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ABSTRACT

What role(s) can the state play when cultural rights come into conflict with women's rights? This article compares conceptions of the state in the normative literature against two empirical cases of multicultural debate in modern India: Islamic law in the 1980s and Hindu law in the 1950s. I find that three conceptions of the state found in the normative literature—*oppressive*, *facilitative*, and *vacated* states—are only partially supported in the empirical cases, which proffer some support for the state as oppressive, but little or none for the state as facilitative or vacated. They also indicate a fourth model not found in the normative literature: an *ameliorative* state. My analysis thus suggests that simplified conceptions of states as 'good' or 'bad' for women's rights, found in some normative literature, find little empirical support in actual cases of multiculturalism and women's rights in India.

I. Introduction

A growing literature on multiculturalism and women's rights has been trending towards deliberative democratic resolutions to apparent conflicts between these two imperatives of liberal governance. This normative literature has focused explicitly on the dilemmas multiculturalism can pose for vulnerable internal minorities (VIMs) in general and women in particular in liberal democratic states, and it has posited various forms of deliberative democracy as the best way to resolve such dilemmas. Scholars of multiculturalism and women's rights have made enormous strides in examining how and under what conditions multicultural dilemmas could be resolved in ways that do not necessarily or unduly burden women, placing them in a position of 'choosing' between their culture and their rights (Mookherjee, 2009).

One important turn in this normative literature has been to consider the institutional aspects of multicultural dilemmas and deliberative democratic resolutions (Eisenberg, 2009; Shachar, 2001). To build and expand on this literature, I focus on theorizing the role of the state in multicultural dilemmas. The state is critical to any practical or theoretical understanding of culture and women's rights. It is apparent that the culture-versus-rights debate assumed—or constructed—a basic dichotomy between culture and rights. Especially for women, culture, and rights became mutually exclusive: these two imperatives of liberal society must be either chosen between or reconciled in some way. But these dichotomies worked—as dichotomies do—to obscure and obfuscate important linkages between the categories of 'culture' and 'rights' themselves. That is, multiculturalism as a system operates from the fundamental logic of treating culture itself as a right. Attached to individuals, groups, communities, or entire societies, culture becomes something that is possessed by them and to which they are entitled. And—as with other rights—it is the state that is meant to preserve and protect (the right of/to) culture. In this way, multiculturalism as a policy itself centers the state as a, if not the dominant, actor. Culture—whether minority or majority, dominant or subordinate, patriarchal, liberal, or otherwise—comes to be negotiated through the modern state.

It is by now commonplace to understand that under the gaze of the modern state, culture (as a right) becomes assignable and categorizable, assumed to map neatly onto 'communities.' But more than just 'protecting' cultures, the state plays a critical role in shaping representations and understandings of the very cultures it is supposed to be 'preserving.' In turn, it is the representation of culture as right, in and through the eyes of the state, which poses and imposes an artificial binary opposition between culture and rights, or more accurately, between cultural rights and other rights. When culture becomes a right, it gets counterpoised against other rights, making multiculturalism a zero-sum game, especially for women. To begin to unravel the multifaceted role(s) of the state in multicultural dilemmas, this article asks: what conceptions of the state are embedded in the recent literature on multicultural dilemmas, and how (well) do these conceptions coincide with state actions in empirical cases?

The methodology of this article is to undertake close reading of two types of texts and then compare and read them against each other. The first type of text is the normative literature on multicultural dilemmas, in which women's rights are (or seem to be) pitted against cultural or religious rights. The second type of text I examine is the debates over two empirical cases of multicultural dilemmas in India: one over Muslim law in the 1980s and another over Hindu law in the 1950s. To analyze these cases, I rely on primary sources, including legislative debates, judicial decisions, newspaper reports, and the speeches of political leaders, along with secondary

sources and my own interviews with political leaders and activists in the field. By reading these materials against each other, I am able to assess how well the normative literature fits (or doesn't fit) into the empirical cases.

Embedded within the literature on multiculturalism and women's rights can be found at least three broad conceptions of the state: I call these an oppressive state that has defined and engaged culture(s) in ways that exacerbate dilemmas for women and other VIMs, a facilitative state that facilitates democratic deliberation and can, will, must, or should protect and enable the voices of women and VIMs in the deliberative process; and a vacated state that acts as a neutral actor or 'forum' for deliberative democratic proceedings, absent from the debates until they are resolved. Once a debate is resolved and some decision is reached by the community (however defined), the state merely implements and enforces the decisional outcome of the debates.1

To determine whether and to what extent these three conceptions of state action describe actual state policies when cultural protections come into conflict with women's rights, this article examines and compares two empirical cases of multicultural debate in India. In one case, a Supreme Court judgment sparked a national controversy over reforming Muslim religious law in the 1980s. The other case was the reform and codification of Hindu religious law in the 1950s. In both cases, women's rights were pitted against cultural rights in broad national debates that took place both within and outside the institutions of the state. In the 1980s, the state acted as an oppressive state, protecting religious rights at the expense of women's rights. But in the 1950s, none of the three models applied: here, the state acted (if imperfectly) to protect women's rights at the expense of religious rights. Thus a fourth model of state action emerges: what I call an ameliorative state that works proactively to promote and enhance women's rights, if need be, at the expense of cultural-religious rights in multicultural dilemmas. Yet I also find that the ameliorative state operated within important political limits to its ability to be fully ameliorative for women's rights.

Ultimately, I find that conceptions of the state as acting in ways that are 'good' or 'bad' for women's rights, in a simplistic way, do not map well or accurately onto real cases of multicultural dilemmas. Real debates, and the roles of state actors in them, are far more complex than some of the conceptualizations found in the normative literature. The article begins with a brief examination of the recent literature on multiculturalism and women's rights to extricate and explicate the conceptions of the state assumed within it. Then it compares debates over Muslim and Hindu religious laws to analyze the actions of the Indian state in each case. I conclude by considering some implications of the analysis for multiculturalism and women's rights.

II. States in the Normative Literature

Through the 1990s and early 2000s, political philosophy began to consider the potential dilemmas posed in and for liberal democratic societies by multiculturalism—both as descriptive fact and prescriptive policy (Benhabib, 2002; Kukathas, 2003; Kymlicka, 1995; Parekh, 2006; Taylor & Gutmann, 1992). An overt consideration of the potential dilemmas posed for women

[1] The implicit value judgments of conceptualizing state actions in these ways are embedded in the normative literature itself and spring from feminist perspectives—which I myself share—that advancing women's rights is a "good" thing and suppressing them is a "bad" thing for states to do. The terms I use—facilitative, oppressive, vacated—are my own, to capture the embedded conceptions of the state that I find in the normative literature.

by policies of multicultural protection was sharpened with the publication of Susan Moller Okin's (Okin et al., 1999) volume, *Is Multiculturalism Bad for Women?* Okin's work ultimately sparked a second wave of literature that more consistently focused on women in particular and explicitly sought to acknowledge and balance the importance of culture with rights (Deveaux, 2006; Eisenberg and Spinner-Halev, 2005; Phillips, 2007; Shachar, 2001; Song, 2007). The debate ultimately equilibrated around a consensus that both these values are indeed important to preserve and protect in liberal democratic societies; and that there are no simple formulae by which potential (or apparent) incompatibilities between the two could be neatly or uniformly resolved in every case. This suggested a case-by-case approach to resolving multicultural dilemmas.

Building on Benhabib (2002), several (though not all) of these authors discussed deliberative democratic processes as the most promising path to resolution for such dilemmas.[2] Song (2007) proposed 'rights-respecting accommodation' as a form of deliberative democracy to deal with the issue of internal minorities. The limits to the accommodation of minority cultures were to be set by the protection of the basic rights of individual members of minority groups, with the choice of specific policies or resolutions to be determined through democratic deliberation. Deveaux (2006) focused on the political aspects of conflicts between cultural rights and women's rights. She argued that such disputes were not necessarily always deeply normative or morally rooted (and hence, by implication, irreconcilable). Rather, they must be treated as political issues, aiming for solutions that look more like temporary, political compromises than permanent, universal resolutions. The path to such solutions was deliberative democracy.

This normative literature certainly recognized the power of the state and the centrality of any role the state would play in deliberative democracy or any other resolutions to multicultural dilemmas. Yet different conceptions of the role of the state and models of state action have been implicitly assumed and embedded in the arguments about multiculturalism, women's rights, and deliberative democracy. The task of this first section is to draw out and name these conceptions. In the normative literature, an oppressive state was recognized as part of the problem, while facilitative and vacated states were constructed as part of the solution.

i. Oppressive States: Part of the Problem

The oppressive state was part of the problem both in creating and resolving multicultural dilemmas. In the literature, it was found to be oppressive with respect to both culture and women: a 'bad' state. At the simplest level, state policies and actions were likely to favor dominant cultures and disadvantage non-dominant cultures and communities.[3] For the majority group or culture, the actions of the state had a normalizing effect: laws, policies, and institutions would tend to reflect the dominant culture's values. Such cultural advantage, in turn, could translate into a political and economic advantage for majority groups. Thus the majority culture was 'normalized,' with the state effectively supporting some cultures (especially that of the

[2] This is true even as some classic and new studies have questioned whether deliberative democracy itself may disadvantage women. See Young 1996; Parthasarthy et al., 2019.

[3] Throughout this article I use the terms 'majority' and 'minority' communities to refer to dominant and non-dominant communities, respectively. My use of majority/minority thus does not refer necessarily to numerical preponderance; it recognizes that numerical majorities may not always be politically dominant, and vice versa.

majority) while constraining others (especially those of minorities). Song called this 'state establishment of culture' and listed it as one of three circumstances to be considered in determining whether a particular group practice warranted protection (Song, 2007, pp. 61-67).[4]

The counterpoint to the state establishment of culture was the state's pernicious indirect and direct effects on minority cultures and communities. Indirectly, the state was conceived as holding disproportionate power over groups or communities, often exacerbating internal tensions and inequities within a group and shaping the very practices that were disputed in multicultural controversies (Deveaux, 2006, p. 17; Song, 2007, p. 169). In particular, majority or dominant cultures and laws have often worked to shape minority or subordinate cultures in patriarchal ways (Song, 2007, p. 115).

The state was also recognized as having directly oppressed minority groups, especially indigenous peoples—certainly historically, if not currently as well. Song noted that the state itself could be and has been the perpetrator of injustice on minority communities and on vulnerable internal minorities (Song, 2007, p. 53). As a result of all these attributes and actions of the oppressive state, we should not be surprised to find that minority groups have often viewed the state with suspicion (Spinner-Halev, 2001, p. 94). Deveaux cautioned that

> *State-mandated reforms…fundamentally ignores [sic] the oppressed character of a minority group and members' consequent mistrust of the broader society and state; as a consequence, such policies risk not only injustice but failure* (Deveaux, 2006, p. 25).

Another critical problem of the oppressive state was the overwhelming power imbalance between states and groups or communities (Deveaux, 2006, p. 31). State actions and policies worked to freeze, rigidify, and homogenize culture, deliberation, and even democracy itself (Song, 2007, p. 36, 38). They did so by treating customs as static and lumping them together (Deveaux, 2006, p. 11). The only means of enforcement available to the state were legal and coercive—means which could fail to protect vulnerable internal minorities (Deveaux, 2006, pp. 7-8). For example, when a state-regulated a cultural practice, it tended to do so by instituting a total ban (Phillips, 2007, pp. 119-120, 123-124). State or court action to codify or institutionalize cultural traditions further worked to limit the possibilities for internal reform or change (Phillips, 2007, p. 158).

Finally, perhaps the most vexing problem /for the state was the question of who would speak for any given community or group and which voices the state would attend to. In practice, Phillips noted, spokespeople—usually or often male—for a group or community tended to rise to the top. She also noted that governments tended to consult older, more established—and thus often more conservative—leaders or group members (Phillips, 2007, p. 160; Shachar, 2001; Sunder, 2005). A related concern was that 'dialogue' might become a one-way, top-down process in which governments asked such community leaders to give their views on a topic, issue, or conflict. So the oppressive state in both its actions and inactions worked to exacerbate the very dilemmas that 'trapped' women between culture and rights and which were sought to be resolved via deliberative democratic means.

[4] The other two circumstances were current discrimination against the group, and historical injustice against it (Song, 2007, pp. 51-61).

ii. Facilitative and Vacated States: Part of the Solution

Where the oppressive state was part of the problem, the facilitative and vacated states were posited in the normative literature as part of the solution to multicultural dilemmas. These are 'good' states. A facilitative state engaged constructively to resolve such dilemmas through deliberative democratic means, working especially to protect and enable the voices of women and other VIMs in such processes. At a minimum, such a state should secure exit options for women or VIMs whose needs and interests were not being addressed within the context of a group's cultural practices. Deveaux agreed with liberal theorists who 'proposed that the state needs to reinforce opportunities for the exit for group members who face discrimination or persecution' (Deveaux, 2006, p. 223; Song, 2007, p. 162). Song argued that preserving and enhancing a right of exit for VIMs could be critical—not even, or only, for the actual option of exit it provided, but also for the 'transformative power' that the potential of exit held. The threat of exit could itself prompt communities to reform (Song, 2007, p. 159). Phillips argued that governments would need to make people, especially VIMs, aware of options and alternatives available to them, ensuring that knowledge of information and available resources was widespread, as well as ensuring privacy and anonymity (Phillips, 2007, pp. 158, 172, 177-178).

But exit options by themselves were insufficient protection for women and VIMs (Deveaux, 2006, pp. 48-50; Phillips, 2007, pp. 138-139; Song, 2007, p. 48). Exit puts the burden of action on dissident or vulnerable individuals while simultaneously lowering incentives for the group to reform itself. A more facilitative state was called upon to provide expanded democratic forums for deliberation and debate—both within and beyond the sphere of state institutions in civil society; and to ensure the widest multiplicity of voices in those democratic forums, especially those of the most vulnerable internal minorities. Notably, the state was called on to facilitate this expansion beyond itself. State initiatives might include, for example, economic reforms empowering women; legislation or court decisions overturning sex discrimination in matters such as divorce and inheritance; and government support for and funding of social and community services, community groups for debate, and local, democratic media outlets (Deveaux, 2006, p. 116). In this way, 'the liberal state can and should encourage the development of other inclusive processes of debate, evaluation, and reform, and foster specifically *democratic* resolution of such conflicts' (Deveaux, 2006, p. 223, emphasis in original). Phillips agreed that expanding dialogue would be a constructive contribution of the state to resolving multicultural dilemmas via deliberative democracy (Phillips, 2007, p. 160).

Of course, simply expanding the venues and opportunities for democratic deliberation may not suffice—particularly if a range of voices were not heard in such forums. So the facilitative state was called on again to ensure broad participation in forums of deliberative democracy and, in particular, to protect and enable the voices of women and other VIMs in these processes. Deveaux argued that

> *the liberal democratic state could and should support internal group processes for the reevaluation and reform of contested customs and arrangements, particularly for women. It can do so by reinforcing existing democratic expressions and resistance and requiring that all stakeholders, including marginalized persons, be included in consultation processes regarding contested practices* (Deveaux, 2006, p. 223).

Song agreed that the 'state could play a key role in ensuring that vulnerable members of minority groups have a voice in the resolution of conflicts (Song, 2007, p. 82). She held that the state's role in the deliberative process *within* a community should be limited to strengthening the participation and voice of vulnerable members (Song, 2007, p. 134). For example, Song suggested that in cases of cultural defense, courts should call on a range of community members, academics, and experts rather than relying solely on one (Song, 2007, p. 107). Ultimately, Phillips (2007) held that the key was to design institutions that would better let individuals articulate their own preferences: the state should thereby make sure that individuals' own voices were heard, not that others were speaking for them.

Thus the role of the facilitative state was to help communities resolve multicultural dilemmas on their own. Disputed customs and traditions should be discussed, debated, and deliberated within civil society—either within the minority community itself, alone, and/or with the involvement of the mainstream/majority community. Once this happened, a vacated state was then needed to implement and enforce those resolutions. So the key role of the vacated state came after deliberations—in implementing and enforcing whatever solutions, decisions, or compromises were reached in civil society. This vacated state had no interests, no position of its own in this conception, and no particular stake in the outcome of the deliberations. This conception of the state as a neutral arbiter has a long pedigree in political science. The pluralistic conception of democracy outlined by Robert Dahl over half a century ago (Dahl, 1961) assumed just such a view of the political arena as a series of tugs and pulls by different sets of interests: some more and some less powerful, to be sure, but none with a consistent and overwhelming advantage. In this view, the state (as anything other than a set of institutions reflecting and implementing the final outcome of the conflict between interests) dissolved or disappeared into the background. It would take political sociologists a couple of decades to 'bring the state back in' to political analysis (Evans et al., 1985). Later, some political philosophers, such as Kukathas (2003), would again argue for a normative vision of the state as a neutral umpire in multicultural dilemmas.

Thus the normative literature constructs an oppressive state as part of the problem—seeing the state as 'bad' for women's rights—and it makes facilitative and vacated states the solution to multicultural dilemmas—wanting the state to be 'good' for women's rights. In general, the former was descriptive, the latter prescriptive. Song explicitly argued that the state's oppressive role was *precisely why* the state 'can and should' play the opposite role and be(come) facilitative. Thus 'the state's involvement in creating or supporting inequality within…communities supports a case for its playing a role in addressing it' (Song, 2007, p. 141).

To gauge whether and how well these conceptions of state action embedded in the normative literature capture how states actually act in multicultural dilemmas, I analyze the role of the state in two cases of multicultural dilemmas in India. Comparing these models to empirical cases can facilitate a fuller theorization of the state's role in multicultural dilemmas (Shachar, 2001) and yield important insights into the role of the state in such dilemmas.

III. States in the Empirical Cases

Institutionalized under British colonial rule in the late 18th century, India's personal laws are a religious legal system in which laws relating to the family are governed by religion. Personal law systems are common throughout much of postcolonial Asia, Africa, and the Caribbean, as well as the Middle East. When India gained independence in 1947, the personal laws were retained as a form of multiculturalism: a way to protect cultural and religious diversity and guarantee cultural autonomy, especially for minority religious communities (Sen, Ragini et al., 2013; Laborde, 2021). Based on religion, custom, and tradition, personal laws tend to place women on an unequal legal and social footing with men (Narayan, 2016). Personal laws have been frequently cited as an illustrative case of the dilemmas of multiculturalism and women's rights (Benhabib, 2002; Charrad, 2001; Mahajan, 2005; Mullally, 2004; Parekh, 2006; Phillips, 2005; Shachar, 2001; Spinner-Halev, 2001).

How well do the conceptions of the state found in the normative literature compare to actual state actions and policies? That is, do actual states in empirical cases of multicultural debates play a role that is recognizably or uniformly 'good' (facilitative), 'bad' (oppressive), or 'neutral' (vacated) with respect to advancing women's rights? How well does the normative literature help us predict, capture, or explain how states will act in multicultural dilemmas? To assess this question, in this section, I examine two cases of multicultural dilemmas in India. I find that the normative literature has only a partially accurate conception of the state and what it does or can do in such cases.

A comparison of two cases of political debate and controversy over personal laws in India shows that the state acted most like an oppressive state in the controversy over reforming Muslim personal law in the 1980s. Here the state preserved a traditionalist interpretation of Islamic law that curtailed Muslim women's secular legal rights. But in the other case of reforming Hindu personal law in the 1950s, none of the three models really applied accurately. Instead, in this case, the state reformed Hindu personal law to enhance Hindu women's legal rights (even if it did so only partially and imperfectly). Thus a fourth model of state action emerges, which I call an *ameliorative* state. Here the state worked proactively to enhance women's rights even at the cost of curtailing religious rights. This was different from the facilitative state, which only protects women's voices in the debate—even if those voices work against women's rights. And both cases together undermine the idea of the vacated state as a state with no position or interests of its own.

Two important points must be made with respect to this comparison of cases. The first is the point of intersectionality: Women are not solely perceived through the prism of sex or gender, but their position is also defined by religion, caste, age, sect, social class, and other important markers of identity. The personal laws as a multicultural dilemma in Indian politics have tended to flatten women's identities around gender and religion solely; this 'flattening' effect is evident in the debates themselves. The second important point to note is that one case, Muslim law, deals with a minority religion in India, while the other case of Hindu law deals with the majority religious community. This certainly made the debates different: as is demonstrated in the analyses below, it meant that Indian political leaders treated or viewed reforming the personal law of the two communities very differently. Where they were more hesitant to change Muslim law in the face of community opposition, they felt able to change Hindu law as they saw themselves as representing the community. It is important to emphasize, however, that the

analysis below does not compare the two cases to each other but rather compares each case to the normative literature.

I begin with the case of Muslim law in the 1980s, then turn to the 1950s case of Hindu law. The former case has been more frequently analyzed in the literature on multiculturalism. It is generally presented as a straightforward case in which minority religious rights trumped women's rights. The case of Hindu personal law has been far less studied in this literature. There may be a variety of reasons for this relative neglect. A central issue is certainly the fact that this case dealt with the majority community rather than a minority community. Yet, as Song has argued, a minority need not be classed only by numbers but by relative disadvantage or vulnerability (Song, 2007, p. 2). Certainly, by this standard Hindu women could be seen as VIMs. After analyzing the cases, I conclude briefly with some preliminary thoughts on the insights offered by the analysis.

i. (Not) Reforming Muslim Laws in the 1980s

The controversy over Muslim personal law in India originated in a Supreme Court decision that upheld an award of maintenance (alimony) to a deserted (and later divorced) Muslim woman, Shah Baho Begum. Shah Bano was awarded maintenance by a state High Court under Section 125 of India's Criminal Procedure Code (Cr.P.C.), which allowed destitute and abandoned or deserted wives and parents to claim maintenance from their husbands or children, respectively. Its purpose was to prevent vagrancy. Shah Bano's ex-husband, Mohammad Ahmad Khan, appealed this decision to the Supreme Court, arguing that the grant of maintenance violated the dominant interpretation of Islamic law in India, which held that a Muslim man was only required to support a divorced ex-wife for the first three months after the divorce (a period called *iddat*). Thus he argued the judgment violated a different section of the Cr.P.C. (Section 127), which allowed an order for maintenance to be canceled if a judge was satisfied that the divorcee had received 'the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce.'[5] Khan, therefore, held that he had already paid Shah Bano what he owed her under Muslim personal law. The Supreme Court disagreed and upheld the maintenance award.[6]

The judgment led to widespread protest and controversy among segments of the Indian Muslim community. Meetings, rallies, and strikes were organized all over the country; by the end of 1985, attendance at these protests reportedly numbered in the thousands. As the controversy escalated, opinions within the Muslim community split. This case came to be structured as a 'classic' multicultural dilemma between a minority community's religious rights and the rights of women within that community. Traditionalist Muslim leaders opposed the reforms embodied in the Supreme Court judgment by arguing that the state had no right to interfere in a minority community's religious laws. They pointed out that Islamic law itself

[5] Cr.P.C. Section 127 (3)(b); cited in *Lok Sabha Debates* (11 December 1973), 316. [Hereafter *LSD*.]

[6] *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945. Khan paid Shah Bano Rs. 3000 as *mahr* (or dower), and argued that this was all he owed her under Muslim personal law. The amount of *mahr* is often fixed at the time of the marriage, but the actual payment of this sum can be deferred until such time as the marriage is dissolved by death or divorce (which was what happened in Shah Bano's case). The Supreme Court, however, held that because *mahr* was a sum payable in consideration of *marriage*, it could not be a sum payable in consideration of *divorce*. Therefore, *mahr* could not be considered in lieu of maintenance for the woman.

provided for destitute, divorced women after *iddat*. According to Muslim personal law, the obligation to support such a woman fell first on her children, then on her father, her brothers, and sisters, and so forth. If there were no family members who could support her, it fell to the Muslim community at large to do so. But in no case should she request or receive support from her ex-husband, since any relation between them, according to Islamic law, had been severed by the divorce.

Reformist Muslims, on the other hand, supported the Supreme Court judgment because they believed it was in accordance with the fundamental tenets of Islam. Although they did not agree with everything the judgment said, they did support its substantive conclusion: that Muslim men should provide adequate maintenance for destitute, divorced women even beyond the period of *iddat*. Reformist Muslim leaders argued that Islam was at the forefront of establishing equal rights for women. They held that women had greatly benefited from the advent of Islam, which had lifted them out of a status of degradation to a position of equality and respect. For this very reason, granting maintenance to divorced Muslim women who had no other means of subsistence was very much in accord with the spirit and principles of Islam ([redacted], 2006, Ch. 5).

As documented by Zoya Hasan, Muslim women participated in the controversy in significant numbers around the country. Many supported the conservative position, but by no means all did: 'the spirited support by some women for the divorced Muslim woman's right to maintenance [was] a noteworthy contrast to the muted and passive opposition to it by others' (Hasan, 1998, p. 85). Yet there was a general sense among Muslim reformists and women's organizations that they had not been able to influence government policy, and 'the government and most political organizations did not pay attention to women's voices' (Hasan, 1998, p. 85). For their efforts, it was the traditionalist position that the government finally accepted.

There was ample legal precedent for the original Supreme Court judgment, and the Congress Party government under Prime Minister Rajiv Gandhi initially supported it, at least through August 1985. But by the end of the year, in the face of escalating controversy, Gandhi seemed to have changed his mind. The government decided to sponsor an official bill to establish that questions of maintenance for Muslim divorcees would be decided by Muslim personal law. After some vacillation and fierce debate, the government introduced the Muslim Women (Protection of Rights on Divorce) Act—commonly known as the Muslim Women Bill—which effectively overturned the Supreme Court judgment. Opponents and even some supporters described the Muslim Women Bill as hastily drafted and flawed with respect to classical Muslim law. The government introduced the bill into Parliament with difficulty, and it was considered—and ultimately passed—in a marathon session on 5 May 1986. Gandhi had issued a whip instructing all Congress Party Members of Parliament (MPs) to vote for the bill, so there was no real question that it would pass, which it did by an overwhelming majority: 372 votes for to only 54 against.[7]

This case is widely interpreted in the normative literature as a straightforward example of the oppressive state. The Indian government ultimately supported a traditionalist interpretation of

[7] The whip left open the question of how much 'real' support the bill actually had. After the vote, reports came out that several Congress Party MPs had not complied with the whip, and were absent from the House during the debates and voting. These numbers were estimated between 40 and 51 MPs. The lower estimate was reported in *Times of India* (6 May 1986), and the higher estimate in the *Sunday Observer* (11 May 1986). Cited in [redacted] 2006, 139-40.

Islamic law that restricted the rights of Muslim women to claim maintenance under a secular law to which all other Indian women had access. The defining aspect of state action as oppressive, in this case, turned on voice and representation. As argued by both Phillips (2007) and Sunder (2005), government officials, to determine the 'will' of a community, may turn to or rely on older, likely more conservative, and likely male community members to define the cultural 'traditions' and preferences of the community. Indian government leaders in the 1980s openly acknowledged a perceived need to try to determine the wishes of the Muslim community on the *Shah Bano* issue. The Prime Minister consulted with selected Muslim religious and political leaders on the contents and drafting of the bill, including two female Muslim MPs. But all those he consulted were known to oppose the Supreme Court judgment (Akhtar, 1994, p. 358). According to A. K. Sen, the Law Minister at the time, no other alternatives to the Muslim Women Bill were ever considered or discussed by the government. Sen explained that the government came to believe that popular Muslim opinion opposed the Supreme Court judgment: 'Our information was that the average Muslim, man or woman, was against the retention of [Section 125] of the [Cr.P.C.] on the statute book applicable to Muslims…they said…it shouldn't be applicable to Muslims, because according to them it is against [Muslim personal law]' (quoted in [redacted] 2006, 138). So the government claimed to be trying to conform to popular Muslim opinion—that is, it was trying to act like a vacated state, simply enforcing what the community wanted.

In effect, however, their policy was based on the views of only one section of the Muslim community. Reformist Muslim voices were marginalized as the government effectively sanctioned the traditionalist position as representing 'true' (or at least majority) Muslim opinion on the issue.

> *[O]ur understanding is that the features of the [Muslim Women Bill] reflect the opinion of the vast majority of the Muslims about their own law. It is quite true that about hundred or five hundred intellectuals or quite a large number of people outside that particular lot feel in a different way...But <u>we have to find the consensus of the community</u> and we...do not think we have found it wrongly.*[8]

There was a clear case where government officials ultimately decided who would speak for Indian Muslims—by deciding to whom they would listen (Ahmad, 2020). In the end, certain (predominantly traditionalist) voices got heard and acknowledged by the state. This was a fairly typical pattern in disputes over multiculturalism and women's rights (Phillips, 2007, p. 160; Shachar, 2001, p. 38; Sunder, 2005, p. 287).

It has been widely argued that political considerations brought about the Prime Minister's change of mind and policy. In December 1985, the Congress Party lost by-elections in two eastern states, Bihar and Assam. In the Bihar election, the Congress candidate was decisively defeated by a Muslim candidate of the Janata Party, Syed Shahabuddin. It was commonly believed that Shahabuddin won the Bihar election 'solely because of his marathon campaign against the Shah Bano judgment' (Akhtar, 1994, p. 286), although Shahabuddin himself has denied that the judgment was an issue in the election. It has been argued that Gandhi took the

[8] Sen, *LSD* (25 February 1986), 353. Emphasis added.

results of these elections to mean that Muslim voters had become alienated from the Congress Party because of the government's support of the Supreme Court judgment.

> *The Congress Party's response was unmistakably influenced by the political crisis that the party faced in the mid-1980s. A new strategy of conciliation and compromise was devised to try and stem the steady erosion of support for Congress. Compromise on Muslim personal law was part of the effort to win back Muslim voters* (Hasan, 1998, p. 74).

Applying the categories in the normative literature does not give a clear or accurate assessment of Indian state policy in this case. The state acted in the very first instance in a facilitative fashion: the Supreme Court passed a judgment that firmly placed the legal rights of Muslim women as equal to those of all Indian women, regardless of religion. Then it tried to act as a vacated state, as the Prime Minister and Parliament claimed to be trying to 'discover' the will of the Muslim community and simply enforce their wishes. But ultimately, the state became oppressive, unable to act to prioritize women's rights over religious rights (or at least a conservative interpretation of them). As for Shah Bano herself, it is widely known that she recanted the maintenance award she had won after local religious leaders 'explained' to her that the award contradicted Islamic law (Nussbaum, 2000, pp. 382-383; Pathak and Sunder Rajan, 1989, p. 565).

ii. Reforming Hindu Laws in the 1950s

The *Shah Bano* case has been widely studied in the literature. But a much harder 'test' case for the normative literature on multicultural dilemmas has been less studied: this is the case of reforms of Hindu personal law in India. This is a very different case for multiple reasons. It deals with the majority religious community (rather than a religious minority), in which the state felt more empowered to represent, speak for, and act on behalf of the Hindu community (Williams 2006, Ch. 6). Perhaps for this reason, the case of Hindu law is even less amenable to the kind of over-simplified 'good' or 'bad' conceptions of state action that the normative literature seems to assume.

Some four decades prior to the *Shah Bano* controversy, shortly after independence, Hindu personal law had been reformed and codified in a series of four bills known collectively as the Hindu Code Bills. The debates over the Hindu Code Bills evolved as a multicultural dilemma between the preservation of Hindu laws and customs on the one hand and the reform of such laws and customs to enhance women's rights on the other. Debates over the bills took place both within and outside the institutions of the state. The most controversial reforms included granting partial inheritance and property rights to certain classes of Hindu women and allowing for divorce and alimony under proscribed circumstances (Gajendragadkar, 1951).

Traditionalist opponents of the Hindu Code Bills argued that the proposed reforms would destroy Hindu socio-religious tradition. Their conception of this tradition turned critically on the role of women. The very constitution and survival of Hindu society, by their definition, depended on preserving gendered roles within the larger social structure. Altering the status of women in this gendered balance risked upsetting the entire social order, literally destroying Hindu society at its base. For example, traditionalists opposed giving daughters inheritance rights in family property equal to those of sons because sons rather than daughters were expected to take care of parents in old age; and furthermore, women got married into other families and

received the benefit of their husband's inheritance. Upsetting this gendered division of rights and responsibilities would result in family fights and social disharmony. Traditionalists also opposed a provision for divorce, arguing that Hindu marriages were sacramental rather than contractual and thus could not be susceptible to divorce. They so argued despite the fact that divorce and remarriage were commonly practiced by custom among Hindu lower castes and classes.

Modernist groups, on the other hand, argued that the reforms were necessary to enhance Hindu women's legal rights and social status, which were, in turn, key to the progress and modernization of the new nation as a whole. Some modernists argued the Hindu Code Bills should be passed to enhance the legal and social status of Hindu women as a value in its own right, and most women MPs held that the main opposition to the bills came from men who simply wanted to protect their existing position of privilege in society. But underlying many proponents' arguments were concerns about nation-building and modernization. Nivedita Menon has argued convincingly that until the 1960s, the struggle for gender equity in India 'was never consciously articulated as distinct from the mainstream discourse of national integration. The two aims of gender justice and national integration seemed to be part of the same project' (Menon, 2000, pp. 82-83). Underlying many modernists' support for the Hindu Code Bills was a desire to raise the status of Indian civilization and the progress of the nation as a whole. Echoing James Mill, modernists noted that 'the state of civilization is judged by the status of the women in it. Therefore, we are keenly interested in seeing that the women are liberated from all kinds of tyranny they are suffering from today.'[9] As a result, modernists could advocate enhanced legal rights for Indian women, and that coincided with their desire for the country as a whole to progress as well. This made modernization and progress the end, and enhancing women's rights became a means to that end. These underlying motivations ultimately came to limit the actual effectiveness of the legislation to protect women's rights ([redacted], 2006, Ch. 4).

Ultimately, the ruling Congress Party government under India's first Prime Minister, Jawaharlal Nehru (Rajiv Gandhi's grandfather), sided with modernists and passed reforms (even in an imperfect form). In this case the state passed the Hindu Code Bills to give Hindu women certain legal rights—at least on paper—that they had lacked in the past. But it did so with its own set of interests and goals. For Nehru and other modernists, the reform of Hindu personal law represented social progress, which in turn was needed to modernize the nation. Nehru stated:

> *I attach great importance to this [legislation]* ***not only*** *in itself but because I believe that such a social reform is essential if we have to make progress in an integrated way. It is impossible to have political reform without economic progress. It is equally impossible, I think, to make good politically and economically unless we make good also in the social sphere.* (Nehru, 1985, p. 104, emphasis added).

Elsewhere, he argued that the reforms of Hindu personal law had:

> *A peculiar significance,* ***not only*** *because of the changes they bring about but chiefly because they have pulled out Hindu law from the rut in which it had got stuck and given it a new dynamism…we have not only striven for and achieved a political revolution, not only are we striving hard for an economic revolution, [but] we are equally intent on social revolution; only by way of advance on these three separate lines and their*

[9] B. Gupta, *Council of States Debates* (March 10, 1954), 2314-5. [Hereafter *CSD*.]

> *integration into one great whole, will the people of India progress.* (Nehru, 1985, p. 369, emphasis added).

In this approach, women's rights in and of themselves were not the primary goal of the Hindu Code Bills, but part of a broader agenda of social change for the nation as a whole. 'I have long been convinced that a nation's progress is intimately connected with the status of its women…The social aspect is indicated by these reforms and the Hindu Law, more especially relating to women.' (Nehru, 1985, p. 384). Perhaps precisely because the government's actions were guided primarily by other interests and only secondarily by the purpose of protecting Hindu women, Nehru was willing to compromise on the substantive content of the reforms in order to get the Hindu Code Bills passed. The government in the 1950s operated under the overwhelming institutional dominance of the Congress Party under Nehru. Congress won clear control of the parliament in the first national elections in 1951, winning 364 out of 489 seats in the Lok Sabha (lower house) and 146 of 216 seats in the Rajya Sabha (upper house). Yet despite this electoral dominance, Nehru had to overcome a vocal and trenchant opposition to the Hindu Code Bills. Some of this came from the (Hindu nationalist) right. Outside Parliament, several groups organized demonstrations and protests, including a few women's organizations consisting largely of upper-caste and upper-class Hindu women. Yet much of the traditionalist opposition to the Hindu Code Bills came from within the Congress Party itself. Even Dr. Rajendra Prasad, India's first President and a leading member of the Congress Party, butted heads with Nehru over the issue of the Hindu Code Bills.[10]

Nehru was ultimately able to defuse this opposition through a series of procedural and substantive concessions. Procedurally, he agreed not to enforce a party whip and allowed free voting among MPs. Substantively, he made key concessions in the actual reforms effected by the bills—most of which came at the expense of women's rights. Significant substantive alterations in the bills watered down the actual content of the reforms and curtailed many legal rights Hindu women might otherwise have won.[11] When all was said and done, many supporters felt that the reforms made by the Hindu Code Bills in its final form did not equal even the most progressive

[10] Prasad hinted that as President, he might consider the option of not approving the Bills if they passed Parliament; Nehru's response was that such an action on Prasad's part would precipitate a Constitutional crisis that India's fledgling democracy probably could not withstand. Their correspondence on the issue can be found in Prasad 1984, Vol. 15-18.

[11] These concessions accumulated over the life of the Hindu Code Bills and included the following changes: (a) the original Hindu Code Bills abolished the *Mitakshara* joint family system and replaced it with the *Dayabhaga* joint family system (which was widely seen as more progressive) for all Hindus. Modernists even argued that the joint family system should have been abolished altogether. The final version reestablished the *Mitakshara* system. (b) The original Hindu Code Bills provided for separation or dissolution of a Hindu marriage. The final version included a restriction allowing divorce only after three years of marriage. (c) The original Hindu Code Bills abolished custom altogether; the final version included the reestablishment of customary law. (d) The rights of women to adopt children were severely restricted, as was the option of adopting girls rather than boys. (e) The original Hindu Code Bills had given daughters a full share equal to sons in intestate succession. This was already a very limited property right, as it by definition excluded agricultural land and joint family property, and included only self-acquired property and, of course, property that had not been otherwise willed away. The final version of the bill reduced this to a one-half share. In addition, an amendment was added that allowed sons to buy out a daughter's share of inheritance with her 'consent.'

of local Hindu customary practices.[12] Subsequent studies have shown that the bills had, and have had, minimal impact on most women's lives (Basu, 2001; Luschinsky, 1963).

Of the three models of state action that I found in the normative literature, how well do they explain the actions of the Indian state in this case? Here I find even less fit: none of these conceptions fit this case well. The state was not facilitative in that it did not necessarily work to ensure the participation and voice of Hindu women in the debates. It did not preclude their voices in any way, but at the same time did not work especially to ensure their voices were heard. It was not strictly oppressive in that it did not necessarily privilege the voices of traditionalists or conservatives to define what 'Hindu tradition' was or what the 'Hindu community' wanted. In fact, it argued against those voices. And the state certainly did not behave as a vacated state, simply listening to the community and doing what they demanded, with no position or interests of its own in the debates or their outcome. Instead, the Indian state in the 1950s worked actively to promote a position that elevated the need for reform, to modernize and enhance women's legal rights, over and above the need to 'preserve' religion, culture, or tradition. This is a fourth model, not identified in the normative literature, that I call an *ameliorative* state. This state works actively to protect and enhance women's rights—for whatever reasons or motivations. But even the ameliorative state worked within limits. The Indian state in the 1950s could be ameliorative because an agenda for women's rights coincided with other agendas (progress, modernization, and nation-building) that were important to lead government officials—most especially the Prime Minister—who could carry their agendas through with overwhelming political dominance and legitimacy. Thus, we might say that the Indian state in the 1950s did the right thing for the wrong reasons (Sinha, 2012).

IV. Conclusion

How do these cases help theorize the role of the state in multicultural dilemmas? It is worth saying a few words, first, about what they do not demonstrate. The analysis does not mean to suggest that the state should be centered as the primary actor or that every aspect of each conflict must be defined in terms of the state and its policies, actions, and inactions. The argument also does not intend to construct 'the state' as a monolithic, aggregate, or 'intentional' actor. Indeed, I have sought precisely to disentangle and analyze the parameters of state action into its constituent parts and the prominent actors who exercised political power.

Within these bounds, these cases yield important insights into the role of the state in multicultural dilemmas. The oppressive state was clearly operative in the 1980s. This coincides with the normative literature, which marks the oppressive state as descriptive. The prescriptive states fared far less well: very little support was found for state action as facilitative or vacated in either case. The vacated state, in particular, was an unlikely construct, eliding as it does the state as an actor with its own interests or positions in a debate or in the outcome of a given debate. In both cases, the state had to be analyzed as a set of actors and institutions with varying interests in multicultural debates. The interests of the state (and its constituent parts and actors) were not reducible to those of any other parties to these controversies. The Indian state in the 1950s, under Nehru's Congress Party, sought modernization and progress for a newly independent India, and

[12] Seeta Parmanand, *CSD* (28 and 29 November 1956); Smt. Pushpalata Das, *CSD* (23 March 1955); Smt. Bedavati Buragohain, *CSD* (24 March 1955); Smt. Lakshmi Menon, *CSD* (23 March 1955).

Hindu women became one important site on which these broader goals could be attained. But ultimately, considerations of nation-building and democratic bargaining substantively limited the scope and extent of the reforms. In the 1980s, Rajiv Gandhi's Congress government sought to (re)establish political stability it perceived as eroding, and it buttressed a conservative interpretation of Muslim personal law to do so. These cases thus draw into question the underlying premise of the vacated state model: the assumption that the state is or could be a neutral forum rather than an independent actor (or sets of actors, disaggregating the state into constituent parts), with its own political goals and interests in the outcome of any given multicultural dilemma or democratic deliberation.

What did emerge from the 1950s case was a fourth model of state action that was not captured in the normative literature: this was the ameliorative state, which acts to support, enhance, or expand women's rights at the expense of cultural or religious rights in a multicultural dilemma. But the case also illustrated the bounds of the ameliorative state, which acted within political limits and with varying sets of goals, objectives, or purposes, as the Indian state in the 1950s.

Across both cases, women represented progress as much as they represented tradition. In the Hindu Code Bills debates, both modernist discourses of nationalism, as well as traditionalist discourses of religion, were constructed in gendered terms. Hindu women embodied the modernization of the nation for modernists (including Nehru's government) as much as they embodied tradition and culture for traditionalists. Similarly, in the Muslim Women Bill debates, both reformist and conservative representations of Islam turned on the status of women. Reformists argued that *Islam* gave Muslim women greater rights than they were getting—not that women *should have* greater rights than they were getting. In this way, both tradition and modernity were simultaneously inscribed on the bodies of women. Women become not only the terrain on which culture/tradition were defined (Mani, 1998) but equally, the terrain on which rights/modernity were asserted and on which the struggle between the two (culture/tradition and rights/modernity) was negotiated through the institutions of modern state power.

My overall finding is that the normative literature gives only partial or limited insight into state actions in empirical multicultural dilemmas. Each empirical case must be analyzed contextually, and broad theories of the 'right to exit' or deliberative democracy may be prescriptive but do little to capture, predict, or even explain state action. Furthermore, the study suggests the need to disaggregate the state: different parts of the state apparatus (executive, legislative, courts) and different actors (prime minister, members of parliament, judges) acted differently in each case. Finally, my analysis shows how multiculturalism as a policy itself makes the state the central actor through which culture gets negotiated. By placing culture under the purview of the modern (gendered) state, multiculturalism turns culture itself into a right; and in the process, women come to represent simultaneously *both* the culture (tradition) and the rights (modernity) between which they are supposed to choose. The broader implication of this analysis is to question whether the state is actually the best way to advance women's rights while also preserving cultural rights (Gangoli, 2007; Solanki, 2013). If women are to realize their culture and their (other) rights, it may not be by relying on the modern state and its institutions that they will be able to do so.

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