HADIYA, HINDUISM AND HETEROSEXUALITY

—Madhavi Menon*

Depending on one's point of view, the Hadiya case caught the national imagination for being a shocking example of "love jihad" or a horrifying instance of the growing criminalisation of desire. Since the latter view is informed by the former, this essay looks at the ways in which the nexus of patriarchy, nationalism, and sexual phobia has built up in India over the centuries, beginning with the laws promulgated under British rule. The emphasis on "personal laws" separable by religious community, the very creation of a religious community as a singular entity, the inexorable march towards a religiously-inflected nationalism, have all gone hand in hand with increasing legal and social control over women's bodies and queer desires. A public investment in muscular masculinity requires laws and judgments to support its agenda, and the Hadiya case takes its place in a long line of such examples of legal capitulations. Even the Supreme Court's overturning of the Kerala High Court judgment depended on gendered and nationalistic assumptions that were every bit as regressive as what was being overturned. The law in both cases seemed unable to accommodate non-heteronormative desire except in the register of terror. Desire in the Hadiya case became terrorising and anti-national because it refused to adhere by commonplace notions of how women should behave. This essay is an account of that legal attitude to women's desire.

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The paradox of sexual desire is that even as it is presented to us as a private affair, it is legislated upon as a public matter. Sexuality is seen as the domain of an individual, but it is also marked by multiple public regulations of religion, caste, and gender. This essay looks at one important legal judgement, commonly known as the 'Hadiya case', in order to map this paradox. In thus thinking about the seemingly private and evidently public nature of desire, the essay traverses the terrain of religion and the history of personal laws. It also explores the vexed question of how women's desire is viewed in the national, religious, and legal imagination. The simultaneous elevation of women, as symbols of purity, and denigration, as markers of impurity, is the hallmark of a heteronormative dispensation that works to monitor women's sexuality. The vexed issue of 'love jihad' and the historical development of separate 'personal' laws for Hindus and Muslims not only undermines women's desires, but also criminalizes cross-communal desire. These legal, sexual, religious, and political developments give us a framework within which to think of this case as it encounters a woman's non-normative choice in religion and marriage.

I. THE CASE

On December 21, 2016, a 24-year-old woman walked into a courtroom in Ernakulam with her newly-wedded husband. The two-judge bench of the Kerala High Court was furious. Recording his anger, one of the judges termed the marriage "a totally unexpected event" that was designed to fool and mislead the Court.[1] He pointed to the discrepancies in the marriage certificate, insisted that the details should be verified, and recorded his "dissatisfaction at the manner in which the entire exercise was accomplished."[2] The judge claimed that the defendant had not said a word about her impending marriage, even though she had been in Court on December 19, the very day of her wedding. Further, despite being active on Facebook, the bridegroom had not publicly posted any photos or updates about the wedding. Building on his "dissatisfaction",[3] the judge ordered a police inquiry into the background details of the bridegroom, and also declared the marriage to be null and void.[4]

Let us go back a few months before this explosion occurred in the High Court. Early in 2016, a writ of *habeas corpus* had demanded that the Kerala High Court track down and bring K.M. Asokan's daughter, Akhila, back to her parental home. Akhila appeared in court, on her own steam, as the defendant in *Asokan KM v Supt of Police*, but she appeared as Hadiya and refused to go back home. She had converted to Islam, which her parents would not allow

1 *Asokan KM v Supt of Police* 2017 SCC OnLine Ker 5085 (Kerala High Court) (Asokan writ petition).
2 ibid.
3 Asokan writ petition (n 1).
4 Asokan writ petition (n 1).

her to practice at home. The case dragged on for a few months, even though it should have been dismissed as soon as Hadiya appeared. After all, a writ of *habeas corpus* demands that the person, whose existence is in question, be produced before the court. Accordingly, the High Court should have declared the case to be closed as soon as Hadiya appeared before it. Instead, the judges tried to adjudicate where and with whom Hadiya should live, as well as how, and by when, she should complete her course in homeopathic medicine. The case dragged on for several months.[5]

Then, something changed: Hadiya married a Muslim man named Shafin Jahan, with whom she attended the court hearing on December 21, 2016.[6] The Kerala High Court was aghast at this development and went into a tizzy of activity. Why did the young woman's marriage rattle the learned judges so much?

II. WOMEN AND LAW

When the case first started, Hadiya was unmarried. The Kerala High Court seemed a bit sad about her conversion to Islam, but was also inclined to let it stand: "The question of faith and religion are matters of personal conviction and this court does not consider it necessary to interfere in such matters that are personal to Ms. Akhila."[7] Even as the Court insisted on referring to Hadiya as Akhila, and could not resist making snide remarks about how it is unusual for a young woman to be so interested in matters of religion, it considered religion to be a 'personal' affair in which the Court should not interfere.

However, after Hadiya's marriage, the 'personal' case became very 'public'. The Court could neither believe that Hadiya's choice of religion had also extended to an expression of sexual desire, nor that she had married without the 'permission' of her parents. Indeed, the Court reminded us that even though Hadiya was 24 years old, we must not forget that "a female in her twenties is at a vulnerable age. As per Indian tradition, the custody of an unmarried daughter is with the parents, until she is properly married."[8] Also, according to the learned judges, marriage is the "most important decision" in a woman's life, and must only be finalized "with the active involvement of her parents."[9] A grown woman is weak and in need of her father's protection until she gets 'properly' married to a man, who will then take over the mantle of protector. However, when the father is Hindu and the husband is Muslim, the

5 Asokan writ petition (n 1).
6 Asokan writ petition (n 1).
7 Asokan writ petition (n 1).
8 Asokan writ petition (n 1).
9 Asokan writ petition (n 1).

mantle seemingly cannot be passed on properly. Suddenly, all notions of what a woman can and cannot choose to do are furiously qualified. Her 'personal' choice is no longer valid when it comes to an expression of sexual desire. Further, her sexual desire is subjected to the scrutiny of the police. Hadiya's 'private' marriage thus became the public jurisdiction of the State itself.

Indeed, what was earlier described as her 'privacy' now got converted into 'secrecy'. The marriage seems to have been conducted in a hurry, the judges said. They insisted that "the entire episode is shrouded in suspicion." The burden of proof was placed on the defendant's shoulders: "Unless the suspicion is cleared the detenue cannot be permitted to go with the person who is seen to be accompanying her now."[10] Just as Akhila could not be called 'Hadiya', Shafin Jahan could not be called her 'husband'. He was demoted from occupying that intimate role to being "the person who is seen to be accompanying her now."[11] Hadiya's private marriage was declared null and void. First, the police and then the National Investigation Agency ('NIA') were publicly ordered to probe the entire affair.[12]

Despite its regressive assertions about the weakness and vulnerability of women, the patriarchal cast of its comments, and its controversial verdict annulling the marriage, the Kerala High Court performed one very useful function in its judgement. It asserted publicly that there is nothing 'private' about the expression of sexual desire.

The appeal against the Kerala High Court judgement finally reached the Supreme Court in 2018, where a three-judge bench struck down the earlier verdict. Interestingly, the Supreme Court's decision too was based on the notion of privacy, but from a different perspective. Quoting his own judgement in *K S Puttaswamy v Union of India* case of 2017,[13] popularly known as the 'privacy judgement', Justice D.Y. Chandrachud reiterated that the freedom to take decisions about "family, marriage, procreation and sexual orientation are all integral to the dignity of the individual",[14] and should not be interfered with. Denouncing the Kerala High Court verdict, Justice Chandrachud noted firmly that "the High Court, in the present case, has treaded on an area which must be out of bounds for a constitutional court. The views of the High Court have encroached into a private space reserved for women and men in which neither law nor the judges can intrude."[15] Marriage is a private matter between individuals, asserted the Supreme Court judgement. However, it simultaneously

[10] Asokan writ petition (n 1).
[11] Asokan writ petition (n 1).
[12] Asokan writ petition (n 1).
[13] (2017) 10 SCC 1.
[14] *Shafin Jahan v Asokan KM* (2018) 16 SCC 368 [87] (Supreme Court of India).
[15] ibid [88].

allowed the ongoing NIA investigation into Shafin Jahan's antecedents. By claiming to respect privacy, the Supreme Court verdict tried to disguise the public aspects of Hadiya's desire. Even as it seemed to uphold privacy, this strange verdict also reinforced the public consequences of desire. As Flavia Agnes points out in relation to the Supreme Court's handling of Hadiya's case,[16]

> There have been countless cases in this country's history when the courts have stood up for the freedom of the individual against the diktat of the community, family or state. By choosing to prioritise shadowy fears of 'love jihad' over a flesh-and-blood individual's rights, the court has gone against its own grain. It runs the risk of feeding into a communal narrative, which is growing in strength.

Hadiya's story moves back and forth between these two poles of public and private. Legally, she is free to choose which religion to follow and whom to marry after the age of 18. However, the Kerala High Court's discomfort, with her 'private' choices also shows us how public such decisions really are. Religion and sexuality are both simultaneously understood to be private and public. In India, their combination has been endowed with a particularly explosive character since the time of the British.[17] In its most recent avatar, the spectre of 'love jihad' has been raised in relation to every cohabitation of desire and religion. Indeed, the government of Uttar Pradesh has recently passed an ordinance that stipulates a 10-year jail sentence (for men) in cases of "inter-faith marriages with the sole intention of changing a girl's religion."[18] The canard goes that, Muslim men are wooing 'unsuspecting' Hindu women and converting them to Islam under the pretext of love. This was the bogey raised in relation to Hadiya as well – both that she is a vulnerable and susceptible woman, and that terrorist organisations are out to recruit people like her. Indeed, the phrase 'love jihad' occurs in almost every news story about the Hadiya case.[19]

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[16] Flavia Agnes, 'Justice for Hadiya' (*Flavia Agnes*, 7 September 2017) <https://flaviaagnes.wordpress.com/2017/09/07/justice-for-hadiya/> accessed 30 June 2021.

[17] See Julia Stephens, *Governing Islam: Law, Empire, and Secularism in South Asia* (repr, 1st edn, Cambridge University Press 2018); Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (repr, Taylor & Francis Group 2016); Perveez Mody, *The Intimate State: Love-marriage and the Law in Delhi* (repr, 1st edn, Routledge 2008); Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (repr, 1st edn, Sage Publications India 1992).

[18] The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020, ss 3 and 5(1).

[19] Take, for instance, the following headlines: 'Kerala Love Jihad Case: Hadiya Says She Converted to Islam, Married Muslim Man of Her Free Will' (*Hindustan Times*, 20 February 2018) <https://www.hindustantimes.com/india-news/kerala-love-jihad-case-hadiya-says-she-converted-to-islam-married-muslim-man-of-her-free-will/story-hebpnm2fGumU5Ie2Io3NxN.

III. MARRIAGE AND LAW

What is interesting, though, is that Hadiya's story follows the opposite trajectory of an alleged case of 'love jihad'. Instead of falling in love and then converting, Hadiya first converted to Islam and 'then' found Shafin Jahan on a matrimonial website.[20] To put the emphasis a little differently, 'Hadiya' converted to Islam and then found herself a husband online. Her case thus defied two basic rules of good behaviour for women – she showed that she has a mind of her own, and that she acts on her sexual desires. She decides which religion to follow and which person to marry. The all-male bench of the Kerala High Court was angered by these extremely public and intensely private decisions made unapologetically by a woman.

While the Indian Constitution technically protects religious freedom,[21] in reality, the State polices the process of religious conversions (in India, the Intelligence Bureau keeps track of them).[22] Nowhere does this policing kick in more viciously than when it comes to marriage. The introduction of religion marks marriage as a domain in which an allegedly private desire is placed firmly in the public sphere – mixing desire and religion opens both up to legal scrutiny. Even when the law tries to help sexual desire overcome religious boundaries, it ends up reinforcing those boundaries. For instance, the Indian government passed the Special Marriage Act in 1954 (the 'SMA') because people were finding it difficult to marry across caste and religious divides (they still cannot marry within the same gender).[23] The Act, brought into effect purely because private sexuality is a very public affair, allows couples to marry for love rather than according to their parents' will. This is a noble sentiment, and has been of use to thousands of couples across the country – it allows them to step outside the fetters of religion and caste. But, and here's the rub, even if their parents 'approve', people belonging to different religions, or prohibited degrees of caste, 'have' to get married under the provisions of the SMA. The law cannot officially condone the transgression of religious and caste boundaries. Instead, it provides a back alley in which parents can be side-stepped. Marriage is primarily seen as an endogamous religious affair,

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html> accessed 30 June 2021; 'Love-Jihad Case: Supreme Court Restores Hadiya's Marriage' (*The Week*, 8 March 2018) <https://www.theweek.in/news/india/2018/03/08/kerala-love-jihad-case-supreme-court-restores-hadiya-marriage.html> accessed 30 June 2021; TK Devasia, 'Kerala "Love Jihad" Case Fallout: Hadiya's Father Has Transformed from Staunch Atheist to Hardcore Hindutvavadi' (*Firstpost*, 18 December 2018) <https://www.firstpost.com/india/kerala-love-jihad-case-fallout-hadiyas-father-has-transformed-from-staunch-atheist-to-hardcore-hindutvavadi-5751371.html> accessed 30 June 2021.

[20] *Asokan* (n 1).

[21] The Constitution of India 1950, art 25.

[22] Abhinav Chandrachud, *Republic of Religion: The Rise and Fall of Colonial Secularism in India* (repr,1st edn, Penguin Viking 2020) 24.

[23] Perveez Mody, *The Intimate State: Love-Marriage and the Law in Delhi* (repr, 1st edn, Routledge 2008) 92.

governed by 'personal' laws (more on these later).[24] Marriage across religions is seen as a 'special' case that needs to be publicly advertised for 30 days,[25] inviting objections from all and sundry, before the couple is allowed to marry. This notice period is not a requirement for any endogamous religious marriage. Legally, then, the normative expectation is that marriage in India will and should take place in accordance with endogamous religious sanction and parental blessing.

This perception, that the family knows best, spills over into a series of related aspects of the law. It even partly explains the current push to 'reform' surrogacy laws in India. Despite suggesting reformation, the Surrogacy (Regulation) Bill, 2019 that was passed by the Lok Sabha in 2019 and now must be passed by the Rajya Sabha, seeks to completely ban commercial surrogacy. Its provisions will only allow a 'close relative' to carry a surrogate child to term, and that too only once in her lifetime.[26] Needless to say, this 'close relative' would not be paid for her labour. Further, the two persons wanting the child and the woman providing the child have to be part of a (heterosexual) married couple. Why all the partners who are involved in surrogacy have to be married and related, one does not quite know. However, the Surrogacy (Regulation) Bill, 2019 makes it clear that, in matters of marriage and reproduction, the family knows best. This is why LGBTQ couples, single people, and those in live-in relationships will be forbidden from engaging a surrogate's services under the new law. Instead, married women will have to shoulder the burden of unpaid 'ethical surrogacy' for the relief of their male brethren.[27]

Hadiya's father was not only banking on a legal system that makes women bow down to the men in their family, but also on precedents set by laws in India to criminalize Muslim men's sexuality. Despite arriving at opposite judgements, the ease with which the Kerala High Court and the Supreme Court could support an NIA investigation into Shafin Jahan indicates how deeply entrenched this conviction of criminality is in our legal system.

IV. RELIGION AND LAW

In fact, no sexual desire is legally more criminalized in India today than desire by and for Muslims. Over the years, there have been several non-state actors who have taken it upon themselves to police this desire. Some of these vigilantes even visit the courts that perform weddings under the SMA in order

[24] *infra* part V ('History and Law').

[25] The Special Marriage Act 1954, s 5.

[26] Shonottra Kumar, 'India's Proposed Commercial Surrogacy Ban is an Assault on Women's Rights' (*The Wire*, 9 November 2019) <https://thewire.in/law/surrogacy-ban-assault> accessed 30 June 2021.

[27] ibid.

to look at the notices of intended marriage, and then inform the family of the girl if she is a Hindu marrying a Muslim.[28] However, the latest in the spate of state-sponsored criminalization of Muslim desire is the Muslim Women (Protection of Rights in Marriage) Act, 2019. Like so many laws in which the use of the word 'protection' actually means its opposite, the 'Triple Talaq' Act, as it is colloquially called, makes *talaq-e-biddat* illegal. Through *talaq-e-biddat*, a man can divorce his wife by saying the word 'talaq' three times.[29]

The practice of triple talaq is outlawed in most Muslim countries and is barely in use in India. There are no reliable sources for the number of cases of triple talaq in the country, and almost all available sources suggest that the number is small.[30] Still, the government felt the need to introduce an Act outlawing this largely-dormant practice. Let us agree that it is indeed good to outlaw triple talaq since it inordinately privileges the husband's desire over the wife's.[31] However, if the goal is to ensure that married men do not have an unfair advantage over married women, then why 'criminalize' the act of triple talaq instead of merely outlawing it?[32]

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[28] Shiba Kurian, 'To Harass Hindu-Muslim Couples, Rightwing Activists are Now Using Their Marriage Documents' (*The Wire*, 20 July 2020) <https://thewire.in/communalism/hindu-muslim-couples-love-jihad-rightwing-marriage-notice> accessed 30 June 2021.

[29] The Muslim Women (Protection of Rights on Marriage) Bill 2017 Lok Sabha [Bill No 247 of 2017].

[30] Zeeshan Shaikh, 'No Solid Numbers for Triple Talaq, but Divorce Data Show Interesting Trends' (*The Indian Express*, 5 May 2017) <https://indianexpress.com/article/explained/no-solid-numbers-for-triple-talaq-but-divorce-data-show-interesting-trends-4641016/> accessed 30 June 2021.

[31] In the cultural imagination, the most famous case associated with divorced Muslim women in the subcontinent is *Mohd Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556 (Supreme Court of India), adjudicated in 1985. The Supreme Court upheld the judgement of the Madhya Pradesh High Court that the husband has to pay monthly maintenance to his divorced wife if she is unable to maintain herself. This payment, they directed, has to be made even beyond the *iddat* period, which is three months after the divorce. Buckling to pressure from conservative quarters, some of whom took exception to Chief Justice Chandrachud's pejorative characterization of Muslims, the Rajiv Gandhi government in 1986 enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. This statute undid the Shah Bano judgement, and required Muslim men only to provide maintenance to divorced wives during the *iddat* period. However, a later judgement, in *Danial Latifi v Union of India* (2001) 7 SCC 740 (Supreme Court of India) in 2001, provided a creative work around the new law by ordering men to pay maintenance of an amount that will last for the lifetime of the divorced wife. The biggest difference from the Muslim Women (Protection of Rights in Marriage) Act, 2019 is that Muslim men were not criminalized as they were later to be under the 2019 Act.

[32] In fact, 'customary' divorce is prevalent also among Hindu communities. It is recognised under Section 29 of the Hindu Marriage Act 1955, which states that, "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act." If the marriage has been formally solemnized under recognised Hindu ritual, then customary divorce is not expected to apply. See, for instance, the 2019 judgement in *Banumathi v Regional Manager* W.P. (MD) No. 6514 of 2014, decided on 22-7-2019. In this case, as in others, customary divorce is only rendered illegal rather than being judged criminal.

Is it because criminalizing Muslim men's sexuality is the 'goal' of the Act rather than an unintended side-effect? "Any Muslim husband who pronounces *talaq*…upon his wife shall be punished with imprisonment for a term which may extend to three years and fine", states the new law.[33] It does not seem to be enough to say that triple talaq will no longer be legal tender in India, and that women 'divorced' in this manner will not be considered divorced at all. The point of the law is to state unequivocally that Muslim men, who resort to triple talaq, are criminals. Even more, the rhetoric deployed by the Muslim Women (Protection of Rights in Marriage) Act is that of the downtrodden Muslim woman suffering at the hands of the criminal Muslim man. Hence, the self-declared ambit of the statute is to "prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat."[34] Its message is clear – Muslim men are criminals and Muslim women are in need of protection (from them).

This fantasy of 'saving' women also animates the High Court's judgement in the Hadiya case. The judges repeatedly ignore the fact that Hadiya is a grown-up woman. They also insist that she has to be saved, both from herself and from the clutches of a shady Muslim 'terrorist' organization, which is presumably run by allegedly criminal Muslim men.[35] However, let us leave Hadiya alone for a while after her wedding and stay with the question of divorce.

The triple talaq statute presents itself as saving hapless Muslim women from criminal Muslim men. Its rhetoric suggests that Muslim women have always been deprived and Muslim men have always been depraved. In this context, it is interesting to note Rohit De's observation:[36]

> The construction of Muslim personal law as backward is ironic, given that Hindu conservatives, in the 1950s, had attacked the 'progressive' Hindu Code Bill on the grounds that the draft code was '90 per cent Muhammadan law'. In the 1950s, divorce, inheritance by women and guardianship rights of the mother—while radical innovations to Anglo-Hindu law—were established precepts of Anglo-Mohammadan law.

In fact, he describes the Dissolution of Muslim Marriages Act of 1939 ('DMMA'), an Act still in effect in India, Pakistan, and Bangladesh, as a

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[33] The Muslim Women (Protection of Rights on Marriage) Act 2019, s 4.

[34] The Muslim Women (Protection of Rights on Marriage) Bill 2017 Lok Sabha [Bill No 247 of 2017], statement of objects and reasons.

[35] *Ashokan* (n 1).

[36] Rohit De, 'Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act' (2009) 46(1)Indian Economic and Social History Review 105.

"radical piece of social legislation…[that] gave Muslim women the right to sue for divorce…almost two decades before Hindu women, and [in which they] could sue under a larger number of grounds than those available to their Christian counterparts in India and women in Britain." In other words, Muslim law was recognized by many Hindus as being progressive, perhaps even overly so.[37]

In 1929, 10 years before the passage of the DMMA, the All India Women's Conference and the All India Muslim Ladies Conference (*Anjuman-e-Khawateen-e-Islam*) called for laws to reinforce Muslim women's rights of inheritance and divorce.[38] While almost all Muslim members of the Central Legislative Assembly supported the Bill, De points out that "Babu Bajinath Bajoria, the representative for Indian Commerce, expressed his horror at a law [the DMMA] that made divorce so much easier."[39] Bajoria feared that if the law were to be passed (which it was), then Hindu women too would clamour for equal rights to divorce (which they did not). The ease with which Muslim women's rights were secured was owed largely to two factors. First, under Quranic law, Muslim women have more rights than their counterparts professing other religions. For instance, even after marriage, husband and wife among Muslims are legally separate persons with separate estates and legacies, and they can enter into separate contracts. Muslim marriage is itself a contract rather than a sacrament, and as such, it is already a legalized exchange rather than a sacralised bond. Muslim weddings require two witnesses and the consent of the bride and groom. No religious figure is involved in the proceedings, and hence the famous aphorism, *miya-biwi raazi, toh kya karega qazi* (if the husband and wife are willing, then what role does the religious man play)?

The legal situation on the ground then was weighted substantially towards Muslim women, who enjoyed rights unheard of by their Christian and Hindu peers. In fact, when the Hindu Code Bills in the 1950s sought to secure inheritance for daughters, the primary criticism was that such a radical practice amounted to an 'Islamization' of Hindu law.[40] Similar, yet completely opposite objections, were raised against the proposal to banish polygamy among Hindu men. If monogamy must be required of Hindus, the claim went, then it must be required of Muslim men as well. Polygamy flourished legally among Hindu men until the passage of the Hindu Marriage Act in 1955. In fact, in 1961, 5.7% of Muslims apparently practiced polygamy, while the figure among Hindu men was higher at 5.8%. Other than the relation of envy that Muslim men might continue to 'enjoy' what Hindu men were about to lose, there were also several other reasons cited against banning polygamy. Among them, as

37 ibid 106.
38 ibid 113.
39 ibid 115.
40 De (n 36) 127.

Archana Parashar points out, was the argument that according to the shastras, Hindu men need sons in order to facilitate their passage into the next world after death. Thus, men without sons must be allowed to marry over and over again until they have a son. Protection of the Hindu faith was a reason as well. It was thought that polygamy was so attractive that Hindu men would convert to Islam in order to hold on to their wives (or, in a more feminist vein, that the men would remain Hindus while the wives would be reduced by law to the status of concubines).[41] Economic necessity (multiple wives were needed to perform the business of farming in villages) was also another defence against outlawing polygamy.

V. HISTORY AND LAW

How have we even come to talk about laws in relation to 'Hindus' and 'Muslims'? When did we start passing laws in relation to religious communities rather than, say, geographical entities? Further, why do we continue to do it?

It has often been pointed out that if Hindus and Muslims did not exist, the British would have invented them. Abhinav Chandrachud notes that in "the census in Gujarat in 1911, some 2,00,000 people described themselves as 'Mohammedan Hindus.'"[42] He adds that "several Muslims in India…considered themselves governed not by the *Shariat* in personal law matters, but by their own customs which were analogous to Hindu personal law."[43] The present-day political divide between Hindus and Muslims ignores the fact that these categories were created by, and for the convenience of, our colonial overlords. The British fashioned Hindus and Muslims as 'always' having been cohesive categories, hermetically sealed off from each other. Several different sects were lumped together under the administrative umbrella of 'Hindu', and several factions got melded together under the aegis of 'Muslim'. This consolidation and classification began with India's first British *de facto* Governor-General, Warren Hastings. In 1772, he declared that 'Mahomedans' and 'Gentoos' (his version of 'Hindus') would be governed by their own laws.[44] But, what were these laws and how to determine them? Hastings set in motion a process in which the Brahmanical texts, principally the *shastras* and the Manusmriti, were understood to be the laws of the Hindus, while the Quran and the *Shariat* were considered to be the law of the Muslims. This textualization of the law had several effects. First, it often disregarded the more malleable customs on the ground that might have been at variance with what the texts propounded.

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41 Parashar (n 17) 114.
42 Chandrachud (n 22) xiii-xiv.
43 ibid 127.
44 De (n 36) 115.

In other words, it ignored how people lived, and it rigidified that which had been much more fluid (however, in relation to Muslim women's rights, textual law was actually more permissive than customary practice). Second, it privileged high-class texts to which most people had no lived relationship – the law was thus overly Brahmanical. Third, it created the legal categories of Hindus and Muslims where such clear-cut divisions had not existed before.

Prior to the British rule, laws were applied to both territories and peoples. The Mughals, for instance, had a variable structure of laws throughout their territories, which were adapted to local customs that criss-crossed religions. The British tried to ensure a smooth transition from Mughal laws to their own, but the smoothness was in name only. The pluralistic practices followed by the Mughal courts were completely ignored. In Rohit De's argument, even though the British claimed to be continuing "to apply the law of Hindus and Muslims to matters of inheritance, marriage and religious institutions,… the analogy was false, since the Company state itself administered the law of each religious group."[45] In other words, even as the British governed by using 'Muslim law' and 'Hindu law', both sets of laws were identified and defined by the British themselves. They undertook a two-pronged strategy to prove that only British law, which they claimed was based on reason rather than religion, was good enough to frame general laws with which to govern the realm. First, they painted Indic religions as irrational and primitive. Therefore, second, they limited the reach of such religions to the realm of 'personal' laws (which were publicly mandated). Where Indians had tended to live in and out of multiple legal systems across all realms of life, they were now divided into 'Hindus' and 'Muslims', and told to live strictly according to 'their' laws as interpreted for them by the British. According to Julia Stephens,[46]

> The [1864] Indian Law Commission for the first time explicitly specified that Hindu and Muslim laws would be limited to 'succession, inheritance, marriage, and caste, and all religious usages and institutions.' It domesticated religious laws, by associating them primarily with the family, and communalized them, by limiting their applicability to a narrow group of co-believers. 'Personal laws' became the legal equivalent of what are anatomically termed the 'private parts' of the body – allegedly central but effectively hidden.

Fostering such religious division encouraged open hostility between Hindus and Muslims, and ensured India's docile submission to the British. Thus, in order to secure British rule, Indian social and religious pluralism was reduced to a legal binary. Almost overnight, India got separate personal Hindu and

[45] ibid 115.
[46] Stephens (n 17) 23.

Muslim laws. Religion and desire became fused, even as religions and their desires got separated. 152 years later, when the Kerala High Court stated its displeasure at the fact that Hadiya "had got married according to Islamic religious rites...[even though her] parents are Hindus", they were speaking in this language of separate personal laws and separated desires.[47]

Like the forced distinctions of 'personal laws', the Kerala High Court judgement also traded in another bogey that currently has the country in its grip – the spectre of terrorism. Indeed, one of the judgement's pet themes was the father's 'concern' that Hadiya might be 'smuggled' out of the country to Syria, and made to join the Islamic State. Hadiya's father alleged in his second writ petition "the involvement of radical Muslim organizations that are engaged in transporting girls who are converted to Islam, out of India." When he had stated this as a concern in his earlier petition, the Court downplayed the possibility of such an occurrence by saying that Hadiya did not even have a passport. But now, the Court portentously observed, the "question that crops up… is whether the marriage that has been allegedly performed is not a device to transport her out of this country."[48] Once again, we are at a point of collision between an allegedly private marriage and a decidedly public nation-state. Religion and sexuality become flashpoints between communities and countries.

VI. HETERONORMATIVITY AND LAW

We have been here before. In 1949, following the horrific and violent partition of British India in 1947 and high-level discussions between India and Pakistan, the 2 countries passed an Ordinance to recover abducted persons on both sides of the bleeding border. In India, this Ordinance was converted into The Abducted Persons (Recovery and Restoration) Act, 1949. This statute defined an abducted person as "a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim". However, in reality, the government's Central Recovery Operation was focused on women living with men of the 'other' religion, all of whom were presumed to be 'abducted' women.[49] These women so identified then needed to be 'recovered' and 'restored', often against their will.

In technical terms, these 'recoveries' were versions of the *habeas corpus* writ petitions filed by Hadiya's father since they all aimed at 'producing the body'. They were also based on certain presumptions about heteronormativity

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47 *Asokan* (n 1).

48 *Asokan* (n 1).

49 Urvashi Butalia, 'Abducted and Widowed Women: Questions of Sexuality and Citizenship During Partition' in Meenakshi Thapan (ed), *Embodiment: Essays on Gender and Identity* (repr, 1st edn, Oxford University Press 1997) 93.

and women that connect the two legal events across seven decades. The first assumption is that women should be fixed in relation to one man, either the father or the (proper) husband. The shocking thing for families of 'abducted' women was that these women were now the property of other men through a process that had not been approved of, by either the father or the husband. While many women really had been abducted, several might have gone of their own will, and might even have settled into their new unions, as the resistance of several women to returning suggests.[50] As late as 1953, the Allahabad High Court was faced with a case, *Bimla Devi v Chaturvedi*,[51] in which Bimla Devi (formerly Razia Khatoon) sent her daughter back to her previous husband, but refused to leave Bagh Shah Khatri, her new husband. The second assumption made by both law and judgements is that women's sexuality cannot be trusted. Despite many women's unwillingness to return, both States inevitably insisted on putting them in camps, and then returning them to their fathers or husbands. This is because women could not be relied upon to speak the truth. These women's insistence that they were happy with their new husbands, and often new children, did not hold water with the authorities. All such statements were considered to be coerced and dismissed out of hand. Finally, and urgently, women's sexuality was assumed to be a matter of national security.[52] Retrieving abducted women was considered an issue of familial and national pride. Even when fathers and husbands rejected women for having become sexually 'polluted', even when women preferred their new union to their previous situation, and even when women refused to return, they were forced to return because it was a matter of national pride that a country's women should be pure and in their 'proper' place. Needless to say, in this equation, the state is coded as both masculine and heterosexual. As Veena Das points out, "The law was instituted to shape the nation as a masculine nation, so the social contract became one between men as heads of households…. The social contract was grounded in a particular kind of sexual contract."[53]

All these patriarchal assumptions about women, sexuality, and nationhood are underlined in the joint statement released by the Prime Ministers of India and Pakistan in 1947:[54]

> [We] wish to make it clear that forced conversions and marriages will not be recognized. Further, women and girls who

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50 ibid 95.

51 1953 SCC OnLine All 55 (Allahabad High Court).

52 See, for example, Partha Chatterjee's work on 'the woman question' in 'Colonialism, Nationalism, and Colonialized Women: The Contest in India', (1989) 16(4) American Ethnologist 622-633; Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism* (Indiana UP 2010).

53 Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (University of California Press 2006).

54 Butalia (n 49) 93.

> have been abducted must be restored to their families, and every effort must be made by the Governments and their officers concerned to trace and recover such women and girls.

Women and girls are to be recovered from their situations of unacceptable desire and restored to their families. The nation-state enacts laws to channel women's (hetero) sexuality in lawful directions dictated by the legitimate family unit. Conversion and marriage-after-conversion of 'women and girls' are seen by all sides as being in need of legislation. Until women and girls are restored to their proper men, the law will act as the man to protect them. In an almost exact echo, undermining and questioning women's sexual desires, the Kerala High Court asserts 70 years later that "this Court, *exercising Parens Patriae jurisdiction*, has a duty to ensure that young girls like the detenue are not exploited or transported out of the country" (emphasis added).[55] The borders of women's desires and the nation alike are matters to be regulated by a masculinist state acting as a parent. Even as the Supreme Court criticized the High Court's use of *parens patriae* jurisdiction, it continued to act on the assumption that Hadiya's desires are dangerous for the welfare of the nation. The more things change legally, the more they stay the same.

VII. CODA

Such are the wide-reaching socio-political ramifications of a woman's resistance to sexual normativity. Hadiya's case bears all the markers of public misogyny and communalized nationalism that have shadowed the history of legislating desire in India. The laws governing sexual desire are enmeshed in multiple aspects of history, religion, and criminality. Sexual desire resists Macaulay's famous goal: "uniformity where you can have it – diversity where you must have it – but in all cases certainty."[56] Sexuality is perhaps the one thing about which we cannot be certain. This is why sexual desire, whether in its public avatar as marriage, or its worrying expression by women, or its manifestation as religious conversion, proves to be such a frustrating subject for the law. This many-headed Hydra is too subtle for a blunt instrument like the law. Hence, the law comes down on the recalcitrance of desire with all the force at its disposal, annulling marriages at will, dismissing women's desires, and initiating national terror investigations.

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[55] *Asokan* (n 1).

[56] Quoted in: Chandrachud (n 22) 113.