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PERSONAL LAW LEGAL ORIGINS AND CONSTITUTIONAL ISSUES: DEBATES OVER UNIFORM CIVIL CODES IN MODERN INDIA[2]

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INTRODUCTION

The world's largest democracy has in recent decades been besieged by a number of critical issues in the broad areas of justice and democracy, not least on the communal front where tensions between disparate communities have raked dangerously high. This challenge to the stability of the Indian society and its basically egalitarian aspirations, are marked by a number of deeper, structural formations that have arguably a longer history and antecedent causality than is otherwise acknowledged in some circles, populist and academic alike. Nevertheless, structures usually targeted for analysis comprise the differential caste/sub-caste ordering based on hierarchical codes of privileging, linguistic and regional divisions, and inter-denominational and communal rifts, each of which plays a significant role in weaving the larger tapestry of community issues. One area in which community

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issues is rather controversially marked, concerns what is generally known as 'Personal Law'.

Until what has come to be known popularly as the *Begum Shah Bano* case erupted in the late 1980's, not much attention, at least in recent decades, was focused on this particular issue; or at best, such disputations as had emerged remained confined within chambers of the courts, government bureaucracies, family and so on. This is rather curious, for a particular Article in the Indian Constitution - of which more later - that had underscored an imperative to move towards common civil law should itself have provided an incentive for such debates to cut more deeply than had happened. However, with the rise to popularity of strong religious and sectarian sentiments, particularly among northern Indian middle class Indians,this issue has assumed immense importance in the public space, drawing into the fray clerics, community advocates, post-colonial writers and feminist critics alike. In the aftermath, one moral community has responded with a sense of horror as it feels it has been singled out for perpetuating a bifurcated system of justice and social-legal dispensations in the name of minority rights, arguing that there is no compulsion within the provisions of the secular Constitution for the community to submit to the belated clarion call for a univocal or uniform civil law, which some writers refer to as 'common civil codes'.

PART I: Pre-Colonial History

With this as the preamble, in the ensuing discussion for the purposes of this article I shall begin by sketching a background to the discourse of Personal Law, so that we may better contextualize the enduring presence and positioning of Personal Law in the wider scope of colonial sovereignty and its treatment in post-independence constitutional enframing of rights and interests of the variegated communities. But any analysis of colonial constructions and productions must necessarily take us further into the past (the pre-colonial, pre-western) unless we are to naively assume that certain of the more fundamental social-legal processes operative in contemporary

South Asia are to be wrested by merely performing an archaeology on the erstwhile colonial consciousness and its displaced epistemes, and so on. And so to make this enquiry deeper, the role and culturally-specific concept of *law* in ancient India is a *sine qua non.* I will confine myself to the issue of substantive law.

As many a commentator has observed, it is difficult to find in traditional India a conception of law that is comparable to liberal Post-Magna Carta conception or the European canons of civil law[3]. There is no central notion of law as presupposed in the idea of Common Law with its bureaucracies, canon law courts, formal statutes, judiciary, and so on. In other words, a central policing or enforcing mechanism is conspicuously absent. In its place what we had was a variety of socially regulative and normative rules, *acara,*.punishments, *prayascitta* (generally lumped under the overarching category of dharma) which however varied across different regions and peoples. Each caste appeared to have a different *svadharma* (duties of its own). In fact, an autonomous concept of law was not yet distinguished from ethics and regulative norms, for to have such a concept would require a theory, albeit abstracted, of law and the due processes, and which would conceivably recognize issues of inequalities, disproportionate distribution of privileges and denial of entitlements, legitimacy and rights to certain classes or groups of people. Not that such recognitions were not possible within the framework of dharma itself, but it lacked a mechanism for codification and adjudication and enforcement of punishments. The bulk of the *Dharma-sastras* do not actually codify the "law", nor engage in academic disquisitions over points of law, but for the large part devote themselves to the articulation of religious mores and ethical norms, as Kane in his monumental work on the *History of Dharma-sastras* has painstakingly pointed out.

It is true nevertheless that with the *Artha-sastras, Manusmrti, Yajnavalkya-Smrti* and *Nibandhas* of medieval India, notably *Kriya-kalpataru*, there are attempts at codifying social/religious codes of

[3]I will be discussing the views of colonial observers as reported by Duncan Derrett and comments by other writers shortly in the text.

conduct based on earlier *Dharma-sastra* material and the "metalegal" framework provided by Purva-mimamsa (Pollock, 1993, p.105). But even here, especially with Kautilya and Manu, although the balance of power is weighted in the interests of the warrior and Brahmanical hegemonies respectively, there is resistance to the predilection toward a monolithic legal framework. Manu concedes that there may be different dharmas in different epochs - thus giving vent to the possibility of ethical relativism, or *athikara-bheda*, a suggestion much agonized over in the *Mahabharata* - while Kautilya explicitly urges the king to recognize and safeguard the different normative and customary rules governing the various *prajas* or peoples, who are citizens of his State. In other words, Kautilya is quite conscious of the diversity from ancient days of the Indian regions, or basic faith-locations, and accordingly allows for a degree of flexibility in matters of law and justice *(dharmasthiya)* (Kane, I, 1962, p.225; Bilimoria, 1998). Indeed, so as to check against the self-serving interests of the warrior or *kshatriya* bureaucrats and ministers, the king is duty-bound to attend in person each morning to individual pleas, complaints and petitions brought to the 'royal maiden' by grieved subjects who may themselves come from different castes and sub-regional groups, including women, the sick, aged and handicapped. When meting out justice, the king or the state is not in a position to *make* or enact laws; rather the sovereign court's jurisdiction is to negotiate between dharma, custom or settled community's moral practices (*vyavahara*), transactions or commercial and personal habits and written edicts (*sastras).* Thus the *Yajnavalkya-smrti* expects of the king the routine dispensation of justice *dharma-sastranusarena,* 'in conformity with *Dharma-sastras* (the texts of religion and law)', and not simply in the light of prevailing political exigencies or some abstract derivation of legal codes. A key term that occurs across the legal wisdom based on the (dharma-) *sastra* is *vyavahara*[4], connotating the functional context, diversity of usage, doubt, interpretation and procedure as established in

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[4]. Interestingly, the etymology of *vyavahara* given by Katyayana as: "*vi*, has the sense of many; *ava,* means doubt, *harana*, or removal is expressed by *hara;* by reason of the removal of several doubts,it is known as *vyavahara".* (Quoted under *Vyavaharadhyaya* in *Viramitrodaya* by Mitramisra in*Yajnavalkya-smrti*, 1938, p.635). If Hans-Georg Gadamer is right that (all) hermeneutics has its origin in jurisprudence, then this would be a decisive instance for it.

common practice or jurisprudence, and the outcomes thereof. (*Yajnavalkya-smrti* with *Mitakshara* I.1, 1938, p.635) The king may overrule the latter two sources of law and their means of dispensing justice, but he cannot put himself above dharma, in accordance with which all instances of disputes and contradictory judgements are to be decided. (*Manu* 3.1.40-44). This precept entails that the king maintains detailed codes of conduct and precedents and judges each case by its merit or otherwise in law (again, *dharma-sastranusarena)*, and he metes out punishments proportionate to the offence or violation of the codes, but not in whimsical excess.

It is worth dwelling on this aspect of the Brahmanical tradition as it registers both the concreteness, and paradoxically, the limits of the conception of law that the tradition is seen to be wedded to. We have commented on the concreteness in terms of the *vyavahara* engagement; however, the limitations of the *Dharma-sastra* rests squarely in respect of the authorial dominance of the two upper caste groups and the scriptural legitimacy etched out of the authority of the allegedly 'authorless', hence ahistorical and socially-disjuncted, Vedas *(Sruti)* and a smaller number of the derivative *Smrtis*. The hegemonic structure that would govern the descriptive and performative contours of the 'legal science', in which the king along with the Brahmanas (*vidvadbhih*) are to be well-versed, and *afortiori* its application in the public moral space is set to prefigure in the discourse of religion and law (in that order) which again is (made) the prerogative of the elite institutes of sovereign classes. This may seem like a circular process, but in fact it is more akin to an 'hermeneutic circle' wherein the part has no meaning were it not already presupposed in the whole (and vice versa). Further, as the society develops, certain kinds of discourses come to dominate, and other subject positions are marginalized in the process. Thus, the emphasis on learning and transmission of coded texts in accordance with a ritualized and sanctioned praxis in time may well eclipse local and particularist concerns even as the system strives towards achieving a more universal and readily assimilable ethos, which is what the successful infusion of ideology amounts to in any given culture. This is as true of the conception of religion as it is, of law; and the conception serves as its

rise, albeit the 'unthought' imperative, as the society inspired by Upanisadic or Vedantic unitary ideals moves towards a transcedentalized, *alaukika* or beyond-worldly, vision of nature, human nature and its *telos*.

To be sure, towards the end of the medieval period, or the early century of the Mughal invasion, viz., that by Mahmud of Ghazni, Laksmidhara among others, had moved toward totalizing conceptualizations of society, threatened as it was by alternative life-worlds (Pollock, 1993, p.106). The transcedentalized image of dharma as the utterly ahistorical, foundational principle represented in the *Vaidika* or *Arya* world view was recalled. With this comes in incipient textualization and therefore legitimation of the age-old hierarchy which marginalizes communities outside the "twice-born". The exclusions are based on implicit theorizations on the scope of dharma, increasingly nuanced with the "metalegal" exegesis of the Purva-mimamsa, which we mentioned earlier. But this did not become a pervasive characteristic of the Indian society in as much as central authority of law was far from being instituted in reality and in judicial practice, despite the theoretical intentionality.

Portuguese missionaries, and French papal legates working with the Jesuits in India, found the prodigious multitude of law and the absence of definitive rules on par with civil law and canon law of Europe a rather perplexing scenario. In a letter written in 1701 Father Bouchet, a papal legal cleric, commented at length on how Hindus have neither codes nor digests, nor do they have any books in which are written down the laws to which they have to conform, (Rocher, 1984, p.18). He further remarks that although the Hindus have elegant religious books and records of ancient wisdom, they do not follow the methods of these texts; rather, 'the equity of all their verdicts is entirely founded on a number of customs which they consider inviolable, and on certain usages which are handed down from father to son. They regard these usages as definite and infallible rules, to maintain peace in the family and to end the suits that arise, not only among private individuals, but also among royal princes. As soon as it has been shown that someone's claim is based on a

custom that is followed within the caste, and on common usage, that is enough. One does not reason about it, it is the rule and one has to conform to it'. (*ibid*, p. 18-19). It puzzled the cleric that custom adhered more closely to caste differentiations and stratification than a more reasoned homogenous rule of divine or other socially-transcending law. The illogical disjunctions lurking beneath customary assumptions and practices also did not cease to bemuse them. Bouchet gives a startling example of prevailing custom that does not permit intermarriage between children of two brothers (or of two sisters) but permits intermarriage between children of brother and sister. All attempts to show that the degree of relationship between these pairs of cousins is exactly the same, elicited no less a response than the bland ruling that "But this is the custom". However, the cleric does go on to report that occasionally the customs are committed to writing, or embossed in copper plates and preserved alongside records of other public deeds (land grants, gifts, and so on). And there are public instruments, such as well-informed judges, caste headman, and as a last resort the king's courts, for recollection of precedents and jurisprudence that are invoked for equity and against prejudices and greed of the local (village) judges. The Mughal rulers appeared to have strengthened this process. He also found that there existed a tradition of rather strict observances of dharmic and social virtues on the part of the judges, so that they can cultivate the requisite degree of detachment from the personal trappings of the case before them and exercise a high degree of objectivity, investigative wisdom, as well as balance or fair-mindedness and thoughtfulness in the interest of equity in their judgements. As all good French intellectuals, however, Bouchet was aware that equity is not something so easily reduced to law or to entitlement (rights), even though the two values are interrelated; little wonder then that the missionaries could not detect much concern for equity in custom, nor on the other hand, locate legal abstractions, canons, declarations (of entitlement, right and claims), or civil case-laws, registering the due processes for distributive justice or equity.

PART II: The Colonial 'Rule of Law'

I now intend to cut short this *dharma-mimamsa* and pre-colonial narrative, and move straight to the moment when the British arrived upon the scene. Upon setting foot in India circa 1772 the administrators of the East India Company were bewildered by the diversity of customary rules, norms and practices, moral judgments and differential treatments of misdemeanours, and vastly different understandings of issues related to marriage, succession, contract, severance, property and inheritance rights, and so on. They seemed specific to each micro community with a complex system of village-based juridical hearing courts or *panchayats*. Astounded at the absence of an overarching central authority or even *ecclesia* that would systematically enact and enforce laws, rules of conduct and social imperatives, and monitor unequivocal adherence to common law of the land which seemed all but elusive. They were further befuddled by the vastly different regional legal dispensation systems and group identity or community membership configurations as well as by the indigenous discretionary, seemingly rather flexible jurisprudential and interpretative schemes prevalent in different parts of the country (e.g. the Mitakshara would be different from the Deobargh in the East or Oudh elsewhere). The Enlightenment sensibilities and expectations were utterly defied and even the strongest indigenous notions registered very different referents vis-a-vis those derived from the Lockeian reworking of Natural Law into Common Law, in which the administrators happened to be better versed. (The very framework, incidentally, that in another potential colony in the antipodes permitted the English settlers to declare the land on which the nomadic native Aboriginal people had lived for many millennia cagily as *terra nullius,* "land not possessed", simply because the Aborigines were not seen to be tilling the land or investing the natural space with labour or productivity, necessary in Locke's terms for its instantiation to "property" status and rightful claims thereof.)

The Governor-General Warren Hastings observed that Indian people appeared to be governed by a system of law virtually unchanged 'from remotest antiquity'. Although, the pressing task of establishing a

viable economic base and political governance in a land where a heterogenous native "culture of law" that otherwise took care of all, calls for an operative regulatory authority and power divested not in the despot or in customary relativism. Rather this is to be secured in the "Rule of Law", with the declared clarity, certainty, and finality of statutes, "Black Letter Law" or the law books, legal and judicial agencies, bureaucracies, attendant personnel, attorneys, judges, law-enforcing (and -abiding) police, detectives, and so on. Happily however, there was a conduit or a transitional platform, as it were, which would help facilitate the transformation from the 'oriental despotism' and from chaotic moralism in its more arcane guise as ritual legalism, to the Common Law universality aspired to by the colonists.

It is clear, then, as Duncan J. Derrett among others, has pointed out, there was in 1772 no such thing as "Law" as understood in the West; the *Dharma-sastras* (much less the concept or regulative social-moral order of dharma) were not "Law" in this sense either. Derrett notes, "Prior to 1772, when the Bengal Presidency first undertook to administer law (as we understand 'law') to the natives, the *sastras* was not law as we understand that term. (Derrett, 1977, III, p.xvi)[5]. The administrators then were hard pressed either to find "Law" in the native tradition itself, or impose a legal framework, the machinery of Law, from outside the culture. They took the royal path, before turning to the tradition. But before any real work was done in the area, Hastings preempted the trajectory in his memorandum to the East India Company officials in these words, 'We have endeavoured to adapt our Regulations to the Manners and Understandings of the People, and the Exigencies of the Country, adhering as closely as we are able to their ancient uses and Institutions' (Cohn, 1985, p.289; in Metcalf, 1995, p.10, n.8).

One of the first steps was to separate out and codify judicial punishment from other kinds of sanctions (especially religious, and what we nowadays call civil codes or *Code Civil).* This supervened on the demarcation between public moral harm, or the potential thereof, and

[5]See also Galanter (1992).

private conduct. In theory, such a demarcation would warrant considerable debate and could hardly be achieved as an abstracted objective. But when we note that the legal paradigm within which the British were thinking, namely, English law, informed the process, it is not difficult to imagine how remarkably swiftly this feat would have been achieved. This resulted in a series of enactments passing Code of Civil Procedure (1859), the Penal Code (1860) and the Code of Criminal Procedure (1861). Since their jurisdiction covered public morality, the latter Codes were deemed to be uniform regardless of race, caste, religion, group membership and so on, notwithstanding cultural legitimations that such practices might have enjoyed under certain circumstances or perceived personal necessities, or inexplicable psychological dispositions (e.g. 'lunacy', 'attempted suicide' as felonies, issues I have discussed elsewhere for the epistemic offence implied in the enactment[6]). The Penal Codes have continued to remain on Indian statute books and echo little else but 18th century ideas of Common Law, with its resistance to local/traditional variety to the homogenizing effect of the modern legal discourse.

Soon enough however the colonial agencies learned that India also boasted an equally hoary tradition of *textual* law, prescriptive authority, normative catalogues, precedents, legal opinions and jurisprudential literature that dated back centuries. So they believed to have uncovered a legal reality closer to the English Common Law, which too was presumed to be of vintage and stable culture, and consistent with the 'dispositions' and 'habits' of the people whose lives it shaped, while reflecting at the same time changing 'habits' and 'usage' of the English people.(Metcalf, 1995, p.13). Still, the contrasts were striking. First, the British conception of Hindu law, as for example in William Jones' case, implied a timeless continuum on the part of Indians, and thus countenanced no sense of responsiveness either to more general historical change or to local, particularised 'usage'. In other words, Indian Law, if there was such a creature, was somehow fossilized in antiquity, though all the more commendable, for they promised to

[6]Bilimoria (1993, 1995).

provide the solid bedrock or simulacrum for the much-needed Indian Common Law.

Secondly, these invaluable and indispensable resources ranged over a vast terrain of the most difficult and obtuse texts, the *sastras,* barely accessible to the resident Englishmen, even with a modicum of Sanskrit under their belt. Hastings's curiosity-fueled promotion of the study of ancient texts and literary traditions of India led to the founding of the Asiatic Society of Bengal in 1784 under the presidency of William Jones. Aided by a battery of locally-recruited pandits and the new-found experts in indigenous sastric law, this venue provided a convenient base for scholarship, translations and transactions of a host of Sanskrit texts treating of legal matters to complement the 'legal accomplishment of a new system of government in Bengal' (Cf. Metcalf, 1995, p.11). Regardless of whether the *sastras* reflected grassroots practices beyond their simple or simplified codifications, it was the *sastras* that came to be prioritized as the pristine and authoritative sources of native law. This very privileging of the *sastras* on the model of the "Black Letter Law" over (and against) prevailing practices textualizes, or rather re-textualizes, an epistemological construction that was to bedevil colonial legal thinking over the course of its career. It began also to dawn on the legal administrators that an individual Indian is not a moral subject in his or her own but is moral subject by virtue of being of a member of a moral community, and more significantly, that there is more than one moral community of which he/she is a member. In other words, the expatriate administrators recognized that even the *sastras,* being the ethical texts of the Hindus, were not uniformly applicable across all the moral communities, especially the Muslims. (Without much discussion, Jains and Sikhs were included under Hindus). The Muslims had their own scriptural sources, although this would be harder to locate if not also diverse in nature. Nevertheless, the argument would be the same: heretofore, the *sastras* for the Hindus and the equivalent texts for the Muslims were to constitute the respective moral communities' sources of law. *Sastras* or comparable law books then became the highest authoritative bodies of textual law, and orthodox Brahmanical learning as the standard-bearer of Hindu law.

But the tension of negotiating and reconciling conflicts between customary practices and *sastric* or textual law with the pressures of incoming British Common Law motifs or the impersonal principles of Justice, Equity and Good Conscience remained endemic throughout the colonial period. An element of hybridization was unavoidable given the theoretical presuppositions of the textualization of Indian law. But it was soon recognized that the *sastras* formed only a part of the law and that in many matters Indians continued to be regulated by less formal bodies of customary law (Galanter, 1992, p.21). How could either in principle or in practice English law "supplant an already complex set of native rules"? Such questions were not far off the minds of the administrators. There was a presumption made that there must have existed fixed bodies of prescriptive codification in India- one for Hindus and one for Muslims (Metcalf, 1995, p.12). Pandits, 'professors' of Sanskrit, and maulvis were enlisted and urgently consulted in the courts and by legal agencies to inform them of patterns of Hindu and Muslim legal thinking, rules and ordinances, which would eventually achieve statutory codification or case law precedents, as well as extensive cataloguing as attempted in N B Halhed's *A Code of Gentoo Laws. The Ordination of the Pundits* (which though had appeared as early 1776). This led to the birth of the so-called Anglo-Hindu and Anglo-Muslim Law. It was mandatory for the courts to apply the law of the *sastra*: 'The statutes did not require that what was to be applied to Hindus should be *deemed* to be derived from the *sastra*; but that it should be so derived'.(Derrett, 1977, p. ix). Even after the help of the pandits were withdrawn from the courts after 1864, the courts, benched by British legal administrators, were expected to have complete judicial knowledge of Hindu law, which is a pathetically tall order, given that this constructed field under the imperial regime could hardly be thought to have achieved sufficient maturity in just over eighty years of its uneasy career. Besides, the Brahmanical Hinduism which the pandits stood for, was already prefigured in the texts and legal manuals they would transact from for the recovery and formulations of the so-called Anglo-Hindu Law.

On the Muslim front, a slow revival of Islamic heritage and moral codes was also under way, especially under the leadership of the 'ulama

of Deoband' in the second half of the 19th century. With the impending threat of Islam posed by British colonial sovereignty and the subsequent Christian missionary activity in the early 19th century, the utilization of the newly available printing presses by the reformist Muslim leaders of northern India was of significance. The presses were used to disseminate the injunctions of Shah 'Abdu'l-Aziz (d. 1824), the son and heir to Renewer Shah Waliu'llah of Delhi (d.1762), as an essential device for teaching the Sacred Law which was no longer being enforced in the law courts, being reformulated by the British India to the hybrid Anglo-Muhammadan or Anglo-Muslim Law. (B.Metcalf, 1982, pp.49-52). The movement was further activated by the *jihad* stance taken by Sayyid Ahamad Barelwi, the proclaimed Martyr (d. 1830), and in more liberal ways by Sayeed Ahmad Khan; new translations of and commentaries on the Qur'an were being issued, utilizing Urdu (which hitherto had remained an elite medium of communication among the upper echelons of both Hindu and Muslim bureaucrats and writers). This voice, at once informed and concerned, gradually blew the whistle on the corruption of Muslim *Shariat* in the Anglo-Muslim codes. Curiously, however, it is these very codification under the hybrid Anglo-Muslim law, that came eventually to pass as the basis of Muslim Law in India after Independence, which Muslim orthodoxy set out to defend, as we shall show later. But the seeds of this confused morality, as I am at pains to demonstrate, were sowed as far back as the mid-to-late 19th century in the colonial tinkering with the diverse tapestry of Indian legal and moral customs.

Duncan Derrett has provided perhaps one of the better accounts of how Indian law in the form of Anglo-Hindu and Anglo-Muslim laws came to be the body of *Personal Laws* that, along with statutory codifications (undertaken earlier by Lord Macauley), became vehicles for administering justice among the major competing moral communities. Each community of course understood claims to their respective distinct religious identities, indigenous traditions, ethical practices and framework for authentication which each had developed, tested and been served by over the past many centuries. The intent

seemed indeed very noble, as the following statement from the Privy Council in 1871 shows[7]:

> While Brahmin, Buddhist, Christian, Mohamedan , Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

However, the process has often been described as a disingenuous attempt on the part of British to wilfully transform, re-constitute with the intent to universalizing, Indian law so that it would more resemble or be consistent with Common Law. In this way it would not continue to be informed by the extant or traditional ethical practices and regulative imperatives of the disparate moral communities. In this respect the Anglo-Indian laws were, to use Derrett's compelling terms, products of a "bogus" enterprise, intellectual sediment of the imperial period, or as Gandhi would later adjudge, "egregious blunders" of the British in their interpretation of native law. (Derrett, 1977 p.vii ff.). Thus, 'Hindus and Muslims were made subject to the new judicially transformed Personal Laws. While intricate attention was afforded to questions of *sastric* antiquity and discoveries of indologists and pandits, there was deliberate and adaptive redactions, and weighted rather heavily towards *Dharma-sastras,* which often were themselves sources of conflict with customary practices'. As a number of writers have pointed out, textual law was elevated over customary law, and "Brahmanical scriptures" were falsely postulated as the "locus" - and prescriptive locus - of "what constitutes authentic cultural traditions (Cf. Pollock, 1993, p.99). But the re-

[7]Quoted by Derrett (1968), p.39; also cited in Larson (1995) with interesting discussion, p.219.

working and distortions of Indian law cut deeply across both *sastric* or textual and customary rules- of Hindus, Muslims and also Indian Christians, who had adopted major Hindu practices, such as caste ordering and inter-caste (endogamous/exogamous) rules.

Let me give an example or two of what I mean. *Sati* ("suttee", generally rendered as "burning of the widow") had been made illegal by 1829, (thanks to the sustained campaign by the Hindu reformist, Raja Rammohun Roy). When attempted suicide, which in most normal circumstance is a voluntary act, was made a criminal offense in 1860 (IPC S.309) (on the presumption that Indian attitude against suicide are well-known), forms of voluntary *sati* were also included as "voluntary culpable homicide", and would therefore count as a criminal act. But Hindus had never thought of *sati* as a 'voluntary' act, or for that matter as a crime, which therefore left open an area of ambiguity. What is this judgment of criminality or felony that comes to be thus attached to an act which to the enlightened Hindus' sensibility was simply the result of an undesirable superstition and culturally aberrant practice that violates women's right and dignity? Were one to show that a particular case of *sati* was not voluntary (as most were not, since the community's coercive expectations were already subtly coded in the martyrdom-like death of the widowed), would the judgment be mitigated - i.e. rendered offensive but not subject to criminal procedure? And if involuntary, who is to be the subject of the violation? Surely not the charred remains of the immolated widow! Could an entire community that bears apparently passive witness to this act be charged with an offense that remains basically undefined in substantive law? Conversely, it was not difficult, with this ambiguity and category mistake committed over a questionable cultural conduct by its codification (as Gayatri Spivak,[1988], among others have shown), the debate shifted on the appropriateness of sanctioned scared suicide (such as *jouhar*, voluntary mass-extermination, and fasting-to-death, a practice which Gandhi half-exploited in his *satyagraha* protests), precisely under the terms of this Penal Code. That is, under the rule of law there can be sanction for certain conducts which would otherwise be deemed criminal, and are therefore immune from punishment by the State - e.g. killing another

person in a war or in a defensive combat in the interest of God, country, self and another (as subjects of the State). Pandits who had earlier located classical texts that supported the British judgment of the inherent evil in the act, now rallied to show that there were indeed texts that also sanctioned the act under certain circumstances. Should this therefore not be a matter for jurisdiction under Anglo-Hindu or Personal Law?: some protagonists would or could in theory ask. So it was not so much that the debate silenced the victim of *sati* and foreclosed the question of agency as Lata Mani (1989) has argued - or perhaps that too, - but the degree of confusion, ambiguity and confounding of issues that heretofore benighted the whole problematic (Sharma and Bilimoria 1997). Once codified, its attempted decoding will exploit the same referents, and perhaps more successfully than if the act had stayed being viewed as a cultural artefact or a "moral fall-out" of a by-gone error and dealt with in these terms: for what is immoral does not always need a law, much less a criminal law, to regulate or proscribe it. The debate to this day has not recovered or gained firm grounds for a rational approach due to this epistemic blunder of historic (or histrionic?) proportions.

Let me give you another example. This concerns property rights and inheritance. The British were keen to set up a system of fiduciary if not feudal lordship under a privileged arrangement of landlords or zamindars, who would turn over the agrarian economy, ultimately to the benefit of the crown. To effect this, they simply took over the existing 'feudal patriarchal system', but became very concerned when women and widowed wives began to stake claims to inheritance, coparcenary shares under Hindu Mitakshara law and dispersal under customary laws and discretions under *sastric* law. The British colluded with Hindu patriarchy and found ways to restrict entitlements of women in this regard, and prevented, or where it suited them, abetted alienation of joint family property, beginning with enactments of Special Marriage Act of 1872, later revised under Hindu Marriage Act (raising marriageable age to 18 for males and 15 females, although the rights of persons under this age to have marriage solemnized by customary rites is not taken away), Child Marriage Restraint Act (1929) with their amendments (in 1938, 1949), Hindu Inheritance Act; Muslim Marriage Act and other codes

governing dissolution of marriage, adoption rights and inheritance therein extending to bigamy and polygamy (which the Penal Codes, of course, debarred, although Muslim men were later given exemption under Muslim Personal Law). (Incidentally, this exemption passed into Muslim Personal Law in the post-colonial era, and recently the Supreme Court exhorted the government to review this provision under Muslim Personal Law as Hindu men had been converting to Islam, or taking on Muslim names, so as to be able to marry a second wife without properly dissolving the former marriage[8].

Anyway, questions of maintenance of the estranged wife, which differed between Hindus, Muslims and others were also dealt with in those differential ways. So the 19th century witnessed a quasi-creative, even if patently false, re-interpretation of indigenous law in as much as the 'private parts' became enshrined under Personal Laws. Even with the enactment of the statutes, or one might argue perhaps by virtue of the enactment of the statutes, the restrictions in force that made the adaptation of Personal Law to Common Law difficult, were not removed; in most instances they were honoured.

PART III: Post-Independence Epiphany

What happens in the 20th century presents an even more ominous picture, to which I will now move.

With the advent of Independence, Indian national leaders were agonized over the status of Personal Laws. Many wanted to do away altogether with separate Personal Laws (Ambedkar being one of them, and Hindu nationalist leaders being opposed to a separate Hindu Codes Bill introduced by Nehru in 1948). However, the violent communal clashes in the lead up to the Independence and Gandhi's rapprochement gestures towards Muslims led to a deferral of the project. Intense debate and some of this century's profoundest constitutional and transformative moral discourse or "conversation" took place within the constitutional assembly (which included Sardar Patel, Munshi, Jawaharlal Nehru, Baba

[8] 'India West', California, May 19, 1995, pp.1,13.

Ambedkar, Rau, Gandhi's representatives and women too). Nehru surmised that circumstances were not propitious or favourable in that moment to radically adopt common civil law. Nevertheless, the framers of the Constitution struggled to balance the diversity in the people's customs, religions, moral systems and ethical mores, and on the other hand the secular impetus inscripted by the colonial administrators into the Indian legal mentality of both investing greater power in the State to control, intervene and to reform these laws. The latter would entail, if not whole scale statutory legislations then certainly a gradual move towards providing a uniform system of principles and codes that override or annul the practice of differential judgement, and privileging a citizen in one way or another, on the basis of religious identity or community membership and such other parochial or local allegiances. Indeed, this impetus foregrounds judicial initiative where the State appears to have defaulted in its Constitutional Directives, in more ways than it is apparent. For instance, in a recent case the Madras High Court upheld a woman's pleading under Hindu Mitakshara law for coparcener's share with the eldest son, as would be the case were the husband to be living, and consequentially forbid alienation of the land in her share. But in effect what the judges had done, as in earlier cases, was to adjudicate on the principle of equity, which, whatever else the motivation underlying the Mitakshara rule, was by no means universally part of the traditional *nyaya* or legal reasoning. The pretext is derived from customary law, but the reasoning is adduced from Common Law which informs the character or Bill of Rights (Derrett, 1977, III, pp.154-156).

It is worth examining the relevant portions of this charter which forms Part III of the Constitution setting out the Fundamental Rights of the citizen. Under this section, which has echoes of the V and XIV Amendments of the US Constitution, certain rights and principles are protected, significantly of equality, personal liberty and non-interference except under procedure established by law (Articles 14, 21), along with freedom to practice, profess and protect religion if one so chooses, (Articles 25-28). The Constitution also underscores equality of religions alongside freedom to practice one's faith, to establish and manage places

of worship, as well as the rights of minorities to conserve their culture, language and script and to establish educational institutions of their choice (Articles 29-30). The Muslim leaders in particular took these provisions as a positive cue to security towards their own community interests and asked the Constitutional Assembly for protection of their Personal Law. In the ensuing debate Ambedkar opposed this move arguing that there would be anarchy and a common system of judicature impossible if each community's Personal Law were to be protected (as though these were on par with the fundamental rights of the citizens which the State was obliged to respect).

As a corrective to the impression that Personal Law beyond provisional statutory status should gain protection of the Constitution, the Fundamental Rights was followed by a section entitled "Directive Principles of State Policy". The Directive Principle was intended as a signal to the State (not though a matter enforceable by the courts or under the purview of the judiciary) to apply these principles through legislature and governance of the country. The most relevant principle for our purposes is stated as follows:

" The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" (Article 44).

The founding members of the nation were more circumspect and left the matter in something of a limbo, but the programmatic for a uniform civil law hovered just above the collective horizon or in the newly chartered national conscience. In other words, the general consensus was that Personal Laws are fine (and only for the specific areas to which they apply, viz., largely in the area of family law which governs marriage, inheritance, succession, adoption, gifts, divorce, guardianship, and maintenance, but also in the area of the governance of religious institutions) so long as they work, and until as such time as the State can find effective ways of either ironing out the differences in customary practices or codify them under one system of the Rule of Law. The Hindu Code Bill of 1948 was the first of such endeavours to bring under codification that vast array of Hindu customs and rules

across the regions (revised in 1957), followed by several others dealing with succession, adoption, guardianship of minors, maintenance and so on. However, the Hindu Code Bill has not been the most successful example, as it picks up items from the earlier *sastras* and Anglo-Hindu law without transforming them in any substantive ways. Through technical loopholes in the Code Bill, a daughter can be still be given away much below the legal marriageable age (as the story of Phoolen Devi disarmingly reveals). Likewise, the persistence of the practice of dowry. Likewise also, with the case of a Muslim girl under the institution of the *nikah*.

The upshot of the unresolved quiddity in the 1950 adoption of the Constitution has meant that those whose identities can be located within one or the other denominational groupings would have their lives continued to be governed by the Personal Law of that community. This is a definitional matter (Sangari, 1994). Secondly, a Hindu is anyone who is not a Christian, Muslim, or perhaps a secular atheist. So Jains, Sikhs and Buddhists are governed by the dominant Hindu Personal Law. Exceptions are made in some areas, such as dissolution of marriage and other family issues which are governed by separate Personal Laws for Parsis and Christians, and by default or complete judicial silence, in respect of the Jaina customary practices of terminal fasting (*sallekhana)* and variant inheritance practice.

Thirdly, since Personal Law pertains to family, marriage, adoption and inheritance, etc. the subjects - real as against virtual - of these laws are mostly women and girls. In other words, a specific religious identity coupled with gender and community affiliation is what will ultimately determine and enforce the outcome. Religion, gender and community defines one's family interests and status.

Fourthly, the element of patriarchy is imbued heavily and inexorably in the structure of Personal Law, whether Hindu or Muslim. Indeed, most traditional systems were in the colonial period, indeed in the pre-colonial also, thoroughly patriarchal; and so feminists who in the 1960s and 1970s arguing for greater space for Personal Law found

themselves in an invidious position of supporting a patriarchal structure and interest (Sangari, 1994). Curiously, widows belonging to the Scheduled Tribes have rights of succession denied under the s.31 of the Hindu Succession Act of 1956 which repealed the Women's Right to Property Act, 1937, and the jurisdiction for the Scheduled Tribes is to be thrown back to the old Hindu law which does not provide the same rights to S.T. widows and female heirs as the 1937 Act had (A.I.R. 1985:59).

Thus, all four elements compound to articulate an ideologically imbued disequilibrium weighted against the common denominator of gender, regardless of whether it is the Hindu or the Muslim Personal Law that is at issue. And this has been the brunt of Indian feminist critique and of sociological commentary alike in the post-Independence era in particular. There is a curious ambivalence in the Constitution of India which has found echoes in just about every major case falling under this purview or jurisdiction that has presented itself to the courts and due judicial processes. This judicial equivocation hermetically echoing that of the Constitution has in turn been exploited by the respective moral communities to further or secure their own ends as it has been perceived to serve them best, towards more orthodox rather than liberal reform inclinations. When this route has failed, they would move the parliament or State to intervene on their behalf to safeguard their interests in terms of the Constitutional rights to freedom of conscience, religious observance and practice which the communities have found to their great delight enshrined in the Fundamental Rights charter (Articles 13, 25-28). But, as already noted, this specific right also clashes with and is seen to be inconsistent with the significant Articles of the Constitution which guarantees equality, including sex-equality, to everyone, and prohibiting all forms of discrimination based on sex (or gender, in its more inclusive sense). Yet discriminatory practices continue, not least under existing Personal Laws, and the State is an accomplice in this matter either by dint of its own uneven treatment of women or its failure to institute wide-spread reforms in all areas of public and private life, moral and religious spaces, where such practices or repetitions continue to oppress women and other groups of

individuals. And this inconsistent approach is also contrary to the spirit of the Constitution which, as we observed a little earlier, in its directive clauses urges the State to instigate such reforms. As we have also noted, while attempts have been made to reform Hindu Personal Law to bring it in line with the recognized equality of legal rights for Hindu women (certain lacunas and still worrying lapses notwithstanding), the Personal Laws of other communities, as Archana Parashar (1992 p.18) has rightly pointed out, 'have been virtually untouched, ostensibly because the leaders of these communities claim their religious laws are inviolate and also because there is said to be no demand for change from within their communities'. She continues, 'That the Constitution is ambiguous about the nature of religious personal laws is indicated by the fact that arguments in favour of their reform as well as those against any reform are both based on the provisions of the Constitution. ... The Constitution does not resolve the difficult questions as to whether the religious nature of these laws prevent a secular State from interfering with them or whether the personal nature of these laws as distinct from territorial laws makes them immune to State control. Such ambiguity in the Constitution permits contradictory claims and permits the State to act discrepantly with respect to essentially similar claims of different communities' (*Ibid*, p.19). Thus the situation at the present time augurs ill for women both of minority groups, as they continue to be denied equal legal rights, and majority community groups, as they have yet to gain formal equality in all aspects of Personal Law governing their every-day life.

There are several case-studies one can appeal to so as to demonstrate this quiddity, and we shall do so with reference to perhaps the landmark case in the area of Personal Law of this century. But before that perhaps it is apposite to comment on the State's attitude toward religion reflected both in its commitment to secularity (which in the Indian context is not altogether divorced from some religious overtones) and to the achievement of equality to everyone, regardless of religious and community membership, sex and age or maturity, and so on. The State indeed recognizes the crucial importance of religion in the lives of the majority of its citizens, and it strives to foster a spirit of equality or a sort of 'communal ecumenism' between and among the

disparate, often mutually suspicious (at least since the colonial period), moral communities which are also by virtue of the peculiarity of Indian census categorization 'religious' communities, in particular between Hindus and Muslims, but also between upper caste groups and lower or non-caste groups alike (such as Scheduled Castes and Tribes Other Backward Castes, and so on). But at the same time the State treats religion or deep religious allegiance which marks these moral communities (and divide them along communal lines) with some suspicions if not also as an emergent rival to its own power base; and as with the Hobbesian law of the jungle, all rivals are dealt with a degree of apprehension, caution and calculated but not callous and unguarded challenge.

This trope might itself be traced back to the nationalist ideology, which offered as one of its solutions against continuing colonial domination the separation of the domain of culture into two spheres - the material and the spiritual, which is analogous to the dichotomy of the outer and the inner. Since the former, i.e. the material, was located in Western civilization, its antithesis, the spiritual, for the purposes of a persuasive strategy of resistance, had to be located in the colonized people, who would learn from the West in organizing their material life to the optimum but would internalize, or 'privatize' the spiritual life away from the public space (Chatterjee, 1989, 238). Ultimately what is important in terms of a sustainable identity and redemptive recovery of culture is the spiritual domain, and since this is differently marked for the distinctive ethnic, communal groups - indeed the 'imagined communities' of Hindus, Muslims, Parsis, Christians, Sikhs, Buddhists, Jains, Tribal and Backward Castes peoples - a respect for this diversity is essential for "India that is Bharat". Certain social practices of greater spiritual, i.e. inner, significance, are better preserved and fostered under the provisions of Personal Law than if these were to be kept under the Common Law, civil codes and criminal procedures (Penal Codes). The sensibilities of women, who tend to veer closely to the introverted, domestic domain being also the *spiritual* heads of the household, are more likely to be catered for under Personal Law provisions. Hence, all such thinking, imaginary moves, confused and ambiguous identity

politics, tended to support upholding an inner core of religion in the life of the nation-state, lest the fledgling India would become a bland, soul-less materialistic, technocratic State against which stand the testimonies of Krishna, Rama, the Buddha, and the pantheon of national leaders down to Gandhi, whose own contributions to the wielding of this particular nationalist ideology cannot be underestimated.

In the latter half of the 20th century as we move to the dawning of the twenty-first century, the situation is exacerbated somewhat with the rise in popularity of religious fundamentalism, whether this be Hindu, Muslim, Christian, or Parsee. Nationalism, too, again as a cause that pitted itself against the colonial regime or imperialism of the expatriate for close to a century, had used religion as a powerful ally and source of legitimation for its activism. After Independence was gained, however, the national leaders opted to challenge the sway of religious sentiments over human affairs and did not seek to legitimate its programmatic through the ruse of religion or tradition. (Cf Baird, 1978; Bilimoria, 1993). Thus, as is very aptly put by Parashar, 'although religion continues to be potent source of ideals and rules for social interaction, of personal and communal comfort in times of hardship, and gives meaning to the lives of the majority of people, the Constitution makers opted for declaring India as a secular State. The imperatives of present day society too, demanded that the Constitution rather than religion provide the governing ideology of the State' (Parashar, 1992, p. 269). And so too with the instruments of the State, notably the legislature, judiciary, bureaucracy, State educational institutions, and various other functioning or governing bodies right down to the *panchayats* and *adalats* at the village level. It was in keeping with this imperative that the courts have on more than one occasion ordered religious bodies to open the doors of its temples to members of the lower caste and other hitherto debarred groups as well. But paradoxically, the State has also legislated to permit religious organizations to govern their own affairs without interference from local bodies, taxation offices, and other actuary bodies concerned about the civil legality of the structures under which such organizations have claimed exemption and immunity from public accountability. The permission by the Uttar Pradesh government to the Hindu zealots to plan

and erect a platform (or a quasi-shrine to Lord Rama) for the throngs of pilgrims trickling into Ayodhya to pay homage to the alleged birth-place of Rama, in the proximity of the controversial Babri (Muslim) mosque, is a case in point. Even after the Central government was informed of the real and insidiously political motive undergirding this act, and implored to intervene by non-aligned activist groups, followed by directive notices from the judiciary to the respective governments to show cause for its apparently partisan stance (in the case of the State government dominated by Hindutva groups) and the concomitant neglect (by both State and Central governments) in controlling the escalating tension in the disputes, outbreak of skirmishes, and potential violence at the very site of contestation between the communally-riven factions, no actions were forthcoming. (Rajiv Dhavan, 1993). The upshot was that the Hindu zealots were able to orchestrate and successfully, indeed triumphantly, carry out a well-planned destruction of the Babri mosque without so much as a shy of demur from the State or its representatives, until it was all too late.

PART IV: The Landmark Shah Bano Case and After

The test case involving Personal Law in respect of the legal rights of women and the power of orthodoxy closer to our time was borne out in the now famous, or infamous, Shah Bano case. This case also highlights many of the contradictions and dilemmas we have been exploring here. At the time of hearing, Shah Bano is a 73-year old Muslim woman, who is driven out of her home by the triple *Talaq* pronouncement issued by her husband after forty years of marriage. Grieved and penniless, she brought a petition for maintenance from her husband under section 125 of the *Criminal Procedure Code (CPC)*[9]. However, according to Muslim Personal Law she was entitled to maintenance only for the period of *Iddat*, that is, for three months following divorce. At the lower court she was awarded twenty-five rupees a month. On appeal, the High Court awarded Shah Bano maintenance of Rs. 179.20 per month. The husband moved a petition in the Supreme Court (the apex bench) against

[9] *Mohammed Ahmed Khan v. Shah Bano Begum*, A.I.R. July 1985, Vol.72, S945.

this award. Shah Bano had the backing of a Muslim Women's Welfare Association and several other activist groups eager to see reform in this particular area. The husband's consul invoked the Muslim Personal Law, and especially the *Iddat*, the cooling-off period, for the limited term of maintenance which he claimed to have fulfilled. Why should this matter be adjudged under the CPC? Surely, this is a limited civic matter, or an affair confined to the 'private' or 'personal' space, and therefore it comes under the purview and jurisdiction of civil codes governing the respective moral community, so argued the appellant's side. However, the Supreme Court dismissed the husband's appeal, and upheld the High Court's judgment that the CPC was applicable where Personal Law failed to make adequate provisions. Technically, the court was not suggesting that civil codes do not apply *simpliciter* to the case, as would be in order if, say, the case involved corporate theft or wilful injury to another person. It was arguing that the applicable civil codes, which in this case properly belong to the principles of Personal Law governing the 'dispositions' of the parties in dispute, have been deemed to have failed to provide the redress appropriate to the context being sought. And, one can only suppose that, in the absence of a governing common civil codes for all citizens right across the board, or the communal-caste divide, there was no other recourse but to prevail on statutory criminal codes (Penal or otherwise) to determine and obtain justice in the matter. The ensuing deliberations of the Supreme Court bench is instructive in this regard as the carefully articulated reasoning adds immensely to the on-going debate on the status of Personal Law. Indeed, the deliberations caused no small ruffle in certain sectors of the society.

In an interesting twist to the case, and much to the chagrin of the appellant, the Supreme Court interpreted the Muslim Personal Law injunction to mean that the position would be true only if the estranged wife was able to maintain herself, but not true if she was not able to maintain herself. The apex bench here felt it legitimate to extend its deliberations to an interpretation of the scriptural sources of Muslim Personal Law, including the Hanifi, *Shariat Act of* 1937, Hadith, the Qur'an, in regard to the different circumstances of dissolution that were recognized. The judgement underlined the following concerns:

* A destitute wife's claim to maintenance after divorce is a *moral* claim, not a religious claim; it is governed by the *Code of Criminal Procedure (CPC)*, and not by the Civil Laws that govern the rights and obligations of the parties belonging to particular religions, like the *Hindu Adoption and Maintenance Act*, , the *Shariat Act* 1937 or the *Parsi Matrimonial Act*

* Neglect of a spouse's need cannot be denied in law. What difference does religious affiliation make here?

In any event, the judges conceded that the Personal Law of the parties should not be supplanted, especially if the Constitution did protect interests of such religious groups or classes in certain restricted matters. In other words, the court was neither arguing for abolishing Personal Law (i.e., setting aside Personal Law matter pertaining to family and private space) nor the extension of uniform civil codes in this particular matter (which, in any case, the judiciary is not empowered to do under the Directive Principles). What the court was arguing for was simply a deliberative and transformative interpretation of a customary practice which would be consistent with current ethical and moral thinking, and it would also respect certain other provisions and rights made accessible to the citizen in the Constitution (especially in respect of the Articles in Fundamental (Bill of) Rights). Just as the courts are obliged to "interpret" the Constitutions (although some judges in the U.S. reject this judicial " intervention"), the courts should be able to interpret Personal Law as well.

But this latter claim - which implied that the court could place itself in the boots of the clergy, the 'ulama' (Ulema) and interpret the Islamic scriptural sources, sent an unsavoury signal to the Muslim community, or some quarters thereof. The All India Muslim Personal Law Board along with the Ulema could not countenance the secular court's temerity to pronounce on the intent of the Holy Book against the verdict of the Hadith and judgement of the community elders. The court had clearly stepped on the sensitive toes of an already beleaguered moral community. And as Ratna Kapur remarks, "Shah Bano's attempt to

assert that the traditions of her religion discriminated against her, and thus violated her gift to gender equality guaranteed by the Constitution, met with outcries of 'religion in danger'" (1997, p.65). Although the court vindicated Shah Bano's right, she was effectively forced to back down by her own community, which seemed to exert an extraordinary influence upon her to give up her claim. In the ensuing debates, Shah Bano denounced the Supreme Court decision in a letter[10], pointing out that the SC judgement was contrary to the injunctions of the Qur'an and Hadith and was thus tantamount to an *obiter dicta* or an unnecessary interference in the dictates of Muslim Personal Law.

The Legislature, then under Prime Minister Rajiv Gandhi; while originally committed to such transformative moves as per the Nehruvian legacy, intervened in the matter and responded favourably to the Muslim fraternity's outcry against intervention in the affairs of the religious community. An independent member of Parliament, a Muslim, introduced a bill to save Muslim Personal Law, at least on this particular issue. Having reserved its position, the Parliament passed the bill in May 1986. Thus *The Muslim Women (Protection of Rights in Divorce) Act* effectively struck down the Supreme Court's judgement, reinstating the legitimacy of the Personal Law under the *Shariat Act*, 1937. It decreed that section 125 of the CPC does not apply to the divorced Muslim women. Her former husband is only obliged to return the *mehr* (dowry, or marriage settlement) and pay her maintenance during the period of *Iddat*. The *Muslim Woman's Act* has been challenged as violating the right to gender equality, and is still pending for consideration by the Supreme Court (Kapur, 1997, p.60).

With that also went into abeyance the very astute observation registering a *telos*, indeed a long-anticipated signal to the Legislature, to institute the requirements of the Directive Principles.

But the judgment in question had also flagged off another important move, namely, that the Muslim community should assume the onus and

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[10]Ratna Kapur (1997), p.60 note 3, letter cited on p.79.

responsibility of transforming from within their own fold Muslim Personal Law, and not have reforms imposed from without. This is a salutary gesture, which some activists, academics and NGO groups have heeded to. Imtiaz Ahmed, for instance, has been organizing large consultative "meets" of Muslim folks to discuss and rationally deliberate on the virtues and vices of the Muslim Personal Law. The "meets" have had some success. The prominent Muslim commentator, Asghar Ali Engineer has made similar pleas, although he is wary of any wholesale attempt to introduce or enforce uniform civil codes anxious that such a move would, a) undermine the historically attested pluralist base of the Indian society, and b) privilege the legal process over community development of practice in accordance with evolving values and changing perceptions of the social members concerned. (Engineer, 1995). However, there is also the stronger countervailing tendency in some quarters of the Muslim Community. This reaction calls for a complete and total protection of Muslim Personal Law with its own *Shariat* courts so that matters arising from and concerning Muslim Personal Law are not left to the judgment or at the behest of secular courts and agencies of the State. In other words, they demand *Shariat* law courts of their own, just as Muslims enjoy these in theocratic Muslim states, in Pakistan, Iran, and elsewhere.

The counterblasts to these two trends, and against the federal government's soft-peddling in this contentious area which now spills into the public space, comes from Hindu groups who vehemently decry any kind of protection afforded to Muslims under Personal Law and they urge for uniform civil codes. The government of the state of Maharashtra recently declared that it will introduce uniform civil codes. (Engineer, 1995). Apparently, a draft bill of the uniform civil codes looks rather more 'secular' in intent than one might have suspected; it may even be an advance on the traumatized Hindu Code Bill. There are some Muslims, of rank and file, who, it is reported, have given their approval to the new codes as being acceptable for the Muslim community (i.e. good enough to replace without much difficulty the fiercely defended Muslim Personal Law). However, notwithstanding Article 44 of the Constitution, the federal government has not responded favourably and

judges in the Mumbai High Court have expressed grave concerns about this move. And there are other concerns which a number of groups have expressed, and these echo the concerns by Ali Asghar Engineer which we noted a little earlier. Basically, those critical of the Maharashtra government's efforts argue that the operation should not assume that uniform civil codes can be arrived at by waving the magic wand of one party, groups or government or political agency (as would seem to be the case in this instance). A system of ethical practices informed by religious predilections of the diverse peoples of the land has indeed a far longer history than of the political-judiciary processes in a place. Such a system, unless it is inexorably evil in all its parts and for all its subjects, cannot be struck down *tout court* by an act that comes essentially from outside of its own framework. In tolerant, democratic politics, transformations have to be sought through discourse, i.e. moral discourse, which ironically is the defining characteristic of a pluralist society, which India undeniably is. Hence for total human flourishing, which should be the goal of any society, "a deliberative, transformative politics (as distinct from a politics that is merely manipulative and self-serving) - a politics in which questions of human good, of what way or ways of life human good consists in, are not marginalized or privatized but, instead , [must] have a central place" (M. Perry, 1990, p.103). Otherwise, one would be returning to or recalling the universalizing tendencies that plagued the earlier colonial/orientalist attempt infuse Indian Law with Common Law. Or, to use a metaphor, it would be like insisting on a moral theory "that looks characteristically for considerations that are very general and have as little distinctive content as possible, because it is trying to systematize and because it wants to represent as many reasons as possible as applications of other reasons" (Williams, 1985, p.117). A moral community, unlike a theory, is not a finished product: it is growing and open and may even be interested in evolving in different ways. Shared critical reflections, would seem to be the need of the day.

Another sort of plea comes from feminist positions articulated most cogently by Kumkum Sangari (1994). It begins by trenchantly subjecting

the Personal Law system to meta-theoretic scrutiny. The following is a condensed argument from Sangari:

(i) If there is to be real diversity in India, why is it made to rest only in the area of family law qua Personal Law? Large areas of social life has been homogenized - tenancy, landholding, criminal procedures, commerce, and so on.

(ii) Why does the State privilege diversity only in the supposedly private areas when they do impinge on public space - as family, marriage, adoption, inheritance, surely do?

(iii) Religion is put in the domain of the private and shifts the onus of maintaining community identity in matters like marriage, family, women - which raises the question: the bracketing of marriage and so on to Personal Law produces a gendered definition of Personal Law that oppresses women more than it oppresses men; relatedly,

(iv) the categorization of Personal Law in a religious frame acts to fossilize both Personal Law and Hindu Code Bill for the view of religion used is an immutable one and inexorable, more or less, in its application to all citizens. This belies the history of religion. Denominational affiliation determines which group one belongs to before deciding which Personal Law applies to her.

The latter is an incredibly constraining concept for effective operation of Personal Law, for consider what would happen if Personal Law itself as a category was altered? E.g. if inheritance and issues of property-relations were taken out of family law and the aligned continuum of religion, and concepts such as denomination, personal, community, family, inheritance, marriage, etc, were broken down and given new definitions, so that some of these no longer were perceived to be matters of Personal Law as we currently have it (or inherited it in the form given under colonial sovereignty)?

It can be surmised that religion becomes the primary determinant of primordial community identity rather than caste, class, region, and economic operators, with the effect that injustices in these areas have no protection, or are of less of a concern than those secured under Personal Law.

Should therefore there not be a cause or a prima facie case for moving towards uniform civil codes while doing away with Personal Law and the idea of community-citizenship (Cf. Larson, 1995)?

I want to make two quick response to Kumkum Sangari's questions, as I think there are presuppositions that recall too great a confidence in Enlightenment-universalism. Firstly, how *effectively* homogenized are Indian laws? There is surely a great deal of variation from state to state on even penal matters (via case law and jurisprudential precedents: the rulings on suicide between Bombay and Andhra courts brought that out). Local practices do interfere or intervene to change outcomes often in unexpected ways. Add to this the differential practices and policies adopted, over time and in different states, on the reservation, special allocation and provisions for Scheduled Castes / Scheduled Tribes and OBCs, and how these impinge on minority identities, religious included. (The Succession Act was already referred to). Those very laws we take to be uniform (within the nation-state) do not cash out in quite that way in the different regions, which accounts for different kinds and degrees of oppression of women, caste and non-caste groups from state to state, and perhaps also in part contributes to the emigration of vast numbers of people, Bahias for example, from Bihar towards the west.

Secondly, the so-called personal matters covered under Personal Law, especially family issues, may be in a *value-based moral* sense of far greater importance and significance than some of the other civil transactions negotiable in the public space. These values, for a number of reasons, may not be as negotiable and malleable in the perceptions of the people concerned as those other matters Kumkum Sangari is referring to. The sources for these may well be derived from religion, but religion might be the foregrounding constituents of values and

ensuring practices which cannot be set aside in the interest of a pragmatic or expedient and instrumentalist political re-structuring of the society.

From this a third question follows: when we talk about changing the categories and working up new definitions of family, marriage, contract, and so on, what authority are we invoking and what language is going to be the basis of these re-definitions and so on? Leela Gandhi made this point in her response to Kumkum Sangari (1994) and I accept this Gandhian query: it is a serious one. Are the history, aesthetics, socio-moral significance of religion which informed these categories now to be replaced by arid sociological contents, or Marxist, or by categories from secularist discursive formations which themselves leave open the same set of questions as one wishes to ask of the former formations and epistemes. These are hard questions, they are in this sense subaltern, and we cannot afford to wash under other seemingly more "contemporary" or post-modern or post-colonial or whatever other questions that might haunt us at this crisis point in Indian history and historiography.

However, proponent of this position, i.e. Kumkum Sangari's critical position, while they convincingly point to the problems that reek through the system of maintaining distinct Personal Law, are far from arguing that the customary rules should be codified and all the codes should be unified under a secular rule of law or an ethos that no longer makes reference to traditional morality, etc. At best, as we urged earlier, the matter requires further deliberations and consultations intra- and inter-communities affected by the practice. Simply achieving uniform civil codes pushed through a legislature, or on the other hand a moral community stubbornly holding on to its Personal Law regardless of the defects and issues of social justice, inequities that come increasingly to light in the public sphere and in ethical discourse, are both *cul-de-sacs* and in the long run cannot hope to serve the goal of human flourishing. I should like to leave you with these philosophical reflections.

SUMMATION AND CONCLUSION

Under British administration (East India Company) and sovereignty (British Charter for India), the Westminster and Common Law models were being introduced. However, the erstwhile diversity of customs, culturally-rooted practices of jurisprudence, the existence of vastly different regional legal dispensation systems and group identity or community membership configurations, rendered the imported "Rule of Law" almost unworkable. The British, in consultation with indigenous legal mentality, devised the so-called Anglo-Hindu and Anglo-Muslim Laws, plus separate Personal Laws for Indian Christians and Parsees as well. Although these governed a narrower area of personal or "private" community conduct - pertaining to family law, marriage, inheritance, kinship, adoption, succession, collective property title, and so on, they nevertheless had specific implications for thinking on issues of citizenship, rights and obligations (including the duty of the State towards its citizens within varying social and cultural contexts). *Prima facie*, this made room for inequality and preferential treatment depending on which community membership a 'subject of the state' identifies herself or himself by and under which particular Personal Law process her or his case is tried or judged. Hindu patriarchy attempted to legitimate *Sati* ("Suttee"), or widow self-sacrifice, under traditional Hindu dharma or religious law, while Muslim men petitioned for recognition of polygamy under Islamic law. But there were positive demands also, such as blocking alienation of land by individual claimants to what is otherwise a collective or clan title, rightful inheritance of property and share for the widow, easing of divorce provisions and maintenance for the estranged wife, the right to practice one's own faith and maintain places of worship, and equitable representation in councils, local and provincial governments, and so on.

Through stages of consultative communities and imperial conferences towards Home Rule, Dominion Status, later Self-governance and Independence, the question of the citizenship status of the Indian, who until Independence is also a *bona fide* British subject but who may also have a dual identity in terms of religious cultural or social

(caste/ outcaste-based) membership, is debated. Either there is a uniform system of rights and there is no need to guarantee social and cultural rights for everyone. But the obverse side of this unilateral thinking would mean the perpetuation of the unequal social conditions and cultural difference which mark, to a large extent, the difference between the moral communities in terms of available opportunities, prospects for advancement and access to resources for development. A measure of positive discrimination and recognition of social immobility and "glass ceilings" on account of one's social status, gender, religion, and caste-identity, was necessary to deal adequately with the contradictions between group dis-entitlements and individual rights. The framers of the Constitution in the aftermath of the bitter and bloody struggle between Hindus and Muslims (with Sikhs suffering as their buffers), were torn between giving universal assent to equality of rights and the recognition that this in itself does not necessarily produce an equitable society especially if traditional customs, system of hieratic privileges, laws, social conditions, and enshrined "indigenist" or community laws, divide them communally and secure differential treatment overall. What model of democracy and citizenship would be appropriate for the decided plurality of the South Asian Society? (Similar questions plagued the newly-founded Pakistan and independent Ceylon or Sri Lanka).

So especially under British sovereign rule, and within the growing communal divisions, the problematic of the role and rights of the 'subject' became rather acute, which resulted in the discourse of citizenship and fundamental rights. Under the latter process ironically there occurred also a revival of traditional notions of citizenship which challenged 18th-19th centuries British models, intermingled with subjugation, Orientalism and Occidentalism. The modalities of the debate spilled into the wider negotiations led variously by Annie Besant, Chelmsford, Motilal Nehru and Mohd. Ali Jonah for the All India Muslim League. The interventions of the nationalist struggle and 'Quit India' movement exacerbated the communal tensions which created further wedges between the moral communities for whom "universal rights" and citizenship were being mapped out for the projected

constitution and trajectory of establishing a "secular" democratic republic. There are resonances here for any "multicultural society" such as Australia and Canada on the broader issues of rights and citizenship.

More particularly, the Directive Principles in the Constitution (which follows on from its Bill of Rights known as Fundamental Rights) urges the State to move towards uniform civil codes. This call resurfaced more recently in the wake of the historic judgement in the Shah Bano case, culminating in the intervention of the legislature towards protecting Muslim Personal Law *(Shariat Act)* in this matter.

This case is highly illuminative and our review here of the religious, legal and critical literature by commentators, feminists and other writers, including the pronouncements of the judges of the apex bench, has shown that there appear to be certain basic dilemmas and contradictions which are not likely to be resolved as swiftly as the wave of a 'magic wand' would achieve it. There are positive elements to be discerned in arguments against retaining separate Personal Laws, especially in respect of gender justice and equity, as the Shah Bano case highlighted. Given also that the Hindu Codes Bill has all but moved Hindu jurisdiction closer to common civil law codes in keeping with the secular ethos of the constitutional system, there is very little convincing reason, other than appeal to 'minority' security, to continue Personal Laws for other communities. A more persuasive case is made by women critics such as Kumkum Sangari that matters affecting and pertaining to family affairs should be moved into those codes governing other conducts, affairs and misdeeds in society. In other words, a greater degree of homogeneity across the codes governing the affairs of citizens is called for. However, there are also drawbacks in moving in this direction, not least the threat to the pluralist and heterogenous basis of Indian society, the erosion historically grounded narrative ethic of particular community, and yet uncharted future-directed telos each of these communities might wish to work out (rather than be drawn into a 'one nation-state' telos or other kinds of uniform nationalism, the great civic wash, and do on, charting the determinant or emergent map for the community). There are merits on both sides, and on the margins too, of the arguments. Our position is

that no community has any obligation to continue everything the predecessor generation, although we are obliged to value them; and it is the responsibility of each generation to think seriously on the values and dispositions it would wish to perpetuate for posterity, i.e. for communities in the future. This latter trajectory also requires that the community considers what is most reasonable to preserve and pass on in terms of current moral and ethical thinking and criticisms of its, or of similar, community interests and commitments. If it appears rational to change certain commitments, then this is an obligation that cannot be dismissed lightly. Judging on this basis, it would seem that in the interest of equity, fair education, justice and continuing of not enhanced opportunities for members of each of the disparate moral communities in question, and informed and well-thought thorough reform of Personal Law codes is necessary and perhaps even pressing in the case of Muslim Personal Law given its current anomalies and questionable record on gender issues in particular.

In the context, then, of the history and politics of British India and a communally-riven modern India, and debates within the Commonwealth on the pro's and con's of the autonomy of cultural rights, as also indigenous challenges to modernist models of Lockean-derived individualist claims over native property rights and other customary practices, the significance of this project cannot be more emphatically underscored. It provides one framework within which to reflect on several issues facing a modern nation-state with pluralist or multicultural face.

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