

Family Matters: Citizenship and Marriage in India, 1939-72

by

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Dedication

For my parents, Ronald D. Grapevine and Rosemary M. Magee

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List of Abbreviations

| | |
|------------------------|---|
| AIR | <i>All India Reporter</i> |
| CCrP | Code of Criminal Procedure |
| CPC | Civil Procedure Code |
| CTA | Criminal Tribes Acts (1871 and 1911) |
| DMMA | Dissolution of Muslim Marriages Act (1939) |
| EIC | British East India Company |
| HAMA | Hindu Adoptions and Maintenance Act (1956), |
| HMA | Hindu Marriage Act (1955) |
| HSRMA/ HMRA | Hindu Separate Residence and Maintenance Act (1946) Hindu Residence and Maintenance Act (1946) |
| ICA | Indian Citizenship Act (1955) |
| IPC | Indian Penal Code |
| MEA | Ministry of External Affairs, New Delhi |
| MHA | Ministry of Home Affairs, New Delhi |
| NUC | Notes on Unreported Cases, <i>All India Reporter</i> |
| RCR | Restitution of Conjugal Rights |
| SCC | Small Causes Court |
| UP | Uttar Pradesh |
| VAWA | Violence Against Women Act (United States) |
| WHO | World Health Organization |

Abstract

India's system of separate Hindu, Muslim, and Christian family laws is often cast as a threat to national unity. In contrast, I argue that Indian law was structured by the emphasis of English law on preserving the marriage tie and wives' legal dependence on their husbands. Based on a study of judicial and bureaucratic decisions about families in Indian law, I show that a patriarchal English family structure based in coverture influenced Indian women's experiences of the law at least as much as religious norms did. I focus on three legal devices: domicile, restitution of conjugal rights, and maintenance. I argue that "law of the family" is a better category with which to consider women's rights than "family law." "Law of the family" suggests the ways in which family statuses structured many aspects of Indian law, including those concerned with family disputes as well as matters such as citizenship. The dissertation is divided into two parts. The first part studies bureaucratic and judicial decisions about the status of wives and sons in Indian citizenship law. Through the legal device of domicile, coverture structured Indian citizenship law. The second part is based in a survey of matrimonial litigation in the north Indian state of Uttar Pradesh between 1939 and 1972. Litigants of all religious communities used restitution of conjugal rights suits and maintenance suits to seek marital redress even after important statutory reforms such as the Dissolution of Muslim Marriages Act (1939) and the Hindu Marriage Act (1955). Courts ruled in favor of wives without condemning marital violence. An individual wife could win her suit without necessarily challenging the patriarchal structure of marriage. Wives faced

difficulties in proving matrimonial violence and often won their suits on the grounds of more easily proved social offenses. Husbands often challenged wives with arguments about both geographic and religious jurisdiction, in a pattern found in England as well. The dissertation concludes with a study of the 1962 UP Amendment to the Hindu Marriage Act, which made cruelty a ground for divorce in the state, providing a model for national reform fourteen years later.

Introduction

This dissertation studies how marriage shapes legal identity in modern India. Indian marriage is often viewed through religious and social lenses because it is regulated by religious personal law. In contrast, this dissertation argues that English law influenced important aspects of wives' and husbands' rights in modern India in a variety of legal domains. These include criminal procedure, civil law, and religious personal law. I show that English laws of marriage influenced Indian laws regardless of whether litigants were Hindu, Muslim, or Christian. An English family structure and the emphasis of English law on preserving the marriage tie had as much to do with Indian women's experiences of the law as did so-called indigenous religious norms. The English model of marriage granted husbands rights of physical control over wives. An English patriarchal family structure with a dyadic husband-wife relationship at its center structured much of Indian law whether civil, Hindu, Muslim, criminal, or Constitutional citizenship law. Violence and physical control were an integral part of the English model of marriage written into secular and religious Indian laws.

This dissertation sets out to answer the following questions: How did colonial and post-colonial courts adjudicate disputes about family status? How did English law intertwine with Hindu and Muslim law in India? What, besides religion, shaped the modern Indian family? Were there appreciable changes in Indian family law marked by Indian Independence in 1947? This dissertation focuses on development of case law in the High Courts of India's most populous state, Uttar Pradesh. It focuses on the twentieth century

and looks at cases from both before and after Indian independence in 1947. I describe several complex routes for the incorporation of English law into Indian secular and religious laws. I focus in particular on how courts defined cruelty and violence in matrimonial disputes.

The remedies of maintenance and restitution of conjugal rights were incorporated in Indian law in the nineteenth century and constituted an important arena for the development of the jurisprudence of cruelty. In at least two ways, these older remedies structured the jurisprudence of cruelty and violence in marriage even after twentieth century statutes reformed and codified Hindu and Muslim law. First, the adjudication of new statutes drew on earlier litigation under these older remedies between these same litigants, indicating the meso-level timeframe of the progress of an individuals' litigation through the courts. Second, litigants for purposes of legal strategy turned to the older remedies of maintenance and restitution of conjugal rights before turning to the new statutes. Twentieth century statutes built upon rather than replaced the nineteenth-century remedies.

The sources for this argument are several hundred decisions about family status in twentieth century Indian courts. The decisions come from the Indian High Courts and the Supreme Court. The decisions covered topics like the citizenship status of wives, marriage, separation, and maintenance. I analyze how lawyers and litigants used these laws between 1939 and 1974. Through an examination of how the courts and the bureaucracy determined both matrimonial disputes and citizenship disputes that involved wives' and sons' dependent identities, I show how a patriarchal family structure in which the husband had extensive rights over his wife structured many areas of Indian law, even when Indian courts often found in favor of wives.

The United Provinces

The setting for much of this dissertation is Uttar Pradesh (UP) and its two High Courts at Lucknow and Allahabad. UP is India's most populous state, with a population close to 200 million.¹ The state is bisected by the Ganges River. The Ganges flows down from the Himalayas through Uttar Pradesh and across Bihar and Bengal into the Indian Ocean. Its route, in reverse, is that of the British East India Company (EIC) as it moved into northern India, from its base at Calcutta.

Prior to Indian Independence in 1947, "UP" stood for United Provinces. The word "united" indexes the major developments of the first century of colonial rule in India, from 1757-1858. In this period, the colonial state dismantled the north Indian political universe centered around the historic polity of Awadh and stitched it back together into the United Provinces. Awadh and Bengal to its east were large and wealthy Indian kingdoms under the nominal sovereignty of the Mughal Empire centered in Delhi. The nawabs, or kings, paid revenues to the Mughal Emperor in Delhi but were otherwise centers of their own complex, vibrant, and wealthy political universes. They are often called regional or "successor" states since they grew out of the provinces of the Mughal Empire in the first half of the eighteenth century. By 1765, the EIC had gained from the Mughal Emperor in Delhi the right to collect revenue on behalf of the Nawab of Bengal. With control of the state's coffers came Company governance. As Clive put it, "We must indeed become the [Nawabs] ourselves."² This marked a crucial shift from trade to rule for the EIC state.

¹ Government of India, Ministry of Home Affairs, *2011 Census*.
http://www.censusindia.gov.in/2011census/population_enumeration.html [last accessed August 17, 2015].

² Quoted in P. J. Marshall, *Bengal: The British Bridgehead* (Cambridge: Cambridge University Press, 1987), 89.

Northwest of Bengal, the Company gained a toehold in the Awadh court. In 1775 it acquired the Awadhi state of Benaras to the south and east of the capital at Lucknow. In 1801 and 1803 it also acquired large swathes of territory belonging to Awadh and a neighboring Indian ruler.³ By 1856, the EIC maintained indirect rule in Awadh and had appointed a full-time “resident” or supervising official at the Awadh court. The twelve historic core provinces of Awadh were surrounded by the British United Provinces and British controlled kingdoms to the north in Nepal. The Company wanted direct control of Awadh for several reasons. First, Awadh was a wealthy agricultural state. Second, order in the state had broken down, in part due to the pressures of East India Company rule. Third, Governor-General Dalhousie sought to regularize British administrative structures and eliminate indirect rule as much as possible across the subcontinent. As indicated by the recent Company takeover of seven nearby Indian states in seven years, Dalhousie sought to unify India’s patchwork of sovereignties.⁴

By wresting control from the Nawabs and restoring “good government,” order in the state, revenues, and economic management could be maximized. The EIC state issued an ultimatum to the nawab that he reform his government. He refused, leading the EIC to annex the state in 1856.⁵ The 1856 annexation of Awadh was one cause of the 1857-8 Rebellion in north India. Awadh and other recently annexed north Indian states provided the heartland for the 1857-8 Rebellion.⁶

Colonial Governance

³ Barbara Metcalf and Thomas Metcalf, *A Concise History of Modern India*, 3rd ed. (Cambridge: Cambridge University Press, 2012), 72; Surendra Nath Sen, *Eighteen Fifty-Seven* (New Delhi: Government of India, 1957), 172-3; Peter Reeves, *Landlords and Governments in Uttar Pradesh: A Study of their Relations until Zamindari Abolition* (Bombay/New York: Oxford University Press), 8.

⁴ Metcalf and Metcalf, *Concise History*, 95.

⁵ Veena Talwar Oldenburg, *The Making of Colonial Lucknow, 1856-1877* (Princeton: Princeton University Press, 1984), 7-9; Sen, *Eighteen Fifty-Seven*, 175-6.

⁶ Metcalf and Metcalf, *Concise History*, 95-6; 101-3.

As the Company expanded northwest from its base at Calcutta, it developed systems for governing and collecting land revenue from its new territories. In 1772, the first Governor-General, Warren Hastings, developed a plan to administer Bengal. To collect revenue from the new territory of Bengal, Hastings focused on the district as the basic unit of administration.⁷ His plan sought to maximize the company's own revenue through the efficient use of pre-existing Indian social and landholding structures. Indeed, districts were largely based on sixteenth century (or earlier) administrative units.⁸ The creation of private markets in land would maximize agricultural productivity and profit.⁹ The Company took on state-like functions such as determining land revenue amounts, collecting revenue, and regulating disputes over land rights, marking a shift from trade to rule.¹⁰

Beyond this basic administrative structure of the district, the way the colonial state administered India varied by time and place over the next seventy-five years.¹¹ It developed different systems of land revenue collection that fit local circumstances and the contemporary ideology about land ownership and the state.¹² The Permanent Settlement of 1793 was Lord Cornwallis's refinement of Hastings's plan. Cornwallis was the second Governor-General of India. The Permanent Settlement set a fixed amount of revenue due

⁷ Along with Orissa and Bihar.

⁸ Cohn, "Law and the Colonial State in India" in *Colonialism and its Forms of Knowledge: The British in India*. (Princeton: Princeton University Press, 1996), 60; Sen, *Eighteen Fifty-Seven*, 172.

⁹ Metcalf and Metcalf, *Concise History*, 59-60; Thomas Metcalf, *Ideologies of the Raj: The New Cambridge History of India III.4* (Cambridge: Cambridge University Press, 1997), 20-1; Cohn, "Law and the Colonial State," 60-1.

¹⁰ M. Zaheer and Jagdeo Gupta. *The Organization of the Government of Uttar Pradesh: A Study of State Administration*. (New Delhi: S. Chand, 1970), 718.

¹¹ Bernard Cohn, "The Initial British Impact on India: A Case Study of the Benaras Region," in *An Anthropologist Among the Historians* (Oxford: Oxford University Press, 1987), 320.

¹² Paul Brass, *Factional Politics in an Indian State: The Congress Party in Uttar Pradesh* (Berkeley: University of California Press, 1965), 11. For example, it collected revenue through intermediary estate owners/holders in Bengal Presidency and most of UP. In Madras and Bombay Presidency, it attempted to collect revenue and vest rights in land directly in individual cultivators. In Awadh, such estate holders were treated as tenants of even larger landowners, called *talukdars*. See also Metcalf, *Ideologies*; Reeves, *Landlords and Governments in Uttar Pradesh*, 6-11.

from each estate to the colonial state, through the aegis of a large landlord. The rate was fixed. The revenue could be paid to the state in cash or in kind. Setting a fixed revenue rate was designed to push each landlord to maximize the efficiency of his holdings and profits. The idea was to create a private market in land that would encourage agricultural productivity.¹³

The Permanent Settlement of Bengal also applied to Varanasi in 1795. But Awadh settled much later, after the Rebellion of 1857-8, followed a different system of land rights and revenue collection. In general, differing regimes of system of land rights and revenue collection rules were found across India.¹⁴ The chronology of British acquisition of India territory, prevailing beliefs about land and government, and the pre-existing social structure influenced the political economy, social structure, ecological, and economic trajectory of the UP countryside. The Company state generally sought to govern through pre-existing social identities and institutions, but it could privilege different elements at different times.¹⁵

The first century of British rule amply demonstrated that knowledge is power. As the colonial state spread its control across the subcontinent, it also developed a variety of institutions designed to “know” the sub-continent.¹⁶ Along with law and the courts, to be discussed shortly, we might also include the gazetteer. These were books designed to describe all natural, physical, demographic, linguistic, social, and economic features of India,

¹³ Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham: Duke University Press, 1996); Metcalf, *Ideologies*, 19-23; Cohn, “Initial Impact,” 335, and *Colonialism and its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996); Vasudha Dalmia, *The Nationalization of Hindu Traditions* (New Delhi: Oxford University Press, 1997), 74-5; Anand Yang, *The Limited Raj* (Berkeley: University of California Press, 1989), 54-6; 61-2; 92-4; David Washbrook, “Law, State and Agrarian Society in India,” *Modern Asian Studies* 15, no. 3 (1981): 649-721.

¹⁴ Thomas Trautmann, *India - Brief History of a Civilization* (Oxford: Oxford University Press), 178; Reeves, 6-11; Metcalf, *Ideologies*, 21.

¹⁵ For example, Varanasi state, acquired in 1775, was eventually settled under the Permanent Settlement in 1795 on estateholders called *zamindars*. But Awadh was not settled until after the Mutiny when the colonial state settled land revenue rights on an extremely small group of rural landed magnates called *talukdars*. Reeves, *Landlords*, 6-11.

¹⁶ Cohn, *Colonialism and its Forms of Knowledge*, *passim*.

district-by-district. A system of knowledge production begun in the early nineteenth century and carried across straight through the twentieth century, they had a variety of uses.¹⁷ For example, they might guide a colonial official in a far away city needing to make a decision about rural affairs or a new colonial officer headed to a posting. They also had legal influence: the gazetteers were used in colonial courts to determine local social customs and adjudicate all manner of social and revenue disputes on the basis of the custom of the district.

Other forms of colonial knowledge included linguistic research and preservation, the cartographic knowledge of surveying the entire sub-continent, history writing, and archaeological and geologic research; and the census. The colonial state's primary purpose was extractive and colonial knowledge projects contributed to concrete material changes to Indian life such as the building of the railways and laying of telegraph lines; development of irrigation and canal systems, for better or worse; the expansion of cash crops (including indigo and opium); major restructurings of social structures in many parts of India; and many others. In line with its view of Indian society as "a land lost in the past" the colonial state privileged caste and religious identities and reinforced elite dominance as a bulwark to its own rule.¹⁸

The colonial view of Indian history and religion had many ramifications for the development of India's legal system.¹⁹ Eighteenth century colonial scholars and

¹⁷ Zaheer and Gupta state that the State Editor of the gazetteer in UP was a high level appointment within the Indian Administrative Service appointed by the Secretary of Revenue; see Zaheer and Gupta, *Organization of the Government of Uttar Pradesh*, 53, 58, 181-2. They also state that the system of gazetteer publishing dropped off around World War I but was revived by the post-colonial UP government in the 1960s, 206.

¹⁸ Metcalf, *Ideologies*, 27.

¹⁹ See Chapter Three, "Law and the Colonial State in India" in Bernard Cohn, *Colonialism and its Forms of Knowledge*; Scott Kugle, "Framed, "Framed, Blamed, and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 257-313; Asaf A. A. Fysee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 2nd ed., edited and revised by Tahir Mahmood (Delhi: Oxford University Press, 2005); Derrett, "The Administration of Hindu Law by the British," in *Religion, Law, and the State in India*

administrators like Warren Hastings and Sir William Jones attempted to preserve the customs of India's two major religions, Hinduism and Islam, so as to minimize the impact of East India Company rule on Indian society.²⁰ So-called personal affairs like marriage and inheritance were distinguished from criminal and contractual legal transactions. Personal laws dealt with those aspects of law that depended on the individual's religion, caste, location, and other factors. Personal law covered many aspects of modern life: marriage, separation, divorce, inheritance and succession, tax and finance, religious institutions and trust, and commercial affairs of family business.²¹ We have already described how the land settlement was one of the key markers of colonial sovereignty. Often through property disputes, the colonial state was drawn into this longer list of affairs.

The story of colonial legal development was of the increasing authority of the book over personal or individual religious-legal authority. We have already described, for example, how the gazetteers recorded local customs regarding property rights, the celebration of religious festivals, marriage practices, social divisions, and others. When it came to religious affairs, there were two sources of authority for the colonial state to learn what Hindu and Muslim laws were, exactly: religious texts and the personal authority of learned men. At first, colonial courts used learned religious advisors to advise colonial judges on the appropriate way to apply Hindu and Muslim law. But colonial officials distrusted these officers. For example, in 1798 a provision was enacted that allowed a judge who doubted the advice of

(London: Faber and Faber, 1968); Robert Lingat, *The Classical Law of India*, trans. J. Duncan M. Derrett (Berkeley: University of California Press, 1973).

²⁰ Michael Anderson, "Islamic Law and the Colonial Encounter in British India," *Women Living Under Laws*, Occasional Paper (1996); Bernard S. Cohn, "Law and the Colonial State."

²¹ See for example, Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship, and Community*. (Cambridge: Cambridge University Press, 2013); Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Durham: Duke University Press, 2009); Gregory C. Kozlowski, *Muslim Endowments and Society in British India* (New York: Cambridge University Press, 1985).

the *pandit*, or Hindu scholar at the court, to appeal to law officers of superior courts.²²

Colonial officers preferred to rely on the impersonal authority of books rather than the personal and biased authority of Indians themselves and by 1864 the institution was abolished.

The preference for textual certainty led Hastings to commission an early text on Hindu law. It was completed in 1775. It was called the *Vivadarnava Setu* (Bridge Across the Ocean of Litigation, known as Halhed's *Code of Gentoo Laws*). This digest was the product of a "synod" of eleven Hindu jurists. Their text was then translated from Sanskrit to Persian to English.²³ Other such efforts followed with variations specific to regional differences in Hindu law.²⁴ Derrett listed 19 such texts directly commissioned by the colonial state and another thirty or so that were encouraged by its presence.²⁵

A Code of Gentoo Laws might be seen in two ways. On the one hand, it could be seen as a continuation of a much longer tradition of commentary and explanation of Hindu law in a complex and incredibly sophisticated intellectual tradition. For example, there were multiple forms of jurisprudential literature in India that dealt with the science of legal and ethical interpretation. These ranged from commentaries on revealed texts that were essentially fundamental rules; treatises; commentaries on these treatises; and regional variations on all of these.²⁶ On the other hand, it could be seen as a rupture with the pre-colonial past, in that it marked the passage of a flexible, local, and uncodified system into

²² Reg. II of 1798, s. 4, noted on p. 583, Jain, 5th ed.

²³ J. Duncan M. Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968), 238-40.

²⁴ *Ibid.*, 255-73.

²⁵ *Ibid.*, 270-3.

²⁶ Lingat, *Classical Law of India*.

British common law.²⁷ One hallmark of this system was its dedication to certainty even over authenticity since certainty was considered important to private property rights.²⁸

The general scholarly consensus is that the British dramatically changed Hindu and Muslim law especially through their emphasis on precedent, textual certainty, and the adversarial legal system. What exactly was the Hindu law the British “found” when they arrived in India? Moreover, the legal systems developed regional variations that were incorporated into the British system.

A similar process occurred within the realm of Muslim law. The *Hedaya* was a primary source of Muslim law for the colonial legal system. This was a twelfth-century manual of jurisprudence compiled in Central Asia and adopted by Indian jurists of the same Hanafi school of religio-legal adjudication.²⁹ Colonial courts relied heavily on this text as a guide to Muslim law. However, the version they used had been translated, first, by Indian scholars from Arabic to Persian, and then, by Charles Hamilton in 1791, to English.³⁰ The complex and inherently selective and political process of translation fundamentally changed the text, as did its deployment in the precedent-based common law courts. Scholar Scott Kugle concludes that in commissioning this translation of the *Hedaya*, Hastings “did not just find a text, he created one.”³¹ While there were many textbooks on Islamic jurisprudence and compendia of non-binding but authoritative legal rulings on how to live a pious and correct life, it seems that colonial judges, for simplicity’s sake, defaulted to the *Hedaya*.³² A close

²⁷ See Derrett, “The Administration of Hindu Law by the British,” in *Religion, Law, and the State*.

²⁸ *Ibid.*, 296 n. 2.

²⁹ By Ali ibn Abi Bakr al-Marghinani (d. 1196). Alan Guenther, “Hanafi *fiqh* in Mughal India: *Fatava i-Alamgiri*,” in *India’s Islamic Traditions, 711-1750*, ed. Richard Eaton (New Delhi: Oxford University Press, 2003), 209-30, here 209-11.

³⁰ Kugle, “Framed, Blamed, and Renamed,” 272.

³¹ *Ibid.*, 272.

³² *Ibid.*, 273.

second was the *Fatava-i-Alamgiri*, a seventeenth century manual of jurisprudence commissioned by the Mughal emperor Aurangzeb.³³

The general scholarly consensus is that the British dramatically changed Indian legal practices. First and foremost, dividing and confining law to “Hindu” and Muslim” itself represented a major change. Second, the common law system relied on precedent and the adversarial legal system. One key point that the Orientalist assumption about India’s inherent religiosity tends to obscure is that within the realm of Hindu law, there were three sources of authority and law. One was *dharma*, or a sacred and timeless ethical duty. A second was the King’s royal edict. A third source was custom.³⁴ The King was both sanctioned by religious authority and responsible for maintaining religiously sanctioned just and right rule within his kingdom.³⁵ In contrast to visions of Oriental despotism in which the king was unchecked by the legislature *dharma* and custom both checked his powers.³⁶

The *dharma* designated as such by the Brahmans the colonial state worked with, represented a “high” or correct tradition. Brahmanical *dharma* was the norm and custom was seen as deviation. This privileging of Brahmanical *dharma* over custom could not last long in the courts in India. Custom came to play a very important role in Anglo-Hindu law. This is all the more so since after all the common law itself greatly respected custom. In its early years, the common law was sometimes described as English custom and custom also implied “foundation in the consent of the users of the English law.”³⁷ The reverence for

³³ Guenther, “Hanafi *fiqh* in Mughal India.”

³⁴ Trautmann, *India*, 119. There is a distinction between custom and practice. Custom is afforded the authority of law even if it remains unrecorded. See Susan Reynolds, “Early Medieval Law in India and Europe: A Plea for Comparisons,” *Medieval History Journal* 16, no. 1 (2013): 4.

³⁵ Trautmann, *India*, 119.

³⁶ Ibid. See also Lingat, *Classical Law*, 141. Summaries of Oriental despotism in India are found in Cohn, “Law and the Colonial State” and Metcalf, *Ideologies*.

³⁷ Paul Brand, “Law and Custom in the English Thirteenth Century Common Law,” in *Custom: The Development and Use of a Legal Concept in the Middle Ages*, edited by P. Anderson and M. Münster-Swendsen (Copenhagen: Djøf, 2009), 17-31; quote from 31. It was custom that influenced the divergent English position on the

custom in the common law and pre-colonial legal systems made a happy marriage with the Company's stated need to administer on the cheap using pre-existing social structures. The incorporation of custom began early in Company rule with a 1799 Regulation allowing Bombay Presidency in western India to defer to well-established customs in the area instead of applying the distinctive law of Bengal. By the late nineteenth century, one District Judge argued that the colonial state should scrap its reliance on "Brahmanical codes." It should replace such law with a code of law based on "a simple form [of] the practices and primitive customs" of "all the castes or a majority of them."³⁸ The plan might not be as naïve as it seems based on the recent spurt of codification starting with the Indian Penal Code of 1860 and the Criminal Procedure Codes of the 1860s and 1870s (discussed in greater detail in Chapter Four).

Custom in the Indian system can refer to local or regional customs and the customs of a particular religious or caste grouping. For example, in some parts of south India, matrilineal succession to property is the norm. In western India around Bombay, some communities that have putatively converted from Hinduism to Islam retain Hindu inheritance law. Custom could also refer to the practices of a particular caste and religious community. In this way, caste, religious community, *and* location all played an important role in defining custom.

Coming to the "high" Brahmanical *dharma* that came to stand for Hindu law. Dharma means duty or moral righteousness. One way to consider this system of law is in

controversial issue of subsequent legitimation of the illegitimately born offspring of an unmarried man and woman who subsequently married. This is discussed in Chapter One. See Brand, 27-31.

³⁸ Lingat, *Classical Law*, 138-9. The District Judge was James H. Nelson.

terms of layers of commentarial traditions.³⁹ At its core was the corpus of the sacred, revealed Vedas. A system of commentaries on the Vedas specifically commenting on their ethical and legal (as opposed to their implications for philosophy, language, or the ritual of the Vedic sacrifice, for example) application arose. These texts, called *dharmashastras*, studied and commented upon the science (*shastra*) of the *dharmas*.⁴⁰ They were written in verse.⁴¹ The most famous and prestigious of these is the Code of Manu, very important in India as well as in “further India” as it was exported to Champa, Cambodia, and Indonesia.⁴² The Code of Manu is a “veritable encyclopedia of religion, morality, politics, and law”⁴³ developed sometime between second century BC and second century AD.⁴⁴ The Code of Manu and other *dharmashastras* had a great deal of authority by their relative proximity to the Vedas themselves, the original source of revealed truth. Even though the *dharmashastras* did not have quite the authority of the Vedas themselves, by the late medieval period (around the ninth century) they were almost in the same class.⁴⁵ Together, the early Vedic and post-Vedic *dharmashastras* “appeared as if they were scripture, timeless, eternal; the whole of them...brought to men the voice of a tradition which was both holy and in conformity with the order of nature.”⁴⁶

In the late medieval period developed a body of literature that sought to interpret, apply, and explain the *dharmashastras*. The medieval texts had great authority though they lacked the sacred quality of the earlier corpus of texts. These commentaries and treatise

³⁹ This corresponds to Sir William Jones (1746-94) and H. T. Colebrooke developed an enduring and influential view of Hindu law that emphasized that the older the text, the greater its authority. See Cohn, “Law and the Colonial State,” 71-8.

⁴⁰ Lingat, *Classical Law*, 9-13.

⁴¹ Ibid., 73, 77.

⁴² Ibid., 77.

⁴³ Ibid., 86.

⁴⁴ Ibid., 95.

⁴⁵ Ibid., 73, 77.

⁴⁶ Ibid., 107.

(which the British called digests) not only explained the law but also played an important role in preserving sections of *dharmashastra* texts that otherwise would be lost. Such treatises and commentaries did not have the same sacral character as the Vedas and earlier *dharmashastra* literature. But they became the basic building blocks of the British administration of law. It was the later commentaries and treatises that were translated first for use in the colonial courts and it was only later that the colonial state concerned itself with the actual *dharmashastras* themselves. Litigants and Indian law officers preferred to defer to other the more sacred but distant *dharmashastra* literature.⁴⁷

Among these treatises, two treatises in particular came to be privileged by the colonial state. One of these became the standard Hindu law for all of India except for Bengal and Assam in eastern India. Composed in the eleventh century Deccan, the *Mitakshara* was a commentary on a much earlier eminent *dharmashastra*.⁴⁸ Counter-posed to this was the so-called Bengal school of law, called the *Dayabhaga*.⁴⁹ The schools differ on an important point of philosophy: whether the son's right of property ownership begins upon the son's birth (*Mitakshara*) or the father's death (*Dayabhaga*), with the father as a "sole master" during the father's lifetime.⁵⁰ This difference has implications for the structure of property holding in the joint (or extended) Hindu family.

Another way to define the difference is between the sons' *succession* to the father's share (the *Mitakshara* position) or the sons' *inheritance* of a fixed share in his father's estate (the *Dayabhaga* position). The proportions of ownership do not change on the father's

⁴⁷ Ibid., 110-11.

⁴⁸ Ibid., 113. This text and its resultant school of law were called *Mitakshara*. *Mitakshara* means "measured in its syllables." The *dharmashastra* text upon which the *Mitakshara* comments is *Yajñavalkya* after its putative author. The *Mitakshara* was composed by Vijnanesvara.

⁴⁹ Ibid., 118-19. This text was Jimutavahana's *Dayabhaga*, composed sometime between around 1100 and 1500 AD in Bengal.

⁵⁰ Ibid., 172-4, quote on page 172.

death in the *Dayabhaga* system, reflecting tenancy-in-common rather than joint tenancy.⁵¹

One scholar argues that late eighteenth century thinkers saw “schools” as structuring Hindu law because of their prior knowledge of the system of schools of Muslim law. In this model, Muslim law was divided into two major sects (Sunni and Shia) and Sunni Islam was further sub-divided into four schools of religious law, with Hanafi law dominant in South Asia.⁵²

This distinction between the dominant *Mitakshara* system in most of India and the *dayabhaga* system in Assam and Bengal was enduring. The undivided Hindu family (the joint family considered as a legal rather than social structure), with its coparcenary property ownership structure, became the basic structure for the Hindu family under the 1955 Hindu Succession Act, albeit with major changes.⁵³ The colonial ideology of Mitakshara dominance and other systems of law as “deviations” rather than “progressive” was replicated in the post-colonial statute.⁵⁴

It must be reiterated that the High Court decisions examined in this dissertation were at a far remove from the original Vedas, the *dharmashastra* texts, and the commentaries and treatises upon the *dharmashastra*. Late eighteenth century translations formed the basic corpus of texts on Hindu law for the colonial courts. These texts were then applied in individual fact circumstances in adversarial proceedings in colonial courts. The colonial judge would have acted with the assistance of the Indian law officer at the court as well as the text. Once his decision was made, it would become binding precedent. In this way, Hindu law in twentieth century Indian common law courts *was* distantly and delicately linked to the longer chain of ethical texts associated with Hindu intellectual traditions that derived their original authority from the Vedas.

⁵¹ Ibid., 173.

⁵² Cohn, “Law and the Colonial State,” 73-4.

⁵³ Newbiggin, *Hindu Family*, 214-26.

⁵⁴ Ibid., 219.

There was an almost infinite number of links in this chain, however, each link indexing a multitude of historical changes. This distance from any spiritual or religious element in so-called Hindu law helps undercut the overly religious view of Indian law. So too, does my analysis that a substantial amount of matrimonial litigation took place under non-religiously marked civil and criminal law, and that these domains all influenced each other. By the twentieth century, Indian lawyers were primarily concerned not with the Vedas or the medieval commentaries. Occasionally these treatises were discussed and debated in court judgments, especially in property suits. However, ultimately courts had to make decisions based not just on the *dharmashastra* commentarial texts but a variety of other, more recent sources including i) statutory frameworks; ii) precedent; iii) local considerations such as custom; iv) general principles of common law governance such as justice or certainty. Treatises helped guide lawyers through the statutes and precedents that structured the practice of Hindu law in twentieth century India.

These were all pre-Rebellion developments. The names Hindu law and Muslim law might suggest that some form of “pure” Hindu or Muslim law was being practiced in India with both substantive law and procedural law governed by religious norms and authorities. The law practiced in colonial courts was often called Anglo-Hindu or Anglo-Muhammadan law. This suggests how the law had been inflected by the colonial legal system in numerous ways. To mark the substantial Indian rather than Anglo agency in creating this body of law, barrister and scholar A.A.A. Fyzee called Anglo-Muslim law Muhammadan law.⁵⁵

Colonialism and the Indian Legal System

⁵⁵ See Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 2nd ed., edited and revised by Tahir Mahmood (Delhi: Oxford University Press, 2005), xxiii-xxiv. See also Derrett, “Translator’s Preface,” in Lingat, *Classical Law*, vii.

Colonialism shaped law and the courts in India. The district played an important role as the fundamental unit for administration. The Collector was also the District Magistrate. He was responsible for revenue collection, civil justice, and law and order.⁵⁶ Over the nineteenth and twentieth centuries, the institution of the District Magistrate developed so that its various extensive powers could be completed by other individuals besides the DM himself. This was concomitant with the general growth of the administrative state.⁵⁷ The District Magistrate/Collector also took on the supervision of development projects in the twentieth century.⁵⁸ The structure of the district courts ensured that most litigants had two appeals, from the sub-district courts to the district courts and from the district courts to the High Courts. According to one guide to Uttar Pradesh government, the District Magistrate/Collector in general possessed “extensive magisterial, police and revenue powers.”⁵⁹

The guide listed the District Magistrate’s multifarious activities. They started with “supervision over Treasury Officer” and ranged to “Land Records,” “relief on account of natural calamities,” “colonization” [the settlement of new land with land rights], and “President of District Soldiers’, Sailors’ and Airmen’s Board.”⁶⁰ In his turn, the DM was at the base of an executive administrative structure overseen by the elected Chief Minister of the province or state. After the Indian Parliament passed a law allowing “registered” or “special,” non-religious, civic marriages in 1954, UP District Magistrates were tasked with

⁵⁶ Cohn, *Anthropologist*; Metcalf, *Ideologies*, 25-7; Zaheer and Gupta, *Organization*, 718.

⁵⁷ A.T. Markose, *Judicial Control of Administrative Action in India: A Study in Methods* (Madras: Madras Law Journal Office, 1956), 91.

⁵⁸ Zaheer and Gupta, *Organization*, 718-19. The terminology for such offices varied somewhat by province and district but the general structure remained the same.

⁵⁹ *Ibid.*, 718.

⁶⁰ *Ibid.*, 749 (Index), 123, and *passim*.

registering and ensuring the administration of the law in their districts. Together the DMs and the “state government” could appoint assistants to help with the workload.⁶¹

Among the DM’s powers were his supervision of civil and criminal powers in his district. Each district had a system of courts centered at the town or city that served as the district headquarters. Even though the buck stopped with the District Magistrate, by the twentieth century responsibility for overseeing the courts in the district was vested in the District and Sessions Judge. Such a position actually rolled two separate jurisdictions into one, powers which would subsequently be further separated from each other.⁶² This was due to the large amount of work in each district.

The chief district judge oversaw a network of Civil Judges sitting below him. The District Judge and Civil Judges’ courts were of “unlimited jurisdiction,” meaning they could try suits of any amount of money. Beneath them sat another layer of inferior civil courts that had limits on the size of the suits they could hear.⁶³ Appeals from these limited inferior civil courts lay to the District Judge or one of his Civil Judges. A decision from such district courts could then be appealed to the High Court in Lucknow or Allahabad.

The Sessions Judge was the chief criminal judge in the district. He had a network of Magistrates below him, mirroring the structure on the civil side. Magistrates were ranked by severity of crimes they could try: as they advanced through the ranks of the colonial judiciary they could hear criminal cases with ever-larger penalties. The Sessions Judge was the only one who could try “grave offences.”⁶⁴ Appeals lay to the Sessions Judge and until 1947 from

⁶¹ Ibid., 123.

⁶² The terminology for the chief executive throughout various districts in India is not consistent. Moreover, the executive chain of command is further complicated by the existence of over-arching executive positions of authority within the civil service, like the Divisional Commissioner. The state’s districts are grouped together in divisions and other groupings. This is a general sketch of the position of judges and executive officers vis-à-vis each other.

⁶³ Kalias Nath Katju. *The Days I Remember* (Calcutta: New Age Publishers, 1961), 132.

⁶⁴ Ibid.,132.

him to the District Magistrate.⁶⁵ From the district level, appeals lay to the High Courts in Lucknow or Allahabad.

There are several different ways in which executive and judicial powers are imbricated with each other in India that may surprise the American reader. It is a model akin to the English system of combined powers.⁶⁶ Even after the process of separating the judicial and executive powers of the Collector/District Magistrate was mostly complete in the late 1960s, the District Magistrate still had many executive powers in his capacity as the chief executive of the district such as issuing orders if he perceived a danger to “public peace and tranquility.”⁶⁷

By the late 1960s, the District and Sessions Judges reported to the High Court in Allahabad rather than the elected Chief Minister of the state. Nonetheless, for most of the period of this dissertation, combined powers of the executive and judicial district officer was the norm.⁶⁸ The extensive executive powers of the District Magistrate were a specific marker of the colonial legacy. The Indian set-up was similar to England’s system of combined executive, legislative, and judicial powers, distinguished of course by the lack of consent of the people.⁶⁹ After colonial rule, the Constitution created inviolable fundamental rights to life and liberty. Moreover, the Indian Constitution’s weaker but still significant Directive Principles of State Policy section enjoined the state to separate executive from judicial powers. But, it was not so simple to separate out executive and judicial powers from each

⁶⁵ Zaheer and Gupta, *Organization*, 115, 722.

⁶⁶ A.W. Brian Simpson, “Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights” *Loyola Law Review* 41, no. 4 (1996): 629-711, and Anil Kalhan, “Constitution and ‘Extraconstitution’: Emergency Powers in Postcolonial Pakistan and India” in *Emergency Powers in Asia: Exploring the Limits of Legality*, edited by Victor V. Ramraj and Arun K. Thiruvengadam (Cambridge: Cambridge University Press, 2010): 89-120.

⁶⁷ Zaheer and Gupta, *Organization*, 724-5. Under s. 144 of India’s Criminal Procedure Code. The District Magistrate also enforces the Press Act that can allow the government to suspend the rights of a press to publish.

⁶⁸ However, appointments to the judicial service were still controlled by the executive branch. See *Ibid.*, 63.

⁶⁹ M.C. Setalvad, *The Common Law in India* (London: Stevens, 1960), 173-5.

other because after two centuries they were deeply inter-laced. One 1956 commentator seemed to assume this would happen quickly now that India had its own Constitution.⁷⁰ But the process took until the late 1960s in UP and even then it was not implemented in all districts.⁷¹ There were many other such anomalies in jurisdiction.⁷²

Despite these different jurisdictional positions at different times, the threefold division of the Indian legal system has remained in place. At the base are the sub-district courts through which most litigants enter the legal system. Decisions of these courts can be appealed to the District Courts. From the District Courts, appeals lie to the appellate courts, first the High Courts in the state capitals and possibly then the Supreme Court in Delhi.

In England, Magistrates acquired the power to order a husband to support his wife living separately from him if he had been convicted of assaulting her. The Magistrates had also been concerned with legal rights and obligations of sustenance and maintenance through the poor law, discussed in greater detail in Chapter Four. From these initially small roots in the Magistrates jurisdiction grew the adjudication and administration of maintenance law in English Magistrates courts that lasted until the 1970s.⁷³ It is also worth noting that Magistrates were in England and the empire responsible for administering the law of masters

⁷⁰ Markose, *Judicial Control*, 91

⁷¹ Zaheer and Gupta, *Organization*, *passim*.

⁷² *Ibid.*, 123. Also, Pervez Mody, *The Intimate State: Love-Marriage and the Law in Delhi* (New Delhi: Routledge, 2008) provides an excellent ethnography of the way in which the Special Marriages Act of 1954 works in practice. She highlights how the Act seeks to tie individuals to a particular location and before the couple can marry. The marriage officer where they seek to marry must seek objections in their home localities. On the one hand, this suggests the ways in which community control and the state are imbricated in regulating marriage. On the other hand, the vast majority of Indians marry under their own religious personal laws. Both the Special Marriage Act (i.e. the civil, non-religious marriage law of India) and India's religious personal laws do afford some measure of community control and/or surveillance over marriage choices. One crucial difference between the realm of the Special Marriage Act and community regimes of control is that as long as the objection and other requirements of the Special Marriages Act can be met by the couple, they may marry regardless of any prejudice of caste or religion. Even though there are problems with the Special Marriages Act and it certainly evidences a social control interest in opening up the couple's marriage to the publicity and objections of their home communities, nevertheless, it also provides an undeniable refuge for controversial marriages.

⁷³ Stephen Michael Cretney, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2005), 200-1 and 443-5.

and servants which governed employment contracts, was an important aspect of the law of status and therefore also distantly related to marriage law, and was, like its cousin the law of marriage, shaped by social control, colonial governance, and principles of unfree labor.⁷⁴

Courts in Uttar Pradesh

Since UP united two separate provinces, it had two separate High Courts. In Lucknow, the Oudh Chief Court [Lucknow High Court] was founded at Lucknow just after British annexation in 1856.⁷⁵ Colonial courts of appeal had been in operation in the eastern United Provinces since 1831, when courts of civil appeal were established in Allahabad so that Indians would not need to undertake the expense of travel to distant Calcutta to pursue litigation.⁷⁶ However, as a High Court, the Allahabad High Court was not founded until after the Rebellion of 1857-58. It was founded under the 1862 High Courts Act. The Act was designed to unify the jurisdiction of the three appellate courts at Calcutta, Madras, and Bombay. It also allowed the formation of new courts in British territory where they were deemed necessary, such as at Allahabad in 1869.

This dissertation focuses on decisions by the appellate courts in the capitals of UP at Lucknow and Allahabad. The Lucknow High Court and its counterpart in Allahabad most closely parallel United States circuit courts. As the Indian legal profession developed over the late nineteenth century, it opened up to Indian legal participation at the Appellate Court level. By the twentieth century, Lucknow and Allahabad were legal, political, and cultural

⁷⁴ Douglas Hay and Paul Craven, "Introduction," in *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: The University of North Carolina Press, 2004), especially 5, 8-9, 26, and *passim*. Violation of an employment contract could until 1867 in England result in corporal punishment, imprisonment, and wage garnishment.

⁷⁵ H.K. Ghose, "History of the Court of Awadh from 1856 AD up to the Present Time" in *High Court of Judicature at Allahabad, 1866-1966, Centenary Commemoration*, vol. 1 (Allahabad High Court Centenary Commemoration Volume Committee, 1966). The court was founded in 1856. It was called the Judicial Commissioner's Court. In 1925, its name was changed to the Chief Court of Oudh.

⁷⁶ Zaheer and Gupta, *Organization*, 9.

capitals, with sophisticated infrastructures dedicated to making colonial law “work” in India. Such institutions included bar associations and law libraries, courses of legal study in universities, and the all-important legal publishing houses. Even in important cities without a High Court like Kanpur legal practice was sophisticated. Some litigants appealed to District Courts and then to one of the High Courts. They often mobilized local connections in their home areas to find lawyers in the legal capitals. Similarly, starting lawyers made their way to legal capitals at Lucknow and Allahabad from outlying districts, starting practice in a small town, moving to a city like Kanpur, and eventually settling in the more prestigious and lucrative High Court town of Lucknow or Allahabad.⁷⁷

The careers of Sir Wazir Hasan (1872-1947) and his son Syed Ali Zaheer (1896-1983) show the various routes lawyers took to joining the legal profession. Syed Ali Zaheer was the oldest son of Sir Wazir Hasan. Sir Wazir was an eminent Lucknow lawyer, Chief Judge of the Lucknow High Court, and nationalist politician. Sir Wazir held a law degree from Aligarh Muslim University (1896). Sir Wazir first practiced as a lawyer in his familial homes of Pratapgarh and Jaunpur districts, in southeastern UP near Allahabad and Benaras. When Sir Wazir moved his family and his practice to Lucknow to in 1903, Syed Ali was seven years old. In 1912, Syed Ali enrolled as an undergraduate student in Canning College in Lucknow. In 1914, his father went to London as part of a delegation to the British government. At the same time, Sir Wazir made arrangements for Syed Ali and another son to enroll at New College, Oxford University. Just as Syed Ali arrived in Bombay to embark for England in 1914, World War I began. He returned to Lucknow. He completed his degree from Canning College and began his career as a pleader in 1918.⁷⁸

⁷⁷ Katju, *Days*.

⁷⁸ Syed Ali Zaheer. *The Memoirs of Syed Ali Zabeer*, edited by Syed Kazim Zaheer (Delhi: Frank Bros. & Co., 2004), 1-15.

During this early phase in his career, Syed Ali could only practice in the district courts. At the lower court level, the lawyer who advocated in court was called a pleader.⁷⁹ To become a pleader one had to pass an examination.⁸⁰ Presumably Syed Ali Zaheer passed the District Pleader's examination.⁸¹ Generally advocates and *vakils* at the High Court were considered more prestigious than the lawyer in the lower courts. Lawyers could begin as pleaders and either build a local practice or move to the appellate court towns where practice was more lucrative.⁸² Sir Wazir Hasan, father of Syed Ali, began his career as a pleader in Pratapgarh and Jaunpur, near Allahabad. The career of Mehr Chand Mahajan, future Chief Justice of India's Supreme Court, followed a similar trajectory in the Punjab.⁸³

Besides going to England to become a barrister, there were routes to legal practice within India. Kailash Nath Katju started practice in a small town, moving to a city like Kanpur, and eventually settling in the more prestigious and lucrative High Court town of Lucknow or Allahabad.⁸⁴ To become a lawyer, Kailash Nath Katju took a competitive examination for admission to the Allahabad High Court's register of *vakils* for the Allahabad High Court in 1906. After passing the examination and earning an MA in History the next year, he enrolled as a *vakil* with the Allahabad Bar in 1908.⁸⁵⁸⁶ He spent his career as a practicing lawyer and in government. Within the Allahabad Bar, there were two separate registers, an Advocates' Register and a Vakils' Register. Advocates were those who had been

⁷⁹ Samuel Schmitthener, "A Sketch of the Development of the Legal Profession in India," *Law and Society Review* 3, no. 2/3 (1968-9), 350-1. In nineteenth century colonial courts, the pleader acted on behalf of the litigant in the court and had special knowledge of the colonial regulations, especially Hindu and Muslim law.

⁸⁰ *Ibid.*, 363.

⁸¹ This is supposition on my part since Syed Ali Zaheer's memoir provides few details about his qualification process. He also does not state where he initiated his practice but presumably within the District Courts of Lucknow in its capacity as district headquarters. Schmitthener and Katju both mention such exams.

⁸² Schmitthener, "Sketch," 354, 371.

⁸³ *Ibid.*

⁸⁴ Katju, *Days*.

⁸⁵ *Ibid.*, 129, 131.

⁸⁶ Katju had a law degree as well. He also got the second highest score on the Allahabad University LL.B. examination in 1906. Katju, *Days*, 128-9.

called to the Bar at the Inns of Court in London. The Advocates would select the High Court *vakils* it deemed meritorious for nomination into the Advocates association as well.⁸⁷ It should be noted here that Calcutta and Bombay had a slightly differently structured legal profession than all other jurisdictions, for complex historical reasons. In Calcutta and Bombay, like in England, lawyers could be either solicitors or attorneys. Solicitors prepared the case and the pleadings and handed off the case to an attorney to be argued in court. However, there was no such system of solicitors in most states, including UP.

The legal profession might provide financial stability as well as political independence, social prestige, and intellectual attainment to the skilled practitioner no matter his exact route through the profession.⁸⁸ The independent source of income and the professional commitment to individual rights for the lawyer also assisted in his political independence. It likely predisposed him to support for greater Indian political representation, political activity, and nationalism.⁸⁹ Famously, Motilal Nehru, father of first Prime Minister Jawaharlal Nehru, gave up his lucrative Allahabad practice to join Gandhi's non-cooperation movement in 1921.⁹⁰ Over the course of the twentieth centuries the Indian state has unified the legal profession, with the 1961 Advocates Act creating the single status of advocate out of the formerly much more complex landscape. Even still, admission to the Bar is contingent on passing an examination and there are multiple routes to obtain the training necessary to pass that exam. These include taking a undergraduate degree course that combines a BA and LLB into one five-year curriculum; obtaining a BA (usually three

⁸⁷ Ghose, "History of the Court."

⁸⁸ Schmitthener, "Sketch," 369-80.

⁸⁹ *Ibid.*, 377-81. David A. Bell suggests, however, that in eighteenth century France the legal profession's political independence was in part due to the barristers' pre-existing sources of independent wealth that allowed them to enter and succeed in the profession in the first place. See Bell, *Lawyers and Citizens: The Making of a Political Elite in Old Regime France* (New York: Oxford University Press, 1994), 17.

⁹⁰ Schmitthener, "Sketch," 370.

years) and then obtaining an LLB as a graduate degree; or taking correspondence courses for an LLB.

Practicing Law

After World War I, Syed Ali took up his England plan again. In 1921 he went to London to enroll in the Inns of Court. These were the ancient learned institutions responsible for the creation and qualification of barristers. There were four Inns of Court: Gray's Inn, the Inner Temple, the Middle Temple, and Lincoln's Inn. Indian students began enrolling at the Inns of Court in the 1860s. Across the late nineteenth century about one hundred total Indian students had enrolled at Lincoln's Inn, a few per year.⁹¹ Soon after Syed Ali arrived in London in 1921, however, South Asian students had increased to a third to half of the students at the Inns of Court.⁹²

He enrolled in the Inner Temple. Usually students had to attend twelve “terms” of dinners to become barristers over three years. Many Indian students enrolled in the Inns of Court while pursuing other educational qualifications at the same time—for example, Mohandas K. Gandhi took the London matriculation exam in the late 1880s.⁹³ Closer to Syed Ali's own time, future civil servant and diplomat Y.S. Gundevia sat for the Indian Civil Service examination while attending dinners at the Middle Temple.⁹⁴ Syed Ali only had to attend two years' worth of terms since he had already earned a degree in law and practiced as a pleader for two years in India. Along with the dinner requirement students (or “benchers”)

⁹¹ Ibid., 366.

⁹² Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture* (Cambridge: Cambridge University Press, 2014), 104 n. 107 states that between 1926 and 1931 32-54 percent of students at the Inns of Court were South Asian.

⁹³ Mahatma Gandhi, *The Law and the Lawyers*, edited by S.B. Kher (Ahmedabad: Navajivan Publishing House, 1962), 9-13.

⁹⁴ Y.S. Gundevia, *In the Districts of the Raj* (Bombay: Disha Books/Orient Longman, 1992), 11-15. I am uncertain if Gundevia was ever called to the bar or not.

had to pass examinations, generally considered to be relatively easy.⁹⁵ Syed Ali was called to the Bar in 1922.⁹⁶

As a barrister, Syed Ali could now leapfrog into the more prestigious High Court Bar when he returned to Lucknow. Zaheer's legal career received a substantial boost from his well-positioned father. Zaheer wrote that when he returned to Lucknow from London, his father "set up an office for me, to which he transferred his extensive and valuable library."⁹⁷ Wazir Hasan also helped his son rent a house that served as an office. He even bought his son a Chevrolet, suggesting he was close in wealth to Motilal Nehru.⁹⁸ For the next decade, Sir Wazir would serve as a judge of the Lucknow High Court, becoming Chief Judge in 1930. After he retired in 1934, he played important roles in Indian nationalist politics.⁹⁹ Sir Wazir passed away just two weeks after Independence in 1947. Syed Ali would go on to become an important politician in post-colonial UP as well as India's ambassador to Iran. He was the Justice (law) Minister in UP during the 1950s and 1960s. He played an important

⁹⁵ Schmitthener, "Sketch," 365; Gandhi, *Law and the Lawyers*, 11-20.

⁹⁶ Zaheer, *Memoirs*, 1-10.

⁹⁷ Ibid., 11. Schmitthener notes that Motilal Nehru was one of the first to have cars in the UP as a result of his tremendous earnings from his practice in Allahabad. See Schmitthener, "Sketch," 370.

⁹⁸ Zaheer, *Memoirs*, 11.

⁹⁹ Sir Wazir Hasan served as the President of the Muslim League in 1936. In the 1937 elections held under the 1935 Government of India Act, the Indian Nationalist Congress did very well while the Muslim League lost its anticipated Muslim vote to regional parties. To consolidate the Muslim League's political base and repair this embarrassing defeat, Muhammad Ali Jinnah, the *de facto* head of the party ended the decades-old institution of dual membership in the League and the Congress. Sir Wazir Hasan was present at this meeting, advocated against Jinnah's position, and lost. He resigned from the League, casting his fortunes with the Congress. So too did Syed Ali Zaheer, as shown in his steady rise through the Congress ranks over the next several decades. Syed Ali Zaheer's memoir emphasizes his own activities within the Shia Political Conference, a sort of sub-party within the big tent of the Indian National Congress's nationalism devoted to convincing Shia Muslims to join the Congress. In a recent monograph, historian Justin Jones argues that though it might seem like Sir Wazir Hasan and Syed Ali Zaheer took a Shia-Muslim-Nationalist position, they primarily saw themselves as representatives of Muslim rather than "Shia" or "Shia Muslim" opinion. See Zaheer, *Memoirs*, 6-10 and Justin Jones, *Shia Islam in Colonial North India* (Cambridge: Cambridge University Press, 2012), 152, 183. The story does not end there. Among Sir Wazir's four sons, the youngest became one of the most important writers of modern India, part of a literary movement known as the Progressive Writers' Association. Sajjad Ali Zaheer was also a journalist and a Communist. Sajjad Ali went to Pakistan when he was elected the General Secretary of the new Pakistani Communist Party in 1947 but he was then imprisoned in 1951 on alleged involvement in the Rawalpindi Conspiracy Case, released in 1955, after which, he returned to India. Sibte Hasan, ed. "Introduction to the Urdu Edition," in Sajjad Ali Zaheer, trans. Amina Azfar, introd. Ahmad Ali Khan, *The Light [Roshnai]: A History of the Movement for Progressive Literature in the Indo-Pakistan Subcontinent* (Oxford: Oxford University Press, 2006), xiv.

role in the statutory reform of Hindu law in UP in 1962, discussed at the end of this dissertation.

Books

Lawyers need books.¹⁰⁰ One advantage of a wealthy father who practiced law was access to his books and law library. Specifically, common lawyers need law reports and treatises. In a common law system, law reports are regularly published collections of recent decisions of binding precedents by appellate courts. The most eminent such series is the *All India Reporter*, published in a yearly series with reports for each High Court, the Supreme Court, a journal, and other sections.¹⁰¹ Most of the sources for this dissertation come from the law reports published in UP in the twentieth century. Individual lawyers developed their own private notetaking systems to remember the key points of each case they read.¹⁰²

Along with reports, treatises are also important books for the lawyer. A treatise is a reference work on a particular area of law that helps guide the practicing lawyer through the case law on the topic. By the late nineteenth century an entire industry devoted to publishing legal treatises had developed. These treatises became something like franchises, updated and republished every few years to reflect the latest High Court decisions. One example is John D. Mayne's *A Treatise on Hindu Law and Usage*, published originally from Madras in 1878 and in the seventeenth edition as recently as 2014 by Bharat Law House. Such treatises range into the hundreds of pages. They provide a detailed and systematic topic-by-topic discussion

¹⁰⁰ Kalias Nath Katju, *Experiments in Advocacy: A Colossus in the Courts of Justice*, edited by Col. V. Katju, Justice Markandey Katju, and Dr. Harish Bhalla (Delhi: Universal Law Publishing, 2006 [1952]), 68-72.

¹⁰¹ Between 1937 and 1950, under the 1935 Government of India Act, India had a Federal Court that acted as a precursor to India's Supreme Court. Appeals from High Courts in places like Allahabad, Madras, and Calcutta would be heard by the Federal Court in Delhi. Still, decisions of the Federal Court could be appealed to the Privy Council in London as before. The ending of this practice and the vesting of India's Supreme Court with its final authority is a crucial marker of independent Indian sovereignty.

¹⁰² See Katju, *Days*, 320.

of all aspects of a particular area of law. They report the details of precedents on the topics so that if a particular point applies in a lawyer's case, the lawyer can find and examine the law report. They use examples to help the lawyer understand how the courts might see particular gray areas of the law. They have extensive citation systems to help the practicing lawyer find the correct law reports for a certain point and the various directions in which that point might take him.¹⁰³ Some treatises became so prominent that they were very close to authoritative law themselves. Treatises also editorialize about the direction the law should take, since they are referenced by judges.¹⁰⁴

Kailash Nath Katju spent his first ten weeks as lawyer living with a relative who was a Civil Judge and maintained a large law library.¹⁰⁵ He wrote, "I remember reading legal classics such as Smiths' Leading Cases, Maine's treatises on Hindu Law, and on Crime, and on Damages, Gale on Easements and Anson on Contract....that study of Maine, has left a permanent impression on me..."¹⁰⁶ Katju also wrote that, "I browsed also among the Indian Law Reports and particularly the early Privy Council Reports, known as Moore's Indian Appeals."¹⁰⁷ These were the law reports from the first century of British rule in India. By the twentieth century they would be supplanted by the *All India Reporter*.

By the twentieth century treatises were held in Bar Association libraries as well as in private collections. Not much different from the trajectory of an American lawyer joining a firm, a lawyer's early apprenticeship period was important for both study and professionalization.¹⁰⁸ Katju's early career also included an apprenticeship phase. He spent his early career under the tutelage of a senior advocate in Kanpur, Pandit Pirthi Nath. This

¹⁰³ Katju, *Experiments*, 68-9.

¹⁰⁴ See Chapter 5 for a discussion of the Dissolution of Muslim Marriages Act.

¹⁰⁵ Katju, *Days*, 128-9.

¹⁰⁶ *Ibid.*, 129.

¹⁰⁷ *Ibid.*

¹⁰⁸ Sharafi, *Law and Identity*, 103-12; Schmittener, "Sketch," 374-6.

experience initiated him into the profession. In Pandit Pirthi Nath's practice Katju learned a great deal. He recalled that the leader of the Kanpur Bar "...corrected my draft pleadings and notes with minute care, and discussed legal principles and pending cases. His reminiscences, his observations on men and affairs as well as on professional ethics and etiquette, were invaluable."¹⁰⁹ Professionalization involved training, reading, drafting documents, and developing systems for managing notes and documents.¹¹⁰ Katju's period of apprenticeship was essential and most lawyers had similar backgrounds. Badruddin Tyabji, the first Indian Muslim to be called to the Bar at the Inns of Court, experienced it. He spent a period of observation and apprenticeship in London.¹¹¹ Gandhi dozed through his Bombay High Court observations after returning from London.¹¹² Since unspoken and unwritten practices play an important role in common law, etiquette and the oral transmission of knowledge was also important.

Historiography

Scholars have discredited the colonial state's claims that it somehow helped protect Indian women by showing how the colonial state sided with conservative elements in Indian society.¹¹³ In a variety of contexts, the colonial state acted as a check on progressive demands within Indian society. When it came to women's rights, time and again the colonial state only

¹⁰⁹ Katju, *Days*, 132-3. This is similar to the experience of Justice Badruddin Tyabji when he was studying at the Inns of Courts in the 1860s. See Schmitthener, 367-8.

¹¹⁰ Badruddin Tyabji had a similar experience as one of the first Indian Muslim at the Inns of Court. When Gandhi returned to Bombay from London in 1891, he spent a period time observing in the High Court in Bombay and then helping draft petitions for a relative's poor clients in the smaller town of Rajkot. See Schmitthener, "Sketch," 366-7 and Gandhi, *Law and the Lawyers*, 24.

¹¹¹ Schmitthener, "Sketch," 366-7.

¹¹² Gandhi, *Law and the Lawyers*.

¹¹³ Prem Chowdry, *Contentious Marriages, Eloping Couples: Gender, Caste, and Patriarchy in North India*. (New Delhi: Oxford University Press, 2007); Mrinalini Sinha, *Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century* (Manchester: Manchester University Press, 1995) and Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Durham: Duke University Press, 2006).

reluctantly yielded to Indian calls for reform. It was Indian reformers like Rammohun Roy (1772-1833) and Iswarchandra Vidyasagar who called for the colonial state to pass legislation banning the ritual immolation of Hindu widows (in the 1820s) and positively allowing the remarriage of Hindu widows (in the 1850s).¹¹⁴ In 1891, the colonial state conceded Indian reformers' demands for legislation that raised the age of consent for sexual intercourse from ten to twelve years old. But immediately after passing the law, the colonial state used an executive order to prohibit the enforcement of the Act, reducing it to mere law on the books.¹¹⁵ It would not be difficult to identify other instances of colonial hypocrisy.¹¹⁶

Instead, historians have turned their attention to the internal complexities of Indian debates over marriage and social reform. After the Rebellion of 1857-58, the colonial state reaffirmed its commitment to protecting Indian religious customs. One very important article by political theorist Partha Chatterjee suggested that in the post-Mutiny period, Indian male elites in similar positions as Rammohun Roy and Iswarchandra Vidyasagar did not make similar demands for the colonial state to pass legislation reforming women's status. Instead, male leaders of middle- and upper-class respectable opinion, especially in Calcutta, linked the protection of the Indian family, home, and religion to the protection of an uncolonized inner core of Indian life. Chatterjee argues that the nationalist "resolution" of the women's question was to argue for the culturally defensive position of protecting the Indian home from colonial regulation. This posited continuity with the pre-colonial past in the spiritual realm allowed respectable upper class Indians to accommodate colonial changes to Indian politics and economy. This was behind what Chatterjee described as the

¹¹⁴ Iswarchandra Vidyasagar, *Hindu Widow Remarriage*, trans. Brian A. Hatcher (New York: Columbia University Press, 2012), Raja Rammohun Roy, *Brief Remarks Regarding Modern Encroachments on the Ancient Rights of Females, According to the Hindoo Law of Inheritance* (Calcutta: Unitarian Press, 1822); and Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998)

¹¹⁵ Sinha, *Colonial Masculinity*.

¹¹⁶ Sinha, *Specters of Mother India*.

“unimportance of the women’s question” to late nineteenth century nationalists, notable when contrasted to the pre-1857 activism around social reform efforts.¹¹⁷

Historians have revised Chatterjee’s thesis in a few ways. First, they have shown the centrality of marriage to debates about nationalism, colonialism, and identity throughout the nineteenth and twentieth centuries. Nationalists did not resolve the women’s question by withdrawing from it but rather debating how the colonial state should regulate marriage and family.¹¹⁸ Second, colonial, revivalist nationalist, and reformist discourses shared key assumptions about marriage and masculinity.¹¹⁹

Colonial and nationalist discourses shared assumptions about marriage and masculinity. These shared mindsets about the control of women were in part a product of an “imperial social formation” that by the late nineteenth century could not be separated out into simply English and Indian strands. Sinha examined the 1891 Age of Consent Act debates. These debates considered whether the British should enact legislation to raise the age of consent for the consummation of marriage from 10 to 12. Some Indian nationalists resisted all forms of colonial intervention aimed at reforming the position of Indian women.¹²⁰ Nevertheless, conservative nationalists shared colonial views of masculinity, undercutting their own claims of opposition to colonial rule. Colonial masculinity associated masculine success with the protection of women and used gender to naturalize racial

¹¹⁷ See Partha Chatterjee, "The Nationalist Resolution of the Women's Question," *Recasting Women: Essays in Indian Colonial History*, edited by Kumkum Sangari and Sudesh Vaid (New Brunswick: Rutgers University Press, 1990): 233-53.

¹¹⁸ Sinha, *Colonial Masculinity*, and Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism* (London: Hurst, 2001).

¹¹⁹ Sinha, *Colonial Masculinity*, Uma Chakravarti, “Whatever Happened to the Vedic Dasi?” In *Recasting Women: Essays in Indian Colonial History*, edited by Kumkum Sangari and Sudesh Vaid (New Brunswick: Rutgers University Press, 1990), 27-87; Himani Bannerji, "Pygmalion Nation: Towards a Critique of Subaltern Studies and the 'Resolution of the Women's Question'," in *Of Property and Propriety: The Role of Gender and Class in Imperialism and Nationalism*, ed. Himani Bannerji, Shahrzad Mojab, and Judith Whitehead (Toronto: University of Toronto Press, 2001).

¹²⁰ Sinha, *Colonial Masculinity*, 142.

hierarchies. The mythic masculine control of emotion and sexuality of an upper-class white male was counterposed to the effeminacy of a middle-class Indian male, stereotypically in the employ of the colonial state. Conservative nationalists deployed a similar framework of masculinity in their attempt to prevent colonial legislation on the Age of Consent. They suggested that the control of a woman's sexuality lay with her father or her husband. For colonial and nationalist opinion, masculinity became a marker of civilizational value. Sinha's analysis exposes the hypocrisy of both conservative nationalists and the colonial government. Notably, the colonial government immediately torpedoed any chance of the enforcement of the Act with an executive order.¹²¹

Indian agency has been an important theme in this literature. On the one hand, the colonial state almost always seemed to have the upper hand, at least in our right conflicts with Indians.¹²² It controlled the police and army as well as a total willingness to use them when deemed necessary. On the other hand, India was not a *tabula rasa* upon which the colonial state could develop its social experiments, no matter how much colonial social control and experimentation projects suggested otherwise.¹²³ Regardless of what the colonial state said or did, Indian thinkers had their own ideas about India's development in the twentieth century. In debates throughout the twentieth century, the relationship among religion, state, and family have simultaneously reinscribed dominant social norms and opened up new possibilities.

For example, Tanika Sarkar argued that even though moments like the 1891 Age of Consent Act debates exposed nationalist male conservatism, they opened up the prospect of

¹²¹ Ibid., 138.

¹²² For example, the Mutiny of 1857-8 or General Dwyer's massacre of unarmed protesting civilians in the Jallianwala Bagh garden in Amritsar, Punjab in 1919.

¹²³ See the discussion of the colonial state's attempt to settle tribal populations in Chapter Four. There is also a wide literature on colonial infrastructure projects such as urban planning, railways, and irrigation.

a girl-wife's rights as an individual not marked by religion. Discussions of women's legal positions pushed forward the development of an individual rights discourse. The idea of consent, she argues, opened "the door to more radical demands..."¹²⁴ In late 1920s debates about child marriage, women's activists, nationalists and religious leaders all advocated for legislation prohibiting child marriage. This exposed the fallacy of the colonial claim that Indians themselves were somehow conservative and opposed to reform. Women were viewed as liberal subjects, not representatives of a particular religious community.¹²⁵

Discourses of consent also structured marriage reform projects that centered on the Self-Respect movement in Madras state. This radical movement of simplified and consent-based marriage contested the dominance of Brahmanical cultural norms in late colonial South India. Simplified, "de-sacralized and de-traditionalized" marriages of the Self Respect Movement eschewed caste hierarchy and emphasized women's consent and free choice.¹²⁶ They shared with Indian nationalist ideas about conjugality the view that marriage and the family could be agents of political change and nation building. But Self-Respect weddings emphasized consent and rejected caste and class distinctions. Such marriages "disrupted the closures of Indian nationalism" and "...[they] consciously posited alternative modern and national forms."¹²⁷ The idea of a woman's consent, part of its larger "individualist politics" aimed at destroying caste hierarchy, included "connections between consent and compatibility, equality, and companionship." The movement put forward a contractual idea

¹²⁴ Sarkar, *Hindu Wife, Hindu Nation*, 245.

¹²⁵ Sinha, *Spectres*, 153.

¹²⁶ Mytheli Sreenivas, *Wives, Widows, and Concubines: The Conjugal Family Ideal in Colonial India* (Bloomington: Indiana University Press, 2008), 86.

¹²⁷ *Ibid.*, 92.

of marriage.¹²⁸ According to Srinivas the movement which much further than Indian nationalism in its ideas of consent.

Since such issues have prompted major controversies in the past century in India, the tantalizing alternative trajectories of Indian modernity and perhaps alternative futures. Sturman and Newbigin's accounts of late colonial personal law reform also have the value of remaining firmly committed to the position that India's personal law system does not deviate or fail at modernity but rather comprises it. Given that Indians make an important proportion of residents in former British holdings from Fiji to Guyana and that most of these polities accommodate plural family laws, Sturman and Newbigin's point may be empirically provable as well as philosophically true.¹²⁹

Personal law statutes were the starting point for a variety of legal developments, often unanticipated. For example, in UP, a substantial amount of litigation under the DMMA concerned the narrow question of how a husband's false charges of adultery could impact his wife's rights under the Act. In scholarly accounts of the legislative debates, this issue is not discussed.

Newbigin and Sturman each examine the DMMA alongside other late colonial personal law statutes and statute efforts. This is a very useful development as it shows how in political institutions and the public sphere conversations about Hindu and Muslim women were intimately woven together. A variety of voices urged differing visions of the relationship between community, religion, law, and the family. There were certainly a range of conceptions put forward, which historians today tend to consider progressive because

¹²⁸ Ibid., 86-7.

¹²⁹ See the introduction to Hay and Craven, *Masters, Servants, and Magistrates*, for the development of the idea of an "imperial legal system" of master and servant law and the ways in which they have quantified this.

they sought to improve women's rights and challenged the colonial religious division of Indian society.¹³⁰

In part, this helps link India into new developments in global history or suggests how India was connected to other parts of the world both through and around London. Law was and had been one important conduit of the exchange of ideas and practices.¹³¹ This dissertation points out examples of the connections between American and Indian law.

One key question in law and society is the extent to which law influences behavior. Although this is a complex question with many potential avenues of research, this dissertation and its associated body of scholarship do offer some interesting historical evidence to consider. We have already briefly noted how administrative and legal state structures re-shaped Indian society especially with regard to dispute resolution and land ownership. Recent legal histories offer other tempting glimpses of how ordinary people modified their behavior to fit colonial legal structures especially that defined identity.

Chandra Mallampalli's historical ethnography of a dispute over personal law describes the legal travails of the Abraham family between 1854 and 1863. When the patriarch of the family died, leaving substantial property invested in a distillery, his widow and his much-younger brother entered into a long legal battle over whether the property should be governed by English law or the law of the Hindu undivided family.

¹³⁰ Sinha, *Specters*; Newbiggin, *Hindu Family*, 135; Rohit De, "Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act." *Indian Economic and Social History Review* 46, no. 1 (2009): 105-130.

¹³¹ Maia Ramnath, *Haj to Utopia: How the Ghadar Movement Charted Global Radicalism and Attempted to Overthrow the British Empire* (Berkeley: University of California Press, 2011); Sunil Amrith, *Crossing the Bay of Bengal: The Furies of Nature and the Fortune of Migrants* (Cambridge: Harvard University Press, 2013); Alys Eve Weinbaum et al, eds. *The Modern Girl Around the World* (Durham: Duke University Press, 2008); Arthur Mitchell Fraas. "Making Claims: Indian Litigants and the Expansion of the English Legal World in the Eighteenth Century," *Journal of Colonialism and Colonial History* 15, no. 1 (2014); Douglas O. Marshall, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjee* (New York: Doubleday, 1956); Hay and Craven, *Masters, Servants, and Magistrates*; and Sinha, *Specters*.

Gradually individual family members' perceptions of family history and identity were shaped by legal discourses. Mallampalli very carefully traces out this process: he argues that the brother, in letters to his nephew at Cambridge, very carefully put into writing his claims on the status of a Hindu brother. Mallampalli also shows how the case moved from the arena of a family dispute through layers of pleaders, *vakil*s, and barristers, moving all the way to the Privy Council in London.

Mallampalli's nuanced account shows us that choice is better understood as a spectrum than a dichotomy. It is not that the Abrahams were choosing between binary options such as Christian/Hindu or Indian/European. Choices were layered. Their actions and beliefs shaded along a continuum, seemingly sometimes guided by economics or emotion and other times purely legal motivations. In courts, earlier choices were "spun" by family members to support their preferred legal position. The courts analyzed the "spin" on those choices to come to final legal decisions. Another important insight that emerges from Mallampalli's account is the ways in which Hindu law often had very little to do with Hindu belief or practice. This dissertation bolsters such a view, showing how husbands and wives acted strategically in the adversarial common law courts.

Sharafi has examined the relationship of the Parsi or Zoroastrian community based in Mumbai to the law. She examines a variety of relationships between Parsis and the law: Parsis were especially active as litigants and lawyers, and also as lobbyists, legislative drafters, and in other roles. Parsis sought to regulate their community using colonial legal institutions that represented a particular form of Parsi modernity.¹³² It could be argued this

¹³² Sharafi, *Law and Identity*, 6.

was a specific form of Parsi legal masculinity. Like Mallampalli, Sharafi concludes that, in the Parsi case, “...influence between law and identity flowed in both directions.”¹³³

Sharafi’s study shows that a minority community can capture a particular profession and exert outsize dominance, as the Parsis did with the Bombay legal profession. Many forces affected the development of the legal regime of personal law for Parsis, especially Parsis’ own agency in gaining the use of colonial law to regulate the community. The study certainly provides fodder for additional analysis of how Parsi law or Parsis acted as a conduit for English features into Indian law. Parsis mainly dominated the western India legal profession centered on Bombay, however. Based on my analysis of UP law in the twentieth century, there was nothing like the Parsi dominance of Bombay law at work either among UP lawyers or litigants. The studies of Sharafi and Mallampalli both show that law and social identities influenced each other, for lawyers, litigants, and religious communities. I show how litigants negotiated multiple layers of litigation through India’s formal courts over relatively long periods of time and suggest instances when law may have shaped human action and the ways in which lawyers, judges, and litigants conceptualized their stories to fit the dictates of law and achieve their desired outcomes.

Showing the complexity of India’s personal law system allows us to view it with lenses beyond religion. It undercuts any simple notion of a straightforward competition between the state and monolithic religious community institutions over women’s rights. One group of scholars has examined how courts apply law and suggests that, despite problems, India’s plural system can be a resource. Gopika Solanki’s account of family law in contemporary Mumbai provides perhaps the clearest and most succinct explanation of how India’s landscape of matrimonial law works: “...among Hindus and Muslims, plural legal

¹³³ Ibid., 6.

actors imagine, construct, debate, shape, and regulate heterogeneous notions and models of the family, marriage, gender, and religion in state and societal legal sites.” Norms and ideas about marriage and family are shared “across legal spheres” in a “cross-pollination of insights...”¹³⁴ Solanki argues the important point that this “plural legal system with shifting balance of authority” among various players and institutions “often checks violations of individual liberty.”¹³⁵ In Solanki’s view, the “shared adjudication model” “fractures the ‘fixed’ religious identities, and provides institutional spaces for ongoing intersocietal dialog between ethno-religious groups, civil society, and the state.”¹³⁶ In sum, “cultural pluralism and gender equality are not antithetical to one another...”¹³⁷

Solanki’s method contributed to her ability to make this claim. She conducted extensive studies of cases of marriage disputes not only in state courts in Bombay but also in informal sites of microadjudication such as caste councils, family meetings, and counseling sessions with various religious clergy.¹³⁸ Solanki gives a substantial amount of credit to women’s ability to exercise agency, at least in plural legal Mumbai. Vatuk has also examined the diverse methods Muslim women can use to obtain marital redress from community institutions.¹³⁹

Such models fit one possible vision for India put forward by political theorist Christine Keating. Keating argues, “The struggles for egalitarian pluralism in India can be seen, in part, as fostering arenas in which people are free to agree on the terms and conditions of their own relationships.” Such “free agreement” can create an “egalitarian”

¹³⁴ Solanki, *Adjudication*, xxii.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid., xxiii.

¹³⁸ Ibid., 35-7, 39. Solanki considered a total of 154 cases of family dispute adjudication in informal courts involving both Hindus and Muslims.

¹³⁹ Sylvia Vatuk, "Moving the Courts: Muslim Women and Personal Law" in *The Diversity of Muslim Women's Lives in India*, edited by Zoya Hasan and Ritu Menon (New Brunswick: Rutgers University Press, 2005): 1-58.

social contract.¹⁴⁰ Even though some aspects of the Indian Constitution tend toward domination, the document can be a very potent source for liberation contracts as well.¹⁴¹

One point that must be considered is that institutions like the courts and marriage do not exist outside of dominant social ideologies. They reinscribe dominant norms and can be unfriendly to vulnerable litigants. Basu examined Calcutta family courts that held out great promise for easy justice for the common wife.¹⁴² Despite the optimism of such institutions, Basu finds, "...seeming innovations continue to be embedded in deeply gendered conceptions of conjugality, allowing for limited negotiation..."¹⁴³ Women exist in vulnerable material and social states such that for most women, "The state of staying married...is regarded as their primary form of property."¹⁴⁴ According to Basu, when women enter marriage they enter into a vulnerable position.¹⁴⁵ Basu's portrayal of women's lack of choice in entering marriage and the normative compulsion to remain married suggests that marriage may be one area in which Keating's free agreements will not easily work.

At a day-to-day level, courts are contested spaces.¹⁴⁶ They tend to reinscribe dominant norms and employ violence, as the discussion in Chapter Six makes clear in greater detail. Nevertheless the deeply held commitment to individual liberties especially in post-colonial India makes the courts important institutions of social change and protection for minorities or the vulnerable. I focus on the High Courts through the historical record of published court decisions. Such decisions provide some glimpses of how lower courts

¹⁴⁰ Christine Keating, *Decolonizing Democracy: Transforming the Social Contract in India* (University Park: Pennsylvania State University Press, 2011), 109.

¹⁴¹ Keating, *Decolonizing Democracy*, 5-7.

¹⁴² Srimati Basu, *The Trouble With Marriage: Feminists Confront Law and Violence in India* (Berkeley: University of California Press, 2015), 87, 89

¹⁴³ *Ibid.*, 93.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, 216.

¹⁴⁶ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India*. (New Delhi: Oxford University Press, 2014).

treated litigants before their cases reached the High Courts. I also examine some aspects of the bureaucratic and legal treatment of marriage. Like the contemporary ethnographic accounts, this dissertation shows how even within the formal court system the legal regime governing marriage is very complex. It involves a variety of laws and institutions. In something akin to the model put forward by Solanki, legal norms about marriage, especially English norms, were transferred among diverse jurisdictions.

Can marriage co-exist with egalitarian social contracts? These examples and others suggest that there is a constant debate on these issues in India and other liberal democracies. While some systems may work better than others in guaranteeing egalitarian conditions, in general it is most important that democracies hold this as a common good.¹⁴⁷ This dissertation presents the example of appellate courts often in favor of protect individual litigants using an ideology of protection while either reinforcing or not challenging the idea of the husband's physical and legal control of his wife found in Indian marriage law. It shows how marriage provided an important structuring principle for many arenas of Indian law.

Many histories of South Asia use 1947 as an end or starting point for their narratives.¹⁴⁸ For histories of nationalism and nationalist histories, Indian independence in 1947 is a natural endpoint, the culmination of at least ninety years of anti-colonial nationalism. For historians of post-colonial India, 1947 is a starting point of independent Indian rule. We have already outlined some of the impacts of religion on Indian political life, such as the division of personal law into Hindu and Muslim, without describing the multi-

¹⁴⁷ Amartya Sen, *The Argumentative Indian* (New York: Picador, 2005), xii-xiii.

¹⁴⁸ Sumit Sarkar, *Modern India, 1885-1947* (Delhi: Macmillan, 1983); Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (New York: Ecco, 2007).

faceted effects of the colonial system of religious political identities on nationalist politics. Though Pakistan is often portrayed as a religious state, historians de-emphasize the extent to which religious belief or fervor motivated the demand for and creation of Pakistan.

Most relevant to this dissertation are the nuanced and rich feminist histories of the ways in which the new states handled Partition. Within the past two decades, feminist scholars have used oral history and careful archival analysis to develop how gender and sexuality structured violence in Partition. Sexual assaults and the abduction of women were used as a weapon of war during Partition violence as well. India and Pakistan sought to assign abducted women to their proper countries in the aftermath of Partition. State detention facilities held women who were caught in between the two countries.¹⁴⁹

The literature on the colonial period also highlights the importance of gender to boundaries between communities and nations. Over the course of the nineteenth century, we can trace the development of new and highly communalized and sexualized narratives of Indian history. Colonial histories about Indian history emphasized an ancient Hindu (or Aryan) golden age. Middle-class nationalists took up this idea of a golden past and squarely located its decline in the gradual emasculation of Hindu men via supposedly aggressive Muslim invasions. From the 1860s onward, these historical invasions were sexualized by portraying atrocities against Hindu women and sexual excesses by Muslim men.¹⁵⁰ As Sarkar points out, this was not always a coherent or total narrative, but the identification of the Hindu woman with the nation was already clear.¹⁵¹ In the twentieth century these ideas about history were consolidated and brought into the present in a variety of ways: Muslim rulers

¹⁴⁹ See Ritu Menon and Kamla Bhasin, *Borders and Boundaries: Women in India's Partition*. (New Delhi: Women Unlimited/Kali for Women, 2000) and Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India*. (Durham: Duke University Press, 2000).

¹⁵⁰ See Charu Gupta, *Sexuality, Obscenity, Community: Women, Muslims, and the Hindu Public in Colonial India*, 1st ed. (New York: Palgrave, 2002).

¹⁵¹ Sarkar, *Hindu Wife, Hindu Nation*.

became Muslim men in general; past atrocities became present; and these ideas proliferated, compelling social and political action ranging from communal associationalism to communal violence.¹⁵²

Unfortunately, but not surprisingly, this link between women and religious community carried over into the violence of Partition and its aftermath. Feminist histories of Partition have shown how closely women's bodies were linked to community and nation during Partition violence and in subsequent recovery and rehabilitation efforts. During the period of Partition violence from 1946-8, rape and other forms of violence against women and forced marriages and conversions were used as weapons by men of all religious communities against other religious communities.¹⁵³

Ritu Menon and Kamla Bhasin's discussion of this process emphasizes the uses and abuses of state power in the recovery effort. Their account also highlights how essential the control of Hindu and Sikh's women's bodies and reproduction was to the new Indian nation-state. Recent feminist scholarship has also shown how the idea of India-as-Hindu influenced post-Partition recovery efforts. In the aftermath of Partition, both the Indian and Pakistani governments agreed that they would not recognize forced conversions or marriages and would endeavor to return abducted women to their original families, no matter what the women themselves wanted. From March 1947 until 1954, the governments decided that any woman living with a man of the "wrong" religion would "be presumed to have been abducted" and all marriages and conversions would thus be illegitimate.¹⁵⁴

Echoing colonial-era discourses, Pakistan was cast as the abductor and India was cast as the civilized recoverer of lost women. The 1949 Abducted Persons (Recovery and

¹⁵² Ibid. See also Sumathi Ramaswamy, *The Goddess and the Nation: Mapping Mother India* (Durham: Duke University Press, 2010).

¹⁵³ Butalia, *Other Side of Silence*.

¹⁵⁴ Ibid., 114-15.

Restoration) Act, despite verbal guarantees to the contrary, allowed the state to overwrite abducted women's own desires and rights in the service of this project. Women could be forcibly returned to their home country no matter whether they wanted to stay with their new families or not; once "returned," they were confined to camps until they could be reunited with their original families. These families often rejected them. In the aftermath of Partition, during the rehabilitation period, women were also subjected to check-ups to determine if they were pregnant; if so they could be forced to abort to prevent the pollution of the nation by non-national children. Menon and Bhasin argue that the Indian state's willingness to go to such lengths to place women in the nation and community where they belonged was driven by a need to maintain strict boundaries and sanctity of nation and community in an attempt to rectify the sexual "disorder" of Partition. Throughout these efforts the state relied upon religious identity to determine where a woman properly belonged: originally Hindu and Sikh women in India; originally Muslim women in Pakistan.¹⁵⁵

Timeframe

The period of analysis for this dissertation, 1939 to 1972, has been dictated by important dates in Indian personal law. The major signposts in this period are the Dissolution of Muslim Marriages Act, enacted in 1939, the Indian Constitution taking effect in 1950, the Hindu Marriage Act and the Indian Citizenship Act, enacted in 1955, and the Uttar Pradesh amendment to the Hindu Marriage Act enacted in 1962. Since my intent was to understand how lawyers and litigants used these statutes in the courts, it was important to extend the timeframe to 1972 to allow for the time lawyers and litigants would have needed

¹⁵⁵ Menon and Bhasin, *Borders and Boundaries*.

to take advantage of the UP Amendment to the Hindu Marriage Act. Ending the survey with 1972 allowed ten years for litigants to use the UP Amendment to the Hindu Marriage Act.

The best way to understand the timeframes at work in the court cases provided here might be through the image of telescoping or concentric timeframes. Law moved slowly and encompassed multiple timeframes. First, once a statute took effect, it would take some time before litigants and lawyers could file a case under the statute. Then, the case would need to wend its way through the court system, to a decision in the first trial, to a first appeal if the litigant chose to appeal, and then from a decision on the first appeal to the second appeal and its decision. This process alone could take many years. Also, each court case would concern events that happened well before the first suit was ever filed. In the matrimonial disputes considered here, a case filed in the post-1947 era might concern a marriage that began twenty years earlier. One particular lawsuit could also refer to additional legal disputes from an earlier period.

Once the final decision had been reached for one set of litigants, their case might take on additional valences in subsequent litigation by other litigants. The most apt example of this is the *Moonshee Buzloor Rubeem* decision by the Privy Council in 1867. This case was and is repeatedly and regularly cited by lawyers and judges throughout this period, despite the advent of the Dissolution of Muslim Marriages Act, independence, the Indian Constitution, and the Hindu Marriage Act. An individual matrimonial dispute and the resultant lawsuit took on a much longer life as a touchstone of the law of restitution of conjugal rights in India. That close to one hundred years later this decision continued to be regularly cited shows that it is important it is to consider the larger structures of Indian law

that underpinned new statutory developments.¹⁵⁶ The timeframes of the Indian judiciary do not map onto either well-known statutory developments or political events. They followed a much longer, slower temporality.

In this process, certain legal structures and rules were reinforced over time. The timeframe and chronology of legal development show that there was not one linear trajectory of progress, as an analysis of statutory developments might suggest, with each new statute signposting a step forward for women's rights. Including bureaucratic and judicial decisions in our analysis allows us to see how "progress" could double back on itself: older legal forms and rules structured litigation even under new statutes.¹⁵⁷ Statutes did not exist in a vacuum and could not simply fiat into existence an entirely new legal regime. In particular, in this dissertation, I show how the coverture-based family modeled structured legal decisions both before and after new statutes and the Constitution purported to give women greater rights to autonomy.

Method and Approach

This dissertation examines wives' rights in two separate bodies of Indian law, citizenship law and matrimonial law. Chapter One focuses on family status in citizenship law in the two decades after India's Constitution took effect. Chapters Two through Six focus on matrimonial dispute litigation in nineteenth and twentieth century India with a special focus on the north Indian state of Uttar Pradesh. Since my interest is in delineating how courts and bureaucracies applied the law, the main sources are court cases and bureaucratic files.

¹⁵⁶ Another example is given by Sturman: the ruling that Khoja and Kutchi Memons in 1847 were deemed to have a custom of Hindu inheritance practices which a later judge, in 1915, deemed as *obiter dicta* that took on, wrongly in his view, the force of law. Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law, and Women's Rights* (Cambridge: Cambridge University Press, 2012), 207-8.

¹⁵⁷ Similar points are made in Baxi, *Public Secrets of Law*, 1-2 and 44 and Reva B. Siegel, "The Rule of Love? Wife-Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1995-96): 2143-2207.

The method for the selection of cases differed for each part. For the citizenship section, I combined three separate approaches. First, I studied major treatises on Indian citizenship law and examined court decisions mentioned there that dealt with questions of family status. Second, I surveyed the *All India Reporters* for the period between 1950 and 1960. The *All India Reporter* is the premier reporter of High and Supreme Court decisions in India. It is published yearly and it is subdivided into multiple volumes, with one for each High Court, a volume for the Supreme Court, an Acts section that details new national legislation, and a Journal section wherein lawyers and scholars can comment on legal affairs. Each of the volumes has an index at the beginning that is sub-divided into topics listing all decisions for that year and bench. When I surveyed the *All India Reporters* for the citizenship section, I noted all cases that involved the part of the Constitution regulating citizenship and the Citizenship Act of 1955. Though I was not able to discuss all of these cases in the dissertation, the survey helped in understanding the broad landscape of citizenship law. Third, I used archival files from the National Archives of India that dealt with the bureaucratic determination of citizenship status. There are innumerable such files in the National Archives of India, mainly in the records of the Ministries of Home Affairs and External Affairs and I was certainly not able to examine all of them. However, I was able to closely examine about sixty-six such files, again, not all of which are treated in the dissertation.

This method might be best envisioned in the shape of a pyramid. The bottom layer of the pyramid would be the vast majority of non-controversial citizenship decisions that left few to no bureaucratic traces. The next layer would be the more controversial bureaucratic decisions that merited inter-Ministry debate and concern and thereby left a larger archival trace. This second layer would include the sixty-six bureaucratic files I examined more

closely. The third layer would include those decisions that were so controversial or troublesome to the applicant that he or she turned to the courts with resultant appeals to the High Courts and the publication by the *All India Reporter*. These are the cases that I found with my survey of the *All India Reporters*. The apex layer would consist of those decisions in layer three that were deemed sufficiently important by treatise writers to be noted and discussed in their treatises. All told, I examined approximately one hundred unique instances of citizenship decisions, whether in the bureaucracy or the appellate courts.

The second part of the dissertation focuses on matrimonial litigation in one state, Uttar Pradesh. The method I used here was slightly different than in the first part. My intent was to understand how the jurisprudence of matrimonial disputes in one jurisdiction evolved over a relatively long time frame, 1939 to 1972. I examined the index of every Allahabad High Court and Oudh Chief Court *All India Reporter* and compiled a list of all matrimonial disputes. I looked at terms in the indices such as “Hindu law,” “Muhammadan law,” “divorce,” “maintenance,” and the relevant statutes. All told, I examined approximately 173 High Court decisions. Many of the court decisions I recorded involved property disputes and I was not able to analyze those for the dissertation. Instead, I focused on matrimonial disputes between husbands and wives so that I could focus my analysis on how courts treated cruelty in matrimonial disputes. I did not intend to conduct a comparative analysis of Hindu and Muslim law. I sought to understand how lawyers and litigants used the law.

Plan of Dissertation

Chapter One studies a variety of decisions about the status of wives and sons in Indian citizenship law. This chapter argues that through the legal device of domicile, coverture structured Indian citizenship law. Exceptions to this regime of wives’ legal

dependence developed, but they did so most often to exclude Muslims from the nascent Indian body politic.

Chapter Two provides an introduction to one of the most widely used legal methods of matrimonial dispute resolution in India, restitution of conjugal rights (RCR) suits. To do so, it examines the nineteenth century incorporation of this procedure into Indian law.

Chapter Three turns to the case study of matrimonial disputes in the north Indian state of Uttar Pradesh. I provide background on the state and track the incorporation of RCR into that state's law. It shows how within UP, litigants of all religious communities used RCR. I also show how RCR suits allowed courts to find in favor of wives without condemning marital violence. By juxtaposing the UP cases with a Scottish case, I also show that this pattern was not somehow unique to India.

Chapter Four examines the use of maintenance law by litigants in UP. Maintenance law was another very popular remedy that allowed the wife to claim support from her husband. I show how maintenance in UP was shaped by both English poor law and colonial dictates of governance and, because of these, maintenance law acted to preserve the marriage tie. Chapter Five studies the impact of the 1939 Dissolution of Muslim Marriages Act in UP. The Act had important political implications for the consolidation of a pan-Indian Muslim identity aligned with support for Muslim women's rights and it represented the first codification of Indian divorce law. However, in UP, the Act did not substantially change the contours of matrimonial litigation: wives still had difficulties in proving matrimonial cruelty in court and suits under the DMMA continued to be structured by earlier RCR and maintenance suits and jurisprudence.

Chapter Six examines the development of matrimonial litigation in UP in the wake of major national reforms to Hindu personal law in 1955-56. Much remained the same: RCR

and maintenance were important arenas for matrimonial dispute resolution. Wives faced difficulties in proving matrimonial violence and often won their suits on the grounds of more easily proved social offenses of the husband, such as adultery and false accusations of adultery. The jurisprudence of cruelty increasingly took on a psychological cast, suggesting that the psychological impact of husbands' behavior should be weighted heavily in such disputes, providing another route for courts to avoid confronting head on the reality of physical and sexual violence in marriage. Along with the psychologization of cruelty, the courts also engaged in increasingly detailed medical examinations of the wife and her sexual capabilities. The chapter concludes with a study of the evolution and impact of the UP Amendment to the Hindu Marriage Act, which made cruelty a ground for divorce in the state fourteen years before the national Act was changed in similar fashion. While the UP Amendment seems to have little impact on litigants, it did provide a model for national reform.

Read through the lens of colonial legal categories of Hindu and Muslim one group or the other, or both groups, winds up looking atavistic, anti-modern, and beyond the scope of India's democratically endorsed secular legal framework. My approach reveals a far more complex, striated landscape of matrimonial litigation in which the categories of Hindu and Muslim were important but secondary. A coverture-based family structure influenced Indian women's experiences of the law of the family in a variety of domains at least as much as religious norms did.

Chapter One

Entering and Leaving the Body Politic: Coverture and Citizenship Law, 1950-70

“Domicile cases require for their decision a detailed analysis and assessment of facts arising within that most subjective of all fields of legal enquiry—a man's mind.”

--Justice Scarman, 1968, *In Re: Fuld*¹⁵⁸

After Partition: Seven Weeks, Seven Years

The travails of N. Basar Khan and his wife Amirunnissa Begum illustrate the way in which the unity of husband and wife produced impractical outcomes as the newly independent Indian state put its citizenship law into practice.¹⁵⁹ When N. Basar Khan was born in Peshawar, North-West Frontier Province in 1923, the idea of Pakistan did not yet exist.¹⁶⁰ By the time Khan came of age in 1942, the Pakistan proposal to divide the sub-continent into two separate nation-states was still unresolved. Khan's early adult life was influenced as much by European nationalism as by Pakistani. During World War II, Khan, an Indian, joined the Royal Indian Army Service Corps, which provided such services as transportation for the Indian army.¹⁶¹ In this capacity, Khan was posted to Madras, where he

¹⁵⁸ *Re: Fuld* (1968 P 675; 1965 3 All Er 776, Probate Division). Reprinted in J.H.C. Morris and P.M. North, eds., *Cases and Materials on Private International Law* (London: Butterworth, 1984), 15.

¹⁵⁹ This case is briefly examined by Vazira Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (New York: Columbia University Press, 2007), 208-9. Zamindar includes this case as an example of the category of the “undefined.” However, my examination of the same file shows that N. Basar Khan was recommended to apply for a Pakistani passport if he wanted to visit his mother. Professor Zamindar also does not examine the outcome of wife Amirunnissa's position in this case.

¹⁶⁰ Peshawar was then in the North-West Frontier Province in territory that later became part of Pakistan.

¹⁶¹ Indivar Kamtekar recounts some of World War II's effects on India, showing how inevitable a Japanese invasion seemed. Indivar Kamtekar, “The Shiver of 1942,” *Studies in History*, n.s., 18, no. 1 (2002): 81-102.

married Amirunnissa Begum, whose family hailed from the city. After their 1943 marriage, Amirunnissa travelled with her husband to his various postings until he was discharged in 1946. The couple then spent about six months in Peshawar before they returned to Madras in 1946, where Khan began his post-war life as a driver.¹⁶²

For almost a decade, the two remained in Madras, a city not much affected by the Partition-related violence of northern India. In 1955, the couple wanted to return to Peshawar (by then in Pakistan) to visit Basar's sick mother, and they applied to the government of Madras for the India-Pakistan passports that would allow them to do so.¹⁶³ The Madras Government in Fort St. George refused to grant the passports without first obtaining the approval of the Ministry of External Affairs in the capital, New Delhi.

The Madras Government reasoned that Basar Khan did not have Indian citizenship. The Constitution required domicile in India along with either birth in India or residence in India for at least five years prior to January 1950. Khan, who was born in Peshawar and only took up residence in Madras in 1946, failed to meet either of these requirements.¹⁶⁴ The Constitution also granted citizenship to those who migrated to India from Pakistan. However, when Khan came to Madras in 1946, he came from British India, not Pakistan, which then did not exist.¹⁶⁵ He was not migrating, simply moving within the territory of British India. If Basar Khan was not a citizen, how could he receive the special India-

¹⁶² National Archives of India (NAI), Ministry of External Affairs (MEA), F. 41(61) 55-PSP, Grant of an India-Pakistan passport to Shri N Basar Khan & his wife (p. 3/corres).

¹⁶³ Ibid.

¹⁶⁴ He and his parents were presumably born in what was now Pakistan, preventing him from coming within the ambit of article 5(a) or (b). In fact early on in the correspondence an officer in the MEA argued that Basar could be said to have been resident in Indian since 1943, giving him the requisite five years' residence. His period in Peshawar could be seen as only a visit and his visit to Burma was in government service. However this contention was rejected. NAI, MEA F. 41(61) 55-PSP, Grant of an India-Pakistan passport to Shri N Basar Khan & his wife, 1.

¹⁶⁵ Ibid., p. 1/corres. Likewise for Sale Mohammad Khan of Narasapur, Andhra state, who was denied on article 6 citizenship because he migrated in 1939, "when there was no Pakistan," as his file stated. NAI, MEA, F. 41/31/55-PSP, 1955, Grant of Indo-Pakistan passport to Sale Mohd. Khan. However Sale Mohammad Khan applied after the Indian Citizenship Act (ICA) took effect in 1955 so Khan had two options, to take out a Pakistani passport or to apply under the ICA.

Pakistan passports from the Indian government? Would he not need a Pakistani passport instead?

Others in a similar situation could wait until the Indian Parliament adopted a new citizenship law,¹⁶⁶ but Basar and his wife urgently needed travel documents to visit Basar's "sickly" mother, as she was described in the correspondence.¹⁶⁷ In reference to his wife Amirunnissa, the Madras Government wrote: "it appears doubtful whether, in view of the indeterminate nature of her husband's national status, she can be considered an Indian citizen, for though she was born in India and has been ordinarily [*sic*] resident in India since her birth, she married Shri Basar Khan prior to the commencement of the Constitution."¹⁶⁸ By virtue of her marriage to Basar Khan, Amirunnissa became a woman without a country in her own hometown, Madras.

In contrast to the Madras government, the Ministry of External Affairs in Delhi took the sympathetic position that the couple could be granted special "passports of restricted validity" so they could go to Pakistan and visit Basar's mother.¹⁶⁹ This was a prospective granting of documents on the basis of the idea that the two would eventually become citizens after Parliament enacted a new citizenship statute, which will be discussed in this chapter. Astutely noting their legally indefinite status, the Madras government wrote back to New Delhi, asking which national status should be listed on these passports.

This follow-up query from Madras prompted the ministries in the capital to scrutinize the case anew. During the re-examination, the Ministry of Home Affairs

¹⁶⁶According to the Madras government's letter, the MEA had issued general instructions in August 1955 that "Pakistan Nationals who entered India, from West Pakistan before the introduction of the permit system may, if they claim to be Indian nationals or aspire for Indian citizenship, be allowed to stay on in an unidentified position, till their status is determined when the Indian Citizenship Act is enacted." NAI, MEA, F. 41(61) 55-PSP Grant of an India-Pakistan passport to Shri N Basar Khan & his wife (1).

¹⁶⁷ Ibid., p. 3/corres.

¹⁶⁸ Ibid. Sri is an Indian respect-marker roughly equivalent to Mister. For women, the term is Srimati (abbreviated Smt.), again roughly equivalent to Mrs.

¹⁶⁹ The passport of restricted validity was a limited-validity passport, p. 2. See also p. 6/corres.

considered issuing Basar an Emergency Certificate rather than a restricted passport. Emergency Certificates, though, were only for stateless people, and Basar was, in the Home department's view, not stateless but still a Pakistani national.¹⁷⁰ The telephone consultation with the Ministry of Law left no record of the reasoning employed, but it convinced the Home Department bureaucrats that Basar was a Pakistani national. If Basar wanted to travel to Pakistan, he could only do so on Pakistani documents.¹⁷¹

No ministry provided advice on how Basar and his wife, once in Pakistan, would surmount their apparent Pakistani identities in claiming permits to return to Madras from the Indian consulate. Without such permits, they would be stuck in Peshawar on Pakistani documents, an almost insurmountable barrier to returning to India and claiming Indian citizenship due to the complex and vigorously enforced system of permits for travel between the two countries. "In seven weeks it was done, the frontiers decided/A continent for better or worse divided,"¹⁷² wrote W. H. Auden about the cartography of Partition. But for Basar the process was not done even by 1954—it had only just begun, seven years, not weeks, after the Partition. Having escaped the ravages of Partition's violence by living in Madras, his origins in Pakistan represented an inescapable blot on his heretofore British Indian identity.

Perhaps the ruling that Basar was a Pakistani national had some tenuous claim on reality—after all, he was a native of Peshawar. This decision produced a far stranger result for his wife. Amirunnissa was deemed a Pakistani national by virtue of her marriage to Basar. If she wanted to go to Pakistan, she too would need a Pakistani passport. The Ministry of External Affairs decided, "she also cannot be held to be an Indian national, for after her

¹⁷⁰ In order to get his Emergency Certificate, he would have to renounce his Pakistani nationality first as well as making an affidavit of his intention to remain permanently in India.

¹⁷¹ NAI, MEA, F. 41(61) 55-PSP Grant of an India-Pakistan passport to Shri N Basar Khan & his wife, 4-6.

¹⁷² W.H. Auden, "Partition," 1966, reprinted in Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy*, 3rd ed. (London: Routledge, 2011), 155-6 and in *Collected Poems*, ed. Edward Mendelson (New York: Modern Library, 2007), 803-4.

marriage with Mr. Khan in 1943, she acquired the domicile of her husband.”¹⁷³ Therefore she could not take out an Indian passport. The anomalous outcome in this case was due to the Constitution’s requirement of domicile for Indian citizenship and the interpretation of domicile using coverture-based principles. A woman’s domicile was defined by her husband’s. Amirunnissa lost her Indian domicile due to her marriage to Basar. The file on Basar was sometimes unclear as to whether the requirement he lacked was residence for five years or Indian domicile, ultimately suggesting he lacked both and was a Pakistani national. But it was far more certain that Khan’s wife lost her Indian domicile upon her marriage to him.¹⁷⁴ The strict requirement of unity of husband, wife, and marital home produced a division between identity and home for Amirunnissa and her husband. Tied to the husband’s place of origin in Peshawar by this interpretation of the law of domicile, the Madras couple faced an impossible choice between what they considered national belonging and family obligations.

Entering and Leaving the Body Politic

India’s Constitutional law of citizenship shaped this dilemma. The Constitutional moment took place in the midst of the ideological and practical difficulties of creating two new nation-states out of one colony. After World War II, it was clear that the British would need to withdraw from India. There were several underlying reasons: promises made to secure Indian co-operation during the war; the unrelenting pressure of Indian nationalism, both non-violent and violent; and Britain’s own straitened post-war circumstances.

However, the timeline and logistics of granting independence and determining the post-

¹⁷³ NAI, MEA, F. 41(61) 55-PSP Grant of an India-Pakistan passport to Shri N Basar Khan & his wife, p. 5.

¹⁷⁴ The note in the Ministry of Home Passports Section noted that she lost her domicile upon marriage to Basar. NAI, MEA, F. 41(61) 55-PSP Grant of an India-Pakistan passport to Shri N Basar Khan & his wife, p. 5, R.S. Chavan, September 1955.

independence political settlement presented enormous challenges for both British rulers and Indian politicians.

In February 1946, Prime Minister Clement Attlee announced that Britain would grant India her independence, and quickly: by June 1948. The May 1946 Cabinet Mission Plan offered a resolution to the conflict between the Indian National Congress and the Muslim League over the role of India's Muslim population. The various Indian provinces would be sorted into three groups so that Muslim and Hindu political power would be nearly equal, and Muslim voices would have representation justified by their historically integral role to the Indian nation and not based on their numerical minority. The central government would be relatively weak, with most power vested in the provinces and only foreign affairs, communications, and defense reserved to the center. For a while this seemed a disagreeable if effective method of resolving the fundamental disagreement between the Congress and the League and moving quickly towards independence. On the basis of this agreement, in the summer of 1946, an interim government of Indian politicians was appointed and elections for the Constituent Assembly were held on the basis of a limited franchise. In late July, the Muslim League withdrew its support of the plan and announced its intentions to boycott the new Constituent Assembly. The Assembly postponed meeting until December 9, 1946, in the hope that the League would come around. Finally, in December, the Assembly began its deliberations, avoiding making any decisions on topics that would foreclose the possibility of a unified India.¹⁷⁵

The penultimate Viceroy, Archibald Wavell, was unable to break the stalemate and, in hopes of solving the India problem once and for all, British Prime Minister Clement Attlee appointed Louis Mountbatten Viceroy in February 1947. Mountbatten forced Jinnah's

¹⁷⁵ The foregoing account draws on Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Delhi: Oxford University Press, 1999; Oxford: Clarendon Press, 1966), 5-7.

hand by offering him either an undivided India without any guarantee of Muslim power at the center, a far worse deal than the Cabinet Mission had been, *or* a sovereign independent nation-state of Pakistan comprised of the western and eastern Muslim-majority wings of India. Jinnah had refused previous such offers, believing that dividing India in this fashion would undercut the Indian Muslim nation that was, after all, dispersed across India in both Muslim-majority and Muslim-minority provinces. He would have preferred “parity” within the Indian nation but accepted the division of Indian sovereignty and the Partition plan.¹⁷⁶ Nehru saw the Pakistan plan as the painful compromise necessary to bring colonial rule to a close. It would also avoid the problems of a weak federal center presented by the Cabinet Mission’s provincial grouping plan.¹⁷⁷ The Mountbatten Plan called on the state assemblies of Sind, Baluchistan, Punjab, and Bengal to vote on Partition.¹⁷⁸ Nehru announced the Congress Party’s support for the proposal even before the state assemblies formally assented: “These proposals will be placed soon before the representative assemblies of the people for consideration. But meanwhile, the sands of time run out and decisions cannot wait the normal course of events.”¹⁷⁹

It was now clear that independent India would not exercise sovereignty over all of her current territory. The definite borders between India and Pakistan were not yet decided. Neither was the issue of the entrance of the princely states to Indian union fully resolved. Despite these remaining open questions, the new developments gave a push to the process of Constitution making in India.

¹⁷⁶ Metcalf and Metcalf, *Concise History*, 216.

¹⁷⁷ *Ibid.*, 216-7

¹⁷⁸ Bose and Jalal, *Modern South Asia*, 151-3.

¹⁷⁹ Jawaharlal Nehru, “Nehru’s Broadcast, June 3, 1947” reprinted in B. Shiva Rao, ed., *The Framing of India’s Constitution: Select Documents*, vol. 1 (New Delhi: The Indian Institute of Public Administration, 1966), 528.

Mountbatten's announcement in June 1947 set the date for British withdrawal as August 14-15, 1947, a year earlier than originally anticipated. This gave only three months to decide on the new borders for India and Pakistan. The Radcliffe Boundary Commission was tasked with drawing the boundaries between India and Pakistan in the state of Punjab in the west and the state of Bengal in the east. Since the members of India's various religious groups did not live in wholly distinct geographic areas, this was a difficult proposition.¹⁸⁰ In the Punjab, it was further complicated by that state's historic role as the birthplace of Sikhism and home to many of its holiest sites. Fear that they would end up on the "wrong" side of the as yet undetermined new border drove millions to migrate: approximately 5 million Hindus and Sikhs migrated from Pakistan into India and an estimated 5.5 million Muslims left India for Pakistan.¹⁸¹ The Radcliffe Commission's decisions were not announced until after independence, fueling the uncertainty.¹⁸² Feminist histories of Partition have shown how women's bodies were linked to religious community during Partition violence and in subsequent recovery and rehabilitation efforts. During the period of Partition violence from 1946-8, men of all religious communities used rape and other forms of violence against women and forced marriages and conversions as weapons of communal violence.¹⁸³ Violence fed violence and retaliation.

On the eastern border, things were calmer but not placid. Exchanges in populations took place, but they spanned a longer period and were less violent if not less traumatic.

¹⁸⁰ Interestingly, enclaves of Indian territory completely surrounded by Pakistan and vice versa were created in East Pakistan (now Bangladesh). This raised a question for the Supreme Court about whether the Parliament was competent to cede Indian territory without Constitutional amendment, *In re: Berubari Union and Exchange of Enclaves*, *All India Reporter [AIR]* 1960 SC 845). The social, though not legal history, of these enclaves is discussed in Urvashi Butalia, "The Nowhere People," in *The Trauma and the Triumph: Gender and Partition in Eastern India*, ed. Jasodhara Bagchi and Subhoranjan Dasgupta (Kolkata: Stree, 2003), 113-22, and Willem van Schendel, "Stateless in South Asia: The Making of the India-Bangladesh Enclaves," *The Journal of Asian Studies* 61, no. 1 (2002): 115-47.

¹⁸¹ Metcalf and Metcalf, *Concise History*, 222.

¹⁸² Bose and Jalal, *Modern South Asia*, 155.

¹⁸³ Butalia, *Other Side of Silence*; Menon and Bhasin, *Borders and Boundaries*.

Hindu Bengalis from the new East Pakistan migrated to Calcutta, substantially reshaping the landscape of that city. Many Bengali Muslims also left Calcutta and the new Indian state of West Bengal to cross over to the new East Pakistan, which in 1971 would declare its independence as the country of Bangladesh. One historian estimates that between 1947 and 1962 approximately 4.1 million refugees crossed from west to east Bengal while about 1.5 million Muslims left West Bengal and neighboring Indian states to go to East Pakistan.¹⁸⁴ India officially became independent from Great Britain on August 15, 1947: a day that simultaneously marked trauma and triumph.¹⁸⁵

In July 1948, India announced the introduction of a permit system to control migration on the western border. Called the Influx from Pakistan (Control) Ordinance, and then Act, the permit system made crossing the border without a valid permit illegal. Under the system the Indian High Commission could issue five types of permits to those in Pakistan wanting to cross the border to India. The first three (temporary; repeated journeys; transit) do not come into play here. The other two, the permanent return permit and the permanent resettlement permit, however, were directly mentioned in the Constitution. As Zamindar has shown, the permanent return permits were for Muslims who had come to Pakistan from India and wanted to return and the permanent resettlement permits were designed for Hindus in Pakistan.¹⁸⁶ The permit system was termed the “real partition,” and many observers, in retrospect, over-optimistically hoped it would come to an end.¹⁸⁷

¹⁸⁴ Joya Chatterji, “Right or Charity? The Debate over Relief and Rehabilitation in West Bengal, 1947-50,” in *The Partitions of Memory: The Afterlife of the Division of India*, ed. Suvir Kaul (Bloomington: Indiana University Press, 2001), 74–110. See also Joya Chatterji, *The Spoils of Partition: Bengal and India, 1947-67* (Cambridge: Cambridge University Press, 2007), 105-7.

¹⁸⁵ Jasodhara Bagchi and Subhoranjan Dasgupta, *The Trauma and the Triumph: Gender and Partition in Eastern India*, (Kolkata: Stree, 2003).

¹⁸⁶ Zamindar, *Long Partition*, 82-3, 102-5, and Chapters Three and Four *passim*.

¹⁸⁷ *Ibid.*, 82-3.

As partition refugees poured into New Delhi, the Indian Constituent Assembly used parliamentary procedure to hammer out the shape of the post-independence government. The Indian Constitution was finally adopted in November 1949 and went into effect in January 1950. Until the adoption in 1949, India did not have a citizenship law, *per se*. Rather, movement and migration were governed by the Partition-related statutes and regulations, including the permit system. The Constitution included seven articles that directly governed Indian citizenship (Articles 5-11). Interestingly, while the other 388 articles of the Constitution only went into effect in January 1950, the matter of citizenship was considered urgent enough to put these articles into effect immediately.¹⁸⁸ Senior government officials—including Dr. B. R. Ambedkar, the first Law Minister and framer of the Constitution, and the first Prime Minister Jawaharlal Nehru—intended to soon thereafter pass further statutes governing citizenship in Parliament.¹⁸⁹ However, these were delayed until 1955 when the Indian Citizenship Act (ICA) was finally passed.

The six articles of India's Constitution that dealt with citizenship are very complex and detailed. Article 5, with which this chapter is primarily concerned, was designed to give citizenship to the vast majority of India's citizens. Article 6 targeted that specific group of people who migrated to India from Pakistan. Article 7 was aimed at those who left the new territory of India for Pakistan, barring their future Indian citizenship unless they returned to India on a resettlement or permanent return permit. Article 8 sought to give citizenship to the children and grandchildren of people born in undivided India who were now living outside of India. It was specifically aimed at India's overseas citizens in places such as Ceylon

¹⁸⁸ See Zamindar, *Long Partition*.

¹⁸⁹ The main reason seems to be debate about the status of India in the Commonwealth. "Consideration of decision of the Prime Minister that the bill should be deferred for some time," NAI, MEA-United Kingdom, 1949, File No. 45(1)-UK 1949. See also Hugh Tinker, *Separate and Unequal: India and the Indians in the British Commonwealth, 1920-1950* (London: C. Hurst, 1976).

(Sri Lanka), Malaya, Burma, East Africa, and many other places. Article 9 prohibited citizenship under the previous articles if the person had “voluntarily acquired” the citizenship of another country. Article 10 guaranteed the “continuance of the rights of citizenship,” subject to any new laws made by Parliament, and Article 11 exempted this part of the Constitution from the normal rules for amending the Indian Constitution. It instead allowed Parliament to change India’s citizenship law without needing to invoke the procedure for Constitutional amendment.

Amidst the many uncertainties, the Constituent Assembly turned to the English legal concept of domicile. The legal press supported the use of domicile, and commentators viewed married women’s dependent domicile as a guarantor of family unity. But the legal unity of husband and wife put married women’s standing as independent citizens in jeopardy. The long pedigree and substantial body of law around the legal concept of domicile in both England and India provided a touchstone of stability in the uncertain times of the Independence and the Partition settlement. India’s Constitution enshrined the English legal concept of domicile as a crucial determiner of identity of post-colonial Indian law. This older legal form existed alongside the newer legal form of Partition in India’s new Constitution.¹⁹⁰ Partition was written into the Constitution through the bar on citizenship to most people who migrated to Pakistan. Though the Constitution used religiously neutral language, in practice nearly all migrants to Pakistan were Muslim, and the move across the border was construed as a marker of disloyalty to India.

¹⁹⁰ See Lucy Chester, “Boundary Commissions as Tools to Safeguard British Interests at the End of Empire,” *The Journal of Historical Geography* 34, no. 3 (2008): 494-515.

The relationships between family, domicile, disloyalty, and the state's discretionary powers under India's new law of citizenship form the subject of this chapter.¹⁹¹ In the first part, I show how the reliance on domicile in citizenship law created legal outcomes that did not reflect practical realities. Bureaucrats and judges interpreted domicile using principles of private international law as defined in England to assign married women and minors a dependent domicile between 1950 and 1955. Private international law, sometimes also called conflict of laws, is that sub-set of international law that determines the correct jurisdiction and body of law with which to adjudicate disputes between non-state actors such as individuals and corporations.¹⁹² Domicile is an important factor in determining which laws to use. The definition and application of domicile in private international law, therefore, played an important role in Indian citizenship law.

The middle sections of this chapter focus on the important legal developments of 1955. In 1955, the Supreme Court and Parliament each reformed the use of the law of status in determining citizenship. First, the Supreme Court decided an important citizenship case that granted a married woman independent legal will, but only for the very narrow purpose of excluding from India those who migrated to Pakistan.¹⁹³ Second, the Indian Parliament enacted a new citizenship statute in 1955, called the Indian Citizenship Act (ICA). In an important departure, the 1955 Citizenship Act granted married women independence of nationality. Along with this fillip to married women's legal independence, the Act adopted a patrilineal line of descent of citizenship for Indians born outside of India. This aspect of the

¹⁹¹ In this dissertation I refer to "the Constitutional law of citizenship," when discussing citizenship claims made using the Constitution of India. This is counterposed to the statutory law of citizenship under the 1955 Indian Citizenship Act, discussed in greater detail later in the chapter.

¹⁹² A.V. Dicey and A. Berriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws*, 4th ed. (London: Stevens & Sons, 1927), 1-4. At the University of Michigan School of Law, two classes are taught on this topic, Jurisdiction and Choice of Law and Conflict of Laws, see the course list of the Law School, <https://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/CourseList.aspx>, last accessed April 19, 2015.

¹⁹³ Article 7 of the Constitution aimed at excluding from citizenship those who migrated to Pakistan.

Bill attracted criticism from female and left-wing members of Parliament. Moreover, the Citizenship Act also created five different “pathways to citizenship.” The different pathways had implications not just for gaining citizenship but also for losing it: it was easier to deprive registered citizens of their citizenship.¹⁹⁴ In this regard, some citizens were more equal than others.

After the 1955 Citizenship Act and Supreme Court ruling, bureaucrats in New Delhi and the states used their wide powers of discretion to adjudicate uncertain cases of citizenship involving family ties. As shown in the final section of this chapter, state police commissions and national and state-level ministries of Home and Law sought to vigorously regulate and enforce the boundaries of the Indian body politic.¹⁹⁵ Well into the 1960s, the state High Courts heard petitions from Muslims on the verge of deportation as a result of these actions. Brought by Muslim males who were minors at the time of Partition, the High Courts had to adjudicate the delicate interplay between descent and intent in such petitions.

Coverture structured the response of the Indian state to individuals caught between the two nation-states. Usually the father’s domicile was transferred to the wife and minor children, showing how coverture and the law of status had intergenerational as well as marital implications. When India granted legal independence to married women or minor sons, it did so to exclude Muslims from the Indian body politic. In other words, married women were seen as having some modicum of legal independence from their husbands, but only for the purpose of exercising intent to migrate to Pakistan. The narrow undoing of coverture here suggests how well-entrenched it was, only unseated by concerns of a complex

¹⁹⁴ Anupama Roy, “Pathways to Citizenship,” *Mainstream*, September 25, 1999, 11-15.

¹⁹⁵ India has a system similar in nature to English cabinet government, Austin, *The Indian Constitution*, 116. Austin quotes K.M. Munshi’s axiom “The Parliamentary system produces a stronger government, for (a) members of the Executive and Legislative are overlapping and (b) the heads of government control the Legislature,” Austin, *The Indian Constitution*, 116). Prime Minister Nehru was thus both the elected head of the legislature and the executor of its will as the head of a council that advised the President. Likewise Pant was both Member of Parliament and Home Minister.

of ideas around national security and loyalty. The patrilineal emphasis of citizenship-by-descent and the insistence on granting rights only to legitimate children also reflected English common law. For married women and minors, domicile and citizenship were based in coverture. In most cases, the father's or husband's status was determinative. But in deciding the husband's domicile, bureaucrats' and judges' discretion to judge assimilation and loyalty could exclude Muslim men from the body politic. The state could also substantially hamper Muslim men's exercise of their rights within India.¹⁹⁶

From the Council of Merton to the Indian Diaspora: The Rule Against Subsequent Legitimation

As with Basar Khan and Amirunnissa, the first point of contact with a recognizably post-colonial arena of the state for many Indians involved the need to travel. Independent India's new foreign missions were not certain how to respond to citizenship claims made by some of the approximately three million Indians abroad.¹⁹⁷ Evidently this official uncertainty was not matched by any lack of clarity among Indians abroad, who were quick to claim Indian citizenship. Across the world, Indians petitioned their Consulates for Indian travel documents.¹⁹⁸ In the case of illegitimate children, consulates adopted a cautious position;

¹⁹⁶ Locke defines this as the community created by the "original Compact" in the Second Treatise of Government: John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), s. 97.

¹⁹⁷ Y.D. Gundevia, *Outside the Archives* (Hyderabad: Sangam, 1984), 47-9. Of greatest concern to the Indian government by virtue of numbers and proximity were the around 700,000 Indians each in Burma, Ceylon, and Malaya. Most Indians abroad were the descendants of Indian indentured labor that supplied the labor needs of the British Empire after the abolition of slavery in 1833. Scholarly studies on this topic are many and varied. They range from Marina Carter's and poet Khal Torabully's especially innovative subaltern approach to indentured history in *Coolitude: An Anthology of the Indian Labour Diaspora* (London: Anthem, 2002) to studies of the simultaneously local and trans-imperial legal culture of the law of master and servant in Hay and Craven, *Masters, Servants, and Magistrates*. See especially the chapters by Michael Anderson, "India, 1858-1930: The Illusion of Free Labor," 422-54 and Prabhu Mahopatra, "Assam and the West Indies, 1860-1920: Immobilizing Plantation Labor," 455-80.

¹⁹⁸ Indians in British East Africa (post-colonial Kenya, Uganda, and Tanzania) are discussed in Deborah Sutton, "Divided and Uncertain Loyalties," *Interventions* 9, no. 2 (2007): 276-88.

they were not over-eager to extend Indian citizenship too far, especially to children with uncertain origins. As the files of the Ministry of External Affairs show, Indians in places as far flung as Geneva and Hanoi asked their Consulates for citizenship rights for their children, and their consular representatives wrote to New Delhi for advice.¹⁹⁹ In response, officials in the Ministry of External Affairs (MEA) in New Delhi, supported by their colleagues in the Ministries of Home and Law, turned to two long-established English legal positions: the rule of patrilineal descent of identity and the enduring rule against subsequent legitimation of illegitimate births.²⁰⁰ It might help here to clarify that the ministries used two kinds of powers under their broad administrative powers. First, they could issue rulings about how to administer the law. Such rulings are a form of subordinate legislation and therefore a legislative power. Second, they could engage in “administrative justice” as they applied the legislation and the rulings to make final decisions about individual cases that anxious or zealous officials in the state enforcement ministries sent to them.

In 1955 the MEA ruled that in unions between Indians and non-Indians, the child of an Indian father abroad was clearly a citizen of India under the Constitution. The domicile of the child followed that of its father. In contrast, the child of an Indian mother and non-Indian father lacked the requisite domicile for Indian citizenship.²⁰¹ Still, as the MEA wrote in response to the query from Geneva, even if the father was not a citizen the child might be

¹⁹⁹ The bootstrapping required to get the Foreign Service up and running is a theme in several former diplomats’ memoirs. See for example Badr-ud-Din Tyabji’s *Memoirs of an Egoist* (New Delhi: Roli Books, 1988); Apa Pant’s *A Moment in Time* (London: Hodder Stoughton, 1974); and the account of Ambassador to the United States, Indian High Commissioner in the UK, and Chief Justice of the Bombay High Court M.C. Chagla, *Roses in December* (Bombay: Bharatiya Vidya Bhavan, 1973). On bootstrapping in constitutional moments, the best article is Jon Elster, “Constitutional Bootstrapping in Philadelphia and Paris,” *Cardozo Law Review* 14 (1992-1993): 549-75. I thank Professor Halberstam, University of Michigan School of Law, for this reference. The evidence of the varied queries from Indians abroad indicates that bootstrapping took place not just in Delhi but also in the diaspora.

²⁰⁰ In contrast to the United States’ separation of powers, Indian administrative agencies operate with combined executive, legislative, and judicial powers. Markose divided administrative action into two major categories: administrative justice and subordinate legislation. This was a case of administrative justice. See Markose, *Judicial Control*.

²⁰¹ NAI, MEA, F. No. F14/6/1955-UK Corres, 3.

registered at the discretion of the registering officer. Scope for discretion was granted to citizenship-by-registration in “borderline cases” especially if a separated mother intended to return to India with her child.²⁰² Only children of Indian men had a right to citizenship. The children of Indian mothers could at best rely on administrative discretion. The emphasis on patrilineal descent foreshadowed the position the ICA would take on the matter in 1955.

In order to decide the rights of a child born out of wedlock, Indian bureaucrats turned to a remarkably enduring feature of the English law of the family: the bar on subsequent legitimation. In England an illegitimate child could not be subsequently legitimated whether through parental declaration of legitimacy, formal adoption, or even the subsequent marriage of the parents.²⁰³ At the Council of Merton, “...[I]n 1236, all the Earls and Barons... ‘with one voice answered they would not change the law of the realm which hitherto had been used and obeyed.’”²⁰⁴ This rule lasted for close to seven centuries. Comparison with Scotland and the Continent shows it is also a particularly English commitment.²⁰⁵ This draconian position was not adopted in Scottish law. This difference in laws led to the conflict behind a foundational case in private international law, *Udny v. Udny*.²⁰⁶ Colonel Udny hoped to prevent creditors from charging his estate in Scotland by styling his son as his heir, thereby protecting his property from attachment. Though he subsequently married his son’s mother, at the time of the birth the two were unmarried. Colonel Udny's domicile was found to be Scottish rather than English, providing the son a

²⁰² *Ibid.*, 2-3.

²⁰³ *Re Goodman’s Trusts* ([1881] 17 Ch D 266; 50 LJCh 425, Court of Appeal) and *Re Luck’s Settlement Trusts*. (1940 Ch 864; 1940 3 All Er 307, Court of Appeal), both reprinted in Morris and North, 412 and 416 respectively.

²⁰⁴ Quoted in Cretney, *Family Law*, 547. Cretney’s book, the best account of English family law in the last century, quotes from Lord Justice Lush’s opinion in *Re Goodman’s Trusts* ([1881] (*Court of Appeal*)).

²⁰⁵ Maitland saw a similarity between Scottish and French law and engaged in comparison between the two jurisdictions. “I have long had a dream that Scotland is the link between England and Normandy.” John Hudson, “F.W. Maitland and the Englishness of English Law,” (unpublished paper presented at University of Michigan School of Law, Ann Arbor, MI, October 2013), 7.

²⁰⁶ *Udny v. Udny*, (1869 LR 1 Sc & Div 447; 7 Macq 89, House of Lords), reprinted in Morris and North, 1-3.

legitimacy that he would not have held under English law.²⁰⁷ The subsequently legitimated son could be considered Udny's heir under Scottish law. In the course of deciding this case, the Appellate Committee drafted a clear statement on the principles of domicile law that would serve as the leading case for more than a century: it is the very first reproduced in a standard legal casebook on private international law.²⁰⁸

Like Scotland, English canon law as well as Continental civil law jurisdictions accepted subsequent legitimation. This gave Blackstone a chance to extol the virtues of English common law over civil law in the eighteenth century.²⁰⁹ The rule against subsequent legitimation better promoted matrimony by limiting property transfers to only those blood relations legitimated by the state from the start, claimed Blackstone.²¹⁰ Finally in 1926 statutory reform in England granted a child born out of wedlock legitimacy if the parents married after his or her birth.²¹¹ Given the long pedigree of the rule against subsequent legitimation, the 1926 statute was quite revolutionary even though it still did not grant legitimacy to the "adulterine bastard," the product of an adulterous union.²¹²

Despite the reform of the rule in England in 1926, it still held persuasive authority in Indian citizenship law in the 1940s through the legal publications and habits of mind of the bureaucrats applying the citizenship law. For example, the Consulate-General in Saigon queried Delhi about an Indian man who adopted the son of his Cambodian concubine "out

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ One might expect a similar conflict between civil law jurisdictions like Louisiana and the common law states in the United States. Goa, as a Portuguese territory until 1961, also likely took the continental civil law position.

²¹⁰ See Blackstone, Chapter XVI, "Of Parent and Child," part II on bastardy, in *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765; repr. Buffalo, N.Y.: William S. Hein & Co., 1992), 442-7, HeinOnline Legal Classics Library. Blackstone gave four reasons that the common law prohibition of subsequent legitimation was better than the civil law position allowing it. It ensured that the father was accurately proven; it prevented frauds; it encouraged the married father's interest in his offspring in infancy, rather than only as an adult, since an adult could not later be legitimated; and it encouraged matrimony through the encouragement of procreation to create heirs and not just children.

²¹¹ Legitimacy Act of 1926 (16 & 17 Geo V c. 60)

²¹² Cretney, *Family Law*, 548-9, 533. A statute allowing the legitimation of children produced from adulterous unions was only enacted in 1959.

of parental love and affection.”²¹³ Repeating the pattern of initial approval followed by subsequent denial, at first the MEA granted the son an Indian passport because the adoption was valid.²¹⁴ After revisiting the issue, the MEA decided, “As no provision has been made in our constitution for conferring Indian citizenship on an illegitimate child or for recognizing an adopted child as an Indian citizen,” the son could not travel on an Indian passport. He could come only on a visa.²¹⁵ The Indian Evidence Act as well as Hindu and Muslim law were potential sources for formulating an Indian law on legitimation after Independence, according to the eminent civil law treatise writer Paras Diwan.²¹⁶ Hindu law allowed adopted sons to inherit property, for example, in at least some cases. Despite the diverse positions found in available legal sources, bureaucrats defaulted to the English common law position that an illegitimate child's domicile followed its mother's. This ruled out the boy's case for citizenship whatever the nature of his affective and legal relationship with his adoptive father.

Similarly, Narain Singh's case shows how the Indian state upheld a strict requirement of proof in cases of doubtful legitimacy. This excluded Narain Singh from Indian citizenship. The child of an Indian father and German mother, after World War II Singh found himself stuck in Aachen and desperate to leave. Despite the fact that Narain's Indian father married his German mother after Narain's birth, he was not considered a legitimate child of his Indian father.

²¹³ NAI, MEA, F. No. F14/6/1955-UK, corres/4.

²¹⁴ Ibid., p. 25. This prompted an enquiry into the Muslim law of adoption before it was pointed out that the father was not a Muslim.

²¹⁵ Ibid. The circumstances of in the Cambodian case were similar to *In Re Luck's Settlement Trusts* (1940 Ch. 864: 1940 3 All ER 307, Court of Appeals). There it was decided that a subsequent declaration of adoption of an illegitimate son is invalid for legitimation purposes; it would only be valid when the law of the father's domicile at the time of the child's birth *and* the law of the father's domicile at the time of the adoption would legitimize such a child. Reprinted in Morris and North, *Cases and Materials*, 415-19. *In Re Goodman's Trusts* (1881 17 Ch D 266: 50 LJCh 425, Court of Appeal) was another case on legitimation of a child through subsequent marriage. Reprinted in Morris and North, *Cases and Materials*, 412-13.

²¹⁶ Paras Diwan, *Private International Law* (Bombay: N.M. Tripathi, 1977), 314-15 and n. 41.

Working in favor of Narain's case for citizenship should have been the straitened circumstances of his life in Germany. During the war he could neither work in nor leave Aachen, and was under threat of being interned by the German authorities. In a case of bureaucratic understatement, the correspondence in the file noted that, "The son was badly treated by the Nazis during the war." The end of the war had not improved his struggle to gain German citizenship.²¹⁷ Narain was desperate to leave German racial discrimination and chose India as the place where he would feel most at home after his wartime ordeal.

The Indian state's capacious commitment to its diaspora seemed designed to answer just such situations; it was certainly capable of admitting wartime refugees from Europe.²¹⁸ At first the Ministry of Home Affairs (MHA) and the MEA seemed inclined to grant it, then considered finding witnesses from the marriage decades before in order to establish Narain's pedigree. This case illustrates the genealogical ambitions of the state, and a sense that kinship ties and networks could be recorded and referenced as required for the determination of status. It is not surprising, given the colonial state's assiduous attention to recording property settlements and family pedigrees.²¹⁹ As one bureaucrat suggested, the ministries should "try and scrape together as much as evidence as we can before we take a decision about Narain's legitimacy and nationality."²²⁰ However, working against Narain's case was his illegitimacy at his time of birth. His father lacked or refused to supply the papers Narain claimed would prove his father's 1922 marriage to Narain's mother.

In truth, the paperwork mattered little because the marriage came too late. "Bastardy

²¹⁷ NAI, MEA, FH 1952, Application of Mr. Narain Singh, p. 14.

²¹⁸ Please also see the discussion later in this chapter of provisions for Indians abroad under the 1955 Indian Citizenship Act. Narain's foil is found in Rani Pratap Singh, whose maintenance suit is discussed in Chapter Three on maintenance. She was a German refugee, possibly Catholic, who married a wealthy Indian man in Shimla, then part of Uttar Pradesh.

²¹⁹ Jacqueline Stevens uses the term "(Familial) State" in *Reproducing the State* (Princeton: Princeton University Press, 1999), 51.

²²⁰ NAI, MEA, FH 1952, Application of Mr. Narain Singh, Note by Patandi in the Ministry of External Affairs from June 22, 1949 in the file.

was indelible,” as an English decision put it, and Narain’s illegitimacy at birth could not be erased.²²¹ The Ministry of External Affairs drew on two sources for the ruling against Narain. First, he could not be registered because, though one of his parents was Indian, “parent” did not include an illegitimate father or mother at the time of birth.²²² This ruling used *Stroud’s Judicial Dictionary* for the proposition, though *Stroud’s* itself gave eleven different definitions to choose from.²²³ Moreover, the memo noted, “Neither Hindu law nor Sikh custom provide that an illegitimate son may be made legitimate by the subsequent marriage of the parents.”²²⁴ Narain could not be registered as an Indian resident abroad under the new citizenship law of the Indian Constitution.²²⁵ On these grounds, Narain's claims were rejected. His case shows the incorporation of patriarchal common law principles of family and private international law in the Constitutional law of citizenship in India.²²⁶

“All the facts, incidents and events of a man's life:” Discretion and Domicile

Coverture and patrilineal principles from English law structured the state’s response to doubtful citizenship claims in the case of women and children. The case was different for men. Domicile relied on human intention and a host of subjective factors played a role in

²²¹ Lord Greene, in *Re Luck’s Settlement Trusts*. (1940 Ch. 864; 1940 3 All ER 307, Court of Appeal). As Greene pointed out this principle had been “always steadfastly maintained in opposition to the civil and canon law save in so far as it was forced to recognize an exception in cases of persons not domiciled in England.” Reprinted in Morris and North, *Cases and Materials*, 490.

²²² NAI, MEA, FH 1952, Application of Mr Narain Singh, 23.

²²³ F. Stroud, *The Judicial Dictionary of Words and Phrases Judicially Interpreted...*, 2nd ed., vol. 2 (London: Sweet and Maxwell, 1903), 1401-2. Stroud’s *Judicial Dictionary* was designed to appeal to an imperial legal market concerned with the questions of personal status and property relations. The preface to the 2nd edition hoped that “...it may become the authoritative Interpreter of the English of Affairs for the British Empire; and, incidentally, forge a link in the golden chain of common interest and community of feeling which brings together its various peoples,” (p. vii, volume 1 of 2nd edition).

²²⁴ NAI, MEA FH 1952 Application of Mr Narain Singh, 21.

²²⁵ Article 8 of the Constitution of India.

²²⁶ Diwan notes, in his 1977 edition of *Private International Law*, that under Hindu law prior to the Hindu Succession Act in 1956, Hindu illegitimate sons did have certain rights, especially among *sudras* [i.e. lower caste Hindus, which today might be called Other Backward Castes]. He also notes that South Asian Muslim law has some exceptions to a strict Muslim prohibition on recognizing illegitimacy.

assessing it. Despite attempts to pin down an infallible test, it was ultimately discretion that determined domicile.²²⁷ In Indian citizenship law, ties to Pakistan were hard to surmount. State and national bureaucrats debated the many factors that might be considered in determining men's domicile. Some of these were birth, parentage, property ownership, personal ties, statements of intention, profession, tax payments, dress, food, and even assimilation. The discussion of men's varied claims on citizenship was as extensive as women's was cursory.

Examining men's claims to citizenship sheds light on how carefully the Indian state policed the boundaries of citizenship. The individual states were tasked with vetting potential citizens and enforcing the citizenship law.²²⁸ After one query in May 1954, Fateh Singh²²⁹ chided state governments, "Of late applications from foreigners have been received from State Governments which do not seem to have been examined or inquired into thoroughly." He urged, "such applications should be scrutinized with greater care" at the state level. Singh's memo reiterated the principles found in Dicey's *Conflict of Laws* as guidance.²³⁰

Each attempt at clarification produced more questions.²³¹ For example, the newly formed Andhra state asked about moneylenders with origins in Pakistan and Afghanistan.²³²

²²⁷ The assessment of intention for residence is different than the assessment of criminal intention, yet both are spaces for the operation of discretion. Elizabeth Papp Kamali, "Felonia Felonice Facta: Felony and Intentionality in Medieval England," in *Criminal Law & Philosophy* (2013): 1-25, and Usha Ramanathan, "Images (1920-1950): Reasonable Man, Reasonable Woman and Reasonable Expectations," in *Engendering Law: Essays in Honour of Lotika Sarka*, eds. Amita Dhanda and Archana Parasher (Lucknow: Eastern Book Co., 2007), 33-70.

²²⁸ These important sources for understanding the functioning of the post-1947 Indian state are also considered in Zamindar, *Long Partition*, and Taylor C. Sherman, "Migration, Citizenship and Belonging in Hyderabad (Deccan), 1946-1956," *Modern Asian Studies* 45, no. 1 (2011): 104 and n. 105.

²²⁹ Unlike Gundevia and many other former civil servants, Fateh Singh seems not to have published about his life 'outside the archives.' His presence inside them is more constant than Gundevia's. Gundevia was quickly called away to be an ambassador. In contrast, Fateh Singh remained in Delhi and advanced through the Ministry of Home Affairs to become a Joint Secretary by the late 1950s.

²³⁰ Fateh Singh's memo was based on BN Lokur's notes in the Ministry of Law from earlier in the month, and Lokur indeed cited Dicey specifically. P. 5/Corres, 33/7/54-Re. Mohd Bhai. Singh.

²³¹ "The difficulty [of the law of domicile] arises not from a lack of clarity in judicial thought, but from the nature of the subject. Domicile cases require for their decision a detailed analysis and assessment of facts

After an internal debate, the Ministry of Home decided moneylending was not a permanent profession, suggesting moneylenders with Pakistani roots did not have a strong claim on Indian citizenship.²³³ This ruling was not without precedent. During the Indian police action in the princely state of Hyderabad between September 1948 and 1950,²³⁴ Indian forces detained thousands of Arabs, Afghans, and Pakistanis on spurious charges of being members of the Nizam of Hyderabad's militias.²³⁵ "As it became clear that Indian forces had acted with excessive zeal in detaining these Muslims on the assumption that they were Razakars [members of the Nizam's militias]," Taylor Sherman notes, the Government labeled some of the 6,255 detainees moneylenders in an effort to find good ground for their detention.²³⁶

This query from six years later shows that the suspicion of moneylenders as separatist foreign agents did not end with Hyderabad's incorporation in 1948. Well into the 1950s the charge of moneylending provided a legalistic veneer to what started as outright religious-communal charges used to detain Muslims without due process.²³⁷ Previously operating in favor of their detention, now the charge of moneylending was used to reject

arising within that most subjective of all fields of legal enquiry—a man's mind." Scarman J. in *Re Fuld* (1968 P 675: 1965 3 All ER 776, Probate Division), reprinted in Morris and North, *Cases and Materials*, 15.

²³² Formed in October 1953 from Madras State. See W.H. Morris-Jones, *Parliament in India* (Philadelphia: University of Pennsylvania Press, 1957), 22-3.

²³³ Fateh Singh was doubtful of moneylenders' permanent intentions "as their stay is only motivated by the object of making as much money as they can in this country." NAI, MHA, Foreigners II, File No. 33/121/54-F. II, 1954, "Subject: Indian Citizenship-Acquisition of-Instructions. Clarification regarding-Reference from Andhra Govt."

²³⁴ Members of the militia fought against the accession of Hyderabad to the India in 1948. Sherman, "Migration," 88. Hyderabad was one of the three princely states that did not voluntarily accede to India. The other two were Kashmir and Junagadh.

²³⁵ A blanket allegation indicating disloyalty, argues Sherman, "Migration," 91.

²³⁶ Sherman, "Migration," 92, describes this process prior to 1950. Relying upon Omar Khalidi, Sherman states that moneylending by Arabs prompted violence, conflicts, and backlash from the 1850s onward in Hyderabad. Omar Khalidi, "The Hadhrami Role in the Politics and Society of Colonial India, 1750s-1950s," *Hadhrami Traders, Scholars and Statesmen in the Indian Ocean, 1750s-1960s*, eds. Ulrike Freitag and William G. Clarence-Smith (Leiden: E.J. Brill, 1997), 76-7, cited in Sherman, "Migration," 86. Sherman states that 6,225 "Pakistanis" were detained in this period, some of whom were described as money-lenders, "Migration," 91-3.

²³⁷ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005); Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

claims to citizenship.²³⁸ The MHA finally ruled that moneylending was not a permanent profession,²³⁹ but this lack of permanence should be considered along with other factors. It might cast doubt on a claim but should not be a sole reason for rejection but rather part of a larger picture. The use of the phrase “all the facts, incidents and events of a man's life taken together”²⁴⁰ in the ruling is an entirely synchronic use of the male as the legal subject. It highlights that ultimately there was no rule of law for determining intent; in tough cases, the test would always be discretionary.

This ruling did not do much to quell the queries that kept popping up about the determination of domicile. West Bengal asked about assimilation, another of the “illustrative test[s]” of domicile offered to the states by the MHA.²⁴¹ Always cautious, Fateh Singh took a skeptical view of the virtues of relying too heavily on assimilation as proof of domicile. Assimilation, in Fateh Singh’s view, was too easy to fake. Foreigners who seemed Indian could really be spies.²⁴² Despite Fateh Singh’s fears about spies, the final ruling from the Undersecretary²⁴³ largely reproduced the Ministry of Law’s advisory memo defining assimilation and allowing it to be used as one determinant of citizenship.²⁴⁴ The memo drew on American definitions of assimilation in the context of early twentieth century Chinese

²³⁸ The government's attempt at excluding the moneylenders on grounds *other* than their nationalities can perhaps be seen as the corollary to Sherman's findings that ethnic origin influenced the administration of citizenship cases despite the different, supposedly more neutral, requirements of the legal regime, Sherman, “Migration,” 101.

²³⁹ As Fateh Singh urged. In contrast, Undersecretary Gajinder Singh argued that political antecedents should not be considered.

²⁴⁰ NAI, MHA, Home Ministry, Foreigners II, File No. 33/121/54-F. II, 1954, 3-4 corres, “Subject: Indian Citizenship-Acquisition of-Instructions. Clarification regarding-Reference from Andhra Govt.” Anupama Roy discusses a strikingly similar case from 1958 involving a moneylender from Quetta, 55-8, referring to File #2/4/58 MHA-IC. My guess is that her 1958 case referred to these earlier discussions. Anupama Roy, *Mapping Citizenship in India* (New Delhi: Oxford University Press, 2010).

²⁴¹ Mentioned in the first letter sent to all state government as a result of Mohammed Bhai’s case. NAI, MHA, Foreigners II, File No. 33/50/55 F. II, 1955, p. 1/corres., “Subject: Security [Scrutiny?] of foreigners’ claim to Indian citizenship-Enquiries regarding-(Reference from the Govt. of West Bengal.)”

²⁴² *Ibid.*, 5.

²⁴³ E.N. Damodaran.

²⁴⁴ By G.S. Gaitonde.

immigration. The memo included a quote from Justice Fields's opinion²⁴⁵ in favor of the Chinese Exclusion Act because of a perceived failure of Chinese assimilation:

They have remained among us a separate people, retaining their original peculiarities of dress, manners, habits and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organisation with the laws and customs which they have brought from China.... They do not and will not assimilate with our people.²⁴⁶

The quote was meant to be helpful in understanding the meaning of assimilation, though it admittedly was not exactly about domicile. Did not reasons similar to those for Chinese exclusion undergird the 1917 statute excluding Indians from immigrating to the United States?²⁴⁷ One American magazine justified the exclusion of Indians because of their “Their habits, their intense caste feeling, their lack of home life—no women being among them-- their effect upon standards of labor and wages.”²⁴⁸ Even an American belief in a shared racial past with Indians (under the guise of the “Aryan race”) was not sufficient to override the cultural differences and Indian potential to undercut American labor that undergirded the policy of excluding Indians.²⁴⁹ The author of the memo, G.S. Gaitonde, an official in the

²⁴⁵ The Act was then amended in 1884. *Chew Heong v. United States* (112 US 536, Supreme Court) dealt with the Chinese Exclusion [Restriction] Act of 1882 and its 1884 Amendment. The majority opinion was by Justice Harlan. Justice Bradley also dissented in a separate opinion. Justice Field's dissent formed the basis for his future unanimous majority opinion in *Chae Chan Ping v. United States* (130 US 581, Supreme Court) in 1889 that upheld the even more restrictive 1888 Scott Act that barred all Chinese workers from entering the United States. See Neil Gotanda, “Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee,” *UCLA Law Review* 47 (2000): 1699-1700 and Lucy Salyer, *Chew Heong v. United States: Chinese Exclusion and the Federal Courts*, *Federal Trials and Great Debates in United States History* (Federal Judicial History Office, 2006), 4-8, <http://www.fjc.gov/history/docs/exclusion.pdf>, last accessed April 21, 2015.

²⁴⁶ NAI, Ministry of Home Affairs (MHA), *Foreigners II*, File No. 33/50/55 F. II, 1955, 2-3. The Court opinion goes on to state in the final sentence “...and their dying wish is that their bodies may be taken to China for burial.” This was not included in Damadoran or Gaitonde's quote. This recalls the axiom Gundevia developed to deal with the confusion over domicile: “Domicile is where you intend to die; not where you intend to live” (Gundevia, *Outside the Archives*, 54).

²⁴⁷ 1917 Asian/Pacific Barred Zone Act.

²⁴⁸ From *Survey* magazine, 1910, quoted in Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* (Boston: Little, Brown and Company, 1989), 297.

²⁴⁹ Despite the claims of Indians that they were Aryan. However in 1923 the Supreme Court ruled there was a difference between white race and Caucasian. Indians may have been Caucasian but were certainly not white, said the Court in the *United States v. Bhagat Singh Thind* (261 U.S. 204, 1923), and therefore Indians' citizenship

Law Ministry, seems not to have known or cared. One wonders what caused him to turn to this seventy-year old American decision, and whether it was well-known in the treatise literature²⁵⁰ or buried in the library of the Home Ministry or elsewhere in New Delhi.²⁵¹ Gaitonde's use of *Chew Heong* suggests the well-known persuasive influence of foreign precedents on the Indian judiciary, especially American decisions, also stretched to the bureaucracy.²⁵²

The MHA advised that assimilation was only one test among many for deciding domicile, as it had when discussing the moneylenders. But, "... the adoption of such modes on the part of a person of foreign origin will go a long way to establish his intention to settle permanently."²⁵³ The cultural orientation of assimilation proposed specifically "Indian modes of life," which given India's vast diversity would have been difficult to define or limit.

could be annulled. S. Mazumdar, "Racist Responses to Racism: The Aryan Myth and South Asians in the United States," *Comparative Studies of South Asia, Africa and the Middle East* 9, no. 1 (1989), 50.

²⁵⁰ Professor A.W.B. Simpson suggested the legal treatise declined as a legal form with the rise of legal realism, and that legal realism was prompted by nineteenth century treatises so successful at their attempts to codify that they tended to freeze the law. Here Simpson was addressing contract law. In India the legal treatise seems to have continued its rise until the internet overtook it with commercial, state, and public interest hyperlinked legal records. But it is still impossible for any working lawyer to navigate practice without the help of treatises. This is not surprising because, as Professor Simpson pointed out, India was governed by the very Codes that inspired the treatise writers in England such as the Indian Penal Code. Drafted by Macaulay in 1830 but not adopted til 1860, the Code was reproduced around the empire and now underwrites the criminalization of homosexuality in former British colonies. A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48, no. 3 (1981): 632-79.

²⁵¹ Jayanth K. Krishnan, "From the ALI to the ILI: The Efforts to Export an American Legal Institution," *Vanderbilt Journal of Transnational Law* 38 (2005): 1255-93.

²⁵² The Indian Higher Judiciary's reliance upon foreign judgments to guide its decisions is well-known and stands in sharp contrast to the American position. The recent major decision decriminalizing homosexuality relied heavily on South Africa's *National Coalition for Gay and Lesbian Equality* decision as well as others from around the Commonwealth, the United States, and the European Court of Human Rights. See *Naz Foundation vs. Government of NCT of Delhi* (Delhi High Court, 2009), available at <http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf>, last accessed April 21, 2015 and Alternative Law Forum, *The Right That Dares to Speak Its Name: Naz Foundation Vs. Union of India* (Bangalore, India: Alternative Law Form: 2009).

²⁵³ In response to another part of the Government of West Bengal's query about the age of majority for determining domicile, it is also noteworthy that Gaitonde and then Damodaran ruled that the definition of minority in these cases would depend upon the Indian Succession Act. Here the Indian Succession Act, as well as the principles of private international law, were cited as the standard of law in India for determining domicile. NAI, Home Ministry, Foreigners II, File No. 33/50/55 F. II, 1955, "Subject: Security [Scrutiny?] of foreigners' claim to Indian citizenship-Enquiries regarding-(Reference from the Govt. of West Bengal.), p. 3/Corres."

Fields's objection to Chinese inclusion included not just "dress and habits" but also "laws and customs." These were also reasons for the desire to exclude Indian immigration to the United States: caste habits and family practices, as well as the perceived effect on wages for white workers. In India, since Independence, right-wing Hindu nationalists have objected to the provisions for religious pluralism in family law. In both the American West and West Bengal, corporeal practices from food to family structure marked the boundary for inclusion or exclusion in the body politic.²⁵⁴ Both Indian and American nationalism contain a strand that views granting space to plural family customs a threat rather than a resource. This is certainly not the official position of Indian constitutionalism and secularism, at least as it is written in the Constitution.²⁵⁵ However, in the nexus of everyday practice and state discretionary power, alternative family customs served as a marker of difference and perhaps even contamination. Embodied corporeal politics create discursive social divisions, which are then reified through the use of state power in practice.

Bureaucratic discretion was used to exclude Muslims with ties to Pakistan. In addition to Basar Khan, one Sale Mohammad Khan²⁵⁶ was deemed to lack the requisite domicile required for citizenship under Article 5, despite long residence in India. Similarly, Mohammad Hashim could not obtain an Indian passport to travel abroad to West Asia on

²⁵⁴ Both local, as discussed in the case of Uttar Pradesh in Chapters Three and Four, as well as religious. The evolution of this policy is discussed in Chapter One. See also Sumit Sarkar and Tanika Sarkar's comments about the fragmented nature of Indian jurisprudence and the importance of property in their introduction to *Women and Social Reform in Modern India*, (Bloomington: Indiana University Press, 2008), 1-12 and Janaki Nair, *Women and Law in Colonial India: A Social History* (New Delhi: Kali for Women, 1996), *passim*; Richard W. Lariviere, "Justices and Panditas: Some Ironies in Contemporary Readings of the Hindu Legal Past," *Journal of Asian Studies* 48, no. 4 (1989): 757-69.

²⁵⁵ Early challenges to religious personal law were shot down by the courts, showing that religious-legal pluralism has been present throughout in post-colonial Indian legal culture. Discussed in my paper "From *Appa's Case* to *Danial Latifi*: The Judiciary and the Legislature in Post-Colonial Indian Personal Law" (2007).

²⁵⁶ NAI, Ministry of External Affairs F. 41/31/55-PSP, 1955, Grant of Indo-Pakistan passport to Sale Mohammad Khan. Khan came from what became Pakistan in 1939, and he was married to a woman from the future Pakistan as well. He could register as a citizen under s. 5.

religious work.²⁵⁷ Despite his birth in India, his alleged pro-Pakistan leanings disqualified him. An “old Muslim Leaguer,” the Central Investigation Department claimed he went to Dhaka (then in East Pakistan) and “narrated...the alleged atrocities committed on muslims [sic] in the Indian Union” in 1949. More recently he had been involved in a students’ agitation in Lucknow.²⁵⁸ Admittedly there were no reports of his past violence nor had he been convicted of any “wrong-doing.” Yet, it was asserted, he believed in violence and “he [was] sure to vilify India in foreign countries if he is allowed to go abroad.”²⁵⁹ Therefore, his passport application was rejected.

The states’ authority to cancel permits and deport stands in sharp contrast to the political considerations the same ministries granted to non-Muslims like T. Gomes.²⁶⁰ A Congress party supporter from East Africa with a letter from the Ambassador in his file, Fateh Singh saw fit to admit Gomes. Gomes owned some property in Pune, boosting his case.²⁶¹ Likewise for G. E. Airan, born in India but eight years resident in Pakistan as an engineer. Once a Member of Parliament prevailed on Nehru to intervene, Airan, a Christian,

²⁵⁷ For *tabligh*, proselytizing to other Muslims for the proper practice of Islam. The locations mentioned are Iraq, Egypt, Syria, Aden, Saudi Arabia, Iran, Dar-es-Salaam, and Durban. Hashim was listed to be from the Firangi Mahal. On Tabligh’s networks see Barbara Metcalf, “Travelers’ Tales in the Tablighi Jamaat,” *The Annals of the American Society of Political and Social Science* 588, no. 1 (2003): 136-48. On the importance of Durban in Indian Islam, see Nile Green, *Bombay Islam: The Religious Economy of the West Indian Ocean, 1840-1915* (Cambridge: Cambridge University Press, 2013).

²⁵⁸ The file associated him with the Raja of Mahmudabad.

²⁵⁹ NAI, Ministry of External Affairs, F. 41(155)/55-PS, Grant of Indo-Pakistan Passport to Shri Mohd. Hashim.

²⁶⁰ Nora Sheila Doss was assured she would retain her Indian domicile despite her marriage to an American citizen and residence there. Mohammad Bhai owned a business in Hyderabad and was granted citizenship despite having come to India on a Portuguese passport from Portuguese Mozambique, where he was born to an Indian father. Fateh Singh’s note in the T. Gomes files shows India’s Ambassador in East Africa, Apa Pant, pressured the Ministry to grant T. Gomes citizenship because of his family’s connections to the Indian National Congress in East Africa. Deborah Sutton, “Divided and Uncertain Loyalties,” provides crucial context for understanding the citizenship claims of Indians in East Africa. Pant served as the Indian Commissioner General in East Africa, which covered Kenya, Uganda, Taganyika, Zanzibar, Belgian Central Africa, and Congo. See in Pant, *Moment in Time*, 48-9. The archival records in the Gomes and Doss cases are from the NAI, MEA: Ministry of External Affairs-UK section, File No. K/54/6421, Citizenship of Mr. T. Gomes; Letter from Indian Embassy in Washington to the MEA (dated February 6, 1950), in Ministry of External Affairs-UK Section, File No. 43-21/49-UK, 1949, NAI, page 100.

²⁶¹ Shares in Pune co-operative housing society.

was issued a visa and instructed to register as a citizen in India.²⁶² Mohammad Bhai's claim to a business and lack of adverse record in Hyderabad admitted him. Though Mohammad Bhai was Muslim, he came from Portuguese Mozambique and had no Pakistan connections, which surely worked in his favor.²⁶³

The reference to immovable property as a marker of permanent intention for Indian domicile indicates the relationship between owning *immovable* property and the legal assessment of permanence. A series of statutes enacted between 1920 and 1956 in India granted first sisters, daughters, and widows and then wives rights to immovable property. In a pattern found also in America²⁶⁴ and, I argue, rooted in English law, women's property was cast as movable: utensils (*bhartan*), jewelry, and cash, items that could move with her person.²⁶⁵ But it was immovable property that was the initial basis for full political rights in nineteenth century England and America. The division between movable and immovable, and women's exclusion from the immovable, was a structuring principle of common law rather than a simple rule that could be easily amended.²⁶⁶ The historical roots of the propertied male political actor contributed to the endurance of property as a claim on citizenship in early post-colonial India.²⁶⁷

Domicile could not escape discretion. To demonstrate the permanent intention required for domicile, a man needed to exhibit certain economic and social characteristics.

²⁶² Contrast this with the difficulty NAI, Ministry of External Affairs, File No. 6-16/56-PSP 1956, "Long term Visa for Mr. G.E. Airan—note by the Prime Minister."

²⁶³ NAI, Ministry of Home Affairs, Foreigners Section, File No. 33/7/54-Re. Mohd Bhai.

²⁶⁴ Linda K. Kerber, "Why Diamonds Really Are a Girl's Best Friend: Another American Narrative," *Daedalus* 141, no. 1 (2012): 89–100.

²⁶⁵ The Hindu Succession Act in 1956 gave Hindu women immovable property rights last, after late colonial statutes rights to widows, sisters, and daughters between 1929 and 1956.

²⁶⁶ Though they introduced significant reforms, married women's property acts, whether in England, America, or India, could not undo the coverture-based structure of the law.

²⁶⁷ See discussion of gendered citizenship in the Introduction. The law of status must be considered in relation to social status and not just gender or religion. Access to land was structured through the scope granted to local customs of all kinds (and certainly not just religious) by the English revenue codification project in nineteenth century India.

Property holding in India would help, as would recommendations of good character by well-placed politicians or officials. An applicant needed to avoid activities that could be construed as anti-national, provide a record of “good conduct,” and somehow assimilate.²⁶⁸ Contact with Pakistan was viewed very suspiciously, all the more so if it could be shaded in any way political. Discretion could be used to deem a man disloyal and disqualify him from citizenship or documents. Once a husband’s domicile was decided on these complicated grounds, women’s claims were simple because they were dependent. In these cases, the question of women’s loyalty did not arise, since their male relatives’ identities determined their identities. The next section examines how India’s Supreme Court balanced women’s loyalty and dependence.

Married Women’s Migration in the Courts, 1950-5

A married woman's dependent domicile was “steadfastly maintained”²⁶⁹ in the bureaucracy. At first the judiciary adopted a similar position. In the first five years after the Constitution, the Supreme and High Courts heard twenty-one citizenship cases.²⁷⁰ The outcomes in the five discussed here hinged on women’s domicile. In the first four, state High Courts upheld a woman’s legal dependence on her husband or father. In 1955, with its unanimous decision in *Kumar Amar Singh*,²⁷¹ the Supreme Court reversed this trend. The

²⁶⁸ NAI, Ministry of Home Affairs, Foreigners Section, File No. 33/7/54-Re. Mohd Bhai, see p. 4.

²⁶⁹ Lord Greene, *Re Luck’s Settlement Trusts* (1940 Ch 864; 1940 3 All ER 307, Court of Appeal). At p. 419 in Morris & North, *Cases and Materials*.

²⁷⁰ Sixteen of these cases dealt with questions of the constitutionality of Partition statutes and regulations vis-à-vis fundamental rights enshrined in the Constitution (seven cases), questions of basic legal facts regarding citizenship status and property rights of evacuees (seven cases), criminal guilt (one case) and children’s domicile and guardianship (one case).

²⁷¹ *The State of Bihar vs. Kumar Amar Singh and Others*, 1955 AIR 282 (Supreme Court). Also discussed by Zamindar, *Long Partition*, 110-11.

Supreme Court accepted that a woman could migrate on her own will but only within the narrow scope of her decision to migrate to Pakistan.

The petitions that gave rise to the 1955 Supreme Court decision came from the eastern Indian state of Bihar.²⁷² There, Rani Sayeedah Khatoon held a substantial Muslim religious endowment or trust (called a *wakf*).²⁷³ The State of Bihar claimed the right to expel Rani Sayeedah because Article 7 excluded from citizenship those who migrated to Pakistan, and Rani Sayeedah's trips to Pakistan constituted migration. She went, she claimed, to visit her *hakim* [traditional doctor], who had moved to Karachi from Bihar during Partition. Rani Sayeedah came home first in 1948 on a temporary permit. To obtain this permit, she listed her domicile as Pakistan. When she came back to India from her second visit to Karachi in 1950, she successfully obtained a permanent return permit from the Indian authorities in Pakistan. However, the State of Bihar cancelled the permit because she listed her domicile as Pakistan to get the first, temporary permit in 1948.

Rani Sayeedah challenged the State of Bihar's orders against her before the Patna High Court, which found in her favor. She was an Indian citizen due to her marriage to a man with Indian domicile. Her husband remained in India during her two trips. The Court relied on what it viewed as well-settled doctrine that the married woman's domicile was the same as her husband's. In addition, the Court made a pragmatic, policy-oriented argument about the importance of the unity of the family: "It is obvious that to permit a married woman to acquire a domicile distinct from that of her husband would be to undermine the marriage tie &, indeed, render the purpose for which the marriage was contracted no longer

²⁷² *Sayeedah Khatoon and Ors. vs. State of Bihar Ors.*, AIR 1951 Pat 434. Rani Sayeedah seems to have come from a different class than the migrants discussed in Papiya Ghosh, "Partition's Biharis," *Comparative Studies of South Asia, Africa and the Middle East* XVII, no. 2 (1997): 21-34.

²⁷³ As both trustee and beneficiary.

capable of performance.”²⁷⁴ The English definition of domicile dependent on the husband was congruent with Indian systems of personal law, argued the decision. At the same time that the Court acknowledged the historical roots of this doctrine in British common law, it also argued for its local compatibility with Indian systems of personal law.²⁷⁵

In 1954 the Allahabad High Court followed suit in a similar situation.²⁷⁶ In 1953 the Bombay High Court also strictly applied the rule of domicile to find that *Karim un Nissa* could be expelled from India.²⁷⁷ Originally from Nagpur, the petitioner had gone with her husband to Pakistan during Partition. When he died a few years later, she returned to India with her young children, but her legal domicile remained Pakistani due to her marriage. The High Court regretted to find against her but decided it had no choice, allowing the deportation to take place but strongly encouraging Indian authorities to register her on moral grounds.²⁷⁸ The rule of dependent domicile was strictly applied: wives were invariably dependent on their husbands. The practical outcomes of this dependence sometimes worked in favor of and at other times opposed wives’ interests.

²⁷⁴ On the comparisons and relationships between Indian personal law and canon law, see Lariviere, “Justices and Panditas.” It is interesting to compare the public nature of the marriage tie acknowledged by Justice Shearer in this quote with historian Hendrik Hartog’s observation that, in America, marriage was described as a matter of public policy in the mid-nineteenth century. Hendrik Hartog, “What Gay Marriage Teaches Us About the History of Marriage,” *History News Network*, August 8, 2005, <http://historynewsnetwork.org/article/4400>, last accessed April 21, 2015.

²⁷⁵ On the significance of British colonial rule in Hindu and Muslim law see Anderson, “Islamic Law and the Colonial Encounter”; Cohn, “Law and the Colonial State”; Kugle, “Framed, Blamed and Renamed”; and Lariviere, “Justices and Panditas.”

²⁷⁶ The two wives went to Pakistan with their natal families but returned to their husbands who had remained in India. Though the women physically undertook the journey to Pakistan with their fathers, both were married before they undertook these journeys, and their husbands remained in India. Though they physically left the country, the dominance of the husband’s domicile gave them the right to remain in India, as it had for Rani Sayeedah before the Bihar High Court. C. J. Malik and Sapru, J., *Mst. Allab Bandi and Anr. vs UoI and Anr.*, 1954 All AIR 456 (Allahabad High Court 1953).

²⁷⁷ Originally from Nagpur, the petitioner went with her husband to Pakistan during Partition. When he died a few years later, she returned to India with her young children. But her domicile remained Pakistani due to her marriage. The High Court regretted to find against her but decided it had no choice, allowing the deportation under the Indian Passport Act of 1920 and Rules of 1950 to take place but strongly encouraging Indians authorities (presumably in Pakistan) to register her on moral grounds. *Karimun Nissa and Ors. vs. State Government of Madhya Pradesh and Anr.*, (1955 CriLJ 28), Bombay High Court, 1953.

²⁷⁸ Mitra Sharafi, “The Semi-autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law,” *Indian Economic and Social History Review* 46, No. 1 (2009): 57-81.

In 1955 the Supreme Court accepted the State of Bihar's appeal in the Rani Sayeedah case, assigning it to a five-justice Division bench.²⁷⁹ The large bench reflected the importance with which the Court viewed the issue. The Justices all agreed that Rani Sayeedah was not an Indian citizen. They upheld the validity of the evacuee property laws under which the State of Bihar sought to label Rani Sayeedah's *wakef* (trust) evacuee property, divesting her and her family from it.²⁸⁰

The Supreme Court found that the High Court's earlier decision had incorrectly applied the Constitution's citizenship articles. According to the Supreme Court, Rani Sayeedah's national status depended not on her husband but on her own migration. In other words, married women's legal independence was recognized, but only in the very narrow context of migration to Pakistan. Since only Muslims migrated to Pakistan from India, it is possible to say that Muslim women were the first women in India to gain legal independence of nationality. This independence was not helpful but harmful, excluding them from Indian citizenship.

Article 7 did allow some migrants to Pakistan to claim Indian citizenship, but only if they came to India on the proper return permit. Obtaining valid permits was a difficult feat, as Rani Sayeedah's case indicated. The return permits she obtained from the Indian government in Pakistan allowed her to cross the border back into India, but her home state of Bihar never consented to these permits.²⁸¹ Without valid permits, she could not remain

²⁷⁹ The bench consisted of Justices B. Jagannadhadhas, Sudhi Rajan Das, N.H. Bhagwati, T.L. Venkataram Aiyar, and B.P. Sinha. The Indian higher judiciary simultaneously occupies many different jurisdictions such as constitutional, criminal, and advisory.

²⁸⁰ *The State of Bihar v. Kumar Amar Singh*, 1955 AIR 1263. A. Sinha suggests that this ruling also calls into question the decision in *Mst. Allah Bandi*, though no specific mention of that case is made in *Kumar Amar Singh*. See A.N. Sinha, *Law of Citizenship and Aliens in India* (New York: Asia Publishing House, 1962), 83-5.

²⁸¹ Because law and order was a state subject, the state executives were responsible for enforcing the permit system and initiating legal action in case of violation.

permanently in India. As the Court itself pointed out, the 1949 Permit System Rules²⁸² provided “that every permit issued under the rules shall be liable to cancellation at any time, without any reason being assigned by the issuing authority.”²⁸³ Though subsequent legitimation of children was barred, subsequent cancellation of permits was certainly allowed.

The Supreme Court’s decision in favor of married women’s independent intent was limited to migration to Pakistan. In other arenas of the law, the strict rule of a wife’s dependent domicile continued to operate as it always had. For example, Calcutta-based Rosetta Attaullah lacked the requisite domicile to avail of the Indian Divorce Act. She wanted to divorce her husband, a Peshawar native, under the 1869 Act for Christians. But the Act required Indian domicile for both parties, which, by virtue of her marriage to a Peshawar native, Rosetta lost.²⁸⁴ She claimed that, despite her marriage and despite Partition and Independence, she still held a British Indian domicile. But the High Court in 1953 reasoned that her husband did not: “the State known as British India disappears... from the map of the world, it is impossible for a person to retain either the nationality or the domicil [sic] of British India.”²⁸⁵ Rosetta could not get her divorce. Marriage assigned Calcutta-based Rosetta a location in Peshawar due to her husband’s link with the city. For both Rosetta and Amirunnissa, also married to a man from Peshawar, marriage upturned any semblance of a practical relationship between affective ties and legal identity.²⁸⁶

²⁸² Framed under the Influx from Pakistan (Control) Act of 1949, Rule 29. The Control Act was designed to help regulate the continued inflows of refugees on its eastern border. Indian statutes typically delegate the power to frame rules on certain issues to the relevant executive Ministry. These rules structure much of how Indian law is practiced. This represents the one major arena of executive power.

²⁸³ *Kumar Amar Singh*, 1265.

²⁸⁴ Chapter Three discusses the question of jurisdiction and English poor law.

²⁸⁵ *Kumar Amar Singh*, para 31

²⁸⁶ RP Mookerjee, K. Chunder, and Lahiri, J., *Mrs. Rosetta Evelyn Attaullah vs. Justin Attaullah and Anr.*, 1953 AIR Cal 530 (Calcutta High Court). As a domicile case, this decision illustrates that domicile operated in many arenas of the law besides citizenship. The idea of the unity of matrimonial home and husband in marriage and maintenance laws is discussed further in Chapters Three and Four.

The Supreme Court did not question the general principle that a wife's domicile followed her husband's. It split the wife's domicile from her husband's only due to the provisions of Article 7 of the Constitution, which barred citizenship to almost all migrants to Pakistan. Dependence of domicile held the field, chipped away at only in the narrow arena of a disloyal and perhaps even disobedient Muslim wife who crossed the border to Pakistan on her own volition.

Dissent Over Descent: The Indian Citizenship Act of 1955

After the Supreme Court's decision in *Kumar Amar Singh* in February, Parliament enacted the Indian Citizenship Act in December 1955.²⁸⁷ The Act provided an important boost to women's independence of citizenship. It granted married women independence of nationality, meaning that the wife of an Indian man could choose to take on his nationality but need not necessarily do so. At the same time, the Citizenship Act also enacted citizenship-by-descent through the patrilineal line for Indians born abroad after 1950. The tensions between these two different aspects of the Act with respect to women's citizenship are explored in this section through an examination of the debate between Home Minister Govind Ballabh Pant and Parliamentary Secretary Lakshmi Menon.

When it enacted the citizenship articles of the Constitution in 1949, the Constituent Assembly delegated to future Parliaments the power to legislate on citizenship. Though part of its Constitution, India's law of citizenship could be amended by simple statute rather than the more laborious Constitutional amendment process.²⁸⁸ The archives of the ministries

²⁸⁷ India's first post-Independence elections were held in 1951-2, and the first elected Parliament met in 1952.

²⁸⁸ Constitution of India, Article 11. This question is by no means so simple for the other sections of the Indian Constitution, especially the Fundamental Rights of social and economic equality and civil liberties in Part III of the Constitution. Specifically, the requirements for the amendment of the Fundamental Rights have

suggest that bureaucrats and politicians assumed that citizenship law in India would be further refined by statute on a priority footing.²⁸⁹ In 1952, the Home Ministry circulated a draft citizenship bill with a stern but ineffectual warning that “the introduction of the Bill will not be held over for the comments” it requested from state governments.²⁹⁰ It was in *this* interregnum that Amirunnissa in Madras found herself stranded.

Despite the 1952 warning, it was not until May 1955 that the Congress Government²⁹¹ could introduce the Citizenship Bill to the Lok Sabha. With independent India’s second round of national elections just about a year away, the Election Commission needed to create voter rolls. This added urgency to the Indian National Congress-led Government’s ambitious legislative agenda, which also included its package of family law reforms.²⁹² After two rounds of debate Parliament passed the Citizenship Bill in December 1955. The Parliamentary debates evidenced a remarkably high level of awareness among

given rise to the two most important cases in India’s constitutional history, *Golak Nath* and *Keshavananda Bharti*, both on the basic structure doctrine.

²⁸⁹ As early as January 1950 Fateh Singh, then Deputy Secretary in the MHA, seemed to think that the new citizenship Act would be passed soon. See NAI, Ministry of Home Affairs, Foreigners II section, File No. 33/3/50-F. II, 1950, “Recruitment to services—latest position re: non-Muslims who have migrated from Pakistan,” 5.

²⁹⁰ NAI, Ministry of Home Affairs, F. II 33/41/52 F. II, “Draft Citizenship Bill Circulation to the State Government Mission Abroad,” 2, in 1950 and 1951 the Ministries of External Affairs, Rehabilitation, and Law, closely tracked the developments relating to the Pakistan’s citizenship law with a particular eye toward the position of Hindus in Pakistan. NAI, MEA, Pakistan I, Progs. No. 18(2)-PI 1951 (Pakistan Citizenship Bill) for this concern and a similar file from the previous year, NAI, MEA, File No. F. 23 (86) Pak III/50, Ministry of External Affairs, Pakistan III Branch, “Subject: Pakistan Citizenship Bill (D. 7090-Pak. III/50)” 1950.

²⁹¹ I capitalize here to indicate I am discussing the Congress party’s representative Government in Parliament, which in theory if not in practice could have been recalled if it lost its majority. This is in contrast to the government institutions that would continue to function no matter who was in power.

²⁹² Regarding the Election Rolls, see Shri BK Das’s comment in the Lok Sabha on August 9, 1955 when the motion to refer the Bill to a Joint Select Committee was being debated. Col. 9721. A note from the Ministry of Home Affairs from October 1954 seemed to imply a meeting to finalize the Citizenship Bill was held around that time. See NAI, MHA, File No. 99/54 Judicial, Ministry of Home Affairs-Judicial, 1954, Subject: Proposal to include in the draft Citizenship Bill provision prohibiting recruitment of Indians on Indian soil in the military service of the foreign countries. On the topic of registering voters for elections, see David Gilmartin, “One Day’s Sultan,” *Contributions to Indian Sociology* 43, no. 2 (2009): 247-84. Certainly Ambedkar’s resignation as Law Minister in 1951, and perhaps the earlier constitutional duel with President Prasad, contributed to the delay. The departure of Constitutional Advisor Sir B. N. Rau to the International Court of Justice in 1951 and his death in 1953 meant that the two most experienced voices on these highly complex legal topics were lost to the Government at nearly the same time. This is perhaps another reason for the delay.

Members about the major concerns and dictates of international law, a notoriously arcane and difficult subject.²⁹³

Aimed at Indians born on or after January 26, 1950, the Citizenship Act added to rather than replaced India's Constitutional law of citizenship. Under the Act, the vast majority of Indians gained their citizenship through the straightforward citizenship-by-birth in India provision. After citizenship-by-birth, the next most common routes to citizenship would have been citizenship-by-descent for Indians abroad and citizenship-by-registration for several different groups.²⁹⁴

The Government took its commitment to Indians abroad seriously²⁹⁵ and the Bill provided citizenship-by-descent for Indians born outside of India.²⁹⁶ The controversial aspect of this section was that it did not go far enough in casting its wide net over diasporic Indians. It granted citizenship through only the father's line.²⁹⁷ At the same time, the Act granted a non-Indian wife independence of nationality. A non-Indian woman *could* register as

²⁹³ Two especially important themes of these debates were the question of adjudging disloyalty and the bounds of executive discretion in depriving someone of citizenship which would result in the deprivation of some Constitutional rights. Most Fundamental Rights applied to "persons" but some only applied to citizens including Article 15 (prohibition of discrimination); Article 16 (equality of employment), and Article 17 (freedom of expression and speech, assembly, association, movement, and residence), and Article 29 (right to language, script, or culture). For the difficulty of private international law see the letter of the great master Dicey himself to Keith in 1907, A.V. Dicey and Arthur Berriedale Keith, *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith*, eds. Ridgway F. Shinn and Richard A. Cosgrove (Lanham, MD: University Press of America, 1996), 22.

²⁹⁴ The ICA also allowed citizenship by naturalization and citizenship by acquisition of territory, but these would have been comparatively rare. Section 5, Citizenship by Registration granted citizenship to "persons of Indian origin" who resided in India for six months; "persons of Indian origin" resident abroad; women married to Indian citizens; minor children of Indian citizens, and citizens of certain Commonwealth countries.

²⁹⁵ This 1955 statute first used the term "persons of Indian origin" for the children and grandchildren of a person born in undivided India. "Persons of Indian origin" is a category still in use today for Indians abroad; it grants them a legal status in India without trading on their claims to citizenship in their home countries. Chapter 1 discusses the evolution of this policy in 1946-50 in greater detail.

²⁹⁶ Indian Citizenship Act (ICA) [No. 57 of 1955, with effect from December 30, 1955], s. 4(1). Clause 4(1) runs "A person born outside India on or after the 26th January, 1950, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth." Indians outside of India could also register with a "prescribed authority" such as an embassy," under s. 5 of the Act.

²⁹⁷ ICA 1955, s. 5, "Citizenship by Registration."

an Indian citizen if she so desired, but her taking on Indian citizenship was not automatic.²⁹⁸

The Government suggested that this reform was sufficient. Critics insisted that, despite the value of married women's independence of nationality, limiting citizenship-by-descent to the patrilineal line contravened the Constitution.

From the start of the Parliamentary debates until after the final vote, Members of Parliament (MPs) criticized that approach. When the Citizenship Bill was circulated to state governments for comments and suggestions, the state government of West Bengal had criticized the approach.²⁹⁹ The very first MP to speak in this debate, Ashoka Mehta, a Congress representative from Maharashtra,³⁰⁰ pointed out that the children of Indian mothers married to non-Indian fathers were not treated on par with the children of Indian fathers married to non-Indian women.³⁰¹ Criticism came from within the Congress party as well as from left parties such as the Kisan Mazdoor Praja and Communist Parties.³⁰² I structure my discussion of the debates around the exchanges between two key figures, both

²⁹⁸ ICA s. 5(1)(c). This was part of a global concern about married women's citizenship that made its impact felt through questionnaires and research, international conferences, and international publications and correspondence. For example, in 1960 and 1961 the National Council of Women in India responded to a survey from its parent organization, the International Council of Women, about changes in nationality laws and their impact on children. See also Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage and the Law of Citizenship* (Berkeley: University of California Press, 1998).

²⁹⁹ Three years earlier, in response to a request for feedback on the draft Bill, the West Bengal state government noted the gender inequity in the proposal, finding it inconsistent with the impression "the Bill is intended to include the widest possible category of potential Indian citizens." NAI, MHA, Home F. II 33/41/52 F. II "Draft Citizenship Bill Circulation to the State Mission Abroad." The file also contains responses from Uttar Pradesh, Madhya Pradesh, Madras, Assam, Burma and Nairobi.

³⁰⁰ Lok Sabha Debates [LSD], August 5, 1955. Asoka Mehta (1911-84) represented the Bhandara district for the Congress party & served in the Lok Sabha in the first Lok Sabha (1952-7), second Lok Sabha (1957-62) and fourth Lok Sabha (1967-70). He later served as the Cabinet Minister of Planning, Social Welfare and Petroleum and Chemicals at various dates between 1966 and 1968. *Indian Parliamentary Companion*, 309.

³⁰¹ Lok Sabha Debates [LSD], August 5, 1955, col. 9483-4.

³⁰² Such as Renu Chakravarty from the Communist Party in West Bengal (LSD, 9505, August 5, 1955); MS Gurupadaswamy from the Kisan Mazdoor Praja [Farm Workers' Party] from Mysore (LSD, 9469, August 8, 1955); SV Ramaswamy from the Congress in Madras (LSD, 9651, August 8, 1955); SVL Narasimhan, an Independent from Guntur, Andhra (August 8, 1955, col. 9673); Veeraswamy, an Independent from the Scheduled Caste constituency of Mayuram, Madras (LSD, col. 9691-9748, August 9, 1955); Mulchand Dube from the Congress in Uttar Pradesh (Farrukhabad); and NR Muniswamy from Wandiwash (LSD, August 9, 1955, 9726). Biographical data drawn from relevant entries in the *Indian Parliamentary Companion: Who's Who of Members of Lok Sabha* (New Delhi: Lok Sabha Secretariat, 2003).

from the Uttar Pradesh Congress Party: Home Minister G. B. Pant and Parliamentary Secretary Lakshmi Menon.

Govind Ballabh Pant was the grand old man of Congress politics in Uttar Pradesh and was, by this time, rewarded for his loyalty to Nehru with the Home portfolio in Delhi.³⁰³ As Home Minister, Pant defended the Government's Citizenship Bill in Parliament in the second half of 1955. Pant's first argument was both pragmatic and ideological, suggesting that, if Indian nationality could be passed through both mother and father, national identities would fragment and loyalties would be difficult to assess. He acknowledged that dual citizenship was a necessary evil because Indians abroad had ties to those countries as well as India.³⁰⁴ But if the principle went too far, "then we may have to be prepared for triple or six-fold citizenship."³⁰⁵ Citizenship by descent should be limited to only the male line in order to prevent the proliferation of citizenships and competing allegiances. To some extent, multiple nationalities would be impossible to avoid, but should nationalities proliferate overmuch, the Indian state would not be able to adjudge loyalty.³⁰⁶ This concern was likely shaped by both the context of Partition and the millions of overseas Indians who could claim one of several different nationalities. Pant also admitted "We have taken this provision bodily from the British Nationality Act."³⁰⁷ This helped ensure that India's citizenship law would fit into the complex international regime of nationality law: India's nationality law should not cause conflicts or work against international trends in nationality law. "There [in the British Act] I

³⁰³ In the rivalry between Nehru and Purushottam Das Tandon in the early 1950s. Page 2 of "Sweet Sour Remedies" by Ajit Prasad Jain, NMML manuscripts collection, private papers of A.P. Jain (serial no. 63).

³⁰⁴ Lok Sabha, August 9, 1955, col. 9734.

³⁰⁵ Ibid.

³⁰⁶ Article 7's inclusion indicates ensuring loyalty was one of the discursive emphases of the ideology of nationalism.

³⁰⁷ The British Nationality Act (1948, 11 & 12 Geo. 6, Ch. 56) stated that "Subject to the provisions of this section, a person born after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by descent if his father is a citizen of the United Kingdom and Colonies at the time of the birth: ..."
See Pant's comments at Lok Sabha Debates col. 9734, August 9, 1955.

think women have been treated with courtesy and respect,” Pant stated in defense of the provision.³⁰⁸ But borrowing from the British Act opened the Government to charges of imitative adherence to English law despite India’s newly independent status.

Pant also justified citizenship by patrilineal descent by pointing to what was, in his view, a tradition of patrilineal descent in India.³⁰⁹ Pant argued that Indian tradition was patrilineal and preserved the “sublime status” of Indian mothers: “In our country too in the olden days the highest virtue that one could earn was to be called the mother of the man addressing her. So that is the sublime status that women occupied as such.”³¹⁰ Pant’s use of the term “olden days” is reminiscent of the “rise-and-fall” narrative of women in ancient India promoted by Indian nationalist histories of women. In this view, women in ancient India occupied a revered position, but suffered a loss in social status and respect as Hindu culture was degraded under Delhi Sultanate and Mughal rule.³¹¹ It was the project of Indian nationalism to restore women to their previous “sublime status.” Pant suggested there was no question of discrimination against Indian mothers because Indian women were honored as mothers, even if the Citizenship Act did not grant their children citizenship.

Pant, not always consistent, also suggested that the discrimination in the patrilineal citizenship provision was balanced by the grant of married women’s independent nationality.³¹² Moreover, the Government planned to ameliorate women’s exclusion from

³⁰⁸ Lok Sabha Debates, August 9, 1955, col. 9734.

³⁰⁹ However Indian personal law had always granted a great deal of scope for India’s matrilineal cultures, especially in the south. See J. Devika *En-gendering Individuals: The Language of Re-forming in Twentieth Century Keralam* (New Delhi: Orient Longman, 2007) and *Individuals, Householders, Citizens: Malayalis and Family Planning, 1930-1970*; G. Arunima *Here Comes Papa*; Janaki Nair, *Women and Law in Colonial India*.

³¹⁰ Lok Sabha, August 9, 1955, col. 9734. Uma Chakravarti’s essay “Whatever Happened to the Vedic Dasi?” in the seminal volume *Recasting Women: Essays in Indian Colonial History*, ed. Kumkum Sangari and Sudesh Vaid (New Brunswick, N.J.: Rutgers University Press, 1990), 27-87. A. S. Altekar, *The Position of Women in Hindu Civilisation, from Prehistoric Times to the Present Day*, 2nd ed. (Delhi: Motilal Banarsidass, 1956).

³¹¹ The ideas of “Hindu culture” and “Muslim rule” are deeply problematic and I strongly disagree with them. Sometimes colonial rule was assigned responsibility for degrading women’s status.

³¹² Lok Sabha, August 9, 1955, col. 9734.

inheritance with its Hindu Succession Bill.³¹³ Rather than extending that principle to citizenship-by-descent, Pant suggested these two reforms were sufficient. The Succession Act would not change what Pant saw as “the deep-seated sentiments of the people” who, according to him, “can think only of the continuance of the lineage in the paternal line.” The matrilineal traditions of India found no space. In Pant’s view, the Succession Act and married women’s choice of nationality were minor changes to the overarching structure of the law, which rightly privileged the legal identity of the husband.

The Joint Select Committee³¹⁴ chaired by Pant featured only one female member out of forty-five, Anasuyabai Kale, a representative of the Congress Party from Maharashtra.³¹⁵ Only one of the six notes of dissent addressed the gender inequity of the provision. By H. N. Mukerjee, M.N. Das, and JVK Vallabharao,³¹⁶ the note argued, “we have been fairly lavish in the bestowal of citizenship rights on different categories.”³¹⁷ Why should citizenship rights not be extended to the children of Indian mothers abroad? The trio disagreed with Pant’s pragmatic argument that citizenship-by-descent in both the maternal and paternal line would

³¹³ Ibid. The Succession [inheritance] Bill was part of the Hindu Code reforms discussed in the next chapter. As it turns out, the Succession Act’s reforms were less effective in this regard than might have been hoped, proving Pant correct. The Hindu Succession Act did grant inheritance rights to daughters, but in most states these rights did not apply to agricultural property, where the vast majority of India’s wealth is held. The most important commentator on this topic is feminist economist Bina Agarwal, who spearheaded a successful 2005 campaign to amend the Hindu Succession Act in this regard. See Bina Agarwal’s comprehensive *A Field of One’s Own: Gender and Land Rights in South Asia* (Cambridge: Cambridge University Press, 1994).

³¹⁴ See Deputy Speaker in Lok Sabha debates, August 9, 1955, around 9747. The Draftsman was R.S. Sarkar, a Joint Secretary and S.A. Draftsman in the Ministry of Law. The Secretariat was represented by N.N. Mallaya, Deputy Secretary, and P.K. Patnaik, Under Secretary. The complete list of members is found in *Gazette of India*, Part II, Section 2, No. 49A, Monday, November 21, 1955, pp. 702A-702Z.

³¹⁵ Anasuyabai Kale (b. 1896) represented Nagpur in the Lok Sabha from 1952-7. Prior to that she had been a nominated member of the CP and Berar Legislative Council (1928) and served as Deputy Speaker of the Central Provinces Legislative Council in Nagpur (1937). She had also been active in the AIWC as well as the Congress, prior to independence. Shanta Bhatt, *Profiles of Women Parliamentarians of India* (Udaipur: Shiva Publishers, 1995), 616-17.

³¹⁶ The other dissenting notes were by Raghuraj Sahai, NP Nathwani, Lanka Sundaram, the trio of HV Kamath, Sarangadhar Das and BC Ghose, and HN Kunzru. They addressed issues such as the naturalization and deprivation processes, the position of overseas Indians and the question of whether a corporation should be a citizen. See Report, pp. 702F-702P. According to its Report, the Committee met four times: on 23 September, 11, 12 and November 20, 1955. *The Gazette of India* Extraordinary, Part II-Section 2, No. 49A, Monday, November 21, 1955, para. 2, p. 702C.

³¹⁷ Ibid., 702G.

create too many nationalities. Instead they based their argument in equality, arguing “The implied discrimination against [women] should go...”³¹⁸ After its four meetings in the autumn of 1955, the Joint Select Committee did not recommend any changes to the citizenship-by-descent provisions.

When the Bill came up for final consideration in the Rajya Sabha in December, Lakshmi Menon, a leader in the All-India Women’s Conference, argued that the provision was unconstitutional:

Generally speaking, the Bill is much more restrictive than article 5 of our Constitution. Here for the first time you find distinctions made between male and female, father and mother, married women who are married to foreigners, etc. All these, I think, contravene the very generous principles which are embodied in our Constitution with regard to citizenship.³¹⁹

Menon held a law degree from Lucknow University and in 1944 published *The Position of Women*, a short but comprehensive report on the status of women in India.³²⁰ If anyone understood the implications of the tangle of laws for women’s status it would be Menon.³²¹

Menon proposed changes to both clause 4 and clause 5. First, she would have opened citizenship by descent to both mothers and fathers arguing, “Wherever there is ‘father,’ it must say ‘parent.’” Second, for Menon, married women’s independent nationality was not enough; she wanted to press the principle of gender equality even further. She moved that the non-Indian wife *or husband* of an Indian citizen be given the choice to register as an

³¹⁸ Ibid.

³¹⁹ Rajya Sabha Debates, December 13, 1955, Smt Lakshmi Menon (Parliamentary Secretary to the Minister for External Affairs), around col. 2388.

³²⁰ Menon later served as Deputy Minister of Executive Affairs from 1957-62. Lakshmi N. Menon, *The Position of Women*, Oxford Pamphlets on Indian Affairs 2 (Bombay: Oxford University Press, 1944).

³²¹ As also see discussion of Seeta Parmanand in the footnotes below. She worked on the equally difficult Succession law.

Indian citizen.³²² Menon went on to argue, "...right through the Bill you find this kind of discrimination which is unfair and which in my opinion also contravenes the Constitution." Menon derided Pant's earlier argument about the proliferation of nationalities as a "fantastic calculation" and "an absurd and a fallacious example given by some very imaginative member of the Law Ministry or the Home Ministry."³²³

Recalling the incident later in life, Menon noted that Pandit H. N. Kunzru warned her she would be "sacked" from her position as Parliamentary Secretary for deviating from the Congress Government's party line. Kunzru, a champion of diasporic Indians' rights, nevertheless agreed to speak in support of her position.³²⁴ Menon later attributed her decision to break with the Government line to her lack of knowledge about Parliamentary conventions. Here Menon's position as a woman's activist conflicted with her prominent position in the government. The next day the Deputy Home Minister³²⁵ felt obligated to clarify that Lakshmi Menon's amendments were personal, not those of the Government. Menon's amendments, and others like them, were rejected.³²⁶ This aspect of the Citizenship

³²² She also recommended that "father" in clauses 3(2) (a) and (b) should be changed to parent. These clauses dealt with those who would be excluded from citizenship by birth in India such as children of fathers resident in India but with diplomatic immunity or who were enemy aliens.

³²³ Rajya Sabha Debates, December 13, 1955, Lakshmi Menon (Parliamentary Secretary to the Minister for External Affairs), col. 2388.

³²⁴ Even though Kunzru served on the Joint Select Committee, he was not a member of the group that supported changes in these provisions. Lakshmi Menon wrote about this episode in a brief essay on her relationship with Nehru. "Once I moved an amendment to the Citizenship Bill because there was a discriminatory clause in it which I thought should not find a place in the bill. I was Parliamentary Secretary then but was not knowledgeable enough to know that I should not have done it. I was happy when Pandit Kunzru said 'Madam, you will be sacked; but I am going to support the amendment.' Pandit Kunzru made a moving a speech and said that P.M. was not wisely advised etc. Well, I had to withdraw the amendment of course, I was not sacked." In the same essay Menon described Nehru's commitment to resolving the canal waters dispute with Pakistan and his position on stateless Indians in Ceylon. This (serial 24) is found in Lakshmi Menon's papers in Personal Paper Collections, Nehru Memorial Museum and Library, New Delhi. Kunzru was a well-known advocate for the position of Indians abroad. For example, Y.D. Gundevia's memoir notes that at this time he was a minister in Home Affairs, and he turned to Pandit Kunzru for help in trying to influence the new citizenship law. See Gundevia's memoir, *Outside the Archives*, 50-60.

³²⁵ Balwant Nagesh Datar.

³²⁶ Important changes introduced in the Bill after the Select Committee's report included: 1) the question of the process refugees from Pakistan would have to go through to register as citizens and 2) a guarantee by Nehru barring the grant of citizenship rights to citizens of countries that discriminated against Indians resident there.

Act was not changed until 1992. When the Deputy Home Minister again explained that the descent through the male line was based in English and Commonwealth legal principles, Lakshmi Menon interrupted to ask, “Can’t we have a law of our own?” after which the debate moved on.³²⁷ Menon suggested that the post-colonial state would do better by its citizens by scrupulously adhering to the principles of gender equality laid out in the Constitution and not by accepting patriarchal colonial legal practices.

The ICA’s patrilineity was justified by the allowance of married women’s independence of nationality, Hindu family law reforms, and appeals to Indian tradition, which, in this ideology, simultaneously honored mothers and adhered to the paternal line. The paternal line was maintained for diasporic Indians through the citizenship-by-descent provision despite criticism that it was unconstitutional and out of line with the spirit of gender equality. The Government’s response was that allowing citizenship by descent through father and mother would create fractured loyalties and unwieldy administrative complications.

This was in response to the concern raised in the Parliament about South African discrimination against Indians, since under section 11 reciprocal citizen rights would be granted to Commonwealth citizens.
³²⁷RSD, December 14, 1955, col. 2613-4, debate on clause 4 amendments. Just after the Rajya Sabha approved the Bill, another important female MP, Seeta Parmanand, made a brief interruption in the Parliamentary proceedings. Parmanand was the author of a piece called “The Hindu Succession Bill and the Socialist Pattern of Society” and a member of the Joint Select Committee on the Hindu Succession Bill. Like Menon, she was active in the All India Women’s Conference. That her speech came too late, only after the final vote on the Bill, did not stop Parmanand from criticizing the citizenship-by-descent provision on Constitutional and human rights grounds. The Deputy Home Minister responded by stating only that he would accept the challenge of a future amendment to the Bill. *Rajya Sabha Debates*, December 14, 1955, col. 2657

Persons of Indian Origin and Wives, 1955-60

The 1955 ICA substantially clarified married women's citizenship and greatly expanded the routes by which Indians resident abroad could apply. Executive discretion at the state and national level also continued to play a key role in citizenship law. In June 1958, the Rajasthan state government asked New Delhi which pathway to citizenship Pakistani women who married Indian men should take. They could either be registered on the basis of their six months' residence in India as "persons of Indian origin" or they could be registered on the basis of their marriage to an Indian citizen and one year's residence in India. The distinctions between these two categories are seemingly minor, but there are some important differences. Under the Act, persons of Indian origin could be deprived of citizenship by the Central Government in summary fashion.³²⁸ A wife's claim on citizenship by marriage was more secure, though it required twelve rather than six months' residence.³²⁹ Created by the ICA, the category of "person of Indian origin" (PIO) has been an enduring one.³³⁰

In August 1958, the Ministry of Home Affairs in New Delhi responded that "there was no objection" to such women being registered as citizens by six months' residence.³³¹ However, the matter did not end there. Repeating a pattern now familiar, the Rajasthan government sent a follow-up question, giving the New Delhi ministries a chance to revise their policy. Should "Pakistani ladies" who *divorced* Indian men be registered under the residence provision or the marriage provision? Fateh Singh, by now a Joint Secretary in the

³²⁸ See s. 10 ICA and discussion in A.N. Sinha, *Law of Citizenship and Aliens in India*, 130-1.

³²⁹ See ICA s. 10(1) on the deprivation of citizenship.

³³⁰ In 2011 it was announced the PIO scheme would merge with the Overseas Citizens of India category (OCI) apparently in an attempt to make it easier for overseas Indians to do business in India: "PM Announces Merging of OCI, PIO Card-Indian Express," *The Indian Express*, January 8, 2011, <http://www.indianexpress.com/news/pm-announces-merging-of-oci-pio-cards/735090/>, last accessed April 21, 2015.

³³¹ NAI, MHA, File No. 6/48/58-IC 1958. Indian Citizenship Branch-Home Ministry. "Registration under the Citizenship Act 1955-Question whether Pakistani women who have come to India on migration certificates can be registered as Indian citizens under section 5(1)(a) or section 5(1)(c) of the Citizenship Act, 1955."

MHA, consulted with the Ministry of the Law and decided that these women should, despite their divorces, be registered citizens by marriage.³³² Fateh Singh reasoned, "... in such cases [of divorce] the chances are that the lady concerned will go back to her parents in Pakistan. It will only be in exceptional circumstances, e.g. where the lady has nobody in Pakistan to look after her, or she has close relatives in India, that she would remain in India. Such exceptional cases can be considered on individual merits and the State Government may be advised to refer such cases to the Government of India when they arise."³³³ The Home Ministry recommended that divorced women be registered as previously married citizens but if there was any doubt the file should be subject to further scrutiny. It was assumed that these women would not want to stay in India. This correspondence shows it was difficult to imagine married women as independent legal subjects even when statutory rights had been enacted.³³⁴ At the same time, providing such women citizenship as married women provided protection from summary deprivation of citizenship.³³⁵

The case of Ram Pyari of Burma prompted several rounds of debate between the Ministries of Home and External Affairs in New Delhi. The legal point that provoked this extensive exercise in genealogy was whether Burmese women of Indian origin should register as wives of Indians or persons of Indian origin. Another example of the difficulty in adjudicating identity, the correspondence indicates the "arbitrariness" of claims to

³³² Fateh Singh's note of October 8, 1958, in NAI, MHA, F. 6/56/58-IC, Home Ministry-Branch Indian Citizenship, 1958, "Subject: Registration under the Citizenship Act, 1955 and Registration of Pakistani ladies married to Indian nationals and later divorce-Question regarding-(Reference from the Govt. of Rajasthan)."

³³³ Ibid., page 4 and Serial No. 2.

³³⁴ A. N. Sinha notes, "According to an official press release twenty-three foreign women married to Indians had acquired Indian citizenship till September 1958. These were 12 from Pakistan, 2 from Ceylon, 2 from Czechoslovakia, one each from Austria, Burma, China, Luxembourg, Portugal, Russia, and one stateless, *The Times of India*, Delhi dated 9 November, 1958, page 5." Sinha, *Law of Citizenship*, 102, n. 111. However, I have not been able to locate this clipping in the *Times of India's* online archive.

³³⁵ Anupama Roy seems to have come across similar or the same correspondence on this topic, *Mapping Citizenship*, 68-9.

citizenship. Despite the clarifications provided by the new statute, the question of married women's citizenship still arose, and discretion was still employed in making decisions.³³⁶

Should she come on an Indian passport issued to her in Burma, after having been registered as a person of Indian origin resident abroad?³³⁷ Or, should she come to India on an emergency certificate instead, after which she could register upon six month's residence or as the wife of an Indian citizen? Initially, the MEA opposed Ram Pyari's immediate registration in Burma, saying "We need not make a gift of Indian citizenship to her for the short time that she is going to be in Burma."³³⁸ However, the MHA preferred that she register as a citizen in Burma so she could travel on a regular Indian passport. The MEA finally accepted this position even though, as its notes showed, "On merits the applicant has a poor case." Ram Pyari had not registered as a citizen under the Constitution when her husband did. In the eyes of the MEA this indicated a lack of commitment to India, though in reality it could have been the result of any number of factors. As the MEA put it, "The only point in her favor is that she is the wife of an Indian national [and] we discourage dual nationality in the same family."³³⁹ The MEA was willing to accept the MHA's recommendation to immediately register Ram Pyari, but it called for a more consistent application of the policy in the future. This time, the MHA prevailed and Ram Pyari could register in Burma as a person of Indian origin resident abroad.³⁴⁰

The Ministry of Home Affairs provided a list of women who had been in the same position as Ram Pyari. It gave five cases of women of Indian origin who were married to Indian men in Burma. In three cases, the wives were registered as persons of Indian origin,

³³⁶ ICA s. 5(1)(b). See Ram Pyari's application at accompanying letters at corres/1-5 of file.

³³⁷ ICA s. 5(1)(b). See page 8 of Ministry of Home Affairs, IC Section, File No. 5/217/59-I.C., 1959, Subject: 1) Smt. Ram Ryari w/o Stm. Bahadur Singh-Registration as an Indian Citizen under Sec 5(1)(?) of the Citizenship Act, 1955."

³³⁸ *Ibid.*, 6.

³³⁹ *Ibid.*, 7.

³⁴⁰ *Ibid.*, 8.

on their own merits as citizens abroad. In all three of these cases, the justification involved the women's family ties. The MHA justified these decisions with statements like, "Her registration was authorized on the basis of her husband's nationality."³⁴¹ The women's family ties, especially their marital ties, provided the basis for these women's registrations as Indians resident abroad.

But in the other two cases examined, the women had been rejected for citizenship as persons of Indian origin. It had been decided that the women were not of Indian origin and would have to come to India with their husbands and then register as the wives of Indian men after one year's residence. These women seemed not to differ in material ways from the women accepted as persons of Indian origin. The different outcomes in the two sets of cases are a clear example of the use of discretion by the administrators of Indian citizenship law.

These inconsistencies prompted the MHA's Indian Citizenship department to call for "a definite policy with regard to the registration of ladies in such cases." In the end, an anonymous Undersecretary recommended "extending the facility of registration under section 5(1)(b) of the Act to these ladies on the ground of their husbands' Indian nationality provided their Indian origin is established and there is nothing against them on record."³⁴² Above him, Joint Secretary Fateh Singh, whose career working on Indian citizenship decisions now touched almost a decade, was not so willing to let "these ladies" into India as persons of Indian origin. For example, Singh thought that if the women were of Indian origin only by a grandparent, rather than by a parent, the case would need further deliberation. In the end, Singh came to the conclusion that "although we should, as a general principle, accept the position that such women can be registered under section 5(1)(b), each case should be decided on its merits." The MEA agreed to this position. Though something

³⁴¹ Ibid., 8.

³⁴² Ibid., dated December 12, 1959, 9-10 of file.

of a clarification, it did not seem to engender the consistency the MEA had originally requested.³⁴³ Bureaucrats managed to simultaneously claim that they were registering women “on their own merits” under section 5(1)(b) of the Act and rely on these women's marriages to Indian men as a factor contributing to their status as persons of Indian origin.

The ICA provided several routes to citizenship via marriage. The principle of family unity underwrote registrations as persons of Indian origin in the case of Burmese women married to Indian men. Generally the policy was viewed as a humanitarian policy designed to keep families together.³⁴⁴ Even as the statute clarified, bureaucratic thinking continued to see women as part of family units and to use these ties in determining wives’ access to citizenship. In the final section of this chapter, I turn to the extensive executive powers that were used to target Muslim males’ claims to Indian citizenship.

Executive Power, Detention, and Deportation

Post-1955 citizenship law in India was characterized by the broad scope granted to administrative discretion and executive power.³⁴⁵ This led to a targeted application of the policy to Muslim males with ties to Pakistan.³⁴⁶ The failure of a citizenship claim could lead

³⁴³ Ibid., 9-13 of file.

³⁴⁴ This must be emphasized given the family divisions and trauma created by Partition; see the seminal feminist historiography of trauma and violence found in Butalia, *Other Side of Silence* and Menon and Bhasin, *Borders and Boundaries*.

³⁴⁵ Ann Dummett and Andrew G.L. Nicol devote an entire chapter of their book, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (London: Weidenfeld and Nicolson, 1990) to the topic of “Secrecy and Discretion.” Throughout the book the authors also point to the growing power of the bureaucracy under the executive (see 82 and 148), especially in the twentieth century. The emphasis on secrecy and executive power is similar in this section. In their first chapter, they write that “...there is always room within the terms of legislation, for functionaries to develop their own rules of practice and make their own judgments on facts. For example, if legislation specifies that an alien acquires some privilege after a certain period of residence, what evidence for that residence will be accepted?... Such matters are usually dealt with in detailed regulations issued under the legislation, and these are drafted by one set of functionaries and applied by another.” (15) Throughout the book, the authors also point to the growing power of the bureaucracy under the executive (see 82 and 148), especially in the twentieth century. The emphasis on secrecy and executive power is similar in this section.

³⁴⁶ I found two cases in the courts aimed at non-Muslims. In 1956 the State of Bombay ordered deportation in *Michael Anthony Rodrigues vs. State of Bombay* on grounds of Rodrigues’s anti-national activity and non-Indian

to deportation or a sentence of imprisonment, or perhaps even indefinite detention.³⁴⁷ From 1956 until 1970, such actions by Indian states produced at least thirty-four petitions before the High Courts, almost all of them involving states' attempts to deport or detain Muslims with ties to Pakistan.³⁴⁸ These originated as Indian states, apparently zealously, enforced the complex rules surrounding passports and permits under the Passports Act, the Foreigners Act, and the new Citizenship Act.³⁴⁹ While the Indian courts did not always uphold these exclusionary efforts, they sometimes did.

Many of the Muslim women discussed in the first part of this chapter could now consider registering under the new Citizenship Act's provisions for citizenship-by-registration—exactly what Ram Pyari and the Pakistani women were allowed to do. They could register either as “persons of Indian origin” or wives of Indian citizens.³⁵⁰ If they did

status. Though he was born in Goa, he had long residence in Bombay. The deportation ultimately failed when Chief Justice Chagla found his junior judge's decision in error (*AIR* 1956 Bombay 501; 729). In *Miss Shanti Singh vs. Governor of Punjab* (*AIR* 1959 PH 375; 1959 CriLJ 1018), Shanti Singh went to Lahore in 1946. As a Government of India employee, Shanti Singh “opted” for India in 1947 but she seems to have remained in Pakistan. In 1953, she finally took out a Pakistani passport so she could return to India. The State of Punjab (India) ordered her to leave or be deported. She challenged this, claiming her domicile had always remained Indian. Justice Dua neutrally applied the test of domicile to Shanti Singh and allowed her deportation. I have greatly condensed many of the details of these judgments here.

³⁴⁷ One 1959 petition succeeded in getting the Andhra Pradesh government to release Abdul Khader upon a determination of his citizenship, but only after an eighteen-month detention (*In Re: Abdul Khader vs. Unknown*, *AIR* 1959 AP 241). Also discussed in Roy, *Mapping Citizenship*, 58-9.

³⁴⁸ This count leaves out the litigation around Evacuee Property statutes, also substantial. Zamindar discusses a few of these High Court and Supreme Court decisions from the pre-1955 period and highlights the role of discretion and arbitrariness. pp. 106-11. It was not until 2010 that the Raja of Mahmudabad settled his claims on property in Delhi. See Zamindar, *Long Partition*, for an excellent discussion of how the evacuee property settlements worked. Details can also be found in Nehru's published correspondence with Mohanlal Saksena, the Minister of Relief and Rehabilitation in 1949. Nehru and S. Gopal, ed., *Selected Works of Jawaharlal Nehru*, second series, vol. 13 (New Delhi: Jawaharlal Nehru Memorial Fund, 1992), 101-9.

³⁴⁹ Like most twentieth century statutes enacted in India, these three statutes provided broad powers of discretion to the appropriate ministries under the executive. The executive power was extensive. The statute passed in Parliament was a mere starting point. Once enacted, executive power worked in several ways. There was the power to make rules under the relevant Act as well as the power for day-to-day enforcement. There were also usually broad powers to enact Ordinances, temporary amendments to the Act that were made as emergency provisions but could be quite long-lasting. Under British rule, the Ordinance power was even greater than under the Constitution. Under the Constitution, there is a formal requirement that eventually Parliament ratify the Ordinance before its expiry. See Austin, *Indian Constitution*, 208-9.

³⁵⁰ S. 5(1)(a) and s. 5(1)(c). Which route married women should take was debated at least twice in the Ministry of Home Affairs during the 1950s. Fateh Singh, now a Joint Secretary, as usual, was right in the thick of things. One series of correspondence involved Pakistani women married to Indian men and another involved Indian

not somehow become citizens, though, they could be deemed foreigners in India illegally. Indeed, Sherman's evidence and the lengthy files in the archives both suggest, as Sherman puts it, that some "District Magistrates were 'asked to maintain a look out for their [alleged Pakistanis] arrival in their districts and to keep them under surveillance for some time.'"³⁵¹ Even after the Citizenship Act, the Constitutional law of citizenship continued to form the major subject of litigation, because the Citizenship Act only applied automatically to those born after 1950.³⁵² The High Courts engaged in a discussion of minors' nationality, examining to what extent a minor, like a wife, could exhibit independent intent to migrate to Pakistan under Article 7. At first the rule of dependent nationality was strictly applied, whether that meant the petitioner would be expelled or allowed to remain in India. By 1965, the courts resisted using such a strict interpretation of dependent domicile, finding the rule of minors' dependence required modification due to the unique circumstances of Partition.³⁵³ The Supreme Court also put limits on Article 7's scope in 1963, in another five-justice Division Bench decision that involved the same advocates and one of the same justices as in the 1955 decision.³⁵⁴

The Passport Act punished those who entered the country without a valid passport. Two High Court cases about a group of weavers from Uttar Pradesh who went to Pakistan after Partition and returned in the late 1950s indicate that the Indian state had difficulty

women in Burma married to Indian men. NAI, MHA, Ministry of Home Affairs, IC Section, File No. 5/217/59-I.C., 1959 re: Smt. Ram Pyari and F. 6/56/58-IC, 1958, "Registration of Pakistani ladies married to Indian nationals and later divorce-Question regarding-(Reference from the Govt. of Rajasthan)."

³⁵¹ Sherman, "Migration," 104 and n. 105.

³⁵² Except for citizenship by registration under s. 5.

³⁵³ Justices suggested India's experience was unique, but see recent work by Lucy P. Chester that highlights the similarities between the cartography and ideology of India's partition and the division of mandate Palestine. Chester, "Boundary Commissions"; Alexandre Kedar, "Nation State Formation and Ethnic Displacement: The Enduring Legal Legacy of the British Empire" (lecture, International Law Workshop, University of Michigan School of Law, October 13, 2008).

³⁵⁴ IN Shroff and BN Sen.

policing its western border.³⁵⁵ Abdul Hamid was a weaver from Meerut and his wife Latifa hailed from Muzaffarnagar, both in Uttar Pradesh.³⁵⁶ Based on the evidence, Justices Kapur and Passey were certain that the parents of both respondents went to Pakistan not during but after Partition.³⁵⁷ They were also certain that Latifa accompanied her parents, and it seemed likely Abdul went with his. The Justices doubted whether the two were really married to each other, suggesting Latifa married someone else in Pakistan.³⁵⁸ The Justices suggested that Abdul Hamid and Latifa were each Pakistani by virtue of their parents' migration under private international law. They also fell within the ambit of Article 7, excluding those who migrated to Pakistan from Indian citizenship. This long discussion of their national status was gratuitous, for what really mattered was the fact that they entered India without a passport. That rule applied even to those with Indian domicile if they came from Pakistan.³⁵⁹ The Justices convicted both husband and wife under the Passport Act, with penalties of rigorous imprisonment and fines.³⁶⁰ The judgment stated that the Executive Government could decide what to do with the couple after their release, holding out at least some hope they would be allowed to stay in India, perhaps by registering. One imagines that

³⁵⁵ Zamindar, *Long Partition*, discusses the Korakpur crossing.

³⁵⁶ *The State vs. Abdul Hamid and Anr*, AIR 1957 PH 86. The case *Abdul Rahman...vs. State of UP* (AIR 1958 All 165) also involved weavers going from Tanda, Faizabad district, Uttar Pradesh, to Pakistan. Abdul Rahman came back to India "when he found that conditions prevailing in the weaving industry in Pakistan were bad." His wife is briefly mentioned as coming back with him. That petition was dismissed.

³⁵⁷ There is no date given beyond this in the judgment.

³⁵⁸ Latifa faced a similar problem of proof as the wives discussed in the next chapter. The Justices cast implicit aspersions upon her chastity and honesty by suggesting she was not married to Abdul. In contrast, justices in matrimonial litigation strongly disapproved of men's allegations on a woman's chastity.

³⁵⁹ The removal of Pakistan from the exceptions list took place in October 1952. See *Abdul Hamid*, paras. 17 and 23. Even if Abdul were found to be Indian, therefore, Latifa could not claim Indian citizenship on the basis of her marriage to Abdul. The counsel for Abdul Hamid pointed to a court judgment by a Lahore Magistrate that Abdul Hamid was an Indian citizen, but the High Court judge did not accept it. They were not being punished under the Foreigners Act but the Indian Passport Act, 1920, read with the Indian Passport Rules, 1950. See para. 23 of the judgment, the second ruling is "that Abdul Hamid is not a national of India and therefore by marriage (even if its proved) Latifa has not become a national of India."

³⁶⁰ They ordered a period of imprisonment of three months for Abdul Hamid as well as a fifty Rupee fine. Latifa Hamid was punished with imprisonment for one week and a thirty Rupee fine. Then the Judge stated that it was for the Executive Government to decide what to do with them after their release.

after their imprisonment, assuming it was enforced, there was a good chance they would want to leave India.

In 1960 the Madhya Bharat High Court gathered 23 petitions and appeals involving orders passed under the Foreigners Act of 1946.³⁶¹ The Foreigners Act as it stood then³⁶² allowed a Magistrate to order foreigners to leave India within two weeks.³⁶³ The various petitioners all disobeyed the order and found themselves hauled up for punishment. These were their appeals claiming they were not foreigners but Indians. The petitioners all had migrated to Pakistan. The major legal question at hand was whether Article 7's bar on migration to Pakistan after 1947 was meant to last forever, or only until 1950, when the Constitution took effect. Two of the three justices found the Article had only a limited time frame, while one thought it referred to migration to Pakistan any time after 1947.³⁶⁴ The former was the more lenient position. It would put an end to the many prosecutions of those who at some point went to Pakistan even after 1950. The matter was taken up by the Supreme Court. The case of Peer Mohammad and his wife Khatoon were among the appeals dealt with by the Madhya Bharat High Court's initial ruling in 1960.³⁶⁵ The couple lent their name to the appeal before the Supreme Court in 1962.

Before the five-justice bench of the Supreme Court in 1962, the State's case was that the respondents were not citizens under Article 7 due to their migration to Pakistan. The Supreme Court framed the question as, "can the respondents be said to be foreigners at the relevant date under Article 7, because they left India for Pakistan after January 26, 1950?"³⁶⁶

³⁶¹ *Firoz Mehrauddin v. Sub-Divisional Officer, Mahasumund*, AIR 1961 MP 110.

³⁶² Foreigners Act s. 14 and the Foreigners Order 1948 clause 7.

³⁶³ JMFC (Judicial Magistrate First Class).

³⁶⁴ Shrivastava and Newaskar on the one side and Naik on the other.

³⁶⁵ *State of Madhya Pradesh vs. Peer Mohammad and Anr*, 1963 AIR [Supreme Court] 645. There the case is named after wife Mst. Khatoon (Criminal Appeal No. 388 of 1958).

³⁶⁶ Para 10.

The Supreme Court found that the petitioners were citizens, or at least that they were not foreigners. They had migrated to Pakistan, yes, but by making the move after the Constitution took effect in 1950, they escaped the effect of Article 7. Now Article 7's ban on migration was confined to only the three-year period between 1947 and the Constitutional law of citizenship. Therefore, they could not be prosecuted under the Foreigners Act and the case had to be decided by the Central Government.³⁶⁷ Presumably this decision put a halt to, or at least a brake on, state enforcement actions against those with Pakistan connections under the Foreigners and Passport Acts. At the same time, the petitioners were still not home free. The state of Madhya Bharat could still ask the Central government to determine whether the petitioners were citizens under the Citizenship Act. But *prima facie* they were *not* not-citizens. They had to await the central government's determination about their citizenship status under the Indian Citizenship Act.

Another set of five petitions before the High Courts came from those who went to Pakistan as minors. In each, a male who was a minor at the time of Partition faced challenges to his status due to his status as a minor at the time of migration.³⁶⁸ In three of these, the petitioner was released from detention under the Foreigner's Act and in the other two he was allowed to be expelled. By 1965 the Courts began to question the dependent nationality

³⁶⁷ What is also noteworthy in Gajendragadkar's ruling in *Peer Mohammad* is that the previous year he had written an opinion on another case upholding the powers of the Central Government under s. 9(2)b of the ICA to take a foreign passport as *proof* of taking on foreign citizenship (*Izhar Ahmad Khan vs. Union of India* 1962 AIR 1052). This was a divided opinion and Das Gupta (on the bench in *Peer Mohammad*) had been writing for the minority. Gajendragadkar was joined by KN Wanchoo (who with Das Gupta and Gajendragadkar, heard the *Peer Mohammad* case) and N. Rajagopala Ayyanagar. Das Gupta's minority opinion found this rule invalid, though they did not dispute the powers of the Central Government under s. 9 beyond this.

³⁶⁸ Notably, the Supreme Court ruled in *Peer Mohammad* that migration to Pakistan for the purposes of Article 7 only referred to migration between 1947 and the commencement of the Constitution on January 26, 1950. This is similar to the "narrow interpretation of migration" discussed by Roy, *Mapping Citizenship*, in relation to *Shanno Devi v. Mangal Singh* (AIR 1961 SCR 576). See Roy, 60.

of minor sons who were Muslim, just as the Supreme Court had done for a Muslim wife a decade before in the *Rani Sayeedah* case.³⁶⁹

In *Sharafat*³⁷⁰ and *Umar*³⁷¹ the two minors had both been picked up by their respective state governments under the Foreigner's Act, implying they were not citizens and were in India illegally. In both cases the rule of the son's dependent nationality was applied, though the outcomes were different. In *Sharafat*, the petitioner traveled to Pakistan with his maternal uncle in 1955. Both his father and mother remained in India. When his father was murdered about a year after the son's departure, Sharafat came rushing back to Rampur (Uttar Pradesh, India) on a Pakistani passport. Since his father's domicile never changed though Sharafat himself went to Pakistan, Justice Broome of the Allahabad High Court found that Sharafat remained Indian and should be released from detention.³⁷²

In *Muhammad Umar*, in contrast, the petitioner went to Pakistan with his father and then returned to Orissa by himself to reside with his mother and maternal grandfather. Muhammad Umar's several attempts to obtain citizenship through the state government all failed; the High Court allowed the state's order imprisoning him for one month to stand.³⁷³ The outcomes of the cases differed, but the principle of a minor's nationality following his father's went unquestioned in both. By 1966 and 1967³⁷⁴ the position began to change, and *Kumar Amar Singh's* ruling about the wife's dependent domicile was applied by analogy to the give the minor independence of intention.

³⁶⁹ *Rashid Hasan Roomi vs. Union of India*, AIR 1967 All 154; *Shree Mohammad Yusuf vs. Union of India*, (AIR 1967 Pat 266).

³⁷⁰ *Sharafat Ali Khan vs. The State of Uttar Pradesh*, AIR 1960 All 637, decided on April 12, 1960.

³⁷¹ *Mohammad Umar vs. The State*, AIR 1961 Ori 150, decided on July 22, 1960.

³⁷² Also perhaps on compassionate grounds; his father had been murdered in Rampur and he rushed back to India on a Pakistani passport.

³⁷³ In *Umar* Chief Justice Narasimhan referred to the ICA s. 4 and 8 to point out that the principle that a minor's nationality followed his father's had been endorsed by the legislature.

³⁷⁴ These two cases did not mention each other. However *Rashid Hasan* discussed *Mst. Allah Bandi*; *Karimunnissa*; *Abdul Hamid*; and *Mubd. Umar*, but their application to the judgment at hand was rejected.

Now, in contrast to the bar on subsequent legitimation, the Allahabad High Court created a kind of subsequent de-legitimation. It broke the tie between father and son on the basis of the father's desertion in *Rashid Hasan* at the end of 1965. Even though his father migrated to Pakistan, Rashid's nationality did not follow his father's. For once, the legal decision fit well with practical circumstances.³⁷⁵ Notably, Rashid Hasan had successfully contested elections for a seat on his town's committee.³⁷⁶ The High Court suggested that Rashid's acceptance by his peers—the electors of his city—implied an additional endorsement of his Indian-ness. The case prompted the first fracture between the father's legal identity and the minor son's.³⁷⁷

Though distinguishable from the previous case on certain facts, in *Yusuf* too the Patna High court rejected the dependent nationality of the minor. Here the minor was found to have exhibited intention when he went to Pakistan. The decision was penned by the same justice who earlier found that *Umar* should be imprisoned.³⁷⁸ In this case, he also found that Yusuf could be deported. Yusuf was found to have exhibited intention in going to Pakistan even though his parents had remained in India. This represented an application of the *Kumar Amar Singh* principle by analogy. If a wife was capable of independent volition in going to Pakistan—at least for the purposes of Article 7—a minor boy could also be capable of such independent will. The case against Yusuf was helped by his twenty-year's residence in Pakistan from 1947 to 1967.

³⁷⁵ Under the Foreigner's Internment Order 1962 (as amended up til 1965). The Justice relied upon *Private International Law* by Cheshire, stating that there could be some exceptions to the rule that an infant's domicile following its father's.

³⁷⁶ Losing the first time in 1956 and winning most recently in 1962. Could the case have arisen out of a local political dispute, or simply because he had become prominent among the government and bureaucracy and thus been “checked out”?

³⁷⁷ On this topic, these are cited as the main cases along with *Debstai* in Atul Setalvad, *Conflict of Laws*, 2nd ed. (Gurgaon: LexisNexis Butterworths Wadhwa Nagpur, 2009), 140 n. 77, 78 and 79.

³⁷⁸ Narasimhan, now Chief Justice.

The Union of India argued that Yusuf was a foreigner and could be expelled. In September 1947, at around age 15, Yusuf opted³⁷⁹ for the railway service in East Pakistan, where he married and lived until 1957. Meanwhile, his natal family remained in Bihar. Yusuf took out a Pakistani passport for himself in 1950 and for his wife in 1953. In 1957 he came to India and then he applied for a citizenship certificate in his home district of Monghyr in 1959. His application was rejected. Yusuf prayed for reconsideration of his application and got the District Magistrate to restrain the government from deporting him. But in 1964 the Superintendent of Police in Monghyr ordered Yusuf to leave or be deported under the Foreigners Act.³⁸⁰ Yusuf then petitioned the High Court to stay his deportation order. In that petition, he argued that his application for Indian citizenship was still pending with the Government of India. However, in response to this contention, the Government of Bihar noted that the Government of India had rejected his application for Indian citizenship in October 1964; Yusuf claimed he never received notification of this rejection.³⁸¹

Yusuf's best argument was that he was a minor when he went to Pakistan. Despite his going there, he remained a citizen throughout.³⁸² At the commencement of the Constitution, his parent's domicile was Indian, so his domicile was also Indian and he was a citizen under Article 5. Against this the State argued for the purposes of Article 7, Yusuf's minority status did not matter. It extended *Kumar Amar Singh's* principle of the wife's independent intention to the minor, relying on the Supreme Court's 1955 position that Article 7 overrode Article 5. Therefore, any migration to Pakistan, even if by a minor whose parents remained in India, was construed as an exercise of free will. It would come within

³⁷⁹ Shanti Singh had claimed to opt for India. See discussion of the decision given to government employees about which new nation to join--called opting--in Zamindar, *Long Partition*.

³⁸⁰ *Shree Mohammad Yusuf vs. Union of India* (AIR 1967 Pat 266), paras 1 & 2. Under powers granted by s.3(2)(c) of the Foreigners Act.

³⁸¹ *Ibid.*, para 2. As in *Mukhtar Ahmed vs. State of UP and Ors.* (1965 CrLJ 22).

³⁸² Or at least that the Central Government was required to determine he lost it definitively under s. 9 of the ICA before it could expel him.

the Article 7 bar. Mohammad Yusuf responded that even if *Kumar Amar Singh* granted a married woman independent domicile for the purposes of migration, it did not grant a male minor independent domicile.

The two-justice Bench sided with the argument put forth by the State. Notably, this began to mark an explicit break with the principles of private international law: "...the rule of private international law regarding the disability of certain classes of persons from changing their domicile must give way if on the facts found it can be held that there was in fact migration to Pakistan after the 1st of March 1947 as required by Article 7."³⁸³ Previously dependent domicile was used to exclude as well as include. Because of Article 7, after the *Kumar Amar Singh* decision, women's independent intentions could exclude them from the nation. Now, likewise, actions taken as a minor deemed to be a legal independent could be construed as independent intent.

Two characteristics marked Yusuf's intent as his own. First, his earlier testimony before the Magistrate stated he went to Pakistan "on the persuasion of others" and against his father's wishes.³⁸⁴ That he went to Pakistan against his father's wishes was used to show that he had been operating as an independent actor, not a dependent minor: "He was not so young as to be incapable of making any choice." The factual violation of his father's will broke his legal dependence. To this was added the evidence of his ten years' residence in Pakistan and his taking out a Pakistani passports for himself and his wife. Given all this, the Court could easily find that he was not a citizen at the commencement of the Constitution under Article 5. Since Yusuf was not a citizen of India at commencement of the

³⁸³ *Shree Mohammad Yusuf*, para. 4.

³⁸⁴ Zamindar labels this the "flight of youth," *Long Partition*, 214.

Constitution, he was not entitled to a decision by the Central Government of his citizenship status under the ICA and he could be deported without further proceedings.³⁸⁵

Conclusion

India's post-colonial citizenship law was structured by some of the deep-rooted structures of India's common law heritage, as well as the regimes of citizenship, passports, and permits created by Partition. The developments of 1955 the ICA and the Supreme Court's decision in *Kumar Amar Singh* created important ruptures with the coverture-based principles of citizenship law. *Kumar Amar Singh* allowed women independent volition in migration, but only for the purpose of migration to Pakistan. The ICA allowed married women's independence of citizenship even though it also limited citizenship-by-descent to the paternal line for diasporic Indians.

Even after these clarifications, bureaucrats still had to struggle with cross-border affective ties of families in the application of citizenship policy. It was difficult to disentangle married women from their marriages. Partition cases continued to come up in the courts well into the late 1960s, as men with Pakistani connections came to the state's notice and were threatened with deportation or punishment. The state and national executives largely controlled the law of citizenship. Throughout the 1950s and 1960s, minors were treated as dependents in the matter of nationality, guided by the well-established principles of private international law. It was only by the late 1960s that the judiciary moved away from this position, applying the principle of women's independent volition in migration to Pakistan to the cases of now-men who had been minors at the time of Partition. This shift was driven by

³⁸⁵*Shree Mohammad Yusuf vs. Union of India* (AIR 1967 Pat 266), para 6.

a perception that private international law could not sufficiently account for the uniquely traumatic break of Partition.

Coverture, then, was a difficult doctrine to dismantle. It was sticky because it was hidden; like the intertwining cross-border family ties discussed in this chapter, coverture was not a discrete doctrine that could be amended, repealed, or read down with the stroke of a judge's pen or a vote in Parliament. It was woven into the fabric of the law and thus it had to be dismantled, when it could be, in fits and starts. This took place when a Muslim wife and then Muslim sons were granted the ability to migrate with independent intention. Their legal independence often worked to exclude them from the Indian body politic. Wives' and sons' legal identity hinged on the location of their husbands and fathers. Dependence of domicile held the field, chipped away at only in the arena of a disloyal and disobedient Muslim wife who crossed the border to Pakistan on her own volition. The next part of this dissertation examines in greater detail the claims of disobedient wives of all religious communities to freedom of movement and from marriage within India's most populous state, Uttar Pradesh.

Chapter Two

The Origins of the Restitution of Conjugal Rights in India

Introduction

The previous chapter examined the status of the Indian wife in twentieth century citizenship law. It highlighted how a woman's status as a wife could influence her access to Indian citizenship. So, too, could a man's pedigree influence his legal relationship to the Indian nation. The law sought to tie wives to husbands and sons to fathers, despite the social reality of mobility across national lines. It sought to reduce complex and dense webs of social relationships, physical locations, and religious, political, and national identities to a simple, easily adjudicated national identity, and it usually did so through a patriarchal, male-headed conception of the family.

Here I retain my thematic interest in the role of marital status in structuring liberty but shift attention to matrimonial law proper. The next chapters focus on matrimonial dispute litigation pursued by husbands and wives in colonial and post-colonial British courts. A substantial portion of such litigation was concerned with restitution of conjugal rights and maintenance law, and not with litigation under Hindu and Muslim case law or statutes. In this chapter, I provide a brief history of how restitution of conjugal rights entered Indian law. Restitution of conjugal rights (RCR) suits, like citizenship cases, located the matrimonial home with the husband. They sought to provide a singular legal identity for husband and wife. Often they sought to protect wives from their husband's excesses of violence and sexual and material greed. And yet, despite the humanitarian impulses that guided many

individual judges making decisions about unique factual circumstances, the remedy also continued to uphold a husband's rights over his wife's body and his control over her movements. Given its origins in Christian marriage and English canon courts, the wholesale and enthusiastic adoption of RCR suits into Indian law may at first seem surprising. Indeed, the routes of incorporation were winding and complex and drew on a variety of sources, including Ecclesiastical law, Hindu law, Muslim law, principles of natural justice, and judicial discretion.

The Privy Council incorporated RCR into Indian law through two important judgments in 1856 and 1867. Together these decisions imported RCR into Indian law but removed it from the ambit of Ecclesiastical law, placing it instead under the umbrella of specific religions' personal laws. The 1856 and 1867 judgments are also valuable sources for the earlier history of RCR in Indian law, starting at the turn of the nineteenth century.

By the mid-nineteenth century, when the Privy Council decided the first case here, conjugal rights had built up a body of at least fifteen known precedents. Even in the very earliest days of its existence in Indian law, members of diverse religious groups asked the courts to enforce conjugal rights. This finding contributes to one of the larger arguments of this dissertation, that members of diverse religious groups used conjugal rights suits and such suits formed a substantial portion of matrimonial litigation in India. The two mid-nineteenth century judgments that are the subject of this chapter, *Aradaseer Cursetjee* from 1856 and *Moonshee Buzloor Ruheem* of 1867, together resolved the question of the jurisdiction of conjugal rights suits. In so doing, the Privy Council preserved patriarchal right in India but removed it from a specifically Christian and European jurisdiction of the High Court. It placed conjugal rights within the ambit of Hindu and Muslim personal law, making a specifically English Ecclesiastical remedy available to litigants of all religious communities.

Over the course of the nineteenth century, conjugal rights suits gained greater prominence, likely through the definitive rulings issued by the Privy Council, leading one commentator to state that after the Privy Council opened the way for conjugal rights suits for Muslim litigants in 1867, Hindus had taken up the remedy “like a flock of sheep.”³⁸⁶ The success of RCR as a civil, non-religiously specific legal procedure, with origins in English Ecclesiastical law, undercuts the division of Indian personal law into watertight compartments of Hindu and Muslim.

The encouragement granted to conjugal rights suits by the High Courts and then the Privy Council had several underlying reasons. The Courts preserved the matrimonial home, its location with the husband, and the obligation of cohabitation. Restitution of conjugal rights was based on the notion that a wife had a right to be maintained by her husband, if at all possible, within his home and with some modicum of decent treatment. If he could or would not, he was obliged to maintain her separately. In a body of law that did not allow divorce, English Ecclesiastical law, conjugal rights suits presented an alternative method of matrimonial dispute resolution. Such suits delineated the residence of husband and wife and their material rights of maintenance and property against each other. As this chapter and subsequent chapters will show, the remedy of RCR suits was not a static one that always worked in one way or the other over its long centuries of existence either in England or India. It could be used by wives and husbands for different purposes. Even though wives could sometimes use it for their own ends, and win such suits, restitution of conjugal rights rested on the fundamental assumption that the husband had the right of physical access to his wife and that her proper location was with the husband, wherever that may have been.

³⁸⁶ The commentator was Rukhmabai’s lawyer, Latham; quoted in Sudhir Chandra, *Enslaved Daughters: Colonialism, Law, and Women’s Rights*, 2nd ed. (Delhi: Oxford University Press, 2008), 76.

This chapter first provides a brief background on equity jurisdiction and Ecclesiastical jurisdiction in England and India. Second, it examines conjugal rights suits from the first half of the nineteenth century, the very earliest such suits in India. Third, it examines the 1856 decision of the Privy Council in *Ardaseer Cursetjee and Perozeboye*,³⁸⁷ which pulled conjugal rights suits out from the ambit of the Ecclesiastical division of the Bombay High Court. Fourth, it studies the Privy Council's decision in the 1867 case of *Moonshee Buzloor Rubeem and Shumsoonissa*,³⁸⁸ which allowed conjugal rights suits to be interpreted through Muslim law within the Indian courts' general civil jurisdiction. Fifth, it looks at the cause célèbre of Rukhmabai, the Hindu wife who sought to defend herself against her husband's conjugal rights suit in the mid-1880s.

Conjugal rights suits were incorporated into Indian law through complex pathways that drew on diverse sources of law, including Ecclesiastical law, Indian religious personal laws, colonial expediency, and judicial discretion. Over the course of their life in India, conjugal rights suits shifted the balance between these factors at different times. In the second half of the nineteenth century, conjugal rights suits were adjudicated through the framework of Indian religious personal laws, reflecting the decline of Ecclesiastical jurisdiction and the imperative of post-Mutiny governance to protect Indian religions. As we shall see in subsequent chapters, even when the framework for adjudicating conjugal rights shifted, the remedy itself remained the first step in most matrimonial litigation. In other words, the remedy of RCR, once incorporated into Indian law, was enormously enduring and sticky. Even today, it is an important arena for matrimonial jurisprudence, whereas in England itself the remedy was abolished in 1970.³⁸⁹ Conjugal rights suits provided an

³⁸⁷ *Ardaseer Cursetjee v. Perozeboye* (6 MIA 348).

³⁸⁸ *Moonshee Buzloor Rubeem v. Shumsoonissa Begum* (11 MIA 551).

³⁸⁹ Cretny, *Family Law*, 149; Chandra, *Enslaved Daughters*, 206-7.

important arena for matrimonial cruelty jurisprudence. Nineteenth century courts used comparison and analogy to delineate husbands' rights over their wives. They granted husbands extensive, though not unlimited, rights of physical control over their wives. In the second half of the nineteenth century, then, the idea of matrimonial rights became firmly entrenched, and the husband was deemed to have rights to his wife's cohabitation and body. Physical control and the wife's liberty, or lack of it, were at the heart of conjugal rights. There are diverse and interwoven strands that constitute legal patriarchy. Patriarchy cannot be boiled down to one factor, such as a particular religion or culture. In India, over two centuries of practice, these strands wove together, influencing and reinforcing each other.

Equity, Ecclesiasty, Exception

The non-common law jurisdictions of equity and Ecclesiastical law played important roles in nineteenth century matrimonial litigation. Equity, a specific, non-common law jurisdiction in England, was important to conjugal rights suits because it allowed the courts discretion to make decisions outside the strict standards of common law precedents. The basic idea of equity was that every wrong had an appropriate remedy and equity jurisdiction in England was designed to provide relief when the common law courts could not. For example, at common law, someone wronged by the breach of contract could only collect damages. But at equity, he could achieve specific performance of the contract, such as in delivering unique property for which damages could not compensate.

Equity occupied a different position in India than it did in England. The first Attorney-General of independent India, M.C. Setalvad explained, "in India the principles of English law whether they be the principles of common law, the statute law or of equity were all introduced as legal principles comprised in the principles of 'justice, equity and good

conscience.”³⁹⁰ Moreover, courts need not apply equity in India if they deemed it unsuitable. Equity covered areas such as restitution of property, specific performance, part performance, rectification, cancellation of instruments, and trusts. In England, equity was not fused with common law until 1873 under the Judicature Act. Setalvad stated that the fusion of equity and common law took place far earlier in India than in England. In fact, Setalvad set the date of arrival of equity in Indian law to 1600, when Elizabeth I’s charter “gave the Company ‘power...to make, ordain and constitute such and so many reasonable laws...as to them shall seem necessary...so always that the said laws...be reasonable and not contrary or repugnant to the laws, statutes, customs of this our realm.’”³⁹¹ Setalvad also notes, “In India equity worked through and not in opposition to the common law.”³⁹² From the start of the colonial encounter, royal charters and pursuant legislation provided great scope for discretion in the colonial courts for the purposes of expediency and addressing the perceived unique circumstances of Indian life. The idea that equity could compel specific relief for a wrong underwrote the courts’ understanding of conjugal rights between spouses. A violation of the husband’s rights of access to his wife could be remedied by compelling her to live with him or punishing her if she would not.

RCR suits had their origins in English Ecclesiastical courts. Tussles over the correct jurisdiction and body of law to use in determining matrimonial disputes were not a peculiar feature of English rule in India, such disputes having a pedigree of about seven hundred years. The main vehicle for such disputes in English Ecclesiastical courts was the writ of prohibition, which a litigant could attempt to use to block his adversary from pursuing relief in the Ecclesiastical courts. Baker states, with regard to the relationship between canon and

³⁹⁰ M.C. Setalvad, *The Role of English Law in India*, Hebrew University Lionel Cohen Lectures (Jerusalem: Magnes Press, 1966), 24.

³⁹¹ Setalvad, *Role of English Law*, 6, citing H. Cowell, *Tagore Law Lectures* 1872, 5th ed., 12-13.

³⁹² Setalvad, *Common Law in India*, 57.

common law in England, that “The conflicts of jurisdiction were not typically disputes between an embattled Church and a hostile royal power; there was rather a conflict of laws, caused by the existence of two systems of equal validity which claimed to operate within the same geographical territory.”³⁹³ He goes on to state that such disputes did not occur at the level of ideological conflicts between popes and kings but instead “jurisdictional conflicts were fought out between private litigants in particular cases...”³⁹⁴

Such disputes gave rise to writs in 1285 and 1315 that more carefully stated what matters the Ecclesiastical courts could address: “the Church courts had an unquestioned jurisdiction over marriage and bastardy, testate and intestate succession to personal property, and punishment of mortal sin, such as fornication, adultery, or gluttony.”³⁹⁵ Moreover, as Baker states, “In case of conflict, the king’s law prevailed. This principle was applied even to limit papal authority.”³⁹⁶ Baker points out the importance of the conflict over jurisdiction as part of deteriorating relationships between the King and the Church in the run-up to the Reformation, a counter-weight to narratives that emphasize the importance of the personal desire for divorce as a key cause of the Reformation.³⁹⁷ Baker’s account also emphasizes an important point about Ecclesiastical law in the post-Reformation period: though papal authority was abrogated in 1534, the system of canon law continued to exist. In the post-Reformation period, “Some kind of fusion [of canon and common law] was seriously contemplated,” but died, predictably, in a law commission.³⁹⁸ Nevertheless, Baker states, the sixteenth and seventeenth century saw a chipping away of church courts’ powers to resist writs of prohibition. This did not yet affect family law and probate law, only the

³⁹³ Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 128.

³⁹⁴ *Ibid.*, 128.

³⁹⁵ *Ibid.*, 129. The two writs were the *Circumspecte agatis* (1285) and the *Articuli cleri* (1315).

³⁹⁶ *Ibid.*, 129.

³⁹⁷ *Ibid.*, 130.

³⁹⁸ *Ibid.*, 131. Baker also points out that later “A commission was finally appointed, under new statutory powers, in 1552; but its report was shelved,” 131, n. 27.

Ecclesiastical courts' criminal and civil jurisdiction.³⁹⁹ The key sources of Ecclesiastical law in England were compendia of decretals rather than law reports.⁴⁰⁰ While common lawyers were trained and credentialed by the Inns of Courts, lawyers in the Ecclesiastical courts were doctors of civil law trained at Oxford and Cambridge.⁴⁰¹ Their courts (as well as the Admiralty Court) were housed in the Doctors' Commons, so-called because to practice there one had to be a Doctor of Civil Law.⁴⁰²

In the first third of the nineteenth century, the Ecclesiastical courts' right of appeal was changed to the Privy Council,⁴⁰³ which did not affect its day-to-day rules or procedures, but foreshadowed the general decline of the Ecclesiastical courts. In 1857 the Ecclesiastical courts' authority over most personal matters was abolished in England, limiting their jurisdiction "to Church matters, such as faculties to alter or sell consecrated property and disciplinary proceedings against clergy."⁴⁰⁴ The new Court for Divorce and Matrimonial Causes took over matrimonial litigation. It was responsible for administering the new divorce procedure. Husbands and wives still instituted conjugal rights suits, but they did so in the new Court for Divorce and Matrimonial Causes.⁴⁰⁵

For the duration of their existence, the Ecclesiastical courts in England could not conceive of divorce in the modern meaning of the term.⁴⁰⁶ The only way to get a divorce was by a Parliamentary bill, a practice that Henry VIII pioneered when he abolished appeals to

³⁹⁹ Ibid., 131.

⁴⁰⁰ Ibid., 126.

⁴⁰¹ Although it seems that not much training went on in either institution; in his biography of the civil lawyer Stephen Lushington, Waddams states that "such that what law was learned [at Oxford] was learned by private study." S.M. Waddams, *Law, Politics, and the Church of England: The Career of Stephen Lushington, 1782-1873* (Cambridge: Cambridge University Press, 1992), 1.

⁴⁰² S.M. Waddams, *Law, Politics, and the Church of England: The Career of Stephen Lushington, 1782-1873* (Cambridge: Cambridge University Press, 1992), 4.

⁴⁰³ Baker, *Introduction*, 132.

⁴⁰⁴ Ibid.

⁴⁰⁵ Cretney, *Family Law*, 144.

⁴⁰⁶ Ibid., 161.

the Pope. After Henry's use of the special Parliamentary Bill, Lord Roos revived it in the late seventeenth century. In 1857, the Matrimonial Causes Act transferred the previous authority of Parliament to grant divorces after an Ecclesiastical grant of a separation (*divorce a mensa et thoro*), to a new entity called the Court of Divorce and Matrimonial Causes.⁴⁰⁷ This created a simpler procedure for divorce that made it far more accessible. As Cretney points out, "As has happened over and over again, changes in procedure did affect perceptions of the law," making divorce more popular by making its procedure clearer and easier to obtain.⁴⁰⁸ Nevertheless, the point that it was extremely difficult to get a divorce, and impossible within Ecclesiastical jurisdiction, remains. For most of its history, divorce was an exceptional zone in English law, requiring extraordinary measures.

The cases of the long histories of the Ecclesiastical and equity jurisdiction point out a crucial feature about English common law. The confusion arises because of two different definitions of the term "common law." A narrow definition of the term would refer only to the "jurisprudence [of] of those unwritten legal doctrines embodying English custom and English tradition...[and] would not include and would be different from the English statute law which has from time to time modified the common law."⁴⁰⁹ However, in India, and often in England and the United States as well, the term "common law" takes on a broader definition to include "...not only what in England is known strictly as the common law but also its traditions, some of the principles underlying the English statute law, the equitable principles developed in England in order to mitigate the rigors of the common law and even

⁴⁰⁷ Both Baker and Cretney emphasize that the 1857 Act was a procedural reform and divorces could be attained before the Act. Cretney, *Family Law in the Twentieth Century*, 161. Lawrence Stone, *The Road to Divorce: England 1530-1987* (Oxford: Clarendon Press, 1990) has a longer discussion of the case of Lord Roos, 309-13. Stone also describes in detail some other early Parliamentary divorce cases.

⁴⁰⁸ Cretney points out, "As has happened over and over again, changes in procedure did affect perceptions of the law," making divorce more popular by making its procedure clearer and easier to obtain. Cretney, *Family Law*, 165-6.

⁴⁰⁹ Setalvad, *Common Law*, 3.

the attitudes and methods pervading the British system of the administration of justice.”⁴¹⁰

Common law, narrowly defined, sat in an uneasy relationship with other forms of jurisdiction, which lacked the same fidelity to rule of law the common law valued. In theory, for at least seven hundred years, matrimonial litigation existed outside of the common law and outside a firm commitment to the precedent based system of the rule of law.⁴¹¹

Naseer Hussain points out the complexity of the rule of law in the colonial setting: “If a rule of law was the settled theoretical standard of colonial politics, the institutional practices of the colonial state constantly fell short of such a standard.”⁴¹² Hussain defines emergency as in phrases such as “the peculiar way in which law contemplates and provides for its own failure.”⁴¹³ Hussain then goes on to argue that colonialism—and specifically colonial violence—structured this relationship between emergency and rule of law.⁴¹⁴ Together, the discussions by Hussain and Setalvad highlight the contradictions between “rule of law” and discretion. The colonial state’s powers of discretion were introduced at the moment that British common law and with its specific ideas of rule of law were introduced in India. Rule of law could not exist without discretion and, indeed, violence. In the Indian colonial context, Ecclesiastical law and equity were used in a colonial common law framework shaped by the imperatives of colonial governance. Matrimonial decisions reflected this tension between rule of law and discretion. Violence and force were often required to preserve the state power needed to uphold the rule of law. The specter of the use of state force to enforce conjugal rights suits haunted many of the judgments. Colonial

⁴¹⁰ Ibid., 3-4.

⁴¹¹ Waddams, *Law, Politics, and the Church of England*, 13-14.

⁴¹² Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 6.

⁴¹³ Ibid., 20, critiquing Schmitt.

⁴¹⁴ Ibid., 22. Hussain’s final chapter is called, “Martial Law and Massacre: Violence and the Limit.”

judges feared to tread too far into the Indian home but were also devoted to upholding husbands' and wives' rights within a legal framework.⁴¹⁵

In an important 1989 article, Richard W. Lariviere noted, “the creation and development of modern Hindu law has been predicated on well-intentioned misunderstanding and innocent irony.”⁴¹⁶ Eighteenth century colonial officials read Indian law and religion through their own religious and intellectual frameworks that understood matters of the Hindu religion’s personal law as “precisely the ones that would have been within the jurisdiction of Ecclesiastical courts in England.”⁴¹⁷ In particular, colonial officials “reduc[ed]...*dharma* until it was equal to religious law.”⁴¹⁸ I agree with Lariviere on this point as well as on his analysis of the effects it had on the practice of Indian law. However, I want to be clear that the point I am making is different. The process outlined below was one in which a particular Ecclesiastical procedure (restitution of conjugal rights) was directly imported into Indian law *as an import* via the Ecclesiastical jurisdiction of the Bombay Supreme Court as well as by general appropriation in Bengal. In Lariviere’s analysis, certain topics (such as those related to marriage) were denoted personal because they were the topics dealt with by the Ecclesiastical courts in England, and then these were sought to be administered under Hindu or Muslim law. But in the process I am describing, there was no pretense that restitution of conjugal rights was an originally Hindu or Muslim procedure. Rather, it was directly drawn from the Ecclesiastical law of England. It was then firmly ensconced in India’s civil law and used by litigants of all communities.

⁴¹⁵ Maeve Doggett, *Marriage, Wife-Beating and the Law in Victorian England*. (London: Weidenfeld and Nicolson, 1992), 83; and Baxi, *Public Secrets of Law*, 23 and 45 each also make the point that marital rape immunity carves out marriage as an exceptional zone.

⁴¹⁶ Lariviere, “Justices and Panditas,” 757.

⁴¹⁷ *Ibid.*, 759.

⁴¹⁸ *Ibid.*

Early Nineteenth Century Suits

In its 1856 and 1867 decisions, the Privy Council provided a brief outline of the history of restitution of conjugal rights in Indian law. The historical analysis took two prongs. First, it examined the records of the Supreme Court and Recorders' Court for *unreported* cases that showed the use of Ecclesiastical law “by natives of India or other Asiatics for any causes matrimonial.”⁴¹⁹ The listing of unreported cases is especially valuable because these records would be otherwise difficult to compile. Second, it looked to *reported* decisions as well. Members of a variety of religious communities used RCR in India right from the turn of the nineteenth century.

Ten unrecorded suits were found in the courts' records: seven of these were filed by Parsi litigants, two by Armenian litigants, and one by Muslim litigants.⁴²⁰

1. *Anna Petruse v. Jacob Petruse*—Armenian—Bombay, filed **1802**, decided March 1805—alimony (“Libel”)—wife won
2. *Dustayool Joannes v. Gregory Johannes*—Armenian—Bombay, filed **1811**, dismissed by consent 1812—divorce a vinculo (“divorce and separation from the bed and board and mutual cohabitation”)
3. *Shaibnaboye v. Shaikjee Zarab*—Mahomedan—Bombay, filed **1815**, not pursued; to void marriage—wife [?] had been granted *in forma pauperis*
4. *Perozeboye v. Aradaseer Cursetjee*—Parsee—Bombay High Court, filed **1843**, decided 1843--a demand for Ardaseer to take back the wife and “treat her with conjugal kindness”—wife lost—she sought and was granted leave to appeal but did not pursue the appeal
5. *Buchooboye v. Mervanjee Nasserwanjee I*—Parsee—Bombay Supreme Court, filed **1844**, decided 1846—“for decree...[to] take home and receive the said *Buchoboye* his wife, and treat her with marital affection and to render her conjugal rights”—wife won
6. *Perozeboye v. Nanabhoy Framjee*—Parsee—Bombay Supreme Court, filed **1844**, decided 1846—for same cause as above—wife won
7. *Buchooboye v. Mervanjee Nasserwanjee*—Parsee—Bombay Supreme Court, filed **1849**, for divorce and separation, struck 1851 due to death of wife—for divorce

⁴¹⁹ *Ardaseer Cursetjee and Perozeboye*, arguments before the Privy Council, 375.

⁴²⁰ The Armenians were a “mercantile diaspora” deemed by the British judges not to “have religious law in the same way that Muslims and Hindus did.” Justice Jackson, in *Aratoon v. Aratoon* (1868) noted he saw “no reason for placing Armenian Christians in civil matters under the authority of their priests, who are probably as unfit to decide a question of civil law as those of our own Protestant church.” See discussion in Sharafi, *Law and Identity*, 134-5.

8. *Perozeboy v. Ardaseer Cursetjee*—Parsee—Bombay Supreme Court, filed **1853**, decided 1856—for husband to “take back his lawful wife...and treat her with conjugal kindness, and to provide for her alimony in the event of the said *Ardaseer Cursetjee* refusing to receive her back”—wife won, wife requested and received leave to appeal to Privy Council

9. *Amaboje v. Nasserwanjee Mervanjee*—Parsee-Bombay Supreme Court, filed **1853**,-- “for decree that [husband] take back his wife...and render her conjugal rights, alimony, *pendent lite*”—wife did not pursue suit

10. *Khursedball v. Bazanjee Dossaboy Baxterna*—Parsee—Bombay Supreme Court—filed **1854**, decided 1855—“for alimony”—wife won⁴²¹

These precedents highlight several features of conjugal rights in early nineteenth-century India. Members of three of India’s minority religious groups used the idea of conjugal rights in the first half of the nineteenth century to pursue alimony and cohabitation rights under the Ecclesiastical jurisdiction of the Bombay Supreme Court. Of the ten suits, four were dropped for various reasons. Of the remaining six suits, five wives won their cases. The one suit in which the wife lost (#4) was overturned upon her appeal (#8). This dispute then gave rise to the 1856 Privy Council decision in *Ardaseer Cursetjee and Perozeboye*, discussed in the next section.⁴²² The courts usually though not always were sympathetic to wives, providing them with maintenance (1,10); ordering the husband to take the wife home and treat her well (5,6); and for these two remedies together (8). There seems to have been a large gap between the use of the remedy by Armenian and Muslim litigants in the period between 1802 and 1815 and its use by Parsis beginning in 1841.

Along with the set of ten unreported precedents gathered from the records of the Bombay Supreme Court and Recorder’s Court, there were three additional reported precedents on conjugal rights discussed in *Ardaseer Cursetjee* that proved important to the

⁴²¹ These are discussed in the *Ardaseer Cursetjee* judgment, 375-6. The use of the term libel should not be confused with the modern use of the term. Instead it refers to the initial statement that kicked off Ecclesiastical proceedings, containing “a very detailed statement of the grounds for relief sought.” See Waddams, *Law, Politics, and the Church of England*, 106.

⁴²² *Ardaseer Cursetjee v. Perozeboye* (6 MIA 348)

Privy Council's reasoning.⁴²³ The most important of these was *Mibirwanjee Nuoshirwanjee*,⁴²⁴ which was important to the final judgment in the Privy Council's decision in *Aradaseer Cursetjee*. It showed that conjugal rights suits could be pursued under the civil jurisdiction of the Indian courts, rather than Ecclesiastical jurisdiction.

The Privy Council decision in *Moonshee Buzloor Ruheem* from 1867 brought forward additional precedents that showed the use of RCR in civil courts. These all involved Muslim litigants: *Maulvi Abdual Wahab v. Mussumat Hingu* (1832);⁴²⁵ *Mussumaut Ameena v. Kuttoo Khan* (1841),⁴²⁶ and *Mussumat Doeen Beebee v. Sheikh Mennoo* (1832).⁴²⁷ Buzloor Ruheem used these precedents before the Privy Council to make the point that "a suit for restitution of conjugal rights will lie in the Civil Court."⁴²⁸ Coming as these did from the Bengal Sudder Dewani Adalat (appellate court for civil matters in Bengal),⁴²⁹ these suits showed that there were precedents that allowed RCR outside of the Ecclesiastical side of the Bombay High Court. The practices of the lower courts on the civil side in Bengal as well as on the Ecclesiastical side in Bombay (until stopped by the Privy Council in 1856) each supported the use of conjugal rights suits.

⁴²³ Only the first case (*Mibirwanjee Nuoshirwanjee*) was discussed in the Privy Council's final decision in *Aradaseer Cursetjee*.

I. *Mibirwanjee Nuoshirwanjee v. Awan Bae*, 1825, (discussed on 353, 383).

II. *Buchaboye v. Mervanjee Nasserwanjee*, 1844, mentioned by both of the Bombay Supreme Court's judgments (by Yardley and Jackson) but not discussed in the Privy Council's final judgement. (discussed on 353, 371) *Perry's Oriental Cases*, 73; in *Perry's Oriental Cases*, it is spelled "Buchaboye v. Merwangee Nasserwangee."

III. *Beebee Muttra's case*, 1833 (discussed on 365, 368, 369)

Andries v. Andries and *Lindo v. Belisario* (1 Hagg. Cons. Rep. Appx. 9), about the Jewish use of London consistory courts, was also discussed on 371.

⁴²⁴ *Ardaseer Cursetjee v. Perozeboye*, 6 MIA 348 at 391, the citation for *Mibirwanjee Nuoshirwanjee* is 2 Borr. Bom. Sud. Dew. Rep., 209, 1825.

⁴²⁵ 5 Ben. Sud. Dew. Ad. Rep. p. 200 discussed in *Moonshee Buzloor*, 570.

⁴²⁶ 7 Ben. Sud. Dew. Ad. Rep., p. 27, discussed *Ibid.*, 570.

⁴²⁷ Sel. Rep., 103; discussed *Ibid.*, 570.

⁴²⁸ *Ibid.*, 570.

⁴²⁹ Setalvad, *Common Law*, 22.

Though a full account of the development of early nineteenth century marital litigation is beyond the scope of this dissertation, a cursory and hypothetical narrative of the incorporation of conjugal rights is possible from the brief account presented above. Some of the very earliest conjugal rights suits involved Armenian Christians on the Ecclesiastical side of the Bombay High Court; they were likely descendants of India's long-standing Armenian trading communities. As noted, though Christians, Armenian Christianity was deemed to lack religio-judicial apparatus suitable for application in the British courts in India, so instead Armenians used English law.⁴³⁰ As Christians, it perhaps made sense to turn to the Ecclesiastical courts in the Bombay Supreme Court. But this was not an entirely religious matter. To contemporary lawyers, the Ecclesiastical courts would also have been natural forums for such arguments because many aspects of matrimonial and personal relationships were litigated in the Ecclesiastical division.⁴³¹

Then, Parsis effectively took up the same remedy in the Bombay Ecclesiastical division.⁴³² This was relatively successful until barred by the Privy Council in 1856. This seems to be a yet another example of the Parsi facility and persistence in using the common law in India. Reiterating the argument made by Mitra Sharafi, one could hypothesize that enterprising Parsi lawyers took up the practice of using the Ecclesiastical courts through observation of earlier Armenian and Muslim use of the courts for conjugal rights, as in cases 1-3. But it should also be reiterated that Ecclesiastical jurisdiction was one natural forum for such suits.

⁴³⁰ Sharafi, *Law and Identity*, 134-5. The cases Sharafi gives for the application of English law to Armenians in India are *Aratoon Harapriet Aratoon v. Catherina Aratoon* (1956), cited in William H. Morley, *An Analytical Digest of All The Repeorted Cases Decided in the Supreme Courts of Judicature in India*. . . ., NS, v. 1, (London: Allen, 1852), pp. 182-3; *Jacob Joseph v. Rowand Ronald*, (Ind. Dec. (O.S.) I: 68 (1818)) and *Emin v. Emin* cited in *Stephen v. Hume* (Ind. Dec. (O.S.) I: 778), found by Sharafi in Jain, *Outlines of Indian Legal History*, 5th ed. (1990), 418.

⁴³¹ See discussions, *passim*, in *Ardaseer Cursetjee and Moonshee Buzloor Rubeem*.

⁴³² Sharafi, 5 and *passim*.

Simultaneously, lower civil courts in Bengal also heard conjugal rights suits under their general civil jurisdiction during the first half of the nineteenth century, as in the three Muslim cases brought forward by Moonshee Buzloor Ruheem. This showed that conjugal rights suits were not limited to Bombay or its Ecclesiastical jurisdiction. It also suggests that the practice may have developed along two separate trajectories with independent origins, primarily in the Ecclesiastical courts in Bombay Presidency (mostly Bombay city), and on the civil side in the Bengal Presidency. Finally, looking at the chronology of the cases, and the gap in dates between its initial use in Bombay and Parsi use in 1840s Bombay, we might surmise that Parsi lawyers drew on the more recently reported Bengal precedents in reviving its use in Bombay. This, however, does not explain why they turned to Ecclesiastical courts while their counterparts in Bengal used civil jurisdiction.

Ardaseer Cursetjee and Perozeboye, 1856

The aforementioned records were unearthed by the 1856 *Aradaseer Cursetjee* proceedings, which called into question the validity of this earlier use of Ecclesiastical jurisdiction. The *Aradaseer Cursetjee* decision by the Privy Council in 1856 sprang out of the unhappy 1830 marriage of two Bombay Parsis. The wife did not go to live with her husband, nor consummate the marriage, until three years later. Even after this, she frequently returned to visit her natal home, in part due to her young age. On one such trip, her husband failed to invite her back to his home. Her father corresponded with the husband's father and eventually the wife was returned to her husband's home. But there she met with her husband's continued ill-treatment of her, and he finally expelled her from the matrimonial home.⁴³³

⁴³³ *Ardaseer Cursetjee*, introduction, 350.

For the rest of her father's life, he supported her in his home but, after his death, she fell on hard times and was forced to sell her possessions and take on loans. Meanwhile, her husband had married a second wife and borne children with her. The first wife asked the Bombay Supreme Court to order her husband to take her back "and treat her with conjugal kindness" or, barring that, to at least provide her maintenance to live separately as well as her maintenance in arrears at the high rate of Rs. 1,000/month.⁴³⁴ The husband protested that Ecclesiastical courts could not entertain such suits between a Parsi husband and wife, especially given that a Parsi husband could, under Parsi law, contract a second marriage, while this was not possible under Christian law.

When the case came before the Ecclesiastical division of the Bombay Supreme Court, it produced two different opinions on the question of whether Parsis could use Ecclesiastical jurisdiction to obtain orders of cohabitation and "conjugal kindness."⁴³⁵ Chief Justice Yardley and Judge Jackson each offered separate opinions. Each opinion accepted the general existence of the Ecclesiastical courts as well as the continued use of them for some forms of matrimonial relief. However, the junior Judge, Jackson, rejected the use of Ecclesiastical courts for enforcing cohabitation among Parsis.

The Chief Justice's position prevailed because he was the senior judge. He argued that Parsis could use Ecclesiastical courts to enforce conjugal rights for three main reasons. First, marriage was a total status with certain rights and privileges that could not be separated out from each other. As Chief Justice Yardley put it, "it is suggested that the wife, in a case like the present, might sue her husband, either on the equity or plea side of the Court, and that at all events persons supplying her necessaries might sue him [since he was her legal

⁴³⁴ Ibid., 350.

⁴³⁵ Ibid., 351.

representative].”⁴³⁶ The problem with such a contention, according to Justice Yardley, was that the rights upon marriage especially for the Parsi wife went far beyond just “the right to be maintained at the expense of her husband” and “under it a female acquires a *status*, rights, and privileges which would be very inadequately vindicated by any action for necessities.”⁴³⁷ It was only in the Ecclesiastical side of the court that the wife could enforce her non-material rights, such as her right of cohabitation and even “conjugal kindness” by the husband, rights that were a part of total package of rights and obligations of marriage.⁴³⁸

Second, the Chief Justice reasoned, Ecclesiastical law was imported directly to India without many modifications so that it should be practiced in India as much as possible as in England, “so far as was consistent with the circumstances of the country and its inhabitants.”⁴³⁹ If an English wife could sue for conjugal rights in that forum, so too could an Indian wife. Third, the Ecclesiastical jurisdiction over conjugal rights had the force of time and institutions working for it. The Chief Justice stated that the practice of hearing such suits in the Ecclesiastical division met Lord Mansfield’s standard of “a rooted and established practice.”⁴⁴⁰

The junior judge, Jackson, made clear his pains to protect Parsi women’s rights, but suggested that Ecclesiastical jurisdiction in India did not extend to include ordering cohabitation. Jackson put forward two main reasons for ending the practice of allowing suits for cohabitation by non-Christians on the Ecclesiastical side of the Bombay Supreme Court. The first reason involved Jackson’s statutory interpretation of the early charters founding the Calcutta and Bombay Supreme Courts. These statutes and subsequent legislation delineated

⁴³⁶ *Ardaseer Cursetjee*, opinion of Chief Justice Yardley, from the Bombay Supreme Court, 362.

⁴³⁷ *Ibid.*, 362-3.

⁴³⁸ *Ibid.*, 362-3.

⁴³⁹ *Ibid.*, 363. See also Setalvad, *Common Law*, 25.

⁴⁴⁰ *Ibid.*, 363.

two separate categories: “British subjects” and “inhabitants of Bombay.” The two groups had different relationships to Ecclesiastical jurisdiction, Jackson argued: British subjects, as well as “native Christians” and “Portuguese,” could avail of Ecclesiastical jurisdiction.⁴⁴¹ Inhabitants of Bombay could use the Ecclesiastical division but their ambit was more limited, primarily “to Probates and Letters of Administration.”⁴⁴² Here Judge Jackson reasoned that, unless some discrimination in the use of Ecclesiastical jurisdiction had been intended by the charters, two separate categories of subjects of the law would not have been delineated in the charters. In this way, for the most part, non-Christians would be excluded from Ecclesiastical jurisdiction.

This first reason contributed to Jackson’s second, culturalist reason, that applying Christian marriage standards to a Parsi or other Indian marriage would be incorrect most especially because of the problem of polygamy (or strictly speaking polygyny). The obligation of cohabitation, “appears to me to be an adjudication applicable to Christians only, and somewhat anomalous when applied to Asiatics...”⁴⁴³ Were the court to grant this right to members of other Indian religions, it would be doing an injustice to the historic right of India’s religions to maintain their own personal laws as well as to Christian religious morality. Parsi marriage was different than Christian marriage. According to Jackson, in contrast to Christian marriage, Parsi marriage did not enjoin an obligation or right of cohabitation:

...I think we should hesitate before we introduced among Asiatics so peculiar a form of proceeding as this. The jurisdiction to compel cohabitation seems to flow peculiarly from the Canonist’s notions of indissolubility of a Christian marriage, and the obligation, under dread of spiritual censure, to perform all conjugal duties, and is, therefore, I think, inapplicable to natives, who are not bound by any law that I know to live with their wives, and are allowed great facilities of divorce. If a suit of this

⁴⁴¹ *Ardaseer Cursetjee*, opinion of Jackson, from the Bombay Supreme Court, 364-7, esp. top 367. Citing the charter, Jackson, from the Bombay Supreme Court, 369; point about Portuguese and “native Christians,” 368. Opinion of Sir Edward Ryan, *Beebee Muttra’s case*, discussed by Jackson top of 368.

⁴⁴² *Ibid.*, 368.

⁴⁴³ *Ibid.*, 372.

nature can be entertained, we may be called on hereafter to compel a native woman to return to her husband's roof, under which he has other wives, who monopolise his attentions, or we may compel a *Mussulmanee* to return to her husband's house, to be divorced the minute afterward, by an imprecation.⁴⁴⁴

Judge Jackson wanted the Christian law to have no part in endorsing polygamy, which it would if it helped a Parsi wife return to a polygamous marriage. Presumably, in Jackson's view, the more appropriate remedy would have been to require the husband to maintain the wife separately.

One of the key points distinguishing the two views revolved around the status of the wife. The Chief Justice found that the Parsi wife could turn to the Ecclesiastical jurisdiction for ordering cohabitation because of her status as a wife, a status that could not be pulled apart into separate rights with separate remedies. On the other hand, Jackson argued that the Indian wife was a *feme sole* (unmarried woman, in law French) or at the very least was usually treated as one by the Indian courts. Her rights as a married woman differed from that of a Christian *feme covert*. The chief difference between the two was that the Christian *feme covert* could not claim damages against her husband in civil court since at law they were one person.⁴⁴⁵ In contrast, the Indian wife, as "*feme sole*," could sue her husband for damages in civil court if her husband refused to maintain her at his home or she could claim for maintenance in equity. Jackson thus separated out the various rights and privileges of marriage from each other. According to Jackson, the three major Indian religions under consideration (besides Christianity), Islam, Hinduism, and Zoroastrianism, all treated the wife as *feme sole* rather than *feme covert*. He stated, "she seems to have just the same right to sue in respect of this breach, as any other person has to sue for any other breach of contract."⁴⁴⁶

As an adjunct to this, Jackson argued that the wife, since she was a *feme sole*, could obtain

⁴⁴⁴ Ibid., 370-1.

⁴⁴⁵ Doggett, *Marriage, Wife-Beating and the Law*, 35, 83, 98, describes the victory of the fiction of marital unity.

⁴⁴⁶ *Ardaseer Cursetjee*, opinion of Jackson, from the Bombay Supreme Court, 373.

maintenance in a non-Ecclesiastical jurisdiction such as in equity jurisdiction.⁴⁴⁷ Her ability to obtain a remedy in another forum obviated the need for her to use Ecclesiastical jurisdiction. Contemporary historians debate the import of marital status in determining women's rights and social status. This difference of opinion within the Bombay Supreme Court shows that, in the nineteenth century as well, marital status had no one fixed meaning. It played an important role in adjudicating matrimonial disputes but its status was not always clearly defined or obvious.

Privy Council decision, 1856

These differing opinions gave rise to the Privy Council appeal by the husband, who sought vigorously to block his wife's use of the Ecclesiastical division in her case. By the time the Privy Council reached its decision in 1856, the husband and wife had been litigating for at least thirteen years, since Perozeboye filed her first suit (which she lost) in the Bombay Supreme Court in 1843 (#4).

The Privy Council came to the same conclusion as Jackson, though for different reasons. It ruled that Parsis (and presumably Hindus and Muslims) could not bring a suit for conjugal rights on the Ecclesiastical side of the Bombay Supreme Court. Nevertheless, the Privy Council still maintained the possibility that RCR could be entertained under the civil jurisdiction of the court, leaving it open to the husband to institute a new suit in the civil jurisdiction. The author of this judgment was the great canon judge Stephen Lushington, writing along with the Right Honorable T. Pemberton Leigh and the Right Honorable Sir Edward Peel.⁴⁴⁸ A reformer, a Whig, anti-slavery campaigner, and sometimes radical, Lushington served as a judge in the Consistory Court from 1828 to 1858 and as a judge in

⁴⁴⁷ Ibid., 372.

⁴⁴⁸ The assessor was Sir Lawrence Peel. See *Ardaseer Cursetjee*, introductory matter, 348.

the Court of Arches from 1858 to 1867.⁴⁴⁹ The Consistory Court was the Ecclesiastical court of the Diocese of London. The Court of Arches was the “highest English Ecclesiastical court.”⁴⁵⁰ Lushington surely knew that matrimonial jurisdiction would be excised from Ecclesiastical jurisdiction when he made his decision in *Aradaseer Cursetjee*, because he sat on the commission that recommended such a change.⁴⁵¹

Since Aradeseer Cursetjee had married a second wife, or at the very least was adulterous, the Privy Council was prohibited from using Ecclesiastical law to endorse such an arrangement. Lushington argued that the wife could not, under Christian law, be ordered to return to either a bigamous or an adulterous marriage. Lushington’s condemnation of bigamous marriage had racial and religious overtones, suggesting the superiority of a Christian sacramental, monogamous marriage that the law made difficult to end. Lushington was reluctant to use Christian law to endorse bigamy. Notably, Justice Jackson’s earlier rejection on the ground of the Parsi wife as *feme sole* played no role here.

Lushington distinguished adjudication by Jews in the Ecclesiastical courts in England from the Parsi use of Ecclesiastical jurisdiction in India. Lushington noted that “the Ecclesiastical Courts in England have exercised jurisdiction with respect to Jewish marriages, ascertaining their validity by Jewish laws; but the very great difficulties attending such investigation, and the almost absurd consequences to which they lead, would not induce us to follow those precedents further than strict necessity requires.”⁴⁵² Lushington did not pursue a detailed rationale for distinguishing the two cases of minority religious groups’ use of Ecclesiastical jurisdiction. Perhaps he considered Zoroastrianism more unknowable than a

⁴⁴⁹ Waddams, *Law, Politics, and the Church of England*, 5-6.

⁴⁵⁰ *Ibid.*, 5-6.

⁴⁵¹ *Ibid.*, 21

⁴⁵² *Aradaseer Cursetjee v. Perozeboye*, judgment of Privy Council, Lushington, 388.

fellow Abrahamic religion like Judaism.⁴⁵³ Again, perhaps the Parsi allowance of polygamous marriages was also a distinguishing factor.

There is a second important point that bolsters the idea that polygamy was a distinguishing factor. In the Bombay case, Perozeboye asked the court to require her husband to accept her in his marital home. This was not the standard practice in English suits, however. Lushington pointed out that an English wife would not request the court to return her to the matrimonial home in the case of a second marriage, though she might request separation and alimony. As Lushington put it, “In England, the wife, on account of such an intercourse would be entitled to a separation from bed and board and alimony; but a prayer for restitution is, under such circumstances, wholly unheard of.”⁴⁵⁴ The Parsi wife sought a different remedy than the English wife would have. Restitution of conjugal rights was a flexible concept and a remedy that litigants took up to serve a variety of ends. In the case of Perozeboye, succeeding in her suit would have restored her to her “status” as wife with rights of residence in her husband’s home despite his second wife. If she failed, she could at least claim a substantial sum of alimony from him. Foreshadowing a pattern found in later cases as well, Perozeboye used a demand for conjugal rights as an initial proof of her husband’s refusal to maintain her in the matrimonial home that could be leveraged for a demand for alimony.

Ultimately Perozeboye lost her suit. Having brought her suit in the incorrect forum, she would now be forced to turn to the civil courts, as prescribed by Lushington.

Lushington suggested that, in the civil courts, each individual religion’s law would be

⁴⁵³ Sharafi notes that many colonial judges did feel this way: “...colonial administrators felt that there was no such thing as religious law in the Zoroastrian tradition. They disagreed over whether this was because of an absence of law from the beginning or a later loss of material.” Sharafi, *Law and Identity*, 136.

⁴⁵⁴ *Aradaseer Cursetjee v. Perozeboye*, judgment of Privy Council, Lushington, 389.

administered to its adherents.⁴⁵⁵ For Lushington, the precedent *Mihirwanjee Nuosbirwanjee v. Awan Bacc* indicated that Parsi law had been administered to Parsis on the civil side of the Bombay Supreme Court in the past.⁴⁵⁶ Therefore, a wife like Perozeboy would not be without recourse even if she could not bring her suit under the Court's Ecclesiastical jurisdiction.

There are several ways to read the Privy Council's banning of the practice of ordering cohabitation and conjugal rights in the Ecclesiastical jurisdiction. The Privy Council may have sought to keep India in sync with developments in England: if English Ecclesiastical courts would no longer administer matrimonial law, why should Indian courts administer it to Parsis? The decision can also be read as an exemplar of colonial masculinity, in that the Privy Council upheld the husband's jurisdictional dodge, denying the wife the remedy she sought.⁴⁵⁷ Its rationale rested on racial, religious, and cultural assumptions. Such racial and religious concerns centered on the possibility of the colonial courts endorsing polygamy within a Christian religio-legal framework. Gayatri Spivak coined the phrase "white men are saving brown women from brown men"⁴⁵⁸ to describe this rationale. But in the case of *Ardaseer Cursetjee*, the Privy Council went so far as to save the brown wife from herself and her (perceived) anomalous desires to be restored to a bigamous marriage.⁴⁵⁹ Lushington's judgment could not countenance her desire to be restored to her matrimonial

⁴⁵⁵ Ibid., 389-91.

⁴⁵⁶ Ibid.

⁴⁵⁷ Sinha writes, "The crucial point about the impact of the politics of colonial masculinity was that even as it produced a complicity between colonial interests and indigenous orthodoxy, it obscured the colonial role in nurturing the indigenous orthodoxy. The result was that colonial masculinity not only discouraged support for reform, but, even more crucially, it underwrote the very protest against social reform." Sinha, *Colonial Masculinity*, 142.

⁴⁵⁸ Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (Urbana: University of Illinois Press, 1998), 296.

⁴⁵⁹ Spivak also describes the Indian wife who was immolated on her husband's pyre (the *sati*) as the "The woman wanted to die." Between these two statements, there was no "itinerary" of free will. Spivak, "Can the Subaltern Speak," 302.

home within the framework of Ecclesiastical law and, because Parsi law purportedly allowed bigamy, he could not simply nullify the second marriage.⁴⁶⁰ As Mitra Sharafi has shown, the decision prompted something of a moral panic among those Parsis who wanted to reform Parsi marriage. They claimed that it led to an increase in polygynous marriages: the court's refusal to grant the wife her restitution of conjugal rights was interpreted as an endorsement of Parsi polygamy, even though this was not what the decision actually stated. It actually found that the Ecclesiastical division was the incorrect jurisdiction.⁴⁶¹ This misperception, in turn, added fuel to the demand for the Parsi Marriage Act of 1865, which did definitively outlaw polygamy for Parsis.⁴⁶²

The failure to accept the adjudication of conjugal rights on the Ecclesiastical side did not sound the death knell of the practice in India—far from it. The decision had implications far beyond the narrow ambit of Parsi personal law. Instead, the *Aradaseer Cursetjee* decision pushed conjugal rights litigation firmly into the civil jurisdiction of the Indian courts, where it also already had a start. There it took on a life of its own.

Moonshee Buzloor Ruheem and Shamsoonissa, 1867

Moonshee Buzloor Ruheem sat on the other side of the great dividing line of the Indian Mutiny from *Ardaseer Cursetjee*. Its outcome reflected the renewed colonial imperative to protect Indian religions, lest religious tampering prompt further rebellion. But it also reflected a longer body of precedents and developments in Indian matrimonial litigation. Decided in 1867 by the Privy Council, the *Moonshee Buzloor Ruheem* judgment comprised two property suits and one conjugal rights suit. The litigation involved the Moonshee Buzloor

⁴⁶⁰ Sharafi, *Law and Identity*, 170-5.

⁴⁶¹ *Ibid.*, 170-3.

⁴⁶² *Ibid.*, 171.

Ruheem of 24 Paragannas, a zamindar (estate owner) who was wealthy in land, but by the time his legal troubles began, “embarrassed” by his lack of liquidity.⁴⁶³ It was his second wife, Shamsoonissa, whose property rights and obligations to suffer physical violence and restraint were the subject of this case. She had entered the marriage with considerable wealth, some of which she had inherited upon her father’s death. The property consisted of jewelry and other valuables, shares in two gardens (Dum-Dum and Narain Mundul, near Calcutta), and a considerable amount of Company paper.⁴⁶⁴

There are many fascinating stories interwoven into this long case. One involves the transformation of a matrimonial dispute dealt with through local means into a formal legal plea. While the twentieth-century litigants discussed in subsequent chapters could turn to a well-established legal form of RCR, *Moonshee Buzloor Ruheem* shows how a local dispute wended its way through the courts to help create that later legal form. It drew on particular factual circumstances; precedents and textbooks of Muslim law; and the lawyers’ own innovative legal arguments and research.

Though the judgment occupied the post-Mutiny moment, most of the relevant events took place in the decade before the Mutiny. Widow Shamsoonissa married Moonshee Buzloor Ruheem in 1847, and added to her brood of five children by having a daughter with him. Conflicts over a complicated series of property transactions from 1847 until the breakdown of the marriage in 1855 seem to have driven Shamsoonissa from Buzloor Ruheem’s home in Sealdah, Calcutta.

⁴⁶³ *Moonshee Buzloor Ruheem v. Shamsoonissa*, 590.

⁴⁶⁴ Notes representing bonds issued by the East India government, a common sort of alternative currency in the first century of English rule. See Amiya Kumar Bagchi, “Transition from Indian to British Indian Systems of Money and Banking, 1800-1850,” *Modern Asian Studies* 19, no. 3 (1985): 513.

This series of legal transactions began when the husband of one of Shamssoonissa's daughters approached the Magistrate for Shamssoonissa's release.⁴⁶⁵ The Magistrate forced the husband to grant Shamssoonissa some degree of freedom, though acknowledging that the marriage tie persisted. Husbands' control over their wives' mobility was a tactic that could limit wives' access to property and freedom. When she complained to the Magistrate [local judge] "of ill-usage on his part, she was allowed by the Magistrate of the Twenty-four *Pergunnahs* to leave his house. They have since lived separately..."⁴⁶⁶ The Magistrate gave "her the option to live where she chose, but declaring that she was not thereby separated from her position as the Wife of the Appellant; and, to prevent the commission of any acts that might lead to an affray, the Appellant was bound over, by recognizance in Rs. 10,000 for a year, liberty being given to the Respondent to sue for having been beaten and confined by the Appellant."⁴⁶⁷ The initial order by the Magistrate evinced violence between husband and wife, especially since the Magistrate placed a bond of considerable value on the husband to guarantee his good behavior with her.

It should be noted that such compromises and bonds of good behavior had very old antecedents, reflecting the local Magistrate or Ecclesiastical judge's role as a "a rather heavy-handed marriage counselor" as much as a legal authority.⁴⁶⁸ Scholar of English medieval matrimonial litigation R. H. Helmholz states that judges could "impose a guarantee (*cautio*) on the husband to treat his wife fairly and honestly" and this was a very common practice in wives' suits for *divorce a mensa et thoro* (separation), resulting in the wife returning to the

⁴⁶⁵ *Moonsbee Buzloor Rubeem*, 556. The husband's restraints on the wife and the wife's relatives' efforts to have her released are very similar to R. v. Jackson described in Doggett, *Marriage, Wife-Beating and the Law*, 1-4.

⁴⁶⁶ *Moonsbee Buzloor Rubeem*, 582 [Privy Council's judgment, case history], 554

⁴⁶⁷ *Ibid.*, 554.

⁴⁶⁸ R.H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge Studies in English Legal History (London: Cambridge University Press, 1974), 101.

husband's home instead of the wife's pursuit of the separation suit to its conclusion.⁴⁶⁹

Helmholz notes that the guarantee in medieval England did not need to be in property; such guarantees could also include "men willing to stand behind his good behavior" or even "the man's oath alone."⁴⁷⁰ The judge's local knowledge and authority, and the litigants' integration in local networks of knowledge, respect, and surveillance, gave such an outcome some hope of efficacy. This was a common practice in the eighteenth and nineteenth centuries. Doggett states, "from the eighteenth century [such a request by a wife] never seems to have been refused."⁴⁷¹ Likewise, here Shamsoonissa and her family members and the Magistrate sought to regulate the husband's behavior through the use of the bond and local surveillance.

This agreement having been reached in December 1855, four months later Shamsoonissa instituted a property suit against her husband, in the spring of 1856.⁴⁷² In response, and "on the same day,"⁴⁷³ Moonshee Buzloor Ruheem filed his restitution of conjugal rights suit against Shamsoonissa.⁴⁷⁴ In the restitution suit, the Zillah [district] judge in the court of first instance, found that the husband had, by virtue of becoming a Freemason, outcasted himself and thereby relinquished his conjugal rights to his wife.⁴⁷⁵ On appeal, the Sudder Ameen, or Indian judge of second class,⁴⁷⁶ ruled in favor of Shamsoonissa. The husband appealed to the Calcutta Supreme Court, but he lost his appeal there as well.⁴⁷⁷ Finally, he appealed to the Privy Council. There he met with somewhat more success: the Privy Council determined that Indian Muslims could use conjugal rights suits

⁴⁶⁹ Ibid., 102.

⁴⁷⁰ Ibid.

⁴⁷¹ Doggett, *Marriage, Wife-Beating, and the Law*, 30.

⁴⁷² *Moonshee Buzloor Ruheem*, 582.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ *Hobson-Jobson: A Glossary of Colloquial Anglo-Indian Words and Phrases*, 2nd ed., comp. Sir Henry Yule, A.C. Burnell, and William Crooke (New Delhi: Munshiram Manoharlal, 1968), s.v. "sudder."

⁴⁷⁷ *Moonshee Buzloor Ruheem*, 583. The Supreme Court at Calcutta became the Calcutta High Court in 1862 under the Indian High Courts Act of 1861.

under Muslim law. It remanded the case to the Calcutta High Court for trial on the facts.⁴⁷⁸ In line with the course endorsed in *Aradaseer Cursetjee*, it made clear that conjugal rights suits could be pursued in Indian civil courts by Muslim litigants but should be adjudicated under Muslim law.

The husband contended that Muslim law should apply to him, and put forward a fundamentally different interpretation of Muslim law than the wife. His interpretation required the wife's residence with her husband and allowed the husband a great extent of physical violence. Even if his behavior had exceeded the limits of violence allowed to a husband by Muslim law, he contended, the wife should still be ordered to return to him with only a bond to guarantee his good behavior.⁴⁷⁹ The husband argued that his patriarchal right lay under Muslim law, and the courts must enforce Muslim law.

The wife argued, first, that Muslim law did not allow this and, second, even if it did, Muslim law did not necessarily apply in this scenario. Since there was uncertainty, there was scope for the courts to make decisions based on justice and good conscience, the wife contended.

In court each side can put forward several different arguments that may mutually exclude each other in an attempt to achieve the best outcome for the litigant. Here the wife argued both that the husband had violated her rights within Muslim law *and* that, even if he had not, his behavior had exceeded the bounds of "justice, equity, and good conscience." In sum, there were three arguments at play here: i) the husband had a right to his wife's person under Muslim law and the government must respect this (husband); ii) the wife had a right to live apart because her husband had violated her rights under Muslim law (wife); iii) the court

⁴⁷⁸ *Moonshee Buzloor Rubeem*, 616-17.

⁴⁷⁹ *Ibid.*, 571-2.

could, under its broad scope for equity, determine that the husband's behavior violated a general standard of "equity, justice, and good conscience" (wife).⁴⁸⁰

The rhetoric of cruelty can be contrasted with both earlier and later language. In the very earliest cases on ordering a wife to return to her husband, the language was not of cruelty at all, but of the husband's positive obligation of conjugal kindness and marital affection. In *Aradaseer Cursetjee*, the wife sought a hybrid: Her demands for residence and decent treatment by her husband were framed by the assessor for the Privy Council as a suit for restitution of conjugal rights.⁴⁸¹ In *Moonshee Buzloor Rubeem*, much of the discussion was taken up with the idea of the husband's and wife's rights against each other. A personal status was brought into the framework of rights language. This process began in *Aradaseer Cursetjee* when the case was classified as a "restitution of conjugal rights suit" even though the original language of the plaint requested simply that the husband "be ordered to take back his wife, and treat her with conjugal kindness," or maintain her.⁴⁸² It received much further support with *Moonshee Buzloor Rubeem*, the Privy Council making clear that such restitution of conjugal rights suits were valid in India. While the earlier suits may also have sought to enforce rights between husbands and wives, it is significant that such conjugal disputes came to be framed squarely within the language of rights.

In part because it was the husband suing the wife, the formula was different in *Moonshee Buzloor Rubeem*. That the husband had some forms of conjugal rights over his wife was not at question: the only question was whether his behavior had crossed the line that would abrogate that right. Shamssoonissa was a "young widow" and the court attributed the

⁴⁸⁰ *Moonshee Buzloor Rubeem*, 576-7. The citation for *Peere Williams* is 2 P. Will., 75. The citation for *Rex v. Brooke* is 2 Burr., 1991.

⁴⁸¹ *Ardaseer Cursetjee and Perozeboye*, introductory matter, 348.

⁴⁸² *Ibid.*, 348, 351.

husband's cruelty to his greed and their property disputes.⁴⁸³ Notably, the husband's cruel behavior was not described in great deal in the original hearing: "there was no evidence given of any specific ill treatment" besides his attempt to control Shamsoonissa's property.⁴⁸⁴ Despite the lack of specificity, the lower court (the Sudder Ameen) found that the wife was "in danger of her life."⁴⁸⁵ The Calcutta High Court decision gave further details: Moonshee Buzloor Ruheem "ill use[d] her, and shut her up as if in prison," forcing her, "lately a rich widow," to leave his home "with [only] the bare clothes on her back."⁴⁸⁶ In the Privy Council's final judgment, the wife was deemed to have provided insufficient evidence of her husband's cruelty, since her contention mainly rested on "the proceeding of the Magistrate" that originally released her, its slim evidentiary value represented by its treatment as "the record of an act done by a Police Officer" and not a legally proven and validated record.⁴⁸⁷ The Privy Council noted the evidence that she could have put forward, but did not, such as calling the Magistrate as a witness to testify to her condition or giving her own testimony.⁴⁸⁸

The Privy Council decisively rejected the wife's argument that justice, equity, and good conscience could be the basis of the court's decision in a suit for conjugal rights between Muslims. The Privy Council declared that Muslim law included a husband's patriarchal right over his wife. Restitution of conjugal rights could be enforced under Muslim matrimonial law. The decision established decisively the space for conjugal rights within the jurisdiction of Indian Muslim law. Since Shamsoonissa was deemed not to have sufficiently proved her husband's cruelty, the Privy Council remanded the suit to the Calcutta High

⁴⁸³ *Moonshee Buzloor Ruheem*, introduction and general facts, 554.

⁴⁸⁴ *Ibid.*, introduction and general case history, 558.

⁴⁸⁵ *Ibid.*, 554, 558.

⁴⁸⁶ *Ibid.*, summary of appeal to the Calcutta High Court, 559.

⁴⁸⁷ *Ibid.*, Privy Council judgment, 616.

⁴⁸⁸ *Ibid.*, 616-7.

Court for a retrial on the facts. The decision thereby imported an English remedy into Anglo-Muslim law.

Sources of Decision

There were three different sources for the Privy Council's decision that the Indian courts did have jurisdiction to entertain RCR suits for Muslim marriages, under Muslim law.

These three sources were:

1. precedents and authoritative textbooks on Muslim law (specifically the *Hedaya* and the *Hingu* judgment from 1832);
2. statute (Bengal Regulation IV of 1793, s. 15);
3. and, "the nature of the thing:"⁴⁸⁹ the imperatives of colonial governance, specifically that since "the rights and duties resulting from the contract of marriage vary in different communities"⁴⁹⁰ there was no alternative to turning specifically to the "the particular law of the contracting parties."⁴⁹¹

1. *Authorities/Precedents*

The Privy Council identified at least three sources for the Muslim husband's right: *i*) the general husbandly authority found in the *Hedaya*; *ii*) an even broader source in the "framework of Oriental society..."; *iii*) prior practice, as found in the *Hingu* precedent.

Let us take the first two together. The *Hedaya* was a primary source of Muslim law for the colonial legal system. It was a twelfth-century manual of jurisprudence (*fiqh*) compiled by Ali ibn Abu Bakr al-Marghinani (d. 1196) in Central Asia. It was adopted by Indian jurists

⁴⁸⁹ Ibid., Privy Council judgment, 610.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

of the same Hanafi school (*madhab*) of religio-legal adjudication.⁴⁹² Colonial courts relied heavily on this text as a guide to Muslim law. However, the version they used had been translated, first by Indian scholars from Arabic to Persian, and then by Charles Hamilton in 1791 to English.⁴⁹³ The complex and inherently selective and political process of translation fundamentally changed the text, as did its deployment in the precedent-based common law courts. This leads scholar Scott Kugle to conclude that, in commissioning Hamilton's translation of the *Hedaya*, Sir Warren Hastings "did not just find a text, he created one."⁴⁹⁴ While there were a multitude of textbooks on Islamic jurisprudence and compendia of *fatawa*, or non-binding but authoritative legal rulings on how to live a pious and correct life available, it seems that colonial judges, for simplicity's sake, usually defaulted to the *Hedaya*, as was the case in *Moonshee Buzloor Rubeem*.⁴⁹⁵

The Privy Council noted the *Hedaya* gave a strong right to the husband over his wife, though the manual did not specifically enumerate the husband's right to compel his wife's residence with him. The Privy Council found that

it seems implied though, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent. In fact, the principle of keeping a man's *hareem* in seclusion and under his control, is so essential a part of the framework of Oriental society, that it is naturally assumed and then and taken for granted by the Mussulman expounder of the law.⁴⁹⁶

The Privy Council extrapolated the husband's rights to his wife's cohabitation from the general patriarchal right of the Muslim husband.⁴⁹⁷ From the fluid, contextual *fatawaat* of the *Hedaya*, the Privy Council built an edifice of a husband's hard and fast legal right.

⁴⁹² Guenther, "Hanafi *fiqh* in Mughal India," 209-11.

⁴⁹³ Kugle, "Framed, Blamed, and Renamed," 272.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid., 273.

⁴⁹⁶ *Moonshee Buzloor Rubeem*, 610-11.

⁴⁹⁷ Ibid., 611.

Three earlier precedents in the civil courts served as guides to the state of Muslim law for the Privy Council. Based on its analysis of these precedents, the Privy Council came to the conclusion that Muslim law, like Christian law, required cohabitation grounded in the patriarchal right of Muslim law. The Privy Council used *Maulvi Abdul Wahab v. Mussumat Hingu* from 1832⁴⁹⁸ for the position that a Muslim wife could not initiate a divorce.⁴⁹⁹ The Privy Council used this feature of Muslim law to support a vision of the husband's patriarchal authority over his wife. It used a similar precedent from 1841, *Mussumat Ameena*, to support the obligation of cohabitation under Muslim law, although that case did not result in a restitution order due to the wife's young age.⁵⁰⁰

These precedents supported the use of restitution of conjugal rights in Indian law; the Privy Council found: "according to the Mahomedan law, by which the question was to be decided, the Plaintiff had a right to the possession of his Wife, and she was compelled to return to him."⁵⁰¹ The Privy Council noted, "From some passages it might be inferred that in the event of disobedience the Wife was to be given bodily into her husband's hands."⁵⁰² However, the Privy Council pointed out that, by 1867, the time at which it was writing, India's civil procedure had changed and the new Civil Procedure Code of 1861 would not countenance ordering the wife to her husband's home as a method of enforcement. Instead, enforcement was to be through imprisonment or attachment of property.⁵⁰³ In England, the method of enforcement had changed from excommunication to imprisonment in 1813.⁵⁰⁴ In

⁴⁹⁸ Ibid., 570.

⁴⁹⁹ Ibid., 560. Summary of the proceedings before the Sudder Ameen court.

⁵⁰⁰ *Mussumat Ameena v. Kuttoo Khan*, 7 Ben. Sud. Dew. Ad Rep., p. 27. From 1841. Discussed in *Moonshee Buzloor Rubeem*, 570.

⁵⁰¹ Ibid., 609.

⁵⁰² Ibid.

⁵⁰³ Ibid. The third Muslim precedent under consideration was *Kulleemooddeen v. Sona Chand Bibi* (1848 Ben. Sud. Dew. Ad. Rep., p. 795), used by the wife to show that there was no objection to the civil courts adjudicating RCR for Muslim laws.

⁵⁰⁴ Cretney, *Family Law*, 143.

1884, imprisonment for failure to resume cohabitation upon a RCR was abolished. Now refusal to resume cohabitation simply meant guilt for desertion.⁵⁰⁵ Despite this change in the method of enforcement, the Privy Council used the *Hingu* and *Mussumat Ameena* precedents to support the jurisdiction of the Indian civil courts to try conjugal rights suits according to Muslim law. Though *Moonshee Buzloor* consolidated the use of conjugal rights suits in Indian law, it did not create it.

The Privy Council reiterated that it was adjudicating its decision according to Muslim law, and not according to any external standard of equity, justice, or good conscience. Though it came to a similar position in the end, it rejected Judge Jackson's analysis that the husband had "oppressed" the wife, since Jackson failed to consider whether such oppression was allowable under Muslim law, instead making his decision outside of its ambit.⁵⁰⁶

2. *Statute*

The Privy Council's analysis also relied on the Bengal Regulation IV of 1793 s. 15.⁵⁰⁷ This series of regulations had created new procedures for Bengal courts. It was part of a larger package of reforms that included the Permanent Settlement and that attempted to separate revenue from judicial power.⁵⁰⁸

3. *Imperatives of Colonial Governance*

The third reason for conjugal rights within Muslim law involved the imperatives of colonial governance. While it made no specific reference to the Mutiny, the rationale was

⁵⁰⁵ Doggett, *Marriage, Wife-Beating and the Law*, 103.

⁵⁰⁶ *Moonshee Buzloor Rubeem*, 613.

⁵⁰⁷ *Ibid.*, 614. Among other things, the Bengal Regulation of 1793 reformed the various courts of Bengal.

⁵⁰⁸ Jain, *Outlines*, 139-48; Percival Spear, *The Oxford History of Modern India, 1740-1975*, 2nd ed. (Delhi: Oxford University Press, 1978), 184.

very much in line with post-Mutiny colonial concerns about the need to protect Indian religions to avoid further discontent. The Privy Council stated that “they [i.e. their Lordships] can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations.”⁵⁰⁹ This statement indicates the key feature of post-Mutiny jurisprudence, the protection of Indian religions. Ultimately it boiled down to “the nature of the thing:” since there was no general rule of marriage in India, “the rights and duties resulting from the contract of marriage...can be ascertained by reference to the particular law of the contracting parties.”⁵¹⁰

The Privy Council stated that the Ecclesiastical courts in England sometimes took positions which an individual judge may not have wanted to take in what later judges would term a “hard case.” It held up the need to enforce the “positive law”⁵¹¹ despite the humanitarian instincts of individual judges. Indeed, there are several examples in this dissertation of judges noting that they would have preferred to make a decision in favor of a wife, but they were constrained by positive law and their need to uphold the rule of law.⁵¹²

Limits on Marital Violence

Though the Privy Council found that the Muslim husband had many rights of physical violence over his wife, it also found that Muslim law put some limits on his

⁵⁰⁹ *Moonshee Buzloor Rubeem*, 614.

⁵¹⁰ *Ibid.*, 610.

⁵¹¹ *Ibid.*, 615.

⁵¹² Cretney also gives a similar example from 1822 wherein the Court of Arches had ordered that a disobeying wife be imprisoned while also expressing “sincere commiseration” for her. The case was *Barlee v. Barlee* (1822 1 Add 304); Cretney, *Family Law*, 143, n. 10.

behavior. Even though it read all this through the lens of Muslim law, it employed analogy to determine what behavior could or could not be tolerated, drawing on English law:

As to personal violence, there are certainly passages in the *Hedaya* which founded on a text in the *Koran*, imply that the Husband may use it for correction; but this right of corporal chastisement is expressly said to 'be restricted to the condition of safety;' and it may be questioned whether these authorities go the full length of the *Futwa* at p. 14 of the record...The Mahomedan law, on a question of what is legal cruelty between Man and Wife, *would probably not differ materially from our own, of which one of the most recent expositions is the following*:--'There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it.' 'The Court,' as Lord *Stowell* said, in *Evans v. Evans (a)*, 'has never been driven off this ground.'⁵¹³

This was the closest the Privy Council came to defining the bounds of the law. Yet it did not give completely clear guidance as to what might or might not be acceptable behavior on the husband's part. It remanded the case to the High Court for trial on facts.

The Privy Council stopped short of going into the details of the sexual relationship between husband wife, stating that "The Cannonists [i.e. Canon rulings] lay down many things concerning the relative duties of man and Wife which the Courts Christian, at least of our Country feel compelled to leave as duties of imperfect obligation."⁵¹⁴ Even though the Canon courts would not directly compel sex, leaving it only a "duty of imperfect obligation," they would go so far as to order cohabitation. The Privy Council quoted from the Attorney General's arguments that "They are content to take the Wife to the Husband's door and to leave her there."⁵¹⁵ These statements acknowledged that colonial courts could not compel sexual intercourse between husband and wife. They also showed that they were well aware of the possibility that a wife would be forced into sexual intercourse if returned to her husband's home.

⁵¹³ *Moonsbee Buzloor Rubeem*, 611-12. Emphasis added. The citation given for the *Hedaya* is Vol. II Book VII. ch. 6, pp. 75-81.

⁵¹⁴ *Ibid.*, 607.

⁵¹⁵ *Ibid.* The Attorney-General was quoting Lord Stowell apparently.

The Problem of Proof

The Privy Council had now decided the question of jurisdiction. Muslim law, read largely through the *Hedaya*, was to be applied. The husband had a clear right to his wife's cohabitation, unless she could prove cruelty. To adjudge this, it had to evaluate the evidence of the husband's cruelty. The Privy Council went on to dismantle the value of the evidence brought forward by the wife.

Recall that the wife's son-in-law petitioned a Magistrate for her release on the ground of the ill-treatment by Moonshee Buzloor Ruheem and that she left his house. As described by the Privy Council, "... it is clear that she carried nothing with her out of his house..."⁵¹⁶ Moreover, it emerged from the Privy Council judgment that prior to the Magistrate's order obtained by the son-in-law, the Magistrate had been approached once before: "...in June 1854, a petition had been presented to the Magistrate, complaining of his [the Moonshee's] ill-treatment of his Wife. He, no doubt, denied the charge, and treated it as emanating, not from his Wife, but from discharged servants; and the Magistrate then considered that the charge was unfounded."⁵¹⁷ This petition was followed up the next year by the son-in-law's successful petition for the release of the wife.⁵¹⁸ Since these early legal actions were not a conviction, nor was the husband present for them, the Privy Council would not accept them as evidence of the husband's cruelty in the conjugal rights suit.⁵¹⁹ Moreover, "It was treated by the *Nizāmaut Adawlut* [court of appeal in Bengal in criminal cases] as being the record of an act done by a Police Officer, and not the judicial proceeding of a Magistrate." The wife's proof rested on her earlier allegations before lower courts, which had produced a legal

⁵¹⁶ Ibid., 591.

⁵¹⁷ Ibid., 593-4.

⁵¹⁸ Ibid.,

⁵¹⁹ Ibid., 616.

record that could be presented at law: the Privy Council went on to state about this same evidence that “at most it proves only that the Magistrate set the Lady free from what he considered improper restraint.”⁵²⁰ This was insufficient to prove the husband’s cruelty to the extent that the wife had good ground not to live with the husband.

The judgment went on to outline other forms of evidence the wife could have introduced. She could have introduced the Magistrate’s direct testimony as a witness, evidence of her ill-treatment such as she had used in her property suit, or her own testimony. Since she did not, the Privy Council stated “She has failed to do any of these things; and it is impossible to say that the Courts below had before them in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.”⁵²¹ The Privy Council did not want to immediately order the wife to return to her husband because “Enough has been shown to render it doubtful, whether she can be restored to his *zenanah* with safety, at least whilst the relation of Debtor and Creditor continues subsist between them...”⁵²² Therefore the Privy Council ordered a retrial before the High Court.⁵²³ The Privy Council, albeit in *dicta*, recommended an informal settlement “by amicable agreement rather than by further litigation” instead of pursuing the expensive course of a retrial at the High Court.⁵²⁴

The Privy Council’s analysis was stretched. Though the two lower courts found a general jurisdiction outside of Muslim law, even after the Mutiny, thereby refusing the husband his suit, the Privy Council instead argued that conjugal rights existed under Muslim law. They read cruelty jurisprudence into Muslim law and stated there were some limits on

⁵²⁰ Ibid.

⁵²¹ Ibid., 617.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid.

the husband's rights to chastise his wife. This was a useful step for wives. However, the larger picture must be examined as well: the overall husbandly right was extensive. The Privy Council clothed its importation of restitution of conjugal rights into Indian law as a protection of Muslim law. Even when it did so, it continued to refer to Christian marriage law as an analogous example that guided its understanding of Muslim marriage. Finally, it insisted upon proof of the husband's cruelty sufficient to deprive him of his right to his wife. Shamssoonissa, in this case, lacked the requisite proof. This was a problem that would plague other wives in subsequent conjugal rights suits as well.

Between 1802 and 1867, conjugal rights underwent several changes in India. First, it was pushed out of the Ecclesiastical courts and into a general civil jurisdiction. Second, with *Moonshee Buzloor Rubeem*, the Privy Council firmly established that conjugal rights could and should be enforced and adjudicated under Indian religious personal law. Third, *Moonshee Buzloor Rubeem* marked an increasing formalization of the legal plea. Initially, wives sought to be returned to their husband's homes and treated with some modicum of decent marital behavior. It was the conjugal rights of the wives that were to be ordered. However, with *Moonshee Buzloor Rubeem*, we see the wife seeking to avoid her husband's demands that she return home so that he could avoid maintaining her separately and control her property. As we shall see in subsequent chapters, in twentieth century India, both husbands and wives used conjugal rights suits in similar patterns.

Rukhmabai, 1884-8

Many of the debates about the proper place of conjugal rights in Indian law were recapitulated in Rukhmabai's struggle with the remedy in the Bombay High Court from 1884

to 1888.⁵²⁵ The initial suit before the Bombay High Court⁵²⁶ and the appeal to a Division Bench⁵²⁷ highlighted the variety of different positions on this issue and how they could be mobilized in the service of litigants' goals. The single-judge bench of Justice Pinhey ruled in favor of Rukhmabai, but the two-justice Division Bench, consisting of Chief Justice Sargent and Justice Bayley, ruled in favor of husband Dadaji. A contemporary critic of child marriage and supporter of Rukhmabai's cause, B.M. Malabari, termed the Division Bench's decision "the brutal embrace."⁵²⁸ Sudhir Chandra's account contains an enormous amount of detail about the legal, political, and social context of Rukhmabai's experiences with marriage, the courts, and the press. The case actually raised two key legal issues: first, whether a child marriage taken out without the wife's consent could be valid, and which body of law should decide this; and, second, if the marriage were valid, the nature of the conjugal rights available to the husband. Here I will confine my analysis to the legal issues raised by the case and specifically the question of RCR.

The original terms of eleven-year-old Rukhmabai's marriage to twenty-year-old Dadaji did not intend for her to reside with her husband, but rather that Dadaji would come to live with Rukhmabai's family, in hopes of furthering his education and prospects in life under their salutary influence. However, Dadaji resisted this arrangement and lived with his uncle instead. When Rukhmabai turned twenty-two, Dadaji initiated the restitution of conjugal rights suit against her, spurred on by the 25,000 Rupees Rukhmabai had inherited from her father.⁵²⁹ Rukhmabai argued that she was not required to live with Dadaji because he did not have "a suitable house and maintenance," and also claiming that since she had

⁵²⁵ Chandra, *Enslaved Daughters*, 1.

⁵²⁶ *Dadaji Bhikaji v. Rukhmabai*, 1885 ILR 9 Bom 529

⁵²⁷ *Dadaji v. Rukhmabai*, 1886 ILR 10 Bom 301.

⁵²⁸ Chandra, *Enslaved Daughters*, 160.

⁵²⁹ *Ibid.*, 15-19.

been a child at marriage and the marriage had not been consummated, it was invalid and Dadaji had no rights over her.⁵³⁰ Rukhmabai also wrote letters to the *Times of India* that criticized child marriage and the difficulties of the Hindu wife.⁵³¹ She decided to fight the suit rather than capitulate and go live with Dadaji. In front of the single-judge bench of Pinhey, Rukhmabai successfully defended herself against her husband's suit. Justice Pinhey used the standard of good conscience to avoid sending Rukhmabai to live with her husband.

When Dadaji appealed this decision to a Division Bench, however, he met with success. The Division Bench did not directly order Rukhmabai to go to Dadaji's home, instead deciding only the relevant points of law and sending the suit to a lower court for re-trial. There, the judge did indeed order Rukhmabai to go to her husband's home.⁵³² However, and fortunately for the colonial state, Rukhmabai's plan to appeal the decision meant that the state did not need to immediately execute the order and imprison Rukhmabai or attach her property for non-compliance.⁵³³ To do so would have put the state in a very awkward position, especially given the enormous publicity around the case. Before her appeal could be heard, the couple came to a compromise wherein Dadaji agreed not to execute the order for Rs. 2,000 from Rukhmabai.⁵³⁴ However, one scholar has found that, in the United Provinces of Agra and Oudh, women were indeed imprisoned for failure to resume cohabitation after a RCR order, three in 1892 and two in 1893.⁵³⁵

Before moving on to examine the legal treatment, we must note the recursive nature of the precedent-based common law system. Precedents had determined the law in

⁵³⁰ Ibid., 19-20.

⁵³¹ Ibid., 25-32.

⁵³² Ibid., 102-4.

⁵³³ Ibid., 102-3.

⁵³⁴ Ibid., 170-80.

⁵³⁵ Priyam Singh, "Women, Law, and Criminal Justice in North India: A Historical View," *Bulletin of Concerned Asian Scholars* 28, no. 7, (Jan.-March 1996): 29, n. 26. Singh found these records in jail reports from the respective years.

individual fact scenarios, and these rulings then took on new life as statements of general law. Later court cases argued about how that law should be applied to the facts. The earlier precedents, *Ardaseer Cursetjee* and *Moonshee Buzloor Rubeem* played important roles in the legal deliberations in *Rukhmabai*. *Ardaseer Cursetjee* was used to prove the authority of British courts to deal with restitution of conjugal rights suits.⁵³⁶ For Dadaji, the problem was that neither *Aradasser Cursetjee* nor *Moonshee Buzloor Rubeem* involved Hindus, opening him to the charge that there was no place for restitution of conjugal rights within Hindu law.

There were subsequent Hindu suits in Indian courts that drew on these earlier precedents, however. This gave weight to Dadaji's contention that Hindu husbands also could institute conjugal rights suits.⁵³⁷ These three suits together showed that husbands and wives of diverse religious communities (Zoroastrianism, Islam, Hinduism) used conjugal rights suits. Rukhmabai gave several reasons as to why she should not have to comply with her husband's order of conjugal rights. First, the marriage itself was not valid. This led to a long discussion of the Hindu law of marriage validity and with it a long discussion of jurisdiction. Should English standards of "equity, justice, and good conscience" or a Hindu law determine the issue? The second issue was whether Dadaji could maintain Rukhmabai at his home. The third issue was whether Rukhmabai could indeed be ordered to return to her husband's home, or whether she should be imprisoned or have her property attached instead.

Justice Pinhey ruled in favor of Rukhmabai. His reasoning was grounded in a standard external to any religious law. He stated, "no court had ever ordered 'a woman who had gone through the religious ceremony of marriage with a man, to allow that man to

⁵³⁶ Chandra, *Enslaved Daughters*, 76-7.

⁵³⁷ *Ibid.*, 77.

consummate the marriage against her will.”⁵³⁸ Pinhey’s analysis came to the closest to acknowledging that the colonial courts were on the verge of positively endorsing marital rape. He used a general standard to avoid having the colonial courts send an unwilling wife to her husband.

Pinhey found for a general standard external to the Hindu law drawing on what Chandra terms “legal-humanitarian frameworks.”⁵³⁹ Pinhey’s ruling did not stand before the Division Bench. The Bench’s reversal of Pinhey’s judgement was a strong reading of patriarchal right into Anglo-Hindu law. It reiterated the positions of *Aradaseer Cursetjee* and *Moonshee Buzloor Rubeem*: conjugal rights could be applied to Indians, so long as it was done within the framework of the litigants’ religious personal laws.⁵⁴⁰ In each of these three cases, the courts found that each religion’s law could countenance conjugal rights under some circumstances. In so doing, the courts each time turned to Christian marriage as an analogous example that also countenanced restitution of conjugal rights. It was as if, by drawing on the model of Christian marriages, colonial judges could somehow accept and normalize the violence inherent in that remedy for the Indian wife as well. It was through this lens that the Division Bench in Rukhmabai’s case also ruled that the wife’s consent was not essential to Hindu marriage, finding her marriage valid, though it had occurred without her consent. With the marriage deemed valid, so too were Dadaji’s conjugal rights over her.

Discussion

Comparison and Analogy

⁵³⁸ Ibid., quoting Pinhey’s judgment, 38.

⁵³⁹ Ibid., 41.

⁵⁴⁰ Ibid., 96-7.

As in *Ardaseer Cursetjee* and *Moonshee Buzloor Rubeem*, the Rukhmabai judgment by the Division Bench adopted a comparative framework for evaluating women's rights. It compared women's rights in Hinduism to those in Christianity. The courts compared women's rights along several axes. For example, in the conjugal rights cases examined here, one axis was the wife's ability to divorce and leave her husband: she could do so with a contractual marriage under Islam but not under sacramental marriage in Hinduism and Christianity.⁵⁴¹ Another axis was the extent of the woman's property rights; again, the Muslim wife was deemed to have greater property rights than the Christian in *Moonshee Buzloor Rubeem*. This comparative framework associated social advancement with women's status, though sometimes non-Christian wives were deemed to have superior rights. For Indian marriages, the husband's rights to a second marriage acted as a marker of inferiority when compared to Christian marriages. It was for this reason that Indian litigants could not use Ecclesiastical law but could use civil law to enforce conjugal rights. In general, the comparativist view adopted in the courts was not exactly the same as the dominant strain of liberalism found in Maine or Mill.⁵⁴² It used a calculation, almost quantitative, of legal rights to adjudge the status of Indian religious law against Christian/English matrimonial law. This was a variation on the standard comparison of religion or women's social status. It was more concerned with legal status and comparing rights than with actually existing social status. The comparative view drew bright lines between various religions, even when it found similar rights for the husband in each religion.

Such a framework haunts contemporary understandings as well. The comparativist approach persisted into recent scholarly treatments of Rukhmabai's legal struggle. For

⁵⁴¹ Ibid., 101. For example, the Division Bench referred to an English case to determine the procedures it could use in *Rukhmabai's* case.

⁵⁴² Metcalf, *Ideologies*, 68-9, 94.

example, Chandra points out that, in their analyses of Rukhmabai's case, both Antoinette Burton and David Gilmour misinterpreted the contemporary understanding of restitution of conjugal rights and imprisoning an unwilling wife as specifically un-English. This misinterpretation prevailed despite the fact that contemporary observers very clearly noted that restitution of conjugal rights suits were a feature of English law.⁵⁴³ Chandra wryly notes, "Stereotypes generate various ways of defying facts."⁵⁴⁴ Relatedly, and more perniciously, this comparative framework has persisted into popular political discourse in India.⁵⁴⁵ In the aftermath of the *Shah Bano* decision in 1984 and the Muslim Women's Act of 1986, Hindu nationalists, and much of mainstream Indian opinion, deemed Muslim men to have been unfairly removed from the ambit of criminal procedure.⁵⁴⁶ Indeed, the media "framed it as a battle between 'fundamentalist, orthodox, obscurantist male chauvinists' and 'modern, secular, pro-women rationalists.'⁵⁴⁷ Such competitive and comparative frameworks zero in on a particular issue and then seek to quantify each religion's approach to women's rights. However, a longer and wider historical framing highlights that India's religious personal laws are oftentimes more alike than different, and that they have common origins and trajectories due to the shared experience of colonial common law.

Another mode of analysis employed by the courts in these cases was analogy. Even though the courts were keen to decisively place conjugal rights suits within the ambit of Indian religious-personal laws, they also continued to refer to Christian marriage as an exemplar of how marriage could and should be structured. For example, in *Moonshee Buzloor*

⁵⁴³ Chandra, *Enslaved Daughters*, 257. Newbiggin also seems to make this mistake: she states that Rukhmabai used the law "to challenge the status quo." However, it was her husband who sought to reinstate the status quo (of the wife living with her husband) by initiating the RCR suit. Moreover, Rukhmabai's attempts to ward off this challenge failed. Newbiggin, *The Hindu Family*, 25, n. 66.

⁵⁴⁴ Chandra, *Enslaved Daughters*, 257.

⁵⁴⁵ See for example, Sylvia Vatuk, "A Rallying Cry for Muslim Personal Law," in *Islam in South Asia in Practice*, edited by Barbara Metcalf (Princeton: Princeton University Press, 2009), 352-9.

⁵⁴⁶ Vatuk, "A Rallying Cry," 356-7.

⁵⁴⁷ *Ibid.*

Rubeem, the Privy Council noted that there were some limits on the husband's rights of violence over the wife under Muslim law, but that this standard would be similar to the standard for the English husband.

Rape and Liberty

One issue at the heart of all the conjugal rights cases examined here was the extent to which colonial courts could compel certain behaviors on the part of husband or wife. Regardless of the chances of their orders actually being followed, the courts were issuing an official ruling on the colonial state's position on women's rights and obligations in marriage. Conjugal rights suits raised the thorny issue of compelling cohabitation and the possibility of forced sexual intercourse. The question of the marital sexual relationship between husband and wife was a vexed issue for the courts. On the one hand, sexual intercourse and procreation were ostensibly the reasons for cohabitation, though the factual circumstances of litigants showed that spouses' motivations for demanding cohabitation were in reality far more varied. The courts did not use the terms marital rape, or rape at all, or even something along the lines of forced sexual intercourse, when engaging this question. At the same time, as noted in the discussion of *Moonshee Buzloor Rubeem*, lawyers and judges recognized the limits of what the courts could compel; recall the statement that "the Courts Christian, at least of our Country feel compelled to leave as duties of imperfect obligation" and that "They are content to take the Wife to the Husband's door and to leave her there."⁵⁴⁸ As the cases of both Shamsoonissa and Rukhmabai showed, courts recognized that ordering a wife to return to her husband's home would make her vulnerable to his physical and sexual violence. In each case, the appellate court refused to order her home but also left open the

⁵⁴⁸ *Moonshee Buzloor Rubeem*, 607. The Attorney-General was apparently quoting Lord Stowell.

possibility that the lower court to which the case was remanded for trial on facts would do so. And, indeed, in Rukhmabai's case, this is exactly what happened, though the issue became moot once she agreed to a compromise.⁵⁴⁹

Even today, marital rape is an exception to the rape provisions of the Indian Penal Code.⁵⁵⁰ Marital rape was only made a crime on par with non-marital rape in England in 1991.⁵⁵¹ In India, though the 1891 Age of Consent Act made marital rape of an under-12 child wife a crime, the Act did nothing to undercut the general acceptance by the Indian Penal Code of marital rape between an of-age wife and her husband.⁵⁵²

Physical control over wives was at the heart of the question of conjugal rights. This fact was aptly emphasized by a phrase used in the Privy Council's judgment in *Moonshee Buzloor Rubeem*, stating that "It seems clear to them that if cruelty in a degree rendering it unsafe for the Wife to return to her husband's dominion were established, the Court might refuse to send her back."⁵⁵³ Behind the idea of dominion was the husband's politico-social domination of his wife as well as his physical control over her. It marked out a relationship of sovereignty as well as a relationship of physical control.⁵⁵⁴

Control over wives' physical movements was central to husbands' strategies for controlling their wives' bodies and property, wives' contentions in courts suggested. For example, in *Moonshee Buzloor Rubeem*, Shamsoonissa noted that her husband wanted to control her property and that is why he had instituted a conjugal rights suit against her. If she were compelled to return to his home, her property suits and rights might also have been threatened by his physical control over her. Likewise, in *Rukhmabai*, Dadaji seemed to be

⁵⁴⁹ Chandra, *Enslaved Daughters*, 102-4.

⁵⁵⁰ In today's IPC, see s. 375, exception; see also Sarkar, *Hindu Wife, Hindu Nation*, 211.

⁵⁵¹ Tim Stretton, "Married Women and the Law in England since the Eighteenth Century," *L'Homme Z.F.G.* 14, no. 1 (2003): 126, available at <http://www.digizeitschriften.de>, last accessed April 21, 2015.

⁵⁵² Sinha, *Colonial Masculinity*, 161-2; Sarkar, *Hindu Wife, Hindu Nation*, 211.

⁵⁵³ *Moonshee Buzloor Rubeem*, 615.

⁵⁵⁴ See also Doggett, *Marriage, Wife-Beating and the Law*, 35, 61, 82-3, 99; Baxi, 23, 44-5.

after his wife's considerable wealth and pursued this end through the legal remedy of conjugal rights, which would have allowed him physical control and through that, he imagined, control over her wealth. While this may not be surprising, it shows an important point about the legal history of marriage and coverture. Though coverture is often collapsed to married women's property rights, it should not be forgotten that legal marriage also brought with it the husband's ability to control his wife's body and sexuality.

An adjunct to this, as we have already seen, was the courts' single-minded locating of the marital home with the husband. There was a mismatch between the social realities of marriage and the law's requirement of a single matrimonial home. Sharafi makes this point in her analysis of the *Aradaseer Cursetjee* decision. She re-frames what the law termed bigamy and adultery as something closer to consecutive marriages.⁵⁵⁵ Likewise, in Rukhmabai's case, the original intention had been for the husband to live with her family in a practice known as *ghar-jawai*, in which the son-in-law lived in the wife's natal home.⁵⁵⁶ As with the citizenship cases examined in the previous chapter, the courts sought to reduce complex social circumstances to the model of the patriarchal family, with the matrimonial home located solely with the husband.

Conclusion

During the nineteenth century, the Privy Council and Indian high courts read such conjugal rights into individual bodies of Indian personal law, whether Parsi, Muslim, or Hindu. In each body of law, the husband was deemed to have a right to his wife's cohabitation unless his behavior exceeded acceptable bounds of violence. In *Moonshee Buzloor*

⁵⁵⁵ Sharafi, *Law and Identity*, 173.

⁵⁵⁶ A *ghar-jawai* or *gharjamai* is a daughter's husband, who, against virilocal norms, lives with his wife's parents, often because they lack a son.

Rubeem, the Privy Council clearly stated that the husband had rights of corporal chastisement over his wife approximately along the same lines as the English husband.⁵⁵⁷ Though these were not unlimited, neither did the wife have an absolute right to a non-violent marriage. Courts used comparison and analogy to delineate husbands' and wives' rights; the key distinguishing feature of Christian and Indian marriage was the difference on the question of polygamy. Husbands and wives each used the remedy of conjugal rights suits to attain different ends. These suits were also closely tied to concerns about property and material rights of maintenance between husband and wife.

Over the course of the nineteenth century, the idea of conjugal affection and cohabitation became formalized into a more uniform structure of "conjugal rights," in which the spouses each had a right to cohabit with the other. That rights language was used to describe such claims should not be allowed to obscure the remedy's heavily patriarchal bias. The matrimonial home was located with the husband and he had a right to access to his wife in his home. While it can be argued that the wife, too, had a right to reside with her husband and receive his financial support, she had no countervailing right to a violence-free marriage or to demand his residence with her. It is interesting that the remedy was so firmly ensconced in the language of rights and that it was open to either spouse to use. These seemingly progressive features of the remedy should not obscure its patriarchal bias and the way in which assumed the wife's dependence on the husband, either by the requirement that she live with him or by the requirement that he maintain her. Here we see that coverture structured this important arena for matrimonial litigation. After the endorsement of this remedy by *Moonshee Buzloor Rubeem*, it became even more popular in India, as we shall see in the next set of chapters. Many of the same issues raised in *Moonshee*

⁵⁵⁷ *Moonshee Buzloor Rubeem*, 611-12. Emphasis added.

Buzloor Rubeem, such as the specter of marital rape, husbands' desires to control their wives' wealth through control of their liberty, and the question of the limits of matrimonial violence, structured twentieth century conjugal rights litigation as well.

Chapter Three

Restitution of Conjugal Rights in Uttar Pradesh

This chapter uses an important 1939 Oudh Chief Court decision on restitution of conjugal rights to begin a discussion of the history of the procedure in the north Indian state of Uttar Pradesh (UP). Often the discussion of Indian personal law collapses diverse regional patterns into national analyses. Such discussions miss the nuances of jurisdictional differences, local cultural patterns, and differing historical trajectories. Though there are some notable exceptions,⁵⁵⁸ histories of Indian personal law lack the regional diversity that characterize other sub-fields of Indian history. However, since the 1935 Government of India Act, personal matters, especially marriage, divorce, adoption, succession, and inheritance (with the important exception of agricultural land) were considered concurrent powers, topics on which both the provinces and federal center could legislate.⁵⁵⁹ This division of powers remained in the 1950 Indian Constitution.

For eight decades, then, legislative powers over many personal affairs have been shared by India's federal center and its states. This has produced important regional differences in the trajectories of Indian personal laws. Moreover, as this and the following chapters show, much of Indian personal lawmaking has taken place entirely outside of the legislative arena. Muslim and Hindu statutory personal law reforms in the final decade of colonial rule were johnny-come-latelys to the arena of personal law in India. The previous chapter made this amply clear by showing that

⁵⁵⁸ Nita Verma Prasad, "The Litigious Widow: Inheritance Disputes in Colonial North India, 1875-1911," in *Behind the Veil: Resistance, Women and the Everyday in Colonial South Asia*, ed. Anindita Ghosh (Delhi: Permanent Black, 2007), 161–90; G. Arunima, *There Comes Papa: Colonialism and the Transformation of Matriliny in Kerala, Malabar, c. 1850-1940*. (New Delhi: Orient Longman, 2003); and Devika, *En-gendering Individuals*.

⁵⁵⁹ Government of India Act 1935, Seventh Schedule, List III (Concurrent Legislative List), items 6 and 7.

the Privy Council and the High Courts were the institutions that defined the place of restitution of conjugal rights (RCR) in Indian law in the nineteenth century.

I have selected the period from 1939 to 1970 because the late colonial and early post-colonial period saw many legislative reforms to Hindu and Muslim personal laws. Such legislation interacted with the pre-existing judicial adjudication of matrimonial disputes in complex ways. These legislative reforms have often been analyzed as a discrete field for their political and cultural implications. My aim here is to put the legislation in dialogue with the longer history of judicial adjudication of matrimonial disputes in order to show a.) how the bulk of law-making on personal law in India occurred within the courts, and b.) that while legislation reinforced religious-communal dividing lines within Indian society, judicial law-making operated with a different vocabulary that oftentimes transcended religio-communal dividing lines. This is not to contend that the legislative reforms were unimportant, but rather to suggest that from the point of view of legal history, they operated within a larger frame of matrimonial dispute resolution in the courts.

It is useful to briefly survey the legislative framework of Hindu and Muslim personal law in this period to provide a better understanding of the timeframe chosen. First, in the late colonial period, there were two important reforms to Hindu women's property rights. The 1929 Hindu Law of Inheritance Act and the 1942 Hindu Women's Right to Property Act (aimed at mothers, sisters, daughters, and widows) expanded women's property rights. Also aimed at property rights was the Shariat Application Act of 1937. This Act explicitly stated that Anglo-Muslim law—and not local customary laws—would apply to Indian Muslims in matters of property, succession, and inheritance. The Act, especially in the Punjab, expanded some women's property rights since a Muslim daughter, under Muslim but not customary law, had a hard and fast entitlement to a share of her father's property upon his death. The Shariat Act, Minault argues, was more important as a symbolic marker of the consolidation of a South Asian Muslim identity, one aligned with expanding Muslim women's

property rights, than in actually improving the status of Muslim women especially in rural areas where tribal customary law “retained undeniable significance.”⁵⁶⁰

These property acts were important touchstones in debates about the progress, or lack thereof, of Indian women’s rights. However, the focus of this dissertation is narrower: it aims at the dyadic relationship between husbands and wives. In this vein, two new statutes of the last decade of colonial rule, the 1939 Dissolution of Muslim Marriages Act (DMMA) and the 1946 Hindu Separate Residence and Maintenance Act or the (HSRMA) are significant. Each provided extensive lists of grounds for the wife to attain her divorce or separate residence and maintenance. Within these lists of grounds for relief, each Act provided an expanded and delimited definition of cruelty. The DMMA was a statutory reform to the law of Muslim marriages and divorces. It granted the wife a long list of grounds for divorce. One impetus behind the Act was a historical critique that argued that British rule incorrectly froze the development of Muslim jurisprudence, preventing Muslim law from adapting to changing social standards. The Act also removed the need for tentative judicial reasoning by making it very clear that the Muslim wife had a right to divorce on numerous grounds, providing a clarified and systematic approach to Muslim women’s divorce rights.

This major Muslim personal law reform statute was followed seven years later by the 1946 Hindu Women’s Right to Separate Residence and Maintenance Act (HSRMA). It provided an extensive list of grounds for the Hindu wife to obtain separate residence and maintenance—as close to Hindu divorce as the late colonial state was willing to come. This late colonial Act was a prelude to the larger package of reforms enacted by the Hindu Code in 1955 and 1956. The Hindu Code was a series of four pieces of legislation that addressed many aspects of Hindu familial relations: the

⁵⁶⁰ Gail Minault, “Women, Legal Reform, and Muslim Identity,” *Comparative Studies of South Asia, Africa, and the Middle East*, XVII, no. 2 (1997): 6-7; David Gilmartin, “Customary Law and Shariat in British Punjab,” in *Shariat and Ambiguity in South Asian Islam*, ed. Katherine Pratt Ewing (Berkeley: University of California Press, 1988), 57; Newbiggin, *Hindu Family*, 19-20 and 125-6; Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law, and Women’s Rights* (Cambridge: Cambridge University Press, 2012), 213-22.

Hindu Marriage Act (1955); the Hindu Minority and Guardianship Act (1956); the Hindu Succession Act (1956); and the Hindu Adoptions and Maintenance Act (1956). For the purpose of this dissertation, and its focus on matrimonial disputes and matrimonial cruelty, the most important legislative benchmarks were the 1939 DMMA; the 1946 HSRMA; and the 1955 Hindu Marriage Act (HMA). Each of these major legislative reforms will be explored, where relevant, in subsequent chapters.

This dissertation argues that these statutory reforms together with the practice of family law in the courts constituted a common legal field. Therefore, I have used the starting date of 1939 to begin my longitudinal survey of High Court decisions on matrimonial disputes. The survey's start date of 1939 marks the first year in which a wife could have used the DMMA to dissolve her marriage, though in fact, the *All India Reporter* did not publish the first High Court judgment on the DMMA until 1944.⁵⁶¹

This and subsequent chapters are based on a longitudinal survey of the development of legal responses to marital cruelty in one Indian state. The cases were selected by surveying the indices of the Allahabad and Oudh *All India Reporters* (AIR) from 1939 until 1970 and recording all cases that involved family disputes.⁵⁶² Hindu, Muslim, and Christian cases have been included. In the period between 1939 and 1955, I identified approximately ninety-eight reported High Court decisions on matrimonial disputes. In the period between 1956 and 1970, I identified approximately fifty-three such High Court decisions. However, I was not able to examine all of these 151 decisions in this dissertation because they focused on diverse bodies of law, including restitution of conjugal rights, maintenance, guardianship and adoption, and property and inheritance disputes. Instead, I narrowed the focus to those disputes that focused on the relationship between husbands and wives, rather

⁵⁶¹ *Mt. Badrulnisa Bibi v. Syed Mohammed Yusuf*, AIR 1944 All 23, from District Gorakhpur. Without a more thorough survey of lower court records, we cannot say what was the first UP case that employed the DMMA.

⁵⁶² 1939-1949: AIR Oudh & Allahabad; 1950-5: AIR All Series; the Oudh Chief Court became the Lucknow Bench of the Allahabad High Court and all decisions are published in the AIR All series.

than inter-generational disputes about property or guardianship and adoption. I further subdivided those specifically matrimonial disputes into i.) restitution of conjugal rights suits; ii.) maintenance disputes under any form of maintenance law (Muslim, Hindu, or criminal); and iii.) disputes specific to Muslim law under the Dissolution of Muslim Marriages Act. Reported cases on Hindu law involved sisters, daughters, and widows more often than wives. However, because such disputes most often involved inter-generational property disputes and the property rights of widows, they have been excluded from my analysis, in order to retain the focus on the dyadic husband-wife relationship and the nature of wife's rights to liberty within marriage and the development of matrimonial cruelty jurisprudence.⁵⁶³

These cases are simultaneously very significant and unrepresentative. This is because they represented the decisions of the premier courts in Uttar Pradesh about how to properly apply laws. The High Court judgments interpreted and applied the law (sometimes statutory and sometimes common) to individuals who sought state support for a rearrangement of the physical, economic, and legal aspects of their familial relationships. The judgments also set precedents which in theory even if not uniformly in practice were followed by the district courts. If a lower court failed to apply a precedent correctly then a litigant would have a good case for appeal to the High Court because of the error of the lower courts.

The High Court was not required to accept all appeals from the District Magistrate. For the High Court to accept an appeal, the case had to raise a significant legal point or argue that the judge of a lower court made an error in applying the law. The cases that were reported in the key sources

⁵⁶³ Prasad termed widows from the late nineteenth century as "litigious" as well. She points out that one source of widows' litigation was the 1856 Hindu Widow's Remarriage Act which preserved widows' rights to their dead husband's property if this was the custom of the community. Prasad, "The Litigious Widow." My examination of cases from the 1940s and 1950s suggests that such litigation resulted from 1929 Inheritance Act that preserved customs of exclusion of female relatives even while it granted female relations inheritance rights. Such cases examined whether the custom of excluding these relatives was valid and produced mixed results. The 1937 Hindu Women's Right to Property Act also prompted litigation in its turn. But even before these two statutes, the question of the widow's right of maintenance from transferred property resulted in complicated property disputes largely involving widows' rights.

for this survey, the *All India Reporters*, were selected for publication out of a larger body of all High Court decisions because they represented decisions on important points of law. Many High Court decisions went unreported. For a judgment to be reported, it had to raise a significant and interesting point of law. To wit, the editors of the *AIR* in 1955 decided to publish the *Notes on Unreported Cases (NUC)*, brief notes on some of the many judgments from all of India's appellate courts that the *AIR* volume for each province's High Court had not been able to reproduce in full. The 1955 *NUC* ran to two volumes of 6163 columns. However, seemingly because of the costs of printing these voluminous additions, and because the unreported cases could only be reported in brief, in 1956 the *AIR* stopped publishing the *NUCs*.⁵⁶⁴ The short-lived experiment in publishing the *NUCs* indicated what a small proportion of judgments the *AIR* published in full. Nevertheless, unpublished decisions could serve as precedents.⁵⁶⁵ We saw this, for example, in *Ardaseer Cursetjee* when the Bombay Supreme Court examined its records for unreported cases to determine whether the Supreme Court had jurisdiction over restitution of conjugal rights suits. Or, take for example the first page of the 1956 edition of *The Code of Criminal Procedure*: it solemnly warned advocates, "Use old books and lose good cases/Case-law is the life-blood of a law book."⁵⁶⁶ The major sources for this chapter are, out of all family disputes, the sub-set of cases that were i.) heard by the UP appellate courts; ii.) published by the *AIR*; and iii.) involved wives' allegations of marital cruelty.

Restitution of conjugal rights was open to either husband or wife to use. A husband could use a RCR suit to prove he wanted to keep and maintain his wife, thereby fending off her maintenance suit. A wife usually, but not always, pursued a maintenance suit under the Code of Criminal Procedure in order to obtain a monthly payment from her husband for her sustenance and

⁵⁶⁴ *AIR*, *Notes on Unreported Cases*, vols. 1 and 2, 1955; *AIR* Journal Section, January, 1956, p. 5: "The New Year."

⁵⁶⁵ Setalvad, *Role of English Law in India*, 27, citing *Vinayak Shamrao v. Moresbwar*, *AIR* 1944 Nagpur, 44, 46. See also Setalvad, *Common Law in India*, 47-50.

⁵⁶⁶ V.V. Chitaley and S. Appu Rao, *The Code of Criminal Procedure (V of 1898)*, 5th ed., vol. V (Nagpur: The All India Reporter, 1956), title page.

the sustenance of her children. A husband's RCR suit, if successful, proved the husband made a good faith offer to maintain his wife at home. In this case, she was at fault for not residing with her husband and could not win maintenance. In this way, the civil remedy of restitution of conjugal rights, with its own muddled origins, and the Code of Criminal Procedure's regulation of maintenance intersected with each other. Together the two were not a matrimonial code like either the post-colonial Hindu Code or the late colonial Dissolution of Muslim Marriages Act (DMMA), which by the late 1930s were considered necessary to unify and ease the administration of family law. Still, they became a robust and sophisticated system for dealing with marriage disputes, the more so because wives and husbands could use the laws to pursue a variety of ends following several different trajectories. Indeed, my survey shows that litigants were far more likely to use these nineteenth century remedies than the late colonial statutes.

Historian Charu Gupta has briefly examined debates over restitution of conjugal rights in late nineteenth century Uttar Pradesh. She notes that this debate took place over the enforcement of restitution of conjugal rights suits under section 260 of the Code of Civil Procedure of 1882 in the aftermath of the Rukhmabai dispute. The debate was over whether wives should be sent to live with their husbands or simply imprisoned if they refused to go. However, in the restitution of conjugal rights cases that I have examined, only one mentioned the Civil Procedure Code (CPC). This makes sense because, as shown in Chapter Three, restitution of conjugal rights was first imported via general common law lawmaking by various justices in both Bengal and Bombay. Gupta's research shows that in late nineteenth century UP, some factions in Hindu society supported imprisonment for a wife who refused to follow an order of restitution of conjugal rights. Other conservative Hindus such as the Hindu Samaj in Allahabad supported reverting to the older system of forcing the

wife to return to her husband, rather than imprisoning her. In late nineteenth century UP some women were indeed imprisoned under the CPC, three in 1892 and two in 1893.⁵⁶⁷

The State of Uttar Pradesh and Its Courts

Today, Uttar Pradesh is India's most populous state. In the colonial period the province was known as the United Provinces, reflecting the integration of two separate provinces of Oudh and the Northwestern Provinces in 1902. In 1949, its name was changed to Uttar Pradesh, which means "Northern Province" in direct translation. In addition, two princely states of Rampur and Tehri Garhwal were added to the state. By the middle of our period, in 1961, the state was 113,654 square miles with a population of 74 million. According to political scientist Paul Brass, in 1961 there were seventeen cities with a population over 100,000.⁵⁶⁸ Some of these important cities were Lucknow, the former capital of the kingdom of Oudh and the site of the Oudh Chief Court (High Court); the industrial center of Kanpur; the city of Varanasi on the banks of the Yamuna, holy to Hindus; and the political center of Allahabad, which until 1949, was the capital of the state and the site of the Allahabad High Court.

Uttar Pradesh is unusual in consisting of one state with two separate benches of its High Court. This again was a product of the amalgamation of the two separate provinces of the Northwestern Provinces and Oudh. It is especially unusual because in contemporary UP, the political capital of the state is located at Lucknow but the main bench of the High Court is at Allahabad, with a subordinate bench of the High Court sitting at Lucknow. Let us take the evolution of the Allahabad High Court first. Under the 1861 High Courts Act, the colonial government was

⁵⁶⁷ Singh, "Women, Law, and Criminal Justice in North India: A Historical View," *Bulletin of Concerned Asian Scholars* 28, no. 7, (Jan.-March 1996): 29, n. 26. Singh found these records in jail reports from the respective years. Also see Charu Gupta, *Sexuality, Obscenity, Community: Women, Muslims, and the Hindu Public in Colonial India* (Delhi: Permanent Black, 2001), 130-1.

⁵⁶⁸ The foregoing details have been taken from Brass, *Factional Politics*, 5-10.

authorized to establish High Courts wherever it deemed them necessary in areas outside the jurisdiction of the High Courts at Bombay, Calcutta, and Madras. In 1866, therefore, the Allahabad High Court was established. The previous chief court for province had been the Sadr Dewani Adalat at Agra (formed in 1831) and it took three years for the full operations to be transferred from Agra to Allahabad.⁵⁶⁹ Meanwhile, the kingdom of Oudh was famously annexed to British India in 1856, providing one major source of discontent that contributed to the Mutiny of 1856-7. After the Mutiny, the province of Oudh was administered by the Lieutenant-Governor of the North-western Provinces, and the two provinces were formally merged into the United Provinces in 1902.⁵⁷⁰ Between 1856 and 1925, the highest court in Oudh was called a Judicial Commissioner's Court, which operated on a shoestring staff of at most three permanent judicial commissioners. In 1925, the Oudh Courts Act was passed, which established the Oudh Chief Court with five Judges for most of its life. Finally, in 1948, after Independence, the Oudh Chief Court was combined with the Allahabad High Court and the Chief Court with the head bench at Allahabad and a subordinate bench at the state capital at Lucknow.⁵⁷¹ Not all Indian states have such a system of multiple benches; however, some commentators have called for an increase in the number of benches in UP and other Indian states to increase judicial efficiency and legal literacy and access.

Argument and Plan of Chapter

I argue nineteenth century remedies structured matrimonial litigation in twentieth century India. As already discussed, the remedies of maintenance and RCR were incorporated in Indian law

⁵⁶⁹ Sir Archibald Henry Bendict Linthwaite Braund, "History of the High Court at Allahabad during the Chief Justiceship of Sir Walter Morgan (1866-1871)," in *High Court of Judicature at Allahabad, 1866-1966, Centenary Commemoration*, vol. 1 (Allahabad High Court Centenary Commemoration Volume Committee, 1966), 1-5.

⁵⁷⁰ Ghose, "History of the Court," 185.

⁵⁷¹ Ghose, "History of the Court," 186-8.

in the nineteenth century. Now this dissertation turns to the trajectories of these remedies in twentieth century India.

The end point of this chapter is a 1939 decision by the Oudh Chief Court called *Ram Bharosey v. Mt. Sheo Dei*. The *Ram Bharosey* case from 1939 illustrates the role restitution of conjugal rights suits played in a larger landscape of matrimonial litigation. An individual suit could occupy three timescales: i.) there was the “progress” of one *individual suit*: here, the decision in *Ram Bharosey’s* appeal to the High Court; ii.) there was the meso-level timeframe of a suit amongst one set of litigants as part of their other legal entanglements with each other; ie. before *Ram Bharosey* filed the initial RCR suit and the two appeals, *Sheo Dei* also initially filed a maintenance suit; iii.) there was development of precedent as part of the larger landscape of matrimonial jurisprudence. In the *Ram Bharosey* case, the individual restitution of conjugal rights appeal before the High Court, between filing and decision, took three years (timeframe i). *Ram Bharosey’s* RCR suit was under consideration by the various courts for over ten years from 1929 until 1939, at least a full decade from the time the husband filed his first suit until the third and final dismissal of it by the Chief Court (timeframe ii). And finally, this individual case relied on and incorporated precedents from 1867 until 1939, seven decades, indicating the much longer timeframe of the inter-linked precedents that interpreted the law. One conclusion is that a historical analysis of continuity and discontinuity built around either seizing or transcending rupture cannot capture the process in which Justice Yorke was engaged in here. The process here was multiplex⁵⁷² and striated.

To understand that suit, and its decision on the relationship between restitution of conjugal rights and religious personal law, it is important to understand the precedents that played a role in that decision. We have already examined the Privy Council’s decision in *Moonshee Buzloor Rubeem*. The

⁵⁷² Bernard Cohn, “From Indian Status to British Contract,” in *An Anthropologist Among the Historians* (Delhi: Oxford University Press, 1987), 467; citing Max Gluckmann, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester, 1955), 19.

precedents that played an important role in *Ram Bharosey* drew on *Moonshee Buzloor Rubeem* and applied it in the Uttar Pradesh High Courts. There were three such precedents: a decision about a Scottish matrimonial dispute by the Appeals Council in 1896 called *Mackenzie and Mackenzie*; the 1906 decision of the Allahabad High Court called *Husaini Begam*; and the 1927 Oudh Chief Court decision *Mt. Maqboolan v. Ramzan*. These are examined in chronological order before turning to an analysis of their use in the 1939 *Ram Bharosey* decision.

Each of these suits played an important role in individual litigants' legal trajectories and simultaneously influenced the development of subsequent law. Each judgment distrusted the husbands' intentions and therefore ruled in favor of the wife without making a strong statement directly and solely against physical abuse. A category of "legal cruelty" that emerged focused on damage to the wife's reputation. Each avoided deciding thorny legal questions about patriarchal dominion and marital violence by drawing a composite picture of the husband's behavior. The structure of restitution of conjugal rights retained the husband's physical dominion over his wife. The courts tended to minimize the physical violence experienced by the wife and focused on the category of legal cruelty and the damage to the wife's reputation.⁵⁷³

In examining *Mackenzie*, in particular, I hope to show that the story of patriarchal dominion in Indian matrimonial disputes was not a linear corruption of progressive English laws that helped wives by Indian husbands, for the benefit of Indian husbands. Padma Anagol argues that over the course of the nineteenth century, "Indian elites overturned the [initially pro-wife] implications" of RCR and that English laws developed into "a tool for oppressing women" in a process initiated by "Indian male agents with little assistance from their British counterparts."⁵⁷⁴ I think the story is far

⁵⁷³ Baxi points out the self-reinforcing nature of judicial precedents and the ways in which such precedents purport to reform without "de-centering the historical injustice to women," *Public Secrets of Law*, 1-2 and 44.

⁵⁷⁴ Padma Anagol, "Rebellious Wives and Dysfunctional Marriages: Indian Women's Discourses and Participation in the Debates over Restitution of Conjugal Rights and the Child Marriage Controversy in the 1880s and 1890s," in *Women and*

more complex. First, the form of RCR and the kinds of arguments husbands made in RCR suits were not limited to India, as *Mackenzie* shows; second, wives continued to benefit from RCR, usually winning their suits; and, third, even when individual wives won their suits, RCR maintained a model of marriage based on patriarchal dominion whether in England, Scotland, or India. I agree with Anagol that wives exercised agency to initiate suits and that to do so they may have overcome formidable challenges, and that “Indian women were resisting a system of marriage that perpetuated maladjusted conjugal unions.” However, I cannot agree that such maladjusted conjugal unions were unique to India or that “Indian societal structures” were uniquely responsible for the tamping down of rebellious wives.⁵⁷⁵ Patriarchal aspects of both British and Indian legal cultures reinforced each other and that the patriarchal features are deeply rooted in both the form and practice of law. Such features cannot be neatly uprooted through a mass of wives’ victories and neither can they be neatly inserted through the simple efforts of Indian patriarchs.

The cases showed that litigants of all religious communities used RCR. The Scottish case *Mackenzie* shows the structural similarities and parallel legal issues raised by restitution of conjugal rights as a legal form rather than a religious (or religio-legal) product. Husbands of all religious communities used arguments about both geographic and religious personal law jurisdiction to attempt to avoid RCR suits. Matrimonial litigation in UP was shaped by many different forces especially the durable and widespread procedure of restitution of conjugal rights, which sought to preserve the marriage tie.

Mackenzie and *Mackenzie* (1895)

The *Mackenzie* case centered on a husband’s sustained regime of draconian social control of his wife: he restrained his wife in his home, his mother closely supervised her, and, together, he and

Social Reform in Modern India: A Reader, ed. Sumit Sarkar and Tanika Sarkar (Bloomington: Indiana University Press, 2008), 289-90.

⁵⁷⁵ *Ibid.*, 291.

his mother removed her infant daughter from her arms by force. The case involved the Scottish equivalent of the restitution of conjugal rights action, called an action of adherence. Just like restitution of conjugal rights, the action of adherence allowed the husband to claim his rights to his wife's physical presence and control. In *Mackenzie*, the validity of this remedy was not at question. The question involved the grounds available to the husband and wife under the two different Scottish statutes. The question was whether the standards for the redress should be the same under the law that governed each. The distinction between the grounds a wife or husband could use to obtain relief, and the differing forms of relief available, is one we shall return to in subsequent chapters.

The two different marital remedies under discussion in the *Mackenzie* case were the action of adherence and the statutory remedy of *divorce a vinculo* under the Scottish Divorce Act of 1573. *Divorce a vinculo* was a ruling of the Ecclesiastical courts that voided a marriage “by reason of a ‘dirimentary impediment’.”⁵⁷⁶ It was an annulment, not a breaking of the marriage tie, but a statement that the “chains [of marriage] were never there.”⁵⁷⁷ Though not a divorce in the modern sense, the advantage of *divorce a vinculo* over an informal separation was that spouses could remarry since in law the marriage never even took place. The sixteenth century Scottish Divorce Act was amended by the Conjugal Rights Amendment (Scotland) Act, 1861. That Act changed the procedure for divorce so that action of adherence was no longer necessary; it made it easier to move directly to divorce, skipping over the action of adherence/restitution of conjugal rights stage. The language of the Act shows how the 1861 Amendment modernized the procedure and incorporated, rather than swept away, older legal forms in the same fell swoop:

...it should not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to

⁵⁷⁶ Baker, *Introduction to English Legal History*, 491.

⁵⁷⁷ Ibid. The term meant the same thing in England and Scotland though the process redress differed due to the differing structures of Ecclesiastical jurisdiction in each country.

denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature to admonish the defender to adhere.⁵⁷⁸

Some of the practices mentioned, such as charging the defender, denouncing the defender, and “apply[ing] to the presbytery of the bounds...” to require the wife to prove why she should not have to live with her husband indicate the archaic and local, community-based nature of this matrimonial litigation. The question of the local authority (“the presbytery of the bounds”) indicated the legacy of community regulation of marriage, reputation, and behavior. Such concerns about local reputation also played a role in Indian matrimonial regulation, as we will see in the many subsequent cases in which the courts put great store in the harm individuals did to wives’ reputations via false criminal charges.

While the divorce-upon-desertion standard of four years created by the 1861 Scottish Act may not seem speedy by today’s standard, the 1861 Act stepped toward speedy divorce.⁵⁷⁹ In England, Scotland was known for its easy marriage and divorce laws, though the divorce procedures were apparently not widely used.⁵⁸⁰

Though aimed at making *divorce a vinculo* easier to attain, the 1861 Act put the action of adherence into an uneasy relationship with the 1573 statute. Each produced a slightly different position on the question of the *grounds* required for the deserting spouse to prove a reasonable cause to avoid either *divorce a vinculo* or adherence. In *Mackenzie*, the husband’s argument was that the wife must show the husband’s bad behavior was “worse” when she defended herself against his action of adherence than when she defended herself against his divorce action. *Mackenzie* pitted several different understandings of a wife’s good ground to live apart from her husband (and thus escape the charge of desertion, divorce, and resultant loss of property) against each other. It put forward a scale of forms of marital redress, with a graded scale of attendant standards to achieve the redress.

⁵⁷⁸ *O.H. Mackenzie v. M.A. Edwards-Moss or Mackenzie*, 1895 AC 384, Introduction.

⁵⁷⁹ Stone, *Road to Divorce*, 5.

⁵⁸⁰ *Ibid.*, 5 and 130-1.

In *Mackenzie*, the two different forms of redress under consideration were i.) separation and ii.) action of adherence. The first required a “higher” standard of cruel behavior. The statutory reforms of 1861 to the sixteenth century Scottish statute prompted the long judicial conversation about the standards of behavior to attain these two separate redresses.

The husband argued that though his behavior may have justified the wife’s leaving him for good cause under the 1573 Divorce Act, it did not do so under the law of the action of adherence. As Lord Herschell put it, “The object of the Act of 1861 was only to simplify the procedure and not to alter the matrimonial law...under the [original law of 1573]...no circumstances could afford ‘reasonable cause’ which would not have been an answer to the action of adherence.”⁵⁸¹ The court had to decide whether the punishment (of an adherence order issued to the wife) fit the “crime”—the wife leaving his home without justifiable cause. The justifications for such a behavior differed depending on the law, so the husband contended.

⁵⁸¹ *Mackenzie v. Mackenzie*, 1895 AC 384, Lord Herschell, para 3.

Figure 1: Arguments in the *Mackenzie* case

| Husband's Action | Good ground for wife living apart/wife's defense | Wife avoids | If successful, husband achieves |
|--|--|---|---|
| Scottish Divorce Act, 1573 | "reasonable cause" | Divorce a vinculo | Divorce a vincula |
| 1861 Conjugal Rights Amendment to the Scottish Divorce Act | <p><u>Husband's contention:</u> Under the 1573 Act, many behaviors were reasonable. The standard of cruelty set by that Act was the same under the 1861 Amendment. The standard is a relatively high one and his single act did not rise to it.</p> <p><u>Wife's contention 1:</u>⁵⁸² What may have been reasonable under the 1573 Act was no longer reasonable under the 1861 Act. The husband's behavior had been unreasonable.</p> <p><u>Wife's contention 2/Ruling:</u> On the facts, the husband's behavior rose to the higher standard of unreasonable behavior set by the 1573 Act, obviating a decision on which standard should apply.</p> | Action of adherence/conjugal rights (i.e. an order to return to her husband's home) | Husband can skip the four year desertion period to attain <i>divorce a vinculo</i> directly |

⁵⁸² The wife's counsel did not argue the case before the Appeals Council. But, the judgments go through both the legal contention (1) and the factual (2) in sufficient detail that one can understand what the wife's arguments were.

In the end, *Mackenzie* avoided deciding this tricky question by ruling that the husband's behavior had been cruel enough to justify the wife's leaving under the 1573 standard, the higher standard. Thus the difference in the standard of cruelty was irrelevant because of the facts of the husband's behavior. The wife successfully defended herself, but the larger legal issue of the relationships between the standards for cruelty and the form of redress remained unsettled.⁵⁸³ Because of the court's reading of the specific facts in the Mackenzie saga, the judgment did not decide the legal question of whether the standard for adherence differed from that for separation.

The case is directly relevant to Uttar Pradesh's legal history because Lord Herschell's position on matrimonial cruelty subsequently was used in several UP High Court rulings. Each of the three opinions in *Mackenzie* (of a five-judge bench) found that the husband's behavior met the standard of cruelty that would justify the wife's *divorce a vinculo* and therefore she also had a good defense to avoid the action of adherence. But since it was Lord Herschell's words that were picked up and applied in UP, it is worthwhile to consider them in their original context. Herschell wrote,

It seems to me open to question whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as s'vitia or cruelty; can he when his own misconduct has led his wife to separate herself from him, come into Court, and allowing his misdeeds, insist that it is bound to grant him a decree of adherence?⁵⁸⁴

This is the portion of the opinion that was drawn on in later UP High Court decisions. In fact, Herschell's words here were *obiter dicta*, or comments made in passing that could only claim

⁵⁸³ *Mackenzie v. Mackenzie*, 1895 AC 384, judgement of Lord Ashbourne. Emphasis mine. Likewise Lord Ashbourne's judgment noted that he had a "clear conclusion that the violence of the 4th of August, 1880, the mental torture to which she was subjected, the dread of coercion and confinement caused by her husband's threats, would have entitled the wife to ask for a judicial separation, and therefore *in any view of the law* to resist a suit for adherence."

⁵⁸⁴ *Mackenzie v. Mackenzie*, 1895 AC 384, judgement of Lord Herschell,

persuasive but not binding authority because they were not part of the actual ruling. The real *ratio* for his decision was that the husband's behavior, on the facts, rose to the standard of mis-behavior required for *divorce a vinculo*, and therefore certainly to the standard required to repel the action of adherence. Nevertheless, it was Herschell's hypothetical statement that even if the husband's behavior stopped just short of cruelty that the court could exercise its discretion and deny the husband the remedy he sought that was reproduced in the UP High Courts.

Even though Herschell found in favor of the wife, he minimized the violence she experienced. He stated, "Although the violence was considerable, it did not result in any serious consequences [to the wife]." ⁵⁸⁵ Herschell did not consider the psychological trauma the wife may have experienced from her husband's violence. Moreover, his analysis here conflicted with his comments in other parts of judgement: "Considerable violence was used. About this there can be no real doubt, the marks left upon the respondent's wrist by the appellant's grip" having been witnessed by several people. ⁵⁸⁶ Lord Herschell stated, "Now, there are, no doubt, cases in which a single act of violence would not afford sufficient ground for a decree of separation; if the assault did not cause any serious injury, if it were the result of sudden passion, and were repented of as soon as committed, and above all, if there was no reason to anticipate its repetition, the Court might not regard it as amounting to s'vitia or cruelty." ⁵⁸⁷ Herschell's statement did not reject marital violence. He stated that such martial violence, if minor, would not necessarily give the wife a legally valid ground to live apart from her husband. Here we find a repeated pattern: the courts found in favor of the wife but did not condemn marital violence wholesale. The condemnation of the behavior of the individual husband sat alongside the judicial acceptance of marital violence.

⁵⁸⁵ Ibid., para. 13.

⁵⁸⁶ Ibid. The witnesses were the brother and sister-in-law of the husband, the brother of the wife, and the wife's maid.

⁵⁸⁷ Ibid., para. 13.

Alongside its incorporation into Indian law, *Mackenzie* is noteworthy for the history of Indian matrimonial cruelty because it showed that husbands across the common law world used similar strategies to maintain control over their wives' bodies and property. This observation questions the overly simplistic association of Indian patriarchy with Hinduism or Islam. *Mackenzie* exposed the ways in which marriage restrained wives' liberty, though the wife succeeded in repelling her husband's suit. The details in the judgment showed the clear-cut reality of husbands' restraints on wives. Lord Chancellor Herschell noted that Mackenzie yanked his nursing child away from his wife while her and his mother, Lady Mackenzie, each restrained her by her wrists which "marks left upon the respondent's wrist by the appellant's grip" were witnessed by several people.⁵⁸⁸

Mackenzie sought to control his wife physically on a larger scale as well. The Council did not look kindly upon Mackenzie, described as a "Highland gentleman of good family, of austere mind and exacting nature."⁵⁸⁹ In response to the wife's attempt to repair relations, the husband acquiesced but only under the condition of his complete supervision of her:

I most emphatically warn you that, as your husband and the head of the family, I feel I shall be obliged to enforce the terms of the assurances I asked for, and I shall require you never again to enter Pool House [where his brother and sister-in-law lived], never to associate with persons in this parish of Gairloch who are not on friendly terms with me without my especial permission, nor leave me for short or long intervals without my consent, or by the advice of my medical man.⁵⁹⁰

Mackenzie sought to closely control his wife's movement and sociality even if she agreed to return and live with him after their initial separation. In this way, Mackenzie did not much differ from husband Moonshee Buzloor Ruheem and other husbands in this chapter.

O.H. Mackenzie of Gairloch Parish/Rossshire in Scotland held a "very exalted sense of the dignity and supremacy of his position as husband, and of the absolute deference which he was

⁵⁸⁸ Ibid., AC 384. The witnesses were the brother and sister-in-law of the husband, the brother of the wife, and the wife's maid.

⁵⁸⁹ Ibid., judgement of Lord Ashborune, para. 2.

⁵⁹⁰ Ibid., judgment of Lord Chancellor Herschell.

entitled to exact from his partner in life.”⁵⁹¹ These “peculiarities” coupled with his mother’s maleficent influence, in Lord Watson’s view, caused the pathological treatment of his wife by an otherwise normal man.⁵⁹² As Lord Watson went on to say, “He appears to have assumed that he was justified in adopting any means that occurred to him for the purpose of enforcing what he deemed to be his rights; and that the infliction of mental distress even to the aggravation of her bodily ailments, physical restraint or personal violence were, should he think it was advisable to resort to them...”⁵⁹³ The social reality of what Mackenzie or Ram Bharosey or any other husband thought cannot be exactly known. However, it is clear that in each case the husband’s legal argument sought some sanction for violence or beating within marriage, rejected by the courts on facts.

Lord Herschell’s judgment also draws out how keenly related the jurisdiction and law were in the husband’s mind. When, after the birth of their child, the wife returned with her husband to his home at Rosshire, “On their way they spent a night at Edinburgh” which allowed the husband to

...consult his legal adviser as to his rights with respect to the child. As the result of the interview he informed his wife that he had consulted Mr. Adam, and that now it was across the Tweed [the boundary between England and Scotland] his power over the child was quite absolute, and that he could stop her seeing it if he chose... This seems the clue to much of his conduct: it was for him to maintain to the uttermost the rights which he deemed the law allowed him; it was for her to submit without question to their assertion.”⁵⁹⁴

Here there is a strong resemblance to the behavior of Abigail Bailey’s husband, described in an article by Hendrik Hertog. Asa Bailey tricked his wife into traveling with him from New Hampshire to New York because of his (likely mistaken) belief that state’s more patriarchal laws would favor

⁵⁹¹ *Mackenzie v. Mackenzie*, judgment of Lord Watson.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*, para. 13 and 14.

him.⁵⁹⁵ Throughout the common law world, husbands sought to use differing legal jurisdictions to amplify their rights over their wives.

Lord Chancellor Herschell discussed Mackenzie's psychology and his attempt to "use physical means in order to subdue her [the wife's] will and to reduce it to absolute submission to his own."⁵⁹⁶ These words indicated that marriage did not necessarily extinguish the wife's independent will. The husband's control over the wife's mobility limited her liberty; her will existed but it was ineffectual, invoking the idea of social death. Yet a husband could not go to any extremes; there were limits on his patriarchal authority. In the end, the court did not make any new ruling that unseated the rule that the wife was subject to at least some element of her husband's control. It did not modernize the law of cruelty, finding instead that on the facts of the case, the husband's behavior rose to the standard of the older, sixteenth century statute and so denied his relief.

The *Mackenzie* decision is important in at least two ways. First, Herschell's comments in *dicta* about allowing the courts to examine the totality of the husband's behavior and his intentions were quoted in UP High Court decisions. Second, as a model of the kinds of conflicts husbands and wives faced, and the way these were litigated in courts, it shares several features with the Indian cases. Mackenzie, like Indian husbands, sought to control his wife's behavior and physical mobility. And, like them, he sought to use procedural dodges to claim his behavior did not amount to cruelty that would give his wife a good defense to his action of adherence/RCR suits. In these ways, Mackenzie did not much differ from the Indian husbands examined here. The legal structure of marriage requiring the wife's residence with the husband in the absence of any reasonable excuse encouraged this pattern of legal behavior.

⁵⁹⁵ Hendrik Hartog, "Abigail Bailey's Coverture," in *Law in Everyday Life*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1995), 69 n. 11.

⁵⁹⁶ *Mackenzie v. Mackenzie*, 1895 AC 384.

Husaini Begam: *Mackenzie* in Uttar Pradesh

In 1906, the *Mackenzie* decision was incorporated into UP law with the *Muhammad Rustam Ali Khan v. Husaini Begam* decision. The case involved two wealthy spouses, the husband from Dholpur and the wife from Moradabad. They married in 1877 and began living together in Dholpur, a small princely state on the border of present-day Uttar Pradesh and Rajasthan, in 1883. The wife left the husband in 1896 to return to her father's home in Moradabad, claiming she did so due to "her husband's misconduct."⁵⁹⁷ The wife had married the husband with the guarantee of the astronomical sum of 500 Rupees per month as "pin money" from the husband's father.⁵⁹⁸ When the payment of this pin money halted (probably around 1896, when she returned to her father's home), she sued the husband's father for the arrears and succeeded in obtaining a compromise order for the amount due to her. When the father-in-law failed to pay that, she instituted a second suit in 1903, losing at first but winning on appeal. While this second suit was wending its way through the courts, her husband instituted a RCR suit against her. However, the husband shot himself in the foot at the beginning of his conjugal rights suit, for "In his plaint...[he made] serious charges against his wife, alleging not merely that she had become immoral, but that she had actually committed adultery" and was pregnant from her adulterous relationship.⁵⁹⁹

The wife's response to his plaint was interesting because it both stated that she felt threatened by him and expressed her willingness to live with him in her own hometown of Moradabad. She stated that "she has strong apprehension of danger to her life" and "alleges acts of immorality on the part of her husband" and that her father-in-law had pressured her husband into accusing her adultery.⁶⁰⁰ On the other hand, she noted that she owned "what she describes as magnificent houses of her own in the city of Moradabad, and that she is willing that her husband

⁵⁹⁷ *Muhammad Rustam Ali Khan v. Husaini Begam*, 1907 ILR 29 All 22, para. 1.

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*, para. 2.

⁶⁰⁰ *Ibid.*, para. 3.

should live with her in that city as he formerly did” or that he could find his own house in Moradabad where he could live nearby or they could live together.⁶⁰¹

The husband’s original allegation was partially reproduced in the High Court judgment, and indicated that the woman’s free agent status was a contributing factor to the husband’s portrayal of her as immoral: “Although her parents are dead, yet the defendant lives alone at Moradabad, where there is no near relative of hers who may look after and take care of her. She wanders about wherever she likes and has become immoral.”⁶⁰² This quote evinces the specter of the free agent woman, detached from natal or marital relationships and living on her own. It suggested her sexuality was ungoverned by any higher authority and that in the absence of supervision she had given in to her baser, sexual nature by engaging in adulterous sexual intercourse.

Three separate characteristics were associated: her sexuality, her free will, and her physical movement (“wandering”). In her analysis of conjugal scandals in the late nineteenth century Bengal, Tanika Sarkar notes that women’s mobility—and even a wife’s visits to her natal home, much less her independent existence⁶⁰³—prompted “deep male fears about the erosion of boundaries, about women’s exposure to men, and to different castes.”⁶⁰⁴ Sarkar also uses the term “wander:” “The orthodox, on the other hand, insisted that the woman’s holiest space lay within the family, in devoted service to the household and the family deity. It was only an immoral woman who used a religious pretext to wander outside the home.”⁶⁰⁵ Sarkar argues, in the late nineteenth century, colonial legislative reforms and highly publicized court cases about women’s sexuality contributed to a process in which “Hindu patriarchy was appropriating certain new turns that colonial laws had given to the structure of disciplinary mechanisms that ruled the woman, transferring the jurisdiction

⁶⁰¹ Ibid.

⁶⁰² Ibid., para. 2.

⁶⁰³ Sarkar, “Talking about Scandals,” *Hindu Wife, Hindu Nation*, 86-7.

⁶⁰⁴ Ibid., 81.

⁶⁰⁵ Ibid., 82.

and execution from the hands of a large kin group to those of the husband.”⁶⁰⁶ Both Sarkar and Charu Gupta point out that this concern about wandering women was particularly fraught around new technologies of mobility (such as the railway) and the greater access to religious pilgrimages such technologies enabled.⁶⁰⁷ While Husaini Begam did not have any religious purpose behind her residence apart from the marital home and her natal family, the loss of patriarchal control over her movement was used to contribute to the portrayal of her alleged adulterous behavior and ungoverned sexuality. The settled existence of a married woman, resident with her husband, was counter-posed to the free agent, immoral, wandering woman.

In fact, the term “free agent” was used in the eighteenth and nineteenth century in referring to women’s status. In *Moonshee Buzloor Rubeem*, the Privy Council stated a husband could exercise his conjugal rights as long as his wife was a “free agent” who was “not detained by others,” perhaps her relatives or a paramour.⁶⁰⁸ A 1735 treatise criticized wives’ positions as under their husbands’ dominion. The treatise stated wives might be “punish’d as free agents for Treason,” but held criminal immunity for other criminal acts because of “the private Royalties of Husbands....”⁶⁰⁹ In her analysis of rape trials in India, Baxi also notes, “The judicial discourse on rape classifies women into those who can potentially be integrated into structures of alliance as distinct from those women who are found to be ‘habituated’, ‘loose’ or exhibiting easy virtue.”⁶¹⁰ The free agent woman haunts many family disputes as well as rape trials.

The decision quoted *Mackenzie* because that decision supported the position that the court could look at the husband’s general behavior and intentions even if they did not necessarily rise to a

⁶⁰⁶ Ibid. 87. Here Sarkar directs us to Radhika Singha’s arguments about heads of household in her article “Making the Domestic More Domestic: Criminal Law and the ‘Head of the Household’-1772-1843,” *The Indian Economic and Social History Review*, 33, no. 3 (1996): 309-43.

⁶⁰⁷ Gupta, *Sexuality, Obscenity, Community*, 146; Sarkar, 81-3.

⁶⁰⁸ *Moonshee Buzloor Rubeem*, 607.

⁶⁰⁹ Doggett, *Marriage, Wife-Beating and the Law*, 58, citing *The Hardships of the English Laws in Relation to Wives...*, London: Printed for J. Roberts, 1735, 24

⁶¹⁰ Baxi, *Public Secrets*, 9. Here Baxi is drawing on Veena Das’s article “Sexual Violence, Discursive Formations, and the State,” *Economic and Political Weekly* 31, nos. 35-7 (1996): 2411-23.

legal standard of cruelty.⁶¹¹ The High Court saw that the husband instituted his RCR suit only in response to the wife's suit for her pin money: "This suggests the idea that the suit was not instituted with a view to renew happy connubial relations, but with the sinister object of giving trouble and annoyance to his wife."⁶¹² The court evaluated the husband's intentions based on his legal harassment.

Moreover, as already noted, when the husband instituted the conjugal rights suits he charged his wife with immorality. The High Court gave this special attention, inserting a sort of class-based relative morality into the husband's accusations: "In view of her parentage, position and fortune, this charge if untrue, is sheer cruelty."⁶¹³ Moreover, the Court pointed out that if the husband was making accusations of the wife's adultery, it seemed reasonable to think that he would not want his wife to return to him, and, if she did, she would not be treated well.

The High Court went on to state that the wife had been ready to compromise by having her husband live with her at Moradabad.⁶¹⁴ The High Court then stated that if the husband did not fulfill this compromise, or for some reason the wife did not allow him to reside with her, the husband could institute a second suit for conjugal rights against her.⁶¹⁵ At first this may have seemed a gesture in the husband's favor (if the wife did not allow him to reside with her, he could return to the court to try to enforce his conjugal rights). But it may also have been a gesture in the wife's favor (if the husband instituted a second conjugal rights suit, the wife could once and for all repel him by putting forward her evidence of his cruelty). In particular, the fact that the wife would be returning to her

⁶¹¹ *Muhammad Rustam Ali Khan v. Husaini Begam*, 1907 ILR 29 All 22, para. 3.

⁶¹² *Ibid.*, para. 7.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*, para. 8.

⁶¹⁵ *Ibid.*, para. 9.

husband in Dholpur, raising the fear that in “a native State, in which she could not invoke the protection of the British law, she will be subject, to maltreatment and violence.”⁶¹⁶

Despite the court’s sympathy to the wife, however, the decision was not an all-out victory. She only received a compromise: as she had offered, the husband could live with or near her in Moradabad and she need not reside with him at Dholpur. The court allowed the wife’s appeal but with a condition upon the wife, that the husband’s suit would be dismissed “upon the defendant’s undertaking...to live with husband in Moradabad and there resume conjugal relations with him.”⁶¹⁷ If the wife did not fulfill this obligation, the husband was allowed to take out another RCR suit.⁶¹⁸ This was a compromise and less than a total victory for the wife. The judgment certainly did not come out strongly against marital violence.

Three important features emerge from *Husaini Begum*. First, it used *Moonshee Buzloor Rubeem* to find that Muslim law should apply to Muslim litigants and that the Muslim wife had some good defenses against restitution of conjugal rights under both Muslim law and the court’s discretion (as found in *Mackenzie*). Second, the Court focused on the legal cruelty of the husband in making accusations about the wife’s adultery; it noted the legal record of physical cruelty but focused on the legal cruelty and reputational damages. Third, it came to be used in subsequent decisions to show the incorporation of *Mackenzie* and *Moonshee Buzloor Rubeem* to law in UP.

Mt. Maqboolan and others v. Ramzan (1927)

Mt. Maqboolan and others v. Ramzan, decided by the Oudh Chief Court in 1927, involved an all-star legal team. The two-justice bench consisted of the Chief Justice, Stuart, and Justice Wazir Hasan. The wife, Maqboolan, and her family were represented by Ali Zaheer, son of Sir Wazir

⁶¹⁶ Ibid., para. 7.

⁶¹⁷ Ibid., para. 8.

⁶¹⁸ Ibid., para. 9.

Hasan, and Shaukat Ali.⁶¹⁹ Ramzan, the husband, was represented by Khaliq-ur-Zaman.⁶²⁰ The husband brought a successful suit for restitution of conjugal rights against his wife in the Munsif's court. The wife appealed to the subordinate judge but lost. In the meantime, the husband instituted criminal complaints against another man, also named Ramzan, and the wife's family members under the Indian Penal Code, sections 497 (adultery) and 498 (enticing or taking away or detaining a married woman). These complaints were dismissed. The wife appealed the RCR decision in favor of her husband to the High Court, and pleaded to enter her husband's false criminal complaints into the evidence. This evidence was entered and it was interpreted by the High Court as an accusation of adultery against the wife. The High Court saw these accusations as legal cruelty and, as such, it gave the wife the right to live separately from her husband. The ruling stated, "An unfounded accusation of adultery by a husband against his wife is certainly a violation of marital rights."⁶²¹ The High Court did not enter into a detailed analysis of the physical violence but focused on the legal cruelty.

The *Maqboolan* decision drew on *Husaini Begam's* quoting of *Mackenzie*. Mackenzie was used to justify the Court's application of "justice, equity, and good conscience."⁶²² The *Maqboolan* decision found that the husband acted without *bona fide* intentions in his RCR suit and that his allegations of adultery against his wife constituted cruel behavior sufficient to give the wife a good ground for living apart. The husband's spurious criminal charges against the wife's mother and brothers and his implication that she had committed adultery proved the malicious motivations of the husband. Therefore he lost his RCR suit. As in *Moonshee Buzloor Rubeem*, and as in *Husaini Begam*, the public and

⁶¹⁹ To the best of my knowledge, this is not the Shaukat Ali of the Khilafat movement. Syed Ali Zaheer is discussed in further detail in Chapter Six and Appendix Three.

⁶²⁰ *Maqboolan v. Ramzan*, AIR 1927 Oudh 154.

⁶²¹ *Ibid.*, 155.

⁶²² *Ibid.*

legal accusations against the wife were deemed to be a special form of humiliation of the wife that violated her marital rights.

It is also worth noting the question of jurisdiction in *Maqboolan*. The High Court ruled in the absence of “any positive rule of Mahomedan Law,” it should look to the rules of justice, equity, and good conscience.⁶²³ This view was bolstered by the Oudh Laws Act,⁶²⁴ which allowed the Oudh Courts to apply justice, equity, and good conscience in the absence of the positive law.⁶²⁵ It was also bolstered by the *Mackenzie* decision. Specifically, *Maqboolan* quoted Lord Herschell’s statement, “It is not a motion [*sic*-notion] strange to our law that the Court should refuse its aid to one who does not come into it with clean hands.”⁶²⁶ The decision then noted that these rules had been applied in Allahabad in *Husaini Begam*, and so too could they be applied in Oudh. *Moonshee Buzloor Rubeem* and *Mackenzie* both played important roles in the early twentieth century jurisprudence of RCR in UP. Each precedent was used to show the courts’ discretion to make decisions about the totality of the husband’s behavior. In a pattern we shall see in additional suits, in *Maqboolan* the High Court put great stock in the husband’s besmirching of the wife’s character.

Ram Bharosey v. Mt. Sheo Dei (1939): Facts and their Interpretation

We have now examined some of the sources for restitution of conjugal rights as it was adjudicated in the Oudh and the Allahabad High Courts in the run up to the 1939 *Ram Bharosey* decision. The cases all involved Muslim litigants. The *Ram Bharosey* case raised the question of whether the rules for Hindu litigants would be the same.

Sheo Dei and Ram Bharosey married in 1915 in Safipur, Unnao district, about thirty-five kilometers due north of Kanpur and fifty-eight kilometers west of Lucknow. Marital troubles that

⁶²³ Ibid.

⁶²⁴ Act 18 of 1876

⁶²⁵ *Maqboolan v. Ramzan*, AIR 1927 Oudh 154 at 155.

⁶²⁶ Ibid.

left legal traces began only in 1929. Beginning with a criminal complaint against Sheo Dei's father for kidnapping her, throughout the early 1930s Ram Bharosey used the Indian Penal Code to slander and harass his wife.⁶²⁷ Sheo Dei left her husband for good and returned to her father's home in 1933. In April 1935, she applied for maintenance under the Criminal Procedure Code (CCrP), alleging that her husband beat her and threw her out of his house. Successful, she was awarded maintenance of six rupees per month.⁶²⁸

Three months later, as a last-ditch effort to escape this monthly maintenance burden, Ram Bharosey filed a RCR suit against his wife in the Munsif's court in Safipur. Ram Bharosey lost his suit for RCR because the Munsif (lower-court judge) found him "guilty of legal cruelty."⁶²⁹ The husband appealed that decision to the District Judge in Unao. When he lost there, he appealed to the Oudh Chief Court in Lucknow. The purpose of his conjugal rights suit was to demonstrate his willingness to accept his wife at their marital home. This would remove the wife's ground to claim maintenance from him by showing that he was entirely willing to maintain her at his home, and that she had no legally valid reason for living apart.⁶³⁰

After dismissals by both the Munsif and District Judge, Ram Bharosey's chances for success were slim by the time K.P. Misra stood to represent him in December 1938. Ram Bharosey recalls Bacchi Singh of Kanpur. Bacchi Singh went crazy in the course of searching for a lawyer who would accept his case until he met K.N. Katju, who then launched his career with an unlikely first victory

⁶²⁷ *Ram Bharosey v. Mt. Sheo Dei* AIR 1939 Oudh 68 at 72. He also filed charges of "theft and immorality" against her. The relevant provisions were IPC ss. 323, 384, and 392.

⁶²⁸ The husband's charge of kidnapping against his wife's father also indicates the coverture-based assumptions in the Indian Penal Code (IPC). Did other *laan* cases use kidnapping charges? What was the relationship between father and husband in the IPC's kidnapping provision?

⁶²⁹ *Ram Bharosey v. Mt. Sheo Dei* AIR 1939 Oudh 68 at 69, rt. col.

⁶³⁰ Code of Criminal Procedure (1998) s. 488(3) and s. 488(5) denied the wife her right to maintenance if she refused to live with her husband without "sufficient reason."

for the destitute and deranged, yet determined, client.⁶³¹ In Ram Bharosey's case, the two lower courts had already accepted the wife's evidence of his cruelty and ruled Sheo Dei had a good defense to his RCR suit. Ram Bharosey and his advocate Misra could not dispute the facts before the Chief Court, only the legal interpretation of those facts. Advocate K.P. Misra certainly made an admirable effort but was not as successful for Ram Bharosey as Katju had been for Bacchi Singh.

Unsurprisingly given these odds in December 1938, the Chief Court, like its two subordinate courts before it, dismissed the husband's suit.

In this relatively routine case, a persistent husband with the means to pursue his wife to the High Court did just that, either out of stubbornness or a calculation that it would be cheaper to cut off at the pass his lifelong maintenance obligations to his wife.⁶³² The significance of the case lay in the husband's arguments against a standard rule of cruelty that applied across religious community on Hindu-religious grounds, and the Chief Court's rejection of those arguments.

Though the husband's jurisdiction objections were spurious, his advocate, K.P. Misra, raised them in skillful fashion, pushing Chief Justice Yorke to clarify the law of cruelty in Oudh. The *AIR* decided to publish the Chief Justice's well-written and thorough opinion. The decision confirmed the fact of the husband's violence, denied the Hindu husband's unlimited rights to beat his wife, and declared a standard of reasonable expectation of harm as a good defense to RCR. Justice Yorke's clarifications included ruling that a husband's behavior need not rise to the level of legal cruelty in order for the court to deny his suit for RCR. Rather, the Court could examine whether the husband's intentions made it "reasonable" to think that there would be "serious danger to her [the

⁶³¹ Though the legal point was eventually decided against Katju and Bacchi Singh's position by the Privy Council, the High Court's award to Bacchi Singh could by then not be reversed and so Bacchi Singh retained his awarded property. Katju, *Experiments in Advocacy*.

⁶³² The wife won maintenance of Rs 6/month. *Ram Bharosey v. Mt. Sheo Dei*, *AIR* 1939 Oudh 68 at 69. Another 1939 maintenance case was over the wife's demand to increase her monthly maintenance from twelve rupees to twenty rupees. This case was likely between Christians under the Divorce Act. Two justice bench seemingly also of Europeans [Collister and Allsop, JJ]. See *Chandler v. Chandler* (*AIR* 1939 All 696).

wife's] health and safety by reason of her" returning to his home.⁶³³ Most importantly, this standard for the husband's behavior applied no matter his religious community.

In *Ram Bharosey's* appeal, Justice Yorke decided two important legal issues: the standard for a wife to successfully repel a husband's RCR suit and whether this standard applied across all communities. The jurisdiction and standard were closely intertwined. Justice Yorke's major question was, what was the standard to repel a RCR suit, outright physical cruelty, or, in the absence of physical cruelty, a broader category of "legal cruelty"? Following this, did this standard differ by religious community? K.P. Misra, the husband's advocate advanced the argument that the standard to condemn a husband's behavior varied by religious community. Justice Yorke examined the precedents that incorporated restitution of conjugal rights in UP. Moreover, Justice Yorke clarified that the Hindu husband did not hold a positive right to employ violence against his wife in the case of her "disobedience."

Despite its extensive discussion of marital cruelty, the judgment did not declare violence within marriage a sole ground to give the wife a good defense to bar a RCR suit. Instead, Justice Yorke stated, "In my opinion the conduct of the plaintiff in making charges of theft and immorality against his wife certainly constitutes a matrimonial offence of a very objectionable kind such as can be raised as a defense to a suit for conjugal rights, particularly when there are also acts of physical violence. It also throws grave doubt on the bona fides of the plaintiff in instituting the present suit."⁶³⁴ As Justice Yorke wrote it, the chief event was the cruelty by legal persecution, then the husband's violence, and each of these weighed along the overall vision of the husband's past record and future intentions.

The decision in *Ram Bharosey* affirmed the standard of a likely "serious danger to her [the wife's] health and safety" as a good reason for a wife to avoid living with her husband. Because both

⁶³³ *Ram Bharosey v. Sheo Dei*, AIR 1939 Oudh 68 at 73.

⁶³⁴ *Ibid.*

lower courts found Ram Bharosey guilty of physical cruelty, he could not call into question the fact that he beat and threw out his wife. He instead staked his argument on the legal point that this behavior did not rise to the standard of cruelty that would give his wife a good ground for living apart. This maneuver was similar to what Mackenzie attempted in his case. The Justice Yorke reproduced a summary of K.P. Misra's arguments for the husband, as if to use the occasion of his judgment to publicly denounce Ram Bharosey's position as a punishment for the husband's earlier use of legal harassment.

K.P. Misra defended the husband's behavior using two arguments. The first was that Hindu husbands had "...a right to inflict corporal punishment on a wife with a light instrument" and Ram Bharosey had only beaten his wife "... on three occasions, on two of which she was beaten with fists and kicks only..."⁶³⁵ The husband argued for his relative good behavior over the years despite three isolated incidents of violence. His second argument was that this violence "...was justified...because the wife was declining to leave the appellant's village Makhi and go to live with him at the various places where as a District Board School Master he was posted...[and] a Hindu husband is entitled to demand obedience ..." ⁶³⁶ His sources for this point were books on Hindu law from 1912 and 1878 and several nineteenth and early twentieth century precedents.⁶³⁷

Against these older precedents and authorities, Justice Yorke accepted the more recent precedents presented by the wife's advocate, L.P. Misra. This allowed him to take a complete view of the husband's behavior rather than to quantitatively measure the instances of violence. The ultimate *ratio* for the decision was that the husband acted without *bona fide* intentions in his demand

⁶³⁵ Ibid., 68, 70.

⁶³⁶ Ibid., 68, 70.

⁶³⁷ Ibid., 68 at 70, 71. The two texts were D. N. Mitter's 1912 University of Calcutta thesis, "The Position of Women in Hindu Law" and Gooroodas Bannerjee's 1878 Tagore Law Lectures, *The Hindu Law of Marriage and Streedhana*. The judgment noted places in which other decisions cited by the husband, all but one from the nineteenth century, did not apply.

for RCR. The wife faced a likely expectation of physical or mental harm if the Court compelled her to return to his home.

Ram Bharosey's false criminal complaints also weakened his case. He criminally charged the wife with "theft and immorality" on three separate occasions between 1930 and 1933 and accused her of adultery with his criminal charges. In his complaints, he further compounded this charge by stating she had caused "injury to the family honour."⁶³⁸ The criminal charge was by its nature public. Courts took a dim view of such public assaults on a wife's reputation. The mere act of filing the criminal charge achieved the husband's end even before a case went to trial: it was a form of public humiliation. After such a drastic step, it was hard to accept such his claim of good intentions in wanting his wife back. The Chief Court made it clear it would not force a wife back to him if it doubted his intentions. It doubted Ram Bharosey's intentions in this case because of his beatings and his use of the law to inflict social cruelty. This was the substantive point of law: reasonable apprehension of harm gave the wife a good excuse for not living with her husband.

The discussion of Sheo Dei's conflict with her husband highlights the important role of mobility and work in marriage. The conflict developed initially because the husband was a schoolmaster who would be sent to different villages to work, and Sheo Dei did not want to leave Makhi, the husband's original village. Ram Bharosey argued that this was disobedience and therefore his violence against her had been justified. The law and practice of government service intersected with husbands and wives' matrimonial litigation. Like Husaini Begam, the wife in this case was considered disobedient because of her refusal to live with her husband.

Ram Bharosey attempted to win his appeal and dodge his wife's maintenance claim by arguing the law of cruelty in RCR suits differed by religious community. In refuting his spurious argument, Justice Yorke examined a chain of precedents beginning in 1867. Ram Bharosey

⁶³⁸ *Ram Bharosey v. Sheo Dei*, AIR 1939 Oudh 68 at 72.

challenged the relevance of these precedents, arguing that since all cases in this line of incorporation involved non-Hindu, mainly Muslim, litigants, they did not apply to him as a Hindu husband.

We have so far outlined the arguments and precedents put forward by the husband to show that he should have a right to his wife's conjugal company. On the other hand, there was a set of five precedents used by the wife's advocate, L.P. Misra, which showed that the wife did not need to prove physical cruelty in order to deny her husband's restitution of conjugal rights suit. The judgement noted that the five recent cases⁶³⁹ from the wife "indicate[d] the progress of opinion such as might be expected from the seed sown" in the older cases put forward by the husband.⁶⁴⁰ These were all from the decade between 1924 and 1937 and involved decisions from many different High Courts in India: Allahabad, Bombay, Lahore, Madras, and Rangoon. The 1924 Allahabad decision was a short judgment that in one paragraph neatly dismissed the husband as a bad actor who simply sought to get a RCR order against his wife so that he could get her maintenance order cancelled. Therefore, the court would not send her back to her husband's home with a RCR order.

It is also worth noting that the decision detailed how the wife had already proceeded to claim her maintenance and the husband had refused: "When the woman endeavoured to obtain the money that was due to her the husband refused to pay it and she had to attach his property and to arrest him and place him in custody to execute the order. At the end of this he has applied for RCR against her and has advanced the somewhat amazing argument that although he has suspected her chastity for twenty years, now that she has claimed an order of maintenance against him, his suspicion has been allayed."⁶⁴¹ The wife had "a reasonable apprehension of bodily injury if she returned to her

⁶³⁹ Along with one each from Lahore, Madras, and Rangoon. *Babu Ram v. Mt. Kokla* (AIR 1924 All 391); *Jivi Bai v. Narsingh Lalbhai* (AIR 1927 Bom 264); *Ude Singh v. Mt. Daulat Kaur* (AIR 1935 Lah 386); *Rukmani Ammal v. T.R.S. Chari* AIR (1935 Mad 616); *Maung Saw Pe v. Man Ban Sein* (AIR 1937 Rang 508).

⁶⁴⁰ *Ram Bharosey v. Sheo Dei*, AIR 1939 Oudh 68 at 71.

⁶⁴¹ *Babu Ram v. Mt. Kokla*, AIR 1924 All 391, Justices Stuart and Mukerji, S NO. 633 of 1922 from DJ Pilibhit; quotes from p. 392.

husband” and therefore the husband could not win his suit.⁶⁴² A 1937 Rangoon decision found that a husband could not win his RCR suit because he was only trying to avoid paying the maintenance of his wife, who left him for good cause.⁶⁴³

As Justice Yorke reiterated, *Ram Bharosey* presented a “similar state of affairs” to these recent legal harassment cases because the husband acted without good intentions.⁶⁴⁴ In other words, the Justice adopted a broad but not unlimited definition of cruelty. Because Ram Bharosey’s suit was not *bona fide*, “it is reasonable to hold that if a decree is given against the wife and the wife in obedience to that decree goes back to the husband there will be serious danger to her health and safety by reason of her so doing.”⁶⁴⁵ The Justice read Ram Bharosey’s legally motivated intentions and past record of physical violence as indicating a likelihood of the wife’s harm if she were forced to return to him. The opinion gave as much weight and attention to the husband’s legal harassment as to his physical cruelty.

Discussion

The following discussion brings together the preceding cases in order to examine the development of arguments in UP restitution of conjugal rights suits along three inter-related axes: i.) the definition of cruelty; ii.) the geographic jurisdiction of the courts over restitution of conjugal rights; and iii.) the jurisdiction of the courts as it related to the religious personal law of litigants.

⁶⁴² *Babu Ram v. Mt. Kokla* (1924) 11 AIR All 391: 79 IC 634: 46 All 210: 46 All 210: 22 ALJ 68. Cited in *Ram Bharosey v. Mt. Sheo Dei* AIR 1939 Oudh 68 at 72, rt. col.

⁶⁴³ *Maung Saw Pe v. Ma Dan Sein [Pyu]*, 1937 AIR Rang 506: 174 IC 121. Cited in *Ram Bharosey v. Mt. Sheo Dei* AIR 1939 Oudh 72, rt. col.

⁶⁴⁴ “The plaintiff [husband] did not institute any suit for restitution of conjugal rights until his wife actually obtained against him an order for maintenance under s. 488, and even when that order was sought by her he repeated his accusations of immorality.”

⁶⁴⁵ *Ram Bharosey v. Mt. Sheo Dei*, AIR 1939 Oudh 68 at 72-3.

Definition of Cruelty

The position taken by the judgment in *Mackenzie*, and the way in which *Mackenzie* was used in UP, were different. In *Mackenzie*, the final ratio for the decision was based on the facts of the husband's behavior. The Privy Council deemed his behavior to have met the higher standard that would have allowed the wife to deny his *divorce a vinculo*. Therefore he also met the lower standard required for her to successfully deny his restitution of conjugal rights suit. The portion of Lord Herschell's decision quoted in the UP courts was used to bolster the position that the courts could use their discretion to evaluate the husband's intentions. They could look at a complete picture of his behavior and his intentions in pursuing a RCR against the wife. There were a variety of harms a wife could experience in marriage. Lord Ashbourne's final sentence in his opinion in the *Mackenzie* judgment highlights three constitutive elements of the package of goods or benefits conceptualized in marriage. "Name, home, and fortune" can be translated to a claim to a status, both social and legally, of approved wife; the right to residence in the matrimonial home, maintenance, and aspects of her husband's legal identity such as domicile; and, perhaps most importantly in this case, her rights to her husband's property and wealth.

The position taken in *Mackenzie*, and adopted in UP, was that courts could exercise discretion to evaluate the husband's behavior. This was then taken up in the 1906 *Husaini Begam* decision in which the husband made accusations about the wife's immorality and adultery. The judge evaluated the husband's behavior as motivated by negative intentions to harm the wife and this was used to deny him his RCR suit. Though there was some evidence before the lower courts of his violence, the High Court focused on his legal cruelty in making these accusations in coming to its decision to order a compromise. In addition, the husband's allegations against the wife were determined to be particularly egregious because of the wife's origins in a wealthy family.

In *Maqboolan*, the Oudh Chief Court looked to the *Husaini Begam* decision to make a similar ruling about the role of legal cruelty and reputational harm in to the wife in bringing false criminal accusations against her. The husband’s accusation of adultery was determinative. In *Ram Bharosey*, Justice Yorke found the standard to be determined by the English law and judicial discretion therefore the standard was not one of Hindu law. Because RCR was an import, and it was specifically an import from equity, there was space for discretion in the adjudication of the standards in line not with an international standard, or even an imagined reasonable man. Rather the standard was the adjudgement of the husband’s behavior *by the court* such as “entire conduct,”⁶⁴⁶ “bona fides,” and “intention.” The continued emphasis on legal cruelty and harassment diverted attention from matrimonial violence. It emphasized public spaces rather than private spaces and easily proved harms to the wife as against those that took place in a private space that were harder to prove.

Allahabad and Oudh developed a particular line of thinking and precedents in adjudicating matrimonial cruelty. A comparison with other states’ law is beyond the scope this dissertation, though the discussion in *Ram Bharosey* indicated that the UP High Courts were in step with other High Courts. These cases show that the UP courts developed a judicial conversation and outlook about marital cruelty based in diverse ethical influences and shaped by RCR and maintenance litigation within the province.

Jurisdiction - Geographic

In each of these cases the location of the matrimonial home played a very important role. When it came to the question of the geographic jurisdiction in *Mackenzie*, we note that i.) the law differed in Scotland and England; and ii.) the husband was keenly aware of this.

⁶⁴⁶ *Ram Bharosey*, 72, lft. Col.

Chief Justice Stanley made a similar point in *Husaini Begam* because the wife was from Moradabad, about 160 km east of Delhi, in British India and her husband was from the princely state of Dholpur. The previous chapter showed that domicile, jurisdiction, and the tricky question of the matrimonial home structured Indian citizenship law. The jurisdiction questions raised here show the same is true for Indian matrimonial litigation within the confines of the territory of late colonial India. Chief Justice Stanley made it clear that he was in the business of saving Indian women. The husband had charged the wife with “the vilest insults,” in which case he asked, “can we say that the defendant has not any ground for reasonable apprehension, that, if she return to Dholpur, a native state, in which she could not invoke the protection of the British law, she will be subject to maltreatment and violence[?]”⁶⁴⁷

As in Chapter One on the Partition cases, jurisdictional concerns allowed the courts to break the hard and fast rule between the husband’s location and the matrimonial home. In Rani Sayeedah’s citizenship case in 1955, the Supreme Court acted to sever the wife’s tie to her matrimonial home in order to exclude her from the territory of the Indian nation-state. In *Husaini Begam*’s case, Chief Justice Stanley acted to sever this tie as well, in order to protect Begam from the perceived inequities and backwardness of law in a princely state. His action would encourage her to remain in British India. In the 1906 compromise, the husband was ordered to live with or near his wife, where she had access to her property as well as British law. The judgment relocated the matrimonial home with her, in part on the grounds that she would otherwise lose the protection of British laws. However, this wife-centric location of the matrimonial home was not an option by the time of *Maqboolan* or *Ram Bharosey*.

⁶⁴⁷ *Muhammad Rustam Ali Khan vs. Husaini Begam* 1907 ILR 29 All 222, para. 7.

Jurisdiction - Religious

The question of different religious personal laws did not arise directly in *Mackenzie*. However, the example of that case shows that husbands' behavior more often conformed to the legal dictates of the English or British laws than to a particular religion or culture. For example, he sought to control his wife's movement just like husbands Moonshee Buzloor Ruheem and Husaini Begam's husband, Muhammad Rustam Ali Khan. He was aware of his differing rights based upon the jurisdiction in which he lived. In *Husaini Begam*, the Allahabad High Court did not see any problem with drawing on *Mackenzie* to bolster the position that the court could look at the totality of the husband's behavior to determine his intentions and what risks the wife would face if ordered to return. The High Court drew on the Scottish precedent of *Mackenzie* right alongside the Muslim precedent of *Moonshee Buzloor Ruheem. Maqboolan* adopted a similar position. It was these two decisions that gave rise to Ram Bharosey's contention that the rules differed for Hindus and Muslim husbands in restitution of conjugal rights suits, since they did not involve Hindu litigants.

In *Ram Bharosey*, Justice Yorke rejected the husband's contention that the *Maqboolan* standard applied only to Muslims. Justice Yorke pointed out that *Maqboolan* adopted the position taken in the judgment of Lord Herschell in *Mackenzie* (1895): it allowed the husband's conduct to be used in evaluating cruelty.⁶⁴⁸ In Justice Yorke's interpretation of *Mackenzie*, "...the principles stated in this case [*Mackenzie*] are of general application and not limited to cases of restitution of conjugal rights where the parties are Mahomedans."⁶⁴⁹ Therefore it mattered not that the parties in *Maqboolan* were Muslims while those in *Ram Bharosey* were Hindu. The *Maqboolan* decision made clear the applicability of the *Mackenzie* standard in Oudh. As such, the law created by it applied to Hindu

⁶⁴⁸ The case in question was *Mackenzie v. Mackenzie* (1895) AC 384. In his decision the Lord Chancellor [Herschell] raised one important issue for the present case. There he stated, "It is not a notion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands" (quoted *Ram Bharosey v. Mt. Sheo Dei*, AIR 1939 Oudh 68 at 70).

⁶⁴⁹ *Ram Bharosey v. Mt. Sheo Dei*, AIR 1939 Oudh 68 at 70

litigants as well as Muslims and so by 1939 Ram Bharosey lost his suit. Justice Yorke decided in favor of the wife's position, against the husband's use of a personal law argument to take her away her claim for a good reason to live apart.⁶⁵⁰ Under this relatively broad jurisdiction, his Court could rule that the husband's baseless criminal allegations were marital cruelty. He also relied on the position in *Moonshee Buzloor Rubeem* that "an Indian Court might well admit defence founded on the violation of marital rights."⁶⁵¹

The *Ram Bharosey* decision illustrated how successful *Moonshee Buzloor Rubeem* and restitution of conjugal rights had been in Indian law. After seventy-two years, a complex and diverse body of case law had developed around this procedure. *Moonshee Buzloor Rubeem*, in its post-Mutiny moment, read into Indian law the secure right for a Muslim to pursue RCR under his own personal law, adjudicated by the standards of that law, as determined by the lower and appellate courts. In so doing, *Moonshee Buzloor Rubeem* confirmed the space for restitution of conjugal rights within Indian law. It was not a general rule but a right assigned under each personal law. The device was imported but the standards were personal. To be sure, *Ardaseer Cursetjee* (1856) and other prior precedents also moved in this direction but *Moonshee Buzloor Rubeem* solidified the position for a religious community much larger than the Parsis, Indian Muslims. It clarified that Indian law could and should use restitution of conjugal rights, but the standards for a wife to have a good defence to the suit were to be determined by the individual personal law. Finally, it articulated a standard *within* Muslim law for a wife's good ground for living apart from her husband in defense to a restitution of conjugal rights suit (an import from English personal law). The English standard—"There must be actual violence of such a character as to endanger personal health or safety; or there must be reasonable

⁶⁵⁰ The case in question is *Maqboolan v. Ramzan* (AIR 1927 Oudh 154). It involved Muslims. In that case, decided by Chief Justice Stuart and Justice Wazir Hasan, the "Cases may therefore frequently arise in which Courts would act on principles of justice, equity and good conscience when such principles are not in conflict with any well-defined positive rule of law." This is from page 155 of that decision. Notably, the wife-appellant was represented by Ali Zaheer and Shaukat Ali and the husband-defendant was represented by Khaliq-ur-Zaman.

⁶⁵¹ *Mt. Maqboolan and others v. Ramzan*, AIR 1927 Oudh 154 at 155.

apprehension of it”⁶⁵²-- was found by the Council to have a near equivalent in Muslim personal law as well. The Privy Council emphasized, “...all these are questions to be carefully considered, and considered with some reference to personal law.”⁶⁵³

In the intervening seventy-two years, significant differences in the position on religious-personal jurisdiction had developed. The *Moonshee Buzloor Rubeem* judgment emphasized the need to adjudge the standards of RCR under Muslim law. In *Ram Bharosey*, however, the standard was a different one, external to either Hindu or Muslim law. In *Ram Bharosey*, the standard hinged on the individual husband’s behavior and the courts adjudgment of that behavior by a standard of *bona fide* intentions, and “reasonable apprehension” of harm.

The use of *Mackenzie* helped move the courts in that direction. Here Justice Yorke found in *Ram Bharosey* that the scope of the court’s adjudication was based in English Ecclesiastical law, not Hindu law. The standard hinged on the individual husband’s behavior and the courts adjudgment of that behavior by a standard of good intentions, bona fide intentions, and “reasonable apprehension.” In 1939, the standard advanced in *Ram Bharosey* was decidedly not one aligned with -- or attempted to be aligned with -- the language of individual human rights, individual norms, or women’s universal rights that might be familiar now. Instead rights were paired with obligations, and they were firmly situated within the dyadic and unequal relationship of heterosexual marriage. Moreover, such marriages were situated in further complex networks of class and religion.

Conclusion

The import of RCR was a great success in India. As in England, the terms of engagement changed over its long use in India. For example, the structure of jurisdiction had changed. The standard of violence had not changed greatly. In both *Moonshee Buzloor Rubeem* and *Ram Bharosey*, the

⁶⁵² *Moonshee Buzloor Rubeem*, 614.

⁶⁵³ *Ibid.*, 616.

wife benefitted due to the adjudgment of her husband's behavior in composite. Neither decision wholeheartedly disavowed violence.

The *Ram Bharosey* case also illustrated the important role of equity jurisdiction in the UP High Courts. Courts retained and expanded their jurisdiction in evaluating marital disputes drawing on equity jurisdiction. This formed the basis of a kind of Uttar Pradesh common law with a broad definition of cruelty. Due to the problem of proof and the existence of understandings of cruelty that embraced non-physical interpretations, physical violence was not the only or primary deciding factor in most of these cases, whether under the older Ecclesiastical remedies or the newer statutory remedies. RCR was a nineteenth-century remedy applied across religious community. It emphasized the husband's patriarchal control over the wife and her location with his identity, location, and home. RCR persisted because though courts were willing to admit individual husbands abused their husbandly rights over their wives, they never unseated the general rule of patriarchal dominion. This patriarchal dominion consisted of both rights and duties, and when the husband failed in his duties, he was punished by losing access to his wife. In theory, even if wives usually won in practice, the husband maintained a right of access to his wife as well as, perhaps again only in theory, the ability to physically harm his wife and the right to socially or mentally harm his wife. Husbands Mackenzie and Ram Bharosey's physical abuse and public and legal depredations suggest there was a link between the law and social practice because husbands and their advocates defended physically abusive relationships in courts of law.

Chapter Four

Maintenance as an Imperial Legal Form

Introduction

Maintenance refers to a husband's obligation to provide sustenance for his wife and children. In India, for the most part (though not entirely), maintenance has been governed by the law of criminal procedure. In this chapter, I track the history of maintenance along several axes: jurisdiction (civil, criminal, and religious); chronology (nineteenth and twentieth century); geography (England, India, empire, locality); and agency (individual, Parliament, judge). In using these frames to analyze the history of maintenance, I question the religious-secular binary through which Indian law is so often viewed. I argue that maintenance was an imperial legal form because maintenance as it was practiced in India was motivated by concerns both specific to colonial governance and shaped by a longer history within Britain.⁶⁵⁴ The concern was to limit the movement of "free agent" women who lacked familial ties that would guarantee they would not become wards of the state, vagrants, or prostitutes. In so doing, the population became more legible, easier to track, and less of a threat to colonial stability.⁶⁵⁵ Specifically, unchecked mendicancy, vagrancy, and movement threatened the

⁶⁵⁴ Sinha, *Colonial Masculinity*, developed the idea of an imperial social formation as an analytical lens for taking account of a "context...that included both Britain and India" and examines "not only the intersection of the imperial with categories of nation, race, class, gender, and sexuality, but also to the essentially uneven and contradictory nature of that intersection." (3).

⁶⁵⁵ A thorough examination of the colonial state's ideology of vagrancy and settlement on the order of James Scott's *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998) has yet to be drafted. However, a seminal effort in this regard is Radhika Singha's brilliant *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998). There Singha argues that "men on the road" "seemed to elude the reach of taxation and policing; their way of life was considered motley and suspect," prompting the development of categories of criminal tribes and castes and draconian restrictions on them (186; 188). The historiography on English poor law suggests that the need for a flexible, docile, and ready workforce drove many

security of the colonial state and a docile and stable labor supply. Overlapping Indian and British patriarchies emphasized and legally implemented the control of wives.⁶⁵⁶

A careful study of the history of maintenance highlights the multiple arenas of law that shaped it. Such a study raises questions about the chronology and scope most useful for understanding its history. The history of maintenance intertwines marriage law, property law, and criminal law. The correct chronology and frame with which to examine maintenance is over the entirety of the early modern and modern period with an eye toward the empire-wide institutional and personal connections that structured it. Rooted in common law and poor law, nineteenth century reforms created particular procedures that restrained wives' mobility, instituting a choice between being maintained by the husband and under his restraint, or pursuing maintenance via the state and living under its strictures.

The pattern was what marked maintenance as a specifically imperial *legal form*. There were three key features: it operated to preserve the marriage tie; it operated through local institutions; and it tied the wife to her husband at law or physically. Relationships between violence and liberty were adjudicated in the same way across the diverse bodies of law (criminal, Hindu, civil) examined here.

reforms to the Poor Law. This is reiterated by Singha as well: "The criminal regulations of the Company were also supposed to encourage the spirit of industry but through the agency of the police and the penal regime" wherein vagrants and robbers "would have to make reparation for his predatory existence on the industrious" (34). Pinch picks up Singha's thread and amplifies it for the post-Mutiny [1857] period, suggesting that religious mendicants were cast as the agents of sedition, labeled "political sadhu[s]." William Pinch, *Peasants and Monks in British India* (Berkeley: University of California Press, 1996), 6-9. Harald Fischer-Tine's *Low and Licentious Europeans* (Hyderabad: Orient Blackswan Private Limited, 2009), 79 and 141-65, explicitly juxtaposes the colonial state's policy towards European vagrancy with English poor law. This is a thread I attempt to pick up here by expanding beyond Fischer-Tine's focus on "white" European migrants. As Fischer-Tine puts it, "Vagrancy was seen as a sort of inheritable weakness of character" and an "incorrigible disinclination to work" (80). This scholarship suggests a guiding concern of imperial policy was to track (as groups or in some cases individuals) and manage potentially disruptive populations. While the specific inflections of the poor law/criminal law of maintenance reflected the priorities of the colonial state, it is also worth noting that vagrancy was also perceived as a law-and-order threat in early modern England. For example, McIntosh notes that in the second half of the sixteenth century those "able-bodied people" who "asked for charitable assistance, preferring the freedom and interest of travel, perhaps interrupted occasionally by casual employment, to staying home with a regular job. These wanderers, commonly termed 'sturdy beggars' or 'rogues in the statutes, were especially worrying when they traveled in groups, were former soldiers, or used dishonest or illegal means to supplement their incomes. For constables, responsible for the only form of policing, unknown strangers were far more difficult to control than their own neighbors; they might therefore be willing to apply to disruptive vagrants the physical punishments required by statute." Marjorie Kenniston McIntosh, *Poor Relief in England, 1350-1600* (Cambridge: Cambridge University Press, 2012), 142.

⁶⁵⁶ Sinha, *Colonial Masculinity*, 7.

The adjudication of maintenance tied wives to their husbands and to their husbands' localities and identities.

Indian law's emphasis on relational statuses such as marriage and kinship and its relentlessly genealogical state policies are often attributed to the moral imperatives of the country's religions and the British colonial attempt to buttress and protect them.⁶⁵⁷ Even revisionist scholarship focuses on the ways in which the British colonial state mis- or re-interpreted indigenous values as expressed in religio-legal texts and scriptures.⁶⁵⁸ At best, this scholarship critically re-examines the constitution of either Hindus or Muslims, accepting the colonial state's division of Indian society into discrete spheres of religious and secular, and Hindu and Muslim. This is a religiously-essentialist interpretation that ignores the institutional and legal forms that knitted England to the Empire. The ties that bound Indian women to their husbands not only grew out of Hinduism or Islam, though they were sometimes found in those religions' respective laws. Rather, they grew out of English poor

⁶⁵⁷ For example, in the aftermath of the revolt, Queen Victoria's Proclamation of November 1, 1858, stated, "We disclaim alike the right and desire to impose our convictions on any of our subjects."

⁶⁵⁸ A quick scan of the University of Michigan Law Library's open stacks collection on Indian family law and women's rights reveals the following: there are four monographs devoted to Muslim law in India. There are nine books devoted to aspects of Hindu law in India. There are a few books devoted to both Muslim and Hindu law. These include Gerald Larson's edited volume, *Religion and Personal Law in Secular India*. (Bloomington: Indiana University Press, 2001); Rina Verma Williams's monograph *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (Oxford: Oxford University Press, 2006), Flavia Agnes, Shoba Venkatesh Ghosh, and Majlis's edited volume *Negotiating Spaces: Legal Domains, Gender Concerns, and Community Constructs* (New Delhi: Oxford University Press, 2012); Archana Parasher and Amita Dhanda's edited volume *Redefining Family Law in India: Essays in Honour of B. Sivaramayya* (New Delhi: Routledge, 2008); Gopika Solanki's monograph *Adjudication in Religious Family Laws*; and Narendra Subramanian's monograph *Nation and Family: Personal, Cultural Pluralism, and Gendered Citizenship in India*. However, these treat Muslim and Hindu law within separate chapters, as discrete fields of analysis. Through its examination of one family and case, Chandra Mallampalli's book *Race, Religion and Law in Colonial India: Trials of an Interracial Family* (Cambridge: Cambridge University Press, 2011) suggests a more nuanced view of identity formation over a *longue durée* in one particular family. Three books suggest more theoretical feminist analyses of Indian law and politics without being devoted to family law in particular: Nivedita Menon's *Recovering Subversion: Feminist Politics Beyond the Law* (Urbana: Permanent Black/University of Illinois Press, 2004); Ratna Kapur's *Erotic Justice: Law and the New Politics of Postcolonialism* (London: Glass House Press, 2005); and Rajeswari Sunder Rajan's *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Durham: Duke University Press, 2003). Jaya Sagade's book *Child Marriage in India: Socio-Legal and Human Rights Dimensions* (Oxford: Oxford University Press, 2005) does not make any religious distinctions. This is not meant to be a complete survey but rather to suggest the dominant trend of the categories of analysis of Indian family law and the breakdown of women's rights along religious lines. Two important additional revisionist examples in this vein are Newbigin, *Hindu Family*; Scott Kugle, "Framed, Blamed, and Renamed." This is not to suggest that there is anything wrong with such analyses, for indeed mastering any one arena of Indian family law is quite complex. But it does suggest that multiple frameworks are required, and a legislation-driven analysis may recapitulate colonial categories while missing the different categories that structure the practice of Indian law at the appellate (and likely lower) court level.

law and common law, and became so well-entrenched in India that they continue to operate today across many bodies of law, whether Hindu, civil, criminal, Muslim, or Christian. Rooted in the parish or locality and aimed at restricting mobility and ensuring order and stability, maintenance in India represented the triumph of poor law governance. This effect was based in the Code of Criminal Procedure's English model of maintenance, not in a Hindu or Muslim religious law or idiom.

Arguing that wives almost always won their maintenance suits, in this light, replaces the sheen of humanitarianism with which judicial decisions were sometimes cloaked and suggests that, perversely, providing for a wife's mere sustenance was a method of social control that pitted her liberty against her survival. This chapter examines several aspects of maintenance: relief, grounds, procedure and jurisdiction, and administrative machinery.

Social Control and Settlement in India

The practice of maintenance law, often read through the lens of the secular/religious divide or through the lens of women's rights, must be seen as part of a form of governance that emphasized social control and that had its roots in colonial settlement and metropolitan poor law. First, several scholars have noted that in nineteenth- and twentieth-century India the colonial state went to great lengths to settle and control mobile and vagrant populations. Some scholarship on vagrancy in India has focused on colonial efforts at regulating lower class Europeans. Harald Fischer-Tine's research indicates the racial and civilizational stakes in maintaining a check on white vagrancy. It shows that the colonial state saw European vagrancy as a potential source of Indian criticism of the empire and a symbol of the failure of the civilizing mission. Such post-Mutiny concerns drove the push for a Vagrancy Act in the 1860s and 1870s. This took the form of two committees appointed by the Government of Bombay in the 1860s.⁶⁵⁹ The eventual 1871 Act

⁶⁵⁹ Fischer-Tine, *Low and Licentious Europeans*, 143.

implemented criminal provisions against vagrants, and allowed for arrest, confinement in a workhouse, and deportation of European vagrants. Fischer-Tine argues that the approach to vagrancy was driven by an “external imperial civilising project” aimed at India and Indians; and a “subsidiary internal civilising mission addressed the lower orders of white society, [that] was based on hierarchies of class and was carried out as clandestinely as possible.”⁶⁶⁰ Workhouses were duly founded, or created out of Strangers’ Homes, in Bombay, Calcutta, Madras, Allahabad, Jabalpur,⁶⁶¹ Nagpur, Lahore, and Rangoon.⁶⁶² There were many factors contributing to the Vagrancy Act; one of the most sensational included the murder of three Marwari merchants by four English “men knocking about the town without employment”⁶⁶³ who attacked their shop in 1866. The men were tried, convicted, and executed the next year. Avoiding such embarrassing exercises and attendant criticisms from the Indian press prompted by such events, the Vagrancy Act came into being.⁶⁶⁴ In 1874 the Act was revised so as to exclude Eurasians and Indians from “the privilege” of admission to a workhouse.⁶⁶⁵

More widespread and disturbing were the ways in which the colonial state sought to settle mobile or otherwise fractious Indian populations. Vinayak Chaturvedi’s book *Peasant Past* compellingly portrays how the colonial state allied with dominant caste groups in Kheda district, Gujarat, in structuring the lives of the so-called criminal tribes, the Kolis and the Dharalas. Chaturvedi shows beyond a shadow of a doubt how social control measures were initiated by colonial statutes and regulations—and vigorously enforced—at the local level by these dominant groups.⁶⁶⁶

⁶⁶⁰ Ibid., 183-4.

⁶⁶¹ Ibid., 165-6.

⁶⁶² Ibid., 170.

⁶⁶³ Ibid., 157, citing contemporary press and government reports.

⁶⁶⁴ Ibid., 157-8.

⁶⁶⁵ Ibid., 164-5.

⁶⁶⁶ Keith Wrightson highlights the important role of “neighbourhood opinion” in the definition of delinquency and in the bringing in of delinquents to the courts in his essay “The Nadir of English Illegitimacy in the Seventeenth Century,”

The peasant cultivators in Kheda district — including tracts only recently encouraged to be brought under regular cultivation — were designated criminal tribes. As such they had to attend daily roll calls. The origins of such colonial control lie, like maintenance law, in the 1860s, in the Village Police Act (VII of 1867), which bolstered each village *mukhṛ*'s [headman's] powers to monitor and punish peasants. Though earlier in the nineteenth century dominant local leaders resisted such colonial efforts, by the post-Mutiny period they were already well-established “colonial emissaries,” to borrow Chaturvedi's phrase.⁶⁶⁷

The colonial state privileged well-established settled landowners by increasing land rental rates so that the Dharalas, the erstwhile cultivators, could no longer afford the land.⁶⁶⁸ This allowed dominant local groups like the Patidars and Kanbis to reap the benefits of Dharala labor. In essence, the colonial state used Dharalas and other criminal tribes in northern India as shock troops for colonizing new lands that were then handed off to upper caste peasant cultivators.⁶⁶⁹ The colonial state and its agents exercised numerous forms of social control over the Dharalas. Dharala and Koli resistance to such measures was interpreted as further evidence of their criminality.

As colonial efforts to surveil drilled ever deeper into Indian society, they too failed in their attempts to control human movement. Thus *mukhis* and headmen, tasked with controlling the Dharalas and Kolis, came in themselves for criticism and greater surveillance and control by the colonial state; in fact this was mandated by the Village Police Act of 1867.⁶⁷⁰ It was followed soon

in *Bastardy and its Comparative History*, ed. Peter Laslett, Karla Oosterveen, and Richard M. Smith (Cambridge: Harvard University Press, 1980), 178-9. The case of the Dharalas presented here is different in that Patidars and Kanbis were officially tasked with implementing certain aspects of the Criminal Tribes Act. Yet both examples show that official structures and socially dominant groups were required for anything approaching effective social control. Vinayak Chaturvedi, *Peasant Pasts: History and Memory in Western India* (Berkeley: University of California Press, 2007).

⁶⁶⁷ Chaturvedi, *Peasant Pasts*, title of chapter 5: “Becoming a Colonial Emissary,” 39.

⁶⁶⁸ *Ibid.*, 32-6.

⁶⁶⁹ Sanjay Nigam, “Disciplining and Policing the ‘Criminals by Birth,’ Part 1: The Making of a Colonial Stereotype—The Criminal Tribes and Castes of North India,” *Indian Economic and Social History Review* 2, no. 2 (1990): 131-64 and Nigam, “Disciplining and Policing the ‘Criminals by Birth,’ Part 2: The Development of a Disciplinary System, 1871-1900,” *Indian Economic and Social History Review* 2, no. 3 (1990): 257-87.

⁶⁷⁰ Chaturvedi, *Peasant Pasts*, 120.

after by the Criminal Tribes Acts (CTA) of 1871 and 1911 that was aimed at the already-settled Dharalas, some of whom were engaged in political protest and/or raids.⁶⁷¹ The Criminal Tribes Acts were far-reaching: each Dharala had to register, providing fingerprints and basic details. Though the CTAs aimed at communal punishment, as Chaturvedi argues, this was somewhat paradoxical because the registration process itself “individuallyiz[ed] each member of the community to make him or her ‘identifiable’ and ‘controllable.’”⁶⁷² Many Dharalas had to “attend *hajri* (roll call) twice daily: at sunrise and at eight o’clock in the evening.”⁶⁷³ They also required passes to travel outside the village and were subject to random nighttime searches.⁶⁷⁴ The daily roll calls were inefficient and wasted a lot of peasants’ time. Moreover, Dharalas were forced to live in the shadow of the law: registration under the CTA could be used by Patidars as a threat to coerce labor.⁶⁷⁵ The Acts required registration of women and children as well as adult males, “even though public opinion on this issue ‘consider[ed] the application of the CTA to women degrading,’”⁶⁷⁶ the more so because women who registered were touched by the officials in order to obtain their fingerprints.⁶⁷⁷

To this long list of social control mechanisms — and after a decades-long effort to settle and pacify the Dharalas — the colonial state removed and resettled about one hundred Dharala families to a camp to serve as a deterrent, deemed cheaper than resorting to the costlier imprisonment, in the wake of the non-cooperation movement.⁶⁷⁸ The camp was designed to enforce work discipline for the labor market, and was in part a response to failed *in situ* social control measures.⁶⁷⁹ The

⁶⁷¹ Ibid., 122.

⁶⁷² Ibid., 123.

⁶⁷³ Ibid., 123-5.

⁶⁷⁴ Ibid., 123.

⁶⁷⁵ Ibid., 126.

⁶⁷⁶ Chaturvedi, *Peasant Pasts*, 123. Chaturvedi is quoting from a Report on the CTA in Kheda by G.K. Parekh from November 22, 1912, Oriental and India Office Collections, Bombay Judicial Proceedings, 1913, P/9338.

⁶⁷⁷ Chaturvedi, *Peasant Pasts*, 124.

⁶⁷⁸ Other groups in this camp included Kaikadis, Chapparbands, Haranshikaris, and Bhats.

⁶⁷⁹ Chaturvedi, *Peasant Pasts*, 145.

resettlement of selected families was designed to serve as deterrent to the most fractious Dharalas. It was aimed at controlling mobility and tying mobile populations to a particular locale.

Along with Chaturvedi's work, scholarship by Sandria Freitag and Sanjay Nigam places the lens on north India. It shows the gradual evolution of small-scale to such larger "social engineering efforts"⁶⁸⁰ as large-scale resettlement of Sansiahs at Kheri, United Provinces/Uttar Pradesh. Freitag shows how the colonial state's social engineering ideology even extended to arranging what it deemed appropriate marriages between the denizens of its resettlement project at Kheri. She also argues that a covert legal system coexisted alongside the colonial state's formal legal system. This legal system was aimed at controlling criminality and displayed no regard for due process. As an adjunct to this, Freitag also points out that evidentiary standards for prosecution under criminal tribes and castes legislation differed from the standards under the larger criminal law. Two constituent elements of this covert legal system were its purported temporariness and its emphasis on communal punishment.

These internment and confinement efforts were more or less contemporaneous with turn of the century famine relief and plague observation camps in Gujarat. And, the efforts in the United Provinces were equally unsuccessful: the camp at Kheri had a 75% attrition rate.⁶⁸¹ Freitag shows that after such failures, colonial state ideology shifted away from settling rural nomadic populations toward regulating urban "gangs."⁶⁸² Nigam's approach is to study the development of colonial knowledge about the criminal tribes. None of these resettlement efforts was very successful. They show how important geography and locality were in the colonial effort to monitor its subjects. Settling unsettled populations was a priority of the colonial state in the post-Mutiny period when uncontrolled movement was seen to threaten its stability. It was this imperative of colonial

⁶⁸⁰ Sandria Freitag, "Crime in the Social Order of Colonial North India," *Modern Asian Studies*, 25, no. 2 (May 1991): 250.

⁶⁸¹ Freitag, "Crime in the Social Order," 254. She does not state whether this was overall or yearly, but presumably she means that 75% of the denizens of the camp left it.

⁶⁸² *Ibid.*, 260.

governance that also underwrote the maintenance provisions examined in this chapter, and this is why maintenance was governed under criminal procedure rather than under civil or religious personal law. Mobile and unknown populations were a threat to colonial stability.

Poor Law and Maintenance

The term *settlement* has as a second, relevant meaning in the context of maintenance law. *Settlement* refers to the idea that each person in England (and Wales) had a set parish to which he or she belonged, and it was this parish that was responsible for maintaining the person in the absence of his or her own self-sustenance. This system stemmed from the Poor Laws of 1597 and 1601.⁶⁸³ A central feature of the Poor Laws was that, “Whenever there was any doubt about a pauper’s place of birth or residence, overseers attempted to reduce the burden of their own community’s poor rates by shunting the applicant off to another parish...”⁶⁸⁴ As the Poor Laws developed, this basic building block remained in place, albeit with revised systems and modernized forms. They required husbands to maintain their wives and tied wives to their husbands through the reimbursement system.

The New Poor Law, based on the Poor Law Amendment Act of 1834, tied wives to their husbands and required the latter to maintain them through the reimbursement system. This involved local institutions of the criminal courts and their considerable administrative machinery. A wife took on her husband’s settlement upon marriage⁶⁸⁵ and Cretney points out that 1834 Act “treated relief given to the wife as being given to the husband.”⁶⁸⁶ The Webbs claimed that the Central Authority found that “a woman may be restrained by the control of her husband from leaving the workhouse” if she so sought to leave. “If he declines to use his marital control” to prevent her from leaving, the

⁶⁸³ Anthony Brundage, *The English Poor Laws, 1700-1930* (Houndsmills, Basingstoke, Hampshire: Palgrave, 2002), 9-10.

⁶⁸⁴ Brundage, *English Poor Laws*, 10.

⁶⁸⁵ Michael E. Rose, *The English Poor Law, 1780-1930* (New York: Barnes & Noble, 1971), 26.

⁶⁸⁶ Cretney, *Family Law*, 459 and n. 111.

husband himself could have been barred from relief.⁶⁸⁷ From 1868, a husband was required to pay his wife's maintenance, reimburse the guardians [in his parish] for their expense of maintaining the wife, or show good cause as to why he could not pay.⁶⁸⁸ The standard procedure was, prior to 1878, to assign a deserted and destitute wife to a workhouse until her husband's maintenance could be obtained.⁶⁸⁹

From this period several reforms lead to a gradual separation of wives' maintenance from poor law. The Matrimonial Causes Act of 1878 gave the wife a procedure to obtain maintenance if her husband were convicted of assaulting her. In the main, the 1878 Act allowed "magistrates to make orders that a wife be no longer bound to cohabit with a husband who had been convicted of assaulting her."⁶⁹⁰ Eight years later, the 1886 Married Women (Maintenance in Cases of Desertion) Act took a further step toward the creation of the modern maintenance regime. It was technically only a procedural reform to the wife's already-existing/inherent right to maintenance. Yet it spawned, according to Cretney, not just standardized and long-lasting maintenance procedures but indeed became "the basis for magistrates' matrimonial jurisdiction for more than 70 years."⁶⁹¹ The 1886 Act gave a wife who had been deserted by her husband a direct financial remedy against him. Instead of being compelled to enter the workhouse until the Poor Law authorities were able to take action and force her husband to meet his maintenance obligations, she could take out a summons against him to compel him to pay her.

The Act also added desertion to the ground of assault conviction for obtaining separate maintenance. To desertion, a further reform in 1895 added "persistent cruelty, or willful neglect to provide reasonable maintenance, provided that the cruelty or neglect had caused her to leave and

⁶⁸⁷ Sidney Webb and Beatrice Webb, *English Poor Law Policy* (Hamden, Conn.: Archon Books, 1963), 41

⁶⁸⁸ Cretney, *Family Law*, 459 and n. 11; Poor Law Amendment Act 1868; Poor Law Act 1927 s. 33; Poor Law Act 1930 ss. 41, 43. Webb and Webb, *English Poor Law Policy*, 270-1.

⁶⁸⁹ Cretney, *Family Law*, 200-1.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

live separately and apart from him.”⁶⁹² As we shall see, the Indian law of maintenance included habitual cruelty from 1861 and from 1898 any “just ground” was deemed by the judge as good grounds for wives to live apart.

A similar logic structured an empire-wide maintenance apparatus. To state that wives won their suits is not to conclude that they went on to achieve the cash payments owed to them. Examining the question of enforcement provides an opportunity to further explore the imperial network of institutions devoted to obtaining maintenance for abandoned spouses. This dense network of laws, regulations, offices and officers, and husband and wives undergirded an imperial network of financial and legal transactions that tied husbands and wives to particular jurisdictions.

Institutions of local governance were linked in a trans-imperial network. In 1921 the Government of India passed the Maintenance Orders Enforcement Act.⁶⁹³ Under this Act, other British territories could pass ordinances to enter into a reciprocal agreement with the Government of India to enforce maintenance orders, as did the government of Ceylon in 1939. The maintenance-seeker applied for a maintenance order in her local court. The local court forwarded this order to the Police Court in the district where the maintenance-ower was supposed to live. The Chief Clerk of the Police Court was to “enter it in his register on the date on which he receives it in the same manner as though the Order had been made at his Court, distinguishing it from the other entries in such manner as he may find most convenient...”⁶⁹⁴ Once the Order was confirmed the Court could direct that the maintenance-ower should make payments to the Court’s designated officer, who

⁶⁹² *Ibid.*, 445, n. 16, citing the Summary Jurisdiction (Married Women) Act 1895 s. 4.

⁶⁹³ Act XVIII of 1921

⁶⁹⁴ “Regulations made by the Governor in Executive Council under the Maintenance Orders (Facilities for Enforcement) Ordinance No. 15 of 1921,” Appendix III in Circular No. 71 from the Colonial Secretary’s Office, Colombo, dated November 16, 1925. From Uttar Pradesh State Archives, Judicial Civil Box # 244, file 178, “Maintenance Orders—Reciprocal enforcement between India and Ceylon.”

would then “send the monies...to the Crown Agents for the Colonies, through the Colonial Treasurer,”⁶⁹⁵ to be paid to the person who was owed maintenance.

This network of local institutions was designed, like the jurisdictional requirement in the Code of Criminal Procedure itself, to provide some check on the indigence of husbands and wives whose mobility was enabled and required by the Empire. The file noted that this reciprocal arrangement applied to British India, the Straits Settlements, Hong Kong, New Zealand, New South Wales, Uganda, Mauritius, and Grenada.⁶⁹⁶

The model for this was initially found in the arrangements created by South African states for maintenance orders amongst themselves and with other dominions by 1907. Some in London, like Lord Elgin, sought to emulate this across the empire.⁶⁹⁷ Elgin’s urge to the contrary, it was rejected on grounds of expense until after World War I. As New Zealand’s Attorney-General and Ministry of Justice John Findlay termed it, despite a strong sentiment in favor of the proposal, the various territories in the empire remained “almost exactly like foreign nations.”⁶⁹⁸ Eventually the deterrent effect was deemed more important, leading to the 1920 Maintenance Order (Facilities for Enforcement) Act.⁶⁹⁹ The 1907 South African model and subsequent 1920 Act proved to be very enduring, providing the “basis for international maintenance agreements, such as the 1956 New York Convention [on the Recovery Abroad of Maintenance (a United Nations convention)], which are still in force to this day.”⁷⁰⁰ According to Levine-Clark, though the Act was originally mooted in 1913, it did not fructify until after World War I in part because “[t]he desire to get back to ‘normal’

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid.

⁶⁹⁷ Marjorie Levine-Clark, “From ‘Relief to ‘Justice and Protection’: The Maintenance of Deserted Wives, British Masculinity and Imperial Citizenship, 1870-1920,” *Gender & History* 22, no. 2 (2010): 309, citing a Letter from Colonial Secretary Lord Elgin to the High Commissioner for South Africa held in the National Archives. However, Levine-Clark does not name the states.

⁶⁹⁸ Quoted in Levine-Clark, “From ‘Relief to ‘Justice and Protection,’” 310, at n. 70, quoting from Imperial Conference Minutes, July 1911, HMSO, 270.

⁶⁹⁹ Ibid., 312-3.

⁷⁰⁰ Ibid., 313.

after the war included a push on many fronts to return to rigid gender roles, with women out of the public sphere, dependent on men who were responsible for their welfare or on government support standing in for men who failed in their responsibilities... the state had a clear role in protecting women from husbands who did not meet the standards of British manhood.”⁷⁰¹ After the war, the deterrent effect was valued more than the cost, despite the protests of the Local Guardians’ Boards who thought the cost was of greater concern.⁷⁰²

While the Act had close ties to the Poor Law, by the time it was passed, these ties were obscured. Some of the language of a 1911 Imperial Conference resolution on the matter was changed, Marjorie Levine-Clark points out, to obscure the Act’s roots in the poor law. For example, the purpose of “relieve[ing] both wives and children and the poor relief burdens of the United Kingdom and her dependencies” was replaced with the goal of “secur[ing] justice and protection for wives and children who have been deserted by their legal guardians either in the United Kingdom or any of the Dominions.” This was because, as Levine-Clark explains, “‘Relief’ was a word intimately connected with the Poor Law, and its connotations were only strengthened by its association with ‘poor relief burdens’ in the text.”⁷⁰³ In Levine-Clark’s analysis, ensuring that British men fulfilled their duties of citizenship, such as to maintain their wives, was the primary motivation for passing the 1920 Act.

Likewise, concerns over domicile and jurisdiction played an important role in divorce in the imperial context. A very significant Probate Division decision in 1921 (*Keyes v. Keyes*) found that a person not domiciled in India could not use the Indian courts for a divorce but would have to revert to the courts belonging to his domicile. The decision impinged not just on divorce of Europeans in India but across the British Empire: “...it would in all probability be found impossible

⁷⁰¹ Ibid., 315, citing Nicoletta Gullace and Susan Kent’s *Making Peace*, and others.

⁷⁰² Ibid., 313.

⁷⁰³ Ibid.

to confine the scope of legislation of this nature to India [legislation aimed at ameliorating the conditions for divorce after the *Keyes* decision], and to avoid raising the large and controversial questions connected with the assimilation of the conditions under which divorces are obtainable throughout the Empire.”⁷⁰⁴ In response to this conundrum the Indian and Colonial Divorce Act was enacted. It allowed those merely resident in India, with domicile in England or Scotland, to file for divorce in Indian courts. Even prior to the *Keyes* decision, these questions were at the heart of the understanding of personal rights as those that inhered in status, whether religious, racial, or relational, and that traveled with the person, not the territory. In this way, the British Empire had a significant effect upon the development of private international law. For example, Albert Venn Dicey, the great Constitutional theorist and international law treatise author, and Arthur Berriedale Keith, the Sanskritist and colonial official, exchanged many letters on the thorny question of divorce within the British holdings around the world.⁷⁰⁵ Domicile structured India’s citizenship law and was even written directly into the Constitutional law of citizenship.⁷⁰⁶ Domicile was, like maintenance, an imperial legal form, and the two were closely related to each other. Moreover, they were also both closely related to the family system embodied in English poor law.

The foregoing discussion suggests that the British Empire devoted considerable energy and attention to pinning the expense of maintaining wives to their husbands. One wonders whether it would have been much less expensive to simply re-direct the money spent on administration to what were likely paltry sums for the wives’ maintenance. Maintenance policy operated to preserve the marital bond and followed certain patterns that emphasized the patriarchal family structure, especially the husband’s dominion over his wife, and her physical tie to him. Similar patriarchal

⁷⁰⁴ Letter from JE Ferard, Secretary, Public Department, India Office, London to the Secretary to the Government of India, Home Department, No. J&P-4116-21, dated July 21, 1921, in Uttar Pradesh State Archives, File No. 69 of 1922, Judicial (Civil) Department, Box 241, File 398.

⁷⁰⁵ A. V. Dicey and Arthur Berriedale Keith, *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith*, edited by Rigdway F. Shinn, Jr., and Richard A. Cosgrove (Lanham, MD: University Press of America, 1996).

⁷⁰⁶ Chapter One, “Entering and Leaving the Body Politic.”

family structures restrained wives' liberty in both secular and religious family laws in India. Thus, along with the influence of British law and jurisprudence, the roots of Indian patriarchy, specifically the husband's dominion over his wife and the location of the matrimonial home with him, produced restraints on wives' liberty. The origins of this system, "utterly contradictory to all ideas of freedom,"⁷⁰⁷ lie as much in Restoration London as in the textual and legal traditions of Hinduism and Islam.⁷⁰⁸

The Poor Law is central to Indian history because it was a mode of governance whose disciplinarian and controlling tendencies fit well into the context of post-Mutiny colonial rule. Just as the Queen's Proclamation declared the protection of Indian religions in 1858, crucial aspects of Indian intimate relations were to be managed through *criminal* procedure, a system that continues to the present. Sturman argues that "the family became a privileged site of colonial governmentality" both through personal adjudication and administrative efforts such as tax collection.⁷⁰⁹ This poor law mode of governance was shaped around disciplining and controlling intimate relations, and the patriarchal marriage tie stood central in India, as mandatory to ensure a governable, if not knowable, population.

Maintenance in Late Colonial Uttar Pradesh

The histories of colonial efforts to control Indian mobility as well as English poor law's emphasis on settlement each provide important contexts for this chapter. The setting for this study is late colonial Uttar Pradesh. My survey of the Allahabad and Lucknow High Court found twenty-one reported decisions on maintenance. Wives nearly always won their maintenance suits. If the wife

⁷⁰⁷ Thomas Malthus describing the 1662 statute that consolidated the settlement system: T. R. Malthus, *Population: The First Essay*, forward by Kenneth E. Boulding (Ann Arbor: University of Michigan Press, 1959 [1798]), 32. Quoted in Rose, *The English Poor Law*, 25.

⁷⁰⁸ See Michael Rose, "Settlement, Removal and the New Poor Law," in *The New Poor Law in the Nineteenth Century*, ed. Derek Fraser (New York: St. Martin's Press, 1976), 25.

⁷⁰⁹ Sturman, *Government of Social Life*, 237.

used the maintenance provisions within criminal procedure, she was likely to be successful. The variety of these maintenance decisions at the Appellate Court level indicates the diversity of jurisdiction in maintenance law, an insight allowed by surveying all bodies of law. Among the twenty-one appeals on maintenance heard by the High Courts, fifteen were criminal, two were civil, and four came under the Hindu Married Women's Right to Separate Residence and Maintenance Act, a new statute for Hindu wives that took effect in 1946.⁷¹⁰ In other words, there were several bodies of law under which a wife could pursue her maintenance suit: criminal, civil and, after 1946, statute. The advantage of the criminal suit was that it was relatively fast and effective: wives nearly always won. However, the amount of relief under the criminal law was limited to 100 rupees. If larger amounts were at stake, wives could use civil law to obtain non-cash maintenance orders as well as larger cash amounts.

After the legislative reforms in 1946, a Hindu wife could also pursue maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act. The unwieldy name of what I will call the 1946 Hindu Residence and Maintenance Act (or the HRMA) illustrates how far it went to empower women, granting Hindu wives unquestionable rights to separate residence and maintenance but stopping just short of granting divorce. The Indian Parliament granted all Hindus the ability to divorce in 1955 under the Hindu Marriage Act (part of the Hindu Code), though even prior to this a great many Hindu wives enjoyed customary rights to divorce.⁷¹¹ Christian, Muslim, and Hindu litigants commonly used the Code of Criminal Procedure even after the 1946 Act took

⁷¹⁰ *Ram Khelawan v. State Through Mt. Parbhu Devi*, AIR 1952 All 1958; *B. Ratan Chand v. Mst. Kalawati*, AIR 1955 All 364; *Shanti Devi v. Sia Ram*, AIR 1955 NUC (All) 3549; *Roshan Lal Nanga v. Mt. Kallo*, AIR 1955 NUC (All) 3582.

⁷¹¹ Madhu Kishwar, "Codified Hindu Law: Myth and Reality," *Economic and Political Weekly* 29, no. 33 (August 13, 1994): 2145-61.

effect. For example, Sheopiari, Maiki, and Chameli⁷¹² were all Hindu wives who filed maintenance suits in a criminal court even after the 1946 Act gave them a right to maintenance under Hindu law.

History of the Code of Criminal Procedure

The Code of Criminal Procedure (CCrP) was first enacted in 1861; a revised version in 1872. These first two versions of the criminal procedure code applied only to provinces, not to the presidency cities of Calcutta, Madras, and Bombay.⁷¹³ It was not until 1882 that the CCrP began to apply to all of British India.⁷¹⁴ It was revised one more time under the Empire to reflect subsequent amendments and enacted again in 1898. Finally, a new and revised version of the Code was re-enacted by independent India in 1973.⁷¹⁵ Of course, the Code was not static between 1898 and 1973 but was amended numerous times. The 1898 version of the Code was sprawling with 595 sections.

The Code of Criminal Procedure was developed simultaneously with Macaulay's more famous Indian Penal Code so that the new penal code would have an appropriate system of criminal procedure alongside it.⁷¹⁶ Like the Penal Code, the CCrP took a long time to enact. The First Law Commission drafted and submitted it in 1848 but it was not enacted until 1861, taking effect at the start of 1862.⁷¹⁷

Most recent historians have focused their attention on colonial debates over racial difference and justice that the Code brought to the fore. One question was whether Europeans in *mofussil* (the interior, non-Presidency town regions of British India) would be subject to trials by Indian judges. In the 1872 Code, a special exception was developed so that European subjects would not have to be

⁷¹² *Sheopiari v. Devi Prasad*, AIR 1954 All 21; *Maiki v. Hemraj*, AIR 1954 All 30; *Chameli v. Gajraj Bahadur Gupta*, AIR 1954 All 33.

⁷¹³ Ratanlal Ranchhodas and Dhirajlal Thakore, *The Criminal Procedure Code*, 7th ed. (Bombay: Bombay Law Reporter Office, 1952), 1-2; M.P. Jain, *Outlines of Indian Legal History*, 1st ed. (Bombay; Tripathi, 1952), 475.

⁷¹⁴ Ranchhodas and Thakore, *The Criminal Procedure Code*, 7th ed., 1-2.

⁷¹⁵ Jain, *Outlines*, 540.

⁷¹⁶ *Ibid.*, p. 539.

⁷¹⁷ *Ibid.*

tried by Indian judges.⁷¹⁸ The 1872 Code was “overlaid with cases,” meaning that it did not hold up well under judicial interpretation in the Courts, and Whitley Stokes drafted the 1882 version.⁷¹⁹ The following year the Ilbert Bill controversy erupted when Law Member Courtenay Ilbert attempted to make criminal procedure totally uniform by allowing Europeans to be tried in courts presided over by Indian judges and magistrates.⁷²⁰ This controversy resulted in the compromise position that Europeans in the mofussil could be tried by juries that were at least half white (European or American).⁷²¹ Kolsky states, “While historians of modern India have situated the Ilbert Bill as a defining moment in the birth of the anti-colonial nationalist movement, the Bill must also be placed in the context of the longer fight for and against uniform legal equality and the contested project of codification.”⁷²²

Though very interesting, these debates are tangential to the role that criminal procedure plays in this chapter. Among the many, sprawling parts of the CCrP, the part that concerns us is section 488, which deals with the husband’s obligation to maintain his wife and children. The CCrP’s maintenance provision remained remarkably stable over its long history. For our purposes, there were two important parts that are worth quoting and that will help define the contours of

⁷¹⁸ Elizabeth Kolsky, “Codification and the Rule of Colonial Difference: Criminal Procedure in India,” *Law and History Review* 23, no. 3 (2005): 671, 679.

⁷¹⁹ Jain, *Outlines*, 540. The most famous codifiers in British India were Thomas Babington Macaulay, progenitor of the first law commission and the Indian Penal Code, James Mill, author of the 1818 *History of British India*, James Fitzjames Stephen, Law Member from 1869 to 1872, and Henry Sumner Maine, Law Member from 1862 to 1879 and author of *Ancient Law*. However, much of the credit for the late nineteenth century explosion in codification should go to Whitley Stokes, who along with being a barrister was a philologist and scholar of Celtic literature. The preface of Henry Maine’s *Lectures on the Early History of Institutions* dedicated it to him for his help with Maine’s 1861 *Ancient Law*. The two first met at the Inner Temple. Once Stokes came to India in 1862, Maine chose him to help with the project of creating additional codes to work with the Indian Penal Code. Stokes became an assistant secretary in the Third Law Commission and then secretary of the Legislative Council. In that capacity he submitted 211 draft acts to codify English law. The most successful of these was the 1872 Code of Criminal Procedure. Metcalf, *Ideologies*, 30, 37-9, 56-7; Nigel Chancellor, “Patriot hare or colonial hound? Whitley Stokes and Irish Identity in British India, 1862-1881,” *The Tripartite Life of Whitley Stokes (1830-1909)*, ed. Elizabeth Boyle and Paul Russell (Dublin: Four Courts Press, 2011), 59-60, 65, 68-9.

⁷²⁰ See Sinha, *Colonial Masculinity*, Chapter 1 on the Ilbert Bill Controversy, 33-68; Kolsky, “Codification,” 680-1.

⁷²¹ Kolsky, “Codification,” 682.

⁷²² *Ibid.*

maintenance. The first part states simply that a local judge could order a man to pay maintenance to his wife:

If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.⁷²³

The amount of maintenance allowable under the Code of Criminal Procedure had been increased from fifty to one hundred rupees in 1923.⁷²⁴ Section 488 then goes on to state that if a person was ordered to pay maintenance but failed to do so, he could be imprisoned for up to a month.

Appended to this was an important proviso that stated that, if the husband offered to maintain the wife, and the wife still refused to live with the husband, the Magistrate could look at her reasons for refusal. The proviso reads as follows:

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for doing so.⁷²⁵

A third important section must be read alongside this proviso. Section 488(4) listed three conditions in which a wife would not be “entitled to receive an allowance:” a wife who was “living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”⁷²⁶ The judge had wide discretionary scope to decide whether a wife had good reason for not living with her husband. The law’s emphasis on maintaining the

⁷²³ Indian Code of Criminal Procedure (1898), s. 488(1); I have used W.T. Sundarajaan, *Soboni’s Commentaries on The Code of Criminal Procedure...*, 14th ed., (Bombay: The New Book Company, 1941), 925.

⁷²⁴ Indian Code of Criminal Procedure (1898), s. 488(1), fn. 1.

⁷²⁵ *Ibid.*, s. 488(3).

⁷²⁶ *Ibid.*, s. 488(3).

marriage tie at a matrimonial home located with the husband can be seen in the denial of maintenance to a couple who lived apart by mutual consent.

The Concept of Relief

The major advantage of a maintenance suit under the CCrP was that it was “summary” and therefore relatively quick, when compared to the timeframe for more complicated civil maintenance suits.⁷²⁷ The civil award was limited only by the “status or means of the party liable,”⁷²⁸ while the criminal remedy had a limit of one hundred rupees per month for the wife and any children. Moreover, under civil law the maintenance could come as a “charge on the property” that could be “enforced against [the husband’s] property in case of his death.”⁷²⁹ Such questions required considerably more argument and investigation while the CCrP mandated speedy but limited relief. Whether it involved ten rupees or ten thousand, maintenance required a continued tie between husband and wife. Maintenance could not be granted to a divorced wife or a wife who lived apart from her husband without a valid excuse. In other words, maintenance preserved the marriage tie. Muslim wives whose marriage ended in divorce were entitled to dower as provided for in the marriage contract. This remained the case until the 1973 revision of the CCrP in which “the meaning of ‘wife’ was expanded to include not only a *‘currently married’* woman, but also ‘a woman *who has been divorced by, or has obtained a divorce from, her husband* and has not remarried.”⁷³⁰ This was the change that prompted the famous Shah Bano controversy over the application of the CCrP’s maintenance provisions to Muslim husbands in 1985. However, from 1862 until the 1973 revision,

⁷²⁷ Chitale and Rao, *The Code of Criminal Procedure*, 2682-3. The footnote (n. 4 on p. 2683) gave several cases, the most recent of which was *Bulteel v. Emperor* (1937 MWN 1127 at 1129) that found that the Magistrate in a criminal maintenance proceeding had fewer powers than a judge in a civil suit. The criminal Magistrate “has no power to settle finally the rights of the parties which can only be done by a competent civil Court.” Moreover, “the Court has not to go and should not go, so deeply into the relationship of the parties a civil Court would have to do.” *MB Ignatious v. Alaganna* (AIR 1935 Rang 192 at 194.) Chitale and Rao, *Code*, 2723.

⁷²⁷ *Ibid.*, 2723-4.

⁷²⁸ *Ibid.*, 1952, 385.

⁷²⁹ *Ibid.*

⁷³⁰ Quoted in Vatuk, “A Rallying Cry,” 354.

the CCrP's maintenance provision only granted maintenance to wives. It would seem unlikely, then, that an already-divorced Muslim wife would sue under the CCrP for maintenance during this period. The crucial thing to understand is that as long as a woman remained a wife, she had a right to her maintenance, barring her failure to meet certain conditions that will be discussed below.

It is important to distinguish between *relief* and *grounds* when discussing the landscape of matrimonial disputes in Indian law. Maintenance is but one example of this. Depending on the law, the wife could obtain different kinds of relief. For example, a Muslim woman could choose whether to pursue the relief of maintenance or of recovering her dower under the marriage contract. Or, a neglected wife could pursue restitution of conjugal rights (RCR) if she wanted her husband to take her back at the matrimonial home, as we saw in chapter two. A wife could also pursue maintenance under civil or criminal procedure law. My focus here is on the *grounds* for attaining relief, not the amounts attained. The relief varied depending on the law, which reinforces the standard view of India as a legally plural society with separate compartments for each religious community. However, the ways in which the court adjudicated the *grounds* to obtain this relief were largely the same across the many laws available to wives. The law provided diverse forms of redress but adjudicated that redress within a shared body of jurisprudence.

Law in India was not only or always an elite phenomenon. Three cases illustrate how wives of differing social classes used maintenance provisions to attain differing amounts of relief. In a 1944 case, the wife's suit in pursuit of her husband's seemingly considerable wealth had to be brought under the Hindu civil law to extract an appropriate proportion of his assets for her maintenance. She requested Rs. 1500/month and won Rs. 650, along with cash to buy a car, the right to be maintained in a separate house, and maintenance in arrears at a rate of 500 Rupees per month. Though it involved exorbitant sums outside the reach of most litigants, the case was cited in subsequent treatises for the position that the amount of the husband's maintenance obligation was

in part determined by the wife's expectations of living standards and lifestyle, in other words by her social class.⁷³¹

In sharp contrast, and far more common, maintenance under the CCrP could be awarded quickly and in small amounts. It was usually, but not always, awarded in cash. In *Punn Debb* (1950), the husband agreed to give his wife a house and land as a compromise in response to her maintenance suit against him. This was in the district of Almora in Ranikhet, in the foothills of the Himalayas,⁷³² where weather and landscape favored wealth in agricultural land rather than cash. The husband did not adhere to the terms of the compromise and did not allow his wife to harvest her crops; instead he “cut away the crops of the field.”⁷³³ The wife therefore succeeded in her suit for ten rupees per month in cash maintenance rather than the previous agreement of access to his fields. Likewise, in *Smt. Maiki v. Hemraj*, the wife won maintenance at ten rupees per month on the grounds of her husband's bigamy.⁷³⁴ Ram Bharosey also instituted a RCR suit against his wife in response to her maintenance suit for six rupees per month. In *Dhani Ram v. Mst. Ram Dei*, the husband challenged the wife's successful maintenance suit against him by arguing that he did not have the means to pay for her maintenance as he represented by his lack of tangible property. Specifically, he argued that the magistrate had not positively found that he had the means to support his wife at the ordered rate of twenty-five rupees/month. He referred to a 1926 Madras ruling that “the word ‘means’...did not mean the husband should be possessed of any tangible property, but if a man was healthy and able bodied he must be taken to have the means to support his wife.”⁷³⁵ The emphasis on the husband's obligation to work and provide for his wife is reminiscent of the obligation in

⁷³¹ *Prem Pratap v. Jagat Kunwar*, AIR 1944 All 97. This case is cited in D.F. Mulla and Satyajeet A. Desai, *Principles of Hindu Law*, 20th ed. (New Delhi: LexisNexis Butterworths, 2007), 884 and fn. 59, for the position that “When a man knowingly marries a girl, accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style.”

⁷³² Now in the state of Uttarakhand, formed in 2000.

⁷³³ *Punn Debb v. Jagat Kunwar*, AIR 1950 All 454, at para 4.

⁷³⁴ *Smt. Maiki v. Hemraj*, AIR 1954 All 30.

⁷³⁵ *Dhani Ram v. Mst. Ram Dei*, AIR 1955 All 320, citing *In Re: Kandasami Chetty*, AIR 1926 Mad 346.

English poor law that it was first and foremost the husband's obligation to support his wife, and that her relationship with the state was mediated through him.

These cases illustrate that both very wealthy wives and those of modest means benefited from the provisions for maintenance. In other words, though justice could be slow and expensive, it could also be (relatively) swift and accessible.

Good Grounds for Living Apart

Having examined the different kinds and amounts of relief available, let us now return to the point that grounds for relief remained largely the same across civil, Hindu, and criminal law.

Imperial concerns centered around preserving the marriage tie, avoiding expense, and settling the population. A specifically English link among these concerns was the pinning of the wife to her husband in physical, financial, and legal terms. The grounds used to adjudicate Indian maintenance law reinforced a patriarchal common law family structure in which the husband held physical dominion over his wife. This section will examine substantive law regarding cruelty.

The husband's failure to maintain gave rise to the wife's initial ground for claiming maintenance. The definition of refusal to maintain was quite broad.⁷³⁶ If the wife lived with her husband and he neglected her, refused her sustenance, deserted her, or otherwise refused to maintain her, she could expect to win an order for maintenance. The husband could only escape his obligation to maintain if she did not live with him and had no reasonable excuse, if she were living in adultery, or if they lived apart by mutual consent.⁷³⁷ The 1898 CCrP changed "habitual cruelty"⁷³⁸ as a good ground for maintenance to any "just ground," a broader category that gave the Magistrate

⁷³⁶ Sundararajan, *Commentaries*, 935 n. 38, states that husband's behavior "from which the Court may draw the inference of neglect or refusal to maintain the wife. A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be expressed or implied."

⁷³⁷ CCrP s. 488(4).

⁷³⁸ Defined as legal cruelty. Chitale and Rao, 2710, n. 21. See also the extensive citations given in fns. 7-10 on 2710.

wider powers of discretion to decide in favor of the wife.⁷³⁹ In most cases before the High Courts, the wife could prove her good ground and therefore won her maintenance suit.

Although most wives won their maintenance claims, they nevertheless faced problems in proving cruelty as a good ground for living apart from their husbands. This was the problem of proof: it was difficult to prove the husband's sexual and physical violence or even abusive words in the absence of witnesses willing to support the wife's claims, or without some other form of documentary evidence. In contrast, it was relatively easy to prove to the court acts of what I call "social cruelty:" those that, by definition, produced witnesses or other forms of proof. Adultery and especially bigamy were the most prominent of these forms. As we saw in the previous chapter, legal harassment was also easy to prove. This is a prime example of the ways in which individual litigants can benefit from decisions in their favor while the overall jurisprudence remains relatively stagnant.⁷⁴⁰ The wife's duty to obey and reside with her husband was matched by his duty to maintain her.

Cruelty

Despite wives' preponderant success in obtaining maintenance, then, demonstrating cruelty remained a vexing problem. By examining two different kinds of cases - the sole instance that I could find of a wife losing her suit and then the far more common case of one succeeding - we will see that wives faced the problem of proving cruelty because they lacked evidence. It is only by examining cases in which wives won on grounds *other than cruelty* that the full picture of the jurisprudence of cruelty emerges. Even if a wife could not prove cruelty, she might still win her suit if she could show other good grounds to live apart from her husband.

⁷³⁹ Ibid., 2710 n. 21 and p. 935 n. 38. Chitale and Rao defined good ground to include "a systematic course of ill-treatment and oppression."

⁷⁴⁰ Siegel, "The Rule of Love" also suggests this.

In the maintenance cases examined here, the sole loss by a wife was the outcome of a protracted legal battle that involved two separate legal procedures, first the husband's RCR suit and then the wife's maintenance suit. The evidence and findings of the initial RCR suit dictated the wife's defeat in her maintenance suit.⁷⁴¹ The legal battle exposed how the preservation of the marriage tie, the location of the matrimonial home with the husband, and the husband's physical dominion over his wife grew out of the nineteenth-century remedies of restitution of conjugal rights and maintenance. This structure underpinned both civil and criminal maintenance law. Moreover, these features structured subsequent statutory reforms as well, as seen in both the 1946 Hindu Separate Residence and Maintenance Act and the 1955-6 Hindu Code.

The history of Zubeda Khatoon's pursuit of maintenance shows that the courts were caught between a humanitarian desire to grant it to a deserving wife and the need to respect previous courts' decisions about evidence. Initially, before the lower court, Mohammad Siddiq, her husband, won a RCR order, dodging a lifelong commitment to pay his wife monthly maintenance. When Khatoon appealed to the District Magistrate, she won. On Siddiq's second appeal to the Allahbad High Court, he won on the basis of his earlier success in the RCR suit against her.

Originally Khatoon lost to her husband's RCR suit, although her return to his home depended on his paying her one hundred and thirty rupees. Around the same time she successfully pursued suits for her dower debt, but since Siddiq did not pay it she did not return to his home. Though she won her dower suit, she could not actually get her dower from him, and turned to a maintenance suit to achieve cash directly from him. Her husband defended himself in this suit on the ground that after the RCR order, she never returned to live with him and therefore was living apart without valid excuse. The High Court found that Khatoon did not have a good ground for maintenance because of the previous court's RCR order requiring her to live with her husband. She

⁷⁴¹ *Mohd Siddiq v. Mt. Zubeda Khatoon*, AIR 1952 All 616b decided March 31, 1949

“deliberately refused to obey the orders of the Civil Court.”⁷⁴² Justice Kidwai encapsulated the wife’s position:

It is no doubt true that the Magistrate has discretion but that discretion must be exercised upon judicial principles and it is not in accordance with sound judicial principles to compel a husband to maintain a wife who contumaciously refuses the order of a civil Court directing her to live with her husband.⁷⁴³

The word *contumacious* indexes the Ecclesiastical origins of restitution of conjugal rights.⁷⁴⁴ After the Ecclesiastical courts lost their power to excommunicate in 1813⁷⁴⁵ as a method of enforcement in England, Ecclesiastical courts could request the Chancery Courts to issue a writ of *de contumace capiendo* against a person who refused to obey the former’s orders.⁷⁴⁶ This writ “empowered sheriffs to jail offenders until they submitted to the dictates of the courts.”⁷⁴⁷ This shift from excommunication to imprisonment foretold first the decline of⁷⁴⁸ and then the end of the Ecclesiastical jurisdiction over marriage.⁷⁴⁹ Though no specific writ of *de contumace capiendo* lay in India, Kidwai’s comments signaled the much longer history of disobedient wives hauled up before the court for refusal to live with their husbands. Wives could also sue for alimony in the Ecclesiastical courts before they were abolished, a further dimension of Ecclesiastical law’s influence on maintenance law.⁷⁵⁰ An unruly wife could be labeled as such in India even after Independence in 1947 and until about nine months ahead of the 1950 Constitution, the Ecclesiastical law of family relations structured many arenas of Indian law.

⁷⁴² *Mohd Siddiq v. Mt. Zubeda Khatoon*, AIR 1952 All 616b para 6.

⁷⁴³ Ibid.

⁷⁴⁴ Even though in India restitution of conjugal rights merged equity with Ecclesiastical and common law procedures; see discussion in Chapter Two.

⁷⁴⁵ Ecclesiastical Courts Act (1813).

⁷⁴⁶ *Black’s Law Dictionary*, s.v. *de contumace capiendo*.

⁷⁴⁷ R. B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge: Cambridge University Press, 2006), 103. Outhwaite attributed the fall of the Ecclesiastical courts to this decision and other similar reforms in the early nineteenth century in England.

⁷⁴⁸ Stone reports only sixty-eight imprisonments for contumacy in England from 1827 to 1829. Stone, *Road to Divorce*, 195-6.

⁷⁴⁹ Ibid.

⁷⁵⁰ Baker, *Introduction*, 488.

Justice Kidwai went on to state that a criminal court had to follow the findings of the Civil Court “that the wife left the protection of her husband upon no justifiable grounds, and that there was no cruelty as alleged by the wife.”⁷⁵¹ Kidwai was bound by the lower court’s decision on this point; the principle of *res judicata* prevented him from re-examining the Zubeda Khatoon’s evidence.⁷⁵² Once a legal issue has been decided, the courts, except under limited exceptions such as the finding of significant new evidence, cannot re-examine the matter.

The physical dominion of husband over wife could restrain her liberty but also her rights to property. Kidwai examined the wife’s argument that she would be prevented from pursuing her property suits for dower against her husband if she returned home to live with him. He balanced the wife’s fears about her legal autonomy against the husband’s “privilege of her company.”⁷⁵³ She claimed her lack of physical autonomy would necessarily interfere with her legal autonomy. In this case, her husband’s dominion over her was made clear in very real physical terms: she feared that if she lived with her husband, her legal autonomy would be limited by his control. A lower court decided for her husband and Kidwai followed because of *res judicata*. Relying on the lower courts’ earlier decisions in RCR suits was one of the major ways to block a wife’s victory in a maintenance suit, when she otherwise had very good chances of winning the court’s sympathies.

Just because the wife’s maintenance suit failed, however, we cannot assume she would follow the earlier RCR order and return to live with her husband Zubeda Khatoon, for example, may very well have remained in her parental home.⁷⁵⁴ Yet her legal loss would have redounded on her immediate cash resources and her long-term prospects, especially since her husband also failed to pay her dower. Khatoon moved from a device with its origins in Ecclesiastical law (restitution of

⁷⁵¹ *Mohd Siddiq v. Mt. Zubeda Khatoon*, AIR 1952 All 616b para 6.

⁷⁵² *Res judicata* means “a matter adjudged.” Once a matter has been decided, the courts cannot re-open the same case for a fresh examination.

⁷⁵³ *Mohd Siddiq v. Mt. Zubeda Khatoon*, AIR 1952 All 616b.

⁷⁵⁴ Rukhmabai escaped the seemingly inevitable imprisonment by either the state or her husband by negotiating a compromise and then studying outside of India. Chandra, *Enslaved Daughters*.

conjugal rights) to criminal procedure (maintenance law). Both of these relied on the marriage tie. She could also have turned to her original marriage contract, forfeiting most of her dower, for a divorce. She was not exactly a free contracting agent under the Islamic contract because she paid a penalty for divorce and she could not negotiate on equal terms. She may have been closer to a free contracting agent, however, than she was under British Indian law. The legal record does not, of course, show whether she took additional steps to attain redress. She also could have turned to the Dissolution of Muslim Marriages Act (discussed in the next chapter) to obtain a divorce with a longer list of grounds. Colonial rule of law did not engender a movement from status to contract, at least in Maine's sense.⁷⁵⁵ The record was far more mixed; a variety of jurisdictions overlapped and worked together.

Whatever the benefits of Islamic contractual marriage to wives, if Zubeda Khatoon needed speedy maintenance, or for some other reason could or would not divorce, the nineteenth century CCrP tied her to Siddiq in a continuing marriage contract if she wanted to be maintained. Khatoon's case illustrates this point well: by virtue of losing the RCR suit, she was tied to him. But if she won her maintenance suit, she would have been tied to her husband as well in a continuing state of marriage. It was the Islamic marriage contract that protected her ability to enter and exit marriage to some small degree before the 1939 Dissolution of Muslim Marriages Act and to a much greater extent after. This suggests that the colonial experience reinscribed status-based regimes rather than liberating individuals into a state of free contracting. This effect was based in the CCrP's English model of maintenance, aimed at preserving the marriage tie, not in Hindu or Muslim religious law or idiom.

There were several intertwined strands in the genealogy of this practice. From the point of view of expediency, it made sense perhaps to include maintenance in the criminal procedure code.

⁷⁵⁵ Henry Sumner Maine, *Ancient Law* (New York: Cosimo Classics, 2005 [1861]), 100.

Just as marriage in England escaped from Ecclesiastical jurisdiction and started to form its own subset of civil law with the Matrimonial Causes Act (1857), the failure to maintain a wife was placed within the ambit of criminal procedure in India in 1861. Second, under the English Poor Law the fiscal and moral motivations of local poor law boards tended towards preserving the marriage tie in order to reduce welfare charges. Third, Ecclesiastical law had also inscribed the obligation to maintain as a moral and religious obligation.

Zubeda Khatoon lost her maintenance suit on the basis of an earlier restitution of conjugal rights suit. Sheopiar's case highlights how each spouse could use RCR and maintenance in a delicate legal dance that approximated judicial separation. Sheopiar's husband in this case, Devi Prasad, succeeded in a RCR suit against her. She successfully appealed the RCR order to the Magistrate. In the meantime she took out her own maintenance suit against Prasad. The Magistrate erroneously did not grant her maintenance because of her husband's initial success in the RCR suit, somehow overlooking the wife's later success in defending against the RCR suit. Sheopiar then appealed her loss in the maintenance suit to the High Court in Allahabad, successfully. The High Court deemed the Magistrate's position incorrect: the Magistrate should not have barred Sheopiar from her maintenance just because her husband earlier filed a RCR suit against her. However, the matter did not end there. It was remanded to the Sessions Judge to examine whether Sheopiar had lived apart from Prasad by mutual consent that, if it were found to be so, would bar her maintenance suit.⁷⁵⁶ In both *Zubeda Khatoon* and *Sheopiar*, the wife's ultimate success in the maintenance suit depended on her earlier success in fending off their husbands' RCR suits. Zubeda Khatoon lost her maintenance suit because her husband had succeeded in his RCR suit. We do not know what happened to Sheopiar's suit after it was remanded to the Sessions Judge. However, her case shows how dependent the fate of a wife's maintenance suit was on the results of a RCR suit. We saw this in the

⁷⁵⁶ *Smt. Sheopiar v. Devi Prasad*, AIR 1954 All 21, 21-22.

previous chapter when Ram Bharosey sought to ward off his wife's maintenance claims with a RCR suit against her.

It is possible to see Indian wives' success in obtaining maintenance before the British Indian courts as a validation of colonial reformist ideology. In this view, English liberalism's individual rights remedy the indigenous patriarchal excesses of Hindu and Muslim men. In contrast, I argue that wives' success in obtaining maintenance was driven by the need of British Indian law, influenced significantly by English poor and Ecclesiastical laws, to reduce welfare expenses and prevent prostitution by preserving the marriage tie. That wives rarely won matrimonial redress on the ground of cruelty undercuts the humanitarian claim of the maintenance law. The husband's patriarchal dominion is best illustrated in the *Zubeda Khatoon* and *Sheopiari* cases; in each, the wife lost due to the RCR's emphasis on the husband's rights to his wife's presence in his domicile.

The Category of Social Offenses

For a wife to win her case, she needed to explain her good ground for living apart from her husband. The grounds that succeeded were those that by definition involved a third party. I label these *social offenses*. By relying on social offenses, courts found other grounds besides cruelty to grant wives maintenance claims under the CCRP and avoided the problem of proof. Most commonly, wives won maintenance suits on the ground of bigamy or adultery.

On paper, Kalawati's difficult marriage⁷⁵⁷ would have seemed to be a prime example of the kinds of situations the late colonial legislature aimed to ameliorate when it enacted the 1946 Hindu Separate Residence and Maintenance Act (HSRMA). However, her husband B. Ratan Chand's legal persistence, and the innovative arguments of his lawyers, indicated that statutory success was only the first among many steps required to create and then defend Hindu women's legal rights. The long

⁷⁵⁷ *B. Ratan Chand, Defendant-Appellant v. Mst. Kalawati*, AIR 1955 All 364.

legal battle indicated the relatively unimportant role of cruelty jurisprudence in wives' success at attaining marital redress. The direction of the legal arguments and the courts' requirement of proof of cruelty pushed the judicial debates and controversies away from cruelty within marriage and towards the question of the husband's bigamous behavior. Ultimately, Kalawati won her case, but the long journey required to achieve this success crystallized some of the key reasons Indian jurisprudence focused on the wife's location and support and skirted around the role of marital violence.

Specifically, Kalawati argued before the original court that she was entitled to maintenance from Chand under the HSRMA. This Act provided a list of seven grounds for which a wife could obtain separate residence and maintenance. These were, in brief and simplified form, "loathsome disease not contracted from her;" "such cruelty towards her as renders it unsafe or undesirable for her to live with him;" desertion; second marriage; conversion to another religion; keeping or residing with a concubine; and "any other justifiable cause."⁷⁵⁸ In providing this long list of grounds, the HSRMA was comparable to the Dissolution of Muslim Marriages Act as we shall see in the next chapter. With specific regard to cruelty, the Act provided a fairly specific definition of what the judge could look at in making his determination: "such cruelty towards her as renders it unsafe or undesirable for her to live with him." And yet in practice the addition and clarification of this section made little difference because it was most often on the basis of social cruelty that the wife won her suit. In Kalawati's case, she put forward two marital wrongs committed by the husband: cruelty and adultery. Before the trial court in 1955, she won only on the ground of adultery. As the High Court recounted, "On the issue of cruelty, the trial court came to the conclusion that the entire story of the husband's cruelty towards the wife was totally false."⁷⁵⁹

⁷⁵⁸ HSRMA 1946 s. 2

⁷⁵⁹ *B. Ratan Chand v. Kalawati* AIR 1955 All 364, at 364, para. 2.

Both spouses each appealed the decision that B. Ratan Chand was obligated to pay maintenance. For a husband to appeal maintenance order was *de rigueur* because, if successful, he would escape the lifelong obligation of a monthly maintenance payment to his wife. What made this case unusual was that Kalawati also appealed the trial court's decision on cruelty. This presented a situation of "cross-appeals." The wife's cross-appeal could indicate that she and her legal counsel were convinced of the validity of her cruelty allegations. A second more cynical interpretation held that she simply used her appeal as a counter-blast to her husband's appeal: a legal strategy designed to exhaust the husband's financial and temporal resources. A third explanation held it was designed to shame the husband in a public forum.

Both Kalawati and Chand lost their appeals to the Civil Judge. Chand appealed this second decision against him to the Allahabad High Court. Here his legal strategy turned to questions of statutory interpretation, specifically the question of the retrospective application of the 1946 HSRMA: should it apply to a marriage undertaken in 1935, a decade prior to the Act? Surprising though it may seem, he actually had some firm legal ground upon which to stand; several High Courts in other jurisdictions that had taken this position. Justice Gurtu of the Allahabad High Court briefly declared that he agreed with the husband's position.⁷⁶⁰ He specifically referenced the Bombay High Court's reasoning, summarized in Gurtu's words as, "the said Act was remedial in character and imposed a new liability on one party and conferred fresh rights on another and it was not retrospective."⁷⁶¹ Therefore it could not retrospectively apply.

Despite Justice Gurtu's decision against her, Kalawati appealed the case to a two-justice bench.⁷⁶² She met with success this time, but only five years later, by 1960. Her counsel argued that in the intervening time since Justice Gurtu's decision against her, the 1956 Hindu Adoptions and

⁷⁶⁰ Position of the Bombay, Nagpur, and one decision of the Madras High Courts

⁷⁶¹ *B. Ratan Chand v. Mst. Kalawati*, AIR 1955 All 364 at 365, para 7.

⁷⁶² *Mst. Kalawati v. B. Ratan Chand*, AIR 1960 All 601.

Maintenance Act (HAMA, part of the Hindu Code) was enacted and took effect. The HAMA was designed to more clearly address the question of retrospectivity than did HRMA. Indeed, Justice Gurtu's decision joined the body of cases that must have highlighted a need for such a change in the HAMA. Rather than pinning the wife's right of maintenance on the husband's date of second marriage, as the HRMA did, the HAMA (section 18) allowed maintenance to a wife "if he [her husband] has any other wife living."⁷⁶³ This cut out the question of when the second marriage took place; for the wife to get relief she had only to show that a second wife did exist, whenever the second marriage took place. Because the second wife was still alive, the High Court had good grounds to find that the wife had a *prima facie* right to maintenance from her husband.

Therefore, in 1960, finally the two-Justice bench of Chief Justice Mootham and Justice S.N. Dwivedi granted the wife her maintenance claim, bringing to a successful conclusion an eleven-year legal saga. Despite her success, though, Kalawati took a significant financial hit. Her initial claim for maintenance had been for Rs. 50 a month alongside a claim of maintenance arrears for Rs. 900, presumably for the time between the husband's second marriage and when she filed her initial maintenance suit. But the two-justice bench only granted her maintenance from the date they felt her claim entered firm legal ground, that is the date the Hindu Adoptions and Maintenance Act took effect, in 1956, effectively cutting her out of close to twenty years of maintenance arrears. Moreover, against her claim of Rs. 50, the court granted her only Rs. 25 per month.

There is an unanswered question about this case. Why did Kalawati and her lawyers choose to litigate under the HRMA and not the Code of Criminal Procedure? The amount she was claiming was relatively low and would have been attainable under the CCrP. I suspect it was because she filed her suit prior to a 1949 amendment to CCrP that provided a wife with relief in the case of her husband's mere adultery, and not necessarily bigamy.

⁷⁶³ Hindu Adoptions and Maintenance Act 18(2)(d).

The 1949 Amendment to the Code of Criminal Procedure

In 1949, after Independence in 1947 but before the Constitution took effect in 1950, India's Parliament amended the Code of Criminal Procedure to make it more favorable to wives by clarifying that they could obtain maintenance for the husband's bigamy *or* adultery. In other words, he need not have taken out a second marriage for the wife to obtain the relief of maintenance. The Amendment added the provision, "If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him."⁷⁶⁴ If the wife could prove the husband's adultery, this Amendment provided a clear good ground for her to live apart from him. Prior to this 1949 Amendment, only bigamy was considered a good ground on which a wife could win her maintenance suit. If she could not prove her husband's second marriage, then she would have had difficulty winning. The 1949 Amendment remedied this situation by allowing a wife to get maintenance from a man who "keeps a mistress."⁷⁶⁵

This substantiates the idea that the social offense, which could be proved by the existence of a third party, played an important role in the landscape of matrimonial litigation. After the Amendment, Srimati Maiki won Rs. 10 maintenance/month on this ground.⁷⁶⁶ Likewise Srimati Hassan received maintenance from her husband because he took a second wife after the new Amendment.⁷⁶⁷ These two cases differ from *Kalawati* in that they used the CCrP, not the new Hindu statute. Similarly, in *Dhani Ram v. Mst. Ram Dei*, the husband argued in his appeal to the High Court that the Magistrate did not give an express ruling about his alleged cruelty. Justice Asthana in his judgment for the High Court wrote that the Magistrate, indeed, had not given "an express finding

⁷⁶⁴ Ranchhoddas and Thakore, *The Criminal Procedure Code*, 7th ed., 384. Act IX of 1949 was the Amendment to the Code of Criminal Procedure.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Smt. Maiki v. Hemraj*, AIR 1954 All 30 at 31, para 3.

⁷⁶⁷ *Zahid Hussain v. Srimati Hasan Jehan and Anr*, AIR 1955 NUC (All) 2705 [Lucknow Bench]

that the applicant [husband] has maltreated his first wife and turned her out of the house, but from the trend of the judgment it appears that he believed the evidence produced on this point by the wife.”⁷⁶⁸ Asthana stated that it would have been better if the Magistrate had “expressly mentioned it in the judgment that he was believing the evidence on behalf of the wife.”⁷⁶⁹ As a result, the husband argued that he had not mistreated his wife and therefore she was not deserving of maintenance. Since he had admittedly taken a second wife, however, his case was weakened and the High Court found in the wife’s favor on this ground. This is a further example of the problem of proof: the Magistrate had been reluctant to make a definitive ruling on the question of violence within the marriage, preferring instead to focus on the social crime of bigamy.⁷⁷⁰ Maintenance was only for wives with living husbands who remained married. Once the marriage tie was broken, whether by death or divorce, the wife had to turn elsewhere for relief.

We cannot pass this without a discussion of the Amendment’s timing. Of course, the period between 1946 and 1950 is now well studied from the perspective of the Constituent Assembly. Here we see the other side of the coin—the Constituent Assembly’s Parliamentary side. As Ambedkar was the Law Minister during this period, it is possible he was the moving force behind the effort. Another possibility was that there was a well-known case that prompted swift action on the Amendment. Whatever the ultimate reason, the 1949 Amendment played a pivotal role in expanding Indian wives’ abilities to pursue legal redress and financial restitution as a result of marital failure. Between the pre-Independence DMMA and the HMA enacted by the Indian state, the Amendment served as a key stepping stone to the legal recognition of women’s rights within matrimonial law.

⁷⁶⁸ *Dhani Ram v. Mst. Ram Dei*, AIR 1955 All 320.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

Jurisdiction: Personal

The previous section examined the substantive law of maintenance. Husbands also resorted to procedural arguments about jurisdiction in this period. These arguments were similar to the kinds of arguments that Shah Bano's husband made in the famous Indian Supreme Court case of 1985, when he contended that the 1973 Code of Criminal Procedure's maintenance provisions should not apply to him as a Muslim husband and that he had a right to be governed under his (Muslim) personal law. That argument — and the Supreme Court's insensitive handling of it — prompted a major political firestorm and resulted in the passage of the 1986 Muslim Women's (Protections of Rights on Divorce) Act.⁷⁷¹ Well before this, husbands of all kinds argued the need to apply their personal law to them, rather than civil, criminal procedure, or other forms of “general” law. They did this in an effort to achieve the best possible outcome for their matrimonial litigation, and likely not out of religious conviction. They made several different kinds of arguments about jurisdiction, both about the geographic jurisdiction of their suits and the religious personal jurisdiction. Husbands of all communities averred that they did not owe maintenance under their personal law, and that religious personal law took precedence over the Criminal Code. The Courts rejected such arguments, finding that because of the criminal nature of the law, it applied to all husbands. For example, in *Shamsber Khan* the husband argued that under Muslim personal law the wife did not have custody of the children. In this case, he argued that under Muslim personal law he was entitled to the children's custody. Since the children remained in the wife's custody, he did not owe her maintenance. Justice Misra rejected this argument because “the statutory liability [under the CCrP] is

⁷⁷¹ *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 SCR (3) 844; Sylvia Vatuk, “A Rallying Cry for Muslim Personal Law.” Such a scenario would never have happened in the period with which we are concerned because until the 1973 revision of the CCrP, wives could not avail of the Code of Criminal Procedure.

distinct from the liability under the personal law.⁷⁷² The wife won her suit for maintenance of Rs. 30/month on grounds of her husband's physical and legal cruelty.

Indian secularism of the late colonial and early post-Independence period propagated an approach to the family that emphasized social control, represented in Justice Misra's rejection of Shamsheer Khan's contention that the Criminal Procedure should not apply to him. In some ways, the idea of legal secularism put forward here reinforces that image of tolerant, multi-stranded Nehruvian, rather than, say, a form of Hindutva secularism that emphasizes strict equality. However, this is not what I intend to suggest. Instead, I argue that legal secularism preserved a domain of state control of the marriage tie, women's movements, and wealth in marriage. Legal secularism operated to preserve the marriage tie, not in the interests of morality, but out of a concern for social control that reified a patriarchal family structure that put significant restraints on wives' liberty. In a context in which mobility was deemed a threat, if a wife's location could be pinned to her husband's, half the battle for controlling and surveilling the population had been won, at least in theory. The criminal jurisdiction of maintenance, moreover, suggests that looking at Indian domestic relations through the lens of religion ignores the social control features of criminal and poor law. Perhaps social control and criminality are more apt lenses through which to view Indian family laws.

The elements of social control demonstrated in the form of maintenance clustered around three major features: first, maintenance aimed at preserving the marriage tie; second, maintenance created significant restraints on wives' liberty by tying them to their husbands via marriage; third, maintenance restrained wives' liberty by tying them to local institutions for its enforcement. The criminal form of maintenance of the nineteenth century CCrP, coupled with the RCR remedy, created large amounts of case law, secondary legal literature such as treatises for working lawyers, forms, and institutions around this particular family structure. The nineteenth century maintenance

⁷⁷² *Shamsheer Khan v. Sm. Siddiquinissa and Ors.*, AIR 1953 All (Lucknow Bench) 720 at 721, para. 8. The husband was ordered to pay her Rs. 30/month.

and RCR procedures in India structured subsequent Hindu and Muslim law and, crucially, many other arenas of Indian law such as the domicile requirement in Indian citizenship law.⁷⁷³

As should be clear from the above discussion, the courts made no distinction between Hindus and Muslims in the application of the criminal maintenance law. Christian husbands also resorted unsuccessfully to the personal-jurisdiction argument. A 1955 decision under the Christian Divorce Act made clear that the maintenance requirements also applied to Christians: “This [i.e. right to s. 488] statutory right is not restricted to any nationality or creed, and is available irrespective of the personal law to which she is subject.”⁷⁷⁴ The decision clarified that because Christians had a separate Divorce Act, there was a difference between maintenance proceedings under the CCrP and the Divorce Act. Once the wife started her divorce proceedings under the Divorce Act, she could not apply under the CrPC for maintenance but had to pursue redress under the Act.⁷⁷⁵ However if she could not obtain a divorce under the stringent requirements of the Divorce Act or for some reason wanted to claim maintenance instead of pursue divorce, she could apply for the summary remedy of maintenance under the criminal code.

Given that maintenance operated to reinforce the marriage tie, wives would lose their rights to maintenance upon divorce in communities where there were pathways to divorce. This is because the CCrP was aimed at protecting wives as wives. A Christian wife was entitled to maintenance as any other wife would be until she started her divorce proceedings.⁷⁷⁶ In *Abdul Shakeer*, an unreported case, the High Court did not grant the wife maintenance after her husband divorced her. It did grant her maintenance for the *iddat* period. In Muslim personal law, this usually three-month period is aimed at ensuring the wife is not pregnant and that the divorce is final. During this period, the

⁷⁷³ Chapter One, “Entering and Leaving the Body Politic.”

⁷⁷⁴ *Earnest Frank Cecil, Appellant v. Sybil Lucretia Cecil*, AIR 1955 NUC (All) 3591 (Vol. 42 Sept). Lucknow Bench.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.*

husband owes the wife support and must also return her dower to her.⁷⁷⁷ At least since 1929 the rule stopping maintenance with divorce had been the explicit rule of the Oudh Chief Court.⁷⁷⁸ I suggest that this was not out of deference to the separateness of Muslim law but because maintaining the marriage tie was a constituent aspect of maintenance law, bolstered by the similar position in which Christian litigants found themselves. Therefore if the wife could obtain her divorce by some other method, she was no longer eligible for maintenance.

A further illustration of this rule can be seen in the cases of wives who sought to pursue maintenance claims against their husbands. For example, in the unreported case from 1955, a wife had successfully achieved maintenance against her husband but he died before she could collect the arrears. She had applied to the court to be paid from his estate that had devolved on his minor sons. The court made two rulings about her pursuit. First, she could not collect maintenance out of a dead person's estate. Second, whether her husband was dead or alive, it was not the wife herself who could apply for the execution of a maintenance order; rather, this was the responsibility of the District Collector.⁷⁷⁹ Likewise, in another 1955 Allahabad High Court decision by a Full Bench of three judges,⁷⁸⁰ the two wives of a deceased man had applied for maintenance out of some property he had mortgaged to another man, some of which had then been sold to a third man. The widows claimed a right of residence on the property, interpreted as a right to maintenance. However, the High Court ruled that they did not have any right of maintenance once the husband had died. Rather, their rights to succeed to his joint family property would govern any rights they had to the

⁷⁷⁷ *Abdul Shakoor, Applicant v. Smt. Kulsum Bibi and Ors.*, AIR 1955 NUC (All) 2706.

⁷⁷⁸ "The order for maintenance ceases to operate as soon as the wife is divorced by her husband [fn. 13-*Kasam Pirbhari* (1871) 8 BH C (Cr. C.) 95; *Abudl Ali Ishmaliji* (1899) 1 Bom LR 346; *Abdur Roboman v. Sakbina*, (1879) 5 Cal 558] though it remains effective so long as the divorced wife is in her *iddat* under Muhammadan law [*Din Muhammad* (1882) 5 All 226; *Shah Abu Ilyas v. Ulfat Bibi*, 1896 19 All 50]. This personal law of Muhammadans is not abrogated by this section [*Shekhanmian* (1930) 32 Bom LR 582; *Mussamat Mariam v. Kadir Bakhsb* (1929) 5 Luck. 442]." Ranchhoddas and Thakore, *The Criminal Procedure Code*, 7th ed., 384. Act IX of 1949 was the Amendment to the Code of Criminal Procedure.

⁷⁷⁹ *Jagdish Prasad and Anr. v. Mst. Bhagwati Devi and Anr.*, AIR 1955 NUC (All) 3526.

⁷⁸⁰ *Mst. Satwati and Anr. v. Kali Shanker and Others*, AIR 1955 All 4, Chief Justice Malik, Justice Agarwala, and Justice V Bhargava.

property. The High Court deemed the wife's right of residence a "personal right against the husband."⁷⁸¹

The emphasis on protecting wives as wives therefore originated in the criminal and not in the religious domain of Indian law. To ignore this salient feature is to overdraw the distinction between Hindu (indissoluble/sacramental) and Muslim (contractual) marriage by focusing merely on the question of divorce. It is also to ignore the over-determined nature of maintenance in India, which was not shaped by Hindu provisions on maintenance but rather shaped by poor law, Ecclesiastical law, common law, and criminal law.

Jurisdiction: Geographic

Husbands resorted to jurisdiction claims to get their wives' maintenance suits thrown out, but they usually lost. The CCrP provided a broad but not unlimited list of jurisdictions in which the wife could claim her maintenance. This geographic-jurisdictional requirement operated to tie wives to their husbands in ways that mapped onto a patriarchal family structure. Usually wives won such suits because Justices construed the jurisdiction requirement broadly; in only one case did a wife lose her suit for lack of jurisdiction. Nevertheless the jurisdiction requirement operated with a virilocal definition of the family. The district was the basic unit of governance in colonial India. To wit, a wife would first take her suit to a local judge and then could appeal to the District Magistrate. The CCrP gave three options for the district where the wife could pursue her maintenance suit against her husband. It could take place "in any district where he resides, or is, or where he last resided with his wife, or as the case may be, the mother of the illegitimate child."⁷⁸² This requirement was added in 1898 but was not found in the 1861, 1872, or 1882 Codes of Criminal Procedure.⁷⁸³

⁷⁸¹ Ibid., All 4 at 6.

⁷⁸² Code of Criminal Procedure, s. 488.

⁷⁸³ Chitale and Rao, *Code*, 2720.

On the one hand, the list of three locations for the wife to pursue her claim and the judiciary's broad interpretation of residence provided a good chance for her to fend off her husband's jurisdictional dodges. On the other hand, the list was limited and followed a patriarchal structure. In line with the restraints on mobility and the need to create a "settled" population, the CCrP required wives to go to their husband's locales—whether it was his present locale, either permanent (where he resides) or temporary (is), or his past locale. The wife, for example, could not expect to successfully pursue the suit in her natal district, where she might enjoy the resources and social support of her family. The determining factor in all three cases was where he resided. The CCrP's attempt to provide speedy and summary justice was undercut by this requirement. The British Indian common law insisted on locating the matrimonial home with the husband and this had implications for wives' mobility and liberty. They could succeed in their maintenance claims against their husbands but they needed to bring such suits in the appropriate location.

In *Rifaqatullah*, the wife lost because she brought her suit in her husband's father's district, Shahjahanapur. Even though the husband's father lived there and the husband "may be a welcome guest in his father's house from time to time," the husband did not reside in the district. In fact, though the family came from Shahjahanapur and the husband's father returned there after retirement, "There is no evidence that the man against whom proceedings were taken has any property in Shahjahanapur or has ever lived there."⁷⁸⁴ Rather the Court found that "to reside means to live or to have a dwelling place or an abode."⁷⁸⁵ The wife would now need to bring her suit in the district where the husband was then residing and therefore lost her maintenance suit.

Rifaqatullah was an exception; wives usually won their suits in the face of such geographic-jurisdictional arguments by their husbands. Mohammad Rasool was guilty of gross physical violence against his wife. Because he could not contest the factual findings of the lower courts proving his

⁷⁸⁴ *Rifaqatullah Khan v. Emperor*, AIR 1947 All 4.

⁷⁸⁵ *Ibid.*, 4-5.

cruelty, he turned to geographic-jurisdiction as a last dodge to escape her maintenance claim. (This was similar to Ram Bharosey in the previous chapter; he could not contest the facts of cruelty so he turned to religious jurisdiction arguments.) He argued that he did not reside in Lucknow and his wife's suit in that city's trial court should fail. However the court found it was he who had brought the wife from nearby Barabanki District to Lucknow for medical treatment apparently resulting from his cruelty. Both the Lucknow trial court and Sessions Court (the urban equivalent of District Magistrate's court) believed they had jurisdiction and the Sessions Court denied his appeal. The husband's second appeal in the High Court turned on the question of whether his five-month stay with his wife in Lucknow was "only a casual visit" and not a residence that would give the wife jurisdiction to lodge her suit.⁷⁸⁶

The Justice looked at the point raised by a Lahore High Court case, whether the visit was casual or a temporary residence.⁷⁸⁷ He went on to point out that a prior Allahabad High Court case noted the difficulty of determining the tipping point between a casual visit and temporary residence but in the earlier judgment even two months residence satisfied the requirement.⁷⁸⁸ He then noted that a Madras case that looked at the "entire case law" found that the Code required more than a casual visit but it was "not equivalent to something in the nature of having a domicile in a particular place."⁷⁸⁹ The Justice found that "[i]n my opinion a stay for above five or six months with the intention of having one's wife treated cannot be called a casual visit. It amounts to a temporary residence and, therefore, it is enough to confer jurisdiction."⁷⁹⁰ Chandrawati also won her suit for

⁷⁸⁶ *Mohd. Rasool v. Mst. Rabbo and Anr.*, AIR 1955 All (Lucknow Bench) 693 at 694, para 6.

⁷⁸⁷ *Charan Das v. Mst. Surasti bai* AIR 1940 Lah 449, discussed in para 8 of AIR 1955 All 693, *Mohd. Rasool, Applicant v. Mst. Rabbo and Anr.*

⁷⁸⁸ AIR 1955 All 693 at 694 para 9, *Mohd. Rasool, Applicant v. Mst. Rabbo and Anr, Opposite Party*. Lucknow Bench. The Allahabad High Court case cited was *Shere Singh v. Mt. Amir Kuer*, AIR 1927 All 291.

⁷⁸⁹ The Madras case was AIR 1953 Mad 78, *Sampoornam v. N. Sunadresan*, in AIR 1955 All 693 at 694 para 9, *Mohd. Rasool v. Mst. Rabbo and Anr.*

⁷⁹⁰ AIR 1955 All 693 at 694 para 9, *Mohd. Rasool v. Mst. Rabbo and Anr.*

maintenance despite her husband's appeals on the ground of jurisdiction.⁷⁹¹ The jurisdiction was associated with the husband. This mirrors somewhat the parish-based relief system of the English Poor Law. It was intensely local, and was dependent on the local exercise of state power and the realities of enforcement, as the discussions over the boundary between residence and visitation showed. Judges' discretion ultimately determined the matter in hard cases. It also reflects the English Poor Law in that the wife's identity played no role in determining the location of the proceedings.

Another similar but slightly separate vestige of English Poor Law was the strong preference for the husband's residence as the site of the matrimonial home. This parallels the earlier chapters' discussion of the identification of the wife's domicile with the husband's concerning citizenship and RCR. However, in line with their sympathy toward troubled wives and their broad discretion, in *Srimati Chameli*, the Court denied the husband's claim of an agreement to live apart, reversing two decisions in his favor by the lower courts. The decision in *Srimati Chameli* relied on a 1937 Allahabad precedent that mutual consent should be defined narrowly. The 1937 judgment was designed not to preserve the marriage tie out of a moral commitment to indissoluble marriage, necessarily, but rather to protect the wife.⁷⁹² If the husband and wife lived apart because he forced her out, he could dodge the maintenance claim by stating they were living apart through mutual consent, challenging her to show she had been forced out. So, according to Justice Randhir Singh, the crucial question was whether the two truly mutually agreed to live apart or whether the husband forced the wife to agree to the arrangement. The state had a positive duty to protect the wife in her status as a vulnerable person. In this case, he found that the husband actually threw the wife out of the house and therefore had no good ground to dodge her maintenance claim. The two lower courts' decisions were overturned and the husband, a *vakil*, was ordered to pay Smt. Chameli Rs. 20/month on his

⁷⁹¹ *Chandrawati v. Suraj Narain*, AIR 1955 All 387.

⁷⁹² *Smt. Chameli, Applicant v. Gajraj Bahadur Gupta, Opposite Party* AIR 1954 All 33, Lucknow Bench.

stated income of Rs. 100-125/month. Despite the sympathy to wives, the overarching rule of determining the jurisdiction for maintenance through the husband's locations did not change.

The first case discussed in this article, wherein a fabulously wealthy husband sought to avoid his wife's maintenance claims,⁷⁹³ highlighted the international dimensions of maintenance law in ways that show how the preference for the virilocal matrimonial home might overlap in different bodies of law. In this case the wife was a refugee from Germany who came to Shimla and married her husband there. One strategy the husband used to dodge his large maintenance obligations was to discount the wife's right to bring such a suit, labeling her an enemy alien. He did this by suggesting her domicile remained in Germany, arguing she broke the dependent domicile rule by virtue of her enemy alien status and therefore was the exceptional married woman with an independent domicile. The husband's arguments were easily rejected by the Court; the ease with which it rejected them indicates how well-entrenched was the idea of the wife's dependent domicile even beyond citizenship law. In the present case, this worked in the wife's favor. The wife, while not necessarily a citizen or British subject, was also not a non-subject as she would have been if deemed an enemy alien. Therefore, as already discussed, she could and did quite successfully pursue her civil suit.

Conclusion

While Indian maintenance law developed earlier and in a more simplified form than did English maintenance law, both reflected the idea of settlement. A particular wife's legal identity was tied to her husband's identity, and her husband occupied a specific location and jurisdiction. A wife's access to maintenance was mediated through her husband's geographic location. As in RCR suits, judges had wide scope to decide whether wives had good reason for living apart from their husbands. Most often, social offenses—those that could be easily proved such as bigamy, adultery,

⁷⁹³ *Prem Pratap v. Jagat Kummar*, AIR 1944 All 97

and legal harassment—were used to grant the wife her desired relief. The colonial imperative to settle the population and to attach each colonial subject to a particular jurisdiction was reflected in the Criminal Procedure Code’s requirement that a maintenance suit be filed in a particular district tied to the husband’s location. Husbands of all religious communities used both geographic and religious jurisdiction arguments to desuit their wives as part of a legal strategy designed to avoid taking on lifelong maintenance obligations to their wives.

So far, this dissertation has examined how nineteenth and twentieth century legal procedures, statutes, and ideas tied wives to their husband in twentieth century India, both before and after the Constitution. These included domicile in citizenship law, restitution of conjugal rights in civil law, and maintenance in criminal procedures. All of these procedures operated to reinforce the marriage tie, tie the wife to her husband, and tie the married couple to a particular locale or set of locales. These chapters have shown how in these non-religious domains of twentieth century Indian law, English legal ideas based in social control and a specific legal interpretation of Christian marriage as indissoluble structured Indian marriage. These chapters have laid the groundwork for a non-religious paradigm for considering Indian marriage and set out the nineteenth and twentieth century origins in England of some important features of this paradigm. The following chapters turn to examining how this framework interacted with India’s twentieth century Muslim and Hindu marriage statutes. I show that the framework structured by maintenance and restitution of conjugal rights continued to play an important role in the adjudication of marriage under “new” twentieth century divorce statutes such as the 1939 Dissolution of Muslim Marriages Act (Chapter Five) and the 1955 Hindu Marriage Act (Chapter Six).

Chapter Five

Cruelty and the Dissolution of Muslim Marriages Act, 1939-55

The Dissolution of Muslim Marriages Act (DMMA), passed in 1939, was a statutory reform to the law of Muslim marriages and divorces. It grew out of a critique of the administration of Muslim law in the subcontinent that argued that British rule incorrectly prevented Muslim jurisprudence from changing in response to new social conditions.⁷⁹⁴ The Act granted the wife a long list of grounds for divorce, removing the need for tentative judicial reasoning by making clear Muslim wives' right to divorce for numerous reasons.

The DMMA was the first modern divorce code in India. This statute is still in effect in India, Pakistan, and Bangladesh: it has proved as enduring as it was wide reaching. Moreover, at least until the enactment of the Hindu Code and the Hindu Marriage Act (HMA) in 1955, the DMMA was the most important statement of what was exactly marital cruelty in Indian law. Prior to the Act, Muslim wives had multiple routes to marital redress under Anglo-Muhammadan law, dower suits, divorce-by-apostasy, and divorce- or separation-by-decree. The Act provided a clarified and systematic approach to these rights that eased women's rights to divorce. Specifically, the DMMA labeled many kinds of behavior as cruelty, including the husband's physical violence. The category of cruelty was also broadened enough to include *laan*, a procedure by which a wife could obtain a divorce in response to her husband's false accusations of adultery against her. The decisions on *laan* indicate—

⁷⁹⁴ Notably Ghose gave an example of a case “where the husband went abroad with a regiment as its master tailor and the wife refused to follow her, that would preclude her from claiming her divorce on the ground of desertion.” *Ghulam Fatima v. Nur Ahmad*, AIR 1931 Lah 721:133 IC 61 cited in A.C. Ghose, *Lawyer's Anglo-Muhammadan Law* (Calcutta: Raychowdhury, 1935), 260.

as in *Ram Bharosey*--that the husband's recourse to disparaging his wife's reputation, as well as his use of criminal charges against her family, were powerful weapons that required effective legal counterweights.

While the DMMA was very important both politically and legally, this chapter will show that, in practice, Muslim husbands and wives continued to litigate their matrimonial disputes in much the same way. The previous chapters showed that there were Muslim wives who sought maintenance under the Criminal Procedure Code. More importantly, despite the newly delineated grounds of cruelty in the DMMA, wives most often won not by arguing and proving their husbands' physical cruelty within marriage but by finding other marital wrongs that were easier to prove. Indeed, within the judgments under the DMMA the courts continued to accommodate some violence within marriage. Examining litigation under this Act allows for a more nuanced view of the difference that twentieth century statutory reforms to marriage law made, and the answer was not as much as one would think. The similar patterns followed by litigants from a variety of religious backgrounds (all Muslims in this chapter) in the course of matrimonial litigation show that there was a shared matrimonial jurisprudence in pre-HMA Uttar Pradesh (UP) structured by English and Indian legal ideas about the patriarchal nature of the family and the rights of husbands and wives within it. Husbands and wives used a variety of legal strategies to attain the best possible outcomes for themselves, and they did this under Hindu, civil, criminal, and Muslim law.

This chapter bases these arguments on eight cases pursued under the DMMA found in the longitudinal survey of the Oudh and Allahabad High Courts in the period between 1939, after the Act's immediate passage and 1955, with the creation of the Hindu Marriage Act [HMA]. The chapter proceeds by first examining pre-DMMA forms of matrimonial redress under Anglo-Muslim law, and then turns specifically to how cruelty was litigated under the DMMA. Guided by the cases found in the longitudinal survey and the arguments litigants made, the chapter then examines the fate of *laan*

in the High Courts, and concludes with an examination of the extent to which the High Court decisions can be deemed representative of Muslim matrimonial disputes in UP.

Muslim Marital Redress Prior to the Act

Before 1939, important methods of marital redress included wife-initiated forms under Hanafi law, informal separation (probably the most common form), the much rarer but politically important category of divorce-by-apostasy, and the category of divorce by judicial decree based in the Courts' equity jurisdiction.⁷⁹⁵ I base this on my analysis of three treatises just before, or immediately after, the passage of the DMMA: A. C. Ghose's *Lawyers' Anglo-Muhammadan Law* (1935); Kashi Prasad Saksena's *Muslim Law as Administered in British India* (1937); and Faiz Hassan Badruddin Tyabji's *Muhammadan Law: The Personal Law of Muslims* (1940). I do not intend to describe the full field of Hanafi law but rather the various forms that might have been available to a lawyer prior to the 1939 Act as opposed to, for instance, the landscape of how Muslim law actually operated in a particular community or how a particular religious commentator viewed things. Treatises also provided an opportunity to present alternative legal positions and suggestions for reform in the form of the author's comments on controversial decisions.

The most important and widely used form of divorce, *talak*, amounted to the husband's unilateral right to dissolve the marriage contract. The wife's four methods to divorce her husband were all conditional in contrast to his unilateral right. These forms were: if her husband agreed (*mubarat*); at her instance with her husband's consent, for a consideration, usually part or all of her dower (*khula*); if her husband delegated her the right to divorce him under specified conditions in

⁷⁹⁵ Ghose, *Lawyers' Anglo-Muhammadan Law*; Kashi Prasad Saksena, *Muslim Law as Administered in British India* (Allahabad: Agarwala, 1937); and Faiz Hassan Badruddin Tyabji, *Muhammadan Law: The Personal Law of Muslims* (Bombay, N.M. Tripathi, 1940).

the marriage contract, and those conditions took place (*talak-i-tafwiz*);⁷⁹⁶ and finally if she had been married to her husband before puberty and by a guardian other than her father or grandfather (the option of puberty).⁷⁹⁷ These routes to divorce were all based in the contract of Muslim marriage signed at the time of the wedding (*nikahnamma*), did not require the colonial's state sanction or intervention. It is difficult to say how widely practiced such forms of divorce were.

A separation was probably a much more common form of redress. Less visible and disruptive, this would have been a much simpler way to ease marital tensions. The wife could try to claim part of her dower or other moveable property left at her husband's place. This was not the long-term, repetitive monthly claim of maintenance or alimony but rather an attempt to get some return on the money invested in the wife's marriage. In the British courts, once the wife won her right to dower, the amount was subject to negotiation between the two parties. In each of the two cases that I examined, the Justices chose an amount between what the husband offered and the wife demanded.

For example, in *Mohammad Taqi v. Farmoodi Begum*⁷⁹⁸ the wife left her husband's home after a long marriage though the decision gave no specific reason for her departure. The High Court rejected the husband's argument that consummation of the marriage negated the wife's right to prompt dower.⁷⁹⁹ She retained a right to her prompt dower — though the Court awarded her less than she would have liked -- though she was not able to completely dissolve the marriage. Likewise a

⁷⁹⁶ Lucy Carroll, "Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife," *Modern Asian Studies* 16, no. 2 (1982): 277–309.

⁷⁹⁷ See Ghose, *Lawyers' Anglo-Muhammadan Law*, 200Q to 200W. Ghose stated that there were various procedures to effect the option of puberty. He writes "it may be done in a good many ways" such as starting a divorce suit, marrying someone else, and as a defense to restitution of conjugal rights. See Ghose, 200(v). One wife used the option of puberty and the High Court affirmed an interpretation of the timing of her repudiation of the marriage although the case was remitted to the District Judge for further finding on the facts. No specific ground or details about the incident that may have prompted the dissolution were given in the report. *Abmad Husain v. Mt. Amir Bano* (AIR 1940 All 63).

⁷⁹⁸ *Mohammad Taqi v. Farmoodi Begum*, AIR 1941 All 181.

⁷⁹⁹ Much of the case was taken up with determining the correct amount of prompt dower. As I will explain in greater detail in chapter six, the term "prompt dower" refers an amount of property or money stipulated in the Islamic marriage contract. It is given to the wife at the time of marriage.

few years later wife Rehana Khatun won her suit for prompt dower against her husband.⁸⁰⁰ In late colonial Uttar Pradesh, to the extent that wives pursued marital redress, the above two forms (Hanafi divorce methods and informal separation) likely dominated. The following two, divorce-by-apostasy and divorce-by-decree, would have been more rare.

Ameer Ali, like other treatise writers, suggested that divorce-by-apostasy was specific to the historical conditions of colonial India.⁸⁰¹ The use of divorce by apostasy began in the British courts as early as 1870.⁸⁰² In Ameer Ali's analysis, the view of apostasy presented in important legal manuals like the *Fatawa-i-Alamgiri* and the *Hedaya* envisioned a state authority that could enforce physical punishment of the husband and imprisonment of the wife in the case of apostasy. The wife's imprisonment was designed to allow her to return to Islam and then remarry her husband.⁸⁰³ Whether this practice was actually enforced when these works of jurisprudence were written is an open question. Ameer Ali noted that the procedure did not work properly given the constraints of British rule in India; the state could not imprison the wife for apostasy. The British Courts interpreted Hanafi law so that a husband's or wife's apostasy from Islam created an automatic divorce⁸⁰⁴

⁸⁰⁰ *Rehana Khatun v. Iqtidar Uddin*, AIR 1943 All 184.

⁸⁰¹ Ameer Ali, *Mabommedan Law: Compiled From the Authorities in the Original Arabic*, vol. 2, 4th ed. (Calcutta: Thacker, Spink & Co., 1917).

⁸⁰² These were the 1870 case of *Zuberdast Khan v. His Wife* 2 NWPCHA 370 and the 1906 case of *Iman Din v. Hasan Bibi* 184 PLR 1906. See Ghose, 200(c) and Saksena, 265-6. The earliest case noted in Muhammad Khalid Masud, *Iqbal's Reconstruction of Ijtihad* (Lahore: Iqbal Academy, 1995), is *Ghaus v. Musammatt Fiji* from Lahore 1915, see 175 fn. 11(3) for many additional cases. Chitaley and Rao give a case from Rangoon in which the legal point of contention was maintenance. A Muslim wife apostatized herself by converting to Buddhism causing a divorce, which negated her right to maintenance under the CCrP: *Sona Ulla v. Ma Kin* ARI 1919 Low Bur 150. See Chitaley and Rao, *Code of Criminal Procedure*, 2703.

⁸⁰³ See Saksena, *Muslim Law*, 264.

⁸⁰⁴ Ali, *Mabommedan Law*, 442. The treatise was first published in 1880. Jamil's explanation was that "The procedure suggested by the Muslim jurists to put a stop to women renouncing Islam for the purpose of getting rid of their husbands could not be applied to Modern Indian conditions and therefore the Courts in India had no option but to apply the principle of law [i.e. divorce by apostasy] in its bareness." Mohammad Jamil, *Marriage and Dissolution of Marriage in Muslim Law*, revised ed. (Lahore: Law Book Company, 1946). See page 158 for discussion of Preamble to the Act.

Ameer Ali criticized the position taken by the British Indian courts, arguing that a Muslim's conversion to another Abrahamic religion should not cause an automatic divorce.⁸⁰⁵ But in 1910 the Allahabad High Court rejected this view finding that even conversion to another Abrahamic religion should trigger divorce. The Justices based their views in the early modern sources of Hanafi law, *Fatawa-i-Alamgiri* and the *Hedaya*, and two earlier cases from the Punjab.⁸⁰⁶

Outside of the British courts, Maulana Ashraf 'Ali Thanawi dealt with a case of a wife using apostasy to escape a persistent or demanding husband as early as 1913. According to Masud the number of such cases in the British courts "increased suddenly around 1920-5" perhaps due to Iqbal's public mention of the problem in 1924.⁸⁰⁷ Thanawi's sustained interest resulted in his writing of the 1933 *al-Hilat al-Najizah l'il Halialat al-Ajizah* (*A successful device for the frustrated wife*). This important text justified what eventually became the DMMA.⁸⁰⁸ Calls for Muslim divorce reform in 1930s, therefore, could be aimed not at Hanafi law *per se* but rather at its British interpretation, which prohibited the import of divorce grounds for the wife's marital redress despite good authority.⁸⁰⁹ Those who favored these changes argued that British rule artificially froze Hanafi jurisprudence, preventing it from adapting to changing social circumstances and making use of other schools' more progressive rules of Muslim law.⁸¹⁰ As Minault has shown, this argument allowed "reformers,

⁸⁰⁵ Reasoning that women could marry Abrahamic non-Muslims (Jews and Christians) and therefore conversion among these religions was not a ground for divorce, Ameer Ali critiqued these developments, stating, "It is absurd and contrary to the principles of justices that one part of the rule should be enforced whilst the other should be ignored." See Ali, *Mahomedan Law*, 445.

⁸⁰⁶ Ghose's treatise explained that the 1910 Allahabad High Court "felt themselves unable to disregard the opinion expressed in Baillie and Hedaya and two old decisions (r) of the Punjab Court." The decision was *Amir Beg v. Soman* 33 All 90:7 A.L.J. 956:7 I.C. 342. The two Punjabi cases were 2 NWPHC A 270 and 85 PR 1906. See also Masud, *Iqbal's Reconstruction of Ijtihad*, 200.

⁸⁰⁷ Masud, *Iqbal's Reconstruction*, 155-6.

⁸⁰⁸ Fareeha Khan, "Traditionalist Approaches to Shari'ah Reform: Mawlana Ashraf 'Ali Thanawi's Fatwa on Women's Right to Divorce," (Ph.D. diss., University of Michigan, 2008), 4; Minault, "Women, Legal Reform, and Muslim Identity," 7-8; Masud, *Iqbal's Reconstruction*, 166-71; However, Thanawi's advocacy for the appointment of Muslim kazis did not succeed.

⁸⁰⁹ Masud, *Iqbal's Reconstruction*, 202-3.

⁸¹⁰ Khan, "Traditionalist Approaches," 12, 76, and *passim*. In the case of the DMMA, this meant borrowing the Maliki rule that allowed women to initiate divorce. To Thanawi, this represented a better option than simply abrogating the

politicians, and *ulama*⁸¹¹ to work together to get the DMMA passed in Parliament.⁸¹² Muslims' fear of losing adherents to Christianity in a climate of numerically driven political competition gave the project of divorce reform added urgency.⁸¹³ In this argument, Hanafi jurisprudence was portrayed as a central core of law that had been modified or enforced – incorrectly - by British rule. In their view, Hanafi jurisprudence was neither static nor immune to social change; it was British precedents that had frozen it in time.

The fourth form of marital redress in colonial India, divorce-by-judicial decree, also involved turning to the British Indian courts. This form of divorce operated from the equity jurisdiction of the British courts though its validity and jurisdictional position were not always certain. Courts could give judicial divorces on the grounds of impotence and false accusations of adultery.⁸¹⁴ Ameer Ali and other treatise writers suggested that cruelty, infidelity, and failure to maintain should be grounds for judicial divorce as well. There was a developing line of legal reasoning among certain High Courts that took Ameer Ali's position,⁸¹⁵ though this was rejected by other Courts.⁸¹⁶ This discussion indicates the difficulties women faced in getting a divorce-by-decree: they had to approach courts that were themselves uncertain about acceptable grounds.

To sum up the four important categories of marital redress in colonial India: First were the Hanafi approved forms like the husband's unilateral right of divorce and the more limited subsidiary

Hanafi school of law (*madhab*) by enacting a law that granted Muslim wives divorce. See Khan, "Traditionalist Approaches," 78.

⁸¹¹ Minault, "Women, Legal Reform, and Muslim Identity," 7-8.

⁸¹² *Ibid.*, 8.

⁸¹³ *Ibid.*, 7-8. Masud in *Iqbal's Reconstruction of Ijtihad* suggests it was one missionary in particular who may have been behind these conversions. See his footnote 20 on page 176.

⁸¹⁴ Khan states that Thanawi argued for the grant of divorce on ground of impotence but there were several conditions, "Traditionalist Approaches," 96-104.

⁸¹⁵ With one case each from the Burma and Sindh High Courts: *Khalila Rahman v. Marian Bibi* 13 Bur LT 89: 59 IC 804 and *Hafizgan v. Saidino* AIR 1925 Sind 22: 86 IC 301. Ghose, *Lawyer's Anglo-Muhammadan Law* (1935), 259.

⁸¹⁶ Ghose, *Lawyer's Anglo-Muhammadan Law*, 259. Ghose provided two cases where Ameer Ali's position was accepted: *Khalila Rahman v. Marian Bibi* 13 Bur LT 89: 59 IC 804 (footnote t) and *Hafizgan v. Saidino* AIR 1925 Sind 22=86 IC 301 (footnote u). The case that rejected the ground of inability to maintain for divorce was *Asmati Bibi v. Saimuddi Pathan* AIR 1925 Cal 533: 79 IC 991 (footnote v). For this rule, Saksena, *Muslim Law as Administered in British India* (1937) also gives: *Hamidulla Khan v. Fakhirjahan Begam* 8 OJL 650: 1922 Oudh 109: 85 IC 452 p. 346, footnote (v).

forms the wife could exercise. These were conceived of as divorce under Hanafi law and did not require state sanction as a matter of course. Second was *de facto* separation. Third was the controversial route of divorce-by-apostasy. In the context of religious competition apostasy attracted outside attention.⁸¹⁷ Fourth was the similarly difficult route of turning to the British courts for a judicial decree of divorce on limited grounds. This drew on the Courts' equity jurisdiction. Because most forms of marital redress did not require state sanction it is difficult to determine how often each of the forms described above were used relative to each other; given its ease, it seems likely informal separation ranked first.⁸¹⁸

Prior to the Dissolution Act, Hanafi law and the law of the British courts were pitched against the wife, though some forms of marital redress for her were possible. Approaching courts required social and financial resources, the more so when the husband could appeal all the way to the High Court. Based on the evidence of the UP High Courts, the DMMA made it easier for wives to obtain divorces by substantially clarifying and expanding the numerous grounds on which they could petition. The difficulties women faced in getting a divorce on their own initiative and the specter of this driving Muslim wives to apostasy drove the DMMA's adoption in 1939. Yet once enacted, the DMMA's structure of decisions in cruelty cases did not differ much from those cases presented in other chapters. The courts did not wholesale condemn physical violence and they continued to weigh heavily social crimes like false accusation of adultery.

Cruelty Under the Dissolution of Muslim Marriages Act

⁸¹⁷ Minault, "Women," 7.

⁸¹⁸For example, *talak* relied on the husband's speaking of certain words in ritually prescribed manner to effect a divorce. As Ghose's treatise noted, "A dissolution of marriage being such an easy affair for the husband, it is seldom necessary for him to resort to a divorce suit [in the British courts];..." *Lanryers' Anglo-Mahomedan Law* (1935), 239 at footnote (j), relying on *Kulsambi v. Abdur Kadir*, 45 Bom., 151; 22 Bom. L.R. 1142; 59 IC 433 for the point that "the Court declined to make a decree inasmuch as the husband had his remedy by divorce."

From several points of view, the DMMA was a major success: it was simple and clear, it has endured in three different countries, it benefitted wives, and it represented a political and religious victory for Muslims in India.⁸¹⁹ The Act replaced the judicial divorce and divorce by apostasy described above with a clarified and consolidated statute. The new Act was significant both for the development of cruelty jurisprudence in Indian law and for its impact on the internal development of Anglo-Muhammadan law.

The Act's scope was wide: it included nine grounds for divorce, listed in Chart 5.1. The last two of these grounds—cruelty and the savings provision—indicate its broad and sweeping nature. The savings provision preserved all prior existing grounds for divorce “recognized valid under Muslim law” and, as previously discussed, there were several available to the wife such as *kehula*, *mubarat*, and *laan*. The option of puberty was preserved in a separate sub-section.⁸²⁰

The cruelty ground was further divided into six categories covering a wide range of behaviors.⁸²¹ These were (see also Chart 5.1):

- a) husband habitually assaults her or makes her life miserable even if such conduct does not amount to physical ill-treatment
- b) associates with women of evil repute or leads an infamous life
- c) attempts to force wife to lead an immoral life
- d) disposes of her property or prevents her exercising her legal rights over it
- e) obstructs her in observance of religious practice
- f) does not treat wives equally if he has more than one

Wives and their lawyers used the DMMA to apply for marriage dissolutions.⁸²² Between 1939 and 1955, the two High Courts in the United Provinces heard and reported eight appeals under the

⁸¹⁹ Minault, “Women,” 8; De, “Mumtaz Bibi’s Broken Heart,” 106.

⁸²⁰ In section 2.vii with the age of puberty listed as 15.

⁸²¹ DMMA 1939, s. 2(viii).

DMMA.⁸²³ These suits used the new grounds for dissolution discussed above, especially the cruelty ground (s. 2(viii)), the ground of failure to maintain (s.2(ii)), and the broad savings provision.

Lower courts' decisions usually, though not always, favored wives. In six of the eight reported appeals, wives won their suits for dissolution. Of the six successful wives' suits, three centered on physical violence and marital cruelty and three suits centered on false accusations of adultery, *laan*. Cruelty was broadly defined and in line with its roots in equity courts were granted wide powers of discretion, especially in judging the husband's intentions.

The Dissolution of Muslim Marriages Act before the High Courts

In the first suit under the DMMA in 1944, the wife, Badrunissa Bibi, won her suit for the return of prompt dower but lost her suit for dissolution.⁸²⁴ This decision juxtaposed the wife's prior legal strategy of making dower claims with the new availability of dissolution. The decision left her in an ambiguous position. The Court's decision rested in the common law principle that neither the husband nor the wife should be able to take advantage of his or her own wrongs, and in this case, Badrunissa was the guilty party because she left her husband's home.⁸²⁵ It granted her dower because the marriage had clearly broken down, the husband remarried, and the Court likely thought she

⁸²² Such cases followed a standard process. They were heard in a local level court, sometimes called the court of first instance or the trial court. The losing litigant could then appeal to the Civil Judge of the District. This Judge could examine both the law and evidence and reach a different outcome than the court of first instance. This was usually called the First Appeal. If the losing litigant had the means and will, he or she could pursue an appeal to the High Court, where it would be heard by a single Justice bench. This was called the Second Appeal. Here the High Court was confined to the legal questions and could not directly examine the evidence put forward in the two lower courts. This is where most suits ended but under certain conditions there was a final right of appeal, the right of letters patent.

⁸²³ More precisely, the reporters for these two High Courts published eight judgments on the DMMA between 1939 and 1955.

⁸²⁴ *Badrunissa Bibi v. Syed Mohammed Yusuf*, AIR 1944 All 23.

⁸²⁵ DMMA sections 2(ii); 2(iv); 2(viii)(a, d, or f). *Badrunissa Bibi v. Syed Mohammed Yusuf*, AIR 1944 All 23. This case was briefly discussed in Jamil, *Marriage and Dissolution of Marriage* (1946), supp. p. 7, for the point that if the wife leaves her husband's home she cannot obtain a dissolution "for that will be giving her a benefit arising from her own wrongful acts." R.B. Sethi, *Muslim Marriage and Its Dissolution* (Allahabad: Law Book Co., 1955), 93-6 discusses the case as well. Sethi glossed the case this way: "Where a wife either of her own accord or out of misguided love for her parent's [sic] fails to go to the husband's place and the husband getting disgusted with the attitude adopted by the wife and their parent marries a second time, the first wife cannot seek dissolution of marriage on the ground that she has not been treated equitably. *In fact the husband has had no chance to treat her at all, either equitably or inequitably.*" (118-19).

deserved some compensation for the substantial amount of dower involved.⁸²⁶ However, the Court did not make full use of the DMMA, instead denying Badrunissa's dissolution because she had failed to remain with her husband.

In *Sofia Begum* (1947), the Allahabad High Court was convinced of the husband's cruelty to his wife and granted her dissolution suit.⁸²⁷ The High Court's decision criticized the lower court for deciding against the wife when the evidence of cruelty was clear. It rejected the husband's argument that violence against his wife was only simple chastisement and did not rise to the standard of habitual cruelty. It also rejected the argument that such chastisement was acceptable under the DMMA. The decision pointed out that the DMMA considerably "enlarged" the wife's rights.⁸²⁸ Nevertheless, the Court also noted in *dicta* that "a few slaps administered gently by a loving husband to a beloved wife" did not constitute marital cruelty.⁸²⁹ The Court found for the wife but it avoided finding that *all* violence within marriage created a ground for divorce. The violence in this case was seen to be egregious or exceptional; the routine violence that the Justice seemed to assume accompanied many marriages was granted some legal space.

The third case, also reported in 1947, *Shamim Fatma* showed how RCR continued to play a significant role even after the DMMA. *Shamim Fatma* occupied a position of higher legal authority than the other decisions discussed here. This was an appeal to a two-Justice Division Bench from

⁸²⁶ "Prompt dower" refers to *mahr*, which is an amount of property or money stipulated in the Islamic marriage contract. There are two kinds of *mahr*, prompt and deferred. Prompt dower is given to the wife at the time of marriage. Sylvia Vatuk, "Moving Courts: Muslim Women and Personal Law," in *The Diversity of Muslim Women's Lives in India*, ed. Zoya Hasan and Ritu Menon (New Brunswick, NJ: Rutgers University Press, 2005), 29-30; Lucy Carroll, "The Muslim Family Laws Ordinance, 1961: Provisions and Procedures—A Reference Paper for Current Research," *Contributions to Indian Sociology*, n.s. 13, no. 1 (1979): 138-9.

⁸²⁷ *Mt. Sofia Begum v. Syed Zabeer Hasan Rizvi*, 1947 AIR All 16. In D.F. Mulla and Sir Syed Sultan Ahmedseth, *Principles of Muhammadan Law*, 13th ed. (Calcutta: Eastern Publishing House, 1950) this case was cited for the point that cruelty was a good ground for refusal of restitution of conjugal rights. The same footnote for this point cited a long line of cases that began with *Moonshee Buzloor Rubeem v. Shumsoonnissa Begum* (1867) 11 MIA 551 at 615; *Meberally v. Sakerkhanobai* (1905) 7 Bom LR 602 at 608; *Husaini Begam v. Muhammad* (1907) 29 All 222; *Hamid Husain v. Kubra Begam* (1918) 40 All 332, 44 IC 728; *Benu Meah v. Begummah Bibi* 33 A.R. 322 and the *Sofia Begum* case. See footnote (m) pp. 246-7. The case is also briefly discussed in Sethi, *Muslim Marriage and Its Dissolution* (1955) on pages 85 and 113.

⁸²⁸ *Mt. Sofia Begum v. Syed Zabeer Hasan Rizvi*, AIR 1947 All 16, para. 17.

⁸²⁹ *Ibid.*

the decision of a single Justice bench. While the High Court possibly intended this decision to clarify the position of the DMMA in Uttar Pradesh, it was not cited or discussed in any of the legal treatises I have examined.⁸³⁰ The two lower civil courts found in favor of the wife: she could obtain dissolution on the ground of her husband's cruelty. A single Justice ruled in favor of the husband. His wife then appealed to a two-Justice Division Bench. The wife lost her case because the Court was barred by *res judicata* from the examination of her evidence of cruelty against her husband.⁸³¹ From a legal point of view, the most important part of the High Court's decision was its emphasis on respecting the previous RCR case decided by the two lower courts.⁸³² The Court couched its decision against the wife as one it had no choice but to make. As long as the RCR suit had already been decided against the wife, the Court could not look into the evidence of the husband's cruelty.

Defeated on that point, the wife's second major argument was that she was entitled to dissolution on ground of the husband's failure to maintain. This ground was the same ground used in the *Badrnunissa* suit.⁸³³ The wife's lawyers argued that a husband had an obligation to maintain his wife "even if she refuses her husband's company." The wife still had an "absolute right to maintenance" and in its absence good ground for dissolution.⁸³⁴

The High Court also found this an untenable position. It would have allowed a wife to take advantage of her own wrongdoings. This was anathema to equitable considerations of marital rights and wrongs. The decision reminded its readers, "It must be remembered that the wife is not entitled

⁸³⁰ Tyabji, *Mubammadan Law* (1940), Jamil, *Marriage and Dissolution of Marriage in Muslim Law* (1946), Mulla, *Principles of Muhammadan Law* (1950), Sethi, *Muslim Marriage and Its Dissolution* (1955), Ali, *Mahommedan Law* (1965).

⁸³¹ *Mt. Shamim Fatma v. Ahmad Ullah Khan*, AIR 1947 All 3.

⁸³² The decision did not specify which two lower courts or the dates of the decisions. This Second Appeal case no was SA No. 1236 of 1943, dated November 1, 1945. *Mt. Shamim Fatma v. Ahmad Ullah Khan*, AIR 1947 All 3.

⁸³³ *Bardunissa Bibi v. Syed Mohammed Yusuf*, AIR 1944 All 23.

⁸³⁴ Sethi, *Muslim Marriage* (1955), 119, discussed *Bardunissa* under the husband's obligations to provide maintenance to the wife under DMMA 2(ii). He discussed it along with *Jamila Khatun v. Kasim Ali Abas Ali* 1951 Nag 375 and *Mt. Khatijan v. Abulla* ILR 1942 Kar 535:1943 Sind 65. His discussion of these three cases and others noted the Courts' findings that the husband was only required to maintain his wife up to the requirements of Muslim law but not "absolutely." A more liberal decision of Lahore in 1942 was overturned three years later in favor of the position outlined here in *Zaffar Husain v. Mt Akbari Begum* (ILR (1945) Lah 517: 1944 Lah 336).

to a decree for dissolution unless there is a failure on the husband's part. The Act does not mean that the husband is bound to follow his wife wherever she may go and force money or food or clothes upon her."⁸³⁵ The husband's earlier success in getting RCR against his wife further indicated his readiness to maintain her at his home; thus, he won his appeal. The decision's comments indicate close association of the husband's location with the matrimonial home, and the matrimonial home with the husband's will. The earlier decision against the wife limited her ability to get a dissolution.

In the *Sofia Begum* case from 1947, M.A. Kazmi appeared for the wife and won. In the 1953 case of *Fakharuddin v. Mt. Hamidan*⁸³⁶ Kazmi appeared for the husband and lost.⁸³⁷ Kazmi had originally authored and introduced the DMMA in the Legislative Assembly.⁸³⁸ That he appeared for both a husband and wife, and that the mover of the DMMA could lose a case under it, indicates how different the lawyer's practice was from the politician's. In the arena of keen competition for legal briefs, especially at the start of one's career, paid briefs likely trumped politics as a consideration in whether or not to take a case. By the time one reached the end of a long career like Kazmi's, motivations were likely more varied. Kazmi's position as counsel to both husband and wife—as well as his important role in getting the Act passed—serve as a useful reminder of the differences between legal and political practice in mid-twentieth century India.

Against Kazmi's arguments that the wife was in the wrong—she had left the husband—Justices Agarwala and Mukerji upheld a concept akin to constructive desertion.⁸³⁹ This idea of desertion did not involve the location of matrimonial home *per se*. Rather it looked at the behaviors of the husband in their social context to understand whether he deserted his wife or not. In this

⁸³⁵ *Mt. Shamim Fatma v. Ahmad Ullah Khan*, AIR 1947 All 3 at 4.

⁸³⁶ *Fakharuddin v. Mt. Hamidan*, AIR 1953 All 571. Discussed briefly in Sethi, *Muslim Marriage* (1955), 87 and R.B. Sethi, *Muslim Marriage and Its Dissolution*, 2nd ed. (Allahabad: Law Book Co., 1961), 145. Also in K.N. Ahmed, *A Commentary on the Dissolution of Muslim Marriages Act* (Karachi: Legal Publications, 1955), 28 under the heading "constructive desertion."

⁸³⁷ Kazmi served in the Central Legislative Assembly from 1934-45. He then returned to national service from 1949-50 as a member of the Constituent Assembly. When he took briefs in *Sofia Begum* (1947) and *Fakharuddin* (1953), therefore, Kazmi's primary occupation was likely practicing in the High Courts.

⁸³⁸ Minault, "Women," 7; De, "Mumtaz Bibi," 120.

⁸³⁹ The case is discussed under the heading "constructive desertion" in Ahmed, *Commentary*, 28.

case, the Court allowed dissolution to a wife whose husband did not invite her to return from a visit to her natal family. Instead of locating the matrimonial home with the husband, this decision put forward an idea of social desertion, wherein the husband left his marital duties unfulfilled. This failure gave a good ground to the wife to dissolve the marriage. Although she originally lost before the Munsif, she won her appeals before the Civil Judge and the High Court.⁸⁴⁰

While the DMMA provided wives many grounds for divorce, there were also some limitations. *Badrunissa* (1944) indicated that wives who did not remain with their husbands could not come *bona fide* or with clean hands to the Court. But, if the husband egregiously violated a social expectation as in *Fakharuddin v. Mt. Hamidan* (1953), a two-justice bench saw fit to accept this as his failure and granted a dissolution to the wife. *Sofia Begum* (1947) made it clear that extreme violence of the sort found in that case was unacceptable, but left open the question of the validity of simple chastisement. *Shamim Fatma* (1947) made it clear that courts could not revisit earlier decisions about cruelty. Lower courts' findings on restitution of conjugal rights were barred by *res judicata* from further examination in dissolution suits. Moreover, wives did not have an absolute right to maintenance. The High Courts disapproved of egregious violence and legal harassment but insisted that, in general, the wife had an obligation to remain with her husband.

Marital Defamation Under Anglo-Muhammadan and English Law

Along with apostasy, *laan* proved to be a useful remedy for wives in British India during the 1920s, 1930s, and 1940s. *Laan* allowed wives redress for the husband's false accusations of adultery. Like apostasy, the use of *laan* in this way was recent, drawn from Hanafi law but developed in the British Indian Courts. *Laan* drew on a different dimension of publicity than the wife's act of apostasy—the husband's use of criminal charges under the Penal Code to slander the wife. Criminal

⁸⁴⁰ According to the case history provided in *Fakharuddin v. Mt. Hamidan*, AIR 1953 All 571, para. 2.

charges gave charlatan husbands of all communities an ultimate weapon and a public forum in which to humiliate their wives. The Courts took a strict view against such behavior and in each of the three cases decided in favor of the wife. After the DMMA, *laan* was still valid under the savings provision, but a 1952 decision showed how the Act's broad definition of cruelty made the strict use of *laan* unnecessary. These husbands' tactics were no different than Ram Bharosey's. Whether via claims of equity jurisdiction as in that case, or within the procedure of *laan*, as in the cases discussed here, the UP High Courts adjudged legal harassment as a form of cruelty and afflicted wives deserving of dissolution.

What exactly is *laan*? As the treatise writers saw it, *laan* represented an opportunity for a wife and husband to settle a husband's accusation of adultery against the wife. The most succinct explanation probably comes from Justice Knox's opinion in *Zafar Husain* in 1919:⁸⁴¹

...[W]hen a Mahomedan makes an allegation against his wife and the wife denies the same, both parties can go to the Kazi. The husband, in the presence of the Kazi, four times over repeats his allegation of misconduct before the Kazi, strengthens it by an oath, that oath being accompanied by the use of the word 'laan' or curse of God. The wife gives testimony also four times over and accompanies her testimony by the use of the word 'ghazab.' If either of the persons refuse to make laan the Kazi is to imprison that person who refuses until he or she makes the laan. If both husband and wife have made their respective oaths, etc., the Kazi can effect separation between them.⁸⁴²

This was the formal procedure of *laan*. The 1919 decision confirmed that *laan* was a remedy available to Muslim wives in British India. Under the prevailing legal fiction, the British courts acted as the Kazis. Since they could not imprison the husband, just like in cases of apostasy, the courts granted judicial divorces instead. Once that was established, husbands' legal defenses changed from denying the validity of *laan* to claiming that the accusations were validly retracted so that the courts should not grant a separation to the wife. In so doing, the husband gained another opportunity to repeat his

⁸⁴¹ *Zafar Husain v. Umaat-ur-Rahman*, AIR 1919 All 182. Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Calcutta: Oxford University Press, 1949), 143, is also useful.

⁸⁴² Ibid.

accusations. In her turn, even if the husband retracted his allegations, the wife retained the ability to make a criminal charge of defamation against him.⁸⁴³

Laan only took off as a legal strategy for wives to gain divorces from 1919 onwards with the *Zafar Husain* ruling.⁸⁴⁴ There seems to have been only one nineteenth-century case.⁸⁴⁵ In this way *laan* in the British Indian courts seems similar to the apostasy argument in that it also only gained popularity in the 1920s. *Zafar Husain* may have represented an increase in wives' use of this legal strategy to obtain divorces in the courts or it may have prompted the development of such a trend.⁸⁴⁶

In England, sexual slander was dealt with by the Ecclesiastical courts until 1855. However, Ecclesiastical cases did not usually involve a husband's accusation against his own wife. Waddams's study of Ecclesiastical decisions found only one example of a suit by a wife against her husband.⁸⁴⁷ From 1855, when Ecclesiastical jurisdiction over sexual slander was abolished, until 1891 sexual slander was not legally actionable at all. In 1891, Parliament enacted the Slander of Women Act, "the effect of which was to permit a woman to bring an action at common law for words imputing unchastity, without proof of special damage."⁸⁴⁸ Because the action lay at common law and not at

⁸⁴³ Section 500, IPC. Ghose, *Lawyer's Anglo-Muhammadan Law*, 1935 p. 255.

⁸⁴⁴ The 1894 and 1917 editions of Ameer Ali's treatises did not discuss any judicial decisions, instead relying on textual sources: *Fatawa Alamgiri*; M. Sautayra; *Fatawa Kazi Khan*; *Fusul Imadiya*; *Sharaya*; *Kitab ul Anwar*; D'Ohsson, vol. III; Bishop On the Law of Marriage and Divorce; *Jamaa-ush-Shittat*; *Irshad Allamah*; *Sharaya*. See Ali, *Mahomedan Law*, 4th ed. and Ameer Ali, *Mahomedan law: compiled from authorities in the original Arabic*, 2nd ed. (Calcutta: Thacker, Spink and Co., 1894).

⁸⁴⁵ [1865] 3 *WR* [*Weekly Reporter*] 93, see Ghose, *Lawyer's Anglo-Muhammadan Law*, 254. Spelled in the original decision as *Jaun Beebee vs. Sbeikh Moonshee Beparee*.

⁸⁴⁶ The apparent recent development of the use of this device could have many possible causes that require independent substantiation. For example, did a change in jurisdiction make this a more appealing strategy? Did the number of husbands and wives wanting divorces increase for some reason, perhaps because it was less taboo option in the late 1920s than in the 1880s? Had there always been a large group of Muslim litigants requiring divorce but lacking the means to pursue these in the British Indian courts, and, now, in the 1920s these means were more readily available? All we can say from the limited evidence here is that the High Courts were more likely to address such cases in the 1920s than in the 1880s.

⁸⁴⁷ S. M. Waddams, *Sexual Slander in the Nineteenth-Century England: Defamation in the Ecclesiastical Courts, 1815-1855* (Toronto: University of Toronto Press, 2000), 29-30. In that case, the suit was dismissed because the facts did not fit the complaint. The husband's friend, not the husband, was sued by the wife, but the words were found to be uttered by the husband.

⁸⁴⁸ Waddams, *Sexual Slander*, 187.

Ecclesiastical law, it was more expensive. Notably, men were now excluded from bringing action. And, unlike the pre-1855 Ecclesiastical law, truth was a good defense at common law. In Waddams's estimation, these changes and others made it more difficult for women to bring sexual slander suits in common law courts than it had been in the Ecclesiastical courts.⁸⁴⁹ Apparently under the 1891 statute the wife could sue her husband for sexual slander.⁸⁵⁰⁸⁵¹

In India, the only reported nineteenth century case involving *laan* found the husband's charge of adultery did not provide a good ground for divorce. Even there, the husband's accusations were not really at the crux of the case — he lost because of his failure to pay the wife's dower. The issue of his treatment of the wife ("the allegation of torment by plaintiff and his second wife") required re-examination by the lower courts and so the suit was returned there.⁸⁵² It was *Zafar Husain* in 1919 that made it clear that the wife could get relief on grounds of the husband's false accusation of adultery. *Zafar Hussain* set the rule that the Court would "strictly construe" the husband's retraction, meaning it would subject the husband's retraction to high standards.⁸⁵³ In practice, this would allow decisions in favor of wives without abolishing *laan* entirely. Faiz Hassan Badruddin Tyabji's narrative emphasized that it was the first edition of his 1913 treatise (*The Personal Law of Muslims*) that proposed an actual procedure for *laan* using the Oaths Act of 1873.⁸⁵⁴

After the DMMA came into effect, the Uttar Pradesh High Courts continued to decide cases on *laan*. Specifically, three were reported between 1939 and 1952. Each wife claimed divorce on the

⁸⁴⁹ Another problem noted by Waddams was that "...her prior reputation was relevant to damages, and, as the common law of defamation then stood, prior sexual misconduct could be proved for that purpose." *Ibid.*, 188.

⁸⁵⁰ Would this kind of sexual slander provide good ground for divorce? And, could wives bring defamation suits against their husbands?

⁸⁵¹ In 1832, an Ecclesiastical reform commission recommended creating a sexual slander crime but this was not adopted. Waddams, *Sexual Slander*, 189.

⁸⁵² 1865 *WR* 93. Civil Courts of Kamroop.

⁸⁵³ After *Zafar Husain*, one important resulting legal question was how, exactly, to adjudicate the husband's retraction under different circumstances. Apparently the High Courts differed in their views although the Oudh Chief Court allowed a husband's retraction in *Fakrbe Jaban Begum v. Hamidulla Khan*. Tyabji, *Mubammadan Law*, 241 n. 12, discussion of husband's option of retraction.

⁸⁵⁴ Tyabji, *Mubammadan Law*, 243 s. 194: "The procedure suggested in that work has since been followed by the Courts."

ground of the husband's false accusation of adultery. Each husband put forward evidence of his retraction of the accusation as good reason to deny the divorce. Each of the three High Court benches found in favor of the wives.⁸⁵⁵

That the Courts disallowed husbands' retractions and granted wives' dissolutions is in line with Tyabji's description of how the courts arrogated to themselves the jurisdiction to intervene in favor of wives in general.⁸⁵⁶ Tyabji read this general trend and the specific way the law of *laan* had developed as of a piece with each other. If the husband refused to take any action in the case of *laan*—neither taking the oath nor giving proof of his accusation against the wife—Tyabji argued that “the Court would then be authorized to dissolve the marriage on the ground of justice, equity, and good conscience.”⁸⁵⁷ He justified this by pointing out that, even prior to the DMMA, the Courts gave “declaratory decrees” dissolving Muslim marriages on a variety of other grounds such as the false accusation of adultery, cruelty, desertion, and the husband's disappearance.⁸⁵⁸ Tyabji argued also that the British Indian Courts should consider dissolving a marriage even when the wife was guilty of adultery, suggesting, “It [the Court] may be of opinion that no useful object is served by keeping undutiful wife tied to dissatisfied husband.”⁸⁵⁹ Tyabji's discussion also indicated that the Evidence Act superseded any pre-Evidence Act “Muslim law of evidence.”⁸⁶⁰ He suggested that the

⁸⁵⁵ Ibid., 241 n. 12 E(b) 1928 4 Luck 168.

⁸⁵⁶ Tyabji showed the five “stepping stones” used by the British courts to make *lian* work for wives: first the idea that the husband's imputation of adultery gave the wife a right to divorce; second that the husband's retraction had to meet certain strict requirements; third that the husband did not have to be given an “express opportunity of retraction”; fourth that “compliance with formalities held unnecessary,” a reference to the required series of oaths and counter-oaths, and fifth, that the husband's retraction had to come during the hearing and not upon appeal. This last issue had been at the heart of the husband's case in the 1927 *Fakhre Jegan Begum* wherein the Oudh Court thought the husband acted in good faith in retracting his statements and therefore the marriage was not dissolved. Ibid., 241-3, s. 193.

⁸⁵⁷ Ibid., 243, para. 194. Specifically Tyabji gave the following analysis: “It was said in earlier edition: “if necessary, Court will no doubt call in aid maxim: *boni juicis est ampliare jurisdictionem*, & also reasoning similar to that in *Vadaka Vitol Ismail v. Odaket Birjakutti Umah* (1881) 3 Mad 347.” This has since happened: see s. 210A. Proceedings of like nature not unknown in Eng.: *William v. Innes* (1808) 1 Camp. 364; *Daniel Pitt*, *ibid.* 366 n.t. *Lloyd v. Willan* (1794) 1 Esp. 178; *Price v. Hollis* (1813) 1 M&S 105.”

⁸⁵⁸ Tyabji, *Muhammadan Law*, 249-50, para 210A and footnotes 5 and 6.

⁸⁵⁹ Ibid., 242-3, n. 21.

⁸⁶⁰ Ibid., 241-2 n. 14.

husband could attempt to block the dissolution by proving his charge under the terms of the Evidence Act.

Like Tyabji, Kashi Prasad Saksena critiqued Anglo-Muhammadan law in his 1937 treatise, published from Lucknow. *Laan* was one of the seven topics treated in Saksena's section on "Decisions of Doubtful Authority by the British Indian Courts."⁸⁶¹ Mulla's treatise—authored by George Rankin⁸⁶²—seemed to agree with this point though it lacked the extensive editorializing of Saksena's treatment.

After the DMMA, the High Courts continued to emphasize that the husband had limited rights of retraction. Between 1939 and 1955, the UP High Courts heard three cases. The first, *Banno Begum*, set a requirement for the husband to act *bona fide* in his retraction. The *Kaloo* case established that the DMMA did not allow the husband to retract at all. The 1952 *Abbas Ali* decision allowed husband's criminal charges against the wife to be brought under the DMMA's category of cruelty. This indicated that the cruelty category was quite broad; it obviated the need to enter into the intricacies of the procedure of *laan*.

In *Banno Begum* the husband criminally charged his wife's alleged adulterer. Banno Begum, his wife, claimed this was a false accusation of adultery and good ground for divorce under the DMMA. The husband criminally accused one Chhotey of "keep[ing] my wife as his own wife."⁸⁶³ Later the husband recanted this accusation in order to ward off his wife's maintenance claim. But

⁸⁶¹ The others were legitimacy, *batil* and *fasid* marriages, remission of dower, option of puberty, equality [of marriage], and alienation by a *de facto* guardian. According to Saksena, the British Indian courts had "been led away by the idea of false accusation" when in fact "according to the Muslim system of jurisprudence, it matters little whether the accusation is false or true, the important point being the taking of the prescribed oaths of *li'an*." He argued that the British Indian courts were concerned with the question of *false accusation of adultery* and the husband's *retraction* of such a false charge but the real concern of *laan* was the sacral oaths. Saksena took this confusion seriously and concluded his section on this topic by stating that because *li'an* effected legitimacy and dower it "should be treated as part of the Anglo-Muslim Law and all its provisions be fully enforced." Saksena, 60. Saksena's fn. 1 points to Dr. M.U.S. Jang's dissertation "The Muslim Law of *Li'an*." I have not attempted to trace this text or figure.

⁸⁶² D. F. Mulla and George C. Rankin, *Principles of Muhammadan Law*, 11th ed. (Calcutta: The Eastern Law House, 1938), 241.

⁸⁶³ Quoted in *Banno Begum v. Inayat Hussain*, AIR 1948 All 34 at 35.

the Justice set a high standard for the Court to accept the husband's retraction. His standard included such benchmarks as "honest admission that the accusation was false,"⁸⁶⁴ "genuine or honest" withdrawal that would result in a "vindication of the honour of the wife,"⁸⁶⁵ or a "frank withdrawal of the charge."⁸⁶⁶ Here the husband acted *mala fide* and the wife got her dissolution. In this case, the key legal issue was the procedure of *laan*: its existence as well as the high standard for the husband's recantations, both validated by *Zafar Hussain* in 1919.

Decided the following year, *Kallo v. Mt. Imamam*⁸⁶⁷ addressed in more specific detail the position of a husband's retraction under the DMMA. The single-Justice bench found that the DMMA entirely did away with the husband's right of retraction under *laan*. As in the previous case, the husband accused the wife of adultery, and then waited until she sued for dissolution to retract his accusation. She lost her suit before the trial court because it deemed her husband's retraction sufficient.⁸⁶⁸ But on appeal, first the Civil Judge in Orai and then the High Court found for the wife.

The husband's appeal before the High Court turned on the savings provision of the DMMA, which allowed dissolution on "any other ground which is recognized as valid...under Muslim law."⁸⁶⁹ The husband's lawyer argued the savings provision included the entire procedure of *laan* "even as regards retraction." In other words, the full procedure of *laan* was still intact and a husband who retracted did not have to succumb to the wife's divorce suit.⁸⁷⁰ *Banno Begum* had not engaged this second question, instead finding the husband's retraction invalid.

⁸⁶⁴ *Ibid.*, 36, para 8.

⁸⁶⁵ *Ibid.*, 36, para. 10.

⁸⁶⁶ *Ibid.*, 36, para. 11.

⁸⁶⁷ *Kallo v. Mt. Imamam*, AIR 1949 All 445 at 447-8 para 10 and 14.

⁸⁶⁸ The trial court found that the husband's retraction was valid because an accusing husband had "*locus penitentia* either to affirm or deny the imputation alleged to have been made by him" until the taking of evidence in the dissolution suit was closed. In other words, the husband had a long timeframe—until the closing of evidence-taking in the dissolution suit—to withdraw his retraction. As the High Court later noted, a 1943 Peshawar case also reached this conclusion: *Mian Said Ahmad Jan v. Mt. Sullan Bibi*, AIR 1943 Pesh 73. This is discussed in paras. 3 and 13 *Kallo v. Mt. Imamam*, AIR 1949 All 445. In other words, according to the Civil Judge, the DMMA took over the entire field of Muslim marriage dissolution in India; previous substantive remedies or procedures were now only valid if included in the DMMA.

⁸⁶⁹ The Dissolution of Muslim Marriages Act, 1939, s. 2(ix).

⁸⁷⁰ *Kallo v. Mt. Imamam*, AIR 1949 All 446, para 4

In *Kallo v. Mt. Imamam*,⁸⁷¹ Justice Ahmed reasoned “[t]he formality of *laan*, if strictly observed, embraces a number of declarations which appear to have been deemed as too artificial in modern society, and that is why we find no provision in our statute as preserving any of those rules.”⁸⁷² While the overall position is similar to Tyabji’s, the specific terminology of the mismatch between oaths and the modern society seem to have been Justice Ahmed’s own.⁸⁷³ He neatly skirted around the issue of *laan* by reclassifying the husband’s multiple charges of criminal behavior not as a “false accusation of adultery” but rather as legal cruelty.

In Justice Ahmed’s analysis, the DMMA neglected to provide a procedure for retraction by the husband. But, the implication of this fact was not that all retractions were valid, as the husband would have it. Instead, it indicated that the legislature did not intend to provide for the husband’s retraction at all. The nineteenth-century Indian Evidence Act had already “preempted Muslim rules of procedure.”⁸⁷⁴ The Evidence Act was a “complete enactment,” with the DMMA coming decades later to fill in certain gaps. Supporters of the DMMA’s reforms like Maulana Ashraf Ali Thanavi might have disagreed with this interpretation of the place of Muslim procedure in British India because it suggested Hanafi law was largely invalid. Ahmed’s judicial reasoning, however, supported the wife’s case and the soundness of her authorities. Significantly this was later rejected in 1962 (as discussed in the next chapter).⁸⁷⁵

After the 1950 Constitution, *Abbas Ali* was the first published decision involving *laan*. Justice Bhargava entirely avoided *laan* by reclassifying the husband’s multiple criminal charges directly as cruelty under the DMMA. Cruelty was broadly interpreted to include the husband’s legal harassment. In this case, the husband’s behavior was extreme, extending to seventeen criminal

⁸⁷¹ Ibid., All 445 at 447-8, para 10 and 14.

⁸⁷² Ibid.

⁸⁷³ Specifically Tyabji stated “inter-mixture of adjective & substantive law may be too close to admit of proof of infidelity in any other mode than in compliance with the strict requirements of Islamic law of evidence; but whether this is so, must surely be adjudicated upon by the Courts as matter of law.” Tyabji *Mubammadan Law*, 241-2 n. 14.

⁸⁷⁴ *Kalloo v. Mt. Imamam*, AIR 1949 All 445 at 447-8, para.12.

⁸⁷⁵ *Tufail Ahmed v. Jamila Khatun*, AIR 1962 All 570.

charges against the wife including charges under Indian Penal Code s. 494 (bigamy) and 497 (adultery). He claimed that as he withdrew these charges, this constituted a valid retraction and therefore his wife's dissolution suit should be denied.

Given the husband's egregious behavior, the High Court unsurprisingly rejected this argument. Specifically, Justice Bhargava wrote, "The act of bringing a criminal complaint in Court against a wife and dragging her into Court as an accused can be considered as a circumstance constituting legal cruelty irrespective of the nature of the criminal complaint."⁸⁷⁶ Therefore an extended discussion of *l'aan* was not necessary as the husband's behavior was clearly cruel. Justice Bhargava stated this rule should apply to other cases: "In all such cases, the fact of bringing a criminal complaint and dragging the wife into Court as an accused can still be considered for the purpose of holding whether the life of the wife has been made miserable by the husband or not."⁸⁷⁷ In contrast to the pre-Constitution cases, this decision did not cite any other precedents - only the DMMA.⁸⁷⁸ The Justice neatly skirted the issue of *laan* by reclassifying the husband's excessive charges of criminal behavior not as a "false accusation of adultery" but rather as legal cruelty in itself. Notably, this decision was very similar to Ram Bharosey's case. The husband's criminal charges indicated his *mala fide* intentions and constituted cruelty in themselves.

The High Courts decided for the wives in all three of the appeals involving a husband's false accusation of adultery. This indicates their dim view of such public attacks on wives' honor and of husbands' continued harassment. The High Court pursued a different line of reasoning in each of the three appeals. The last decision examined here suggested that *laan* was no longer relevant with the DMMA's passage. The contortions undergone to preserve this remedy no longer mattered and in *Abbas Ali* a husband's legal harassment was deemed cruelty. But whether examined under a sort

⁸⁷⁶ *Abbas Ali v. Mt. Rabia Bibi*, AIR 1952 All 145, para 4.

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Ibid.*

of UP common law as in *Ram Bharosey*, the Anglo-Muhammadan law of *laan*, or the DMMA's cruelty provision, public accusations against the wife counteracted husbands' legal vindictiveness and barred him from his desired legal relief.

Representativeness

As already noted, the High Court cases examined in these chapters were significant as statements of law by the highest courts but were, by their very nature, unrepresentative. Only appeals that raised thorny points of law would be heard by the High Courts and only significant decisions on those legal questions would be published in the *All India Reporters*. Without a thorough sample and survey of lower court matrimonial litigation, it is difficult to state the extent to which the cases presented here represent litigation in the lower courts in the same period. And, even if such a survey were carried out, it would likely not provide much insight into how the vast majority of couples resolved matrimonial disputes using informal or quasi-legal means. Thus this study has not purported to reflect the state of marriage in UP but rather to reflect the state's legal position on marriage in the relevant period. That said, a chance find in the UP State Archives allows for some analysis of the extent to which the cases presented in this chapter were representative.

In 1950, in the Uttar Pradesh State Assembly, Mohammad Asrar Ahmad asked the Government of UP how many people had applied for marriage dissolutions and, out of these, how many of these went to court and, out of those, how many applications had been made by women and how many by men.⁸⁷⁹ This prompted the state government to write to all District Judges to reply with the relevant statistics. Notably, Ahmad did not ask about the religious community of the applicants nor did most of the District Judges (hereafter DJs) reply with this information, though a few did.

⁸⁷⁹ UP State Archives, Judicial (A), File No. 17AQ/50, "Assembly Question No. 28 regarding the "dissolution of marriage ties" asked by Shri Mohd. Asrar Ahmad MLA."

Across the state's twenty-nine districts, 1296 applications for dissolution of marriage were filed in 1948 and 1949. Only fifty-one of these were filed by husbands and the other 1245 by wives. The Government's tabulated results showed the various grounds on which such applications were filed. There were twelve categories it considered. The first ground contained the most applications by a drastic margin: 1109 applications for dissolution were filed on the ground of cruelty, misbehavior, and neglect. The second most popular ground was "immorality of husband" with forty-eight applications.⁸⁸⁰ This suggests that wives and their lawyers saw these grounds as the easiest way to dissolve a marriage. That they were largely successful should not obscure one of the larger points of this dissertation: just because a wife could obtain marital redress on the ground of cruelty, courts condemned matrimonial violence wholesale. In many cases, as the High Court cases have shown, the category of cruelty was widened to include easily provable offenses such as legal harassment or adultery. The forty-one applications by husbands cover the following three grounds: immorality of wives (38), refusal to come with the husband (7), and misbehavior by wives (6). For this last group, there were six cases, four from Farukhabad alone. This suggests perhaps a particular lawyer met with success with this legal strategy or a particular judge was known for granting dissolutions on this ground.

Four districts together accounted for 534 of the 1296 applications *in toto* and for 498 of the 1245 applications filed by wives: Meerut, Kanpur, Moradabad, and Aligarh. The number of husbands in this group is negligible except in Kanpur. Kanpur was unusual because it had a large number of cases from husbands compared to other districts—it had twenty-one applications filed by husbands all on the ground of the "immorality of wives." Oddly, a large number of wives in Kanpur as well applied for dissolution by accusing their husbands of unnatural offenses—there were forty-

⁸⁸⁰ The other potential grounds listed by the Government in its tabulated results were desertion or inability to maintain; refusal by woman after attaining majority; insanity; impotency; immorality of wives; refusal to come with husband, etc.; misbehavior by wives; of unbecoming features; of committing unnatural offence; leprosy.

five such applications on this ground in the whole state in the period with forty-one from Kanpur alone and four from Fatehpur district.⁸⁸¹

Because data were not consistently reported, it is difficult to get a nuanced view of the range of actions that the lower courts viewed as cruelty. We can make some observations, however. Again, by far most of the applications for dissolution were filed based on the husband's "cruelty, misbehavior, or neglect." But each district reported its data differently. For example, Basti and Barabanki Districts both reported wives filing cases against their husbands "on account of torture" (Basti) or because their husbands "neglected them and put them under tortures" (Barabanki). Ghazipur used the category of "misbehavior and ill treatment" and Budaun listed the ground as "men were of immoral character and used to harass their wives in some way or another." In Saharanpur the parallel category was "cruelty, drunkard, and harsh statement." The variety of ways in which husbands' behavior was described shows the general constellation of behavior courts and litigants deemed unacceptable. It also shows the extent to which judicial discretion operated at the local level in adjudging such behavior as well as in deciding how to report it. As such cases made their way through the appeals process, the fine-grained details of individual behavior were lumped into the larger category of cruelty.

Most of the districts did not report whether the applicants won or lost their dissolution suits. However, a few districts did report this information. This data was not reported in the tabulated results presented by the state government but I was able to cull it from the individual responses that each District Judge sent to the state. In Basti District, twelve total applications were reported and data on the outcomes of ten of these was given. Of these ten, only three went to a full trial: two were decided in favor of the husband and one for the wife. Five were "decided otherwise" (meaning perhaps a compromise) and two remained pending. In Kumaun, one Christian wife applied for

⁸⁸¹ Such analyses could continue but my reading of the file suggests that the data are muddled because each district categorized their cases differently.

dissolution but later withdrew her suit. And in Rampur there were eight suits, of which four were pursued to the end by the time of the data reporting. Of these four, a wife won definitively in only one case. In two of the remaining three, one suit was dismissed in default; one was decided in favor of the husband. Another suit was also dismissed because the judge seemed not to accept the wife's ground that she and her husband were within prohibited degrees of each other.

Based on this very limited data, it is possible to surmise that wives filed the vast majority of suits but did not always win them. These data would suggest that wives lost in most cases, because in those suits for which we know the outcomes, seven total went to trial and wives won only two of these. However, if we turn to the four cases from the High Courts studied in the first part of this chapter (*Sofia Begum*, *Shamim Fatima*, *Banno Begum*, and *Kallo*) and examine the record before the lowest courts, we see that three wives won their suits. Again acknowledging the limitations of the data, it still seems plausible to conclude that wives had better chances of winning than their husbands did. And this observation is strongly bolstered by the fact that almost all of the dissolution applications were filed by wives, so it seems likely that they and their lawyers thought they had reasonable chances of winning, perhaps even better than the limited data above would suggest. Perhaps the editors of the *Reporters* felt a duty to reform Indian society and published decisions that provided clear pathways to victories for wives and that condemned husbands' bad behavior. Yet the admittedly limited data here also suggest that if a wife did lose her suit in the trial court, her best chance was to appeal it to the High Court, where she had a much better chance of winning. Even then, the High Courts did not condemn all marital violence, finding ways to rule in favor of wives without fundamentally challenging husbands' dominion over them.

Conclusion

This chapter has traced out the development of matrimonial litigation under the DMMA. It examined the forms of matrimonial redress available under Anglo-Muslim law prior to the Act and then explained how the Act delineated in far greater detail than before the various grounds that women could petition for a divorce under Muslim law. It showed how litigants used— and not used — the new Act: the specific availability of a cruelty provision under which wives could claim divorce did not lead to an efflorescence of cruelty litigation. Rather, the pattern of the courts looking at the totality of the husband's behavior and focusing on easily provable offenses such as adultery and *laan* proved to be more effective for wives pursuing divorce. Nonetheless, effectiveness did not necessarily translate into guaranteed success: based on my research, women could often lose dissolution cases and husbands' dominant role within the marriage was generally upheld.

On the one hand, the DMMA marked the continued religious-ization of Indian marriage law. Its delineation of cruelty generally consolidated the ways in which Indian law dealt with marital cruelty to that point. The next chapter turns to the 1955 Hindu Marriage Act (HMA), which played a similar role for Hindu law. It both codified the law of cruelty in marriage (for Hindus) and marked the continued religious-ization of marriage law. Adjudication under each statute was structured by the long chains of precedents under several pre-existing bodies of law, including restitution of conjugal rights and maintenance law. Adjudication under each statute was uneven, with the new statutes' clarifications no guarantees of wives' successes in gaining marital redress. The DMMA and the HMA marked a to a new era of Indian-legislated, post-British statutes. Sometimes these statutes are seen to rest uneasily with India's Constitution because religiously-differentiated marriages laws are viewed as a perceived violation of secular standards. These statutes and others do, in my view, sit uneasily with the Constitutional regime. However, this is not so much because of their marking of

the female citizen as Hindu or Muslim but because of their marking the citizen as a wife. This chapter and the next show that in applying the new Hindu and Muslim statutes, the English model of husband-located residence, commitment to preserving the marriage tie, and the husband's physical, social, and sexual rights over his wife structured marriage adjudication in both Hindu and Muslim law.

Figure 2. Muslim Marital Redress Before and After the DMMA 1939

Marital Redress Prior to the DMMA

Husband initiated dissolution

- i)* the husband-initiated form of talak

Wife initiated divorces

- ii)* mubarat
- iii)* khula
- iv)* delegated talak
- v)* option of puberty

Other forms of redress

- vi)* separation and dower claims

Forms specific to late colonial India

- vii)* divorce by apostasy

- viii)* judicial divorce
 - a. I'aan
 - b. impotence

Section 2 of the DMMA 1939:

Nine grounds for divorce

- i. husband not heard from for four years or more
- ii. neglect or failure to provide maintenance for two years or more
- iii. husband sentenced to imprisonment for seven years or more
- iv. husband failed to perform marital obligations for three years or more
- v. impotence
- vi. insanity for two years or more; leprosy; virulent venereal disease
- vii. the wife's exercise of her option of puberty if she were married prior to age 15
- viii. cruelty (see Cruelty under Section 2(viii) below)
- ix. a catch-all provision: "on any other ground which is recognized valid under Muslim law"

Cruelty under Section 2(viii)

- a. husband habitually assaults her or makes her life miserable even if such conduct does not amount to physical ill-treatment
- b. associates with women of evil repute or leads an infamous life
- c. attempts to force wife to lead an immoral life
- d. disposes of her property or prevents her exercising her legal rights over it
- e. obstructs her in observance of religious practice
- f. does not treat wives equally if he has more than one

Chapter Six

Matrimonial Litigation after the Hindu Marriage Act In Uttar Pradesh, 1956-72

Introduction

This chapter examines how courts decided matrimonial disputes in Uttar Pradesh after the passing of the Hindu Marriage Act (HMA) in 1955. The Hindu Marriage Act was part of the Hindu Code, a series of four statutes enacted in 1955 and 1956. The Code, a package of four laws, sought to establish a uniform and comprehensive set of laws related to marriage, divorce, inheritance, adoption and maintenance for Hindus.⁸⁸² “[A]nomalies and uncertainties” resulting from the 1937 Hindu Women’s Rights to Property Act led the Government to appoint the Hindu Law (Rau) Committee in 1941. The Rau Committee called for the codification of Hindu law in stages. The first proposed bills were published, circulated for opinion and introduced in the Legislative Assembly in 1942 and 1943.⁸⁸³ Thus began the effort for the codification of Hindu law, which would traverse Independence and Partition and lead to Dr. B. R. Ambedkar’s resignation as Law Minister in 1951 before the Code was passed in 1955. The Hindu Code was passed by the Indian Parliament around the same time as the Indian Citizenship Act, discussed in Chapter One. The Hindu Marriage Act unequivocally lifted the prohibition on divorce in Hindu personal law. Prior to the HMA, many communities could argue that their community allowed divorce under customary law and receive

⁸⁸² The Hindu Code includes the Hindu Marriage Act, passed in 1955, and the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act, all passed in 1956.

⁸⁸³ See Appendix 1, Resolution No. F-208/1/43-C & G in Hindu Law Committee, *Report of the Hindu Law Committee* (Delhi: Manager of Publications, 1947), 40.

endorsement for divorces in the courts. To do so they had to bring forward evidence of the custom to the courts. Now the HMA made it clear in no uncertain terms that any Hindu could obtain a divorce. Though the Hindu Women's Rights to Property and Separate Residence Act of 1946 came close to this position by allowing separate residence and maintenance, it stopped just short of divorce, instead preserving the marriage tie. The HMA replaced these half-measures with a rule that all Hindu wives could divorce on a variety of grounds. Along with divorce (s. 13), the HMA also outlined a procedure for judicial separation (s. 10) and a procedure for restitution of conjugal rights (s. 9).

This chapter studies how the Hindu Marriage Act and the Hindu Adoptions and Maintenance Act fared alongside other statutes as they were used by litigants in the Uttar Pradesh (UP) courts. The HMA was, like the DMMA, yet another effort to create a clear uniform legal code to regulate marriage and the consequences of its dissolution. Yet, the HMA co-existed alongside earlier laws and precedents that litigants could invoke and to which judges could turn. Moreover, states like Uttar Pradesh sought to modify this national legislation. I argue that the fate of the HMA in Uttar Pradesh was unique in all of India. Seven years after its passing, UP availed of its powers over personal law to amend the Act to make it easier to get a divorce. The UP changes to the HMA were only emulated with similar national changes fourteen years later. Uttar Pradesh, then, served a pathbreaking role as the one state to enshrine women's total access to divorce, and thus their autonomy vis-à-vis marriage, in the new Indian nation. Thus, while HMA was a key benchmark in the creation of a uniform family law, it also served as a means for individual states to go beyond it in enshrining women's rights into law.

The sources for this chapter are the UP appellate High Court decisions on matrimonial disputes between 1956 and 1972. All told, there were forty-three such decisions.⁸⁸⁴ Twenty-three of these came under the new HMA and four came under the new Hindu Adoptions and Maintenance Act (HAMA) of 1956. Eleven came under the Code of Criminal Procedure's (CCrP) maintenance provisions. Four came under the Dissolution of Muslim Marriages Act (DMMA) and one on restitution of conjugal rights (RCR) under the Civil Procedure Code. However, this breakdown is not fully reflective of the course of matrimonial litigation because disputes included both a husband's RCR suit and a wife's maintenance claim or other similarly complex configurations. Also, many of the HMA cases involved minor procedural issues about the wife's rights to maintenance *pendite lite* during the course of HMA proceedings or the correct forum for the HMA suit. This chapter has two main and related purposes. First, the chapter studies the impact of the HMA had on wife's rights and on cruelty jurisprudence. Second, it seeks to understand the local dimensions of marriage law in UP. Why was Uttar Pradesh the state that amended the HMA to make it easier to get a divorce in UP in 1962? What was it about its particular local configurations that compelled it to be more far-seeing than other Indian states?

Despite the advent of the HMA, matrimonial disputes continued along much the same patterns established in the prior chapters. I argue even as the courts widened their view of cruelty to give greater weight to psychological cruelty, they refused to confront the sexual and physical violence allowed by the marriage tie. In fact, the medicalization of marriage led courts sometimes to engage in traumatic examinations of the intimate details of wives' physiology and sexual lives in open court. While the burden of proof generally plagued wives' accusations of physical and sexual cruelty, courts resorted to invasive medical examinations of wives.

⁸⁸⁴ This includes one appeal to the Supreme Court of a court originating in the Allahabad High Court as well as a constitutional challenge to the HMA in that court, decided first by a single judge bench and then a Division Bench.

Husbands used RCR suits to attempt to repel wives' maintenance suits though Hindu husbands did so under the new HMA instead of under the Civil Procedure Code. They also sought judicial separation and divorce. There were twelve such cases. Wives used the HMA far less frequently: three times to attain judicial separation or divorce and once to attain RCR. If appellate court records are any indication, wives preferred to use maintenance claims to attain redress. They were often put in the position of using the HMA to repel their husbands' attempts at separation. In such cases, they had to claim cruelty and other marital wrongs in order to preserve the marriage.

Social offenses were the easiest for wives to prove. The most important ground for wives to claim redress continued to be the husband's bigamy. The courts heard false imputation of unchastity cases as well. However, in the 1960s, two separate cases determined husbands' retractions of such accusations and took away wives' ground to claim redress.⁸⁸⁵

Despite the advent of the Hindu Code, and the opposition to it from Hindu conservatives who sought to protect Hindu law from state intervention and reform, the distinctions between religious laws were not terribly significant. The definition of cruelty, as the courts interpreted it and applied it to the litigants' circumstances, drew on new statutes as an additional layer on top of the legal-historical definitions of cruelty developed over long decades of litigation in the UP High Courts. They drew on diverse sources, such as previous Indian courts' decisions on cruelty, English appellate court rulings, and English statutes. Cases involving Hindu litigants also defined cruelty with reference to the Dissolution of Muslim Marriages Act, and an important case on the DMMA drew on precedents involving Hindu litigants.

This chapter is organized in four sections covering seventeen of the forty-three cases surveyed. The first section examines six cases in which wives won. The second section examines six cases in which wives lost. The third section examines two cases in which community arbitration and

⁸⁸⁵ *Tufail Ahmad v. Jamila Khatun*, AIR 1962 All 570, and *Smt. Prabhawati Devi vs. Radhey Shyam Tripathi*, AIR 1965 All 598.

compromise played an important role, showing that the new statutes overlaid community dispute resolution systems. The fourth section examines the development of the 1962 UP Amendment to the Hindu Marriage Act by studying the debates over the Amendment in the UP legislature as well as litigation under the Act.

Restitution of Conjugal Rights Cases in which the Wife Won

A 1965 case decided by the Allahabad High Court, *Kusum Lata v. Kampta Prasad*, addressed the question of a husband's cruelty to his wife.⁸⁸⁶ The husband used the HMA to pursue RCR against his wife while the wife used the HMA to seek a judicial separation. The wife claimed that the husband had falsely accused her of unchastity, neglected her when she needed medical treatment, and forced her into nonconsensual sex.

The trial court dismissed each spouse's petitions. The wife's allegations were not sufficiently proved and her judicial separation suit was dismissed. The trial court also found the husband's behavior had given the wife "an apprehension that if she lived with her husband she would be criminally neglected and colossal indifference on the part of the husband would lead her one day to the grave."⁸⁸⁷ She had good reason not to live with him. The trial court's finding was incongruous. If the husband was sufficiently cruel for the wife to avoid a RCR order, then he was sufficiently cruel for her to obtain judicial separation. The wife appealed her loss in the judicial separation suit to the District Judge. The District Judge agreed with the trial court that the wife had not proved the husband's cruelty.⁸⁸⁸

The wife appealed to the High Court. The wife made two arguments. First, the husband lost his RCR suit, and the facts and findings in that case were *res judicata*: the lower court had determined

⁸⁸⁶ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280.

⁸⁸⁷ *Ibid.*, para. 2.

⁸⁸⁸ *Ibid.*, para. 3.

the husband was sufficiently cruel to bar a RCR suit, the husband had not appealed that finding, and now the question of facts could not be re-opened before the High Court. Second, the two lower courts had not properly determined the meaning of cruelty under section 10 of the HMA.

The High Court sided with the wife, drawing on diverse sources to bolster its interpretation of cruelty under the law. The ruling's discussion showed that while the HMA was an important addition, it did not exist in a vacuum. Cruelty need not be only physical; it could also include psychological cruelty. The ruling reviewed the HMA's definition that to achieve judicial separation, cruelty must "...cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party."⁸⁸⁹ The ruling compared this definition of cruelty with other definitions. One was located in two late nineteenth century decisions in *Russel v. Russel*.⁸⁹⁰ In *Russel*, cruelty was defined to mean, "there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it..."⁸⁹¹ The Justice also turned to the Dissolution of Muslim Marriages Act to bolster his position, stating that the DMMA "contains a definition of cruelty which includes cruelty by conduct 'even if such conduct does not amount to physical ill-treatment.'"⁸⁹² The Justice noted the DMMA played an important role in expanding the definition of cruelty to "cruelty by conduct" or psychological cruelty. The HMA "could not be held to lay down a more restricted definition of cruelty than can be found in the case of [*Russell v. Russell*] decided at the end of the 19th century, or in the DMMA, unless such an intention was clear from the words used in the statute itself."⁸⁹³ Such older definitions should be used in interpreting the new law

⁸⁸⁹ *Ibid.*, para. 10.

⁸⁹⁰ *Russell v. Russell*, 1895 P. 315 at 322 and *Russell v. Russell* 1897 AC 395 at p. 430.

⁸⁹¹ *Russell v. Russell*, 1895 P. 315 at 322, quoted in *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 12. The Justice noted, "The importance of this definition [found in *Russell v. Russell*] for us is that it was adopted and applied by our High Courts to cases under the Indian Divorce Act" as in *Baron v. Baron* (AIR 1959 All 516 at p. 518).

⁸⁹² *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 12.

⁸⁹³ *Ibid.*, paras. 12, 13. The Justice pointed out that the HMA's definition of cruelty was "somewhat more advanced" than the *Russell* definition "inasmuch as the mental condition and the temperamental qualities of the petitioner, depending partly upon the background, the psychological make up, and other facts and circumstances peculiar to the

of cruelty under the HMA. The Justice noted the Indian Parliament was surely aware of these definitions when it drafted and enacted the new act.⁸⁹⁴ The High Court encouraged the lower courts to consider psychological considerations of cruelty claims. It even encouraged parties in matrimonial litigation or the courts to consult with psychiatrists.⁸⁹⁵ Similar language was used by the High Court in a wife's suit for maintenance. She could not quite prove physical cruelty but the High Court opined,

Where evidence of physical violence is not per se sufficient to warrant a finding of cruelty the Court is bound to take into consideration the general conduct of the husband towards the wife and if this is of a character tending to degrade the wife, and subjecting her to a course of intense indignity injurious to her health, the Court is at liberty to pronounce the cruelty proved.⁸⁹⁶

In the present case, given the broad definition of cruelty, the Justice deemed the husband's false accusations of unchastity against the wife cruelty. The husband accused the wife of unchastity in his testimony in court and in a letter he sent to her. He used her unmoored status to allege her immoral behavior and call her respectability into question.⁸⁹⁷ The ruling turned to the discussion of false accusations of adultery found in *Abbas Ali v. Mst. Rabia Bibi*,⁸⁹⁸ a case on false accusation of adultery discussed in the previous chapter. Cruelty jurisprudence, even after the HMA, drew on diverse sources of law not limited by any religious community. Based on all of these sources, the High Court

petitioner, may have to be taken into account." He found further support for this in a similar statement in a 1963 book on English matrimonial law.

⁸⁹⁴ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 12.

⁸⁹⁵ *Ibid.*, para. 29. The judge encouraged this even though "competent psychiatrists...are, unfortunately, very scarce in this country." The High Court pointed to a Kerala High Court decision that "The harm apprehended may be mental suffering as distinct from bodily harm, for, pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife, by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person." *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 30, citing *Sarah Abraham v. Pyli Abraham*, AIR 1959 Ker 73 at p. 78.

⁸⁹⁶ *Smt. Pancho v. Ram Prasad*, AIR 1956 All 41, para. 3. In that case, the wife also had a ground under HSRMA because of her husband's second marriage. The High Court deemed the HSRMA to have retrospective effect.

⁸⁹⁷ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 16. For example, the husband's petition before the court stated, "The separate and independent living at various places" was "objectionable" for the husband, "who belongs to a very respectable family."

⁸⁹⁸ *Abbas Ali v. Mst. Rabia Bibi*, AIR 1952 All 145

thought that false accusations of cruelty fit into the “modern view of cruelty of one spouse to another.”⁸⁹⁹

Easily proven social offenses allowed wives to win their suits most often, as in this case. The judge prioritized the husband’s false accusation of adultery in finding against him. It was harder for the wife to prove other aspects of her husband’s cruelty and the judge doubted her proof. Though the High Court found the husband guilty of falsely accusing the wife of unchastity, it noted that accusations of social offenses were sometimes plagued by the problem of proof. The High Court argued for sensitivity to spouses’ individual dispositions: “If the complaining spouse was quite insensitive to a particular kind of insult of accusation, which may cause a nervous break down to another spouse, the test to be applied in the case of such a spouse will be different.”⁹⁰⁰ In this case the husband’s false accusations of adultery were designed to harm and intimidate the wife and the accusations had a negative impact on her. The High Court reprimanded the trial court, stating, “In such cases, there is usually some exaggeration, sometimes considerable exaggeration by each side. It is, therefore, particularly necessary for courts to be careful so as not to allow the fact that mountains were made out of some molehills to induce a belief in them that even the mountains are molehills.”⁹⁰¹ The judge’s point was that even if some of a wife’s claims were exaggerated, not all of them necessarily were.

The wife’s second charge against her husband was that he neglected her by not taking her for medical treatment when she was sick. The trial court had not accepted this as cruelty in the husband’s RCR suit, claiming the wife was exaggerating.⁹⁰² The doctors who examined the wife for the purpose of the trial also found that the child of the couple was “undernourished.” The trial

⁸⁹⁹ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 18. Halsbury’s Laws of England also noted that a judge could consider “The impact of the personality and conduct of one spouse on the mind of the other.” Here the Justice was citing *Halsbury’s Laws of England*, vol. 12, 3rd ed., 270 para. 516.

⁹⁰⁰ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 21.

⁹⁰¹ *Ibid.*, para. 23.

⁹⁰² *Ibid.*, para. 25.

court discounted this, blaming the child's malnourishment on parental ignorance rather than willful maltreatment.⁹⁰³ It did not count this against the husband. While the High Court condemned such lower courts' treatment of the wife's testimony as too hurried to discount the wife's claims, it also argued that "There are other instances in which the complaints made by the wife may have been rather exaggerated and unjustified, in a way in which feminine complaints can often be, but the remarks passed by the courts below appear to me to be both improper and unjustifiable."⁹⁰⁴ Here the High Court gave some credence to the position that wives would exaggerate, but also criticized the lower courts for taking this presumption too far.⁹⁰⁵ In so doing, it minimized its recognition of the harm claimed by the wife. It also echoed the courts' bias in rape cases that women are prone to exaggeration and regularly make false accusation of rape.⁹⁰⁶

The problem of proof also plagued the wife's accusations of sexual mistreatment in the lower courts. The High Court took her allegations seriously. It framed the issue medically, focusing on the wife's health and pregnancy. The High Court looked at the evidence and noted that the husband insisted "upon having sexual intercourse with his wife, about a month after childbirth, so that she became pregnant again."⁹⁰⁷ The High Court avoided the language of rape or sexual assault and instead argued sex was dangerous because pregnancy was not medically recommended so soon after childbirth. The trial court found that "even if she had some objection to having any sexual intercourse with her husband soon after the birth of a child to her, the insistence of the husband upon such intercourse does not amount to cruelty in the eye of law."⁹⁰⁸ The High Court noted that the first appellate court "has, very lightly, dismissed this matter by observing that all young and

⁹⁰³ Ibid., paras. 25-6.

⁹⁰⁴ Ibid., para. 28.

⁹⁰⁵ Ibid.

⁹⁰⁶ Durba Mitra and Mrinal Satish, "Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India," *Economic and Political Weekly* 49, no. 41 (October 11, 2014): 53-4; Flavia Agnes, "To Whom do Experts Testify? Ideological Challenges of Feminist Jurisprudence," *Economic and Political Weekly*, 40, no. 18 (April 30, 2005): 1859-66.

⁹⁰⁷ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 27.

⁹⁰⁸ Ibid.

newly married husbands are liable to indulge in sexual relations with their wives rather excessively.”⁹⁰⁹ The High Court condemned such views, stating they were “...completely out of tune with the times and in conflict with the ideas of underlying the concept of cruelty” in the HMA. The judge opined that the correct approach to cruelty as found in the HMA “excludes, in my opinion, selfish brutality or disregard for the health, needs, desires, and feelings of the other by either spouse even in a matter such as sexual relations between the two.”⁹¹⁰ The judge also pointed out that in the “The modern view” of cruelty found in HMA the definition of cruelty did not vary by the spouse’s gender. At the same time he also noted, “The need to pay particular attention to the mind of the petitioner entitles the courts to take into account the greater liability of a woman to psychological injury.”⁹¹¹ Though the wife won her judicial separation, she could not do so without exposing the messy and painful details of her sexual and reproductive life in the public forum of the court. The lower courts were wrong in causing both parties to lose their suits. If the wife successfully barred the RCR suit, she also should have been entitled to a judicial separation, which she won in the High Court ruling.⁹¹²

Another important RCR suit came not under the HMA but under the Civil Procedure Code since it involved Muslim litigants. In *Itwari v. Smt. Ashgari and Others*⁹¹³ the husband appealed his loss in a RCR suit to the Allahabad High Court. The couple married in 1950 but when their marriage fell apart the wife returned to live with her parents while he remarried. The wife, in a now familiar pattern, filed a maintenance suit under s. 488 Criminal Procedure Code and in response her husband filed a RCR suit. She claimed that she had reasonable excuse for not living with her husband: he kicked her out of the matrimonial home, beat her, took her jewelry, and did not pay her prompt

⁹⁰⁹ Ibid. Moreover, the High Court also recorded that the first appellate court had written that the wife “wanted to dictate to her husband the time when he should have sexual relations with her.”

⁹¹⁰ *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, para. 27.

⁹¹¹ Ibid., para. 30a.

⁹¹² Ibid., para. 31.

⁹¹³ *Itwari v. Smt. Ashgari and Ors*, AIR 1960 All 684.

dower; all of this “caused her physical and mental pain.”⁹¹⁴ The husband won his suit for restitution of conjugal rights before the munsif because the wife failed to prove cruelty: the munsif did not deem the second marriage cruelty, especially since the husband did not bring the second wife to the home he shared with his first wife. After his second marriage the wife did not attempt to dissolve her marriage, which the munsif interpreted as the wife’s condonation of the second marriage. The wife appealed to the District Judge in Rampur and won her appeal. The District Judge thought the husband was using his RCR suit as retaliation for her maintenance suit. He thought she would be unhappy if compelled to return to the matrimonial home now that the husband had a second wife.⁹¹⁵

The husband appealed to the High Court, making three arguments. First, the High Court need not confine itself to ruling only on the points of law; it could also re-open an investigation of the facts of the case and it should do so in this case. Second, that taking a second wife was not cruelty under Muslim law. Third, that “to defeat a husband’s suit for assertion of his conjugal rights there must be proof of cruelty of such a character as to render it unsafe for the wife to return to her husband’s dominion.”⁹¹⁶ He claimed neither a second wife nor his other behaviors met this standard of cruelty.

A Muslim husband tried to argue that his “right” to multiple wives under his religious personal law did not constitute cruelty. This was not a product of some kind of religious separatism or patriarchy but of husbands’ attempts to get the best possible outcome for their cases. Viewed in this light, the husband’s argument here was not an anachronistic or political attempt to carve out a unique space in Indian secularism but simply a legal strategy designed to give the husband his best shot at dodging his maintenance obligation.

⁹¹⁴ Ibid., para. 1.

⁹¹⁵ Ibid., para. 2-3.

⁹¹⁶ Ibid., para. 4.

The High Court responded with creative judicial reasoning. Justice Dhavan ruled that the question was not a matter of the husband's right to marry a second wife under Muslim personal law. The important question, according to Justice Dhavan was "whether this Court, as a court of equity, should lend its assistance to the husband by compelling the first wife, on pain of severe penalties, to live with him after he has taken a second wife in the circumstances in which he did."⁹¹⁷ Justice Dhavan turned to the argument in *Moonshee Buzloor Rubeem* as well *Abdul Kadir v. Salima*⁹¹⁸ that RCR was a decree for specific performance of a contract (the marriage contract) and that this remedy was an equitable relief. Since it was an equitable relief, the Courts could "take into consideration the conduct of the person who asks for specific performance [the husband in this case]."⁹¹⁹ Therefore, a simple consideration of justice and the wife's well-being could guide the Court's decision.⁹²⁰ Justice Dhavan noted that even though under Muslim law it was "undisputed" that the husband could take up to four wives, "it does not follow that Muslim Law in India gives no right to the first wife against a husband who takes a second wife, or that this law renders her helpless when faced with the prospect of sharing her husband's consortium with another woman."⁹²¹

To make this point, the judge examined the various circumstances under Anglo-Muslim personal law in which a Muslim wife could obtain relief due to her husband's second marriage. First, she could divorce him under her delegated power (*talak-i-tafwiz*) if he took a second wife.⁹²² Second, the wife could write a right to divorce into the marriage contract from the start.⁹²³ Justice Dhavan argued that if Muslim law had seen the husband's right to take a second wife as absolute, then it

⁹¹⁷ *Ibid.*, para. 5.

⁹¹⁸ *Abdul Kadir v. Salima*, ILR All 149 149 (FB).

⁹¹⁹ *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 6.

⁹²⁰ *Ibid.*, para. 7.

⁹²¹ *Ibid.*, para. 10.

⁹²² Here Justice Dhavan referred to *Badu Mia v. Barannessa*, 40 Ind Cas 803: AIR 1919 Cal 511, *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 10.

⁹²³ Justice Dhavan referred to *Sheikh Mohammad v. Bardunnissa Bibee* (7 Beng LR App 5) and *Badaraunnissa Bibi v. Mafiattala* (7 Beng LR 442). For the point that the second marriage was a continuing wrong and she need not exercise her right straight away, Justice Dhavan referred to *Ayatunnessa Beebee v. Karam Ali* (ILR 36 Cal 23). *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 10.

would not have given the wife the right to stipulate her way out of the second marriage in the marriage contract. Therefore the law “cannot regard the husband’s right to compel all his wives to submit to his consortium as fundamental and inviolate.”⁹²⁴ Moreover, Justice Dhavan referred to *Moonsbee Buzloor Rubeem*’s point that Muslim, Hindu, and English cruelty did not much differ from each other. He wrote, “It follows that Indian law does not recognize various types of cruelty such as ‘Muslim’ cruelty, ‘Christian’ cruelty, ‘Hindu’ cruelty, and so on, and that the test of cruelty is based on universal and humanitarian standards that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife’s safety or health.”⁹²⁵ As in the previous case, *Kusum Lata v. Kampta Prasad*, Justice Dhavan argued for a definition of cruelty that reflected contemporary social circumstances and the circumstances and temperaments of the parties.⁹²⁶

Justice Dhavan also specifically noted that Muslim law was responsive to social change. He wrote, “Muslim society has never remained static and to contend otherwise is to ignore the record of achievements of Muslim civilization and the rich development of Mohammedan jurisprudence in different countries.”⁹²⁷ Justice Dhavan referred to the DMMA, and specifically its provision allowing divorce if a husband failed to treat his multiple wives equally, as further evidence that Muslim law could change and adapt to the times.⁹²⁸ Justice Dhavan wrote, “Today Muslim woman [sic] 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 under modern conditions.”⁹²⁹ Justice Dhavan went on to state that the social

⁹²⁴ *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 10.

⁹²⁵ *Ibid.*, para. 12.

⁹²⁶ For this, he referred to Raydyn on Divorce, 5th edition, page 80. *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 13.

⁹²⁷ *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 13. For this he referred to Sir Abdur Rahim’s *Tagore Law Lectures*, 1908.

⁹²⁸ *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 14. He took further evidence for the position that that the DMMA was designed to improve women’s status from the ruling in *Mt. Sofia Begum v. Zabeer Hasan* (AIR 1947 All 16, discussed in the previous chapter).

⁹²⁹ *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 15.

disapprobation attached to multiple wives would have a negative impact on the first wife's mental health. He claimed, "Under the prevailing social conditions the very act of taking a second wife, in the absence of a weighty and convincing explanation, raises a presumption of cruelty to the first."⁹³⁰ Unless the husband could provide a good reason for the second marriage (Justice Dhavan gave the example of the wife suggesting it), it would be presumed cruelty. Justice Dhavan also specifically rejected the husband's argument that, relying on Mulla's *Principles of Muhammadan Law*,⁹³¹ cruelty had to rise to the standard of physical violence to give the wife good reason for not returning to the matrimonial home. Instead, he noted, "The Court will grant equitable relief of restitution in accordance with the social conscience of the Muslim community, though always regarding the fundamental principles of the Mahomedan Law in the matter of marriage and other relations as sacrosanct."⁹³² He was careful to point out that though the second marriage could act as a good bar to the husband's RCR suit, his ruling did not deny the husband his right to take a second wife. If he chose to marry and bore children with his second wife, those children would still be legitimate. Justice Dhavan noted that even if the first wife could not prove physical or other forms of cruelty, if the court felt that she would face an injustice by returning to her husband, it would not compel her to do so.⁹³³ Therefore, as in the previous case involving Hindu litigants, Justice Dhavan felt competent to refuse the husband's RCR suit and grant the wife maintenance.

A recent article on the *Itwari* case highlights how easy it is to conflate both Muslim litigants with Muslim law and the religious identity of litigants with religious law in general. The article takes the *Itwari* case as an example of a suit for a Muslim wife's restitution of conjugal rights under the

⁹³⁰ Ibid.

⁹³¹ 14th edition, page 246, *Itwari v. Smt. Asghari*, AIR 1960 All 684, para. 16.

⁹³² *Itwari v. Smt. Asghari and Ors*, AIR 1960 All 684, para. 16.

⁹³³ Here Justice Dhavan referred to three precedents in which the courts refused to grant the husband a RCR order when they thought the husband did not sufficiently care for the wife: *Hamid Hussain v. Kubra Begum* (ILR 40 AIR 332: AIR 1918 All 235); *Navab Bibi v. Allah Ditta* (AIR 1924 Lah 188); and *Khurshid Begum v. Abdul Rasbi* (AIR 1926 Nag 234).

Dissolution of Muslim Marriages Act.⁹³⁴ Of course, there was no provision for RCR under this act, which only addressed divorce. Even after the DMMA took effect, a litigant who sought RCR, rather than divorce, would turn to the general civil jurisdiction under the Civil Procedure Code. A wife who sought maintenance, as the wife in *Itwari* did, would turn to the maintenance procedures under the Criminal Procedure Code. I argue a substantial portion of Indian matrimonial litigation took place in these legal bodies, neither of which was religiously specific. It is true that the ruling in *Itwari* mentioned the DMMA as one persuasive authority for a broad definition of cruelty – though it was only one such source. The most important legal authority came from the equity jurisdiction of the court. Such jurisprudence was incorporated in Indian law through a case involving Muslim litigants (*Moonshee Buzloor Rubeem*) but, as this dissertation has argued, litigants of all religions regularly used restitution of conjugal rights and maintenance. Other sources included an English decision from 1951,⁹³⁵ an English legal treatise,⁹³⁶ and 1908 lectures on Muslim law.⁹³⁷ The previous case discussed (*Kusum Lata*) also referred to the DMMA to justify the broad category of cruelty. Each decision referred to the changing definitions of cruelty, arguing that a broader definition was appropriate for the time period.

The slippage in the recent scholarly literature parallels errors in scholarly understandings of the *Rukhmabai* restitution of conjugal rights suits. Chandra shows how even scholars committed to a post-colonial framework interpret the order for Rukhmabai to return to her husband as a feature of *Hindu* patriarchy, when all contemporary observers acknowledged RCR as an English device.⁹³⁸

These slippages indicate the perils of conflating the religion of litigants with the laws they used, and of reducing our understanding of Indian law to any one statute or lawsuit without understanding its

⁹³⁴ De, “Mumtaz Bibi,” 106.

⁹³⁵ *Simpson v. Simpson*, 1951 1 All ER 955).

⁹³⁶ Raydyn on Divorce, 5th ed., 80.

⁹³⁷ Tagore Law Lectures, 1908, p. 43, by Abdur Rahim.

⁹³⁸ See discussion of *Rukhmabai* in Chapter Two. Sudhir Chandra makes these points about the “inverted” interpretation of the first edition of his book by David Gilmour in *The Long Recessional: The Imperial Life of Rudyard Kipling* and Antoinette Burton in *The Heart of Empire*. Chandra, *Enslaved Daughters*, 256-8.

larger context. Similarly, in the recent article, a matrimonial dispute about RCR and maintenance—both non-religious, nineteenth century legal devices—are conflated with a religiously specific twentieth century statute simply because of the litigant’s religion.

When we compare *Itwari* with a case involving Hindu litigants from around the same time, this point is made even more clearly. It was not only Muslims who made arguments about their special rights under religious personal law. Just as *Itwari* argued that Muslim husbands should be entitled to second marriages under Muslim law, so too did Ram Prasad Seth argue for Hindu husbands’ rights to polygamy. Ram Prasad Seth, a civil servant, challenged the HMA’s prohibition on polygamy before first a single-Judge bench in 1957⁹³⁹ and then before a two-Justice bench four years later. The challenge came under Article 226 of the Constitution, which allowed High Courts to issue any directions, orders, or writs for the enforcement of fundamental rights of the Constitution or any other reason.⁹⁴⁰ Ram Prasad Seth’s petition prayed that the orders issued by the UP government prohibiting his second marriage be quashed. He also prayed for a writ of mandamus (an order from a high court to a lower court or other government office to take or refrain from some action) that his petitions be dealt with under the Hindu law of *dharmashastra* and not under the HMA. He claimed the HMA violated the Constitution since it guaranteed his fundamental right to his personal law.⁹⁴¹ Ram Prasad Seth’s case shows domestic personal relationships were closely intertwined with government employment. Government employees provided a prime site for the state to exercise its socially reformist initiatives. Though not a restitution of conjugal rights case strictly speaking, it is treated here because of its thematic overlap with the issue of polygamy under *Itwari*.

⁹³⁹ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411.

⁹⁴⁰ Constitution of India, 1950, Article 226.

⁹⁴¹ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411, para 1.

Seth had a degree in civil engineering and worked as a Sub-Divisional Officer for the Public Works Department in District Garhwal. He married his wife Shanti Devi in 1934 and together they bore four daughters; after the birth of their fourth child, the wife had five miscarriages.⁹⁴² The husband contended that he had a right to bear a son under the Hindu *dharmashastras* and a son was required for his religious salvation. He obtained permission from his wife (so he claimed) to marry another woman in the pursuit of a son, but she later changed her mind and asked the State Government to stop him from marrying again. The Chief Engineer of the Public Works Department sent him a telegram stating he should not marry a second wife without the permission of the State Government.⁹⁴³ As a result of this denial he applied for permission from the UP state government in April 1955 and his father applied again on his behalf that July. He was not granted permission, although the HMA had not yet taken effect. In August 1955, he inquired from the Chief Engineer about the status of his application and the reasons for not allowing him to marry again. The Chief Engineer responded in November 1955 stating that no reasons could be given.⁹⁴⁴ Along with the HMA, from January 1955 the UP state government had passed an order that prohibited government servants' polygamous marriages. Seth's proposed second marriage ran afoul of both the UP government's January 1955 order, first, and then the HMA that May.

Seth contended that the state government order along with the HMA violated his rights under Article 25 of the Constitution. Article 25 guaranteed the freedom to "profess, practice, and propagate religion" although these were subject to "public order, morality and health."⁹⁴⁵ The State Government argued that if a person entered state government service with an understanding of its rule against polygamous marriages, he could not argue that the rule was unconstitutional, for "[i]n effect this argument is that what the State Government is doing is only enforcing a certain term for

⁹⁴² Ibid., para 2.

⁹⁴³ Ibid.

⁹⁴⁴ Ibid.

⁹⁴⁵ Constitution of India, Article 25.

the conditions of service.”⁹⁴⁶ The High Court found that the state could not simply escape the burden of Constitutionality by stating that someone had entered its employ agreeing to certain conditions of service (such as any rules made by the State). Therefore the High Court had to evaluate the constitutionality of the state government’s rule against polygamy for government servants.⁹⁴⁷

The High Court framed the question as whether “the right to marry a second wife in the presence of the first wife can be regarded as a religious belief and any restriction placed on such a right is hit by Article 25 of the Constitution?”⁹⁴⁸ Seth argued that it was an essential part of Hinduism for a husband to marry a wife and produce a son. The freedoms guaranteed under Article 25 were not just freedoms of belief but of practice.⁹⁴⁹ In response, the High Court opinion pointed out that though freedom of practice was indeed guaranteed under the Constitution, it was subject to restrictions of public order, morality and health.⁹⁵⁰ Next, the husband argued that a Hindu man needed a male child for salvation and by extension he had a right to marry a second wife: remarriage was part of his freedom of practice to Hinduism. In response, the High Court reasoned that though Hindu religious texts testified to the requirement of a son they did not state that the bearing of a son must happen via a second marriage; rather, it could also happen through an adoption.⁹⁵¹ Polygamy came within the exception to freedom of religion under Article 25(2) of the Constitution.⁹⁵² The Justice relied on two authorities for the position that polygamy would harm public order, morality and health. First, the legislature passed such a law in an effort to achieve social reform: “...marriage

⁹⁴⁶ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411.

⁹⁴⁷ *Ibid.*, para. 3.

⁹⁴⁸ *Ibid.*, para. 5.

⁹⁴⁹ One case the husband turned to for this point was a 1954 Supreme Court case that made a similar point. *Ratilal Panachand v. State of Bombay*, AIR 1954 SC 388. Justice Mehrotra ruled that a second marriage though permitted by the *Yagnyawalkya Smriti* “cannot be regarded as an integral part of a Hindu religion.”

⁹⁵⁰ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411, para. 6; Constitution of India, Article 25.

⁹⁵¹ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411, para 6.

⁹⁵² Justice Mehrotra’s ruling endorsed the State’s reliance on the Bombay case of *State of Bombay v. Narasu Appa Mali* which ruled that the state could prohibit certain practices in line with public health, morality, and social welfare. *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

is a social institution and it may be for the welfare of the State to control such an institution and to bring about measures of reforms which the legislature's wisdom thinks proper to in the Interest of the State."⁹⁵³ Second, the Justice turned to a general position that polygamy was disavowed by world opinion and was anachronistic in a modern society: "It may not be universally recognised but it still has been admitted by a large volume of world opinion that monogamy is a very desirable and praiseworthy institution."⁹⁵⁴ The High Court determined polygamy fell within the exception to Article 25 for public order, morality and health.

The matter did not end there. Ram Prasad Seth appealed the 1957 decision to a Division Bench.⁹⁵⁵ This bench also denied his appeal. Ram Prasad Seth again made three major arguments. First, as before, the rules against polygamy violated his right to freedom of religious practice under Article 25. Second, the exception to Article 25 for public order, morality, and health (Article 25(2)) was subordinate to Article 25(1). All exceptions under Article 25(2) needed to be read against Article 25(1): if the two conflicted, then Article 25(1) should predominate. Third, the exceptions carved out by Article 25(2) were not aimed at individuals but at Hindu religious institutions. The Division Bench quickly dismissed all three arguments. The ruling found the two clauses of Article 25 did not conflict with each other: "The extent to which freedom of religion is guaranteed is to be found in the whole of the Article and not in any particular part of it."⁹⁵⁶ There was certainly no argument to be made that Article 25 was only aimed at Hindu religious institutions.⁹⁵⁷ Finally, the Indian legislature was fully competent to make laws aimed at social welfare: "The legislature of the country is the best judge of what is necessary for the welfare or reform of a particular community at any

⁹⁵³ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411, para 8.

⁹⁵⁴ *Ibid.*

⁹⁵⁵ Chief Justice Mootham and Justice A.P. Srivastava

⁹⁵⁶ *Ram Prasad Seth v. State of UP*, AIR 1961 All 334, para. 8.

⁹⁵⁷ *Ibid.*, para. 10.

particular stage.”⁹⁵⁸ Neither of the benches in Ram Prasad Seth’s case engaged in an extensive discussion of the merits of polygamy or its place in Indian society. Rather each decision deferred to the legislature’s competence to make such a social reform measure.

A 1963 decision examined the implications of the Hindu Adoptions and Maintenance Act (HAMA) for the CCrP.⁹⁵⁹ Ram Singh, like so many husbands before him, attempted to appeal his wife’s maintenance order under s. 488 CCrP. He claimed that once the HAMA came into effect, the wife could not pursue a maintenance suit under the CCrP. The husband went so far as to claim that the CCrP was “impliedly repealed” by the HAMA.⁹⁶⁰ The High Court rejected that claim, stating if a wife pursued her maintenance claim under the Code of Criminal Procedure there was no bar to her pursuing it in the criminal courts.⁹⁶¹ The provisions of the CCrP and the HAMA were not inconsistent with each other; in fact, “both the provisions are consistent, inasmuch as both provide for the maintenance of a Hindu wife.”⁹⁶² The order was sent back to the Magistrate’s court to look into the amount of maintenance that should be ordered to the wife.⁹⁶³

Ram Prasad Seth’s arguments were similar to those of Ram Bharosey and Itwari in that they sought to carve out an exception for a particular religious familial practice on the ground of freedom of religion. Ram Bharosey argued for his right as a Hindu husband to use physical violence and legal harassment against his wife, Though he lacked any Constitutional backing for his argument, he could turn to the colonial guarantee of the use of religious personal laws. In *Itwari*, a Muslim husband argued that taking a second wife was his right as a Muslim and did not provide his first wife reasonable grounds for not living with him under Indian maintenance or RCR law. However, the

⁹⁵⁸ Ibid., para. 9.

⁹⁵⁹ *Ram Singh v. State*, AIR 1963 All 355.

⁹⁶⁰ Ibid.

⁹⁶¹ Ibid.

⁹⁶² Ibid.

⁹⁶³ Ibid. An additional issue that came up in this case was the amount of maintenance due to the wife. The husband claimed the amount “has been fixed by the Magistrate arbitrarily without due regard to the facts.” The Magistrate found that the husband owned 80 bighas [unit of measurement], cattle, and a house. The Magistrate had not looked into the husband’s profits on the land or his other income.

High Court ruled that though the husband had a right to take a second wife under Muslim personal law, it would constitute sufficient enough cruelty to provide a good bar to a RCR suit against the first wife. In Ram Prasad Seth's case, the husband argued that he had a right to take a second wife despite the new HA and UP government's rules against bigamy. One major difference between Ram Prasad Seth's line of argument and Itwari's was that the latter did not turn to the Constitutional guarantee of freedom of religion. Ram Prasad Seth did because he was attempting to impugn the laws on constitutional grounds. Ram Singh used a jurisdictional challenge to his wife's maintenance suit order under the CCrP by insisting that she use the relatively new Hindu maintenance statute.

All of these husbands attempted to use the state's guarantee of religious personal law to justify their treatment of their wives, whether it involved physical cruelty and legal harassment (as in Ram Bharosey's case) or taking a second wife, which in Itwari's case was brought within the ambit of legal cruelty and in Ram Prasad Seth's case was deemed invalid by the legislature out of the need to protect public order and morality. Itwari and Ram Prasad Seth each sought to defend their polygamous marriages by resorting to arguments about their rights within their religious law. However, the High Court found against both husbands. In all cases, the High Court drew on diverse authorities for its broadened definition of cruelty. These included Hindu, Muslim, English, and civil law.

In *Smt. Mango v. Prem Chand*, the husband's mental state came up for question. The wife married him in 1955 and went to live with him, but her relatives came the next year and brought her back to her natal home. The husband then filed a restitution of conjugal rights suit. However, the wife contended that she had good reason for living apart from her husband because he was "a man of weak intellect, who was sexually impotent, who deserted the appellant and treated her with cruelty."⁹⁶⁴ Moreover, the husband's father "had an evil eye on" her and "he was bent upon

⁹⁶⁴ *Smt. Mango v. Prem Chand*, AIR 1962 All 447, para 3.

outraging the modesty of the appellant [wife]”; therefore it was unsafe for the wife to continue to live in the matrimonial home.⁹⁶⁵ The wife lost her suit before the Civil Judge and appealed to the High Court. She contended that her husband’s cruelty had been improperly discounted by the Civil Judge while the husband’s lawyer argued that the statement was not equivalent to evidence since it had not been under oath and therefore her appeal should be dismissed.⁹⁶⁶ The High Court judge (Mithan Lal) noted that the husband “at least was not a person who possessed ordinary intellect...However, it cannot at the same time be said that he is an idiot.”⁹⁶⁷ The question that came up before the High Court was whether if the wife’s argument, even if not technically a reasonable excuse under the HMA, would still be sufficient to disentitle her husband to RCR. On appeal, she chose to focus her arguments simply on the husband’s cruelty, foregoing arguments on his impotence or intellect. This presented the problem of proof to the High Court since it had to evaluate her evidence against her husband’s. The High Court ruling noted that the husband’s statements before the Civil Judge had been a “fully tutored statement” and conflicted with the husband’s own statement, made while weeping, in the Civil Judge’s court, that “My father teases me and my wife.”⁹⁶⁸ These were weighted against the wife’s statements that her husband was of weak intellect and that both he and her father-in-law had teased her and that her father-in-law had attempted to outrage her modesty. Her argument was that it was not the husband who had wanted to file the suit but his father.

It seemed that the wife had a strong case for living apart from her husband. As she was not arguing his impotence or idiocy, however, she faced a legal problem, since most of the mal-treatment was argued to have come at her father-in-law’s hands. This eventuality did not seem to have been provided for in the HMA. However, the Judge found a workaround to this challenge. The

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid., paras. 5-7.

⁹⁶⁷ Ibid., para. 8.

⁹⁶⁸ Ibid., para 9.

RCR provision was divided into two sections, as we have noted. The second section made the rule that either spouse had reasonable excuse to live apart for any of the reasons listed in the separation, nullity, or divorce provisions.⁹⁶⁹ If these were the only reasons the wife could live apart, then the wife in this case would have been in trouble, since the cruelty was at the hands of her husband's parents. However, her lawyer made an ingenious legal argument, turning to the first section's provision that in order for a spouse to achieve a RCR rights suit, the deserting spouse had to have "withdrawn without reasonable excuse."⁹⁷⁰ It did not necessarily follow that the only reasonable excuses were those outlined in the second section of the provision. The first provision could be construed even more broadly than the second provision. The wife's lawyer had two High Court cases from the Punjab High Court to back him up.⁹⁷¹ Justice Mithan Lal summed it up this way: "It has already been stated earlier that besides the ground given in Sections 10, 12 and 13 of the Act, the Court has further to see whether the person, who is living apart, has a reasonable excuse to do so..."⁹⁷² Therefore Justice Mithan Lal could dismiss the husband's suit and uphold the wife's appeal.

This case indicates how the HMA focused on the dyadic marriage tie when oftentimes the wife's discomfort in her marital home may have extended beyond her relationship with her husband to other members of his family, as when many of this wife's problems stemmed from her father-in-law's behavior. Also, the HMA sought to specifically delineate all the reasonable excuses for resisting a RCR suit in s. 9(2)—referring to the grounds in the separation, nullity, and divorce provisions. If these were the only reasons available, the wife in this suit would have been subject to a RCR order. However, due to her lawyer's trick of statutory interpretation, borrowed from the Punjab High

⁹⁶⁹ HMA s. 9(2).

⁹⁷⁰ HMA s. 9(1).

⁹⁷¹ This argument was described in *Smt. Mango v. Prem Chand*, AIR 1962 All 447, para. 8. The two Punjab High Court cases were *Mst. Gurdev Kaur v. Sarwan Singh*, AIR 1959 Punj 162 and *Gurcharan Singh v. Sink Waryam Kaur*, AIR 1960 Punj 422.

⁹⁷² *Smt. Mango v. Prem Chand*, AIR 1962 All 447, para 12.

Court, the High Court retained an expanded discretionary jurisdiction to adjudge the wife's various reasons for not living in the matrimonial home.

In *Ram Devi v. Raja Ram*,⁹⁷³ the wife claimed maintenance from her husband on the ground that he treated her cruelly and had taken a second wife. To dodge her maintenance claim, the husband argued the two had never been legally married and the marriage was a nullity. He claimed that the marriage had not been consummated and the wife "was unfit for sexual intercourse and was incapable of begetting children..."⁹⁷⁴ He also denied cruelty. The wife won both her cruelty claim and the court's recognition for the marriage's validity; therefore, she won her maintenance.

However, in so doing, she was subjected to multiple invasive medical examinations and the intimate details of her sexuality were exposed in the highly public forum of the court.

The trial court agreed that the wife was capable of having children and was deserved of past and future maintenance because the husband had treated her with cruelty. The husband appealed the decision and the case was remanded so that the wife's doctor could be examined in trial court. In the re-trial the wife called her doctor to the court and the husband applied to have the wife examined by another doctor. This plea was rejected and the wife again won her suit. The husband appealed again to the Civil Judge. There the husband and wife agreed to having her examined by another doctor belonging to neither of them. That doctor found that she was impotent and, given that the marriage was a nullity, she was not entitled to maintenance. The Civil Judge dismissed the wife's maintenance suit. She then appealed to the High Court. One of the questions it had to decide was whether a marriage could be declared a nullity even if the two had been married according to Hindu sacraments.

The husband claimed the marriage was a nullity because the wife was sexually abnormal, sterile, and impotent. During the course of the proceedings, the wife was examined three separate

⁹⁷³ *Ram Devi v. Raja Ram*, AIR 1963 All 564.

⁹⁷⁴ *Ibid.*

times by three separate doctors. Two of the doctors found that she was incapable of sexual intercourse while one found she was. In all three examinations, it seems the wife was submitted to having two fingers inserted in her vagina to determine her capability for intercourse. Other aspects of her sexual organs were also described in detail in the High Court report.⁹⁷⁵ The two-finger test has been used in rape trials to determine whether the survivor was sexually active prior to her rape or sexual assault. If so, her credibility was called into question on the assumption that a sexually active woman is more likely to make a false charge of rape.⁹⁷⁶ This has justly come in for criticism on both medical and feminist ethical grounds: Pratiksha Baxi terms it “state sanctioned assault.”⁹⁷⁷ In 2014, the Supreme Court ruled that the test “violates the right of rape survivors to privacy, physical and mental integrity and dignity.”⁹⁷⁸ Clearly, there is no relationship between a woman’s consent to sexual intercourse and her sexual history or her physiological characteristics. Nevertheless, the test has been widely recommended in Indian medical jurisprudence textbooks on rape.⁹⁷⁹ In rape trials, the test is used to prove the woman’s sexual history. Under what was until recently the prevailing ideological framework, the unruptured hymen and the capability of being able to fit only one finger, rather than two, into the vagina was to the rape survivor’s advantage, since it helped to prove her sexual inexperience and the increased likelihood that the sex she experienced was non-consensual.⁹⁸⁰ The test could be used in other ways as well. In the present case, the wife’s inability to accommodate more than one finger, tested upon three separate occasions, was proof of her sexual incapacity; it

⁹⁷⁵ Ibid., paras. 4-7.

⁹⁷⁶ Baxi, *Public Secrets*, Chapter Two; Mitra and Satish, “Testing Chastity, Evidencing Rape,” 51-2; Nisreen Khambati, “India’s two finger test after rape violates women and should be eliminated from medical practice,” *The BMJ*, May 16, 2014, 348; Flavia Agnes, “To Whom do Experts Testify?,” 1859-60.

⁹⁷⁷ Ibid. For the quote, see Baxi, *Public Secrets*, 86.

⁹⁷⁸ *Lillu @ Rajesh & Anr. V. State of Haryana*, Criminal Appeal No. 1226 of 2011, accessed at Indian Kanoon, <http://indiankanoon.org/doc/78844212/>, last accessed March 25, 2015. Crusading Justice Kamini Lau of the Delhi Sessions Court also clearly stated that the test “in the absence of consent [by the woman] would be violative of Constitutional dictates of right to Life as enshrined under Article 21 of the Constitution of India” in *St. v. Umesh Singh and Anr.* FIR No. 1135/06 PS Uttam Nagar, Delhi. Quoted in Baxi, *Public Secrets*, 102.

⁹⁷⁹ Baxi, *Public Secrets*, Chapter Two; Mitra and Satish, “Testing Chastity, Evidencing Rape,” 51-8; Agnes, “Experts,” 1859-66.

⁹⁸⁰ Mitra and Satish, “Testing Chastity, Evidencing Rape,” 53-4; Agnes, “Experts,” 1862; Khambati, “India’s two finger test,” 348.

was proof that marital sexual intercourse would be difficult.⁹⁸¹ What in a rape trial would have been a physiological advantage, in a matrimonial dispute became a disadvantage. The wife's responses to the physical discomfort and likely psychological trauma that the multiple tests likely inflicted on her found no place in the High Court's ruling. However, I find it hard to imagine that the wife experienced no pain or discomfort in the course of these medical examinations or their subsequent descriptions in their subsequent court proceedings and the published High Court judgment.⁹⁸² Indeed, a 2010 letter from Indian women's groups to the Government of India stated the test "further aggravate[s] women's experience of assault."⁹⁸³ Human Rights Watch report noted, "Inserting fingers into the vaginal or anal orifice of an adult or child survivor of sexual violence can cause additional trauma, as it not only mimics penile penetration but can also be painful."⁹⁸⁴ The WHO states that medical examinations of rape survivors "should be offered in such a way so as to minimize the number of invasive physical examinations and interviews the patient is required to undergo" and that such finger exams are "rarely indicated post sexual assault."⁹⁸⁵ Also, the Special Rapporteur to the UN Commission on Human Rights argued that "'virginity-testing' is a form of 'gender specific...torture.'"⁹⁸⁶ Though the wife won her suit in this case, it may have come at a great cost.

The wife won because the court deemed the marriage valid despite her sexual incapacity.

The judge ruled, "Sexual intercourse for procreation may be the chief reason for the marriage tie but

⁹⁸¹ *Ram Devi v. Raja Ram*, AIR 1963 All 564, paras. 4-7.

⁹⁸² Khambati, "India's two-finger test," 348; *Lillu @ Rajesh & Anr. v. State of Haryana*.

⁹⁸³ This letter is cited as "Letter by Indian women's groups to Mr. G.K. Pillai, Secretary, Ministry of Home Affairs, Government of India, June 2010," in Human Rights Watch, *Dignity on Trial: India's Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors*, 41-4.

⁹⁸⁴ *Ibid.*

⁹⁸⁵ World Health Organization, "Guidelines for medico-legal care of victims of sexual violence," 17, para. 3.1.1. and screen no. 124, quoted in Human Rights Watch, *Dignity on Trial*, 50.

⁹⁸⁶ Interim Report of the Special Rapporteur to the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/55/290, August 11, 2000, 7, cited in World Health Organization, "Guidelines for medico-legal care of victims of sexual violence," 17, para. 3.1.1. and screen no. 124, quoted in Human Rights Watch, *Dignity on Trial*, 48.

such cases cannot be excluded where the parties may live together without having sexual intercourse.”⁹⁸⁷ The judge found that no matter the state of sexual relations between husband and wife, she should be protected by the preservation of the marriage tie. Moreover, the wife’s impotence was not complete, since the final examining doctor argued there was some possibility that surgery could correct her condition.⁹⁸⁸ A similar case the Bombay High Court found that if the wife was “impotent” at the time of marriage, the marriage was a nullity.⁹⁸⁹ The Justice in this case disagreed with the Bombay High Court ruling, finding Hindu marriage was sacramental and indissoluble.⁹⁹⁰

The preceding six cases illustrate several trends. Wives continued to win their suits while failing to prove physical cruelty. Social offenses such as polygamy and false accusations of adultery were more potent ways to prove cruelty. The broad definition of cruelty continued to operate with increased attention to the psychological impact of the husband’s behavior. And yet just as the courts were concerned with the psychological impact of the husband’s behavior, there was little concern for wives’ privacy or dignity when it came to the court examining and reporting on the intimate details of their sexual experiences.⁹⁹¹ Marital sexual assault was decried on medical terms rather than on the grounds of a woman’s right to control her own body and consent.⁹⁹² *Smt. Mango v. Prem Chand*, though also a victory for the wife, relied on creative, stretched judicial reasoning to provide her good cause for living apart despite her father-in-law’s cruel treatment. Though the HMA aimed at the dyadic marriage tie, wives had to deal with more complex familial relations in the marital home that were not particularly well addressed in the HMA.⁹⁹³ Husbands of all religions tried to

⁹⁸⁷ *Ram Devi v. Raja Ram*, AIR 1963 All 564, para. 15.

⁹⁸⁸ *Ibid.*, para. 20.

⁹⁸⁹ *Ibid.*, paras. 11, 12; the Bombay case was *A v. B* (AIR 1952 Bom 486).

⁹⁹⁰ *Ibid.*, paras. 13, 14, 15.

⁹⁹¹ *Ram Devi v. Raja Ram*, AIR 1963 All 564.

⁹⁹² *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280.

⁹⁹³ *Smt. Mango v. Prem Chand*, AIR 1962 All 447.

assert their rights to bigamy or deny their wives maintenance on the basis of their religious personal laws, but the courts denied such claims.⁹⁹⁴

Cases in which Wives Lost

Wives usually but not always won their suits. The Hindu husband's outcasting or the Muslim husband's failure to pay the wife's prompt dower did not constitute good grounds for the wife to obtain the relief she sought. A husband's false allegations of unchastity did provide a good ground, but overturning an earlier ruling, the High Courts found that if he retracted such charges, the wife lacked a good ground to live with him. Finally, even if the husband took out a second marriage, if this was not the primary cause for the wife leaving him, she could not resist her husband's suit for judicial separation.

In a 1964 case, a husband sought a RCR suit against his wife but, unusually, she lost. She claimed she had a good ground for not living with him because he had been outcasted. She claimed their *biradari*⁹⁹⁵ had a custom that allowed a wife to refuse to live with an out-casted husband.⁹⁹⁶ The husband admitted the custom but argued that this custom ran afoul of the HMA. He argued that the only reasons a wife could give for resisting a RCR suit were those found under the judicial separation, nullity, or divorce provisions of the HMA under s. 9(2). However, there was a catch in this case. The husband's suit had been filed prior to the HMA's taking effect and the High Court judge⁹⁹⁷ ruled that the act would not apply retrospectively. Therefore the remaining question was

⁹⁹⁴ *Iwari v. Smt. Asghari and Ors*, AIR 1960 All 684; *Ram Prasad Seth v. State of UP*, AIR 1957 All 411; *Ram Singh v. State*, AIR 1963 All 355.

⁹⁹⁵ Biradari refers to a patrilineal kin group purportedly descended from the same male ancestor. It can be roughly translated as kin group, clan, or brotherhood. See Chowdhry, *Contentious Marriages, Eloping Couples*, 96 and Veena Das, "Masks and Faces: An Essay on Punjabi Kinship," *Contributions to Indian Sociology*, n.s., 10, no. 1 (1976): 10 fn. 10.

⁹⁹⁶ *Mohan Lal v. Smt. Shanti Devi*, AIR 1964 All 21 (Lucknow Bench).

⁹⁹⁷ Justice S.D. Singh

whether RCR under pre-HMA law could be successfully resisted on the grounds of a husband's outcasting.⁹⁹⁸

The Constitution took effect in 1950, five years prior to the HMA, and under it discrimination on the basis of caste was illegal and untouchability was outlawed.⁹⁹⁹ Yet rather than turning to India's Constitution, the judge turned to a nineteenth century law. The Justice referred to the Caste Disabilities Removal Act of 1850 prohibited the inflicting "on any person forfeiture of rights or property" just because of outcasting. The Justice ruled that the husband had a right to his wife's company and this was covered under this act.¹⁰⁰⁰ The RCR order stood and the wife lost her appeal - one of the few examples of a wife losing such a suit.

Good ground for Living Apart

Rabia Khatoon v. Mohammad Mukhtar Ahmed was decided by a Division Bench of the Allahabad High Court in 1966.¹⁰⁰¹ The case was sent to a Division Bench because the single justice who first heard the appeal thought that a rule created in an earlier case was *obiter dicta* and therefore not good law. That rule had been that a Muslim wife had no right to refuse herself to her husband once the marriage had been consummated, regardless of whether her prompt dower had been paid or not.¹⁰⁰² The High Court judgement used the term "prompt dower" to refer to *mehr*, which is an amount of property or money stipulated in the Islamic marriage contract. There are two kinds of *mehr*, prompt and deferred. Prompt dower is given to the wife at the time of marriage.¹⁰⁰³ In this case, it was set at Rs. 5,000.¹⁰⁰⁴ Deferred dower is an amount guaranteed to the wife if the husband

⁹⁹⁸ *Mohan Lal v. Smt. Shanti Devi*, AIR 1964 All 21 (Lucknow Bench).

⁹⁹⁹ Constitution of India, Articles 15 and 17.

¹⁰⁰⁰ *Mohan Lal v. Smt. Shanti Devi*, AIR 1964 All 21 (Lucknow Bench).

¹⁰⁰¹ *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, Justices D.P. Uniyal and S.D. Khare.

¹⁰⁰² *Ibid.*, para. 1. The rule came from *Abdul Kadir v. Salima* (1886) ILR 8 All 149.

¹⁰⁰³ Vatuk, "Moving Courts," 29-30; Carroll, "The Muslim Family Laws Ordinance, 1961," 138-9.

¹⁰⁰⁴ *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, para. 3.

chooses to divorce her and serves as a guarantee for the wife's well-being in that eventuality.¹⁰⁰⁵ In this case, the wife's failure to prove her husband's cruelty meant she could rely only on arguments about her husband's failure to pay her prompt dower.

The case involved the wife's suit for dissolution against her husband and the husband's suit for restitution of conjugal rights against the wife. The two married in 1948 and bore a son in 1951. But after the birth of the son the wife returned to her father's home. Her husband came to collect her in the spring of 1951 but she refused to return to the marital home. The two turned to the courts in 1956. Rabia Khatoon claimed the dissolution of her marriage on grounds of her husband's failure to maintain her (DMMA s. 2(ii))—he had not provided maintenance since 1951—and his cruelty (DMMA s. 2(vii)). Each of the lower courts found that she could not win her case on these grounds. They dismissed her claims of cruelty and found that though the husband refused to maintain her, he had done so because she was living apart without good reason.¹⁰⁰⁶ The High Court mentioned several other cases where it was found that the husband did not have an absolute obligation to maintain the wife if she lived apart without good reason.¹⁰⁰⁷ In response, the wife's lawyer had argued that the husband's failure to pay her prompt dower did, indeed, give her good reason for living apart.

Rabia Khatoon claimed that though she performed her marital obligations by having sexual relations with her husband and even bearing a child, he failed to live up to his end of the bargain by failing to pay her prompt dower of Rs. 5,000. She also alleged that her husband beat her, threw her out of his home, and did not maintain her.¹⁰⁰⁸ The husband denied the allegations of cruelty and throwing her out, and therefore she lived apart without good cause. He claimed he had only owed

¹⁰⁰⁵ Vatak, "Moving Courts," 29-30.

¹⁰⁰⁶ *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, paras. 13, 14.

¹⁰⁰⁷ *Ibid.*, 16, 17.

¹⁰⁰⁸ *Ibid.*, paras. 2-3.

her deferred dower of Rs. 500. These same allegations were traded in the RCR suit.¹⁰⁰⁹ The lower courts agreed on the following facts: The husband had not beat or thrown the wife out of the marital home or otherwise treated her with cruelty. He had owed the wife prompt dower in the amount of Rs. 5,000, and he had not paid it, as the wife claimed. The courts also found that the husband had not paid the wife any maintenance since she had been living apart. However, the Civil Judge in Meerut, who heard the first appeal, thought that since the wife consummated and continued sexual relations with the husband, she essentially condoned the non-payment of her prompt dower. Therefore she had no good reason for refusing to live with him. The Civil Judge declared the husband's RCR suit in his favor and the wife lost her suit for dissolution, "on the ground that she could not deny herself to the husband after consummation of the marriage merely because her dower remained unpaid."¹⁰¹⁰

Herein lay the reason for the hearing of this case by a Division Bench. The key question was "whether a Mohammedan wife has a right to refuse to go to her husband if her prompt dower is not paid even though the marriage had been consummated with the consent of the wife before the date of the refusal."¹⁰¹¹ The Full Bench decision of the High Court in 1886 found that once the wife consented to sexual relations with her husband and consummated the marriage, she lost her ability to refuse to live with him for non-payment of prompt dower.¹⁰¹² A similar case up before a Division Bench in 1933 and the rule developed in the 1886 case was followed.¹⁰¹³ Notably, each decision was penned by an important Muslim High Court justice, the 1886 decision by Justice Mahmud and the 1933 decision by Justice Sulaimain.¹⁰¹⁴

¹⁰⁰⁹ Ibid., para. 4.

¹⁰¹⁰ Ibid., para. 5.

¹⁰¹¹ Ibid., para. 6.

¹⁰¹² Ibid., paras. 6-8. The case was *Abdul Kadir v. Salima* (1886 ILR 8 All 149).

¹⁰¹³ *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, para 9. The case cited was *Mt. Anis Begam v. Mohammad Istafa*, AIR 1933 All 634.

¹⁰¹⁴ Ibid., paras. 1, 9.

The 1886 case ruled that the husband's failure to pay prompt dower did not provide the wife a good excuse not to live with her husband. The 1886 decision highlighted that there were different points of view among three major Imams on the topic. While Imam Abu Hanifa thought that the husband's failure to pay prompt dower provided the wife a good reason not to live with her husband, his two disciples, Qazi Abu Yusuf and Imam Muhammad, disagreed, finding that the failure to pay prompt dower did not provide the wife a reasonable excuse. In the 1886 decision, Justice Mahmood thought that the decision should be made according to a majority rule and agreed with the two disciples in his final opinion.¹⁰¹⁵ When a case came up before Chief Justice Sulaiman in 1933,¹⁰¹⁶ he found that the majority rule was not the correct one. He stated, "According to Allawi the correct rule was that in cases of difference of opinion regard should be had to the authority and reasons in support of each of view and the one which has the strongest support should be followed."¹⁰¹⁷ Nevertheless, Justice Sulaiman agreed with the earlier decision because it had the force of time behind it, because in India dower amounts were very high which made it practically difficult for the husband to fulfill his obligation, and in part because a RCR suit was a suit for specific performance and the courts could exercise their discretion in analyzing the marital situation.¹⁰¹⁸ The discussion of the position framed within the terms of Muslim law was ultimately irrelevant, because the High Court decided that if the 1886 decision "were to be held as bad law it would not only create uncertainty about the law but also disturb the domestic peace of Mahomedan families throughout India...it would be dangerous to adopt this view [that the marriage is invalid even if consummated without payment of prompt dower] at the present time having regard to the prevalent practice and the modern conditions of life."¹⁰¹⁹ The arguments over

¹⁰¹⁵ Ibid., para.7.

¹⁰¹⁶ *Anis Begam v. Mohammad Istafa*, AIR 1933 All 634.

¹⁰¹⁷ Ibid. quoted in *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, para. 8.

¹⁰¹⁸ Ibid., para. 9.

¹⁰¹⁹ *Rabia Khatoon v. Mohammad Mukhtar Ahmad*, AIR 1966 All 548, para. 12.

authoritative Hanafi legal scholars' various positions and their proper interpretation and application was designed to show that the High Court did not intend to apply the wrong legal position, though it was known that this was the incorrect position, but that it was applying the rule for reasons of administrative convenience.

The High Court found, "There is no right in the wife to refuse to live with her husband after the marriage has been consummated with her consent. So long as she keeps herself away without the fault of the husband she has no right to claim maintenance from him."¹⁰²⁰ The opinion also expressed doubt about the wife's evidence that she actually requested the prompt dower from her husband. The High Court upheld the lower courts' dismissal of the wife's dissolution suit and its orders in the husband's RCR suit. His victory in the RCR suit was conditional, however, upon his payment of the wife's prompt dower in the amount of Rs. 5,000.¹⁰²¹ The wife's failure to prove cruelty left her dependent on this one excuse, the husband's failure to pay dower, and she lost.

The feminist legal strategy organization FeminIjtihad criticizes the decision in this case.¹⁰²² It points out that in Pakistan a similar case arrived at a different opinion, upsetting the rule in the 1886 decision in *Abdul Kadir*.¹⁰²³ The FeminIjtihad analysis notes, "A disappointing aspect of the judgment is the grounds on which the decision rests. The judgment follows the approach of Justice Mahmood in *Abdul Kadir*; it is worth noting that in *Abdul Kadir* preference was given to the

¹⁰²⁰ Ibid., para. 18.

¹⁰²¹ Ibid., para. 20.

¹⁰²² FeminIjtihad is a multi-sited organization that seeks to link scholarly research on women's rights with on-the-ground legal activism. According to its website, the group "draft[s] legal opinions, defence statements, and law reform analyses on women's human rights under international and Islamic law.... We aspire to mentor more lawyers and take on controversial and test cases." The group's website states, "A significant hallmark of our research selection consist of scholarship that argues for how Muslim women assert power and agency in spaces where patriarchal systems of power govern social interactions... We make a conscious effort to avoid mono-casual assumptions that "bad interpretations" of Islam is the central cause and site of Muslim women's efforts." See FeminIjtihad, "Research Premises," at <http://feminijthad.com/2011/04/01/research-premises/>, and "About," <http://feminijthad.com/about-4/>, last accessed March 25, 2015.

¹⁰²³ FeminIjtihad (Devika Agarwal)/Women's Rights Case Law, analysis of *Rabia Khatoon*, at <https://wrcaselaw.files.wordpress.com/2012/12/rabia-khatoon.pdf>, 5-7, last accessed March 25, 2015; the Pakistani case is *Rabim Jan v. Muhammad*, PLD 1955 Lah 122.

view of the disciples than that of the master Imam Abu Hanifa.”¹⁰²⁴ The website concludes, “we find that the Islamic law on this point is actually in favour of the woman and to the extent that *Rabia Khatoon* and earlier judgments have overlooked case laws and the Sharia Law are judgments *per incuriam*.”¹⁰²⁵ In other words, the court was wrong and the court made its decision without following the relevant Muslim personal law.¹⁰²⁶

Husbands’ Retractions of False Imputation of Unchastity

Wives often won against their husbands’ false accusations of adultery. The 1949 case *Kaloo v. Imaman*¹⁰²⁷ gave the wife a good ground for dissolution under the DMMA though he subsequently retracted his false charges of adultery. Yet in two similar cases from the 1960s wives lost their suits when they attempted to pursue redress on this ground because their husbands retracted the accusations.

One was the first case (1962) under the DMMA in post-colonial UP from the district of Saharanpur.¹⁰²⁸ The case was referred to a two-justice bench from a single justice because it involved an important legal question.¹⁰²⁹ Jamila Khatun married Tufail Ahmed in 1935. The marriage began to deteriorate in 1947 and the next year she left and went to live with her brother. Her husband then filed a complaint against her under s. 498 IPC impugning her chastity. The complaint was dismissed. Around the same time, the husband also filed a RCR suit where he “unequivocally retracted the allegation which he had, apparently stupidly, made” about her unchastity.¹⁰³⁰ Despite this retraction, he lost the RCR suit. The wife then filed a suit in March 1949 for dissolution under DMMA on s.

¹⁰²⁴ FeminIjtihad (Devika Agarwal)/Women’s Rights Case Law, analysis of *Rabia Khatoon*, at <https://wrcaselaw.files.wordpress.com/2012/12/rabia-khatoon.pdf>, last accessed March 25, 2015, 5-7.

¹⁰²⁵ *Ibid.*

¹⁰²⁶ *Per Incuriam*, s.v., *Black’s Law Dictionary*, 2nd ed. (1910) defines “per incuriam” as “through inadvertence;” in other words, the court inadvertently made a decision without referring to the relevant statute or law.

¹⁰²⁷ *Kaloo v. Mt. Imaman*, AIR 1949 All 445.

¹⁰²⁸ *Tufail Ahmad v. Jamila Khatun*, AIR 1962 All 570.

¹⁰²⁹ The bench consisted of Justices B. Mukerji and D.P. Uniyal.

¹⁰³⁰ *Tufail Ahmad v. Jamila Khatun*, AIR 1962 All 570, para. 2.

2(ix) that allowed dissolution on any ground allowed under Muslim law.¹⁰³¹ Her ground was the husband's false imputation of unchastity against her, made when he filed a suit against her under s. 498 IPC. The husband contested the suit by pointing to his retraction of that statement when he filed the RCR suit against her.¹⁰³² The court had to decide whether the husband had falsely accused the wife of adultery and, if so, whether his retraction had been valid. The lower courts found that the husband did falsely accuse his wife of adultery but that he indeed retracted the false accusation in his RCR suit.¹⁰³³ However, the lower courts declared the wife's dissolution suit because a similar case, 1949's *Kalloo v. Mt. Imamam*,¹⁰³⁴ set the rule that the husband's procedure for retracting under *laan* had been eliminated by the DMMA. Therefore, the lower courts ruled that the wife deserved her dissolution under the DMMA. But the single judge who heard the wife's appeal to the High Court was not as certain and referred the case to a two-judge bench.¹⁰³⁵ Thus the *Kalloo v. Mt. Imamam* decision was revisited.

The DMMA did not specifically address the false accusation of unchastity. Rather, the device had continued to be used under DMMA s. 2(ix) that allowed dissolution "on any other ground which is recognised as valid for the dissolution of marriages under Muslim law."¹⁰³⁶ The High Court noted that the husband's false accusation under s. 2(ix) was always accepted; the only question was whether the wife lost her right to dissolution if the husband retracted it.¹⁰³⁷ The High Court disagreed with the decision in *Kalloo v. Mt. Imamam*. Its first line of reasoning was that "the right of the wife to claim a dissolution of marriage arose not merely on there being a false imputation of unchastity against her but a failure to retract or failure to prove that imputation."¹⁰³⁸ Since the

¹⁰³¹ Ibid.

¹⁰³² Ibid., para. 3.

¹⁰³³ Ibid., para. 4.

¹⁰³⁴ *Kalloo v. Mt. Imaman*, AIR 1949 All 445.

¹⁰³⁵ Justices Mukerji, D. Uniyal.

¹⁰³⁶ DMMA 1939 s. 2(ix).

¹⁰³⁷ *Tufail Ahmad v. Jamila Khatun*, AIR 1962 All 570, para. 6.

¹⁰³⁸ Ibid., para. 12.

husband had retracted, the wife's suit did not meet this condition. The second line of reasoning provided by the High Court was that "the law was jealous of preserving matrimonial relations: the law did not lightly put asunder man and wife, even though they had come together by virtue of a contract and not as a result of a sacrament."¹⁰³⁹ The High Court thought that the husband should be given an opportunity to retract his statement: "The law has always recognised and acted on *locus poenitentiae* and has tried to forgive where forgiveness was possible and tried to whittle down the rigors where complete exoneration under the law was not possible, in all cases where the Court was of the view that there was honest *locus poenitentiae*."¹⁰⁴⁰ The Justice noted that *locus poenitentiae* had been "engrafted by the Muslim law" and, this being so, "there was not only perfect justification for it but that it would be unjust and against the conception of marriage tie not to give effect to it."¹⁰⁴¹ Therefore the wife lost her appeal and her suit to dissolve her marriage was dismissed. In so doing, the High Court also overturned *Kaloo v. Mt. Imamam*.

Smt. Prabhawati Devi vs. Radhey Shyam Tripathi presented a similar set of circumstances though it did not mention the cases under the DMMA discussed above.¹⁰⁴² The High Court came to the same conclusion in two very similar cases, one involving Hindu and one involving Muslim litigants. The wife applied for maintenance on the ground that her husband and his father treated her cruelly.¹⁰⁴³ The husband denied this and stated his desire to have his wife and children come back to him. She lost her maintenance suit before the Magistrate's court because she had no good reason to live apart.¹⁰⁴⁴ The wife appealed to the Sessions Judge who accepted her appeal on the ground of the husband's false accusation of unchastity against the wife.¹⁰⁴⁵ The Sessions Judge sent the case to the

¹⁰³⁹ Ibid., para. 9.

¹⁰⁴⁰ Ibid. *Locus poenitentiae* means "place of repentance" and refers to the "point at which it is not too late...to change one's legal position." See Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thomson/West, 2004).

¹⁰⁴¹ *Tufail Ahmad v. Jamila Khatun*, AIR 1962 All 570, para. 9.

¹⁰⁴² *Smt. Prabhawati Devi vs. Radhey Shyam Tripathi*, AIR 1965 All 598.

¹⁰⁴³ Ibid., para. 2.

¹⁰⁴⁴ Ibid.

¹⁰⁴⁵ Ibid., para. 4.

High Court so that the Magistrate's order could be set aside. The High Court opinion noted that the husband, wife, and children all appeared before the High Court. The husband again claimed he was ready to take his wife and children back to his home and the wife again stated she was not willing to go back to him. The judge thought, based on the husband's behavior, he genuinely wanted his wife and children to live with him.¹⁰⁴⁶ He stated that there was no good reason for the wife to refuse to live with her husband. While he acknowledged that the husband had falsely accused the wife of unchastity, he dismissed them as merely "foolish allegations."¹⁰⁴⁷ The husband claimed he had filed criminal charges against the wife's brother and mother because he thought they were the ones obstructing her return to his home. He was attempting to get her relatives to send her back to him with these criminal charges. The charges showed "his keen desire to get back his wife and to force her people to allow her to live with him."¹⁰⁴⁸

The Magistrate did not see any negative intentions in the husband's actions and the High Court judge agreed with him. The wife had no further evidence of the husband's cruelty besides his criminal charges.¹⁰⁴⁹ The High Court framed the question as "...whether if a husband in his weaker moments, pressed by unfavorable circumstances, makes a false charge of unchastity against his wife but later on in calmer moments sincerely recants it, does it disqualify him forever from enforcing his marital relations against his wife?"¹⁰⁵⁰ The Justice did not think so: "if it [the false accusation of unchastity] has been made not by any such motive but under pressing circumstances and with the aim of getting back the wife from the possession of others..." and if the husband also recanted the statement, it did not provide the wife a good ground for residing apart and claiming maintenance.¹⁰⁵¹

The Justice also bolstered his ruling that the wife did not deserve separate maintenance by

¹⁰⁴⁶ Ibid.

¹⁰⁴⁷ Ibid., para. 5.

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ Ibid., para. 6.

¹⁰⁵⁰ Ibid., para. 7.

¹⁰⁵¹ Ibid., para. 8.

examining the husband's financial circumstances. He found that the husband did not have sufficient means to support the wife and children living separately.¹⁰⁵² Together these two cases might have had the effect of opening the door to wives' losses when their husbands retracted such accusations. If so, wives lost an important ground for claiming redress.

Desertion: A Surprising Finding

The circumstances in *Smt. Robini Kumar v. Narendra Singh*¹⁰⁵³ involved wealthy royal litigants and a tricky question of law. The failure to prove cruelty made a substantial difference in the outcome of the case. When the husband's suit for judicial separation came up before a single judge bench of the Allahabad High Court, the judge referred it to a two-judge Division Bench.¹⁰⁵⁴ Narendra Singh of Sarela Estate married Rohini Kumari, the daughter of the Maharaj of Alirampur Estate, in 1945. After about two years, she returned to her father's estate while her husband was out of town, taking her property, including jewelry and other valuables, with her. The husband entreated her to return but she refused. She claimed she told him that she did not want to be with him and that he could remarry. The husband petitioned for a judicial separation. In response, the wife claimed she had been treated cruelly at her husband's and that she left her husband's home with good excuse, to seek treatment for her heart condition at her father's home. She also claimed she did not outright refuse to return to her husband's home but instead stated she was willing to go if he promised to reform his behavior. She also denied that she had permitted the husband to remarry. Finally, she claimed the husband instituted the petition against her "to justify his conduct in having married Countess Reita in Europe."¹⁰⁵⁵ In the trial court, the husband won his suit for judicial

¹⁰⁵² Ibid., paras. 9-10.

¹⁰⁵³ *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102.

¹⁰⁵⁴ Ibid. The two-judge bench comprised Justices R. Prasad and A. Kirty.

¹⁰⁵⁵ *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, para. 4. If the website indianrajputs.com is to be believed, the husband was Raja Narendra Singh, b. 1927, educated at Mayo College, Ajmer, Allahabad University, and Magdalene

separation. The wife appealed and lost her first appeal. The two lower courts agreed on certain facts that could not then be contested before the High Court: the wife was well-taken care of at her husband's home, she left the husband's home to end her marital ties with her husband, and she had no intention of going back to her husband.

The wife argued that although she may have originally deserted her husband without good cause, her desertion did not last for two years. Rather, once the husband made a second marriage, she now had good cause to live apart from him.¹⁰⁵⁶ He retorted that to prove just cause for living apart, she had to show that it was his second marriage that caused her to leave him. If she left for another reason, she would be living apart without just cause.¹⁰⁵⁷ The husband pointed to correspondence between the husband and wife when the husband was posted at the Hague. The correspondence lacked any reference from the wife to the cause of her refusal being his "friendship with that Dutch girl."¹⁰⁵⁸ The husband in the correspondence expressed his willingness to take back the wife. She requested that the husband provide for her separate residence and maintenance and to return her *stridhan*.¹⁰⁵⁹ This led the High Court to conclude "...the friendship of the respondent with Countess Reita which ultimately resulted in marriage, did not really have any impact on the mind of

College, Cambridge. He was a Foreign Service officer from 1948 until 1985, serving as the Aide-de-Camp to Mountbatten around Partition and as the Deputy Permanent Representative to the UN, an Officer on Special Duty for Kashmir Affairs, a Joint Secretary dealing with Pakistan and the UN in External Affairs, and eventually, in the 1970s, ambassador to Spain, Brazil, Libya, and Switzerland. He also served as Chairman of the Board of Nestle from 1994 to 2000. The second wife in question was Countess Rita von Oberndoff and bore one daughter with her. The two married in Dehra Dun in 1955 and divorced four years later. Narendra Singh is also the author of *The Shadow of the Great Game: The Untold Story of India's Partition* (HarperCollins, 2005). See the entry for Sarila on the website Indianrajputs.com, last accessed March 25, 2015.

¹⁰⁵⁶ *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, para. 14-19. The wife's lawyer cited *Lachman Utamchand v. Meena*, AIR 1964 SC 40, as well as four other precedents.

¹⁰⁵⁷ *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, para. 20, 22. The husband's lawyer referred to the same Supreme Court case the wife had used, quoting *Lachman Utamchand v. Meena*, AIR 1964 SC 40. The husband's lawyer referred to the same Supreme Court case the wife had used. He quoted from the SC judgment the rule that "...where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse." In further support of this position, the husband's lawyer also referred to several English cases and authorities. These were *Earnshaw v. Earnshaw* (1939-2 All ER 698); *Herod v. Herod* (1938-3 All ER 722); *Parrock v. Parrock* (1956-1 All ER 555); Rayden on Divorce, 8th ed., p. 188, and Halsbury's Laws of England, 3rd ed., v. 12, p. 259.

¹⁰⁵⁸ *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, para. 21.

¹⁰⁵⁹ *Ibid*.

the appellant [wife] so as to afford a cause for desertion.”¹⁰⁶⁰ In making this finding, the Allahabad High Court disagreed with the position taken by the Andhra Pradesh and Mysore High Courts.¹⁰⁶¹ Those Courts, the Allahabad High Court stated, incorrectly imported an interpretation of the meaning of desertion from other statutes (such as the 1946 HSRMA) that did not apply in the case of the Hindu Marriage Act. Under the HMA, the Allahabad High Court stated, desertion must include “a determination to put an end to marital relations and to put an end to cohabitation permanently,” - an “*animus deserendi*.”¹⁰⁶² The simple fact of the husband’s remarriage did not give the wife a reasonable cause to live apart from the husband if it was not what caused her to desert him in the first place.¹⁰⁶³ In this case, since it was not his remarriage that caused the wife to leave him, she had had no reasonable cause for desertion; the husband, therefore, rightly earned a judicial separation.¹⁰⁶⁴ The wife lost her appeal. The High Court granted the wife maintenance of Rs. 150/month from the husband on his income of Rs. 2000/month (1600/month salary plus 400/month allowance). It based this paltry amount on the fact that the cost of living was high, the husband had many taxes to pay on his income, and he needed to support his daughter with Countess Reita.¹⁰⁶⁵ It is possible that, given that the husband was a highly placed Foreign Service Officer with important roles at the UN and the Ministry of External Affairs, the High Court shaped its analysis to find in favor of the highly placed husband.

A 1964 ruling showed that bigamy could cut both ways.¹⁰⁶⁶ A wife sought to prove that her second marriage was valid so that she could obtain maintenance at the rate of 15 Rupees/month from her second husband. She won in the first trial but her husband appealed and won on the

¹⁰⁶⁰ Ibid.

¹⁰⁶¹ *Thenku Verriah v. Tamiseti Nagiab* (AIR 1959 Andh Pra 547); *S. Pullaiah v. S. Rushingamma* (AIR 1963 Andh Pra 323); *K. Siddegowda v. Parvathamma* (AIR 1965 Mys 299); discussed in *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, paras. 15-17.

¹⁰⁶² *Smt. Robini Kumari vs. Narendra Singh*, AIR 1970 All 102, para. 28.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid., para. 30.

¹⁰⁶⁵ Ibid., para. 31.

¹⁰⁶⁶ *Ishwar Singh v. Smt. Hukam Kaur*, AIR 1965 All 464.

finding that her first husband was alive, which therefore invalidated the second marriage. She then appealed to the High Court. While the wife's claims might seem far-fetched at first she had some reason to think that her second marriage was valid. This is because her first husband, though still living, "... had allowed her to marry any person she liked because of his ill health."¹⁰⁶⁷ In this regard, she was not much different the husband in the previous case in arguing that she had permission to undertake a second marriage. However, her claim to have her first husband's permission was based on her own testimony rather than the first husband's direct testimony and the High Court disbelieved it. The High Court found that unless the divorce between first husband and wife had been conducted under the HMA, it was not a valid divorce. Therefore the second marriage was invalid and the wife was not entitled to maintenance.

More common, however, were cases in which the husband disavowed his marriage to his wife, as in a case decided in 1968.¹⁰⁶⁸ Naurang Singh and Sapla Devi married in 1963. The wife claimed that after about one year, the marriage deteriorated and the husband took a second wife, Kalpa Devi. About four months after the second marriage, Naurang Singh allegedly threw Sapla out of the house and she returned to her father's home.¹⁰⁶⁹ The husband denied the claim that he actually had married Sapla Devi. In contrast, he contended that he had married the purported wife's cousin-sister, Kalpa Devi, fifteen years prior. He claimed it was to visit her cousin-sister that Sapla Devi came to his home and they started an "illicit connection" that resulted Sapla's pregnancy.¹⁰⁷⁰ In the Magistrate's court, Sapla Devi won her maintenance claim, the judge finding that the two had validly married.¹⁰⁷¹ The husband appealed. The Sessions Judge's view was that first Naurang Singh

¹⁰⁶⁷ Ibid., para. 3.

¹⁰⁶⁸ *Naurang Singh Chuni Singh vs. Smt. Sapla Devi*, AIR 1968 All 412.

¹⁰⁶⁹ Ibid., para. 2.

¹⁰⁷⁰ Ibid., paras. 3, 4.

¹⁰⁷¹ Ibid., para. 4.

had married Kapla Devi and then he took on Sapla Devi as his second wife. Therefore, Sapla Devi was not entitled to maintenance since the marriage had not been valid in the first place.¹⁰⁷²

She then appealed to the High Court where a single justice¹⁰⁷³ decided to refer the case to a Division Bench.¹⁰⁷⁴ The Division Bench accepted the lower court's finding that Sapla was indeed Naurang Singh's second wife. The legal issue was framed as "[w]hether the marriage of a Hindu husband, solemnized with a second wife during the continuance of his marriage with his former wife is void on account of the provisions of sections 5(1) and 11 of the Hindu Marriage Act 1955, and is such a wife by the subsequent marriage prevented from claiming maintenance from him in accordance with section 488, Code of Criminal Procedure?"¹⁰⁷⁵ The first marriage with Kalpa took place in 1952 or 1953. The second marriage with Sapla took place a decade later. The High Court reiterated the purpose of s. 488: "to prevent vagrancy by compelling the husband or the father to support his wife or child unable to support itself. These provisions are not in the nature of penal provisions but are only intended for the enforcement of a duty, a default in which may lead to vagrancy. The real object is to provide food, clothing and shelter to deserted wife and children."¹⁰⁷⁶ The Court reiterated the position that maintenance was due only to a "legally wedded wife."¹⁰⁷⁷ So the question that had to then be determined was whether the validity of the marriage. The High Court turned to three precedents to show that a second marriage taken out in the lifetime of the first wife was void.¹⁰⁷⁸ The wife lost her suit for maintenance.

¹⁰⁷² Ibid., para. 5.

¹⁰⁷³ Justice Misra

¹⁰⁷⁴ Justice R. Chandra and Justice K. Puri.

¹⁰⁷⁵ *Naurang Singh Chuni Singh vs. Smt. Sapla Devi*, AIR 1968 All 412, para. 6.

¹⁰⁷⁶ Ibid., para. 7.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid., para. 9. The three cases cited were *Mohd. Ikram Hussain v. State of Uttar Pradesh* (AIR 1964 SC 1625); *Ishwar Sinen v. Smt. Hukam Kaur* (AIR 1965 All 464); *Banshidhar Jha v. Chhabi Chatterjee* (AIR 1967 Pat 277).

Community and Compromise

This section discusses matrimonial disputes in which local customs or community intervention played an important role. Community leaders seem to have been a frequent first stop for resolving matrimonial disputes. When such efforts failed, husbands and wives could turn to the courts. In 1972 a two-justice bench issued a ruling on cruelty under the HMA.¹⁰⁷⁹ The husband and wife married at an unnamed date. In 1963, the wife filed a suit for maintenance, claiming that her husband had thrown her out of the house three years before, that he had treated her cruelly, and that he had committed adultery.¹⁰⁸⁰ In response the husband pleaded that the two had divorced by mutual consent in a custom available in their community called “Chhuttam Chutta.” Both husband and wife had signed a decree declaring their divorce by mutual consent. At first the wife contended that her assent to this decree had been obtained by fraud. She later conceded that she signed the agreement but she contended that this customary divorce was invalid.¹⁰⁸¹ The key issue the courts had to decide was “Has the relation of husband and wife between the parties been dissolved?”¹⁰⁸²

The trial court found that no dissolution had taken place because there was no legally binding divorce and it granted the wife’s maintenance claim along with arrears. The husband appealed; he did not owe his wife maintenance because they were legally divorced. In his appeal, he argued that he should be allowed to lead evidence about the custom’s validity in the appellate court. He had not been allowed to do so in the trial court because his application to do so was very late. The appellate court did not allow him to enter the evidence. The appellate court agreed with the lower court and dismissed the husband’s appeal: his claim that the dissolution was valid was rejected.¹⁰⁸³ He then appealed to a single-justice bench of the High Court, arguing he should be

¹⁰⁷⁹ *Madho Prasad v. Smt. Shakuntala Devi*, AIR 1972 All 119, bench of Justices H.D. Gupta and A.K. Kirty.

¹⁰⁸⁰ *Ibid.*, para. 2.

¹⁰⁸¹ *Ibid.*

¹⁰⁸² *Ibid.*

¹⁰⁸³ *Ibid.*, paras. 2-3.

allowed to lead evidence to prove the validity of the community's custom of divorce by mutual consent. The single-judge¹⁰⁸⁴ bench agreed with the husband because "it was necessary in the interest of justice and for pronouncing a satisfactory judgment to obtain a finding on the question whether in the community known as 'Barai Chaurasiya' to which the parties belonged..." the custom of Chuttam Chuttu divorce actually existed.¹⁰⁸⁵ The High Court sent the case back to the lower court with an order to look into the custom that existed in the community.¹⁰⁸⁶

When the lower court re-opened the case, the husband entered evidence from five witnesses and the wife entered evidence from seven. The court found that the custom of divorce by mutual consent did exist within the community. This finding was sent to the High Court and the wife then objected. The single-justice bench decided that the issue was an important one because it "affect[ed] an important section of the Hindu community known as 'Barai Chaurasiya'" and therefore a two-justice bench should hear it.¹⁰⁸⁷ The wife put forward two arguments. First, the single-justice bench's decision to send the case back to the lower court to allow the parties to enter evidence had been improper. Second, the lower court had been wrong in finding the custom valid. The two-justice bench rejected both of these arguments, finding that it was an important question, and the first justice had been correct in ruling that the case should be re-opened to allow for the entering of evidence about the custom. The High Court also noted that the lower court's ruling on the existence of the custom had been correct. The wife's case that the custom did not exist was harmed by the fact that her witnesses had also testified to its existence. One of the wife's witnesses, the Secretary of the Barai Chauraiaya Sahbha at Allahabad, had testified that custom had been in existence for a long time. Therefore the appeal was set aside and the wife lost her maintenance case.¹⁰⁸⁸ Though the

¹⁰⁸⁴ Justice K. Asthana.

¹⁰⁸⁵ *Madho Prasad v. Smt. Shakuntala Devi*, AIR 1972 All 119, para. 4.

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ *Ibid.*, para. 5.

¹⁰⁸⁸ *Madho Prasad v. Smt. Shakuntala Devi*, AIR 1972 All 119, paras. 7-9.

courts ruled against the validity of second marriages by Hindu husbands or wives after the HMA, in this case the High Court accepted the validity of the customary divorce. Such customs were specifically saved by s. 29(2) of the HMA, though this provision was not mentioned in the judgment.

A 1964 decision from the Allahabad High Court examined the question of cruelty under the DMMA as well as the legal validity of informal arbitration of marriage disputes.¹⁰⁸⁹ At first the wife had filed a suit for dissolution under DMMA on the ground of cruelty. The Munsif then appointed Himayat Ullah Kidwai to examine the wife.¹⁰⁹⁰ However, when the day for the examination came, the husband, wife, and their lawyers approached the court and stated they agreed to have the divorce arbitrated by three leaders in Faizabad, the advocate Himayat Ullah Kidwai, Haji Mohammad Ismail, and Hakim Murtaza Hussain.¹⁰⁹¹ The spouses gave full freedom to the arbitrators to make any enquiries and to make any decision they liked and stated the decision of the arbitrators would be binding.¹⁰⁹² About three months later, the arbitrators declared the marriage dissolved.¹⁰⁹³ Then, the husband filed several objections to the arbitration award in the Munsif's court. His main claim was that arbitration in a matrimonial dispute was not covered under the Arbitration Act.¹⁰⁹⁴ The Munsif rejected these claims, letting the arbitrators' order stand. The husband appealed the Munsif's decision to the Civil Judge in Faizabad, where it was also dismissed. The husband then appealed to the High Court.

The High Court had to decide whether the Arbitration Act could be used in such cases, or whether the DMMA prevented its use. Justice Manchanda noted that the DMMA did not give any specific procedure for dealing with suits nor did the statute purport to replace other forms of

¹⁰⁸⁹ *Faqir Mohammad vs. Amina*, AIR 1964 All 246.

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*, para. 3.

¹⁰⁹⁴ *Ibid.*, para. 4.

Muslim law, only to “consolidate and clarify it.”¹⁰⁹⁵ The Justice noted, “The CPC [Civil Procedure Code], the Arbitration Act and other procedural laws would, therefore, clearly be attracted to suits under [the DMMA].”¹⁰⁹⁶ The parties could certainly avail themselves of the Arbitration Act for a suit under the DMMA, the Justice ruled.¹⁰⁹⁷ This position found further support because Muslim marriage was a civil contract and not a sacrament.¹⁰⁹⁸ The husband also alleged that there was misconduct by the arbitrators. Since the two lower courts found this not to be the case, the High Court could not re-open the issue.¹⁰⁹⁹

The High Court ruling argued that even if the husband and wife could not enter arbitration under the DMMA, they agreed to a form of *talak-i-tafwiz* (delegated divorce) when they submitted their agreement to arbitration to the court. The husband had delegated to the arbitrators the power to divorce. The Justice quoted Baillie’s *Digest of Mohammedan Law*: “As a man may in person repudiate his wife, so he may commit the power of repudiating to herself or to a third party.” The Justice also pointed to Sayed Ameer Ali’s treatise and the *Fatawa-i-Alamgiri* to provide further support for this position.¹¹⁰⁰ The declaration to the court, the Justice noted, “leaves no manner of doubt that the husband had delegated his powers to the three persons mentioned in the document as objectly [sic--abjectly], unequivocally and categorically as it is humanly possible for anyone to do.”¹¹⁰¹ This was a form of *talak-i-tafwiz* in which the wife did not exercise her own option of divorce but had rather delegated it to someone else. Whether the marriage had been dissolved by arbitration

¹⁰⁹⁵ Ibid., para. 6.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Ibid., para. 7. He referred to an earlier RCR suit in which the parties also availed of the Arbitration Act. *Rup Narain v. Mt. Nandrani*, AIR 1934 Oudh 494, Division Bench; he also referred to *Ramudamma v. Kasi Naidu*, AIR 1945 Mad 269. He dismissed a Lahore decision that seemed to bar the use of arbitration in a matrimonial dispute because the justice’s comments in that case were deemed *obiter dicta*, *Abdul Ghani v. Mt. Sardar Begum*, AIR 1945 Lah 183.

¹⁰⁹⁸ *Faqir Mohammad vs. Amina*, AIR 1964 All 246, paras. 9-10. For authority, the justice cited *Abdul Kadir v. Salima*, ILR 8 All 149, Full Bench.

¹⁰⁹⁹ Ibid., para. 11, 12. Another minor procedural objection was rejected as well.

¹¹⁰⁰ Neil B.E. Baillie, *Digest of Mohammedan Law*, 2nd ed. (London: Smith, Elder & Co., 1875), 238; the Justice also quoted Ali’s *Mabommedan Law*, 5th ed., 495; *Fatawa-i-Alamgiri*, vol. 1, 543. quoted in *Faqir Mohammad vs. Amina*, AIR 1964 All 246, para. 13, 15, 16.

¹¹⁰¹ *Faqir Mohammad vs. Amina*, AIR 1964 All 246, para. 17.

or *talak-i-tafwiz*, the High Court ruled that it *was* dissolved. Since the wife had undertaken a second marriage, the Justice also did not see fit to overturn the lower courts' decisions and the husband lost his appeal.¹¹⁰²

This case showed that wives and husbands would often turn to community leaders to negotiate their marital disputes in what was a sometimes start-and-stop process. The couple initially turned to the courts, yet were somehow convinced to turn to community leaders for arbitration. They still sought some official recognition of their dissolution, which explains why they submitted their arbitration agreement to the court. The examples given here show how community forms of arbitration and marital dispute resolution overlapped with and even received sanction from the twentieth-century codes of the HMA and the DMMA. Sometimes formal law and informal law are depicted as discrete fields or in conflict with each other or women's rights. The examples here suggest that the various forms of dispute resolution could work together and reinforce each other as well.

UP Amendment

This final section turns to unique features of matrimonial law in UP. The 1962 UP Amendment to the HMA showed that UP availed of its powers under India's federalism. Though the UP Amendment was not widely used by litigants, yet its enactment shows that states saw fit to amend personal laws. The UP example is an important case of Indian federalism with respect to personal law in action. Under the Seventh Schedule of the Indian Constitution, "marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition" are concurrent powers, that is, topics on which both the state and federal center can legislate.¹¹⁰³ In September 1962, UP availed of these powers to make two changes to the HMA as it operated in the

¹¹⁰² Ibid., para. 18.

¹¹⁰³ Constitution of India, Seventh Schedule, List III, item 5.

state. First, the 1962 Amendment allowed divorce on the ground that the respondent “has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.”¹¹⁰⁴ In other words, the Amendment added the ground of cruelty to divorce under the HMA in UP. The second modification changed the timeframe for divorce. Normally, once a petitioner received a decree of judicial separation, he or she had to wait for two years before petitioning for a divorce. The Amendment allowed a petitioner to apply for divorce immediately once a decree of judicial separation was passed if “the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party.”¹¹⁰⁵

The 1962 Amendment highlighted some of the HMA’s limitations. Take the example of a wife seeking a divorce because of her husband’s cruel treatment. As we have seen, this situation was extremely rare. Wives usually alleged a variety of grounds rather than just cruelty. Nevertheless, in the hypothetical case where a wife wanted a divorce and her sole ground was cruelty, she would need to first petition for a judicial separation under s. 10. If she proved it, she could get it on the ground that her husband had “treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.”¹¹⁰⁶ Then, the wife would need to wait two years before she could petition for a divorce.¹¹⁰⁷ In sum, she would need to go through two major legal proceedings separated by at least two years, in other words, legal limbo between the judicial separation and divorce. Neither she nor her husband could remarry during this period. The amendment to the Hindu Marriage Act adopted by UP allowed the wife to skip this lengthy process and move straight to divorce. It allowed

¹¹⁰⁴ The Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam, 1962, UP Act No. XIII of 1962, s. 2.

¹¹⁰⁵ *Ibid.*

¹¹⁰⁶ HMA s. 10(1)(b).

¹¹⁰⁷ HMA s. 13(1)(viii).

a wife (or husband) to move more quickly by skipping over the two-year interim period to divorce on the ground of her husband's persistent or repeated cruelty.

Domicile played an important role in the application of the Act. After all, the Amendment could allow anyone present in UP to avail of its provisions, or it ran the risk of opening the state up to a rush of unhappy spouses coming to use its easier divorce provisions. (In the event, the statute was lightly used.) The Act stated that it “applies to Hindus domiciled in the State of Uttar Pradesh and shall also apply if either of the parties to the marriage was at the time of the marriage a Hindu domiciled in the State of Uttar Pradesh.”¹¹⁰⁸ Domicile played an important role in determining the application of the Act. If either one of the two spouses had a domicile in the State of UP, he or she could avail of the Amendment. However, one wonders whether the courts would have followed the rule of the wife's dependent domicile in determining her domicile—so, for example, if she had an UP domicile and her husband had a domicile in the Madhya Pradesh, would her domicile also be Madhya Pradesh? I found no evidence that this conflict was never litigated on so it remains an open question.

Impact of the Amendment

The UP Amendment is relatively unknown. My survey of the its High Courts for the decade after its passage only found only one example of its use by litigants. There are few references to the Amendment in legal publications and treatises, though it is mentioned in one treatise published in Allahabad.¹¹⁰⁹ The Justice Minister who was responsible for sheparding the amendment through the UP legislature, Syed Ali Zaheer, does not mention the Amendment in his memoir.¹¹¹⁰ However, it was not entirely unknown; there was litigation under it that was ultimately decided by the Supreme

¹¹⁰⁸ The Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam, 1962, UP Act No. XIII of 1962, s. 1(2).

¹¹⁰⁹ Shiva Gopal, *The Hindu Code*, 2nd ed. (Allahabad: Central Law Agency, 1964), 352-3.

¹¹¹⁰ Zaheer, *Memoirs*, 40-69.

Court in 1967.¹¹¹¹ Moreover, there were several days worth of debate over the proposed Amendment in the Uttar Pradesh Legislative Council (Upper House of Parliament, Vidhan Sabha) in 1962. Finally, the Amendment played an important role in national reforms to the Hindu Marriage Act fourteen years later in 1976.

One clue to how the UP Amendment became a model for the national reforms is offered by examining the recommendations and membership of the report, *Towards Equality: Report of the Committee on the Status of Women in India*. The report recommended that the UP model be adopted at the national level, which was then adopted in a 1976 Amendment to the Hindu Code which allowed divorce on the ground that the “respondent has, after the solemnisation of the marriage, treated the petitioner with cruelty.”¹¹¹² While the UP Amendment was explicitly discussed as a model in the *Towards Equality* report, it was not discussed in the Law Commission Report that recommended the same change.¹¹¹³ It seems probable that the conduits for this were two UP-based members of the Commission: Savitri Shyam, a supporter of the UP Amendment in the Vidhan Parishad, and Sakina Hasan, daughter of Syed Ali Zaheer.¹¹¹⁴

One major difference between the UP Amendment and the 1976 national Amendment highlights the limits of UP’s progressivism. The UP Amendment granted divorce on the ground of the responding spouse having “persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious

¹¹¹¹ *Avinash Prasad Srivastava vs. Smt. Chandra Mohini*, AIR 1964 All 486 and *Chandra Mohini Srivastava vs. Avinash Prasad Srivastava*, 1967 AIR 581; 1967 SCR 864.

¹¹¹² HMA, s. 13(1)(ia), as amended by the Marriage Laws Amendment Act of 1976 (Act 68 of 1976).

¹¹¹³ Law Commission of India, *Fifty-Ninth Report on Hindu Marriage Act and Special Marriage Act, 1954* (Delhi: Law Commission of India, March 1974), <http://lawcommissionofindia.nic.in/51-100/report59.pdf>, last accessed April 21, 2015, under the chairmanship of P.B. Gajendragadkar, paras. 2.11-2.17

¹¹¹⁴ For the recommendation regarding adopting the UP amendment nationally, see 4.95 (p. 119) of Committee on the Status of Women in India, *Towards Equality: Report of the Committee on the Status of Women in India* (New Delhi: Department of Social Welfare, Ministry of Education and Social Welfare, Government of India, 1974). The 1976 Amendment (Marriage Laws Amendment Act of 1976, Act 68 of 1976) adopted other changes that made it easier for spouses to divorce: it allowed divorce for a single instance of adulterous sexual intercourse after marriage (changed from “living in adultery”); desertion for a period of at least one year (instead of the previous two); granted the wife the ability to divorce in case she won a maintenance suit under the Code of Criminal Procedure and had not resumed cohabitation for at least one year; and granted divorce by mutual consent.

for the petitioner to live with the other party.”¹¹¹⁵ The 1976 Amendment defined cruelty as “treat[ing] the petitioner with cruelty.”¹¹¹⁶ The cruelty need not have been persistent or repeated as it was under the UP Amendment.

Reasons Behind the Act

Given the relative obscurity of the Amendment, it is difficult to state with certainty the reasons behind its development. Based on my survey of High Court decisions, there was no smoking gun case that showed a clear need for the reforms to divorce law in UP. Rather, it seems there were a variety of factors that contributed to the development of the Act. First, in the Vidhan Parishad debates, Law Minister Syed Ali Zaheer stated, “Various letters/petitions [*kbhatuu*] have come to us that if it [cruelty] is persistent then there should be an amendment in this. We accepted this.”¹¹¹⁷ This suggests that some form of public pressure influenced the Government, though Zaheer gave no further details about who sent such petitions or in what quantity. Nor was I able to find any archival records of the genesis of the Amendment in the UP State Archives or the National Archives of India that might have explained whether a particular organization lobbied for such changes.

Another influence seems to have been the experience of individual lawyers and judges in dealing with matrimonial disputes. Here, Legislative Council member Savitri Shyam, who held an LLB, suggested that Zaheer’s own experience with matrimonial cases in the courts might have influenced his push for the Amendment. She congratulated the government, “especially Ali Zaheer Sahab who had a long association with the bar, from which experience he benefited...How many full-of-sadness stories must have come in front of him, how many women must have put their

¹¹¹⁵ The Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam, 1962, UP Act No. XIII of 1962, s. 2(a)(i-a).

¹¹¹⁶ HMA, s. 13(1)(ia), as amended by the Marriage Laws Amendment Act of 1976 (Act 68 of 1976).

¹¹¹⁷ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Syed Ali Zaheer, 10 September 1962, 325-36.

sorrowful cries in front of him, how many of their cases he must have plead in court.”¹¹¹⁸ Savitri Shyam herself would go on to serve as a member of the Committee on the Status of Women in India, whose 1974 report recommended that reforms similar to UP’s be adopted at the national level. Syed Ali Zaheer’s mother, Begam Wazir Hasan (Sakinatul Fatima) founded the Lucknow Women’s Association.¹¹¹⁹ His wife, Begam Ali Zaheer (Aliya Khatoon) was from Bhopal and served as the chairman of UP’s State Social Welfare Board from 1955 to 1967.¹¹²⁰ Syed Ali Zaheer’s legal practice and the influence of his mother and wife may have also influenced his decision to develop and advocate for this Amendment.¹¹²¹

A further context for the Amendment might be found in national-level discussions and reforms on other aspects of marriage law and women’s rights. In 1959, the Parliament passed the Miscellaneous Personal Laws Extension Act, which extended Indian personal laws to former princely states.¹¹²² Syed Ali Zaheer was certainly aware of the cruelty ground under the Dissolution of Muslim Marriages Act, which allowed a Muslim wife dissolution on the ground of cruelty even if

¹¹¹⁸ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Savitri Shyam, September 7, 1962.

¹¹¹⁹ Zaheer, *Memoirs*, biographical sketch of Begam Wazir Hasan, front matter and 217.

¹¹²⁰ Ibid., biographical sketch of Begam Ali Zaheer (Aliya Khatoon), 219.

¹¹²¹ Not much is known about Syed Ali Zaheer beyond what is found in his memoir. See the Appendix for further details of Zaheer’s training and legal practice. Zaheer was the Indian Ambassador to Iran from 1948-51 before joining the UP Government as Justice Minister in 1951. He served as Justice Minister until his loss of his seat in the UP legislature in 1967. See Zaheer, *Memoirs*, 11-81 *passim*. Chandra Bhanu Gupta’s biographer described Zaheer in unfavorable terms, in part because the Zaheer was part of the Cabinet of C.B. Gupta’s rival Dr. Sampurnand. He describes Zaheer as “non-controversial middling politician with graceful manners. He is an embodiment of Muslim culture though he is not an orthodox Mussalman. He wields influence in the Shia community, outside he pulls no political weight...his powers as Minister of Justice began with selection of honorary magistrates and ended with the appointment of Assistant Government Advocates. In the Government he never wielded much influence and never trod on the corn of a colleague to cause resentment.” This quote is from L.N. Sarin, *Chandra Bhanu Gupta: A Profile in Courage* (Delhi: S. Chand & Co., 1967), 19. Indeed, Paul Brass discusses Zaheer’s role in a dispute over the appointment of an honorary magistrate when he was Justice Minister when Govind Ballabh Pant served as Chief Minister in 1953 and 1954. See Paul R. Brass, *An Indian Political Life: Charan Singh and Congress Politics, 1937 to 1961* (New Delhi: Sage Publications, 2011), 408-9. William Gould presents a discussion of corruption accusations against Zaheer. Gould states that some of the corruption allegations in 1964-5 against Zaheer were quite minor and seem to have been a product of his membership in a faction that rivaled dominant faction of then-Chief Minister Sucheta Kripalani. Gould, *Bureaucracy, Community and Influence in India: Society and the State, 1930s-1960s*. (London: Routledge, 2011). Syed Ali Zaheer’s brother, Sajjad, was far more famous. Sajjad was a member of the Communist Party and a founder and important figure in the Progressive Writer’s Association. He was also its chief chronicler, with his history of the movement titled *Roshnai*, or “the light.” See Sajjad Zaheer, *The Light: A History of the Movement for Progressive Literature in the Indo-Pakistan Subcontinent*, trans. by Amina Azfar, with an introduction by Ahmad Ali Khan (New Delhi: Oxford University Press, 2006).

¹¹²² Miscellaneous Personal Laws Extension Act, Act 48 of 1959. The Act excluded the extension of these various Acts from Jammu and Kashmir and Manipur.

it was not physical. He may have had this in mind with his proposed Amendment. In 1961, the Prohibition of Dowry Act was passed at the all-India level. Moreover, the Indian Law Commission published three Reports in 1960 and 1961 about Christian marriage and divorce law.¹¹²³ Just one month before the Vidhan Parishad debates discussed above, the Law Commission published a Report on the Law of Foreign Marriages.¹¹²⁴ Meanwhile, across the border in Pakistan, the Muslim Family Law Ordinances were enacted in 1961. The Ordinance expanded wives' rights, making previously irrevocable *talaq* [divorce] revocable, providing for the formation of Arbitration Councils to try to reconcile the couple in case of divorce, and allowing judicial dissolution of marriage on the basis of irretrievable breakdown.¹¹²⁵ India also sent representatives to the 1962 Tokyo Conference on the Status of Women. None of these events directly explains the direct impetus for the Act, but they do show that there was a great deal of attention to regularizing and reforming personal laws in India in the late 1950s and early 1960s.

Debates on the Act in the UP Vidhan Parishad

The Definition and Defense of Cruelty

The UP Legislative Council debated the Amendment in September 1962 and approved on September 10, 1962, with no changes or amendments. The Legislative Council debates acted as a forum for the airing of opinions or grievances rather than a forum for introducing substantive changes. The debates in UP's legislature took on a *pro forma* quality as Pitambar Das, the leader of the

¹¹²³ Indian Law Commission, *Report 15: Law Relating to Marriage and Divorce among Christians in India* (New Delhi: Indian Law Commission, 1960); *Report 18: Converts' Marriage Dissolution Act, 1866* (New Delhi: Indian Law Commission, 1961); *Report 22: Christian Marriage and Matrimonial Causes Bill* (New Delhi: Indian Law Commission, 1961). All of these were published under the Chairmanship of TL Venkatarama Aiyer.

¹¹²⁴ Indian Law Commission, *Report 23: Law of Foreign Marriages* (New Delhi: Indian Law Commission, 1962), under the chairmanship of J.L. Kapur.

¹¹²⁵ Carroll, "Muslim Family Laws Ordinance," 118-19, 121-5, 128-9. Other reforms included provisions to register marriages and divorce and the creation of Arbitration Councils to arbitrate marriage disputes. The judicial dissolutions on grounds of irretrievable breakdown was, Carroll states, a form of judicial *khul'*; therefore, the wife was required to repay her dower to her husband as she would have needed to with a traditional *khul'*.

Jan Sangh, and his allies engaged in lengthy discourses against the Amendment on grounds of the protection of the sacred nature of Hindu marriage.¹¹²⁶ Their comments recapitulated the themes of the 1955 HMA debates, reiterating a culturalist defense of preventing changes to the HMA.

As the many cases analyzed in this dissertation have shown, High Court justices often found it difficult to define cruelty precisely. This lack of clarity was one major criticism of the Amendment in the Vidhan Sabha. Justice Minister Zaheer's response to this criticism highlighted the interplay of India's common-law tradition, state-made statutes, and local circumstances in the state adjudication of violence within marriage. The 1955 HMA defined the standard of cruelty needed to obtain a judicial separation as needing to "cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious to live with the other party." The 1962 UP Amendment added that if such behavior was repeated and persistent, the petitioner could obtain a divorce, and if the behavior exhibited "exceptional depravity," the petitioner could obtain divorce directly without the two-year period of judicial separation. In response, to such criticisms, Zaheer went on to point out "you know that these words [defining cruelty] have been taken from English law," pointing to the common law tradition's influence upon India as well as the common knowledge of that tradition.¹¹²⁷ Zaheer pointed out that the new definitions still allowed for considerable latitude on the part of the adjudicating judge to consider individual contexts: "The special condition of husband-wife, in that some things are understood to be a cruelty, while in relation to a different condition of husband-wife, its definition changes. The court will have to decide this in each case whether it is cruelty or not."¹¹²⁸ Zaheer argued that the definition of cruelty might change depending on the context and the

¹¹²⁶ The Jan Sangh was the political wing of the Rashtriya Swayamsevak Sangh, a right-wing Hindu nationalist paramilitary group. Founded in 1951, the Jan Sangh won 15.3% of the vote and 49 seats in the Legislative Assembly (lower house of the UP legislature). The Congress party won 34.9% of the vote and 249 seats. Brass, *Factional Politics*, 23-5.

¹¹²⁷ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Syed Ali Zaheer, 10 September 1962, 325.

¹¹²⁸ *Ibid.*

personalities of the husband and wife. It left latitude for the judge to hear and consider individual circumstances.

As one of the Act's major critics, Pitambar Das pursued this line of criticism. He stated, "People have different-different ideas about cruelty. One friend was saying that if a husband would swear at his wife then that too would come within cruelty.... One time a woman told me I will have this one remorse in life that my husband did not beat me even once. Sometimes to beat is also understood as an indication of love."¹¹²⁹ One way to read Das's comments is as a defense of north Indian patriarchal prerogative. Yet Das's words are also similar to the title of Reva Siegel's article on domestic violence, "'The Rule of Love?' Wife-Beating as Prerogative and Privacy."¹¹³⁰ Siegel's analysis of debates over what kinds of violence should trigger the 1993 American Violence Against Women Act's federal civil rights remedies shows Das's link between love and violence was by no means unique to his time and place.¹¹³¹ Siegel analyzed Senator Orrin Hatch's objections to the civil rights provisions of the VAWA. For example, Hatch stated, "If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from *animus*."¹¹³² In other words, a rape "motivated by love" should not attract the federal civil rights provisions of VAWA. Siegel argues that in the late twentieth century, "As in the nineteenth-century interspousal immunity cases, assertions about love and intimacy in a relationship rhetorically efface the violence of sexualized assault...Where love is, law need not be. Intimacy occurs in a domain having no bearing on matters of citizenship."¹¹³³

¹¹²⁹ Ibid., 325-6.

¹¹³⁰ Siegel takes this phrase from James Schouler's 1870 treatise, *A Treatise on the Law of Domestic Relations* (Boston: Little Brown & Company, 1870). She uses it as an index of the rise of the ideal of companionate marriage but the overall argument of her article suggests that the rise of affective tie of love between husband and wife as an ideal did not supersede the acceptance of violence within marriage. Siegel, "'The Rule of Love?'" 2143.

¹¹³¹ Siegel, "'The Rule of Love?'" 2196.

¹¹³² Here Siegel takes Senator Hatch's words from Ruth Shalit, "Caught in the Act," *New Republic*, July 12, 1993, 12 and 14. Siegel, "'The Rule of Love?'" 2205.

¹¹³³ Ibid., 2205-6.

Siegel argues that a law intended to eliminate status-based regimes (in this case discriminatory laws about sexual assault) were soon co-opted by “traditional discourses of marital status in new idiomatic form.”¹¹³⁴ Pitambar Das’s anecdote bears similarities to Siegel’s example of Senator Hatch. Zaheer’s Amendment also sought to eliminate the husbandly prerogative of physical cruelty by giving wives in UP access to speedy divorce. Pitambar Das sought, like Hatch, to mount a culturally conservative defense of a husband’s prerogative in the language of affect, to frame “traditional discourses of martial status in new idiomatic form,”¹¹³⁵ to clothe a wolf in sheep’s clothing.

The arguments against the Amendment also reiterated the argument that making divorce easier in the case of cruelty would lead to the breakdown of Indian family life. In these debates, restraint was counterposed to happiness, and the ideal of restraint included the suffering of martial wrongs. For example, Hraday Narayan Singh stated,

To obtain happiness is a very elusive ideal.... Mankind should pass his life in restraint, behind marriage is this thought.... The idea of western civilization, that type [of independence] is not our principle. We pass our married lives through self-restraint... Now the question is, imagine if a wife and husband don’t live together in harmony, so a talak [in this context, general term for divorce] should take place, and another marriage took place, but if there also they don’t live harmoniously, and then another divorce took place, in this way divorce and marriage would keep on happening. From this family life will become broken, shattered (*chitra-bhinn*).¹¹³⁶

Siegel’s history of American domestic violence law shows that the idea of forbearance as a necessary aspect of marriage was not unique to India. As the martial ideal shifted from patriarchal authority to companionate marriage during the nineteenth century, Siegel argues “...it was not the husband’s authority that defined the nature of marriage so much as the wife’s altruism. Altruism included

¹¹³⁴ Ibid., 2206.

¹¹³⁵ Ibid.

¹¹³⁶ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Hraday Narayan Singh, September 10, 1962, 304-5.

forgiveness of the husband's transgressions, service to others, 'magnanimity,' and privacy."¹¹³⁷

Hraday Narayn Singh's arguments also enjoined wives to suffer marital wrongs and unhappiness as a sacrifice to protect Indian family life.

In response to a proposed amendment that would have allowed divorce only if the spouses lived apart for three years, Syed Ali Zaheer differentiated Hindu and Muslim law, reiterating that Hindu law, even with the Amendment, still made it harder to get a divorce than Muslim law. Zaheer stated,

Your thought is if those people would only live apart for three years, then divorce can be given [i.e. divorce due to marital breakdown], this is not a correct thing. In Muslim homes, this is there that if husband and wife are agreed upon divorce then the Maulvi was called and a divorce is given. But this is not in *this* provision. In this divorce can be given [only] upon some reason. It cannot happen just because they both agree. If this [i.e. the proposed change to the Amendment] would be given then it could also happen that husband and wife live apart for three years and take another marriage, then live apart for three years apart and marry again so from this the condition would not be good. Only upon both agreeing is not correct either, but rather in that there should be some reason without which talak could not be given. I think that the sections that are there, to make any kind of change/amendment is not correct. The things which have been given in the bill are good, to make changes in that is not good. I think it is not good to make these things so easy. To agree and get a divorce is not correct.¹¹³⁸

In other words, divorce on the ground of irretrievable breakdown or no-fault divorce was going too far. Zaheer was a reformer but he did not wish to make divorce too easy without at least providing some basis of legal wrong.

UP's Unique Position

An additional criticism was that Uttar Pradesh had no need to change the HMA since other provinces had not done so. Zaheer's responses highlighted some possible reasons for the UP Government's thinking about the Amendment. He asked his fellow legislators to consider that such a provision allowing judicial separation on the ground of cruelty was already present in the all-India

¹¹³⁷ Siegel, "The Rule of Love?," 2145-7, 2155, 2169.

¹¹³⁸ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Syed Ali Zaheer, 10 September 1962, 313-14.

HMA, so, “What are we changing...? This change was from the beginning in the law [i.e. the HMA].” His point was that a new ground was not being added; the ground of cruelty already existed to obtain judicial separation and now divorce was being added as an additional relief for cruelty. The Amendment simply extended the ground of cruelty, already allowed for separation, to include immediate divorce as well. Zaheer went on to state, “Various letters/petitions [*kehatun*] have come to us that if it [cruelty] is persistent then should be an amendment in this. We accepted this.”¹¹³⁹ This suggests that some form of public pressure influenced the Government in conceptualizing the Bill, but Zaheer provided no further details about who sent such petitions or in which quantity, nor was I able to find any archival records of such letters.

Legislators also raised the question of the records of the UP courts on matrimonial disputes, suggesting that judicial trends and decisions might influence the Government's actions on a particular legal matter. One opponent (Virendra Shah) complained that Zaheer had not provided the number of such cases before the judiciary that this Amendment would help remedy, and therefore the case for the Amendment was not compelling.¹¹⁴⁰

Women, Men, and Representation

The debates show how two women legislators, and some male legislators as well, were forced into defending their own right to speak in the debates. The two female advocates for the Act were Savitri Shyam and Sheoraj Vati Nehru.¹¹⁴¹ They took on the responsibility of speaking for women in cruel marriages and more broadly for women in society, and directly contested the Hindu

¹¹³⁹ Ibid., 325-6

¹¹⁴⁰ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Virendra Shah, September 10, 1962, 320.

¹¹⁴¹ Neither Sheoraj Vati Nehru nor Savitri Shyam is discussed in Visalakshi Menon's *Indian Women and Nationalism: The UP Story* (New Delhi: Shakti Books, 2003) or the other books on UP politics and history that I have surveyed. Savitri Shyam (1918-89, born in Muzaffarnagar) held an MA and LL.B. She held numerous positions in UP related to community development, social welfare, and prohibition. She was a member for the UP Legislative Council from 1955-67 and served in the Lok Sabha representing Anonla from 1967 to 1977. With Shyam Sunder, she wrote a book called *The Political Life of Govind Ballabh Pant* (Lucknow: Shailanil, 1960). C.K. Jain, *Profiles of Women Parliamentarians* (Surjeet Publications, 1993), 842-3.

revivalist position of members like Pitambar Das. In the process some frank truths about “our country’s married life”¹¹⁴² were put forth into the public sphere. According to Sheoraj Vati Nehru, who stood to speak against sending the Amendment to a Select Committee, married life for women was not happy, but rather filled with trouble (*ranj*), sadness, sorrow (*aaba*), and tears.¹¹⁴³ According to Sheoraj Vati Nehru, “For women, it [marriage] is only sacrifice, service, fulfilling the duty and the ties of religion, virtue, and chastity’s burden.”¹¹⁴⁴ The proposed amendment provided an opportunity for Sheoraj Vati Nehru and Savitri Shyam to expound upon the limits and problems of marriages in Indian society.

Here, the Chairman apparently intervened to state that another woman legislator, Savitri Shyam, also wanted to speak, but Sheoraj Vati Nehru’s interpretation of this interruption was to state, “You are being troubled [i.e. by the opposition], that is why you are not letting me speak.”¹¹⁴⁵ She went on to state, “I do not want to give my right to anyone.”¹¹⁴⁶ It seems that the Chairman, sub-consciously or consciously, allotted to women legislators as a whole only a limited amount of time to speak and he felt a responsibility to divide that time between Shyam and Nehru. Nehru, however, in the interests of her own passionate beliefs or political interests, did not want to engage in this zero-sum game. She continued outlining the troubles of married women and the abuses and atrocities they faced, including increased dowry demands and lack of interest from husbands who have returned to them from abroad.

Supporting my suggestion that female legislators were viewed as a unified bloc, Savitri Shyam was the next speaker after Nehru. Her speech began with a request that “this respected body

¹¹⁴² Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Sheoraj Vati Nehru, September 7, 1962.

¹¹⁴³ Ibid. Sheorajvati Nehru (1897-1981) was born in Lucknow and educated in Aligarh. She married Dr. Kishan Lal Nehru in 1915 and was imprisoned for nationalist activities from 1939 to 1942. She was a member of the first Lok Sabha from 1955-7 representing Lucknow. I was not able to ascertain the exact dates of her service in the UP Legislative Council. See Jain, *Profiles of Women Parliamentarians*, 747-8.

¹¹⁴⁴ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Sheoraj Vati Nehru, September 7, 1962.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Ibid.

not...make fun of this bill, it is beneficial for both women and men and in relation to this, if a story full of pain about a woman is told, then laughter is not necessary in this. It does not raise your honor and it does not raise the honor of women.”¹¹⁴⁷ Savitri Shyam's and Shivarajwati Nehru's speeches were seen by their less sympathetic colleagues as undifferentiated and shrill women's talk, there were important differences. Savitri Shyam made the point that women had played important roles in the earlier independence struggle and in electing the Congress. In one of the rare instances in the entire debate when the Constitution was explicitly invoked, Shyam noted, “our Constitution gave women equal rights, but I believe that right is only up to giving votes...Women have equal rights, but where do women work as equals of men in offices and public offices [*kacheri*]? They do have the right but in practice there is no right. They say that women are princesses and queens, but they are not allowed actually to do anything.”¹¹⁴⁸ In other ways, Savitri Shyam echoed some of Sheoraj Vati Nehru's comments, for example, in pointing out the problems that wives of husbands who have returned from foreign countries faced, the general sadness of married life for women, the hypocrisy of “male society,” and increasing and increasingly vehement dowry demands.¹¹⁴⁹

While Savitri Shyam and Sheoraj Vati Nehru advocated for women's rights, there were some tensions in their speeches. Nehru began to discuss increasing dowry demands and the redress that the Amendment would provide to women subject to them when the Chairman interrupted her and suggested she consider that husbands might take a wife's dowry, begin beating her in order to expedite a divorce, and then remarry and begin the process all over again with a second wife. In response, she noted that such wives would at least have the right of maintenance, but went on to state, “Whoever gives her right to property to a man, I really believe that woman is a fool

¹¹⁴⁷ Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Savitri Shyam, September 7, 1962.

¹¹⁴⁸ Ibid.

¹¹⁴⁹ Ibid.

(*bevkauj*).”¹¹⁵⁰ Her comments evinced her belief that women of all classes and circumstances were able to maintain control over the disposition of their property.

In a similar vein, Savitri Shyam noted that “education is in shortage among women,” and then went on to point out some class differences in the treatment of women from her point of view.¹¹⁵¹ She stated,

I myself have seen that a money-earning man who drives a rickshaw that brought the liquor bottle with him, when he reached home he threw 2-4 annas in front of his wife, and then became absorbed in intoxication, and he did not bring anything home to fill the stomach and he began to beat the wife. Leave aside genteel (*sabhya*) matters of genteel people, those who are educated respect women, and those who are of lower class because of economic means and because they have not been educated, today their women are not good...It has become the duty of us women that we should give women this kind of education that it is also our fundamental right to spend our lives with freedom and respect.¹¹⁵²

In these excerpts, both women claimed to speak on behalf of all Hindu women—even all Hindu and Muslim women on occasion—but they also felt that class and educational differences resulted in irrational and uncivilized behavior toward and by women among the lower classes.

Although their speeches were interrupted by male legislators, they also engaged in unparliamentary behavior. In other words, they tried to give as good as they got. The transcripts of the debates record one such interesting incident. Shri Jaganath Acharya stood to speak, and almost before he could begin, “a woman” (as recorded in the transcript) sarcastically interjected, “Now goes the contractor (*thekadar*) of religion.”¹¹⁵³ The use of the term “a woman” reflects both the difficulties and vagaries of accurately transcribing Parliamentary debates, but also the sense that women legislators were an undifferentiated bloc within the Council. There were male legislators who spoke in support of the Amendment for similar reasons as Sheoraj Vati Nehru and Savitri Shyam. A Socialist legislator’s speech was interrupted by a woman who pointed out that his party did not have

¹¹⁵⁰ Ibid.

¹¹⁵¹ Ibid.

¹¹⁵² Uttar Pradesh Vidhan Sabha (Legislative Council) Debates, speech of Virendra Shah, September 7, 1962.

¹¹⁵³ Ibid.

any female representatives.¹¹⁵⁴ The debates on the Amendment showed a culturalist defense of indissoluble marriage, and its ideals including forbearance, restraint, and the toleration of violence. On the other hand, the female legislators described marriage as difficult and sad for women and advocated for the Amendment so that wives could get divorces more easily.

The UP Amendment in the Courts

My extensive research did not, however, much evidence of the Amendment's use in the appellate courts. One series of cases that showed the Amendment was known and used by at least one set of lawyers and litigants. The case involved a husband who sought divorce or, failing that, judicial separation from his wife under the HMA. The husband won a divorce before the Allahabad High Court but his wife won when she appealed to the Supreme Court. The UP Amendment was used in a way probably not intended by the Amendment's drafters since the husband, rather than the wife, employed it in an attempt to expedite his divorce.

The couple married in May 1955 in Gorakhpur and had a son two years later. The husband claimed that the wife refused co-habitation with him without reasonable excuse and that she lived in adultery with another man. The wife denied these allegations and claimed that the husband and his parents treated her with cruelty. The husband claimed separation on three separate grounds: adultery, cruelty, and desertion. Before the High Court, he proved the wife's adultery and desertion but not her cruelty.

The husband had several forms of evidence for the wife's adultery, including letters between her and her alleged adulterer in 1955 and his father's and his own testimony that he caught the two *in flagrante delicto* in his home in 1958. However, the Civil Judge in whose court the case was first tried, rejected the husband's and his father's testimony about catching the two because "8 P.M in the

¹¹⁵⁴ Ibid.

month of May and June was not at all the opportune time for carrying on such a nefarious activity in a house inhabited by the parents and other relatives” of the husband.¹¹⁵⁵ The Civil Judge also pointed out other problems with the testimony: it was unlikely that the two would have pursued their adulterous affair at a time when they knew the husband was expected home from the office or that the two would have taken up to ten minutes to open the bedroom door.¹¹⁵⁶ The High Court agreed with the Civil Judge’s assessment on the demerits of the husband’s testimony. However, it disagreed with the Civil Judge about the value of the letters between the wife and her alleged adulterer, the wife’s cousin. The High Court found in the letters convincing proof of the affair: “The flowery language of these letters, the emotional out-bursts and the half revealed and half concealed sentiments expressed therein clearly indicate that it was not a sort of platonic love, which existed between the respondent and the co-respondent, but it was the usual intimacy of sex.”¹¹⁵⁷

Even without the direct evidence of catching the two lovers in the act, the High Court thought that the letters showed “they had reasonable opportunities of having sexual intercourse...when both of them lived at Gorakhpur.”¹¹⁵⁸ The High Court opinion noted, “The learned Civil Judge, who had the advantage of seeing, hearing, and watching the demeanour of the witnesses also came to the definite conclusion that there was some illicit intimacy between the respondent and the co-respondent...”¹¹⁵⁹ It pointed out that to get a divorce the plaintiff had to prove that the respondent was living in adultery while to get a judicial separation the plaintiff merely had to prove that adulterous sexual intercourse took place even once. Thus, the husband could claim judicial separation. The High Court also rejected the lower court’s ruling that the husband had

¹¹⁵⁵ *Avinash Prasad Srivastava vs. Smt. Chandra Mohini*, AIR 1964 All 486, para. 5.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ *Ibid.*, para. 6. The High Court relied on a Bombay High Court decision that “It is enough to prove [adultery] by oral, documentary or circumstantial evidence from which the Court can draw an inference beyond reasonable doubt that the respondent and the co-respondent had adulterous relationship with each other.”

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ *Ibid.*, para. 8.

somehow condoned the affair by not reporting it immediately when it was alleged to have happened in 1955. He did not find the letters until 1959 and instituted the suit the next year.¹¹⁶⁰

The husband did not prove any physical cruelty by the wife against him, though her “voluntarily depriving the appellant [husband] of her society and co-habitation for a long period” was “mental and moral cruelty” to him.¹¹⁶¹ Both he and his father each testified that the wife had deserted him. Moreover, a Railways employee had also testified that “he had himself seen the respondent fleeing away from her husband’s house, and two other Railways employees had testified that “he had himself seen the respondent fleeing away from her husband’s house, that it was with great difficulty that he took her home, but she refused to live with her husband.”¹¹⁶² A second witness who was also employed by the Railways testified that in 1958 the wife “had gone to the office of the appellant [husband] and threatened to commit suicide by laying herself on the railway track.”¹¹⁶³ This evidence was further confirmed by a letter written by the husband’s father to the wife’s father in 1959 that stated that she had left him. There were also letters from the husband to the wife that showed that she was living apart from him. Her living apart from the husband was deemed to have been without reasonable cause.¹¹⁶⁴ Yet the evidence provided by the various witnesses suggests a far more tortured conflict between the couple, one in which the wife was even willing to threaten suicide in public. The High Court seems to have given short shrift to any reasons the wife had for deserting for her husband.

The Justice used the 1962 UP Amendment to grant the divorce. He noted that, while he normally would have preferred to grant a judicial separation to maintain the possibility of reconciliation, the degraded state of relations seemed to have foreclosed that possibility. The

¹¹⁶⁰ Ibid.

¹¹⁶¹ Ibid., para. 9.

¹¹⁶² Ibid., para. 10.

¹¹⁶³ Ibid.

¹¹⁶⁴ Ibid.

husband, he noted, “is already about 31 years of age, while the respondent has attained the age of 27; they have thus already passed the ages of matrimony, judged from normal Indian standards.”¹¹⁶⁵ The Justice thought he had good legal ground to skip directly to divorce because the 1962 Amendment allowed divorce in “the case...of exceptional hardship...” to the petitioning spouse and “exceptional depravity” by the responding spouse.¹¹⁶⁶

The wife appealed to the Supreme Court and, three years later, her appeal was upheld.¹¹⁶⁷ The bench consisted of two justices, G.K. Mitter and K.N. Wanchoo, the author of the opinion. The Court reviewed the husband’s claim for divorce: he had experienced exceptional hardship within the meaning of the UP Amendment to s. 13. If he could not get divorce, he claimed cruelty sufficient to allow a judicial separation under s. 10.¹¹⁶⁸ The Court reviewed the history of the case: the trial court found no evidence of any kind of adultery or cruelty on the part of the wife.

The Supreme Court disagreed with the High Court’s finding that the wife committed adultery. It pointed out that the trial court found that the alleged intimacy at the husband’s home between the wife and her cousin had not taken place. The key evidence for adultery was the cousin’s (alleged adulterer’s) letter to the wife. The Supreme Court noted that “the mere fact that some male relation writes such letters to a married woman, does not necessarily prove the there was any illicit relationship between the writer of the letters” and the wife.¹¹⁶⁹ It also pointed out that there was evidence within the letters that the wife did not reciprocate her purported adulterer’s feelings; for example, in one of the letters, he wrote, “You love me as you others and this is why my share is very small.”¹¹⁷⁰ The Supreme Court summarized its position: “When we have the clear denial of the appellant to the effect that she never had any sexual intercourse with Chandra Prakash, we have no

¹¹⁶⁵ Ibid., para. 11.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ *Chandra Mobini Srivastava vs. Avinash Prasad Srivastava*, 1967 AIR 581: 1967 SCR 864.

¹¹⁶⁸ Ibid., para. 1.

¹¹⁶⁹ Ibid., para. 7.

¹¹⁷⁰ Ibid.

hesitation in accepting that denial, for there is nothing in these letters which would even suggest that the denial was false.”¹¹⁷¹

The Court also noted that even if the letters proved adultery of some kind, the High Court wrongly applied the UP Amendment. It noted there were two separate requirements needed to trigger the Amendment. First, an order of judicial separation needed to be passed and, then, either a period of two years needed to elapse or the petitioner needed to prove “exceptional hardship” to him or herself or to prove “exceptional depravity” by the other spouse to obtain an expedited divorce.¹¹⁷² The High Court had wrongly skipped the judicial separation stage and moved straight to divorce. As the Supreme Court put it, “We cannot accept the contention that it is open to a court under the amended provision to grant a decree of divorce on the ground of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party, even without a decree of judicial separation having been first made.”¹¹⁷³ If that was the case, was the Supreme Court willing to pass an order of judicial separation? It did not think the husband had proved the wife’s adultery sufficiently. The letters did not prove adultery. Even if they did, the Supreme Court found the husband condoned the adultery because although it was alleged to have taken place in 1955 or 1956, he continued to live with her and even fathered a child with her in 1957. He tried to escape from this implication by stating he held suspicions, but no proof, about the affair in 1955 and 1956. It was only when he discovered the letters later that these were confirmed. Since they continued have sexual relations until 1958, the Supreme Court interpreted this as condonation because he continued to have a sexual relationship with her in spite of his discovery of her letters.¹¹⁷⁴ Therefore the wife’s appeal was allowed, the High Court’s decree was set aside, and the trial court’s initial decree

¹¹⁷¹ Ibid.

¹¹⁷² Ibid., para. 8.

¹¹⁷³ Ibid., para. 9.

¹¹⁷⁴ Ibid., para. 11-12.

dismissing the husband's petition was upheld. The wife was exonerated and the marriage remained intact.

Avinash Prasad Srivastava's pursuits show that lawyers and litigants knew about the UP Amendment. However, the only reported appellate court case using the Amendment was pursued by the husband in an attempt to expedite his divorce. It was not used by wives to escape from a difficult and cruel marriage. The Amendment was an experiment designed to help UP wives obtain divorce, and more quickly, on the ground of cruelty. It shows that individual states, especially UP, sought to use their concurrent powers under the Constitution to modify national laws as they saw fit. Apparently lightly used by litigants, modifications to the cruelty provision found their most helpful expression in national changes to the HMA in 1976, if the reported appellate court cases are any indication.

The UP Amendment to the HMA was not the only specific expression of a UP position on personal law. The UP state government banned second marriages for Hindu husbands in state employ even before the HMA was enacted, as shown by Ram Prasad Seth's 1957 constitutional challenge to the rule.¹¹⁷⁵

A third UP-specific approach involved the state's approach to maintenance law, as illustrated by a case decided in 1960 by the Allahabad High Court.¹¹⁷⁶ In this case a Brahmin man married a Thakur widow around twenty years earlier. In 1954, he kicked her out of his home and refused to support her. She duly applied for maintenance under the Code of Criminal Procedure. The village *panchayat* (council), however, gathered in April 1954 and mediated the dispute, making a written agreement with the husband that he would pay his wife Rs. 30/month as maintenance. Like many husbands before him, he refused to pay, causing the wife to turn to the formal court system and file a maintenance claim in the Small Causes Court (SCC) in Rampur. The husband then claimed that he

¹¹⁷⁵ *Ram Prasad Seth v. State of UP*, AIR 1957 All 411.

¹¹⁷⁶ *Smt. Kastoori Devi v. Chiranjil Lal*, AIR 1960 All 446.

originally “engaged [her]...as a maid servant but subsequently turned her out when he discovered that she was stealing his things.”¹¹⁷⁷ He explained away his earlier signing of the maintenance agreement before the village *panchayat* by claiming that the Sub-Inspector of the village police station in Tanda coerced him. The Small Causes Court judge did not believe the husband’s coercion claim. Nevertheless, he dismissed the wife’s maintenance suit because he found the marriage was never properly validated. It had been an inter-caste marriage made when no custom existed to sanction such a marriage, and it had not been solemnized with proof of the rite of *saptapadi*. The wife then appealed to the High Court. The husband contended the wife’s suit in the SCC had never been maintainable. However, the High Court found that within UP the Provincial Small Causes Court Act had been amended in 1954 to allow a wife to sue for *arrears* of maintenance in a Small Causes Court, even if she could not institute a suit for maintenance in the SCC. This is an additional example of UP’s use of its concurrent powers to amend national legislation to improve wife’s rights within the state. The Amendment to the Small Causes Court (SCC) Act was likely aimed at making it easier for wives to get cheap and easy justice in the case of their husbands’ refusal to pay maintenance. The problem for the wife was she never obtained an official maintenance order, just a written agreement mediated by the panchayat. Her husband challenged the validity of her suit for arrears in the SCC on this ground. He also argued that his agreement with her had been an invalid contract because it lacked consideration or, in other words, any “benefit conferred” as an “inducement to a contract,” typically one of the requirements for a valid contract.¹¹⁷⁸ However, the High Court found that the wife had given him a consideration for the agreement negotiated by the panchayat: she agreed to stop her proceedings for maintenance against him in the District Magistrate’s court.

Next, the wife needed to disprove the Small Causes Court judge’s decision that her marriage was invalid due to its intercaste nature. She correctly argued that the judge’s decision had ignored the

¹¹⁷⁷ Ibid., para. 1.

¹¹⁷⁸ S.v. “Consideration,” *Black’s Law Dictionary*, 2nd ed. (1910).

HMA along with an earlier similar act, the 1949 Hindu Marriages Validity Act. The decision noted that each of these statutes had retrospective effect, a point that the SCC judge had ignored. Moreover, even before this recent legislation, an intercaste (*anuloma*) marriage of a lower caste woman to a higher caste man had the sanction of the *smritis*. The Judge disagreed with the view of a Madras High Court opinion¹¹⁷⁹ that though the *smritis* might have endorsed such an *anuloma* marriage, later commentators did not. Justice Dhavan noted, “the opinion of a commentator, though of great value in elucidation of the Code, cannot be permitted to override the law [i.e. the *smriti* allowance of intercaste marriage] itself.”¹¹⁸⁰ It is interesting that Justice Dhavan engaged in this somewhat extensive discussion of the position of Hindu law when none of it really mattered given the statutes’ retrospective endorsement of inter-caste marriages. It shows that though the tradition of analyzing Hindu religious texts in the common law courts was no longer strictly necessary, it still held some symbolic weight. Perhaps Justice Dhavan engaged in this reasoning in order to provide greater weight and influence to the newer statutes, hoping to change minds through religious reasoning as well as through the force of law. He also noted that proof of *saptapadi* was not a requirement to prove a valid marriage; the only evidence required was a witness to the marriage. In this case, the wife herself had testified that the marriage had taken place as had the priest who performed it. So too had other witnesses.¹¹⁸¹ Justice Dhavan ruled in favor of the wife and decreed her suit for maintenance. He noted, “...the defendant has behaved throughout in a manner which would justify this Court in calling him a cad.”¹¹⁸² Justice Dhavan reiterated the courts’ specific disapproval of the ways in which a woman’s character could be harmed by her husband: “He [the

¹¹⁷⁹ *Subbaramayya v. Venkata Subbamaa*, AIR 1941 Mad 513.

¹¹⁸⁰ *Smt. Kastoori Devi v. Chiranjilal*, AIR 1960 All 446, para. 13.

¹¹⁸¹ *Ibid.*, paras. 18, 19.

¹¹⁸² *Ibid.*, para. 22.

husband] put up a defence, which if successful, would have had the effect of branding the plaintiff as a woman of loose character.”¹¹⁸³

This example shows an alternative route wives could use to pursue maintenance, by obtaining a local agreement by the *panchayat* and then, if the husband refused to follow the agreement, by pursuing maintenance arrears in the Small Causes Court. Perhaps UP amended its Small Causes Court Act in 1954 to allow wives who were not being maintained to pursue cheap and ready justice against their husbands in the Small Causes Courts. The case also showed that along with some of the strategies we have already outlined, husbands could attempt to dodge their maintenance burdens by calling into question their marriages’ very validity. In this case, the husband did so on caste grounds. Along with rejecting such an argument on the basis of new statutes that retroactively allowed intercaste marriages, Justice Dhavan also engaged in analysis of Hindu religious texts in order to rule that such intercaste marriages were valid.

Conclusion

Post-colonial matrimonial litigation continued on much the same lines as before the HMA. Wives most often won their suits; social offenses continued to be the easiest for wives to prove and win; and accusations of marital physical and sexual cruelty were plagued by the problem of proof. Yet, the courts also took an increasingly medical and psychological view of cruelty. The broader definition of cruelty allowed the courts to go beyond considerations of physical harm and consider the psychological impact of the husband’s behavior against his wife. The courts also carefully examined intimate details of husbands and wives’ sexual lives, with an emphasis on the wife’s medical capacities for sexual intercourse and childbearing. While in each case the wife won her relief, the process of doing so resulted in the exposure of intimate details of the wife’s body and sexuality

¹¹⁸³ Ibid.

in the public forum of the court. Courts' definitions of cruelty as psychological, on the one hand, provided a broader scope for considering the grounds on which a wife could attain redress. On the other hand, it again shaded the courts attention away from husbands' physical violence against wives.

Husbands from a variety of religious communities attempted to use the state's guarantee of religious personal law to make an argument for their treatment of their wives, even when this involved physical cruelty and legal harassment. The definition of cruelty, as the courts interpreted and applied it, drew on the twentieth century statutes as an additional layer on top of the legal-historical definitions of cruelty developed over long decades of litigation in the UP High Courts. These definitions drew on diverse sources, such as previous Indian courts' decisions on cruelty, English appellate court rulings, and English statutes, the latter often derived from common law precedent. Cases involving Hindu litigants also defined cruelty with reference to the Dissolution of Muslim Marriages Act [DMMA] and an important case on this Act drew upon precedents involving Hindu litigants.

The Hindu Code and family law in general in UP sit at the conjunction of several important features of the new Constitutional regime in India. The UP Amendment of 1962, for example, raised the issue of the concurrent powers of states and the federal center to legislate on personal law. More important, perhaps, were the factors that judges took into consideration – whether a particular bar for cruelty, however defined, was met; whether and how marriages were considered to be valid; and ultimately how much scope wives (and husbands) should have for dissolving the bonds of what was then – and now – considered to be one of the fundamental institutions of Indian life. As this chapter has tried to show, litigants chose to utilize whatever aspects of the new legislation they could to advance their suits and to bolster their individual narratives.

Conclusion

This dissertation has examined how marital status influenced women's rights in twentieth-century India. In several different arenas, Indian law attempted to preserve the marital bond and tie wives to their husbands. This was the case both before and after Independence. I examined two separate arenas of Indian law to show how coverture affected many different aspects of women's marital status, both those directly under the rubric of family law as well as under so-called secular arenas of law.

Chapter One examined the evolution of Indian citizenship law. It showed the signal role played by the legal idea of *domicile*: that each person had a particular location. Domicile was written into the Indian Constitution to help determine citizenship in the fluid circumstances of India's independence. Determining citizenship was complex due to the Partition, which was accompanied by mass migration and the substantial numbers of Indians who resided outside of India. Domicile was a well-known feature of private international law which made it a compelling legal device to help structure India's new citizenship law. With this well-known concept came its attendant body of structuring principles, namely the wife's dependence on her husband. Even as India's new Constitution enacted individual fundamental rights for Indians of all social locations, no matter gender, caste, or creed, the law of citizenship written into it incorporated the coverture-based notion of dependent domicile.

Dependent domicile structured many aspects of citizenship law until 1955, when two important developments provided a fillip to married women's independent citizenship. The 1955

Supreme Court decision in *Kumar Amar Singh* created a small hole in the coverture-based interpretation of domicile, allowing wives independent volition but only when it came to migration from India to Pakistan. Thus, the edifice of coverture began to crumble in the narrow category of cases of wives with ties to Pakistan. The 1955 Indian Citizenship Act allowed married women's independent citizenship but it continued to limit citizenship-by-descent to the paternal line for diasporic Indians. At the discursive level, wives' ties to their husbands continued to influence bureaucratic understandings of citizenship. Throughout, the state and national executives played a very important role in citizenship policy. It was these bureaucracies that decided, on a day-to-day basis, who met the burdens of citizenship, such as loyalty and assimilation. Though all routes to citizenship had the same endpoint—national belonging—the variances impinged on the ease and difficulty of depriving someone of citizenship.

Chapter Two's study of restitution of conjugal rights (RCR) shows that physical control of the wife was at the heart of the marriage tie. It examined three important RCR cases, *Ardaseer Cursetjee* (1856), *Moonshee Buzloor Ruheem* (1867), and *Rukhmabai* (1884-8). This concept of marriage in the particular form of RCR was brought into Hindu and Muslim personal law from English ecclesiastical law over the course of the nineteenth century. It shows how Indian common law deemed wives dependent on their husbands for their legal identities. In the first part of the century, wives most often used conjugal rights suits to attempt to compel their husbands to maintain them and treat them as properly married wives. With the 1856 decision in *Ardaseer Cursetjee*, the Privy Council deemed that such suits could not be brought within the Ecclesiastical jurisdiction of the Indian courts. However, it did not ban the use of such suits by Indian litigants entirely. Therefore, they began to be brought under the civil jurisdiction of the courts.

The structure of the conjugal rights suits remained the same whether they were brought by Hindu or Muslim litigants; however, in the second half of the nineteenth century they were brought

within the ambit of religious personal law. The suits showed the braided influences of the Indian legal context: an Ecclesiastical remedy, removed by the Privy Council from ecclesiastical jurisdiction in India, adopted by Muslim and Hindu litigants within the ambits of their civil religious personal law. One shared feature of this remedy was the extent to which it simultaneously granted wives relief by allowing them to compel certain behaviors on the parts of their husbands and granted husbands scope for the use of physical violence against their wives.

Through its study of the incorporation of RCR into Indian law, Chapter Two makes several important points. First, the remedy of RCR had its origins in English Ecclesiastical law and was acknowledged as such even as it was imported into Hindu and Muslim law. Second, its structure was similar to the family structure found in domiciles: a husband-headed family, located together in a single home, with the wife legally dependent on the husband, and the husband having some extensive, though not unlimited, rights over the wife. Third, litigants of all religious communities used conjugal rights suits and it appears to have been one of the foremost methods to attempt to attain marital redress in the British Indian courts.

Chapter Two shows that restitution of conjugal rights opened the door to two modes of analysis that simultaneously sought to assert the difference of Hindu and Muslim law from English law and draw aspects of English law into Indian family laws. Judges drew bright lines among the various religions but found similarities in how each religious law treated women, thereby showing the scope for RCR in Hindu and Muslim personal law as well as in Christian law. Similarly, courts also drew analogies among the bodies of law that allowed the operation of RCR in all bodies of law. An open secret was the way in which RCR would allow a wife to be exposed to her husband's physical and sexual violence. The cases showed that courts acknowledged that in ordering a wife to return to her husband they were exposing her to this risk as well as some physical violence and the husband's control over her property.

Chapter Three shows how the nineteenth century remedy of RCR structured twentieth century matrimonial litigation in the north Indian state of Uttar Pradesh. Its end point is the 1939 case of *Ram Bharosey*, an important case that showed that the law of RCR was the same for husbands of all religious communities. *Ram Bharosey* built upon *Moonshee Buzloor Rubeem*, the 1891 *Mackenzie* case, the 1906 *Husaini Begam* decision, and the 1927 *Mt. Maqboolan* decision. The chapter shows how RCR suits, no matter the location or religion of the litigants, often followed very similar patterns dictated in part by the legal form itself. So, too, did judgments share certain similarities. Judges drew composite pictures of husbands' behavior and viewed them with distrust. This allowed them to rule in favor of wives on the ground of husbands' legal cruelty. However, the definition of legal cruelty was broad and often focused on damage to the wife's reputation as much as to her physical or psychological well-being.

Husbands relied on arguments about both religious and geographic jurisdiction. They were keenly aware of jurisdictional differences, whether it was between Scottish and English law in *Mackenzie* or Princely and British India in *Husaini Begam*. In *Husaini Begam*, the fear that wives would be mal-treated in a princely state caused the court to break the usually strict rule associating the location of the matrimonial home with the husband. But this was not a possibility in the later cases of *Maqboolan* or *Ram Bharosey*. In *Ram Bharosey*, the husband argued that the line of law developed from *Moonshee Buzloor Rubeem* to *Maqboolan* should not apply to him as a Hindu husband. But he lost this argument. By the late 1930s, everyone was well aware that RCR was a British importation, yet it had firmly established itself in Indian law. It never took on the guise of a Hindu or Muslim remedy but rather fit well into Indian law. As the remedy became ever more entrenched in Indian law with each new case, the courts took on larger scope for discretion about the husband's behavior.

Chapter Four turns from restitution of conjugal rights to examine the history of maintenance law in Uttar Pradesh (UP). Like RCR, maintenance was aimed at preserving the marital tie since it,

under compelling circumstances, allowed wives living separately to be maintained by their husbands. Maintenance was an imperial legal form. Multiple arenas of law conditioned by India's status as a British colony shaped Indian maintenance. These included criminal, civil, matrimonial, and Ecclesiastical law. Colonial governance sought to limit vagrancy and it drew upon the longer history and shape of English poor law that had similar aims. Maintenance was shaped around a pattern that preserved the marriage tie and was administered through local institutions, tying the wife to her husband legally and physically. Though it was easy to portray maintenance as a humanitarian endeavor designed to protect destitute women, viewing it through this lens shows that a wife's liberty was often pitted against her sustenance. I site maintenance at the intersection of these overlapping ideas of social control: the colonial desire to settle mobile populations and ensure stability and security, and the domestic English idea of tying paupers to a particular parish to ensure that the local community bore the burden of poor relief. As my discussion of twentieth century maintenance law shows, this idea was reproduced across the Empire, oftentimes at considerable effort, because the perceived deterrent and morally salutary effect of tying wives to their husbands was a priority for the imperial government in London.

My study of the operation of maintenance law in Uttar Pradesh between 1939 and 1955 shows that to obtain maintenance from their husbands, wives had to show a good reason for living apart from them, such as unreasonable cruelty or adultery. All wives could use criminal procedure to obtain maintenance readily in relatively small amounts. If larger sums were desired due to the husband's wealth, they had to turn to the general civil law. Wives almost always won their maintenance suits. While one could interpret this as a victory for the humanitarian mission of the courts, I argue that their success was driven by the need of British Indian law, influenced significantly by English poor and Ecclesiastical laws, to reduce welfare expenses and to prevent prostitution by preserving the marriage tie.

Chapter Five examined the application of the Dissolution of Muslim Marriages Act in Uttar Pradesh. This groundbreaking 1939 statute provided a complete and lasting code of divorce for Muslim marriages in reaction to the fear that wives, facing difficulty in obtaining unilateral divorces, would leave the Muslim fold to gain the advantage of a divorce by apostasy. The DMMA delineated nine grounds for divorce, one of which was cruelty. Cruelty was further sub-divided into six specific categories of behavior. The Act provided a model of the statutory codification of grounds for marital redress. Within Uttar Pradesh, my survey found eight appeals to the High Courts under the new DMMA. Wives won in six of these, showing that the DMMA could be a powerful tool to attain marital redress on the ground of cruelty. In three of the six, wives won due to the physical violence and marital cruelty they experienced. In three, wives won due to the charge of *laan*, or false accusations of adultery by the husband.

This chapter also suggests that *laan*, the practice of a husband retracting a false accusation of adultery against his wife, took off as a remedy in the twentieth century with the 1919 *Zafar Hussain* case. It continued to remain in use after the DMMA with three cases decided by the UP High Courts. The three wives in each case won their suits even though the husband retracted his false accusation of adultery. Even under the DMMA, judges continued to take a dim view of husband's use of the courts to cast aspersions on their wives' faithfulness and chastity. Chapter Five concludes with a study of the number of applications for marriage dissolution across the state in 1948-9. Almost all applications for dissolution originated with wives rather than with husbands and most were filed on the basis of the husband's "cruelty, misbehavior, or neglect." Wives seemed to have most often won their suits on such charges and as the High Court cases show, even if they lost at the lower court level, they were likely to win on appeal to the High Court. Though there were limits on the husband's behavior and wives almost always won, the courts acknowledged that husbands

did have rights of violence over their wives. Earlier findings under RCR could also influence the outcome of suits under the DMMA.

Chapter Six examines the fate of UP matrimonial litigation in the period after 1955, when the Hindu Marriage Act (HMA) and other statutes reforming Hindu law were adopted at the national level. Wives used the Hindu Code less frequently than might have been expected, often continuing to rely on the maintenance provisions of the Criminal Procedure Code and RCR suits. There continued to be a great deal of traffic between the various arenas of law as, for example, when the High Courts addressed the legality of taking a second wife using sources from both Hindu and Muslim law. The courts continued to take a dim view of social offenses - especially bigamy - as well as false accusations of adultery or other immorality in the courts. In the 1960s, when the courts allowed the husband's retractions of false accusations of adultery, this signaled a shifting trend toward husbands. While wives still often won their suits, they seemed to lose with greater frequency at the High Court level than in the 1939-55 era.

An additional important change to the jurisprudence of cruelty was the increasingly medical view that the courts took of the matter. This had two prongs: first, the courts delved into medical details of couples' sexual lives. Marital rape and sexual assault were viewed through a medical lens as, for example, when the courts granted the wife separation due to her husband's forcing sexual intercourse on her while pregnant. Also, courts used the so-called two-finger test not just in the more well-known example of testing rape survivor's chastity but also to determine the chastity of a married woman. The second prong of this medicalization involved the courts' practice of delving into the details of the couples' sexual life. Chapter Six also shows how local community institutions and informal arbitration played an important role in regulating matrimonial disputes. Such institutions were not opposed to formal law; rather the formal, court-based law and the local institutions worked as overlapping entities.

My translations and analyses of the 1962 debates on the UP Amendment to the Hindu Code show the distance between Delhi and Lucknow and between legislative debates and legal practice. Perhaps compared to the monumental DMMA or the parent statute itself, the Hindu Marriage Act, the UP Amendment was not so significant in legal practice at the High Court level. Yet it represented an example of an Indian state amending a national marriage law on terms that did not map onto any particular UP-specific custom or practice. Rather, the UP Amendment made separation and divorce somewhat easier than it had been under national law. This state-based unit of analysis is an important one. It highlights that while regional and religious-communal considerations did play an important role in Indian family law, they were not the only motivating factors.

In summary, I argue that this dissertation makes several important contributions. First, it shows how marriage occupied an important position in many arenas of Indian law, not just marriage laws that applied to a particular religious community.

Second, priorities beyond religion structured both the colonial and post-colonial Indian state's approaches to marriage in Indian law. These included social control and colonial governance, the weight of tradition and institutions, legal infrastructures such as the availability of treatises, and the law itself - both statute and precedent. The point here is not to quantify somehow the English and Indian impact on Indian law, patriarchy, or society, which would reinforce the competitive view of women's rights.

Third, even within the formal court systems, and even within that sub-set of the High Courts in UP, litigation on marriage was very complex. Despite the absence of one over-arching Uniform Civil Code of family law for all Indians, the interlaced system of criminal, civil, and communally marked laws approached something like a complete system for governing marriage. In some ways, it was lawyers, litigants, and judges who created this system through the development of precedents and definitions that supported particular interpretations of the law. Together, for better or worse,

the various domains of law examined here laid out where a husband and wife should live, how they should treat each other, and their economic relations. Religiously marked personal law was an important but not the sole part of this system.

Fourth, it is important to consider law from the point of view of both statute and precedent. For that matter, associated institutions such as publishers, educational institutions, and bar associations are significant as well. This dissertation has sought to balance accounts of the development of important marriage statutes with its own account of the development of case law. In translating and analyzing the UP legislative debates in the final chapter, I suggest that when scholars do consider statutes, it is worthwhile to consider how different states debated amendments to those statutes for their particular states.

Fifth, this dissertation contributes to the literature on the Constitution, rights, and discrimination and equality in India. It shows that the pace of legal change is slow and that, even within one very narrow slice of the law, a variety of compulsions structure how the law is applied to the husbands and wives who turn to it. These central features, such as definitions of key terms, precedents, long-standing statutory frameworks, persuasive authorities like treatises, and many other factors influenced how the courts applied new statutes. I have resisted the temptation to comment on contemporary Indian legal and political matters related to marriage and family, such as the *Shah Bano* affair, honour killings and other forms of illegal, extra-legal, and legal coercive violence directed at controlling gender and sexuality. These events are well-known and without extensive and sensitive discussions of their context, it is easy to interpret them in ways that reinforce rather than challenge colonial assumptions about the community control of women and Indian illiberality.

Sixth, and finally, I have used a case law-focused method for selecting my sources. This method involved analyzing High Court decisions. Rather than being guided by the treatise literature on family law, I chose to focus on all matrimonial disputes in a particular period (1939-72) and

jurisdiction (Uttar Pradesh). This choice allowed me to see all the different kinds of family disputes in the UP courts, rather than the much more narrow set of cases that would have been selected if I had followed the cases highlighted by the treatise literature. Also, generally treatises cover the law of all of India and focus on the most important cases. Completing a survey like this one, of course, cannot come close to replicating the mindsets of litigants and lawyers as they approached the High Courts. However, it has sought to represent some important aspects of the world of the practicing lawyer in a legal capital in the twentieth century. By adopting something closer to the perspectives of lawyers and litigants themselves, even at the relatively far remove from everyday life of the High Courts, I have shown that a variety of categories beyond religion are required for analyzing the legal history of the family in India. I have specifically sought to disprove the value of the competitive framework for analyzing women's rights.

These general insights build toward the overall argument of the dissertation about the law of the family. An English model of marriage structured many aspects of Indian marriage law, especially those that set the conditions of entering and leaving and residence. This model allowed the husband some modicum of physical control over the wife. Indian marriage law emphasized the preservation of the marriage tie. It sought to tie husbands and wives to a limited number of locales, reflecting both colonial governance and the long shadow of English poor law. I argue that this represents a coverture-based model of marriage and that the law of status, especially that of marriage, structured many arenas of Indian law. I have sought to show that to the extent that restraint and control are a central part of marriage and marriage law, at least in modern India, these features have genealogies directly traceable to its English common law system.

Appendix

Lawyers of the Allahabad and Lucknow Bars

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| <i>Jivi Bai v. Narsingh Lalbbhai</i> | AIR 1927 Bom 264 |
| <i>Maqboolan v. Ramzan</i> | AIR 1927 Oudh 154 |
| <i>Maung Saw Pe v. Man Ban Sein</i> | AIR 1937 Rang 508 |
| <i>Mt. Badrulnisa Bibi v. Syed Mohammed Yusuf</i> | AIR 1944 All 23 |
| <i>Muhammad Rustam Ali Khan v. Husaini Begam</i> | 1907 ILR 29 All 22 |
| <i>O.H. Mackenzie v. M.A. Edwards-Moss or Mackenzie</i> | 1895 AC 384 |
| <i>Ram Bharosey v. Mt. Sheo Dei</i> | AIR 1939 Oudh 68 |
| <i>Rukmani Ammal v. T.R.S. Chari</i> | AIR 1935 Mad 616 |
| <i>Ude Singh v. Mt. Daulat Kaur</i> | AIR 1935 Lah 386 |
| <u>Chapter Four</u> | |
| <i>Abdul Shakoor, Applicant v. Smt. Kulsum Bibi and Ors.</i> | AIR 1955 NUC (All) 2706 |
| <i>B. Ratan Chand v. Mst. Kalawati</i> | AIR 1955 All 364 |
| <i>Buldeel v. Emperor</i> | 1937 MWN 1127 |
| <i>Chameli v. Gajraj Bahadur Gupta</i> | AIR 1954 All 33 |
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| <i>Earnest Frank Cecil, Appellant v. Sybil Lucretia Cecil</i> | AIR 1955 NUC (All) 3591 |
| <i>Jagdish Prasad and Anr. v. Mst. Bhagwati Devi and Anr.</i> | AIR 1955 NUC (All) 3526 |
| <i>MB Ignatious v. Alaganna</i> | AIR 1935 Rang 192 |
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| <i>Mohd. Rasool v. Mst. Rabbo and Anr.</i> | AIR 1955 All 693 |
| <i>Mohd. Siddiq v. Mt. Zubeda Khatoon</i> | AIR 1952 All 616 |
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| <i>Mst. Satwati and Anr. v. Kali Shanker and Others</i> | AIR 1955 All 4 |
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| <i>Ram Khelawan v. State Through Mt. Parbhu Devi</i> | AIR 1952 All 958 |

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| <i>Rifaqatullah Khan v. Emperor</i> | AIR 1947 All 4 |
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| <i>Shamsber Khan v. Sm. Siddiquinissa and Ors.</i> | AIR 1953 All 720 |
| <i>Shanti Devi v. Sia Ram</i> | AIR 1955 NUC (All) 3549 |
| <i>Smt. Chameli, Applicant v. Gajraj Bahadur Gupta, Opposite Party</i> | AIR 1954 All 33 |
| <i>Smt. Maiki v. Hemraj</i> | AIR 1954 All 30 |
| <i>Smt. Sheopiari v. Devi Prasad</i> | AIR 1954 All 21 |
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| <i>Banno Begum v. Inayat Hussain</i> | AIR 1948 All 34 |
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| <i>Avinash Prasad Srivastava vs. Smt. Chandra Mobini</i> | AIR 1964 All 486 |
| <i>Chandra Mobini Srivastava vs. Avinash Prasad Srivastava</i> | AIR 1967 SC 581: 1967 SCR 864 |
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| <i>Ishwar Singh v. Smt. Hukam Kaur</i> | AIR 1965 All 464 |
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| <i>Madho Prasad v. Smt. Shakuntala Devi</i> | AIR 1972 All 119 |
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| <i>Ram Devi v. Raja Ram</i> | AIR 1963 All 564 |
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| <i>Smt. Robini Kumari v. Narendra Singh</i> | AIR 1970 All 102 |
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