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Law: Modern: Family

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Introduction

According to the 2011 Census of India, more than 172 million Muslims live in India, roughly 14 percent of the total population. They constitute not only the biggest Muslim minority worldwide but also one of the largest religious minorities in the world. Over the last four decades, the massive discrimination and increasing violence against Muslims in almost every sphere of society and politics, as well as the economy, has often been downplayed or flatly denied, especially by supporters of Hindu nationalism, which emerged as a very powerful political force in India following the Emergency period of the late 1970s. In view of this increased polarization, the publication of the Sachar Committee Report in 2006 marked a significant turning point regarding public discourse about the Muslim minority in India. For the first time in postindependence history, this report clearly and officially stated that Muslim Indians were severely underrepresented in the public sector and civil service. In order to introduce adequate measures and mechanisms that would help improve the situation of Muslims and, above all, achieve an equality of opportunity in the field of education, the National Minorities Development and Finance Corporation (NMDFC) was created shortly afterwards. However, as far as the central problem of identity and representation of Indian Muslims, and particularly of Muslim women, is concerned, it remains strongly linked to the unsolved question of civil law, a question that has been the focus of discussion ever since India gained independence in 1947. Nigar Ataulla, executive editor of the Bangalore-based magazine

Islamic Voice, speaks in this context of a "dangerous triangle." As soon as the conversation turns to a subject such as the status of Muslim women in the Indian context, the focal point of discussion is inevitably placed upon three topics, she argues: (1) the infamous out-of-court repudiation of a wife through the so-called triple *ṭalāq*, (2) the matter of polygamy, and (3) the "veiling" of the woman (Schneider 2005, Ataulla 2008. Opinion polls and studies have also revealed that even though the portrayal of the "veiled/secluded" woman that has long dominated Indian media is not a realistic portrayal of Indian Muslim women, most non-Muslims still attributed Muslim women's low status to the discriminatory treatment under India's Muslim personal law, as well as to Islam itself. According to this perception and representation, Islam "suppresses women to a greater extent than other religions do": Muslim women, compared to women of other religions, are "submissive," "reserved," "fragile," and, due to their social conditioning, unable to fight for their own rights (Kidwai 2003, 104–28).

In reality, Muslim women in India have never been as quiet and passive as they are repeatedly portrayed, and there are many historical examples of women who have committed themselves in both public and private areas and staked their claims to their rights as full members of their communities. Historians like Gail Minault (1998), Barbara Metcalf (1990), Azra Asghar Ali (2000), Siobhan Lambert-Hurley (2007), and Margrit Pernau (2008) have shown that Muslim women and men alike have constantly strived for new definitions, or redefinitions, of existing women's rights since the second half of the nineteenth century. Regarding the contemporary situation, however, as Tahera Aftab argues in her groundbreaking bibliography *Inscribing South Asian Muslim women* (2007), studies on the lives of Muslim women in South Asia are generally scarce. According to Aftab, South Asian Muslim women are generally represented as "oppressed," "backward," and "victims of the double tyranny" of their religion and the specifically South Asian form of patriarchy that is grounded in the traditional Hindu view of femininity (Aftab 2007, xxxi). With specific reference to India, Nida Kirmani describes how a more recent scientific interest in research into the subject of "Muslim women" first crystallized in the 1970s, namely in the context of a generally increasing interest taken by Western feminists in "Third World women," where "Muslim women" were often assumed to be the most oppressed members of this group (Kirmani 2009a). At the same time, this construction and portrayal of the category of the "Muslim woman" in academic research was also founded in a wide range of scientific publications that attempted to explain the social realities faced by Muslim women in India from the perspective of their legal status under Muslim personal law and the gender-specific roles ascribed to them within the religious framework of Islam. It was only in the very recent past that this decontextualized and very strongly essentialized category of the "Indian Muslim woman" has also been strongly called into question by academic research, and the demand has been raised that the peculiarities of region, location, context, and social caste should be more strongly taken into account than has been the case thus far, and that the idea of a clearly definable, coherent group be questioned more strongly than in the past. (See e.g. Searle-Chatterjee 2000, Vatuk 2008, Gayer and Jaffrelot 2012, Kirmani 2013, Tschalaer 2017.)

Despite these efforts, the fact that Muslims in India continue to be seen by a non-Muslim majority as an "obvious community" that draws its specificity from an inherent nature of its religion continues to hamper efforts to pluralize their representation and to raise awareness of the diversity of Muslim women's lives in India. On the one hand, it is often overlooked in this perspective that, as members of Indian society, Indian Muslims are naturally involved in processes of economic change, nation building, and secularization just like any other section of the population. On the other hand, the role of the state is often neglected, especially with regard to the relationship between the state and patriarchal structures in society. The Indian state, in fact, has always been actively involved in the definition and construction of the family and private sphere. This can be best exemplified by the history and postcolonial interventions of the Indian state in Muslim personal law (Chhachi 1999).

Down to the present day, Muslim personal law can thus be considered as a core element of "Muslim identity politics" in India. Hindu nationalists in particular routinely allege that Muslims' adherence to a separate, religion-based family law demonstrates that they are "backward-oriented" and "not willing to integrate" into the national community (Schneider 2005). They argue that only a "secular" uniform civil code—in lieu of the religion-based personal or family laws—would bring about the desired national integration of Muslims into Indian society.

According to Article 44 (Directive principles of state policy) of the Indian constitution, "the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This modernist, or even Kemalist, notion of the transformative power of a secular and national civil law was "borrowed" from the national feminist movement and other secular forces in Indian society (Sayyid 1997; see also Herklotz 2016). In contrast to this, a new Muslim women's movement has emerged in the last four decades as the central advocate for the reformability of Muslim personal law, in accordance with their quest for greater gender equality (Vatuk 2008, Schneider 2015, Tschalaer 2017). In order to understand current debates and the particular politics around religion-based personal laws in India, especially around Muslim personal law, it is therefore important to consider their historical origin under colonial rule, as well as the shaping influence of major discursive events in postcolonial India, notably the long controversies over the introduction of the Hindu Code (mid-1940s until 1961), the Shah Bano case (mid-1980s until 1992), and, most recently, the passage of the so-called Triple Talaq Bill in the Indian Lok Sabha (the lower house of the bicameral Indian Parliament) in December 2017. It should be noted that the Shayara Bano case (2016) and Supreme Court verdict was not the first case in which Indian courts invalidated (instant) triple *ṭalāq* or *talaq-e-bidat*; this had already happened several times before, most notably in the 2002 Shamim Ara case. Moreover, many of the Muslim women's organizations that supported the ban on triple *ṭalāq* opposed the criminalization of Muslim men who sought to divorce their wives by saying the word *ṭalāq* three times.

Identity Politics and Muslim Personal Law

The Indian Penal Code and the Criminal Procedure Code were both enacted by the British colonial administration in 1862 and were to be applied to Indian society in general, irrespective of religion or caste. In contrast, family or personal laws were enacted during the first half of the twentieth century on the basis of religious adherence, to be applied in the context of legal questions or disputes over marriage, divorce, maintenance, inheritance, adoption, succession, and religious endowments. Religion-based personal laws, therefore, were primarily legal innovations that served to determine the boundaries of religiously defined communities and communal identities. By embedding religion-based personal laws within the legal structures of the state, however, so-called primordial institutions were simultaneously recognized and legitimized (Hasan 1999). The term "primordial institutions" refers to groups that employ the "language of primordiality" (i.e. to those groups who represent their shared history, culture, and religion as an unchangeable reality of their collective identity), whereas the history of its construction is usually blanked out (Randeria 1996). After independence in 1947, the persistent focus of Indian Muslims on their personal law as a core identity marker was further corroborated by the anchoring of cultural and religious group or collective rights into the Indian constitution. This explains why demands for the reform of Muslim personal law are recurrently interpreted as attacks on their cultural identity by many Indian Muslims who feel increasingly threatened and marginalized vis-à-vis an assertive Hindu majority. Under the "guise" of a secularist rhetoric, many fear a forced assimilation into a hegemonic Hindu-majority culture.

It is important in this context to consider developments in the global Islamic community. The abolition of the Ottoman Caliphate by Mustafa Kemal in 1924 effectively marked the end of the last remaining supranational political space for Muslims. It was no longer possible to imagine and construct a political community that was not based on the model of the nation-state. In India, where the Caliphate Movement had found a great deal of support, Muslim intellectuals, as well as the ulama, subsequently recognized Muslim personal law as the only remaining common ground for the evolution of a unitary identity out of what was actually a highly fragmented Muslim "community" (cf. Minault 1982, Robinson 1997, 257–356, Shaikh 1991, 160–94).

Demands for Muslim personal laws in India date back, however, to late nineteenth-century Muslim reform movements that strove for modernization within the logic of the Shariah. These reformers pointed out that a religion-based personal law would grant Muslim women rights that were not available to them under any other customary rights applied in India at the time. Muslim women's rights to the dissolution of marriage, to inheritance, and to remarriage following divorce or widowhood were frequently cited to illustrate their greater legal rights compared to women of other religious communities. As a consequence, the enactment of the Muslim Personal Law Application Act (1937), as well as of the Dissolution of Muslim Marriages

Act (1939), was initially seen as conducive to the legal betterment of Muslim women in India and was hence supported by women's organizations (Mahmood 1972, 81–84, Mahmood 1986, 46ff).

This attitude toward Muslim personal law changed dramatically after independence in 1947, especially following Nehru's death in 1964, when supporters of a strong central power and cultural homogeneity increasingly viewed the continued existence of religion-based personal laws as a basis for political mobilizations along communalist lines and cultural identity markers. Resulting from a fundamental ambivalence of the Indian state, as well as the violation of liberal principles, particularly with regard to individual rights, a "genuine" nation-building and modernization process would be thwarted. Like the supporters of the Kemalist modernization project in Turkey, they were convinced that a common and secular civil code would help flatten particularist identities and prevent communalist riots, thus accelerating national integration and social reform (see Ghose 1972, 50f., Mansfield 1993, 139f, Göle 1995, 95).

However, it was the long and bitter controversy over the reform and codification of Hindu family laws, which lasted for more than a decade starting in the mid-1940s, that most decisively shaped the subsequent perception and debate about these issues. As early as 1944, the Hindu Code Committee that had been appointed by Prime Minister Jawaharlal Nehru, presented a draft bill that sought to reform, among other things, the existing laws on succession, marriage and divorce, and adoption and custody. This ambitious reform project met with stiff resistance within the legislative assembly and, accordingly, from a large number of members of the ruling Congress Party. Nehru then decided to divide the new Hindu Code into four parts and to pursue a strategy of cautious, gradual reform. One after another, the Hindu Marriage Act (1955), the Hindu Succession Act, the Hindu Adoption and Maintenance Act (both 1956), and the Dowry Prohibition Act (1961) were accepted by the legislative assembly.

In retrospect, perhaps the most striking aspect of these legal reforms is the similarity in the arguments that were put forward by opponents of the Hindu Code Bill and those used later by opponents of reform in Muslim personal law. For instance, just as legislators were denied the competence to interpret the *shāstras in the 1950s*, members of the All-India Muslim Personal Law Board (AIMPLB) denied the Supreme Court the ability to interpret Quranic verses in the context of the Shah Bano debate in the 1980s. Similarly, the protracted debates about monogamy, divorce, and the regulation of maintenance in the new Hindu Code were as tedious and acrimonious as they were in the context of the claimed reform of Muslim personal law. In the eyes of many Hindu organizations, as well as of conservative Hindus in the Congress Party, the new laws and regulations were nothing less than an "attack on the fundamental principles of Hindu culture and civilization," which, against the preservation of "Muslim polygamy," amounted to "racial suicide" (Som 1994, 165–94). Conservative Hindus and Hindu nationalists were clearly embittered by the fact that they had had to renounce many of their "cultural customs" and traditions for the benefit of social reform and modernization and to accept the

enactment of the Hindu Code, while in their perception, Muslim personal law remained "untouched." As a consequence, the alleged "backwardness" and "unwillingness to reform" of Indian Muslims, as it came to be symbolized by their "unreformed personal law" (Narain 2017), as well as the purported privileging of the Muslim minority by the ruling Congress Party, formed a central basis for the oppositional strategy of the Jana Sangh, as well as of its successor party, the Bharatiya Janata Party (BJP). Their strategy of "unmasking" the postcolonial modernization project of the Nehru era and their depiction of Nehru's Congress Party as "pseudo-secular" and "inconsistent" significantly added to the popularity of the Hindu nationalist party in the 1980s and 1990s. It was precisely this sharp distinction and double construction of the Other (i.e. the "pseudo-secular" project of modernization and Westernization of the postcolonial Indian state), as well as the continued existence of a "premodern" and "oriental" Muslim culture in India, that provided the ground for the imagination of a totality of Hindu culture as the basis of a majoritarian "national culture" and identity. This also explains the "excessive focus" by Hindu nationalists on Muslim personal law, as well as their appropriation of the demand for a Common or Uniform Civil Code, particularly in the 1980s, 1990s, and, more recently, in the context of the debate about the Triple Talaq Bill (2017).

In the 1980s and 1990s, the polarization of the Indian public sphere over the question of Muslim personal law also spawned an uneasy "argumentative alliance" between parts of the Indian women's movement and right-wing Hindu nationalist organizations such as the Shiv Sena in Maharashtra and the Rashtriya Swayamsevak Sangh (RSS). This alliance can be explained against the background of a basic consensus within the Indian women's movement that it was the responsibility of the state to generate cultural, social, and political progress in Indian society by legislating to strengthen "national integration." Doubts about the model of the secular nation-state grew stronger in the wake of the general "anti-secularist" critique in the mid-1980s (Bhargava 2002, Mahajan 2002, Subramanian 2014) and the emergence of so-called neo-nationalist movements around the same time. The long-held assumption of the postcolonial political elite that social change and progress was inherent to the process of nation building came increasingly under critique. By the end of the 1990s, political scientist Zoya Hasan found that, despite their different positions in the ongoing debate, no major women's organization supported the claim for a Uniform Civil Code any longer, and that "BJP has appropriated what was otherwise a feminist demand" (Hasan 1999, 138).

Debates persist, however, over which strategies should be best followed in order to achieve greater gender equality under the existing religion-based laws (i.e. Hindu, Muslim, Christian, and Parsi personal laws). Against the background of a recurring debate around the enactment of a Uniform Civil Code since 2014, lawyer and women's rights activist Flavia Agnes has criticized the "tacit acceptance that the codified Hindu family law will form the base of such a code," as many Muslims had feared during and after the Shah Bano controversy. As the Hindu Code is applied not only to Hindus but also to members of the Sikh, Buddhist, and Jain

communities, Agnes argues for an examination of whether the codified Hindu law has helped to bring about social transformation and change gender relationships. She further argues that the "discriminatory aspects of the Hindu cultural ethos which dominate the Hindu law of marriage are seldom held up for scrutiny" (Agnes 2016, 611). In any case, the prevailing political climate has prevented a general debate about the necessary reforms in all religion-based personal laws. Unlike in earlier decades, most women's organizations have turned their attention to a strategy of gradual reform within the framework of existing personal laws.

The Shah Bano Case and Its Aftermath

The Shah Bano case originated in the late 1970s, when an Indian civil court sentenced lawyer M.A. Khan to pay monthly maintenance to his divorced wife, Shah Bano (see Hasan 2009). Khan, unwilling to accept this judgment, appealed to the Supreme Court in Delhi, arguing that, under Islamic law, Muslim women had a right to maintenance payments only during a three-month period (*iddat*). His appeal was finally rejected in 1985, prompting a fierce controversy between supporters of the decision and Muslim community leaders, who felt their cultural rights as a minority had been violated. Their outrage was fueled by the clearly disparaging remarks on Islam in the presiding Supreme Court Judge Chandrachud's final comments.

The Shah Bano case dramatically brought to the fore the long-running controversy over whether religion-based personal laws present an obstacle to democracy, national unity, and the progress of Indian society, or rather a warrant for legal pluralism as a basis for the plurality of Indian society. The fiercely disputed question of maintenance for repudiated or divorced Muslim wives was exploited, among others, by Hindu nationalist actors, who called for the substitution of existing personal laws by a Uniform Civil Code (UCC), as envisaged by the Indian constitution. Faced with growing polarization about this question, the Congress government under Prime Minister Rajiv Gandhi somewhat hastily adopted the so-called Muslim Women (Rights of Protection on Divorce) Bill in 1986. The law gave Islamic personal law priority over criminal law in maintenance issues, and by doing so effectively excluded Muslim women from seeking criminal procedure. By adopting this law, however, the Indian state also put an end to the repeated attempts by Muslim women since the 1980s to obtain maintenance under secular jurisdiction (Chhachhi 1999). As Amrita Chhachhi points out, the Indian state itself, by its legislative power, thereby reestablished and reconfirmed patriarchal, religiously justified control over Muslim women. Due to this entanglement between state intervention and patriarchal claims to power on the part of Muslim organizations like the AIMPLB, Muslim women's rights activists were forced to seek new ways to engage with religious and political discourse and to seek legitimacy within Islamic discourse. It is from this point of departure that recent feminist thinking in India has stressed the necessity and possibility of reform within the framework of existing (religion-based) family laws as a viable way to achieve gender-just laws.

Many local Muslim women's rights groups and initiatives were founded in the late 1980s, such as the Goa Muslim Women's Association or Awaaz-e-Niswan in Mumbai. Although many of these organizations have been active for more than thirty years, the English-language press in India, for instance, started to cover their activities and agenda to a significant extent only in the late 1990s (Schneider 2009 Tschalaer 2015). Especially since 2005, the number of reports and interviews with Muslim women's rights activists has increased significantly. Many of these articles put a focus on Muslim women's organizations and activists who question religious authorities, especially the ulama—for instance, the All-India Muslim Women's Personal Law Board (AIMWPLB, founded in 2005 in Lucknow) and the Mumbai-based network Bharatiya Muslim Mahila Andolan (BMMA, founded in 2007). Muslim women's rights groups have also actively developed new public relations strategies for themselves and established good relations with the media to attain more attention for their agenda. Nonetheless, it remains a highly ambiguous relationship for many Muslim women's rights activists in India, as the predominantly negative and biased representation of the Muslim minority in Indian mass media has been and continues to be a central concern and debate among Indian Muslims.

While many older Muslim women's organizations were founded initially to pursue the goal of legal reforms, a number of organizations established during the last fifteen years have actively sought to create and enlarge legal spaces for Muslim women in India (Tschalaer 2015, 2017), and to create more publicity for the discourse of gender justice and equality in Islam. Most of them seem to have emerged from local grassroots initiatives, which are so typical for vital civil society in India. Anthropologist Sylvia Vatuk (2008) describes how the main activities of one of the largest and best-known organizations led by Muslim women, the Mumbai-based Awaaz-e-Niswaan (AeN, founded in 1985), concentrate around the professional education of poor women with the goal of enabling them to make a living for themselves and their children. In addition to that, AeN offers weekly marriage counseling, and it is worth noting that these services are not available exclusively to Muslim women (Vatuk 2008). In 1999, activists from AeN and from the Mumbai-based Women's Research and Action Group (WRAG) founded the All-India Muslim Women's Rights Network (MWRN, Kirmani 2009b). Between 1994 and 1998, WRAG conducted an extensive study titled "Women & Law in the Muslim Community," with the declared aim of collecting, documenting, and analyzing the diverse civil or family laws applied to Muslims in India. One of the findings of this research project was that Muslim women in India clearly support the demand for reform of Muslim personal law in India (Nainar 2000). As WRAG describes on its homepage, it was this claim, among other factors, that led to an increase in awareness-raising campaigns designed to inform Muslim women about the rights guaranteed to them in the Quran and, thereby, to encourage new impulses for debate on the reform of Muslim personal law. In 2007, the BMMA was founded for this specific goal. The BMMA claims to be the first pan-Indian movement uniting Muslim women across the various existing castes and classes in Muslim Indian society. It is this organization that most explicitly states its reference to the global discourse of gender justice and equality in Islam in the formulation of objectives by declaring that BMMA strives to explore possibilities of reforming

personal laws currently based on male dominance (Schneider 2009). However, by increasingly going public and questioning established religious authorities and their knowledge production, these new Muslim actors generally face a lot of opposition and hostility (Zaman 2002, Sikand 2009, Khan 2017). It is important to note that conservative groups such as Bazme Khawateen in Lucknow, founded in 1937 under British colonial rule (see Tschalaer 2017), as well as some Islamic revivalist groups such as the Jamaat-e-Islami Hind, are also among the strongest proponents of a return to the normative sources of Islam and thereby contribute, perhaps in some cases unknowingly, to an increasing acceptance of the discourse of Muslim women's rights and gender equality within the framework of Islam. Vatuk argues that by using this markedly feminist rhetoric, "the leader of a religiously orthodox Islamist mass organization … essentially echoes what the leaders of so many much smaller organizations with longstanding and serious commitments to the pursuit of feminist goals, have been striving for two decades to communicate to the Muslim clerical establishment and the Muslim community at large" (Vatuk 2008, 518). By contrast, Irfan Ahmad (2008) uses the concept of Islamic feminism as an analytical category for what he calls a transformative movement within Islamist groups in India. In his view, this current grew stronger especially in the years following Jamaat founder Maududi's death in 1979 and was reinforced by the emergence of critical voices and a new generation that began questioning Maududi's neo-patriarchal and misogynist ideology. By the 1990s, these voices had become so strong that they had coined a new critical language that could be labeled "Islamic feminism."

Ever since the AIMWPLB was established in February 2005, attracting a great deal of media attention in India and beyond, a plurality of Muslim women's voices has become audible in India. Like many of their male counterparts, these women encourage believing Muslims to read and interpret the Quran for themselves and to find new ways to bring their religious belief into accordance with the prerequisites of modern life. And perhaps even more pronounced, Muslim women argue that the "modernization" and future of the Muslim minority heavily depends on the achievement of gender equality within the community and on the recognition of Muslim women as active Indian citizens by the majority community.

Conclusion

Abida Samiuddin and Rashida Khanam (2002) identify three stages in the Muslim women's movement in South Asia. The first phase of Muslim feminism, they argue, was characterized primarily by individual writings, poems, short stories, novels, autobiographies, journalistic articles, essays, and scientific theses, from which early forms of gender awareness and feminist ideas sprang in the late nineteenth and early twentieth centuries. These efforts helped spark a debate and made possible a greater degree of networking between women. The second phase of Muslim feminism in South Asia, in the second half of the twentieth century, was characterized by what might be called "everyday activism," for example, in the shape of individual innovations, the creation of social relief organizations or educational initiatives, and

also by the fact that Muslim women, at least from the middle and upper classes, gradually gained access to public life and modern professions. It was only during the third phase, which Samiuddin and Khanam see foremost in the present day, that an organized movement emerged and became more visible and much more confrontational than any previous forms of Muslim women's activism in South Asia.

The danger of such a unilinear conception of chronological phases of Muslim feminist articulation is that one tends to focus on only one aspect of social dynamism at any given time. Today, while the politicization of Muslim women and the creation of new legal spaces for their activism in India is very visible, a deeper and more careful examination reveals the emergence of new and very diverse forms of articulation. In films, poems, novels, and journalistic formats, for example, these describe new subjectivities of Muslim women in India that do not necessarily take place within a religious context or need to be justified by religion. Moreover, they often take place on the level of "everyday activism" or contribute to the organization of a social movement, which also need not necessarily be located within a religious framework. This striving for self-representation and self-definition is perhaps best exemplified by the BMMA, which Rafia Zaman describes as a "loose network of individuals and organizations working with the Muslim community, particularly women," all over India (Zaman 2013, 26). The BMMA approaches the question of reform of Muslim personal law by arguing for women's rights that are already seen as available in the Quran. In spite of this appropriation and adaptation of the global discourse of gender justice and equality in Islam, however, the BMMA's approach also allows for a "conceptual shift away from the frame of religion," as the question of Muslim women's marginality and perceived immobility is also "located into social, economic and developmental spheres" (Zaman 2013, 42). While legal matters such as the Shah Bano case and the ongoing controversy of Muslim personal law—including discussions about a reformed *nikahnama* (marriage contract) or, more recently, the heated debate about the Triple Talaq Bill (2017)—have been formative events for a whole generation of Muslim women in India, these issues are not always the primary concerns for today's young activists. In the words of Fathima Nizaruddin, a Delhi-based documentary filmmaker from Kerala, "the Shah Bano was the event which politicised my mother's generation, but my generation, we were politicized by the violence in Gujarat [in 2002]" (Schneider 2015, 144). It seems that some of the presently most active organizations and networks in India are currently beginning to think about agendas and topics that are more attuned to the aspirations of young Muslim women and girls in India, especially regarding better education and mobility.

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