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Hijacking Law

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This essay considers the legal strategies of comparative communities in South Asian, Middle Eastern, and US history. What does it mean for a particular group to "hijack" a body of law, taking everyone on board to an unwanted destination? The piece compares the legal strategies of the Parsi community in colonial and postcolonial India to those of the German Jewish yekke *population in mandate Palestine and early independent Israel, the women's movement in India in recent decades, and Protestants in contemporary America before the 2015* Obergefell *decision legalizing same-sex marriage. There are multiple ways of trying to take control of a body of law, and for multiple reasons. A group may capture a body of personal law to perpetuate its own values within the group. It may try to control a territorial legal system to impose its values on the entire population. It may work across bodies of personal law to obtain as uniform a result as possible—as if the system were a unified field, not a segmented one. Or its group members may make available their legal expertise to shore up a newly independent state's legal system. The essay suggests that taking control of a body of law does not necessarily mean hijacking it.*

Parsi and Zoroastrian studies are often marginalized within the larger fields of South Asian and Middle Eastern studies. In my book, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (2014), I tried to bring the story of Parsi legal culture into conversation with South Asian and imperial history, law and religion, the study of law and minorities, and sociolegal studies generally. I am particularly gratified by the opportunity to use this exchange to consider what Parsi legal history can offer across disciplines and historical settings. I thank the contributors to the symposium for the quality of our discussion. These four thought-provoking essays by scholars of South Asia, the Middle East, the United States, and global comparative contexts offer perspectives from the disciplines of history, law, anthropology, and religion. My comments build on their interest in the legal strategies of comparative communities. In this brief essay, I take up Winnifred Sullivan's example of Protestants in contemporary America, Sylvia Vatuk's discussion of the women's movement in postcolonial India, and Assaf Likhovski's case study of the German Jewish population of mandate Palestine and independent Israel. Sullivan's reference to the "hijacking" of law is useful for thinking about how communities have historically co-opted bodies of state law. Controlling a body of law does not necessarily mean hijacking it. Some groups created their own community-specific body of personal law, rather than taking over the general body of territorial law that applied to everyone. Other times, the

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legal skills of one group's members have been harnessed in the service of a larger and newly independent polity. When a community takes control of a body of law, we must therefore ask two further questions: *For what purpose?* and *To whom does this law apply?* Only then can we decide if we have a hijacking.

At the outset, let me express my gratitude to Bhavani Raman for so lucidly and elegantly setting the stage with her overview of the big questions in my book. As she notes, the interplay between law and culture is complex, and all sides are altered by these interactions. In the Parsi case, what is particularly interesting is the way collective identity—in answer to the question, *Who is in and who is out?*—morphed from a predominantly religious to an increasingly racialized concept as it traveled through law. In Raman's words, colonial law was more than a tool for governing culture: "new forms of self-making and new normative worlds" also drew on the law, which provided "the resources and the language to debate cultural identity" (Raman, 1211–1212). She points to a line from David Nelken that may sum up my book better than any other: "legal culture is about who we are not just what we do" (Nelken 2004, 1). Although this essay focuses on the comparative contexts raised by Sullivan, Vatuk, and Likhovski, I thank Bhavani Raman for presenting my book's key concepts so insightfully.

Communities have differed in their attitudes toward the law of the state, and have pursued different strategies for engagement.[1] Winnifred Sullivan notes that for Protestants in the United States today, "going to law" to settle intragroup disputes is regarded as a violation of Paul's prohibition on taking inside disputes to an outside forum (I Corinthians 6:1–7). In this way, the position of the Hosanna-Tabor Evangelical Lutheran Church (the original defendant in *Hosanna-Tabor v. EEOC*) resembles similar Jewish prohibitions and looks different from the colonial Parsi case, where such theological admonitions were absent. Sullivan takes from the historical Parsi example a possible lesson for Lutherans: a "separatist withdrawal from public life" is not the only way to get what you want out of law. Jumping in can work, too.

Some Protestants in recent US legal history have recognized the value of engagement rather than avoidance, as Sullivan notes via the work of Mary Ann Case (Case 2011). Unlike Jews and Muslims, Protestants lacked a broad and robust internal system of religious law. As a result, Case argues that state law mattered *more* to them. This is why many Protestants opposed same-sex marriage more vocally than did other conservative religious communities that were Catholic or Jewish, at least before the US Supreme Court recognition of gay marriage in *Obergefell v. Hodges* (2015).[2] Catholics and Jews still had their own law, in other words, but Protestants had only the law of the state. Protestant resistance to same-sex

1. On the shift from avoidance to greater engagement with US law among Middle Eastern and South Asian Americans since 9/11, see Sharafi (2015). On political organizing by "Muslim-looking" populations in America, see Mishra (2016) and Love (2017). Before 2001, Sikh organizations developed sophisticated legal strategies through conflicts over the wearing of the Sikh turban, *kirpan* (ceremonial dagger), and *kara* (steel bangle). Across the English-speaking world, Sikh efforts led to the creation of religion-specific exceptions in domains including hard-hat rules on construction sites, motorcycle helmet laws, police and military uniforms (requiring the wearing of hats), barristers' wig rules, and school dress codes.

2. Case is not arguing that non-Protestant religious groups in the United States accepted same-sex marriage before 2015, but that they opposed it *less vehemently* (than did Protestants) because they had their own law on which to fall back.

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marriage thus reflected a previously successful takeover of state law: "having previously been accustomed to co-opt the institution for sectarian ends, they felt an understandable although not justified sense of loss and grievance when their control was challenged and taken away … they had little by way of ready-made institutional structures of their own to fall back upon as they lost the fight to control state institutions" (Case 2011, 302).

Sullivan notes the parallels here with Parsis in British India circa 1800. Not having their own body of nonstate religious law or state-based personal law created the impetus to hijack state law, as Sullivan colorfully puts it. Because of India's personal law system, Parsi legalism was operating in what I call a segmented rather than a unified field: each religious community was governed by its own separate body of family law, as applied by state courts. This feature of the legal field made its takeover quite different from the pre-2015 Protestant co-optation of US matrimonial law. Hijacking implies diverting a plane full of people to one's preferred destination. But the Parsi aircraft was never going to be for everyone; rather, colonial Parsis built their own plane and then they flew it. Only their own members were on board, and the plane was due for a destination that only their airline would offer. By contrast, the pre-2015 Protestant strategy described by Case does look like a hijacking. The fight over same-sex marriage included a Protestant push to sustain the hijacking of the airplane that carried all passengers. This long-term takeover ended with *Obergefell*.[3]

One reason why Parsi legal culture was so successful was precisely *because* of the segmentation created by the personal law system. In Euro-American contexts, it is fair to assume that taking control of a body of law means hijacking it—taking others along to a place they do not necessarily want to go. However, in the personal law systems of Asia and Africa, the dynamics are different: each group travels to its own destination in its own separate vehicle. That everyone *within* each group may not agree on the planned destination becomes a key point of conflict in such systems. There is also external conflict in a segmented field like Indian personal law. Rather than focusing on a set of rules that will apply to everyone, these external fights center on the fact that by the accident of birth into a particular community, similarly situated individuals (typically women) will be treated differently by law.[4] Nevertheless, those who are neither members of the community in question nor concerned with the unequal treatment of others may simply remain indifferent to proposed change in a body of personal law other than their own. What happens in a unified body of law, by contrast, affects everyone.

If, indeed, the pre-2015 refusal to recognize same-sex marriage in many US states represented a hijacking by Protestant interests, the fact that Protestants have historically been the majority religion in the United States may explain how this was

3. Despite the diversity of individual state laws, I consider US matrimonial law to be a unified and not a segmented field. In any particular place, one body of territorial law applies to all marriages regardless of any couple's religious affiliation.

4. In the 2017 case of *Shayara Bano v. Union of India*, the Supreme Court of India found the triple *talaq* to be unconstitutional. The doctrine was contested in India both within and outside of Muslim communities. The triple *talaq* allowed a husband to divorce his wife extrajudicially by saying *talaq* (I divorce you) three times. It had no equivalent in other bodies of Indian personal law.

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possible at all in a unified field. The Parsi example, by contrast, is a story of a tiny minority carving out for itself a body of law. It could only have happened in a setting where each religious community had its own discrete pocket of law—a body that would not affect others. While Case's Protestants and colonial Parsis may both have co-opted certain areas of law, in other words, the former were flying the general public's jumbo jet while the latter were using their own regional airline. This is not to say that having a regional airline was not collectively useful or important. It was both. But even so, Parsi community leaders' plan to change the law affecting their members would have been unlikely to succeed outside of a personal law system.

The importance of segmented and unified fields leads me to a second community of comparative interest. Sylvia Vatuk's essay traces gender-related developments across bodies of personal law in Indian legal history, focusing on Parsi, Hindu, and Muslim personal law. There is another community in her story, and it cuts across ethnoreligious lines. The Indian women's movement is a community with its own law-oriented strategies, too (Kumar 1993). What interests me in particular is the movement's legal maneuvers since the creation of India's Constitution in 1950. Article 44 of the Indian Constitution promises that at some point in the future, India's personal law system will be replaced with a territorial one for family law. In other words, the segmented fields of Hindu, Muslim, Parsi, and other bodies of personal law will be replaced with a single body of matrimonial and inheritance law that will apply to all Indians. This unusual provision reflected the antipathy of its prime draftsman, B. R. Ambedkar, to Hindu law in particular. As a *dalit* lawyer (formerly referred to by the pejorative term "untouchable"), Ambedkar regarded Hindu law as oppressive because of its perpetuation of the caste system. Yet to this day, the promise of Article 44 has not materialized. The debate over the Uniform Civil Code (UCC) became paralyzed when the women's movement found itself uncomfortably allied with the Hindu Right in favor of the UCC against religious minorities (particularly Muslims), who wanted to retain the personal law system (Agnes 2016).

How has the women's movement adjusted its legal strategies since this deadlock of recent decades? Vatuk notes that there has been a general convergence in the laws relating to women's rights, particularly between Hindu, Parsi, and Christian personal law. Leading feminist advocates such as Flavia Agnes argue that the personal law system is here to stay, and that women's rights activists should focus their energy on working within this framework, rather than fighting against its existence. In other words, the women's movement has worked not just *within* a segmented field (as did colonial Parsis) but *across* it, too. Feminist activists have worked for similar outcomes *within each and every segment*. By encouraging reform that will produce similar results in each body of personal law, they are trying to approximate what the UCC might have achieved—but without abolishing the personal law system. The women's movement is now working to gain control of as many regional jets as possible, accepting that Indian family law may never get its own jumbo jet. This strategy represents a labor-intensive and intricate workaround to the problem of being unable to change the structure of the field itself. Because the collapse of Indian family law's segmented fields into a unified one now seems impracticable, feminist legal activists have adapted their approach.

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The debate over the abolition of the personal law system also brings back into view Case's study of the Protestant co-optation of US marriage law pre-2015. Although this hijacked American jet was presented as a neutral, secular legal regime, it was colored by the religious values of the majority. This is precisely the fear of Muslim opponents to the Uniform Civil Code in India today. They argue that if India replaces the fleet of regional airplanes with a single, purportedly neutral jumbo jet for all, the latter will look a lot like Hindu personal law. This argument is increasingly plausible with India's political turn in recent years toward what some call Hindu neofascism.[5]

Case's study serves as a cautionary tale for Muslim opponents of the UCC in India. Her work shows that while a unified field may present itself as religiously neutral, it may in fact be co-opted by a particular religious tradition. Here is the startling combination of the US Constitution's First Amendment disestablishment clause, on the one hand, and the Christian values that permeate allegedly secular US matrimonial law, on the other. The lesson is that it may be better to control one's block of personal law within a segmented field than to create a unified field and lose control—possibly not even to secular authorities but to another religious group that has captured the territorial regime. In a sense, the same set of anxieties led to the reverse move in 1947: the creation of a segmented field of polities in South Asia—namely, independent India and Pakistan—out of the unified polity of British India.

A third community of comparative interest is Assaf Likhovski's German Jewish population of mandate Palestine and independent Israel. Likhovski notes the distinctly legal orientation and expertise of the *yekke* community historically. By the late 1930s, German Jews represented about 12 percent of the Jewish population of mandate Palestine (Sela-Scheffy 2006, 49 at n. 3). The postmandate chapter of this community's history is of special interest here. As Likhovski points out, the legal profession in the early years of Israeli independence was dominated by *yekke* lawyers, and 36 percent of Israeli Supreme Court judges between 1948 and 1978 were Jews of German background or education. Many leading officials of the Israeli Ministry of Justice were, too.

There were even more similarities between *yekke* and Parsi legal history than Likhovski mentions. My book ends at Indian Independence in 1947, but the story of Parsi legal culture also has a postcolonial chapter. The book focuses on the inwardly turned question: *What did Parsi legal culture do for its own community during the colonial period?* This is partly the story of success within one segmented field of Indian personal law—designing and then controlling the regional airline of Parsi personal law. However, there is a larger and later story that answers the outwardly turned question: *What did Parsi legal culture do for independent India?* I take on this question in a separate article (forthcoming). Let me sketch out the argument here, pointing to the important role of law-oriented minority communities in newly independent states.

5. Marxist scholars use the term *fascism* explicitly. See Banaji (2016). For work that instead refers to Hindu nationalism and the Hindu Right, see Jaffrelot (2015) and Doniger and Nussbaum (2015).

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Independence movements in mandate Palestine and colonial India were loose, multi-stranded affairs whose actors often disagreed on method. India had its nonviolent Gandhians and its violent extremists all working toward independence from British rule. As a League of Nations mandate under British control, Palestine, too, saw the rise both of paramilitary organizations like the Stern Gang and of those who pushed for an independent Israel by less violently anti-British means. Another form of diversity within these movements pertained to the skill sets that were applicable at different moments. Effective nationalist movements included not only destructive players (whether violent or nonviolent) who could apply sufficient pressure to achieve independence; they also needed actors who could arrive in the wreckers' wake to run the new state in constructive ways. At these moments of tight postcolonial turnarounds, minority cultures like *yekke* and Parsi communities became especially important. As Likhovski observes, a disproportionate number of early judges of the Israeli Supreme Court were German Jews (see Oz-Salzberger and Salzberger 1998; Sela-Scheffy 2006, 45–47). They played a key role in solidifying the court's institutional reputation among Israelis during its first few decades.

The Indian story was different, but it too revealed the influence of minority legal culture. During the late colonial period, elite Parsis led the early "constitutionalist" phase of the Indian National Congress movement (1885–1919) and insisted on working for change through existing state processes and structures. Early Congress leaders Dadabhai Naoroji, Pherozeshah Mehta, and Dinsha Wacha were products of Parsi legal culture (see Mehrotra and Patel 2016, xi–xlix; Mody 1997; Talwalkar 2005). They were turning outward—for the benefit of all Indians—the law-focused strategy that had worked so well during the preceding half-century for their own community. Their approach was abandoned as the nationalist movement became a mass movement circa 1920 under Gandhi's leadership. Gandhi was a London-trained barrister, but he rejected the idea that progress could be achieved through state organs (see Gandhi 2004). His methods of nonviolent protest were extralegal, a feature shared with the violent extremists who were building bombs and assassinating British officials during the early twentieth century.

The values of Parsi legal culture and the Congress constitutionalists were relegated to the back burner from the 1920s until the late 1940s, but they were brought back to life upon Independence, particularly in the Constituent Assembly that created the Indian Constitution (1947–1950) and in the interpretation of the Indian Constitution after 1950. The early Congress model of "constitutional agitation" fed into what B. R. Ambedkar would call India's "constitutional morality." Both required the relinquishment of "the bloody methods of revolution" and of Gandhian civil disobedience alike (Jadhav 2013, 533). If India wanted to remain a representative democracy, Ambedkar insisted that it would need "a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own" (Jadhav 2013, 473). Ambedkar had close contact with Parsi legal culture during his formative years as a lawyer. Many of the leading litigators in India's constitutional conflicts post-1950 were also Parsi. Early independent India could reactivate constitutionalism and the rule of law as ideals because these were preserved readymade within a particular politicolegal tradition, albeit one that had fallen out of favor in

the decades before Independence. This tradition was heavily influenced by Parsi legal culture.

Postcolonial *yekke* and Parsi influence on Israeli and Indian law were not akin to hijacking a jumbo jet. Rather than being diverted to an alternative destination, the plane retained its original destination, namely, the creation of a robust postcolonial legal system. German Jewish and Parsi legal culture provided the values and personnel to help fly the plane during the unstable early years following independence in 1947–1948.

There is much to be gained from thinking about how the shape of the legal field matters to communities' strategies for engaging with state law, particularly when their own nonstate religious law is thin or nonexistent. Equally, it is possible that legal strategizing in pursuit of one community's own interests may produce a pool of legal personnel and expertise that can be harnessed for the interests of the general population outside of the personal law context. This was the story of Parsi legal culture, initially working in the service of its own members' collective interests in British India and later turned outward to shore up constitutionalism in independent India. I am grateful to my reviewers for our joint exploration of the comparative dimensions of this story.

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