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The Role of Personal Laws in Creating a “Second Sex”

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THE ROLE OF PERSONAL LAWS IN CREATING A “SECOND SEX”

RANGITA DE SILVA DE ALWIS** AND INDIRA JAISING***

I.	INTRODUCTION	1086
II.	VIEWING PERSONAL LAWS THROUGH THE LENS OF INTERNATIONAL NORMS	1089
III.	CHALLENGING DISCRIMINATORY PERSONAL LAWS ..	1093
	A. <i>Dismantling the Muslim Personal Laws</i>	1093
	1. <i>The Shah Bano Case</i>	1093
	2. <i>The Danial Latifi Case</i>	1096
	B. <i>Dismantling the Syrian Christian Laws</i>	1098
	1. <i>The Mary Roy Case</i>	1098
	C. <i>Combating the Hindu Personal Laws</i>	1099
	1. <i>The Gita Hariharan Case</i>	1099
IV.	THE WOMEN IN THE CASES	1100
V.	CONCLUSION	1103

“Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. . . . Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimina-

* In *Reed v. Reed*, 404 U.S. 71 (1971), then-litigator Justice Ruth Bader Ginsburg challenged the statutory preference for men over women as administrators of estates. In her brief, she called the Idaho statute a “device of law mandated subordination . . . [which] secured women’s place as the second sex.” Brief for Appellant at 59, *id.* (No. 70–4).

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tion. Unless these rights have meaning there, they have little meaning anywhere."

—Eleanor Roosevelt¹

I. INTRODUCTION

The Universal Declaration of Human Rights (UDHR) 1948² defines the family as the basic unit of society. Thus, family law is a litmus test with regard to the status of women and has the most intimate and powerful impact on women's lives. The family has been described as the "site of struggle over symbols, entitlement to property and decision-making."³ The family is both a social and legal construct and is often the locus of gendered power relations in the family. The cultural construction of gender determines the role of women and girls within the family while the construction and definition of gender is deeply embedded in culture.

Martha Minow has defined family law as "forming underneath everything that grows."⁴ She argues that family law grows "‘underneath’ other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state."⁵ Personal status laws that govern family pose the greatest challenge in the application of the universal concepts of human rights. Family law inequalities are often translated into inequalities in nationality law, penal law (for example, the responses to domestic violence), and even employment law (husband's consent to employment, finances, etc.).

Under Personal Law systems, subtle but insidious discrimination against women takes place in the name of religion and

1. "The Great Question," Speech at the United Nations on the Tenth Anniversary of the Universal Declaration of Human Rights, New York (March 27, 1958).

2. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

3. FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* 89 (2005).

4. Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819 (1985).

5. *Id.* at 819.

women are often sacrificed at the altar of family. States reject civil marriage as an encroachment on the power of religious institutions. Women are essentially deprived of the benefits of the regulating power of international human rights norms or from the various principles of equity contained in those specific legal proposals.

The discourse around marriage, reproduction, and divorce is supported by an invisible network of power exercised by all members in society. Power acts by laying down the rule. As Foucault has argued, "power's hold on sex is maintained through language, or . . . from the very fact that it is articulated, a rule of law."⁶ Moreover, this power is insidious and often shrouded in religion and custom. Martha Minow has said, "[p]ower is at its peak when it is least visible."⁷ Personal laws in India, which I define as laws that constitute all matters related to any individual and their families, are anchored in religion and culture. Under the cover of the rule of law, they often mask the subordination of women

Personal laws at different levels circumscribe a woman's right to travel outside the home; get a job or pursue a trade or profession without permission; sign a contract; register a business; be the "head of household" or "head of family"; be able to confer citizenship to her children; decide where her child will attend school; open a bank account; choose where to live; have ownership over property; inherit property; act against the wishes of their husbands; convey citizenship to a non-national husband; administer marital property; exercise basic guardianship and custody rights over their children and more.⁸

6. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 83 (Robert Hurley trans., Vintage Books 1990) (1978).

7. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987).

8. See Dinusha Panditaratne, *Towards Gender Equity in a Developing Asia: Reforming Personal Laws Within a Pluralist Framework*, 32 N.Y.U. REV. L. & SOC. CHANGE 83, 86–92 (2008) (outlining the history of discriminatory personal laws in India, Sri Lanka, Bangladesh, Thailand, Malaysia, Singapore, and the Philippines); Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 BERKELEY J. INT'L L. 201, 203–204, 219–220 (2005) (same in a study of the impact of "granting group rights to religious and cultural minorities within a nation-state"); Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 968–69 (2008) (describing how the personal laws in India discriminate against women).

This essay demonstrates the implications of personal status laws on the rights and freedoms of women by looking at the Indian personal status systems.

Discrimination in personal laws governing marriage, separation, and divorce constitutes *de jure* and *de facto* discrimination against women and violates both formal and substantive equality in the law.

Personal status laws, whether based on Muslim, Christian, or Hindu tradition, custom, or religion, were drafted by male hierarchies and did not involve the participation of women. Religion was seen to control affairs of the home and family even while the state remained secular. Pluralism in family law is often justified on the basis of minority, ethnic, or other group rights. However, these group rights often result in the oppression of the individual and most often the women. While gender stereotypes pervade all aspects of human existence, women's rights are at particular risk in the family, which is a locus for the perpetuation of traditional values.

The first part of this essay examines the international law framework that serves as a critical analytical tool to examine personal laws in India. The second part of this essay examines three landmark Indian cases argued by Indira Jaising. Despite the generous sprinkling of ethnic groups and tribes across India, the principal personal laws are Hindu Law, Muslim Law, and Christian Law.

Part three examines the experiences of the women litigators and plaintiffs to understand the often-excluded female perspective in the laws that ignore women's experiences and the multiple layers of meaning surrounded by those experiences. It has been noted, "[O]ur capacity to render experience in terms of narrative is not just child's play, but an instrument for making meaning that dominates much of life in culture."⁹ An examination of these experiences leads to an analysis of gender that is rooted in women's lived experience of gender inequality shaped by the telling and retelling of the stories of women's lives in the cases examined. These cases then are more than an abstract attempt at reshaping the laws but an effort to reshape the lives of women living under three different religious traditions. Narratives that illustrate the indi-

9. JEROME BRUNER, *ACTS OF MEANING* 97 (1990).

vidual harms of inequality have a profound power that often transcend statistical or more generalized accounts of discrimination in culture and religion.

II. VIEWING PERSONAL LAWS THROUGH THE LENS OF INTERNATIONAL NORMS

States that implement religious laws, and believers themselves, have contended that many practices that violate women's human rights are manifestations of the freedom of religion or belief, and as such are entitled to protection under international law.¹⁰ Attempts to resolve conflicts between competing human rights values must therefore ensure the right to equality as the bedrock of the rights principle.

Despite the fact that international law of human rights has only recently focused on discrimination and violence in the family, these gaps have been filled in most recently through the Committee of the Convention on the Elimination of Discrimination against Women (CEDAW). Apart from the CEDAW, the UDHR and the International Convention on Civil and Political Rights (ICCPR) serve as foundational documents on the rights within a family. Article 16(1) of the UDHR¹¹ affirms the equality of men and women with regard to marriage, irrespective of their race, nationality or religion. In addition, the Article 16 of the Convention on Elimination

10. See, e.g., Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, 24 N.Y.U. J. INT'L L. & POL. 795, 795 (1991) ("Many gender-specific human rights violations are grounded in cultural and religious practices."); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 154 (2003) ("In recent years the notion that religious and cultural practices should be accommodated even at the cost of relinquishing the protection of women's rights has been gaining prominence and many abuses of women's rights have been dismissed as justified and inevitable."); Michele Brandt & Jeffrey A. Kaplan, *The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J. L. & RELIGION 105, 105 (1995) ("Since women's rights first entered the agenda of the United Nations . . . there has been a running tension between the expression and codification of those rights and the right to freedom of religion."); Susan Moller Okin, *Feminism, Women's Human Rights, and Cultural Differences*, 13 HYPATIA 32, 32 (1998) ("[M]any of women's rights violations occur in the private sphere of family life, and are justified by appeals to cultural or religious norms . . .").

11. UDHR, *supra* note 2.

of All Forms of Discrimination Against Women (CEDAW) enshrines the rights for equality between women and men in all aspects of marriage and dissolution of marriage.¹² Article 16 is anchored in the Universal Declaration of Human Rights. Perhaps more so than on any other Article in the CEDAW, customs, traditions and religious practices have a large impact on the implementation of Article 16. Article 16 must be read in conjunction with Article 2, which requires States parties to prohibit discrimination in all laws including personal status laws, and Article 5, which requires States parties to address gender stereotyping, as well as religious and customary laws that reinforce harmful practices.¹³

Article 26 of the International Convention on Civil and Political Rights (ICCPR)¹⁴ mandates the equality of all persons before the law and calls upon State parties to guarantee to all persons equal and effective protection against discrimination on any ground, such as race, sex, religion, social origin, or other status. The equal rights of men and women to enter marriage, during marriage, and at its dissolution are affirmed in the ICCPR in Article 23(4).¹⁵ Moreover the Committee on the Economic, Social and Cultural Rights affirms the equality of men and women to the enjoyment of all economic, social, and cultural rights.

CEDAW directs State parties to accord to women “equality with men before the law” and “in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.”¹⁶ Under Articles 2,¹⁷ 5,¹⁸ and 15¹⁹ of CEDAW, State parties are obligated to reform domestic laws that codify religious measures such as inheritance provisions,

12. Convention on the Elimination of All Forms of Discrimination Against Women art. 16, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 20 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW].

13. *Id.* art. 2, 5.

14. International Convention on Civil and Political Rights art. 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976 [hereinafter ICCPR].

15. *Id.* art. 23.

16. CEDAW, *supra* note 12, art. 15.

17. *Id.* art. 2.

18. *Id.* art. 5.

19. *Id.* art. 15.

and to take steps to abolish discriminatory customary practices.

Article 5 of CEDAW is ground-breaking in the sense that it requires States to reform the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.²⁰ This provision establishes a legal standard for the primacy of women's right to equality over discriminatory cultural or religious practices and prohibits the invocation of culture and religion to justify discrimination and violent practices against women and girls.

The Article 16(1) of CEDAW ensures that States "shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."²¹ This read together with Article 5 of CEDAW calls for the dismantling of gender bias and stereotypes implicitly and explicitly perpetrated in personal laws.²²

In its most recent General Recommendation on Article 16 of CEDAW, the CEDAW Committee states that: "The committee has consistently expressed concern that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women."²³

Moreover, the General Recommendation states that: "Personal laws should embody the fundamental principle of equality between women and men, and should be fully harmonized with the provisions of the Convention"²⁴

In 1962, the U.N. Economic and Social Council, in a resolution, called upon States to ensure that men and women in the same degree of relationship to a deceased individual are

20. *Id.* art. 5.

21. *Id.* art. 16.

22. *Id.* art. 5.

23. Comm. on the Elimination of Discrimination against Women, *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women*, ¶ 14, U.N. Doc. CEDAW/C/GC/29 (Feb. 26, 2013) [hereinafter *General Recommendation on Article 16*].

24. *Id.* ¶ 15.

entitled to equal shares in the decedent's estate, and to equal rank in the order of succession.²⁵

Several U.N. human rights experts and special procedures mandate holders have established that neither cultural diversity nor freedom of religion may be used as authority to discriminate against women.²⁶ The U.N. Working Group on the Issue of Discrimination Against Women in Law and in Practice (Working Group), one of the special procedures of the U.N. Human Rights Council, stated that:

The Working Group is concerned about the considerable increase in laws and public policies developed to protect culture and religion that threaten the universally established standards on the rights of women. Gender-based stereotypes, often strengthened and legitimized in national constitutions, laws and policies, are justified in the name of cultural norms or religious beliefs. Failure to eliminate these stereotypes leads to the generalization of practices that are harmful to women and girls.²⁷

The Working Group called upon States to "combat discrimination against women in cultural and family life."²⁸

The Working Group affirmed the importance of bringing family arrangements in line with international human rights norms, thereby once and for all, tearing down the false construct of the public and private spheres that separated the family from the searchlight of international human rights principles.

After [analyzing] the impact of culture and religion on the enjoyment of equal rights by women and girls in society and the family, the Working Group redefines family by incorporating a gender perspective. In reaffirming equality between the sexes and family di-

25. Rep. of Comm'n on the Status of Women, 34th Sess., July 3–Aug. 3, 1962, U.N. Doc. E/3671; ESCOR, 44th Sess., Supp. No. 1 at 19 (1962).

26. See generally Frances Raday, *Culture, Religion, and Gender*, 1 INT'L J. CON. L. 663 (2003) (proposing that when faced with divergent norms, gender equality should have normative hegemony over both cultural and religious norms).

27. Human Rights Council, Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, 20th Sess., ¶ 20, U.N. Doc. A/HRC/29/40 (2015) [hereinafter Working Group].

28. *Id.* Summary.

versity, it is necessary to apply the principle of women's right to equality in all forms of family law, in secular family law systems, State-enforced religious family law systems and plural systems.²⁹

Finally, the recently adopted Sustainable Development Goals (SDGs) commit to ending all forms of "discrimination against all women and girls everywhere" and eliminating "all harmful practices, such as child, early and forced marriage and female genital mutilation" that are inherent to personal laws.³⁰

The SDGs call for programmatic State action to prevent any cultural norms that discriminate against women and perpetuate structural discrimination, taboos or stereotypes based on gender. Moreover, States are bound to ensure the effective implementation of guarantees of equality and non-discrimination between men and women in all areas and at all levels of public and private life.³¹

III. CHALLENGING DISCRIMINATORY PERSONAL LAWS

In the following section we will look at major case law that has shaped the interpretation and implementation of Muslim, Hindu and Christian personal laws in various regions of India.

A. Dismantling the Muslim Personal Laws

1. *The Shah Bano Case*³²

Shah Bano, a sixty-five year old woman living deep in the byzantine confines of the old royal state of Madhya Pradesh was divorced after forty-five years of marriage by her husband by the triple *talaq* method, in which the husband says in one setting "I divorce you" three times. Shah Bano filed an action in court seeking a small subsistence from her wealthy lawyer husband under Section 125 of the Criminal Procedure Code, 1973 (Cr.P.C, 1973), a colonial piece of legislation intended to prevent "vagranacy" of wives. Her husband challenged her right

29. *Id.*

30. G.A. Open Working Group on Sustainable Dev. Goals, GAOR, 68th Sess., Goals 5.1-3, U.N. Doc. A/68/970 (2014).

31. *Id.*

32. *Khan v. Begum*, (1985) 2 SCC 556 (India).

to maintenance of 175 Indian Rupees on the ground that he had unilaterally divorced her and that under Muslim personal law, she was not entitled to any maintenance beyond the *iddat* period (three months after divorce). The case went up to the Supreme Court. The Supreme Court based its judgment on Section 125 of the Cr.P.C, 1973, a secular law, which states that when a husband has manifestly sufficient means, the court may request the husband to pay a sum of 500 Indian Rupees a month to his wife.³³ As Muslim personal laws do not require the husband to pay anything beyond the *iddat* period, Section 125 of the Cr.P.C, 1973 attempts to prevent the wife's destitution following the divorce. The historic contribution of the judgment was not just the recognition of the right of a divorced woman to maintenance but also the right of Muslim women to receive fair treatment. The Court borrowed from Pakistan's Report to the Commission on marriage and Family Laws:

Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children."³⁴

The Report concludes thus:

In the words of Allama Iqbal, 'the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative.'³⁵

The Shah Bano judgment swung open the floodgates of debate and sparked controversy within the Muslim commu-

33. Act No. 2 of 1974, CODE CRIM. PROC., §125, <http://indiacode.nic.in/> (India).

34. Khan v. Begum, (1985) 1 SCR (3) 844 (India).

35. *Id.*

nity. Lawyers, women's groups, progressive and reactionary elements, and Hindu and Muslim organizations all released statements³⁶ either for or against the judgment. The Muslim community, divided by internal schism, reacted strongly with a call for Islamic resurgence. Muslim leaders burnt effigies of the Supreme Court Justices³⁷ and raised the battle cry "Islam is in danger."³⁸ The Government of India responded to the controversy by overruling the Supreme Court decision. The Rajiv Gandhi Government passed the Muslim Women (Protection of Rights on Divorce) Act of 1986 (MWPRDA)³⁹ to counteract the communal strife which had bubbled to the surface in reaction to the Supreme Court's decision. This law is credited as being the single clearest act of "appeasement" by the majority community to the minority community,⁴⁰ further strengthening the worst elements of identity politics.

The MWPRDA, passed in 1986, required that the husband pay a reasonable maintenance fee within the *iddat* and required the husband to return all property belonging to his wife before or at the time of marriage.⁴¹ If the woman cared for and maintained children during the marriage, then, after the divorce, maintenance is to be made and paid by her former husband for a period of two years from the respective dates of the birth of such children.⁴²

The MWPRDA was drafted and passed under the influence of conservative, communalist Muslim groups, and without the input of more moderate Muslim and women's groups. It was felt that the Rajiv Gandhi Government had been pressured by communalist groups.⁴³ A flurry of cases have been

36. See generally Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, 27 ASIAN SURV. 935 (1987) (discussing criticisms of the case).

37. ASGHAR ALI ENGINEER, THE SHAH BANO CONTROVERSY 227 (1987).

38. RAVINDRA KUMAR, PROBLEM OF COMMUNALISM IN INDIA 44 (1990).

39. The Muslim Women Protection of Rights on Divorce Act, No. 25 of 1986, INDIA CODE, <http://indiacode.nic.in> [hereinafter MWPRDA].

40. Zoya Hasan, *Minority Identity, Muslim Women Bill Campaign and the Political Process*, ECON. & POL. WKLY, Jan. 7, 1989, at 44.

41. MWPRDA, *supra* note 39, §§ 3(1)(a), (d).

42. *Id.* § 3(1)(b).

43. Yüksel Sezgin, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL, EGYPT AND INDIA 183-184 (2013); Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33(3) L. & SOC. INQUIRY 631, 645-646 (2008).

filed by Muslim women in various courts for maintenance under Section 125 of the Cr.P.C., 1973, despite the new enactment of MWPRDA.⁴⁴ Nevertheless, women's organizations have continued to challenge the law.⁴⁵

Although the Shah Bano case was played out in the political theatre long before the drafting of the General Recommendation on CEDAW Article 16 in 2013,⁴⁶ the case foreshadowed the General Recommendation.

Religious laws governing personal status do not merely affect women's standing within their religious communities; they also directly and indirectly condition their ability to exercise civil, political, economic, social, and cultural rights guaranteed by international and national law in both public and private life.

2. *The Danial Latifi Case*⁴⁷

In the Danial Latifi case, the constitutionality of the MWPRDA was challenged before the Supreme Court on the grounds that it deprived Muslim women of maintenance benefits equivalent to those provided under Section 125 of the Cr.P.C, 1973 in violation of Articles 14,⁴⁸ 15⁴⁹ and 21⁵⁰ of the Constitution.

The Supreme Court in this case articulated the post-divorce maintenance rights of Muslim women and upheld the constitutionality of the MWPRDA by interpreting the provisions of the legislation in a gender-just way.

It is pertinent to note that, before interpreting the provisions of the MWPRDA, the Supreme Court deemed it necessary to analyze the role of a woman in an Indian marriage. The Supreme Court stated:

[T]here exists a great disparity in the matter of economic resourcefulness between a man and a woman.

44. Subramanian, *supra* note 43, at 647-48.

45. Asghar Ali Engineer, *Maintenance for Muslim Women*, THE HINDU (Aug. 7, 2000), <http://www.thehindu.com/2000/08/07/stories/05072524.htm>.

46. *General Recommendation on Article 16*, *supra* note 23.

47. *Latifi v. Union of India*, (2001) 7 SCC 740.

48. INDIA CONST. art. 14.

49. *Id.* art. 15.

50. *Id.* art. 21.

Our society is male dominated both economically and socially and women are assigned, invariably, a [dependent] role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in term of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally [recognized] by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.⁵¹

The Supreme Court held that the expressions "reasonable and fair provision" and "maintenance" as defined under S.3(1)(a) of the MWPRDA cover different things, and that the husband is liable for making reasonable and fair provision for

51. Latifi, (2001) 7 SCC 740.

the future of the divorced wife, including her maintenance.⁵² The Court stated that the word "provisions" indicates that something is provided in advance for meeting some needs, and that at the time of divorce, the Muslim husband is required to contemplate the future needs of his wife and make preparatory arrangements in advance for meeting those needs.⁵³ The Court thus reasoned that a Muslim husband's legal obligation to pay maintenance is not confined to the *iddat* period.⁵⁴ A reasonable and fair provision for the wife that will cover her needs even beyond the *iddat* period must be made by the husband within the *iddat* period according to the terms of S.3(1) of the MWPRDA. Comparing these provisions to S.125 Cr.P.C, 1973 and seeing that the purpose of S.125 is to prevent vagrancy and destitution, the Court held that this purpose and object of S.125 Cr.P.C, 1973 is fulfilled by the provisions of the MWPRDA.⁵⁵ The Court thus interpreted the MWPRDA as codifying what was stated in the Shah Bano judgment.

By these interpretations, the Court ruled that the MWPRDA is constitutional.

Thus, as per the MWPRDA, a Muslim husband's liability to provide the reasonable and fair provision and maintenance to his divorced wife extends beyond the *iddat* period, and he must realize his obligation within the *iddat* period.

B. *Dismantling the Syrian Christian Laws*

1. *The Mary Roy Case*⁵⁶

Sections 16 to 19 of the Travancore Christian Succession Act, 1916 (TCSA)⁵⁷ provided that a widow or mother of an intestate who was entitled to immovable property of such intestate would have only a life interest, terminable at death or on remarriage, and that a daughter would not be entitled to succeed to the property of the intestate in the same share as a son (the precise amount of her share being contingent on a range of circumstances specified in Sections 16 to 19).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Roy v. State of Kerala & Ors.*, (1986) 1 SCR 371 (India).

57. Travancore Christian Succession Act, No. 2 of 1916, §§ 16-19.

Until 1986, when Mary Roy obtained a landmark judgment from the Supreme Court entitling Syrian Christian women to an equal share in their father's property, the Syrian Christian community followed the provisions of the TCSA and Cochin Christian Succession Act, 1921 (CCSA) even while members of the community in other parts of the country were governed by the provisions of the Indian Succession Act, 1925 (ISA). As per the TCSA and CCSA, daughters were eligible for one quarter of the sons' share or 5,000 Indian Rupees, whichever was less, if the father died intestate. This phenomenon was within a community which owned coffee estates and tea estates, all of which went to the male heirs to the exclusion of daughters. The Supreme Court held that henceforth the ISA would apply to all Christians, leading to equal inheritance rights for male and female heirs.

C. *Combating the Hindu Personal Laws*

1. *The Gita Hariharan Case*⁵⁸

In this ground-breaking case, the Supreme Court dealt with two writ petitions challenging the legality of Section 6 (a) of the Hindu Minority and Guardianship Act, 1956 (HMGA) and Section 19 (b) of the Guardian and Ward Act, 1890 (GWA).⁵⁹

In the first petition,⁶⁰ Gita Hariharan, a writer, applied to the Reserve Bank of India for Relief Bonds in the name of her son. The application stated that Gita Hariharan was rejected on the ground that she could not act as guardian for the minor son. Gita Hariharan and her husband jointly challenged the law as being discriminatory on the basis of sex.

Dr. Vandana Shiva, the second petitioner⁶¹ claimed custody of her minor son challenging the same discriminatory law on the ground that it constituted the father as the "natural" guardian to the exclusion of the mother.

58. Hariharan v. Reserve Bank of India, A.I.R. 1999 S.C. 1149.

59. Hindu Minority and Guardianship Act, 1956, No. 32, § 6(a), Acts of Parliament 1956 (India); Guardians and Wards Act, 1890, No. 8, § 19(b), A Collection of the Acts of the Central Legislature and Ordinances of the Governor General, 1890 (India).

60. Hariharan, A.I.R. 1999 S.C. 1151.

61. *Id.*

Both the petitioners claimed that Section 6 (a) of the HMGA, 1956 and Section 19 (b) of the GWA, 1890 violated the equality clauses of the Constitution because the mother of the minor can exercise her right as a natural guardian only after the father, thus she is relegated to an inferior position on grounds of sex.⁶²

In the Gita Hariharan case, the Supreme Court interpreted a provision in the HMGA which had reinstated the English law idea of the single male head of household, in line with the Indian Constitution and CEDAW's norm of gender equality. The Court decided that the mother could have shared rights of parental guardianship with the father.

The Supreme Court held the literal interpretation of the words "after him" to mean after the death of the father, which violated gender equality, one of the pillars of the Indian Constitution.⁶³ The Court reinterpreted the word "after" to mean in the absence of, which could mean that the father was not in charge of the affairs of the minor either due to an agreement between the two parents or if the father for any reason was not able to take care of the child and the mother would remain the natural guardian even during the lifetime of the father.⁶⁴ The Court cited CEDAW and the Beijing Declaration as persuasive authority for the ruling.⁶⁵

Justice Banerjee referenced international law and most specifically Article 2 of the UDHR. He stated that the UDHR entitled everybody to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion.⁶⁶

IV. THE WOMEN IN THE CASES

Research shows that in countries where women face legal discrimination in the ability to work, head a household, choose where to live, or inherit property, or are required by law to obey their husband, women are less likely than men to own an account and to save and borrow.⁶⁷ This in turn limits

62. *Id.*

63. *Id.* at 1152.

64. *Id.*

65. *Id.* at 1154.

66. *Id.* at 1155.

67. Asli Demirguc-Kunt et al., *The Global Findex Database: Women and Financial Inclusion*, 9 *FINDEX NOTES* 1, 4 (2013), <http://siteresources.world>

women's participation in the economy and in public life. The misuse of religion, tradition, and culture to curtail women's human rights as well as women's rights to participate in public life is showcased in the narratives of the petitioners in the four cases discussed above.

Despite the fame that these cases have garnered, little attention has been given to the rich cast of characters in these historic cases whose actions have changed the history of women in India. These women who brought these suits, belie the lack of agency of women assumed by the laws on the books in profoundly powerful ways

While these stories capture or distill the essence of individual experiences, they describe the social situation of all women. They present how litigation, and its analytic potential, can make use of women's stories within a legal framework to secure the human rights of women.

Women's narratives, traditionally silenced in the law, are central to the egalitarian development of the law and legal system. Stories are passed from actor to actor, shaping the way that a particular event or person is understood within a legal context and influencing the legal system's reaction to that event or person. Insightful lawmaking is anchored in storytelling. Clients tell stories to lawyers, who recast these stories within a legal framework and retell these stories in court. In turn these stories are transformed into legal rulings and judicial decision-making.

Gita Hariharan is a well-known writer; her published work includes novels, short stories, essays, newspaper articles, and columns. Her first novel, *The Thousand Faces of Night*, won the Commonwealth Writers' Prize for best first book in 1993. Her fiction was published in Salman Rushdie's *Mirrorwork: 50 Years of Indian Writing 1947-1997*. A Visiting Professor or Writer-in-Residence in several universities, including Dartmouth College and George Washington University in the United States, and the University of Canterbury at Kent in the UK, Gita

Hariharan was denied equal guardianship rights under the law.⁶⁸

Ms. magazine, a leading feminist magazine in the United States, described Vandana Shiva as a leading environmental scientist, scholar, advocate, and as someone who has “devoted her life to fighting for the rights of the ordinary people of India. . . . [H]er fierce intellect and her disarmingly friendly, accessible manner have made her a valuable advocate for people all over the developing world.”⁶⁹

Mary Roy is probably one of the most fascinating women to bring a case to court. A well-known educator, Roy was denied her share of the familial property due to the sexist TCSA and sued her brothers to reclaim it after her father’s death.⁷⁰ The founder of the Palikoodam School (formerly the Corpus Christi High School) in Kerala, her values on activism, social justice, and gender equality were honed as a single mother bringing up her children, disenfranchised from family support.⁷¹ Her daughter, Arundathi Roy, the Man Booker Prize winner, memorialized the ancestral pickle factory owned by the men in the family, in her book, *God of Small Things*.⁷²

More than a quarter of a century after Mary Roy began her legal battle for equality in property rights for Syrian Christian women with their male siblings, the very property that is the basis of the case has finally come into her hands as the principal sub-court here ordered execution of the final decree in her property suit in 2010. “It has been 26 years since I had started my fight for justice. I am happy that our share of the property has finally come into our hands, mine and my sisters.”⁷³

68. Tanya Singh & Pramod Kumar Singh, *Discrimination between Parents by ‘Hindu Minority & Guardianship Act, 1956’: An Overview*, 9 INT’L J. APPLIED RESEARCH 1025, 1026 (2015).

69. Barbara Leiterman, *Vandana Shiva Simply Wants to Change the World*, Ms. (May/June 1997), at 30–31.

70. *Roy v. State of Kerala & Ors.*, (1986) 1 SCR 371 (India).

71. *About Us*, PALLIKOODAM, <http://www.pallikoodam.org/main/aboutus.asp>.

72. Nayare Ali, *There’s Something About Mary*, TIMES OF INDIA (July 14, 2002), <http://timesofindia.indiatimes.com/Theres-something-about-Mary/articleshow/15871684.cms>.

73. George Jacob, *Final Decree in Mary Roy Case Executed*, THE HINDU (Oct. 21, 2010), <http://www.thehindu.com/todays-paper/final-decree-in-mary-roy-case-executed/article840061.ece> (quoting Mary Roy).

Most women cannot afford to wait over a quarter century for justice. Women such as Mary Roy, Vandana Shiva, and Gita Hariharan are outliers in Indian society or for that matter in most societies. As Mary Roy said in an interview, "[t]here are few women who are able to work and support their families in India. Indian women need more economic independence. . . . What we need is mental and financial independence for women so that they can exist as Indian citizens with equal rights with men."⁷⁴

V. CONCLUSION

This essay recognizes that gender is only one frame of reference and one axis of difference which intersects with other forms of experience such as religious affiliation. While religious affiliation is an important factor in determining women's lived experiences, these plural identities can exacerbate discrimination.

Although CEDAW General Recommendation 29 acknowledges women's multiple identities, such as ethnicity and religion, gender equality is the overriding concern. Any identity based on religion or ethnicity that threatens to undermine gender equality is frowned upon by CEDAW. General Recommendation 29 expressly provides that: "States parties should adopt written family codes or personal status laws that provide for equality between spouses and partners irrespective of their religious or ethnic identity or community"⁷⁵

Ignoring the multiplicity of women's experience can generate essentialized analyses and stymie the development of multi-faceted legal strategies for change. At the same time, obscuring the commonality of experiences among women may also privilege a simplified perspective that belies a systemic understanding of complex social problems. Women's narratives in the law then are necessary antidotes to the absence of women's voices in lawmaking.

It is important to recognize that there is no homogeneity in family structures and that pluralism exists in different family

74. George Iype, *Ammu May Have Some Similarities to Me, but She is Not Mary Roy*, REDDIFF ON THE NET, <http://www.reddiff.com/news/sep/18arun.htm> (last visited Dec. 21, 2015).

75. *General Recommendation on Article 16*, *supra* note 23, ¶ 15.

arrangements. According to the Working Group, families encompass a plethora of diverse families including:

[S]ingle-parent families; families headed by women; intergenerational families including, among others, grandparents; families headed by children, such as orphans or street children; families comprising lesbian, gay, bisexual, transgender and intersex (LGBTI) persons; extended families; self-created and self-defined families; families without children; families of divorced persons; polygamous families; and non-traditional families resulting from interreligious, intercommunity or inter-caste marriages.⁷⁶

Gender equality in the family—in secular family law or religious family law systems—is a cardinal principle under international human rights law. Bringing personal laws in line with international human rights law is both an instrumental and human rights imperative, integral to the due diligence standards of State responsibility.⁷⁷ Governments have always argued that demands for change must be endogenous and come from within the affected community. It is heartening to note that as we write, Muslim women have demanded a gender-just personal law.

76. Working Group, *supra* note 27, ¶ 23.

77. See generally Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994) (examining the pervasiveness of discrimination against women worldwide and exploring legal recourse and remedies therefor).