

FEMINIST ADVOCACY, FAMILY LAW AND VIOLENCE AGAINST WOMEN

INTERNATIONAL PERSPECTIVES



EDITED BY
MAHNAZ AFKHAMI,
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FEMINIST ADVOCACY, FAMILY LAW AND VIOLENCE AGAINST WOMEN

Around the world, discriminatory legislation prevents women from accessing their human rights. It can affect almost every aspect of a woman's life, including the right to choose a partner, inherit property, hold a job, and obtain child custody. Often referred to as family law, these laws have contributed to discrimination and to the justification of gender-based violence globally. This book demonstrates how women across the world are contributing to legal reform, helping to shape non-discriminatory policies, and to counter current legal and social justifications for gender-based violence.

The book provides case studies from Brazil, India, Iran, Lebanon, Nigeria, Palestine, Senegal, and Turkey, using them to demonstrate in each case the varied history of family law and the wide variety of issues impacting women's equality in legislation. Interviews with prominent women's rights activists in three additional countries are also included, giving personal accounts of the successes and failures of past reform efforts. Overall, the book provides a complex global picture of current trends and strategies in the fight for a more egalitarian society.

These findings come at a critical moment for change. Across the globe, family law issues are contentious. We are simultaneously witnessing an increased demand for women's equality and the resurgence of fundamentalist forces that impede reform, invoking rules rooted in tradition, culture, and interpretations of religious texts. The outcome of these disputes has enormous ramifications for women's roles in the family and society. This book tackles these complexities head on, and will interest activists, practitioners, students, and scholars working on women's rights and gender-based violence.

Mahnaz Afkhami is Founder and President of Women's Learning Partnership, former Minister for Women's Affairs in Iran, and editor of *Faith and Freedom: Women's Human Rights in the Muslim World*.

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International Perspectives

*Edited by Mahnaz Afkhami, Yakın Ertürk,
and Ann Elizabeth Mayer*

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“This revolutionary book offers a blueprint for reform of oppressive family laws in a variety of global contexts, secular and religious, progressive and traditional. This is a handbook to be dog-eared by activists and a fascinating read elucidating how change happens even in the most traditional societies.”

Madhavi Sunder, Professor of Law, Georgetown
University Law Center, USA

“Born out of the Women’s Learning Partnership’s (WLP) global campaign for family law reform, this anthology represents the richest compendium of comparative research on family laws. It combines rigorous research with clear objectives, drawing upon lessons learned and developing tools for advocacy and action. An essential resource for academics and activists alike.”

Deniz Kandiyoti, Emeritus Professor of Development
Studies, School of Oriental and African Studies,
University of London, UK

“This collection of comparative studies provides a valuable road map through the labyrinth of family laws as they define the status of women in some countries of the Global South, and of the feminist battles to reform them. The aim of these battles, though different from country to country, is ultimately one: to create new laws designed not only to provide gender equality in all matters, but also to protect women from the violence to which they are so often subjected.”

Jean Said Makdisi, Writer and Activist, Lebanon

“Enlightening and heart-wrenching simultaneously, *Feminist Advocacy* is a truly cross-cultural tour de force, bringing together the best of research and advocacy. It covers systematic violence and human rights abuses against women across many cultures and goes directly to the roots: it is all in the family laws. It is a must read.”

Shahla Haeri, Associate Professor of Anthropology,
Boston University, USA

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ABOUT WOMEN'S LEARNING PARTNERSHIP

Women's Learning Partnership for Rights, Development, and Peace (WLP) is a coalition of autonomous women's rights organizations working in the Global South that is dedicated to empowering women, strengthening civil society, and advancing democracy. WLP partners develop culturally adapted curriculum, lead transformative workshops, design and implement advocacy initiatives, and promote capacity-building activities. The Partnership uses a sustainable, bottom-up approach to advance human rights, increase political participation, develop robust democratic institutions, and promote leadership that is inclusive, horizontal, and compassionate. WLP's training materials have been published in more than twenty languages, reaching tens of thousands of women in more than fifty countries.

4

INDIA

*Kalpana Kannabiran*¹

Introduction: contextualizing personal laws in India

The State shall endeavour to secure that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. The state shall also recognize that motherhood has a special claim upon its care and protection.

*Draft Article 42 of Constitution of India,
dropped without debate (Rao 1968: 323)*

India is a constitutional, secular democracy, with the principles of equality and secularism written into the Preamble of the Constitution. The fundamental rights chapter (Part III) of the Constitution of India guarantees equality before the law (Article 14), non-discrimination based on sex, religion, caste, race, place of birth, or any other category (Article 15), the right to life and personal liberty (Article 21), and the right to freedom of religion (Article 25).

Alongside this constitutional framework, and intersecting with it, are religious laws that govern matters related to the family (marriage, divorce, inheritance, adoption, maintenance, succession, and guardianship). In the main, there are three sets of religious personal laws – Hindu, Muslim, and Christian – that have figured in public debates and jurisprudence, especially in terms of their specific relationship to the Constitution and other public law (notably criminal law). There is, of course, a diversity within these traditions as well that has been extensively debated in sociological discourse. The important aspect of these three traditions is that they immediately bring into play the question of the rights of minorities and the (written and unwritten) privileges of the majority in the country – rights and privileges that are not restricted to family laws alone but often bleed into the discourse on family law from a larger, often embattled debate on majoritarianism and the disentanglements of minorities in post-colonial, independent, democratic, plural, and multicultural India.

Tracing the historical context of the majority–minority dichotomy in India, Robinson argues that it was introduced by British colonial rulers

who viewed particularly the Hindus and Muslims essentially through the lens of religion and saw them as bounded and un-differentiated communities . . . The application of such categories and of the rigid notion of cultural/communal identity that accompanied them is . . . far from the localized, criss-crossing, and overlapping nature of identities that existed prior to British interventions.

(Robinson 2012: 6)

The codification of Muslim Personal Law (MPL) (not the *reform* of MPL) was crucial to this process of constructing minority identities (Williams 2012). Scholars have argued that “India’s minority rights policies have weakened the capacity of the state to protect the rights of women as equal citizens of a secular democracy” (Robinson 2012: 34) and assert that the state cannot become “an ally of social conservatism” or allow the undermining of its authority to legislate equal rights (Mahajan 1999, cited in Robinson 2012: 34). However, there is also a tendency to fix the aberrational presence on “the case of Muslims” as distinct from “Hindu Personal Law which has been amended from time to time by the state and Christians who have come together to make more gender-just the provisions of Christian Personal Law” (Robinson 2012: 34).

This chapter will focus on violence in the family and the approach of litigants, courts, legislatures, and the political elite to the elimination of such violence and/or neglect, tracing the relationship between laws criminalizing gender-based violence and personal laws that govern the family. To anticipate our argument, the cases and campaigns unravel for us the complexities in the interconnections between women’s status across communities irrespective of, or despite, reform – the Muslim woman not really emerging as the oppressed exception in an otherwise fair and equal world for women of other communities. However, there is another field in which gender simultaneously plays out – Muslim women in an increasingly stridently majoritarian society are denied agency and viewed as victims of an oppressive community, as evident from the debates around triple *talāq* and the Uniform Civil Code (UCC).

While acknowledging the vast and complex terrain occupied by the family in women’s lives, this chapter focuses on one aspect of feminist struggles in India – struggles against violence against women (VAW) in the family – and traces feminist debates, advocacy, legal reform, and the growth of jurisprudence and public policy (national and international) around the question of domestic violence (DV) and its interlinkages with gender-based discrimination in family laws from the early 1980s to 2016.

Background of women’s rights in India: 1970s and beyond

The early 1980s witnessed the rise of new feminist voices in India. This was the period immediately after the State of Emergency of 1975, which also witnessed the

growth of struggles for civil liberties and democratic rights across the country. The articulation of women's rights, however, was independent of the dominant human rights discourse, often raising questions of civil and political rights within the state, and, more importantly, within groups – communities, movements, families – and forcing the state to resolve contending claims. As women's rights movements gained momentum, a number of mass movements and democratic rights groups recognized the need to frame women's rights as part of a broader analysis of human rights, such as the Dalit and Adivasi rights movements.

With the rise in right-wing Hindu nationalism and communalism however, especially in the aftermath of the demolition of Babri Masjid in 1992,² one witnesses a shift in public discourse and feminist articulations, especially with respect to the rights of women in the family. Shades of strident majoritarianism are of course evident even in the 1980s, consolidating itself in the next decade.

Most women's groups were small, city/town-based, and worked primarily on consciousness raising, campaigns, and individual casework. This period witnessed the rapid growth in women's organizations, and a large number of women of different generations from all walks of life entered activism as a politically conscious choice. Women's rights groups across India, as elsewhere in the world, sprang from the need to reckon with gender discrimination and to find the theoretical tools to do this effectively. Feminist campaigns brought women's issues into public view through a multi-pronged strategy that included media exposure, strategic litigation, case work, public protests, consciousness and awareness raising at the local and national levels, and lobbying for changes in the law. As Gandhi and Shah argue, feminist mobilization on issues of VAW politicized what was up to that point understood as a "social issue" (Gandhi and Shah 1992: 94).

Voices from the struggle

I begin my account of law reform with three voices from the early 1980s, because the women speaking here are women who have had a lasting influence on the articulation of women's rights in the family. Flavia Agnes is one of the leading lawyers for women's rights in the country; Shahnaz Sheikh was the first Muslim woman to challenge triple *talāq* in the Supreme Court of India, while Satyarani Chadha is known as the face of the anti-dowry movement – her fight to have her son-in-law prosecuted for her daughter's murder resulted in far-reaching changes in the criminal law on dowry deaths in the early 1980s:

The first time he said I'll beat you, I thought he was joking. No one had said these words to me all my life. When he beat me the first time with his hands I was shocked. The second time – with a wooden hanger . . . The third time it was the belt, the buckle hurt the nose and the bridge broke. I was numb not so much with pain, but despair. No one had warned me marriage included this.

(Agnes 1984: 11).

Shahnaz Sheikh writes of her experience:

In 1983, I filed a writ petition in the Supreme Court challenging Muslim Personal Law as being discriminatory to Muslim women. I was divorced by the utterance of triple talaq and thrown out at midnight by my ex-husband. Life was difficult . . . It was [my husband's] word against mine. I consulted five qazis [magistrates or judges of Sharia courts], each of whom gave me a different version of my divorce.

I did not know what my legal marital status was. Was I married or divorced? That was when I decided to hire a lawyer and challenge this form of divorce and Muslim Personal Law in the SC [Supreme Court] on grounds of equality guaranteed by the Constitution. This was the first case of its kind in the Court.

(Sheikh 2016)

Satyarani Chadha's twenty-year-old pregnant daughter died of burns within a year of marriage:

I lost my daughter 35 years ago but in that process I saved thousands and thousands of others. But in the end, what did I get? He is alive, married and absconding, he is not in prison, but my daughter is dead. This disillusionment with law will always stay with me.

(Jain 2014)

The debate on social reform, especially as it impacts women's lives, has an old history. While in its earliest phases the debate focused on the subjugation of Hindu women, particularly high-caste Hindu women, the voices of reform that focused on marriage, conjugal practices, and family have arisen from different regions and, within each religion, from different groups.

Yet it is also true that heightened violence during conflict and the anticipation of violence post-conflict do give rise to community-driven spaces of collective mobilization to offer support to survivors. Vahida Nainar observes that advocacy during the conflict phase improves narrating violence and bearing witness. Victim-survivor communities experience a sense of agency (and even empowerment) as they recall each other's experiences of violence – the space of the camp is transformed into a space of community and solidarity.³ This is indeed the solidarity that Zakia Soman speaks about when she recounts the cascading effect of community-based advocacy post-conflict into homes in an effort to stall the economic violence of eviction from the matrimonial home and dispossession from assets that come with the unilateral pronouncement of divorce under Muslim law.⁴

There are widely divergent experiences of working with survivors of family violence – especially spousal violence – across religious community, caste, region, and class in India. While some advocates observe that the only women who come to them for relief under public law are women from the majority community, suggesting

also that Muslim women go either to Muslim lawyers or to Qazi courts, there are others in the same city like the counselors from Shaheen, a women's support group in the Old City of Hyderabad, managed by survivors, that point to the fact that across social locations, the women who have come to them have suffered from very similar problems. This difference in access to constituencies perhaps also derives from (a) spatial location – lines of contact in the new city being drawn in very different ways from lines of contact in the Old City of Hyderabad, and (b) the distinction between professional legal practice on the one hand and cross-community counseling, paralegal services, and victim support on the other. Sultana, from Shaheen, is a survivor of gruesome assault by her husband when she was pregnant; now, fifteen years later, she is a leader in the counseling center, with a keen sense of the practicalities of justice delivery and the indispensability of providing relief to women in difficult circumstances. She observes that polygamy is a problem for Muslim and Hindu Backward Class (BC) women, while severe restrictions on mobility are a problem with Muslim, Hindu BC, and Dalit women. She also notes that from her experience of a decade as counselor, not all women want to opt out of an abusive marriage or relinquish custody of their children. Several want to remain with the family but want the violence to abate, especially the routine sexual violence. In a context where both the men and women are poor, lack regular employment, and are socially vulnerable, the heightened vulnerability of women in the family can sometimes be reduced through counseling services by women's collectives like Shaheen that are able to bring violent husbands to the counseling table, using their goodwill with the Qazi and their presence in the community and neighborhood.⁵

It is useful to recall Solanki's delineation of two approaches to governing the family. The first she calls the "society-centred" approach, which suggests "group autonomy for cultural groups, especially minorities, in the regulation of the family." Here, she cites Chatterjee's view that a "strategic politics of difference" may be invoked whereby "cultural communities can refuse to be homogenized in the name of dominant reasonableness by developing an 'inner democratic forum'" (Solanki 2011: 5). The second approach is "state-centric" with difference relegated to the private sphere – with the state as the only locus of law (ibid.: 5–6).

Feminist reasoning

The significant aspect of the reform initiatives triggered by feminist groups in India is that there were a series of institutional responses – pre-legislative, legislative, and jurisprudential – that brought about a significant shift in the public discourse on VAW in the family. The purpose through this journey into feminist deliberations over thirty years is to understand the ways in which feminist advocacy has interwoven with legislation and statutory interpretation to shift the standards of interpretation of women's place in the family in India – a shift that has immediate implications for public discourse, the treatment of individual women in families, the response of the justice system (formal and community-based), and the political responsibility of elected representatives.

There have been two distinctive strains of feminist legal reasoning in debates around women's rights amidst claims to cultural (and religious) autonomy across the board – from minority to majority religions: the first has argued for a UCC that will govern practitioners irrespective of faith; the second has argued for a robust recognition of religio-cultural diversity, even while posing the question of equality, entitlements, and protections for women within community spaces.

The debates have been complicated by the fact that: (a) in the first set of arguments in favor of the UCC, the most strident appropriation of the debate has happened in the dominant Hindu right-wing political formations, where the separate spheres argument has been challenged as “appeasement of Muslims” by allowing specific practices like polygamy, unilateral divorce (especially the form that has come to be known as triple *talāq*), and maintenance for divorced/separated Muslim women under the Muslim Women's (Protection of Rights on Divorce) Act, 1986, rather than under the standard provision of Section 125 Criminal Procedure Code; (b) on the second track, where democratization of community spaces has been advocated, right-wing, conservative Muslim clergy and political parties (overwhelmingly male) have resisted every move for internal reform that could reduce the vulnerability of women to structural violence in the family, by insisting on the complete autonomy of community spaces under Article 25 of the Constitution of India; and (c) on the third track, where feminists, especially those from the dominant Hindu groups, have set themselves apart from fundamentalist or communal positions on women, there has not been a clear critique of patriarchal biases in Hindu laws of marriage and divorce and also the “hinduization of the Special Marriages Act” (Agnes 2008a: 504–505).

Advocate Albertina Almeida poses pertinent questions in relation to the current debate on the UCC, drawing on the experience of Goa in retaining the uniform code:

[E]ven as the UCC is being touted as the panacea for the violations of women's rights, nobody asks what really is the UCC in Goa. What is meant when the civil code is said to be “uniform”? Why was it retained in Goa? And how is it working for different sections of women?

(Almeida 2016)

Cautioning us that uniformity does not presume equality, that it can mean uniformity of discrimination across all religions, and that treating unequals equally results in inequality in effect, she presents an analysis of the Goan experience with uniform codes, which is quite specific and bears lessons for the ongoing national debate in India (*ibid.*).

Across all positions, to put it in a nutshell, equality must be understood in a manner that does not suggest uniformity but rather suggests a framework that ensures parity between groups (especially religious groups) and democracy within groups (Solanki 2011).

Dowry deaths, Hindu women, and law reform: the 1980s

The late 1970s witnessed the deaths of large numbers of young women, in their matrimonial homes, especially from burns; these women were recently married (mostly Hindu, in endogamous marriages within their castes), urban for the most part, and educated. The use of kerosene stoves was rapidly expanding across the country and consuming the lives of newly married women. These deaths were being reported by the husbands' families as suicides:

Satyarani Chadha did not have the benefit of either vernacular or English education, nor the privileges of an elite class. She was a shy, middle class family woman until the tragic death of her 20 year old, six month pregnant daughter Kanchanbala, with 100% burns in her marital home. This event in 1979 . . . changed her into an activist and a relentless crusader for women's rights and justice. Along with the parents of over 20 dowry victims, she spent 27 years of stubborn pursuit and dogged determination, battling legal cases and visiting courts, till she finally got justice when the High Court upheld the conviction of her son-in-law for abetting Kanchanbala's suicide.

Turning her grief into courage and deriving strength from her personal trauma Satyarani embarked on a life long struggle through her organization Shakti Shalini for women survivors facing DV, dowry abuse and harassment in their marital homes. She spent many years guiding, counseling and supporting parents and girls facing harassment and violence at the hands of their husbands and in-laws for dowry.

(Jain 2014)

Feminists insisted that dying declarations of women who had "attempted suicide" be treated as evidence and that police procedures be tightened up; protests against these deaths cascaded (see Kumar 1990: 115–126), with demonstrations, street theater, and sustained campaigns. In 1978, a year after the nationwide protests began, the Prime Minister of India, Mr. Charan Singh, assured a women's delegation that "measures to stop the maltreatment of women for dowry" would be introduced in the next Parliamentary session (*ibid.*: 120).

Following up on the demand by women's rights groups that matrimonial matters need to be adjudicated in a space that "mitigate[s] disequilibrium inherent in marriage relationships by creating new obligations and modifying old ones," family courts were set up under the Family Courts Act, 1984, with jurisdiction over criminal and civil matters relating to the breakdown of marriage: divorce, restitution of conjugal rights, alimony, maintenance, and child custody (Agnes 2008b: 276–277; see also Basu 2014). These courts were structured to create a more easily navigable space for women and were an important part of the structural and institutional changes brought about through feminist lobbying with the government. On another, related, track, India signed CEDAW in 1980 and ratified it in July 1993 with some reservations.

A survey of one hundred reported cases of deaths of women in their matrimonial homes between 1995 and 2004 shows that although there are problems in the interpretation of women's position in the family arising from the patriarchal mind-sets of judges and lawyers, and although the number of women dying in matrimonial homes remains alarmingly high – women being poisoned, burned, battered, drowned, shot, hanged, and strangled within the “safe and harmonious” confines of the family – there is a marginal increase in the rate of convictions in cases where women have died gruesome deaths and a perceptible shift in the judicial conscience.⁶ This impact is not as perceptible however in cases where the woman survives and escapes the cruelty of the matrimonial home. In these cases, the hostility to the survivor for not acquiescing to the codes of patriarchal conjugality (which is constituted by spousal violence) is evident in accounts of encounters with the criminal justice system. On another level, while most of the violence that women are subjected to within their matrimonial homes is premeditated and intentional, *mens rea* (criminal intent) is not read into murders of wives in the same way as it is read into murder *per se*. As Nainar observes, it is very difficult to argue that DV is torture – that is, giving these acts the gravitas that torture has – unless we are able to shift the focus from the actor to the acts.⁷ The family relationship is always the mitigating factor in sentencing policy, although the family relationship in fact renders these women more vulnerable to assault.

Still, justice delayed is better than no justice at all, which is demonstrated amply by the judgment in the case of the murder of Satyarani Chadha's daughter in 1979, which triggered the whole movement for criminal law reform. The Delhi High Court ruled that with respect to presumption, Section 113A of the Indian Evidence Act, although it came into force after the incident, “did not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and so retrospective in its application.”⁸

Through all of this however, the 1980s saw the emergence of a new common sense – in the public domain, the legislature, the executive, and the judiciary – on women's rights and entitlements within the family. The contradictions were deep, but the debate opened up a space for a different level of engagement, and the law forced an institutional engagement with the problem of VAW and an understanding of the crimes within the family that women were subjected to on a daily basis. Despite this, when the Protection of Women from Domestic Violence Act (PWDVA) was being debated two decades later, eminent jurists asked Indira Jaising, “What is this thing called ‘domestic violence’? The law recognises no such thing” (Jaising 2013: xv). The thing called domestic violence had to wait till 2006 to be defined in law.

Muslim women organizing around rights in the family, 1986–2016

It is apt to begin the discussion on family laws and Muslim women with the statement issued on 20 October 2016 by over a hundred “Muslims and people of Muslim descent” in India, which opposes triple *talāq*, the UCC, the Hindu right-wing ruling party's (the Bharatiya Janata Party) “new found love for Muslim

women,” and the appropriation of the Muslim voice by the All India Muslim Personal Law Board.⁹ Here I discuss the textures of advocacy on Muslim women’s rights in different parts of the country, focusing on the relationship between family laws and the larger political debates and projects on the status of minorities in India.

In the view of noted political scientist Zoya Hasan, religion, feminist politics, and the question of Muslim women’s rights need to be understood so that the intersection between minority rights and women’s rights is accounted for. A second issue concerns

the strategies deployed by minority groups to preserve their distinctive identity in response to threats to it, on the one hand and how Muslim women-led networks are challenging the authority of the religious elite to represent the “Muslim community” while reframing the category “Muslim women” in order to assert political agency to enhance women’s rights, on the other.

(Hasan 2014: 264)

The nuanced articulation of the rights of Muslim women as put forth in Hasan’s statement is a core aspect of the recent article by Shahnaz Sheikh, the first Muslim woman to challenge triple *talāq* in the Supreme Court of India, in 1986 (Sheikh 2016).

The single “positive” outcome of the genocidal VAW in Gujarat,¹⁰ according to Zakia Soman, a founder of the BMMA (Bharatiya Muslim Mahila Andolan or Indian Muslim Women’s Movement), was that ordinary women came out of their homes to speak about the violence they had witnessed or experienced. There was anger among women. They simply refused to accept the situation and stepped out of their homes to become first-generation activists – 200–300 women in the first instance. In the face of numbing, targeted assault, survivors were not stigmatized or ostracized by their family or community. There was also insecurity in the minds of parents, which led to mass marriages of very young girls – thirteen to sixteen years of age – post-conflict in the relief camps conducted by camp organizers and supported by Muslim organizations. Soman recounts that the act of stepping out and speaking about anti-Muslim violence led quite naturally to women speaking up about injustice and violence in the family – DV, *talāq*, second marriage without informing the first wife, and sudden demands for dowry. While initially they met as Aman Samuday (Peace Coalition), they realized soon that they needed to meet as women, and called meetings under the banner of Niswaan. Soman recounts their first meetings as a women’s group:

I remember a lot of women had come. Some of the women had come in a full-fledged burkha. But once we all got into the room we said, “there’s nobody here, we can all be free here, Ab uthar do, ab burkhe ki zaroorat nahi hai” [now you can remove your burkhas, there is no need for burkhas now]. And they had taken off their burkhas. I had seen their faces for the first time; I’d known them otherwise in the burkha, because they were coming for some rally or dharna [protest] over the Gujarat riots – I had only seen them through their eyes.¹¹

The first issues that were brought to the group were *talāq* and polygamy. Where women faced violence and needed to be moved out of the matrimonial home, the fact that the organizers were involved in post-conflict support had built trust in the community so they did not face resistance in retrieving a victim's personal belongings from her husband's home. In terms of law, they used a combination of instruments that worked – Muslim personal law, 125 CrPC for maintenance, PWDVA, 498A IPC, and negotiation and mediation with an abusive husband – anything that was just and brought relief to a woman in a particular situation. Most importantly, the BMMA felt both codification of Muslim law and access to public remedies were both necessary and important.

In the context of working with Muslim women, Noorjehan Safia Niaz observed that violence is not just physical – the threat of divorce, polygamy, and denial of child custody are all forms of violence commonly deployed against women.¹² While it may be desirable to use formal legal institutions such as the courts, women have no control over legal proceedings and poor women cannot afford the expenses incurred in court proceedings. Most prefer a settlement in the Women's Sharia Courts set up by the BMMA. Reiterating Zakia Soman's viewpoint, Noorjehan felt that after the demolition of Babri Masjid and the violence across the country against Muslims, there was a rise of Muslim women's organizations and women found their own voice within the community. Looking back on the early cases like Shah Bano,¹³ she feels the difference is that in the mid-1980s there were individual women fighting their battles, whereas now, Muslim women's collectives and movements were backing individual women's struggles. Although there is a very vocal opposition to their work (whether on the topics of *talāq* or women's entry into the Haji Ali *dargah* [tomb]), she feels that it is a sign of the tacit support they enjoy that there has been no fatwa issued against them to date. And she does not believe that it will be possible for regressive forces to gain control over them.

Muslim communities in Tamil Nadu are governed by the Jamaat, an all-male body that interprets Sharia law in adjudication of cases related to family law, especially marriage and divorce. Women, by definition, were excluded from the Jamaat and represented by male kin, even when matters directly concerning them were heard by the Jamaat. In 2004, around the same time that Zakia Soman began to work with Muslim women in post-conflict Gujarat, Sherifa Khanum formed the Tamil Nadu Muslim Women's Jamaat in the southern state of Tamil Nadu:

Whenever the jamaat wanted to subjugate women, they cited Quran as their guide. So we understood that it was the authority they drew from Quran that they used to oppress women. We then read Quran and re-examined our realities as women. This strengthened our resolve. The word that crystallised their actions and their authority was “jamaat” – a word that carried immense weight. And so in the course of our discussions, the idea was born. Why should we not form a jamaat ourselves?¹⁴

In 2002, Jameela Nishat founded the Shaheen Women's Resource and Welfare Association to work among women in the riot-affected areas of the Old City of Hyderabad. Taking a different route and working with the office of the Qazi alongside courts dealing with family law – rather than setting up women's jamaats or Sharia courts – in an interview Nishat underscored the difficulties of providing relief to women. Straddling criminal courts, family courts, and Qazi courts, Shaheen calibrates the options available to women who want to leave abusive homes. Recounting her work with the office of the Chief Qazi, she pointed out that the Qazi's records show an overwhelming number of cases of *khula*, where the woman asks for divorce and secures it. She cautioned against reading this as an expression of women's freedom.¹⁵ Rather, in the experience of Shaheen, it indicates that there is so much violence that women are unable to bear it and choose to opt out of marriage.

The All India Muslim Women's Personal Law Board (AIMWPLB), led by Shaista Amber, was set up as the women's wing of the All India Muslim Personal Law Board in 2005. It was perhaps born at this precise moment in response to the growing demand for reform by Muslim women across the country:

The Muslim woman today continues to face the brunt of a discriminatory law. She is divorced either orally, or in writing, and unilaterally, she gets meagre or no mehr^[16] amounts, her husband continues to remarry with impunity; her consent is not taken at the time of marriage, she is forced to undergo halala,^[17] she faces intolerable restrictions during her iddat^[18] and so on. It is a tragedy that while Quran bestows many rights on the Muslim women, they are not able to access them. The Quranic injunctions must be made legally enforceable by adding it to the constitution of India.¹⁹

AIMWPLB's *Khuli Adalat* (open court), a mobile adjudicatory forum, provides women facing difficult situations, especially in the family, to place their problems for consideration before Islamic scholars.

In general, the experience of Muslim women and the debate on personal law reform vis-à-vis the UCC has resulted in binaries in public discourse that thwart the possibilities of organic solutions emerging and crafted by the women themselves. Despite this, we have seen the various ways in which women have been able to negotiate the system – if the formation of a women's Jamaat is one route, women's Sharia courts and *Khuli Adalats* are another, and working with the Qazi's office to ensure that women get a fair hearing and decent maintenance in the case of *khula* is a third way.

In addressing the question of law reform for Muslims, in 2005 AIMWPLB put out a Model *Nikahnama* (marriage contract), while in 2015 Soman and Niaz circulated a Draft Muslim Family Law for signatures.²⁰

What is of particular interest through all these initiatives is the effort expended to integrate the constitutional principles of justice and equality for women with religious law. Within all these moves, there is a cascading feminist common sense

across social location that interrogates violence in the family and searches for alternatives – through counseling, dissolution on mutually consensual terms, negotiated settlements for the return of peace, the right to residence, and importantly in the domain of public law, strategic litigation, legislative reform, and legislative impact assessments on a regular ongoing basis, among others. It is with these questions before us that we move to a consideration of case law and problems in statute and interpretation in the three major religious traditions in India – Hindu, Muslim, and Christian.

Family law jurisprudence: an interreligious snapshot

Two discriminatory statutes that governed Hindus were challenged in *Gita Hariharan v. Reserve Bank of India* (AIR 1999, 2 SCC 228) – the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890.²¹ In the first petition, Gita Hariharan was refused recognition as her minor son's guardian when she applied for Reserve Bank of India Relief Bonds in his name. In the second petition, Vandana Shiva claimed custody of her minor son, challenging the legal norm of the father as natural guardian to the exclusion of the mother. The Supreme Court reinterpreted the statutory provisions in both these acts in favor of substantively equal status of mother and father vis-à-vis a minor child. In doing this, the court cited provisions from CEDAW, the Beijing Declaration, and Article 2 of the Universal Declaration of Human Rights (UDHR) (see de Alwis and Jaising 2016 for a detailed analysis). It must be stressed that the route to personal law reform has been distinctive in each of the major religions. The reforms around anti-dowry legislations that primarily affected Hindu women were described in an earlier section, as well as the efforts at mobilizing Muslim women around issues of DV, imbuing new meaning to the idea of plural jurisprudence.

Tracking the relationship between legislative and judicial action with respect to family laws, Subramanian observes that the Christian clergy and mobilizers were more inclined to reform in the post-1980s period than were Muslim leaders (Subramanian 2014). As a result, the initiative for Christian law reform came from the legislature, whereas Muslim law reform was pushed through statutory and constitutional interpretation, faced as it was with no legislative initiative and demands by aggrieved women litigants for entitlements, especially on dissolution of marriage. Even prior to the deliberations around reforming the Christian law of divorce, however, the 1986 case of *Mary Roy v. State of Kerala* (1986 AIR 1011, 1986 SCR (1) 371) removed gender-based discrimination in the inheritance of property among Syrian Christians in Kerala, although her lawyer, Indira Jaising, recalls, importantly, that what Mary Roy was primarily asserting was not ownership, but her right to usufruct, in the property of her natal family to whom she returned after her divorce.²²

Although there was a fair degree of unanimity that Christian law of divorce, the Indian Divorce Act, 1869, provided very limited and unequal grounds for divorce to men and women, legal reform itself was considerably delayed. It was

the case of *Mary Sonia Zachariah v. Union of India* (1995 (1) Ker LT 644 (FB)) that saw the coming together of religious organizations and rights organizations, which included two of Kerala's important reformed Orthodox churches, Christian reform organizations, and rights groups such as the Joint Women's Programme.

The specific points on which the court deliberated in *Mary Sonia Zachariah* were the limited grounds for the availability of divorce (denied to women on grounds of cruelty or desertion alone) and the unequal access to divorce for Christian as compared to other religious groups. The latter point, the court felt, defeated the constitutional guarantee to equality and non-discrimination on grounds of religion and gender. The denial of cruelty as a ground for desertion, the court felt, violated women's fundamental right to life and personal liberty.

The second judgment, *Pragati Varghese v. Cyril George Varghese* (AIR 1997 Bom 349), introduced an easier availability of divorce to Christian women than to Christian men, riding on the crest of Christian reform advocacy. It justified such asymmetry by taking recourse to the "muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role particularly in this country."

The legislative amendment to the Indian Divorce Act in 2001 was comprehensive and equalized the divorce rights of Christian men and women. It (a) made divorce available to men and women upon mutual consent; (b) removed the requirement of high court confirmation of lower court divorce decrees; (c) increased alimony entitlements, and (d) removed the punitive approach to adultery that authorized transfer of the property of adulterous women to their husbands and children on divorce.

Section 125 of the Criminal Procedure Code (New) adopted in 1974 required men to support their dependent ex-wives. For Muslim men, this meant extending support beyond *iddat*, until such time that the ex-wife found support either through employment or through remarriage. Although in deference to pressure from conservative Muslim legislators a qualification was added in Section 127(2)(6) that exempted Muslim husbands from providing support to their ex-wives beyond *iddat*, decisions on maintenance claims by divorced Muslim women varied in applying these two sections between 1974 and 1985. There was a preponderance in the judicial view that husbands were required to pay permanent maintenance – in contrast to decisions involving Hindu or Christian women, where alimony was the norm after 1974. The case that brought the question of maintenance for a divorced Muslim woman to the national stage was the case of Shah Bano, decided by the Constitution Bench of the Supreme Court of India.²³

While the arguments of Shah Bano's advocate and legal scholar Danial Latifi were crafted with a keen and nuanced understanding of Muslim law, the author of the judgment, Justice Y.V. Chandrachud, rather than building on the arguments presented, interspersed his judgment with statements such as the "fatal point in Islam is the degradation of woman," and called for a UCC (Subramanian 2014).

The furore that followed this judgment, especially among Muslims, led to Shah Bano herself renouncing the alimony that the court had decreed. In response to

the demand of conservative sections, the Muslim Women (Protection of Rights on Divorce) Act, 1986 (MWPRDA) was passed. According to this act, the natal family of the woman and community trusts (*waqf*) would bear the responsibility of providing economic support for women beyond *iddat*.

However, the act was ambiguous about the man's responsibility to maintain his ex-wife beyond the *iddat* period – there was no clear statement that men would not be required to support their ex-wives beyond *iddat*. Women therefore continued to seek maintenance both under 125 CrPC and through other plural mechanisms described in the earlier section. Section 125 CrPC itself was amended in 2001 to remove the ceiling of Rs. 500 per month on maintenance.

In 2001, in *Danial Latifi v. Union of India* (2001 (7) SCC 740), lawyers who had represented Shah Bano argued that Muslim men owed their ex-wives permanent alimony even after the passage of the MWPRDA. Without overruling Shah Bano, or the MWPRDA, the Court followed an established standard of judicial construction – construing statutory law in the light of the Constitution – and asserted that it is “difficult to perceive that Muslim Law would place the responsibility for economic support for a divorced woman entirely on people unconnected to the matrimonial relationship” (cited from Subramanian 2014). Also, importantly, by the time the Latifi decision came, the political climate in the country had turned stridently anti-minority. Given its accommodative and careful approach to interpretation, the Latifi judgment came to bear without much resistance from those who had protested against Shah Bano earlier.

Finally, after decades of opposition to the practice of “triple *talāq*” by Muslim women's organizations, in August 2017 the court in *Shayara Bano v Union of India and Others*²⁴ finally applied the principle of manifest arbitrariness to strike down the practice of triple *talāq*.

Protection of Women from Domestic Violence Act, 2005

The PWDVA came into effect on 26 October 2006, to provide for “more effective protection of the rights of women guaranteed under the Constitution *who are victims of violence of any kind occurring within the family*” (PWDVA, Statement of Objects and Reasons, cited in Jaising 2014: 3, emphasis added). As Senior Advocate Indira Jaising points out, the legislative invocation of the Constitution in a law on DV is testimony to a feminist journey through the rugged patriarchal terrains of law, where we have come full circle from the point where a judge of a high court famously declared that introducing constitutional law in the home is “like introducing a bull in a china shop.”²⁵ The home, under this law, was conceived as a shared space with entitlements to residence that did not flow from ownership. Jaising points out that the idea of “shared household” in PWDVA “is in keeping with the family patterns in India, where married couples continue to live with their parents in homes owned by their parents” (Jaising 2014: 3). DV under this law is not limited to spousal violence, and “matrimonial relationship” is displaced by “domestic relationship.”²⁶ In the history of feminist support to survivors of DV,

dispossession from both the natal home on marriage and the matrimonial home through cruelty has not addressed the survivors' needs for sustenance and shelter. The combination of criminal and civil elements in this legislation, therefore, is aimed at ensuring the abatement of violence *and* the securing of other needs of the woman. The fact was that "women were getting relief all under one roof, where they didn't have to run separately for maintenance, separately for custody, separately for compensation, and then the right to residence – which was a big deal."²⁷

The PWDVA was enacted after three decades of struggle to end violence in the home, which included legislation, legislative impact assessment, the deliberations of a Parliamentary Standing Committee, and close monitoring and evaluation (Jaising 2014). In fact, it would not be far from the truth to state that the PWDVA is a direct result of these actions.

What is particularly interesting about the trajectory of this legislation is the different institutional realms and practices it has intertwined with. The PWDVA recognizes public health facilities as service providers and addresses for the first time *within a legislation* the issue of violence as a public health concern (Bhate-Deosthali et al. 2012: 67). The significance of this lies in the fact that it is perhaps the first time that redressing VAW has involved a close engagement with the public health-care system – both from the need for evidence gathering in a medico-legal case and to address the need for emergency treatment, care, and trauma counseling.²⁸ The dominant view until this point was that DV was a "personal" problem, with the healthcare provider only providing symptomatic relief.

Women's experiences of violence exist across a continuum. Several advocates interviewed for this chapter observed that the *Nirbhaya* case has had a marked impact in women naming marital rape and sexual violence as DV – despite the fact that criminal law in India does not recognize the crime of marital rape, and by these accounts the threshold of tolerance for domestic violence has dropped, with natal families in several instances coming out in support of daughters.²⁹

Further, approaches to justice are plural – and not all cases go through the public law system. Yet one of the remarkable characteristics of feminist advocacy against violence has been that the cumulative sensibilities that are crystallized in the PWDVA (for example) have in small but significant measure made inroads into spaces of personal law, providing important standard-setting tools in different locales. With the PWDVA itself being central to the thick nesting of activism around CEDAW, international debates, standards, and stories filter through to the smallest initiatives through an array of practices in strategic litigation – the women's Jamaat, the Qazi court, the *biradari panchayat* (informal caste councils), the court of the magistrate, the constitutional court, or the CEDAW sessions that call governments to account.

The most important lesson that this legislation bears for our understanding of the changed position of women in the family, according to Indira Jaising, is that it represents a departure from protectionism by the state and the emergence of the woman's autonomous and inalienable rights within the family – to a life free from both violence and from dispossession.³⁰

Conclusions

This study has attempted to provide a bird's-eye view of the intersections in India between feminist struggles against VAW in the family, the rise of feminist legal scholarship, the campaigns for law reform, and the afterlives of feminist engagements with law.

The rise of violent Hindu majoritarianism has had very specific discursive effects on the rights of women, especially from minority groups, both within the courts and in the public domain. The successful challenge in the Supreme Court of India to the practice of triple *talāq* by Muslim women, and the appropriation of this discourse by the ruling party through the enactment criminalizing the pronouncement of triple *talāq* for instance, to serve the Hindutva agenda of stigmatizing minorities for their shabby treatment of “their” women has rendered the pitch extremely difficult to navigate for women generally, but especially for Muslim women who have been fighting for reform within personal law traditions.³¹ The observation is poignant and true that witnessing/surviving collective anti-minority violence makes the narration of violence (within the family) possible. This larger context of bitterly contested majority-minority politics within which Muslim women – from Shahnaz Sheikh and Shah Bano in the 1980s to Shayara Bano in 2016³² – have stood their ground against both Muslim orthodoxy and Hindutva politics is one that shines the torch on the strength of feminism in India even in times of siege.

An important aspect of this engagement is that the resolution of cases has steadily taken place with simultaneous recourse to the courts and to community-based adjudicatory spaces – those driven by women, like the Muslim women's Jamaat (Dhanraj 2011), as well as through creative interventions in Qazi courts.³³ In terms of its demonstration of a wider praxis for feminist legal reform, the indispensability of plural legal spaces, and the calibrated use of each space to wrest more ground for women, is most significant (see Vatuk 2017).

This review has attempted to signpost the various ways in which legal reform efforts have historically taken shape in India. Codification is not always the answer, as we have seen – it could result in the dispossession of women in insidious ways; nor, as Indira Jaising has argued, is the right to property alone the answer. Across communities, women who leave abusive marriages (or are thrown out) find themselves on the edge of survival. Those who anticipate these troubles and stay are often killed. The campaigns for reform of criminal law introducing the new offence of torture and murder for dowry in the 1980s fueled a new turn in feminist mobilization. And yet, two decades later, the CEDAW Committee marked the rise in dowry deaths as a matter of concern and the Law Commission of India (2007) published a second report on dowry deaths recommending the death penalty.

Important lessons from the campaign against domestic violence, however, are: (a) the ways in which we can resurrect older practices of fairness contained in personal laws and ousted through codification, for a new template of justice; and (b) the ways in which feminist interventions in legal reform intersect. The focus in the PWDVA on shared residence, drawing as it does, on the older right to usufruct that women enjoyed, makes a sharp departure from an approach of state protectionism towards

women towards their *right* of residence. This was also the basis of the earlier challenge posed by Mary Roy to Christian women's right to inheritance, which focused on Roy's right to *use* the family property.³⁴ Similarly, several accounts stressed the fact that the uprising against sexual assault in 2012 and the subsequent reform of rape law has reduced the threshold of tolerance for domestic violence,³⁵ with survivors of marital rape reporting this at public hospitals.³⁶ While on the subject, the importance of treatment (of physical and psychological injury) and recording of medical evidence of survivors who approach healthcare facilities is rarely discussed as an intrinsic part of law reform on VAW. The case of the Centre for Enquiry into Health and Allied Themes (CEHAT) in Mumbai illuminates this path for us (Bhate-Deosthali et al. 2012 and Bhate-Deosthali et al. 2013).

The core strengths of the feminist movement against violence in India have been the steady emergence of survivors as leaders of the movement to end violence and the intersectional approach to women's rights. This mapping of the trajectories of rights advocacy, legislation, and the rise of new sensibilities and consciousness, we hope, will serve twin purposes: providing a template through which we may begin to understand other social movements, and offering a template to think through transversal politics for women's rights, in which engagements with legal regimes/lawnsapes are critical.

Notes

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- 2 On 6 December 1992, the Vishva Hindu Parishad and the Bharatiya Janata Party organized the demolition of the Babri Mosque in Ayodhya, Uttar Pradesh, involving 150,000 'volunteers'. The crowd overwhelmed security forces and tore down the mosque, resulting in months of heightened communal tension, widespread protests against the demolition, organized violence against Muslims, and the deaths of at least two thousand people.
- 3 Interview with Vahida Nainar, 23 December 2016.
- 4 Interview with Zakia Soman, 21 December 2016.
- 5 Interview with Sultana, Shaheda, and Suman, Shaheen Women's Resource and Welfare Association, 28 December 2016.
- 6 These are cases reported from various high courts and the Supreme Court. Details are available on file with the author.
- 7 Vahida Nainar interview, 23 December 2016.
- 8 *Subhash Chander and Anr. v. State on 16 December 1991*, 46 (1992) Delhi Law Times 366.
- 9 <http://thewire.in/74667/triple-talaq-statement-muslims/>. There are many decisions on triple *talāq* and unilateral male repudiation among Muslims. For a detailed list of cases, see Subramanian 2014: n. 98.

- 10 In 2002, more than a thousand people were killed over the course of two months in genocidal violence against Muslims in Gujarat, a state then led by Narendra Modi, now India's prime minister.
- 11 Interview with Zakia Soman, 21 December 2016.
- 12 Interview with Noorjehan Safia Niaz, 2 January 2017.
- 13 In 1978, Shah Bano, a sixty-two-year-old Muslim mother of five from Madhya Pradesh, was divorced by her husband. She filed suit in India's Supreme Court and won the right to alimony. However, under pressure from Islamic leaders, the Indian Parliament subsequently reversed the judgment.
- 14 Sherifa Khanum in *Invoking Justice*, a documentary film on the Tamil Nadu Muslim Women's Jamaat directed by Deepa Dhanraj, 2011.
- 15 Interview with Jameela Nishat, 26 December 2016.
- 16 *Mehr* (*mehrieh* in Farsi) is a mandatory payment, in the form of money or possessions paid or promised to pay by the groom to the bride at the time of marriage, which legally becomes her property.
- 17 *Halala* is a situation in which the divorced woman is forced to marry another man and consummate that marriage, divorces that man, and remarries her original husband.
- 18 *Iddat* is the period a woman must observe after a divorce or the death of her spouse, during which she may not marry again.
- 19 Website of All Indian Muslim Women Personal Law Board, www.aimwplb.com/about.
- 20 They also put into circulation a draft legislation on Muslim family law (Soman and Niaz 2015).
- 21 This discussion of cases, judicial interpretation, and reform in this chapter is based on Subramanian 2014.
- 22 Interview with Indira Jaising, 5 February 2017.
- 23 *Mohammad Ahmed Khan v. Shah Bano Begum*, 1985 SCR (3) 844.
- 24 Writ Petition (Civil) 118 of 2016.
- 25 *Harvinder Kaur v. Harmander Singh*, AIR 1984 Del 66.
- 26 Domestic relationship includes "all relationships based on consanguinity, marriage, adoption and even 'relationships in the nature of marriage'" (Jaising 2014: 9).
- 27 Interview with Anuradha Kapoor, Swayam, Kolkata, 21 December 2016.
- 28 Interview with Padma Bhate-Deosthali and Sangeeta Rege, 27 December 2016.
- 29 Interviews with Advocate Vasudha Nagaraj, Hyderabad, 29 December 2016, and Noorjehan S. Niaz, 2 January 2017. The *Nirbhaya* case refers to the sexual assault and murder of a young woman on the streets of Delhi in December 2012 that resulted in amendments to the rape law in 2013.
- 30 Interview with Indira Jaising, 5 November 2017.
- 31 Muslim Women (Protection of Rights on Marriage) Act 2017 passed in December 2017, in Section 4 sets out imprisonment for three years and a fine as punishment for men pronouncing triple *talāq*.
- 32 *Shayara Bano v. Union of India*, Writ Petition (Civil) 118 of 2016.
- 33 Interviews with Jameela Nishat, 26 December 2016, and Sultana, Shaheda, and Suman, Shaheen Women's Resource and Welfare Association, 28 December 2016.
- 34 Interview with Indira Jaising, 5 February 2017.
- 35 Interviews with Vasudha Nagaraj, 29 December 2016, and Renu Mishra and AALI team, 5 January 2017.
- 36 Interview with Padma Bhate-Deosthali and Sangeeta Rege, 27 December 2017.

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Abbreviations in Case Citations

AIR: *All India Reporter*; Bom: Bombay; Del: Delhi; ILR: Indian Law Reports; Kar LJ: *Karnataka Law Journal*; Ker LT: *Kerala Law Times*; SC: Supreme Court; SCC: Supreme Court Cases; SCR: Supreme Court Reports