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Making Family and Nation: Hindu Marriage Law in Early Postcolonial India

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Postcolonial states responded differently to the group-specific personal laws that were recognized in many colonial societies. While some retained most colonial personal laws (e.g., Lebanon) and others introduced major changes (e.g., Tunisia), most introduced modest yet significant changes (e.g., Egypt, India, Indonesia). Indian policy makers retained personal laws specific to religious groups, and did not change the minority laws, although minority recognition did not rule out culturally grounded reform. They changed Hindu law alone based on their values, as they saw Hindu social reform as the key to making nation and citizen. Reform proposals drew from the modern Western valuation of the nuclear family, and from Hindu traditions that were reformed to meet standards of modernity. As Hindu nationalists and other conservatives defended lineage authority, legislators retained much of the lineage control over ancestral property. But they provided limited divorce rights, reduced restrictions on mate choice, and banned bigamy. The visions driving the initial proposals influenced many later changes in India's family laws.

LAWS RELATING TO MARRIAGE and the family often reflect how people view personal relations and group cultures. Changes in these laws and contention over these changes can tell us a lot about shifts in visions of modernity and culturally authentic personal relations. This was the case in many postcolonial societies, such as Egypt, Malaysia, and Indonesia, as well as India, whose experience this paper explores. Colonial laws that recognized group cultures usually pertained to family life, as the personal was considered central to group culture, and many colonial states were more willing to accommodate cultural specificity in their regulation of family life than in their regulation of commerce or crime (Benton 2001). Postcolonial states dealt in different ways with such colonial policies meant to recognize group cultures. The colonial recognition of difference was often tied to views that the cultures of colonized peoples were incompatible with modernity and nationhood, and taken by some to weaken the solidarity of the colonized. In response, anticolonial nationalists and postcolonial states either revalued these cultures, sought to reform these cultures so

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that they could meet received standards of modernity, or, in a few cases, tried to end the recognition of these cultures. These tendencies came into play in their responses to the group-specific family laws (also called personal laws) that many colonial states had adopted.

Some postcolonial states retained most of the group-specific laws of the colonial era (e.g., in Lebanon and Syria). In these societies, social groups that valued the sources of these laws or felt an interest in the forms of family relations that these laws supported had considerable influence over policy. Other states introduced major changes in family law to promote national consolidation and state control, to restrict the authority of religious and ethnic associations and lineages, and to project an image of a modern society. They did so either by rejecting the relevant cultural and religious traditions as sources of family law (e.g., in early republican Turkey[1]), or by adopting novel interpretations of group law (e.g., in early postcolonial Tunisia). In most postcolonial societies, policy makers introduced more modest yet significant changes in colonial family law soon after independence (e.g., in Egypt, Iraq, Pakistan, India, Sri Lanka, Malaysia, and Indonesia).

Some relevant conditions were similar in the countries in which early postcolonial family law reform was modest but significant: the heterosexual, monogamous nuclear family was central to visions of modern family life, which were based largely on the directions of social change in the West from the nineteenth to the mid-twentieth century; modernists were significantly represented in the early postcolonial state elite; religious, ethnic, or kin institutions had considerable authority; and religious practices and politicized ethnic identities varied. These conditions motivated initiatives to authorize the monogamous nuclear family and to provide women some new rights, but also restricted the scope of these reforms. While sharing these features, the family law reforms introduced in these countries varied in the authority they granted the nuclear family rather than larger kin groups, the rights they accorded women and men, the autonomy they offered individuals in family life, and the extent to which they sought to regulate family life. The aforementioned initial conditions did not, therefore, determine the policies.

Visions of indigenous modernity in the non-West were not based solely on the models of change provided by Western societies. They also drew from precolonial cultures, reformed to meet standards of modernity; as a result, the predominant visions of modern family life varied in the former colonies. The modernists who wished to transplant Western models or to promote more locally based social reform faced challenges from groups that claimed to represent deeply rooted traditions. These traditionalists valued different kinds of family relations, and varied in influence. The responses of modernists to their

[1]Republican Turkey was postimperial rather than postcolonial. However, Western models and cultural nationalism influenced policy makers there, as in many postcolonial societies.

challenges and the policies chosen depended crucially on the approaches taken in particular countries to state formation, and the social coalitions that supported the initiatives to make state and nation.

Early postcolonial Indian leaders retained a version of colonial family law in which distinct laws governed the personal lives of religious and other cultural groups in order to recognize cultural specificity, the public relevance of religion, and the links that many citizens felt between group laws and group identities. Moreover, the executive changed Hindu law in the first postcolonial decade, left the laws of the religious minorities unchanged, and indefinitely postponed the plan indicated in the constitution to introduce a uniform civil code (UCC). Hindu law governs about 78 percent of India's population. It applies to Hindus other than those taken to belong to tribes, and to the followers of other religions of South Asian origin, such as Sikhism, Buddhism, and Jainism.

Many scholars claim that these decisions were meant to give the religious minorities influence over the family laws that governed them. They also argue that these decisions were in keeping with the rights recognized in the modernist and egalitarian Indian constitution, as the changes introduced in Hindu law promoted these rights, and these changes indicated the direction along which the minority laws, and perhaps the UCC, would be shaped in the future. There are two major problems with this understanding. First, even if the accommodation of religious minorities required the retention of distinct group laws, this would have been compatible with changes based on the relevant group's legal traditions, norms, practices, and initiatives. Early postcolonial policy makers did not consult opinion within these groups or attempt such changes in their laws soon after decolonization, although they had considerable autonomy of religious groups at that time. The second problem with the foregoing interpretation is that the changes introduced in Hindu law during the first postcolonial decade did not systematically promote such constitutional rights as gender equality and individual liberty.

The crucial choices about family law that were made in India during the first postcolonial decade were part of a modestly modernist strategy of making nation and family. While employing idioms of modernization and national integration, the leaders of the ruling Indian National Congress (Congress Party) drew from both post-Enlightenment Western ideas and Indian traditions to visualize the nation, and built alliances with religious elites and ethnic and lineage leaders. Moreover, they wished to retain these alliances so that the Congress Party could remain a catchall party that dominated a competitive multiparty system. Such discourses and social coalitions influenced how India's early state builders recognized cultural specificity and changed family law. These factors made them less determined to change family law than the state builders of early republican Turkey and early postcolonial Tunisia, who broke their links with more religious elites and rural lineages and led one-party states.

Political elites in India disagreed more about the specific direction of family law than about other culturally accommodative policies—for example, the formation of states largely along the lines of language use and the adoption of preferential policies based mainly on caste. However, most were willing to retain distinct group laws and limit the changes they made to these laws as they prioritized state-directed change in economic and political life far more than in family life. These priorities made compromise on family law easier. The eventual compromise provided women more conjugal autonomy (by making divorce available to more Hindus and reducing the restrictions on mate choice) than control over property (their access to ancestral property was seriously restricted), and gave the nuclear family greater authority over the property its members earned than over ancestral property. While remaining open to cultural recognition in family law, the modernists wished to underwrite specific forms of family life. As a result, they introduced some legal changes that faced significant opposition, but formulated them so that they were unlikely to lead to rapid and unpopular social changes. This was the case with divorce rights, which were made available based mainly on spousal fault and only three years after judicial separation, to encourage the reconciliation of estranged spouses and to reduce the chance of divorce rates rising quickly.

Parts I, II, and III place the paper's arguments in the context of accounts of secularism, nationalism, cultural recognition, and family law in India and elsewhere, and discuss the influences on postcolonial Indian family law. Parts IV and V analyze the major changes introduced in Hindu marriage law during the first postcolonial decade. Part IV addresses the greater attention that the political elite gave to Hindu law than the Special Marriage Act (SMA), by which couples of any religious group or of no religious affiliation could choose to be governed. Part V explores the decisions to extend divorce rights, ban bigamy, and recognize intercaste marriages in Hindu law. Part VI indicates the influence of the modernist proposals that were not implemented in the 1950s over later changes in India's various family laws.

I. Secularism and Family Law

Many recent interpretations of Indian secularism offer these claims: viable secularist institutions and policies vary according to social context; distinct religious laws might be appropriate in India and other societies in which public religion is significant; and the postponement of changes in the laws of India's religious minorities was necessary to accommodate these groups. But, they say, the vision embodied in the Indian constitution shaped changes in Hindu law, which provided less support thereafter for gender inequality and joint-family authority than India's other family laws (Bhargava 1999, 2008; Chiriyankandath 2000; Jacobsohn 2003; Mahajan 1998). Some accounts of Indian multiculturalism

add that the postcolonial state did not change Muslim law as conservative Muslims, who had significant influence in their community, considered these laws important bases of Muslim identity; in fact, some of them made their membership in the Indian (rather than the Pakistani) nation contingent on the retention of these laws (Brass 1991).

These accounts of Indian secularism appear to heed the call of José Casanova (1994, 2006) and Talal Asad (2003) to understand the trajectories of secularization in relation to their social and ideational contexts. However, they remain inadequately attentive to important aspects of social context and policy, and conclude too readily that religion was appropriately recognized. These accounts ignore the possibility that the minority laws could have been changed based on the relevant group's norms and practices. Some Muslim leaders who demanded the retention of distinct personal laws in the Constituent Assembly, such as Naziruddin Ahmad and Hussain Imam, remained open to such changes if they had the relevant community's consent, and even to the future introduction of a UCC. Naziruddin Ahmad unsuccessfully proposed that the clause of the constitution about a UCC be qualified thus: "The personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community" (CAID 1999, 7:541–43, 546; see also PD 1951, 2550–52).

Initiatives to change public and family life among Indian Muslims shaped the flexible stances of these Muslim representatives. Some major *ulama* (e.g., Maulana Ashraf Ali Thanawi and Maulana Hussain Ahmad Madani of the influential Darul Uloom Deoband) and some important Muslim intellectuals educated in secular institutions, such as the poet Mohammad Iqbal and the lawyer-jurist Badruddin Tyabji, aimed to revive the tradition of *ijtihad* (innovative interpretation of Islamic law), which the colonial courts had marginalized (Kugle 2001; Robinson 2008; Zaman 2002). Imaginative legal reasoning led many *ulama* to initiate an increase in Muslim women's divorce rights through the Dissolution of Muslim Marriages Act in 1939. Muslim women's organizations such as the Anjuman-i-Khavatin-i-Islam; Muslim women's journals such as *Tahzib un-Niswan*, *Sharif Bibi*, and *Avaz-i-Niswan*; and Muslim leaders of the Indian nationalist All India Women's Conference (AIWC) advocated more extensive changes in Muslim law (Devji 1994; Jalal 2001; Metcalf 1982; Minault 1981, 1998). Early postcolonial policy makers did not engage with such currents to change Muslim law. While it is not evident that these initiatives represented preponderant Muslim opinion, it is equally unclear that the modernist Hindu law reform proposals of the time enjoyed support among a majority of Hindus.

These accounts also characterize the changes in Hindu law inaccurately. They illustrate the claim that Hindu law became more compatible with constitutional rights than the minority laws, mainly with reference to the recognition of bigamy among Muslims and not among Hindus. But they do not acknowledge the ways in which Hindu law reform reduced certain rights of some women—for example, the right of women in some matrilineal groups to inherit and control ancestral

property, the right of remarried widows to enjoy a part of their ex-husbands' property, and the right of later wives to inherit some property from their polygamous husbands. Moreover, they do not address the many inequalities that persisted in Hindu law, such as the "conjugal right" to the company of a spouse who prefers to live on her own, despite the risk this carried of enabling marital rape. (This right was recognized in Hindu case law from the late nineteenth century following the British regulations of the time, but gained the fixity that comes from incorporation into statute only in 1955; see Chandra 1998). The access of Hindu daughters to ancestral property was seriously constrained until 2005, as male joint-family coparcenaries (collective entities) controlled such property, and daughters could not demand their share of ancestral property. Most Christian and Muslim daughters had more effective claims to such property. Besides, Muslim women enjoyed more extensive divorce rights beginning in 1939 than both Hindu women and men did until 1976. While Muslim women could gain divorces immediately on grounds such as cruelty, desertion, and adultery, Hindus could only get judicial separation initially for these reasons, and obtain divorces only three years later.

Some scholars recognize that the Hindu law reforms of the 1950s did not systematically promote gender equality. But they proceed on this basis to inaccurately claim that these legal changes clearly reduced women's rights (Agnes 1999, 2007). Most Hindu women gained some new rights as a result of the reforms—for example, to inherit a share equal to that of their brothers in their parents' self-earned property in intestate cases (this especially benefited women from patrilineal groups, which account for the majority of Hindus); to get divorces, though only three years after judicial separation in most cases (not available to most upper and upper-middle caste Hindus until then); to prevent their husbands from practicing polygyny or to live separately while getting material support from their polygamous husbands; to will the property they inherited from their deceased husbands (provided they did not remarry); and to marry some extended kin.[2]

Flavia Agnes (2007) attributes the supposedly unambiguous decline in Hindu women's rights to the focus on nation building. Visions of the nation influenced approaches to family law in India and elsewhere. But nation-building imperatives do not account for the specific legal changes, as these changes varied in the rights and responsibilities they created. Nation building involved the promotion of different kinds of gender relations, varying degrees of cultural homogenization, and assimilation to different norms in various societies and times. This paper

[2]Mitakshara law, which the colonial courts took to govern the majority of Hindus, prohibited women and men from marrying kin sharing ancestors or descendants within seven generations on the paternal side and five generations on the maternal side. The postcolonial reforms reduced the range of impermissible marriage partners to those sharing ancestors or descendants within five generations on the paternal side and three generations on the maternal side.

addresses the ways in which Indian policy makers sought to shape nation and family by focusing on Hindu law and changing it in the ways they did soon after independence.

II. Nationalism, Colonial Modernity, and Cultural Difference

The engagement of Indian nationalism with colonial modernity and cultural difference influenced postcolonial family law. Gyanendra Pandey (1991) traced the influence of colonial classification on Indian nationalism, which oscillated between visions of the nation as a composite of religious groups and as a homogeneous entity. He highlighted the tendency of the latter vision to revert to a version of the former, according to which Indian culture was largely Hindu. Cosmopolitan and Hindu majoritarian discourses of the Indian nation influenced family law.

Early postcolonial political elites with Hindu majoritarian visions, as well as many of a more cosmopolitan and pluralist orientation, linked their aim to form the Indian citizen with projects of changing Hindu society. As a result, they focused their vision of desirable family life more on Hindu law than on the SMA or the minority laws. Among the cosmopolitan nationalists, the most influential agents of early postcolonial family law were Jawaharlal Nehru (India's first prime minister, from 1946 to 1964), and B. R. Ambedkar (India's first law minister, from 1947 to 1951, and a major architect of India's constitution). They were professed secularists, valued the recognition of religious minorities, and did not identify themselves with Hindu political identity. Moreover, Nehru was part of the syncretic Mughlai culture of the North Indian elite (Hindu and Muslim), and Ambedkar, the most important lower-caste leader of the mid-twentieth century, identified Hinduism with caste oppression and so converted to Buddhism soon after the major family law debates were over. Nevertheless, Nehru and Ambedkar focused on changing Hindu law as a means to form the citizen. They sought to consolidate Hindu law, which varied considerably until then by region and caste, and saw that consolidation as a step toward a UCC.

These features of family law policy were congruous with other policies introduced around the same time. For instance, Hindus belonging to the lower castes (the former untouchables or scheduled castes) were provided preferential policies and special civil rights protections, but lower-caste individuals who were not considered Hindu were not, despite abundant evidence that the latter group faced much the same constraints and indignities as the Hindu lower castes.[3] A common rationale underlay this choice and the focus on

[3]These rights were later extended to Sikh, Buddhist, and Jain scheduled castes, but not to those considered Muslims and Christians.

Hindu law reform in the 1950s: the state's efforts to reduce enduring inequalities were focused on Hindus. The uneasy coexistence of majoritarian and pluralist outlooks influenced this asymmetric approach to reform.

Partha Chatterjee (1989, 1993) claimed that the compulsion that anticolonial nationalists felt to assert their sovereignty over the cultural realm led them to reject the paternalistic social reform initiatives of colonial states. Indian nationalists, according to him, did so from the late nineteenth century, while leaving open the possibility of introducing such reforms after decolonization. However, Chatterjee's analysis does not account for the positions of many anticolonial nationalists, and it offers no understanding of the variations in social and cultural policy in postcolonial societies. Deniz Kandiyoti (1991, 2000), Joane Nagel (1998), and Nira Yuval-Davis (1997) indicated that the central role of unequal gender relations, especially in the domestic sphere, in the imagination of nations urged nationalist policy makers to give low priority to women's empowerment, particularly in family life. However, they did not systematically trace the links between the variations in the gendered imagination of nations and in the gendered formation of state institutions and policies.

Chatterjee's claims only fit the positions taken in the colonial period by conservative Indian nationalists, such as Bal Gangadhar Tilak, who opposed an increase in the age of consent that girls needed to reach before their husbands could have sexual intercourse with them in the 1890s, and Madan Mohan Malaviya, who resisted an increase in the minimum age of marriage in the 1920s. The ideological heirs of Tilak and Malaviya adopted similar postures after independence, opposing efforts to give Hindu daughters a share in ancestral property and to provide Hindus divorce rights in the 1950s. Many other Indian nationalists, both less conservative traditionalists such as Mohandas Gandhi and modernists such as Gopal Krishna Gokhale and Jawaharlal Nehru, supported increases in the age of consent and the minimum age for marriage, and Gandhi and Nehru also supported the proposals of two Hindu Law Committees to change Hindu law in the 1940s. While these leaders were not at the forefront of these efforts, some of their supporters were, especially those in the AIWC and the Women's Indian Association, who aided the passage of the Child Marriage Restraint Act in 1929 and mobilized support for reforms to Hindu law beginning in the 1930s. These actors did not feel that their support for these initiatives compromised their efforts to build a nation with indigenous roots, although Indian liberals who were colonial judges and bureaucrats proposed the ban on child marriage and made up a majority of the members of the Hindu Law Committees, as they either found domestic cultural bases to reshape the family along these lines or sought to reconstruct indigenous cultures to enable these ends. The modernists and many of the less conservative traditionalists initiated efforts to change family law after independence, drawing on the very visions of desirable family life that had influenced their social policy preferences during colonial rule. Indian nationalist women's organizations such as the AIWC tried to shape these reforms to maximize women's empowerment.

But their policy influence was restricted by their limited engagement in mass mobilization and their limited autonomy from the Congress Party, as well as their preference for a UCC in a context in which the major political leaders' concerns for recognition only provided space to reform group-specific family laws (Basu and Ray 1990, 54–69; Everett 1979, 139–89; Forbes 1981; Levy 1968–69; Mazumdar 1999; Nair 1996, 79–84; Sinha 1999; Williams 2006).

Some anticolonial nationalists followed the trajectory that Chatterjee attributed to all of them. For instance, modernist Tunisian nationalists shifted from a rejection of family law reform during colonial rule to the introduction of extensive changes soon after decolonization. But this path was a result of their changing support bases, rather than a consequence of their opposition to colonial discourse. Modernist Tunisian nationalists resisted reform more than their Indian counterparts during colonial rule because they were more closely allied with rural patrilineages and religious leaders, and introduced more extensive reforms soon after decolonization as they severed their links to these forces (Charrad 2001).

III. Modernity, State Formation, and Family Law

Modernists in the colonies derived their visions of desirable legal change partly from the changes made in Western law from the late nineteenth century to the mid-twentieth century—that is, the period just before and during the decolonization of much of Asia, Africa, and the Caribbean. These changes recognized the heterosexual monogamous nuclear family, formed and maintained by autonomous adult choice, as the primary unit of domestic life. The main such changes were the requirement of marriage registration; the constriction of the ability of lineage elders to determine marital partners; the extension of divorce rights under specific conditions; the criminalization of bigamy; the provision of inheritance rights to daughters, widows, and their children; and the prioritization of nuclear family members in inheritance (Diduck 2003; Friedman 2005; Glendon 1989; Goode 1993).

Ideas of indigenous legal modernity in the non-West also drew from precolonial traditions, in the forms in which they were interpreted in light of the ideas of modernity that emerged in these societies during the colonial encounter. The reconstructed versions of Islamic law that emerged in state courts, community courts, and the imaginations of scholars and activists in the Arab world, Iran, Indonesia, and Malaysia have especially attracted scholarly attention (Bowen 2003; Feener and Cammack 2007; Mir-Hosseini 2000; Peletz 2002; Stowasser 1994; Welchman 2007). Ideas of Hindu social reform grew from the nineteenth century onward in response to European critiques of some Hindu norms and practices. These ideas emphasized the promotion of women's education, greater freedom in mate choice, widow remarriage, women's employment in particular gendered occupations, and the restriction of child marriage and polygamy

as ways to enhance the virtue and stability of the family (Heimsath 1964; Jones 1990; Majumdar 2009; Sreenivas 2008). However, Hindu reformers and modernists were wary of the rapid growth of divorces, which they felt Western legal change had enabled. Influenced by Western models and ideas of Hindu reform, the Hindu Law Committees of the 1940s proposed to ban bigamy and provide divorce rights based on spousal fault rather than just mutual consent or marital breakdown, and after efforts at spousal reconciliation.

Christian missionary criticisms and middle- and lower-caste mobilization urged Hindu reformers to reduce caste segregation, and induced the more ambitious among them to build a Hindu community transcending caste boundaries (Bayly 1999; Jones 1990). These aspirations made some modernists wish to reduce the recognition of caste distinction, and perhaps incorporate some middle- or lower-caste norms into Hindu law. Such inclinations were in tension with their greater valuation of texts of religious law, whose prescriptions were closest to the customs of many twice-born castes (the upper and upper-middle castes) than to the customs specific to region, sect, and caste that were recognized inconsistently but extensively in the colonial courts. (Indigenous modernism drew this inclination from the tendency of Orientalist scholars to value textual traditions more than "folk" practices). The twice-born castes' sociopolitical power and the leadership of these groups in efforts to build Hindu solidarity also constrained efforts to recognize lower- and middle-caste norms. Nevertheless, the modernists who devised Hindu law reform proposals in the 1940s and 1950s proposed to recognize intercaste marriages and incorporate the divorce customs of many lower and middle castes into Hindu law.

In her account of the formation of states and family law in North Africa, Mounira M. Charrad (2001) argued that modernist reform succeeded if states contained the power of lineages and religious elites, and gained the primary authority to regulate family life. In India, reformers engaged with the authority of patrilineages, as well as those of religious elites, caste leaders, and language mobilizers. Policy makers acknowledged the relevance of religious norms in making postcolonial family law, but not specifically that of lineages. Religious mobilizers upheld religious laws, but these laws varied in the authority they accorded lineages. Of the two schools of Hindu law as they were conceived during the colonial period, Mitakshara law especially supported lineage authority, as it prescribed the control of coparcenaries, usually composed of male agnates, over much property. The Dayabhaga school of Hindu law and the various schools of Islamic law did not support lineage control as much as they applied the same rules to the inheritance of the property earned by parents as well as ancestral property, and Islamic law gave women definite shares in both kinds of property (see Cohn 1996, 57–75; Rocher 1972 on the formation of the idea of schools of Hindu law).[4]

[4]John Bowen and Donald Davis helped me understand the points discussed in this paragraph.

Hindu conservatives and Hindu nationalists disagreed strongly with many modernist proposals. Some of them defended the authority of the patrilineage, others vetted proposals with reference to the *shastras* (important texts of upper-caste Hinduism), and yet others wished to maintain the validity of some previously recognized customary laws or to incorporate these customs into Hindu law. Conservative resistance was most effective when it was presented as a defense of religious traditions, especially if powerful groups found support for their interests in such traditions. This was the case with the opposition to giving women and nuclear families greater control over ancestral property, which was contrary to the dictates of both Mitakshara and Dayabhaga law, and threatened patrilineal authority even more than proposals to reduce the joint-family's authority over conjugality. Reformers were more successful if they could present their preferences as compatible with religious tradition. This was true of the proposals to augment the economic support that women could get from male kin, for which there was considerable precedent in modern Western law, Hindu legal traditions, and some local customs.

Family law formation pitted against one another subcultures that were associated with distinct social visions, which were in conflict with each other over a range of other policies in many countries. In Southern and Central Europe, those associated with enlightenment and republican traditions, and later the socialists and communists, battled those belonging to Catholic and Christian Democratic subcultures over family law. In North Africa, urban coastal groups linked to nationalist parties supported modernist reform, which rural patrilineages and religious elites opposed (Charrad 2001; Glendon 1989). Contention over family law was not linked so much in India in the 1940s and 1950s to partisanship and preferences about making state and society in other respects. This was crucially because the dominant Congress Party drew support across the social, geographic, and, to some extent, ideological spectra. This made compromise easier, and gave some reformers the confidence that compromise would not indefinitely postpone their ultimate goals. Subsequent changes confirmed these calculations.

IV. The Special Marriage Act and Hindu Law Reform

The proposals and debates regarding family law from 1941 to 1956 indicate the outlooks in contention, and some of the ways in which policy decisions were reached. The Indian Parliament passed five pieces of family law legislation in the 1950s—four pertaining to Hindu law and a fifth to the optional SMA.

The SMA appeared more compatible than the personal laws with the Indian state's professed secularism, as it did not apply to particular religious groups or draw overtly from religious norms. Indeed, couples who opted to be governed by this act could be considered forerunners of a secularized future. However,

public and parliamentary debate focused far more on Hindu law than on the SMA. A Hindu Code Bill was initially proposed in 1941, and was the subject of extensive public consultation through the 1940s and early 1950s. A variant of the initial proposal was debated in the first postcolonial parliament between 1948 and 1951, but was abandoned because of considerable opposition. It was then divided into four acts, which were passed only after considerable compromise in 1955 and 1956. By way of contrast, the SMA was initially proposed only to the second parliament in 1952—and that, too, as part of the Hindu Marriage and Divorce Bill—and passed in 1954 as a separate bill without much alteration, as it evoked far less opposition in Parliament. Conservatives opposed Hindu law reform far more than the SMA, although some of the act's provisions departed even more from their preferences because they, as well as the modernists, gave the SMA less importance than Hindu law.

The SMA was applicable only to couples who renounced their affiliation with India's major religions from 1872 to 1923, and also to other Hindu, Sikh, Jain, and Brahmo Samaj couples from 1923 to 1954. (The Brahmo Samaj is a reformist sect formed in the nineteenth century.) Couples belonging to different religious groups or castes or to the same *gotra* or *pravara* (imagined mega-lineage) typically registered their marriages under this act, as the major religious personal laws did not govern marriages that crossed religious boundaries, and Hindu law did not recognize most marriages across caste boundaries or within a mega-lineage. Colonial law severed such couples from their joint-families and separated any shares they might have in joint-family coparcenaries. This authorized the control of these couples over their shares of ancestral property, but also made their continued economic cooperation with their kin less likely, and was in fact meant to urge them to forego their rights to inherit ancestral property. Moreover, it enabled couples whose only living son chose the SMA to adopt a son to perform their *pinda* (memorial ceremony), on the assumption that it would be inappropriate for a son whose marriage broke social norms to perform *pinda.* Besides, SMA couples were required to place notices of their wedding for a month in the government office in which the marriage would be registered, during which time others could contest the validity of the planned marriage. This gave the couple's kinsfolk a better chance to learn of their marital plans and subvert them if they so wished. No such advance notification was required for weddings governed by the religious laws. The Hindu Marriage Disabilities Removal Act had accepted intralineage marriages, and the Hindu Marriages Validity Act had accepted intercaste marriages in Hindu law, in 1946 and 1949, respectively, some years before the major Hindu law reforms were passed. This made it no longer necessary for such couples to register their marriages under the SMA.

The new SMA passed in 1954 enabled all Indian couples to register their marriages under this act. It was formulated more in keeping with prevalent modernist visions than Hindu law and Muslim law. It provided daughters greater access to ancestral property than Hindu law (as they could gain control over

their shares of such property), and higher shares of family property than Muslim law (equal to rather than half that of the shares of sons). Moreover, the SMA gave the nuclear family greater control over ancestral property, provided more extensive divorce rights (including divorce based on mutual consent), set a higher minimum marriage age for women (eighteen rather than sixteen), and placed fewer restrictions on intrakin marriage (disallowing marriages to those sharing ancestors or descendants within three generations, in contrast with Hindu law's nonrecognition of marriages to those sharing ancestors or descendants within five generations on the paternal side and within three generations on the maternal side since 1955). It was said that the act's last two features were based on eugenics rather than custom (PD 1953, 2507). These aspects of the SMA suggested that it could be the first step toward a UCC, an impression reinforced by C. C. Biswas, the minister of state for law who steered the act through Parliament (LSD 1954, 794–95, 812, 833, 892–93, 937; PD 1953, 2512).

However, the suggestion that the SMA would regulate the family lives of most citizens soon was in tension with the act's name and its preamble, which said that it provided "a special form of marriage," as well as with the claims of Biswas and some other SMA supporters, that only a few couples were expected to register their marriages under this act for a long time, primarily those belonging to different religious groups (LSD 1954, 897–98; PD 1953, 2507). Moreover, some aspects of the legislation made it unlikely that many would choose the SMA soon. First, the default choice for couples belonging to the same religious group was their religious law. This seemed to place those choosing the SMA on the margins of their religious group, although they no longer needed to renounce their religious identities. Second, the costs attached to registering one's marriage under the SMA were not reduced much.[5] Third, couples choosing the SMA had no adoption rights, which Hindu law provided but Muslim law and Christian law did not. Fourth, the Indian Succession Act, which governs Christians, also applied to the inheritance of property of SMA couples. It gave daughters greater inheritance rights—shares equal to those of sons in both property to which parents had joint title and that to which they had individual title, with no restriction on accessing their shares of joint property—than Hindu law and Muslim law. This made the choice of the SMA less likely, as the majority of Indians preferred to will much of their property to their sons (Basu 1999). Besides, applying an act governing Christians to non-Christians appeared to impute to them a Christian identity in this respect, further reducing the likelihood that non-Christians (98 percent of India's population) would opt for the

[5]These couples had to give a month's notice of their wedding; Hindu couples doing so were legally separated from their joint-families until 1976; couples belonging to different religious groups continue to face this consequence; and couples whose only living son chooses the SMA could adopt a son to perform their *pinda*.

SMA (LSD 1954, 750–52; 1955, 7935–36, 7997–98; PD 1953, 2510–11, 2523, 2546, 2559–60). An amendment of the SMA in 1976, which made the Hindu Succession Act rather than the Indian Succession Act govern Hindu couples opting for the SMA, did not offset the other factors discouraging the choice of the SMA. Foreseeing this, political elites focused their efforts to influence family life on Hindu law rather than the SMA.

Although members of all religious groups could register their marriages under the SMA, Nehru said that it was meant to reform Hindu society (LSD 1954, 8049–54), and many conservatives agonized over how the act differed from Hindu law (e.g., LSD 1954, 750–57, 875–76, 891–92, 895–97). Political elites were aware that the SMA differed from Muslim law, but did not discuss this much, as they assumed that it was primarily Hindus who would use the act. Not only did they focus reform efforts on Hindu law, they also felt that most non-Hindus would not follow the modernist paths open to them.

V. Hindu Marriage Laws Recast

Contending Visions and Actors

Parliamentarians provided various reasons for their focus on Hindu law. First, many of them felt that as the executive and legislature were largely drawn from Hindus, it would be best for them to change Hindu law and leave changes in the other family laws to the initiative of the concerned groups. Second, others argued that this focus was natural, as Hindus accounted for the vast majority of the population. Third, some valued Hindu consolidation and called it a goal of Hindu law reform. Fourth, some claimed that Hindus were readier than the other religious groups (especially Muslims) for the reform of family life. Fifth, some said that Hindu law was more backward than Muslim and Christian law, and so particularly in need of reform. Sixth, the greater diversity of legally recognized customs among Hindus was considered a reason to prioritize the consolidation of Hindu law.

The first claim was made by leaders who varied in their openness to social change and their sensitivity to non-Hindu concerns. Among them were Nehru and Ambedkar, who were critical of Hindu orthodoxy and valued cooperation across religious lines greatly; C. Rajagopalachari, India's only postcolonial governor general, who was an orthodox Brahman and one of Gandhi's chief lieutenants in his paternalist efforts at lower-caste "uplift"; and H. V. Pataskar, who piloted the major Hindu law reforms through Parliament as the Union minister of law in 1955–56, and was sympathetic to aspects of Hindu nationalism. When presenting the Hindu Marriage Bill before Parliament in 1955, Pataskar said that the focus was on Hindu law, as "our own people" were in power. Rajagopalachari chimed in that this was appropriate because "we are the [Hindu] community" (LSD 1955, 6480, 6483, 7673–74). Many of the same elites advanced the second claim.

Only Congress leaders with Hindu nationalist inclinations offered strong versions of the third claim. Pataskar, for instance, said that "bring[ing] together what are now termed Hindus" was central to the "ideology underlying the bill" (LSD 1955, 7674). Besides, he opined that the new Hindu laws would be extended to other Indians if they proved beneficial, although the government did not commit itself to this plan (LSD 1955, 7437–38, 8003). The concern with Hindu consolidation influenced aspects of the Hindu Marriage Act (HMA) such as its divorce clause, which provided for divorce immediately after the conversion of a spouse to a religion originating outside South Asia, but until 1976 made desertion, cruelty, and adultery grounds only for judicial separation, which could lead to divorce three years later. This choice was justified by claims that spousal reconciliation was less likely and perhaps less desirable after religious conversion than after desertion or cruelty (LSD 1955, 6473–75, 7673–74). Secularists such as Nehru and Ambedkar did not value Hindu solidarity, but claimed that Hindu law homogenization would enable Indian solidarity (Nehru 1996, 17:189–90; PD 1951, 2470–72). They said that Hindu law consolidation was a step toward a UCC, but remained silent on the UCC's content.

Policy makers provided no evidence to back the fourth claim. They were unable to rebut socialist leader Acharya Kriplani when he said that the policy proposals were out of tune with popular opinion, as a ban on bigamy enjoyed greater support among Muslims than divorce rights did among Hindus (LSD 1955, 7374–76). Many Hindus opposed divorce rights, but the extent of Muslim support for a ban on bigamy was uncertain, as this move was neither proposed nor widely discussed. Some critical proponents of reform offered the fifth claim. They included such leaders of the AIWC as Hansa Mehta, Renu Chakravartty, Sucheta Kriplani, and Jayashri Raiji, as well as other women parliamentarians such as Begum Aizaz Rasul, who had studied the gendered qualities of the different family laws closely (CAILD 1948, 3642–44, 3648; LSD 1955, 7877–78; PD 1951, 2534, 2753). Many modernists, especially Ambedkar, advanced the sixth claim, as they associated uniformity with modernity and effective state regulation (PD 1951, 2951–52).

Ambedkar, the main author of the modernist proposals, and Nehru, their most influential proponent, differed in the relative importance they gave to statute, texts of religious law, and custom. Ambedkar had a more sharply defined jurisprudential vision. He valued the standards of elegance set by civil law traditions, to which uniformity and completeness were central, and wished to depart from common law–based reliance on precedent. Moreover, he wanted to frame statutes to limit the opportunity for judicial interpretation, so that law would be more certain and the courts more tightly tethered to the intention of a popularly elected legislature (PD 1951, 2992–94).

Ambedkar valued textual sources far more than customs (PD 1951, 2992–94, 3029–30, 3077–78, 3185–86), and he wished to strictly limit the recognition of custom and the choice available to individuals regarding the laws that would

govern them. Aesthetic considerations urged him to favor this approach: "our law . . . should not altogether be unaesthetic: It must be good to look at" (PD 1951, 2948). Colonial Hindu law drew mainly from religious texts that prescribed patrilineal inheritance, marital alliances outside extended kin circles, and marriage indissolubility, following the customs of the upper and upper-middle castes of northern and western India. But the courts made many exceptions to these rules in recognition of customs that were specific to caste and region, such as divorce among many lower and middle castes, intrakin marriage in southern India, and bilateral and matrilineal inheritance among some groups in southern and northeastern India (on kinship patterns, see Agarwal 1995; Nakane 1967; Trautmann 1982; on Hindu law, see Derrett 1963; Menski 2003).

Ambedkar's inclination to limit the recognition of custom was in tension with his desire, as the most prominent lower-caste public figure of his time, to recognize some lower-caste norms. His enthusiastic equation of Hindu law homogenization with "slum clearance" (PD 1951, 2951–52) reflected this tension. He attempted to resolve this tension by incorporating some lower- and middle-caste customs that he valued into Hindu law statutes. Ambedkar argued that the introduction of divorce rights would ensure that Hindu law reflected the customs of the majority of Hindus (CAILD 1948, 3652; 1949, 827, 834, 838–41; PD 1951, 2948, 2992–94, 3004, 3185–86). Despite his association of Hinduism with caste discrimination, he wished to apply Hindu law to Sikhs, Buddhists, and Jains, as he believed that Hinduism was the only religion of South Asian origin associated with a legal framework, although Buddhist legal traditions existed in Burma (Myanmar), Sri Lanka, Thailand, and Japan, and distinct Buddhist laws were recognized then in Burma and Thailand (PD 1951, 2470–72). Nehru was more open than Ambedkar to the recognition of customs, especially those of tribal groups. The pressures that tribal group representatives exerted to maintain tribal customary law ensured that these groups were excluded from the purview of Hindu law statutes (see GIE 1954, 6890, 7474; PD 1951, 2419, 2692, 2965, 3110–13, 3183–84). The initial proposals, which faced strong opposition, were modified in the eclectic ways that Nehru favored more than Ambedkar, as Nehru was far more influential, a viable coalition had to be built to pass the reforms, and Ambedkar had resigned from the Law Ministry and the Congress Party some years before the Hindu law reforms assumed their final shape.[6]

The visions motivating opposition to the initial proposals ranged as widely as those of the proponents. Opposition was strongest to proposals that threatened the authority of patrilineages and the continuity of the nuclear family—that is, inheritance rights to ancestral property for married daughters and divorce rights. Many parliamentarians who opposed these changes were willing to

[6]Ambedkar, however, was open as early as 1948 to one of the major compromises the modernists made, the maintenance of joint-family control or primogeniture regarding agricultural land (CAILD 1948, 3651).

accept women's rights that they did not feel seriously threatened patrilineal authority (e.g., inheritance rights of unmarried daughters), as well as changes that valorized the nuclear family and conjugal autonomy (e.g., a ban on bigamy and the recognition of intercaste marriages). These preferences were based on the patrilineal assumption that married women are part of their husband's joint-families, which rendered their inheritance of shares of their parents' property a reduction in the property of their natal patrilineages. Congress leaders Pandit Thakur Das Bhargava, Pattabhi Sitaramayya, Sardar Hukam Singh, Seth Govind Das, Ganesh Sadashiv Altekar, and C. D. Pande voiced such preferences. Indeed, Bhargava advocated that women be given inheritance rights in the property of their fathers-in-law, not just that of their husbands. Along with Hukam Singh, Bhopinder Singh Mann, and Ranbir Singh, he also demanded the continued recognition of Punjabi customary law that recognized patrilineages' control over property; levirate marriages, which kept widows within their deceased husbands' patrilineages; and the extension of all the rights of sons to adopted sons. While defending such practices, he led the effort to expand conjugal autonomy by recognizing intercaste marriages in Hindu law in 1949 (CAILD 1948, 3637; 1949, 420–22, 425–26; LSD 1955, 7783–84; 1956, 6713–25, 6807–12, 6872–74, 6908–12; PD 1951, 2434–36, 2442, 2445, 2459–60, 2688, 2835–70, 2991, 3024–28, 3031, 3051–52, 3075–82, 3130–44, 3145–50). The nature of the opposition to the proposed changes influenced the eventual compromise over Hindu succession law, which gave daughters a greater share in their parents' separate property compared to the initial bill of 1948 (a share equal to rather than half that of sons), but accepted the control of solely male coparcenaries over joint property, as supported by Mitakshara law, rather than adopt the revised version of Dayabhaga law initially proposed, which gave daughters the right to claim their shares in such property, or make daughters coparceners.

The Hindu nationalist parties—Hindu Mahasabha, Bharatiya Jan Sangh, and Ram Rajya Parishad—were unanimous and most vociferous in their opposition to the reforms in Parliament and on the streets. This was the case even though they aimed to promote Hindu solidarity, and some policy makers argued that the reforms would enable Hindu consolidation. The Hindu nationalists resisted Hindu law homogenization mainly because they opposed many of the proposed changes, which enabled the violation of the norms of their main support groups, the twice-born castes of northern and western India. They particularly opposed divorce rights, the recognition of some extended kin marriages, the ban on bigamy, daughters' rights to partition ancestral property, and daughters' shares in their parents' self-earned property being made equal to those of sons.

Shyama Prasad Mookerjee, the founding leader of the Bharatiya Jan Sangh, expressed these concerns most effectively in the first parliament. He argued that the changes did not enjoy popular support, and he objected to the application of the new laws to Hindus, but not to the followers of the Semitic religions. When it appeared that conservatives would not have much influence over the content of

the new statutes, he urged that individuals should be given the alternative of previously recognized customs. While he meant this primarily to give the upper castes of northern and western India the option of retaining prereform laws, Mookerjee was willing to allow other groups to follow their customs as well. But he made no effort to hide his disdain for the customs of South Indians, the lower castes, middle castes, and tribes. For instance, he said, "I say good luck to South India! Let South India proceed from progress to progress, from divorce to divorce . . . but why force it on others who do not want it?" (PD 1951, 2716; see also PD 1951, 2178, 2710–13, 2715–20, 2722–23). However, he preferred a uniform Hindu law based on the customs of his core support groups to govern all Hindus, and eventually others as well once public opinion was appropriately shaped (PD 1951, 2706–8, 2723). Some other Hindu nationalists such as N. C. Chatterjee, G. R. Sarwate (Hindu Mahasabha), and Nand Lal Sharma (Ram Rajya Parishad) valued the *shastras* more, deduced from them rules similar to those Mookerjee advocated, and wished to apply them soon to all Indians (GIE 1954, 710–14; LSD 1955, 7452–55, 7479–81, 7490, 7497–98, 7697, 7760, 7925–29, 7933, 7978–79; PD 1951, 2374–75, 2392–2405, 2682–86, 2702, 2880–88, 2905–7, 3001–2, 3176–78).

Divorce Rights and Other Changes

The major changes introduced in Hindu marriage law during the first postcolonial decade were the recognition of intercaste, intralineage (*gotra/pravara*), and some kinds of intrakin marriages (e.g., marriages of cousins' children); the ban on bigamy; and the introduction of delayed divorce rights. Divorce rights and the recognition of intercaste and intralineage marriages aided conjugal autonomy; the recognition of intrakin marriages had an ambiguous effect on freedom in mate choice, as elder kin arrange most such marriages; and so did the ban on bigamy, as it strengthened the autonomy of women in many marriages, while weakening the recognition and the economic implications of the conjugal relationships that men entered into after their marriages broke down. The recognition of intercaste marriages was readily accepted because building solidarity across caste boundaries was central to both modernist and Hindu reformist ideas. The ban on bigamy and the recognition of intrakin marriages did not face much opposition, as Hindu texts did not clearly require bigamy, Christian evangelism had brought bigamy into disrepute among the elite, and the forms of intrakin marriage recognized were widespread in some regions. Divorce rights faced far more opposition in Parliament, and even more forceful resistance in pamphlets, speeches, and street protests, as they threatened the nuclear family's continuity and the joint-family's control over conjugality. The Anti-Hindu Code Bill Committee, which spearheaded protest from 1948 until the 1952 elections, made divorce rights the focus of its opposition.

The opponents of the HMA demanded a vote on its divorce clause alone in the Lok Sabha (the lower house of Parliament). Twenty of the 170 Lok Sabha

members who voted opposed the inclusion of divorce rights in the HMA (LSD 1955, 7821–24). The Hindu nationalist parties voted unanimously against it, joined by a minority of Congress party and Socialist Party members. Many other Congress party parliamentarians opposed divorce rights, but desisted from voting against them because the popular prime minister favored their introduction, because the Congress party had handily won the 1952 elections after some opposition parties emphasized their resistance to divorce in their election campaigns, and because policy makers made divorce less readily available in order to encourage the reconciliation of estranged spouses and thus reduce the chances of a rapid rise in the divorce rate. The two Hindu Law Committees of the 1940s and the bill presented to Parliament in 1948 proposed the immediate availability of divorce on grounds such as cruelty, desertion, and adultery. But the bill presented to Parliament in 1952 and the HMA made the conditions for divorce more stringent than those for judicial separation, raised the minimum wait between judicial separation and the consideration of a divorce petition from one year to three years, made it possible to have a divorce petition considered only three years after one's marriage, and raised the minimum period after divorce when remarriage was possible from six months to a year. The opposition to divorce rights did not lead the modernists to lower their aims regarding divorce rights in all respects, however. While divorce was to be made available only to couples who had civil marriages registered under Hindu law in the Hindu Women's Right to Divorce Bill of 1938 and in the Hindu Law Committee Report of 1941, the act that was eventually passed also made it available to those whose marriages had involved religious ceremonies.

The majority of Indians, as well as the majority of Hindus, already had divorce rights under some circumstances. Parsis gained these rights in 1865, converts to Christianity and their spouses in 1866, and other Christians in 1869. While Muslim men could always initiate divorce, Muslim women gained the right to do so in the state courts in 1939. Muslim community courts considered women-initiated divorce pleas even earlier. Besides, a majority of Hindus—many of the middle and lower castes—had customs of nonjudicial divorce that the colonial courts recognized (Mahmood 1995, 145–56). Moreover, five states (Kolhapur, Baroda, Bombay, Madras, and Saurashtra) provided all Hindus divorce rights between the 1930s and the early 1950s (Kusum 1975, 611; Menski 2003, 438–42). Nevertheless, the extension of divorce rights to all Hindus evoked significant opposition mainly because it was not clearly driven by prior changes in opinion. Greater social stigma attached to divorcées among the upper and upper-middle castes that dominated the legal and political elite than to those using the other new Hindu marriage law provisions. Such stigma was much greater among India's upper strata in the 1950s than it was among the social elite of Western Europe when comparably extensive divorce rights were introduced there—in the 1970s in Italy, Spain, and Portugal, and much earlier

in predominantly Protestant countries.[7] It remained strong enough in India thereafter that the courts often cited this as a reason to deny divorce petitions.

Bigamy was prohibited before the passage of the HMA for a little under a third of India's Hindus and just over a quarter of all Indians, a smaller group than those with divorce rights. Anti-bigamy provisions had been introduced in Christian, Parsi, and Jewish law throughout India, as well as in Hindu law in four states (Bombay, Madras, Saurashtra, and Madhya Pradesh) before the HMA was passed (Kusum 2000, 250; Parashar 1992, 286–87). Ambedkar therefore said that the introduction of divorce provisions under Hindu law was less innovative than the requirement of monogamy (CAILD 1949, 832–33). Nevertheless, many more parliamentarians opposed the divorce provision than the ban on bigamy (LSD 1955, 6487–89, 6843–50, 6856, 7693, 7760; PD 1951, 2713, 2716).

The divorce debate revolved at least as much around the practices the state would approve as around those it would permit. This made divorce proponents as intent on including divorce rights in statutory Hindu law as divorce opponents were averse to this course. Divorce opponents such as S. P. Mookerjee, N. C. Chatterjee, and Nand Lal Sharma argued that, in describing marriage as a *samskara* (a sacred purifying ceremony or process of self-realization), the *shastras* indicated that marriage is indissoluble, based on Orientalist translations of *samskara* as the Judeo-Christian "sacrament" (LSD 1955, 6843–50, 6856, 7693, 7705; PD 1951, 2512, 2712–13, 2880–87, 2913, 2905–7). Many divorce opponents were willing to continue to recognize customary divorce. They did not wish to place divorce within the easy reach of groups without divorce customs, but argued that these groups could seek divorces through recourse to the SMA (LSD 1955, 6504–6, 6514–15, 6835–42, 7796; PD 1951, 2716, 2723, 2749, 2818, 2823). Divorce proponents were unwilling to accept this arrangement, as they felt that only the inclusion of divorce rights in statutory Hindu law would effectively underline the state's valuation of conjugal autonomy, and that the alternative would not make divorce readily accessible. The alternative would have required members of groups with divorce customs to demonstrate the existence of these customs, and would have made divorce available to other Hindus who had not opted for the SMA earlier only based on mutual consent, as they would have needed their spouses' consent to retrospectively register their marriages under the SMA.

Divorce proponents such as Nehru and Ambedkar contested such conservative interpretations of Hindu traditions that had been incorporated into colonial law. They argued that the Orientalists had misinterpreted the *shastras* to regard marriage as a sacrament, pointed to the support in some *shastras* for divorce

[7]Divorce rights comparable to those introduced in 1955 for India's Hindus came into continued existence in France in 1884, in Sweden in 1915, in Britain in 1923, and in Germany in 1938 (Glendon 1989, 3, 17, 149–50, 160, 175–77, 182–85, 191).

under specific circumstances, and claimed that divorce rights would ensure that men respect the sanctity that the *shastras* associated with marriage by calling it a *samskara.* On this basis, they said that customary divorce was no further removed from the *shastras* than were upper-caste norms. This harkened back to the acceptance of diverse forms of *achara* (normative practice) in the *shastras*, in contrast with the view in colonial law that they were customs that could be accepted only as exceptions to Hindu law (LSD 1955, 6477–78, 6487–89, 6498–99, 6845, 7432–35, 7707–8, 7957–58, 7962–63; Nehru 1996, 10:447–50, 16:76; PD 1951, 2726–28).[8] Moreover, they argued that statutory Hindu law should be based on the customs of most Hindus unless such customs were undesirable. They pointed out that the inclusion of divorce rights in Hindu law was unlikely to trigger a divorce explosion, as divorce rates seemed low among groups with judicially recognized divorce customs, and the restrictions placed on divorce rights would urge estranged spouses to attempt reconciliation. These arguments helped assure many that divorce rights would not spell cultural deracination or undermine the nuclear family (LSD 1955, 6487–89, 6845, 7426, 7432–35, 7757–77; Nehru 1996, 1:443; RHLC 1947, 23–24).

Contention over divorce partly reflected the caste specificity of divorce practices. All parliamentarians who spoke or voted against divorce belonged to the twice-born castes, although they varied in party affiliation (LSD 1955, 7821–24). The appeal of including lower- and middle-caste customs in Hindu law urged some parliamentarians to vote for divorce rights (CAILD 1948, 3640–41; LSD 1955, 6533–36, 6891, 7374–76; Nehru 1996, 17:37, 59, 192–94, 434, 457; PD 1951, 2708–9, 2474–77, 2491–94, 2506–9, 2514, 2548–49, 2702, 2723, 2818, 2823, 2889–90, 2906). Many other plebeian customs were not incorporated into Hindu law, including some that were more conducive to gender equality and individual liberty than the new statutes. This was true of the matrilineal customs of various groups in northeastern and southern India (e.g., the Garos, Khasis, Jaintias, Lalungs, Rabhias, Nairs, Mappillas, Kurichiyas, Bants, Billavas, Nangudi Vellalas, Koyas, and Malmis), which provided women greater property rights and placed fewer constraints on mate choice. Many modernist Indian nationalists valued the ideal of mated couples from the early twentieth century, and advocated divorce rights for couples who ceased to feel deep bonds. Fewer of them valued considerable freedom in mate choice and women's control over property, and many accepted evangelical critiques of matriliny and were most comfortable with patriliny. As a result, the initial proposal of bilateral inheritance rules was abandoned, but divorce rights were introduced (Kishwar 1994, 2151–52; RHLC 1941, 1947; Sivaramayya 1999).

[8]This assessment of the relationship between customs and the *shastras* was perhaps appropriate because of the diversity of the *shastras* and the openness of classical Hindu law to different forms of *achara* (see Davis 2010, 144–65; Lingat 1998, 176–206).

The introduction and expansion of divorce rights had ambiguous effects on gender relations in many contexts, as the socioeconomic inequality of most spouses constrained women's ability to seek divorce and enabled many men to leave their wives and often reduce their material obligations toward them in the process (on the effects of the introduction of no-fault divorce in the United States, see Jacob 1988; Weitzman 1985). The HMA in particular provided women only limited space to leave unhappy marriages, as it enabled only delayed divorce on most grounds until 1976, and so did not trigger a patriarchal backlash despite the sharpness of the divorce debate.

Contrary to the indissolubility of marriage, not many defended bigamy or caste endogyny. As most political elites supported the promotion of solidarity across caste lines, intercaste marriages were recognized in Hindu law six years before the HMA was passed, although intercaste marriages were limited other than among hypergamous groups (CAILD 1949, 419–28). A few parliamentarians preferred to permit bigamy when men who have no sons with their first wives wish to marry another woman to have a son, as sons perform *pinda* in most Hindu families. This did not generate much opposition to the bigamy ban, as adopted sons could perform *pinda*, and bigamy opponents clarified that they meant to deter the practice and protect first wives rather than to punish bigamists (LSD 1955, 6888–89, 7555–56, 7579, 7727–29; PD 1951, 2721–22). Indeed, many Hindu bigamists escaped punishment even after bigamy was banned if their later wedding ceremonies did not involve the upper-caste ritual of *saptapadi* as many courts recognized marriages only when *saptapadi* was performed (Agnes 1999, 87–88; Menski 2003, 392–406).

VI. Early Postcolonial Lawmaking and the Subsequent Regulation of Family Life

Visions of modern personal life centered on the nuclear family and companionate marriage, and interpretations of Hindu religious and legal traditions from these perspectives influenced the Hindu law reforms proposed after independence. Policy makers meant to indicate through these reforms the forms of family life they wished to promote. They had to engage with the influence of religious traditions, patrilineages, and regional and caste customs. The diverse social groups and outlooks represented in the ruling Congress Party made only modest reform likely. More extensive reform might have occurred if the modernists led by Nehru had broken their links with conservative groups more fully, but they chose not to do so because they wanted the Congress Party to remain a dominant catchall party in a competitive multiparty system, and the changes they preferred in family law were not among their priorities. Positions on desirable legal change did not coincide closely with partisanship, making compromise easier. The proposals that were effectively presented as based in Hindu tradition were more

successful, particularly if they did not seriously threaten patrilineal authority. This was the case with divorce rights, but not with efforts to give nuclear families and women greater control over ancestral property.

Some scholars claim that these compromises undermined the transformative aims of the early postcolonial modernists (Agnes 1999; Sarkar 1990; Som 1994). They point out that divorce rights did not clearly empower women, that bigamy law had loopholes that judicial interpretation widened to seriously limit the punishment of bigamists, and that the proposed change most valuable to women—giving women effective access to ancestral property—was postponed. Women's limited economic autonomy, not advanced much by the modest changes in inheritance law, restricted their gains from divorce rights and anti-bigamy law. These studies accurately depict some consequences of Hindu law reform, but partly misunderstand the legislative intention and understate the influence of early modernist ambition on subsequent lawmaking.

Indian policy makers introduced some laws mainly to underwrite particular values, rather than to make all citizens adhere to these rules soon, as was true of many changes in Western family law (see Glendon 1989). They did not believe that the ban on Hindu bigamy would lead to the rapid imprisonment of bigamists or ought to have this effect, as many citizens tolerated the practice, and many women involved in bigamous relationships wished to retain the economic support they gained as a result. Judges followed legislative intention in declaring findings of bigamy much more often when women demanded maintenance payments and a separate residence from their husbands than in criminal cases against bigamists. Legislators introduced other legal changes (e.g., restricted divorce rights) partly because they were confident that they would not generate rapid social change. Judges urged most couples seeking divorce to initially attempt reconciliation, and followed legislative intention in this regard as well.

Some social, political, and ideational changes—family nuclearization, a decline in lineage control over property, the reduced salience of Hindu traditions in family law discourse, and the growth of autonomous civil society organizations, particularly women's organizations—proved conducive to the introduction of more of the earlier proposed reforms over the last three decades. Policy makers increased divorce rights as the weight they gave conjugal autonomy increased compared to the importance they accorded the nuclear family's continuity. Parliament reduced and then eliminated the waiting time between judicial separation and divorce on the grounds of cruelty, desertion, and adultery, in 1964 and 1976, respectively. Judges set lower standards of proof of cruelty, which they more often found when a spouse was subject to emotional distress, rather than doing so only if there was extreme physical violence; they also reduced standards of proof of adultery, which they more frequently took to exist based on neighbors' inferences rather than requiring eyewitness accounts. Moreover, Parliament made mutual consent divorces possible in 1976, and required permanent

alimony for indigent divorcees in 1973. Reformers changed inheritance law to give women higher shares of ancestral property, and more effective access to these shares, from the mid-1970s to the early 1990s in five states (Kerala, Andhra Pradesh, Tamil Nadu, Karnataka, and Maharashtra) with many bilateral and matrilineal groups, and in 2005 throughout India.

The modernist visions of family life articulated in the 1950s also influenced changes in the minority laws. The divorce rights of Christian men and women were increased and equalized, and unilateral male repudiation was restricted and permanent alimony made applicable among Muslims. These changes favored conjugal autonomy, much as the later changes in Hindu law did, and created areas of partial convergence in the laws governing India's major religious groups. Such convergence resulted as some judges and legislators interpreted the rather different traditions of these groups based on the same normative vision, one that valued conjugal autonomy and women's right to be free from violence and harassment and to get economic support from their husbands and ex-husbands if they are indigent (Subramanian 2008).

The early postcolonial policy debates also influenced aspects of subsequent legal mobilization. Early postcolonial policy makers presented the changes introduced in Hindu law as a step toward a UCC. Such slippage between the formation of Hindu law and a UCC in early postcolonial policy discourse made it easier for Hindu nationalists to present themselves as advocates of secular family laws once their political fortunes rose in the 1980s and public support for certain women's rights increased. Although the Hindu nationalists had resisted modernist Hindu law reform in the 1950s, they argued in the 1980s that minority accommodation had prevented the introduction of a UCC and thus the promotion of modern values, and that they alone would take the long overdue step of homogenizing family law, as they did not give the religious minorities undue recognition. Such rhetoric was not accompanied by efforts to specify the content of the UCC they wished to introduce. This led some to infer that a UCC introduced by Hindu nationalists would be based on some version of Hindu law, following the preferences that many Hindu nationalist leaders had voiced in the 1950s.

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