facing harassment and malice from neighbours, friends, relatives, and colleagues. Reaffirmation of marital status in such circumstances is a seal of approval of their good conduct as wives (Interviews with S. D., 9 May 2003; H. S., 4 June 2003; K. P., 2 March 2003; M. J., 3 November 2002; I. S., 5 October 2002, Mumbai). A respondent wife had won a case against her husband after litigation of five years and separation of more than ten years, including the years of litigation. She had not filed for maintenance or alimony. The Court's decision "revalidated her harassment and upheld her case in eyes of the society as well as law" (Interview with S. S., 4 February 2003, Mumbai).

[153] The parties were married in 1996. The husband accused the wife of adultery and doubted the paternity of the child. He also accused her of cruelty of "wanting to terminate her pregnancy." He claimed that the wife had assaulted him while they were on a trip and had torn his shirt; he alleged that the wife had filed police complaints against him at various police stations and that she had caused him and his family great mental agony. The wife stated that her husband and in-laws treated her badly, did not give her food, and did not allow her to visit her natal family. She denied "extra marital relationships" and denied assaulting her husband and wanting to terminate her pregnancy. She also stated that she had filed a case under Section 498 (A), IPC only after her husband and in-laws had beaten her and had not allowed her to enter the matrimonial home. She argued that she had filed a case under restitution of conjugal rights. She also claimed maintenance under the Hindu Marriage Act for her daughter and herself; she had had a job earlier but had to leave it. She stated that the criminal case was filed by her under compulsion and that the husband could not take advantage of his own wrong for dissolution of marriage (see H.S. v. V.S., Family Court Records, 2002).

[154] The judge reasoned that the husband had failed to prove allegations of cruelty: he had not produced evidence to support his denial of paternity, the alleged adultery by his wife, or the proof of assault by his

Furthermore, the Family Court denied the wife maintenance under Section 25 of the Hindu Marriage Act, 1955 as the court could not "grant relief of maintenance under the HAMA, 1956 in proceedings under Section 25 of the Hindu Marriage Act, 1955."[155] In similar cases, the Family Court is more lenient towards women petitioners who file for divorce, though women tend to forego alimony in these cases. In some instances, the Family Court takes steps to ensure that the petitioner husbands do not take advantage of ex-parte divorces in cases of divorcing couples with minor children.[156] However, the Family Court granted an ex-parte divorce to a petitioner husband when his wife, who resided in rural Maharashtra, filed her written statement but did not present herself in court despite being "contacted repeatedly."[157] The Family Court is more lenient to husbands' pleas for divorce

---

wife. As for his claim that the respondent was forced to marry him, the judge stated that "no parents would force marriage over unhappiness of their daughter." The Court considered the claim of filing a criminal case under Section 498 (A), IPC as an act of cruelty as alleged by the husband. The judge opined that "it was pointed out by the respondent that when she went to... (the) police station to file a case, the police called both parties, and it was decided that the petitioner (husband) will take the respondent back but he has not done so. Even the criminal act was filed by the wife after the husband filed for judicial separation and therefore, filing of the case does not automatically prove that the respondent has treated the petitioner with cruelty." The petitioner had cited a case (JT 2002 (1) SC, p.25 Savitri Pandey v. Prem Chandra Pandey), and the court cited from the same judgment that "the ordinary wear and tear of family life and sensitivity with respect to conduct of the spouse cannot be cited as cruelty." (See H.S. v. V.S., Family Court Records, 2002.)

[155] The Family Court seems to have replicated the view of some High Courts in India that "the grant of ancillary relief under Section 25 of the Hindu Marriage Act is dependent on the grant of the main relief" (Sagde 1996, 53).

[156] In one case, a husband had filed for divorce on the grounds of cruelty claiming that his wife had deserted him and taken three young children with him. The wife lived in another city and did not attend the court for fourteen months despite having received summons. The court asked him to advertise the next court date in the largest circulating vernacular daily in the wife's city asking her to appear in court to attend the matter of divorce. The wife did not appear on the appointed date, and the court postponed the matter for six more months. The case was dismissed due to the petitioner's death (Family Court Records, 2002). In another case, the Family Court did not grant an ex-parte divorce to a husband. The petitioner husband had filed a case in 1998 for divorce on the grounds of cruelty after being separated for three years. The petitioner wife had filed her written statement contesting divorce and had remained absent since 1999. The court denied the husband an ex-parte divorce three years later on the basis of the wife's written statement. The judge opined that "every wife has always cherished her home and does not wish to leave it unless she is thrown out, especially where she has the burden of children... The testimony of the petitioner is silent on how she left the house. It is a strong circumstance to indicate that the petitioner treated her with cruelty and threw her out" (Family Court Records, 2002).

[157] The case was of inter-cousin marriage, and customarily such marriages are dissolved at the familial level. The respondent wife's family was seen as "lower" in status, and the act of the petitioner husband to file a case in court was seen as a "shameful act to assert their superior status." The respondent wife's family could

in cases where marriage is for a short duration, where the wife is more educated, "modern," and ably supported by her natal family;[158] when parties have lived apart for many years;[159] when parties do not have children; and when husbands have succeeded in proving adultery.[160]

### Divorce under Muslim Personal Law: The Debate over Triple *Talaq*

Muslim Personal Law recognises three types of divorce: *talaq ahsan*,[161] *talaq hasan*,[162] *and talaq ul bidaat*.[163] Historically, courts have recognised both oral and written divorce (Section 310Mulla 1955,).

The thrust towards the centralisation of law is evident in the lawmaking exercise of the Supreme Court and higher courts through the establishment of precedents in key issues that have percolated in lower courts for many years. For instance, one of the significant legal developments includes the repudiation of the practice of unilateral divorce by higher courts in landmark judgments that are also sensitive to the minority's claim to separate personal laws, as well as to the issue of gender justice. The issue of the validity of

---

not go to court as they felt they could never win and did not have money to fight a case in Mumbai (Interview with M. N., Maternal aunt of respondent, 7 March 2003, Mumbai).

[158] A petitioner husband had filed for divorce on the grounds of cruelty, accusing the wife of desertion, "modern behaviour," arrogance due to her higher education, and sexual issues. The respondent wife lived in the village with her family. She sent a written statement by post, counter-stating that she was an obedient and docile Hindu wife and was harassed by her husband and in-laws. She denied the husband's allegations. The husband was granted an ex-parte divorce in the Family Court on the grounds that the "main objection in the respondent wife's statement was technical... she had argued that the court had no jurisdiction over this case. However, the Family Court has jurisdiction over this matter because the couple resided in Mumbai" (H.H. v. B.H., Family Court Records, 2002, Mumbai).

[159] A husband was granted divorce after he proved a separation period of more than fifteen years.

[160] The petitioner husband was granted divorce on the grounds of adultery. The wife was also denied custody of the two minor sons.

[161] This consists of a single pronouncement of divorce made during a period of menstruation followed by sexual abstinence during *iddat* (Mulla 1955, 267).

[162] This consists of three pronouncements made during successive *tuhr*s with no sexual relations taking place during the time (Mulla 1955, 267).

[163] *Talaq ul bidaat* consists of three pronouncements made during a single *tuhr* in one sentence or a single pronouncement made during a *tuhr* clearly indicating an intention to dissolve the marriage irrevocably (Mulla 1955, 267).

unilateral divorce has received attention, and over the years, higher courts have tended to lay down criteria for authenticating unilateral divorce.[164] Recently, the Aurangabad bench of the Bombay High Court laid down the criteria in the Dagdu Pathan case.[165] Thus, the higher courts have tightened the procedure without negating the provisions and have consequently avoided theological conflicts.

The doctrine of legal precedent holds that following the dictates of the Supreme Court is the duty of the lower courts[166] (Carminkar 1994; Levinson 1993) and that lower courts are crucial to the interpretation and implementation of Supreme Court decisions (Johnson 1987, 325). However, it is unclear when a precedent is compelling enough to command judicial obedience from judges who resist it (Kelso and Kelso 1996; Lee 1999). In spite of legal precedents, the Family Court has tended to accept unilateral divorce without examining the conditions in which the divorce took place. Judges in the Family Court seek written proof of divorce (and hence do not accept oral divorce as valid),[167] but they do not investigate the conditions under which the divorce took place.[168]

---

[164] R. Bhatnagar, "On Triple *Talaq.*" *The Times of India.* 24 August 1998. See also Shamim Ara v. State of U.P., 2002, AIR SCW 4162.

[165] See discussion in *Muslim India*, 237 (September 2002): 426. The Aurangabad bench of the Bombay High Court laid down the criteria to ascertain the validity of unilateral divorce if the recipient wife contests such a divorce. See Dagdu s/o Chotu Pathan v. Rahimbi Dagdu Pathan and Others, May 2002, Aurangabad bench of Mumbai High Court. *All India Maharashtra Law Reporter (Criminal)* 2: 1230-1261.

[166] Arguments in favour of legal precedent can be made from the standpoint of fairness ("treat like cases alike" Schauer 1987, 595), predictability (knowing the past decision helps anticipate present and future decisions), efficiency as each case requires little scrutiny and stability (cross-case differences are suppressed and emphasises similarities of the human condition) (Carminker 1994; Schauer 1987, 602).

[167] The issue of validity of Muslim marriages and divorce arises time and again in matrimonial legislation concerning the economic rights of Muslim women. Muslim husbands who divorce their wives must prove this divorce in court by showing proof of divorce. Standard procedure in cases of divorce has been to send a written notice of divorce to the wives along with the cheque or money order for *mehar* and maintenance during *iddat*. Wives have to sign the registered letter in order to accept the divorce. In many cases, wives refuse to sign the letter and claim ignorance of divorce. As a result, husbands cannot provide a valid proof of divorce in court.

[168] An enterprising husband managed to overcome this problem by giving a "public divorce" to his wife: he rented advertising space in the largest circulating daily in the town his wife resided in with her natal family and proclaimed divorce therein. The Family Court accepted this "public divorce as valid" (Interview with G. Q., 6 April 2003, Mumbai). Muslim women have used this tendency of the courts in their favour in a few

Several factors explain the non-compliance of precedents, such as the lack of knowledge,[169] the fear of the reversal of judgments (Amar 1985; Klein 1995),[170] the communal biases of judges (Mukhopadhyay 1998), and the desire to avoid controversy especially with respect to Muslim Personal Law. However, this non-compliance by lower courts leads to uncertainty in the legal process.

**Divorce under Muslim Personal Law: Issues in Statutory Divorce**

The Dissolution of Muslim Marriages Act, 1939 allows Muslim women to initiate judicial divorce[171] and lays down grounds for divorce.[172] Cases filed under this Act are also converted into divorce by mutual consent.[173] A litigant withdrew a case under this Act as the societal solution of divorce secured more rights than the one in the state law.[174] Muslim Personal Law accepts *khula* (divorce initiated by the wife and accepted by the husband

---

cases: a Muslim husband's petition under the restitution of conjugal rights was dismissed when the respondent wife argued that he had divorced her and therefore the court dismissed the case (Interview with A. M., 16 February 2003, Mumbai).

[169] In one case, a woman had signed a money order of Rs.5000, an amount equivalent to her *mehar*. The husband showed acceptance of *mehar* by the wife as a proof of divorce. The Family Court accepted this claim of the husband without investigating whether this portion of the dower was prompt or deferred. Intricacies of Muslim Personal Law are not usually debated in judgments of the Family Court (see N.S. v. S.K., Family Court Records, 2002).

[170] This doctrine derives from the power of one court to reverse the decisions of lower courts (Amar 1985; Klein 1994).

[171] It is argued that this Act represents the legal form of *khula* (Interview with Nissar Ahmed, 8 June 2003, Mumbai).

[172] The judicial construction of cruelty includes polygamy. In one case, a petitioner asked for divorce on the grounds of cruelty. She argued that her husband's second marriage was an act of cruelty towards her (Interview with F. S., 3 March 2003, Mumbai).

[173] In one case, the wife had field for divorce on the grounds of cruelty and desertion. The matter was decided by mutual consent wherein the wife got custody of the children and did not ask for maintenance or *mehar* as the husband was unemployed. The husband returned her *stridhan* (Interview with Y. R., 6 March 2003, Mumbai). In another case, the petitioner wife had claimed Rs.300,000 and the cost of litigation. The case was settled by mutual consent, and the wife received a sum of Rs.30,000 as part of *mehar* and *iddat* (Interview with S. K., 4 February 2003, Mumbai). See also Abdul Zalil Ahmed v. Mustt. Marina Begum, AIR 1999 Gauhati, 28.

[174] A litigant had filed for divorce under this Act, but her husband absconded to another city and thus did not accept the summons. She could have obtained an ex-parte divorce from the Family Court, but it would not have helped her recover her *mehar* that amounted to Rs.100,000 and *stridhan* valued at Rs.400,000. Her lawyer suggested that she use "extra-judicial means to persuade the husband." The family members withdrew the legal case and traced the husband to another city and recovered the dowry and obtained divorce after foregoing *mehar* as part of the bargain to obtain divorce.

under different bargaining arrangements)[175] and *mubaraat* (divorce by mutual consent) (see Sections 307, 319, 320, Mulla 1955). Judges in the Family Court accept the written form of unilateral divorce given by the husbands but do not readily recognise unilateral divorce by women (*khula*) since the Dissolution of Muslim Marriages Act, 1939 is seen as an equivalent of *khula*. Nor do the judges recognise legal innovations at the community level such as *faskh*.[176] In two cases, petitioner husbands had filed for restitution of conjugal rights, and the wife challenged the suit by showing proof of *khula* and *faskh*. Judges did not factor in unilateral divorce by wives while framing legal issues in their judgments, and they awarded the decree in the husbands' favour.[177]

Menski has argued that Hindu husbands can also unilaterally divorce their wives after obtaining an order for judicial separation and then later filing for divorce (Menski 2001). There are other similarities between Hindu and Muslim laws. Divorce by mutual consent is allowed under both religious laws. The Family Court's aim to prevent divorces in society is against the spirit of provisions of mutual consent divorce under Hindu and Muslim personal laws. Both the Hindu Marriage Act, 1955 as well as Dissolution of Muslim Marriage Act, 1939 allow divorce on similar grounds of fault, and the manner in which these grounds are construed in legal processes are similar as shown in the sections above.

---

[175] As per Section 319 (2), the wife may instigate the divorce only with the consent of the husband and is usually effected by the wife offering a compensation to the husband if he releases her from the marital bond (Mulla 1955, 272).

[176] *Faskh* is a judicially arbitrated divorce (Pearl 1987).

[177] Interviews with Y. S., 28 January 2003; H. S., 31 January 2003, Mumbai.

## Women and Property in Marriage and Divorce Laws

Family law establishes the state's control over the intra-household distribution of property. The state lays down criteria for the division of matrimonial resources. Family law is also subject to the state's policy of prevention of destitution, crime reduction, and protection of vulnerable members of the family. The Indian state's inability to provide welfare to vulnerable citizens has led the state to delegate this responsibility to the family through the enactment of laws on maintenance (Menski 2003).

### *Legal Provisions Applicable to Hindu and Muslim Women under State Laws*

The concept of matrimonial property does not exist under any personal or secular laws. However, Hindu wives are entitled to claim maintenance under the Hindu Adoption and Maintenance Act (HAMA), 1956.[178] After divorce or annulment of marriage, Hindu women lose the right to maintenance under this Act. Hindu wives are also entitled to seek alimony or maintenance when they petition for any of the matrimonial remedies available under the Hindu Marriage Act, 1955 as maintenance/alimony and custody matters are ancillary relief under this Act (Sagde 1996, 34). Divorced Muslim women can seek maintenance under the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

Married women of any religion can file for maintenance under Section 125, Cr.P.C. without filing for any matrimonial remedies under any personal laws. This Section is popular among poorer members of society since the recovery of arrears is easier: the law enables the Family Court to attach the property of the defaulter in case of non-payment of

[178] Maintenance defined under the HAMA includes the provision for food, clothing, residence, education, medical assistance, and treatment. The act also lays down the criteria to decide the quantum of maintenance. The courts are to pay due regard to the position and status of the parties, the reasonable wants of the claimant, and the value of the claimant's property and income derived from such property or from the claimant's own earnings or from any other source (Sagde 1996, 29).

maintenance. Married women across religious boundaries can file for an injunction under Section 7 (d) of the Family Court's Act, 1986. They also have a right to retrieve *stridhan*[179] during the subsistence of marriage or upon divorce.

In terms of matrimonial property, Muslim women are entitled to *mehar.*[180] In state law, a Muslim husband is bound to maintain his wife, and a Muslim husband does not enjoy the right to maintenance from his wife (Mulla 1955; Fyzee 1974). Section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939 allows a Muslim wife to seek divorce if the husband has failed to maintain her for a period of more than two years (Mulla 1955, 245). Middle-class Muslim women who have not been divorced can seek recourse to this provision under special circumstances.

***Maintenance and Alimony under Hindu Personal Law***

Maintenance and alimony is an ancillary remedy under the Hindu Marriage Act, 1955. Thus, women or men can claim maintenance or permanent alimony from the other spouse in cases filed under mutual consent divorce or contested divorce. It is an independent remedy under the Hindu Adoption and Maintenance Act, 1956. As per Section 18 of the HAMA, a Hindu wife is entitled to claim maintenance from her husband

[179] *Stridhan* is the woman's property, and the husband cannot alienate this property or mortgage it against her will. Legally, the wife retains control over this property and should receive her entire dowry whenever she needs it.

[180] *Mehar* is defined as "the sum of property which the wife is entitled to receive from her husband in consideration of marriage" (Mulla 1955, 249). Muslim women have a right to *mehar.* However, the amounts fixed are low, and the courts often require proof of payment of *mehar* to validate their claim of divorce. The courts do not supervise the payment of *mehar* in cases where husbands have been able to prove divorce. While Section 286 specifies that the amount of *mehar* should not be less than ten dirhams (Section 286, Mulla 1955, 249), the societal practice varies considerably across sect and class lines among Muslims. The amount of *mehar* can be fixed before or after marriage (Section 287, Mulla 1955, 250), and a wife is entitled to proper dower (*mahr-i-misl*) even if "the marriage was regularised under the express condition that she should not claim any *mehar* (Section 289, Mulla 1955, 250). There are two kinds of dower: prompt and deferred. The prompt *mehar* is payable on demand (payable upon the dissolution of marriage by death or divorce) (Section 290, Mulla 1955, 251). A wife—and after her death, her heirs—can sue for *mehar* (Section 292, Mulla 1955, 252). However, a wife may remit her *mehar* in favour of her husband; such remission is valid if made with free consent (Section 291, Mulla 1955, 252).

if the husband is guilty of cruelty, conversion, desertion, adultery, polygyny, or communicable disease.[181] Failure on the part of the husband to comply with the decree passed for the restitution of conjugal rights in the wife's favour does not disentitle a wife to maintenance under the HAMA, 1956.[182] A Hindu wife loses her right to maintenance if she converts to another religion or if she is proved to be "unchaste." While there is no provision to grant interim maintenance under this Act, the Family Court had granted the same in several cases.[183] These provisions of maintenance under the Hindu law contrast sharply with social practices of groups that practice bride-price as opposed to dowry, and they do not benefit women who are the primary earners in the family.[184]

While awarding maintenance under the Hindu law, the court considers the income and work of both spouses, custodial responsibility of both husband and wife after the termination of marriage, and their financial responsibility towards other dependents in the family. In rare cases, the court may also heed factors such as the length of the marriage as well as the age and health of both the spouses, but it does not respect the wife's contribution to the marriage in terms of her labour and social networks, which might have benefited the couple and shaped their lifestyle during marriage. Proof of the wife's employment, however menial, usually renders her ineligible for alimony or maintenance.[185]

---

[181] In one case, a woman had filed for maintenance under this Act. The husband challenged the validity of the marriage by proving customary divorce. The wife was granted interim maintenance of Rs.2000 per month (Interview with K. S., January 2003, Mumbai).

[182] See K.K. v. K. K., Family Court Records, 2002.

[183] Ibid. Also, Interview with K. S., 16 January 2003, Mumbai.

[184] In one case, a woman had paid for her husband's education and contributed to buying a house post-marriage. At the time of divorce, she was not entitled to maintenance and was also forced to partition the property and thus treat it as a joint property. Her contribution remained undervalued (Interview with S. H., 23 March 2003, Mumbai). I discuss this issue in greater depth in the following chapter.

[185] In one case, the petitioner wife had filed for divorce on the grounds of cruelty and had asked the court for interim maintenance for herself and her minor daughter during the period. The Family Court granted Rs.500 per month for the child but did not grant her interim maintenance since she worked as a secretary in a firm and earned Rs.2260 per month; this despite the fact that her salary would not support herself and her daughter even for a week (Interview with H. M., 23 February 2003, Mumbai). In another case, the Family Court

While the establishment of fault is an important criterion for awarding maintenance, fault does not always influence calculations in terms of maintenance and alimony under the Hindu Marriage Act, 1955[186] as well as under the HAMA, 1956.[187]

There are no standard measures to decide the amount of maintenance granted under this Act, but usually the amounts granted are less than one fifth of the husbands' income and property.[188] Settlement amounts are lowest in cases filed under mutual consent divorce.[189] Many of these marriages were of short duration and couples did not have children or joint financial investments. In mutual consent cases, only a few parents who did not have custody paid child support.

Legally innocent women have higher chances of obtaining financial settlements in cases of contested divorce that are "converted" into mutual consent cases.[190] Cases filed

---

refused to grant maintenance to a Hindu wife as the husband was able to prove that the wife worked as an insurance agent in an informal capacity (Interview with D. P., 5 May 2003, Mumbai).

[186] The Family Court denied a petitioner husband divorce as he was not able to prove cruelty on the part of the wife but did not grant the wife permanent alimony, reasoning that since the relief sought in this petition was refused and the petitioner husband's petition was dismissed, the ancillary relief of maintenance under the HMA could not be granted to the wife (V.S. v. H.S., Family Court Records, 2002, Mumbai.)

[187] In one case, a petitioner woman filed for restitution of conjugal rights as well as maintenance for herself and her children under the HAMA, 1956. The Family Court ruled in her favour, and the husband challenged the decision of the Family Court on the grounds that "had the petitioner been treated with cruelty, she would not have filed for restitution of conjugal rights." She filed for interim maintenance while the case was pending in the High Court. During this time, she came to know of the husband's intention to marry again, and she managed to get a copy of the wedding card of her husband's second marriage. She filed an application to uphold the validity of her marriage and to prevent the husband's second marriage and won the case. However, the husband married again in a few days and even went so far as to register his second marriage. The petitioner got a copy of this registration and proved polygyny on the part of the husband. The husband is a skilled worker in a company and earned Rs.6000 per month. The court ruled that the petitioner had proved desertion, adultery, polygyny, and cruelty on the part of the husband. The court also opined that the husband earned Rs.10,000 while the wife earned Rs.2600 (out of which she paid Rs.1500 for house-rent) and had the custody of children for past eight years. The wife had been deserted for eight years, and the husband had not maintained her or the children. However, the court did not grant maintenance to the wife as "she was earning" but granted maintenance of Rs.2000 per month as maintenance for children. In another case, a petitioner husband had filed for divorce. The wife filed for restitution and maintenance for herself and child. She claimed that she had to leave her employment because the husband made threatening calls to her office, and she had to quit her job due to his threats. The court denied interim maintenance on the grounds that the wife was capable of working (V.S. v. H.S., Family Court Records, 2002).

[188] Interviews with R. S., 16 April 2003; M. S., 18 March 2003; J. K., 4 May 2003, Mumbai.

[189] See Sagde 1996 for similar observations.

[190] Interview with J. S., 6 June 2003, Mumbai.

under Section 18 of HAMA, 1956 are often converted into cases of mutual consent under Section 13 (b) of the HMA, 1955.[191] In cases of divorce, the lawyers' perception of the general trend of courts being more likely to deny divorce to men results in the increased bargaining power of women.[192] Women's ability to bargain for a better financial settlement is higher in cases in which husbands have filed for divorce.[193] Women receive higher financial compensation in cases wherein they have filed parallel criminal cases, such as cases under Section 498 (A), Indian Penal Code as financial settlements are traded for the dropping of charges.[194] Women's ability to obtain an order to prevent the sale of the matrimonial home can lead to more property rights for them, especially when the husband and his family members need to sell the property or in cases in which the wife obtains an injunction while residing in matrimonial home.[195]

However, the cases of divorce in which the husband gains his freedom in exchange for a financial settlement favouring the legally innocent wife is often not as rewarding for women litigants. Women are often forced to compromise during the process of divorce since they come to realise their financial and social vulnerability in the litigation process.[196]

---

[191] A petitioner wife who had filed for maintenance agreed to a divorce by mutual consent and received Rs.100,000 as a settlement amount and recovered her *stridhan* (Interviews with P. G., 4 June 2003; V. T., 16 February 2003, Mumbai).

[192] Interview with H. G., 5 April 2003, Mumbai.

[193] See R. S. v. M. S., Family Court Records, 2002. The settlement amount in this case was Rs.5 lacs. However, the amount did not even match the wedding expenditure (Interview with S. S., 22 February 2003, Mumbai).

[194] In one case, a woman received the settlement of Rs.350,000 after agreeing to sign the divorce petition and dropping the case registered under Section 498 (A), IPC. In another case, domestic violence was severe enough for the woman to miscarry. In this case, the settlement amounted to Rs.100,00 (Interviews with R. S., 22 March 2003; N. P., 11 January 2003, Mumbai).

[195] A woman petitioner residing with her parents-in-law and children in Mumbai while her husband worked abroad filed for an injunction preventing her husband from throwing her out of the matrimonial home and obtained an order in her favour. She could also file for maintenance for herself and her children (Interview with A. N., 11 May 2003, Mumbai).

[196] In two cases, women won maintenance claims but opted for reconciliation "for (their) children's futures." A woman lawyer stated that "women come to me for advice about divorce but often do not opt for it as it can potentially render them penniless after years of marriage" (Personal Communication with Indira Jaising, April 1999, Washington D.C.). In another case of contested divorce, the wife was forced to reconcile as she

Women litigants find it difficult to prove the husbands' income and to produce relevant papers such as salary slips, land records, documents showing the registration of property, details of pension funds, income-tax returns, and investments.[197] Male litigants tend to have more financial resources than women and are able to hire better lawyers and thus escape the payment of maintenance and property.[198] The provision of an injunction against the transfer or sale of property under the Family Courts Act, 1984 is not as effective when women have been evicted from their matrimonial home and when the family have no immediate plans for selling the property.[199] Pressure by the court and social workers to arrive at a negotiated settlement can adversely affect women litigants who have made substantive contributions to their marriage.[200] In general, post-divorce settlement amounts are meagre, and often the divorced spouse must rely on themselves, the natal family, or the new spouse for material subsistence. While permanent alimony or settlement amounts in some cases may seem high,[201] the sum does not enable women to buy separate property, and as a result, they remain dependent on their natal families.

---

realised that the financial amount awarded to her would not be enough to sustain her (Interview with K. S., 5 February 2003, Mumbai).

[197] Interview with Veena Gowda, Lawyer, 6 April 2003, Mumbai.

[198] Husbands court arrest, resign from their jobs, or transfer their jobs to the name of another member in order to avoid payment. Husbands who work in family businesses claim lack of income as the excuse. They use lengthy court proceedings to "tire their wives" until they drop the case; they often intimidate their wives and family members on their way to court. They take loans and show deductions in their salary slips to claim low income and make false claims about their wives' earnings (Interviews with Veena Gowda, 6 April 2003; K. S., 5 February 2003; R.S., 7 March 2003, Mumbai).

[199] A petitioner husband filed for divorce and went to the U.S. for work. The respondent wife filed for restitution of conjugal rights under Hindu law along with the injunction against the sale or mortgage of the matrimonial home. She received a favourable judgement from the court and tried to re-enter the matrimonial home. However, her mother- and sisters-in-law prevented her entry into the home. The court injunction did not increase her bargaining position, and his family had no plans to dispose of the house. The settlement amount came to Rs.3 lacs.

[200] In one case, a wife had supported her husband for several years on her salary and later had filed for divorce and custody of children because the husband was violent. She was ineligible for maintenance since she worked in a school as a teacher. The husband refused to pay any maintenance for the children in exchange for divorce (Interview with S. P., 24 January 2003, Mumbai).

[201] Settlements in these cases remained between 1 and 5 lacs. While these seem large amounts, it is "less than the cost of the wedding we paid for" (Interview with R. S., 7 March 2003, Mumbai).

Divorce among Hindus leads to different economic and social consequences for women than it does for men. The most adversely affected divorcée women are homemakers, especially those with children who have been married for more than ten years; women in low-paying occupations;[202] women in low-income jobs who are ineligible for maintenance; and women whose lifestyle reduces drastically as a result of divorce.

### *Muslim Women's (Protection of Rights on Divorce) Act, 1986*

Divorced Muslim women can claim maintenance under the Muslim Women's (Protection of Rights on Divorce) Act, 1986. Section 3 of the Act specifies entitlements for divorced Muslim women.[203] In many instances, social workers, media persons, and even lawyers are unaware of the provisions and interpretations of this law.[204] Feminist and legal scholars have portrayed this Act as regressive and anti-women, and they have argued that divorced Muslim women are entitled to maintenance during the period of *iddat* under the Act (Narain 2001; Parashar 1992; Sagde 1996; Sunderrajan 2003). Recent literature has drawn attention to precedents from the Supreme Court and pro-women judgments of

---

[202] In most cases, husbands are able to retain their lifestyle whereas the same cannot be true of wife; an earning wife is seen to be able to "maintain herself" regardless of changes in lifestyle that divorce might induce. The lack of home for women is also overlooked though this renders a divorced woman dependent on her natal family. In one case, the court refused to give divorce to the petitioner husband and granted custody of the daughter to the wife but failed, on technical legal grounds, to give permanent alimony to the wife and the child despite the evidence that the wife was unemployed. Six months after the divorce, the wife, who was employed as a stenographer, had found employment again, but her salary was Rs.2400, and the money was not sufficient to support herself and her daughter. Furthermore, she lived in a small apartment with aging parents and a younger brother. "The situation will deteriorate further once (my) brother marries and has a family... where will I go with my daughter then?" (Interview with H. S. and her family members, 2 May 2003, Mumbai).

[203] The remedy is:

i. A reasonable and fair provision and maintenance to be made and paid to her during the *iddat* period by her former husband.

ii. an amount equal to the sum of *mehar.*

iii. all the properties belonging to her before or at the time of marriage.

[204] Interview with H. Sheikh, Criminal Lawyer, 15 March 2003, Mumbai. He appeared for a Muslim woman who had filed a case under Section 125, Cr. P.C. Upon being asked to explain his legal strategy, the lawyer replied that "divorced Muslim women are not entitled to maintenance beyond *iddat.*"

several High Courts, which have interpreted the Act liberally and have awarded fair settlement amounts to divorced Muslim women (Agnes 1999; Menski 2001, 2003; Subramanian 2005). It has been argued that the Act provides more rights to Muslim women than those granted under Section 125, Cr.P.C. There is no limit to the amount of maintenance awarded under this Act, and the Act can potentially open doors for the distribution of matrimonial property among Muslims (Subramanian 2005). It is my contention that the Muslim Women's Act, 1986 (MWA) provides additional benefits to Muslim women in ways other than those discussed above. In some respects, the MWA is more progressive than current matrimonial legislation among Hindus.

The following case illuminates my claim. A female Muslim petitioner had filed a case in the Family Court for maintenance. The husband proved that he had divorced her, and the case was transferred to the Metropolitan Magistrate's Court in 1998 to be tried under the Muslim Women's Act, 1986. The court delivered a judgment in 2000 asking the husband to pay a lump sum of Rs.200,000 to his wife, and he was also asked to pay *mehar* and *iddat*. During this time, the petitioner woman had married again. The respondent defaulted, and the magistrate gave an order of arrest. The respondent was jailed for forty-five days after which time he approached the petitioner to settle the case; he paid Rs.75,000 and returned her *stridhan*. The case was settled in 2003 and by then, the wife had a child from her second marriage.[205] (Divorced women who remarry lose their rights to maintenance under Section 125, Cr.P.C. In contrast, under the MWA the remarriage of divorced Muslim women during the course of trial does not nullify their claim to maintenance.) Before the enactment of this Act, divorced Muslim women belonging to upper and middle strata fell through the cracks as there was no provision to address their

[205] Interviews with Nissar Ghatte, 19 February 2003; Z. S., Litigant, 23 April 2003, Mumbai.

financial vulnerability post-divorce. They could not seek recourse to Section 125, Cr. P.C. as the amounts granted under this Section were too low for them to go through the process of litigation. The Muslim Women's (Protection of Rights in Divorce) Act, 1986 bridges this gap.

Under the Act, divorced Muslim women have more rights than divorced Hindu women have under the HMA. The HMA is gender-neutral, and both husbands and wives can claim alimony under the HMA whereas the Muslim Women's (Protection of Rights in Divorce) Act, 1986 awards settlements only to the wife. Divorced Hindu women can claim alimony or maintenance only under the HMA. Under the HMA, the payment of alimony and divorce often go hand-in-hand. As a result, Hindu wives who wish to obtain divorce often forego their alimony to arrive at mutually acceptable solutions. Also, contested divorce among Hindus is awarded on grounds of fault, and in several cases courts tend to deny the wife maintenance or alimony if she is found guilty.[206] Courts have also tended to deny alimony to Hindu wives in cases of dismissal of petitions for divorce.[207] Section 25 (3) of the HMA allows the cancellation of permanent alimony to the wife on the grounds of unchastity or remarriage. While judges have tended to rule that this provision is not an absolute bar disentitling the wife to maintenance,[208] the issue is left to judicial discretion.[209] Under this Section, maintenance under the HMA is subject to revision if there is some change in the financial circumstances of either of the parties. In some cases, this affects a Hindu divorcée's interests adversely. Divorced Muslim women, on the other hand, are not

[206] See for instance the discussion in Sagde 1996, 50-59
[207] See the discussion in the case of H.S. v. Z.S. Family Court Records, 2003, Mumbai.
[208] See Jaipal Kaur v. Ishan Singh, 1983 HLR 119 discussed in Sagde 1996, 59.
[209] See Diwan 1988, 591.

subject to these pressures since they can rebuild their lives while fighting for the fair and reasonable amount to which they are entitled.

A favourable order of maintenance does not guarantee the implementation of this order: a husband who has never appeared in court or has absented himself is not likely to pay maintenance. Maintenance amounts are difficult to collect in ex-parte orders that the court has ordered in the wife's favour.[210]

***Maintenance under Section 125, Cr.P.C.***

Married and divorced women and vulnerable members of families, including legitimate and illegitimate children and parents, across religions can apply for maintenance under Section 125, Cr.P.C. The Section is popular among the vulnerable members of the family since it provides speedy relief. In order to claim maintenance, a woman litigant has to prove marriage[211] and demonstrate that she is unable to maintain herself. A wife has to prove that the husband has deserted her or driven her out of the house and that he has sufficient funds to support her[212] but neglects to do so. It is also argued that the standard of

[210] In another case, a woman was granted an ex-parte order of maintenance of Rs.600 per month and Rs.500 in legal costs under Section 18, HAMA as she had been deserted for three years. The husband did not remain present in court after he had filed a written statement. The woman did not pursue the matter as she had "come to know that he had fled the city and was now living in a villager after contracting (a) second marriage." In another case, a woman was married and stayed in the village with her marital family while the husband lived in Mumbai. The couple had a child and the husband stopped visiting. The wife came searching for him in Mumbai and found that he had another wife in Mumbai. She filed a case for maintenance under HAMA for herself and her child. The husband failed to appear in court. After three years of litigation, the wife got an ex-parte order in court. She could not appear in court on the day of the judgment and did not follow it up with the lawyer and thus remained ignorant of the order in her favour (Interview with N.J., 10 March 2003, Mumbai).

[211] It is argued that proof of a valid marriage is not strictly necessary, and courts have presumed marriage in cases where women have proved cohabitation (Menski 2003). However, cases vary. A woman petitioner was denied maintenance under this Section as she was not able to prove customary marriage conducted without fanfare (Interview with C.D., 15 January 2003, Mumbai).

[212] Women whose husbands work in the public sector find it easier to prove income and collect instalments as worker turnover in the public sector is lower than in the private sector. It is also easier to attach the salaries of public sector employees through court orders. In two of the cases, husbands had quit their jobs in the public

proof required to prove cruelty and desertion is lower in these cases. Once again, there is a wide range of judgments in these cases.[213] Acts of adultery, separation by mutual consent, and refusing to cohabit with the husband without sufficient cause disentitles a wife to maintenance. The quantum of maintenance under this law is increased[214] and Section 127 Cr.P.C. allows the enhancement of maintenance under changed circumstances.[215]

Initially enacted as a public interest measure to prevent destitution, prostitution, and vagrancy, the Act enables the state to shift its responsibility to protect the vulnerable members of society (Menski 2001, 2003). However, amounts granted under this Act are not enough to prevent destitution, and the assumption that families would step in to help women is often unfounded.[216] The Act requires women to prove that they are not able to maintain themselves. Women find themselves in a bind—the law renders them ineligible for maintenance if they work, but the amounts granted are so meagre that the women have

---

sector in order to avoid paying maintenance (Interviews, P.N., 17 January 2003; P.W., 8 October 2002, Mumbai).

[213] A petitioner wife had filed for maintenance for herself and two sons. The husband was a skilled worker employed with an automobile manufacturer. In the judgement, the judge opined that she had been unable to prove cruelty. In the judgement, the judge reasoned that "he (the husband) has filed for restitution of conjugal rights. This shows his willingness to take her back. There is no other reason for him to get displeased with her and she has born him two sons... if she could stay with him and his family till she gave birth to the first child, I do not see any reason as to why she could not pull on further in the circumstances." The woman had argued that her parents-in-law and others in the family beat and tortured her. The judge reasoned "the husband cannot provide her with a separate residence... besides, a person having his service as the only source of income and such liabilities (maintenance of parents and younger brothers) can hardly go for committing offences alleged against him... the petitioner is compelling the respondent to live separately from the joint family on flimsy grounds." The judge denied maintenance to the wife and awarded Rs.100 each for maintenance of two sons who remained with the mother (Interview and case records of D.P,. 11 January and 4 March 2003).

[214] In the Family Court in Mumbai, it is now generally fixed at Rs.1500 per month.

[215] A petitioner wife was granted Rs.100 per month as maintenance in a case in 1988. She filed for enhancement, arguing the increased need due to medical expenses as well as the increase in the ceiling of maintenance amount awarded to her. The court increased her maintenance to Rs.600 per month. In another case, a wife had filed for enhancement of maintenance under this Act—she was awarded Rs.200 per month for herself and her son in 1992. In 2002, the court increased the amount to Rs.400 per month. The quantum of maintenance calculated in each case is often arbitrary.

[216] A deserted woman who sought help in a women's shelter was awarded Rs.300 per month as maintenance. The husband did not pay his dues, and she did not move the court to recover arrears for such a low amount. She was forced to find work as a domestic worker. The job entailed no minimum wage and working hours were not defined, but she was forced to work as the work guaranteed her shelter with her employers (Interview with S.K., 7 January 2003, Mumbai).

no choice but to work. Furthermore, in cases where working women are granted maintenance for children, the quantum of maintenance is so low that the cost of litigation exceeds the benefits received under this law. However, women litigants who work in informal occupations find maintenance paid in instalments useful.[217]

Under this law, the maintenance is given from the date of the order. This impacts women litigants adversely since in many instances, women file for maintenance after attempting informal resolutions for two to three years before taking recourse to the law. There is no provision in the law entitling the wife to claim maintenance during this period when she might be dependent on her relatives and friends.[218]

A question of whether Muslims should be exempted from provisions of this secular law came up in 1973 when the Criminal Procedure Code was amended. Sub-section 3 (b) of Section 127, Cr.P.C.[219] was added to it, which set the stage for the exemption of divorced Muslim women from under the purview of this act. However, a number of judgments sought to encompass divorced Muslim women under this Act (Parashar 1992). This question was "settled" after the Supreme Court's decision in the controversial Shah Bano case, which led to the perception that Muslim women seldom get maintenance under this Act because Muslim husbands unilaterally divorce their wives to counter their claims

[217] These women worked as tutors, took up home-based work in the garment industry, and assisted in low-scale family businesses to earn their living (Interviews with V.M., 4 February 2003; P.N., 3 March 2003; N.H., 16 April 2003, Mumbai).

[218] In one case, a Muslim woman was thrown out of the house by her husband and was divorced six months later. The woman moved the Family Court to seek maintenance during this period. The court dismissed the petition (Interview with Z.K., 3 March 2003, Mumbai).

[219] As per this Section, a magistrate can rescind the maintenance order given to a woman who has received a financial settlement following a customary divorce as per the personal laws of the parties. This was cited as a reason to stop maintenance payment of Muslim women who had been given *mehar* and maintenance during *iddat* following divorce.

for maintenance (Narain 2001; Parashar 1992; Sunderrajan 2001). This perception was not subjected to substantive empirical scrutiny.[220]

However, my data show that married Muslim women and dependent children tend to file for maintenance under this Act.[221] Husbands also use the provision of Section 127, (3) (b)[222] in order to challenge the maintenance claims of petitioners.[223] While this strategy is used by Muslim husbands in a number of cases, what is often overlooked is the use of this Section by Muslim wives to fulfill their goals. Muslim women tend to file cases under this Act in order to obtain divorce from reluctant husbands.[224] They also use this Act to validate an oral divorce given by their husbands.[225] The Family Court has the jurisdiction to award maintenance to dependent children. As a result, in several cases, divorced Muslim women drop their claims to maintenance[226] so that their children may be awarded maintenance under the Act.[227] Though Section 125, Cr.P.C. allows both legitimate and

---

[220] However, Agnes indicates that large number of Muslim women were able to file cases under this Act in lower courts (Agnes 2001).

[221] Thirty Muslim litigants who had filed these cases were interviewed. Out of these cases, maintenance was not granted in two cases. Petitions were withdrawn in five cases and transferred in four. In two cases, children were granted maintenance. Three petitions were dismissed, and 17 petitions were accepted.

[222] This Section states that the magistrate should cancel the order given under Section 125, Cr.P.C. if the woman had received the whole sum of settlement based on the personal laws of the parties.

[223] A petitioner wife had filed a case under this Section in October 2000 and was granted an order in her favour in July 2002. The husband was asked to pay her maintenance from the date of application. The husband produced a *talaqnama* (deed of divorce from a *qazi*) and replied that he had divorced her in April 2001, and he was not obliged to pay her maintenance under the provision of Section 127 (3) (b) Cr.P.C. The judge gave an indication that he was disinclined to believe this argument based on recent precedents. The parties arrived at a settlement: the husband paid Rs.10,000, and the wife agreed to forego future arrears (Interview, T.A., 8 December 2002, Mumbai).

[224] Interviews with A. S., Litigant, 9 December 2002; S. S., Litigant, 17 April 2003, Mumbai.

[225] The husband had orally divorced the wife and refused to give the *talaq* in writing. The wife wished to remarry and needed the proof of written divorce. The wife finally filed a case in the Family Court, and the husband responded by sending the registered letter of divorce (Interview with F.B., 5 January 2003, Mumbai).

[226] Such cases are transferred from the Family Court to the Metropolitan Magistrate's Courts. Many Muslim women litigants complain of additional costs and find it difficult to manage cases in two courts. Women litigants find it easier to represent themselves in the Family Court but are intimidated by the prospect of representing themselves in the Metropolitan Magistrate's Courts since the legal culture in these courts is not client-friendly (Interviews with L.N., 5 March 2003; B.N., 5 March 2003; P.S., 7 May 2003, Mumbai).

[226] Interviews with J. M., 11 January 2003; Z. S., 2 October, 2002, Mumbai.

[227] Interviews with L. N., 5 March 2003; B. N., 5 March 2003; P. S., 7 May 2003, Mumbai.

illegitimate children to claim maintenance, husbands dispute the paternity of children to counter claims of maintenance.[228]

***Implementation of Maintenance Orders***

Obtaining an order of maintenance does not necessarily guarantee payment. In one case, a litigant woman who had been granted the order remained ignorant of the order.[229] The institutional mechanism enforcing compliance to the decree of maintenance is rather weak. It is very difficult to collect maintenance in cases in which ex-parte judgments have been given. Furthermore, the wife can approach the court for non-payment of arrears one year at a time, from the date the amount is due. The wife has to keep appearing in court time and again to recover arrears. In many cases, husbands delay the court procedure and wait to pay up until they are likely to receive the order of attachment of property or arrest. They prevent this order by paying half or one third of the amount due.[230] In many cases, respondent husbands claim sickness, debts, and loan deductions to justify the non-payment of dues. The process is cumbersome, and many women drop their cases after a few years.[231]

Non-payment of an order under the Cr.P.C. is treated as contempt of court, and the attaching of the property of the husband is one way to recover maintenance dues. In many cases, the courts have stepped in to assist women in collecting their dues. In one case, a woman had obtained an order of maintenance for herself and her four children. The husband had not paid his dues for approximately four years. The court gave an order to attach his property after which he paid up the arrears of Rs.46,500. However, the salary is

---

[228] Case of H.S., N.S., 7 January 2003, Mumbai.

[229] In one case, a woman litigant had stopped going to court for the last two court dates and remained unaware of the court order upholding her maintenance claims (Interview with N.J., 2 March 2003, Mumbai).

[230] Interviews with P. W., 8 December 2002; R. L., 6 March 2003; V. G., 16 April 20003, Mumbai.

[231] Three women litigants I interviewed had dropped cases after pursuing recovery cases for three to five years (Interviews with P. W., 8 December 2002; R. L., 6 March 2003; V. G., 16 April 20003, Mumbai).

attached only for the recovery of arrears and not for future maintenance. This often acts against women's interests.[232]

The imprisonment of judgment defaulters is another way to extract maintenance payments from reluctant husbands. While the court has held that arrest and imprisonment do not absolve these husbands of responsibility (Sagde 1996, 91), in practice, husbands choose this option over the payment of maintenance.[233] The collection of maintenance arrears can take as long as six years, especially when higher amounts are involved.[234]

***Injunction for Property***

This provision addresses, however inadequately, one of the lacunae under all personal laws: the lack of shelter in circumstances of marital breakdown.[235] Section 7 (d) of

---

[232] To illustrate, Maya Dande had applied for maintenance under Section 125 Cr.P.C. and was granted Rs.1500 per month as maintenance for herself and her four children. The respondent husband had not paid his instalments, and she had to file a petition under the law to recover Rs.21,600. During the process, she came to know of his plan to take voluntary retirement on a condition to turn his job over to his brother in order to escape maintenance payment. The wife filed an application asking the Family Court to pass an order to deduct the amount from his Voluntary Retirement Scheme dues. The husband received Rs.60,000 from his employer and had to pay only Rs.21,600 to his wife and four children. At the time of the interview, the husband had married again and lived with his brother and was supported by him. The husband also had a share in the house owned by his parents. On the other hand, the wife and four children were dependent on her family, who were poor, but she would not be able to claim maintenance from her husband as he was unemployed. She and her family had to support four young children between the ages of 4 and ten. Feminists have often pointed to the inadequacy of maintenance amounts granted to divorced or deserted wives.

[233] In a case spanning twelve years, a deserted wife with one daughter had filed for maintenance, and her husband chose to go to the jail twice for six months each time because of his refusal to pay maintenance. The court could not rule for property attachment as he had transferred all his property to his brother's name (Interview with L.K., 4 February 2003, Mumbai).

[234] In a case filed for mutual consent divorce, the husband had agreed to pay Rs.6000 per month to his wife and daughters. The divorce was finalised in 1995, and he subsequently failed to pay maintenance for five years. The wife filed a case for collection of arrears in 1999. In 2000, the husband appeared in court and evaded arrest by paying half the amount, after which time he did not pay maintenance. The wife had to reapply for the recovery of arrears, and the husband tried to evade payment by refusing to accept the summons, moving residence, hiding business assets, remaining absent from court, and attempting to stall orders of arrest. However, the judge assigned to this case was a "pro-active, sympathetic, and pro-women judge." In 2002, the judge found the respondent "husband guilty of wilfully defaulting his payment of maintenance and sentenced him to simple imprisonment of six months" and ordered the police to arrest the respondent. The husband paid up the arrears that very day (Interview with S.J., 3 March 2003, Mumbai).

[235] Many women are forced to leave the matrimonial home; the lack of property rights and the relative poverty of women make it difficult for women to build separate houses for themselves, a problem which is accentuated in urban conglomerations such as Mumbai that has high property prices.

the Family Courts Act, 1984 allows women and male litigants across religions to seek an order or injunction in circumstances arising out of a marital relationship. The lawyers and judges have used this provision to stretch the boundaries of the law creatively to award women minimal rights within the matrimonial home,[236] and societal actors such as NGOs cooperate with the lawyers and the court officials to assist women. The provision is useful to women who can fight cases while living in the matrimonial home, but it is not useful once they are thrown out of the matrimonial home.[237]

The practice of unilateral divorce can make it difficult to restrain husbands from selling the matrimonial house as the married status of the wife is necessary to enforce this provision. In some cases, husbands divorce their wives as soon as they file for injunctions, and they are thus able to prove divorce, leading to the dismissal of these injunctions.[238] However, in several cases, wives were able to prevent dispossession by their husbands by filing for an injunction before divorce and subsequently not accepting divorce.[239] However,

---

[236] In one case, a lawyer involved societal actors such as NGOs and the court to work together in awarding rights to a woman litigant. The litigant parties had married in Mumbai, and the wife resided in her natal village for two years before coming to Mumbai when her husband failed to visit her. She traced her husband with the help of the NGO workers in her area and visited him with a social worker to find that he was living with another woman. The NGO workers called him in their legal cell and asked him to maintain his wife. He rented a room for the respondent and visited her. When she was pregnant, he filed a case for divorce against her on the grounds of adultery and denied the paternity of the child. He stopped paying rent for the premises to pressure her to leave the home. The wife sought an injunction against the sale of the property and filed for interim maintenance. She won both the cases, and the husband negotiated the settlement. He transferred the premises under dispute to her name, awarded her permanent alimony of Rs.40,000, and gave her custody of the child in exchange for divorce. The NGO workers gave evidence in the woman's favour, apprised the Family Court social worker of the dynamics of the case, and helped concretise the terms of settlement of the case (Interview with Irene Seqeira, Lawyer, 8 June 2003, Mumbai).

[237] In one case, a woman who was thrown out of the matrimonial home obtained an injunction against transfer and sale of property, but the injunction did not provide any leverage since the husband's family did not have any such plans, and the husband did not wish to speed up the divorce process (Interview with G.S., 16 March 2003, Mumbai).

[238] A petitioner wife filed a restraining order against her husband, his first wife, and their children. The husband responded by sending her a divorce letter. The wife has filed a case in the Metropolitan Magistrate's court under the Muslim Women's Act, 1986 (Interview with S.A., 4 March 2003, Mumbai).

[239] A petitioner woman moved the court for an injunction after learning of her husband's plans to sell the house after contracting a second marriage. She was granted the order (Interview with Rukhsanabi, 17 April 2003, Mumbai).

the injunction is not effective in cases where women have been thrown out of their matrimonial homes or in cases in which women seek reconciliation.[240] The injunction is generally used as a stepping stone for other remedies since it increases the bargaining power of litigants.[241]

When it comes to enforcing women's economic rights, interviews with lawyers and litigants suggested judicial discretion plays a large role in stretching the legal boundary to award economic rights to women.[242] For instance, while only a married woman has a claim to the husband's matrimonial home, a pro-women judge managed to stretch the claim to widowed women as well. The pro-women judge awarded a higher quantum of maintenance and assigned legal aid to women clients when he felt they needed it.[243]

The analysis of the decisions of the Family Court does not always clarify how judges sort out facts and arrive at decisions, but the most persuasive explanation in the Indian case is that put forth by judicial behaviouralists. To elaborate, it is argued that the

---

[240] A Muslim woman was thrown out of the matrimonial home along with her five children but could not obtain an injunction once she was out of the house (Interview with N.A., 6 June 2003, Mumbai).

[241] In one case, a petitioner wife filed for an injunction against the sale of the property the husband had bought in the name of his wife and daughter; she filed for divorce under the Dissolution of Muslim Marriage Act, 1939. The husband claimed that he had bought the property by taking the benefit of the Benami Transaction Prohibition Act, 1988. The husband can be restrained from selling property if the property is in the name of the wife; however, the lawyer argued that it was fiduciary property, and the real owner was the husband. The matter was settled: the property was divided equally between the husband and the wife, and the husband also made a lump sum settlement for maintenance of the children (Interview with Nissar Ghate, 19 February 2003, Mumbai). In another case, a Muslim wife who was thrown out of the matrimonial home filed for an injunction to prevent the sale of property and tried forcibly to move back into the matrimonial home. Her marital family members prevented her violently. She filed a complaint of domestic violence at the police station and used the incident as a proof of malicious desertion in order to obtain a maintenance order under Section 125, Cr.P.C. (Interview with Y.A., 8 June 2003, Mumbai).

[242] The analysis of the decisions of the Family Court does not always clarify how judges sort out facts and arrive at decisions, but the most persuasive explanation in the Indian case is that put forth by judicial behaviouralists. To elaborate, it is argued that law exercises external constraints on judges and produces judicial conformity to legal rules (Eskridge 1990; Scalia 1989; Schauer 1987). Others argue that judges rely not only on subjective preferences but make decisions "in good faith" in order to "further public policy aims" (Baum 1993, 445; Dworkin 1978, 81-130, 279-90, 331-381; Tamanaha 1996). However, judicial behaviouralists argue that analyses of legal principles, rules, and structures of judicial reasoning are insufficient to explain judicial decision-making. They highlight instead the role of personal elements comprising the ideologies, politics, and experiences of judges as explanatory factors guiding judicial decisions (Spaeth and Segal 1999, xv; Gillman 2001). This also leads to the fragmentation of law.

[243] Interview with Veena Gowda, Lawyer, 23 June 2003, Mumbai.

law exercises external constraints on judges and produces judicial conformity to legal rules (Eskridge 1990; Scalia 1989; Schauer 1987). Others argue that judges rely not only on subjective preferences, but they make decisions "in good faith" in order to "further public policy aims" (Baum 1993, 445; Dworkin 1978, 81-130, 279-90, 331-381; Tamanaha 1996). However, judicial behaviouralists argue that analyses of legal principles, rules, and structure of judicial reasoning are insufficient to explain judicial decision-making. Instead, they highlight the role of personal elements that make up the ideologies, politics, and experiences of judges as explanatory factors guiding judicial decisions (Spaeth and Segal 1999, xv; Gillman 2001). This also leads to the fragmentation of law.

### *Negotiating Retrieval of Stridhan*

While the Indian state had prohibited dowry,[244] the practice of dowry is widely prevalent in Indian society, and the retrieval of the dowry at the time of divorce is of interest to women litigants as well as the natal family. In cases of divorce, the return of dowry is finalised in court, usually at the time of divorce.[245] However, the retrieval of these assets is dogged by a lack of clarity in the law and a process of difficult negotiations that impact women's rights to property. There are several issues involved here. There exist diverse opinions about what constitutes *stridhan*. While sociologists define dowry as gifts given to the husband's family through the lifetime (Uberoi 1994), there are two different interpretations in the law. In some cases, *stridhan* is narrowly defined as the gifts given to the bride at the time of marriage. At other times, *stridhan* is seen to consist of gifts given to

[244] The Dowry Prohibition Act, 1961 criminalises dowry demands and exchange. Dowry-related violence is also a crime under Section 198 (A), Indian Penal Code. A dowry usually consists of clothes, furniture, and other household items ranging from utensils to cars, jewellery, and, in many cases, money.

[245] Many communities and families have developed the practice of making a list of dowry and gift items received by the couple at the time of marriage. This list serves as evidence of dowry exchange.

the bride from the natal family, marital family, and other relatives and friends at the time of marriage. Feminists and women's organisations have lobbied for the societal and legal acceptance of the second definition. However, the Family Court at Mumbai has tended to favour the former definition of *stridhan* as dowry.

In most cases, women litigants need their *stridhan* at the time of separation—be it legal separation or informal separation. Women are often thrown out of or forced to leave the marital home, and they are unable to take their entire *stridhan* with them. When they try to collect the *stridhan*, husbands in many cases refuse to part with it. The police refuse to register complaints by wives classifying them as civil disputes between family members to be resolved in the Family Court. The recovery of *stridhan* is often complicated by the fact that while women legally own their *stridhan*, they often lack control over this property, and the *stridhan* may be damaged, mortgaged, or diminished in value due to usage. In most cases, women have to forego the depreciation in value of *stridhan*.

Women who file for divorce in Family Court can only hope to recover *stridhan* at the time of resolution of the case when couples separate and exchange their mutual belongings. This period may stretch over years in cases of contested divorce; women might not be able to collect their belongings for many years, and there is no guarantee that their belongings would be replaced.[246] However, women litigants who wish to recover their

[246] In one case, a woman litigant had filed for divorce on the grounds of cruelty. During the process she came to know that the husband and his family were planning to move to another town after selling their business and residence. She filed an application in the Family Court for the recovery of her *stridhan* during the process of divorce. However, the husband remained absent on two consecutive court dates. She went to the police to register a complaint under Section 406 of the IPC to recover her dowry. The police refused to register the offence. The wife also approached a women's organisation, but her husband refused to hand over her dowry stating that "the matter was subjudice." During this time, the husband and his family left town. Even if she were granted an ex-parte divorce, she would not recover her *stridhan* (Interview with M.M., 4 April 2003, Mumbai).

*stridhan* but do not wish to file for divorce find few legal options to recover *stridhan.* Women's organisations have occasionally been able to fill in this gap.[247]

Thus, to summarise, the concept of matrimonial property does not exist in either Hindu or Muslim personal laws. A spouse retains her or his pre-acquired or inherited property and assets acquired during marriage are not equitably divided; furthermore, women are at disadvantage as societal practice disinherits the daughter. Furthermore, divorce and matrimonial disputes harm the interests of women across religious communities, and there exist few provisions that recognise women's productive and reproductive labour within the family (Agarwal 1994; Basu 1999; Sharma 1983). Contrary to claims made by feminist scholars (Narain 1997; Parashar 1992; Sundarrajan 2001), data do not suggest a wide variation in economic rights granted to Hindu and Muslim women in state courts. Judges in lower courts have tended to lean towards more liberal interpretation of Muslim Women's (Protection of Rights on Divorce) Act, 1986,[248] and as a result, divorced Muslim women have more rights than Hindu women in these jurisdictions.

**Conclusion**

The chapter analyses the nature of state-society relations in state courts and highlights two contradictory and simultaneous movements in the state law: the *centralisation of law* as well as the *diffusal of law.* Given that the codification of customs and policy-making through legal precedents have been sources of legal developments in India, the *centralisation of law* is a component of the lawmaking function of courts in India. The centralisation of law is also seen in the systemisation, routinisation, and

[247] Women's organisations had assisted in the recovery of *stridhan* in five cases while the matter was subjudice or disposed of (Interviews with A.J., 4 April 2003; H.S., 5 March 2003; M.N. and K.K., 15 February 2003; P.W., 9 November 2002, Mumbai).
[248] Interview with advocate Nissar Ahmed, 19 February 2003, Mumbai.

standardisation of law (Hydebrand and Carroll 1990) in courts influenced by the model of justice developed in specialised courts such as the Family Court. The *centralisation of law* also evinces the intention of the state to shape from above the realms of family, marriage, divorce, intimacy, and sexuality according to morality and policies of the liberal secular state. The Indian state seeks to establish its overarching authority by streamlining family law and protecting individual rights.

At the same time, another dominant trend in the adjudication of family law in the Family Court is the *diffusal of law* within the state law. The term refers to the dispersal of law in the state legal system as well as the intermeshing of law and societal elements within state law. *Diffusal of law* is an overarching term that can be further classified in two categories. The first pertains to *fragmentation of law* arising from the lack of coordination between higher and lower courts, conflict of jurisdiction among lower courts, failure of lower courts to follow precedents, and the arbitrariness of judicial discretion. The *diffusal of law* caused by the fragmentation of law is due to factors intrinsic to the formal legal system. This leads to the decentring of law and to uncertainty about law within the state legal system. The second category of the *diffusal of law* is the *societalisation of law* within state law. The chapter describes myriad ways in which society seeps into the formal legal system. The adjudication process in the Family Court encourages the informal settlement of disputes through inter-lawyer negotiations, intervention of social work professionals, and inter-litigant bargaining in the presence of societal actors. Judges in the Family Court, too, view their roles as reconciliators and advisors. The informalisation of the legal process blurs the boundaries of the inner world of courts and the outer world of society within the

state legal system. Thus the societalisation of law is caused by factors extrinsic to the formal legal system.

The dynamic processes of the centralisation and the diffusal of law have an impact both upon the accommodation of religious groups and upon women's rights within state law. I also demonstrate that in some instances, courts attempt to protect Muslim women without offending minority sensibilities on controversial matters related to Muslim Personal Law, such as the regulation of unilateral divorce and the provision of economic rights to Muslim women. I also argue that while substantive as well as procedural equality is elusive in all personal law, judges and lawyers have stretched the boundaries of existing legislations to address the concerns of women's rights within the family.

# CHAPTER FOUR

## *Making and Unmaking the Conjugal Family: The Administration of Hindu Law in Society*

In this chapter, I discuss the dynamic interaction between the state and sub-state actors such as caste *panchayats*, women's organisations, and informal actors in adjudication processes under Hindu law.[249] This chapter is organised into two parts. The first part establishes the socio-historical processes and organisational contexts of the adjudicative mechanisms practiced by three castes[250] that are placed differentially in the caste hierarchy among Hindus[251] in Mumbai, and whose practices point to the considerable organisational diversity and ambiguity in the nature of justice across castes.[252] The section

---

[249] The shared adjudication model of the Indian state allows societal actors to regulate marriage and divorce. Divorces that take place in the societal arena are notarised. One approach I may have taken in my research was to sample cases from notaries' offices as parties who operate the non-state forums for divorce may often register the divorce with notaries. However, initial interviews with some key respondents (lawyers, women's rights activists, and social workers) revealed that focusing on notarised divorce would not exhaust the range of categories. These respondents stressed the centrality of caste *panchayats* in dissolving customary marriages. This convinced me to choose to sample cases from the caste *panchayats* and to identify other actors through this channel. The role of other legal actors is explored through interviews with individual litigants who have used multiple forums.

[250] The focus on caste identities and activities does not reduce the individual to her caste-based circles. I highlight caste as a constructed category and caste identity as only one dimension of the socio-political identities of individuals. I uphold that many members choose to live outside these caste-based networks and circles, and many individuals discard their caste identities in their day-to-day practices. Given the nature of the inquiry, I focus exclusively on individuals who connect themselves to castes or participate in caste-based institutions. I also recognise that cultural groups are not essentialised, homogeneous, and monolithic entities. I draw from Rudner's discussion about the notion that "different castes have 'social portfolios' reflecting differential specialisation and diversification in liquid and fixed forms of symbolic capital" (Rudner 1994, 213-214).

[251] The sample selection was based on the accessibility of sample subsets and the linguistic ability of the researcher.

[252] The body of literature suggests two forms of organisations within castes. Caste associations are seen to be voluntary, broad-based coalitions of differing castes who align for common goals in democratic participation (Bailey 1963; Hardgrave 1969; Kothari and Maru 1965; Rudolph and Rudolph 1967; Washbrook 1975, 1988). Caste *panchayats* are decision-making bodies dominated by caste elders to solve internal caste disputes (Rudner 1994, 16; Verma 1979, 3). Little attention has been given to questions about the nature of adjudication in caste *panchayats* in India. The body of anthropological literature on dispute resolution in informal courts has presented long descriptions of the legal processes in village arbitration bodies (*Nyay Panchayats* or *Lok Adalats*), but it has not paid close attention to cases related to personal law. Furthermore, ethnographic studies on caste *panchayats* have tended to study the processing of disputes in rural settings (Cohn 1965, 1987; Hayden 1983, 1984, 1999; Mendelsohn 1989; Moog 1991, Moore 1998).

also delineates the role played by laws and customs in engendering these caste spheres. The second part of the paper focuses on the micro-politics of adjudication, draws on experiences of litigants, and examines the nature of interactions between state law and non-state laws. This section also compares the adjudicative processes across castes and discusses the variances in the cases.

**Multiple Sources of Dispute Resolution**

Based on interviews with litigants and caste authorities, I have compiled 65 cases across castes. The number of litigants who approached state courts is lower than the number of litigants who approached various societal forums.

**Table 5. Accessing diverse adjudicative forums under Hindu law.**

| Castes | Cases Resolved in State Court | Caste-Based Resolution | Family-Based Resolution | Women's Organisations /Other Agents | Multiple Forums of Resolution | Total Cases |
|---|---|---|---|---|---|---|
| Meghwal | 6 | 15 | 4 | 6 | 10 | 41 |
| Sai Suthar | 4 | - | 5 | 4 | 2 | 15 |
| KVOs | 6 | n.a. | 3 | - | - | 9 |
| Total | 16 | 15 | 12 | 10 | 12 | 65 |

The number of cases from the KVOs is lower as divorce is infrequent within the group. The data show that the Meghwals have access to the highest number of societal options in legal matters.

## Caste-Formation[253] and Law-Making among Meghwals

This section outlines the processes and factors leading to the formation of the "caste" of Meghwals; that is, the caste-building among the Meghwals. The section also suggests that from the perspective of agents, the building of caste councils and of the regulatory institutions was intertwined, and they were simultaneous projects that were integral to the founding of the caste. Taking a society-centric view of caste-formation, I argue that the caste constituted itself as a group that followed the rules of marriage codified through the consensus of its members and that it abides by the rules of its caste *panchayat*. The following section begins with the history of migration and resettlement in Mumbai.

### *Migration to Mumbai and the Statist Construction of the "Caste"*

The British began to build the city of Bombay[254] as a trading centre from the late 16th century and invited prominent trading castes of Gujarat to the city (especially the Kapol banias, the Bhatias, the Khojas, the Boras, and the Parsis) and offered them economic incentives (Kakatiya 1978; Mallison 1996; Shodhan 2001). As the city expanded, its infrastructure and sanitation (which until then had been privately managed), required a large labour force. Records show that this considerable supply of labour was largely chosen from poor migrants from Kathiawar, Gujarat, and Maharashtra.[255]

---

[253] This section is not meant to be an exhaustive history of caste-formation. I have privileged the history of lawmaking over other aspects of the social history of the castes.

[254] Until the 16th century, Bombay was an island of a cluster of sparsely populated fishing villages. The Portuguese gifted the island to Charles II of England, who handed it over to the East India Company in 1668. The British developed Bombay as a port to guard against the political ambitions of the Sultan of Gujarat, the Marathas, and the Mughals (Campbell as cited in Mehta 1942, 6).

[255] Migration to Mumbai during these years was from Kathiawar and Gujarat due to natural factors such as persistent drought and crop failure. Famines ravaged Saurashtra over the course of many years: in 1804, 1811-1815, 1820, 1825-1826, 1838-39, 1846-47, 1869, 1877, and 1878. However, 1900 saw a great famine in Saurashtra that led to the loss of life and that spurred migration (Mehta 1942, 30). The stories of this famine (called *chhappaniyo dukal*) dominate the stories of migrants who came to Mumbai in search of food and livelihood. Besides drought and famine, the advance of mechanised transport, shipping, and the

Workers who performed manual labour in the BMC came from diverse castes such as Vanakars (weavers), Barots (clan genealogists and poets), Turis (shehnai[256] players), and Nats (acrobats), and they migrated as individuals, not as caste groups. However, the colonial state created caste categories for its workers who performed "polluting" tasks for the city[257] and classified them as "untouchables" (these were mainly Dhers, Chamars, and Mahars) in state records.[258] These diverse groups did not share a religion,[259] and they did not have common rites, rituals, and histories. They were not permitted to stay within the

---

introduction of railways that connected Kathiawar to Mumbai in 1855 were also factors that impacted migration.

[256] A traditional wind instrument made of metal.

[257] Several factors point to this. By 1865, the BMC expanded its services and hired many workers from provinces such as the North-West Frontiers Provinces; these did not belong to "untouchable castes" (see *Annual Report of the Bombay Municipal Commissioner* 1866, 2 as cited by Albuquerque 1992, 187).

[258] According to the BMC records, the number of Dhers employed in the BMC had increased from 47,000 in 1901 to 67,360 in 1931. In the case of the Mahars, the increase was from 21,305 in 1911 to 23,449 in 1931. About 5,645 Chamars were employed in the BMC in 1911 and their numbers swelled to 7,097 in 1931 (Campbell 1896, 271.)

[258] Apart from being employed by the BMC, these workers were also employed in textile mills, railways, non-textile factories, and the municipal transport system of the city as coolies or casual labourers (Morris 1965, 74, 126). Scholars who trace the social history of the Mahar community in Bombay show that the Mahars migrated to Bombay as a "community" (Gokhale-Turner 1980; Zelliot 1995). Similar claims are made by other chroniclers who record Dalit history (Prashad 2000). However, this is not true of many migrant communities from Gujarat who did not migrate as "castes" per se.

[259] Religious identities were fluid in the group. Different groups of workers worshipped different deities, which included plants, spirits, goddesses, and gods. The slums, where members of the "untouchable" caste stayed, were also areas of Christian missionary activity. The castes came under the influence of several churches that remained active in the residential areas. These included the Church of Holy Cross (opened in 1898) and the Society of St. John (1873) (the Evangelist Jesuits) (Campbell 1896, 220). Today, caste members recall that the first *pucca* slums for the community were built by the Methodist Episcopal Church. A large number of group members were then baptised. It is unclear what conversion meant to them, for while the converted group members changed their names, they continued to follow their language, rites, and customs. These *chawls* were sold to a Khoja Muslim in 1904, and a number of people reverted back to their caste identity at this time. In 1887, the Khoja community in Mumbai split into two groups, and each group recruited members into their communities. Their influence on the Meghwals was also pronounced. In 1917, the Aga Khan had an interview with many Meghwals after which quite a few of the members became Khojas. Many of them were also employed as helpers in clothing stores owned by the Khojas. However, most of these converted families refused to live in the residential areas of the Khojas and asked the Khojas to build them more *chawls* where they could continue to follow their customs. Most Meghwal women refused to change their traditional dress and adopt *salwars* worn by the Khoja women. After a period, many families decided to revert back to their former beliefs. Some families still remained "Khojas" and worshipped in the *Jamatkhana* but continued to live with fellow group members and follow the traditions and cultural practices of the Meghwals. Two families left to stay in Imambara, where most Khojas resided (Mehta 1942).

city boundaries because of their "caste status" until the early 20th century.[260] As the number of workers grew, the BMC constructed *chawls* in areas that were away from upper-caste neighbourhoods.[261] The residential arrangement threw together the previously dispersed families of cleaners from groups classified as Dher, Mahar, and Chamar. The members of these groups now began to share common occupations as well as residential spaces. However, these groups who were not assimilated into local castes of similar status as Chamhars, Mahars, and Mangs since they shared different linguistic and cultural traditions;[262] thus they began to organise as endogamous groups.

### Nationalist Movement, Naming the Community, and Attempts at Law-Making

The "untouchability" question occupied the centre of the nationalist movement in the 1920s.[263] The decade saw the emergence of key Dalit leaders, and legal and political

---

[260] Most of the private buildings in Bombay were owned by members of the upper castes who did not rent them to "untouchables." As a result, they had to reside in thatched huts on the outskirts of the city (however, some families managed to find rental space in buildings owned by Muslims who did not practice caste rigidly). In fact, most members' memories revolve around the struggles of their forefathers to construct huts on garbage dumps without access to water. "Large pigs could sneak in and eat food any time and rats would bite us even then. We lifted human and animal waste (*melu*), but there was no provision of toilets for us" (Interview with Gangaben Bariya, 5 September 2002, Mumbai).

[261] These *chawls* were 3 to 4 stories high, structured like barracks, and had rooms the size of 8 feet by 8 feet. Each family was given a room and had to share toilet facilities with others.

[262] Rivalries existed between these three castes of roughly similar status within Maharashtra. The Mahars were the first group to organise politically; they remained distinct from other Maharashtrian "untouchables." Reasons for this include their enlistment in the colonial army, employment opportunities outside the village system, access to education through Christian missions and their own political struggles, and the leadership of Dr. Ambedkar (Zelliot 1995, 27-35). Similarly, caste groups classified as "untouchables" and who migrated from Gujarat were more pro-Congress Party and did not readily accept Dr. B. R. Ambedkar as their leader. They also did not join the temple entry movement that was intrinsic to militant Mahar politics from 1927 onwards (Zelliot 1995, 35).

[263] In 1923, the Bombay Legislative Council passed a resolution stating that all public places be open to untouchables. Several followers of Dr. B. R. Ambedkar conducted campaigns such as the burning of the Manusmriti, drinking water from water sources in upper-caste areas, challenging the prohibition of Dalits from using public places and services, and other such tactics (Zelliot 1995, 40-41). Dr. Ambedkar attended the round table conference and asked for separate electorates for the Dalits in 1930. However, Gandhi opposed this claim, and the Gujarati untouchable community supported Mahatma Gandhi's position on this. (The period of 1930-1939 saw the conflict between Mr. P. G. Solanki, the leader of the Gujarati Dalits, and Dr. Ambedkar, who was seen to represent only the Mahar community) (Gokhale-Turner 1980, 275). The Poona Pact of 1932 was signed against the backdrop of Dalit agitations and as a result of a compromise

gains were made within this period. Many individuals from various caste clusters of the BMC workers began to be involved in the nationalist movement. This involvement was reflected in the number of organisations that were formed among BMC workers. Between 1920 and 1950, the Servants of India Society and the All India Servants of India Society founded organisations for "untouchable" youth, which resulted in a number of youth clubs, cricket clubs, and voluntary corps.[264] While the caste clusters remained apart from the more radical programmes of the Ambedkarites, they also began to organise in order to receive education.[265] The struggles for the schooling of the children of the cleaners began during that time.[266] During these years, the employment opportunities of these caste clusters began

---

reached between Dr. Ambedkar (who had earlier bargained for separate electorates for the Dalits) and Mahatma Gandhi (who had denied this demand, insisting that untouchability was a vice within Hinduism and Hinduism needed to reform itself). According to the Pact, the Depressed Classes would be given reserved seats on the basis of joint electorates and would be included in the public service and local boards. In addition, an adequate sum would be reserved in all provincial grants for the education of the Depressed Classes. The Poona Pact and its inclusion into the Government of India Act, 1935 was the first step in providing a constitutional guarantee of special rights for the untouchables. Mahatma Gandhi established the *Harijan Sevak Sangh* in the 1930s, and Dr. Ambedkar established the Independent Labour Party in 1936, which fought the provincial elections in 1937. The Harijan Temple Entry Bill was passed soon thereafter.

[264] The youth were mainly active in challenging caste hierarchies through individual struggles. They did not display the political assertiveness that characterised the Mahar community under the leadership of Dr. Ambedkar. These caste clusters were more attracted to Mahatma Gandhi's programmes for the removal of untouchability (Interview with Vishrambhai Waghela, 2 May 2003, Mumbai).

[265] The first schools for children of the untouchables in Maharashtra opened at the initiative of Mahatma Jyotiba Phule in 1852 in Poona. Subsequently, the British government established separate schools for the untouchables. In 1882, there were 16 such schools in the Bombay Presidency (Zelliot 1995, 44). However, in 1911, only 0.48 percent of Mahars, Holiyas, and Dhers were literate in Bombay Presidency. This proportion had increased to 1.5 percent in 1921 and 2.9 percent in 1931 (*Census of India, 1911*, (Bombay, 1912), Vol. III, Part 1, Table IX; *Census of India, 1921* (Bombay 1922), Vol. VIII, Table X, 85; *Census of India, 1931* (Bombay 1933), Vol. VIII, Part 1, Imperial Table XIV).

[266] This section is based on interviews with Tabhjibhai Solanki, 10 February 2003. The children of the caste clusters that comprised the Meghwals were not allowed to study since the "untouchables" had no facilities for education in private schools. The caste clusters of the "Harijans" wished to start a school and could only get space from a Khoja Muslim in the red light district of Mumbai. Eight children of varying ages, including one girl, attended that school. It had one room and was staffed with a teacher who had studied up to the 5$^{th}$ class himself. After two years of ad hoc functioning, the caste members wrote to Mahatma Gandhi about the state of affairs, and provisions for new schools were made. Mahatma Gandhi asked volunteers from the Servants of India Society to begin teaching children there. He also intervened to secure them admission to high school.

to grow. Between the 1920s and the 1950s, a few of the caste members were employed as mill workers,[267] dock workers, casual labourers in factories, or cleaners in private service.

The construction of the category of "Hindu" began taking shape in the public sphere in the late colonial period (Pandey 1992). Between the late 19th century and the early 20th century, many "untouchable" castes engaged in efforts to create separate institutions within Hinduism (Zelliot 1995). In 1911, diverse caste clusters began to organise around the issue of temple entry for the "untouchables" and established organisations such as the Meghwal Sudharak Sabha (the Meghwal Reform Committee) and the Meghwal Hitvardhak Mandal (Society for Welfare of the Meghwals).[268] They tried to build a separate temple for the cleaners as they were not allowed to enter into upper-caste temples.[269] The formation of these organisations was the first indication of a section of the community classified as Dhers who began to call themselves Meghwals. There is no strict date on which group members who were classified in government records as Dhers came together and named themselves Meghwals. However, this term coexisted with the term Dhers and later Harijans or Vanakars until the 1950s. The use of the term Meghwal as a subcategory of the broad term Harijans began to emerge within the process of constitution-building and lawmaking in the second half of the 20th century.

---

[267] Data show that untouchables tended to be concentrated in certain sectors in all employment sources. Citing a study sponsored by the Bombay Mill-Owners' Association, Morris suggests that at that time, 13.8 percent of the workforce in the mills was clustered in certain sectors of the mills: e.g. about 70 percent of the male untouchables worked in ring-spinning. Of the women untouchables, 74 percent of them worked in winding and reeling departments (Gokhale-Turner 1980, 114-115; Morris 1965).

[268] This agitation and mobilisation around the issue was meant to raise their self-perception as "Hindus." Since the 1830s, the Christian Evangelical forces became active in the Bombay Presidency. The presence of Christian missionaries also sparked off public debates over practices of widow remarriage, the exploration of the link between Hinduism and heterodox cults such as Shaktaism, the resolution of the "caste question within Hinduism," whether Brahmins can attend "polluting" Christian schools, and over issues concerning the management of Hindu temples (Tucker 1976).

[269] This *Lakshmi Narain* temple was inaugurated by Sarojini Naidu, and many Congress leaders such as Deshbandhu Chitranjan Das and Vitthalbhai Patel were also present (Lakshmi Narain Mandir 1935, 17). A permanent board of trustees to handle the finances and related matters was announced (*Harijano matena Sri Lakshmi Narain Mandir* 1935, 17-18).

***Exposure to Democratic Politics, Creating Structures of Governance, Constructing Identity through Laws***

For the Meghwals, the decades between the 1950s and the late 1970s were marked by their exposure to democratic politics. The BMC institutionalised the "Preferential Treatment Policy" for this category of workers.[270] As per this unwritten policy, the BMC hires family/kin members of the Scheduled Castes at the time of retirement of any fourth class municipal worker. Given the nature of employment in the public sector, this policy ensured the steady employment of at least one member of a Meghwal family through the generations. In the first decades of independence, the caste members were exposed to political parties, union politics,[271] and intra-caste politics. These decades also saw a proliferation of civic organisations within the caste. While the focus of civic organisations in pre-independence time was the "upliftment of the caste," the newer organisations were less charity-oriented and more active in politics.[272]

The decades following independence were marked by the efforts by sections of the castes to construct a "caste." Two different constitutions, in 1953, and later, in 1964, were proposed by reformist leaders who justified the need to form a *panch* system in order to forge unity among various factions and sections of the caste, to push modernist reforms, to

---

[270] This policy is also very popular since the BMC provides its workers with housing and healthcare. The BMC also provides daycare services, and its welfare department provides assorted services for the workers' families. The provision of substantive citizenship rights for the BMC workers has had a great impact on the community life of the caste members. The BMC workers are housed as tenants in the BMC *chawls*. However, as members of the same family are rehired under the Preferential Treatment Policy, the 8-foot by 8-foot room remains in the family for generations. Controlled rent for the residential space in Bombay, where property prices are inflated, makes this policy very popular among workers (Interview with Lalitbhai Waghela, 6 November 2002, Mumbai).

[271] There were few Meghwal members in the Bombay Kamaghar Sangh (The Bombay Employees' Union) when it was established in 1935. However, their membership quickly grew. In 1949, about 15,000 members of the Bombay Kamghar Sangh went on a long strike and gained higher wages. This participation in the strike was an invaluable experience that served to politicise many Meghwal caste members (Interview with Jeevrajbhai Koli, 4 April 2003, Mumbai).

[272] The caste youth members organised discussion groups that were facilitated by eminent left academics such as Dr. A. R. Desai (Interview with Vishrambhai Waghela, 3 January 2003, Mumbai).

centralise authority through democratic governance within the caste, and to find avenues to collect revenue for caste welfare. The constitution provided a framework for the construction of identity. The "Constitution" of 1953 defines the caste of "Meghwal" as a group that follows the rules of marriage codified by the group members and who agrees to abide by the decisions of the *panchayat*.

As the Meghwal identity began to be consolidated, the caste members were viewed as a "caste constituency" since the group tended to vote en masse. Thus the *panch* system became a battleground used by different political parties to capture the caste constituency. Given the history of the caste clusters' association with the nationalist movement, their leaning towards Gandhian politics, and the penetration of the Congress Party-affiliated civil organisations (such as the Harijan Sevak Sangh and the All India Servants' Society), the caste members were drawn to the Congress Party in Mumbai,[273] especially in local Municipal Corporation elections.[274] The caste constituency depended on the BMC to provide basic amenities (water, electricity, government schools for children, welfare centres, kindergartens, and so on), and they also had linkages with the BMC given their occupational status as cleaners.[275] The Communist Party of India also tried to make inroads

[273] In the early years, it was said that "even an inert object like a lamppost fielded by the Congress Party would win an election from the Meghwal-dominated residential areas" (Interview with Lalitbhai Waghela, 8 March 2003, Mumbai).

[274] The Congress won the BMC elections in 1948, 1952, and 1961 and remained a powerful presence in these elections. In 1957, a multiparty alliance, the Samyukta Maharashtra Samiti, which demanded and created a unilingual state of Maharashtra, won the elections. In the 1973 elections, the Congress Party suffered a setback, and even the Shiv Sena could not retain its strength. Post-emergency, the Janata party came to power in 1978. The 1984 elections installed the Shiv Sena, but the 1992 elections saw the Congress Party winning the elections once again. (Thakkar 1996, 251-252).

[275] The Congress Party in turn tried to make inroads in the caste to consolidate its hold. However, instead of building intra-caste organisational structures and linking them with the party organisation, the Congress Party depended on local caste politicians. These caste politicians then claimed to represent the interests and people of the caste; the Congress Party interacted with the caste members through these representatives. Many ambitious young men of the Meghwal caste were attracted to the idea of political power and tried to build networks within the Congress Party. They also followed their caste politicians whom they hoped would mentor them and initiate them into political careers. However, the caste politicians did not allow the

but did not enjoy a broad support of the caste members. There were also conflicts between the Meghwal leaders who were in the Communist Party and the Congress workers. During 1950s and 1960s this inter-party struggle was played out in the *panch* systems. Both the Congress Party and the Communist Party and their supporters tried to capture the office of the *panchayat*, yet neither of these political parties established the *panch* system as a neutral independent body, and since it was not perceived as a legitimate authority, the *panch* system's constitution did not gain popular support; people could violate its rules with relative impunity.

### *Democratising Panchayats, Civic Awareness, and Law Reforms: From the Panch System to the Panchayat*

The decades of 1970s saw efforts to form an autonomous caste *panchayat*. This process of "depoliticisation" took two forms: one was a continued attempt to reform the laws; the second was to further democratise the *panchayat*. An election commission was formed in 1974-75, and intra-caste elections were held[276] as a step towards the institutionalisation of internal governance.[277] Another round of discussions on the issue of law reform took place within the Meghwal community. All public and intra-*panch* communications (letters, circulars, announcements, and public requests) reiterated the statement that "members were requested not to discuss political issues under any circumstances." An Interim Constitutional Amendment Committee was formed; it drafted

---

emergence of second-rung leadership within the caste. Moreover, the Congress Party leaders insisted on dealing with these men through their caste leaders. As a result, there was a sense of frustration among the youth and the politically-motivated members. By the 1970s, caste members did not feel they had gained substantially from their loyalty to the Congress Party, and murmurs of disenchantment had begun (Interview with Lalitbhai Waghela, 4 May 2003, Mumbai).

[276] See pamphlet entitled "Programme and time table: Election of the Caste President," filed as Document 60D, undated. Signed by the Election Commission, Mr. Mulji Gigabhai Koli (Convenor), Mr. Palji Lalji Dafda, Mr. Keshav Kalabhai Wagh, Mr. Mulji Gangjee Koli, and Mr. Kishor Jaising Singh.

[277] See circulars dated 7 July 1974, and 18 September 1975.

several amendments to the constitution. This time, the constitution and its amendments were discussed through a decentralised participatory process. Apart from including area-based civic bodies (such as youth clubs and welfare centres), residential committees were included in the process to elicit a range of opinions. Women were actively involved in discussing these drafts.[278]

The decentralisation process created a three-tier system, and local groups forwarded the amendments to the *panch* and sub-committees on various provisions. Their recommendations in turn would be forwarded to the central constitutional amendment committee.[279] Three meetings with the caste members at larger were held between August 5, 1975 and December 30, 1975[280] before finalising the draft of the changes of the new

---

[278] Reasons given by the constitution committee were, first, to ensure the representation of women since not many women participated in the process of constitution-building, and their voices needed to be heard in a process that was self-consciously inclusive. Secondly, women did discuss these matters in the inner spheres of their houses and *chawls*. It was clear that they had opinions that needed expression in a united voice through the creation of "an organised women's voice." The reformers also were of the opinion that "the Meghwal women did not have access to education and 'culture' (*Sanskar*)" and this had a direct impact on their capacity as mothers. This also had a negative impact on the new generations; therefore, they needed "to come out and participate in social activities." Another reason given by the committee was to organise and mobilise women to oppose traditions that were "dominated by patriarchal biases and needed change." The reformers also perceived that women would consent to change in harmful traditions as they had more to gain from modernising the caste laws. Women discussed reforms in public meetings as well as in several group meetings facilitated by the *panchayat*. The first women's public meeting was called on August 17, 1975, and social workers from Bombay were invited. Prominent caste leaders who were perceived to be pro-women were also invited to the meeting. Mr. P. T. Patel chaired the meeting. Meghwal women participated in the meeting in large numbers and discussed women's economic rights in the context of the social customs of elopement and divorce.

[279] See also *Internal Communication*, paper No. 8/75, 10 August 1975. The letter asked the local *panch* whether they had called the meetings of the women's committees as well as the beggars' committees in their respective areas. The letter also invited suggestions from the *panchs* about holding a larger meeting in which all women caste members could be present. It asked them to suggest possible dates and places for holding these meetings and to meet with these two subject committees for their individual feedback. The letter was signed by Mr. Devshi Khuman and Mr. Karsan Chauhan.

[280] For instance, the meeting on August 5 discussed following agendas: bride-price, marriage, economic transactions during marriage, divorce and remarriage, death rites, and duties. Other public meetings were necessary as one meeting could not do justice to all speakers (see filed as 30 A ) (Public Meeting (*sabha*) to discuss social reforms, 20 June 1975).

constitution, which was passed on January 26, 1976. The discussion of legal changes within the caste continued even in the latter half of the 1970s.[281]

The depoliticisation of the *panchayat* that took place in the 1970s created a legacy of challenging the presence of political parties in matters of internal governance of the caste; however, this does not mean that these contestations have ceased or will cease.[282] The process of depoliticisation met with opposition from political workers and political parties. These conflicts came out in the open in 1987 at the time of renewed dialogue on the caste constitution.

### *Attempts at Repoliticisation and the Conflict over Caste Constitution*

The arrival of the Dalit Panthers[283] on the political scene offered the local youth an option in politics. In fact, all caste members were exposed to the militant politics of the Dalit Panthers,[284] and while not many joined the Panthers, their political discourse brought

---

[281] This is suggested by a cursory perusal of a memo. The letter discusses the elopement of widows as a contested issue requiring further debate (Internal Communication, 30 November 1976, signed by Devshi Khuman).

[282] "There emerged a general understanding that while people belonging to different parties may be active in the Panchayat, they will not have strong voices in running the panchayat. They have to create their 'social credibility' in order to make voices heard in this arena (The Central *panchayat*)" (Interview with Vishrambhai Waghela, 6 February 2003, Mumbai).

[283] The Dalit Panthers is an organisation of militant Maharashtrian Dalit Neo Buddhists (formed in 1972) who adopted the political goal of a democratic socialist state. By the late 1960s, the first generation of Dalits who reaped the benefits of a formal education joined the "Little Magazine" movement through which they challenged the literary monopoly of the upper-caste Hindus. They draw their ideology from Buddhist and Marxist philosophies and are inspired by the Black Panthers of the United States. Their earthy, often racy, militant literary works reflect their solidarity with peasants, labourers, prostituted women, Africans, Cambodians, Vietnamese, and so on (Gokhale-Turner 1980; Murugkar 1991).

[284] A Shiv Sainik was murdered while gambling in the Meghwal residential hub. The Shiv Sena had engaged with the Dalits in riots and clashes; there were therefore internal rivalries between the middle-caste Sena workers and the Dalits. The murder was not politically-motivated, but the Shiv Sena decided to play it as such. The Sena communicated in all its branches that the Meghwal caste was responsible for the death of its Sainik. The Badanwanshi caste members feared the backlash from the Sena. The caste members then turned to the Dalit Panthers who responded immediately: Namdeo Dhasal, the leader of one of the factions of the Dalits, came to address a rally in the area. The Sainiks decided not to attack, and the situation remained under control. However, this incident left a mark on the public memory of the caste (Interview with Vishrambhai Waghela, 5 February 2003, Mumbai).

about an awakening among the caste members.[285] This relationship gathered strength during the riots of January 1975[286] during which the Dalits suffered massive repression by the state.[287] The caste *panchayat*'s project of law reform also laid the foundation for a battleground of inter-party competition to capture the caste *panchayat* in the mid-1970s. Between 1975 and the early 1980s, a Constitution Rejuvenation Committee was formed with the tacit backing of the Congress Party who invited the Dalit Panthers to join the process. But soon, differences between the Congress Party and the Dalit Panthers spilled over into the public sphere; the Panthers wanted to restructure the *panch* system itself.[288]

The conflict between the Congress Party and the Dalit Panthers ran deeper than their struggle to capture the caste constituency.[289] The Dalit Panthers reaffirmed the centrality of political intervention in the process of constitution-making and opposed any move to Hinduise the caste. The Panthers stated: "We believe that any member who is part

---

[285] While the Mahar had used the Dalit identity since the 1930s, the Meghwals, until the 1970s, referred to themselves as "Harijans." Since the 1970s, they have adopted the term "Dalit" to refer to themselves.

[286] The Dalit Panthers competed with the RPI, the Congress Party, and the Shiv Sena on the political scene of Maharashtra in the 1970s. Over the course of a Lok Sabha by-election in 1974, the Panthers engaged in numerous violent clashes with the Hindu right wing party, the Shiv Sena. About 80,000 Dalit voters boycotted the polls. This protest was organised by the Panthers in protest of the ill-treatment of the Dalits by caste Hindus (Sirsikar 1995, 199-200).

[287] I have focused on these stories, which have become part of the caste members' repertoire of folklore, to explain crucial changes in the formation of the caste *panchayat*. "Story telling is crucial in constructing experimental meanings of the event after the fact and thus self understanding of those who, on either side, participated in it" (Auyero 2002, 153).

[288] Their aim was to shift the attention from inner governance to social welfare. They identified four functions of the caste *panchayat*: social welfare, economic upliftment, maintenance of records, and social progress and the consequent broadening of the caste agendas. They argued that the function of the caste *panchayat* should be to ensure and facilitate the process of securing the benefits of reservations for the Dalits. Their suggestions for social welfare activities included the use of caste funds to open educational institutions for Dalit students, to start literacy classes, and to provide tuition and scholarships for educationally weak students in each residential area. Other activities included providing ambulance service for the caste members as well as free legal aid for caste members. They also called for a cooperative bank, for a consumer society, and for the building of a large public hall for caste celebrations (*Agenda of the Panch-System*, Undated pamphlet).

[289] The conflict between the two parties was about control over caste ideology (over the meaning of "Meghwal-Dalit"), icons (whether to adopt Mahatma Gandhi or Dr. Ambedkar as a caste leader), religious affiliations (especially over the nature of religious affiliations of the Meghwal caste), the social sphere (the nature and functions of the caste *panchayat*), and programme agendas (what should be the general direction of the reforms).

of the *panchayat* can be a member of any political party... We also believe that members of this *panchayat* can belong to any religion and can celebrate whichever festival they wish."[290] Caste members joined the debates through discussions, and many wrote to both factions.[291] The Congress Party managed to garner support, and despite the controversy, the third Meghwal constitution was unveiled at the Meghwal Gnati Sammelan (Meghwal Caste Meeting) that was held on January 25, 1987.[292]

This political controversy brought about a heightened sense of distaste for the interference of the political parties in the social sphere of the caste. Many individuals, especially civic bodies who had supported the process, once again called for the depoliticisation of the caste. And once again, the caste members attempted to revive the social sphere of the caste.[293] The idea of democratising the *panch* system and of amending

---

[290] *Postscript*, 25 February 1987, pamphlet.

[291] Many of these letters are handwritten, and many letters are not signed. Some members have opposed the changes in the caste constitution. "Why should we change the constitution? It is a forward looking constitution which has been introduced by leaders with higher stature than yours. Why should self-appointed leaders meddle with the constitution?" A letter entitled "The Bubble Has Burst" (unsigned letter delivered to the Committee) accused the committees of engaging in new endeavours for their own benefits.

[292] See *Beyond Tomorrow: A Prayer to Public*, 25 January 1987; see also Minutes of the Constitution Rejuvenation Committee, 2 September 1986; see also Internal communication, circulated to all *panchas* by the Constitution committee, 26 September 1986, signed by Paljibhai Boricha, Virjeebhai Solanki, Mavjibhai Solanki, Shyamjee Koli, and Lalit Waghela.

[292] There were several reasons for which the caste constitution was passed. In general, people supported the Constitution Committee of the Congress Party over the Panthers. One of the reasons was that the parent parties of the Dalit Panthers went through a phase of in-fighting between factions; its disorganisation (Murugkar 1991) also affected its organisational capabilities and strength at the ground level. This infighting also affected the popular perception of the party at the caste level. Furthermore, the programmatic agendas of the Panthers did not distinguish between the civic activities and the social regulatory aspect of the caste *panchayat*. Secondly, the modernist images of the Panthers raised fears about state intervention in the community's affairs, and the constitution committee was able to play on these fears. On the other hand, the Congress Party supported the constitution committee and played upon the differences between them and the Panthers; the party thus built on the foundations of earlier constitutions was able to project itself as "moderate." This won over the trust of a large section who did not want radical changes. However, this process also saw the victory of the orthodox/moderates and the pro-Hindu factions of the caste.

[293] The idea of depoliticising the caste system also reflects the political developments in Maharashtra at that time. By the mid-1970s, a general perception emerged that the fruits of development were not equitably distributed and that the Indian state had failed to deliver to the poorest. A number of social movements—the Dalit movement, the people's science movement, the student movements, and women's movements—emerged during the seventies.

the constitution came about in this atmosphere of depoliticisation; soon, efforts began in that direction.

### The Decade of the 1990s: Consolidating the Caste Identity, Social Regulation, and Law-Making

The process of constitution-making in the 1990s took place in the broader political context of the twin developments in the Indian polity: economic liberalisation and rising communalism in Mumbai.[294] At present, there are more than 10,000 Meghwal households in Mumbai. Currently, members belonging to the upper stratum of the Meghwal caste are engaged in white collar professions (such as doctors, lawyers, and government officials). Individuals working as clerks, teachers, and industrial workers comprise the middle layer; many of them work as cleaners in the BMC and public sector offices. Many Meghwals are manual labourers in the informal sector. Income disparity within the caste is marginal.

The decade of the 1990s saw the fragmentation of the caste as a political constituency:[295] the caste members have not come to a public consensus over its religious

---

[294] In the early 1990s, the Hindu right wing party, the BJP, and its affiliate organisations staged a political campaign to build a temple at the birthplace of one of the Hindu gods, Ram, as well as to demolish the Babri Mosque on December 6, 1992; the result was nationwide riots. Bombay was one of the cities where the riots were more severe, and the Shiv Sena played a prominent role in the riots. The Bombay riots ravaged the Muslim communities in the city and also affected the Dalits given their proximity to Muslim neighbourhood because of their historical position of untouchability. While the Muslims suffered far more losses given the pogromic character of the riots, the Dalit properties were also affected during these riots (Interviews with Vishrambhai Waghela, 6 March 2003, Mumbai). Also, the decade of the 1990s ushered in economic reforms in India. These reforms had a direct impact on the livelihoods of workers employed in public sector companies. The reforms have also brought in a general sense of employment insecurity among the Meghwals. The Bombay Municipal Corporation has stalled the use of the preferential policy in recent years; this has caused unrest within the caste. The BMC has also withdrawn the housing policy; as a result, the workers have gradually been asked to vacate government *chawls* that they had been allocated for generations. A number of meetings on issues have been held by the Meghwals. The caste members have also been concerned about the possibility of the privatisation of the BMC and the resultant loss of rights to housing, pensions, and healthcare; this privatisation would adversely affect intra-caste organisations and activities (Interviews with Lalitbhai Waghela, 18 November 2002; J. M. Maroo, 19 March 2003, Mumbai).

[295] The 1990s were also marked by coalition politics at both the state and national levels. While a majority of the Meghwals tend to favour the Congress Party, the rise of the Samajwadi Party and the Bahujan Samaj Party have provided the Meghwals with new electoral options. The RPI does not have a base among the

identity. While many caste members are tolerant of other faiths, the 1990s have seen a rupture in this caste consensus.[296] Many caste members claim to be Hindus but add, with self-conscious irony, that they were not accepted by Hindu society at large. Many progressive sections and the Marxists scorn the recent trends of Hinduisation of the caste and criticise the caste *panchayats* for holding Hindu prayers on Hindu festivals. The caste holds Ramdeo *Pir,* who is worshipped by Hindus and Muslims, as its chief figure of faith and celebrates his pirhood and miracles through various ceremonies and public processions. However, the religious arena is seen to be separate from social and cultural fields: thus, Ramdeo *Pir*'s opinions and dictates are confined to religious matters. There is considerable religious freedom in the caste, and the constitution so does not conjoin Hinduism with Meghwal identity.

Throughout the 1990s, the participation of the Meghwals in organisations and associations remained vibrant. There are a number of civic organisations within the caste. In addition, several *panchs* also organise various activities at the local level, such as cricket matches, blood-donor clinics, AIDS awareness programs, intra-caste micro-credit groups for women, literacy classes, and celebrations of festivals including national festivals. The

---

Meghwals. However, many Meghwals support the Communist parties. The Shiv Sena has tried to woo the Dalit workers through actively taking up issues concerning the Preferential Treatment Policy in the BMC. This fragmentation of loyalties to the political parties has weakened the parties' dominance in the social sphere of the caste. The caste *panchayat* is seen as an independent body regulating social activities of the caste and is seen to be distinct from political parties. Very few members of political parties are elected as office-bearers of the caste *panchayat*.

[296] There exist contesting ideas and assertions of Hindu identity among a section of the community. I came across one case in which a Meghwal family had suffered residential boycott and persecution as a result of their conversion to Islam. The residents of that building justified their boycott in light of the family's renunciation of the Meghwal identity. The members of the converted family changed their pattern of dress as well as their speech, and they began to socialise with Muslims—an act that was perceived to be anti-Meghwal. A local youth who harassed the women members of the family argued: "We have nothing against Muslims... You can go and pray in the Mosque and bow to the *qazi* ... many Meghwals do that, but these people went too far." The youth explained what he meant by "too far": "It is as though they ceased to be Meghwals, and the women started wearing Muslim dress, *burqas*, and suddenly started speaking in Hindi... Why, don't we belong to (the) same culture? Have they forgotten that their parents were not *nawabs* (aristocrats), but night-soil lifters?" (Interview with Praveen Koli, 7 March 2003, Mumbai).

community has many poets and singers who sing both devotional and revolutionary songs. There are also women poets and writers in the caste whose plays are performed at public meetings.

The decade saw the rise of the first generation of educated Meghwal workers who were experienced in labour policies and familiar with trade union politics; they understood government administration, bureaucracy, and laws. These men and women took the lead in renewed calls for community reforms. Many of these leaders have participated in workers' movements as well as the women's movements, but they have been disappointed by formal politics and have sought not to "depoliticise but repoliticise"[297] the caste sphere through internal reforms and progress. Some feminists who were part of the Meghwal reform process had mediated effectively in many matrimonial disputes and had also coordinated with feminist organisations and activists in several cases.[298] The functioning of the *panchayat* over the years has been further democratised. The caste holds bi-annual review meetings in which caste members discuss issues concerning caste laws, and they exchange information about other forums. For instance, some women in a meeting exhorted the caste women to approach women's organisations, especially a Muslim women's organisation in their area, for more help in these matters.[299]

### *Summary of the Constitutional Provisions: Commonalities, Continuities, and Discontinuities*

The caste constitutions have been scrutinised and changed six times[300] since the creation of the caste community. The assessment and evaluation of the caste constitution is

[297] Interview with Gangaben Bariya, 8 September 2002.
[298] Interview with Gangaben Bariya, Forum Against Oppression of Women, 13 September 2004.
[299] The meeting to discuss the current caste constitution, 26 July 2003, Mumbai.
[300] The changes were formalised in 1935, 1953, 1965, 1974-75, 1987, and 1996, respectively.

an ongoing process. The caste group organises bi-annual meetings to discuss laws and their implementation. They invite lawyers, women's organisations, and Hindu and Muslim political leaders to discuss legal developments. The process of lawmaking has been inclusive from the first constitution.[301] The lawmaking process has also led to the consolidation of law wherein each new constitution includes both the contents of earlier laws and some alterations that cleared earlier inconsistencies in the law.

The constitution-making brings to light the agency of the caste in creating a collectivity called "Meghwals." Subsequently, the term has become fixed since 1987. The caste collective has expanded the area of its jurisdiction. Many caste members from different territorial areas can also become members of the Meghwal community.[302] Different constitutions have laid down extensive guidelines, rules, and regulations governing births, deaths, engagements, marriage, remarriage, breach of promise, divorce, elopement, and bride-price (the practice of bride-price is not widely prevalent anymore and has not been replaced by dowry).[303] At different times, the functions of the *panch* have included the registration of births, deaths, engagements, marriages, divorces, elopements; the enumeration of residents in a local area and the names of Meghwal residents; the maintenance of accounts; and the creation of records of non-adherence to caste laws and rules.[304]

Each constitution is both exhortative as well as authoritative, seeking maximal conformity with enshrined principles while implying that it will function on the basis of

---

[301] Indeed, the process in the 1970s epitomised this process in which a large number of institutionalised groups, representatives of different factions (who were co-opted to become members of subcommittees), and diverse bodies were consulted and different meetings were held to discuss the substance of their recommendations.

[302] See the Meghwal caste constitution, 1987, 1996.

[303] Feminist debates on dowry suggest that the replacement of this custom has had adverse implications for women's property rights (Caplan 1994; Sharma 1994).

[304] See *Meghwal Gnati Bandharan* 1953, 14-16; 1965, 1975.

voluntary compliance.[305] Each constitution has sought to remove "harmful traditions" such as child marriage (1953, 1965, 1987, 1996), the auctioning of women (1953), and the remarriage of older widowers with young women (1987). The constitutions have created intricate divorce laws. The process of divorce in the 1935-53 draft was hybrid, and the forms of divorce therein were akin to the Islamic practice of unilateral divorce. Women who had been separated for more than six months had the right to a unilateral divorce. Men did not have the reciprocal right (1953, 1964). Grounds for divorce, such as insanity, infertility, and incurable disease, were introduced in 1987. Other types of divorce include "fault-based divorce," divorce due to "mutual incompatibility," and divorce due to "mutual fault" (1964). The constitutions recognise annulment (1953-1996), the principle of ex-parte divorce (restricted only to women, 1953), and mutual incompatibility as grounds for divorce.

The constitutions have also sought to delineate rules concerning children and their lineage. The earlier practice of matriliny (1953, 1964, 1975) has since been replaced by patriliny (1987, 1996). Paternity is not the guiding principle in determining guardianship of children: the mother is seen to be the natural guardian of the child, and the children from the first marriage are seen to be the "natural" children of the man whom the mother married or with whom she cohabits (1953, 1964, 1975, 1987). The concept of illegitimacy does not exist in the caste (1953, 1964, 1975, 1987, 1993).

---

[305] For instance, the constitution prohibits child marriage (marriage in cradle) (*Sri Meghwal Gnati Bandharan* 1953, 1). Furthermore, each constitution holds that marriages should be performed without any economic exchanges (*Kanku-Kanya na lagan-Sri Meghwal Gnati Bandharan* 1953, 1965, 1987, 1996); this is the ideal type of marriage. They also recommend that marriages should be performed with as much simplicity as possible; for instance, the section on "Guidelines Regarding Arrival of the Groom's Party: '*Varghoda*'" stresses that intra-caste rivalries played out in outlandish and expensive marriages should be discontinued, and the bridegroom's procession should be small and simple (*Sri Meghwal Gnati Bandharan* 1953, 2).

While most caste constitutions were amended after the enactment of the Hindu Marriage Act, 1955, and lawyers working in state courts often serve as *panch* and advisors of the caste *panchayat*, only some caste laws have been harmonised to fit the framework of either the Hindu laws or the Indian Penal Code. The line between marriage and non-marriage was more fluid in the 1950s: the constitution allowed a married woman to marry a different partner who could pay a higher bride-price (1953, 1964). Each constitution sanctions cohabitation and conditional polygyny. Polygyny is permitted in cases of sterility; however, polygyny cannot take place before five years have elapsed, and even then, the first wife's consent must be obtained before polygyny is allowed (*Sri Meghwal Gnati Bandharan* 1953, 7; 1996).

Finally, the constitutions have formalised women's right to ownership of property (1987, 1996), and women are recognised as economic actors and not as dependents. In addition, women's right to maintenance during marriage is safeguarded in the constitutions. Similarly, women have rights to the self earned property.

**The Gendered Sphere among Meghwals**

The social sphere of the constructed caste collectivity of the Meghwals is not bisected into the dichotomies of public/private, inner/outer, home/world, or male/female. Women within the caste are seen as economic agents and act as economic agents.[306] The democratisation of the caste *panchayat* has also provided a few opportunities to women to participate in intra-caste governance, though their numbers are very few. Many women workers are trade unions members and participate in social movements, including

[306] The data suggest an important presence of women in the Bombay Municipal Corporation in the nineteenth century. For instance, in 1911, 1800 men and 1100 women classified as Dher and Mahar from Kathiawar were employed in the sanitation department (Mehta 1942, 9).

women's movements. Meghwal women are part of organisations and clubs and identify themselves as workers, committee members, cultural group members, writers, dramatists, and politicians. Many Meghwal women are local *panch*, and the central *panchayat* has a woman member on its committee.

The Meghwal caste laws do not construct a patrilineal, monogamous, nuclear family with a rigid sexual division of labour within the household. Patriarchal authority within the family is neither rigid nor non-negotiable. Joint families are the norm within the caste, but these households are comprised of various kin members as well as blood relatives and children from previous marriages. Within the caste, women's sexual choices are not restricted,[307] and sexual freedom is considered legitimate even after marriage. While heterosexuality is privileged, a few women have formed lesbian unions and they head their families.[308] Furthermore, the constitutions do not lay down criteria regarding women's dress, appearance, or behaviour.

Besides their access to more inclusive family rules, the women of the caste enjoy vast informal networks made up of kin members, family members, and neighbours since they tend to reside in common residential areas. They also enjoy access to civil society organisations, especially women's groups and the services provided by public sector employers (such as health services, daycare for children, and counselling services), and they are members of trade unions. They have also formed micro-credit groups and run women-related activities. Thus, they have access to public spaces and organisations.

---

[307] Scholars have argued that on the one hand, Dalit women have enjoyed relative sexual autonomy; on the other hand, their sexuality has been exploited by men from "upper" castes (Dube 1998). However, status as workers in the public sector has not rendered Meghwal women vulnerable to structural sexual exploitation.

[308] Interview with Champaben Waghela, 17 June 2003, Mumbai. Champaben Waghela has lived with her lover Satoshben for the past fifteen years. They have not faced discrimination from family or other caste members.

However, discriminatory practices do coexist with the relative freedoms enjoyed by Meghwal women. Meghwal women are not represented in the caste *panch* in large numbers, and rules in *panchayat* elections allow women to vote only if they are the head of a household. Practices such as veiling exist in the caste as a symbolic concession to Sanskritisation[309] (Srinivas 1966); "symbolic" as it does not prohibit women from participating in the public sphere. Many customs are changing as practices become more pro-women: for instance, the custom of bride-price is eroding, and matrilineal practices have been replaced by patrilineal practices.[310] However, caste laws still control women's income: a woman who elopes must leave her savings and income to her husband's family.

***Innovative Legal Process: "Democratic Participatory Justice"***

The Meghwal *panchayat* has not recreated the old traditional *panchayat* system but has innovatively institutionalised a "democratic participatory justice" system: the *panch* are elected representatives of the caste, and adjudication is one of their many tasks. This adjudication system is voluntary, informal, public, participatory (spectators can participate by getting involved in the decision-making process), flexible (about time, place, and presentation of proof), and decentralised. Decisions are binding, though members often refuse to abide by caste authorities and challenge them in state courts. Reasons prompting the decisions evolve in the process but are not stated in writing. The *panch* lacks penal authority, but it manages to exercise its authority by public reprimands, the collection of fines (disguised as donations), and indirect threats. Rumours, gossip, shame, public

[309] Sanskritisation is the process by which the "lower" castes mimic and adopt rituals and practices of "upper" castes to move up the cast ladder.

[310] Indeed, women within many sections of the caste clusters of the collective used to write their mothers' names after their names. The state's classificatory system of fixing, standardising, and legalising (Scott 2004) paternal names has abolished this practice.

humiliation, and speculation are other tools used to enforce compliance. Charges of corruption, partiality, and social coercion are often levelled against the *panch* by caste members.

The local *panchayats* meet at many different sites. Most of them have offices in the slums/*chawls* where they are situated. They often share these spaces with local NGOs or schools. At times, meetings are held in caste members' houses. The central *panchayat* functions from a Bombay Municipal Corporation's school. They hear matters of appeal and thus hear fewer cases than local *panchayats*.[311] Usually, all officials of the caste *panchayat* are present. Some unelected members of the caste gather around and act as messengers or perform odd jobs and add their voices to various matters. Caste-related gossip is exchanged on a regular basis: local news, politics, and other stories are told on "slack" days.

***Structure and Organisation of the Meghwal Caste Panchayat***

The Meghwal caste *panchayats* follows a two-tier structure. Any locality constituted of more than 50 households of the Meghwal caste can form a *panchayat*. Currently, there are fifty-five functioning local *panchayats* in the city of Mumbai and three in other parts of Maharashtra. Elections are held every five years. Any adult member of the caste can contest a *panchayat* election. Each household is allowed to cast one vote. Usually, this is cast by the eldest male of the house. Female heads of the household are also allowed to cast votes. In general, about five percent of elected members of the local *panchayats* are women. Similarly, members of the caste elect a central *panchayat* (Samasta

[311] The annual caseload in the central *panchayat* numbers approximately 25 to 30 cases every year (Interview with Bhimbhai Khuman, 3 March 2003, Mumbai).

Mumbai Meghwal Panchayat) through direct elections every five years. The central *panchayat* is seen as a chief governing body in the regulation of intra-caste matters.

*Process of Adjudication in the Meghwal Caste Panchayat and the Provision for Appeal*

Any member of the caste can give an application to their local *panchayat* for a meeting to discuss her/his case. The two sets of *panch* and the two families with their extended kin discuss the matter. The *panch* from either side act as advocates (they purposefully pay special attention to the claims and interests of the family they accompany); witnesses (when it comes to character reports, circumstances of domestic fights, economic situation of the families, etc.), and mediators (to bring about consensus). Judges, who try moral persuasion in cases where consensus between parties remains elusive, also participate in the proceedings. Cases in which parties fail to come to an agreement are directed to the central *panchayat*. At times, the local *panchayat* members ask the central *panchayat* to intervene. However, if either party is dissatisfied with the judgement of the local *panch*, he or she can also appeal to the central *panchayat*.[312]

**Similarities, Dissimilarities and Hybridity in State Law and Non-State Law**

The following section discusses the areas of overlap and conflict between state laws and caste laws of Meghwals. While caste laws have adapted to state laws in some instances, I show that the conceptions of conjugal family are strikingly different among the Meghwals.

***Who Is a Hindu, Who is a Meghwal?***

The Hindu law defines a "Hindu" as a person who is not a Muslim or a Parsi or a Christian or a Jew (Mulla 1966, 616). As per state classifications, the Meghwals are registered as belonging to the Scheduled Castes and are therefore governed by Hindu personal law in state courts. The data show that "enumerated" Scheduled Castes such as Meghwals adapt and resist state classificatory schemes and deploy their multiple identities strategically and selectively. Historically, there has never been an internal agreement among the Meghwals about their membership in a religious community. The religious affiliations of caste members are a matter of ongoing debate, dissent, and controversy within the caste collective. Over the course of the twentieth century, the caste collective has had members who have individually practiced Islam, Christianity, or Buddhism and have remained "Meghwals." The caste collective has adopted Ramdeo *Pir* as their chief deity, and caste members have worshipped the *pir* while adhering to varied sects, religions, and gods and goddesses. Religious beliefs are not seen as permanent but as temporary and can be assembled and dismantled.[313] The push to classify themselves as "Hindus" was strident during the 1910s and 1920s as well as during the 1990s. And while there has been the "Hinduisation" of the caste to a large extent, voices of dissent remain active.

Viswanathan has outlined how the colonial state divided the material domain from the spiritual one by accepting the converts in the adopted religion but allowing them to be governed by their old religious personal laws (Viswanathan 1998). The Meghwal caste

[313] "People dabble in religions... people are looking for solutions, influences of different sects wax and wane in our caste. In between a lot of people followed the Baba Santhnam, then there came a wave of following some Nagbawa (Serpent saint)... people are told that this sect will alleviate their pain or that *dargah* will yield fruits, and they run there.... many people go to Haji Ali (a mosque) to pray. People change their beliefs all the time anyway... Why, people began to worship Ram and Krishna after watching TV serials" (Interview with Mukesh Waghela, 5 March 2003, Mumbai).

members have adopted and refashioned this by trifurcating the domains they inhabit: the material domain, consisting of economic activity where they define themselves as Hindus to fit into the classificatory scheme of the state to access the benefits of affirmative action programmes; the spiritual domain, where they practice religious rites and rituals of the adopted religion; and the cultural-legal domain wherein they follow caste customs, practices, festivals, and rituals (some of these may also be Hindu festivals and rites). For instance, at present, many families among the Meghwals practice Islam or Christianity in their daily life and do not see contradictions in approaching the Meghwal caste *panchayats* when it comes to matters concerning marriage or divorce. So, being "Meghwal" is not equivalent to being "Hindu." For the Meghwals, the category "Hindu" is not an ascriptive category; rather, it is a category that is displayed when needed and is often rejected or rendered meaningless in practice. The caste *panchayat* opens up the divide between religious laws and cultural norms, and it views culture as a distinct sphere from religion.

***Consent***

Provisions such as the restitution of conjugal rights in Hindu law act against the notion of autonomy inherent in the concept of consent. However, consent is seen to be an integral part of the rules of the Meghwals.[314] Interestingly, in addition, the rules governing consent are also applicable after marriage, and lack of consent is a valid reason to end a marriage. The Meghwal caste *panchayat* often gives primacy to individual will and

[314] The Meghwal constitution of 1953 included a section on "Marriage by Insistence" whereby young women could insist on marrying a person of their own choosing against the wishes of the natal families. Section 2 of the caste constitution on marriage stresses that "engagements should be entered into with the consent of the parties and their families" (*Meghwal Samaj-Gnati Bandharan*, 4). Similarly, the section on "Marriage by Elopement" (*kadhpanu*) also stresses that parents should not oppose marriages of two consenting adults (Meghwal *Samaj-Gnati Bandharan,* 21). The recognition of *consent* is an important legitimising criterion for ascertaining the distinction between marriage and non-marriage within the caste.

freedom to marry over kinship obligations. As per a Meghwal practice, young persons often run away when being pressured into marriage by their families.[315] Unmarried couples who face opposition to their marriage plans may "elope" and apply to the caste *panchayat* for "re-admittance into the caste." They are reaccepted into the caste upon payment of fines (taxes) to the *panchayat.* The *panch* in turn negotiate parental approval of the marriage. The mediation often results in the woman's family being paid compensation money for "losing" the daughter.

In an analysis of runaway marriages between unmarried couples in North India, Chowdhry describes the cultural arena as inegalitarian and the state as patriarchal but a potential ally in securing women's rights; however, she also finds that the state and traditional authorities often collude in denying sexual agency to women runaways (Chowdhry 1997, 2004). Mody has pointed out the contradiction between the acceptance of a "love marriage" in law and the societal delegitimisation of this form of marriage. He argues that the freedom of choice inherent in the notion of a "love marriage" is seen as antithetical to social notions of familial and caste obligations (Mody 2002). However, this trend is reversed among the Meghwals. When Jayesh and Bharti, a young unmarried couple, eloped to escape parental opposition to their marriage, the caste *panchayat* registered their marriage and ensured that both sets of parents accepted the union.[316]

Indeed, the Meghwal caste's provisions of elopement by married parties contravene state authorities' interpretation of provisions in law to deal with runaway marriages. A married Meghwal woman, Lakshmi, eloped with a man from outside the Meghwal

[315] The tradition is widely prevalent today: Ramesh, a young man "ran away" (*bhagi gayo*), and his parents had to pay compensation decided by the *panch* to the bride's families for "losing face" (Interview with Nathabhai, *panch*, 7 September 2002, Mumbai).
[316] Interview with Bharti, 15 February 2003, Mumbai.

collective, taking her *stridhan* and savings of Rs.100,000, thus violating the caste law.[317] The husband went to the police to track her down, and the police and lawyers advised him to charge her and her lover with theft, adduction, and kidnapping.[318] However, the husband and the Meghwal *panch* insisted that "elopement was quite common in their caste and they did not wish to prosecute the man she had eloped with. They wanted to recover the money which was against the caste laws."[319] In the end, Lakshmi granted her first husband a divorce, got a favourable custody arrangement, and retained half of her savings. Through the use of criminal laws in cases of "elopement," the state law affirms women as objects. The caste law is more open to sexual choices made by women, but it still reaffirms familial control over the fruits of the woman's labour.

### *Differing Conceptions of Marriage and Divorce: Marriage as Fixed or Fluid?*

Hindu law makes a distinction between marriage and non-marriage. Among the Meghwals, the line between marriage and non-marriage is often shifting—a line drawn in the sand. The practice of elopement can lead to different unions, especially since the caste laws do not make a symbolic distinction between elopement between unmarried partners and elopement between already married partners. When married couples elope with unmarried or married partners, these combinations give rise to various forms of simultaneous marriages. In one case, Nilesh,[320] a married man, had eloped with his wife's

[317] Married women who elope are required to leave behind their earnings. Married men who elope are obliged to maintain their previous families (*Meghwal Samaj-Gnati Bandharan* 1996, 21).
[318] Adultery is a criminal offence according to Section 497 of the Indian Penal Code, though women cannot be charged for this offence. In cases such as Lakshmi's, parties are also accused of, and often charged for, committing offences such as kidnapping (Sections 359, 361) and abduction (Section 362, Indian Penal Code, 1860). See Chowdhry 2003 for more details.
[319] Interview with Nathabhai, 3 October 2002, Mumbai.
[320] Interview with Nilesh and his father, B.C., 27 January 2003, Mumbai.

sister, and both had asked the permission of the caste for re-admittance into the caste.[321] The caste *panchayat* accepted the application and called the man's family, including the marital family, to arrange a dialogue. The families came to the consensus that the man and his wives would live together as his first wife decided to wait for six months before she decided on any "final solution." However, both the women would be recognised as his wives and would have equal economic rights upon divorce. This contravenes the state laws on polygamy and on maintenance.

Hindu law and caste law also disagree on matters of divorce. As per Hindu law, the act of divorce terminates a legal marriage; thus, divorce is an irreversible act. The parties must re-enact the stipulated rites of the Hindu marriage if they choose to remarry. However, the caste law has a provision titled "Undoing the Deed of Divorce." Divorce, in this case, is seen as a reversible act.[322]

Hindu law normalises heterosexual, monogamous marriage and disallows other forms of unions; it disallows polyandry or polygyny. The Meghwals, however, accepted polygyny, but it was not widely practiced. The first constitution regulated polygyny. While state law has prohibited polygyny since 1955, the Meghwal caste constitutions allowed polygyny in special circumstances until the 1980s. Polygamy was not seen as a

---

[321] Both married and unmarried partners who elope are required to place an application for re-admittance into the caste.

[322] Section 39 of the Meghwal caste constitution discusses caste rules in matters of divorce. Titled "undoing the deed of divorce," the Section states that divorced partners can, by mutual consent, reverse the deed of divorce. The parties can submit an application to their local *panchayats* informing them that they wish to "undo the divorce." In such instances, the parties should exchange property dues and pay fines of Rs.75 to their respective local *panchayats* and Rs.50 to their central *panchayat*. The applicants are then formally recognised as husband and wife by their families and caste members. In one case, the parties involved (Priya and Amit) revoked their divorce after about 11 years of separation and began to cohabitate as husband and wife, without undergoing marriage ceremonies. They informed the caste *panchayat* about their decision to "undo the divorce" (Interview with Priya and Amit, 23 May 2003, Mumbai). This process is often more decentralised. In another case, Maya obtained divorce from her husband and went to live with her lover. Within fifteen days, she returned to live with her husband. They did not inform the caste *panchayat* of their decision. However, they are still accepted by their fellow caste members and families as "married" (Interview with Maya, 20 January 2003, Mumbai).

controversial provision in the caste, despite wider debates in society, since divorce was easy and polygyny was practiced symbolically in many cases.[323] The caste constitution has withdrawn support from polygyny only since the 1990s.[324] Recently, the option of polygyny was revisited when it was considered in a case where a wife was infertile. The case was not pursued as the wife was unwilling to give her consent.[325] Ironically, polygamy is easy to practice in cases in which men's wives have approached the state court for maintenance but do not wish to grant a divorce. Men tend to challenge the validity of marriages in such cases and then tend to marry again.[326]

### *"Validity" of Marriage*

The caste laws on elopement once again bring to focus the lack of a socio-legal distinction between marriage, non-marriage, and cohabitation. Under Hindu law, the state does make a distinction between marriage and non-marriage. For instance, cohabitation is not recognised as equivalent to marriage; therefore, the rights of non-married partners are

---

[323] The practice of levirate was tied to polygyny and was customarily practiced until the late 1960s. Young widows were married to unmarried brothers-in-laws. However, older widows (women older than 50 years) were also married to their married younger brothers-in-law. These marriages were often symbolic and were carried out to ensure security to women in their old age (Interview with Shantaben Waghela, 6 February 2003, Mumbai).

[324] The issue of polygamy has been systematically taken up by the Hindu right since the Shah Bano case in 1986, and there has been much debate on this front. Public sector employees, however, are not allowed to contract more than one marriage; these changes in policies are also some of the reasons behind changes in the caste law.

[325] A woman was "sent back" to her natal home after her husband discovered she was infertile. The woman refused the divorce conferred upon her. During negotiations, her husband's family asked her if she was willing to consent to her husband's second marriage. She denied the option and was not persuaded by either family (Interview with Champaben Waghela, 5 October 2002, Mumbai).

[326] In a case of maintenance filed by the wife, Jaya, in the state court, Ramesh's lawyer argued that the marriage was invalid. The court ruled in his favour, and Ramesh remarried even when Jaya challenged the decision in the High Court. He was able to do so because his second wife belonged to "their caste but not to their *samaj* (collective)," and as a result, the issue of the legality of his marriage remained outside the purview of the caste collective of the Meghwal *panchayat* (Interview with Jaya and Ramesh Chauhan, 14 April 2003, Mumbai).

not recognised under Hindu law. Conversely, cohabitation is widely practiced in the caste, and economic rights of the cohabiters are recognised by caste laws.[327]

*Procedural Aspects of Defining Valid Marriages*

It has been persuasively argued by Menski that courts also recognise customary rites; Menski suggests that many forms of marriage are recognised under Hindu law (Menski 2003, 33). In actual practice, especially among lower courts, decisions vary widely.[328] In lower courts, the validity of a Hindu marriage depends on the performance of certain rituals, such as *saptapadi*, seven steps around the sacred fire, and *homa*, an invocation before the sacred fire (Section 7 (1) of the Hindu Marriage Act, 1955; Mulla 1966, 638). Among the Meghwals, first marriages are ritually sanctioned and celebrated in public. The second marriages are called *ghar gharna* and may or may not be celebrated in public.[329] State courts are often arbitrary in their recognition of caste rites and laws, which adversely affects women's rights.[330]

---

[327] The Meghwal constitution describes customary laws upon elopement ("self-chosen relationships"). This section regulates and sanctifies a vast array of sexual relationships, including when a couple chooses to adopt a sexual union irrespective of their marital status. The section lays down criteria for resolving disputes in cases involving the elopement of unmarried parties, married parties, and situations in which one of the parties (either the man or the woman) is married while the other is unmarried. Marriages by elopement are quite common among caste members. Parties who elope are seen to have committed a "socially improper act" against their individual families and fellow caste members. They are symbolically outcast until the dispute is resolved. Customary laws dictate that these parties approach the caste *panchayat* and pay required taxes (fines) (*Meghwal Gnati Bandharan* 1996).

[328] In practice, most Hindu marriages are not registered, and the courts tend to accept wedding invitations and photographs of the weddings as proofs of marriage.

[329] As per custom, the women of the groom's family come to the bride's house with a set of new clothes for the bride. The bride changes into these clothes and accompanies the women to her new marital house. This exchange takes place only between women, and the groom is never present at these occasions (Interview with Shantaben Waghela, 6 February 2003, Mumbai).

[330] Interview with Rajesh Shah, Rajkot, Lawyer, 30 March 2003, Mumbai. A court session in Gujarat refused a maintenance request under Section 125, Cr.P.C. to a Meghwal woman, Jaya, on the grounds of invalid marriage. It was the second marriage for both parties, and it was performed without any ceremony, which was not recognised by the court (Interview with Ramesh, 30 March 2003, Mumbai).

Secondly, the recognition of valid marriage rests with the discretion of individual judges, and it is often difficult to prove marriage when there is no ceremony involved. Levirate among Meghwals is recognised orally. Even if the court can presume marriages due to evidentiary proofs such as common residence, levirate is difficult to prove since joint residential arrangements are the norm among Meghwals. At times, such marriages are only recognised among small kin circles within the caste.[331]

### *Divorce in Caste Laws*

Legalising divorce is one of the reforms made under Hindu law in 1955. However, in the judicial sphere, divorce is often seen as a benchmark of social instability (Menski 2003) and is not granted easily, especially if one of the parties opposes it.[332]

Divorce is and has been a widely acceptable familial practice among Meghwals.[333] However, the 1990 constitution stresses that "the decision to divorce should be a carefully

---

[331] The practice of levirate in present times is tied to the Preferential Treatment Policy, which enables a Meghwal widow to be designated as a recipient of her deceased husband's public sector job, which carries benefits to sustain the entire family. The widow's remarriage outside the family would jeopardise the fine economic balance of that family; as a result, levirate is often encouraged, especially when the younger brother-in-law is unmarried. However, the families do not register the marriages with caste authorities because the remarriage of the widow renders her ineligible for the Preferential Treatment case. Besides, the applications for Preferential Treatment cases can take three to five years to process and finalise. The marriage has to be kept invisible from the gaze of the state until the "widow" gets her job (Interview with Hiraben Boricha, 14 January 2003, Mumbai).

[332] Under the Family Court's Act, 1984, the role of the Family Court is to "stabilise" marriage. Section 2 (e) of the "Statement of Objects and Reasons," Family Court's Act, 1984 makes it "obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute." Hindu law allows divorces on certain grounds, thus incorporating some restrictions on divorce. There are seven grounds for divorce under Hindu law (Section 13 of the Hindu Marriage Act, 1955; Mulla 1966, 682). Hindu law does not recognise "no fault" divorce. An amendment to the Hindu Marriage Act, 1976 has introduced divorce by mutual consent without stating the grounds for divorce. Hindu law is not a monolithic construct, and the idea of divorce as harmful to public morality and the institution of family coexists with the idea of privileging individual freedom in marriage.

[333] Among the Meghwals, marriage is not understood as an institution providing social stability. It is also not linked to ideas of public health or private morality. The Meghwal constitution on marriage and divorce does not lay down explicit rules on grounds for divorce. The section on divorce (*Meghwal Gnati Bandharan* 1996, 28) states that "incompatibility between husband and wife or irreconcilable differences between spouses can be grounds for divorce. Enmity between the two families can also be seen as providing grounds for divorce" (*Meghwal Gnati Bandhara* 1996, 28). Given that multiple local sources officiate in matters related to divorce, the granting of divorce is flexible.

considered... divorce should not be taken lightly." However, this assertion is challenged within the caste in the implementation of laws,[334] considering that the Meghwal caste constitution has approved "no fault" divorce. A woman, Maya, approached the *panchayat* for divorce in order to live with her lover. The husband was against the idea of divorce, but the *panch* "persuaded" the husband to grant her divorce.[335] Had this case been heard in a state court, the outcome would have been radically different. As per the state law and procedure, adultery as grounds for divorce is based on a notion of marital obligations wherein fidelity is seen to be a moral obligation of the partners. The role of the state is to ascertain the wrong that is committed by the guilty party and to see that only the innocent party is allowed to remarry. Besides, the concept of "fault" is not always understood in the same manner as it is framed in the court. For example, the Family Court would not have granted a divorce to Maya in the face of her husband's opposition.[336] The court's logic of ascertaining "fault" would have established Maya as an adulteress, and the ruling in her favour would have been seen as victimising her husband. In addition, Maya's act of adultery would be construed not only as a wrong against the married spouse, but also as a step contrary to public interest and morality. In the state's eyes, the granting of divorce to

---

[334] To illustrate, a nineteen-year-old woman who had been married for less than a year had approached the caste *panchayat* for divorce and cited "indifference" as grounds to terminate the marriage. The husband was ambivalent. The *panchayat* asked her if she wanted them to effect a reconciliation once before they decided on the final outcome. At which, a spectator who was in the *panchayat* office at that time spoke up: "It seems too obvious to me that the husband is uninterested. What are we wishing for? Why not grant her divorce? Since when have we become Brahmins that we have to try to prolong marriages through reconciliation?" This view was accepted by the *panch* (Interview with Mohanbhai Baria, 5 June 2003, Mumbai).

[335] The officiating *panch* said: "the husband was unwilling to sign on the divorce papers, but I told him that if the woman does not want to stay with you, what can be done? There is no legitimacy in forcing a woman to live with you when she wishes to be elsewhere (*bai manas ne jabarjashi sathe rakhi ne shun fayado*)?" (Interview with Dahyabhai, 10 March 2003, Mumbai).

[336] It can be argued that Maya's husband may not have been able to prove adultery. However, the caste *panchayat*'s decision does not rest on evidentiary grounds. Maya has asked for divorce in order to live with her lover within the caste. The difference between state law and caste law lies in the legal of regulation of sexuality within marriage.

Maya would be encouraging her sexual license. However, the *panch* in this case gave the judgement based on the terms of personal freedom.

Fault has not been completely abolished among the Meghwals, however. In practice, the concept of "fault" is used to decide post-divorce financial settlements. For example, a couple separated for more than two years approached the *panchayat* for divorce. The young man was mentally unstable and had beaten his wife unmercifully. Both the families had tacitly decided upon divorce, and the woman's remarriage was to be arranged. The *panchayat* granted the woman alimony because of physical violence within marriage.

***Economic Rights within Marriage and upon Divorce***

The Meghwal women are perceived as economic actors under caste laws. For instance, gifts given to the husband by her family at the time of marriage or during marriage are seen to be her property. If parts of her property have been sold/mortgaged or damaged, she is compensated for that at the time of the divorce as per *panchayat* rules. The *panchayat* rules also state that the woman's self earned property—be it in form of life insurance policy, a house/dwelling, share certificates, etc., acquired during marriage—is her own property (neither her natal family nor her marital family has a right to it). Her own earnings are not seen as joint marital property by the caste *panchayat.* In cases of the breakdown of a marriage, the woman is entitled to all of her share of self earned property (*Samasta Meghwal Gnati Bandharan*, 21). While the constitution is silent on permanent alimony, it states that the husband is bound to provide maintenance for his wife and children (if applicable) during the period of "separation due to differences" (*risamana no samay*). The *panch* claim that many husbands fail to pay this amount; even so, this amount

is added to the final divorce settlement in most cases. However, a married woman who elopes has to leave her self earned property as well as her joint savings behind or hand these over to her husband's family (*Samasta Meghwal Gnati Bandharan* 1993). A man who elopes must shoulder the responsibility of his wives and children from the first as well as the second marriage, as the case may be.

While Hindu law enables the parties to make claims from each other as individuals who have entered into the marriage contract, the Meghwals can lay claims for maintenance from other family members of their partners.[337] The economic circumstances of either party are often constrained, and sharing of family resources is considered quite common.

The Meghwals do not recognise a husband's right to demand maintenance from the wife. In contrast, under Hindu law male spouses can demand maintenance from their wives.[338] However, this provision of the Hindu law has affected Meghwal women's ability to bargain for their rights in marriage:[339] there have been several cases in the caste in which husbands have asked working women to compensate them during the period of separation in exchange for divorce.[340] Similarly, in cases where state law and caste law become intermeshed, caste laws that can potentially grant more rights are often diluted due to the parties' exposure to state law. In a case involving claims for maintenance, Mita, a woman who had been the primary bread earner for the family for about 15 years, filed a case for

---

[337] I have interviewed 12 individuals who received a financial settlement upon divorce. In all these instances, families had shouldered/shared the financial responsibility.

[338] This provision is used by Meghwal men to demand money in exchange for divorce. In one case, the woman was the primary earner and wanted to divorce after three years of marriage. Her husband refused to give divorce unless she gave him a lump sum (Interview with Nila, 8 September 2002, Mumbai).

[339] A Meghwal woman called Padma explained why she had never filed a case in court despite her need to get a solution: her husband is an alcoholic and has never worked in his life. He asks her for money. He beats her if she does not give him any, and at times he steals utensils from the house to sell and pay for his liquor. She works as a peon in a school and manages the family. She said that she had talked to a lawyer who had told her that her husband could claim maintenance from her. She was even unwilling to approach the *panchayat* out of the fear that her husband may file a case for maintenance in the Family Court if she tried to upset the marital arrangement. She said it was easier for her to not to take any steps against her husband.

[340] Interview with Pushpa Waghela, 23 October 2002, Mumbai.

maintenance against her husband because she was thrown out of her matrimonial home with her three school-aged children. When the hearing date drew near, her husband, Ritesh, approached her for reconciliation.[341] The terms of the compromise involved her dropping the request for maintenance. Matters did not improve, and she approached the *panch* for dialogue. The *panchayat* asked Ritesh to pay maintenance to her and the children as per caste laws. Ritesh declined stating that as per the Hindu law, he was not entitled to pay Mita maintenance because she worked. He simply disregarded the *panchayat*'s decision (*faisla*); unfortunately, the office lacks implementing authority.

In addition, Hindu women can also ask for maintenance under Section 125, Cr.P.C. under state law. This Section is popular among Meghwal women, many of whose husbands work in the public sector and whose payment are easier to attach through court orders. Resorting to this Section contravenes Meghwal caste norms in the sense that desertion or a long separation without divorce has not been the custom among Meghwals. Caste authorities often insist on divorce as a final solution to questions of marital disagreement. However, Meghwal women who wish for economic assistance without intending to terminate the marriage often opt for this provision. State laws around maintenance enable them to maintain subsisting marriages and increase their bargaining power within marriage. Denial of paternity is accepted by courts as grounds for contestation over maintenance claims in state courts. Among Meghwals, children from first marriages are seen as the responsibility of the second husband and are given the same status as biological children that the couple may have in future (*Meghwal Gnati Bandharan* 1996).

[341] Ritesh had a job in the private sector, and his salary would have been deducted at the source had she not dropped the case.

## Interactions between Diverse Societal Organisations and Actors

### *Contestations among Informal Legal Actors*

The history of constitution-making shows conflict between factions who support the idea of democratic governance and factions who wish to retain individual authority. There is also a struggle over capturing caste *panchayat*. This has resulted in factionalism and the fragmentation of the caste sphere. The authority of the caste *panchayat* is often resisted by individual actors. Similarly, some marriages within the caste are dissolved through the informal consent of the parties. These divorces are not registered with caste *panchayat*. In some cases, divorce is mutually agreed upon by both the parties and does not seem to be a "public dispute" deserving intervention by the caste.[342] In such cases, parties employ mediators or kinsmen to mediate and dissolve marriages. Such divorces are "understood" but unregistered. These divorces take place when the remarriage of parties occurs among their own kin members. In other cases, approaching the caste *panchayat* might be an option that would not benefit either party, and the marriage is dissolved "on the sly."[343] Women often tend to lose rights when justice is not a public process within the caste. Respondents suggested some instances of intimidation, threats, and coercion linked to bargaining over matters related to divorce and settlements at the time of divorce.[344]

---

[342] A woman whose marriage was s dissolved informally stated: "People go to *panchayats* when they disagree about divorce. We did not have a dispute" (Interview with Rama, 5 February 2003, Mumbai).

[343] In one case of divorce, the parties failed to come to an agreement on who would pay the taxes to the *panchayat*. Both parties declined to do so, and the *panchayat* refused to give a written authorisation of divorce. The parties met again without the *panchayat* and agreed upon an "understanding" that the marriage was dissolved. The woman was then remarried to her cousin. "We could take such a stand because we knew we were to remarry our daughter in our own family" (Interview with Bhikhabhai Boricha, Kin member, 10 December 2002, Mumbai).

[344] In one case, a woman was thrown out of the matrimonial house because she was infertile. The woman's family did not wish to accept the idea of divorce and tried to negotiate for three years. However, the husband's family tried to secure a divorce after a few years and approached the caste *panchayat*. The caste *panchayat* asked the husband's family to pay the maintenance amount of Rs.25,000 due to the wife during the period of "separation due to irreconcilable differences" as per the caste law. The husband's family

Some litigants also seek help from political parties,[345] state officials such as the police, Muslim religious organisations,[346] and women's groups.

### *Women's Organisations as Informal Forums of Justice: Implementing State Law without Litigation*

In a socio-legal field that allows for multiple legal actors, civil society organisations, especially women's groups, often expand the reach of state law. The organisations mediate among parties "within the shadow of the law" (Kornhauser and Mnookin 1978) and replicate the functions of the state. They also provide a forum for support to women who feel silenced within the caste and who lack social support within the caste. Women of the group approach both Hindu and Muslim women's organisations in order to confront the caste authority. In the following case, a woman called Hansa approached a woman's organisation when her husband eloped with another married woman, Leela, and she was afraid that she and her son would be thrown out of the matrimonial home. In an intervention that spanned over four years, the women's organisation helped Leela and her first husband negotiate their divorce, ensured the

---

refused to pay the amount, and the intra-caste adjudication process proved inconclusive. The *panchayat* then tried to pressure the woman's family through close kin members who worked as intra-caste intermediaries. The husband's family threatened that they would spread rumours of the woman's infertility within the caste if the wife did not agree to divorce. In return, the woman's family bargained for a settlement amount of Rs.15,000, which was less than the amount directed by the caste. Women who are well connected within the caste, however, are less vulnerable to such threats and coercion (Interview with M.K., 17 October 2002, Mumbai).

[345] A Meghwal woman who had links with the *bahujan Samaj* party asked their fellow workers to be present at the time of negotiations in order to increase her bargaining position (Interview with P.M., 4 October 2002, Mumbai).

[346] "Upper castes do not share residential areas with us. Historically, Dalits and Muslims have lived in adjoining areas. We live in a predominantly Muslim area. We approach social organisations of this area if we need help. There is a Mahila Mandal in this area; they are all Muslim and they do good work" (Interview with Leelaben Boricha, 30 January 2003, Mumbai).

implementation of a maintenance amount to Hansa from Bipin, and helped Hansa to retain her right on the matrimonial residence—all without resorting to litigation.[347]

### *Women's Organisation as Moral Watchdogs: Women's Organisations and Caste Authorities*

Conflict between women's organisations and caste authorities rises to the fore in cases in which women use organisational support to challenge patriarchal provisions within the caste. In such an instance, a woman, Lata, filed a case in state court for divorce and was granted a divorce. However, Lata and her extended family went to her husband Haresh's house to collect her *stridhan*; they found that Haresh and his family had called 5 to 7 men of their community. Haresh explained that these were the members of the local *panchayat* and that they were present to finalise the divorce as "they and their caste did not recognise divorce of the court."[348] Lata and her family were forced to comply and sign the divorce papers. They were then asked to pay the dues of Rs.2250 as per caste laws[349] since she had initiated the divorce proceedings. Lata and her family found that the men they believed to be local *panchayat* members were not actual *panchayat* members; on the basis of this "fraud" she approached a women's organisation to get the money returned and to get appropriate compensation for her damaged *stridhan*.

Conflict also arises over the use of Section 498 (A), Indian Penal Code, which is the law on domestic violence. A women's organisation was instrumental in helping Esha to register a case against her husband, Naresh, under this Section,[350] alleging physical

---

[347] Interviews with Hansa and Bipin, 13 May 2003, Mumbai.
[348] Interview with Lata, 11 September, 2002, Mumbai.
[349] A woman who initiated a divorce had to pay Rs.2250 to the caste. This included the return of bride-price paid to her family at the time of marriage and the caste penalty for the initiation of divorce.
[350] In the 1980s, the Indian women's movement had raised the issue of dowry-based violence and asked the Indian state to enact laws to address the issue. As a result, there was a spate of legislation prohibiting dowry-

violence due to dowry demands, as a narrow interpretation of law criminalises dowry-related violence. As a result, Naresh, his younger brother, and his mother who resided jointly in the marital house were arrested and were not released until the commencement of the trial; the bail amounted to Rs.20,000. However, some caste members went to the court sessions as witnesses and claimed that "dowry was not a customary practice."[351] The conflict here went on at several levels. From the viewpoint of Esha, she wished to raise an issue of domestic violence and had to fit her narratives in a pre-determined framework of the law. As a result, dowry demands and violence became interrelated. Such admission went against the manner in which their social customs were recognised and ordered. The caste *panchayat* emphasised the wider issue of police harassment of the subaltern classes and wished to "save" a fellow caste member. What they refused to address was the issue of sanctioning domestic violence through their support of Naresh.

***Bargaining for Women's Rights vis-à-vis the State and the Caste***

While women's organisations privilege state law, they often attempt to stretch the meaning of the law in order to secure maximum rights for women. Both Hindu law and the caste constitution recognise a woman's right to her *stridhan*. However, access to *stridhan* is finalised at the time of divorce in the caste rules as well as in the state law, along with

---

related violence. However, this also led to the clubbing of the issue of domestic violence with dowry demands (Dave and Solanki 2001; Gandhi and Shah 1992; Katzenstein 1989; Agnes 1995a). Section 498 (a), IPC is a forward-looking law in the sense that it allows women to define what they consider to be violence, including verbal abuse and emotional violence faced in the marital home. Furthermore, it places the onus of proof on the perpetrator. Potentially, the law also holds not only the husband but the entire marital family accountable for domestic violence in cases where the couple resides with the joint family (Mukhopadhyay 1998). However, the patriarchal biases of the police and the judiciary are evident in their conservative interpretation of this law as "dowry-related domestic violence that would lead a woman to commit suicide." This bias of the state has led to low registration and conviction rates in such cases despite a high incidence of domestic violence (Dave and Solanki 2001).

[351] Interview with Esha, 25 November 2002, Mumbai.

distribution of other property.[352] Women often demand access to their property during marriage or at the time of informal separation or during the process of litigation for maintenance.[353]

However, there is no provision in civil law that allows women control over property. In these cases, women's organisations often step in. They mediate between family members, and in cases where a husband's family is unresponsive to a woman's demands, they try to involve the police by either persuading the police to lodge cases under Section 406, IPC[354] or by attempting to persuade the husband's family members to part with the wife's *stridhan*. The meaning of *stridhan* is also disputed between the state, the caste, and women's organisations. The courts often interpret *stridhan* as dowry,[355] as does the Meghwal caste *panchayat*. Women's groups hold *stridhan* to mean "gifts given to women by both the natal and marital families at the time of and during the marriage."[356] Hence, women's organisations attempt to stretch the interpretive scope of laws and use different legal tools and extralegal bargaining to broaden the scope of women's rights in law.

The section above highlighted the hybridity and difference between state law and caste laws and discussed how interactions and negotiations among various societal actors

---

[352] Similarly, Meghwals have formalised a system for the registration of *stridhan* at the time of marriage when caste elders and caste *panchayat* members record gifts given to the bride and the groom at the marriage venue. The lists are given to both the parties and are returned to the woman at the time of divorce. However, caste authorities are reluctant to return *stridhan* except at the time of divorce as caste practice intertwines the return of property with the breakdown of marriage.

[353] Most women need their property at this time because they attempt to rebuild their lives, and movable property such as jewellery is useful for this purpose. They also fear permanent loss of this property from the marital home. Most respondents complained of receiving damaged property, and almost all respondents claimed receiving less than what they had originally been given. The caste *panchayat* has more success in recovery since the caste registers gifts given to the woman at the time of marriage and assiduously recovers these at the time of divorce.

[354] The Section is used to prosecute for criminal breach of trust. It is used by women's organisations to recover dowry and women's property (see Dave and Solanki, 2001).

[355] There have been some SC judgements that have interpreted *stridhan* more expansively than dowry.

[356] Interview with Vandana Nanawade, 20 June 2003, Mumbai.

impact upon women's rights in legal forums. The following section discusses the adjudication of Hindu law in a sub-caste of Sai Suthars.

## The Caste *Panchayat* among the Sai Suthars

This section focuses on a sub-caste group known as Sai Suthars that is primarily organised as a regulating unit of endogamous circles. The sub-caste is also part of the broader local supra-caste association comprised of 108 similar sub-caste groups classified by the state as "Other Backward Classes."[357]

### *Internal Governance of Family Matters among the Sai Suthars*

As per caste folklore, individual young men of the sub-caste came to Bombay in search of livelihood from Saurashtra in the early 1900s. Many of them worked as tailors and did not require access to credit, capital, or other help from other caste members to start their trade.[358] There was insignificant contact between fellow caste members in the initial years, and there was "no demand to organise across caste lines as there was no perceived need for caste unity for upliftment of the caste."[359] Young men who migrated to Mumbai in these years went back to villages to marry and left their brides behind in the villages. They visited their families in villages while earning their livelihood in Mumbai. The village

[357] This term refers to socially and economically backward groups. These groups do not enjoy all the benefits of affirmative action programmes that are granted to the Scheduled castes and Tribes.

[358] "We could rent some space under any staircase and begin tailoring. Unlike other community members, we did not live in clusters but were spread out across Mumbai for our fellow caste members are also our competition... after all, how many tailors can a locality support?" The caste members have tended to work largely in the private sector (as tailors and small-time traders) and have not formed or joined professional guilds or unions. Some caste members also worked as weavers, carpenters, and blacksmiths. Members of this sub-caste remained spectators to the socio-political developments in Mumbai in the first half of the nineteenth century. They did not participate in the nationalist movement as a group and were not perceived as a vote bank by political parties. They did not succeed financially as a group and did not participate in educational activities. Most caste members consider themselves as "Hindus." They do not have common religious Gurus or heads. There are no religious power centres within the caste sphere (Interview with Kanubhai Galia, 3 February 2003, Mumbai)

[359] Interview with Kanubhai Galia, 22 January 2003, Mumbai.

remained a centre of their social activities and duties. Until the late 1960s, they were governed by their *gnatis* in the village in which the *panch* (usually comprising adult male leaders of the caste in each village or a cluster of villages) ruled in family matters.

The idea of forming a *panchayat* among the Sai Suthars was mooted in 1965 as a mechanism to promote caste consciousness at a micro level and to communicate among fellow sub-caste members from endogamous circles. Subsequent years have not seen significant organisational activities. The caste *panchayat*, since its inception, has been dominated by prominent members of the caste. Elections are not regular and are not called every five years.[360] The office bearers largely perceive caste *panchayat* as a body to yield and consolidate their social prestige. The *panchayat* celebrates Hindu religious festivals, provides marriage bureaus, subsidises wedding ceremonies, and facilitates meetings between marriageable candidates within the sub-caste. Broader participation and opinions of the caste are not highly caught in matters of everyday administration of the *panchayat*. Women do not officiate in the *panchayat*.[361]

An opportunity to vitalise the *panchayat* came in the 1980s when the sub-caste joined a broad organisation of Gujarati OBCs to reclassify themselves as "Dalits" in order to access benefits of the reservation policy. Approximately 300 sub-caste groups belonging to four OBC castes formed an organisation called "Society for Promotion of Vanza-Weavers" (*Samasta Vanza Vanakar Samaj*, now renamed *Samasta Vanakar Samaj*) and

---

[360] A president of the *panchayat* remained in power for fifteen years and was unchallenged by other caste members. A progressive, reformist faction from within the caste tried to challenge this and managed get one of their members elected. Elections were regularised for two terms; however, more factional infighting led to the reversal of this policy (Interview with Khushalbhai G., 10 January 2003, Mumbai).

[361] Male members insist that they have tried to induct women into their programmes, but women members of the caste deny these claims and blame the social practice of veiling as well as larger male resistance for their non-participation. A successful business woman of the caste tried to run a Mahila Mandal (and thus tried to being some income-generating programmes), but it did not succeed (Interviews with Geetaben Parmar and Kanubhai Galia, 10 January 2003, Mumbai).

classified themselves as a Scheduled Caste of "weavers" for state records. The federation promoted inter-caste activities, youth clubs, and cultural events; established scholarships; subsidised marriage ceremonies; and started intra-caste periodicals to unite these castes.[362] It has been argued that horizontal inter-caste alliances can secularise the internal spheres of the sub-organisations (Kothari and Maroo 1962; Shah 1975). However, that does not seem to be the case here. Sub-castes such as Palawalis do not support the idea of intermarriage among these allied caste groups. Indeed, the tailors who believed themselves to be superior to other OBCs pledged allegiance to another caste organisation, the Association of Mumbai Tailors, in order to endorse intra-caste intermarriage.[363]

Governance of internal affairs, especially handling legal matters, has not been the mandate of the sub-caste *panchayat* as the urban, city-based *panchayat* has not been able to replicate the authority of traditional village *panchayats*, nor has it been able to adapt to changing times and rebuild its sphere of authority. There are several reasons for this. The *panchayat* does not have sufficient resources to propose economic incentives. It does not offer any proximity to the government or political parties. It also does not promote social programmes or activities. The caste has only a thin layer of the upper stratum of families who are financially better off. But in general, class disparity does not exist among caste members, and the nature of their professions does not require them to engage in group activities.[364] The sub-caste lacks a cultural sphere and does not promote music, theatre, or literary activities. The caste *panchayat* does not have linkages with other political

[362] Interview with Sushila Parmar, 12 January 2003, Mumbai.
[363] Interview with Pratapbhai Divecha, 7 February 2003, Mumbai.
[364] At present, many members of the sub-caste pursue traditional occupation as tailors. A few members are also professionals. The educational levels of caste members is not high, and women are more likely to be educated than men since there is social pressure on the men to take up occupations. Income disparity among caste members is not very high (Interview with Kanubhai Galia, 10 January 2003, Mumbai).

organisations such as unions. However, individual caste members involved in other voluntary organisations can bring in their agendas and politics into the internal caste sphere.[365]

### *The Gendered Sphere among Sai Suthars*[366]

Women members of the caste identify the lack of education, financial dependence, and domestic violence as problems they must face. Caste practices such as veiling, which go hand-in-hand with restricted mobility, are other issues cited by them for their non-participation in the public activities of the caste *panchayat*. A bulk of women workers from this caste are employed in low-income informal work (such as teachers, nurses, piecemeal workers in garment factories, and telephone operators).[367] The Sanskritising ambition of the caste is apparent in the changing caste customs such as the prevalence of dowry in place of bride-price and the lowered value of women's participation in the workforce in upper middle-class families within the caste.

Traditionally, caste customs allowed widow remarriage and divorces, and they were quite common. The sub-caste practiced polygamy (though it was not widely accepted) as well as bride-price.[368] At present, divorces are readily available and remarriages are quite common. Widow remarriage has been a customary practice, and the demands of marital fidelity expressed through sexual chastity even after the death of the

---

[365] Interview with Khushalbhai Galia, 10 January 2003, Mumbai.

[366] This section is based on interviews with a number of caste women of diverse class and occupational status and is largely based on the perceptions and experiences of women members of the caste. The respondents are Geetaben Parmar (10 January 2003), Chandrikaben Waghela (13 February 2002), Prabhaben Galia (17 April 2003), Sumanben Tolia (23 April 2003), and Deelapi Mandekar and Sana Sheikh (13 February 2002).

[367] Many male members pursue the traditional occupation of tailoring, and women contribute to the household economy by "assisting" in tasks related to tailoring (sewing hems, buttons, and embroidery). Cultural practices and taboos do not "allow" them to set up shop because sewing is considered to be a male activity. Nevertheless, some women, especially single women, have chosen to practice this trade.

[368] Interview with Khushalbhai Galia, 20 December 2003, Mumbai.

husband are not enforced; in fact, women have considerable sexual freedom within the caste.[369] Sexual control of young women is enforced largely through the emphasis on caste endogamy,[370] though women with a higher education and professional status find it easier to transgress the requirements of caste endogamy.

Not many women are active in civil society organisations, women's movements, or unions. Semi-organised and non-participatory groups such as the Sai Suthars provide few opportunities of interchange among women caste members. The women of the group have formed loose networks through social activities—celebration of festivals, caste-sponsored dinners, and collective weddings—which have enabled them to exchange information and to help devise strategies to counter family violence and legal struggles. However, most of this support is covert and does not see women through in times of legal or financial crisis. In fact, women are often forced to fall back on family and kin members to sustain them through legal processes. Unlike women belonging to the Meghwal community, Sai Suthar women, as a group, do not possess enough individual resources to support other women members. Besides, their lack of higher education and their low participation in the public sector are some reasons why these women have not been able to participate in social organisations or in supra-caste horizontal networks that their caste members have formed. Some individual women, however, access both types of women's organisations. They also access Muslim women's organisations or the *mohalla* committees on an individual basis.

---

[369] A successful business woman who had struggled to work as a business woman and had succeeded in establishing a separate business for herself was labelled a "loose woman." Her husband distributed pamphlets to members of the caste, advertising her alleged affair with a man. However, caste *panchayat* members sided with the woman and reprimanded her husband (Interview with R.M., 15 March 2003, Mumbai).

[370] A woman who had married a Muslim had to sever contacts with her family, and the family's status allegedly suffered as a result of this action (Interview with Sana, 6 June 2003, Mumbai).

The lack of support from women caste members also has an impact upon individual women's choice of legal forums and their rights within the family.

### *Fragmented Caste Panchayat and the Adjudication of the Family within in the Caste*

The adjudicative process within the caste is bifurcated. Given the lack of societal mechanism of justice, the informal justice system among the Sai Suthars is decentralised and performed at the familial level. The Sai Suthar caste *panchayat* does not usually officiate in matters of marriage and divorce.[371] Marriages are dissolved informally in the presence of family members. At times, some male caste members act as arbitrators relying on "common sense" and notions of "appropriate social behaviour."[372] This process is called "dissolution at home" (ghar mele patavavu). The procedure is not public and often lacks transparency and accountability. Divorces within this sub-caste are quite common and perceived grounds of fault are cruelty, inappropriate conduct of either party or their families, infidelity, and incompatibility. There are no established legal rules and procedures within the sub-caste. In general, parties who want a speedy divorce and who are able to work out matters concerning financial and custodial arrangements through mutual consent choose not to approach state courts. In most instances, bargaining for post-divorce financial arrangements depends on a person's social networks within the caste; the

[371] Indeed, *panchayat* members deny the existence of the practice of customary divorce in their sub-caste. There are two reasons for this denial: firstly, they believe customary divorce as a practice contravenes Hindu personal law, which is the state law administered by the state court. Secondly, they believe that "such practices exist among lower castes." They therefore seek to distance themselves socially from lower castes, especially "weavers" (Interview with Bipinbhai H., 6 March 2003, Mumbai).
[372] Interview with Bipinbhai H., Caste President, 6 March 2003, Mumbai.

perception of fault, such as the neglect of spousal duty as per caste norms; information about state law; and the financial capacity of the parties.[373]

***The Caste is the Public Sphere and the State, Private***

Within the caste, parties tend to choose the option of informal dissolution in order to "salvage the honour of the wronged party."[374] Proceedings in state courts are believed to be "private." The caste sphere is a "public" sphere wherein social reputations acquire meaning. In one case, a woman's husband had an extramarital relationship with his sister-in-law. Nisa, the wife, did not inform her family of this when he deserted her after ten years of marriage. Nisa's family approached her husband's family for an informal dissolution of marriage and insisted on a series of meetings involving various caste members as arbitrators in order to "bring about social pressure" upon his family and to arrange a large financial settlement for her. This settlement was based on the concept of "fault," and the publicity of this case through caste networks was instrumental in resolving the settlement in Nisa's favour.[375]

---

[373] In one case, a woman could not approach the court for economic relief since her husband's family had undergone financial losses and "there was no hope of proving his income." They chose instead to dissolve the marriage informally through caste mediators.

[374] Interview with Nisa H., 11January 2003, Mumbai.

[375] "I suffered in this marriage... if I had gone to court, it would have been quiet, no one would have known. But when we have joint meetings mediated by the caste, people come to know. They know that I am not at fault. I should be compensated. We talked to a lawyer. Proving adultery is difficult in court. But in the caste, people understand you... They know your family, they have seen you grow, they understand who is who and what is what... That is justice" (Interview with Nisa H., 11 January 2003, Mumbai). In another instance, a woman who sought divorce a month after her marriage to the son of a prominent caste leader managed to retrieve her *stridhan*, recover the cost of marriage, and get an additional sum of money as alimony for not filing the case of annulment and agreeing to an informal settlement. The breakdown of this marriage in its very early stage led to speculation within the caste about the son's sexual impotency; this perception of "fault" on the man's side made the bargain agreeable to both parties (Interview with Kanubhai G., 5 May 2003, Mumbai).

### *In the Shadow of State Law and Courts*

Informal bargaining between families at the time of divorce often rests on the "idea of the state" (Gupta 1999; Migdal 2001). The state is perceived as the guarantor of the economic rights of women and this perception is used to bargain for rights on an informal level.[376] For instance, a woman who receives maintenance from her husband as part of a settlement through customary divorce stated: "It is the law. A wife can get half of her husband's salary as maintenance for her children. We have taken the divorce through informal channels, but we know the law. Everyone knows this much."[377] At the same time, perceptions of lengthy court procedures and corrupt court officials deter litigants from approaching state courts, especially in cases of mutual consent divorces. "In case of a compromise, what does it matter whether it is done in the court or in our house? It is cheaper to do so in the house—you do not have to wait forever for justice... Besides, we know the law. Details of settlements upon marriage are regularly reported in newspapers. A wife is entitled to half the share of her husband's property. Anyone who reads papers knows the law. We go by the state law in our negotiations."[378]

### *Justice through "Other Means"*

The lack of a mediating forum between individuals and the state often leads people to resort to extralegal means to resolve issues as they arise. For instance, Geeta[379] had been separated from her husband for eight years; she has two children. She had filed a case for

---

[376] "Men in our caste know that the court gives maintenance to women and children. I and my brother told them that either you pay for us or we'll go to the court—but he (the husband) agreed to give money. He (husband) said that 'he preferred to give his money to his son rather than to lawyers and corrupt judges at the family court' but I know that I can always go to the court if he does not pay up" (Interview with Neelaben Chawda, 19 March 2003, Mumbai).
[377] Interview with Nikita M., 22 October 2002, Mumbai.
[378] Interview with Kanubhai G., 5 May 2003, Mumbai.
[379] Interview with Geeta, 7 March 2003, Mumbai.

maintenance in the Family Court. Her husband did not attend the court dates, and the court gave her an ex-parte order of maintenance. Her husband refused to come to the court or to pay maintenance. She did not pursue the matter legally. She later found work in a garment factory. She relies on her natal family for support, but when she needed extra money for a financial crisis related to her children's health, she had to rely on "other methods" to extract money. Her brothers have ties to local goons, and she often relies on them to collect informal maintenance amounts from the husband. She argues that the lack of caste organisation and support systems is one of the reasons she has to opt for these methods. Women's informal intra-caste networks enable some women to access women's organisations for individual cases. In one case, the local informal organisation headed by a Muslim women's lawyer[380] was instrumental in helping a woman, Pavitra, challenge the informal pressure of the caste members to sign divorce papers.[381] Other women have approached women's organisations for legal aid[382] and for filing cases of domestic violence.

***Women's Experiences in State Courts***

Women litigants from within the caste approach the state court when they need economic relief and when it cannot be arranged through mutual consent. Women litigants who have successfully pursued their cases see the state law as a guarantor of economic

[380] This organisation is called the *mohalla committee* and is headed by the lawyer Yasmin Sheikh (Interview with N. Chauhan, 19 March 2003, Mumbai).
[381] "I went to my husband's house with Yasmin Sheikh and she managed an amicable settlement" (Interview with Pavitra H., 2 April 2003, Mumbai).
[382] A woman litigant had been receiving free legal aid from a women's organisation for five years at the time of the interview (Interview with Ambika Soni, 6 March 2003, Mumbai).

rights.[383] Some litigants have withdrawn their cases mid-procedures for a variety of reasons,[384] while some women have successfully pursued their cases in the Family Court. As a woman litigant revealed, "Initially, I was scared of the court—I am not educated and did not know where to go, what to do... but it has been five years and I have pursued my case regularly... Sometimes I have a lawyer, sometimes I represent my case."[385] However, state courts do not always guarantee more rights for women, as the case below demonstrates.

***Dual Patriarchies of the Family and the State***

The issue of conflict between customary laws and state laws arise when the validity of customary divorces is challenged in court; state responses to customary divorce are not unified. Mridu, a woman belonging to this sub-caste, was married to Kanu for twenty-two years and they had adult children. In 1991, Kanu forced her to sign papers of customary divorce and gave her Rs.100,000 and a small one-room house in their ancestral village as alimony from him; he asked her to leave the matrimonial house. Kanu was the joint owner of a house, which was worth 10 million rupees, and the sole owner of a business, which was housed on a property worth 15 million rupees. Mridu went to stay with her son and daughter-in-law who lived in an apartment that Kanu had bought for them on mortgage.

---

[383] Sai Suthar women who come from poor families, who can prove their husbands' income, and who did not wish to remarry were more likely to pursue the option of maintenance through state courts and perceive the courts as the guarantor of minimal economic rights. In one case of maintenance, Mamata was awarded maintenance under Section 125, Cr.P.C. in 1990. Since then, she has been receiving maintenance through the court. Her husband has tried to dodge his payments. Mamata has had to file for "recovery of arrears" after six months of non-payment; this has occurred three times. However, she is assured of minimum support.

[384] In one case, a woman was forced to leave the marital home with two daughters under the age five. She sought to train as a nurse and raise her two young daughters while pursuing a case for maintenance. However, she withdrew her case because frequent court dates seriously inconvenienced her: each court date led to the loss of a workday. In another case, a woman dropped her case as she did not trust her lawyer who was from the same caste. She suggested that her lawyer was "friendlier with her husband as a fellow caste man and she did not trust him to safeguard her interest" (Interview with Ashalata, 3 May 2003, Mumbai).

[385] Interview with Naina C., 17 October 2002, Mumbai.

Mridu stayed with her son for about a year but refused to accept her divorce. During this year, Mridu came to know of procedures in the Family Court from some women of her caste. The caste women introduced her to a lawyer, and she filed a petition for maintenance in the Family Court.

Mridu petitioned the Family Court for maintenance under the Hindu Adoption and Maintenance Act, 1956. In her petition she proved his income and attached proofs of the actual worth of his property. In response, Kanu argued that they belonged to the Scheduled Caste and customary divorce was allowed in their caste.[386] He claimed that he had already divorced her and paid her alimony. He claimed to be excused from maintenance payment by questioning his status of marriage. He also claimed that he had suffered heavy losses and was in debt (he brought proofs of unpaid loans). He also claimed that his business property could not be liquidated and that his house belonged to his joint family and was not his own. Sidestepping the issue of the validity of customary divorce, the Family Court judge gave an order for interim maintenance of Rs.2000 per month to Mridu after three months.

Kanu petitioned the High Court against the order of interim maintenance granted by the Family Court, arguing that his marriage was dissolved by customary divorce and that Mridu had already accepted Rs.100,000 as alimony. He was not obliged to pay any maintenance to her. The respondent, Mridu, did not accept the settlement as binding. The High Court agreed that "the woman had accepted customary divorce" and referred the case back to the lower court "to record the prima facie findings of the case and to dispose of the

[386] In claiming his "Scheduled Caste identity," Kanu and his lawyer relied on the common assumption among judges and lawyers that customary divorces are allowed only in Scheduled Castes and Tribes.

application only after hearing the parties again." Until then, the ad hoc maintenance of Rs.2000 a month was continued.

The case was referred back to the Family Court. However, two months later Mridu withdrew the case for maintenance due to financial difficulties. Kanu had stopped payment of the mortgage amount for the house he had given to his son as soon as Mridu filed a case, and it became apparent that her son was supporting her. The son was not financially solvent and could not manage to pay the mortgage, legal fees, and support his family. The interim maintenance amount given to Mridu was less than the monthly dues of society fees for the house. The case seemed lengthy, and she had little hope of winning as she could not afford legal fees. Mridu approached her immediate and extended family to work out a compromise with Kanu. After a few meetings and the persuasion of the children, Kanu and Mridu were "reconciled," and she agreed to withdraw the case for maintenance. Kanu and Mridu were not legally remarried because "they were considered married by default as caste members and others did not know about the divorce."

This case illustrates how women are coerced into signing the divorce papers. The decision of the High Court forced Mridu back into matrimony with her husband as the negligible financial amount granted to her was not enough to sustain her even during the process of litigation. Customary divorce is not seen to be a private affair: the state invalidates contracts that contravene the provisions of Hindu law. Mridu's argument that she was coerced into signing the divorce was not upheld by the High Court even when the evidence pointed to the loss of substantial economic rights to Mridu. In this case, however, the High Court safeguarded the validity of customary divorce even in cases of blatant

injustice, overruling the interim judgement of the Family Court, which had taken a more sympathetic view of the woman's economic conditions.

As demonstrated above, the adjudication in Hindu law among the Sai Suthars is carried out by caste authorities or state courts. In regulating divorce, the Sai Suthars rely on contemporary customs, state law, or the perceptions about state law. In the caste's unorganised and fragmented *panchayat*, women's rights in the family depend upon their social and family networks and support from within the caste, and still the process does not ensure accountability or transparency in adjudication.

### Struggles for Legal Autonomy in Family Matters among the Kutchi Visa Oswals (KVOs)

This section explores the movement for legal autonomy in family law-related matters within a sub-caste of a Jain[387] religious community in Mumbai. About 100,000 members of a caste collective in Mumbai came together in June 2003 to attend a public meeting to consider the future of the family within their sub-caste in the context of rising divorce rates within the caste.[388] The Kutchi Visa Oswals (KVOs) is a mercantile sub-caste of Jains and belongs to the upper stratum in the caste hierarchy of Gujarat.[389] Historically, the caste has never practiced divorce and as such is not eligible to rule in matters of customary divorce as per Hindu law. A number of factors explain the emerging demands

[387] There is vast amount of literature on the Jains as a socio-religious community (see for instance Carrithers et al. 1991; Fox 1969; Laidlaw 1995). Hindu law classifies Jains as Hindus. Whether Jains consider themselves Hindus or not is a matter of discussion among social scientists (Humphrey 1991, 73). Some scholars stress the Jains' self-perception as a community that is different from Hindus, while Cottam Ellis (1991) stresses the Jain-Vaishnav interactions and highlights commonalities. Singhi (1991), too, prioritises the primacy of caste over religious identities in his studies of Jains.

[388] There exist no records of the number of divorces within the caste. Divorces are stigmatised as anti-social and alien within the caste. Desertion is seen as a common social problem (Interview with S. Malde, 5 July 2003, Mumbai).

[389] The sub-caste is further divided across religious sects and sub-sects as well. I have not focused on these divisions as they are not relevant to the matters discussed here (Interview with S. Malde, 5 July 2003, Mumbai).

for caste autonomy in family matters. I argue that this mercantile caste collective has built an engendered caste order, which ties family to intra-caste wealth through control over family law. The caste collective seeks to reify caste boundaries through the reaffirmation of caste endogamy and to reinforce ties between family and business through the retention of dowry wealth within the caste collective. The movement for legal autonomy aims to prevent intra-familial division of resources post-divorce.

### *The KVOs and the History of Migration to Mumbai*

The KVOs are a sub-caste of Jains who practice caste and village endogamy in twenty villages in Kutch in Gujarat. They owned land and were farmers in the villages in Kutch. The KVOs began to migrate[390] to Mumbai from late the 1800s to the early 1900s; these migrants connected the "traditional activity to new enterprise"[391] by entering into the business of selling agricultural yields from villages in Kutch to Mumbai. They also worked as brokers for city dealers in grains and captured the wholesale and retail trade in grains. By the 1970s, the sub-caste members emerged as a powerful lobby within the Bombay Grain Dealers' Association and diversified into areas such as staple commodities, timber, cement, transport agencies, and real estate. As migration increased, the sub-caste developed informal financial cooperation between caste members along lines of trust; they established banking and credit networks among fellow caste members and traders.

Increased economic activity within the group improved educational opportunities through hostels and scholarships for fellow caste members. As a result, many male members availed themselves of opportunities for higher education in Mumbai. A

[390] Interview with Leeladharbhai Gadda, 5 June 2003, Mumbai. There are no precise records of this migration, and I have relied on oral records and have tried to substantiate these by documentary evidence when available.
[391] Interview with Leeladharbhai Gadda, 5 June 2003, Mumbai.

professional class began to grow in the sub-caste from 1950 onwards. The sub-caste members are segmented into two classes: traders and a few professionals comprise the upper classes, and the weaker sections of the caste tend to work as clerks, bookkeepers, and assistants in businesses owned by fellow caste members. Very few members are employed in the government service. The sub-caste did not have a history of participating in the nationalist movement as a group and did not, as a group, develop a relationship with any political party. On the whole, the sub-caste group's linkages to political parties as a caste-based vote-bank remain negligible though individual merchants and traders tend to cultivate bureaucrats and leaders of political parties as business contracts.

***Forming a Panchayat***

The members of the sub-caste were governed by the *mahajan* (caste authority) in different villages. Migrants who came to Mumbai established a caste *panchayat* as a locus of caste organisation. The caste *panchayat* was formed through the initiative of young professionals who had gained from other caste-based organisations formed by Mr. Velji Napu, a prominent caste elder.[392] They also started an intra-caste magazine called *The Path*, which reports on caste activities, serves as a discussion forum within the caste, and opens up avenues for internal communication within the caste. The caste *panchayat* was controlled by a faction of the caste and did not hold democratic elections between 1960

[392] Mr. Napu, a nationalist lawyer, stressed the importance of a modern education and opened a hostel in 1915 for young caste members who wished to study in Mumbai. He identified a socially active caste member, Mr. Anup Shah, and invited him to be the warden of the hostel. The hostel became the hub of social reformist ideas and youth activities. These young members then settled in various professions in Mumbai and began working for the "upliftment of the caste and to bring about caste unity." During 1945-1947, Velji Napu asked Anup Shah to visit Kutch and participate in caste activities there in order to bring about better coordination between the village of *Mahajan* and caste members in Bombay. Many former students who had studied in the caste hostel also returned to Kutch and interacted with fellow caste members there. Such initiatives cemented the ties between villages and the caste group in Mumbai (Interview with Leeladhar Gadda, 23 June 2003, Mumbai).

and 1990. There was vocal opposition to the "capturing of this institution" from within other factions of the caste. Elections were held again in 2003, and a new governing body comprised of younger caste officials came to power this time around.[393]

The caste *panchayat* from 1947 to the 1970s served the twin goals of welfare and social control. Income disparities within the group were not marked between the 1950s and the 1960s, and the goal of the caste *panchayat* was caste unity and the upliftment of members. Since the early 1970s, a section of the trading elite emerged as an economically powerful group within the caste; in fact, their "ostentatious display of wealth created jealousy and raised questions about caste unity."[394] The caste *panchayat*, dominated by the professionals, held a campaign for austerity among marriage and social occasions and began to picket weddings and ceremonies "which exhibited vulgar display of wealth."[395] An attempt was also made to codify and reform caste traditions by laying down rules for performance of rites during marriage, birth, and death. However, these efforts were not fruitful. As a leader explained: "We realised that while strategies such as picketing and boycott of caste members contained certain forces within the caste, it also brought a realisation that the caste *panchayat* had neither the authority nor power to control fellow caste members."[396]

Since the 1970s, the caste *panchayat* has been seeking to address the growing economic and social stratification within the group by representing a collective

---

[393] Editorial page, *The Path*, June 2003.
[394] Interview with Leeladhar Gadda, 23 June 2003, Mumbai.
[395] Two incidents of "social boycotting" and picketing of marriages form part of the repertoire of caste folklore. On November 29, 1970, a grain merchant invited 300 people for the engagement ceremony of his daughter, despite the advice of the caste *panchayat*. Most caste leaders and members of women's organisations within the caste stood outside the venue waving black flags. Many guests decided to boycott the function. A similar situation occurred in May 1970: a caste member called the police and launched a criminal case against members of the caste *panchayat* (See *The Path* 500 (June-July 1997): 23-24).
[396] Interview with Sushila S., 5 July 2003, Mumbai.

organisation to facilitate the cooperation between economically and professionally differentiated caste members. The caste *panchayat* began to function in the capacity of a welfare organisation.[397] Ironically, factionalism contributed to a growth of smaller, intra-caste organisations at the local levels resulting in a rich associational sphere that encourages intra-caste interaction and organisation.[398] The group at present has two diverse power centres in regulation of the family: one of these is the caste *panchayat*;[399] the second centre is the influential villagers who are the loci of social authority. The village *Mahajan* yields considerable social authority. The *Mahajan* collects "taxes" at the time of marriages of any village sub-caste members. The village *Mahajan* plays a role in arranging marriages, presides over social functions, mediates in property disputes, and runs charitable trusts for caste welfare within the twenty villages. Caste members seek glory

---

[397] At present, the caste *panchayat* runs group insurance schemes for different economic strata of the caste, arranges collective health camps, provides free treatment to caste patients who suffer from TB, gives scholarships to needy students, provides interest-free loans for housing to approximately 50 families per year, runs a micro-credit programme for women of the caste, and helps provide a market for their home-based products. The caste runs a "book bank" from which about 2400 students were given textbooks for free. The caste *panchayat* also runs free healthcare programmes for their members in the village; about 82 poorer caste members were provided healthcare worth Rs.300,000. The caste *panchayat* congratulates students for their educational achievements and holds youth camps, spirituality workshops, drawing and elocution competitions, picnics and summer camps, drama competitions, folk dances, music festivals, and mountaineering camps for the caste youth. The caste *panchayat* also runs computer classes and marriage bureaus, and it arranges collective weddings every year (Interviews with Shirish Malde, 5 July 2003; Leeladhar Gadda, 5 June 2003, 23 June 2003 Mumbai; The Path, April 2003, May 2003, June 2003).

[398] These include cricket clubs, yoga classes, hiking clubs, elocution competitions for the youth, and women's committees, which tend to organise for economic activities such as producing and marketing food and household products as well as for social purposes such as organising cultural festivals and folk dances. Many caste members organise charitable activities. For example, doctors from within the caste may organise camps to distribute free services to weaker members of society. There also exist temporary organisations formed in response to natural disasters that may affect the caste; for instance, many caste members organised to send relief to villages in Kutch following the earthquake in Gujarat in 2002. Participation in common religious activities, such as attending public addresses and participating in rituals in Jain temples, also form an important part of common activities drawing caste members together. Some of these activities are independently held by local committees and some are facilitated by the caste *panchayat* (Interview with S. Malde, 5 July 2003, Mumbai).

[399] There is intra-caste factionalism: a faction of the caste had broken away and had challenged the monopoly of the factions that controlled the caste *panchayat*. They sought to establish a parallel organisation; however, this parallel organisation is not recognised by fellow caste members as a *panchayat*. There is also internal power struggles over the informal control of the *panchayat* given that there are no regular elections. The older members of the caste *panchayat* resigned en masse in 2002, ostensibly to "make way for the new blood."

within the sub-caste through charitable acts such as the construction of hospitals, residences, hostels, and guest houses as well as the establishment of charitable trusts for caste members in the villages. Families visit villages to celebrate Jain festivals with pomp. The village is a site of social competition to display wealth and to uphold social standing. These activities played an important secondary role: they also sustained caste endogamy.

***Family, Capital, and Religio-Cultural Organisation***

It has been argued that family and business identities are intertwined among mercantile communities. Among castes that are clustered around particular trades, a family's credit, signifying its business worthiness, comprises its moral standing, intra-caste social reputation, and the personal conduct of all its members. Good marriages between business families increase the "credit worthiness of its members" (Fox 1969; Laidlaw 1994, 355) and increase the business confidence in that family (Rudner 1994; Laidlaw 1994). Religious activities, too, form an arena for competition over status within the caste. The caste members contribute funds for the construction of Jain religious temples, residences for Jain religious figures, and meeting halls. They sponsor religious talks and discussions and participate actively in religious gatherings, prayers, and public addresses by Jain religious figures as well as travel together for religious pilgrimages to Jain temples.

The moral rectitude and religiousness of "its" women are the twin grounds on which a family's honour is also assessed. The women's participation in religious activities such as fasting as well as their attendance at and hosting of religious festivals demonstrate the women's sexual chastity and their economic austerity, which assures the caste at large that the family's credit will not be dissipated either through sexual misconduct or by economic profligacy (Laidlaw 1995, 356). There is a sexual division of labour in the

religious sphere as well: women fast and men give donations and celebrate the breaking of the fast with great pomp. This "giving" by men in the form of donations and the "giving up" of women are complimentary tasks (Laidlaw 1995, 356).

Caste endogamy is favoured in the community because it ties business families together, retains dowry wealth within the caste, and opens avenues of joint economic activities. Given the importance attached to inheritance, sexual restraint among women is priced and made public through religious rituals. Marriage ties or alliance-building are closely linked to the economic activities of the caste since hypergamous marriages increase the business confidence of both parties. Divorce and the division of property post-divorce is problematised since it upsets the fine balance between business and family.

***Gendered Sphere within the Caste***

The inter-linkages between religious observance, occupational structures, and familial practices engender the caste sphere. Historically, caste and village endogamy was strictly practiced and dowry exchange was common in the cases of marriage between families of equal economic status. Financially weaker families used to mortgage young daughters to moneylenders as their marriages to wealthy elderly men could fetch a high bride-price. The caste laws did not allow for divorce and widow remarriage. Maintenance to a deserted wife was provided for in the form of separate residence or separate quarters within a residence in the marital house. Polygyny was also practiced. Women's mobility and chastity were controlled. Women did not inherit property. Widowed women are seen

to be inauspicious and are excluded from rituals religious festivities.[400] Finally, the veiling of women was quite common.

At present, women members of the caste collective are not seen as independent economic actors despite their higher education. In practice, daughters do not have equal rights to inheritance, and sons are groomed to take over any family-owned business. Housework, childrearing, and maintenance of kin-ties remain the domains of women's labour. The sexual division of labour is rigidly observed within the caste.[401] Women spend a vast amount of time in cultural labour attending to intra-caste "social relations"[402] and perpetuating a sense of community. Women maintain caste boundaries through endogamous marriages and retain dowry wealth within the caste. They also socialise children, especially daughters, into religious and caste ethos and thus ensure the perpetuation of the community. Women's sexuality and chastity are rigidly policed given the importance of property in maintaining the business community. Religious attendance and participation are an integral and expected aspect of women's social lives. Religious activity is another domain that segregates the worldly, male domain of commercial activity from the pure female acts of religious observance (Humphrey and Laidlaw 1994). Women caste members who oppose the traditions thus elect to exit from the social membership of the caste.

Since the late 1980s, there have been attempts to "reaffirm endogamous marriages, to prevent breakdown of marriages through resocialisation of the youth and to evolve

[400] See letter to *The Path* by Harshi Sawla. *The Path*, May 2003, 7.
[401] Many women of the caste talked about the difficulties in finding educated husbands for their professional daughters. A woman trained as a gynaecologist could not find a husband in the same caste as most men did not want "a working wife."
[402] These activities include attending birth and death ceremonies; visiting sick relatives and kin members; helping various kin members at the time of marriage, crisis, and on social occasions; visiting relatives and kin members in villages; participating in intra-caste celebrations and festivities; helping to arrange marriages; charity work with fellow caste members; and hosting feasts.

internal means of regulation of divorces."[403] Yet the caste has moved for partial legal autonomy. The next section presents an analysis of divorce cases from within the caste to explain reasons behind the caste movement for legal autonomy.

***Protecting the Good Woman: Denial of Divorce in the Family Court***

A husband, Suresh, filed for divorce on the grounds of cruelty and desertion by his wife, Shilpa. He alleged that she was "indifferent, immature, irresponsible and aloof" towards his family members and that she "practiced black magic." In June 1985, she "fell off the stairs and had to be admitted to the hospital." In May 1990, the parties were reconciled through the efforts of her family at a joint meeting between their respective families. She returned to his home after "assuring the assembled of her good conduct in future," but the arrangement did not work.

The respondent, Shilpa, replied that in June 1985, she was asked to bring Rs.200,000 and 50 gm. of gold. When she pleaded her inability to meet the demand, her husband attempted to kill her by throwing her down the stairs. She was badly injured, yet she was ready to go back to her marital home "as befitting her wifely duty," but her husband refused to accept her. She claimed to have sent eight registered letters asking her husband to take her back and produced the proof. She also challenged his allegation of "desertion," claiming that she had stayed in her marital home in the village in 1997 and

[403] Interview with S. Malde, 5 July 2003, Mumbai. Also, U. Gada, "Then and Now...," *The Path*, May 2003; N. Gala, "Analysis of the Questionnaire on Marriage," *The Path*, May 2003, 48-52. After the unsuccessful attempt to codify caste customs in the early 1980s, an attempt was made by a caste-based organisation in 1989 to collect social opinions on marriage and related practices. The caste *panchayat* at that time did not respond. However, in early 2003, the caste *panchayat* designed a survey to "discuss caste practices in marriage and divorce" and distributed the questionnaire to 25,000 randomly selected caste members. The results of this survey were presented and discussed in a caste magazine. This event was a precursor to a movement for social reform within the caste that mobilised lakhs of caste members to come together to discuss marriage-related reforms.

had undertaken a religious fast, which was celebrated by her family; she had not deserted him. In her testimony before the court, she claimed that she was willing to go back to her husband despite having her life threatened. The wife's lawyer has built the case around the image of a wronged, long suffering, and religious wife who was fighting divorce.

While the court case was proceeding, Shilpa's family and other caste members attempted to "resolve" the case. In both the court and within the caste, Shilpa was proved as a good woman, religious and devout, who had been willing to reconcile despite "domestic difficulties," a euphemism for severe domestic violence. Both caste members and the court felt that the husband should be denied divorce as he was at fault. The court in this case ruled in favour of the wife and refused the divorce to her husband.[404] This decision of the court was hailed as one in which the court upheld the sanctity of marriage and disallowed its breakdown.

### *"Rubberstamping" Informal Settlements*

While the incidence of divorce is very low, and divorce is seen to harm the social sphere of the caste, it is seen as a consequence of modernity and Westernisation by some caste members. As a woman lawyer in the caste opined, "While divorce is against social propriety and should be curbed, it cannot be denied if both parties are adamant."[405] But divorce is an internal matter of the family and of the caste: caste leaders mediate in

---

[404] The court opined that the husband has failed to prove cruelty and desertion. The husband's case was based on the grounds that the wife had deserted him for eight years. While the court accepted the claim of the husband, it held that he had failed to prove desertion due to fault in her conduct. The court also observed that the husband had not filed for "restitution of conjugal rights" despite his claim of desertion whereas the wife had documentary evidence, in the form of letters, to show her willingness to reside with her husband "despite the wear and tear of the family life." Thus, the husband had not proved *animus deserendi*; therefore, his case was dismissed. The husband's allegation that the wife practiced black magic was cited as cruelty. According to the court, the examination of witnesses revealed that the wife practiced black magic with the intention of "helping her husband instead of harming him."

[405] Interview with Sushilaben Shah, 26 June 2003, Mumbai.

divorces and these agreements are rubberstamped in the court. In one instance a wife, Neelam, filed for divorce within six months of marriage on the grounds of cruelty.[406] Two months after filing the case, the extended families of both the parties asked prominent caste members to mediate in the dispute. A joint meeting was held at the woman's house, and the parties decided to terminate the marriage by mutual consent and agreed upon a financial arrangement. The parties then filed an application in the court to "convert" the case into one of mutual consent divorce.

The above two cases show that the ideology of the state and the caste are not different when it comes to ideas about conjugality; indeed, the second case illustrates how the caste continues to be a legitimate mediating body in cases of divorce. Despite the court's agreement with caste decision, however, the KVOs have moved for legal autonomy. It is my contention that the legal developments in civil and criminal laws from the late 1980s to the early 2000s account for this movement for legal autonomy within the caste. For instance, the law on domestic violence enacted in 1986 penalises both the husband and the in-laws for physical and mental cruelty meted out to married women, and the violence serves as a bargaining chip in some divorce cases. For example, Haresh and Meena obtained a divorce through mutual consent after a year of litigation. During the

[406] In one case, the parties were married in December 1999 and within a month, the wife, Neelam, had accused her husband, Ilesh, of attempting to kill her. The husband alleged her of indifference and neglect towards his parents and her household duties during the brief period they stayed together. They separated in February 2000. The wife returned to her matrimonial home in April 2000. She left the matrimonial home once again after a quarrel in July 2000. The grounds of cruelty included the quarrelsome nature of the wife, her refusal to serve her husband and her in-laws, her unsociability ("she was cold towards her husband's relatives"), neglect towards household duties (failing to attend to her husband during his mealtimes, failing to be present to receive a father-in-law on his return from the hospital), her "pampered upbringing" (which renders her unfit to be a "proper wife"), her desire to visit her natal family and relatives, and her indifference towards her husband.

interview, Haresh admitted that his wife had not filed a case of domestic violence,[407] but the threat of the case and the possibility of arrest lowered his bargaining status. Reflecting upon the process, Haresh said,[408] "We had separated for some months and our lawyers told us that she can file a case on me and my parents for dowry related harassment. My parents are old... how can we outlive such shame on our society? Besides, I have to travel abroad for work and a criminal record creates problems for visa... My wife and her lawyer know this and are squeezing me." Meena got the custody of the daughter and a settlement of Rs.500,000. Haresh has also agreed to pay for his daughter's marriage in the future.[409] Thus, the possibility of registering a criminal case increased the wife's bargaining power in this case.

Secondly, new legal developments and the legal strategy of applying civil law on property and tenancy rights to matrimonial property (Singh 1993), especially with respect to married women's right to residence, has created the possibility of the intra-familial division of resources in matters of divorce. Nisha and Ashesh's case serve as a keen illustration: the couple were married in 1998 and resided with the joint family for a few months before moving into a separate apartment bought by Ashesh's father in his name. After facing years of domestic violence, Nisha approached a lawyer and filed for maintenance; she made an application in the court for "non-alienation and transfer of the property while the case is pending." Ashesh worked in the family business and his lawyer argued that "Ashesh could not pay maintenance as he was fired by his father and was

---

[407] Research shows that the police's perceptions of the misuse of this Section by women lead to police reluctance to file cases under Section 498 (A), IPC. There were only 232 cases filed under this Section in 1999-2000 in the entire city of Mumbai, even though the prevalence of domestic violence is very high (Dave and Solanki 2001).

[408] Interview with Haresh Gadda, 7 January 2003, Mumbai

[409] It is not a fair settlement. Meena rightly complains that "the agreement provides for her daughter but not for her" (Interview with Meena, 5 July 2003, Mumbai).

unemployed." Nisha found it difficult to claim maintenance because she could not obtain proof of Ashesh's independent income. Papers showing Ashesh's ownership of the flat was the only piece of evidence that could prove Ashesh's income.[410] Finally, Nisha gave up the claim on matrimonial property and receive maintenance in the amount of Rs.5000 per month for herself and her children.

The strongest leverage women have is the "civil provision on right to matrimonial residence," which is rarely but effectively used. The law allows women a right to tenancy in the matrimonial home. In one such use of the provision, and the woman filed for an injunction on the matrimonial property after her husband filed for divorce. The husband had to sell that apartment and give her one third of the money as a settlement before she agreed to divorce.[411]

Claims of maintenance bring to the fore additional issues that intertwine business practices with family matters. A recent judgement ordered a middle-class stock broker was asked to pay a monthly maintenance amount of Rs.10,000 to his wife. He defaulted on his payments for two years, and the ex-wife had to file for arrears. Though he has defaulted on his monthly payments to his wife, he claims that "the amount of maintenance is negligible for a man of his means," but "the real discomfort lies in the state prying into my business records.[412] The business is owned in partnership with a fellow caste member and a distant cousin... it is a question of *saakh*, of social prestige, in the caste—many of my clients belong to my caste—they do not trust divorced men: 'he could not manage his (personal) life, how is he going to manage our money?' Besides, it is the nature of the business—

---

[410] "Her claim on (the) right of residence in the matrimonial property remained the only point on which she could bargain" (Interview with Veena Gowda, Nisha's Lawyer, 7 June 2003, Mumbai).
[411] Interview with Susheela P., 9 July 2003, Mumbai.
[412] Tax evasion by businessmen is very high in India under the current tax structure. Therefore, any records involving the exposure of "real" income are seen to invite trouble from the tax authorities.

financial liquidity is a problem in my line of work—money is good in some months, bad in others—we do not have fixed income and I am asked to pay monthly sums by the court. It inconveniences everyone here, I mean my partners—I have to ask my partners to 'fix' my income while their families are inconvenienced."[413] This case presents the views of caste members: that divorce endangers the ties of business. Furthermore, traditional mercantile activity avoids state scrutiny in business affairs. The process of divorce and the distribution of property expose business practices to the scrutiny of the state.

Thus, consensual ties between the state and the caste are weakened in cases of maintenance and the enforcement of married women's property rights. While the state offers minimal succour and a small portion of men's earnings, the division of property threatens the very fabric of the social order of the caste. The increased call by women for economic rights at the time of the breakdown of marriage has led to calls for preventing divorce and for "recreating the *panch* system."[414]

### "Social Movement around Marriage and Divorce": Reaction to State-Led Reforms

According to an interviewee, "the 'social movement' within the caste is about three 'evils': increased divorce rates, caste exogamy, especially by young women, (and) rising aspirations about marriage."[415] The movement seeks to reorganise the caste *panchayat* ("we wish to resuscitate the *Mahajan*"[416]) by demonstrating a desire for the substitution of the current caste *panchayat*, which functions as a charitable organisation, for a functioning, community-based "judicial" *panchayat*.

---

[413] Interview with Nisha, Litigant of the caste, 6 January 2003, Mumbai.
[414] Interview with Uday G., 10 July 2003, Mumbai
[415] Interview with Susheela P., 9 July 2003, Mumbai.
[416] Interview with S. Malde, 7 June 2003, Mumbai.

There are both facilitative and controlling aspects to internal governance. One is the preventive aspect: the vigorous promotion of caste endogamy through evolving mechanisms to curb inter-caste marriages.[417] The other aspect is to chalk out legal strategies to reaffirm caste control over matters related to marriage and divorce. Legally, the caste has two choices.[418] One is to "recreate a tradition;" that is, to institutionalise the practice of divorce by performing them. If challenged in court, the caste could argue that it has customarily practiced divorce and therefore the KVO caste *panchayat* should be authorised to issue judgements in these matters. However, this is seen to be a difficult tactic to use since there might not be enough historical proof to validate the stand of the caste *panchayat*, and an adverse judgement could stall the entire process. The second option is to create a mediation body within the caste and to vest it with informal authority.[419] As per this solution, caste members can reapply private contracts between parties to authorise decisions taken during the course of mediation. The group members believe that this provision would compel the parties to abide by the decisions made during

---

[417] This includes the increased involvement of the village *Mahajan*. It is suggested that the village *Mahajan* as well as the caste *panchayat* would create lists of "suitable matches," and these would be circulated among interested caste members. Many caste members have also suggested purchasing advertising space in the caste magazine to increase "the choice of matches." Some have argued to "increase the endogamous circles to include more villages and other castes of horizontal social status." The other suggestion revolves around the resocialisation of young people and negating the influence of TV and Western media through pre-marital counselling. The caste *panchayat* sponsored large gatherings of youth of marriageable age chaperoned by their parents who encouraged more interaction between caste members. Young men and women are encouraged to look for matches within the caste, and women are exhorted to "lower their expectations." Their families are also counselled about their expectations and roles in the changing social milieu (See Special Issue on Pre-marriage Counselling, *The Path*, May 2003).

[418] Interviews with S. Malde, 7 June 2003; Sushila Gadda, 9 June 2003, Mumbai.

[419] The caste has begun the process of designing the formal committee that would operate in different residential areas of the city. The committee would be comprised of psychologists, social workers, and prominent caste members, and it would have two women representatives. The committee members would be nominated and not elected. Any family or caste member would approach the committee members and call for a meeting. The committee would counsel the couple and their extended families for reconcilement. Couples whose cases cannot be reconciled would be advised to move to court after the couples and the caste committee "formalise" the divorce arrangements. The families would sign private contracts as per the advice of the moral authority of the caste (Interviews with S. Malde, 7 June 2003; Leeladhar Gadda, 15 June 2003, Mumbai).

mediation. The divorce in the Family Court would be a formal stamp on the process undertaken within the caste. The movement demonstrates the caste members' aspirations to contest the disruption of intra-caste social order due to state law and to seek authoritative legal expression in order to curtail shifting values.

**State-Society Encounters in Law: Comparison of Caste-Based Legal Forums**

The processes of organisation-building and lawmaking in the three castes across caste hierarchy show the variations in adjudicative processes under Hindu law. A number of factors explain the divergence in rights granted to women across castes. The data discussed above show that internally democratic caste *panchayats* that interact with external actors—political parties, social movements, women's organisations, religious organisations, and trade unions—are more likely to evolve democratic justice systems, interact with different sections of the society, and increase women's options for justice.

The data show that among various castes, historical practices play a role in determining women's rights in law. However, assessing caste-formation and lawmaking within these groups also illustrates how these processes are fluid and influenced by state policies, economic activities, and the influence of informal actors, movements, and organisations. Thus, caste laws and customs are subject to revision.

The study highlights that the gendering of caste spheres also shapes women's rights in society. The participation of Meghwal women in the labour force, especially in the formal sector, and their exposure to social movements as well as to party and local politics have ensured their higher status within their group. The caste laws recognise them as agents, and women, too, participate in the internal governance of the caste. The Meghwal women have formed informal networks within their castes through which they share

information and support women members. They have also consistently forged linkages with women's organisations and are therefore able to increase their rights and challenge patriarchy. The women of the Sai Suthar group participate in the labour force, but they are not seen as equal economic actors. The women of the KVO group enjoy greater economic and educational status, and they participate in intra-caste activities. However, their participation is limited to social and cultural activities, such as creating income-generating programmes for poorer women and supporting caste celebrations. They do not interact with other social movements, social organisations, or civic bodies, and their exposure to party politics is limited. As a result, these organisations often mimic patriarchal agendas, such as enforcing caste endogamy and restricting divorce. The women of the KVOs are not recognised as economic agents, and their challenge to the economic order within the caste is through individual acts of resistance through the pursuit of legal options under state law.

The data show that state law has penetrated into the castes' traditions and has impacted the legal developments in the various castes. In some instances, this impact has had negative consequences for women. For instance, the greater penetration of state law has led to the erosion of matrilineal practices among the Meghwals. However, the criminalisation of domestic violence, the introduction of the right to matrimonial property, and the stricter enforcement of maintenance laws in state courts have had a positive impact on gender relations across castes.

The findings above reiterate the need for continued reforms in state laws and courts since these reforms may lead to a reactionary mobilisation against the liberal agenda of the state. For instance, we see that the KVOs seek to maintain difference through the assertion of caste endogamy as a principle of organisation; this opposes the state's vision of

interchange among various Hindu castes through the legitimisation of inter-caste marriages. However, such reactionary mobilisation would exist in tension with changing gender relations within the caste and would generate individual opposition, as seen in cases of litigant KVO women who have successfully been granted economic rights upon divorce.

**Conclusion**

In this chapter I discuss the "shared adjudication" model in Hindu law as both the state and caste groups strive to shape individual and familial subjectivities through lawmaking and adjudication. The interactions between the state and societal actors over the definition and administration of Hindu law impact the normative configuring of the conjugal family, as well as the material domain of the family since these normative worldviews have an impact upon the intra-household division of property.

In the model of shared authority, the normative material world shaped by the state coexists with the normative material worlds imagined and practiced by societal actors and institutions. The normative and material worlds of the state and/or the caste are not unified, coherent entities: they are both internally contested and shaped by their interaction with one another. Certain aspects of these diverse, fragmented worlds overlap as well. For instance, both the state and caste *panchayats* privilege patriarchal, heterosexual families and retain male authority over economic resources. The Meghwals and Sai Suthars share the idea of personal freedom inherent in divorce. The conflict between the normative and material worlds of the state and the caste is most pronounced in case of Meghwals. The Meghwal caste laws and practices differ from the state over the regulation of family structure, the definition of marriage, the regulation of cohabitation, the acceptance of patrilineality, the criteria for group membership, the sexual autonomy of individual

members within the family, and the economic rights and obligations of family members. The KVOs share aspects of the normative ideology of the state, but they reject the notion of personal freedom inherent in the notion of divorce and intra-familial distribution of wealth.

# CHAPTER FIVE

*Juristic Diversity, Contestations over "Islamic Law," and Women's Rights: Regulation of Matrimonial Matters in Muslim Personal Law*

## Introduction

In this chapter I outline the nature of adjudication in matrimonial matters under Muslim Personal Law in Mumbai. I highlight the interplay between state law and non-state law, I analyse the interaction between multiple sources of legal authority, and I discuss the processes of community-initiated reforms in Muslim Personal Law. Given that multiple societal actors and bodies adjudicate and produce law, the adjudication process demonstrates how the content of Muslim Personal Law itself is a subject of contestations between law-producing and law-legitimating agents. I demonstrate that multiple representations and understandings of "the Muslim family" and Muslim women's rights within the family coexist in the adjudicative arenas and how these are tied to different understandings of "Muslimness." Thus, the religious identity premised upon in Muslim religious family law is fluid and subject to constant revision. I also discuss the impact of these state-society interactions upon women's rights in law, I describe how the decentralised legal sphere offers avenues for women's agency, and I show the limits of this agency given the asymmetrical position of women within the family, society, and the law.

## The Nature of Muslim Personal Law

Muslim Personal Law in postcolonial India is based on local custom, Islamic laws[420] and precepts,[421] customary laws made by sect-based organisations, state-law

[420] The term "Islamic law" covers both the *Sharia* (the divine law) and *fiqh*, which is the product of human understanding that sought to interpret and implement the *Sharia* (Esposito 1982, 105). Islamic jurisprudence

enactments, and judicial precedent.[422] The state courts administer the uncodified Muslim Personal Law as well as state-enacted law. In general, state law recognises uncodified Islamic law when it comes to marriage and divorce, but it privileges statutory law in matters of maintenance.

### Classification of Legal Actors and Institutions in Societal Arena

The state allows multiple actors and avenues in the regulation of Muslim Personal Law. The societal actors who adjudicate in Muslim Personal Law can be classified in three categories: individual actors such as lawyers, the clergy, family members, and strongmen comprise the first category; religious organisations, women's organisations, and sect-councils make up the second category of adjudicators in Muslim Family Law; and "doorstep courts," such as residential committees and women's ad hoc groups, form the third category of adjudicators. The typology suggests that while religious factions of the Muslim community exercise some authority in matters of governance of Muslim Personal Law, they are not the sole spokespersons or adjudicators on the ground. There exist different power centres within the legal sphere, and legal activity is localised and decentralised in everyday legal practice. The following section discusses how these sources of legal authority shape the process of adjudication in laws relating to marriage, divorce,

---

has developed as the science of interpretation of both the Quran (the revelation of God) and the *sunna*, which is the Prophet's statements and the tacit approval of certain deeds of which he had knowledge (Haddad and Stowasser 2004, 5). The elaboration of law depended on the Quran and the *sunna* and upon the application of juridical reasoning to discover the reason behind each rule and to apply it in a specific context (Esposito 1981; Hallaq 2001; Pearl 1987). Thus, the interpretive science relied on a methodology called *ijtihad*. The resultant body of law—classical *fiqh* schools (*madhabib*)—in which the details of law are stated and recorded, are Hanafi, Maliki, Shafi, and Hanbali.

[421] Most Sunni Muslims in India follow the Hanafi law, though Shafi, Maliki, and Hanabali laws are also adhered to in some pockets of the community. Many Shia communities follow the Shia law and Shia sects such as Bohras, Khojas, and Ismailis follow sect-based laws (An Nai'm 2002).

[422] There is a history of state action in Islamic laws in India. The development of Anglo-Mohmeddan law in state courts during the colonial period was a combination of British legal precepts and local Islamic rules and practices (Fyzee 1965; Parashar 1992; Mukhopadhyay 1998; Pearl 1987).

and maintenance among Muslims and argues how law is made and unmade by legal actors in society.

### *Individual Legal Actors and "Private" Divorce*

Under Muslim Personal Law, the right to divorce, both oral and written, lies with men;[423] women can only obtain judicially-mediated divorce. A husband can use the threat of divorce to coerce his wife and demand obedience.[424] In many cases, divorces happen without warning, and women are often left out of the matrimonial home.[425] In some cases, women are divorced by telephone or through email.[426] In most cases, divorces are mailed through registered post, which requires the recipient's signature. This method is most popular as both the sender and the recipient have proof of divorce. In some cases, husbands delegate the right of divorce to their male kin members[427] or to their wives.[428] In some

[423]It is argued that the man's right to divorce under Islamic law is balanced by the woman's economic rights upon divorce (Geertz 1961; Rosen 1984). In Morocco, for instance, men enjoy the right to divorce, but women enjoy the right to matrimonial property, dowry, and maintenance post-*iddat*. There, remarriage is fairly common, as is the help of maternal families (Rosen 1984). The situation is different in India. In the Indian case, while divorce can be accommodated in societal ways that give some relief to women (remarriage is frequent, divorce is not considered a moral failure, maternal/natal families often assist in child care, etc.), it cannot be denied that women bear the brunt of the social, financial, and emotional consequences of divorce.

[424] "The threat of divorce casts a shadow on marital life...Whenever he was displeased, he would say 'I shall divorce you.' I was constantly worried; where will I go if he utters those words?" (Interview with K.B., 11 January 2003, Mumbai). "The threat of divorce is used to prevent women from reporting marital abuse" (Interview with Vandana Nanaware, Social Worker, 6 June 2003, Mumbai).

[425] "A strategy to curb this abuse of divorce is to insist on arbitration before divorce. If there were more regulatory conditions attached to divorce, the number of divorces would be reduced" (Interview with Mufti, Dar ul Qaza, 17 June 2003, Mumbai).

[426] Interview, Pratibha Jagtap, Social Worker, 6 November 2002, Mumbai.

[427] A man had migrated to the gulf as a labourer after his marriage. His *nikahnama*, the marriage contract, specified the delegation of right to divorce under certain conditions. His wife insisted on divorce within a few months. The husband's cousin gave a delegated divorce to the woman (Interview with H.K., 6 March 2003, Mumbai).

[428] Delegating the right of divorce to women is more unusual as it increases the wife's bargaining power within the marriage. There is resistance to the incorporation of this right in the marriage contract. However, the practice is standardised in some families and localities (Interview with Mr. Maniar, Public Complaint Centre, 23 May 2003, Mumbai).

instances, divorces are given following community procedures in the presence of witnesses.[429]

A woman may approach the court to divorce her husband by filing a case under the Dissolution of Muslim Marriage Act, 1939. At the societal level, a wife may ask for *khula*, a form of divorce initiated by the wife, though the wife's legal recourse to divorce through court is not equal to the husband's legal capacity to end a marriage at will. However, the woman-initiated divorce, the *khula,* is finalised only if the husband accepts the divorce. In practice, a woman who wants to opt out of the marriage may buy the repudiation from her husband. In many cases, the payment takes the form of money, goods, or foregoing the right of *mehar* (maintenance) during *iddat* (alimony).[430] At times, a husband may repudiate his wife by granting the wife's requests[431] or by opting for a mutual consent divorce.[432] Individuals and extended family members can also adjudicate or negotiate divorce under Muslim Personal Law. In many cases, divorce is subject to claims and counterclaims of parties and as such, is often sorted out among family members.[433]

---

[429] This is the case in more organised sects, such as the Khojas, the Memons, the Bohras (Engineer 1988).
[430] Interviews with litigants, M. A., 5 March 2003; N. S., 15 April 2003; Q. S., 14 February 2003, Mumbai.
[431] A woman who was married to her cousin was granted a *khula* by her husband at her insistence. Her dowry was also returned to her (Interview with M. S., 14 February 2003, Mumbai).
[432] The parties were divorced in a women's organisation through mutual consent. They divided their property, and the husband gave an assurance of maintenance for the children. The deed of divorce (*talaqnama*) was stamped by a notary (Interview with N. S., 17 January 2003, Mumbai).
[433] In one case, a Muslim wife filed a case for maintenance under Section 125, Cr.P.C. in the Family Court. Her husband produced proof of divorce in the Family Court; it showed that the wife had received the divorce. The court dismissed the woman's petition for maintenance under Section 125, Cr.P.C. The woman and her family got a *fatwa,* or legal opinion, from another clergyman, who held that the divorce was invalid as it was not communicated to the wife. The man was to remarry and the first wife and her family contacted his future bride's family to prevent the marriage, as polygamy was not widely practiced in their community. Ultimately, the parties settled the matter privately, and the husband returned the dowry, gave maintenance during the period of *iddat*, and returned the *mehar* to his ex-wife (Interview with N.H., 17 January 2003, Mumbai).

### *Inter-Lawyer Negotiations*

Inter-lawyer negotiations can expand the law into an informal arena, as state law acts as a backdrop to the negotiated settlement in the societal arena (Kornhauser and Mnoookin 1979). Inter-lawyer negotiations are often based on legal precedents, and lawyers are often instrumental in resolving the dispute without going to court.[434] Thus developments in state law help in bargaining for rights in society at the pre-litigation stage as well as during litigation. While communities and families differ in their acceptance of oral divorce, lawyers tend to privilege written divorce—many lawyers draft divorce notices for their male clients. Lawyers also counter clergy-given divorces in some instances.[435]

The theory of democratic professionalism holds that professionals can play a role in extending the reach of state law in the societal arena and can thus increase popular participation in democratic affairs (Olson and Dzur 2004, 139). However, lawyers can also limit the reach of state law in society and promote societal justice. For instance, some lawyers advocate private vigilante justice to speed up the legal process or to collect dues.[436] Lawyers also do not keep abreast of new legal developments. For instance, many lawyers do not advise clients to file cases under the Muslim Women's (Protection of Rights on

---

[434] A female client had approached a lawyer after her husband had given her an oral divorce. She wished to contest the divorce. The lawyer convinced her and her family to accept the divorce and to file for a settlement under the Muslim Women's (Protection of Rights on Divorce) Act, 1986 as this would give her more rights. The lawyer sent a notice to the husband. In less than two months, the parties and their lawyers arrived at a settlement of Rs.100,000, and the *mehar* was returned to the woman (Interview with Nissar Ahmed, Ghatte, Lawyer, 19 February 2003, Mumbai).

[435] Lawyers differ in their views on the validity of divorce under Muslim Personal Law. Some lawyers hold that oral divorces are legally invalid. They also opine that *talaq ul bidaat*, unilateral divorce pronounced in one sitting, was valid only if performed under certain conditions (Interview with Nissar Ahmad, 19 February 2003, Mumbai). Other lawyers opine that both oral and written divorces performed under any conditions are valid (Interviews with Rashid Ahmad, 4 March 2003; Ahmed Razaq, 14 March, 2003, Mumbai).

[436] A Muslim woman had filed for divorce under the Dissolution of Muslim Marriage Act, 1939. Her husband fled from Mumbai with her dowry worth Rs.9 *lakh* and some jewellery. He refused to accept a summons of the Family Court and did not attend the court date. While the woman might have applied for an ex-parte divorce from the Family Court, the lawyer advised the family to "seek other means." The woman's brother managed to trace the husband and he "recovered" the dowry and jewellery by hiring local strongmen (Interview with R.A., 11 July 2003, Mumbai).

Divorce) Act, 1986 despite the fact that the law can potentially grant more economic rights to Muslim women.[437] These factors halt the positive impact of legal precedents.

### *The Clergy*

A wide variety of clergymen adjudicate in Muslim Personal Law. They represent the religious/moral authority of experts with specialised training and experience. Many *qazis*, or judges, are registered under the Qazi's Act, 1880[438] and are allowed to perform religious rituals and marriage ceremonies.[439] Most clergy are not trained in accredited institutions. Most clergy are trained in India,[440] and very few are trained in the seminaries in the Middle East.[441] Furthermore, it is difficult to arrive at an estimate of the number of clergy who officiate on matrimonial matters, especially since some clergymen combine their religious and professional/legal activities.[442] Apart from their legal/professional work, they perform religious duties and, as such, solemnise marriages, advise community members on matters of religious laws, and finalise mutual consent divorces at the community level. Some religious clergy are linked to networks of Islamic schools or organisations.[443] Some clergy who opine on religious matters are attached to a mosque,

---

[437] The lawyer had filed a case in the Metropolitan Magistrate's court for maintenance under Section 125, Cr.P.C. for his client. He claimed that the Muslim Women's Act, 1986 was not known to judges, and women did not get rights under this law (Interview with A. Rashid, Advocate, 4 March 2003, Mumbai).

[438] The powers of the *qazis* to settle civil disputes were diminished after the colonial state introduced civil courts. The Qazi's Act, 1880 only allows the *qazis* to perform religious duties such as the solemnisation of marriage.

[439] For a discussion of the provisions of the act, see Ephroz 2003, 67-69.

[440] "There are no standard qualifications required to be a practicing *qazi* in Mumbai. Technically, any adult Muslim male can open 'shop.' Most *qazis* are not knowledgeable about various doctrines of Islamic laws" (Interview with Haroun Musawala, Social Worker, 5 September 2002, Mumbai).

[441] "A number of clergy are trained in Iran, Iraq, and Syria" (Interview with Qazi Ahrar Mohammed, 19 May 2003, Mumbai).

[442] For instance, some lawyers are also registered as *qazis* and function as both (Interview with Syed Hussein, 13 February 2003, Mumbai).

[443] The Sunni community organisation called Amarat E Shariat, which has been active since 1921 in Bihar and Orissa, manages a network of Sharia courts ("houses of dispute settlement") across states (Mahmood 1995, 108-109). This organisation has been visible in Mumbai since the mid-1990s. *Qazis* linked to this

while others are independent and work from their homes or offices or in spaces attached to mosques. Some clergy are associated with religious charities and foundations.[444]

***Strongmen***

The use of physical violence, coercion, and threats as a strategy used against opponents in the litigation process has been mentioned frequently by various litigants seeking recourse to the formal and/or informal legal system. The operation of a parallel system of justice in Mumbai has not been studied systematically.[445] However, the underworld,[446] the militant wings of political parties,[447] and offshoots of political parties, often get involved in "family matters," though their help is sought relatively infrequently by people in family matters.[448] Other private mediators include so-called social workers[449] (also called "fixers") and big-men (wealthy, influential men/community leaders) who use a

---

network offer legal advice to litigants. In 1996, women's groups lobbied progressive *qazis* in Mumbai to popularise *khula, faskh*, and *talaq e tafwid*. "One of the *qazis* in Amarat E Shariat accepted and gave pro-women judgements. Many women's organisations sent their women clients to Maulana Israr Ahmed. The Maulana charged Rs.3000 per divorce. His son took over as a *qazi* after his demise, and women litigants accuse him of corruption" (Interview with Vandana Nanaware, 6 June 2003, Mumbai).

[444] For instance, the organisation Jamaat e Ulema e Maharashtra runs religious charities that also house clergy who offer services of adjudication in matters of Muslim Personal Law (Interview with Haroun Musawala, 5 September 2002, Mumbai).

[445] For a broader discussion on vigilante justice in Mumbai, see Hansen 2004, 185-193; Eckert, 2004.

[446] A Muslim husband refused to accept the *khula* his wife's family sent him. The wife's brother used the underworld contacts to "persuade" him to accept the *khula* (Interview with H. M., 14 March 2003, Mumbai). In another case, a Muslim man divorced his wife after eight years of marriage. She refused to accept his divorce and continued to stay in the one-room house where they were the tenants of the Mumbai Municipal Corporation. The husband tried to evict her from the premises and sought the help of the local goons to persuade her to accept the divorce and to throw her out of the house with their three children. The woman filed many complaints against him at the local police station. See records of complaints filed as non-cognisable offences against the husband: 1544/89, dt. 23/6/89' 2451/90, on 16/12/1990; 2514/90 dt. 18/12/90; 758 dt.14/4/91; 7327 dt. 13/06/91; 33/91 dt. 7/6/91; 1072/92 on 25/04/92; 1332/92 on 17/05/92.

[447] The militant Hindu right wing party, the Shiv Sena, has a women's wing (Mahila Aghadi), whose members often mete out "informal justice." A Muslim man approached the local Mahila Aghadi office to seek help to divorce his wife whom he claimed was a "prostitute." The Aghadi women dragged the Muslim woman out of her house to be presented at the local meeting of the Mahila Aghadi of her residential area, and they compelled her to accept divorce (Interview with A.K., 6 June 2003, Mumbai).

[448] Interview with N. S., 5 January 2003, Mumbai.

[449] Men residing in the same locality as the litigants who help female and male litigants access services and resources; they are able to help due to their networks with local political party leaders, police, local businessmen, unions leaders, and, at times, criminal elements.

mix of threat and moral persuasion to negotiate with the opposite party on behalf of litigants.

These strongmen are often employed or appealed to by the families to coerce husbands to give a divorce,[450] to recover *stridhan*,[451] and to collect maintenance.[452] The intimidation of litigants and their families,[453] their interception on their way to the police station or to an organisation,[454] making threatening phone calls, hurling abuses within the neighbourhood and work spaces,[455] and beating male family members[456] are all common tactics used by muscle-men mediators.

### Organised Legal Bodies, "Doorstep Courts," and Processes of Adjudication

This sub-section discusses the diverse laws and processes of adjudication in organised societal legal bodies, and it highlights divergent ideological positions regarding the content of the law.

---

[450] "My wife's brothers had some connection with the local *Bhai-log* mafia. She went home to her natal family and refused to come back. Her brothers sent goons to ask me to sign on the *talaqnama*, the deed of divorce" (Interview with S.K., 15 February 2003, Mumbai).

[451] "I had to go to my natal family to deliver the second child, a daughter, when my husband sent me a notice of divorce. He had custody of the first child... They also had my *stridhan*. He refused to return it unless I accepted the divorce....We waited another year, attempting to negotiate, but he got married again. Finally, my father and some cousins went to his house to pick up the dowry and related items. They refused to give us anything. My father then went to the local strongmen and asked them to help—we are not that sort of people, but what does one do in such a situation—how many mouths can my father feed? The local *dada* was helpful: we recovered my *mehar*, *stridhan*, and arranged for maintenance" (Interview with P.S., 13 September 2002, Mumbai).

[452] "I have a court order—he is supposed to give me maintenance every month—but he did not come to court even once. I could file another case, but what is the point? Finally, we had to settle the matter informally" (Interview with P.S., 13 March 2003, Mumbai).

[453] Interview with P. S., 13 March 2003, Mumbai.

[454] Interview with H. K., 10 January 2003, Mumbai.

[455] Interview with J. K., 12 April 2003, Mumbai.

[456] Interview with Vandana Nanaware, Social Worker, Special Cell for Women and Children, 7 June 2003, Mumbai.

### *The Administration of Muslim Personal Law in the Dar ul Qaza*

Historically, the Deobandis has sought to mobilise and unify the Muslim community using the symbol of Muslim Personal Law as an element binding the religio-legal Muslim community (Metcalf 1982). The Deobandis have also been active in influencing the All India Muslim Personal Law Board. Since the late 1990s, the Deobandis have established Dar ul Qazas (place of justice), or community courts, as a mechanism to converge diverse interpretations of Sharia.

One of the Dar ul Qazas in Mumbai is located in a predominantly Muslim area in central Mumbai and is housed in a building leased by the Jamiat Ulema E Maharashtra. The office is staffed by a Mufti, juriconsultant, and a secretary who maintain records. In the two years since its establishment, 35 of 60 cases of divorce have been "resolved" by the Dar ul Qaza. The procedure adopted by the body is standardised,[457] informal, consensual, and inexpensive.[458] Parties who come to the Dar ul Qaza sign a consent form verifying that they have approached the Dar ul Qaza of their own accord and have agreed to abide by its decisions. The consent form is signed by the parties before two witnesses. The parties also demonstrate their faith in Dar ul Qaza by agreeing not to approach the state courts in appeal. The proceedings at Dar ul Qaza are discontinued in cases where parties approach the state court despite signing the agreement form.

---

[457] The body seeks to standardise the divorce procedure. A party seeking their help informs them of the problem and specifies the kind of help required, then signs the consent form as the first step. The Dar ul Qaza officials then send a registered letter to the second party asking them to meet the officials on a specified date. This notice is sent four times to accommodate counter-response. The woman receives an ex-parte judgment if the husband fails to come to the Dar ul Qaza despite all efforts.

[458] Parties are charged Rs.250 for their case (Interview with Mufti, 7 September 2002, Mumbai). However, this seems to be a variable practice as parties are charged Rs.500 to register a case in other Dar ul Qaza in Mumbai (Interview with Wajihuddin Mohammed, 20 June 2003, Mumbai).

The cases in this organisation range from reconciliation,[459] divorce,[460] *khula*,[461] and *faskh*.[462] Given the uncertainty attached to oral divorce, women often approach Dar ul Qaza in order to obtain proof of divorce.[463] At Dar ul Qaza, women litigants are not granted permanent alimony beyond the period of *iddat*. As the Dar ul Qaza officials can only persuade male litigants by their moral authority, they have limited success in recovering women's *stridhan* in cases of *khula* and *faskh*.[464]

---

[459] In one case, a man had divorced his wife, and she had approached the Dar ul Qaza for assistance in the recovery of *mehar*. She complained of severe mental and physical violence. The couple had three children who were in the custody of their father. The *mufti* spoke to the children who wished for reconciliation. After several meetings, the man revoked the divorce, and we periodically followed up on the case after the reconciliation (Interview with Mufti, 7 September 2002, Mumbai).

[460] The body validates both written and oral divorce and recognises three types of divorce as "Islamic": *talaq ahsan*, *talaq hasan* and *talaq ul bidaat*.

[461] *Khula* is not often encouraged as women tend to lose their rights to *mehar*. According to the Mufti, *khula* may be granted to a woman if she is not at fault and if the husband accepts the divorce. If the woman is not at fault, she receives her *mehar* but has to forego maintenance during *iddat*. If she is at fault, then she has to forego *mehar*, maintenance during *iddat*, and her *stridhan*. However, a husband cannot ask for a sum of money to agree to a *khula*. In one case, a woman and her young son, aged two-and-a-half years were deserted by the husband. The woman had come seeking *khula*. The husband refused to grant her a divorce and declined the paternity of the child. The Dar ul Qaza officials held that there is a presumption of legitimacy on the child born in marriage and that should be exercised in favour of the woman unless the husband proves otherwise. The husband finally agreed to give divorce and returned the *mehar, stridhan*, and maintenance during *iddat*, while the woman signed away her right to file for additional maintenance. "We try to convert the *khula* cases into *talaq* cases as women receive more economic rights" (Interview with Mufti, 7 September 2002, Mumbai).

[462] *Faskh* is judicial dissolution of marriage for causes stipulated in Islamic law (Pearl 1987). However, it is essential that the woman prove her case. The woman can claim divorce on many grounds: the inability of the husband to maintain her; cruelty and harassment by the husband or in-laws; dowry demands; sexual disease, especially HIV; alcoholism on part of husband—these are all grounds for *faskh*. The Dar ul Qaza officials encourage *khula* only as a last resort as women tend to lose economic rights in *khula*. They grant *faskh* if the "woman asking for *faskh* is not at fault" (Interview with Mufti, 7 September 2002, Mumbai).

[463] A man had given an oral divorce to his wife four years earlier. The woman did not have proof of divorce, and she wished to remarry. She had come to the Dar ul Qaza to obtain the proof of divorce as she feared that her second marriage would be considered illegal. The Dar ul Qaza granted her the judicial divorce *faskh* since the first husband refused to respond (Interview with Mufti, 7 September 2002, Mumbai).

[464] "Husbands are reluctant to give away the *stridhan* at the time of divorce, especially when husbands do not accept women-initiated divorce. We try to go as a delegation of religious persons and persuade them to respect our decisions on the basis of our moral and religious authority" (Interview with Mufti, 7 September 2002, Mumbai).

***Residential Committees***

Some areas in Mumbai have a residential committee usually comprising of socially prominent male residents who have connections with political parties, the police, and the Municipal Corporator of the area. The committee takes up civic issues related to the efficacy of public utility services in their area, and it celebrates public festivals. Some residential committees are more cohesive, while others are more disorganised and function in an ad hoc manner. Many residential committees take up issues concerning Muslim Personal Law and evolve internal mechanisms for reform. For instance, a residential committee banned the practice of triple *talaq* after many deliberations. "We sought the opinions from many sources—we called the clergy, religious leaders, lawyers... and heard their views... and we had a meeting and decided that we do not wish to go against the religion, but this form of divorce is unIslamic."[465] At times, residential committees can also extend the outreach of state law by monitoring cases in their areas and helping families gain access legal aid and courts.[466] In other cases, residential committees can reinforce conservative interpretations of texts and thus limit women's legal options and curtail their rights. Women litigants can avoid their intervention more easily in cases where the

[465] Interview with members of the Melibai Chawl Committee, Bandra, 2 February 2003, Mumbai.

[466] The residential committee interviewed here is from a centrally located area in Bandra, Mumbai. Most residential members are Sunni Muslims hailing from Gujarat. About forty Muslim families live in the neighbourhood *chawls* and work as small traders. The committee members meet every Friday. In one case, the residential committee members ensured that the man provide maintenance to his ex-wife and monitored the payment granted to her under state law. "Men in our *chawl* are persuaded against quick divorces without sufficient cause... Our job is to act as mediators in cases wherein parties are thinking about divorce... Sometimes we talk to the couple directly—at other times, we talk to their families... We discourage hasty action in such matters" (Interview with B.Q., Member, Residential Committee, 17 March 2003, Mumbai). In another case, a husband beat his wife regularly and was abusive towards neighbours who wished to protect her. The residential committee referred her to the court for maintenance. The woman in question got a favourable judgement and had been receiving maintenance for two years at the time of the interview. She approaches the residential committee when her ex-husband fails to pay maintenance for several months. The man is reprimanded and asked to pay the arrears; he abides by the residential committee because he has a criminal record and can be picked up by the local police whenever there is communal disturbance in the city. The "good word" of the residential *chawl* committee saves him from police harassment (Interview, H.N., Member, Residential Committee, Bandra, 17 March 2003, Mumbai).

committees are not very powerful or when their natal families can shield them against the dictates of the committees.[467] In some cases, they also accept help from women's organisations in the negotiations with residential committee members.[468]

Followers of Islamic religious movements also influence the legal sphere. Activists of movements such as the Tablagh i Jamaat,[469] which work in specific residential areas of Mumbai, often intervene in cases of domestic disputes. In some cases, they work through residential or other local committees to intervene and influence the sphere of the family.[470] The activists of this movement are able to influence the parties when both families have joined the movement.[471]

### *Civil Society and the Administration of Muslim Personal Law*

While a broad spectrum of civil society organisations[472] are involved in campaigning on the issue of reforms in religious family laws, I have limited my

---

[467] "The members of the residential committee in our area had come to ask if they could be of help to me when my husband divorced me, but I was determined to go to the court and did not see how they might help... I prefer to be distant with these 'social workers' who force their help on people" (Interview with P.S., 13 February 2003, Mumbai).

[468] "In a case, the members of the neighbourhood had come to give evidence against the woman who had approached us. The neighbours who were members of a residential *jamaat* were bribed and bought by the husband as witnesses against the wife, whom he accused of infidelity. The residential committees favoured the husband. We confronted the residential committee members—where were you when he was beating her till she fainted in the street of your *chawl*?" (Interview with Naseem, Member, Awaaz e Niswaan, 12 January 2003, Mumbai).

[469] The Tablagh i Jamaat is a religious movement founded by Maulana Muhamed Ilyas (1885-1944), a Sufi *aalim* who preached conformity to Sharia and advocated a spirit of tolerance and compromise. His teachings sought to revive the puritanical character of Islam, not through direct criticism of folk Islam and customs, but through the inculcation of religious obligations onto people. The movement is popular in North and Western India (Faruqi 1981).

[470] "The Tablagh i Jamaat networks through familial/religious work and has control over madrassas in some areas. Their influences very strong and it is difficult for feminist organisations to make inroads into areas controlled by the Tablagh i Jamaat. The Tablagh i Jamaat coerces women who seek help from outside sources" (Interview with Sophia Khan, 4 July 2003, Mumbai).

[471] Interview with H. Q., 4 February 2003, Mumbai.

[472] These include religious organisations and charitable trusts, social welfare organisations, crisis centres, feminist organisations, women's shelters, women's wings of political parties, NGOs, etc.

investigation to include organisations that privilege everyday intervention through their direct work with Muslim litigants and that support campaigns concerning this issue.

An organisation entitled "the Public Complaint Centre" was established as an interface between the Congress Party and local populace in the Muslim-dominated part of central Mumbai, but it later switched its focus to work on the issue of personal law.[473] The organisation has formed a core committee comprised of local Muslim leaders, social workers, and lawyers. They are also assisted by a few clergymen. The committee members represent different sects that make up the populace in that area. There are no women members on the core committee. The committee meets late at night as most of the core members are volunteers. The Public Complaint Centre works on cases[474] of Hindu and Muslim women. The organisation holds campaigns against the performance of *muta* marriages[475] and organises public discussions around issues such as the validation of oral divorce. The committee also publicly confronts clerics on individual cases.[476] The organisation has links with progressive clerics who would issue pro-women *fatwas* in favour of some women litigants.

Historically as well as presently, autonomous women's groups have been vocal, active, and dynamic actors who have consistently engaged with the issue of reforms in

---

[473] "The founders realised that they were besieged with women coming to them for help regarding matrimonial matters, and they decided to shift the focus of their work to dealing with issues concerning Muslim Personal Law" (Interview with Mr. Maniar, 15 June 2003, Mumbai).

[474] "We ask the clients as to which law they would prefer—if they are Deobandis, we go by their laws if they are Ahl e Hadith, we ask their clergy's opinion, and we also keep in mind the state law" (Interview with Mr. Maniar, Member, Public Complaint Centre, 15 June 2003, Mumbai).

[475] *Muta* marriages are temporary marriages undertaken by parties under Shia laws. The period of cohabitation under *muta* marriage is fixed, along with the amount of dower at the time of solemnisation of marriage. A *muta* marriage does not create the right of inheritance between the husband and the wife, but the children are considered legitimate and could inherit from both parents (Fyzee 1965; Mulla 1955). For instance, the group had carried out a campaign against *muta* marriages performed by some local clergy for wealthy Arab men who visited Mumbai for business purposes.

[476] In one case, a husband had divorced his wife by issuing a *fatwa*. The core committee held the divorce as invalid as it was carried out in the absence of the wife. The committee reprimanded the cleric and the husband and declared the divorce invalid (Interview with N.S., 5 January 2003, Mumbai).

personal law.[477] The broad-based Indian women's movements have consistently taken up the issue of law-reforms. The Indian women's movements adopt a two pronged strategy. The movements encourage Muslim women's organisations and activists to articulate feminist positions, and they support these groups and individuals. For instance, in June 2003, secular and Muslim women's organisations came together in a three-day seminar to discuss Muslim women's legal rights. They also discussed their position vis-à-vis the All India Muslim Personal Law Board (AIMPLB). At the end of the workshop, secular and Muslim women's organisations prepared a memorandum to present to the AIMPLB, alerting them to feminist opinions from within the community and from outside.[478]

Women's rights activists across religions use the human rights discourse in order to campaign for more rights for Muslim women under religious law.[479] Awaaz e Niswaan is a feminist organisation that began as a consciousness-raising group comprised of Muslim women residing in central Mumbai who came together to discuss their legal experiences and organise around the Shah Bano case. Since then, the organisation has organised street protests,[480] hosted seminars, participated in the right to livelihood campaigns, organised

---

[477] I have focused on the work of women's organisations rather than on more generic NGOs who work on a broad range of issues concerning the rights of vulnerable members of society and who may take up issues of reform in personal laws. However, NGOs have often been important supporters of initiatives taken up by women's organisations.

[478] Interview with Hasina Khan, Awaaz e Niswaan, 14 July, 2003, Mumbai.

[479] Many women's organisations exchange information and build alliances with international feminist organisations. "We bring in the international dimension in all our discussions with the clergy and to the AIMPLB. It is a fact that Muslim women living in Muslim majority countries have more rights. For instance, Syrian women get compensation if they are arbitrarily divorced and Tunisia has banned polygamy. However, the clergy are not open to reform experiences which are pro-women. Muslim women in Pakistan enjoy more legal protection than Indian Muslim women. While the religious factions turn a deaf ear to positive international experiences, women at the grassroots level always ask why these reforms cannot be replicated in our context" (Interview with Hasina Khan, 10 January 2003, Mumbai).

[480] It has spearheaded public protests and campaigns against dowry. In 1991, the group organised a public demonstration against a dowry death; Muslim women participated in the protest in large numbers. More recently, in April 2005, the organisation also organised a public protest against the religious clergy's injunctions to Muslim women, asking them to veil.

relief and rehabilitation work in communal riots,[481] and organised public meetings on issues of reforms in personal law,[482] minority rights, communalism, and the state's role in genocide. At the grassroots level, the organisation runs a counselling centre and literacy classes, and it organises computer training for young women. It has also established the first feminist shelter for Muslim women in Mumbai. It has been instrumental in initiating the Muslim Women's Rights Network, a network of more than 25 women's organisations, NGOs, and women's wings of political parties; the network works exclusively on reforming Muslim Personal Law. The counselling at Awaaz e Niswaan takes the form of pre-litigation work through mediation, arbitration, and negotiations as well as adjudication.

***The "Doorstep Courts"***

Several informal (unregistered) organisations work on domestic violence and matrimonial issues among women, especially Muslim women. One such initiative is an offshoot of peace committees (the Mohalla Committees) established by the Mumbai Police in the aftermath of communal riots in Mumbai. These committees aim to bring together the police and the public to create communal harmony and to foster trust within the Muslim minority in riot-affected areas. A lawyer, Yasmin Sheikh, was active in one such police station located in central Mumbai, a predominantly Muslim locality. She found that she witnessed many cases requiring intervention in matters of Hindu and Muslim personal law. As a result, she asked for and got space to function several days per week from one of the

[481] The organisation coordinated a sustained rehabilitation process after the violence against Muslims in Gujarat in 2002, which was orchestrated by the Hindu right with the complicity of the state of Gujarat (Interview with Hasina Khan, 10 January 2003,Mumbai).

[482] Awaaz e Niswaan has been an active participant in the process of debating reforms in personal law initiated by the Indian women's movement in 1996. The organisation has also kept the process alive since then (Interview with Hasina Khan, 10 January 2003, Mumbai).

disused police beat offices (chowkis).[483] She received 688 complaints in three years and claimed that about 40 percent of these cases have been "settled" in the sense that parties have arrived at and accepted mutually satisfactory solutions based on state law provisions.

A women's informal group, the Hamraaz Group, comprised of former litigants working in a slum in Mumbai has worked with litigant Muslim women over the past ten years. The female members of the committee assist women in matters of domestic violence, arbitrate in cases of marital disputes and custody matters, and assist with legal aid. They challenge the clergy in their orthodox interpretation of Islam and help women to obtain *faskh* or *khula* through *qazis* who are known to hand down women-friendly judgements.[484] The committee also participates in various campaigns to work towards legal reforms through promoting intra-community debates.[485] These groups draw upon their own ideas of law. For instance, another community-based informal women's group, Samzota Mahila Mandal, believes that divorce should be given only in the presence of two credible witnesses from either side. They have also asked that divorced Muslim women should get *mehar*, maintenance during *iddat*, a lump sum maintenance, and provision for shelter.[486]

---

[483] "The cases range from contestations over oral divorce, the abuse of unilateral divorce, the provision of shelter to divorced women and their children, domestic violence, and the retrieval of *stridhan*. We intervene in cases of Hindu and Muslim Personal Law" (Interview with Yasmin Sheikh, 22 January 2003, Mumbai).

[484] "We prefer societal solutions in cases where both the parties are very poor... People in our locality are very poor, most of them squat on some land... Most of the time neither of parties has money or property. What use is a court to them? But if women need financial help and if the husband's family is capable of giving money, we ensure that financial assistance is given—such cases can go to court" (Interview with Khatoom Gafoor Sheikh, 22 April 2003, Mumbai).

[485] They argue that *mehar* should be made incremental in recognition of women's labour in the family and should be handed over to the woman at the time of marriage. They also argue for the abolition of the tradition in which the husband has a right to forego *mehar*. They argue for more maintenance (Interview, Khatoom Gafoor Sheikh, Member, Hamraz Committee, 22 April 2003, Mumbai).

[486] Interview with N. S., Member, Samzota Mahila Mandal, 22 April 2003, Mumbai.

### *Dispute Resolution among Organised Sects: The Khojas*

The Khojas, practicing Ismailism[487] in Gujarat and in Bombay until the 1840s were a self-governing community that followed a version of Islam that drew form heterodox religious and cultural sources.[488] For instance, during the latter half of the nineteenth century, Khojas drew from Shia Islam, but their practices were Sunni.[489] Their religious practices were also drawn from Hinduism[490] and Islam, and they preferred a distinct identity as Khojas.[491] The community self-identified itself as Muslim, but this "Muslimness" was fluid and not limited merely to an identity based on doctrinal essences of Islam (Shodhan 2001). This heterodoxy was challenged by the arrival of the religious leader, the Aga Khan in Mumbai in the late 1800s. The Aga Khan attempted to control the property of the community and advocated "a patently 'Shia' identity" over the more heterodox "Khoja" identity (Masselos 1978, 106). The Aga Khan's religious authority was legally challenged by a section of the Khoja mercantile elites who wished to retain their

---

[487] Ismailism is a form of Shia Islam that emerged due to a schism among Shias in 765 CE over the authority of the seventh Imam, Ismail. The followers of the seventh Imam were called the Ismailis, and they developed their own religious thought and established political power through the foundation of the Fatimide dynasty in Egypt (910-1171 CE). Their power waned in 1094 CE when the followers of Nizar, the eldest son of Imam al Mustanasir, opposed his younger brother, Mustal. The Nizaris took refuge in Persia and later in India. The Nizari chief, called the Aga Khan, sent missionaries (*dais*) to India from the thirteenth to the sixteenth century. The Indian Nizaris who were converted by these envoys came to be called Khojas or *Satpanthis* and fled to India in 1840 when the Aga Khan was defeated by the Shah of Iran. He first came to Sindh in 1840 and then to Bombay in 1860 (Daftary 1990; Ivanow 1948; Mallison 1989; Nanji 1978; Misra 1964; Schimmel 1980; Shodhan 2001).

[488] Scholars of Khoja history read the heterodoxy in different ways. For instance, Ivanow and classical Islamic scholars see the Khoja religiosity as a sign of incomplete conversion (Devji 1987) while other scholars view religious heterogeneity as the syncretism of Hinduism and Islam (Engineer 1989). However, other scholars suggest Khoja practices as localised versions of Islam wherein principles of Islam are decontextualised from Arab culture and grafted onto local Indian culture (Mallison 1978; Malleos 1978; Shodhan 2001).

[489] For instance, until the 1860s, the mosques in the Khoja burial grounds were presided over by a Sunni *mulla*, and a portion of the funeral ceremony was as per Shia rites. Prayers and worship were also along Shia lines (Masselos 1978, 102-103). Their marriage ceremonies were performed by Sunni *qazis* (Shodhan 2001).

[490] They worshipped a *pir* (miracle man) called and saw *Dashavatar*, the story of the ten reincarnations of the Hindu God Vishnu, as one of their texts. They differed from the Hindu story in the sense that they held that the last reincarnation of Vishnu was Ali (Mallison 1991; Masselos 1978).

[491] "Some say we are Soones, some, Sheas. Our religion is a separate religion." (Evidence of Habib Ibrahim, KC. T. and C., 24 June 1847, cited in Masselos 1978, 104).

unique identity as "Khojas." However, the colonial court ruled in favour of the Aga Khan and classified the Khojas as "Shia" Muslims[492] and fixed hitherto loose boundaries of "Khoja Muslimness" into pre-determined criteria of an essentialised Islamic sectarian identity (Shodhan 2001).

The Ithna Ashri Khoja community interviewed for this project was formed following a schism among Ismaili Shias in Mumbai in the 1860s. There was continuous opposition to the Aga Khan within the Khoja community, and groups of people were ex-communicated from the Ismaili *jamaat*.[493] This "outcasted" group claimed that the Khojas were Shias *before* the Aga Khan and that they were "Ithna Ashari Khojas."[494] The Ithna

---

[492] In effect, the push to adopt a sectarian identity became pronounced after the arrival of the first Aga Khan in Mumbai. The Aga Khan was trying to raise resources to challenge the Shah of Iran even at that time, and he had joined forces with the British to that end. The Aga Khan began to establish more control over the internal affairs of the Khojas and demanded increased financial compensation. He also advocated a Shia identity (Masselos 1978, 106) and encountered opposition from Khoja elites, which lead to violence and legal conflicts. In 1861, a group of reformist Khoja mercantile elite tried to break away from the Aga Khan and claimed partition of the property held collectively by the Khoja *jamaat*. They argued that they, as Khojas, were a unique community that drew from both Shia and Sunni traditions as well as local religio-cultural practices while retaining a unique identity. The case, widely known as the Aga Khan case, was heard in 1866. The judge opined in favour of the Aga Khan: he defined the Khojas as a Shia sect and validated the leadership of the Aga Khan. The opponents henceforth came to be known as Sunni Khojas, and the Khojas thus split into two sects. While Masselos attributes the growth of sectarian identity to societal actors, Shodhan argues that the involvement of the colonial state in the adjudication process superimposed the sectarian identity over Khoja identity.

[493] Since the 1860s, a group of prominent Khoja members began to meet in a space other than the Khoja *jamatkhana* to offer Friday prayers. This new group identified themselves as Ithna Ashariyas, a sect of Shias. Opposition to Aga Khan's supremacy was the main agenda of the dissident group who couched these differences in the language initiated by the colonial court. Once again, the group claimed allegiance to essentialised religious identity—that of Shias—and claimed to undiluted Shia past free from influence of the Aga Khan (see the letter by Hajee Abdallhbhoy Haji Mowjee to the Commissioner Place, Bombay, 10 November 1900). They sought to reorganise themselves in a manner that would not centralise the hold of religious figures into the Khoja sphere. Devjibhai Jamal, a member of the sect went to Karabala and invited first Mulla Qadir Husain, a clergyman from Madras and later, Ayatollah Abdul Qasim Najifi to Mumbai to teach them the teachings of Shia Islam.

[494] In 1876-77, several persons and families were ex-communicated from the Khoja Shia *jamaat* for following Athna Asari doctrines. The domain of intra-sect politics and commerce were two arenas wherein the battle of identity was fought in the name of religion. They held that Khojas were Shias before the Aga Khan and conducted their organising and religious dissent secretively for ten years (see Janab Haji Roshan Alibhai Haji Dawood Haji Naser, a centenary presentation of Khoja Ishashari *jamaat*, 1319-1419 A.H.). This group argued that it believed there were twelve Imams rather than the Seven adopted by the Imami Ismailis. Two other persons were outcast in 1878-79, and by 1884, twenty-five such families joined the dissenters. In 1899, their numbers grew, and they came out openly against the Aga Khan and sought to build a mosque and obtain land for their separate graveyard. There were many instances of violence between the Ismailis and the

Ashari dissenters were leading merchants and professionals of the sect, and the group, through its trading networks, prospered in the early half of the nineteenth century and established a social welfare system for their group. Many of the group members migrated to Pakistan upon partition as they had business interests in Karachi. Some of those left behind vast estates for the benefit of the community.

*Socio-Political Changes in the Community between the 1950s and the 1990s*

The fragmented Ithna Ashari Khoja community has re-constituted itself through political alliances, provisions of welfare activities, and the administration of family laws. The Ithna Ashariyas had been vocal supporters of the Muslim League before partition, but some of its members have turned to the Congress Party since the 1960s. Their business interests, especially in shipping and real estate, have led them to cultivate politicians of a different hue.[495] Wealthy industrialists and traders[496] make up the elite class within the sect, professionals and merchants fall into the middle level, and small shop owners and hawkers occupy the lower level. The *khum* (one fifth of the savings of each individual) is given away to the *jamaat* by the wealthy members and is offered to poorer members as interest-free loans, which help them to initiate entrepreneurial activities. The Ithna Ashari Khojas

---

breakaway group. The new group also attempted to recruit members from other Muslims in their sect. This group continued to recruit and was open to Julehas, Moghuls, and other Muslims as members of their sect. See the letter by Hajee Abdallhbhoy Haji Mowjee to the Commissioner of Police, Bombay, 10 November 1900. The breakaway group did not seek any changes in the inner sphere of the community.

[495] For instance, many local businessmen also cultivate local Shiv Sena leaders and invite the Bhartiya Janata Party leaders to their centenary celebrations. However, most of the community members lean towards the Congress Party. The report of their centenary celebration, "A Centenary presentation of the Khoja Shia Isnaashari Jamaat" includes messages from then-Prime Minister A.B. Vajpayee; leader of the Shiv Sena, Manohar Joshi; Governor of Maharahstra, P.C. Alexander; and many Congress leaders, including Murli Deora, 1998.

[496] Many of these own shipping and steel industries, while some are in real estate (Interview with H.M., 23 January 2003, Mumbai).

run a number of welfare trusts for their community members[497] and exercise considerable hold over them. The community has sought to retain its unique identity, but the social sphere within the Ithana Asharis has changed since the late 1980s. The communal riots of Mumbai in 1992-1993 and the religious violence in Gujarat in 2002 have also had an impact on inner fundamentalism within the community[498] and have led to greater Islamisation of the sect.[499]

*Family Laws among the Ithana Ashari Khojas*

While the Ithna Ashari Khojas privileged sectarian identities in the initial phases of group-formation, they adhere to customary laws in regulating marriage and divorce. The sect members codified the sect laws and procedures in 1955 and amended some provisions in 1959. There have not been major changes in the family laws of the Khojas since the 1960s. The Khoja *jamaat* (assembly of adult male members)[500] and the *jamatkhana* (council hall and office of the group) are two important collective institutions that discuss and rule on matters internal to the group.[501] The *jamaat* of the Khojas is divided into sub-

[497] The *jamaat* runs a number of charitable trusts as well. The Habib Trust and the Dawoodbhai Fazalbhoy Muslim Education Trust were established in 1923 to encourage education among sect members. The trusts also started giving scholarship to sect students for education in India and elsewhere. They started the Habib Hospital to give free medical aid to the poorer members of the sect and offered interest-free loans to sect members of weaker financial positions (Engineer 1989, 253-254).

[498] Many poorer members of the community were left without employment and residence during riots; they moved to a largely Muslim ghetto on the outskirts of Mumbai. The *jamaat* raised funds to provide housing for 300 such families.

[499] For instance, they have begun to adopt lifestyles and customs of the Syeds, the Shias from Uttar Pradesh. Hindi has begun to replace Gujarati as the language of communication. They have sought to make changes in family law along the lines befitting the wider Shia laws. For instance, social limitations on polygamy have begun to be eased on "Islamic grounds" (Interview with H.B., 14 March 2003, Mumbai).

[500] The *jamaat* in Mumbai dated back to the 1740s and was presided over by a *mukhi* (the treasurer) and the *kamadiya* (accountant)—these were not elected positions—the *jamaat* was led by wealthy, old, and influential men of the group. The *jamaat* controlled property, which ranged from cooking utensils for group dinners to burial grounds and other charitable trusts (Masselos 1978).

[501] The Ithna Ashariyas sought to reaffirm their administrative hold once again by tightening the implementation aspect of family law in 1959. An amendment to the 1955 Constitution states that the parties who received "judgement" by the council were obliged to adhere to it.

committees and the *gharsansar* committee (the committee for resolution of domestic matters) arbitrates in matters of marriage and divorce. At present, the Committee has sixteen male and two female members and is not democratically elected. The *jamaat* follows a consensus model and does not issue edicts. Decisions of the committee are seen as binding, and there are no provisions for appeal. Failure to follow the decision of the sect can lead to social boycott by the other members of the sect.[502]

Membership in the community at present is considered to be ascriptive, and the *jamaat* maintains records of birth, death, engagements, and marriage, and it privileges sect endogamy.[503] The parties seeking engagement and marriage must secure permission from the officials and give prior notice of engagement or marriage. The *mehar* is fixed,[504] and the gifts and dowry received at the time of marriage are registered in the *jamatkhana*. Gifts received by women are considered as her *stridhan*. Women do not have ownership over gifts received and given from the groom's side.

The Ithna Asharis permit polygamy in certain circumstances and permission of the first wife is necessary in order to remarry; permission is granted in case of infertility, sexual impotence, or prolonged illness.[505] The maintenance of the wife and children is fixed by the arbitration committee. Divorce by mutual consent is allowed,[506] though

---

[502] This can take the form of denying burial space at the time of death or disallowing the performance of marriage in the *jamaatkhana*.

[503] Members of the Khoja *jamaat* receive substantial welfare benefits. For instance, the *jamaat* is committed to the provision of housing, employment, education, medical aid, and interest-free loans to its community members. Secondly, the identity and distinctive cultural and legal practices are guarded and held sacred by the *jamaat* members; the continuation of these practices is another reason for maintaining group boundaries. As a result, sect endogamy is rigidly enforced and periodically revised in order to ensure further reinforcement.

[504] At present, the earlier practices continue. The amount of *mehar* is standardised by the sect. Usually, the *mehar* is fixed at Rs.500 or Rs.1000 and may reach as much as Rs.50,000 when the groom hails from the Khoja diaspora in Europe, North America, or South Africa.

[505] Interviews with women members of the community suggests that first wives can be coerced into consent if they lack support from their natal families (Interview with S.M., 5 February 2003, Mumbai).

[506] *Khula* is also not frequently granted by the caste constitution. *Faskh* is also not a part of sect laws.

divorce is infrequent and is given only under extreme circumstances.[507] The grounds for divorce include conversion, desertion, cruelty, and any other grounds that council may consider sufficient. Upon divorce, the wife is awarded *mehar,* maintenance during *iddat,* post-divorce maintenance for both the wife and children, and any other immovable or movable property deemed fit by the council.

*Interaction with Other Forums*

The Ithna Ashari Khoja community seeks to maintain social control in matters of family law and remains wary of religious influences in the administration of family law. The sect is spread across the world, yet the Ithna Ashari members of the diaspora remain in touch through sect organisations. Given the tradition and practice of endogamy, sect organisations across borders get involved in cases of domestic disputes.[508] There are also conflicts with other forums, especially between the clergy and the Khoja *jamaat.* In one case, a male litigant divorced his wife after less than a year of marriage. He went to a *qazi,* got a letter of divorce, and handed it to his wife. The woman complained in the community forum *(jamatkhana)* as unilateral divorce is unacceptable as per sect laws. The committee

[507] The party who wishes to file for divorce has to file an application in the *jamaatkhana* and accept the adjudicative procedure. Parties who wish to file for mutual consent divorce can hand in an application but must wait six months before finalising the divorce. While fault is grounds for divorce, committee members can desist from granting divorce. In one case, a young woman of about twenty-five years and mother of two children had a relationship with a young male neighbour. The husband found out and approached the council for divorce. The woman apologised for her conduct and wished for reconciliation. The council asked the couple to wait for some time, and many members of the committee met with the husband individually to persuade him to reconcile. Finally, the husband agreed and withdrew his application (Interview with S.M., Member, Ghar Sansar Committee, 7 September 2002, Mumbai).

[508] For instance, a woman was married to a Khoja man residing in South Africa. After marriage, the husband did not send for his wife and ceased all communication with her. A woman member of the Ghar Sansar Committee was of the opinion that the woman in question should be granted a *khula.* However, there are no explicit rules on the matter in the constitution, and as a result male members were opposed to the idea. They adopted the usual method of adjudication in such a case. They approached the South African chapter of the Khoja *jamaat* and asked them to get in touch with the man about the issue. The divorce would be finalised as per the rules of the constitution (Interview with S.M., Member, Ghar Sansar Committee, 7 September 2002, Mumbai).

held the divorce as invalid and held the man and his family accountable to the sect for violating sect laws.[509] Thus, women members of the Khoja *jamaat* gain more rights through sect laws in matters related to divorce, but in some instances, they choose to seek out state courts to gain economic rights.[510]

**The Question of Representation: Who Represents the Community?**

The section above illustrates the multiple interacting sources of legal authorities adjudicate in Muslim Personal Law and that the question of who represents the community in matters of Muslim Personal Law has not been resolved within the community. Among societal actors, the All India Muslim Personal Law Board[511] (AIMPLB) attempts to project itself as a representative organisation on the question of Muslim Personal Law. Scholars have argued that the state has isolated Muslim orthodoxy and the AIMPLB as interlocutors and representatives of the Muslim community as seen in the developments since the Shah Bano case (Hasan 1998). However, at the societal level, the issue of representation is one of ongoing debate and contestation. The AIMPLB is not a democratically-elected body,

[509] Interview with M. H., 18 October 2002, Mumbai.

[510] "A woman from our community wanted a divorce and she had three children. The husband refused to divorce her and pay maintenance despite our mediation. She approached the state court for maintenance. We as women do not see any harm in these measures. However, state courts have yet not granted her 'justice' as the process is lengthy and cumbersome" (Interview with S.M., Member, Ghar Sansar Committee, 7 September 2002, Mumbai).

[511] The AIMPLB, in its incipient stage, was a loose group of Muslim religious and community leaders who aimed to retain the Sharia in India. A group of Muslim leaders sought to safeguard the autonomy of Muslims in 1972 when the Law Minister of India sought to introduce a Uniform Adoption Bill as a preliminary move towards establishing a uniform civil code. The Bill was dropped after protests. Similar contestations arose when the Criminal Procedure Code was amended in 1973. Muslim leaders sought exemption from Section 125, Cr. P. C. and lobbied to add section 127, Cr. P. C., which granted exemption to parties from provision of Section 125, Cr. P. C. if the law conflicted with provisions of personal laws of parties. However, the AIMPBL rose to prominence in 1986 when it organised protests against the judgment in the Shah Bano case. Since 1992, after the demolition of the Babri Mosque, the Board has involved itself in seeking a political and legal approach to the solution of the dispute involving the Ram Mandir-Babri Masjid dispute.

though its body represents many Islamic sects and sub-sects.[512] The AIMPLB also holds discussions on Muslim Personal Law with non-Muslim and secular women's organisations and individuals. While the AIMPLB is partially successful at establishing itself as a representative in the issue of Muslim Personal Law, its claim is questioned and challenged by rival theological schools such as the Barelvis,[513] women's organisations,[514] liberal Muslims, intellectuals, and religious organisations.[515] This is evident in the discussions concerning the AIMPLB's efforts to establish religious courts to streamline adjudication under Muslim Personal Law in society.

**Divergent Opinions on the Establishment of Religious "Courts"**

In an effort to determine authoritative interpretations among societal sources, the AIMPLB has sought to streamline the judicial process at the societal level by opening Dar ul Qaza, religious courts, wherein trained Muftis, largely from Deoband seminary, officiate in matters of Muslim Personal Law. This is also an attempt to sanitise Islamic practices

[512] However, despite these claims, the AIMPLB is seen to favour Sunnis over Shias and is seen to propagate the views held by the Deobandis. In recent years, the Shias have established the All India Shia Personal Law Board and the Barelvis have organised to form the All India Muslim Personal Law Board Jabid. See "Four Law Boards: Will Muslim Women find a Messiah?" in *South Asian Women's Forum*, Web edition, 7 February 2005.

[513] The Barelvis follow the teachings of Pir Anwar Raza Khan Sufi preceptor (*pir*) who supported custom-laden but conservative folk Islam as opposed to the more sanitised and puritanical form of Islam followed by the Deobandis. Ahmad Raza Khan also formed the theological school Manzar ul Islam and endorsed the Hanafi doctrine (Jamaluddin 1981; Sanyal 1995).

[514]The Muslim Women's Rights network, consisting of twenty-five organisations that have been working on the issue of Muslim Personal Law, arrived at "minimum common understanding" on issues of critical importance to Muslim women. The network proposed reforms in four areas: the regulation/banning of triple *talaq* and oral divorce, compulsory registration of marriage, the compulsory registration of divorce, and women's right to matrimonial property. In 2000, the network held discussions with members of the AIMPLB, religious organisations such as Jamaat e Islami and Tamir e Millat, and independent clergymen. The network expressed the need to revive rights given to women within the framework of Islam and human rights. However, the AIMPLB, as well as religious organisations, remained unreceptive to the demands of these groups. See the report of the Hyderabad meeting, Muslim Women's Rights Network, 16-17 June 2001.

[515] The AIMPLB has, in recent years, been mired in controversy over its campaigns to exempt Muslims from the uniform Child Marriage Restraint Act, 1929, claiming that the Sharia allows marriage of girls post-puberty. Some members of the Board have also issued statements against the use of contraceptives by Muslims and have sought to implicitly extend the jurisdiction of Islamic law to criminal law.

and delink them from local custom and influences. However, the capacity to evolve a judicial process is doubtful given the localised nature of justice. Political developments suggest that the Indian state would not accept a move to centralise the societal judicial system.[516] Different opinions exist among societal actors with respect to the establishment of parallel religious courts such as Dar ul Qazas. Some lawyers also disagree with the establishment of the Dar ul Qazas and call these illegal as these are not supported by any legislative acts.[517] Sects and groups, who are organised and have regulatory bodies, have not adopted a confrontational stand on this issue but would seek to retain their own system of regulation,[518] implicitly opposing the imposition of religious courts. Many women's organisations also oppose these courts and proclaim their verdicts as anti-women. Many Barelvis do not access these religious courts, nor do many Shias or the communities, individuals, and families who abide by their local rules. The clergy, too, see these religious courts as opposing their interests.[519]

---

[516] Recently, a Muslim woman, a mother of four, was allegedly raped by her father-in-law. When she complained about the rape, a local cleric issued a *fatwa* dissolving her marriage. The case received wide publicity and public-interest litigation was filed in the Supreme Court to do away with the parallel legal system among Muslims in India. The Law Minister Hansraj Bhardwaj also stated that no parallel judicial system would be allowed to function in India. The Supreme Court issued a notice to the centre, the *Dar ul Uloom*, the seminary of Deoband, and several states where Sharia courts function. The AIMPLB plans to hand the Supreme Court a detailed report on the functioning of Dar ul Qaza, which they say is complimentary to the judicial system and not parallel to it. The Board argued that it is one of the forums for the redressal of grievances and that it complements the judicial system. (Joshi, Poornima, "Minority Cell Mulls Political Lobbying." *The Telegraph*. 28 August 2005). The AIMPLB also plans to lobby political parties in this matter. Other proposals to establish religious courts deliberated by the AIMPLB include a proposal to incorporate Sharia experts in the system of the Family Court. However, this plan has been shelved after the outcry in the aftermath of the alleged rape case. The AIMPLB think-tank had also deliberated over a proposal to appoint experts in Sharia law to officiate in Family Court in India. They had also sought to reintroduce the powers of the *qazis* to settle civil disputes that were diminished after the colonial state introduced civil courts. See Subodh Ghildiyal, "Muslim Law Board Tones Down Stand." *Times News Network* (New Delhi), 22 August 2005.

[517] "Each local informal institution (such as the Lok Adalats and the Panchayati Raj institutions) is supported by a legislative enactment. These Dar ul Qaza are not supported by any such measures—they have no legal validity" (Interview with Nissar Ahmad Ghatte, 19 February 2003, Mumbai).

[518] Interview with M. M., 5 March 2003, Mumbai.

[519] Indeed, tensions between local clergy and the Dar ul Qazas are rife in Muslim-dominated areas (Interview with Haroun Musawala, 7 September 2002, Mumbai).

To summarise, adjudication in Muslim Personal Law in society involves diverse legal procedures and results in conflict, cooperation, or communication between different legal actors and bodies. The following section discusses the interaction between state law enactments and societal laws.

## Conflict and Convergence between Statutory Muslim Personal Law and Societal Laws

The difference between a section of women's organisations, the state and other legal actors is over the very definition of the family. Women's organisations, including Muslim women's organisations, working on identity issues demand that the state redefine the notion of the family to include gay, lesbian, and transsexual families.[520] However, state laws penalise homosexuality,[521] and most other societal actors from within the Muslim community are against the redefinition of the family as it is considered unIslamic.

Both state law and societal law as well as practices in the regulation of family law demarcate the boundaries of religious groups. The Shariat Act, 1937 was enacted as a tool to construct a unified Muslim community as a step towards a conception of Muslim as a nation/political/religious community (Gilmartin 1988; Jalal 1985). As a result, the Act allows inter- and intra-sect marriages. However, different sects, clans, and groups practice endogamy in order to preserve the boundaries of their group.[522]

---

[520] Interview with Hasina Khan, Awaaz e Niswaan, 6 March 2003, Mumbai. See also the discussion in Gangoli 1996; Menon 1998.

[521] For instance, Section 377 of the Indian Penal Code penalises sodomy and is also used by the police as well as the societal elements to harass lesbian couples (Interview with Hasina Khan, 6 March 2003, Mumbai).

[522] See Engineer 1988 for sect endogamy practiced among some Shia and Sunni groups. Many other organised groups among Muslims practice both sect and caste endogamy (Interview with Dr. Asghar Ali Engineer and H. K., 10 January 2003, Mumbai).

The Indian courts accept three types of divorce under Muslim Personal Law.[523] Historically, Indian courts have accepted both written and oral divorce in some cases (Fyzee 1965; Mahmood 1997, 2002; Mulla 1955), but in recent years, the Family Court has demanded written proof of divorce.[524] Recent developments in Muslim Personal Law in state courts suggest that the higher courts accept *talaq ul bidaat*, or triple *talaq*, as a valid form of divorce only if it is carried out in the presence of witnesses and only after attempts at mediation.[525] However, as I have argued in the third chapter, data show that lower courts have generally not followed this judicial precedent.

The judges in these courts balance minority rights and gender justice by splitting their "hard" decisions—they do not employ rigorous measures to restrict unilateral divorce but enforce maintenance claims. In the case of the validation of triple *talaq*, they do not express opinions about unilateral divorce or enforce judicial precedents of higher courts with respect to unilateral divorce. Nor do they supervise the provision of *mehar* upon divorce, but they provide economic rights through the strict enforcement of maintenance claims, and they treat judicial cases under Muslim law at par with cases filed under Hindu law or the secular law.

In contrast to the lower courts, *talaq ul bidaat* (or triple *talaq*) is considered illegal and unIslamic by some societal actors.[526] Several Shia communities such as the Bohras, Khojas, and Memons do not practice or sanction this form of divorce (Engineer 1988),

---

[523] These include *talaq a hasan*, *talaq hasan*, and *talaq ul bidaat*.
[524] See the arguments in Chapter Two.
[525] For instance, see Dagdu s/o Chotu Pathan versus Rahimbi Dagdu Pathan and Others, May 2002, Aurangabad Bench of Mumbai High Court. All India Maharashtra Law Reporter (Criminal) Vol. 2, 1230-1261.
[526] For instance, the Ahl i Hadith faction does not consider triple *talaq* in one sitting as a valid form of divorce (Interview with Maulana Israr Ahmad, 26 March 2003, Mumbai).

though they might accept it as Islamic.[527] Some women's organisations call to ban triple *talaq*[528] at the societal level. Other organisations, including women's groups, support triple *talaq* but seek to impose conditions to regulate it.[529] Religious seminaries disagree over the question of the validity of triple *talaq*.[530] For instance, both the Deobandis and Barelvis consider *talaq ul bidaat* as a valid form of divorce, while the Ahl i Hadith sect views this form of divorce as unIslamic. While religious laws may permit divorce, customary laws prohibit this type of divorce for some groups.[531] However, many societal actors also advocate for the acceptance of oral divorce.[532] As a result, there are mixed views concerning triple *talaq*.

Many societal actors promote *talaq e tafwid*, a form of delegated divorce.[533] The Islamic judicial divorce, *faskh*, is also widely practiced; however, neither of these types of

---

[527] "Islam prohibits *talaq ul biddat*—anyone who gives *talaq* like that isn't considered a Muslim in our community" (Interview with a Sunni litigant from South Gujarat A.S., 5 March 2003, Mumbai).

[528] See minutes of the discussion between the Muslim Women's Rights Network comprised of 25 organisations and the All India Muslim Personal Law Board.

[529] They seek to popularise the verdicts and judicial precedents in cases such as Dagdu Pathan case and demand that divorce should be invalid unless conditions of arbitration are met. See the presentation of women's opinions on triple *talaq*, presentations by the Samzauta Mahila Mandal and the Hamraz Mahila Mandal in a meeting hosted by Women's Research and Action Group, 6 March 2003, Mumbai. Women's Research and Action Group.

[530] Among Sunnis, scholars belonging to Deobandi and Barelvi schools agree on the validity of triple *talaq*, though they opine that this type of *talaq* is condemned by the Prophet. A Deobandi Mufti, who issues verdicts in cases of personal law, said "The Prophet even condemned murder but, once committed, a murder is a murder. The murderer's punishment in this world or by the God does not wipe out the finality of his act" (Interview with Mufti Sahib, 7 September 2002, Mumbai). The clergymen hold that *talaq* pronounced by an intoxicated or insane husband as valid. Followers of the sect Ahl e Hadith on the other hand, disagree on the issue of validity of triple *talaq*. The clergy attached to the Ahl i Hadith Mosque in Mumbai argued that "the practice of triple *talaq* is not enshrined in the Quran or the Hadith but is based on the legal precedents and as such cannot be considered valid" (Interview with Maulana Israr Ahmad, 26 March 2003, Mumbai).

[531] "Many sects have arrived at uneasy compromise between religious laws and custom—groups which did not practice polygamy and triple *talaq* do not validate them and attempt to limit them. However they do not denounce them as unIslamic" (Interview with M.H., 27 April 2003, Mumbai).

[532] Interviews reveal that theological schools such as the Deobandis, the Barelvis, and the Ahl e Hadith view oral divorce as reprehensible but valid (Interview with Mufti, Dar ul Qaza, 13 April 2003, Mumbai). Religious organisations also accept oral divorce as valid. Some residential committees, the clergy, and lay Muslims also hold this form of divorce as valid (Interviews with G.S., 19 January 2003; Maulana Akhtar Mehmood, Member, Bandra West Residential Committee, 2 January 2003; P.S., 5 March 2003, Mumbai).

[533] This form of divorce is promoted as it "delegates the right of divorce to the wife or the husband's family members." The wife is entitled to *mehar* under this form of divorce (Interviews with Mufti, Dar ul Qaza, 13 April 2003; Mr. Maniar, 17 March 2003, Mumbai).

divorces is accepted by the state courts.[534] Similarly, diverse and conflicting opinions exist over the regulation of *muta* marriages.[535] Ascertaining an ideal amount of *mehar* to provide a safety-net for women in case of divorce is another point of dispute.[536] At times, state and societal actors may disagree on the issue of the validity of divorce, thus placing a question mark on the marital status of parties.[537] The issue of the validity of written and oral divorce under Muslim Personal Law remains crucial for Muslim women who wish to prosecute their husbands for domestic violence by filing a case under the provision of Section 498 (a), IPC, as only married women can file under this provision. In one case, a Muslim woman was forced to drop her complaint midway through proceedings as her husband had divorced her before the case could be filed.[538]

---

[534] For instance, a Muslim woman obtained divorce by *faskh* after her husband filed a case against her for restitution against conjugal rights. The Family Court refused to accept societal given *faskh* as valid divorce (Interview with N.M., 18 March 2003, Mumbai).

[535] For instance, the Public Complaint Centre ran a campaign against clergymen who solemnise *muta* marriages (Interview with Mr. Maniar, 8 June 2003, Mumbai). For instance, acceptance of *muta* marriages has been debated by the Ithna Ashari Khojas. One suggestion is that *muta* marriages should be performed between the couple after engagement and before marriage (Interview with M.H., 21 April 2003, Mumbai).

[536] Women's organisations argue for higher monetary value of *mehar* as it provides financial security to divorced women in the case of unilateral divorce. A higher amount of *mehar* can also act as a deterrent to divorce. The Public Complaint Centre opposes the demand for high *mehar* as it limits women's ability to ask for *khula*. However, as an activist from Awwaz e Niswan, a Muslim women's organisation, suggests, returning of *mehar* upon *khula* is an issue only if women opt for community divorce and not when the matter is decided by the court[536] (Interview with Hasina Khan, 10 January 2003, Mumbai).

[537] For instance, a husband divorced his wife through a *fatwa* acquired from a clergy. The woman went to a grassroots-level NGO working on the issue of divorce, the organisation declared the divorce as invalid as the conditions of the divorce (the presence of witnesses and arbitration prior to divorce) were not met. The woman then filed a case for maintenance for herself and her children in the Family Court. The man argued that he had divorced his wife and produced the *fatwa* but could not prove divorce as there was no written proof of acceptance by the wife. In the meantime, the woman continued to occupy the apartment her husband had leased from the Bombay Municipal Corporation. He asked the corporation to evict his wife as he had divorced her, but the woman challenged his claim, and the corporation accepted her claim as valid as she could prove that she was living in the apartment. This dispute unravelled over the course of five years, and the couple's marital status remained contested during this entire period (Interview with N.S., 17 January 2003, Mumbai).

[538] In one case, a Muslim woman had gone to the police station to file a case under Section 498 (A), IPC. The police sent a constable to bring the husband to the police station. The husband fled before the constable could reach him. The husband approached a lawyer and together with the lawyer produced a deed of divorce (*talaqnama*) before the police could prepare a charge sheet. The police decided not to file charges as the law could not be applied to divorced couples (Interview with T.S., 16 January 2003, Mumbai).

In an effort to widen women's access to divorce, the state allows Muslim women to terminate their marriage through the Dissolution of Muslim Women's Act, 1939. While the Indian court largely follows the Hanafi law, it has cobbled together provisions from Hanafi, Maliki, and Shafi schools to provide grounds of divorce to the Muslim wife.[539] Both state law as well as Islamic law include "fault" as grounds for divorce.[540] Muslim women can also dissolve their marriage at the societal level through *khula*. The difference between state law and the societal form of divorce is that *khula*, as practiced at the societal level, requires the husband's consent while consent is not necessary for divorce under state law. Judicial processes at both levels can often result in the conversion of *khula* into a mutual consent divorce.[541] Women are at a disadvantage in societal divorce; they are forced to renege their economic rights in exchange for divorce.[542] In very rare cases, women wishing to initiate divorce, *khula,* have been able to provoke their husbands into giving

[539] Grounds for divorce under the Hanafi law are very restricted, and as a result, the Dissolution of Muslim Marriages Act, 1939 has incorporated provisions from Maliki and Shafi schools. See the discussion in Pearl 1987, 130.

[540] There are areas of similarities in the manner in which cruelty is construed in courts as well as in societal legal forums. For instance, the Family Court at Mumbai denied maintenance to a Muslim woman as she was unable to prove harassment. Her claim of not wanting to stay in the joint family was seen by the court as a demand of a modern, western wife who watched too much TV (See M.S. v A.S., Family Court Records, 2002, Mumbai). In many cases, the clergy's interpretation of "fault" rests on the wife's failure to obey the husband. Women's organisations do not accept these as grounds of "fault" as they find both the court and the *qazis*' interpretation of marital "fault" as often dominated by patriarchal interpretations of women's roles and obligations within the family... that sanctions domestic violence and cruelty and silences women" (Interviews with Hasina Khan, 13 March 2003; N.S., Awaaz e Niswaan, 10 January 2003, Mumbai).

[541] Cases filed under the Dissolution of Muslim Marriage Act, 1939 are often converted into mutual consent divorce cases in the state law as a result of societalisation of divorce as argued in the second chapter. At the societal level, cases of *khula* are often converted into *talaq* by the clergy in order to protect the rights of Muslim women (Interview with Mufti, 13 April 2003, Mumbai).

[542] Women who ask for *khula* often have to forego *mehar* and maintenance (Interview with Mufti, Dar ul Qaza, 7 September 2002, Mumbai). A woman's right to divorce is often hampered by the husband's refusal to accept divorce. There are several cases in which husbands refuse to grant divorce and agree only after a large sum is paid to them (Interview with N.B., 14 February 2003, Mumbai). Some women are similarly disadvantaged in the state courts. Women who initiate divorce in state courts are often forced into compromising their economic rights in order to obtain divorce if they are unable to prove "fault."

them *talaq ul bidaat*.[543] Commonly, women wishing to initiate *khula* with reluctant husbands imitate the male strategy of divorcing reluctant wives; [544] that is, Muslim women find clergymen or organisations willing to issue *khula* and send the notice of divorce to husbands by registered post. The proof of signed registered receipt by the husband (or his family members) is produced as a proof of valid *khula*.[545] However, non-acceptance by husbands has often led to confusion about the validity of the divorce.[546]

State law permits polygamy among Muslims but also seeks to contain it.[547] Similarly, societal actors accept polygamy as it is valid under the Sharia law, but many actors seek to restrain the practice.[548] Polygamy without the consent of the first wife is not permitted among many Muslim sects (Engineer 1988). There exist other societal limitations on polygamy.[549]

It has often been argued that the Muslim minority in India has pushed its religious agenda in the state through legislative means, undermining the power of the state and

---

[543] Interview with feminist social worker Vandana Nanaware, the Special Cell for Women and Children, 16 June 2003, Mumbai.

[544] Women's organisations also identify women friendly *qazis* who would be willing to issue *khula* and refer women litigants in need of divorce to them (Interview with Vandana Nanaware, 16 June 2003, Mumbai).

[545] Interviews with Z. S., 14 June 2003; H. K., 5 March 2003; N. S., 6 March 2003, Mumbai.

[546] In one case, a Muslim woman had obtained *khula* through a clergyman. The clergyman had issued three notices to the husband asking him to appear and present his side of the case. The husband had refused to come but had accepted the notices posted by registered post. The wife was granted *khula* on these grounds and her remarriage was fixed. The husband showed up at the time of her remarriage and claimed that she was still his legal wife. The woman's father had to pay him a sum to agree to divorce (Interview with P.S., 4 March 2003, Mumbai).

[547] Courts construe polygamy as a form of cruelty and award divorce to the wife on these grounds under the Dissolution of Muslim Marriage Act, 1939. Muslim wives can argue constructive desertion to counter polygamous husbands' claims in cases of restitution of conjugal rights. For a more in-depth discussion on this point, see the arguments in Chapter Two.

[548] While the clerics agree that polygamy is permissible in Islam, many argue that "a man should not remarry unless he can treat his wives equally well" (Interview, Mufti, 7 September 2002, Mumbai). In one case, a husband's polygamy was seen as cruelty by a cleric who issued a *khula* on those grounds. The husband went to another cleric who contested the *khula* as he argued that polygamy cannot be considered grounds for divorce under Muslim Personal Law since it is sanctioned by the Prophet (Interview with B. S., the woman litigant, 26 March 2003, Mumbai).

[549] A man who wishes to remarry cannot find a bride in some Muslim communities until he produces proof of divorce. He finds it even more difficult to find another bride if he has incurred post-divorce financial liabilities (Interview with A.S., 7 March 2003, Mumbai).

harming the rights of Muslim women in the process (Parashar 1992; Narain 1997; Sunderrajan 2003). However, courts in India have sought to change, modify, and reinterpret religious laws and have, to some extent, safe-guarded women's rights in the process. For instance, judicial developments on the interpretation of the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 evince that divorced Muslim women have more rights than divorced Hindu women have. This law travels in society and results in out-of-court settlements in some cases.[550] However, religious seminaries, the clergy, and a section of religious organisations declare these developments as unIslamic and illegitimate, thereby limiting the scope of reforms.[551] The reach of this law is further limited because the women's movement, intellectuals, and moderate Muslims have been against the enactment of the law in the post-Shah Bano era and have not grasped subsequent legal changes in this law.[552]

The issue of the recovery of dowry, or *stridhan*, brings to light the conflict between local practice, state laws, and Islamic precepts. The practice of dowry has been considered a Hindu practice and is against Islamic laws (Uberoi 1994). Societal actors such as the AIMPLB and some clergy forbid the practice.[553] However, the practice is widely prevalent on the ground. In general, husbands return their wives' *stridhan* at the time of divorce both

---

[550] "I have settled two cases on the basis of this law" (Interview with Nissar Ahmad Ghatte, 23 March 2003, Mumbai).

[551] "Divorced Muslim women are allowed maintenance only during *iddat* per Hanafi laws" (Interview with Mufti, Darul Qaza, 7 September 2002, Mumbai).

[552] For instance, scholars of theology and women activists actively engaged in the process of reform in Muslim Personal Law also argue that the Muslim Women's (Protection of Rights upon Divorce) Act, 1986 denies maintenance to divorced Muslim women. See Yoginder Sikand, "Listen to the Women." Available from http://outlookindia.com. Accessed 5 May 2005. Sikand has interviewed Noorjahan Niaz, of the Women's Research and Action Group. Niaz argues that the denial of the right of maintenance to a divorced woman is to deny her compensation for domestic work. In this light Niaz critiques the Muslim Women's Protection of Rights upon Divorce Act, 1986 for having taken away the rights to maintenance that divorced Muslim women enjoyed.

[553] See a declaration adopted at a conference on "Genuine Problems of Women and their Solution in the Light of Shariah," organised by the All India Muslim Personal Law Board at Jamia Milia Islamia, 8 April 2001.

in state courts as well as in the societal arena. Recovery of the dowry becomes more difficult in cases in which the wife refuses to accept *talaq*,[554] when the husband refuses to accept *khula*,[555] or when either refuses to accept *faskh*. Women's organisations are crucial to these negotiations concerning marital status and the retrieval of the dowry. Women's organisations advocate that the dowry is a woman's property that should be controlled by women, and that it should be retrievable at any time, regardless the marital status of the parties.[556]

To summarise, this section demonstrates that there are multiple views on Islamic laws within the society, and heterogeneous ideas about the Muslim conjugal family, marriage, and divorce coexist in the legal sphere. The following section discusses how individual litigants and legal actors provide spaces for women's rights in law.

## Agency and Its Constraints: Muslim Women's Rights in the Legally Plural Sphere

The previous sections suggest that the terrain of Muslim Personal Law is an arena for expressing and constructing alternate visions of the family, marriage, community, law, and Islam as a whole. Sugarman (1983) discusses facilitative law: law that functions not by imposing obligations but by conferring legal power to them. So, law permits private lawmaking and interpretation and enables the individual to expand or contract her

[554] A Muslim husband divorced his wife by registered letter, which the wife refused to accept. The parties were separated for a year, and the woman heard that her husband was about to mortgage her jewellery. She went with her extended family to his house to obtain her *stridhan*, but he refused to part with it until she accepted divorce (Interview with Z.I., 23 May 2003, Mumbai).

[555] In one case, a woman was thrown out of the marital house following a violent incident. The woman decided to seek *khula* after that and obtained the divorce through a *qazi*. Her husband refused to accept the *khula* and returned her *stridhan*. He claimed that custom dictated that she could retrieve *stridhan* only if he divorced her. The woman received her *stridhan* after the intervention of a women's organisation. The organisation argued that the *stridhan* was the woman's property, and she could claim it regardless of her marital status (Interview with Vandana Nanaware, Social Worker, Special Cell for Women and Children, 16 June 2003, Mumbai).

[556] Interviews with Vandana Nanaware, 16 June 2003; Yasmin Sheikh, 11 December 2002, Mumbai.

autonomy and thus promote, qualify, or subvert state policy. Santos has argued that different layers of law (international, national, state-generated law, and local customs and practices) coexist and interact in legal spheres. This inter-legality, the phenomenological counterpart of legal pluralism, is a dynamic process that shapes the legal consciousness of actors (Santos 1987). Within such legal spheres, legal actors "become not only law abiding citizens, but law inventing" (Kleinhans and Macdonald 1997, 2) and navigating subjects. The section points out that the difference between statutory and non-statutory laws leads to the notion that marital status is a negotiated status, subject to claims and counterclaims of rival parties. As a result, at times, parties determine their own status and justify it in light of "authentic Islamic law."

The availability of multiple legal avenues enables Muslim women to engage in forum shopping. In some cases, heterogeneous options increase the choices for litigants;[557] however, the data also show that the mere existence of multiple legal avenues may not be enough to safeguard women's rights in law.[558] The legal arena also enables parties to "exit"[559] from one sect and enter into another without exiting a community, thus individuals deculture themselves. For instance, a man divorced his wife and repented. He converted to the sect Ahl i Hadith and thus managed to proclaim his divorce as invalid as this sect does

[557] For instance, a woman was denied *khula* when she asked for a divorce after her husband contracted a second marriage. The *qazi* argued that polygamy was legal in Islam, and as a result, she could not ask for *khula* on these grounds. However, she went to a woman's organisation that referred her to another *qazi* who argued that "Islam asks a man to remarry only if he is able to treat all his wives equally and that is not the case here" (Interview with M. S., 19 March 203, Mumbai).

[558] "The courts and the *qazis* are often alike when it comes to their interpretation of women's roles and obligations in the family. An ideal wife is supposed to be an obedient, docile and passive housewife. In a case, a judge denied a woman maintenance believing the husband's claim that she watched TV all day and did not help out in housework. The *qazis* also believe the same" (Interview with Hasina Khan, 10 January 2003, Mumbai).

[559] The term "exit" is defined as the group member's decision to opt out of a cultural group.

not recognise *talaq ul bidaat*.[560] The literature on the informalisation of law suggests that corruption and arbitrariness on the part of society-based legal sources can consolidate the position of the powerful and violate the rights of oppressed groups (Abel 1982; Harrington 1985; Merry 1982, 1989; Tomasic 1982). However, this case seems more opaque. The data suggest that while some litigants are harmed by the lopsided nature of laws and the process of justice, some litigants find ways to tweak the system in their favour by taking advantage of new developments in state law or by accessing societal power centres.

The data show that everyday legal ability is based on the knowledge, ability, initiative, awareness, and resources of a family or of individual women. Hence, education on marriage law is seen as one of the key strategies of the women's movement. Women's groups and networks circulate information about the content of laws and legal sources; thus, the organisational and institutional actors among women[561] demonstrate to women that accessing certain legal actors may precipitate certain results. Women's organisations keep a list of the clergy who give *faskh*, and refer to them the cases of Muslim women seeking divorce.[562] Women's organisations refer cases to these clergymen and act as watchdogs. Women often filter back information about their dealings with various clergy and organisations to the women's organisations.[563] However, many individual women who do not have access to information might be sidelined.[564] In general, marital status then is

[560] Interview with R. S., 23 January 2003, Mumbai.
[561] Interviews with H. K., 12 January 2003; N. S., 5 March 2003; P. S., 18 March 2003, Mumbai.
[562] Interview with Vandana Nanaware, Social Worker, 16 June 2003, Mumbai.
[563] Women's organisations confront and boycott corrupt clergy who charge women for divorce. They also hold discussions with different clergy, lawyers, and religious organisations either on the basis of individual cases or over matters of common concern (Interview with Vandana Nanaware, Social Worker, 16 June 2003, Mumbai).
[564] A woman litigant waited three years before approaching the Dar ul Qaza despite being deserted for three years as her natal family understood that they had to wait for her husband to pronounce the divorce. The husband refused to accept the *khula* but signed for the registered letter sent by the Imarat e Sharia, and this was accepted as a proof of *khula* (Interview with K.B., 15 April 2003, Mumbai).

indeterminate and subject to personal/familial negotiations. Religio-legal considerations often do not enter into the struggles over marriage and divorce.[565]

The interactions between multiple actors enable women to act as individual litigants as well as collective groups in their challenge of patriarchy.[566] Activists working in feminist groups, too, confront multiple structures of patriarchy in their everyday activities as well as in public protests. As a social activist of Awaaz e Niswaan stated: "We not only had to struggle against those who seem like our 'own' within our families and communities but also against the communal 'others' outside the community."[567] They use innovative confrontational methods to drive home their viewpoints and engage in debates over the interpretation of law with legal actors in their area.[568]

While many Muslims agree with the idea of being governed by Islamic laws in family affairs, there is no consensus over which law should prevail or what is "Islamic" about any law and how is it different from local practice. Indeed, individual families, clans, neighbourhoods, and sect *panchayats* classify any law or practice that is commonly practiced or ratified by (generally) male authority as "Islamic." In such cases, cleavages between "Islamic laws" and local laws and practices are not often seen to be repugnant to

---

[565] A woman litigant got the *khula* certified by a *qazi*. Her remarriage was arranged when her husband and some members of his family challenged the *khula* showing another *fatwa* from another source that did not validate the *khula*. The husband and his family had to be paid off by the woman's family (Interviews with G. S., 6 March 2003; N. S., 22 January 2003, Mumbai).

[566] I draw on Bina Agarwal's distinction between covert resistance initiated by individual women and overt action by women's groups and collectives in their resistance to patriarchy (Agarwal 1994).

[567] Interviews with Yasmin Sheikh, Hasina Khan, and Naseem Sheikh, 10 January 2003, Mumbai.

[568] A women's informal group working in a slum in Mumbai has been active for the past ten years. The group is comprised of former or current women litigants. They have named themselves the Hamraaz Group. A woman member of the *mahila mandal* received divorce from her husband through a *qazi*. The members went as a group to the same *qazi*. They asked him to perform *nikah*, or marriage. Not sighting a man among the crowd, the *qazi* asked: "Where is the man?" They answered: "When you can give *talaq* in absence of women, why can't you perform marriage in absence of the man?" Khatoom Gafoor Sheikh, member, Hamraaz group, Mumbai.

religious practice or to individual conscience.[569] Such a decentralised legal sphere can, at times, give agency to some women's groups to debate, discuss, and implement their own version of Islamic law.[570]

**The Campaign around Nikahnama: Reforms from Within**

Given the multiple loci of law within India, there are ongoing discussions about the need for reform within Muslim Personal Law. There are three broad positions taken by different sections of the community. The conservatives oppose state intervention in the community's affairs and also oppose calls for reforms within the ambit of a religious framework. They argue that the Sharia is divine and immutable, and therefore there cannot be any human intervention in its rules. The other lobby is the reformists who are divided on the issue of the need for state intervention in the matter of personal law reform, but who initiate ad participate in moves towards reforms from within the community. The third, the AIMPLB, represents the accommodationist lobby who tries to balance between the two lobbies. The following section discusses one such campaign for reform within Muslim Personal Law that was initiated from below, and it assesses the interplay between these three lobbies.

The campaign to revive the custom of prenuptial contracts,[571] or *nikahnama*, as a strategy to protect women's rights within the framework of Islamic laws gained

[569] A woman litigant argued that it was considered "Islamic" not to practice polygamy in her community and that customary laws dictated this. "We are Muslims... and we believe in Muslim Personal Law. Any departure from Islamic laws is repugnant to us" (Interview with N.S., 17 January 2003, Mumbai).

[570] "Women tell us time and again that they want to be governed by Muslim Law that the Mahila Mandal advocate" (Interview with Hasina Khan, 12 January 2003, Mumbai).

[571] Such prenuptial agreements were deemed valid in Indian case law. See Section 314, Muslim Personal Law, Mulla 1955, 269. In some cases these were invalidated as is seen in a judgement of the Bombay High Court in Bai Fatima v. Alimahomed, (1913) 37 Bom. 280,17 I.C. 946. This prenuptial agreement is prohibited under Hanafi, Malaki, and Shafi schools but is allowed under Hanabali law and is incorporated in the state law of Jordan, Morocco, and Syria (Anderson 1959, 50-51).

momentum in the mid-1990s when women's groups initiated the discussion of reforms in personal law. This was also seen as a legal innovation enforced through social regulation to balance gender inequalities prevalent in Muslim Personal Law. The *nikahnama* is a prenuptial agreement in which the husband agrees to delegate the right of divorce to his wife. He may also consent to divorce his wife (assuming that she wants a divorce at that point) if he fails to maintain her or if he deserts her or remarries. A bride may also insist on additional conditions, such as the provision of maintenance post-*iddat* and arrangements regarding guardianship and custody of future children.[572]

Since the mid-1990s, many women's groups and networks arranged seminars and meetings to discuss the details of *nikahnamas*, circulated drafts, and sought legal advice.[573] They then re-circulated the amended versions among various pockets of Muslim communities. These *nikahnamas* were prepared by activists,[574] individuals,[575] lawyers,[576] organisations,[577] and networks such as Muslim Women's Rights Network,[578] which prepared a summary of suggestions on reforms in personal law that could be incorporated

---

[572] For a detailed discussion on the potential of this law in the Indian context, see Carrol 1982.

[573] Legal experts such as Prof. Satyaranjan Sathe, Vaijayanta Joshi, Lakshmi Paranjpe, and others offered their advice. See minutes of a meeting organised by the All India Progressive Muslims Conference. 26 June 1999.

[574] See the 1996 draft of *nikahnama* prepared by a group of women's rights activists including Prof. Ramla Baxamusa, Nahida Sheikh, Waheeda Nainar, Nasreen Fazhalbhoy, and others.

[575] See for instance the model *nikahnama* prepared by Dr. Zeenat Saukat Ali.

[576] See for instance the *nikahnama* presented by Zakir Maniar, at a meeting on *nikahnama* organised by the All India Progressive Muslims Conference, 26 June 1999. See for instance the *nikahnama* prepared by advocate Niloufar Akhtar, see Bhattacharya Chandana, "Rights for Women in Model Nikahnama." *The Telegraph*. 26 July 2004.

[577] See *Zeenat ka Nikahnama*, prepared by Prof. Shamsuddin Tamboli, 26 June 1999, meeting on *nikahnama* organised by the All India Progressive Muslims Conference. See also the *nikahnama* prepared by The Islamic Research Foundation, prepared by Dr. Asghar Ali Engineer. Many ideas about the *nikahnama* were discussed in various meetings. See suggestions made by Khatoom Gafoor Sheikh, Member, Hamraaz Group, Mumbai. The grassroots women's organisation working in a slum in Mumbai ask for a ban on triple *talaq* and to replace it with arbitrated divorce handed down by the court or women's groups. The group argues that *mehar* should be made incremental in recognition of women's labour in the family and should be handed over to the woman at the time of marriage (Interview, Khatoom Gafoor Sheikh, Member, the *Hamraz* Committee, at the Book Release Function organised by Women's Research and Action Group, 22 April 2003, Mumbai).

[578] The network represents 25 feminist organisations across India.

in the *nikahnama*. Individual men and women voluntarily signed these contracts to popularise the practice during their own or their relatives' marriages.[579] However, a vexing question here was the enforcement of *nikahnama* at the time of marriage since the *nikahnama* faced opposition from a section of the clergy[580] and also from society at large because the contract required voluntary abdication of male privilege. After many years of campaigns on the issue, several groups asked the AIMPLB to take the lead to discuss the concept of *nikahnama* throughout the country, to standardise the contract, and to work out mechanisms to ensure its enforcement. Bowing to intense pressure from various groups, the AIMPLB also took up the task of preparing its own version of the *nikahnama*[581] and placed it on the agenda in its meeting in February 2005 at Bhopal.

However, the process of internal reform in the community depends on balancing the power of the conservative and moderate forces from within the community. Before the AIMPLB meeting, 80 *ulemas*, many of them from the Barelvi sect, issued a statement intending to pressure the AIMPLB not to carry out wide-ranging reforms, especially those concerning triple *talaq*.[582] However, the possible move by the Board was closely watched by different sections of the community and diverse lobbies[583] and was seen as an

---

[579] For instance, a woman leader of a local women's group prepared a *nikahnama* for her son's wedding that specified a condition against polygamy and granted a lump sum maintenance to his wife in case of divorce (Interview with N. M., 22 February 2003, Mumbai). A Muslim activist, Syedbhai, presented his own *nikahnama* at a meeting on *nikahnama* organised by the All India Progressive Muslims Conference, 26 June 1999.

[580] Some religious clergy argued that while this may help curb polygamy, it is not permissible in Islam as polygamy is a right granted to men under Islamic law, and a husband cannot bind himself so as not to exercise the right given to him in Islamic law (Interview with Maulana Faisal Ahmad, 23 March 2003, Mumbai).

[581] For instance, Uzma Naheed, a woman member of the AIMPLB had worked with the Ulema and the Board members to push forth women's rights through *nikahnama* since 1994. See Bhattacharya Suchandana, "Rights for Women in Model *Nikahnama*." *The Telegraph*. 26 July 2004.

[582] See "No Compromise on Triple Talaq System: Ulemas." Available from. http://www.outlookindia.com. Accessed 14 August 2004.

[583] See Rasheed Kidwai, "Curtain to Drop on Triple *Talaq*." *The Telegraph*. 30 April 2005.

opportunity to portray the tolerant, outward-looking character of the Indian Muslim community.[584]

Bowing down to pressure from the conservatives, the Board declared a standard *nikahnama*, which fell short of feminist ideals. The Board recommended that triple *talaq* should be seen as reprehensible, and it made a statement that the *mehar* should be paid and that women should not be asked to forego the *mehar* payment. They did not include *khula* or *talaq e tafwid* as women's right to divorce, but they did call the practice Islamic.[585] The Board prepared a standard *nikahnama* that did not fall far short of reformist demands. Some feminist organisations and women's wings of the political parties acknowledged the internal reform process as a step in the right direction.[586] Feminist organisations, including Muslim women's organisations, however, held demonstrations against the proposal;[587] moderates and intellectuals condemned the AIMPLB's inability to push for pro-women reforms.[588] The process brought into the open the limitations of the AIMPLB in the implementation of legal changes. The campaign for regulation of *nikahnama* succeeded in generating public dialogue and discussion on the nature of reforms in Muslim Personal

---

[584] "The Board (intends to)... focus on improvement in personal conduct, reforms in marriage and divorce and a complete ban on dowry and extravagance... a model *nikahnama* hopes to reduce gender-based discrimination, particularly in divorce-maintenance cases" See Rasheed Kidwai, "Muslim Board to Open New Chapter." *The Telegraph*. 7 October 2004.

[585] See Suchandana Gupta, "*Talaq*: Once is Enough." *The Times of India*. 2 May 2005.

[586] See interview with Veena Gowda, lawyer with the feminist organisation *Majlis* Mumbai, in "We will Make Our Own *Nikahnama*." *The Hindu*. 7 May 2005. See also the Press Release prepared by the All Indian Democratic Women's Organisation, signed by Suhasini Ali (President), Brinda Karat (Vice President), S. Sudha (General Secretary), and Anwara (Member). 5 May 2005.

[587] Muslim women tore the copies of the AIMPLB's *nikahnama* in a public meeting in Mumbai called by the Muslim Women's Rights Network, Awaz e Niswan and the Forum against Oppression of Women. See "We Will Make Our Own *Nikahnama*." *The Hindu*. 7 May 2005. See also the interview of Nusrat Bano Ruhi in "India Muslim Divorce Code Set Out." Available from .http://news.bbc.co.uk. Accessed 2 May 2005

[588] The Prince of Arcot, a well-known reformist, asked the AIMPLB to ban triple *talaq*. See "Talaq Woes Worry Prince." *The Statesman*. Accessed 5 May 2005. See also Arshad Alam, "The Board of No Shame." Available from http://outlookindia.com. Accessed 4 May 2005.

Law,[589] but it failed, in a sense, since the success of the reforms depended on individual volition, which proved the limitations of the moral authority of the AIMPLB.

**Competing Ideologies and Interests among Socio-Legal Actors and Institutions**

The Muslim community is not monolithic; therefore, parties that debate on religious family laws face two tasks: one is to bring about changes within the community while keeping in mind the diverse interests and positions of factions; the other is to recontextualise the debate of law-reform while countering growing religious intolerance and attacks by Hindu fundamentalists.

While there is a loose consensus in favour of reforms within the framework of Islamic law among various sections, there is no blueprint for the nature of the reforms. Neither is there an agreement within the community on the nature and degree of state intervention in the sphere of the community. For instance, religious seminaries and a section of the clergy argue for decreased state intervention. Some of their demands include the withdrawal of litigants from the state judiciary, the streamlining of Muslim Personal Law through the establishment of religious courts, the development of Islamic law in India, the expansion of Muslim law in the criminal justice system, and the increased control over the family and women. Their vision also seeks to give representation to diverse sects, seminaries, and ethnic Muslim communities. However, there exist differences between the various theological schools in India, and various theological schools have sought to establish their own Personal Law Boards.

---

[589] For instance, pro-reform sections have used a variety of means to push forth reform. Some residential committees enforce it, as do civil society organisations. Some *ulemas* exhort Muslim men to sign the *nikahnama* in Friday sermons. See Geeta Pandey, "Muslim Women Fight Instant Divorce." Available from http://news.bbc.co.uk. Accessed 4 August 2004.

Each party has an interest in how personal law is practiced. Lawyers tend to favour the extension of state law and oppose the establishment of societal-level religious courts as these developments are against their professional interest. The clergy wish to retain the private, individualistic nature of justice within Islam and wish to retain the current system of plural legal sources. Muslim intellectuals, moderates, and a number of civil society organisations advocate more state intervention; they appeal for reforms within state laws and within the formal legal system. Among political parties, the BJP and its affiliates have renewed cries to establish a uniform civil code while other parties, especially the leftist parties and the Congress Party, are against the enactment of a uniform civil code. However, most political parties disagree with the proposal of establishing separate religious courts. A very small number of Muslims argue for a uniform civil code since it is one of the core demands of the BJP.

The issue of law reform is tied to the broader processes of struggles against communalism. At the other end, women's groups and other civic organisations are divided into two streams: one group of women's organisations pushed for reforms within the community within the framework of the Sharia. However these groups call for pro-women or feminizing interpretations of Islamic law and argue for equal rights between the sexes. The other faction of Muslim feminist organisations disagrees with the basic premise of religious personal law as they see religion as inherently patriarchal.[590] Both groups agree, however, in their vision of the family that is gender-just. They argue for more procedural

[590] These differences are mirrored by lay Muslim women. A Mumbai-based women's organisation, Women's Research and Action Group, carried out a survey of 14,624 Muslim women across India to ascertain their views on personal law reform. About 47 percent of women wished for changes within the framework of religion, while 11 percent wished for secular and gender-just law, and 25 percent denied wanting changes in the law. About 7.5 percent did not know any this about the issue, and 6.1 percent did not wish to comment (Nainar 2000, 40).

and substantive equality for women within state laws.[591] They also argue that the societalisation of divorce creates a vested interest for the religious clergy as it increases their power over sections of the community, including women, and it influences gender relations within the family. At the same time, the clergy support internal reforms within the community and contribute to societal initiatives for reform.

The women's movement is further divided on the issue of the rights of homosexuals within the family. A section of women activists and organisations, including Muslim women activists and organisations that advocate for the rights of gay, lesbian, and transsexual persons, prefer to argue their case in the language of human rights. They opt out of the debate on reforms from within the circumscribed boundaries of religious discourse as they cannot make a case for the rights of homosexuals within the religious framework. However, they stress the importance of dialogue on the definitions of family within the Muslim community.[592] In general, women's organisations are alert to the unification agenda of the Hindu right and therefore advocate internal reform within the community, and they are reluctant to demand a uniform civil code. Both factions engage in internal reform through the feminist reading of scriptures, and they engage in dialogue with religious organisations, the clergy, religious seminaries, and the media. Muslim women's organisations take a more nuanced stand on this debate as they are caught between the partisan state and the inward-looking community.[593]

---

[591] In Tamil Nadu, some Madurai-based Muslim women's organisations launched a campaign stating that *talaq* issued by an authority other than the state would not be acceptable. Presentation by Nazneen Barkat, ASAG, Minutes of MWRN Meeting, 6 July 2003, Mumbai.

[592] Interviews with S. K., H. K. 15 January 2003, Mumbai.

[593] "On the one hand, after the genocide in Gujarat, feminist organisations acting on Minority issues cannot trust the state as a saviour of individual rights. On the other hand, riots and genocides intensify the hold of patriarchal elements—after the riots in Mumbai in 1993, the clerics told omen that 'the riots happened because you do not veil.' As Muslim women, we are caught between these patriarchies." Presentation by

## Conclusion

In this chapter, I study adjudication in Muslim Personal Law in multiple legal locales, and I outline the processes of confrontation, cooperation, and communication between litigants and legal actors and bodies. I suggest that while litigants and adjudicators legitimate their legal choices and decisions as "Islamic," perceptions of what is "Islamic" vary. The centrality given to religious laws as defining markers of community identity is also resisted, both in everyday practice as well as in the national sphere, by sections of civil society, Muslim intelligentsia, social organisations, and sections of the women's movement. The language of resistance is different: it does not consent to a homogenised Indian nation, nor does it validate the Muslim identity imagined by the orthodoxy. It is also evident that the mere existence of multiple arenas may not be enough to equalise gender relations in law. However, women's individual and collective agency finds expression in everyday negotiations under the law and permits the levelling of some forms of gender hierarchy.

---

Hasina Khan, Member, Awaaz e Niswaan. 4 July 2003, Mumbai. Many women's organisations engage with the state while remaining critical of the state and alert to the state cooptation of their agenda.

# CHAPTER SIX

*Conclusion*

My thesis poses the following questions: How do accommodative arrangements advocating shared adjudication between state and society in legally plural democracies impact upon the interactions between and within religious groups and other societal bodies? And how do they shape women's rights in the family? What is the nature of state-society interactions in the adjudication of religious laws in legally plural societies? The study aims to describe, understand, and in the end, explain the functioning of the Indian policy of legal pluralism as an accommodative measure in the governance of marriage and divorce among Hindus and Muslims. The Indian state has adopted what I call a "shared adjudication model" in which the state and a broad range of societal bodies share adjudicative authority.

Deriving theoretical support from the body of literature on state-society relations and legal pluralism, I contend that adjudicative processes in religious family laws of Hindus and Muslims evince competition, conflict, cooperation, and communication between multiple centres of civic, lay, religious, and state authority in dispersed legal forums. The prevalence of heterogeneous actors and organisations in the legal sphere leads to a paradoxical dynamic of "centralisation and decentralisation of law" in which state law is resisted, adapted, integrated, or transformed within society. These interacting legal agents construct normative universes in which diverse ideas, values, and understandings of religious membership, the conjugal family, and gender hierarchy are both contested and constructed. These ongoing negotiations between litigants and legal bodies can promote,

facilitate, deepen, formalise, and spur communication between and within religious groups on matters related to the family; they can also facilitate women's rights in law.

In the Indian context, the differences in the formation of family are seen as pivotal to boundary drawing between Hindus and Muslims. However, the data show considerable overlap in the representations and understanding of the family among Hindus and Muslims of similar class and caste backgrounds. I also demonstrate that while Hindu and Muslim women are not granted equal rights in religious family laws, Muslim women do not face greater discrimination and, in some instances, are awarded greater economic rights under Muslim Family Law.

**Overlapping Jurisdictions, Women's Rights, and Intra-Cultural Accommodation**

Cases of marriage and divorce under Hindu and Muslim personal laws are adjudicated in state courts and informal forums. The state-governed Family Court allows self-representation, provides legal aid, ensures speedy disposal of cases, and, upon request, exempts women from paying court fees. Despite these measures, the crude divorce rate in the Family Court of Mumbai is still only 0.0001.[594] The low utilisation of state courts and the presence of informal actors in the governance of marriage and divorce is seen by scholars as a failure of the state legal system (Galanter and Krishnan 2003, 2005); this criticism of the formal legal system is used by "unofficial" legal actors to justify their intervention (Eckert 2005).

I posit that the above explanations are partially useful, and that the Indian model of legal pluralism does not evince the limit of state intervention. The state adopts the strategy of "regulated autonomy" by which it incorporates religious groups into the governance of

[594] The crude divorce rate is calculated as number of divorces per 1000 inhabitants in a given year.

the family and circumscribes their sphere of autonomy. This strategy is an outcome of the Indian state's desire to govern while balancing plural demands of groups.[595] My data show that the low usage of courts in the governance of marriage and divorce is due to the shared adjudication model of the Indian state. To elaborate, I study adjudication processes in formal and informal legal forums in Hindu and Muslim religious family laws. Each religious group is internally heterogeneous; ethnic and religious organisations, doorstep courts, social and family networks, political parties, NGOs, women's groups, and individuals, including lawyers, strongmen, and the clergy constitute different sources of adjudicative authority. I show how state law travels into societal legal forums and how these capture the paradoxical movement of law, which I call the "centralisation and decentralisation" of law. I show that while the state attempts to extend its authority, state law is resisted, appropriated, adapted, transcended, or integrated in societal laws. Thus, the movement of law creates different normative universes in which ideas about family, gender roles, and religious membership are aired and exchanged between and within religio-cultural groups in different legal settings. Thus, my data highlights the interstices of state-society interactions in law and demonstrates that the low utilisation of courts does not imply that state law and procedure has failed to structure marriage and divorce in society.

---

[595] Rudolph and Rudolph (2001) suggest that the uniform civil code debate presents an ongoing tension between the idea of legal centralism and the practice of legal pluralism through the recognition of religious personal laws. While they do not make this point with regard to legal informalism, I have retained this analytical lens as it captures the working of legal pluralism on the ground. The Indian state has, time and again, regulated marriage and divorce in religious communities through legislative amendments and enactments and judicial precedents. For instance, the Supreme Court has opposed any move to establish "parallel courts" and has opposed any move by religious clergy to intervene in cases related to criminal laws, especially in cases of rape. See Fatwas not Binding: Muslim Personal Board. Available from www.outlookindia.com. Accessed 22 March 2006. There has been the move by the Supreme Court towards compulsory registration of marriages. See "Supreme Court Makes Marriage Registration Compulsory." *The Times of India*, 14 February 2006; "Make Registration of Marriage Compulsory." *Outlook*, 14 February 2006.

My study reformulates existing debates in the Indian context that overlook similarities in the accommodation of Hindus and Muslims in the adjudication of religious family laws. In the state-run Family Court in Mumbai, judges use the Family Courts Act, 1984 to override specific sections of Hindu and Muslim religious laws while regulating void and invalid marriages; they also extend matrimonial remedies such as the restitution of conjugal rights and the right to reside in the matrimonial home to both Hindu and Muslim litigants. There are other similarities between Hindu and Muslim laws. Unilateral divorce is allowed among Muslims, and my data also reconfirms Menski's account that Hindu husbands can also unilaterally divorce their wives after obtaining an order for judicial separation and later filing for divorce (Menski 2001). Divorce by mutual consent is also allowed under both religious laws. The Family Court's aim to prevent divorces in society is against the spirit of the provisions of mutual consent divorce under Hindu and Muslim personal laws. Both the Hindu Marriage Act, 1955 as well as the Dissolution of Muslim Marriage Act, 1939 allow divorce on similar grounds of fault, and the manner in which these grounds are construed in legal processes are similar, as illustrated in the previous sections. Similarly, while polygamy is permitted under Muslim Personal Law, the courts protect Muslim women's rights by enforcing maintenance claims. Muslim societal actors also restrain polygyny. Similarly, while polygyny is criminalised in Hindu law, it is practiced in societal laws.

While state law does not grant equal rights to women, analyses of judicial cases and processes in state courts reveal some pro-women trends in judgments. For instance, in the case of Hindu law, the Family Court repudiates contested divorces initiated by men and pays attention to non-financial harm caused to Hindu women. The Court is more lenient to

Hindu women who initiate divorce. In the context of Muslim Personal Law, with regard to women's economic rights post-divorce, I argue that the Muslim Women's (Protection of Rights on Divorce) Act, 1986 offers Muslim women more rights to claim maintenance under state laws than Hindu women have. And while women across religious cleavages do not have equal rights to matrimonial property, the creative boundary-stretching of the law by combining provisions of civil, religious, and criminal laws; the stricter enforcement of maintenance claims; and the inclusion of civil society organisations in adjudicative processes in state courts have all played a role in increasing women's bargaining capacity in state law. The courts also tend to balance cultural accommodation and women's rights by relying on different provisions of Islamic laws.

My study does not posit community and society as binary opposites of the state. The data also show that many competing societal laws and adjudicative forums provide more rights to women than do state law and courts. I discuss the "democratic participatory justice" system developed by the Meghwals and demonstrate that caste laws do not control women's sexuality, but they recognise the economic contribution of women, and in the end, offer more protection to women than state laws do. Similarly, societal laws also offer Muslim women protection from polygyny and unilateral divorce.

I trace the processes and mechanisms that can play a role in checking abuses of power within societal legal forums and show the deployment of two types of mechanisms. I demonstrate that while informal legal organisations use tactics like social boycott, ridicule, shame, and intimidation to enforce their laws, intra-group factionalism and competition between external sources of authority prevent violations of individual rights.

Furthermore, organisations also evolve self-regulatory measures from below to check the abuse of authority.

Given that multiple sources of authority co-govern the conjugal family, I argue that the intertwined and interacting state agencies and professionals challenge, compete, cooperate, and communicate with one another across legal sites. Legal professionals, state officials, women's organisations, community leaders, and members of political parties intervene and negotiate with one another while adjudicating in individual cases; thus, they all participate in community-initiated processes of law-reform. For instance, in the fourth chapter, I discussed how women from a Hindu caste encourage other women to approach Muslim women's organisations in order to access rights. Negotiations in such cases involve dialogue between Muslim women's organisations, Hindu litigants, and the caste authorities. I discuss the public campaign against Muslim religious clergy who promote *muta* (temporary) marriages. The campaign was organised by the Muslim religious organisation that is led by a group of social workers, clergy, lawyers, and business men and that helps both Hindu and Muslim residents of a locality in central Mumbai. I also discussed how religious organisations and legal professionals challenge unilateral divorces granted by *qazis* and offer support to women in individual cases.

I contend that a pluralised legal sphere balanced by civic, religious, and lay sources of authority facilitates cultural accommodation and allows spaces from which to negotiate women's rights. The data on adjudication in micro-legal sites show that individual actors negotiate religio-cultural hybridity in practice and switch between religious identities. At the level of groups, we find that each religious group has several regulative and justificatory authority centres, none of which represents the internal consensus among the

group. Intra-group heterogeneity questions the rhetoric around "authentic religious laws" and prevents an essentialised understanding of religious communities since religious laws do not symbolise the unity of religious groups. In fact, a range of actors and organisations decide the content of religious family laws and encode different notions of family forms, values, and meanings into these laws. Thus, the notion of a particularistic religious identity grounded in the institution of the family and premised upon gender roles is challenged from within religious communities. In other words, diverse and contested notions of the idealised "Hindu" family and "Muslim" family exist in both communities and are linked to different understandings of religious identities, as sub-units within religious groups hold diverse ideas about what comprises "Muslimness" and/or "Hinduness." These processes of imagining, constructing, and communicating the conjugal family prevents the homogenisation of religious identities.

I submit that state-society interactions in adjudicative processes reveal fissures that prevent the cementing of group boundaries. First, codified Hindu laws and uncodified Muslim laws are reasonably fluid, and ideas about normative Hindu or Muslim families are contested in state courts and informal forums. As a result, the idea of a normative conjugal family as a repository of community identity is challenged in legal sites. In addition, litigants and organisations permeate or cross over religious boundaries. Individual litigants "exit" their caste, sect, and religious groups through tactical manoeuvres across religious and intra-religious boundaries. Furthermore, both Hindu and Muslim litigants approach a variety of secular and religious charitable organisations for legal assistance during adjudicative processes; this forum-shopping by litigants necessitates dialogue, confrontations, and compromise between and among litigants and organisations. The

process of internal reforms in laws of different sects, castes, and communities necessitates both deliberation and interaction between state officials, religious organisations, women's groups, lawyers, and state officials such as the police.

The body of academic work on family law reforms in multicultural societies maintains a critical tension between group rights for minorities and women's rights in the community. This body of work fails to capture the dynamics of the Indian model of accommodation through "shared adjudication" as it facilitates more cultural diversity and women's rights than one might expect, given extant theory and research. The modalities of interactions between state and societal actors create spaces for individual and collective agency of women. The "shared adjudication" model allows litigants to switch forums to access their rights. I describe individual women's agency in increasing their bargaining power through combining legal alternatives. I also discuss women's collective agency in transforming laws and legal structures through their participation in lawmaking processes, especially in societal forums. Economic contexts, cultural ethos, political affiliations, and internal democracy within caste groups shape gender relations within organised caste groups and provide structural conditions for women's agency. Women's agency is constrained by poverty, domestic and religious violence, the lack of affinal and social networks, and the sexual division of labour within the family.

My dissertation contributes to the academic work on state-society relations and legal pluralism. Moving away from a reading of the state as an autonomous actor standing above and shaping society, I focus on interstitial spaces between state and society that are used by different state and societal legal actors, including civil society, to account for the dynamics of the Indian case. I show how different normative orders penetrate and

communicate with one another and transform the internal coherence of one another. My study informs academic work on legal pluralism, gender and agency in religious communities, postcolonial patterns of recognition, and the accommodation of minorities.

**Discussing Law Reform in Personal Laws**

The Indian case also contributes to discussions on law reforms in multicultural societies in the Middle East, Africa, and South and South East Asia. In general, state-centred proposals for reforms argue that democratic states should provide formal and substantive equality for women and should deepen citizenship rights in society, as the improvement of women's status in general increases their ability to confront patriarchal laws.[596] A variant of this approach suggests that states should provide conditions for legal reforms (Bilgrami 1996). Hallaq offers that the development of classical Islamic laws was stunted during colonial and postcolonial state-formation and that states wishing to introduce the Sharia law in modern legal systems should provide conditions to facilitate the development of classical Islamic law (Hallaq 2002, 2004). In addition, states can bring various factions within a cultural group together in a bid to arrive at consensus. For example, Deveaux[597] discusses the South African case of state-led reform of customary

[596] For instance, in India, the feminist group Forum against Oppression of Women recommends that the state attempt wide ranging reforms of the formal legal system and make it more accessible to women (Visions of Gender Just Realities, FAOW, 1996). Additionally, as the Mumbai-based feminist legal centre Majlis suggests, the state should enact new laws regarding matrimonial property that can be applied to women litigants across religions (Gangoli 1996).

[597] The difference between and within religio-cultural groups is not always over normative issues but can also reflect conflicting interests of actors within. As Deveaux discusses, the post-apartheid constitution sanctioned customary laws and practices that conflicted with the constitutional goal of sex equality. Feminists opposed unequal practices while a number of customary authorities supported these. The South African Law Commission brought these diverse groups together to discuss current practices and reforms within these factions; they arrived at a minimum common ground, which is reflected in the Customary Marriage Act. This Act does not give women equal rights, but it does abolish glaring gender inequalities, and it is a step forward in the battle for sex equality in customary laws (Deveaux 2005).

laws and argues that public, transparent processes of democratic deliberation between various factions of religious minority groups help accommodate diverse interests. My data also show that ongoing dialogue within society, between majority and minority, between the state and communities, and especially between differing factions within the cultural groups with differing interests can also result in incremental reforms in personal laws and help increase inter-cultural dialogue in society.

I do not advocate uncritical cultural pluralism, nor do I argue that the state surrender its regulatory autonomy to society. The discussion around adjudication in the formal legal system reveals that the Indian state penetrates society, retains its authority to check rule violations and aberrations, curtails the powers of formal and informal legal organisations, and remains an authority for appeal and protection against the violation of individual rights within society. Given that the formal and informal systems are intertwined, my study shows that reforms in the content of state laws and court procedures would have both a symbolic and a material impact on informal legal forums as well.

I do not suggest that the mere presence of different adjudicative centres of authority increases pluralisation and women's rights. I show instead that shared adjudication by *ideologically diverse actors* such as the state, civil society organisations including women's groups, religious organisations, and informal networks is a structural condition for the claim made here. In addition, the Indian situation does not represent an example of "best practices" in the governance of religious family law; rather, the case points towards devising reforms in legally plural situations by combining multiple reform strategies from state courts and societal legal bodies. For instance, discussing the case of regulation of *talaq ul bidaat*, or triple *talaq*, I demonstrate that in the adjudication of Muslim Personal

Law, the higher courts have used reformist strategies by drawing from Islamic laws rather than constitutional sources to increase women's rights in law in regulating unilateral divorce. However, lower courts have not implemented judicial precedent, which has limited the impact of judicial reform from above. However, I demonstrate how societal organisations also evolve measures to check male privilege in Islamic divorce. Societal organisations ban *talaq ul bidaat*, challenge the validity of this form of divorce in everyday negotiations, run campaigns against clergy who give divorce, privilege customary laws that deny unilateral divorce, and advocate judicially arbitrated divorces for women. Thus, a combination of eclectic legal strategies, such as state-led reforms from above and society-driven reform from below, can be potentially beneficial to women's rights.

However, while the state is an agent of change, spaces for interreligious interactions and gender equality also exist in domains autonomous from the state. Drawing from my thesis, I also propose another step towards concrete reforms in laws from below by focussing on informal spaces. I turn to Teubner's concept of self-reflexive law and decentralised self-regulatory institutions for concrete proposals for change. The interpenetration of state law and societal laws and institutions creates a flow of legal actors, facilitators, and gatekeepers across formal and informal spheres. In his views on autopeitic systems, Teubner argues for the decentralisation of the legal system so that state law and the legal system can structure and reform societal-level institutions from outside and can thus regulate them (Teubner 1983). Teubner identifies a legal structure or "reflexive law," which "restricts itself to installation, correction, and redefinition of democratic self-regulating mechanisms" of societal legal orders (Teubner 1983, 239). The state should "decide about decisions, regulate regulations and establish structural processes

for future decisions in terms of organisations, procedures and competencies" (Teubner 1983, 275). My thesis describes how castes and sects evolve democratic measures, create self-regulatory mechanisms, and build innovative organisational models to regulate the family. I suggest that engaging with informal agents in imaginative ways can herald social change. For instance, designing societal legal institutions by simultaneously drawing inspirations from traditional dispute resolution systems, democratic institutions, and state courts is a step towards ensuring accountability and justice. I also suggest that building informal society-based organisations that can democratise and enhance the feminisation of societal legal spaces is one of the strategies of law reform from below.

## Future Projects

### *Hindu Nationalism and the Family*

My study has several implications for debates on the uniform civil code and Hindu nationalist politics in India. Central to the construction of a Hindu nation is the idea of a Hinduised uniform law,[598] a homogenising and civilising force that would turn religious minorities into unmarked citizenry. Control over the conjugal family is central to this image of a uniform civil code as a disciplinary project of the Hindu nation. The elements in the Hindu nationalist vision of the family include the prevention of inter-caste and interreligious marriages through control over women's sexuality, mobility, and reproduction.

[598] It is argued that the BJP has never clarified the content of a uniform civil code, and it is questionable whether they would wish to universalise the Hindu law to govern all Indians. However, the Rashtriya Swayamsevan Sangh, the "cultural affiliate" of the BJP, has made its agenda more explicit: it believes that the Hindu Code, which governs Sikhs, Jains, and Buddhists, should also be applicable to Muslims and Christians. See "Sikhs Belong to Hindu Samaj." *The Indian Express*, 2 May 2007.

In contrast, the ethnography of adjudication reveals that the ideas and constructions of the conjugal family prevailing among Hindus and Muslims counter the Hindu nationalist project of enforcing a uniform civil code that would homogenise the Indian family along lines imagined by the Hindu right. Furthermore, interactions and communication between women's organisations, religious organisations, ethnic organisations, and members of religious communities structure the formation of key institutions in society, create spaces for inter-cultural interactions and oppose the Hindu right's agenda. However, this evidence also raises a puzzle: spaces for inter-cultural mingling and dialogue exist concomitantly with episodes of religious violence in the same sites in India. The explanation of these contradictory trends is substance for future research.

***Designing Institutions in Comparative Contexts***

My study contributes to the debates on crafting public policy measures to accommodate religious groups and points to another future endeavour to probe the capaciousness of legal institutions in absorbing new group demands across comparative contexts. The body of literature on religious family laws focuses on the conflict between religious freedom and cultural accommodation (Agnes 1999; Banks 1976; Galanter and Krishnan 2000; Gerd 1999; Narain 2001; Mahmood 1993; Mukhopadhyay 1998; Moosa 2006; Nussabaum 1997; Parashar 1992; Rosenblum 2000) and between group autonomy and gender justice (Ahmad 1992; Das 1994; Hatem 1986; Okin 1999, 2002, 2005; Philips 1994, 2005; Joseph 1997). Studies on institutional arrangements to facilitate ethnic accommodation, on the other hand, focus on the processes of power-sharing agreements. These do not address the crafting and operation of legal institutions (Lev 1972; Lijjphartt

1985). Moreover, the literature linking legal institutional arrangements with cultural accommodation across countries is extremely scarce. My study adds to the body of literature on the construction of legal institutional arrangements that facilitate co-governance between states and ethno-religious groups. The study also raises areas of future inquiry regarding the success of these legal institutions in accommodating the newly emergent demands of group autonomy or claims for the extension of group rights in matters of governance of religious laws in comparative contexts. Can these new claims put forth by religio-ethnic groups be accommodated within the existing framework of legal institutional arrangements across cases?

**Conclusion**

This dissertation shows that the Indian model of "shared adjudication" in which ideologically diverse actors and institutions—that is, the internally heterogeneous religio-cultural groups, civil society, social networks, and the state—all share adjudicative authority, and they are more likely to enhance interreligious accommodation and provide women's rights. The study contributes to the literature on state-society relations, legal pluralism, and multicultural accommodation, and it highlights strategies to facilitate diversity and increase women's rights in law.

We have seen how in processes of reforms, as well as in adjudicative sites, state and societal legal bodies are involved in processes of negotiations, communication, and discussions over the nature, meaning, and content of laws and women's rights in the family. Each group enters into this process bringing in its own version of the conjugal family and women's rights therein and inserts its versions of the family and women's rights into the normative repertoire available to other parties. State-society interactions in

interpenetrative legal spheres ensure that these ideas are transmitted, communicated, and negotiated across different normative worlds. This dynamic forges spaces for imagining and disputing versions of marriage, divorce, and gender both *within* and *among* heterogeneous religious communities, civil society, and the state. Thus, the pluralizing of legal worlds also challenges patriarchal trends in imagining gender roles. While this may not transform the patriarchal control of the group, this interaction interjects heterogeneous ideas of different values in family life; herein lies the potential for structural change that would enable women to overcome patriarchal constraints. This also deepens pluralization and opens up newer possibilities of transformation of the family and gender relations from both above and below.

# BIBLIOGRAPHY


Abdullahi, A. An-Na'im. 1999. The cultural mediation of human rights: The al-Arqam case in Malaysia. In *The East Asian challenge for human rights*, ed. Joanne Bauer and Daniel Bell, 147-168. New York: Cambridge University Press.

_____. 2002a. *Cultural transformations and human rights in Africa.* New York: Zed Books.

_____. 2002b. *Islamic family law in a changing world: A global resource book.* New York: Zed Books.

_____. 2006. *African constitutionalism and the role of Islam.* Philadelphia: University of Pennsylvania Press.

Abel, Richard. 1982a. The contradictions of informal justice. In *The politics of informal justice, Vol.1: The American experience*, ed. Richard Abel, 267-310. New York: Academic Press.

_____. 1982b. Introduction to *The politics of informal justice, Vol.1: The American experience* by Richard Abel, ed. New York: Academic Press.

_____, ed. 1982. *The politics of informal justice, Vol.1: The American experience.* New York: Academic Press.

Abu-Lughod, Lila. 1990. The romance of resistance. *American Ethnologist* 17: 41-55.

Acar, Feride and Ayse Günes-Ayata, ed. 2000. *Gender and identity construction: Women of Central Asia, the Caucasus and Turkey.* Boston: Brill.

Afifi, Mohamed. 1996. Reflections on the personal laws of Egyptian Copts. In *Women, the family, and divorce laws in Islamic history*, ed. Amira Sonbol, 202-215. Syracuse: Syracuse University Press.

Agarwal, Bina. 1994. *A field of one's own: gender and land rights in South Asia.* New York: Cambridge University Press.

Agnes, Flavia. 1995a. Hindu men, monogamy and uniform civil code. *Economic and Political Weekly* 50 (16 December): 3238-3244.

_____. 1995b. *State, gender and the rhetoric of law reform.* Bombay: SNDT University.

_____. 1997. Protecting women against violence?: Review of a decade of legislation, 1980-1990. In *State and politics in India*, ed. Partha Chatterjee, 521-560. Delhi: Oxford University Press.

_____. 1999. *Law, gender and inequality: The politics of women's rights in India.* Delhi: Oxford University Press.

_____. 2002. Transgressing boundaries of gender and identity. *Economic and Political Weekly* 37, no. 36 (7 September): 3695-3698.

Ahmad, Ibrahim and Ahlimah Joned. 1987. *The Malaysian legal system.* Kuala Lumpur: Diawan Bahasa dan Pustaka.

Ahmad, Imtiaz. 1973. *Caste and social stratification among Muslims in India.* Delhi: Manohar.

_____, ed. 2003. *Divorce and remarriage among Muslims in India.* Delhi: Manohar.

Ahmed, Leila. 1992. *Women and gender in Islam: Historical roots of a modern debate.* New Haven: Yale University Press.

Alam, Arshad. The board of no shame. *Outlook India*, Web edition. Available from http://www.outlookindia.com. Accessed 4 May 2005.

Alavi, Hamza. 1979. The state in postcolonial societies: Pakistan and Bangladesh. *New Left Review* 74 (July-August): 59-81.

Alberstein, Michael. 2006. Mediating paradoxically: Complimenting the paradox of 'relational autonomy' with the 'paradox of rights' in thinking mediation. In *Paradoxes and inconsistencies in the law*, ed. Oren Perez and Gunther Teubner, 225-246. Portland: Hart Publishing.

Albuquerque, Teresa. 1992. *Bombay, a history.* New Delhi: Rashna/Promilla.

Ali, Firasat and Furqan Ahmad. 1983. *Divorce in Mohammedan law: The law of 'triple divorce'.* New Delhi: Deep and Deep.

Allot, Anthony. 1970. *New essays in African law.* London: Butterworths.

Allot, Anthony and Gordon R. Woodman, ed. 1995. *People's law and state law: The Bellagio papers.* Dordrecht: Foris Publications.

Amar, Akhil. 1985. A neo-federalist view of Article III: Separating the two tiers of federal jurisdiction. *Boston University Law Review* 65 (March): 205-272.

Amien, Wahida. 2006. Right to freedom of religion and women's right to equality: A South African case study of Muslim personal law. *Human Rights Quarterly* 28: 729-754.

Anderson, J. N. D. 1959. *Islamic law in the modern world.* New York: New York University Press.

_____. 1968. *Family law in Asia and Africa.* London: Allen and Unwin.

An Naim, Abd Allahi Ahmad. 1990. *Toward an Islamic reformism: Civil liberties, human rights, and international law*. Syracuse: Syracuse University Press.

Antoun, Richard. 1980. The Islamic court, the Islamic judge and the accommodation of traditions: A Jordanian case study. *International Journal of Middle Eastern Studies* 12: 455-467.

_____. 1990. Litigant strategies in an Islamic court in Jordan. In *Law and Islam in the Middle East*, ed. Daisy H. Dwyer, 35-60. New York: Bergin and Garvey.

Arat, Yesim. 2005. Gender and citizenship in Turkey. In *Women and Islam: Critical concepts in sociology*, ed. Haideh Moghissi, 58-70. New York: Routledge.

Arthurs, H. W. 1985. *Without the law: Administrative justice and legal pluralism in nineteenth-century England.* Toronto: University of Toronto Press.

Asad, Talal. 1993. *Genealogies of religion: Discipline and reasons of power in Christianity and Islam.* Baltimore: John Hopkins University Press.

_____. 2003. *Formations of the secular: Christianity, Islam, modernity.* Stanford: Stanford University Press.

Auerbach, Jerold. 1983. *Justice without law*. New York: Oxford University Press.

Auyero, J. 2002. The judge, the cop and the queen of carnival: Ethnography, storytelling and the (contested) meanings of protest. *Theory and Society: Renewal and Critique* 31, no. 2 (April): 151-187.

Bailey, Frederick G. 1960. *Tribe, caste and nation: A study of political activity and political change in Highland Orissa*. Manchester: Manchester University Press.

_____. 1963. *Politics and social change: Orissa in 1959*. Berkeley: University of California Press.

Bailey, Martha. 1989. Unpacking the rational alternatives: A critical review of family mediation movement claims. In *Canadian Journal of Family Law* 8, no. 1: 61-94.

Bainham, Andrew. 2003. Men and women behaving badly: Is fault dead in English family law? In *Family law: Processes, practices and pressures*, ed. J. Dewar and S. Parker, 523-542. Portland: Hart Publishing.

Baird, Robert. 1993. On defining Hinduism as a religious and legal category. In *Religion and law in independent India*, ed. Robert Baird, 24-40. Delhi: Manohar.

_____. 2001. Gender implications for a uniform civil code. In *Religion and personal law in secular India: A call to judgment*, ed. Gerald Larson, 145-162. Bloomington: Indiana University Press.

_____, ed. 1993. *Religion and law in Independent India.* Delhi: Manohar.

Balchin, Cassandra, ed. 1994. *A handbook of family law in Pakistan.* Lahore.: Shirkat Gah. Women Living under Muslim Laws.

Banakar, Reza and Max Travers, ed. 2005. *Theory and method in socio-legal research.* Portland: Hart Publishing.

Banks, David. 1976. Islam and inheritance in Malaysia: Culture, conflict or Islamic revolution? *American Ethnologist* 3, no. 4: 573-586.

Barkey, Karen. 1994. *Bandits and bureaucrats: The Ottoman route to state centralization.* Ithaca: Cornell University Press.

Basu, Amrita. 1995. Feminism inverted: The gendered imagery and real women of Hindu nationalism. In *Women and the Hindu right: A collection of essays*, ed. Tanika Sarkar and Urvashi Butalia, 158-180. New Delhi: Kali for Women.

Basu, Monmayee. 2001. *Hindu women and marriage law: From sacrament to contract.* New Delhi: Oxford University Press.

Basu, Srimati. 1999. *She comes to take her rights: Indian women, property and propriety.* Albany: State University of New York Press.

_____. 2001. The personal and the political: Indian women and inheritance law. In *Religion and personal law in secular India*, ed. Gerald Larson, 163-183. Indianapolis: Indiana University Press

Baum, Lawrence. 1993. Case selection and decision-making in the United States Supreme Court. *Law and Society Review* 27: 443-459.

Baumann, Gerd. 1999. *The multicultural riddle: Rethinking national, ethnic and religious identities.* New York: Routledge.

Baxi, Upendra. 1982. *The crisis of the Indian legal system.* New Delhi: Vikas.

_____. 1985. Popular justice, participatory development and power politics: The Lok Adalat in turmoil. In *People's law and state law: The Bellagio papers*, ed. Anthony Allott and Gordon R. Woodman, 171-186. Dordrecht: Foris Publications.

_____. 1986. *Towards a sociology of Indian law.* Delhi: Satvahan.

Baxi, Upendra and Marc Galanter. 1979. *Panchayat* justice: An Indian experiment in legal access. In *Access to justice. Vol. 3: Emerging issues and perspectives*, ed. M. Cappelletti and B. Garth, 341-386. Milan: Giuffre.

Beck, Lois and Nikki Keddie, ed. 1978. *Women in the Muslim world.* Cambridge: Harvard University Press.

Belley, Jean-Guy. 1997. Law as *terra incognita*: Constructing legal pluralism. *Canadian Journal of Law and Society* 12, no. 17 (fall): 17- 24.

Benhabib, Seyla. 2002. *The claims of culture: Equality and diversity in the global era.* Princeton: Princeton University Press.

Bennet, Andrew and Colin Elman. 2006. Qualitative research: Recent developments in case-study methods. *Annual Review of Political Science* 9, no. 1: 455-476.

Bennet, T. 1985. *Application of customary law in South Africa: The conflict of personal laws.* Cape Town: Juta.

Beteille, Andre. 1965. *Caste, class and power: Changing patterns of stratification in a Tanjore village.* Berkeley: University of California Press.

Bhargava, Rajeev. 1998. *Secularism and its critics.* New York: Oxford University Press.

Bhatnagar, R. On triple talaq. *The Times of India*, 24 August 1998.

Bhattacharya, Suchandana. Rights for women in model *nikahnama. The Telegraph*, 26 July 2004.

Bilgrami, Akeel. 1994. Two conceptions of secularism: Reason, modernity and Archimedean ideal. *Economic and Political Weekly* XXIX, no. 28 (4 July): 1729-1748.

_____. 1997. Secular liberalism and moral psychology of identity. *Economic and Political Weekly* XXXII, no. 40 (4-10 October): 2527-2540.

Black, Donald. 1973. The mobilization of law. *The Journal of Legal Studies* II, no.1 (January): 125-149.

Blackburn, Susan. 2004. *Women and the state in modern Indonesia.* Cambridge: Cambridge University Press.

Blair, D. Marianne and Merle H. Weiner. 2003. *Family law in the world community: Cases, materials, and problems in comparative and international law.* Durham: Carolina Academic Press.

Bottomley, Anne. 1985. What is happening to family law? A feminist critique of conciliation. In *Women in law: Explorations in law, family and sexuality*, ed. J. Brophy and C. Smart, 162-187. London: Routledge and Kegan Paul.

Bowen, John. 2003. *Islam, law, and equality in Indonesia: An anthropology of public reason.* New York: Cambridge University Press.

Bradshaw, Alan. 1997. Sense and sensibility: Debates and developments in socio-legal research methods. In *Socio-legal studies*, ed. Philip Thomas, 99-122. Dartmouth: Aldershot.

Brady, Henry and David Collier. 2004. *Rethinking social inquiry: Diverse tools, shared standards*. Lanham: Rowman & Littlefield.

Brass, Paul. 1991. *Ethnicity and nationalism: Theory and comparison*. New Delhi: Sage Publications.

_____. 1994. *The politics of India since independence*. Cambridge: Cambridge University Press.

Bright, Charles and Susan Harding, ed. 1984. *Statemaking and social movements: Essays in history and theory*. Ann Arbor: University of Michigan Press.

Bromley, Peter M. 1992. *Family law*. London: Butterworths.

Bryan, P. E. 1992. Killing us softly: Divorce mediation and the politics of power. *Buffalo Law Review* 40: 441.

Bunsha, Dione. 2006. A serial kidnapper and his mission. *The Hindu* 23, no. 25 (December).

Butler, Judith. 2004. *Undoing gender*. New York: Routledge.

Butt, Simon. 1999. Polygamy and mixed marriage in Indonesia: The application of the marriage law in courts. In *Indonesia: Law and society*, ed. Timothy Lindsey, 122-144. Sydney: The Federation Press.

Cain, Bruce, Russell Dalton, and Susan Scarrow, ed. 2003. *Democracy transformed?: Expanding political opportunity in advanced industrial democracies*. Oxford: Oxford University Press.

Cain, Maureen. 1988. Beyond informal justice. In *Informal justice?*, ed. Roger Matthews, 51-86. London: Sage Publications.

Campbell, James. 1896. *Gazetteer of Bombay* 3: 1.

Carens, Joseph H. 2000. *Culture, citizenship and community: A contextual exploration of justice as even handedness*. Oxford: Oxford University Press.

Carminker, Evan. H. 1994a. Precedent and prediction: The forward looking aspect of inferior court decision making. *Texas Law Review* 73 no. 1: 82.

_____. 1994b. Why must inferior courts obey Supreme Court precedents? *Stanford Law Review* 46: 816-873.

Carrithers, Michael. 1988. Passions of nation and community in the Bahubali affair. *Modern Asian Studies* 28: 281-310.

Carrithers, Michael and Caroline Humphrey. 1991. *The assembly of listeners: Jains in society*. New York: Cambridge University Press.

Carroll, Lucy. 1978. Colonial perceptions of Indian society and the emergence of caste associations. *Journal of Asian Studies* XXSLVII, no. 2 (February): 233-269.

_____. 1982. Talaq e tafwid and stipulation in a Muslim marriage contract: Important means of protecting the position of South Asian Muslim wife. *Modern Asian Studies* 16: 277-309.

_____. 1983. Muslim Family Law in India: Law, custom and empirical research. *Contributions to Indian sociology* 17 (July-December): 205-222.

*Census of India, 1911* (Bombay, 1912).

*Census of India, 1921* (Bombay, 1922).

*Census of India, 1931* (Bombay, 1933).

Chakrabarty, Dipesh. 1988. Conditions for knowledge of working class conditions: Employers, government and Jute workers of Calcutta, 1890-1940. In *Selected subalterns studies*, ed. Guha Ranajit and Gayatri Chakravorty Spivak, 179-230. New York: Oxford University Press.

Chakravarty, Uma. 2003. *Gendering the caste through feminist lens*. Calcutta: Stree.

Chambers, D. 2000. Civilizing the natives: Marriage in post-apartheid South Africa. *Daedalus* 129: 101-124.

Chambers Simone and Will Kymlicka, ed. 2002. *Alternative conceptions of civil society*. Princeton: Princeton University Press.

Chandhoke, Neera. 2003. *The conceits of civil society*. New York: Oxford University Press.

Chandra, Kanchan. 2000. The transformation of ethnic parties in India: The decline of the Congress and the rise of the Bahujan Samaj Party in Hoshiarpur. *Journal of Asian Studies* 59, no. 1: 26-61.

Chandra, Sudhir. 1998. *Enslaved daughters: Colonialism, law and women's rights*. New York: Oxford University Press.

Chanock, Martin. 2001. *The making of South African legal culture, 1902-1936: Fear, favour and prejudice*. Cambridge: Cambridge University Press.

Chaplin, Susan. 2002. Scavengers: Still marginalised. In *Dalits and the State*, ed. Ghanshyam Shah, 205-240. New Delhi: Centre for Rural Studies, Concept Publications.

Chatterjee, Partha. 1993. *The nation and its fragments: Colonial and post-colonial histories*. Princeton: Princeton University Press.

_____. 1994. Secularism and toleration. *The Economic and Political Weekly of India* 29: 1774.

_____. 2004. *The politics of the governed: Reflections on popular politics in most of the world*. New York: Columbia University Press.

_____, ed. 1997. *State and politics in India*. Delhi: Oxford University Press.

Chaudhry, Mohammad. 1998. *Law, custom and social order: The colonial experience of Malawi and Zambia*. Portsmouth: Heineman.

_____. 2003. *Justice in practice*. Lahore: Oxford University Press.

Chen, Martha and Jean Dreze. 1992. Widowhood and health in rural North India. *Economic and Political Weekly* 27 (42-42) WS 81-92.

Chiba, Masaji. 1985. The channel of official law to unofficial law in Japan. In *People's law and state law: The Bellagio papers*, ed. Anthony Allott and Gordon R. Woodman, 207-216. Dordrecht: Foris Publications.

_____. 1986. The identity postulates of indigenous law, and its function in legal transplantation. In *Legal pluralism: Proceedings of Canberra law workshop VII*, ed. Peter Sack and Elizabeth Minchin, 33-50. Canberra: Research School of Social Sciences, Australian National University.

_____. 1995. Legal pluralism in mind: A non-Western view. In *Legal polycentricity: Consequences of pluralism in law*, ed. Hanne Petersen and Henrik Zahle, 71-84. Dartmouth: Aldershot.

_____. 2002. *Legal cultures in human society*. Tokyo: Shinzansha International.

_____, ed. 1985. *Asian indigenous law in interaction with received law*. New York: Kegan Paul International.

Chodosh, Hiram. 2004. *Global justice reform: A comparative methodology*. New York: New York University Press.

Chowdhry, Prem. 1994. *The veiled women: Shifting gender equations in rural Haryana, 1880-1990*. Delhi: Oxford University Press.

_____. 1997. Enforcing cultural codes: Gender and violence in North India. *Economic and Political Weekly* 32, no. 19: 1919-28.

_____. 2004. Private lives, state intervention: Cases of runaway marriages in rural North India. *Modern Asian Studies* 38, no. 1: 55-84.

Christie, George C. 1982. *Law, norms, and authority.* London: Duckworth.

Cobb, Sara. 1997. The domestication of violence in mediation. *Law and Society Review* 31: 397-440.

Cohen, Carl. 1971. *Democracy.* New York: Free Press

Cohen, Cathy J., Kathleen B. Jones, and Joan C. Tronto, ed. 1997. *Women transforming politics: An alternative reader.* New York: New York University Press.

Cohen, Jean. 1995. Interpreting the notion of civil society. In *Towards a global civil society*, ed. Michael Walzer, 35-40. New York: Berghahn Press.

Cohn, Bernard. 1965. Anthropological notes on dispute and law in India. *American Ethnologist* 67, no. 2: 85-122.

_____. 1968. *Structure and change in Indian society.* Chicago: Aldine Publishing Company.

_____. 1987. *An anthropologist among historians and other essays.* Delhi: Oxford University Press.

_____. 1996. *Colonialism and its forms of knowledge: The British in India.* Princeton: Princeton University Press.

Colby, P. 1987. Two views on the legitimacy of non acquiescence in judicial opinion. *Tulane Law Review* 61. 1041-1069.

Coleman, J. 1989-90. Legal limbo: The divorcing family between physical separation and legal separation: A proposal to reduce the mischief, expense, waste and acrimony of the divorce process. *Journal of Family Law* 28, no. 4: 659-702.

Collier, Jane. 1976. Political leadership and legal change in Zinacantan. *Law and Society Review* 11: 131.

Comaroff, John and Simon Roberts. 1981. *Rules and processes: The cultural logic of disputes in an African context.* Chicago: University of Chicago Press.

Conant, Lisa. 2004. Contested boundaries: Citizens, states and supranational belonging in the European Union. In *Boundaries and belonging: States and societies in the struggle to shape identities and local practices*, ed. Joel Migdal, 284-317. Cambridge: Cambridge University Press.

Constable, M. 2002. The rhetoric of community: Civil society and the legal order. In *Looking back at law's century*, ed. A. Sarat, B. Garth, and R. Kagan, 213-231. Ithaca: Cornell University Press.

Cook, Rebecca J., ed. 1994. *Human rights of women: National and international perspectives.* Philadelphia: University of Pennsylvania Press.

Cooper, Davina. 1998. *Governing out of order: Space, law and the politics of belonging.* New York: Rovers Oram Press.

Corrigan, Philip and Derek Sayer. 1985. *The great arch: English state formation as cultural revolution.* New York: Basil Blackwell.

Cott, Nancy. 2000. *Public vows: A history of the marriage and the nation.* Cambridge: Harvard University Press.

Coulson, Noel. 1969. *A history of Islamic law.* Edinburgh: University of Edinburgh Press.

Cover, Robert. 1983-1984. Foreword: Nomos and narrative. In *Harvard Law Review* 97: 4-68.

Daftary, Farhad. 1990. *The Ismai'lis, their history and doctrines.* Cambridge: Cambridge University Press.

Das, Rathin. Gujarat marriage fiat tied in knots. *Hindustan Times.* 21 July 2006.

Das, Veena. 1984. For a folk theology and theoretical anthropology of Islam. *Contributions to Indian Sociology* 18, no. 2 (July-December): 293-300.

Dave, Anjali and Gopika Solanki. 2001. *Journey from violence to crime: A study of domestic violence in the city of Mumbai.* Mumbai: Tata Institute of Social Sciences.

Day, Anthony. 1996. Ties that (un)bind: Families and states in pre-modern Southeast Asia. *Journal of Asian Studies* 55, no. 2: 384-409.

De Lange, Rael. 1995. Divergence, fragmentation, and pluralism: Notes on polycentry and unity in law. In *Legal polycentricity: Consequences of pluralism in law*, ed. Hanne Petersen and Henrik Zahle, 103-126. Dartmouth: Aldershot.

Delgado, Richard. 1985. Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution. *Wisconsin Law Review* 6: 1359-1404.

Deliege, Robert. 1999. *The untouchables of India.* Translated by Nora Scott. New York: Berg.

Denzin, Norman K. 1997. *Interpretive ethnography: Ethnographic practices for the 21st century.* Thousand Oaks: Sage Publications.

Derret J. D. M. 1963. *Introduction to modern Hindu law*. Bombay: Oxford University Press.

_____. 1968. *Religion, law and the state in India*. London: Faber.

_____. 1976. *Essays in classical and modern Hindu law, Vol.1-4*. Leiden: Brill.

_____. 1999. *Religion, law and the state in India*. New York: Oxford University Press.

Deshpande, Swati. HC upholds court fee waivers for women in some types of cases. *Times of India*. 29 March 2002.

Deveaux, Monique. 2000. *Cultural pluralism and dilemmas of justice*. Ithaca: Cornell University Press.

_____. 2005. A deliberative approach to conflicts of culture. In *Minorities within minorities*, ed. Avigail Eisenberg and Jeff Spinner-Halev, 340-362. Cambridge: Cambridge University Press.

_____. 2006. *Gender and justice in multicultural liberal states*. Oxford: Oxford University Press.

Devji, Faisal. 1987. Conversion to Islam: The Khojas. M.A. diss., Department of History, University of Chicago.

Dewar, John and Stephen Parker, ed. 2003. *Family law: Processes, practices and pressures: Proceedings of the tenth world conference of the international society of the family law, July 2000, Brisbane, Australia*. Portland: Hart Publishing.

Dhagamwar, Vasudha. 1974. *Law, power and justice: Protection of personal rights under the Indian Penal Code*. Bombay: M. N. Tripathy.

_____. 1992. *Law, power and justice*. New Delhi: Sage.

Dhavan, Rajeev and Fali Nariman. 2004. The Supreme Court and group life: Religious freedom, minority groups and disadvantaged communities. In *Supreme but not infallible*, ed. B. N. Kirpal et al., 256-287. New Delhi: Oxford University Press.

Diduck, Alison and Felicity Kaganas. 2006. *Family law, gender and the state: Text, cases and materials*. Portland: Hart Publishing.

Dirks, Nicholas. 1992. *Colonialism and culture*. Ann Arbor: University of Michigan Press.

_____. 2001. *Colonialism and the making of modern India*. Princeton: Princeton University Press.

Diwan, Paras. 1985. *Modern Hindu law*. 6th ed. Allahabad: Modern Book House.

Dobbin, Christine. 1970. Competing elites in the Bombay city politics in the mid-nineteenth century 1852-1853. In *Elites in South Asia*, ed. E. Leach and S. N. Mukherjee, 79-94. Cambridge: Cambridge University Press.

_____. 1972. *Urban leadership in western India: Politics and communities in Bombay City 1840-1885*. Delhi: Oxford University Press.

Doornbos, Martin and Sudipta Kaviraj. 1997. *Dynamics of state formation: India and Europe compared*. New Delhi: Sage Publications.

Dostal, Walter and Wolfgang Kraus, ed. 2005. *Shattering tradition: Custom, law and the individual in the Muslim Mediterranean*. New York: I. B. Tauris.

Dowd, Nancy and Michelle Jacobs, ed. 2003. *Feminist legal theory: An anti-essentialist reader*. New York: New York University Press.

Dube, Saurabh. 1998. *Untouchable pasts: Religion, identity and power among a central Indian community 1780-1950*. Albany: State University of New York Press.

Dudley-Jenkins, Laura. 2003. *Identity and identification in India: Defining the disadvantaged*. New York: Rutledge Curzon.

Dumont, Louis. 1957. *Hierarchy and marriage alliance in South Indian kinship*. London: Royal Anthropological Institute of Great Britain and Ireland.

Dundes, Alan. 1997. *Two tales of crow and sparrow: A Freudian folkloristic essay on caste and untouchability*. Lanham: Rowman and Littlefield.

Dupret, Baudouin, Maurits Berger, and Laila al-Zwaini. 1999. *Legal pluralism in the Arab world*. Boston: Kluwer Law International.

Durrany, Seema. 2003. Muslim law of divorce in India: A legal reflection. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 397-408. Delhi: Manohar.

Dworkin, Ronald. 1978. *Taking rights seriously*. Cambridge: Harvard University Press.

Dwyer, Daisy H. 1990. *Law and Islam in the Middle East*. New York: Bergin & Garvey Publishers.

Dzur, Albert and Susan Olson. 2004. Revisiting informal justice: Restorative justice and democratic professionalism. *Law and Society Review* 38, no. 1: 139- 176.

Easterbrook, Frank. 1989-90. Presidential review. *Case Western Law Review* 40: 905-919.

Eckert, Julia. 2003. *The charisma of direct action: Power, politics and the Shiv Sena*. New Delhi: Oxford University Press.

_____. 2004. Urban government and emerging forms of legal pluralism in Mumbai. *Journal of Legal Pluralism and (Un)Official Law* 50: 29-60.

_____. 2005. Whose state is it?: Hindu-nationalist violence and populism in India. In *The dynamics of states: The formation and crises of state domination*, ed. Klaus Schlichte, 41-70. Aldershot: Ashgate.

Edelman, Lauren B. 1992. Legal ambiguity and symbolic structures: Organizational mediation of civil rights law. *American Journal of Sociology* 97: 1531-1576.

Edelman, Lauren B. and Mark C. Schuman. 1997. The legal environment of organizations. *Annual Review of Sociology* 23: 479-515.

Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. 1999. The endrogeneity of legal regulation: Grievance procedure as a rational myth. *American Journal of Sociology* 105: 406- 454.

Edelman, Martin. 1994. *Courts, politics and culture in Israel*. Charlottsville: University of Virginia Press.

Eickleman, Dale. 1982. The study of Islam in local contexts. *Contributions to Asian Studies* 17: 1-16.

_____. 1996. Foreword to *Civil society in the Middle East*, vol. 2, by Ed Norton and Augustus Richard. Leiden: E. J. Brill.

Eickelman, Dale and James Piscatori. 1996. *Muslim politics*. Princeton: Princeton University Press.

Eisenberg, Avigail. 2005. Identity and liberal politics: The problem of minorities within minorities. In *Minorities within minorities*, ed. Avigail Eisenberg and Jeff Spinner-Halev, 249-270. Cambridge: Cambridge University Press.

Eisenberg, Avigail and Jeff Spinner-Halev. 2005. *Minorities within minorities*. Cambridge: Cambridge University Press.

Emirbayer, Mustapha and Ann Mische. 1998. What is agency? *American Journal of Sociology* 103: 281-317.

Engel, David M. 1987. Law, time and community. *Law and Society Review* 21, no. 4: 605-637.

Engineer, Ashghar Ali. 1989. *The Muslim communities of Gujarat*. Ajanta Publications: Delhi.

Ephroz, Khan Noor. 2003. *Women and law: Muslim personal law perspective*. New Delhi: Rawat Publications.

Eskridge, W. 1990. The new textualism. *UCLA Law Review* 37: 621-691.

Esposito, John. 1982. *Women in Muslim family law*. Syracuse: Syracuse University Press.

Esposito, John L. with Natana J. DeLong-Bas. 2001. *Women in Muslim family law*. 2d ed. Syracuse: Syracuse University Press.

Etzioni, A. 1998. Community justice in a communitarian perspective. In *Community justice: An emerging field*, ed. David Karp, 373-378. Lanham: Rowman and Littlefield.

Evans, Peter B. 1995. *Embedded autonomy: States and industrial transformation.* Princeton: Princeton University Press.

Evans, Peter, Dietrich Rueschemeyer, and Theda Skocpol, ed. 1985. *Bringing the state back in*. New York: Cambridge University Press.

Everett, Jana. 2001. All the women were Hindu and all the Muslims were men: State, identity politics and gender. *Economic and Political Weekly* (9 June): 2071-2080.

Ewing, Katherine. 1988. Introduction to *Shari'at and ambiguity in South Asian Islam*, by Ewing Katherine. Berkeley: University of California Press.

_____. 1988. *Shari'at and ambiguity in South Asian Islam.* Berkeley: University of California Press.

Farouqi, Ziya ul Hasan. 1981. Orthodoxy and heterodoxy in India. In *Communal and pan-Islamic trends in colonial India*, ed. Hasan Mushirul, 326-343. Delhi: Manohar.

Fatwas not binding: Muslim Personal Board. *Outlook India*, Web edition. Available from http://www.outlookindia.com. Accessed 22 May 2006.

Fearon, James and David Laitin. 1996. Explaining interethnic cooperation. *American Political Science Review* 90, no. 4: 715-721.

Feuss, Harald. 2004. *Divorce in Japan: Family, gender, and the state, 1600-2000.* Stanford: Stanford University Press.

Fineman, Martha. 1991. *The illusion of equality.* Chicago: University of Chicago Press.

Fishbayn, Lisa. 1999. Litigating the right to culture. *International Journal of Law, Politics and the Family* 13: 143-173.

Fisher, F. 1958. The mathematical analyses of Supreme Court decisions: The use and abuse of quantitative methods. *American Political Science Review* 52: 321-338.

Fisher, Sue. 1993. *Negotiating at the margins: The gendered discourses of power and resistance.* New Brunswick: Rutgers University Press.

Fisher-Tine, H. and M. Mann, ed. 2003. *Colonialism as a civilizing mission.* London: Anthem Press.

Fiss, Owen. 1983. The bureaucratization of the judiciary. *Yale Law Journal* 92: 1442.

_____. 1984. Against settlement. *Yale Law Journal* 93: 1073-1090.

Fitzpatrick, Peter. 1983. Marxism and legal pluralism. *Osgood Hall Law Journal* 22, no. 1: 115-138

_____. 1986. Custom, law and resistance. In *Legal pluralism: Proceedings of Canberra law workshop VII*, ed. Peter Sack and Elizabeth Minchin, 63-82. Canberra: Research School of Social Sciences, Australian National University.

_____. 1992a. The impossibility of popular justice. *Social and Legal Studies* 9-215.

_____. 1992b. *The mythology of modern law*. New York: Routledge.

_____. 2001. *Modernism and the grounds of law*. New York: Cambridge University Press.

Flood, John. 2005. Socio-legal ethnography. In *Theory and method in socio-legal research*, ed. Reza Banakar and Max Travers, 33-48. Oxford: Hart Publishing.

Forum Against Oppression of Women. 1996. *Visions of gender just realities*. Unpublished Draft. Mumbai.

Four Law Boards: Will Muslim Women find a Messiah?. In *South Asian Women's Forum*, Web edition. Available from http://www.sawf.org. Accessed 7 February 2005.

Fox, R. G. 1969. *From Zamindar to ballotbox: A community change in a North Indian market town*. Ithaca: Cornell University Press.

Frankel, Francine R. and M.S.A. Rao, ed. 1989. *Dominance and state power in modern India*. New York: Oxford University Press.

Freeman, Michael, ed. 1999. *Family, state and the law*, vol. 1. Dartmouth: Ashgate.

_____. 1999. *Family, state and the law*, vol. 2. Dartmouth: Ashgate.

Frietag, Sandria. 1989. *Collective action and community: Public arenas and the emergence of communalism in colonial North India*. Berkeley: University of California Press.

Fuller, C. J. 1976. *The Nayars of today*. Cambridge: Cambridge University Press.

_____, ed. 1996. *Caste today*. New York: Oxford University Press.

Fyzee, Asaf Ali Asghar. 1964. *Outlines of Mohamaddan law*, 3d ed. London: Oxford University Press.

_____. 1965. *Cases in the Muhammadan law of India and Pakistan*. Oxford: Clarendon Press.

_____. 2005. *Cases in Mohammadan laws of India, Pakistan and Bangladesh*, 2d ed. New York: Oxford University Press.

Galanter, Marc. 1966. The modernization of law. In *Modernization: The dynamics of growth*, ed. Myron Weiner, 153-165. New York: Basic Books.4

_____. 1968. The displacement of traditional law in modern India. *Journal of Social Issues* XXXIV, no. 4: 65-91.

_____. 1974. Why the 'haves' have come out ahead: Speculations on the limits of legal change. *Law and Society Review* l, no. 9: 95-160.

_____. 1981. Justice in many rooms: Courts, private orderings and indigenous law. *Journal of Legal Pluralism and Unofficial Law* 19, no. 1: 1-47.

_____. 1984. *Competing equalities: Law and the backward classes in India.* Berkeley: University of California Press.

_____. 1985. Indigenous law and official law in the contemporary United States. In *People's law and state law: The Bellagio papers*, ed. Anthony Allott and Gordon R. Woodman, 67-70. Dordrecht: Foris Publications.

_____. 1986. A settlement judge, not a trial judge. Judicial mediation in the United States. In *The role of courts in society*, ed. S. Shetreet, 295-318. Dordrecht: Martin Nijhoff.

_____. 1989. *Law and society in modern India.* New York: Oxford University Press.

_____. 2004. Fifty years on. In *Supreme but not infallible*, ed. B. N. Kirpal et al., 57-65. Delhi: Oxford University Press.

Galanter, Marc and Jayanth Krishnan. 2000. Personal laws and human rights. *Israel Law Review* 34: 101-133.

_____. 2003. Debased informalism: *Lok Adalats* and legal rights in modern India. In *Beyond common knowledge: Empirical approaches to the rule of law*, ed. Eric G. Jensen and Thomas C. Heller, 96-141. Stanford: Stanford University Press.

Ganai, Nisar Ahmad. 2003. Divorce and remarriage among Muslims of Jammu and Kashmir: A socio-legal study. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 291-303. Delhi: Manohar.

Gandhi, Nandita and Nandita Shah. 1992. *The Issues at stake: Theory and practice in the contemporary women's movement in India.* New Delhi: Kali for Women.

Gangoli, Geetanjali. 1996. Law on Trial. Mumbai: Akshara.

_____. 2003. Muslim divorce and the discourse around Muslim Personal Law. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 367-396. Delhi: Manohar.

Gavison, Ruth. 1992. Feminism and the public/private distinction. *Stanford Law Review* 45: 1-45.

*Gazetteer of the Bombay Presidency*. 1913-1914. Bombay: Government Central Press.

Geertz, Clifford. 1963. The integrative revolution. In *Old societies and new states: The quest for modernity in Asia and Africa*, ed. Clifford Geertz, 105-157. New York: Free Press.

_____. 1971. *Islam observed: Religious development in Morocco and Indonesia.* Chicago: University of Chicago Press.

_____. 1983. *Local knowledge: Further essays in interpretive anthropology*. New York: Basic Books.

Geertz, Hildred. 1961. *The Javanese family: A study of kinship and socialization.* New York: Free Press of Glencoe.

Gerber, Haim. 1994. *State, society, and law in Islam: Ottoman law in comparative perspective*. Albany: State University of New York Press.

Ghildiyal, Subodh. Muslim law board tones down stand. *Times News Network* (New Delhi), 22 August 2005.

Giddens, Anthony. 1979. *Central problems in social theory: Action, structure and contradiction in social analysis*. Berkeley: University of California Press.

_____. 1984. *The constitution of society*. Berkeley: University of California Press.

Gillman, Howard. 2001. What's law got to do with it? Judicial behavioralists test the 'legal model' of judicial decision making. *Law and Social Inquiry* 26: 465-504.

Gilmartin, David. 1988. Customary law and *Shariat* in British Punjab. In *Shari'at and ambiguity in South Asian Islam*, ed. Katherine Ewing, 43-62. Berkeley: University of California Press.

Glendon, Mary Ann. 1981. *The new family and the new property*. Toronto: Butterworths.

_____. 1989. *The transformation of family law: State, law and family in the United States and Western Europe*. Chicago: University of Chicago Press.

Gokhale-Turner, Jayashree. 1980. From concessions to confrontation: The politics of the Mahar community in Maharashtra. Ph.D. diss., Department of Political Science, McGill University.

Goldfarb, S. 1988-89. Marital partnership and the case for permanent alimony. *The Journal of Family Law* 27, no. 2: 351-372.

Greenhouse, Carol. 1998. Legal pluralism and cultural difference: What is the difference? A response to Professor Woodman. *Journal of Legal Pluralism* 42: 61-72.

_____. 2002. Citizenship, agency and the dream of time. In *Looking back at law's century*, ed. A. Sarat, B. Garth, and R. Kagan, 184-211. Ithaca: Cornell University Press.

_____, ed. 1998. *Democracy and ethnography: Constructing identities in multicultural liberal states.* Albany: SUNY Press.

Griffiths, Anne. 1985a. Four law of interaction in circumstances of legal pluralism: First steps towards an explanatory theory. In *People's law and state law: The Bellagio papers*, ed. Anthony Allott and Gordon R. Woodman, 217-227. Dordrecht: Foris Publications.

_____. 1985b. Introduction to *People's law and state law: The Bellagio papers* by Anthony Allott and Gordon R. Woodman, ed. Dordrecht: Foris Publications.

_____. 1986a. Recent anthropology of law in the Netherlands and its historical background. In *Anthropology of Law in Netherlands*, ed. Keebet Von Benda-Beckmann and Fons Strijbosch, 11-66. Dordrecht: Foris Publications.

_____. 1986b. What is legal pluralism? *Journal of Legal Pluralism and Unofficial Law* 24: 1-56.

_____. 1990-91. The 'women's question' in Kwena family disputes. *Journal of Legal Pluralism* 30-31: 223-254.

_____. 1997. *In the shadow of marriage: Gender and justice in an African community.* Chicago: University of Chicago Press.

_____. 2005. Using ethnography as a tool in legal research: An anthropological perspective. In *Theory and method in socio-legal research*, ed. Reza Banakar and Max Travers, 113-122. Portland: Hart Publishing.

Grillo, Trina. 1991. The mediation alternative: Process dangers for women. *Yale Law Journal* 100: 1545.

Guha, Ranajit. 1994. The prose of counter-insurgency. In *Culture/ power/ history: A reader in contemporary social theory*, ed. Nicholas Dirks, Geoff Ely, and Sherry Ortrner, 336-371. Princeton: Princeton University Press.

Gupta, Akhil. 1995. Blurred boundaries: The discourse of corruption, the culture of politics and the imagined state. *American Ethnologist* 22, no. 2: 375-402.

Gupta, Suchandana. *Talaq*: Once is enough. *The Times of India*, 2 May 2005.

Haddad, Yvonne and Barbara Stowasser, ed. 2004. *Islamic law and the challenges of modernity.* Walnut Creek: Altamira Press.

Hajjar, Lisa. 2004. Domestic violence and Shari'a: A comparative study of Muslim societies in the Middle East, Africa and Asia. In *Women's rights and Islamic Family Law*, ed Lynn Welchman, 258. New York: Zed Book.

Hale, Sondra. 2005. Ideology and identity: Islamism, gender and the state in Sudan. In *Women and Islam: Critical concepts in sociology*, ed Haideh Moghissi, 3-28. New York: Routledge.

Hallaq, Wael. 2001. *Authority, continuity, and change in Islamic law*. New York: Cambridge University Press.

_____. 2004. Can the *Shari'a* be restored? In *Islamic law and the challenges of modernity*, ed. Yvonne Haddad and Barbara Stowasser, 21-54. Walnut Creek: Altamira Press.

_____. 2005. *The origin and evolution of Islamic law*. New York: Cambridge University Press.

Hamayotsu, Kikue. 2003. Politics of Syariah reform: The making of the state religio-legal apparatus. In *Mayasia: Islam, society and politics*, ed. Virginia Hooker and Norani Othman, 55-79. Singapore: Institute of Southeast Asian Studies.

Hancock, Mary. 1995. Hindu culture for an Indian nation: Gender, politics, and elite identity in urban South India. *American Ethnologist* 22, no. 4: 907-926.

Hanley, Sarah. 1989. Engendering the state: Family formation and state building in early modern France. *French Historical Studies* 16, no. 1: 4-27.

Hann, Chris and Elizabeth Dunn, ed. 1996. *Civil society: Challenging Western models.* London: Routledge.

Hansen, Thomas Bloom. 2001a. Governance and state mythologies in Mumbai. In *States of imagination: Ethnographic explorations of the postcolonial state*, ed. Thomas Bloom Hansen and Finn Stepputat, 221-256. Durham: Duke University Press.

_____. 2001b. *Wages of violence*: *Naming and identity in postcolonial Bombay.* Princeton: Princeton University Press.

Hansen, Thomas and Christophe Jaffrelot, ed. 2001. *The BJP and the compulsion of politics in India.* 2d ed. New York: Oxford University Press.

Hansen, Thomas Bloom and Finn Stepputat, ed. 2001. *States of imagination: Ethnographic explorations of the postcolonial state*. Durham: Duke University Press.

Hardgrave, Robert. 1969. The Nadars of Tamilnad: The political culture of a community in charge. Berkeley: University of California Press.

Harrington, C. B. 1982. Delegalization reform movements: A historical analysis. In *The politics of informal justice, Vol.1: The American experience*, ed. Richard Abel, 35-71. New York: Academic Press.

_____. 1985. *Shadow justice: The ideology and institutionalization of alternatives to court*. Westport: Greenwood Press.

Harris, Olivia. 1996. *Inside and outside the law: Anthropological studies of authority and ambiguity*. New York: Routledge.

Hart, H. L. A. 1961. *The concept of law*. Oxford: Clarendon Press.

Hartog, Herman. 2000. *Man and wife in America: A history.* Cambridge: Harvard University Press.

Hasan, Zoya. 1994. *Forging identities: Gender, communities and the state*. New Delhi: Kali for Women.

Hasan, Zoya, E. Sreedharan, and R. Sudarshan, ed. 2005. *India's living constitution: Ideas, practices and controversies*. London: Anthem.

Hasan, Zoya and Ritu Menon, ed. 2004. *Unequal citizens: A study of Muslim women in India*. New Delhi: Oxford University Press.

_____. 2005a. *The diversity of Muslim women's lives in India.* New Brunswick: Rutgers University Press.

_____. 2005b. *In a minority: Essays on Muslim women in India*. New Delhi: Oxford University Press.

Hatem, Marvyn. 1986. The enduring alliance of nationalism and patriarchy in Muslim personal status laws: The case of modern Egypt. *Feminist Review* 6: 19-41.

Hayden, Robert. 1983. Excommunication as an everyday event and ultimate sanction: The nature of suspension from an Indian caste. *Journal of Asian Studies* 42, no. 2: 291-307.

_____. 1984. A note on caste *Panchayats* and government courts in India. *Journal of Legal Pluralism* 22: 43-52.

_____. 1987. Turn-taking, overlap, and the task at hand: Ordering speaking turns in legal settings. *American Ethnologist* 14, no. 2: 251-270.

_____. 1999. *Dispute and arguments among nomads: A caste-council in India*. New Delhi: Oxford University Press.

Herbst, Jeffrey. 2000. *State and power in Africa.* Princeton: Princeton University Press.

Heuer, Jennifer. 2005. *The family and the nation: Gender and citizenship in revolutionary France 1789-1830.* Ithaca: Cornell University Press.

Heydebrand, Wolf and Seron Carroll. 1990. *Rationalizing justice: The political economy of federal courts.* Albany: SUNY Press.

Heyman, Josiah. ed. 1999. *States and illegal practices.* New York: Berg.

Hirsch, Susan. 1998. *Pronouncing and persevering: Gender and the discourses of disputing in an African Islamic court.* Chicago: University of Chicago Press.

Hobsbawm, Eric and Terrence Ranger, ed. 1983. *The invention of tradition.* Cambridge: Cambridge University Press.

Hofrichter, Richard. 1982. Neighborhood justice and the social control problems of American capitalism: A perspective. In *The politics of informal justice. Vol.1. The American experience*, ed. Richard Abel, 207-244. New York: Academic Press.

Holden, Livia. 2004. Hegemonic treatment of Hindu divorce customs by dominant legal discourses. *The Journal of Legal pluralism and (Un)Official Law* 49: 47-74.

Hollister, John Norman. 1988. *Islam and Shia's faith in India.* Delhi: Kanishka.

Hooker, M. B. 1975. *Legal pluralism: An introduction to colonial and neo-colonial laws.* Oxford: Oxford University Press.

_____. 1976. *The personal laws of Malaysia: An introduction.* New York: Oxford University Press.

_____. 1984. *Islamic law in South-East Asia.* Singapore: Oxford University Press.

_____. 1999. The state and the Syrian in Indonesia: 1945-1995. In *Indonesia: Law and society*, ed. Timothy Lindsey, 94-110. Sydney: The Federation Press.

Horowitz, Donald L. 1977. *The courts and social policy.* Washington: Brookings Institution.

_____. 1985. *Ethnic groups in conflict.* Berkeley: University of California Press.

_____. 1994. The Quran and the common law: Islamic law reform and the theory of legal change. *American Journal of Comparative Law* 42, Part I: 233-93; Part II: 543-580.

Howland, Courtney W., ed. 1999. *Religious fundamentalisms and the human rights of women.* New York: St. Martin's Press.

Humphrey, Caroline. 1991. *The assembly of listeners: Jains in society*. Cambridge: Cambridge University Press.

Humphrey, Caroline and James Laidlaw. 1994. *The archetypal actions of ritual: A theory of ritual illustrated by the Jain rite of worship*. Oxford: Clarendon Press.

Ibn-i Farid. 1996. *A preliminary report of incidence of divorce among Indian Muslims*. New Delhi: The Institute of Objective Studies.

Ibrahim, Ahmad Mohamed. 2000. *The administration of Islamic law in Malaysia*. Kuala Lumpur. Institute of Islamic Understanding (IKIM).

Ihsan, Yilmaz. 2005. *Muslim laws, politics and society in modern nation states: Dynamic legal pluralism in England, Turkey and Pakistan*. Aldershot: Ashgate.

Iliah, Kancha. 1996. *Why I am not a Hindu: A Suddra critique of Hindutva philosophy, culture and political economy*. Kolkata: Samya.

Imtiaz, Ahmad, ed. 2003. *Divorce and remarriage among Muslims in India*. Delhi: Manohar.

India Muslim divorce code set out. BBC Web edition. Available from http://news.bbc.co.uk. Accessed 2 May 2005.

Ingleby, R. 1992. *Solicitors and divorce*. Oxford: Oxford University Press.

International Society on Family Law. 2000. *Family law: Processes, practices and pressures: Proceedings of the Tenth World Conference of the International Society of Family Law*. Brisbane, Australia.

Isaka, Riko. 2006. Gujarati elites and the construction of regional identity in the late nineteenth century. In *Beyond Representation: Colonial and Postcolonial Constructions of Indian Identity*. Crispin Bates, 151-176. New Delhi: Oxford University Press.

Ivanow, W. 1948. Satpanth. In *Collectanea*, ed. W. Ivanow, 1-54. Leiden: E. J. Brill.

Jacob, Alice. 1999. Uniform civil code: Reforms in Christian family law. In *Engendering law*, ed. Amita Dhanda and Archana Parashar, 375-386. Lucknow: Eastern Book Company.

Jacob, Herbert. 1988. *Silent revolution: The transformation of divorce law in the United States*. Chicago: University of Chicago Press.

_____. 1992. The elusive shadow of law. *Law and Society Review* 26, no. 3: 565-590.

_____, ed. 1996. *Courts, law, and politics in comparative perspective*. New Haven: Yale University Press.

Jacobsohn, Gary. 2003. *The wheel of law: India's secularism in comparative constitutional context*. Princeton: Princeton University Press.

Jaffrelot, Christophe. 2001. The Sangh Parivar between Sanskritization and social engineering. In *The BJP and the compulsion of politics in India*, ed. Thomas Hansen and Christophe Jaffrelot, 22-71. New York: Oxford University Press.

_____. 2004. Composite culture is not multiculturalism: A study of the Indian constituent assembly debates. In *India and the politics of developing countries: Essays in memory of Myron Weiner*, 126-149. New Delhi: Sage Publications.

Jain, Sonu. Women didn't receive rights without struggle. *Indian Express*. 13 September 2005.

Jaising, Indira. 2004. Gender justice and the Supreme Court. In *Supreme but not infallible*, ed. B. N. Kirpal et al., 288-320. New Delhi: Oxford University Press.

Jamaluddin, Syed. 1981. The Barelvis and the Khilafat movement. In *Communal and pan-Islamic trends in colonial India*, ed. Hasan Mushirul, 344-357. Delhi: Manohar.

Jayal, Niraja. 2001. *Democracy and the state: Welfare, secularism and development in contemporary India*. New Delhi: Oxford University Press.

Jenkins, Laura. 2001. Personal laws and reservations: Volition and religion in contemporary India. In *Religion and personal law in secular India*, ed. Gerald Larson, 104-123. Indianapolis: Indiana University Press.

Jenkins, Rob. 2001. Rajput Hindutva, caste politics, regional identity and the Hindu nationalism in contemporary Rajasthan. In *The BJP and the compulsion of politics in India*, ed. Thomas Hansen and Christophe Jaffrelot, 101-120. New York: Oxford University Press.

Jodhka, Surinder. 2001. *Community and identities: Contemporary discourses on culture and politics in India*. New Delhi: Sage Publications.

Johnson, Charles. 1987. Law, politics, and judicial decision-making: Lower federal court's uses of SC decisions. *Law and Society Review* 21: 325-340.

Jolly, Margaret and Kalpana Ram. 2001. *Borders of being: Citizenship, fertility, and sexuality in Asia and the Pacific*. Ann Arbor: University of Michigan Press

Jones, Gavin. 1994. *Marriage and divorce in Islamic South-East Asia*. Kuala Lumpur: Oxford University Press.

Joseph, Gilbert and Daniel Nugent, ed. 1994. *Everyday forms of state formation: Revolution and the negotiation of rule in modern Mexico*. Durham: Duke University Press.

Joseph, Suad. 1997. The public/private: The imagined boundary in the imagined nation/state/the community. *Feminist Review* 57, no. 1: 73-92.

_____. 2005. Gender and citizenship in Middle Eastern States. In *Women and Islam: Critical concepts in sociology*, ed. Haideh Moghissi, 47-57. New York: Routledge.

Joseph, Suad and Susan Slyomovics, ed. 2001. *Women and power in the Middle East.* Philadelphia: University of Pennsylvania Press.

Joshi, Poornima. Minority cell mulls political lobbying. *The Telegraph*, 28 August 2005.

Kairys David, ed. 1998. *The politics of law: A progressive critique.* New York: Basic Books.

Kakatiya, Manjula. 1978. Brhad Mumbaina kapol vaishya jnati ek samajshastriya anveshan. Ph.D. diss., SNDT University.

Kamalai, Mohamed Hashim. 2000. *Islamic law in Malaysia: Issues and developments.* Kuala Lumpur: Ilmiah Publishers.

Kandiyoti. Dennis. 1996. *Gendering the Middle East: Emerging perspectives.* Syracuse: Syracuse University Press.

Kaplan, Martha and John D. Kelly. 1994. Rethinking resistance: Dialogics of 'disaffection' in colonial Fiji. *American Ethnologist* 21, no. 1: 123-151.

Kapur, Ratna and Brenda Cossman. 1996. *Subversive sites: Feminist engagements with law in India.* New Delhi: Sage Publications.

Karim, Wazir Jahan. 1992. *Women and culture: Between Malay Adat and Islam.* Boulder: Westview Press.

_____. 1995. *'Male' and 'female' in developing Southeast Asia.* Providence: Berg.

Kasaba, Resat. 1998. Cohabitation?: Islamist and secular groups in modern Turkey. In *Civil society: The history and cross-cultural possibility of a democratic ideal*, ed. Robert Hefner, 265-284. New Brunswick: Transaction Publishers.

Katzenstein, Mary Fainsod. 1989. Organizing against violence: Strategies of the Indian women's movement. *Pacific Affairs* 62, no. 1 (spring): 53-71.

Katzenstein Mary, Uday Mehta, and Usha Thakkar. 1997. The rebirth of the Shiv Sena: The symbiosis of discursive and organizational power. *Journal of Asian Studies* 56, no. 2: 371-396.

Kaufman, Amy. 2005. Polygamous marriages in Canada. *Canadian Journal of Family Law* 21, no. 2: 315-344.

Kelso, R. and Clark Kelso. 1996. How the Supreme Court is dealing with precedents in constitutional cases. *Brooklyn Law Review* 62: 973-1037.

Kerber, Linda K., Alice Kessler-Harris, and Kathryn Kish Sklar, ed. 1995. *United States history as women's history: New feminist essays*, Chapel Hill: North Carolina University Press.

Khan, Dominique-Sila. 2003. The Ismaili origin of the Hindu cult of Ramdeo Pir. In *On becoming an Indian Muslim: French essays on aspects of syncretism*, ed. M. Waseem, 264-278. New Delhi: Oxford University Press.

Khare, R. S. 1970. *The changing Brahmans: Associations and elites among the Kanyakubjs of North India*. Chicago: University of Chicago Press.

_____. 1972. Indigenous culture and lawyer's law in India. *Contemporary Studies in Society and History* 14, no. 1: 71-96.

Kidder, Robert L. 1973. Courts and conflict in an Indian city: A study in legal impact. *Journal of Commonwealth Political Studies* 11, no. 2: 121-139.

_____. 1974. Litigation as a strategy for personal mobility: The case of urban caste association leaders. *Journal of Asian Studies* XXXIII, no. 2: 177-191.

Kidwai, Rasheed. Curtain to drop on triple talaq. *The Telegraph*, 30 April 2005.

_____. Muslim board to open new chapter. *The Telegraph*, 7 October 2004.

Kikani, L. T. 1912. *Caste in courts or rights and powers of caste in social and religious matters as recognized by Indian courts*. Rajkot: Ganatra Printing Works.

Kirpal, B. N., ed. 2004. *Supreme but not infallible: Essays in honour of the Supreme Court of India*. New Delhi: Oxford University Press.

Kishwar, Madhu. 1994. Codified Hindu law. *The Economic and Political Weekly of India* 29, no. 33 (13 August): 2145-2161.

Klein, David and Robert Hume. 2003. Fear of reprisal as an explanation of lower court compliance. *Law and Society Review* 37, no. 3: 579-606.

Kleinhans, Martha and Roderick Macdonald. 1997. What is critical legal pluralism? *Canadian Journal of Law and Society* 12 (fall): 25-46.

Kolenda, Pauline. 2003. *Caste, marriage and inequality: Essays on North and South India*. Jaipur: Rawat Publications.

Kondo, Dorinne. 1990. Crafting selves: Power, gender and discourses of identity in a Japanese workplace. Chicago: University of Chicago Press.

Kornhauser, Lewis A. 1995. Adjudication by a resource constrained judiciary: Hierarchy and precedent in a judicial system. *Southern California Law Review* 68: 1605-29.

Kornhauser, Lewis and Robert Mnookin. 1979. Bargaining in the shadow of law: The case of divorce. *Yale Law Journal* 88: 950.

Kotani H. 2002. *Western India in historical transition: Seventeenth to early twentieth centuries*. Delhi: Manohar.

_____, ed. 1997. *Caste system, untouchability, and the depressed.* New Delhi: Manohar Publishers & Distributors.
Kothari, Rajani. 1988. *State against democracy: In search of humane governance.* Delhi: Ajanta Publishers.

Kozlowski, Gregory. 1985. *Muslim endowments and society in British India*. Cambridge: Cambridge University Press.

_____. 1995. Loyalty, locality and authority in several opinions (*fatawas*) delivered by the *Mufti* of the *Jamiah Nizamiyyah Madrasah*, Hyderabad, India. *Modern Asian Studies* 29, no.4: 893-927.

Krishna, Aniruddh. 2003. What is happening to caste?: A view from some North Indian villages. *The Journal of Asian Studies* 62, no. 4: 1171-1193.

Kudva, Neema. 2005. Strong states, strong NGOs. In *Social movements in India: Poverty, power and politics*. Rake Ray and Mary Katzenstein, 233-266. Lanham: Rowman and Littlefield.

Kugle Scott, Alan. 2001. Framed, blamed and renamed: The recasting of Islamic jurisprudence in colonial South Asia. *Modern Asian Studies* 35, no. 2: 257-313.

Kukathas, Chandran. 1992. Are there any cultural rights? *Political Theory* 20: 105-139.

Kumar, Ravinder. 1968. *Western India in the nineteenth century*. London: Routledge and Kegan Paul.

Kymlicka, Will. 1993. *Liberalism, community and culture*. Oxford: Clarendon Press.

_____. 1995. *Multicultural citizenship: A liberal theory of minority rights*. Oxford: Clarendon Press.

Kymlicka, Will and Baogang He, ed. 2005. *Multiculturalism in Asia*. Oxford: Oxford University Press.

_____. 1998. The juridification and technicisation of alternative dispute resolution practices. *Canadian Journal of Law and Society* 13: 169-186.

Laidlaw, James. 1995. *Riches and renunciation: Religion, economy and society among Jains*. Oxford: Clarendon Press.

Laitin, David D. 1986. *Hegemony and culture: Politics and religious change among the Yoruba*. Chicago: University of Chicago Press.

Lariviere, Richard. 1989. Justices and *panditas*: Some ironies in contemporary readings of the Hindu legal past. *Journal of Asian Studies* 48, no. 4 (November): 757-769.

_____. 1993. A persistent disjunction: Parallel realms of law in India. In *Religion and law in independent India*, ed. R. Larson, 351-360. Delhi: Manohar.

Larson, Gerald, ed. 2001. *Religion and personal law in secular India: A call to judgement*. Bloomington: University of Indiana Press.

Lata Mani. 1990. Contentious traditions: The debate over *sati* in colonial India. In *Recasting women: Essays in Indian Colonial History*, ed. Kumkum Sangari and Sudesh Vaid, 88-126. New Brunswick: Rutgers University Press.

Lateef, Shahida. 1983. Modernization in India and the status of Muslim women. In *Modernization and social change among Muslims in India*, ed. I. Ahmad, 153-184. Delhi: Manohar.

_____. 1998. Muslim women in India: A minority within a minority. In *Women in Muslim societies: Diversity within unity*, ed. H. Bodman et al., 251-276. Boulder: Lynne Rienner.

Layish, Aharon. 2006. *Women and Islamic law in a non-Muslim state: A study based on decisions of the Sharia courts in Israel*. New Brunswick: Transaction Publishers.

Lazarus-Black, Mindie and Susan Hirsch, ed. 1994. *Contested states: Law, hegemony and resistance*. New York: Routledge.

Lazreg, Marnia. 2005. Citizenship and gender in Algeria. In *Women and Islam: Critical concepts in sociology*, ed. Haideh Moghissi, 313-324. New York: Routledge.

Lee, Thomas R. 1999. Stare Decisis in historical perspective: From the founding era to the Rhenquist court. *Vanderbilt Law Review* 52, no.3: 645-735.

Lev, Daniel. 1972. *Islamic courts in Indonesia: A study in the political bases of legal institutions*. Berkeley: University of California Press.

Levinson, Sanford. 1993. Identifying the Jewish lawyer: Reflections of the constitution of professional identity. *Cardozo Law Review* 14: 1577-1621.

Levy, Jacob. 2000. *The liberalism of fear*. Oxford: Oxford University Press.

Lijphart, Arendt. 1996. The puzzle of Indian democracy: A consociational interpretation. *American Political Science Review* 90, no. 2: 258-269.

Lijphart, Arendt and Carlos Wiesman. 1996. *Institutional design in new democracies: Eastern Europe and Latin America.* San Diego: University of California Press.

Lindsey, Timothy, ed. 1999. *Indonesia: Law and society.* Sydney: The Federation Press.

Loos, Tamara. 2006. *Subject Siam: Family, law and colonial modernity in Thailand.* Ithaca: Cornell University Press.

Lopez-Alvares, Fernando. 2000. *State-formation and democracy in Latin America, 1810-1900.* Durham: Duke University Press.

Macaulay Stewart. 1986. Private government. In *Law and the social sciences*, ed. Leon Lipson and Stanton Wheeler, 445-518. New York: Russell Sage Foundation.

Madan, T. N., ed. 1995. *Muslim communities in South Asia: Culture, society and power.* Delhi: Manohar.

Mahajan, Gurpreet. 2005. Can intra-group equality co-exist with cultural diversity? Re-examining multicultural frameworks of accommodation. In *Minorities within minorities*, ed. Avigail Eisenberg and Jeff Spinner-Halev, 90-113. Cambridge: Cambridge University Press.

Mahmood, Saba. 2005. *Politics of Piety: The Islamic revival and the feminist subject.* Princeton: Princeton University Press.

Mahmood, Tahir. 1995a. *Human rights in Islamic law.* New Delhi: Genuine Publications Private Ltd.

_____. 1995b. *Statute-law relating to Muslims in India: A study in constitutional and Islamic perspectives.* New Delhi: Institute of Objective Studies.

_____. 1997. *Islamic law in Indian courts since independence: Fifty years of judicial interpretation.* New Delhi: Institute of Objective Studies.

_____. 2002. *The Muslim law of India.* New Delhi: Lexisnexis Butterworths.

_____, ed. 1991. *Minorities and state at the Indian law: An anthology.* New Delhi: Institute of Objective Studies, Genuine Publications.

Mallison, Françoise. 1989. Hinduism as seen by the Nizari Ismaili missionaries of Western India: The evidence of the Ginans. In *Hinduism Reconsidered,* ed. G. N. Sontheimer and H. Kulke. Delhi: Manohar.

_____. 2003. Pir Shams and his Garabi songs. In *On becoming an Indian Muslim: French essays on aspects of syncretism*, ed M. Waseem, 180-207. New Delhi: Oxford University Press.

Mann, Michael. 1986. *The forces of social power*. Cambridge: Cambridge University Press.

Mansfield, John. 1993. The personal laws or a uniform civil code? In *Religion and law in independent India*, ed. R. Baird, 139-178. Delhi: Manohar.

_____. 2001. Religious and charitable endowments and a uniform civil code. In *Religion and personal law in secular India: A call to judgment*, ed. Gerald Larson, 69-103. Bloomington: Indiana University Press.

Mariko, Tamanoi. 1991. Songs as weapons: The culture and history of komori (nursemaids) in modern Japan. *Journal of Asian Studies* 50, no. 4. 793-817.

Marriage, family and community: A feminist dialogue. Symposium organized by Larzish. *Economic and Political Weekly* (February 19, 2005): 709-722.

Marshall, Tony. 1988. Out of court: More or less? In *Informal justice?*, ed. Roger Matthews, 24-40. London: Sage Publications.

Marshall, Tony and Scott Barclay. 2003. In their own words: How ordinary people construct the legal world. *Law and Social Inquiry* 28, no. 3: 617-628.

Matthews, Roger. 1983. Reassessing informal justice. In *Informal justice?*, ed. Roger Matthews, 1-24. London: Sage Publications.

_____, ed. 1988. *Informal justice?*. London: Sage.

Masselos, J. C. 1978. The Khojas of Bombay: The defining of formal membership criteria during the nineteenth century. In *Caste and social stratification among Muslims in India*, ed. I. Ahmad, 97-116. New Delhi: Manohar.

Mayer, Adrian. 1960. *Caste and kinship in central India: A village and its region.* Berkeley: University of California Press.

Mayer, Ann. 2004. Internationalizing the Convention on women's rights: Arab countries face the CEDAW committee. In *Islamic law and the challenges of modernity*, ed. Yvonne Haddad and Barbara Stowasser, 133-160. Walnut Creek: Altamira Press.

Mazumdar, Veena. 1999. Political ideology of the women's movement's engagement with law. In *Engendering law*, ed. Amita Dhanda and Archana Parashar, 339-406. Lucknow: Eastern Book Company.

McNollgast. 1995. Politics and courts: A positive theme of judicial doctrine and rule of law. *Southern California Law Review* 68: 1631-84.

Mehdi, R. 2002. *Gender and property law in Pakistan: Resources and discourses*. Lahore: Vanguard.

Mehta, Bob. 1942. The socio-economic status of the Meghwals. Unpublished Ph.D. dissertation. University of Bombay.

Mendelsohn, Oliver. 1981. The pathology of Indian legal system. *Modern Asian Studies* 15, no. 4: 823-863.

Menon, Nivedita. 1998. Women and citizenship. In *Wages of freedom: Fifty years of the Indian nation-State*. ed. Partha Chatterje, 241-266. Delhi: Oxford University Press.

Menski, Werner. 2001. *Modern Indian family law*. Richmond: Curzon.

_____. 2003. *Hindu law: Beyond tradition and modernity*. New Delhi: Oxford University Press.

_____. 2006a. *Comparative law in a global context: The legal systems of Asia and Africa.* Cambridge: Cambridge University Press.

_____. 2006b. Jaina law as an unofficial legal system. In *Studies in Jaina History and Culture: Disputes and Dialogues*, ed. Peter Flugel, 419-437. New York: Routledge.

Merry, Sally Engel. 1982a. Defining 'success' in the neighborhood justice movement. In *Neighborhood justice: Assessment of an emerging idea*, ed. R. Tomasic and M. Feeley, 172-193. New York: Longman.

_____. 1982b. The social organisation of mediation in non-industrial societies: Implications for informal community justice in America. In *The politics of informal justice. Vol.2*, ed. Richard Abel, 17-42. New York: Academic Press.

_____. 1989. Myth and practice in mediation process. In *Mediation and criminal justice: Victims, offenders and community*, ed. M. Wright and B. Galaway, 239-250. London: Sage Publications.

_____. 1990. *Getting justice and getting even.* Chicago: University of Chicago Press.

_____. 2003. From law and colonialism to law and globalization: A review essay on Martin Chanock's *Law, custom and social order: The colonial experience in Malawi and Zambia. Law and Social Inquiry* 28, no. 2: 269-90.

Mertz, E. 1994. Legal loci and places in the heart: Community and identity in sociolegal studies. *Law and Society Review* 28: 971-992.

Meschievitz, C. and M. Galanter. 1982. In search of Nyay Panchayat: The politics of a moribund institution. In *The Politics of Informal Justice Vol.2.*, ed. Richard Abel, 47-73. New York: Academic Press.

Messick, Brinkeley. 1988. Kissing hands and knees: Hegemony and hierarchy in Shari'a discourse. *Law and Society Review* 22, no. 4: 637-659.

Metcalf, Barbara. 1982. *Islamic revival in British India: Deoband 1860-1990.* Princeton: Oxford University Press.

_____. 1993. Living Hadith in the Tablighi Jama'at. *The Journal of Asian Studies* 52, no. 3: 584-608.

_____. 1998. Women and men in a contemporary pietist movement: The case of the Tablaghi Jama'at. In *Appropriating gender: Women's activism and politicized religion in South Asia*, ed. Amrita Basu and Patricia Jafferey, 107-121. New York: Routledge.

_____, ed. 1984. *Moral conduct and authority: The place of Adab in South Asian Islam.* Berkeley: University of California Press.

Metcalf, Thomas. 1994. *Colonialism, property and the state.* Delhi: Oxford University Press.

Migdal, Joel. 1988. *Strong societies and weak states: State-society relations and state capabilities in the Third World.* Princeton: Princeton University Press.

_____. 1996. Integration and disintegration: An approach to society formation. In *Between development and destruction: An enquiry into the causes of conflict in post-colonial states*, ed. Luc van de Goor, Kumar Rupesinghe, and Paul Sciarone, 91-106. London: Macmillan.

_____. 2004a. Mental maps and virtual checkpoints: Struggles to construct and maintain state and social boundaries. In *Boundaries and belonging: States and societies in the struggle to shape identities and local practices*, ed. Joel Migdal, 3-26. Cambridge: Cambridge University Press.

_____, ed. 2004b. *Boundaries and belonging: States and societies in the struggle to shape identities and local practices.* New York: Cambridge University Press.

Migdal, Joel and Klaus Schlichte. 2005. Rethinking the state. In *The dynamics of states: The formation and crises of state domination*, ed. Klaus Schlichte, 1-40. Aldershot: Ashgate.

Migdal, Joel, Atul Kohli, and Vivienne Shue, ed. 1994. *State power and social forces: Dominance and transformation in the Third World.* Cambridge: Cambridge University Press.

Mills, Albert and Tony Simmons, ed. 2005. *Reading organization theory.* Toronto: Garamond Press.

Mines, Matthieson. 1994. *Public faces, private voices: Community and individualism in Tamil Nadu.* Berkeley: University of California Press.

Minow, Martha and Mary Lyndon Shanley. 1996. Relationship rights and responsibilities: Revisioning the family in liberal political theory and law. *Hypatia* 11: 4-29.

Minow, Martha, Michael Ryan, and Austin Sarat, ed. 1993. *Narrative, violence and the law: The essays of Robert Cover.* Ann Arbor: University of Michigan Press.

Mir-Hosseini, Zeba. 2000. *Marriage on trial: A study of Islamic family law.* London: I. B. Tauris.

Mitchell, Timothy. 1991. The limits of the state: Beyond statist approaches and their critics. *American Political Science Review* 85: 77-96.

Mody, Perveez. 2002. Love and the law: Love-marriage in Delhi. *Modern Asian Studies* 36, no. 1 (February): 223-256.

Moghadam, Valentine. 2005. Islamist movements and women's responses in the Middle East. In *Women and Islam: Critical concepts in sociology*, ed. Haideh Moghissi, 264-281. New York: Routledge.

_____, ed. 1994. *Identity politics and women: Cultural reassertions and feminisms in international perspective.* Boulder: Westview Press.

Moghissi, Haideh, ed. 2005. *Women and Islam: Critical concepts in sociology.* New York: Routledge.

Mohr, Lawrence. 1976. Organizations, decisions and courts. *Law and Society Review.10 no.4.* (summer): 621-642.

Moin, Shakir, ed. 1989. *Religion, state, and politics in India.* Delhi: Ajanta Publications.

Momin, A. R. 1978. Muslim caste in an industrial township of Maharashtra. In *Caste and social stratification among Muslims in India*, ed. I. Ahmad, 97-116. New Delhi: Manohar.

Moog, Robert. 1991. Conflict and compromise: The politics of *lok adalat* in Varanasi District. *Law and Society Review* 25: 545-569.

_____. 1993. Indian litigiousness and the litigation explosion. *Asian Survey* 33, no. 12: 1136-1150.

_____. 1997. *Whose interests are supreme?: Organizational politics in civil courts in India.* Ann Arbor: Association for Asian Studies.

_____. 2003. Democratization of justice: The Indian experiment with consumer forums. In *Beyond common knowledge: Empirical approaches to the rule of law*, ed. Eric G. Jensen and Thomas Heller, 142-163. Stanford: Stanford University Press.

Moore, Erin. 1994. Law's patriarchy in India. In *Contested states: Law, hegemony and resistance*, ed. Mindie Lazarus-Black and Susan Hirsch, 89-117. New York: Routledge.

_____. 1998. *Gender, law and resistance in India.* Tucson: University of Arizona Press.

Moore, Sally Folk. 1973. Law and social change: The semi-autonomous field as an appropriate subject of study. *Law and Society Review* 7, no. 4: 719-746

_____. 1978. *Law as process: An anthropological approach.* London: Routledge and Kegan Paul.

Moors, Annaliese. 1996. Gender relations and inheritance: Person, power and property in Palestine. In *Gendering the Middle East: Emerging perspectives*, ed. Dennis Kandiyoti, 69-84. Syracuse: Syracuse University Press.

_____. 2003. Public debates on family law reform: Participants, positions and styles of argumentation in the 1990s. In *Islamic Law and Society, Special Volume* 10, no. 1: 1-33.

Moosa, Najma. 2002. The role that lay Muslim judges play in state courts and religious tribunals in South Africa: A historical, contemporary and gender perspective. In *Access to justice: The role of court administrators and law adjudicators in the African and Islamic context*, ed. Christina Jones-Pauly and Stefanie Elbern, 99-136. The Hague: Kluwer Law International.

Morab, S. G. 1965. The Bhandari caste council. *Man in India* 45: 152-158.

Morris, D. 1965. *The emergence of an industrial labour force in India.* Berkeley: University of California Press.

Morris, Henry Francis. 1972. Indirect rule and the search for justice: *Essays in East African legal history.* Oxford: Clarendon Press.
Morrison, Charles. 1974. Clerks and clients: Paraprofessional roles and cultural identities in Indian litigation. Law and Society Review 9, no. 1: 39-62.

Mukhppadhyay, Maitreyi. 1998. *Legally dispossessed: Gender, identity and the process of law.* Calcutta: Stree.

Mulla, Dinshah Fardunji. 1955. *Principles of Mahomedan law.* Calcutta: Eastern Law House.
_____. 1966. *Principles of Hindu law.* 13th ed. Bombay: N. M. Tripathy.

Munger, Frank. 1998. Mapping law and society. In *Crossing boundaries: Traditions and transformations in law and society research*, ed. Austin. Sarat, et al., 21-88. Evanston Ill: Northwestern University Press: American Bar Foundation.

Murugkar, Lata. 1991. *Dalit Panther movement in Maharashtra: A sociological appraisal.* Bombay: Popular Prakashan.

Nader, Laura and Harry Todd, ed. 1978. *The disputing process: Law in ten societies.* New York: Columbia University Press.

Nainar, Vahida. 2000. *Muslim women's views on personal laws.* In Report complied by Women's Research and Action Group, Mumbai.

Nair, Janaki. 1996. *Women and law in colonial India: A social history.* New Delhi: Kali for Women with the National Law School of India University.

Nanji, Azim. 1978. *The Nizari Ismai'li tradition in Indo-Pakistan subcontinent.* Delmar: Caravan Books.

_____. 1988. Shariat and Haqiqat: Continuity and synthesis in the Nizari Ismaili Muslim tradition. In *Shariat and ambiguity in South Asian Islam*, ed. Katherine Ewing, 62-76. Berkeley: University of California Press.

Narain, Vrinda. 2001. *Gender and community: Muslim women's rights in law.* Toronto: University of Toronto Press.

_____. 2006. Anxiety and amnesia: Muslim women's equality in postcolonial India. Ph.D. diss., Faculty of Law, McGill University.

Narayan, Uma. 1998. Essence of culture and a sense of history: A feminist critique of cultural essentialism. *Hypatia* 13, no. 2: 86-106.

_____. 2000. Undoing the 'package picture' of cultures. *Signs* 25, no. 4: 1083-1086.

Nasir, Jamal J. 2002. *The Islamic law of personal status.* 3d ed. The Hague: Kluwer Law International.

Nettl, J. P. 1968. The state as a conceptual variable. *World Politics* 20: 559-592.

Neufeldt, R. 1993. To convert or not to convert: Legal and political dimensions of conversion in independent India. In *Religion and law in independent India*, ed. Robert Baird, 293-312. Delhi: Manohar.

Nhlapo, T. 1998. African family law under an undecided constitution: The challenge of law reform in South Africa. In *The changing family: Family forms and family law*, ed. J. Eekelaar and T. Nhlapo, 617-634. Portland: Hart Publishing.

Nijjar, Manjit Singh. 1994. *Nullity of marriage under Hindu law*. New Delhi: Deep and Deep.

Nishat, Jameela. 2003. A long way to go: Divorce practices among Muslim families of Hyderabad city. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 3-16. Delhi: Manohar.

Nishimura, Yuko. 1998. *Gender, kinship and property rights: Nagarattar womanhood in South India*. Delhi: Oxford University Press.

No compromise on triple talaq system: Ulemas. *Outlook India*, Web edition. Available from http://www.outlookindia.com. Accessed 14 August 2004.

Noever, Ivy. 2005. Women's choices: Norms, legal pluralism and social control among the Ayt Hdiddu in central Morocco. In *Shattering tradition: Custom, law and the individual in the Muslim Mediterranean*, ed. Walter Dostal and Wolfgang Kraus, 189-207. New York: I. B. Tauris.

Nordlinger, Eric. 1972. *Conflict regulation in divided societies*. Cambridge: Harvard University Press.

_____. 1981. *On the autonomy of the democratic state*. Cambridge: Harvard University Press.

Nugent, David. 1994. Building the state, making the nation: The bases and limits of state centralization in 'modern Peru'. *American Anthropologist* 96, no. 2: 333-369.

_____. 1997. *Modernity at the edge of empire: State, individual and nation in the northern Peruvian Andes 1885-1935*. Stanford: Stanford University Press.

Nussbaum, Martha. 1997. Religion and women's rights. In *Religion and contemporary liberalism*, ed. P. Weithman, 93-137. Notre Dame: University of Notre Dame Press.

_____. 1999. *Sex and social justice*. Oxford: Oxford University Press.

_____. 2000. Religion and women's equality: The case of India. In *Obligations of citizenship and demands of faith: Religious accommodation in pluralist democracies*, ed. Nancy Rosenblum, 335-402. Princeton: Princeton University Press.

_____. 2001. *Women and human development: The capabilities approach*. Cambridge: Cambridge University Press.

Nussbaum, Martha and Jonathan Glover, ed. 1995. *Women, culture and development: A study of human capabilities*. Oxford: Clarendon Press.

O'Donovan, Katherine. 1999. Marriage: A sacred or profane love machine? In *Family, state and the law, Vol.1*, ed. Michael Freeman, 244-258. Dartmouth: Aldershot.

Offe, Claus. 1996. *Modernity and the state: East, west.* Cambridge: MIT Press.

O'Hanlon, Rosalind. 1985. *Caste, conflict and ideology: Mahatma Jotirao Phule and low caste protest in nineteenth century Western India.* Cambridge: Cambridge University Press.

Okeley, Judith. 1991. Defiant moments: Gender, resistance and individuals. *Man* 26: 3-22.

Okin, Susan. 1989. *Justice, gender and the family.* New York: Basic Books.

_____. 1997. Is multiculturalism bad for women? *Boston Review* 22: 25-28.

_____. 1999. Is multiculturalism bad for women? In *Is multiculturalism bad for women?*, ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, 7-26. Princeton: Princeton University Press.

_____. 2002. Mistresses of their own destiny: Group rights, gender, and realistic rights of exit. *Ethics* 112, no. 2: 205-230.

_____. 2005. Multiculturalism and feminism: No simple questions, no simple answers. In *Minorities within minorities*, ed. Avigail Eisenberg and Jeff Spinner-Halev, 67-89. Cambridge: Cambridge University Press.

Olsen, Frances. 1999. The myth of state intervention in the family. In *Family, state and the law Vol.1*, ed. Michael Freeman, 81-110. Dartmouth: Aldershot.

Olson, Susan and Albert Dzur. 2004. Revisiting informal justice: Restorative justice and democratic professionalism. *Law and Society Review* 38, no. 1: 139-176.

O'Neill, Onora. 2000. *Bounds of justice.* Cambridge: Cambridge University Press.

Oommen, T. K. 2005. Civil society: Religion, caste, and language in India. In *On civil society: Issues and perspectives*, ed. N. Jayaram, 187-202. New Delhi: Sage.

Ortner, Sherry. 1995. Resistance and the problem of ethnographic refusal. *Comparative Studies in Society and History* 37, no. 1 (January): 173-193.

_____. 1996. The virgin and the state. In *Making gender: The politics and erotics of culture*, ed. Sherry Ortner, 43-58. Boston: Beacon Press.

_____. 1999. *The fate of culture: Geertz and beyond.* Berkeley: University of California Press.

Örücü, Esin, Elspeth Attwooll, and Sean Coyle, ed. 1996. *Studies in legal systems: Mixed and mixing.* Boston: Kluwer Law International.

Owen, Jessop. 2003. The constitutional dimension of customary family law in PNG. In *Family law: Processes, practices and pressures*, ed. J. Dewar and S. Parker, 441-452. Portland: Hart Publishing.

Pandey, Geeta. Muslim women fight instant divorce. BBC web edition. Available from http://news.bbc.co.uk. Accessed 4 August 2004.

Pandey, Gyan. 1992. *Construction of communalism in colonial North India.* Delhi: Oxford University Press.

Papanek, Hana. 1962. Leadership and social change in the Khoja Ismaili community. Ph.D. dissertation. Harvard University

Parashar, Archana. 1992. *Women and family law reform in India: Uniform civil code and gender equality.* Delhi: Sage Publications.

Parekh, Bhiku. 2000. *Rethinking multiculturalism: Cultural diversity and political theory.* Cambridge: Harvard University Press.

Parry, Jonathan. 2001. Ankalu's errant wife: Sex, marriage and industry in contemporary Chhattisgarh. *Modern Asian Studies* 35, no. 4: 783-820.

Patwardhan, Sunanda. 1973. *Change among India's Harijans.* New Delhi: Orient Longman.

Pavlich, George. 1996. The power of community mediation: Government and formation of self-identity. *Law and Society Review* 30: 707-733.

Pearl, David. 1987. *Textbook on Muslim personal law.* 2d ed. London: Crom Helm.

_____. 2000. *Islamic family law and its reception by the courts in England.* Cambridge: Islamic Legal Studies Program.

Peletz, Michael. 2002a. *Islamic modern: Religious courts and cultural politics in Malaysia.* Princeton: Princeton University Press.

_____. 2002b. Judicial process and dilemmas of legitimacy and sovereignty: The Malaysian case in comparative perspective. In *Sovereignty under challenge: How governments respond*, ed. John Montgomery and Nathan Glazer, 221-58. New Brunswick: Transcation Publishers.

Perez, Oren and Gunther Teubner, ed. 2006. *Paradoxes and inconsistencies in the law.* Portland: Hart Publishing.

Petersen, Hanne and Henrik Zahle, ed. 1995. *Legal polycentricity: Consequences of pluralism in law.* Dartmouth: Aldershot.

Philips, Anne. 1994. Dealing with difference: A politics of ideas or a politics of difference? *Constellations* 1, no. 1: 74-82.

_____. 1995. Democracy and difference: Some problems for feminist theory. In *The rights of minority cultures*, ed. Will Kymlicka, 1-30. Oxford: Oxford University Press.

_____. 2003. When culture means gender: Issues of cultural defence in the English courts. *Modern Law Review* 66: 510-531.

Philips, Anne and Moira Dustin. 2004. UK initiatives on forced marriage: Regulation, dialogue and exit. *Political Studies* 52: 531-551.

Posel, Deborah. 1991. *The making of apartheid, 1948-61: Conflict and compromise*. New York: Clarandon Press.

Posner, R. 1995. *Overcoming law*. Cambridge: Harvard University Press.

Powell Walter W. and Paul J. DiMaggio, ed. 1991. *The new institutionalism in organizational analysis*. Chicago: University of Chicago Press.

Prasad, Vijay. 2000. *Untouchable freedom: Social history of a Dalit community*. New Delhi: Oxford University Press.

Rajaraman, Indira. 2005. Economics of brideprice and dowry. In *Dowry and inheritance*, ed. Srimati Basu, 42-55. New York: Zed Books.

Ram, Kalpana. 1991. *Mukkuvar women: Gender, hegemony and capitalist transformation in a South Indian fishing community*. New York: Zed Books.

_____. 2001. *Borders of being: Citizenship, fertility, and sexuality in Asia and the Pacific*. Ann Arbor: University of Michigan Press.

Rawat, Basant Rawat. VHP crown for Gujarat mob leader. *The Telegraph*. 28 February 2004.

Rawls, John. 1996. *Political liberalism*. New York: Columbia University Press.

Ray, Raka and Mary Katzenstein. 2005. *Social movements in India: Poverty, power and politics*. Lanham: Rowman and Littlefield.

Raz, Joesph. 1994. *Ethics in the public domain: Essays in the morality of law and politics*. Oxford: Clarendon Press.

Reid, Charles J. 2004. *Power over the body, equality in the family: Rights and domestic relations in medieval canon law*. Grand Rapids: Eerdmans.

Resnik, J. 2003. Many doors? Closing doors? Alternative dispute resolution and adjudication. *Ohio State Journal on Dispute Resolution* 10: 211.

Reynell, Josephine. 2006. Religious practice and the creation of personhood among Svetambara Murtipujak Jain women in Jaipur". In *Studies in Jaina History and Culture*, ed. Peter Flugel, 208-237. New York: Routledge.

Rheinstein, Max. 1972. *Marriage stability, divorce and the law*. Chicago: University of Chicago press.

Robinson, Rowena and Sathianathan Clarke, ed. 2003. *Religious conversion in India: Modes, motivations, and meanings*. Oxford: Oxford University Press.

Rose, Nikolas. 1987. Beyond the public/private division: Law, power and the family. *Journal of Law and Society* 14: 61-76.

Rosen, Lawrence. 1980-1981. Equity and discretion in modern Islamic legal system. *Law and Society Review* 15, no. 2: 217-245.

_____. 1984. *Bargaining for reality: The construction of social relations in a Muslim community*. Chicago: University of Chicago Press.

_____. 1989a. *The anthropology of justice: Law as culture in Islamic society*. Cambridge: Cambridge University Press.

_____. 1989b. Islamic 'case law' and the logic of consequence. In *History and power in the study of law: New directions in anthropology*, ed. June Starr and Jane Collier, 302-319. Ithaca: Cornell University Press.

_____. 2000. *The justice of Islam: Comparative perspectives on Islamic law and society*. Oxford: Oxford University Press.

Rosenberg, Gerald. 1991. *The hollow hope: Can courts bring about social change?* Chicago: University of Chicago Press.

Rosenblum, Nancy, ed. 2000. *Obligations of citizenship and demands of faith*. Princeton: Princeton University Press.

Rosett, Arthur, Lucie Cheng, and Margaret Y.K. Woo, ed. 2003. *East Asian law: Universal norms and local cultures*. London: Routledge.

Rudner, David W. 1994. *Caste and capitalism in colonial India: The Nattukottai Chettiars*. Berkeley: University of California Press.

Rudolph, Lloyd and Susanne Rudolph. 1967. *The modernity of tradition: Political development in India*. Chicago: University of Chicago Press.

Rudolph, Susanne and Lloyd Rudolph. 2001. Living with difference in India: Legal pluralism and legal universalism in historical context. In *Religion and personal law in secular India*, ed. Gerald Larson, 36-68. Indianapolis: Indiana University Press.

Rzezaura, B. 1994-95. Tanzania: Building a new family law out of plural legal system. *Louisville Journal of Family Law* 33: 523.

Sangari, Kumkum. 1995. Politics of diversity: Religious community and multiple patriarchies. *Economic and Political Weekly* 23 (December): 3287-31.

_____. 2003. Politics of diversity: Religious communities and multiple patriarchies. In *Communal identity in India: Its construction and articulation in the twentieth century*, ed. Vidyut Chakrabarty, 181-213. New Delhi: Oxford University Press.

Sangari, Kumkum and Sudesh Vaid, ed. 1984. *Recasting women: Essays in colonial history*. New Delhi: Kali for Women.

Santos, Boaventura de Sousa. 1977. The law of the oppressed: The construction and reproduction of legality in Pasardaga. *Law and Society Review* 12, no. 1: 5-126.

_____. 1995. *Toward a new common sense: Law, science and politics in paradigmatic transition*. New York: Routledge.

_____. 2006. The heterogeneous state and legal pluralism in Mozambique. *Law and Society Review* 40, no. 1 (March): 39-75.

Santos, Boaventura De Souza and Rodriguez-Garavito Cesar, ed. 2005. *Law and globalization from below: Towards a cosmopolitan legality*. Cambridge: Cambridge University Press.

Sanyal, Usha. 1995. Pir, shaikh and prophet: The personalisation of religious authority in Ahmed Riza Khan's life. *Muslim communities of South Asia: Culture, society and power*, ed. T. N. Madan, 405-448. New Delhi: Manohar.

_____. 1996. *Devotional Islam and Politics in British India: Ahmad Riza Khan Barelwi and his movement, 1870-1920*. Delhi: Oxford University Press.

Sapiro, Virginia. 1993. Engendering cultural differences. In *The rising tide of cultural pluralism: The nation state at bay?*, ed. M. C. Young, 36-54. Madison: University of Wisconsin Press.

Sarat, Austin. 1986. Access to justice. In *Law and the social sciences*, ed. Leon Lipson and Stanton Wheeler, 519-580. New York: Russel Sage Foundation.

Sarat, Austin et al., ed. 1998. *Power and justice in socio-legal studies*. Evanston: Northwestern University Press and American Bar Foundation.

Sarat, Austin and Jonathan Simon, ed. 2003. *Cultural analysis, cultural studies, and the law: Moving beyond legal realism*. Durham: Duke University Press.

Sarat, Austin and Thomas R. Kearns, ed. 1999. *Cultural pluralism, identity politics and the law*. Ann Arbor: University of Michigan Press.

Sarkar, Tanika. 2001. *Hindu wife, Hindu nation: Community, religion and cultural nationalism.* Bloomington: Indiana University Press.

Sarkar, Tanika and Urvashi Butalia, ed. 1995. *Women and right wing movements: Indian experiences.* New York: Zed Books.

Satter, R. 1994. *Doing justice: A trial judge at work.* New York: Simon and Schulster.

Scalia, A. 1989. The rule of law and law of rules. *University of Chicago Law Review* 56: 5175-5188.

Schauer, Frederick. 1987. Precedent. *Stanford Law Review* 39: 571-605

Schlichte, Klaus, ed. 2005. *The dynamics of states: The formation and crises of state domination.* Aldershot: Ashgate.

Schultz, Dorothea. 2003. Political factions, ideological fictions: The controversy over family law reform in Mali. In *Islamic Law and Society, Special Volume* 10, no. 1: 132-164.

Schwartz, B. 1997. Collective memory and history: How Abraham Lincoln became a symbol of racial equality. *The Sociological Quarterly* 38, no. 3: 469-496.

Schweickart, Patrocinio. 1995. What are we doing? What do we want? Who are we? Comprehending the subject of feminism. In *Provoking agents: Gender and agency in theory and practice*, ed. Judith Gardiner, 229-249. Chicago: University of Illinois Press.

Scott, David. 1999. *Refashioning futures: Criticism after post coloniality.* Princeton: Princeton University Press.

Scott, James. 1998. *Seeing like a state: How certain schemes to improve the human condition have failed.* New Haven: Yale University Press.

Searle-Chatterjee, Mary and Ursula Sharma. 1994. *Contextualising caste: Post-Dumontian approach.* Cambridge: Blackwell Publishers/Sociological Review.
Shabbir Mohammad. 1988. *Muslim personal law and judiciary.* Allahabad: The Law Book Company Private Limited.

Shachar, Ayelet. 1998. Group identity and women's rights in family law: The perils of multicultural accommodation. *Journal of Political Philosophy* 6: 285- 305

_____. 2001. *Multicultural jurisdictions: Cultural difference and women's rights.* Cambridge: Cambridge University Press.

Shah, Ghanshyam. 2001. The BJP's riddle in Gujarat: Caste, factionalism and Hindutva. In *The BJP and the compulsion of politics in India*, ed. Thomas Hansen and Christophe Jaffrelot, 243-266. New York: Oxford University Press.

_____, ed. 2002. *Dalits and the state*. New Delhi: Concept.

Shah, Prakash. 2005. *Legal pluralism in conflict: Coping with cultural diversity in law*. Portland: Glass House Press.

Shaheed, Farida. 2005. The cultural articulation of patriarchy: Legal systems, Islam and women. In *Women and Islam: Critical concepts in sociology, Vol.1*, ed. Haideh Moghissi, 224-243. New York: Routledge.

Shankar, Shylashri. 2003. Dealing with religious freedom in India and Israel: Do courts follow an institutional logic? Unpublished paper.

Shanley, Mary. 1989. *Feminism, marriage and the law in Victorian England: 1850-1895*. Princeton: Princeton University Press.

Sharma, Ursula. 1983. *Women, work and property in North India*. London: Tavistock.

_____. 2005. Dowry in North India: Its consequences for women. In *Dowry and inheritance*, ed. Srimati Basu, 15-26. New York: Zed.

Sharma, Vijay. 1994. *Protection to women in matrimonial home*. New Delhi: Deep & Deep Publications.

Shastri, Amita and Jeyaratnam Wilson, ed. 2001. *Postcolonial states of South Asia: Democracy, identity, development, and security*. Richmond: Curzon.

Sheth, Dhirubhai. 1999. Secularization of caste and making of new middle class. *Economic and Political Weekly* 43, nos. 34-35 (21 August): 2502- 2510.

Shinoda, Takashi. 2002. The structure of stagnancy: Sweepers in Ahmedabad district. In *Dalits and the State*, ed. Ghanshyam Shah, 241-271. New Delhi: Centre for Rural Studies, Concept Publications.

Shodhan Amrita. 2001. *A question of community: Religious groups and colonial law*. Calcutta: Stree.

Sieber, Rachel. 2001. Rethinking citizenship: Reforming the law in postwar Guatemala. In *States of imagination: Ethnographic explorations of the postcolonial state*, ed. Thomas Bloom Hansen and Finn Stepputat 203-220. Durham: Duke University Press.

Sikand, Yoginder. Listen to the women. *Outlook India*, Web edition. Available from http://www.outlookindia.com. Accessed 5 May 2005.

Sikhs belong to Hindu Samaj. *The Indian Express*, 2 May 2007.

Singh, Shiv Sahai. 1993. *Unification of divorce laws in India*. With a foreword by Amit Sen. New Delhi: Deep & Deep Publications.

Singha, Radhika. 1998. *A despotism of law: Crime and justice in early colonial India.* New York: Oxford University Press.

Sinha, Surya Prakash. 1996. *Legal polycentricity and international law.* Durham: Carolina Academic Press.

Sirsikar, V. M. 1995a. *Politics in Maharashtra: An overview.* Hyderabad: Orient Longman.

_____. 1995b. *The politics of modern Maharashtra.* Bombay: Orient Longman.

Smart, Carol. 1984. *The ties that bind: Law, marriage and the reproduction of patriarchal relations.* Boston: Routledge, Kegan Paul.

Smith, A. 1983. *State and nation in the Third World.* New York: St. Martin's Press.

Smith, Carol. 1993. Social relations in Guatemala over time and space. In *Guatemalan Indians and the state: 1540-1988*, ed. Carol Smith, 1-30. Austin: University of Texas Press.

Smith, Donald Eugene. 1963. *India as a secular state.* Princeton: Princeton University Press.

Smith, Mark. 2000. *Rethinking state theory.* New York: Routledge.

Sonbol, Amira, ed. 1996. *Women, the family, and divorce laws in Islamic history.* Syracuse: Syracuse University Press.

Spinner-Halev, Jeff. 1994. *The boundaries of citizenship: Race, ethnicity, and nationality in the liberal state.* Baltimore: John Hopkins University Press.

Srinivas, M. N. 1954. A caste dispute among washermen of Mysore. *The Eastern Anthropologist* 6-7: 148-168.

_____. 1962. *Caste in modern India and other essays.* New York: Asia Publishing House.

_____. 1987. *The dominant caste and other essays.* New York: Oxford University Press.

_____. 1989. *The cohesive role of Sanskritization and other essays.* New York: Oxford University Press.

_____. 1996. *Caste, its twentieth century avatar.* New York: Penguin.

_____. 2002. *Collected essays.* Delhi: Oxford University Press.

Starr, June. 1978. *Dispute and settlement in Turkey: An ethnography of law.* Leiden: Grill.

_____. 1990. Islam and the struggle over state law in Turkey. In *Law and Islam in the Middle East*, ed. Daisy H. Dwyer, 77-98. New York: Bergin and Garvey.

_____. 1992. Law as metaphor: From Islamic courts to the palace of justice. Albany: The State University of New York Press.

Starr, June and Jane Collier, ed. 1989. *History and power in the study of law: New directions in legal anthropology*. Ithaca: Cornell University Press.

Starr, June and Mark Goodale, ed. 2002. *Practicing ethnography in law: New dialogues, enduring methods*. New York: Macmillan.

Stein, Burton. 1989. *Vijayanagara*. New York: Cambridge University Press.

Steinmetz, George, ed. 1999. *State/ culture: State-formation after the cultural turn*. Ithaca: Cornell University Press.

Stevens, Jacqueline. 1999. *Reproducing the state*. Princeton: Princeton University Press.

Sturman, Rachel. 2005. Property and attachments: Defining autonomy and the claims of family in nineteenth-century Western India. *Comparative Studies in Society and History* 47, no. 3 (July): 611-637.

Suad, Joseph, ed. 2000. *Gender and citizenship in the Middle East*. With a foreword by Deniz Kandiyoti. Syracuse: Syracuse University Press.

Subramanian, Narendra. 2004. The judiciary, the legislature, and the reform of Christian and Muslim law. Paper presented at the Annual Conference of the *Association for Asian Studies* (4-7 March).

_____. 2005. Legal change and gender inequality: Changes in Muslim family law in India. Paper presented at the *Association for the Study of Nationalities Convention*, New York (14-16 April).

Sugarman, David, ed. 1983. *Legality, ideology, and the state*. New York: Academic Press.
Sunder Rajan, Rajeshwari. 2000. Women between community and state: Some implications of the uniform civil code debates in India. *Social Text* 18, no. 4: 55-82.

_____. 2003. *The scandal of the state: Women, law and citizenship in postcolonial India*. Durham: Duke University Press.

Swidler, Ann. 1986. Culture in action: Symbols and strategies. *American Sociological Review* 90: 273-286.

Talaq woes worry prince. *The Statesman*. 5 May 2005.

Talib, Mohammad. 2003. Personalizing Islam in communicating divorce. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 179-206. Delhi: Manohar.

Tamanaha, Brian. 1993. The folly of 'social scientific' concept of legal pluralism. *Journal of Law and Society* 20, no. 2: 192-236.

_____. 1996. The internal/external distinction and the notion of 'practices' in legal theory and sociolegal studies. *Law and Society Review* 30: 163-204.

_____. 1997. *Realistic socio-legal theory*. Oxford: Clarendon Press.

_____. 2001. *A general jurisprudence of law and society*. New York: Oxford University Press.

Tanzeem, Fatima. 2001. *Islamic law and judiciary: Trend-setting judicial pronouncements on Islamic law since 1950*. New Delhi: Deep & Deep Publications.

Tessler, Mark, Janet Roger, and David Schneider. 1978. Women's emancipation in Tunisia. In *Women in the Muslim world*, ed. Lois Beck and Nikki Keddie, 141-158. Cambridge: Harvard University Press.

Teubner, Gunther. 1983. Substantive and reflexive elements in modern law. *Law and Society Review* 17, no. 2: 239-285.

_____. 1986. After legal instrumentalism? Strategic models of post-regulatory law. In *Dilemmas of law in the welfare state*, ed. Gunther Teubner, 299-326. Berlin: Walter de Gryuter

_____. 1992. The two faces of Janus: Rethinking legal pluralism. *Cardozo Law Review* 13: 1443-1462.

_____, ed. 1988. *Autopoietic law: A new approach to law and society*. New York: W. de Gruyter.

Thakkar, Usha. 1995. The commissioners and the corporators: Power politics at municipal level. In *Bombay: Metaphor for modern India*, ed. Sujata Patel and Alice Thorner. Mumbai: Oxford University Press.

Thomas, Philip, ed. 1997. *Socio-legal studies*. Dartmouth: Aldershot.

Tie, Warwick. 1999. *Legal pluralism: Toward a multicultural conception of law*. Aldershot, Hants, England; Brookefield, VT; Ashgate, Dartmouth:

Tilly, Charles. 1988. War making and state making as organized crime. In *Bringing the state back in*, ed. Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol, 169-191. New York: Cambridge University Press.

_____, ed. 1975. *The formation of national states in Western Europe*. Princeton: Princeton University Press.

Tomasic, Roman and Malcolm Feeley. ed. 1982. *Neighborhood justice movement: An assessment of an emerging idea.* New York: Longman.

Toniatti, R. 1995. Minorities and protected minorities: Constitutional models compared. In *Citizenship and rights in multicultural societies*, ed. M. Dunne and T. Bonazzi, 195-219. Keele: Keele University Press.

Torry, W. 1999. Multicultural jurisprudence and the cultural defense. *Journal of Legal Pluralism and Unofficial Law* 44: 127-161.

Trainor, Brian. 1992. The state, marriage and divorce. *Journal of Applied Philosophy* 9: 135-148.

Tucker, Judith. 1998. *In the house of law: Gender and Islamic law in Syria and Palestine.* Berkeley: University of California Press.

Tucker, Richard. 1976. Hindu traditionalism and nationalist ideologies in the 19th century Mahharashtra. *Modern Asian Studies* 10, no. 3: 321-348.

Twining, William. 2005. Social science and diffusion of law. *Journal of Law and Society* 32, no. 2: 203-240.

Unnithan-Kumar, Maya. 1997. *Identity, gender and poverty: New perspectives on caste and tribe in Rajasthan.* Oxford: Berghahn Books.

Upadhya, Carol. 2001. The concept of community in Indian social sciences: An anthropological perspective. In *Community and identities: Contemporary discourses on culture and politics in India*, ed. Surinder Jodhka, 32-58. New Delhi: Sage Publications.

Vanaik, Achin. 1990. *The painful transition: Bourgeois democracy in India.* London: Verso.

_____. 1997. *The furies of Indian communalism.* London: Verso.

Van Der Veer, Peter. 1994. *The Indian nationalism: Hindus and Muslims in India.* Berkeley: University of California Press.

Van Dyke, Vernon. 1977. The individual, the state, and ethnic communities in political theory. *World Politics* 29: 343-369.

Varshney, Ashutosh. 1993. Contested meanings: India's national identity, Hindu nationalism, and the politics of anxiety. *Daedalus* 122, no. 3: 227-262.

_____. 2001. Ethnic conflict and civil society: Indian and beyond. *World Politics* 53 (April): 362-398.

Vatuk, Sylvia. 2001. Where will she go? What'll she do?: Paternalism towards women in the administration of Muslim Personal Law in contemporary India. In *Religion and personal law in secular India: A call to judgment*, ed. Gerald Larson, 226-250. Bloomington: Indiana University Press.

_____. 2003. Muslim women in the Indian family courts: A report from Chennai. In *Divorce and remarriage among Muslims in India*, ed. Imtiaz Ahmad, 137-160. Delhi: Manohar.

_____. 2005. Moving the court: Muslim women and personal law. In *The diversity of Muslim women's lives in India*, ed. Zoya Hasan and Ritu Menon, 18-58. New Brunswick: Rutgers University Press.

Venderlinden, J. 1989. Return to legal pluralism: Twenty years later. *Journal of Legal Pluralism* 28: 149-157.

Verma, Krishna Kumar. 1979. *Changing role of caste associations*. New Delhi: National.

Vijaykumar, V. 2006. *Traditional futures: Law and custom in India's Lakshdweep Islands*. New Delhi: Oxford University Press.

Viswanathan, Gauri. 1998. *Outside the fold: Conversion, modernity and belief*. Princeton: Princeton University Press.

Volpp, Leti. 1994. (Mis)identifying culture: Asian women and the 'cultural defense'. *Harvard Women's Law Journal* 57: 113-131.

Walsh, Judith. 2004. *Domesticity in colonial India: What women learned when men gave them advice*. Lanham: Rowman & Littlefield Publishers.

Waltman, Jerold L. and Kenneth M. Holland. 1988. *The political role of law courts in modern democracies*. New York: St. Martin's Press.

Walzer, Michael. 1995. The concept of civil society. In *Toward a global civil society*, ed. Michael Walzer, 7-27. New York: Berghahn Books.

Wardle, L. 1995. International marriage and divorce regulation and recognition: A survey. *Family Law Quarterly* 29: 497-499.

Warren, Mark. 1996. Deliberative democracy and authority. *American Political Science Review* 90, no. 1 (January): 46-61.

Warren, Michael. 2003. A second transformation of democracy? In *Democracy transformed?: Expanding political opportunity in advanced industrial democracies*, ed. Bruce Cain, Russell Dalton and Susan Scarrow, 223-249. Oxford: Oxford University Press.

Washbrook, David. 1975. The development of caste organizations in South India. In *South India: Political institutions and political change*, ed. C. J. Baker and David Washbrook, 150-203. Delhi: MacMillan.

_____. 1981. Law, state and agrarian society in colonial India. *Modern Asian Studies* 15, no. 3: 649-721.

Weiner, Myron. 1989. *The Indian paradox: Essays on Indian politics*. New Delhi: Sage Publications.

_____. 1997. India's minorities: Who are they? What do they want? In *State and politics in India*, ed. Partha Chatterjee, 459-495. Delhi: Oxford University Press.

Weisbrod, Carol. 1999. Universals and particulars: A comment on women's human rights and religious marriage contract. *Southern California Review of Law and Women's Studies* 9, no. 1 (fall): 77-100

Welchman, Lynn. 2000. *Beyond the code: Muslim family law and the Sharia judiciary in the Palestinian West Bank*. The Hague: Kluwer Law International.

_____, ed. 2004. *Women's rights and Islamic family law: Perspectives on reform*. New York: Zed Books.

We will make our own *nikahnama*. *The Hindu*, 7 May 2005.

Wilkinson, Steven. 2004. India, consociational theory and ethnic violence. In *India and the politics of developing countries: Essays in memory of Myron Weiner*, ed. Ashutosh Varshney, 150-180. New Delhi: Sage Publications.

Williams, Susan. 1997. A feminist reassessment of civil society. In *Indiana Law Journal* 72: 417-447.

Wilmsen, E. et al., ed. 1996. *The politics of difference: Ethnic premises in a world of power*. Chicago: University of Chicago Press.

Women's Crisis Centre. 2000. *Muslim women and access to justice: Historical, legal, and social experience in Malaysia*. Penang, Malaysia.

Woodman, Gordon. 1999. The idea of legal pluralism. In *Legal pluralism in the Arab World*, ed. Baudoin Dupret, Maurits Berger, and Laila al-Zwaini, 3-20. Boston: Kluwer Law International.

Woods, Patricia. 2001. Courting the court: Social visions, state authority and the religious law conflict in Israel. Ph.D. diss., University of Washington.

_____. 2004. Gender and reproduction and maintenance of group boundaries: Why the 'secular' state matters to religious authorities in Israel. In *Boundaries and belongings: States and societies in the struggle to shape identities*, ed. Joel Migdal, 226-250. Cambridge: Cambridge University Press.

Yilmaz, Ihsan. 2002. Secular law and the emergence of unofficial Turkish Islamic law. *The Middle East Journal* 56, no. 1. (winter): 113-131.

Yngvesson, Barbara. 1993. *Virtuous citizens, disruptive subjects.* New York: Routledge.

Young, Crawford. 1976. *The politics of cultural pluralism.* Madison: University of Wisconsin Press.

Young, Iris Marion. 1989. Polity and group difference: A critique of the ideal of universal citizenship. *Ethics* 99: 250-274.

_____. 1990. *Justice and the politics of group difference.* Princeton: Princeton University Press.

Yuval-Davis, Nira. 1997. *Gender and nation.* Thousand Oaks: Sage Publications.

Zelliot, Eleanor. 1995. Learning the use of political means: The Mahars of Maharashtra. In *Caste in Indian* politics, 5th ed., ed. Rajni. Kothari, 27-65. Hyderabad: Orient Longman.

_____. 2001. Dalit traditions and Dalit consciousness. In *Democratic governance in India: Challenges of poverty, development and identity*, ed. Niraja Gopal Jayal and Sudha Pai, 232-252. New Delhi: Sage Publications.

Zemans, Frances Kahn. 1982. Framework for analysis of legal mobilization: A decision-making model. *American Bar Foundation Research Journal*: 912-1071.

# APPENDIX A

*Cases Cited*

Abdul Zalil Ahmed v. Mustt. Marina Begum, AIR 1999 Gauhati, 28 (1999).

Bai Fatima v. Alimahomed, 37 Bom. 280, 17 I.C. 946 (1913).

Bai Tahira v. Ali Hussain Fisalli Chothia, AIR SC 362 (1979).

Dagdu s/o Chotu Pathan v. Rahimbi Dagdu Pathan and Others, Aurangabad bench of Mumbai High Court (May 2002).

Daniel Latifi v. Union of India, (7) SC 740 (2001).

Mohammad Ahmed Khan v. Shah Bano Begum, AIR SC 945 (1985).

Narasu Appa Mali v. State of Bombay, AIR (Bombay1952).

Shamim Ara v. State of U.P. and Another, AIR SCW 4162 (2002).

Sarla Mudgal v. Union of India, AIR SC 1531 (1995).

# APPENDIX B

*Permission for Access to the Records of Matrimonial Cases in the Family Court, Mumbai*

# APPENDIX C

*Ethics Certificate*