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PULLING THE WOOL: THE INDIRECT REFORM OF RELIGIOUS FAMILY

LAWS IN INDIA

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Religion-based personal laws in the postcolonial Indian state have been the site of a virulent contest between minority rights on the one hand, and gender and child rights on the other. While enshrining a Uniform Civil Code as a constitutional aspiration, India continued the colonial policy of non-intervention in family laws of distinct religious communities, which grant an unequal status to women and children. However, the February 2014 decision of the Supreme Court in Shabnam Hashmi v. Union of India and Ors., symptomises a re-imagination of the project of ‘modernising’ family laws. While overruling Muslim personal law, this decision upheld the right of Muslim individuals to adopt and be adopted under the secular Juvenile Justice Act. This paper sheds light on this innovation of Indian policy, which sidesteps the landmines that are the religious family laws (RFL), and instead focuses on mandatory secular laws (e.g. Protection of Women from Domestic Violence Act, Prohibition of Child Marriage Act, welfare of the child principle) and “opt-in” provisions (e.g. Juvenile Justice Act), to obliquely secure the rights of women and children within families. This paper places this approach in a critical perspective, and argues that while RFL are correctly no longer the sole authorities on rights of women and children within the ‘private sphere’, the need for their reform is still not obviated. In doing so, the paper problematises the historical legitimization of the call of minority communities to exclude intervention of the State from RFL in the first generation of reforms post-Independence, and the entrenchment of family laws in religious silos through the second generation of reforms from the 1980s onwards. These in turn founded the ideological and strategic limitations of the current policy of “indirect reforms”, by cultivating a resistance to the elimination of patriarchal and patrilineal hierarchies within families. In conclusion, while the current model innovates a nuanced strategy of balancing minority rights with gender and child rights, India still needs to envision a fourth generation of reforms that make the religious governance of family laws child- and gender-just.

I. INTRODUCTION

Does the secular law on adoption also apply to Muslims? The question before the Supreme Court of India in *Shabnam Hashmi v. Union of India and ors.*,¹ was whether Muslims could adopt, and be adopted, under the Juvenile Justice Act, 2000 [JJ Act], when Muslim Personal Law [MPL] does not permit adoption, but only limited

¹ Writ Petition (Civil) No.470 of 2005, Supreme Court of India, hereinafter *Shabnam Hashmi*.

guardianship under the *kafala* system. The JJ Act, a comprehensive legislation providing for the welfare, protection and rehabilitation of juvenile delinquents and children in need of care, empowers some civil courts to give children in adoption. While the JJ Act makes no distinction between the religion or gender of the adoptive parent(s) or the child, the All India Muslim Personal Law Board [AIMPLB] contended that the provisions were in conflict with the *shariat*, and therefore should be read to exclude Muslims.²

Close to thirty years ago, the Supreme Court had faced a similar dilemma. Does the secular law on maintenance also apply to Muslims? Then, the Supreme Court had to decide the application for maintenance of an old and destitute Muslim woman, divorced by her husband. S.125, Code of Criminal Procedure [CrPC] cast an obligation upon an ex-husband to provide maintenance to the ex-wife until her remarriage or death, even though his obligation under MPL was limited to providing maintenance only during the three-month *iddat* period. This was the controversial *Shah Bano* decision,³ which culminated in the kind of State intervention that left an indelible mark on the fate of religion-based personal laws [RPL] in India.

In both decisions, the Supreme Court decided that secular welfare provisions would operate irrespective of the RPL of distinct communities. In this manner, they secured the interests of women and children governed by patriarchal family norms, under which they have scant means of support outside the family set up, and also face a high degree of discrimination within. Both decisions also required the Supreme Court to adjudicate on the autonomy of minority religious communities over the ‘private sphere’ of the family and the home.

Communities in India were permitted autonomy over matters of the family throughout colonial rule, since they did not relate directly to the economic interests of the colonisers. Post-Independence in 1947, freshly wounded from a communal Partition of the country

² The AIMPLB is an organization of Muslim clerics, which, disputably, holds itself out as the voice of the Muslim community in India, and is renowned for its conservative readings of Muslim religious doctrine. See Y. Sikand, “Listen to the Women”, Outlook, 5 May 2005, available at <<http://www.outlookindia.com/article.aspx?227300>>, last accessed on 31 May 2014; S. Vatuk, “Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law”, 42(2-3) *Modern Asian Studies* (2008) 497; J. Jones, “Signs of Churning: Muslim Personal Law and Public Contestations in Twenty-First Century India”, 44(1) *Modern Asian Studies* (2010) 175. 499.

³ *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 3 SCR 844, hereinafter *Shah Bano*.

with mass rioting, India elected to tentatively preserve the distinct personal laws as a signal of minority protection within a secular state, while enshrining a Uniform Civil Code (UCC) as a constitutional aspiration.⁴

The UCC, and as a corollary, intervention in MPL, has been the banner of Hindu nationalists in their agenda to build a ‘Hindu’ nation.⁵ Simultaneously, RPL symbolise the distinct religious identities for the minority communities, such that intervention by the (largely Hindu) State is perceived as a threat to their identity itself.

Gender-equity has been caught in the crossfire of these ‘multiple patriarchies’,⁶ each of which seek to claim authority to govern women and children within the home. In this quagmire, the Indian state has attempted distinct strategies for the reform of family laws: a) the introduction of a UCC, in complete obliteration of RPL; b) UCC as an optional ‘opt-in’ or ‘opt-out’ law c) State-pioneered reforms within RPL; d) community-led reforms within RPL. Yet, *Shabnam Hashmi* is different. This paper argues that *Shabnam Hashmi* symbolises a new innovation of the Indian state, which seeks the amelioration of the conditions of women and children within families through a secular framework of laws completely *independent* of RPL. While doing so, the paper also sheds light on the manner in which this innovation is constrained by the ideological outcomes of the earlier attempts at RPL reform.

In the first part, I analyse the first wave of RPL reforms post-Independence, in which Hindu laws were consolidated and overhauled, and a uniform Adoption Bill was also considered. This period produced the first ideological constraint in the process: that religious communities have a legitimate interest in excluding state intervention in the domain of the family. In the second part, I trace the second set of reforms, largely since the 1980s, by which the aim of gender-equity was obfuscated amid the rhetoric of communalism, thereby creating the second constraint: the deep entrenchment of family

⁴ Art.44, Constitution of India, contained in the chapter on Directive Principles of State Policy, requires the state to secure for its citizens a Uniform Civil Code. This provision is non-justiciable, and was imagined solely as a progressive ideal of the Indian polity.

⁵ K. Sangari, “Politics of Diversity: Religious Communities and Multiple Patriarchies”, 30(51) *Economic and Political Weekly* (December 23, 1995) 3287; R. Patel, “Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice”, 44(44) *Economic and Political Weekly* (October 31, 2009) 44; Z. Hasan, “Gender, Religion and Democratic Politics in India”, 31(6) *Third World Quarterly* (2006) 939.

⁶ K. Sangari, *id.*

laws in religious silos. In the third part, I finally elucidate the innovation marked by *Shabnam Hashmi*, through an analysis of legislations such as the JJ Act, the Protection of Women from Domestic Violence Act [DVA], among others. Here, I posit the need for a fourth generation of reforms with the aim of dismantling the ‘multiple patriarchies’ that operate within the home and the community.

II. FIRST WAVE OF REFORMS

II. A. *Brief Account of the Constituent Assembly Debates (CAD)*

Colonial strategies and the nationalist struggle in the early twentieth century had led to severe communal tensions, especially between the Hindu and Muslims. The culmination of the nationalist struggle soon before independence in 1947 had witnessed severe communal riots. This eventually led to a partition of India, into the Muslim state of Pakistan, and the secular, yet Hindu-dominated state of India, with the largest minority community of Muslims.

Against this background, the status of personal laws under the Constitutional scheme was the subject of intense debate in the post-Independence Constituent Assembly from 1947 until 1950. There were two issues before the Assembly: *one*, the introduction of a UCC *per se*, and *two*, the power of the State to change the RPL. Nehru, Ambedkar and women’s groups favoured a UCC for the entire country, with countervailing demands from upper-caste Hindu and minority community leaders, seeking a preservation of distinct RPL. Nehru viewed a UCC as an indispensable tool for national integration, uniting the country behind a single set of standard laws. For Ambedkar, the UCC was necessary for the elimination of highly oppressive, exclusionary and discriminatory caste practices within Hinduism. Women’s groups such as the All India Women’s Conference believed the UCC to be the solution to women’s oppression within the family, and the path for an equal status in the new nation.⁷

Contrarily, upper-caste Hindus and minority communities sought strict non-intervention in the RPL, couching it as a facet of religious freedom guaranteed as a fundamental right

⁷ RV Williams, *POSTCOLONIAL POLITICS AND PERSONAL LAW: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE*, (New Delhi: OUP 2006) at 164; F. Agnes, *FAMILY LAW, VOL.-I: FAMILY LAW AND CONSTITUTIONAL CLAIMS*, (New Delhi: OUP 2011) at 149.

in the Constitution. Specifically for minority communities, non-intervention in the RPL was the only assurance of the preservation of their religious identities in the new State, already perceived to be under threat in a charged communal atmosphere.⁸ KM Munshi challenged this discourse, arguing that the association of personal laws with religion, and consequently, with minority identity, was fostered by the British through their executive and judicial administration, and the modern Indian nation must outgrow it.⁹

Consequently, despite their inherently discriminatory character- on the basis of religion and sex both (since all RPL treated men and women unequally)- the Constituent Assembly decided to retain the RPL. Instead, it enshrined the UCC as a Directive Principle of State Policy [DPSP], as a non-justiciable political aspiration to be progressively realised by the Indian state. Art.44 states that “[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” A proposal by a Muslim leader to qualify the provision by excluding intervention by the State into the RPL without the permission of that community was rejected.¹⁰ Nevertheless, Ambedkar assured the minorities that their RPL would not be changed against their will.

The Constituent Assembly, therefore, had a choice. It could have either separated personal laws as a component of religious freedom, and assured minority protection by increased participation in the public sphere, or it could have preserved the symbolic link between personal laws and religious identity. Behind this dilemma lay a question of legitimacy: whose governance over unequal family relations is more legitimate- the State’s or the religious community’s? The Constituent Assembly clearly accepted the right of religious leaders of minority communities to govern the civil, private relations of individuals within the family. This right was not qualified by the constitutional principles that were to otherwise govern unequal private relations, such as the Hindu casteist practice of untouchability, or human trafficking and forced labour.¹¹ Instead, the reform

⁸ RV Williams, *ibid* at 100; Z. Hasan, *supra* note 6 at 942; CA Choudhury, “(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India”, 17 *Columbia Journal of Gender and Law* (2008) 52.

⁹ KM Munshi, Constituent Assembly Debates, 23 November 1948, available at <<http://parliamentofindia.nic.in/ls/debates/vol7p11.htm>>, last accessed on 20 May 2014; RV Williams, *supra* note 8 at 102.

¹⁰ RV Williams, *supra* note 8 at 102.

¹¹ The right against untouchability is enshrined as a fundamental right under Art.17. The freedom from

of family relations was postponed as a project for a later date, when the political climate is more conducive to the introduction of the UCC. The concern of Ambedkar and Munshi, that already the country is governed by a uniform, independent set of laws in all other civil and criminal matters, went unaddressed.

II. B. *The Hindu Code Bill*

Even while RPL were being debated in the Constituent Assembly, Nehru and Ambedkar were simultaneously spearheading the codification and reform of Hindu Personal Law through a comprehensive Hindu Code Bill. This was a project left incomplete in the last years of colonial rule, which proposed radical reforms to the Hindu laws on marriage/divorce, succession, adoption and guardianship, maintenance etc. The Bill, *inter alia*, defined Hindu broadly to include all castes and other Asian religions, eliminated restrictions on inter-caste marriages, introduced grounds for divorce, granted widows and daughters absolute shares in property, abolished the joint Hindu Undivided Family, enabled widows to adopt in their own right and permitted daughters to be adopted- all of which were great leaps from the content of Hindu law as it stood then.¹²

The Hindu Code Bill met with staunch opposition, both within and outside the Assembly. There were two levels of opposition: *one*, that the Bill lacked public support, reminding the Assembly that State-intervention in personal laws is illegitimate; *two*, that the content of the Bill obliterated the Hindu way of life.¹³ There were massive protests and demonstrations by the conservative Hindu classes on the streets, also attempting to mobilise public opinion against the Bill through dissemination of pamphlets and brochures.

As a compromise, Nehru split the Bill into four parts, the Hindu Marriage and Divorce Bill, the Hindu Succession Bill, the Hindu Minority and Guardianship Bill and the Hindu Adoptions and Maintenance Bill. After the first General Elections, these were passed as piecemeal legislations, with significant concessions to the conservative groups.

exploitation in the form of trafficking and forced labour is also a fundamental right under Art.23.

¹² WF Menski, *HINDU LAW: BEYOND TRADITION AND MODERNITY*, (New Delhi: OUP 2010) at 212-224; N. Subramaniam, "Making Family and Nation: Hindu Marriage Law in Early Postcolonial India", 69(3) *The Journal of Asian Studies* (2010) 781-792; A. Sridhar, "The Conflict Between Communal Religious Freedom and Women's Equality: A Proposal for Reform of the Hindu Succession Act of 1956", 20 *Berkeley Journal of International Law* (2002) 555-557; RV Williams, *supra* note 8 at 113.

¹³ RV Williams, *supra* note 8 at 110.

The agenda underlying Hindu personal law reform, to the exclusion of other personal law reform, was a telling comment on the shape of things to come. Supporters of the Bill viewed the consolidation of Hindu laws as the first step towards national integration, which is why it was important to unify all castes and other Asian religions behind a common law.¹⁴ It was important to commence with Hindus first, because that was the majority religious community. Even numerically, modernising Hindu laws first would have benefitted 80% of the Indian population straightaway. As the majority community, these reforms would not have stoked communal insecurities, which the immediate reform of MPL or Christian personal laws would have done.

Politically, the Parliament was conscious of the composition of the Legislature as a largely Hindu body. Accordingly, their judgment on the modernisation of Hindu laws was decorated with legitimacy,¹⁵ by simultaneously portraying themselves as the enlightened elite. Within this fold of the ‘enlightened elite’, the supporters of the Bill inside Parliament also included the numerically small voices in the public endorsing the Bill.¹⁶

For them, this project was also the first step towards the eventual introduction of the UCC.¹⁷ The changes in the laws applicable to Hindus within the private sphere was as much a process of secularisation and modernisation. As Derrett, and some other authors, have shown, the content of the Bills was scarcely drawn from religious sources. It was instead shaped by the need to attain gender equity within the family and eliminate caste distinctions in the making of a modern Indian society.¹⁸ Agnes¹⁹ and Sangari²⁰ argue that the consequence of several of these changes was to draw the lines between different religions even more starkly. This was first done by defining ‘Hindu’ as a syncretic

¹⁴ WF Menski, *supra* note 13; RV Williams, *supra* note 8 at 113; F. Agnes, *supra* note 8 at 149; N. Subramaniam, *supra* note 13 at 777-779.

¹⁵ N. Subramaniam, “Legal Change and Gender inequality: Changes in Muslim Family Law in India”, 33(3) *Law and Social Inquiry* (2008) 637.

¹⁶ RV Williams, *supra* note 8 at 110-112.

¹⁷ MP Jain, *OUTLINES OF INDIAN LEGAL HISTORY*, (Nagpur: Wadhwa and Co. 1990) at 640; WF Menski, *supra* note 13; N. Subramaniam, *supra* note 13.

¹⁸ JDM Derrett, “The Concept of Duty in Ancient Indian Jurisprudence: The Problem of Ascertainment”, in *THE CONCEPT OF DUTY IN SOUTH ASIA*, (WD O’Flaherty and JDM Derrett eds., London: Vikas Publishing House Pvt. Ltd. 1978) at 55; A. Parashar, “Religious Personal Laws as Non-State Laws”, 45(1) *The Journal of Legal Pluralism and Unofficial Law* (2013) 9.

¹⁹ F. Agnes, *supra* note 8 at 152.

²⁰ K. Sangari, *supra* note 6 at 3295.

umbrella category, including all religions originating in the subcontinent. In the process, Christians, Muslims, Jews and Parsis were framed as the perennial ‘Other’. Secondly, the reforms took Hindus out of the reach of secular legislations, such as the Caste Disabilities Removal Act and reduced the punishment under the Child Marriage Restraint Act. They also attached significant disadvantages to conversion and apostasy. Conversion was a matrimonial offence entitling the non-converted spouse to divorce, the spouse lost maintenance and guardianship rights upon conversion, converted children were automatically disinherited, among others.²¹

Yet, by the same token that the Parliament proclaimed legitimacy over the codification of Hindu laws, it disavowed legitimacy over the modernisation of minority personal laws, again parading State intervention as an illegitimate exercise. The Parliament signalled to the minorities that the State would play only a supportive role in their call for reforms, by enacting appropriate legislation as and when invited to do so by the community itself, thereby reifying the autonomy of the community over the RPL. In the same vein, it did not recognise that the communities themselves were fragmented on the question of State intervention, and of what the content of the personal laws should be. It also did not recognise that the brunt of this non-intervention would be borne by those already excluded from political activity within the minority communities, and those disadvantaged under the prevailing RPL - women and children. So while the rhetoric on gender equality was present in the discourse on RPL reforms, it was subservient to the interest of communal politics.

II. C. Special Marriage Act

Contemporaneous with the codification of HPL, the Parliament also passed the Special Marriage Act in 1954. This governs inter-religious marriages, and also marriages between individuals of the same religion, should parties choose to be governed by a non-religious marriage law. In this way, it acts as an ‘opt-in’ UCC. All marriages under the Special Marriage Act are thereafter governed by the Indian Succession Act in matters of property and succession, which contains more equitable provisions than the RPL.²² Nevertheless, it still does not extend substantive equality to women, and despite being a

²¹ F. Agnes, *supra* note 8 at 152.

²² F. Agnes, *supra* note 8 at 153.

secular legislation, no efforts have been taken to amend the Act in a manner that could achieve this target.

During its enactment, the Special Marriage Act was not subject to very intensive debates, on account of having been overshadowed by the Hindu law codification process. Yet, it was clear that it was being introduced as an independent, opt-in, secular legislation for parties wishing to opt out of religious laws in exercise of their individual freedom of religion and conscience. This too was met with resistance by conservative religious factions in the Hindu, Muslim and Christian communities.²³ Some isolated Muslim leaders also demanded that the Act not govern Muslims- much like the exception sought in 1985 in *Shah Bano*, and in 2014 in *Shabnam Hashmi*. However, Nehru insisted that this was merely an optional, facilitative legislation, and that no person was bound by it unless they chose to be so bound.

Even though the Special Marriage Act was intended to be a secular legislation, uniformly applicable irrespective of religious affiliation, its contents were still reminiscent of upper-caste Hindu practices. For instance, the Special Marriage Act prohibits marriages between close family relatives and cousins, which is a prohibition not found in lower-caste Hindu or South Indian customs, or under Muslim or Parsi law.²⁴ This resemblance confirms the fears of the minority communities, that the UCC will only be a Hindu text, universally applicable to all.

And so the project of secularization of family laws stood unobtrusively outside the domain where religious leaders could exercise their influence, ensuring that their authority over the community is not curbed in any manner. 60 years since its enactment, the Special Marriage Act remains a legislation that is scarcely used.

II. D. Adoption Bill

Most pertinent to the *Shabnam Hashmi* controversy is the debate over the Adoption Bill in the 1970s. Similar to the provisions of the JJ Act now, the Adoption Bill was an attempt to introduce a uniform, secular law to make adoptions accessible for persons of all religions. In the absence of this legislation, only Hindus could adopt freely, under the

²³ A. Parashar, *WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY*, (New Delhi: Sage Publications 1992) at 87; F. Agnes, *supra* note 8 at 153.

²⁴ F. Agnes, *supra* note 8 at 153.

Hindu Adoptions and Maintenance Act. Hindu religious texts permitted adoption to sonless men, for the discharge of their material and spiritual obligations. The Hindu Adoptions and Maintenance Act made adoption available to women as well, and enabled daughters to be adopted.

The introduction of this Bill in 1972 predictably roused opposition from several quarters, since it infringed directly on the personal laws of communities. The most resounding objection was that adoption would alter the inheritance patterns. For Muslims, this variation in the inheritance pattern, which was predicated on fixed and certain shares in property, was construed to be contrary to the *shariat*.²⁵ At the same time, several Muslim scholars welcomed the Bill, and argued that it was not inconsistent with the *shariat*. Tribals, who are permitted their own customs in the matter of personal laws distinct from religious laws, also objected to the devolution of tribal, community land to non-tribal children.²⁶

Giving sway to the opinion of conservative religious and tribal opinion against intervention in personal laws again, the Bill was modified to exclude tribals and Muslims from its application.²⁷ In the next round, the same objections were also raised by Parsis, who feared devolution of Parsi trust property upon non-Parsis. With resounding opposition from all quarters to State intervention in personal laws of minority communities, the Bill was eventually withdrawn.²⁸

II. E. Judicial Response to Non-Intervention

During these first reforms, the Judiciary ratified this policy of non-intervention pursued by the Legislature, despite extensive powers to strike down laws violative of fundamental rights. RPL, as compartmentalised laws and customs, violate the guarantee of equality at two levels: *first*, as different laws applicable to different communities, and *second*, by refusing even formal equality to women and children.

On several occasions, provisions of RPL and customs have been challenged before the High Courts and the Supreme Court of India. One of the earliest challenges was raised to the prohibition of bigamy among Hindu men, while Muslim men were still permitted

²⁵ F. Agnes, *supra* note 8 at 155.

²⁶ F. Agnes, *supra* note 8 at 156.

²⁷ F. Agnes, *supra* note 8 at 156.

²⁸ F. Agnes, *supra* note 8 at 156.

polygamy, in the case of *State of Bombay v. Narasu Appa Mali*.²⁹

The Bombay High Court rejected the challenge, but not on the rhetoric of modernisation, secularism or gender equity. Instead, the High Court refused to view personal laws as ‘law’ within the meaning of Art.13 of the Constitution, thereby immunising them entirely from judicial scrutiny and constitutional challenges! The Court borrowed from the insertion of Art.44 in the DPSP as a non-justiciable aspiration, to proclaim that all personal laws remain beyond the reach of the Constitution, as a political question, and not as a question of rights.

The precedent set in *Narasu Appa Mali* was followed immediately in *Srinivasa Aiyar v. Saraswati Ammal*,³⁰ and in *Ram Prasad v. State of Uttar Pradesh*,³¹ whereby a constitutional challenge of personal laws was excluded entirely. It set the tone for constitutional challenges to RPL for decades to come, and continues to be relevant today. In *Ahmedabad Women’s Action Group v. Union of India*, in 1997, the Supreme Court of India adopted the same stance as in *Narasu Appa Mali*. The case again pertained to a challenge to the practice of polygamy under MPL, which was rejected, on the ground that the remedy lay with the Legislature and not the Judiciary.³² Even when the ratio of *Narasu Appa Mali* not followed strictly, the courts still need to distinguish it, as was done in *Madhu Kishwar v. State of Bihar*, discussed later.³³

Narasu Appa Mali represented the sentiment of the time, deployed more effectively in the second wave of reforms discussed subsequently. Sangari labels the contest of RPL and UCC as one of ‘multiple patriarchies’, where the majority and minority communities compete over who retains greater patriarchal privileges. In this debate, the cause of gender equality gets either sidelined or appropriated.³⁴ This explains the centrality accorded to *triple talaq* and polygamy by the Hindu right in their criticism of MPL.

III. SECOND WAVE OF REFORMS

²⁹ AIR 1952 Bom 84, hereinafter *Narasu Appa Mali*.

³⁰ AIR 1952 Mad 193.

³¹ AIR 1957 All 411.

³² AIR 1997 SC 3614.

³³ AIR 1996 SC 1864.

³⁴ See generally, K. Sangari, *supra* note 6; Z. Hasan, *supra* note 6 at 944; S. Mullally, “Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano case”, 24(4) *Oxford Journal of Legal Studies* (2004) at 673; Note, “Reversing the Option: Civil Codes and Personal Laws”, 31(20) *Economic and Political Weekly* (May 18, 1996) 1181.

III. A. *Muslim Personal Law*

Through the debates in the Constituent Assembly, the Hindu Code Bill and the Adoption Bill, the Parliament had taken a clear stand of non-intervention in the RPL of the minority communities, accepting that the State had less legitimacy in governing family matters than the heads of the communities themselves. The Judiciary had endorsed this stance, viewing the status of women and children in the private sphere not through the lens of fundamental rights, but as purely political questions.

The second stage of reforms, starting roughly in the 1980s, witnessed a divergence in the political view and the judicial view of RPL. At the Legislative level, the State continued the policy of non-intervention. The Judiciary, on the other hand, regularly faced inequitable results in the application of the RPL, enabling the development of a more sympathetic jurisprudence. This was a critical period in the history of RPL reforms in India. The women's movement was at its peak in the 1980s, seeking changes in laws relating to sexual offences, and focusing special attention to the discriminatory nature of personal laws as well.

This period is represented most starkly by the *Shah Bano* controversy.³⁵ In this case, an old Muslim woman sought maintenance from her ex-husband under S.125, CrPC. The CrPC is a criminal legislation operating outside the field of family laws. Within that, S.125 is a mere anti-vagrancy provision, distinct from the obligation of maintenance, which is pegged more to the status and lifestyle of parties.³⁶ Under this, ex-husbands are obligated to provide (at the time) a maximum of Rs.500/- per month to their ex-wives. Shah Bano's husband disclaimed the obligation under S.125, arguing that he was governed by the MPL, under which his obligation is limited to maintenance for the post-divorce three-month *iddat* period alone.

The Supreme Court decided in favour of Shah Bano, holding that a secular legislation, drafted without exception to RPL, would apply uniformly across all communities. This was not a radical innovation, since the Supreme Court earlier in *Bai Tahira v. Ali Hussain Fideali Chotthea*,³⁷ and in *Fuzlunbi v. K. Khadil Vali*³⁸ had decided the same

³⁵ *Supra* note 4.

³⁶ S.23(2), Hindu Marriage Act.

³⁷ AIR 1979 SC 362.

question with the same outcome.

Yet in *Shah Bano*, the Supreme Court made unwarranted comments relating to the retrogressive nature of Islam, reflected in the personal laws. It stated, unconnected to the legal controversy at hand, that MPL granted an inferior status to women.³⁹ This, despite the fact that MPL granted the right to inheritance and divorce to women much before Hindu law did. Further, the limitation on the testamentary capacity of Muslim men ensured women participation in property. The full testamentary capacity of Hindu males continues to deny daughters and widows such participation in property to date.

While *Bai Tahira* and *Fuzlunbi* analysed the perceived conflict between S.125 and MPL through the rights and conditions of women, *Shah Bano* was tainted with anti-Muslim communal rhetoric. This decision sparked a massive communal backlash by the largely conservative Muslim clerics, chief among them the AIMPLB, similar to the backlash of the upper-caste Hindus in the 1950s.⁴⁰ The interpretation accorded to S.125, so far largely uncontroversial, was suddenly viewed as unwarranted intervention in MPL.

The government, under Rajiv Gandhi (ironically, the grandson of Nehru), initially endorsed the *Shah Bano* decision.⁴¹ However, owing to the mounting communal tensions, it succumbed to the demands of the religious clerics and promptly passed the Muslim Women (Protection of Rights on Divorce) Act, under which the obligation to maintain Muslim women after the *iddat* period was transferred to her legal heirs, failing which, the obligation fell upon the *wakfs* (Islamic trusts).⁴² Notable Muslim leaders within the government opposed the Act, labelling it as a rollback of the rights of Muslim women, to which they were otherwise entitled.⁴³ Pertinently, this was the first, and so far, the only change made to MPL post-Independence.

Simultaneously, the rising Hindu right couched this as a measure of ‘minority appeasement’, objecting to ‘this exceptional treatment’ of Muslims and to extending ‘special privileges’.⁴⁴ As Sangari points out, these ‘special privileges’ for the Hindu patriarchs was not the retention of distinct RPL *per se*, but the patriarchal privileges

³⁸ AIR 1980 SC 1730.

³⁹ *Supra* note 4.

⁴⁰ F. Agnes, *supra* note 8 at 157.

⁴¹ RV Williams, *supra* note 8 at 136.

⁴² S.4, Muslim Women (Protection of Rights on Divorce) Act.

⁴³ RV Williams, *supra* note 8 at 139.

⁴⁴ Z. Hasan, *supra* note 6 at 943.

enjoyed by Muslim men, denied to Hindu men.⁴⁵ For this reason, the campaign against easy divorce and polygamy lay at the centre of their rhetoric, ignoring that despite the prohibition, 6% of Hindu men continued to practice polygamy- the same percentage as the Muslim men themselves.⁴⁶ Consequently, their demands for a UCC, intended as a frontal attack to the Muslim identity, was vehement.

This communalisation of Indian politics had not left the Judiciary untouched, a fact that *Shah Bano* had demonstrated in 1985 already. Anti-Muslim biases asserted themselves most strongly in cases on polygamy and triple *talaq* through the next decade. In *Rahmat Ullah and Khatoon Nisa v. State of Uttar Pradesh*,⁴⁷ triple *talaq* was held to be unconstitutional, even when it was not under a constitutional challenge. This rationale was employed to *deny* a Muslim woman her right to property, and the entire judgment, in its call for a UCC, was replete with anti-Muslim rhetoric. This was repeated in 1995, when the Supreme Court decided *Sarla Mudgal v. Union of India*.⁴⁸ This case pertained to the conversion of a Hindu man to Islam solely for the purpose of contracting a second marriage. The Supreme Court struck down the conversion, and the second marriage, as invalid. On the way, it made unsolicited remarks about the Muslim community and its refusal to modernise. Notably, the Supreme Court found polygamy under MPL reprehensible not for its impact on women, but because the provision acted as a temptation for innocent Hindu men to convert out of their religion and contract multiple marriages.⁴⁹ *Lily Thomas v. Union of India* related to a similar question, and invited similarly offensive remarks.⁵⁰

To distance themselves from the Hindutva ideology, women's groups ceased the call for the UCC.⁵¹ The Hindu right had now appropriated the UCC-RPL debate, subscribing to which would have implied negating minority rights of communities already threatened by Hindu majoritarianism. Therefore, it was necessary for them to turn to changes and reforms in personal laws individually. The increased communalisation of the project

⁴⁵ See generally K. Sangari, *supra* note 6; Z. Hasan, *supra* note 6 at 944.

⁴⁶ Z. Hasan, *supra* note 6 at 943.

⁴⁷ II (1994) DMC 64.

⁴⁸ (1995) 3 SCC 635.

⁴⁹ *Id.*

⁵⁰ (2000) 6 SCC 224.

⁵¹ Z. Hasan, *supra* note 6 at 948; Z. Hasan, *FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE*, (New Delhi: Kali for Women 1994) at 107.

through the politics of Hindutva meant that the unification project was decisively abandoned, and the personal laws were entrenched in silos.

Instead, to overcome the disadvantages produced by the Muslim Women (Protection of Rights on Divorce) Act, several constitutional challenges were raised to it in the High Courts and the Supreme Court. As Agnes points out, simultaneously, even Muslim ex-husbands were appealing orders passed by the lower courts under the Act. Despite the political motivations, the lower courts had, in fact, been reading the obligation of the ex-husband to make a ‘reasonable and fair provision’ during the *iddat* period broadly, exceeding even the ceiling imposed by the CrPC.⁵² Unintentionally, the Act had in fact expanded the rights of divorced Muslim women against their ex-husbands.⁵³ Consequently, in *Danial Latifi v. Union of India*, the Supreme Court upheld the constitutionality of the Act,⁵⁴ permitting the rights of Muslim women to be expanded within their personal law itself.

III. B. Christian and Parsi Personal Law

Apart from the Muslim Women (Protection of Rights on Divorce) Act, the decades after 1980 also witnessed the first amendments to the RPL of Christians and Parsis. Christian marriage law reforms had been on the table for several decades previously. Parsi law reforms, on the other hand, were tabled and passed promptly. This is best explained by the State’s non-intervention policy.

The reforms under Parsi law were initiated entirely at the behest of the community, which is numerically very small. Accordingly, there was even scant debate within the Parliament.⁵⁵ Changes were introduced through two distinct legislations, one amending marriage and divorce laws, and the other amended succession laws. Through the first, in 1988, the grounds for divorce under Parsi law were harmonised with those under the Hindu Marriage Act, thereby attaining a degree of uniformity between the two communities, albeit within their own silos of religious laws. Through the second, in 1991, the distinction between legitimate and illegitimate children was abolished, and the rights

⁵² F. Agnes, *supra* note 8 at 167.

⁵³ *Arab Ahmedia Abdulla v. Arab Bail Mohmunna Saiyadbhai*, AIR 1988 Guj 141; *Ali v. Sufaira*, 1988(2) KLT 94; *Aliyar v. Pathu*, 1988(2) KLT 172.

⁵⁴ 2001 (7) SCC 740.

⁵⁵ F. Agnes, *LAW AND GENDER INEQUALITY: POLITICS OF WOMEN’S RIGHTS IN INDIA*, (New Delhi: OUP 2010) at 137.

of inheritance of daughters was brought on par with those of sons.⁵⁶ Amendments to the Hindu Succession Act in 2005 were to attain the same effect, of making daughters equal coparceners in joint family property as sons.

Christian law reforms divided the Christian community, especially the religious leaders, who were opposed to any changes in the divorce law.⁵⁷ S.10 of the Indian Divorce Act permitted husbands to obtain a divorce on grounds of adultery *per se*. Wives had to prove bigamy, cruelty or desertion in addition to adultery. This issue had been in discussion since 1958-59, in civil society and various government quarters. Women's groups had undertaken tireless efforts to build consensus within the community, make representations to the government and various commissions within it, prepare draft legislations etc.⁵⁸ Successive governments dawdled over the proposals, introducing Bills, and permitting them to lapse without discussion. This continued until the late 1980s, when the proposals were rejected for not having the sanction of religious leaders, despite massive community support to divorce reforms under Christian law, endorsed by the Christian population across the country, including priests and religious heads.⁵⁹

While the Legislature was seeking grounds for 'legitimate' intervention, the High Courts and Supreme Court were scrutinising S.10 for violation of fundamental rights. Initially, they only commented on the need to reform S.10 based on its oppressive character, and directed the Legislature to amend it.⁶⁰ In the absence of any reform, High Courts across the country eventually held the provision unconstitutional on grounds of discrimination and violation of life, liberty and dignity.⁶¹ This clearly demonstrated a turnaround for the Judiciary from its stance in *Narasu Appa Mali*, limiting the ratio of *Narasu Appa Mali* to uncodified religious principles, whereas statutes must still pass the test of constitutionality.⁶² This was followed in *Pragati Verghese v. Cyril George Varghese*,⁶³

⁵⁶ *Id.*

⁵⁷ *Supra* note 56; A. Jacob, "Uniform Civil Code: Reforms in Christian Family Law", in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR* (A. Dhanda and A. Parashar eds., Lucknow: Eastern Book Company 2007) at 378.

⁵⁸ *Supra* note 56 at 152.

⁵⁹ *Supra* note 56 at 152; A. Jacob, *supra* note 58.

⁶⁰ *Jorden Diengdeh v. SS Chopra*, (1985) 3 SCC 62; *Reynold Rajamani v. Union of India*, (1982) 2 SCC 474; *Swapna Ghosh v. Sadananda Ghosh*, AIR 1989 Cal 1.

⁶¹ *Ammini EJ v. Union of India*, AIR 1995 Ker 252.

⁶² *Id.*

⁶³ 1997 AIHC 3493 (Bom).

where S.10 was held unconstitutional in Maharashtra.

Due to the mounting judicial and public pressure, the Parliament amended S.10 of the Indian Divorce Act in 2001 eliminating the requirement of ‘adultery+’ for women seeking divorce, and also introduced divorce by mutual consent. These resembled the reforms in Parsi divorce law undertaken a decade prior, yet were undertaken as two isolated, distinct projects.

III. C. Judicial Response

Based on a failure of the Legislature to proactively reform the status of women and children within families, gradually, the Courts broke with their own precedent and spoke on the constitutionality of the distinct RPL *as they were*. This was already reflected extensively in judicial pronouncements on Christian law, notably through *Jordan Diengdeh v. SS Chopra*.⁶⁴

Courts responded similarly to cases brought under other personal laws as well, including the majority Hindu law. Instead of introducing equality and non-discrimination directly across all personal laws, the Judiciary introduced the same principles piecemeal. In this manner, courts did not outrightly reject non-intervention, but also did not intervene blatantly.

It was through this approach that the Hindu laws on custody and guardianship was realigned, from the patriarchal right of fathers over their offsprings to the welfare of the child principle. In *Geeta Hariharan v. Reserve Bank of India*, the Guardians and Wards Act, prescribing that the father is the primary guardian of a Hindu child, and after him, the mother, was under challenge.⁶⁵ The Supreme Court did not strike down the provision outrightly for discriminating between the parents based solely on their sex and permitting the mother to be the guardian only after the father’s death. Instead, it read the provision to mean that both parents have an equal right of guardianship and custody of a minor child, to be decided on which parent serves the welfare of the child best. In this manner, the best interests of the child principle was introduced in cases of custody and guardianship under Hindu law, and now firmly occupies the field.

Similarly, in *Mary Roy v. State of Kerala*, the Travancore Christian Succession Act was

⁶⁴ *Jorden Diengdeh v. SS Chopra*, *supra* note 61.

⁶⁵ AIR 1999 SC 1149.

under challenge, which discriminated between sons and daughters in matters of inheritance.⁶⁶ Instead of intervening directly and holding the provision unconstitutional, the Supreme Court took a narrow view, and held that the enactment of the Indian Succession Act had effectively repealed the Travancore Christian Succession Act, and the Indian Succession Act made no such distinction between sons and daughters.⁶⁷

Therefore, the approach through the second wave of reforms was to seek judicial remedies and not political remedies for injustices created through personal laws. This was in direct opposition to the first wave of reforms, where personal laws were cast as a political question exclusively. Since the legislative powers of the Judiciary are constrained, the only solution was to scrutinise piecemeal provisions within the RPL. For the first time since Independence, the Parliament was simultaneously amending family laws, not through uniform legislations, but through individual RPL, with the baggage of *Shah Bano* behind it.

IV. THIRD WAVE OF REFORMS

By the onset of the twenty-first century, it was clear that the conflation of religious identity with the personal laws was posing a real challenge to the quest for justice within the family. This period also came with the realisation that the inequalities within the family were not specific to one religion, but spanned the patriarchal cultural mores of the country at large. The most pressing agenda were ‘private’ violence against women and children and destitution of dependents.

The first decade of the twenty-first century, therefore, saw the enactment of numerous general legislation addressing these issues. These included the DVA, the Prohibition of Child Marriage Act, which replaced the colonial-era legislation Child Marriage Restraint Act, the Juvenile Justice Act, the Maintenance and Welfare of Parents and Senior Citizens Act, among several others. All of these legislations created a set of rights for women, children and the elderly within the family, the most significant of which is the DVA.

The DVA provides women, children and the elderly facing violence of any kind within the home with civil remedies against the violence. The objective is not criminal sanction-

⁶⁶ (1986) 2 SCC 209.

⁶⁷ *Id.*

which is supplied by the general criminal provisions- but protection through Protection Orders,⁶⁸ Residence Orders,⁶⁹ Maintenance Orders,⁷⁰ Custody Orders,⁷¹ among others. Through the DVA, courts can order the perpetrators to refrain from inflicting further violence, to remove themselves from the shared household or provide alternative accommodation to the aggrieved person, provide compensation for any injuries caused and maintenance, and tentative custody of children to the aggrieved person.

Following on past trends, the applicability of the DVA to Muslims was also challenged in several High Courts across the country.⁷² Some provisions of the DVA, especially those pertaining to compensation and maintenance orders, operate in the field covered by the personal laws. In each of these cases, High Courts highlighted the secular nature of the legislation, and its intent to address a social problem that plagues members of all religious communities, based on which the contention was rejected.⁷³

The Prohibition of Child Marriage Act sets the minimum age for marriage for men and women both. The regulation of matters relating to marriage are otherwise covered by the RPL. Yet, by stipulating the minimum age of marriage for girls at 18 years and for boys at 21 years for all communities, the Act attempts to combat a social problem across all spectra- of underage marriages, most notably of girls. Minority groups have recently opposed this as well, citing religious doctrine to support the proposition that girls should be married earlier.⁷⁴

The JJ Act, while stipulating a sympathetic procedure for the rehabilitation of juvenile delinquents, also provides for the care and protection of abandoned and destitute children by providing for adoption. This plugs the gap left by the abandoned Adoption Bill, by making adoption available across all religions.

Lastly, the Maintenance and Welfare of Parents and Senior Citizens Act passed in 2007 provides separately for the maintenance of elderly citizens. Excepting this Act, so far,

⁶⁸ S.18, DVA.

⁶⁹ S.19, DVA.

⁷⁰ S.20, DVA.

⁷¹ S.21, DVA.

⁷² *Priya v. Shibhu*, 2008 (3) KLJ 304; *Karimkhan v. Nahid Akhtar*, 2011 Cri.LJ 4793; *Syed Md. Nadeem and Ors. v. State and anr.*, W.P. (Crl.) 887/2011, Delhi High Court.

⁷³ *Id.*

⁷⁴ Special Correspondent, “Muslim Groups Oppose Ban on Child Marriage”, available at <<http://www.thehindu.com/news/national/kerala/muslim-groups-oppose-ban-on-child-marriage/article5155367.ece>>, last accessed on 31 May 2014.

only the CrPC provided for the maintenance of the elderly by their children/relatives. The Act seems to have borrowed from the MWA by casting the obligation of maintenance of the elderly upon the heirs.⁷⁵

It is in this context that *Shabnam Hashmi* too was decided. This was a petition by a Muslim woman, seeking a declaration that the right to adopt is a fundamental right and a facet of the right to life and personal liberty of an individual, and that Muslims are entitled to adopt under the JJ Act, irrespective of their personal laws. The Supreme Court refused to hold the right to adopt as a fundamental right, but agreed that the JJ Act operated simultaneously with Muslim law, and was an optional legislation for adoption for Muslims as well. Those who associated more strongly with their religion could choose to religious norms and follow the *kafala* system. Those who did not associate so strongly with their religion had the option of adopting under the JJ Act. Under no circumstances did the JJ Act compel Muslims to reject their religious norms.⁷⁶ The decision upheld the individual as the core of constitutional rights, instead of the community- which the decades since Independence had largely neglected. It gives greater freedom to the individual exercise of freedom of religion and conscience than the collective exercise of it. In contrast stand the DVA and the Maintenance and Welfare of Parents and Elderly Act, which are compulsory legislations and obligate members of all communities.

Despite opposition, these legislations have not invited the same exceptionalism as the CrPC or the Adoption Bill. This is seemingly because the RPL are not the direct targets of reform under these legislations, but the solution to pervasive social malaise. Their impact on the RPL is only incidental, compared to the Adoption Bill, for instance, whose impact on the RPL was direct. This has two ramifications: *first*, these legislations do not carry the taint of oppressive majoritarianism, as the other legislations were perceived to carry. *Second*, they nevertheless manage to address some social inequities pervasive in the private sphere, whose solution until now was imagined to lie simply in the reform of personal laws.

Menski analyses these developments, through the second and third phase of reforms, and

⁷⁵ S.4, Maintenance and Welfare of Parents and Senior Citizens Act.

⁷⁶ *Supra* note 2.

concludes that they indicate a uniformisation of personal laws *outside* a UCC.⁷⁷ The grounds for divorce under Christian and Hindu laws have been synchronised. The separate amendment to the CrPC in 2001, removing the previous ceiling of Rs.500/- in maintenance awards, brings the rights of women from all communities at par with those of the Muslim community after the MWA. The Maintenance and Welfare of Parents and Senior Citizens Act casts the same obligation upon all persons, irrespective of their religious affiliation, to provide for their parents and the elderly.⁷⁸

Menski's analysis speaks of two distinct kinds of laws. The first, such as the amendment to the grounds of divorce under Christian law, seem to directly bring personal laws into sync with each other. The second, such as the CrPC and the Maintenance and Welfare of Parents and Senior Citizens Act, provide familial obligations independent of RPL. Both of them require a critique through distinct lenses.

In the first kind of laws, Menski's observations accurately describe the limited set of provisions he does analyse. At the same time, he ignores the lethargy that has plagued RPL reforms otherwise, which makes uniformity a distant dream. Since Independence, the Indian state has identified itself as an illegitimate intervenor in the RPL of communities, thereby placing itself in a situation of stalemate. Accordingly, barring the 2005 amendment to the Hindu Succession Act, which makes daughters coparceners of joint Hindu family property in the same right as sons, there have been scant amendments to RPL relating to property *per se*. Different communities continue to exclude property women from property ownership, albeit in different ways and to different degrees.⁷⁹ Most women in India do not have rights to matrimonial property either. Secondly, Kapur and Cossman correctly identify that the notion of uniformity in India implies the similarity of minority RPL to Hindu laws, which is still seen as a 'neutral' norm.⁸⁰ The communalisation of the agenda has relieved Hindu laws from scrutiny themselves. Thirdly, Menski misidentifies the objective of a UCC as uniformity for uniformity's sake. Debates since Independence have linked the need for a UCC to national integration and

⁷⁷ See WF Menski, "The Uniform Civil Code Debate in India: New Developments and Changing Agenda", 9 *German Law Journal* (2008) 211.

⁷⁸ *Id.*

⁷⁹ A. Sridhar, *supra* note 13 at 572.

⁸⁰ R. Kapur and B. Cossman, *SECULARISM'S LAST SIGH: HINDUTVA AND (MIS)RULE OF LAW*, (New Delhi: OUP 2001) at 260.

gender justice- neither of which the amendments to RPL attain in spirit. It is only the second kind of laws that come closer to these objectives.

Parashar's critique of the DVA, and by extension the other secular legislations, reflects the shortfalls of the current agenda more closely.⁸¹ Parashar argues that the DVA shortsells the cause of women's rights by setting a limited agenda for empowerment of women within the home. According to her, the DVA creates a limited set of temporary rights, which attain the limited objective of freedom from domestic violence in the short run. The remedies of Residence Orders, compensation and custody provide temporary relief to the aggrieved person, until the same issues are justiciated through the normal civil laws. Accordingly, women are provided secure residence only until a more permanent solution can be found for herself, and not indefinitely. Compensation orders, which include a significant component of maintenance, would still remain subject to the RPL on maintenance, as would custody orders. None of these provide a comprehensive remedy against domestic violence, which would instead be supplied by greater economic empowerment.⁸²

Barring Custody Orders, none of the other remedies in the DVA indicate that they are subject to a more permanent solution through the RPL. Nevertheless, Parashar's critique is valid. Transitory solutions to individual cases of domestic violence do not attack the causes which generate the violence in the first place. Domestic violence remains rampant largely on account of the relationship of dependence between the violator and the aggrieved person, which the DVA not only fails to remove, but in fact inculcates. Domestic violence cannot be prevented without simultaneously pursuing strategies of the economic empowerment of women. This necessitates ensuring greater access to property, be it self-created, or ancestral or matrimonial. Property generation by women can be ensured by increasing participation of women in the market, which requires a change in the secular labour laws. The devolution of ancestral or family property upon women can only be attained by removing gender discrimination in inheritance laws, all of which are governed by RPL. This makes State intervention in RPL not only desirable, but necessary, which the strategy of the third phase of reforms does not attain. Matrimonial

⁸¹ See A. Parashar, "Gender Inequality and Religious Personal Laws in India", 14 *Brown Journal of World Affairs* (2008) 143.

⁸² *Id.*

property is not recognised in India, barring Christian law. The Marriage Laws (Amendment) Bill, 2013 does provide for division of property between the husband and wife in case of no-fault divorces, but places it entirely upon the discretion of the judge, and views it not as the contribution of the wife to the home, but as a mere ‘compensation’.⁸³ This benefit too is extended only to Hindu women and marriages solemnised under the Special Marriage Act, and only in cases of no-fault divorce. It is not a right that accrues at marriage, and is not even available under other grounds of divorce. While the Bill follows the strategy of piecemeal reform of RPL, women’s right to matrimonial property can be equally ensured through an independent legislation applicable across communities.

At the same time, while grounds of divorce have been liberalised across all RPL at some stage, none of them currently stipulate sexual abuse and marital rape as a ground for divorce. Sexual intercourse continues to be viewed as a marital obligation owed by the wife to the husband, with or without consent. RPL thereby compromise the bodily integrity of women within marriages. Even the Indian Penal Code grants immunity to husbands from prosecution for marital rape.⁸⁴ The first solution to this lies in deleting this immunity from the Indian Penal Code itself. However, it is necessary for the marriage and divorce laws to also incorporate this as a ground for divorce. This could be done either by the Judiciary, by expansively reading ‘cruelty’ under the distinct RPL to include marital rape, which it has refrained to do until now, or by way of amendment to the RPL themselves.

In either case, it is necessary for the Indian State to stand up as the protector of individual rights and full autonomy of persons within the families, and not consider religious freedom as a countervailing consideration in all RPL reforms.

V. CONCLUSION

Shabnam Hashmi symptomises a return of the agenda of equality and justice within the family, without stepping on communal sensitivities on matters related to the family. So far monopolised by religion, *Shabnam Hashmi* indicates the manner in which family

⁸³ R. Chitkara, “Between Choice and Security: Irretrievable Breakdown of Marriage in India”, paper presented at the International Academic Conference on Law and Politics 2014, Turkey, 26-27 April 2014.

⁸⁴ Explanation 2 to S.375, Indian Penal Code.

relations are now being secularised. While the State may have renounced, albeit incorrectly, its authority over RPL in Independent India, it has regained its authority over family relationships *per se*, by couching it as a problem not of religion, but of the nation itself. Independent secular legislations regulating family relationships, therefore, pull the wool on the eyes of religious leaders, by giving the appearance of non-intervention in the personal laws, but indirectly regulating the private sphere of family relations anyway.

Yet this strategy is effective only in transition. It can effectively lay the foundations for greater intervention in the family sphere later, but cannot be the solution unto itself. This is because it does not address familial inequalities comprehensively, most notably in matters of property and violence within the home. Furthermore, while secular legislations may be enacted on issues otherwise regulated by the RPL, the conflict between the two will always provide grounds for challenges. This provides fodder for greater judicial intervention, and the expectation that the Judiciary will continue to subject RPL to independent legislations for the benefit of women and children.

At the same time, it is clear that the Judiciary itself is not immune to communal sentiments, due to which a definitive stance by the political representatives is necessary. Courts can operate only within the framework that legislations provide them with. Inequalities and omissions within legislations perpetuate gender inequalities, and do not effectively challenge the relationship between minority identity and autonomy in the private sphere.