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EDITOR'S INTRODUCTION

Religious family law and legal change in comparative perspective

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1 Introduction

It is a usual practice in both scholarly and political discourses to frame the question of religious family law within a binarized framework of conflicting values: personal autonomy/communal authority; women's rights/multiculturalism; secularism/state recognition of religious authority; universal rights/cultural rights; and so forth. While religious family laws, normatively and in their operation, do entail conflicts of the above nature, such framings also presume (a) state-enacted secular family law to be necessarily better than religious family law, and (b) religious family law to be fixed and unresponsive to wider socio-political changes. Our point of departure in this *Special Issue* of the *Jindal Global Law Review* is to take religious family laws to be a dynamic arena of contestations between states, individuals and religious communities, as well as between different institutions and interests within the state and the community.

The articles presented in this issue focus on the vectors of legal change in religious family laws in different jurisdictions across South Asia. The articles shed light on the routes through which legal change takes place in religious family laws; why they take place in certain circumstances; how are questions of identity and representation foregrounded or occluded in debates over religious family laws; how and why judges triggering legal change respond differently to the same problem in

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different jurisdictions; and how codification of religious law effects legal change, among others. We use the neutral term "change", rather than "transformation" or "reform" to frame these queries, since the legal phenomena that are presented below differ widely by nature and scale. The following three examples provide a glimpse of the diversity in the forms of legal change in religious family law systems across the world.

At its independence from French colonial rule in 1956, Morocco adopted the Code of Personal Status (*Mudawwana*), under which women had a subordinate status in all aspects of family life, from the formation of marriage to its dissolution and related aspects.[1] Changes to the Code was resisted by the religious conservatives for the next four decades, until a fortuitous turn of events in the early 2000s enabled the King, who had been pro-reform, to overcome Islamist resistance and accede to the demands of the women's movement for an egalitarian Code.[2] The 2004 reforms sought to modernize the Code, while retaining its basis in the existing Islamic framework of justice. Under the new Code, the minimum age of marriage for women was raised to eighteen; they could get married without the consent of a matrimonial guardian; wives and husbands were regarded as joint heads of the household; restrictions were put on both polygamy and unilateral repudiation by the husband; and women were given the right to initiate divorce on their own, among others.[3] The new Code also vested the judiciary with greater discretion in deciding matrimonial disputes. This, according to some commentators, is obstructing the radical possibilities of the Code from reaching women, since the judiciary trained in the traditional Islamic doctrine is reluctant or unable to give effect to the new mandate of women's equal legal status in the family.[4]

In 2014, Kenya enacted the Marriage Act, a common comprehensive law, that replaced its earlier regime of seven different laws for civil, religious and customary marriages and their incidents. The new law declared that the parties to a marriage will have equal rights at the time of, during and at the dissolution of marriage; set the minimum age for a valid marriage at eighteen; made the registration of all marriages—including customary ones—mandatory; and established community of property and a equal share entitlement of the wife over the property acquired during marriage, among others.[5] These aspects of the Act which constitute the modern legal regulation of marriage, however, coexisted with the recognition of polygamous marriages—a fact that received disproportionate attention from the Western media. A proposal that required the consent of an existing wife to the husband's subsequent marriages was rejected by the law

[1] Mounira M. Charrad, *Family Law Reforms In The Arab World: Tunisia And Morocco* (*Rep.*), U.N. (May 15, 2012) http://www.un.org/esa/socdev/family/docs/egm12/PAPER-CHARRAD.pdf.

[2] *Id.*

[3] *Id.*

[4] Aida Alami, *Gender Inequality in Morocco Continues, Despite Amendments to Family Law*, N. Y. TIMES, March 17, 2014, http://www.nytimes.com/2014/03/17/world/africa/gender-inequality-in-morocco-continues-despite-amendments-to-family-law.html?_r=0.

[5] Hanibal Goitom, *Global Legal Monitor, Kenya: Comprehensive Marriage Law Enacted*, LIB. CONGRESS, May 2, 2014, http://www.loc.gov/law/foreign-news/article/kenya-comprehensive-marriage-law-enacted/.

makers. This pit the Catholic Church—which does not recognize polygamous marriages[6]—and some women politicians—who were concerned about the adverse effects of polygamy on women[7]—against the reformist politicians, even as other women's groups welcomed the move,[8] since legal recognition gave legal protection to the rights of all the co-wives in polygamous marriages, which was not the case earlier.

Independent India inherited a family law system whereby different religious communities were governed by their own laws, administered by common state courts. The Constitution of India, adopted in 1950, provided that the state shall seek to adopt a uniform civil code governing all the citizens of the country. Hindu law was codified in the 1950s, which recast Hindu marriage by incorporating elements of modern marriage such as minimum age, consent of the parties, monogamy and gender equal access to divorce. But the laws of the other religious communities were left untouched. While the deferred goal of a uniform code is invoked periodically by secular groups, women's rights groups as well as the Hindu supremacist groups that see the autonomy granted to minority religious groups as minority appeasement, legal developments in the last 30 years have shown that convergence of religious family laws can take place and gender justice can be ensured, even in the absence of a legislated uniform code. Christian law of divorce underwent large-scale legislative amendment in 2001 that not only removed egregiously gender discriminatory provisions, but also made it almost similar to the Hindu, Parsi and the secular divorce laws. Muslim women were removed from the ambit of secular law of maintenance by the Parliament in 1985.[9] The restriction has been made redundant by creative judicial interpretation that has re-established the husband's duty to pay maintenance under the secular law, irrespective of his limited duty under Muslim personal law.[10] In a 2002 judgment, the Supreme Court (SC) of India laid down conditions to restrict the Muslim husband's arbitrary use of unilateral divorce.[11] Similarly, adoption, which is not recognized by Islamic law, was made available to Muslim couples, under secular law, by another SC judgment in 2014.[12]

If the legislative unification and modernization of the law of marriage in Kenya is one end of the spectrum of legal change, then the group-specific reform of laws and their gradual convergence led by the judiciary in India is the other end. What must be noted is that be it the modernization of Kenyan laws or the convergence of Indian laws, both processes remain incomplete, thus producing a legal field in each jurisdiction that is continuously shaped by contestations between religious leaders,

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6 *Kenya's New Marriage Law: How Suitable for the Country*, AFRICALINK, July 13, 2014, http://www.africalink.ch/index.php/news/top-stories/123922-kenya-s-new-marriage-law-how-suitable-for-the-country.

7 *Kenyan Polygamy Law: Female MPs Storm out of Parliament,* BBC, March 21, 2014, http://www.bbc.com/news/world-africa-26681580.

8 Faith Karimi & Lillian Leposo, *New Kenya Law Legalizes Polygamy; Women's Group Applauds It*, CNN.com, May 1, 2014, http://edition.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/.

9 *Mohmmed Ahmed Khan v Shah Bano Begum* 1985 S.C.R. (3) 844.

10 *Danial Latifi and Another v Union of India* 2001 (7) S.C.C. 740.

11 *Shamim Ara v State of Uttar Pradesh* A.I.R. 2002 S.C. 3551.

12 *Shabnam Hashmi v the Union of India* (2014) 4 S.C.C. 1.

state actors, feminist and secular reformers, religious feminist reformers and lay individuals who mobilize the legal system for their specific interests. Paying close attention to these contestations is crucial for these are the sources of legal change in these societies.

2 Nation building, gender justice, judicial role

We find three dominant themes running through the contributions presented here, which we use to weave them together. Regulation of family life has been central to the processes of state/nation building, characterized by the transfer of authority over individuals in the private domain, from the community to the state. While textbook cases of such transformation are seen in most European nations, where the state assumed exclusive authority to lay down rules governing the family, we also witness alternative forms of such processes in the postcolonial/developing world, where states share rule-making and adjudicatory authority over the family with non-state entities. Be that as it may, even in jurisdictions of the latter category, the aspiration for a "national" legal system remains a source of legal change.

We begin with Veronica Corcodel's article which provides a critical overview of the treatment of religious family law in the writings of key Euro-American comparatists. While the family/market distinction has been a cornerstone of the liberal legal thought, Corcodel shows a parallel sacred/secular distinction operating in the writings of comparatists, from the nineteenth century British historian Henry Maine to post War writings of the French law professor René David. Religious law—both Hindu and Islamic—as less advanced, is relegated to the domain of the family in this body of work, while the secular law of the market, grounded in individual liberty and facilitating contract, is seen as representing an advanced stage of legal evolution. As Corcodel shows, even when these comparatists made a case for sensitivity toward the particularism of non-Western societies, their overall theoretical framework was one in which societies and legal systems followed an evolutionary path with Western modernity as the ultimate destination, where secular law of the market alone could help achieve modernization and economic development. Corcodel's intervention is extremely significant, for it helps underscore the fact that the binaries with which we began this introduction do not govern the question of religious family law alone, but are constitutive of a wider pattern of, what she calls, "liberal-imperial domination".

Sachin Dhawan's article carries forward the theme of family law as the site and comparison as the method of articulating and concretizing the distinction between modernity and its "other", by examining the traffic of ideas between the United States (US) and India on the regulation of polygamy. Dhawan shows how Indian judges have since the 1950s justified the prohibition of polygamy among the Hindus and in some instances the Muslims too, by drawing on nineteenth century US jurisprudence, which in turn was based on characterizing polygamy as a feature of the "despotic" societies of Asia and Africa, and hence, a threat to the Western systems of governance. Ironically, the USA has since then gone back on the prohibition of polygamy, while in India the issue has become the very ground on which the modern Hindus/barbaric Muslims distinction is constituted.

Kumaravadivel Guruparan's contribution addresses the question of who can reform minority religious family law in a majoritarian polity, using the case of customary law of the Tamil minority in Sri Lanka. Guruparan reminds us helpfully that liberal states are not culturally neutral; the "liberal universalism" espoused by the policies of liberal states often bear assimilationist tendencies. Thus, while the call for a uniform family law that is oblivious to such assimilationist undercurrents is problematic, so is the alternative project of harmonizing culturally specific family laws with international human rights standards, if the human rights discourse is ultimately meant to feed into a nation-building project. Guruparan argues that reforming Tamil customary law can be legitimate only if it is preceded by a reorganization and redefinition of state structure in which the Tamil minority is able to exercise self-determination.

Promoting equality between men and women in the legal regulation of family life is a common trigger for changes in religious family laws across jurisdictions. Legal change has been occasioned either by legislative enactments as a result of mobilization by women for equal status within the family, or by the exercise of judicial authority. The codification of Islamic family law in Tunisia in 1954 and the revision of the Moroccan Code in 2004 are widely cited examples of the former.[13] However, the relationship between codification of religious law and gender progressive legal change is complicated and contradictory. Both Tunisia and Morocco underwent codification of Islamic family law upon their independence from colonial rule in the 1950s, and yet the two codes differed vastly in terms of recognition of women's rights. The codification of Hindu law in India in the 1950s is yet another example of the contradictory effect of codification. While it granted women equality in areas where they did not enjoy equality under classical Hindu law, codification also proved to be disadvantageous to some groups of women by erasing local customary rules that were more favorable to them than what they became entitled to under the codified law.

This theme finds repetition in Marium Jabyn's article which discusses the impact of codification of Islamic family law principles in the Maldives through the Family Act of 2000. Jabyn shows that while codification has furthered the rights of the wife in certain matters such as polygamy, unilateral repudiation by the husband and reconciliation, but has retained the superior position of the father in the matter of custody of children, in traditional Islamic doctrine, in the codified law. Significantly, Jabyn argues that states can further the rights of women even within an Islamic framework.

Where legal change has resulted from judicial authority, gender equality has often been a background concern. Muhammad Zubair Abbasi's article discusses how the Pakistani judges invoked gender equality to uphold the wife's right to unilateral no-fault divorce under Muslim law without the husband's consent, as was required by prior judicial interpretation of the Islamic doctrine. Motivated by similar concerns for gender justice in Muslim divorce law, Indian judges followed a different strategy: they limited the husband's right to unilaterally repudiate the marriage by requiring that such repudiation can only be for a "reasonable cause"

[13] Charrad, *supra* note 1.

and only if it was preceded by attempts of reconciliation. Abbasi concludes that comparing the approaches of the Indian and Pakistani judges shows that similar to secular law, rules of Islamic law are also determined by external socio-political influences. Abbasi's article thus helps to de-emphasize the binaries within which religious family law debates are usually framed as we have noted above.

The creative use of judicial authority plays a critical role in the politics of religious family law, by defusing conservative resistance to changes in the law. In the case of India, it has been argued that, contrary to the widespread view that Muslim family law is resistant to change—particularly, those aspiring to give equal rights to men and women—it has actually undergone incremental change through judicial interpretation.[14] Judges have departed from precedent and introduced crucial changes in Muslim law of divorce, polygamy and maintenance by basing their decisions on reformist interpretations from within Islamic legal traditions, rather than the secular constitution. There are also instances, however, where judicial authority has been used to bolster the notion that Muslim law in India is backward, unchanging and gender unjust, which then has formed the basis for exhorting the legislature to enact uniform civil code.[15]

Jhuma Sen's contribution to this volume addresses the authoritative discourse created by judgments that use gender justice as a pretext for furthering anti-minority opinions, by offering a feminist alternative to a judgment. Sen takes up the 1995 judgment of the SC in *Sarla Mudgal v Union of India*, which is deemed as a landmark for making a case for an uniform civil code. The SC in this case was called upon to decide the validity of the second marriage performed by a married Hindu man after converting to Islam in order to avoid the charge of bigamy. The SC, while holding the man liable for bigamy, also held the same to be the outcome of a system of multiple personal laws, including Muslim law that allowed polygamy. Sen's feminist alternative to *Sarla Mudgal* imagines the possibilities of adjudication by squarely denouncing bigamy of Hindu men without attributing the same as a product of Muslim personal laws.

3 The comparative method

In conclusion, we want to briefly consider the relevance of a comparative method to the question of religious family law, given the orientalist, teleological underpinnings of much of comparative law scholarship on family law in non-Western societies. Till recently, family law was not considered a proper object of study by the Euro-American comparative law scholars otherwise committed to unifying and harmonizing the law of the market. The view that family law was rooted in culture, as opposed to the market, led scholars to see family law as exceptional.[16] In her

[14] Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 L. & SOC. INQUIRY 631-72 (2008).

[15] *Prakash v Phulavati* A.I.R. 2016 S.C. 769.

[16] Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777–810 (Fall 2010).

account of family law exceptionalism in Western comparative law scholarship, Fernanda Nicola refers to English jurist Harold Gutteridge's view that the study of comparative family law would allow "race, religion and politics into the study of law"[17]—issues that he believed lawyers should not be concerned with. Nicola notes that the comparative lawyers' reluctance to engage with family law faded in the 1990s, owing to the increased emphasis on individual rights within the family, spurred by women's rights and human rights movements. However, as Corcodel rightly points out in her article in this volume, this recent shift in the comparative lawyer's reception of family law, being confined to harmonization projects undertaken in the European context, implicitly reproduces the opposition between the secular, modern family of the West and its religious, backward Other. Besides, the European project represents an instrumental use of comparative law for the purpose of regional consolidation, which is itself fraught with assimilationist moves.

Does comparative law or the comparative method more broadly have any relevance for the study of religious family law? We suggest, following Werner Menski, that a comparative law method that is not tied to pursuing specific policy goals and that approaches law as a "… complex internally plural field involving constant negotiation between its own different, potentially conflicting manifestations *and* other elements from outside the field of law",[18] can contribute meaningfully to the study of religious family law. Three books on religious family law published in recent years employ such an approach to law and the comparative method in this manner and produce insights that advance the debate on religious family law by moving away from the usual binarised framework. *Nation and Family: Personal Law, Cultural Pluralism and Gendered Citizenship in India*[19] by Narendra Subramanian looks at the course of religious family law reform in India, by placing it in a comparative map of other postcolonial regimes that also have such laws. Among other things, Subramanian concludes: (a) that comparative experience shows that in societies where people accord value to their religious or cultural identities and recognize a public significance of religion, reforms in family law grounded in religious or cultural traditions have greater legitimacy and the new norms are internalized more effectively (which resonates with Jabyn's and Abbasi's articles); and (b) that in case of India, the dominant ideas of Indian nationalism have primarily remained Hinduism-centric and have failed to engage with minority religious traditions, which has restricted change in minority religious family laws (which resonates with Guruparan's article). *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*[20] by Yüksel Sezgin, which has been reviewed in this issue by Saumya Saxena. And finally, *Adjudication in Religious Family Laws: Cultural Accommodations, Legal Pluralism, and Gender Equality in India*[21] by Gopika Solanki,

[17] *Id.*, 778.

[18] Werner Menski, comparative law in global context: the legal systems of Asia and Africa 595 (2nd ed., 2006).

[19] Narendra Subramanian, Nation and family: personal law, cultural pluralism and gendered citizenship in india (2014).

[20] Yüksel Sezgin, Human rights under state-enforced religious family laws in israel, Egypt and India (2013).

[21] Gopika Solanki, Adjudication in religious family laws: cultural accommodations, legal pluralism, and gender equality in india (2011).

argues, through a nuanced ethnography of the “micropolitics of adjudication”[22] in state and non-state family dispute resolution fora, that state recognition of religious and customary regulation in family matters has the possibility of enhancing and not necessarily restricting gender justice. Interestingly, all three books are written by social scientists and not lawyers. The lesson for comparative legal scholars studying religious family law clearly then is to embrace “race, religion and politics in the study of law” and not block it in pursuance of a pure vision of law.

[22] *Id.*, at 21.