3 The Application of Muslim Personal Law in India

A system of legal pluralism in action

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Introduction

In this chapter I describe the way in which Islamic family law is applied to Muslim citizens of India today, both in the state courts and in a variety of non-state religious and community-based dispute-settlement venues. I draw upon the extensive secondary literature, as well as some of the relevant case law, supplemented by ethnographic and archival data from research that I have been carrying out over the past 13 years on various aspects of Muslim personal law in India and its impact upon women's welfare. In the course of this research I spent nine months in 1998–99 in Chennai carrying out ethnographic fieldwork, interviewing Muslim women litigants and examining case files in the Chennai Family Court and in one of the city's All-Woman Police Stations. In the fall of 2001 I did a similar, though less extensive, study of Muslim personal law cases in the Hyderabad Family Court, while also examining a large body of marriage records that, by law, are required to be deposited in the Andhra Pradesh State Archives by the government *qazis* who preside over most weddings that take place in that city. I also interviewed several of those *qazis* in their respective offices and was given permission by one of them to copy a substantial sample of his recent divorce records. In the fall and winter of 2005–06 I spent one month in Delhi and three months in Hyderabad observing the proceedings and examining the files of divorced Muslim women's maintenance cases in the magistrates' courts of the two cities.[1]

Legal pluralism in India

The Indian system of family law (or personal law, as it is usually called in that country) is characterized by legal pluralism, a concept defined and used in a variety of different ways but generally employed to refer to situations in which more than one legal regime or order is operative within a society at a particular point in time (see, for example, Galanter 1981; Griffiths 1986; Merry 1988; Tamanaha 1993; Fuller 1994).[2] India's legal system is plural in two senses. The first is in what Griffiths has called its 'weak' or 'juristic' sense, which refers to situations wherein the state commands different bodies of law for different categories of persons in the population (1986: 5). Thus in India, insofar as matters of marriage and the family are concerned, distinct legal codes govern the adherents of each of the religions represented in the population: one for Hindus,

another for Muslims, a third for Christians. Parsis and Jews also have their own codes of personal law.[3] When someone approaches the court to resolve a personal law issue, the judge determines the litigant's religious affiliation and applies the appropriate code.[4]

Personal law cases are heard in the regular state-run civil courts – or, in large cities, in specialized family courts – by government-appointed judges. Neither are there any government-run religious courts, nor does the state retain a cadre of religiously trained Muslim judges to hear cases filed under Muslim personal law. The religious identity of a judge is not taken into account when he or she is appointed, and it is not considered in the assignment of cases to a particular court.

Since the vast majority of Indian judges are Hindu and some of the rest are Christian or Parsi, it is only rarely and entirely a matter of chance that a Muslim personal law (MPL) case will be heard by a Muslim judge.[5] And even a judge who is Muslim by faith is unlikely to have any particular expertise in Islamic jurisprudence. Like their non-Muslim colleagues, they have been trained almost exclusively in western law and have received only minimal exposure to the rudiments of MPL. Judges in the lower courts, when confronted with an MPL case, typically refer for guidance to a recent edition of one of the better-known standard Indian textbooks or manuals on MPL compiled during or shortly after the end of the colonial period. Judges at the higher levels of the judiciary are similarly unlikely to have received any formal training in the fine points of Islamic law and few, if any, can read the original Arabic sources. However, some have made it a point to acquire considerable erudition on the subject of Islamic law and in their judgments cite relevant passages from authoritative English translations of the Qur'an, quote from some of the older pre-colonial Indian legal texts and compilations (for example, the Mughal-era *Fatawa-i Alamgiri*) and reproduce, on occasion, passages from works on the law by prominent contemporary Islamic scholars.

MPL in non-state dispute-settlement venues

The second, strong, sense in which the Indian system of personal law is pluralistic is that, insofar as the settlement of personal law disputes are concerned, there is a plurality of normative codes and a variety of venues for dispute resolution that are regarded by the public as valid and even preferred alternatives to the state-sponsored courts. Hindus and Muslims alike turn to the traditional village, caste (*jati*) or neighborhood council (*panchayat*) to resolve family conflicts. Specifically Muslim venues include mosque committees (*jama'at*) and *qazior shari'a* courts (*dar-ul quzat*), some sponsored by religious institutions – such as the *madrasa* at Deoband or the Bihar-based Imarat-Shari'ah – or by multi-sectarian organizations of religious scholars such as the All India Muslim Personal Law Board (AIMPLB).[6]

These bodies are invariably presided over exclusively by men and some do not even allow women complainants to present their cases in person but insist that they be represented by a male relative. Feminist activists, believing that all-female mediation bodies can better meet women's needs, have recently promoted the formation of so-called women's courts (*mahila* or *nari adalat*). They can now be found in many rural and in most urban areas of India. Poor women, in particular, find it easier to narrate their marital problems before a sympathetic and understanding audience of their own sex

and background. These bodies strive to reach resolutions that are more attentive to the social and cultural context of women's lives than those that either the state courts or the traditional community councils provide.[7]

None of these non-state bodies have any legal authority to enforce their edicts; they can only use social pressure and the force of public opinion to help ensure that the parties adhere to the agreements they have forged. But it is to such venues that the vast majority of Muslims prefer to take their marital and other family disputes, at least in the first instance, turning to the state courts only as a last resort. Consequently, only a very small minority of the marital and other family disputes that could theoretically be handled by the judicial system ever come to its attention.

The reasons for this are many. To go to court is expensive – fees are imposed at every stage of the process and under-the-table payments to court staff are typically required to ensure that one's case is proceeding in a timely manner. And a favorable outcome can hardly be hoped for unless one engages an advocate and compensates him (or her) generously for constructing a credible case and making the necessary court appearances.[8]

Furthermore, court cases are known to drag out interminably, particularly if they are contested: prolonging a case to the point where one's adversary gives up in disgust is a favorite strategy of skilled advocates. Finally, it is considered shameful – especially for a woman – to take one's private family conflicts to a court of law, rather than resolving them within one's own kin group or having them mediated by community-based bodies.

Resistance to the state's official system of justice

In her 1988 review of the state of research on legal pluralism at that time, Merry called particular attention to the need for further research on questions about 'the dynamics of the imposition of law and of resistance to [state] law ... from other normative orders' within the society (Merry 1988: 890). Such issues are of particular importance at the present time in relation to MPL in India. On the one hand, the government has for some time been establishing – and encouraging others to form – alternative dispute resolution (ADR) bodies. It has also been promoting arbitration over judicial decision-making, at least for certain types of cases (see Galanter and Krishnan, 2003). At the same time, both the government and the public at large are becoming increasingly suspicious and critical of the activities of such existing non-state ADR bodies as caste *pancayats* and shari'a courts, mainly because the decisions they issue are often biased against women. Erin Moore, for example, related the travails of a rural Muslim woman who for years fought her community council for the right to live apart from her abusive husband (Moore 1998). A similar Muslim village council attracted considerable media publicity a few years ago after a young Muslim woman alleged that her father-in-law had raped her. She was told to cease conjugal relations with her husband because, since she had engaged in sexual relations with her husband's father, the couple would have to treat one another as 'mother' and 'son' (Reddy 2005; Metcalf 2006).[9]

The state claims sole legitimate authority to change the law and many policymakers, concerned about certain provisions of MPL that create special hardship for Muslim women, feel a positive responsibility to see that the MPL is made to conform to the

principles of gender equity enshrined in the Indian Constitution. For decades there has been an active and ongoing campaign, led initially by feminist activists and later taken up – though for other reasons – by right-wing Hindu chauvinist politicians,[10] to abolish the entire existing personal law system and replace it with a uniform civil code (UCC) that would apply to all citizens. But, largely for political reasons related to the position of Muslims as a minority group within a largely Hindu citizenry, the legislature has not ventured to take any concrete action in this direction.

From the side of the Muslim religious establishment there is a counter-movement of increasingly organized resistance to the state's attempts – through both legislation and judicial activism – to expand the scope of its legal hegemony over matters that the clerics would like to protect from outside interference and reserve, as far as possible, for resolution by their own quasi-judicial religious institutions. These issues have been highly contested for a very long time, but particularly so since India achieved independence in 1947. And there is considerable evidence of hardening attitudes on both fronts in recent decades.

Some religious leaders are indeed strongly resistant to the very notion that any MPL disputes should be dealt with by non-Muslim judges in the regular civil courts. Thus there is a growing move to press for the establishment of a greater number of Islamic dispute resolution fora and to encourage Muslims to use them in preference to the state-run legal institutions. The AIMPLB, in particular, has been trying for some time to persuade Muslims experiencing marital difficulties to approach *shariat* courts (*dar-ul quzat*) rather than resort to the state-sponsored judiciary. This was, for example, one of the explicit recommendations of a model marriage contract that they drafted and disseminated in 2005 (All India Muslim Personal Law Board 2005).

But during the past decade there has been increasing concern expressed in the society at large about whether the activities of informal religious dispute-settlement bodies, such as shari'a courts, are harmful to Muslim women or even pose a threat to the state-run judicial system. An active public interest movement to ban their operation altogether is underway. A writ petition was submitted to the Supreme Court in 2005 by a politically active Hindu lawyer, demanding that 'a courts be banned from continuing to operate in India as what he characterizes as 'a parallel legal system' that, in his view, poses a serious 'challenge to the judicial system' of India.[11] The Supreme Court solicited and received responses to this petition from the AIMPLB and other Islamic institutions but to date no judgment has been issued. The continuing controversy is symptomatic of a heightened level of confrontation over the issue of how much autonomy the Muslim community ought to be allowed to exercise in the administration of MPL.

The Muslim clerical leadership has tried to defuse public criticism of these courts by characterizing them as engaged purely in mediation or conciliation and counseling activities. But at the same time – and possibly in part as a reaction to criticism from outside the community – they have been making efforts both to expand the geographic coverage of the shari'a court network and to strongly encourage the faithful to use such venues in preference to taking their family and marital disputes to the state's civil or criminal courts. It is, of course, impossible to predict the outcome of these counter-vailing forces of imposition and resistance, emanating respectively from the state and the Muslim clerical leadership. But the fascinating dynamics of this contestation

between the two normative orders of this legally pluralistic society warrant continued scrutiny and further in-depth investigation and analysis, as it continues to develop in the years to come.

Muslim women's groups generally feel that encouraging Muslims to rely upon shari'a courts to settle marital disputes would be detrimental to women's interests. In the mid-1980s Muslim women in cities throughout the country began organizing around attempts to reform Muslim personal law in such a way as to enhance gender equity (Vatuk 2008b, 2013a; Kirmani 2009, 2011; Schneider 2009). Like the male religious leaders of their community, many Muslim women's groups believe in working within the Muslim community itself to bring about reform of those provisions of MPL that discriminate against women, rather than encouraging or relying upon the state to do so. For the most part, they use religious, rather than secular, human rights arguments for overcoming the gender bias that characterizes MPL, as it is interpreted and administered in India today. Based on their own readings of the Qur'an and *hadith,* they claim that patriarchal interpretations of those holy texts have been foisted upon the ignorant lay Muslim population for centuries by self-interested male *'ulama'*. They demand of the clerical establishment that they give Indian women the rights that God vouchsafed to them in His revelations to the Prophet Muhammad. They specifically point to certain provisions of MPL that have an especially negative impact on women, such as the man's right to dissolve his marriage by pronouncing an extrajudicial, unilateral divorce (*talaq*) and his right to marry multiple wives. They also excoriate the religious authorities' failure to effectively enforce various male religious obligations, such as the payment of *mahr* upon divorce.[12]

Muslim leaders react strongly to any sign that the state intends to introduce changes in MPL, whether through legislation or by judicial decree. They take the position that Muslim personal law is divinely inspired and therefore cannot be altered – even though in the past some of their number have sponsored the passage of statutes that have done just that. Some *'ulama'* do acknowledge the possibility that minor modifications of existing laws might be possible but insist that only their own religio-legal experts are qualified to undertake them.

Muslim clerics and clerical organizations have also resisted the enactment of laws applicable to all citizens that could potentially impinge, directly or indirectly, on matters that, in their view, properly fall within the scope of personal law. The AIMPLB and others have voiced objections, for example, to government moves to introduce a system of compulsory registration of marriages (Venkatesan 2007).[13] Their stated rationale is that records of Muslim marriages are already kept by the clerics who write up the marriage contract (*nikahnama*) when they preside over a wedding (Anwar 2007). There have also been demands to exempt Muslims from the Prohibition of Child Marriage Act 2006 that makes it an offense to solemnize the marriage of a girl under the age of 18 (or a boy under 21).[14] Its opponents contend that, inasmuch as shari'a law considers a girl eligible for marriage once she has attained puberty, to impose a higher minimum marriage age on all females, regardless of religion, constitutes undue interference with MPL. These two issues are, of course, not unrelated: if all marriages are required to be registered with the state, it will be more difficult to evade the law against marrying underage girls.

Laws that address gender violence, particularly section 498a of the Indian Penal Code (IPC), have also come under criticism by some Muslim leaders who, like many other Indians, believe that they are widely misused by malicious wives and daughters-in-laws, in retaliation for attempts to discipline them for neglecting their household duties or diverging from other accepted standards of feminine comportment.

Muslim personal law: the statutes

MPL is broadly based upon shari'a law, as interpreted and modified – from the late-eighteenth century onward – by successive British colonial and later post-independence Indian courts. It is largely uncodified but includes a small number of legislative acts, all but one of which was enacted before India gained independence from Great Britain in 1947. The statute with the widest scope, the Muslim Personal Law (Shariat) Application Act 1937 (SAA), provides the overall framework within which Indian Muslims are governed today in terms of personal law.[15] It was originally conceived by Muslim community leaders who were disturbed by the fact that many Indian Muslims, instead of being governed by Islamic law, were in practice being subjected to whatever form of customary law prevailed in their respective local regions, which often ran directly counter to the dictates of Islam, especially insofar as rules of inheritance were concerned. Islam gives daughters and widows defined shares in a father's or husband's estate, but in most parts of India real property was (and in many cases still is) divided exclusively among the deceased's male heirs. The SAA states that in all matters of inheritance, marriage, divorce, maintenance, dower, guardianship, endowments, etc., shari'a is to prevail over local custom.[16]

Each of three other legislative acts that form part of MPL address very specific points of Islamic law. The Mussalman Wakf Validating Act (MWVA) was enacted in 1913 in response to controversies raging at the time over the legality – under shari'a – of setting up a religious endowment or trust (*waqf*, pl. *auqaf*) for the sole benefit of one's own family and descendants.[17] Numerous court cases were fought over the question until the Privy Council, in a precedent-setting appellate decision in 1894, declared such *auqaf* to be invalid because they have no religious, pious or charitable purpose as is required by shari'a. This judgment ignited furious condemnation from the Muslim community and led to an eventually successful campaign for legislation to confirm the legal validity of family *auqaf* (Kozlowski 1985; Powers 1989: 554–63).

The Dissolution of Muslim Marriages Act 1939 (DMMA) made it possible for a Muslim woman to obtain a divorce from an unwilling or untraceable husband. In Hanafi law (followed by the vast majority of Indian Muslims) a woman cannot divorce without her husband's consent. But the Indian courts had long upheld the principle that she could have her marriage automatically voided if she renounced her faith. Some leading *'ulama',* concerned that increasing numbers of women were converting to Christianity for this purpose, drafted a bill setting forth a number of approved grounds under which a woman could get a divorce from a court of law. These included desertion, insanity, obstructing the wife's right to practice her religion, disposing of her property without her consent, charging her falsely with adultery or subjecting her to mental or physical cruelty. At the same time, the act rescinded the option of voiding one's marriage through apostasy.[18]

The Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA) was the most recent legislation to be enacted and the only one since independence. It also came about at the initiative of Muslim leaders and was meant to ensure that a Muslim man would not be held responsible for the support of a wife whom he had divorced, beyond an approximately three-month post-divorce waiting period (*'iddat*). Should she have no other means of maintaining herself thereafter, the law provides that she can ask a magistrate to order her adult children (if any) or one or more of her natal relatives to maintain her.[19] Otherwise, the *waqf* board[20] of the state in which she resides may be ordered to pay her a monthly living allowance.

The precipitating event for this legislation was a 1985 Supreme Court decision (*Mohd. Ahmed Khan vs Shah Bano Begum*) rejecting a well-to-do husband's appeal against a maintenance order awarded by a lower court to his divorced wife under section 125 of the Criminal Procedure Code (CrPC).[21] This judgment was widely publicized and, both because of its substance and because the (Hindu) justice had ventured to interpret the Qur'an and had interjected his views on the need for a UCC, created a furor among the Muslim religious establishment. There were mass demonstrations, petitions and public speeches protesting this unwarranted interference with MPL. The issue was extensively debated in the media and Parliament bowed to political pressure and soon passed the act.

MPL in the higher courts

Those aspects of MPL that have been most controversial in recent decades are maintenance for divorced women, unilateral divorce (particularly by the so-called triple *talaq*) and polygamy. Case law on these issues – particularly the first two – goes back to the early British colonial period. However, since independence those aspects have been brought to the attention of India's courts much more frequently and some recent judicial pronouncements have produced new directives for their interpretation in the context of MPL.

Maintenance for divorced women

The passage of the MWA was, from the outset, deplored by feminist and human rights activists. It was characterized as highly discriminatory, singling out Muslim women for deprivation of a fundamental right that all other women possessed and in the process contravening India's constitutional guarantee of equality for all under the law. It was widely assumed that the MWA would have serious consequences for all divorced Muslim women. In the Indian cultural context, it was believed unreasonable to expect a woman to file a maintenance suit against an adult child, parent or sibling, no matter how needy she might be.[22] Consequently, untold numbers of Muslim divorcees would be left penniless, with no avenue of recourse.

The MWA does indeed provide a convenient escape for men threatened by maintenance suits. Advocates routinely advise clients that they can avoid a maintenance order by simply pronouncing *talaq*. Civil and family court judges often have a similar understanding of the act's intent: upon learning that a Muslim petitioner under section 125 has been divorced by her husband, they frequently dismiss her case immediately. The legal efficacy of this tactic has been seriously undermined by recent High Court and Supreme Court decisions, but unfortunately the lower courts are not always cognizant of the applicable case law and continue to reject women's maintenance applications on this basis.

Soon after the act's passage, decisions from various high courts began to accumulate that indicated the willingness of some judges to interpret the law quite differently from the way its authors had intended.[23] A number of men whose wives had been granted maintenance awards by lower courts appealed to a higher jurisdiction, claimed that they had divorced their wives and cited the MWA to the effect that after their wives completed their *'iddat*, their financial obligations were at an end. But several appeals of this kind were rejected by the high courts and the men were instead ordered to make longer-term financial provisions for their ex-wives in the form of lump-sum payments.[24]

The key concept here was the 'reasonable and fair provision', which the MWA directs the husband to make for his ex-wife during the *'iddat* period. Those who drafted the original legislation had meant to ensure that a Muslim man would have no further financial responsibility for his ex-wife after *'iddat*. But in at least 15 of the reported cases decided under the act between 1987 and 2000, the woman's right to a 'reasonable and fair' amount *in addition to* her *'iddat* expenses was upheld by an appeals court (Agnes 2001: 32–41).[25] In 2001 a Supreme Court settled the issue with its decree that during the *'iddat* period a Muslim man is liable to make a payment to his ex-wife sufficient to sustain her in the future (*Danial Latifi & Anr. v Union of India*). Since then, courts have begun in increasing numbers to order husbands to transfer substantial lump-sum cash amounts or material assets, such as land, a house, gold jewelry or stocks, to their ex-wives.

This has led some feminist legal scholars to take a revisionist view of the 1986 law, suggesting that it has had an unintended *positive* effect on the ability of divorced Muslim women to obtain financial assistance from their ex-husbands. They claim that, rather than being disadvantaged by their inability to resort to section 125, Muslim women are finding the 1986 act 'a blessing in disguise, bringing ... newer alternatives for a more viable economic settlement' and 'scope for more innovative safeguards' for women's financial well-being after divorce (Agnes 2001: 72). While there is much to be said for this assessment of the impact of the act, it has to be emphasized that its benefits accrue mainly to women of the middle and upper classes who were married to men who can afford to pay substantial amounts as alimony. Women in poverty who, in the past, could have received maintenance awards under section 125 CrPC, are less likely, even if awarded a judgment under MWA, to be able to collect any substantial amounts from ex-husbands whose incomes are low and often unpredictable and who lack any appreciable assets.

Unilateral divorce by triple *talaq*

The issue of extrajudicial, unilateral divorce has also generated a good deal of case law in recent years. In Agnes's words, '[t]he entire discourse on Muslim women's rights revolves around this issue' (2011: 60). The question for the Indian courts has not been

whether a Muslim man can dissolve his marriage by pronouncing *talaq* (divorce) three times – since shari'a clearly allows this, it has not been seriously questioned, either by the judiciary or by legislators. The issue has been whether he can utter the word three times *in rapid succession*, or 'at one sitting'. This procedure, popularly known as triple *talaq*, is the one most frequently used in India to effect a Muslim divorce. The Arabic term is *talaq-ul bida'at* (innovative divorce), so called because it was unknown in the early days of Islam and introduced only at a later date. In the eyes of some Islamic scholars, it is of questionable validity. Some contend that when pronounced in this way it should be counted as a single *talaq* and is therefore revocable, just as if the man had pronounced the word only once. Most Indian Sunni clerics, however, while they may acknowledge that it is an undesirable and even sinful practice, consider the triple *talaq* to be a legally permissible way of effecting an irrevocable divorce. Until recently, the British and post-independence Indian courts followed this interpretation, typically citing the 1905 decision in *Sarabai vs Rabiabai*. The judge in that case, while admitting that in shari'a the *approved* method is to leave one month between the first and second and the second and third *talaqs* in order to allow for the possibility of reconciliation, declared an irrevocable divorce by triple *talaq* to be 'good in law, though bad in theology'.

In the 1980s the appellate courts began to turn away from this approach to the question. The issue of triple *talaq* has not often arisen directly, but rather in connection with maintenance cases. Typically, a lower court has ordered a man to pay his wife a monthly stipend under section 125 CrPC. He appeals the decision, claiming that he has pronounced *talaq* and made all the religiously required *mahr* and *'iddat* payments and returned her wedding gifts. Therefore, he contends, he has no legal obligation to maintain her further. The wife, in response, claims that the divorce never took place or was improperly executed. In 1981, Justice Baharul Islam of the Gauhati High Court (later of the Supreme Court) – one of the few Muslims in the higher ranks of the judiciary – took the opportunity presented by one such case to declare instantaneous divorce by triple *talaq* invalid. The judge's argument was *talaq* could only be for a reasonable cause and that a relation of each the husband and wife must make attempts to effect a reconciliation between the parties. In his view, it was the Qur'an that stated the correct law of *talaq*. Further, the judge stated that Qur'anic law did not provide a husband with an unfettered right to end the marriage; the husband could not act on a whim as long as the wife maintained her faithfulness and obedience to the husband (*Jiauddin vs Anwara Begum*).

Justice Baharul Islam made a similar decision in a subsequent case (*Rukia Khatun vs Abdul Khalique Laskar*) and some other high courts followed his lead. A 2002 Supreme Court ruling in *Shamim Ara vs State of U.P.* effectively settled the issue. The appellant was the wife. A lower court had refused to consider her maintenance plea, on the basis that, as a divorced Muslim woman, the MWA made her ineligible for relief under section 125 CrPC. As evidence of the divorce the lower court had accepted the husband's affidavit, which had been prepared in connection with an entirely different case but happened to mention his having divorced his wife some time previously. The apex court was asked to decide whether such a declaration proved that a divorce had actually taken place. The justice ruled that it did not and therefore the lower court should not

have relied upon it when rejecting the wife's maintenance application. The marriage still subsisted and the husband remained liable to pay maintenance until it was legally dissolved.

In reaching his decision, Justice Lahoti cited two respected authorities on MPL – a standard 1906 law manual (*Mulla's Principles of Maomedan Law*: Hidayatullah and Hidayatullah 1990) and a textbook by a respected contemporary legal scholar (Mahmood 1980) – and strongly rejected the position held by both, that 'a mere plea of previous talaq ... , though unsubstantiated', is sufficient to prove a divorce. He pointed to earlier High Court decisions establishing that a *talaq* is not effective without the husband providing adequate justification and making serious attempts at reconciliation. The present case met neither of these conditions.

Polygamy

The fact that MPL allows a man to have as many as four wives at a time, while men of other religions are limited to one, is repeatedly criticized in the Indian media and by the non-Muslim public more generally.[26] Yet the issue has generated relatively little case law. To the extent that the judiciary has been inspired to express its views on the matter, its usual position is that although polygamy is an undesirable practice, causing untold suffering to Muslim wives, it is clearly permitted by the Qur'an and therefore, inasmuch as the SAA requires Muslims to be governed in all family matters by shari'a, it can be neither banned nor restricted by the Indian state. In the words of Justice R. Basant of the Kerala High Court:

> Polygamy is permitted, tolerated and accepted and enforced by the Indian courts only because the Muslim Personal Law (Shariat) Application Act, 1937 mandates that the Muslim Personal Law (Shariat) ... has to be followed by the Indian courts. The stipulation regarding polygamy is therefore accepted and enforced .... In that view of the matter, the law permitting polygamy will also have to pass the test of constitutionality under Art. 13 (*Abdurahiman vs Khairunnessa*).

The Supreme Court has been asked on more than one occasion to declare this provision of MPL unconstitutional, but each time has refused to do so.[27] Thus, in 1996, a writ petition, asking that the laws under which Muslims are allowed to practice polygamy, extrajudicial unilateral divorce and discrimination against females in inheritance be declared void (*Ahmedabad Women Action Group (AWAG) vs Union of India*).[28] The court dismissed it, saying that 'these are all matters for legislature', not the courts, to decide. In 2006 a public interest litigation (PIL) suit challenging those same practices on constitutional grounds was likewise dismissed. That two-justice bench declared that only Parliament has jurisdiction over such matters: 'If the law provides that Muslims can have four wives, we cannot change it' (TNN 2006). The Supreme Court also rejected a 2001 plea – by a woman whose husband had taken a second wife and then divorced her – to declare polygamy unconstitutional, on the grounds that it constitutes 'a denial of equality, personal liberty and human rights' (*Julekhabi vs Union of India*). She was instructed to approach Parliament for a remedy (TNN 2001).

Some judges have referred to an argument put forward by Muslim women activists and others that, inasmuch as the Qur'an requires a polygamous husband to treat all wives equitably but acknowledges that this condition is close to impossible to fulfill in practice, the proper meaning of the injunction is that a man should have only one wife. However, these observations have been merely *obiter dicta*: they have not de-legitimized the practice, as such.

The main contexts within which polygamy appears in case law is in connection with suits for divorce, maintenance or restitution of conjugal rights (RCR).[29] Under the DMMA, the simple fact that one's husband has taken another wife is not a ground for divorce. However, a woman may sue for dissolution on grounds of cruelty, if her husband 'does not treat her equitably in accordance with the injunctions of the Qur'an' (DMMA s. 2 (viii)(f)). This was the issue in *Abdurahiman vs Khairunnessa* (cited above). In dismissing the husband's appeal against a lower court's award of a divorce decree to his wife, the presiding justice cited three relevant *ayats* (verses) from the Qur'an and the commentary of its translator (Yusuf Ali 1983)[30] and on that basis concluded that Islamic law clearly gives a woman the right to exit a polygamous marriage if she has been unfairly treated by comparison with other wives. She needs not even provide any evidence: 'it is the assertion of the woman that matters. She is the best Judge to decide whether she has been treated equitably or not' (p. 33). Various high courts have used similar reasoning when rejecting a husband's plea for restitution of conjugal rights,[31] and it has been successfully employed by married Muslim women, when filing for maintenance under section 125 CrPC, to justify their residing separately from their husbands.

In 1995 the Supreme Court addressed the issue of Muslim polygamy in *Sarla Mudgal vs Union of India,* when hearing together the cases of four different couples. All of the parties were born Hindu and the men's first wives were Hindu as well. Each of the men, unable to divorce their wives but desiring to marry other women, converted to Islam and married according to Islamic rites, hoping in this way to circumvent the monogamy clause in the Hindu Marriage Act. The author of this decision cites a number of analogous cases involving conversion and remarriage that go back to the late-nineteenth century and concludes that a second marriage contracted by an already-married Hindu convert to Islam is void and the man guilty of the offense of bigamy (under section 494 IPC). This judgment has, of course, no bearing on the validity of multiple marriages contracted by men born to Muslim parents.

Recurring themes in appeal court decisions on issues of MPL

In formulating their decisions on cases of MPL, all justices refer at least briefly to the text of the Qur'an, many of them discoursing at length upon those passages of the Holy Book that pertain most directly to the issue at hand, referring to English translations, usually those produced by Indian Muslim Islamic scholars of an earlier age. They also quote liberally from standard Indian textbooks of Islamic law, as well as citing relevant case law, sometimes excerpting lengthy passages from earlier, precedent-setting High and Supreme Court judgments. Occasionally, a justice will also refer to legislation passed by other – usually Muslim-majority – countries, which they believe could serve as models

for a particular interpretation of shari'a or as an indication of the kind of reforms that could be introduced into MPL in India – in terms of, for example, imposing limits on or regulating the ability of men to discard their wives unilaterally or marry more than one wife.

Another recurrent theme in the recent case law is the need for a uniform code of family law to replace the existing pluralistic legal system. Justices dealing with issues of MPL repeatedly deplore the fact that, although Article 44 of the Indian Constitution enjoins the state to 'endeavour to secure' a UCC for all its citizens, it has, in the words of Justice Chandrachud in *Mohd. Ahmed Khan vs Shah Bano Begum & Ors*:

> remained a dead letter. There is no evidence of any official activity for framing a common civil code .... Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code.

The necessity, when interpreting particular provisions of MPL, of taking into account the gender imbalance in Indian social structure is also mentioned very frequently in these judgments. Thus, for example, Supreme Court Justice S. Babu writes in *Danial Latifi & Anr. vs Union of India*:

> where matrimonial relationship is involved, one has to consider the social conditions prevalent in the Indian society ... [in which] there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Indian society is male dominated both economically and socially and women are assigned, invariably, a dependent role.

Expressions of sympathy for the sufferings of Muslim women under particular provisions of MPL appear frequently in these judgments. For example, in a 1968 Kerala High Court decision the justice laments:

> Should Muslim wives suffer ... [their husbands'] tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? ... My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed (*Pathayi vs Moideen*).

Justices often express the idea that the very concept of marriage has changed from what it was in earlier times. Justice R. Basant of the Kerala High Court points out in *Abdurahiman vs. Khairunnessa* (2010) that '[m]arriage as an institution has totally different purposes and incidents in the modern world'. He then goes on to cite an earlier decision, by the same court, to the effect that marriage is no longer:

> an arrangement between the master and a slave or domestic maid hired for life for performing the domestic chores ... [but for] the pursuit of the mission of life by

> equal adult partners seeking perfection, ... happiness and contentment in life (*Aboobacker vs Rahiyanath*).

Likewise, in a much earlier (1960) case the issue was whether a woman whose husband had taken a second wife was legally justified in choosing to live apart from him. S. S. Dhavan of the Allahabad High Court rejected the husband's contention that she was not and remarked that:

> in any particular case, the Court cannot ignore the prevailing social conditions, the circumstances of actual life and the change in the people's habits and modes of living. Today Muslim women move in society, and it is impossible for any Indian husband with several wives to cart all of them around. He must select one among them to share his social life, thus making impartial treatment in polygamy virtually impossible. (*Itwari vs Smt. Asghari*)

The fact that views of the kind outlined here are so widely shared among justices at the higher levels of judiciary, and are reflected in their decisions on important cases involving unilateral divorce, polygamy and maintenance, has meant that significant changes have occurred in MPL over the past 20 years, all in the direction of greater gender equity. These have occurred in spite of the fact that the judiciary consistently declines to declare any specific provisions of the law unconstitutional and the legislature refrains from taking any action that the Muslim community might regard as threatening its legal autonomy.

MPL in the lower courts

Lower court cases are very rarely officially reported and therefore data on how issues of MPL are dealt with at that level of the system are not easily available. To obtain them it is necessary to personally examine case files in court record rooms. Furthermore, under family court rules (as laid out in the Family Courts Act 1984), all hearings are held in camera and in neither of the family courts whose files I examined had the judges issued any written decisions beyond brief notes in the file indicating the mode of disposal of the case. My research (see Vatuk 2001, 2003, 2005) shows that the vast majority of MPL cases are brought by women. Thus, 70 percent of the petitioners in the 540 Muslim suits filed in the Chennai Family Court between 1988 and 1997 were female. More than two-thirds of the women were applying either for maintenance (232 cases) or divorce (63 cases).[32] This predominance of women petitioners is not surprising. Muslim men can divorce extrajudicially and cannot obtain maintenance orders against their wives. The only matrimonial relief available to them in the state courts is for RCR; in most cases they file such suits not to get their wives back but rather to defeat their wives' petitions for divorce or maintenance.[33]

Divorce

Typically a Muslim women files for divorce under DMMA only after trying other remedies, either negotiating with her husband for an extrajudicial *khul'* divorce or persuading a religious official to dissolve her marriage, without her husband's agreement, by *faskh*. Either alternative is much cheaper, more expeditious and less complicated than filing suit in a court of law. My data from the two family courts thus indicate that the DMMA is relatively infrequently resorted to. The Chennai Family Court began operation in 1988. Over the next ten years, in a city with a Muslim population of 333,672, only 6.3 suits (on average) were filed under the act per year. In Hyderabad, with a Muslim population somewhat over four times as large, the corresponding figure was 32.3 filings per year. Thus, the rates of resort to DMMA were similarly low in both cities and considerably lower than the rate of court filings for divorce by women of other religions.[34]

In Chennai only 42 percent of the cases filed under the DMMA in the decade for which I have data were pursued to judgment. The rest were dismissed, usually because the petitioner had stopped making the required court appearances, whether because she had reconciled with her husband, had convinced him to divorce her by *khul'*, had been divorced by *talaq*, could no longer afford to pay her advocate's fees or had simply become discouraged. All of the women who stayed the course did eventually succeed in obtaining a court-ordered divorce, but in most cases only after months, if not years, of successive court appearances. Furthermore, in the final settlement they almost always waived their rights to *mahr* and *'iddat* expenses. The DMMA specifies that both are immediately payable upon divorce but, at least in Chennai, judges seemed reluctant to grant a contested divorce under the act. Instead, they endeavored to gain the husbands' consent, even if it meant persuading the wife to agree to a disadvantageous financial outcome. The implicit model for a court divorce thus appeared to be the Islamic *khul'*.

Maintenance

Maintenance cases are more plentiful than any other kind of case on the dockets of the family courts. As I have discussed above, insofar as MPL is concerned, the key legal issue – which arose upon passage of the MWA in 1986 – is whether and by what means a divorced woman can obtain financial support from her former husband. Although the Supreme Court decreed in 2001 that within three months of divorcing his wife a man must not only pay her *mahr* and *'iddat* expenses but must also provide for her future subsistence needs, the lower courts have been slow to implement this ruling. Many Muslim women have been unable to take advantage of this more recent interpretation of the MWA because their lawyers are unaware of its significance and do not realize the law's potential to ensure a divorced Muslim woman a secure financial future (see Vatuk 2013b). As one Delhi lawyer – himself a Muslim – told me, when a divorced Muslim woman comes to him for help, his strategy is to treat her file for maintenance under section 125 CrPC as if she were a married woman. If the husband contends that he has divorced her, the advocate will argue that the divorce never

occurred or that it was not legally executed. If the husband then proceeds to divorce her according to the more recently established judicial guidelines, he can at least be ordered to pay maintenance from the time the couple first separated until the effective date of the new divorce. Like other Delhi lawyers and court officials whom I interviewed in 2005, this gentleman had never filed a case under the MWA and was not even sure how to go about doing so.

In Hyderabad I found a somewhat different situation. Some Muslim lawyers there had been filing suits under the MWA for years and had been able to get several of their clients substantial lump-sum payments under the 'reasonable and fair' provision of that law. Between 1995 and 2005 a total of 224 suits had been filed under the MWA in the Hyderabad Mahila Court, the magistrate's court that dealt mainly with cases of crimes against women. Most of the MWA petitioners sought *mahr* and/or *'iddat* expenses and the return of wedding gifts given by each spouse's family. Many had also submitted claims for 'reasonable and fair provision'. Some of these cases dragged on for years. Of the cases filed in the previous decade, 30 percent were still pending, and 15 cases for five or more years. Forty percent had been dismissed for one reason or another. In only 25 percent of the cases had a judgment been pronounced by the time I left the field and in almost every one of these the husband had been ordered to pay some amount to his former wife, though not always all that she had petitioned for.

Whereas the MWA provides that a divorced woman unable to support herself can ask a magistrate to order one or more of her adult children or natal relatives to maintain her, such cases are extremely rare. I found not a single example during my investigations. However, the final option provided in the MWA – asking a magistrate to order the Wakf Board[35] of one's home state to disburse a monthly stipend – is being increasingly availed of by poor women. A woman's right to do so, even if she has not first filed against any of her kinsmen, was firmly established in a 1996 Supreme Court ruling (*The Secretary, Tamil Nadu State Wakf Board*). Some state boards have been more responsive than others to the requirement that they provide financial assistance to poor divorcées when ordered to do so by the courts. But there is a clear upward trend in the numbers being helped in this way. For example, when I was in Hyderabad in 2005, the Andhra Pradesh State Wakf Board was maintaining only four destitute divorced women. But by March 2012 the number it reported providing with monthly stipends had risen to 320.

A knowledge gap between the higher and lower courts

The practical impact of precedent-setting High Court and even Supreme Court decisions is not as strong as it might be, in part because high courts in one state are not bound to follow the rulings of those issued by others. Furthermore, lower court judges are frequently oblivious to the precedents that have been set by those courts or do not fully understand their implications and therefore do not follow them when making their own decisions on cases that come before them. As Subramanian has observed, with reference to the limited impact of the *Danial Latifi* judgment: 'The knowledge of judges and lawyers in the lower courts is uneven about such recent landmark judgments and some lower courts continue to restrict maintenance for Muslim divorcees to a three-month period' (2008: 649). Likewise, with respect to the issue of instantaneous unilateral divorce, Agnes remarks: 'despite the plethora of judgments [denying the validity of divorce by triple *talaq*], ... many lawyers and some trial court judges continue to endorse the view that ... Muslim women can be deprived [thereby] of their legal right of maintenance' (2011: 64).

Even after the Supreme Court has definitively ruled on such issues as triple *talaq*, cases addressing these same theoretically settled issues continue to be brought before the high courts of various states. But, of course, the vast majority of negative verdicts never even get to be overturned by appeals courts because few women have the knowledge or the wherewithal to pursue their cases beyond the level of the originating court that dismissed them.

Conclusion

I have presented here an outline of the way legal pluralism operates in practice in India with respect to some of the key issues in Muslim personal law. I have shown that the state-sponsored judiciary does not hold a monopoly on the privilege of administering MPL. It takes no active role in facilitating or regulating male-initiated Muslim divorce: a Muslim man may freely divorce extrajudicially and is also empowered to grant this privilege to his wife, if he chooses to accept her offer of financial compensation. A Muslim woman's options outside of the civil courtroom are more limited than a man's, but before resorting to a suit for divorce she too has the choice of either trying to persuade her husband to release her extrajudicially or getting the *qazi* of a shari'a court to declare her marriage void, on the grounds that the marital relationship has become so strained that it is impossible for her to continue to 'observe God's limits' – that is, to remain chaste.

Although the vast majority of marital and family issues that arise among Muslims are handled outside of the official judicial system, there is no lack of cases involving issues of MPL, either in the lower courts or in the various high courts and in the Supreme Court of India. In the lower courts, women greatly predominate among the Muslim plaintiffs, for reasons that I have outlined above. The vast majority of these women are seeking maintenance awards against their husbands or ex-husbands. A smaller number are seeking a divorce. In both the Supreme Court and the high courts, however, Muslim appellants are predominantly male. But there too the main issues being adjudicated relate in one way or other to the maintenance of separated or divorced wives. Such cases have led to a number of far-reaching and game-changing decisions being issued by various high courts and by the Supreme Court of India on the main contentious issues of MPL in India today – not only maintenance for divorced Muslim women, but also unilateral divorce by triple *talaq* and polygamy. Regrettably, the practical impact of these judgments, in terms of actually improving the conditions under which Muslim women experiencing marital problems labor, has been weaker than one would like. This seems to be because too many of the lawyers and judges working in the lower levels of the judicial system are either unaware of, fail to understand the implications and potentialities of, or simply ignore the precedents set by the higher judiciary. The remedy for this might be a more robust system of continuing education for those in both professions. But that is something easier to recommend than to put into place.

Notes

1 My research in Chennai was funded by a US Department of Education, Fulbright-Hays Senior Research Fellowship and a sabbatical leave from the University of Illinois at Chicago. The 2001 Hyderabad research was undertaken with the support of an American Institute of Indian Studies Senior Fellowship and a semester-long research leave from the College of Liberal Arts and Sciences of the University of Illinois at Chicago, while my 2005–06 research on maintenance for divorced Muslim women was again funded by the American Institute of Indian Studies. I am grateful for the valuable assistance provided at different times during these years by R. Saraswathy, Rafia Anjum, Rina Ambikeshwar, H. Rayees Fathima, Muhammad Ayyub, Bhavana Avaneendra, Mahfooz Nazki and Shahkar Mehdi.

2 Merry, in fact, insists that legal pluralism is not characteristic only of societies of a particular type, such as those that have been under colonial domination at some point in their history, but that 'plural normative orders are found in virtually all societies' (1988: 873).

3 A couple can opt out of being governed by one of these religion-specific codes by marrying in a non-religious, civil ceremony under a separate secular marriage law, the Special Marriage Act 1954 (SMA). Furthermore, a couple married in a religious ceremony has the option of registering their marriage after the fact under this act, in order henceforth to be governed in matrimonial and other family matters by the SMA, rather than by the personal law code that formerly applied to them. This device is often used by Muslims who wish to leave a larger proportion of their property to a chosen heir than he or she would otherwise be entitled to under Islamic inheritance laws.

4 To be more precise, the choice of law code depends upon the religious rite under which the individual's marriage was solemnized. Normally, of course, this would be the religion into which he or she was born.

5 The most recent census figures available on the religious distribution of the population show that 80.5 percent are Hindu, 13.4 per cent Muslim (available online at http://censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx). However, fewer than 5 percent of judges in the lower courts are Muslim. The 2006 Sachar Committee Report on the status of Muslims concludes that their poor representation in the judiciary is not due to discriminatory hiring practices but is rather a consequence of the fact that Muslims have, on average, markedly lower levels of educational achievement than upper-caste Hindus; the latter are disproportionately well-represented at this level of the system. (available online at http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf, pp. 173–74, 372 accessed 10 October 2010). There are relatively more Muslims in the higher levels of the judiciary, but not nearly in proportions equivalent to those found in the population as a whole. The Supreme Court of India currently has three Muslim justices out of twenty-five (12 percent) (available online at http://doj.gov.in/?q=node/24). Most of the 21 high courts also have two or three Muslim justices. But since these courts are invariably larger than the Supreme Court, the percentage of Muslims is consistently lower than it is in the latter body. For example, among the 51 justices of the Madras High Court, three are Muslim (6 percent) (available online at www.hcmadras.tn.nic.in/prejudge.htm). The Kerala High Court, with 30 justices, likewise has three Muslims (10 percent) (available online at http://highcourtofkerala.nic.in/prjudges.html), the Andhra Pradesh High Court has three out of thirty-two (9 percent) (available online at www.andhranews.net/state/whoswho/hc.asp), the Delhi High Court two out of thirty-five (6 percent) (available online at http://delhihighcourt.nic.in/cjsittingjudges.asp?currentPage=1) and the Calcutta High Court only one out of forty-two (2 percent) (available online at http://calcuttahighcourt.nic.in/judges.htm, all websites accessed on 15 October 2012).

6 The AIMPLB is a self-appointed body of 251 clerics who represent most of the major Muslim sects in India. It was set up in 1973 'to protect the Muslim Personal Law' and has become the most prominent, vocal and influential organization of its kind in the country. See www.aimplboard.org/index.html (accessed 19 May 2007).

7 For a review of some of the recent literature on this new kind of dispute resolution body see Vatuk 2013b.

8 This is even true in Family Court, where the law specifies that, except under special circumstances, litigants are not entitled to legal representation (The Family Courts Act 1984, Chapter IV, Section 13). The original purpose of this provision was to enable the parties to come before the judge in person and to argue their own cases in their own ordinary language, rather than in the specialized language of the law. However, few litigants have the necessary knowledge and skills to negotiate, without the help of an advocate, the complicated and lengthy process of filing and pursuing a legal case. Therefore most family courts adapt to the realities of the situation by being, in practice, quite flexible on this point. It is, of course, also in the interest of members of the legal profession that they should be so: this provision doubtless contributes to the receptivity of family court judges to pleas for permission to be represented by counsel.

9 The reasoning behind this *fatwa* was that a woman is prohibited by shari'a law from having sexual relations with both a father and his son.

10 Most feminists and feminist-oriented women's organizations have backed away from their former advocacy for a UCC and now prefer instead to promote 'legal reform from within' the various minority communities. This shift came about largely in response to the politicization of the issue by the Hindu right, whose demand for an end to the current system of personal laws is perceived to be part of a broader anti-Muslim agenda with which feminists are very loath to be associated.

11 *Vishwa Lochan Madan vs Union of India*, Writ Petition (Civil) No. 386/2005. See Redding 2010 for an extended discussion of the issue.

12 For a marriage to be valid under shari'a law, a man must give his bride a gift of money or valuables, the amount to be recorded in the marriage contract. In India the *mahr* is rarely handed over at the time of the wedding and it is seldom paid to the wife even later, during the couple's married life. Legally, it becomes due immediately upon divorce or widowhood but, in practice, few women ever receive it.

13 Such regulations are already in effect, though not necessarily consistently enforced, in some states.

14 This law replaced the similar Child Marriage Restraint Act 1929 (CMRS), as amended in 1978. In 2002 the AIMPLB was party to an unsuccessful petition to the Supreme Court that challenged, on the cited grounds, the earlier law's applicability to Muslims (Report 2002). It has also weighed in recently to the same effect on some cases involving under-age Muslim brides (see, for example, IANS 2012).

15 Available online at http://legalapproach.net/legal.php?nid=218 (accessed 24 October 2012).

16 One of the key issues arising out of this conflict of laws revolved around women's inheritance: customary law rarely allowed daughters to inherit property, particularly agricultural land. So during negotiations over the wording of the bill, large Muslim landowners, particularly in north-western India, who wished to preserve their custom of restricting inheritance to males, insisted upon inserting an exception for the inheritance of agricultural land (Gilmartin 1988). Recently, several southern states have amended the act so as to remove this exclusion, but it is still in effect in the rest of the country. In 2005 a petition signed by large numbers of individuals and women's groups, asking that this passage also be deleted from the central act, was presented to the Prime Minister (available online at http://groups.yahoo.com/mukto-mona/message/28242, accessed 10 October 2012). The AIMPLB has also indicated that it favors the change. However, as of December 2012, the Parliament had taken no action on the matter.

17 Available online at www.helplinelaw.com/docs/THE_MUSSALMAN_WAKF_VALIDATING_ACT,_1913 (accessed 24 October 2012). Not only in India, but also elsewhere in the Muslim world, dedicating one's property to a private, family trust (*waqf alal aulad*) was – and is – a popular device for ensuring a secure financial future for one's descendants. By bypassing those provisions of the Muslim laws of inheritance that lead inevitably to the fragmentation of property, it allows one to keep it intact for the benefit of later generations (see Powers 1990).

18 For more details about the discussions and controversies that led up to the passage of this act, see Masud 1996 and De 2010. The latter author cites and examines much of the relevant case law that preceded it.

19 Specifically, any relatives who stand to inherit from her in the event of her death.

20 The government office charged with the regulation and management of Muslim religious endowments.

21 Under this section any man who neglects or refuses to maintain his wife can be ordered by a magistrate to pay her a monthly allowance. The inclusion of a 'divorced wife' under the definition of 'wife' was strongly opposed from the outset by Muslim religious leaders, who contended that in Islam a husband's financial responsibilities for his wife end when she completes her *'iddat*.

22 This belief has, in fact, proved to be correct.

23 Agnes analyzed statistically 243 reported cases in which maintenance of a divorced Muslim woman was at issue and describes 67 of these in more detail. In 52 cases (78 percent), the petitioner was the husband, appealing a lower court judgment in which he was ordered to pay maintenance under section 125 CrPC. Only a few cases had been originally filed under the MWA (2001: 12–13, 104, 100–01).

24 Some within the Muslim clerical leadership became concerned that through such judicial activism the original intent of the law was being subverted. As Agnes notes, 'In response to the generous interpretations of the Act, Syed Shahabuddin ... moved a Private Members Bill (Bill No. 155 of 1992) ... to amend the Act and restrict its scope in clear terms to maintenance only for and during the iddat period' (2000: 105).

25 I do not have space here to go into detail concerning the reasoning behind such judgments and the points of Islamic law that were drawn upon in their support, but see Agnes 2001 for a detailed analysis of some of those decisions. See also Subramanian (2008: 645–49).

26 Although reliable recent statistics are lacking, most scholars agree that the incidence of polygamous marriages among Indian Muslims is quite low and is in any case no higher than among non-Muslims, even though the latter can be charged with the crime of bigamy (under section 494 of the IPC) if they marry another woman during the subsistence of a prior marriage. But, since bigamy is a non-cognizable offence – i.e. the state will take notice only upon a formal complaint by the first wife or her parents – the actual likelihood of prosecution is minimal.

27 In all of these cases the petitioners demanded that not only polygamy but also other gender-discriminatory provisions of MPL, such as male-initiated unilateral divorce, be declared unconstitutional.

28 The petition also asked that the MWA and certain sections of Hindu and Christian personal laws be declared unconstitutional.

29 This is a legal remedy designed to compel a spouse who has left the matrimonial home to return to it and, in the formulaic phrase repeatedly encountered in court documents: 'restore to the petitioner the comforts and bliss of married life.' In Hindu and Christian personal law, women as well as men can – and do – file for restitution, but only men have access to this relief under MPL. In an unusual recent case, however, a Muslim woman applied for, but was denied, a restitution order by the Bombay Family Court. On appeal, the Bombay High Court ordered the case re-heard (Deshpande 2010). Its ultimate outcome is unknown.

30 This translation, by a highly respected Indian Islamic scholar, was originally published in the 1930s.

31 The precedent most frequently cited in this regard is a 1960 Allahabad High Court decision, *Itwari vs Smt. Asghari*.

32 The rest sought a variety of remedies, including declarations as to the validity of a marriage or a divorce, child custody or the retrieval of personal property in the possession of a husband or parent-in-law. I exclude here the very numerous filings for execution of previously issued court orders, mainly pertaining to maintenance awards that had not been complied with.

33 Even if granted, such an order is unenforceable: there is no legal way to compel a woman to return to her marital home against her wishes.

34 In Chennai I found that Hindu and Christian women were three times as likely as were Muslim women (in proportion to their respective numbers in the city's population) to seek a divorce under their respective codes of personal law. Most of the difference is doubtless explained by the fact that Hindu women lack the same options for out-of-court divorces that are available to their Muslim sisters. Indian law does recognize the validity of so-called customary divorces in castes or tribes that have a longstanding traditional procedure for dissolving marriages extrajudicially. But what proportion of the population is in a position to avail themselves of this option is not known.

35 The government agency charged with the supervision of Muslim endowments.

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