TOWARDS GENDER EQUITY IN A DEVELOPING ASIA: REFORMING PERSONAL LAWS WITHIN A PLURALIST FRAMEWORK

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INTRODUCTION

Personal laws are statutory and customary laws applicable to particular religious or cultural groups within a national jurisdiction.[1] They govern family relations in such matters as marriage and divorce, maintenance and succession. Personal laws remain prevalent in Asia and especially in South Asia and South-East Asia, including in India, Sri Lanka, Bangladesh, Thailand, Malaysia, Singapore and the Philippines. Almost invariably, personal laws entrench inequalities with regard to women in two respects. Firstly, they sanction unequal rights of men and women within a given cultural or religious group. For example, some personal laws permit women to divorce their husbands on narrower grounds than those on which men are permitted to divorce their wives. Secondly, the application of personal laws results in unequal rights amongst women themselves, contingent on their religion or ethnicity. Hence, in a given jurisdiction, Muslim women may be entitled to smaller maintenance payments than Christian or Hindu women, or vice versa.

In this article I seek to highlight the discriminatory nature of personal laws and, moreover, to indicate a path for reform that is consonant with prevailing political conditions and minority group interests. It is an underlying tenet of this article that it is possible, to a greater extent than commonly understood, to reconcile the goal of equal rights for women with the aspiration of cultural and religious pluralism. The article will be divided into four parts.

Part I will highlight discriminatory aspects of personal laws in Asian countries with particular reference to India, Sri Lanka, Singapore and the Philip-

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1. It is often difficult to precisely identify a given personal law as either "statutory" or "customary". Rather, personal laws evolve from an interplay of statute, custom and, at least in common-law jurisdictions, from how statute and custom are interpreted in judicial decisions. A statutory personal law governing a religious group, for example, may require reference to prevailing customary norms. For example, the Marriage and Divorce (Muslim) Act, No. 13 of 1951 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 134) [hereinafter MDMA], in Sri Lanka requires Muslim *qadis* and "lay assessors" to apply the Muslim customary law governing the sect to which the parties to a dispute belong. This legislation and other Sri Lankan acts cited to Sri Lankan Legislative Enactments are available at http://www.commonlii.org/lk/legis/consol_act/. Sri Lankan statutes enacted between 1956 and 2006 are also available at http://www.lawnet.lk/list_page.php?id=4.

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pines.[2] Part II will trace the development of such personal laws and, in particular, two key aspects of that development. The first section of Part II will demonstrate that from a historical perspective, customary and religious laws in pre-colonial times were often less discriminatory towards women than current personal laws. During colonial occupation, a plethora of diverse and fluid customary and religious laws were consolidated into "personal laws" in a manner disadvantageous to women.

The second section of Part II will discuss how, in the post-colonial era, national governments have repealed or amended the personal laws applicable to *majority* religious and ethnic groups to remove or lessen discrimination against women. But they have largely retained discriminatory personal laws applicable to *minority* communities to appease minority political and religious leaders. Hence the issue of further reform of personal laws that discriminate against women has become entangled in the complexities of majority-minority political relations.[3]

Part III of this article will emphasize specific reasons why personal laws that discriminate against women need to be reformed. Part IV will identify and evaluate three principal means of reforming personal laws: firstly, by legislative amendments; secondly, by progressive judicial interpretation and application; and thirdly, by instituting a uniform civil code.

It will be argued that legislative amendment of personal laws is preferable to the latter two means of reform, from the perspectives of women's rights and of religious and cultural pluralism. Moreover, this means of reform will also prove politically feasible when combined with certain elements. Namely, pro-women groups within *minority* communities must publicly reclaim the pre-colonial history of customary and religious laws favorable to women, as identified in the first section of Part II of this article. Furthermore, pro-women groups in *majority* communities must work to dissolve the majority-minority divide identified in the second section of Part II. Specifically, they must determinedly advocate

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2. A broader discussion of personal laws in other Asian countries is precluded by reasons of space and by the fact that jurisdictions with a Muslim-majority population require a different analysis than jurisdictions (such as India, Sri Lanka, Singapore and the Philippines) that have non-Muslim majorities.

3. The retention of personal laws as a bargaining chip with minority communities has led to an uncomfortable alliance in India and other countries between feminists and right-wing nationalists, with both groups seeking the complete abolition or narrowing of personal laws of minority communities in furtherance of their separate agendas. *See* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 1 (1999); VRINDA NARAIN, GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA 130 (2001); Srimati Basu, *Shading the Secular: Law at Work in the Indian Higher Courts*, 15 CULTURAL DYNAMICS 131, 137 (2003). Some left-leaning women's rights groups have retreated from demanding the abolition of discriminatory personal laws in order to distance themselves from nationalist factions and to demonstrate their commitment to cultural and religious pluralism. Thus a certain lack of direction has emerged among women's rights groups as to how best to confront the discriminatory nature of personal laws.

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genuine pluralistic measures benefiting such communities which afford greater "public" (rather than "personal") rights for minorities. With a combination of these elements, the discriminatory aspects of personal laws can be reformed for the benefit of women *and* in accordance with the long-term interests of minority communities.

I.
DISCRIMINATORY PERSONAL LAWS IN ASIAN JURISDICTIONS

This Part will examine the prevalence and discriminatory facets of personal laws in India, Sri Lanka, Singapore and the Philippines, as a prelude to discussing the historical and political dimensions of such laws in Part II.

A. India

The most complex body of personal laws in Asia exists in India, where personal laws apply at the national and regional levels, governing Hindu, Muslim, Christian and Parsi populations.

At the national level, the Hindu Marriage Act of 1955[4] and the Hindu Succession Act of 1956[5] are among the statutory personal laws governing Hindu women and men. The Muslim Personal Law (Shariat) Application Act of 1937,[6] the Dissolution of Muslim Marriages Act of 1939[7] and the Muslim Women (Protection of Rights on Divorce) Act of 1986[8] apply to the Muslim community. The Indian Divorce Act of 1869,[9] the Indian Christian Marriage Act of 1872[10] and portions of the Indian Succession Act of 1925[11] apply to Christian women and men. Finally, the Parsi Marriage and Divorce Act of 1936[12] and portions of the Indian Succession Act of 1925[13] govern the Parsi community. In addition to these national statutes, the other principal source of personal laws is customary law, as it is recognized and applied in judicial decisions.[14]

It is possible for members of any given religious or ethnic group to choose

4. Hindu Marriage Act, 1955, No. 25 of 1955 (India) (as amended). Indian legislation is available at http://indiacode.nic.in/ (search by act title, number, text or year).

5. Hindu Succession Act, 1956, No. 30 of 1956 (India) (as amended).

6. Muslim Personal Law (Shariat) Application Act, 1937, No. 26 of 1937 (India) (as amended).

7. Dissolution of Muslim Marriages Act, 1939, No. 8 of 1939 (India) (as amended).

8. Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986 (India).

9. Indian Divorce Act, No. 4 of 1869 (India) (as amended).

10. Indian Christian Marriage Act, 1872, No. 15 of 1872 (India) (as amended).

11. Indian Succession Act, 1925, No. 39 of 1925 (India) (as amended).

12. Parsi Marriage and Divorce Act, 1936, No. 3 of 1936 (India) (as amended).

13. Indian Succession Act.

14. *See* ABDULLAHI A. AN-NA'IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 222 (2002) ("[M]ost of the personal law applicable to Indian Muslims is uncodified and is administered by state courts on the basis of Indo-Muslim judicial precedents.").

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to exclude the application of personal laws, by availing themselves of a residual, "secular" corpus of family law. This corpus of family law comprises, *inter alia*, the Special Marriage Act of 1954,[15] which permits couples to opt for a civil marriage and thereby to exclude the application of personal laws of their particular religious or ethnic group. However, such "opting out" of personal laws appears to be rare in practice, at least in marriages between two persons of the same religion.[16] This is unsurprising given that marriages are occasions particularly given to reflecting cultural traditions and preferences of parents or other family members.

The Indian statutes referred to above entrench two forms of discrimination. They contain provisions that discriminate between men and women within a particular religious or ethnic group, to the clear disadvantage of women in the group. In addition, these statutes differ significantly from each other with respect to the rights of women, thereby discriminating between women across different groups. The following discussion will highlight examples of both forms of discrimination in personal laws.

With respect to marriage, although polygamy has been criminalized with respect to non-Muslims,[17] Muslim women are normally obliged to accept polygynous marriages contracted by their husbands.[18] Regarding the right to maintenance, a divorced Muslim woman is entitled to maintenance from her husband only for the duration of the *'idda* period (three menstrual cycles or months) following her divorce, whereas no such time limit applies to non-Muslim women who can obtain maintenance under Section 125 of the Criminal Procedure Code.[19] Conversely, Hindu and Parsi women can be ordered to pay maintenance

15. Special Marriage Act, 1954, No. 43 of 1954 (India) (as amended).

16. AN-NA'IM, *supra* note 14, at 222 (noting that, while there is an "option of registering a marriage under the Special Marriage Act 1954 (under which all inter-religious marriages must be registered) . . . it does not, however, appear to be very common in practice.").

17. Indian Penal Code, No. 45 of 1860, § 494 (India) (as amended). It appears, however, that in practice, bigamous marriages are common among Hindus—a phenomenon encouraged by ambiguities in the Hindu Marriage Act, 1955, No. 25 of 1955 (India) (as amended). *See also* AGNES, *supra* note 3, at 87–88.

18. AGNES, *supra* note 3, at 117. Bigamy or polygamy can constitute a ground for dissolution of a Muslim marriage only in extraordinary circumstances. Dissolution of Muslim Marriages Act, 1939, No. 8 of 1939, § 2 (India) (as amended); AN-NA'IM, *supra* note 14, at 223.

19. The term *'idda* is sometimes written as *iddat*. *Compare* Code of Criminal Procedure, 1973, No. 2 of 1974, § 125 (India) [hereinafter Criminal Procedure Code] (obliging maintenance payments generally for destitute women in India), *with* Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986, §§ 3–4 (India) [hereinafter Muslim Women's Act] (restricting maintenance payments). By virtue of Section 5 of the Muslim Women's Act, Section 125 of the Criminal Procedure Code would apply to Muslim women only in the extraordinary circumstance that a divorced woman *and* her former husband opt to be governed by Section 125 of the Criminal Procedure Code instead of by the provisions of the Muslim Women's Act. In addition to the discrimination between non-Muslim and Muslim women with respect to maintenance, there is no provision in either the Criminal Procedure Code or the Muslim Women's Act for maintenance payments by women to men.

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to their husbands, whereas Christian and Muslim women have no such obligation.[20]

With regard to inheritance rights, the Hindu Succession Act of 1956 provides that daughters and sons will equally inherit their parents' intestate *non-ancestral* property—i.e., property that was separately acquired or self-acquired by either parent.[21] However, until very recently, when a father died intestate, his *ancestral* property devolved equally to members of the coparcenary[22] (a traditional unit of property ownership under Hindu *Mitakshara* law, which conferred rights of co-ownership to male family members upon their birth[23]), thus preventing Hindu females from succeeding to their intestate fathers' ancestral property.[24] Under Islamic laws of inheritance, the general rule is that women are entitled to half the share of a male counterpart.[25] By contrast, Christian females and other females subject to the Indian Succession Act of 1925 have long received the same share as their male counterparts, with no distinction made between ancestral and non-ancestral property.[26]

The foregoing paragraphs highlight just some of the discriminatory aspects of personal laws in India. Similar discriminatory personal laws exist in Sri Lanka, Singapore and the Philippines.

B. Sri Lanka

In Sri Lanka, personal laws apply to the Muslim community and to certain

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20. *Compare* Hindu Marriage Act §§ 24–25 *and* Parsi Marriage and Divorce Act, 1936, No. 3 of 1936, §§ 39–40 (India) (as amended), *with* Indian Divorce Act, No. 4 of 1869, §§ 36–38 (India) (as amended), *and* Muslim Women's Act §§ 3–4. *See also* AGNES, *supra* note 3, at 83 & nn.22–23.

21. Hindu Succession Act, 1956, No. 30 of 1956, §§ 8–10, 15–16 (India) (as amended).

22. *Id.* § 6 (recently amended by the Hindu Succession (Amendment) Act, 2005, No. 39 of 2005 (India), to prospectively abolish this discriminatory facet of intestate succession). For a discussion of the amendment, see Bina Agarwal, *Landmark Step to Gender Equality*, THE HINDU, Sept. 25, 2005, *available at* http://www.binaagarwal.com/ (follow "Popular Writings" hyperlink; then follow "Landmark step to gender equality" hyperlink). Professor Agarwal argues that, despite the long-overdue and welcome amendments, some anomalies remain and suggests that it would have been preferable to abolish the *Mitakshara* system, *see infra* note 23 and accompanying text, altogether.

23. *See* Archana Sridhar, *The Conflict Between Communal Religious Freedom and Women's Equality: A Proposal for Reform of the Hindu Succession Act of 1956*, 20 BERKELEY J. INT'L L. 555, 559–60 (2002).

24. *See id.* at 564–65.

25. AGNES, *supra* note 3, at 35 n.25 (noting that variations to this general rule exist among different Muslim sects). Section 2 of the Muslim Law Act directs the application of Muslim Personal Law (Shariat) in matters among Muslims regarding intestate succession. Muslim Personal Law (Shariat) Application Act, 1937, No. 26 of 1937, § 2 (India) (as amended) [hereinafter Muslim Law Act]. An-Na'im notes that there has been no legislation in this area, and it therefore appears that the customary Muslim personal law prevails. AN-NA'IM, *supra* note 14, at 222.

26. *See* Indian Succession Act, 1925, No. 39 of 1925, pt. V (India) (as amended); AGNES, *supra* note 3, at 66–67.

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persons of Tamil and Sinhalese ethnicity.[27] Sri Lankan Muslims are governed by the Muslim Intestate Succession Act of 1931[28] and the Marriage and Divorce (Muslim) Act ("MDMA").[29] The MDMA provides for the administration of Muslim laws relating to marriage, divorce and maintenance by special courts staffed by *qadis*—male Muslim arbitrators who are appointed by the Judicial Services Commission of Sri Lanka.[30] Muslims are specifically excluded from certain laws of general applicability. For example, Section 24 of the MDMA provides for polygynous marriages by Muslims, and correspondingly, Muslims are generally not subject to the provisions of the Penal Code that criminalize bigamy.[31] While legislative amendments in 1995[32] raised the minimum age for marriage to eighteen years for non-Muslims, Muslim girls may be married at the age of twelve years without the permission of a *qadi* and younger with the permission of a *qadi*.[33]

The personal law applicable to Tamils originating from the northern peninsula of Sri Lanka is known as the *Thesawalamai*, under which a married woman cannot sell, transfer or gift her property without the consent of her husband.[34]

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27. Sri Lanka is a multi-ethnic country. CIA – The World Factbook — Sri Lanka, at People, https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html#People; *Sri Lanka: the Ethnic Divide*, BBC NEWS, May 16, 2000, *available at* http://news.bbc.co.uk/2/hi/south_asia/514577.stm.

Approximately 74% of the population is Sinhalese, but there are significant Tamil and Muslim minorities (the precise percentages of which have been difficult to ascertain in the past two decades due to armed conflict in the northeast of the country, where substantial numbers of Tamil and Muslim Sri Lankans reside).

28. Muslim Intestate Succession Act of 1931, No. 10 of 1931 (codified at Sri Lankan Legis. Enactments (1980), ch. 72).

29. Marriage and Divorce (Muslim) Act, No. 13 of 1951 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 134) [hereinafter MDMA].

30. *Id.* §§ 12–15.

31. *See* Penal Code, Sri Lankan Legis. Enactments (1980), ch. 25, § 362B. The exception to the general exemption of Muslims from criminal prosecution for bigamy is that non-Muslims who are married and convert to Islam will be subject to criminal prosecution for bigamy if they marry again. *See* U.N. Comm. on the Elimination of Discrimination Against Women [hereinafter CEDAW Comm.], *Third and Fourth Reports of States Parties: Sri Lanka*, ¶ 170, U.N. DOC. CEDAW/C/LKA/3-4 (Oct. 18, 1999) [hereinafter Sri Lanka CEDAW report]. *See also infra* notes 219–23 and accompanying text.

32. Marriage Registration (Amendment) Act, No. 18 of 1995, § 2 (codified at Sri Lanka Stats. 1956–2006 Official, ch. 112, § 15); Kandyan Marriage and Divorce (Amendment) Act, No. 19 of 1995, §§ 2–3 (codified at Sri Lankan Legis. Enactments (1980), ch. 113, § 4).

33. Sri Lanka CEDAW report, *supra* note 31, at ¶ 43; AN-NA'IM, *supra* note 14, at 239; MDMA §§ 23, 47(l)(j).

34. Jaffna Matrimonial Rights and Inheritance Ordinances, No. 1 of 1911, No. 58 of 1947 (codified at Sri Lankan Legis. Enactments (1980), ch. 70, § 6) [hereinafter Jaffna Ordinance]. The term *Thesawalamai* is also sometimes written as *Thesavalamai*. *See* Jayanthi Liyanage, *Kandyan Marriage Laws*, http://www.lankalibrary.com/rit/kandyan4.htm (observing that "Women under Thesavalamai Law cannot sell, transfer or gift their property (even when purchased from one's own money during marriage) without the written consent of their husbands.") See also the similar observations of Anton Cooray, *Asian Customary Laws through Western Eyes*, *in* LAW, SOCIETY

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Personal laws also exist with respect to Sri Lankans of Sinhalese ethnicity who are of "Kandyan" origin—i.e., whose family originates from the north-central province of Kandy or surrounding areas.[35] Kandyan personal laws distinguish between *diga* and *binna* marriages.[36] In a *binna* marriage, the bridegroom shifts to the bride's house upon marriage, and if the bride's father dies intestate, she receives an equal share of the father's ancestral property together with her brothers, unmarried sisters and other sisters in *binna* marriages. In a *diga* marriage, however, the bride shifts to the bridegroom's house upon marriage, and if the bride's father dies intestate, she does not receive any share of his ancestral property.[37] These discriminatory inheritance rules do not exist in the Matrimonial Rights and Inheritance Ordinance,[38] which applies to the majority of Sinhalese in Sri Lanka and to other persons not governed by Muslim, *Thesawalamai* or Kandyan personal laws. Under Section 24 of that Ordinance, sons and daughters equally inherit their parents' intestate property, whether ancestral or non-ancestral property.

C. Singapore

The application of personal laws is less complex in Singapore and the Philippines, as only the Muslim communities are governed by statutory personal

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AND THE STATE: ESSAYS IN MODERN LEGAL HISTORY 145, 158 (Louis A. Knafla & Susan W.S. Binnie eds., 1995). The statutory regime of *Thesawalamai* comprises the Jaffna Ordinance and the *Thesawalamai* Pre-emption Ordinance, No. 59 of 1947 (codified at Sri Lankan Legis. Enactments (1980), ch. 74).

35. *See* Marriage and Divorce (Kandyan) Act, No. 44 of 1952 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 132); Kandyan Succession Ordinance, No. 23 of 1917 (codified at Sri Lankan Legis. Enactments (1980), ch. 133); Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 71). The term "Kandyan" is largely a geographical distinction, although the colonial history and cultural practices of Kandyans differ in some respects from those of non-Kandyan Sinhalese. *See infra* text accompanying notes 63–65.

36. *See* Marriage and Divorce (Kandyan) Act § 23(1)(a)(ii) (requiring marriage registrars to register accurately "the nature of the marriage (whether in *binna* or *diga*) which the Registrar is hereby required to ascertain from the parties").

37. *See* Cooray, *supra* note 34, at 156–58 (observing that "in *diga* marriage, the wife left her family and went to live with her husband, forfeiting the right of inheritance to her father's estate in favour of her brothers and any sisters who were either unmarried or married under the *binna* form of marriage"). The term *diga* is also sometimes written as *deega*. *See* Liyanage, *supra* note 34 (commenting on the situation of a young Kandyan woman by the name of Bandara Menike who "found a suitor in Kandy and left her parental home in Kurunegala [a town northwest of Kandy] on a blissful 'deega' (marriage in which the bride shifts to her bridegroom's house) . . . . Soon after, her father died leaving no last will to ensure her share of the paternal property. The process, applying Kandyan law, which followed to divide the estate among his children, deprived Bandara Menike of any right to her 'paraveni' (property inherited from her father). Her three brothers and two sisters—one, unmarried and the other, settled in a 'binna' (marriage in which the bridegroom shifts to the bride's house)—received equal shares of the 'paraveni'.").

38. Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 69).

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laws in those countries.[39]

In Singapore, Muslim marriages and family rights are governed by the Administration of Muslim Law Act ("AMLA") of 1966.[40] All other marriages and rights related to marriage in Singapore are governed by the statutory Women's Charter of 1961.[41] The AMLA provides for the administration of customary Muslim laws by a *Syariah* Court and permits polygynous marriages under certain conditions,[42] whereas the Women's Charter mandates monogamous marriages by non-Muslims.[43] Pursuant to Section 9 of the Women's Charter, the minimum age for marriage is eighteen years, although persons under the age of eighteen may be granted a special licence to marry in certain circumstances.[44] However, Section 96 of the AMLA provides that the minimum age in Muslim marriages is sixteen years and that a *qadi* may in certain circumstances solemnize the marriage of a girl below sixteen years who has reached puberty.[45]

D. The Philippines

In the Philippines, the Code of Muslim Personal Laws of 1977[46] is applied by *Shari'a* courts to Muslim Filipinos, while the Family Code of 1987[47] and the Civil Code of 1949[48] govern family relations of non-Muslims. Reflecting the Roman Catholic heritage of most Filipinos, annulment of marriages under the Family Code is possible on certain grounds, such as insanity, violence, bigamy or fraud, but not by mutual consent.[49] By contrast, the Code of Muslim Personal Laws provides for several grounds of divorce by Muslim women in accordance

39. These personal laws are chiefly the Administration of Muslim Law Act of 1966 (codified at Laws of Sing., ch. 3) [hereinafter AMLA] and the Code of Muslim Personal Laws of 1977, Pres. Decree No. 1083 (1977) (Phil.), *available at* http://www.asianlii.org/ph/legis/pres_decree/pdn1083181/. The statutes of Singapore are available at http://statutes.agc.gov.sg/ (follow hyperlinked letter corresponding to first letter of act name; then follow hyperlinked act name).

40. AMLA.

41. Women's Charter of 1961 (codified at Laws of Sing., ch. 353, §§ 3(2)–(4)).

42. AMLA § 35.

43. Women's Charter pt. II, §§ 3(2)–(3), 11.

44. *Id.* § 9.

45. AMLA § 96(4)–(5).

46. Code of Muslim Personal Laws of 1977, Pres. Decree No. 1083 (1977) (Phil.) [hereinafter Philippines Muslim Code].

47. Family Code of the Philippines, Exec. Ord. No. 209 (July 6, 1987) [hereinafter Philippines Family Code]. Executive Ordinances of the Philippines are available by date at http://www.lawphil.net/executive/execord/execord.html. The Philippines Family Code repealed Titles III–XV, Book 1, of the Civil Code, which dealt with marriage and family law matters. *See* Myra S. Feliciano, *Law, Gender and the Family in the Philippines*, 28 LAW & SOC'Y REV. 547, 551 n.3 (1994).

48. An Act to Ordain and Institute the Civil Code of the Philippines, Rep. Act No. 386 (June 18, 1949) [hereinafter Philippines Civil Code]. Philippines statutes are available by date at http://www.lawphil.net/statutes/repacts/repacts.html.

49. Philippines Family Code art. 45. *See also* Feliciano, *supra* note 47, at 558 (referring to Article 45 of the Family Code).

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with customary Islamic law, and indeed, prior to the passing of the Family Code, only Muslims could legally end their marriages in the Philippines.[50] As in India and many other jurisdictions with personal laws governing Muslims, a Muslim husband in the Philippines may extra-judicially divorce his wife by pronouncing *talaq* under certain conditions.[51] Under the Civil Code, intestate property is devolved equally to legitimate sons and daughters.[52] By contrast, Book Three of the Code of Muslim Personal Laws provides that succession among Muslims will be governed by the general Islamic law rule that women shall receive half of the share of their male counterparts.[53]

The above discussion of personal laws throughout India, Sri Lanka, Singapore and the Philippines makes it clear that such laws discriminate between women of different ethnic groups and also disadvantage women vis-à-vis men within those groups. Although the discrimination appears most stark where there are personal laws governing Muslim communities, it is evident that personal laws discriminate against women across various religious and cultural groups.[54]

II.
TRACING THE DEVELOPMENT OF PERSONAL LAWS

Discriminatory personal laws are frequently misunderstood as reflecting the indigenous histories and cultures of the communities they govern. This misunderstanding inhibits reform of such laws and thereby disadvantages women. It is therefore necessary to clarify certain aspects regarding the development of personal laws. This section will argue that, from a historical and sociological perspective, personal laws in their modern form were legislatively and judicially

50. Philippines Muslim Code tit. II, ch. III. *See also* AN-NA'IM, *supra* note 14, at 275 ("Until the passage of the Family Code, Muslims were the only Filipinos with a possibility for legally ending a marriage.").

51. Philippines Muslim Code arts. 45–46 (in respect of the Philippines); Marriage and Divorce (Muslim) Act, No. 13 of 1951 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 134, 2d sched., R. 2) (in respect of Sri Lanka); Muslim Personal Law (Shariat) Application Act, 1937, No. 26 of 1937, § 2 (India) (as amended) (in respect of India). See as well the commentary of An-Na'im, who observes that there has "been no substantial reform of the classical law relating to *talaq*. The Muslim husband retains the right to repudiate his wife extra-judicially . . ." AN-NA'IM, *supra* note 14, at 223–24.

52. Article 979 of the Civil Code provides that "Legitimate children and their descendants succeed the parents and other ascendants, without distinction as to sex or age, and even if they should come from different marriages. An adopted child succeeds to the property of the adopting parents in the same manner as a legitimate child." Philippines Civil Code art. 979. Article 980 of the Civil Code provides, "The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares." *Id.* art. 980.

53. *See, e.g.*, Philippines Muslim Code art. 128(c).

54. See the discussions on personal laws affecting Hindus and Parsis in India, *supra* notes 20, 22–24 and accompanying text; on Kandyan Sinhalese and persons governed by *Thesawalamai* law, *supra* notes 34–37 and accompanying text and on Catholic Filipinos, *supra* note 50 and accompanying text.

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entrenched in two "waves", both of which subordinated the rights of women to other interests. The first wave of entrenchment occurred during the colonial era, when customary family laws were codified and applied by European colonial powers. The second wave came after the independence of the former colonized states, when minority personal-law regimes were retained and even strengthened in order to assuage majority-minority ethnic divisions.

A. Development of Personal Laws During Colonial Occupation

The first wave of entrenchment of personal laws occurred during the colonial occupation of Asian countries.[55] During this time, a diverse range of customary norms that governed familial relations in various cultural groups were officially recognized and solidified by European powers as "personal laws". This process was effected by three primary means: by the enactment of statutes or codes that devised statutory family-law regimes for different religious or cultural groups, by provisions in colonial statutes or codes that allowed for application of customary familial laws and (in common-law jurisdictions) by judicial decisions of colonial courts.

Legislative and judicial measures by colonial administrations which allowed for the development of personal laws were frequently regarded as acts of colonial generosity towards "native" populations and, indeed, continue to be so regarded in some spheres of discourse.[56] According to this view, the establishment of a regime of personal laws during colonial times allowed entrenched religious norms among indigenous populations to be practiced without European interference, despite European disapproval of the patriarchal nature of such norms.

Fallacies in Colonial Perception

There are a number of fallacies inherent to the colonialist view described above. Contrary to this view: (1) the norms were not "entrenched" in pre-colonial times but were in fact both diverse and evolving; (2) customary norms followed by a family or community actually depended as much on geographical and other factors as on any "religious" affiliation; (3) though some norms were indeed "patriarchal", many were often extremely progressive towards women by

55. The Spanish colonization of the Philippines began in the mid sixteenth century. The British colonial occupations of the territories of India began in the late eighteenth century and soon after in Sri Lanka and Singapore. For an account of these periods, see COLIN MASON, A SHORT HISTORY OF ASIA 27–28 (Sri Lanka), 139–40 (Singapore), 158–62 (India), 255–59 (the Philippines) (2000).

56. For references to variations of this view, see Cooray, *supra* note 34, at 149–50; NARAIN, *supra* note 3, at 14–15, 22–23; Archana Parashar, *Do Changing Conceptions of Justice Have a Place in Indian Women's Lives? A Study of Some Aspects of Christian Personal Laws, in* CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA 140, 153 (Michael R. Anderson & Sumit Guha eds., 1998); MASON, *supra* note 55, at 160–61.

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prevalent European standards and (4) personal laws were in fact solidified *with* "European interference" as they invariably enmeshed Victorian and other colonial values which were themselves patriarchal.

A few historical examples with reference to the Philippines, Sri Lanka and India should suffice to demonstrate these points.

1. The Philippines

Prior to Spanish occupation, women in the Philippines were able to divorce and remarry.[57] It was only upon colonization that the concept of marriage as an indissoluble union was integrated into Filipino culture.[58] Such Europeanized concepts were inherent in the Spanish Civil Code, which was applied to people in the Philippines with the proviso that where there was "no statute applicable to the point in controversy, the custom of the place shall be applied".[59] It has been observed that prior to the introduction of Spanish norms, religion and laws, women in the Philippines could become chief of their *barangay* (village) and perform the role of *babaylan* (priestess).[60] Pre-colonization, women had naming rights over their children, held property, could trade with their own money and maintained independent income from their businesses.[61] These practices demonstrate that customary law in the Philippines was far from being patriarchal. By contrast, Spanish rule and legal codes introduced the Roman doctrines of *patria potestas* and *paterfamilias*, whereby a woman was clearly subordinated to

57. *See* Feliciano, *supra* note 47, at 548 ("Before the Spanish came . . . [w]omen enjoyed substantial equality with their menfolk. They had the right to own property. They could obtain divorce and re-marry.").

58. *Id.* at 548, 557 (noting that "divorce is not allowed in the Philippines"). Philippines law permits the annulment of marriages and "legal separation" but does not provide for divorce. *See* Family Code of the Philippines, Exec. Ord. No. 209, tit. I, ch. 3 (July 6, 1987); *id.* tit. II; An Act to Ordain and Institute the Civil Code of the Philippines, Rep. Act No. 386, bk. I, tit. III, ch. 3 (June 18, 1949); *id.* bk. I, tit. IV. Formally, marriage as an indissoluble union does not discriminate against women, since divorce is proscribed for both men and women. However, substantively, the proscription more gravely disadvantages women than men. This is because the proscription against divorce works in combination with other sexist factors (e.g., the value attached to women as mothers and carers of the family, the social disapproval of women having multiple sexual partners and the civic or legal status accorded to men as "heads" of the marriage and family) to suppress the independence of married women and to stigmatize marital separation. Conversely, the availability of divorce to women serves to affirm that women have a role outside motherhood and the family, to legitimate a second husband or sexual partner and to enable independent control of children and other family members.

See Rebecca E. Silberbogen, *Does the Dissolution of Covenant Marriages Mirror Common Law England's Subordination of Women?*, 5 WM. & MARY J. WOMEN & L. 207, 208–15, for a commentary on old English laws that deemed marriage to be an indissoluble union, noting that these laws required physically and emotionally abused women to endure their marriages, *id.* at 212, and that the "continuation of unhappy marital unions was also perpetuated by the subordinate position of women in society", *id.* at 209.

59. Feliciano, *supra* note 47, at 547 (citing Article 6(2) of the former Spanish Civil Code).

60. *Id.* at 548.

61. *Id.*

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male authority within her marriage, family or clan.[62]

2. Sri Lanka

In Sri Lanka, before British colonization of the Kandyan kingdom in 1815, Kandyan women practiced polyandry, normally by taking two or more brothers as husbands.[63] However, the Kandyan Marriage Ordinance of 1859 prohibited both polyandry and polygyny among Kandyans.[64] Similarly, Kandyans did not customarily prize virginity among brides or bridegrooms; thus husbands and wives dissolved marriages at will and remarried.[65] Yet colonial legislation integrated the concept of lifetime monogamous marriages by mandating that a marriage could be dissolved only on specified grounds.[66] The grounds for divorce under Kandyan personal laws continue to be discriminatory towards women; they are required to prove adultery coupled with gross cruelty or incest, while men need prove only simple adultery.[67]

3. India

In India, the notion of clearly defined Hindu and Muslim religious laws emerged primarily as a result of British administrative, legislative and judicial actions.[68] Prior to colonization, there existed a variety of customary laws whose substantive norms were influenced by different schools or sects within Hinduism and Islam and were variously applied in different regions of India.[69] Many of these norms empowered and benefited women, and it is worth considering these

62. *Id.* at 549 ("Roman doctrines of *patria potestas* and *paterfamilias* as absolute ruler and the wife's subordination to the authority of her husband were seen in the several provisions of the Spanish Marriage Law of 1870, the Spanish Code of Commerce of 1845, and the Spanish Civil Law of 1885.").

63. Cooray, *supra* note 34, at 157.

64. *See id.* This prohibition of polygamy was later replicated in Section 6 of the MDKA. *See* Marriage and Divorce (Kandyan) Act [MDKA], No. 44 of 1952, § 6 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 132).

65. ROBERT KNOX, AN HISTORICAL RELATION OF CEYLON 175, 177 (2d ed. 1966). *See also* Asiff Hussein, *Traditional Sinhalese Marriage Laws and Customs*, http://www.lankalibrary.com/rit/marry.htm.

66. Cooray, *supra* note 34, at 158 ("By legislative intervention Kandyan marriage became a monogamous union, which had to be registered and which could be dissolved only on specified grounds.")

67. *See* Liyanage, *supra* note 34; MDKA § 32.

68. For further discussion on this thesis, see NARAIN, *supra* note 3, at 14–18, who notes that in the colonial era, the "formulation of Anglo-Muhammadan law, together with the British political strategy of communal representation, fostered the development of Muslim identity politics." *See also* AGNES, *supra* note 3, at chs. 2–4. I am indebted, especially in this section on the "Development of Personal Laws During Colonial Occupation" and in *infra* Part IV(A)(1)(a), to the thorough and insightful analysis of Flavia Agnes in her landmark book on family law and women's rights in India. *See* AGNES, *supra* note 3.

69. AGNES, *supra* note 3, at 12–22, 31–33; NARAIN, *supra* note 3, at 10–11.

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norms in turn.

Within Islam, Sunnis and Shias comprise the two broad sects, and there are several sub-sects within each.[70] Both sects, however, share a progressive notion of marriage as a civil and dissoluble contract, a principle that radically differed from the prevailing Christian notion of marriage at the time of British occupation.[71]

In Hinduism, the *Dayabhaga* school was the leading authority in Bengal, and the *Mitakshara* school was more authoritative in the rest of India, but there were also several sub-schools of *Mitakshara*, such as the *Mithila*, *Benares*, *Bombay* and *Dravida* sub-schools that were operative in particular localities.[72] Both *Mitakshara* and *Dayabhaga* schools recognized the concept of *stridhana*, which represents the exclusive movable and immovable property of a woman that could not be alienated by her husband, father, son or indeed any other male relative.[73] The *Mitakshara* school recognized inherited property as *stridhana*, and the *Benares*, *Bombay* and *Dravida* sub-schools had adopted an expansive approach to determining other types of property that constituted *stridhana*.[74] The norm of *stridhana* is just one aspect of Hindu law that operated to the benefit of women. Under the *Mitakshara* school, *stridhana* devolved to daughters and granddaughters of a deceased women, so a son could inherit the *stridhana* of his deceased mother only if there were no female heirs.[75]

Aside from the influences of different religious schools, local customs were heavily influential in determining the laws applicable to a given person or community. For example, female-headed households and matrilineal inheritance patterns existed among various castes and tribes along the Malabar coast in southern India.[76] Significantly, persons who converted to Christianity or Islam

70. NARAIN, *supra* note 3, at 10.

71. AGNES, *supra* note 3, at 33; Parashar, *supra* note 56, at 158.

72. AGNES, *supra* note 3, at 13. *See also* Sridhar, *supra* note 23, at 557–60 (discussing the principal *Mitakshara* and *Dayabhaga* schools, as well as the ancient texts that influenced these schools); LAW COMM'N OF INDIA, 174TH REPORT ON "PROPERTY RIGHTS OF WOMEN: PROPOSED REFORMS UNDER THE HINDU LAW", D.O. No. 6(3)(59)/99-LC(LS), § 1.3 (May 2000), *available at* http://lawcommissionofindia.nic.in/kerala.htm (cited by Sridhar).

73. The concept of *stridhana* resembles in some respects the Muslim concept of *mahr* (also written as *mehr*), which is an amount stipulated at the time of marriage that a woman is given at the time of marriage or has the right to redeem upon her husband's divorce from her. Divorce is available to a Muslim woman even in the absence of neglect or similar shortcomings of her husband by renunciation of her *mahr*. NARAIN, *supra* note 3, at 148 n.198. *See also* AGNES, *supra* note 3, at 64.

74. AGNES, *supra* note 3, at 17. *See also* Sushil Jain, Family Law in South Asian Context, A Paper Read at the Socio-Legal Studies Conference, University of Wales, Cardiff, nn.47 & 49 and accompanying text (Apr. 2–4, 1997) (unpublished conference paper), *available at* http://www.ucc.ie/ucc/depts/law/restitution/archive/articles/jain.htm#t47.

75. AGNES, *supra* note 3, at 18.

76. *See id.* at 21; G. Arunima, *A Vindication of the Rights of Women: Families and Legal Change in Nineteenth-Century Malabar*, *in* CHANGING CONCEPTS, *supra* note 56, at 114, 114–39.

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continued to follow these regional, matrilineal inheritance patterns.[77] This indicates that persons and communities (in at least these areas) followed local customs as much as—or even more than—religious directives.[78] Several regional groups of women, including the Lingayat (part of the Sudra caste) women of the Dharwar region in southern India, commonly exercised the right to divorce and re-marry and were also able to own property.[79] The rights of these groups of women differed from the more patriarchal Brahmin and upper-caste customary laws practiced in northern India, where sexual morality was strictly controlled and there were severe restraints on divorce and widow re-marriage.[80]

Within the diversity of these scripturally based and regional norms, colonial authorities habitually favored patriarchal norms over more pro-women customary norms.[81] They were no doubt influenced by Victorian values reflected in the laws of England at the time, which barred married women from disposing of their property without their husbands' consent and prohibited divorce except in extremely limited circumstances.[82] Colonial preference for more-patriarchal norms was apparent in both judicial decisions and legislative enactments.

For instance, colonial judges provided Hindu and Muslim men with the European remedy of restitution of conjugal rights, by construing ancient indigenous texts to support such a remedy.[83] Furthermore, a series of decisions in the late nineteenth century gradually eroded the indigenous practice that inherited property could constitute *stridhana*, to the point that even property inherited from female relatives no longer constituted *stridhana*.[84] That such decisions

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77. AGNES, *supra* note 3, at 23–24.

78. *See id.* at 21–23. *See also* Basu, *supra* note 3, at 133 (noting that the practice of personal laws "varied greatly depending on sectarian interpretations, *and* regional and local customs") (emphasis added); NARAIN, *supra* note 3, at 19–20 (noting the "diversity within the Muslim community and the critical fact that 'Muslim communities in India were historically constituted in ways that did not conform to strictly Islamic practices'" and citing JANAKI NAIR, WOMAN AND LAW IN COLONIAL INDIA (1996)).

79. AGNES, *supra* note 3, at 21.

80. *Id.* at 19–21.

81. *Id.* at ch. 4.

82. *Id.* at 53. *See also* Henry Finlay, Divorce and the Status of Women, Beginnings in Nineteenth Century Australia (Sept. 20, 2001) (unpublished seminar paper presented to the Australian Inst. of Family Studies), *available at* http://www.aifs.org.au/institute/seminars/finlay.html (follow "Divorce in England and the double standard" link). Finlay notes that prior to the passing of the English Divorce and Matrimonial Causes Act of 1857, a marriage was dissoluble only by an Act of Parliament, a procedure available only to the very wealthy. *Id.* The Divorce and Matrimonial Causes Act made divorce an option for other sections of society but retained the substantive grounds for adultery formerly applied by Parliament—i.e., a man was entitled to apply for a divorce for the simple adultery of his wife, while a wife could get a divorce only on the ground of aggravated and repeated adultery by her husband.

83. AGNES, *supra* note 3, at 64; Parashar, *supra* note 56, at 161–62. Agnes points out that sexist judicial interpretations of ancient Hindu and Muslim texts were further exacerbated by the reliance of colonial judges on English translations of such texts.

84. *See* AGNES, *supra* note 3, at 48–50. Agnes cites, for example: (1) the decision of the Calcutta High Court in *Gonda Kooer v. Kooer Gody Singh*, (1874) 14 B.L.R. 159, which held that

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were at least partly influenced by sexist norms of nineteenth-century English law is evident by, for example, the opinion of Lord Erskine Perry in the 1853 case of *Hirbae v. Sonbae*, which noted that a "custom for females to take no share in the inheritance is not unreasonable in the eyes of English law for it accords in great part with the universal custom."[85] English colonial norms were also manifest in legislation enacted in the colonial era in India. Thus, for example, the concepts of the restitution of conjugal rights, lifelong marriage and judicial separation (as opposed to community-sanctioned separation) were introduced to statutory law via the Indian Divorce Act of 1869.[86]

Hence, under European colonial administrations, a myriad of different customary laws, which were often progressive towards women, were consolidated into "Hindu", "Muslim" or other religious laws in a manner that disadvantaged women. These developments: (1) obscured regional and other nuances of customary laws,[87] (2) encouraged self-identification of persons and communities on sectarian grounds,[88] (3) negated pro-women aspects of customary laws in favor of aspects and interpretations consonant with prevailing Western values[89] and (4) inhibited the flexible and progressive development of customary laws by embedding anti-women norms in statutory or codified form and, with respect to British colonies, in decisional law governed by the principle of stare decisis.[90]

B. Development of Personal Laws Since Independence

The harmful consequences of the first wave of personal laws in the colonial era have since intensified, as a result of a second wave of amendments and enactments of personal laws in the first five decades of the post-independence era. Newly independent governments were tasked with maintaining ethnic and religious harmony among groups that now more stridently identified themselves along religious or racial lines.[91] In the decades following independence, the

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property purchased out of the accumulated income from *stridhana* could not itself be considered *stridhana*, and (2) the decision of the Privy Council in *Sheo Shankar v. Debi Sahai*, (1903) 30 I.A. 202, holding that property inherited by a woman from her mother does not constitute the *stridhana* of that woman, and upon such woman's death will devolve to her sons rather than to her daughters.

85. *See* AGNES, *supra* note 3, at 51 & n.27.

86. Indian Divorce Act, No. 4 of 1869, §§ 22, 32 (India) (as amended). *See* AGNES, *supra* note 3, at 62–63. Agnes argues that colonial values fundamentally altered social perceptions and norms that were adopted in later statutes. *Id.* at 58, 63, 68–69. The infusion of colonial values continued, and was exacerbated, in the immediate post-independence era by the dominance of British-educated lawyers in India's ruling Congress Party, *id.* at 80, when statutes such as the Hindu Succession Act were enacted. This idea is seconded by Basu, *supra* note 3, at 134. *See also id.* at 142–43 ("1939 Dissolution of Muslim Marriage Act . . . denied women rights to *mehr* (dower) and limited alimony in its final form.").

87. *See supra* notes 69, 76–81 and accompanying text.

88. *See supra* note 68 and accompanying text.

89. *See supra* notes 57–58, 61–66, 85–86 and accompanying text.

90. *See supra* notes 62, 64, 66, 83–86 and accompanying text.

91. As Singapore's most famous political figure, Lee Kuan Yew, put it, "We had said that an

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Philippines, Singapore, Sri Lanka and India instituted some progressive reforms of personal laws governing each of their respective *majority* ethnic-religious groups.[92] Yet personal laws governing these countries' *minority* groups have been largely retained (and in a few instances have become even more legally entrenched).[93] The principal reason for this polarized development of personal laws governing majority and minority communities since independence has been the political realities of majority-minority relations.

Realities of Majority-Minority Relations

While the establishment of democracy in newly independent states provided members of the majority ethnic-religious group with a greater public voice, minority communities had comparatively less public representation and power to achieve their communitarian goals.[94] In this context, minority communities increasingly appropriated the issue of personal laws as vital to their identity and autonomy. Hence in India, Sri Lanka and Singapore, minority communities resisted reform of existing personal laws.[95] In the Philippines, where there was no

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independent Singapore was simply not viable. Now it was our unenviable task to make it work. How were we to create a nation out of a polyglot collection of migrants from China, India, Malaysia, Indonesia and several other parts of Asia?" LEE KUAN YEW, THE SINGAPORE STORY: MEMOIRS OF LEE KUAN YEW 22 (1998). With respect to India, see George E. Jones, *India Today*, 16 FAR EASTERN SURV. 229–32 (1947). Jones, a former India correspondent of the New York Times, observed that "independence thrusts upon Indians themselves the responsibility for solving their problems, and partition complicates the task of facing the Indian Union and Pakistan. . . . Complexity is the keynote of India. It remains an inconsistent mixture of races, languages and religions, with religious differences more dynamic than others." *Id.* at 229. *See also* MASON, *supra* note 55, at 28 (discussing Sri Lanka), 179, 184 (discussing India); Bob East, The Bangsa Moro: Fighting for Freedom During the War on Terror: The Muslim Independence Movement of the Southern Philippines 5 (2005) (unpublished paper presented to the Social Change in 21st Century Conference, Centre for Soc. Change Res., Queensland Univ. of Tech.), *available at* http://eprints.qut.edu.au/archive/00003494/01/3494.

92. *See infra* notes 102–03, 109–10, 115, 119–20 and accompanying text.

93. *See infra* notes 101, 104, 112, 115–18, 125, 181, 238 and accompanying text.

94. *See, e.g.*, *Sri Lanka: the Ethnic Divide*, *supra* note 27 (regarding minorities in Sri Lanka). In India, the diminished influence of Muslims was particularly stark in the post-independence era because of the ensuing partition of mainly-Hindu India and mainly-Muslim Pakistan. *See* Subrata Kumar Mitra, *Desecularising the State: Religion and Politics in India After Independence*, 33 COMP. STUDS. IN SOC'Y & HIST. 755, 763 (1991) ("Independence brought popular political accountability . . . . Even more importantly, independence saw the decline of the Muslim proportion in the population from 40 to 14 percent, removing at once the communal balance . . . .").

95. *See* R. Upadhyay, *Muslim Personal Law: Should It Be Politicised?*, South Asia Analysis Group Paper No. 666 (2003), *available at* http://www.saag.org/papers7/paper666.html; F. Zackariya & N. Shanmugaratnam, *Communalisation of Muslims in Sri Lanka: An Historical Perspective*, http://www.islamawareness.net/Asia/SriLanka/communalisation.html; Ramani Muttettuwegama, *'But I am Both', Equality in the Context of Women Living Under Parallel Legal Systems: The Problem of Sri Lanka*, LINES, Mar. 2002, *available at* http://www.lines-magazine.org/textfolder/ramani.htm; Yash Ghai, Legal Responses to Ethnicity in South and South-East Asia, Occasional Paper #1, at 7 (Jan. 1993) (unpublished paper presented as Lansdowne Lecture, Univ. of Victoria), *available at* http://www.capi.uvic.ca/pubs/oc_papers/GHAI.pdf. Ghai comments on

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existing minority personal law at independence, the Muslim minority community was successful in establishing its own personal law in 1977.[96] Correspondingly, the majority-dominated national governments remained relatively disposed to permitting minority groups autonomy in the seemingly private sphere of "personal" laws.[97] From their standpoint, a liberal policy on personal laws (which ostensibly affects only individuals and families in minority communities and therefore does not significantly concern the majority community) has been less politically costly than granting minority communities increased autonomy in the "public" sphere, via measures like quotas for minorities in government or political devolution of power (which would correspondingly diminish the political influence of the majority population).

In essence, both national governments and minority groups in the post-independence era have treated personal laws as a lever in negotiating the boundaries of minority rights.[98] Women have rarely been party to this negotiating process, and neither the national government nor minority groups have consistently prioritized (or in earlier times, even recognized) the rights of women.[99]

This aspect of the development of a majority-minority dichotomy with regard to personal laws is evident in the political and legal history of many Asian states and is discussed below with respect to the Philippines, Singapore, Sri Lanka and India.

1. The Philippines

In the Philippines, for instance, the Code of Muslim Personal Laws of 1977 was instituted by former President Ferdinand Marcos in connection with a Libyan-brokered peace agreement between the Filipino government and Moro Na-

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the difficulty of reforming Muslim personal law in Singapore in the post-independence era. (The article was written in 1993 and thus does not comment on the amendments to AMLA in 1999, discussed *infra* at Part IV(A)(1)(b).) The politicization of the issue of personal laws did not occur in more-ethnically-homogeneous Asian jurisdictions that did not have significant minority communities. Thus Hong Kong, for example, has been able to do away with personal laws almost completely. *See* Cooray, *supra* note 34, at 159–69.

96. Ghai, *supra* note 95, at 7 (noting the introduction of the Muslim Code in 1977 "to strengthen all the ethno-linguistic communities in the Philippines within the context of their respective ways of life" and citing the preamble to the Muslim Code).

97. *Id.* (commenting that the "preservation of regimes of personal laws moderated the consequences of . . . changes of sovereignty" and that "legal pluralism [in the form of such laws] was continued after independence despite the emergence of nationalism and policies to consolidate national unity.").

98. *See* Basu, *supra* note 3, at 137–38, 143. *See also* Isabelita Solamo-Antonio, *The Shari'a Courts in the Philippines: Women, Men and Muslim Personal Laws*, *in* WOMEN LIVING UNDER MUSLIM LAWS, DOSSIER 27: A COLLECTION OF ARTICLES 9 (Philippa Loates & Sarah Masters eds., 2005) ("In 1977, in an attempt to appease Muslim separatists, a Code of Muslim Personal Laws (CMPL) was enacted under the Marcos regime."), *available at* http://www.wluml.org/english/pubs/pdf/dossier27/doss27-e.pdf; Zackariya & Shanmugaratnam, *supra* note 95.

99. *See* NARAIN, *supra* note 3, at 24, 81; Parashar, *supra* note 56, at 164; AGNES, *supra* note 3, at 72, 192–93.

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tional Liberation Front ("MNLF").[100] The MNLF was fighting for a separate state in the southern Philippines, but President Marcos decreed the establishment of a separate code of personal laws for Muslims in order to thwart support for the separatist demands of the MNLF.[101] By contrast, the government instituted a new Family Code of 1987 which liberalized the restrictive family laws governing non-Muslim Filipinos under the pre-existing Civil Code of 1949.[102] The Family Code permits both the annulment of marriages and legal separation on broader grounds than in the Civil Code.[103]

2. Singapore

In Singapore, the AMLA was passed in 1966,[104] at a sensitive time following Singapore's separation from the predominately Muslim Federation of Malaysia in 1965 after Chinese-Malay racial riots in 1964.[105] Malay Muslims were and continue to be the largest ethnic-religious minority group in predominantly Chinese Singapore.[106] However, Singapore repealed customary laws governing the Chinese majority group and the smaller minority groups (who did not carry the same historical and political sensitivity as the larger Muslim community) via the Women's Charter of 1961.[107] For example, the Chinese customary norm of concubinage or "secondary" wives[108] was overridden by the requirement that all marriages be registered[109] and by the prohibition of any form of polygamy by non-Muslims.[110]

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100. *See* DATU MICHAEL O. MASTURA, MUSLIM FILIPINO EXPERIENCE: A COLLECTION OF ESSAYS 179–80 (1984); AN-NA'IM, *supra* note 14, at 273.

101. *See* Solamo-Antonio, *supra* note 98.

102. Feliciano, *supra* note 47, at 555, 557–58. *See also* CEDAW Comm., *Third Periodic Report of States Parties: The Philippines*, U.N. DOC. CEDAW/C/PHI/3, at 64 (Apr. 8, 1993).

103. *Compare* Family Code of the Philippines, Exec. Ord. No. 209, art. 45 (July 6, 1987), *with* An Act to Ordain and Institute the Civil Code of the Philippines, Rep. Act No. 386, art. 85 (June 18, 1949). *Compare also* Family Code of the Philippines art. 55 *with* Civil Code of the Philippines art. 97.

104. *See supra* text accompanying note 40.

105. *See* LEE KUAN YEW, *supra* note 91, at 554–69.

106. The 2000 census revealed that Singapore's population is approximately 77% Chinese, 14% Malay and 8% Indian. *See* STATISTICS SING., CENSUS OF POPULATION 2000, at tbl.1, *available at* http://www.singstat.gov.sg/pubn/popn/c2000adr/t1-2.pdf.

107. Walter Woon, *Singapore*, *in* ASIAN LEGAL SYSTEMS: LAW, SOCIETY AND PLURALISM IN EAST ASIA 314, 348 (Poh-Ling Tan ed., 1997). *See* Women's Charter of 1961 (codified at Laws of Sing., ch. 353, §§ 3(2)–(4)).

108. This norm was simplistically viewed and recognized by British colonial administrations as polygyny, constituting another instance (in addition to those described in Section A of Part II of this article) of the misunderstanding by colonial administrations of customary familial norms in Asia. On this point, see Carol G.S. Tan, *The Twilight of Chinese Customary Law Relating to Marriage in Malaysia*, 42 INT'L & COMP. L. QUARTERLY 147, 148–49, 153 (1993).

109. *See* Women's Charter pt. IV.

110. *See id.* pt. II.

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3. *Sri Lanka*

In Sri Lanka, a protracted armed conflict began in 1983 between the government and a separatist group of Tamil ethnicity in northern Sri Lanka, where *Thesawalamai* personal law applies.[111] Although ceasefires have occasionally prevailed, the history of the conflict and the threat of its continuation have prevented the issue of reforming *Thesawalamai* from becoming a political priority for the Sri Lankan government.[112]

The rights of Muslims are also a sensitive political issue[113] and are implicated in any resolution of the current conflict.[114] The Sri Lankan government is therefore not inclined to undertake a reform of Muslim personal laws either; although it raised the minimum age of marriage for most Sri Lankans in 1995, it has yet to take that step with respect to Muslim Sri Lankans.[115] The government has long discussed constitutional reform as a means of ending the current conflict or at least placating some political demands by minority groups.[116] Yet, as other commentators have noted, the Sri Lanka Muslim Congress (Sri Lanka's most powerful Muslim political party) has "categorically stated that any changes in the fundamental rights chapter of the Constitution (or introduction of a Bill of

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111. INTERNAL DISPLACEMENT MONITORING CENTRE [hereinafter IDMC], SRI LANKA: ESCALATION OF CONFLICT LEAVES TENS OF THOUSANDS OF IDPS WITHOUT PROTECTION AND ASSISTANCE 144 (2006), *available at* http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/FFBBFDF012F17ADEC1257227004203D7/$file/Sri+Lanka+-November+2006.pdf. The separatist group is known by the name Liberation Tigers of Tamil Eelam [hereinafter LTTE].

112. Rohan Edrisinha, Discussion Paper: Meeting Tamil Aspirations Within a United Lanka: Constitutional Options 5 (2001) (unpublished paper presented at the conference "Exploring Possible Constitutional Arrangements for Meeting Tamil Aspirations Within a Unified Sri Lanka", Locarno, Switz.), *available at* http://www.cpalanka.org/research_papers/Swiss_Conference_Rohan.doc. The issue of *Thesawalamai* reform is complicated by the fact that the LTTE claims to have reformed discriminatory provisions of *Thesawalamai* law with respect to the northern areas over which it exercises de facto control. IDMC, *supra* note 111, at 144–45. As the Sri Lankan government is engaged in a protracted conflict with the LTTE, it generally adopts an oppositional stance to actions of the LTTE and may therefore be reluctant to institute similar reforms of *Thesawalamai* law.

113. *See* Zackariya & Shanmugaratnam, *supra* note 95.

114. *See* Kamal Nissanka, *Do Muslims Demand a Separate State?*, SUN. OBSERVER (Sri Lanka), Jan. 4, 2004; Dumeetha Luthra, *Sri Lanka's Muslims Warn of Backlash*, BBC NEWS, Dec. 10, 2004, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/4076561.stm.

115. *See supra* notes 32–33. *See also* Sri Lanka CEDAW report, *supra* note 31, at ¶ 43 (stating, in a paragraph noting that the minimum age for marriage was raised to eighteen for non-Muslims, "the Muslim law is based on religious beliefs that the State has a duty to protect and uphold and it is argued that there is no concept of minimum age of marriage . . . . The Government has found it difficult to address this issue in an environment of political sensitivity to plural religious and ethnic identities.").

116. *See* G.L. Pieris, *Introductory Overview: Constitutional Reform and Devloution of Power*, *in* THE DRAFT CONSTITUTION OF SRI LANKA: CRITICAL ASPECTS 1, 1–12 (Dinusha Panditaratne & Pradeep Ratnam eds., 1998); Rohan Edirisinha, *Critical Overview: Constitutionalism, Conflict Resolution and the Limits of the Draft Constitution*, *in* THE DRAFT CONSTITUTION OF SRI LANKA, *supra*, at 13, 13–37.

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Rights) must not perforce allow any individual to challenge Muslim personal law [which is] the fundamental symbol of religious identity."[117]

The Sri Lankan government has asserted that "in an environment which calls for sensitivity to pluralistic religious and cultural beliefs, it has not been possible to address" the "discriminatory features" of personal laws.[118] In sum, the government has preserved the current status quo on personal laws governing minority communities with the hope that this will facilitate more-manageable political relations with Tamil and Muslim groups.

4. India

In India, personal laws governing the majority Hindu population have been reformed to the benefit of women in several respects. For example, amendments to the Hindu Marriage Act in 1976 substantially broadened the grounds for divorce, including by permitting divorce by mutual consent.[119] More recently, aspects of Hindu succession law that discriminated against daughters were amended to grant females succession rights equal with their male siblings.[120] By contrast, the pace of reform of personal laws governing Christians and Muslims in India has been markedly slower. The Christian personal laws enacted by the British in the nineteenth century contained extremely restrictive grounds for divorce and were reformed only in 2001.[121] Several earlier proposals for such reform were obstructed by the Roman Catholic church.[122] This obstruction was presumably partly based on conservative religious dogma, but likely exacerbated by the fact that Christian leaders were wary of any further erosion of the status of minority Christians in India since independence from Britain.[123]

Personal laws governing Muslims in India have actually become more dis-

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117. Zackariya & Shanmugaratnam, *supra* note 95.

118. Sri Lanka CEDAW report, *supra* note 31, at ¶ 21.

119. *See* Hindu Marriage Act, 1955, No. 25 of 1955, §§ 13(1), 13B, 17 (India) (as amended by Marriage Laws (Amendment) Act, No. 68 of 1976 (India)).

120. *See supra* note 22 and accompanying text.

121. Pursuant to Section 10 of the Indian Divorce Act, for example, a husband could petition for the dissolution of his marriage on the ground of simple adultery committed by his wife, whereas a wife seeking dissolution on the ground of adultery was required to show such adultery was combined with incest, bigamy, cruelty or desertion. Indian Divorce Act, No. 4 of 1869, § 10 (India). The Indian Divorce (Amendment) Act, No. 51 of 2001 (India) [hereinafter Indian Divorce Amendment Act], amends Section 10 to provide the same grounds for divorce for Christian men and women, except that women retain the additional ground for divorce of "rape, sodomy or bestiality" committed by her husband. The grounds for divorce in Christian marriages now include simple adultery, as well as desertion, cruelty and insanity—by either party. Moreover, the Indian Divorce Amendment Act adds a new Section 10A to the Indian Divorce Act, providing for divorce by mutual consent of both parties.

122. AGNES, *supra* note 3, at 150; Parashar, *supra* note 56, at 164.

123. Christians constitute just over 2% of the population in India. Census Data 2001 >> India at a glance >> Religious Composition, http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx.

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criminatory against women since independence. Following vocal lobbying from conservative Muslim leaders,[124] the national government enacted the misleadingly named Muslim Women (Protection of Rights on Divorce) Act of 1986, which bars Muslim women from claiming maintenance under Section 125 of the Criminal Procedure Code and expressly limits maintenance payments to Muslim divorcees to their *'idda* period.[125] Conversely, the national government has not been responsive to proposals to grant Muslim Indians greater participatory rights,[126] for example by introducing quotas for Muslims in public employment and education.[127] Given the current context of continued bloodshed between religious groups in India[128] and the still-uneasy relationship between India and Pakistan (particularly as regards Kashmir),[129] the maintenance of "personal" laws remains a relatively easy carrot for national governments to offer Muslim leaders in place of more pluralistic measures in the political or "public" domain.

Within the generally complex dynamics of majority-minority relations, there is a more specific (albeit secondary) factor in the polarized development of majority and minority personal laws, which, at least in India, further explains the receptiveness of the majority community to reforms of its own personal laws. Specifically, a segment of the Hindu majority community has come to espouse the idea of *Hindutva* (Hindu-ness),[130] implicitly or explicitly believing that its

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124. *See infra* notes 237–38 and accompanying text.

125. Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986 (India).

126. *See* Ghai, *supra* note 95, at 4 (noting the "less than generous disposition towards Muslim claims" at independence and the continued stance of a "preferred position for no particular community").

127. *See* Staff Correspondent, *Muslims Seek Quota in Jobs, Education*, THE HINDU, Oct. 20, 2003.

128. *See, e.g.*, *Gunmen Open Fire at Hindu Temple*, CNN, *available at* http://edition.cnn.com/2005/WORLD/asiapcf/07/05/india.site.background/.

129. Although, as the BBC has recently commented, "the peace process is moving forward again". *India-Pakistan Talks 'Positive'*, BBC, *available at* http://news.bbc.co.uk/2/hi/south_asia/6255931.stm.

130. For an account of the enduring, if currently slightly diminished, popularity of *Hindutva*, see, e.g., *BJP Keeps Hardline Hindu Stance*, BBC, June 22, 2004, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/3828325.stm. Nationalism in majority communities is by no means confined to India. It also prevails, for example, amongst segments of the majority Sinhalese in Sri Lanka. Sinhalese nationalists oppose political concessions to minority communities in Sri Lanka and are allied with the current Sri Lankan President Mahinda Rajapakse. *See Profile: Mahinda Rajapakse*, BBC, Nov. 18, 2005, *available at* http://news.bbc.co.uk/1/hi/world/south_asia/3602101.stm (noting that, earlier, the President was "seen as someone who favoured a negotiated settlement with the Tamil Tiger rebels. But after signing a poll deal with two nationalist parties, [the President's] stance has become increasingly hardline."). For a nuanced commentary on the various nationalist agendas in Sri Lanka, including among the Sinhalese, see Philip Gourevitch, *Letter from Sri Lanka: Tides of War – After the Tsunami, the Fighting Continues*, THE NEW YORKER, Aug. 1, 2005, *available at* http://www.newyorker.com/fact/content/articles/050801fa_fact1. Nationalism is not as powerful a force in Singaporean and Filipino politics, but majoritarian policies and sentiment have recently been directed against the minority Muslim communities in those states. *See infra* note 266.

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culture is more "mainstream" or "progressive" than minority cultures.[131]

This sense of cultural separateness or superiority appears to have facilitated the reform of personal laws governing the Hindu majority[132] and has even fuelled support among right-wing adherents of *Hindutva* for the complete abolition of minority personal laws.[133] In particular, nationalist Hindus frequently denounce discriminatory aspects of Muslim personal laws as evidence of a "backward" Muslim culture and have increasingly called for the replacement of personal laws by a uniform civil code.[134] Rather than evincing a progressive agenda towards women, such calls reflect a monist cultural and political agenda towards minorities.[135]

The impact of nationalist-inspired denunciation of minority personal laws is twofold. It makes a logical demand of nationalists to assent to progressive reform of personal laws governing their own majority communities. Yet the nationalist attacks on minority personal laws also make minority communities more "protective" of laws pertaining to their cultural norms, and thus more wary of reform.[136]

This Part II has sought to highlight two waves of development with regard to personal laws in Asia and to explain the primary factors underlying these waves. Of course, there remain other reasons why discriminatory personal laws developed and persist. For instance, it has been argued that urbanization has exacerbated the discriminatory facets of personal law in the Philippines, as women in urbanized settings have lower work participation relative to their husbands and therefore less control of money and resources.[137] In respect of Muslim personal laws across jurisdictions, it has been suggested that Muslims have a more pronounced understanding of what constitutes a private, sacrosanct sphere that must remain free of governmental interference in predominantly non-Muslim countries.[138] Thus while Christians are more pragmatically directed to "[r]ender

131. See, for example, the unashamedly entitled *Why Muslims Are Backward*, THE TRIB. (India), Nov. 28, 1998, *available at* http://www.tribuneindia.com/1998/98nov28/edit.htm#1.

132. *See* AGNES, *supra* note 3, at 79 (noting that early reform of Hindu personal law was driven by the notion of "homogenizing a community by uniting them under one law").

133. In particular, via the implementation of a uniform civil code [hereinafter UCC]. *See* Praful Bidwai, *Reforming Personal Laws: Uniform Code No Magic Wand*, THE DAILY STAR, Aug. 18, 2002, *available at* http://www.thedailystar.net/2003/08/18/d30818020422.htm.

134. *Id.*

135. Bidwai states this argument as follows: "If Hindutva's champions of personal law reform were really serious, they would have worked with [progressive Muslims], rather than use the UCC as an instrument of chiding and coercion. They shed crocodile tears over the plight of Muslim women, but are blind to Hindu women's growing oppression through bride-burning, female foeticide, and spread of purdah. Their real agenda has nothing to do with reform of justice." *Id.* *See also* Basu, *supra* note 3, at 137–38.

136. AGNES, *supra* note 3, at 194.

137. *See* Feliciano, *supra* note 47, at 552.

138. *See* AN-NA'IM, *supra* note 14, at xi (noting that Islamic family law "has become for Muslims the symbol of their Muslim identity, the hard irreducible core of what it means to be a

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to Caesar the things that are Caesar's",[139] Muslims are more likely to consider Islamic law as strictly binding on a broad range of matters in daily life,[140] which should not be altered by governmental "reform".[141]

Nevertheless, this Part has focused on two stages in the development of personal law because each signifies two vital elements of any feasible path for reform. Firstly, as I will argue in Part IV of this article, the reform of personal laws requires recapturing the historicity of personal laws from their colonial clutches—specifically, by publicly reclaiming the diversity and pro-women aspects of pre-colonial indigenous laws. This first element is vital for the political palatability and feasibility of any reform, which will have to overcome the views pervading both majority and minority communities that personal laws reflect the respective histories and culture of those communities.[142]

Secondly, the chosen path for reform must also account for majority-minority dynamics as they have evolved following independence from colonial rule. In particular, the path for reform must reflect a reconciliation of the rights of women with the rights of minorities and the broader ideal of pluralism. From a theoretical standpoint, a pluralist approach to rights is desirable in any society over a monist approach that suppresses all religious and cultural differences.[143] From a practical standpoint, a pluralist approach is especially vital in South and South-East Asia, where nationalism and ethnic divisions—flamed by the divide-and-rule policies of colonial rulers—have damaged communal relations to the extent of actual and threatened violence.[144]

However, before discussing which path for reform can best capture these

Muslim today"). If this is so, then the sphere of familial relations is especially difficult for governmental reform efforts to penetrate.

139. *Mark* 12:17 (King James).

140. For a discussion on this point, see Mastura, *supra* note 100, at 203, and Werner Menski, *Developments in Muslim Law: The South Asian Context*, 3 S.C. CASES (JOUR) 9, § II (2000), *available at* http://www.ebc-india.com/lawyer/articles/2000v3a2.htm. Menski notes: "Modern Western-style state law, which tends to be built on positivist Austinian principles, cannot, at the end of the day, abrogate Islamic law, because the latter is a different legal category, namely a religious commitment as well as a way of life . . . ." Menski, *supra*.

141. *See* M.H.A. Reisman, *Some Reflections on Human Rights and Clerical Claims to Political Power*, 19 YALE J. INT'L L. 509, 512 ("The Christian injunction 'Render unto Caesar those things that are Caesar's and unto God those things that are God's' is alien to classical Islam.").

142. *See* Robert D. Baird, *Gender Implications for a Uniform Civil Code*, *in* RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 147 (Gerald James Larson ed., 2001) (noting that "both Hindus and Muslims consider their codes of family law sacred and part of their religion").

143. *See* Michael Freeman, *The Morality of Cultural Pluralism*, 3 INT'L J. CHILD. RTS. 1, 17 (1995).

144. *See* East, *supra* note 91 (with respect to the Philippines); *supra* notes 111–14, 128–29 (with respect to ethnic violence in Sri Lanka and India). *See also* Ghai, *supra* note 95, at 2 (observing with respect to India, Sri Lanka, Singapore, Malaysia and the Philippines that the "histories, and indeed in some instances the very birth, of these states are embedded in ethnic politics, much of it in modern times taking the form of ethnic strife and conflict").

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twin elements, I shall briefly reiterate why reform of personal laws is necessary.

III.
THE NEED TO ELIMINATE DISCRIMINATORY PERSONAL LAWS

This Part will firstly explain how discriminatory personal laws violate the right to non-discrimination enshrined in both international human rights law and national constitutions. However, discriminatory personal laws do not merely violate the legal right to non-discrimination. Discriminatory personal laws are also inconsonant with the social, economic and political development of women in Asia.

A. International Norms

Discriminatory personal laws contravene numerous international human rights norms. They violate several provisions relating to non-discrimination in the International Covenant on Civil and Political Rights ("ICCPR") and the Universal Declaration of Human Rights ("UDHR").[145] Article 26 of the ICCPR, for instance, mandates the equality of all persons before the law and requires states 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.[146] Article 16(1) of the UDHR affirms the equality of men and women with regard to marriage, irrespective of their race, nationality or religion.[147]

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145. The International Covenant on Civil and Political Rights [ICCPR], 1967, 6 I.L.M. 368 (entered into force Mar. 23, 1976), and the Universal Declaration of Human Rights [UDHR], Dec. 12, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, form part of the so-called "international bill of rights." OFFICE OF THE HIGH COMM'R FOR HUMAN RTS. [hereinafter UNHCHR], FACT SHEET NO.2 (REV.1), THE INTERNATIONAL BILL OF HUMAN RIGHTS, *available at* http://www.ohchr.org/english/about/publications/docs/fs2.htm.

146. ICCPR art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). *See also id.* art. 23(4) ("States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution . . . .").

147. UDHR art. 16(1) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."). *See also id.* art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law."). The UDHR is a declaratory statement of international human rights norms rather than a treaty. However, there is support for the view that the UDHR generally represents customary international law. *See, e.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 15–17 (1982) (stating that the UDHR "as an authoritative listing of human rights, has become a basic component of international customary law . . . ."). Customary international law binds all states, with the exception that a particular customary norm will normally not bind a state that expressly disavows that norm. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10, 12–13 (5th ed. 1998). The right to racial non-discrimination

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Furthermore, discriminatory personal laws contravene several provisions in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[148] These provisions include Article 15 of CEDAW, which requires states 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".[149] More specifically, Article 16(1) of CEDAW provides that states "shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations." India, Sri Lanka and the Philippines are parties to the ICCPR, while India, Sri Lanka, the Philippines, Singapore and most other Asian states are parties to CEDAW.[150] It is a point of interest that Singapore is a party to CEDAW even though it has *not* ratified most other major international human rights instruments.[151]

Some Asian states, including India and Singapore, have issued reservations to the ICCPR and CEDAW purporting to exempt their respective personal laws from the anti-discrimination provisions in these conventions.[152] The reservations of Singapore to CEDAW, for example, include the statement:

> In the context of Singapore's multi-racial and multi-religious society and the need to respect the freedom of minorities to practise their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal

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has been considered to be so fundamental as to constitute a *jus cogens* (peremptory) norm of international law; it thereby binds all states regardless of state practice and despite any disavowal of that norm. *Id.* at 515.

148. Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], 1980, 19 I.L.M. 33 (entered into force Sept. 3, 1981). Several commentators have discussed how discriminatory personal laws contravene CEDAW as well as other international human rights norms. *See, e.g.*, Sara Hossain, *Women's Rights and Personal Laws in South Asia*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 465, 467–73 (Rebecca J. Cook ed., 1994).

149. CEDAW art. 15, §§ 1, 2.

150. Brunei Darussalam appears to be the only country in Asia, aside from some Arab countries in West Asia, that has not acceded to CEDAW. Afghanistan became a party to CEDAW on April 4, 2003. *See* UNHCHR, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS Treaties, *available at* http://www.unhchr.ch/pdf/report.pdf (showing the status of worldwide ratifications of human rights treaties). There are several Asian states that are not party to the ICCPR, including Bhutan, Indonesia, Malaysia, the Maldives, Myanmar, Pakistan and Singapore. *Id.*

151. Singapore is not a party to the International Covenant on Civil and Political Rights (ICCPR); nor is it party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

152. The texts of the reservations to the ICCPR can be viewed at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm and the texts of the reservations to CEDAW at http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm.

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laws.[153]

However, the validity of such reservations under international law has been strongly disputed by other states party to CEDAW as well as by academic commentators, who have contended that they are incompatible with the object and purpose of CEDAW,[154] thereby rendering them void under international law.[155]

B. Constitutional Provisions

In addition to contravening international legal norms, discriminatory aspects of personal laws in India, Sri Lanka, the Philippines and Singapore also appear to violate those countries' respective constitutions. For example, Article 12 of the Sri Lankan Constitution enshrines the right to equality and states that no citizen "shall be discriminated against on the grounds of race, religion . . . sex [and] place of birth."[156] Similarly, Article 15(1) of the Indian Constitution provides that the state "shall not discriminate against any citizen on grounds only of relig-

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153. Declarations and Reservations, http://www.unhchr.ch/html/menu3/b/treaty9 asp.htm. One commentator has argued that Singapore's "reservations to Articles 2 and 16 in deference to minority religious and customary rights . . . considerably blunt the reach of CEDAW, especially in modifying sexist cultural patterns." Thio Li-ann, *"Pragmatism and Realism Do Not Mean Abdication": A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law*, 8 SING. YEAR BK. INT'L L. 41, 87 (2004).

154. See, for example, the response by the government of Sweden, dated August 13, 1997, to the reservations of Singapore, which included the following statements:

> The Government of Sweden is of the view that these general reservations raise doubts as to the commitment of Singapore to the object and purpose of the Convention and would recall that, according to article 28, paragraph 2, of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted. . . . This objection does not preclude the entry into force of the Convention between Singapore and Sweden. The Convention will thus become operative between the two states without Singapore benefiting from these reservations.

Declarations and Reservations, *supra* note 153, at § 45. *See also* Hossein, *supra* note 148, at 471–73 (discussing the reservations of Bangladesh).

155. For the textual international law governing the validity of reservations to treaties, see Articles 19 to 21 of the Vienna Convention on the Law of Treaties, 1969, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Article 19(c) provides: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty." *Id.* art. 19(c). There is support for the view that these provisions in the Vienna Convention relating to reservations represent customary international law and therefore bind states that are not party to the Vienna Convention. *E.g.*, Declarations and Reservations, *supra* note 153 (statements of the government of Sweden) ("According to customary law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.").

156. SRI LANKA CONST. ch. III, art. 12(1), (2) (1978). For a discussion on the substantive limitations of Article 12, see Dinusha Panditaratne, *Equal Opportunity*, *in* SRI LANKA: STATE OF HUMAN RIGHTS 1998, at 127, 143–48 (Law & Society Trust 1998). As detailed therein, Article 12 does not expressly proscribe discrimination on the grounds of marital status, sexual orientation, culture or ethnic or social origin, *cf.* S. AFR. CONST. art. 9(3) (1996) (proscribing discrimination on the aforementioned grounds), or bind non-State entities, *cf. id.* art. 8(2)–(3).

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ion, race, caste, sex, place of birth".[157] The Philippine Constitution requires the state to "ensure the fundamental equality before the law of women and men" and further mandates that no person "be denied the equal protection of the laws".[158] Although the Singapore Constitution does not specifically prohibit discrimination on the ground of sex, it provides that all "persons are equal before the law and entitled to the equal protection of the law".[159]

Discriminatory personal laws violate each of the aforementioned constitutional guarantees, given that they discriminate against women and, furthermore, discriminate between women on the ground of their race, religion or place of birth. Yet despite these constitutional guarantees, discriminatory personal laws persist in India, Sri Lanka, the Philippines and Singapore on other legal grounds. In Singapore, for instance, the constitutional guarantee of equality competes with Article 153 of the Constitution, which requires the legislature to "make provision for regulating Muslim religious affairs".[160] In Sri Lanka, laws not conforming to the fundamental-rights provisions of the Constitution, including the right to non-discrimination, can be invalidated only in very limited circumstances. Specifically, Article 121 of the Sri Lankan Constitution limits judicial review to bills of Parliament and thereby precludes judicial review of laws already in force.[161] In India, Article 13 of the Constitution expressly provides that both prospective laws and "laws in force" shall be void if they derogate from Constitutional guarantees of fundamental rights.[162] However, judges have conservatively construed the definition of "laws in force" in Articles 13 and 372 of the Constitution to determine that personal laws are *not* "laws in force".[163]

157. INDIA CONST. art. 15(1).

158. PHIL. CONST. art. II, § 14; art. III, § 1. For a discussion of these two provisions, see Feliciano, *supra* note 47, at 554–55.

159. SING. CONST. art. 12(1). For a discussion on this provision, see Thio Li-Ann, *The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism & the Transformative Potential of CEDAW*, 1 SING. J. INT'L & COMP. L. 278, 317 (1997) (noting that Article 12(1) declares that all persons are equal before the law and entitled to the equal protection of the law and then commenting, "Article 12(2) lists four types of forbidden classification, stating that laws cannot discriminate against citizens on the ground only of 'religion, race, descent or place of birth.' Gender is conspicuous by its absence though the word 'persons' in Article 12(1) should be construed inclusively to bring both men and women under its covering.").

160. SING. CONST. art. 153 ("The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion.").

161. SRI LANKA CONST. arts. 80(3), 121. *See also generally id.* ch. XVI. For a discussion on the limitations of judicial review in Sri Lanka, see Dinusha Panditaratne, *Proposed Changes to the Judicial System, in* THE DRAFT CONSTITUTION OF SRI LANKA, *supra* note 116, at 106–09.

162. INDIA CONST. art. 13(1)–(3).

163. *See* NARAIN, *supra* note 3, at 37–41 (citing the decisions of the Bombay High Court in State of Bombay v. Narasu Appa, (1952) 1952 Bom. 84, and of the Supreme Court of India in Krishna Singh v. Mathura Ahir, (1980) 2 S.C.R. 660). Narain criticizes these decisions and notes that certain (lower) courts have taken the opposite view. *See also infra* note 247 and accompanying text. It is plausible that one reason Indian courts have adopted narrow interpretations of the term "laws in force" in cases concerning personal laws is to extricate themselves from the contro-

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Nevertheless, the accessions to CEDAW and other international human rights treaties by Asian states, together with their respective constitutional guarantees of non-discrimination, represent official recognition of the innate right of women to non-discrimination. Although such official recognition is insufficient to resolve the many issues implicated in reform of personal laws, it has spurred some amendments of personal laws.[164] In Sri Lanka, for instance, it appears that the government's decision to raise the minimum age of marriage to eighteen years in all communities except the Muslim community was at least partly influenced by its ratification of CEDAW and its subsequent engagement with the Committee on the Elimination of Discrimination against Women ("CEDAW Committee").[165]

C. Socio-economic and Political Development of Women

Aside from the fact that discriminatory personal laws contravene the right to non-discrimination of women in international law and national constitutions, such laws must also be reformed because they hinder the development of women. As women represent half of a national population, discriminatory personal laws logically also impede the progress of Asian nations. Women in many Asian countries suffer significant social and economic disadvantages compared to men and, as a related matter, are relatively powerless in the political sphere. The continued existence of discriminatory personal laws reflects these disadvantages and relative powerlessness.[166] From a prognostic point of view, discriminatory personal laws almost certainly perpetuate these disparities.

The fact that discriminatory personal laws persist in Asia, within a context of women's relative lack of political power and comparative socio-economic disadvantage, is evident from United Nations reports and other data. In the po-

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versial task of determining the constitutionality of personal laws.

164. Examples of such reforms are detailed in *infra* Part IV.

165. *See Concluding Observations of the CEDAW Committee*, CEDAW A/47/38 (1992) ¶¶ 396 ("The Committee asked a series of questions . . . for example, had consideration been given to raising the age for marriage?"), 412 (the government representative "agreed that there was definitely a need to amend the statute concerning the marriage age"); *Concluding Observations of the CEDAW Committee*, CEDAW A/57/38, pt. I, ¶ 270 (2002) ("The Committee commends the introduction of legal reforms that have been adopted since 1995, in particular the revision of the marriage laws, which increased the age of marriage, except in the case of Muslims, to 18 for both women and men"); *supra* note 115 (referring to the statement of the Sri Lankan government in the Sri Lanka CEDAW report, *supra* note 31, that it had raised the minimum age of marriage to 18 for all communities except the Muslim community). *See also* Ramani Muttettuwegama, *supra* note 95 (noting "the adoption of the Women's Charter in 1991 [which is] based on CEDAW. . . . Further to the Women's Charter, many changes were made to legislation and to state policy and regulations with respect to women. This included a uniform age of marriage for men and women under the General Marriages Ordinance and the Marriage and Divorce (Kandyan) Act (although no change was made to the Marriage and Divorce (Muslim) Act.").

166. *See supra* note 99 and accompanying text (discussing the limited participation and influence of women in official discourse on reforming personal laws).

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litical context, for example, according to the United Nations Development Programme Human Development Report of 2003, the percentages of national parliamentary seats held by women in Singapore, the Philippines, Sri Lanka and India[167] are respectively 11.8%, 17.2%, 4.4% and 9.3%.[168]

From a socio-economic perspective, in each of these countries, women have a lower literacy rate than men, albeit only a slightly lower rate in the Philippines.[169] The starkest disparity is in India, where 69% of adult men are literate, compared to only 46.4% of adult women.[170]

Women governed by discriminatory personal laws appear more likely to enter into early or involuntary marriages, to have less economic security and to have less ability to participate in the economic, political and social life of their country, when compared to women in the same country who are *not* governed by such laws. For example, in Singapore, where Malay and other Muslim women are governed by discriminatory personal laws,[171] 24% of legislators, senior officials and managers in Singapore are women,[172] and yet "virtually no *Malay* women are in senior executive positions."[173] In its periodic report to the CEDAW Committee in 1999, the Sri Lankan government stated that "it does not record any incidents of female genital mutilation" amongst the female population in general but observed that female genital mutilation "is said to take place in a moderate form among certain segments of the Muslim community."[174] One commentator has pointed out that the unequal inheritance rights of Hindu women in India[175] exacerbated parental preferences for baby boys and accordingly increased the incidence of sex-selective abortion among Hindus.[176]

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167. The countries are listed in the report in descending order of their UNDP development "rank".

168. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2003: MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY 314–16 (2003).

169. *Id.* at 310–12.

170. *Id.* at 312.

171. *See supra* notes 40–45 and accompanying text.

172. HUMAN DEVELOPMENT REPORT 2003, *supra* note 168, at 314.

173. Carmen Luke, ASS'N OF COMMONWEALTH UNIVS., WOMEN'S CAREER MOBILITY IN HIGHER EDUCATION: CASE STUDIES IN SOUTH-EAST ASIA (bulletin) (emphasis added), *available at* http://www.acu.ac.uk/yearbook/139-womens.html. *See also* INT'L WOMEN'S RTS. ACTION WATCH, SINGAPORE COUNTRY REPORT, *available at* http://iwraw.igc.org/publications/countries/singapore.htm (noting that "Malay women face additional barriers to equal employment opportunities and are underrepresented in corporate management positions.").

174. Sri Lanka CEDAW report, *supra* note 31, at ¶ 144. It is difficult to imagine that female genital mutilation can take place in a *moderate* form: presumably the government intended to state that it occurs to a moderate extent, which of course is still a concern in itself. For different views on the issue of female genital mutilation (or female circumcision), see Kate Green & Hilary Lim, *What Is This Thing About Female Circumcision? Legal Education and Human Rights*, 7 SOC. & LEGAL STUD. 365 (1998), and Freeman, *supra* note 143, at 6, 12–17.

175. This inequality as to inheritance rights persisted until a recent statutory amendment in 2005. *See supra* note 22 and accompanying text.

176. Sridhar, *supra* note 23, at 574.

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In short, discriminatory personal laws reflect and reinforce the social and economic disadvantages of women and their relative political powerlessness. The abolition of discriminatory aspects of personal law would therefore be a step in advancing the social, economic and political development of women and, ultimately, of their countries.

It might be argued that a legal regime of personal laws is a necessary component of cultural pluralism in Asia, notwithstanding the fact that such laws discriminate against women. It should be reiterated, however, that personal laws do *not* necessarily further ethnic or religious pluralism, as is commonly assumed. As I noted in Section B of Part II above, national governments have used the retention of personal laws as a convenient bargaining chip with minority communities, to avoid instituting more-"public" forms of pluralism. As I will explain below,[177] it may actually be in the interests of minority communities and all those who favor pluralism in civil society to support the progressive reform of personal laws. This development could help press national governments to provide more genuinely pluralistic measures in the political realm. Correspondingly, minority leaders are likely to be more receptive to reform of personal laws when national governments demonstrate a commitment to minority interests through other, politically substantial means.

The experience of Singapore in reforming its Muslim personal laws, as further detailed in Part IV below,[178] provides one example of this dynamic. Of the four countries surveyed in this article, Singapore has more substantially reformed its personal laws governing Muslims in favor of women than has any other Asian country with personal laws governing Muslim minorities. Significantly, it is also the only one among the four countries with a constitutionally guaranteed quota to ensure political representation of its minority communities in Parliament.[179] It is plausible that the Muslim community in Singapore has been more receptive to the reforms of Muslim personal law because they are guaranteed a political platform to voice the full range of both "public" and "personal" issues.

IV.
ASSESSING THE PATHS FOR REFORM

Recognition of the need to remove discriminatory aspects of personal laws has thus far led to some measures of reform, via three principal means. Firstly, legislatures have amended specific personal laws; secondly, courts have narrowed the scope and application of personal laws in a manner favorable to women; and thirdly, a few legislatures have considered repealing such laws alto-

177. *See infra* Part IV.A.1.b.
178. *Id.*
179. *See* SING. CONST. art. 39a.

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gether and instituting a uniform civil code. This Part will initially discuss examples of each of these paths for reform in the surveyed Asian jurisdictions and will identify problems inherent to each such type. It will then suggest a path for reform that is both desirable, from feminist and pluralist perspectives, and feasible, from a political standpoint.

A. Reforms of Personal Laws

1. Statutory Reforms

As discussed in the second section of Part II of this article, there have been several legislative amendments of personal laws governing majority communities, although such laws remain far from egalitarian in Sri Lanka, the Philippines and India.[180] Yet legislative amendments of personal laws governing minority communities have been sparse. There have been no reforms of the Philippine Code of Muslim Personal Laws since it was established in 1977.[181] In Sri Lanka, there have been no significant amendments of personal laws governing the Tamil, Muslim and Kandyan-Sinhalese communities. In India, personal laws governing the Muslim community remain highly discriminatory. In each of these countries, sectarian violence[182] has made reform of personal laws a particularly thorny issue.

There are, however, a few notable exceptions to the general absence of pro-women reforms of personal laws governing minority communities in the four countries surveyed in this article. These include amendments to Parsi and Christian personal laws in India[183] and amendments to Muslim personal laws in Singapore.[184] The Parsi and Singaporean amendments, in particular, hold valuable lessons for future reformation of personal laws, and these amendments are therefore analyzed in more detail below.

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180. For example, Section 19 of Sri Lanka's Marriage Registration Ordinance, No. 19 of 1907 (codified at Sri Lankan Legis. Enactments (1980) (as amended)), which regulates all marriages except—pursuant to Section 64—those contracted under Kandyan marriage laws and those between Muslims, still provides for divorce on the basis of "fault" rather than by mutual consent. With respect to India and the Philippines, *see supra* notes 20, 22–24, 50 and accompanying text.

181. Although several reforms have been proposed to the Muslim Code, the process has faced the likely predicament of the Muslim community taking "issue with ethnic identity, i.e. non-recognition of ethnic identity and cultural ethnocentrism". Solamo-Antonio, *supra* note 98, at 11.

182. *See supra* note 144 and accompanying text.

183. *See infra* notes 185–90 and accompanying text (Parsi personal laws); *supra* note 121 and accompanying text (Christian personal laws); *infra* text accompanying note 197 (also Christian personal laws).

184. *See infra* notes 207–08 and accompanying text.

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(a) Statutory Reform of Parsi Personal Law in India

The Parsi Marriage and Divorce (Amendment) Act of 1988[185] liberalized the grounds for divorce and, in particular, established the ground of divorce by mutual consent.[186] Further reform was achieved in 1991 via the Indian Succession (Amendment) Act,[187] which provided for the equal succession rights of female and male Parsis.[188] These reforms build on a historical commitment of Parsis to overcome discriminatory laws that were inconsistent with Parsi customs.[189] In the nineteenth century, for example, colonial judicial activity made the Parsi community concerned that they would become subject to the English law of primogeniture (under which the eldest son inherits the whole property), a principle that was alien to Parsi customs.[190] Accordingly, the community successfully negotiated the enactment of the Parsees Immovable Property Act of 1837,[191] which exempted them from the English rule of primogeniture and instead granted Parsi widows a share of the property, with the residue divided equally amongst the children and their descendants.[192]

Although certain anti-women biases later crept into Parsi personal laws, Parsis continued to advocate pro-women reforms to their personal laws.[193] This

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185. Parsi Marriage and Divorce (Amendment) Act, 1988, No. 5 of 1988 (India).

186. Parsi Marriage and Divorce Act § 32B (as amended).

187. Indian Succession (Amendment) Act, 1991, No. 51 of 1991 (India).

188. *See id.* sched. II, §§ 51, 54.

189. *See* Martha Nussbaum, *Religion and Sex Equality*, *in* OCCASIONAL PAPER SERIES, WOMEN AND HUMAN DEVELOPMENT, THE FIFTH ANNUAL HESBURGH LECTURES ON ETHICS AND PUBLIC POLICY, at 42, *available at* http://kroc.nd.edu/ocpapers/op_16_2.pdf (noting, while discussing the difficulty of reforming a community's personal laws in a plural society, that "this has not been the case with the Parsi system, which has amended its inheritance laws several times in the direction of gender equality, and since 1991 has a fully gender-equal law."). *See also* AGNES, *supra* note 3, at 130–35, 136 (commenting that—although the reform process was not driven by women, and "gender justice" was more an ostensible than a substantive agenda—the Parsi "community is liberal and holds a progressive stand on women's issues").

190. *See* AGNES, *supra* note 3, at 130.

191. Act IX of 1837 (India).

192. AGNES, *supra* note 3, at 130–31 ("Since this [principle of primogeniture] was not the custom followed by Parsis, the community was alarmed and pressed for a separate legislation . . . . In response to this appeal, an Act was passed in June 1837, which relieved the Parsis of Bombay from the operation of the English law of primogeniture.").

193. *See id.* at 132, 134 (discussing an initiative of the Council of the Parsi Central Association to amend the Parsi law of succession with the "main objective . . . to improve the position of the widow and daughter under the statute and allotment of share to parents"). Agnes notes, however, that the Parsi reforms were initiated by liberal *male* leaders. *Id.* at 136. Furthermore, their position was not always consistent—hence until the reform of the Indian Succession Act in 1991, *see supra* notes 187–88 and accompanying text, the Parsi inheritance laws continued to discriminate against females by according them half the share of their male counterparts well after English statutes had incorporated the notion of equal inheritance rights of men and women. Agnes comments that this was "rather surprising . . . given the context that the demand for a separate law for the Parsis originated with their resentment against the anti-women provisions of the English statutes being inadvertently applied to them." AGNES, *supra* note 3, at 134.

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advocacy was reflected in the reforms of Parsi succession and divorce laws passed during the 1930s and then again during the late 1980s and early 1990s.[194] Indeed, the process for liberalizing the grounds for divorce among Parsis during the 1980s was initiated by the Bombay Parsi Panchayat (local council).[195] In short, the reforms of Parsi personal laws were carried out with the proactive involvement of Parsi leaders and an awareness, both within and outside the community, of customarily progressive Parsi norms. The reformist experience of the Parsi community demonstrates the importance of adhering to historically non-sexist aspects of customary laws in reforming the colonial biases of personal laws, while concurrently sustaining a strong cultural voice and identity.

The process of reforming Parsi personal laws can be contrasted to the recent reforms of Christian personal laws, which sound a cautionary note for women's rights advocates who adhere to the values of pluralism.[196] The Indian Divorce (Amendment) Act of 2001[197] substantially liberalized the grounds for divorce for Indian Christians, but the process of reform appeared to be driven partly by nationalist sentiment and not by feminist and/or Christian groups. The Indian government, then led by the Hindu nationalist Bharatiya Janata Party (BJP), failed to consult leading women's groups *and* Christian leaders until later in the reform process.[198] The nationalist undertones were underscored by the fact that the government (unsuccessfully) attempted to pass concurrent amendments to Christian marriage laws, which purported to narrow the right of Christians to marry in church.[199] Viewed as a whole, the history of the recent amendments of Christian personal laws demonstrates the importance of engaging a cross-section of the community whose personal laws are to be reformed, and tailoring those reforms in response to such engagement.

By contrast, the Parsi experience provides a valuable lesson for those advocating the reform of discriminatory personal laws, irrespective of whether they govern majority or minority communities. Progressive members of almost every religious-ethnic group must contend with patriarchal sections of the group who consider pro-women reforms to be Western constructs. As has been pointed out, these segments within both majority and minority communities fail to realize that, in opposing pro-women reforms, they are to some extent beholden to colo-

194. Namely, the amendments to the Indian Succession Act in 1939 (via The Amending Act XVII of 1939), the Parsi Marriage and Divorce Act in 1988 (via the Parsi Marriage and Divorce (Amendment) Act) and the Indian Succession Act in 1999 (via the Indian Succession (Amendment) Act). *See* AGNES, *supra* note 3, at 134–36.

195. AGNES, *supra* note 3, at 136.

196. *See id.* at 127–28.

197. *See supra* note 121.

198. *See* J. Venkatesan, *Christians React Sharply to Divorce Act Amendment Move*, THE HINDU, Nov. 25, 2000.

199. *See* Aruna Chakravorty, *Coupled to Debate—A Marriage Bill*, EXPRESSINDIA, Aug. 28, 2000, *available at* http://www.expressindia.com/ie/daily/20000828/ina28039.html. *See also* Indian Christian Marriage Act, 1872, No. 15 of 1872, § 4 (India) (as amended).

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nial Western norms.[200] It is the task of women's rights advocates to determinedly and vocally reclaim the history of pro-women aspects of indigenous customary laws in public discourse, so that reforms of personal laws can be carried out with the broader support of the affected community.

(b) Statutory Reform of Muslim Personal Law in Singapore

A second important exception to the general absence of pro-women reforms of personal laws governing minority communities in Asia is the amendment to the AMLA in Singapore in 1999.[201] Like the reforms of Parsi personal laws in India, these amendments provide a salutary example of how reforms of personal laws can and should be effected. The Singaporean amendments set an especially valuable precedent in the context of laws governing minority communities.

The AMLA governs Muslims in Singapore, who comprise approximately 14% of the national population and are overwhelmingly of Malay ethnicity.[202] It provides for the administration of customary Muslim laws by a *Syariah* Court, including laws relating to marriage and divorce, maintenance and inheritance.[203] Even prior to the 1999 amendments, the AMLA was more favorable to women in certain respects than were Muslim laws in most other Asian jurisdictions. For example, Section 52(3) of AMLA permitted the *Syariah* Court to award maintenance to divorced Muslim women beyond the duration of her *'idda*,[204] in contrast to the equivalent provisions in personal laws governing Muslims in India and the Philippines, which limit maintenance of a divorced woman to the *'idda* period.[205] Furthermore, a Muslim husband in Singapore could not divorce his wife extrajudicially by pronouncing triple *talaq*, as is possible in India and in the

200. *See* Marie-Aimée Hélie-Lucas, *The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws*, *in* FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES 188, 193 (Carol R. McCann & Seung Kyung Kim eds., 2003) (noting the irony of Muslim leaders' reintroducing traditions that are in fact "directly inspired by Western colonization, without ever being accused of betrayal and collusion with the West", while "many traditions which were indeed favorable to women are at present being eradicated").

201. *See* Administration of Muslim Law Act of 1966 (codified at Laws of Sing., ch. 3) [hereinafter AMLA]. The amendments included amendments to Sections 51 and 52 of the AMLA, and the insertion of a new Section 53 of the AMLA, all of which strengthened the provisions for the payment of maintenance to divorced Muslim women.

202. Relevant statistics for religion and ethnicity are available from the 2000 Singapore census at http://www.singstat.gov.sg/pubn/popn/c2000adr.html. *See also supra* note 106.

203. *See* AMLA §§ 47–50 & pt. VI (marriage and divorce); §§ 51, 52 (maintenance); pt. VII (inheritance).

204. *First Periodic Report of Singapore to the CEDAW Committee*, CEDAW/C/SGP/1, at ¶¶ 17.189(c), 17.20 (1999).

205. *See* Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986, §§ 3–5 (India); Code of Muslim Personal Laws of 1977, Pres. Decree No. 1083, at art. 67 (1977) (Phil.) [hereinafter Philippines Muslim Code]. *See also infra* notes 231–38 and accompanying text (discussing Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844 (India)).

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Philippines.[206]

Amendments to Sections 51 and 52 of the AMLA in 1999 further improved the position of women governed by Muslim law in Singapore. Most importantly, the amendments strengthened the *Syariah* Court's ability to compel divorced men to pay maintenance to former wives and to pay back their *mahr*. In particular, the Court may order imprisonment for up to six months for failure to comply with its payment orders, which should be a useful instrument in arresting previous practices of blatant non-compliance.[207] In addition, the amendments introduced a new Section 53A of the AMLA, which permits the Court to execute documents to effect the transfer of property in place of a defaulting party who refuses to comply with an order by the Court, so that such property can be duly transferred to the innocent party.[208]

The amendments to the AMLA were enacted with the input of "traditionalist" Muslim leaders and without strident opposition from the Muslim community.[209] There are various possible explanations for the general acceptance of the amendments by the Muslim community. One is that Singapore is a highly conformist state where political opposition is generally suppressed. However, this cannot be the only explanation, as Muslim Singaporeans vociferously opposed the pronouncement by the Singaporean prime minister that Muslim girls should not wear headscarves in schools.[210]

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206. *Compare* AMLA § 102(4)–(5) *with* Philippines Muslim Code arts. 45–46 *and* AN-NA'IM, *supra* note 14, at 224–25 (discussing customary law).

207. AMLA §§ 51(5), 52(13). The amended provisions are detailed in the *Second Periodic Report of Singapore to the CEDAW Committee*, CEDAW/C/SGP/2 (2001) [hereinafter Singapore CEDAW report No. 2], at ¶ 11.4.

208. Section 53A(1) provides:

> If a judgment or order of the Court is for the execution of a deed, or signing of a document, or for the indorsement of a negotiable instrument, and the party ordered to execute, sign or indorse such instrument is absent, or neglects or refuses to do so, any party interested in having the same executed, signed or indorsed, may prepare a deed, document or indorsement of the instrument in accordance with the terms of the judgment or order, and tender the same to the Court for execution upon the proper stamp, if any is required by law.

AMLA § 53A(1). The effect of the new Section 53A is discussed in more detail in Singapore CEDAW report No. 2, *supra* note 207, at ¶ 11.5.

209. *See* Noor Aisha Bte Abdul Rahman, *Traditionalism and Its Impact on the Administration of Justice: The Case of the Syariah Court of Singapore*, 5 INTER-ASIA CULTURAL STUD. 415, 429 (2004) (noting that "the recently introduced amendments to the AMLA in 1999 draw upon most of the guiding principles of the Women's Charter, revealing that these principles are not inconsistent with Islamic law", but lamenting that "the input of the traditionalist" forestalled even deeper reforms of the AMLA). *Cf.* Suzaina Kadir, *Islam, State and Society in Singapore*, 5 INTER-ASIA CULTURAL STUD. 357, 369 (2004) (indicating that there was "tension between the *ulama* [Islamic scholars, sometimes written as *ulema*] and the existing Malay [Muslim] political elite"). This tension was a far cry, however, from the intense controversy and civil disobedience, *id.* at 357, which accompanied the directive against wearing headscarves in schools. *See infra* note 210 and accompanying text.

210. For an indication of the debate which this generated, see the transcript of an interview

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Another, more plausible explanation is that Singapore has facilitated the public voices of Muslims and other minorities in government—not to an ideal level, but at least to a greater extent than in comparable countries.

For instance, Article 153 of the Constitution provides for the legislative establishment of a Council to advise the President in matters relating to the Muslim religion,[211] and, indeed, the AMLA established such a *Majlis Ugama Islam*, which plays a consultative role in Muslim affairs.[212] More substantially, Article 39a of the Constitution provides for "Group Representation Constituencies" in Parliament, each of which comprises three to four members, at least one of whom must be non-Chinese.[213] As a consequence, approximately 25% of Singapore's ninety-four members of Parliament are from minority ethnic groups, and approximately half of the minority members are Muslims, including one Malay woman.[214] This contrasts to the legislative representation of minorities in India, where there is no similar constitutional provision requiring minority representation in parliament. Although Indian Muslims comprise 13.4% and a growing proportion of the population,[215] Muslims comprise a mere 6% of the 543 members of the *Lok Sabha*,[216] the lower house of the Indian parliament whose members are directly elected by voters.[217] It appears likely that the general acceptance by Singaporean Muslims of the amendments to Muslim "personal"

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conducted by Sonya De Masi of the Australian Broadcasting Corporation with Mohammad Rahizan Bin Yaacob, Secretary-General of the Singapore Malay National Organisation, and Dr. Yaacob Ibrahim, (then) incoming Minister-in-charge of Muslim Affairs (on file with the author). *See also* Kadir, *supra* note 209, at 357.

211. SING. CONST. art. 153 ("The Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion.").

212. *See* AMLA pt. II (establishing the *Majlis Ugama Islam* [hereinafter *Majlis*], including its functions, powers and membership). The functions of the *Majlis* include:

> to advise the President of Singapore in matters relating to the Muslim religion in Singapore . . . to administer matters relating to the Muslim religion and Muslims in Singapore including any matter relating to the Haj or halal certification . . . [and] to administer all mosques and Muslim religious schools in Singapore . . . .

Id. § 3(2). *Cf.* Thio Li-ann, *supra* note 153, at 86 (acknowledging that the *Majlis* represents part of the "state's recognition of cultural autonomy" but citing a critic who has alleged that the *Majlis* is "severely controlled").

213. SING. CONST. art. 39a.

214. A full list of parliamentary members is provided at http://www.parliament.gov.sg/AboutUs/Org-MP-currentMP.htm. Singapore's population is approximately 77% Chinese, 14% Malay and 8% Indian. *See supra* note 106.

215. *See* Census Data 2001, *supra* note 123. Excluding Jammu & Kashmir and Assam, Muslims comprise 12.4% of India's population. *Id.*

216. *See Sachar Committee Report on Muslims Tabled in LS*, REDIFF INDIA ABROAD, Nov. 30, 2006, *available at* http://www.rediff.com/news/2006/nov/30report.htm (stating that 33 of the 543 Lok Sabha members are Muslims).

217. The *Rajya Sabha* is the upper house of India's national parliament; most of its 250 members are elected by regional legislatures, and the remaining members are appointed by the President of India. *See* Parliament of India, http://www.parliamentofindia.nic.in/.

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laws is at least partially attributable to their greater "public" participation, which makes them less zealous in preserving personal laws as a sole measure of legal identity.

The contrasting realities of political representation of minorities in Singapore and India, as described in the foregoing paragraph, offer an important lesson for both minority leadership and pro-women advocates. Minority leaders could achieve greater rights in the political realm, including devolution of national power and more-secure legislative representation, if they were prepared to shift their focus from the preservation of personal laws. Correspondingly, progressive women's groups should not hesitate from supporting greater political rights for minorities for fear that they are emboldening the custodians of anti-women personal laws. Rather, they can genuinely and emphatically support these political rights in accordance with pluralist ideals, and then leverage that support within minority communities to promote the reforms of discriminatory personal laws.

2. Judicial Reforms

Aside from legislative initiatives, courts in some jurisdictions with personal laws have also tried to mitigate the discriminatory provisions of such laws by narrowing the scope and application of personal laws in a manner favorable to women. A few examples of these judicial decisions will suffice to assess both the potential and limitations of judicial activity as a means for reform.[218]

In Sri Lanka, the Supreme Court narrowed the scope of the Muslim personal law permitting polygyny in its 1997 decision of *Abeysundere v. Abeysundere*.[219] Overruling the decision of the Privy Council in *Attorney General v. Reid*,[220] the

218. For a discussion of other examples of judicial decisions in personal laws in Asia, see Hossain, *supra* note 148, at 478–80 (discussing Bangladeshi cases), and Kirti Singh, *Obstacles to Women's Rights in India*, *in* HUMAN RIGHTS OF WOMEN, *supra* note 148, at 375, 384–89. This section focuses on judicial reforms in Sri Lanka and India. The Philippines is a civil-law jurisdiction, and hence judicial decisions are not as authoritative a source of law as in common-law Asian jurisdictions. Singapore is a common-law jurisdiction, but its judges have taken a more cautious approach to judicial "law-making" than in other common-law systems. *See, e.g.*, Nappalli Peter Williams v. Inst. of Technical Educ., (1999) 2 S.L.R. 569 (Sing. Ct. App.) (rejecting the appeal of a teacher who alleged his constitutional rights were violated when he was dismissed from his job for not singing the National Anthem and reciting the National Pledge). The Court of Appeal took a restrictive approach to drawing on rights-based principles from other common-law jurisdictions, stating that the Constitution is "primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia." *Id.* at 574 (citing State of Kelantan v. Fed'n of Malaya, 1963 M.L.J. 355, 358). For a critical analysis of Singaporean courts, see Thio Li-ann, *supra* note 153, at 58–59.

219. Abeysundere v. Abeysundere, (1998) 1 Sri L.R. 185, *available at* http://www.worldlii.org/lk/cases/LKSC/1997/8.html.

220. Attorney Gen. v. Reid, (1964) 67 N.L.R. 25 (P.C.) [hereinafter *Reid's case*] (holding that, in a country of many religions, races and marriage laws like Ceylon (the former name of Sri Lanka), there was "an inherent right in the inhabitants domiciled there to change their religion and personal law, and thus to contract a valid polygamous marriage if recognised by the laws of the

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Supreme Court held that when a married, non-Muslim man converts to Islam and subsequently marries another woman, he does not escape the monogamous obligations of his first marriage, contracted under non-Muslim marriage laws, and will be subject to prosecution for bigamy.[221] The intention of the Supreme Court was to prevent men who could not obtain a divorce from converting to Islam for convenience. The decision was recognized as a victory for the notion of gender equality.[222] But it was also criticized by many Muslims and by human rights activists for having upset settled law and for creating two kinds of Muslims: those born to the faith and those who converted at a later stage in life.[223]

In India, the 1986 decision of the Supreme Court in *Mary Roy v. State of Kerala & Others*[224] alleviated the effect of discriminatory personal laws as they

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country, notwithstanding the subsistence of an earlier marriage.").

221. *Abeysundere*, 1 Sri L.R. 185. As in *Reid's case*, the accused in *Abeysundere* had purported to contract a second marriage under the Marriage and Divorce (Muslim) Act, No. 13 of 1951 (as amended) (codified at Sri Lankan Legis. Enactments (1980), ch. 134), after a first marriage to another woman under the Marriage Registration Ordinance, No. 19 of 1907 (codified at Sri Lankan Legis. Enactments (1980) (as amended)). Section 35(2) of that Ordinance requires the marriage registrar to address the bride and bridegroom with a statement including the following:

> [K.]now ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence.

Marriage Registration Ordinance § 35(2). According to the Supreme Court in *Abeysundere*, "[T]he Privy Council in Reid's case failed altogether to appreciate the significance of section 35 of the Marriage Registration Ordinance in the context of a statute which recognizes only a monogamous marriage." *Abeysundere*, 1 Sri L.R. at 195. The Supreme Court continued to state that the:

> true issue is not whether the respondent's second marriage under the Muslim Marriage and Divorce Act is valid or not, but whether by a *unilateral conversion to Islam* he could cast aside his antecedent statutory liabilities and obligations incurred by reason of the prior marriage. As stated earlier, the answer is clearly in the negative.

Id. at 197.

222. *See* Savitri Goonesekere, *Human Rights as a Foundation for Family Law Reform*, 8 INT'L J. CHILD. RTS. 83, 97 (2000) ("[T]he concept of gender equality was used to . . . challenge the validity of a polygamous marriage by a convert to Islam, overruling an established precedent of the Privy Council [*Abeysundere*, (1998) 1 Sri L.R. 185, *overruling Reid's case*, (1964) 67 N.L.R. 25]").

223. *See, e.g.*, Lakshman Marasinghe, *Monogamy, Bigamy and Polygamy;* Abeysundere v. Abeysundere - *A Conundrum*, 8 LAW & SOC. TRUST REV. 18, 31 (1998) (commenting that the "decision raises an urgent need for parliament to intervene, for it creates two categories of Muslims in the country, those who are born into the faith and those who have converted. Such a dichotomy is harmful to society and on principle should be removed."). Marasinghe further observes:

> As for the respondent, his fundamental rights must be protected under his newly acquired personal law, namely the Muslim law. Under that law he has the power to marry four times despite the existence of a previous marriage under the personal law which he has abandoned. . . . The violation of fundamental rights is of the converted and not of the aggrieved party.

Id. at 27. In Marasinghe's view, Lord Upjohn in *Reid's case* correctly stated the position of a right to change one's religion and personal law, unless such right is abrogated by statute. *Id.* at 30.

224. Mary Roy v. State of Kerala & Others, (1986) 1 S.C.R. 371 (India).

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applied to Christian women. The Court was required to determine whether the appellant was subject to the Indian Succession Act of 1925[225] or, alternatively, to a Christian succession law of the former princely state of Travancore—which became part of India in 1949.[226] Under the local Christian succession law of Travancore, women had limited succession rights,[227] whereas the Indian Succession Act of 1925 grants sons and daughters equal rights to parental property.[228] The Supreme Court held that the Tranvancore Christian succession law was impliedly repealed by national legislation passed in 1951,[229] which extended the application of Indian statutes (including the Indian Succession Act of 1925) to Travancore, and hence Christians in Travancore were now governed by the Indian Succession Act of 1925.[230]

In the controversial decision of *Shah Bano*, the Supreme Court of India mitigated the effect of Muslim personal laws that limited the maintenance payable to a divorcée.[231] The Supreme Court held that, regardless of any previous payment of maintenance by a divorced man to his former wife during her *'idda* period and payment of her *mahr*, a former wife could still seek additional maintenance from her ex-husband under Section 125 of the Criminal Procedure Code, which permits courts to order maintenance payments for financially impoverished women.[232] In its decision, the Court quoted certain passages from the Qur'an in support of the position that a divorced man has an obligation to mate-

225. Indian Succession Act, 1925, No. 39 of 1925 (India) (as amended).

226. *Mary Roy*, (1986) 1 S.C.R. at 373–75.

227. Sections 16 to 19 of the Travancore Christian Succession Act 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). *Mary Roy*, (1986) 1 S.C.R. at 375.

228. Indian Succession Act § 37.

229. *See* Part B States (Laws) Act, 1951, No. 3 of 1951 (India).

230. *Mary Roy*, (1986) 1 S.C.R. at 376–82. *See also* AGNES, *supra* note 3, at 149 (explaining that the Supreme Court in *Mary Roy* "struck down the discriminatory provisions on a technical ground that after independence the laws enacted by the erstwhile princely states, which were not expressly saved have been repealed.").

231. Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844 (India). For further discussion on this case, see Singh, *supra* note 218, at 384–86; AGNES, *supra* note 3, at 100–04 and NARAIN, *supra* note 3, at 28–35.

232. "The contention that, according to Muslim Personal Law the husband's liability to provide for the maintenance of his divorced wife is limited to the period of *iddat* despite the fact that she is unable to maintain herself cannot be accepted . . . ." *Shah Bano*, (1985) 3 S.C.R. at 847.

> Clause (b) of the Explanation to section 125(1) of the [Criminal Procedure] Code, which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Wife, means a wife as defined, irrespective of the religion professed by her or by her husband. Therefore, a divorced Muslim woman so long as she has not married, is a wife for the purpose of section 125.

Id. at 846.

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rially support his former wife.[233]

The decision in *Shah Bano* triggered massive protests amongst conservative Muslim Indians, who viewed the decision as a deliberate attempt to undermine "their" personal laws and were outraged that a secular court tried to support its decision with references to the Qur'an.[234] Fundamentalist Muslim leaders even pressured the victorious appellant, Shah Bano, to withdraw her support for the Court's decision in her favor.[235] Despite acclaim for the decision from women's rights advocates, including from some Muslim women's groups,[236] many Muslim leaders lobbied for legislation to overturn the Supreme Court's decision.[237] As a result, without any consultation with either women's groups or moderate Muslim leaders, the national government hastily passed the Muslim Women (Protection of Rights on Divorce) Act of 1986, which limited a Muslim man's duty to pay maintenance to his former wife to her *'idda* period.[238]

Admittedly, progressive judicial decisions can sometimes diplomatically negate discriminatory aspects of personal laws, as occurred in the *Mary Roy* case. However, there are at least three dangers of relying on judicial decision making as a means of sustained reform of discriminatory personal laws. Firstly, judges in family-law matters are apt to focus on the personal dispute between the parties at hand, rather than on a decision that is appropriate for entire communities. Unlike legislatures and other public fora, they are institutionally constrained in calling and hearing the views of various segments of society. Hence they may miscalculate the ramifications of their decisions on highly politicized

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233. The term *Qur'an* is written in different ways, including as *Koran* and *Quran*. "Aiyat No. 241 and 242 of 'the Holy Koran' fortify that the Holy Koran imposed an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of Koran." *Id.* at 848.

234. *See* Asghar Ali Engineer, *Maintenance for Muslim Women*, THE HINDU, Aug. 7, 2000, *available at* http://www.hinduonnet.com/thehindu/2000/08/07/stories/05072524.htm. Engineer comments that Muslim scholarly leaders "maintained that the Supreme Court [in *Shah Bano*] has no right to interpret the Quran" and that "the controversy snowballed into a major political problem as thousands of Muslims took to the streets and demonstrated against the Supreme Court decision." *Id.*

235. NARAIN, *supra* note 3, at 81–82. *See also* Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community* (1997) (Edward A. Smith Lecture, Harv. L. School) (commenting that "Shah Bano denounced the judgment of the court under pressure from her community"), *available at* http://library.law.columbia.edu/urlmirror/11/ReinventingInternationalLaw.htm.

236. *See* Ranjit Devraj, *Fighting the Veil: Muslim Women Mobilize to Overcome Their Traditional Second-Class Status*, INDIA TOGETHER, Aug. 5, 2002, *available at* http://www.indiatogether.org/women/articles/veil0802.htm.

237. *See Shades of Shah Bano*, THE TRIB., June 21, 2000 ("The Supreme Court ruling in the Shah Bano case was overturned by Rajiv Gandhi under pressure from Muslim fundamentalists."); Engineer, *supra* note 234 ("Ultimately the Rajiv Gandhi Government bowed to the pressure and enacted a law exempting Muslim women from the purview of Section 125 of the [Criminal Procedure Code].").

238. Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 of 1986, §§ 3–5 (India). *See* NARAIN, *supra* note 3, at 33.

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intra-community and inter-community relations.

Secondly, insofar as a sustained and harmonious reform of personal laws depends on reclaiming historically pro-women aspects of religious and cultural laws,[239] secular courts lack legitimacy to do this, in the view of the community whose laws they try to reform.[240] The Supreme Court in *Shah Bano* made an admirable attempt to draw on the abundance of enlightened, pro-women maxims in the Qur'an to support its decision. For example, it emphasized the progressive notion of *mahr* as a payment by a husband "that is generally expected to take care of the ordinary requirements of the wife, during the marriage *and* after."[241] However, as the anti-women developments that followed the *Shah Bano* case demonstrated, such enlightened religious principles should be reclaimed and recognized from within the community concerned, rather than imposed from outside, to sustain the long-term reformation of personal laws.

Finally, judges cannot—and indeed do not—always decide reforms in favor of women's rights. Progressive judicial reform usually depends on the presence of some ambiguity in the law, at which point a judge can intervene to favor a rights-based construction of the law.[242] Even when ambiguities are present, the varied personal inclinations of judges mean that they do not always construe the law to protect women's or other rights. For example, in *Krishna Singh v. Mathura*, the Indian Supreme Court displayed conservative inclinations in deciding that personal laws are not governed by Part III of the Constitution, which deals with fundamental rights.[243] Disapproving a lower court's more progres-

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239. *See supra* notes 142, 200 and accompanying text.

240. Where jurisdictions provide for special, religious courts implementing personal laws (e.g., *Qadi* or *Syariah* courts), judicial reform of personal laws may be more appropriate.

241. Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844, 847 (India) (emphasis added to highlight that the *mahr* is expected to be a significant sum, although with the influence of northern-Indian Hindu customs, its value has been undermined among Indian Muslim communities). *See* AGNES, *supra* note 3, at 36.

242. On the point that judicial discretion arises when the law is "indeterminate or incomplete", see generally H.L.A. HART, THE CONCEPT OF LAW 272 (1996). This point and its rights-based implications have been acknowledged in various legal contexts, including in the interpretation and application of international treaties, property law and constitutional law. *See, e.g.*, *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 945 (2000) ("The court does not find the treaty language ambiguous, and therefore its analysis need go no further."); Marie-Ann Bowden, *The Polluter Pays Principle in Canadian Agriculture*, 59 OKLA. L. REV. 53, 78 (2006) ("[I]t is a well-established principle of statutory interpretation that *if* legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights . . . .") (emphasis added); David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 561 (2004) ("[F]undamental rights are used to resolve interpretive ambiguities in constitutions and to guide judicial review generally."). Aside from the constraints on judicial, rights-based reform in common-law countries, it would seem that judges are further constrained in civil-law jurisdictions. *See, e.g.*, Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. LAW 419, 424 (1967) (noting the comparatively greater importance of the legislation (as distinct from case law) in civil law systems).

243. Krishna Singh v. Mathura Ahir, (1980) 2 S.C.R. 660 (India).

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sive application of Constitutional guarantees, the Court stated that:

> the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law.[244]

The decisions of *Krishna Singh*, *Abeysundere* and *Shah Bano* illustrate the shortcomings of relying on judicial decision making as a means of reform. When courts are presented with the opportunity to reform discriminatory personal laws (by no means a certain or regular happenstance), they may not grasp that opportunity. Alternatively, if they do, their eventual decisions could unsuspectingly provoke the ire—and even fury—of a significant segment of the relevant ethnic community. As was evident from the case of *Shah Bano*, this fury could lead to further restrictions on the rights of the women in that community.[245]

3. Uniform Civil Code

A third mode of reforming discriminatory personal laws is to abolish them altogether and institute a uniform civil code. Of the four jurisdictions surveyed in this article, the establishment of a uniform civil code has been seriously considered only in India.[246] This is undoubtedly because Article 44 of the Indian Constitution mandates the establishment of such a code by providing that the "State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." Although this constitutional mandate has existed for over half a century and women's rights advocates have long demanded its realization, opposition from patriarchal minority leaders has hitherto prevented the implementation of a uniform code.[247]

Prospects for implementing Article 44 in the foreseeable future have become more complicated over the past decade. A uniform civil code has been increasingly advocated by nationalist Hindus, who are eager to abolish minority personal laws to further their own majoritarian agenda.[248] This development has

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244. *Krishna Singh*, (1980) 2 S.C.R. at 670. *See also* NARAIN, *supra* note 3, at 41 (criticizing the Supreme Court for not explaining its conclusion that the personal laws are not subject to fundamental rights provision of the Constitution). Part III (Articles 12 through 35) of the Indian Constitution provides for the protection of certain rights, which are enumerated in Articles 14 through 30. *See especially* INDIA CONST. arts. 13, 15(1); *supra* notes 157, 162 and accompanying text. The Supreme Court in *Krishna Singh*, however, did not refer to these or any other articles of the Constitution.

245. *See* Basu, *supra* note 3, at 140; *supra* notes 233–38 and accompanying text.

246. *See Indian Court Backs Common Code*, BBC, July 23, 2003, *available at* http://news.bbc.co.uk/2/hi/south_asia/3089539.stm.

247. *See* NARAIN, *supra* note 3, at 56–61.

248. *See id.* at 129–30; Rajeswari Sunder Rajan, *Women Between Community and State*, 18

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led to a split among women's groups on the issue of a uniform civil code. Some women's rights advocates continue to favor the establishment of such a code, arguing that it serves the interests of all Indian women and that women's rights should not once again be subordinated to political machinations.[249] Other women's groups have retreated from advocating a uniform code, expressing concern that any advocacy of a uniform code will be hijacked by nationalist Hindu leaders who will ultimately frame a code that serves a majoritarian ethno-religious agenda, rather than women's rights or indeed any other fundamental rights.[250]

A uniform civil code is clearly an attractive means of reforming personal laws from a women's rights perspective. It offers the opportunity to remove both facets of discrimination in existing personal laws: discrimination against women within particular ethnic-religious groups, as well as discrimination between women of different groups. However, the key question surrounding a uniform civil code is whether the implementing process and the substantive norms of such a code will be neutral. A uniform code is often advocated as a "secular" measure,[251] but as has been pointed out with respect to India, most South and South-East Asian societies are distinctly *not* secularized.[252] They are intensely multi-religious polities with interspersed colonial institutions.[253] Many of them are experiencing an ascendance of nationalist-fundamentalist values benefiting the majority religious-ethnic group.[254]

In the context of the majority-minority dynamics that developed in the post-independence era in India, Sri Lanka and some other Asian countries with personal laws, it is probable that a uniform civil code will end up reflecting the values, customs and priorities of the majority group, or at the very least be *perceived* as such.[255] The prospect of a uniform family or civil law remains a highly charged issue in most Asian countries with personal laws,[256] emanating a level of sensitivity not readily understood outside the region. Normatively, the establishment of a uniform civil code will signal the devaluation of diversity and cultural identity in states that should be striving to foster pluralism and multicul-

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SOC. TEXT 55, 57 (2000).

249. *See* Rajan, *supra* note 248, at 63–64.

250. *See* NARAIN, *supra* note 3, at 130–31; Amrita Chhachhi, *Civil Codes and Personal Laws: Reversing the Option Working Group on Women's Rights*, 8 WOMEN AGAINST FUNDAMENTALISMS J. 20 (1996), *available at* http://waf.gn.apc.org/journal8p20.htm.

251. For a discussion of this point, see Basu, *supra* note 3, at 136.

252. Parashar, *supra* note 56, at 157. Parashar views "secular" institutions to be European colonial institutions rather than "neutral" indigenous institutions.

253. *See id.* (discussing the juxtaposition of "basically European institutions" with a "plurality of religious views").

254. *See supra* note 130.

255. *See supra* notes 132–34.

256. *See, e.g.*, *Indian Court Backs Common Code*, *supra* note 246; *supra* notes 132–34.

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turalism.[257] In more pragmatic terms, its passage could engender communal violence and fracture already-uneasy relations between ethnic-religious groups.[258] In the long run, neither women nor men have much to gain from a nation-state that ostensibly recognizes equal rights but is predicated on majoritarian or nationalist ideologies.

B. Desirable and Feasible Means of Reform

My own view is that there is a third way, between replacing community-specific personal laws with a uniform civil code and maintaining the evident discrimination against women in existing personal laws. As indicated earlier, this third way consists of advocating legislative reform of each community's personal laws with two key elements.

First, *every* community subject to personal laws in India, Sri Lanka, Singapore and the Philippines has a rich history of customary laws that valued women, a history that must be recaptured into the public discourse of those communities.[259] For example, the Muslim community's customs of *mahr* and grounds for divorce are pro-women norms, which have been distorted in personal laws shaped by colonial administrations and majority community norms, as well as by anti-women Muslim leaders.[260] The customary Hindu practice of *stridhana*, the Parsi custom of equal succession, the indigenous Filipino liberality with respect to divorce and female leadership and the Kandyan Sinhalese practice of polyandry all evince progressive or feminist customary practices that were (at least temporarily) overridden by patriarchal values during and after the colonial era.[261]

Undoubtedly, each community's ancient customary laws also contained norms that did not favor women. Currently, conservative male leaders within each community appear to cling to those norms together with norms imposed on them by European colonizers. Collectively, women's rights advocates within each community can: (1) expose the colonial origins of those norms that are now claimed to reflect "indigenous" values and (2) bring to light the abundance of pro-women aspects of historical customary laws. This process is already underway to some extent[262] but can be greatly strengthened with further collaboration

257. *See* AGNES, *supra* note 3, at 194, 208–09.

258. *See* East, *supra* note 91, at 3–4; *supra* notes 91, 111–14, 128–29, 144 and accompanying text.

259. *See supra* Part II.A.

260. *See supra* notes 71, 73, 231–38 and accompanying text.

261. *See supra* notes 57, 60–61, 63, 73–74, 193 and accompanying text.

262. For example, the Muslim Women's Research and Action Front in Sri Lanka argues for reform of Muslim personal laws on the basis of Qur'anic principles. *See* MUSLIM WOMEN'S RES. & ACTION FRONT, MEMORANDUM SUBMITTED TO THE COMMITTEE ON PROPOSED REFORMS TO MUSLIM PERSONAL LAW (1988), *available at* http://www.wluml.org/english/pubs/rtf/dossiers/dossier3/D3-05-srilanka.rtf.

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among women's rights groups and leaders. The experience of the Parsi community in India demonstrates the effectiveness of such an indigenous-based reformist approach.[263]

However, the reclamation of a pro-women cultural identity is unlikely to be a sufficient basis for reform of personal laws governing *minority* communities, as minority leaders will be reluctant to relinquish control over what is often their only sphere of autonomy. Hence as a second step, women across all communities should actively promote the rights of minorities in political and public spheres, where such rights are compatible with women's rights. It is beyond the scope of this article to provide any detailed analysis of the means by which the participatory rights of minority groups can be facilitated within a nation-state.[264] However, affirmative-action measures such as reservations for underrepresented minorities in education and politics are one example. In states where minorities are seeking devolution of power, the decentralization of government within the framework of constitutionally guaranteed human rights may be a further option. Another, more practical option is legislation enabling minority employees to follow their religious obligations, such as by granting time to undertake the *hajj* pilgrimage. All such measures will enhance the public standing and political participation of minorities. As the Singaporean experience demonstrates, these measures should make most members within minority groups more receptive to reform of discriminatory personal laws.[265]

By active involvement in minority rights movements, women's groups can also use their support for minority rights as political leverage with minority groups in promoting reform of discriminatory personal laws. Additionally, the effective advocacy of women in minority movements will negate the patriarchal assumptions of conservative minority leaders who devalue the contribution of women in the political and public process. These factors will facilitate a steady path of reform.

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263. *See supra* notes 187–97 and accompanying text. The Parsi experience also indicated another factor—that of widespread literacy—in generating awareness and political pressure for reform. Parsi women have an exceptionally high literacy rate of 97%, compared to the overall adult female literacy rate of 46.4%. *See* Amberish K Diwanji, *Are Parsis in Self-Destruct Mode?*, *available at* http://ushome.rediff.com/news/2004/nov/11spec.htm; *supra* note 170 and accompanying text.

264. For a summary of the various means which have been tried thus far in South and South-East Asia, see Ghai, *supra* note 95. *See generally* Yash Ghai, MINORITY RTS. GROUP INT'L, PUBLIC PARTICIPATION AND MINORITIES (2001), *available at* http://www.minorityrights.org/admin/Download/Pdf/PubPartReport.pdf; WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995).

265. *See supra* Part IV.A.1.b (discussing the means by which Malay-Muslim interests are integrated into Singaporean government and society (most notably, by Group Representation Constituencies in Parliament) and the relative ease with which amendments to Muslim personal laws were passed in 1999).

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CONCLUSION

Hundreds of millions of women in South and South-East Asia continue to be subject to discriminatory personal laws. There is no doubt that personal laws which discriminate against women must be reformed. These laws violate a woman's inherent right to equality and, furthermore, perpetuate the social, economic and political disadvantages of women.

Comprehensive reform of personal laws has hitherto been obstructed by the patriarchal values embedded in both majority and minority communities, as well as by the vigilant protection of personal laws by conservative minority leaders. Advocates for the reformation of personal laws must tackle the root causes of these patriarchal values and minority vigilance. In this article I have sought to demonstrate that patriarchal values exist among majority and minority communities at least partly because of the *false* assumption that they are integral to indigenous culture, and that minority vigilance over personal laws is especially pronounced because minorities have been unable to secure their political rights and identity via other means.

Reformists of personal laws must therefore adopt a two-pronged approach to eliminating the discriminatory aspects of personal laws. They must reclaim the normative paradigms of their cultures that were overborne by colonial occupation and patriarchal values, by publicizing the progressive histories of customary laws. They must further address the political insecurity of minority groups in the face of ascendant majority values, by advocating substantial and genuine minority rights alongside reforms of personal laws.

These twin elements are best combined with the legislative amendments of personal laws, rather than with *ad hoc* judicial decisions or with a uniform civil code. A uniform code which reflects the norms of a plurality of individuals and communities is likely the ultimate goal of women's rights advocates. However, this is an idealistic prospect, given the prevailing context in many Asian countries of majoritarian values and sectarian violence.[266] Given this context, women's rights advocates should clearly separate themselves from majoritarian agendas and advocate women's rights by means that reflect a respect for pluralism and diversity in their societies.

266. For example, see *supra* notes 112–15, 129–31 and accompanying text (discussing Hindu-Muslim violence in India and Sinhalese-Tamil violence in Sri Lanka). Even in Singapore, where the government has historically been relatively committed to maintaining communal harmony by various means (for example, by the predominant use of the English language and by minority quotas in government), the post–September 11 "war on terror" has created an increasing sense of alienation among the Malay-Muslim community. *Singapore Terror Suspects Average*, AP, Sept. 27, 2002, *available at* http://www.singapore-window.org/sw02/020927a1.htm. The same sense of alienation appears to have grown among Filipino Muslims. *See* Ilene R. Prusher, *Filipino Muslims on the Defense*, CHRISTIAN SCI. MONITOR, Jan. 11, 2001.

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