

# (MIS)APPROPRIATED LIBERTY: IDENTITY, GENDER JUSTICE, AND MUSLIM PERSONAL LAW REFORM IN INDIA

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*“Muslims, particularly, are an undigested lump in the throat of Hindu professionals. They must be absorbed—that is Hinduized—or coughed up.”<sup>1</sup>*

*“The Religious Right is writing the obituary to imagination, imagination that is born of diversity, difference, dissent. And in India, it is doing it in and through the discourse of secularism.”<sup>2</sup>*

Muslim women in India often find themselves caught between loyalties to their religious or ethnic communities and a desire for greater freedom and equality as women within those communities.<sup>3</sup> They face significant constraints in reconciling these conflicting influences, and a great many of them do it in the context of poverty. As Zoya Hasan notes, “Muslim women are triply disadvantaged—as members of a minority, as

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<sup>1</sup> Granville Austin, *Religion, Personal Law, and Identity in India*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 15, 21 (Gerald James Larson ed., 2001).

<sup>2</sup> Ratna Kapur, *The Fundamentalist Face of Secularism and Its Impact on Women's Rights in India*, 47 CLEV. ST. L. REV. 323, 332 (1999).

<sup>3</sup> See, e.g., ZOYA HASAN & RITU MENON, THE DIVERSITY OF MUSLIM WOMEN'S LIVES 6-7 (2005) [hereinafter DIVERSITY OF MUSLIM WOMEN'S LIVES].

women, and most of all as poor women.”<sup>4</sup> On one hand, traditionalists within Muslim communities in India seek to universalize and ossify interpretations and practices of Islam that maintain women’s status as second-class members with far fewer rights than men. Resistance to conservative interpretations of Islam is cast as disloyalty and can call into question the very identity of a Muslim woman within her community. On the other hand, loyalty to religious interpretations and to principles that are clearly gender-biased calls into question Muslim women’s commitment to emancipation and gender justice.<sup>5</sup> These experiences are exacerbated for women who are economically impoverished.<sup>6</sup>

In spite of these opposing forces, Muslim women continue to struggle articulately for their rights at the crossroads and margins of Indian and Indian-Muslim society. Although they have made progress, Muslim women are still subject to a separate code of religious family law that, after

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<sup>4</sup> *Id.* The intersection of subordinations has been well theorized in the United States by Kimberlé Williams Crenshaw, Emma Coleman Jordan, Adrien Katherine Wing and others in the Critical Race Feminism movement. *See, e.g.,* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2003). Like Black women in the United States, Muslim women have been the targets of racialized sexual violence. Their interests have been subordinated to those of Muslim males, and when they have achieved success in the courts, that success has often been cast as retribution or punishment of Muslim males, thereby pitting women against men. *See, e.g.,* Kimberlé Williams Crenshaw, *Mapping the Margin: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242, 1250-63 (1991). Indeed, one could transpose the term “racial” or “race” for “communal” or “ethnic” here. This Article uses the term “racism” at certain moments simply because it is a familiar idiom in the West. However, theorists of communal relations in India have used other terms, most notably “ethnic,” to describe the difference between Muslims and Hindus. Neither race nor ethnicity (regardless of its broad definition) quite captures the religious dimension of difference between Hindus and Muslims. Where the members of the two communities share a language, customs, economic status, and history, labeling the two as separate ethnicities does not adequately reflect the narrowness of difference when it is only along the single dimension of religion. *See, e.g.,* ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA* (2003). For the most part, this Article uses the most common descriptor of religious difference that has come to signify Hindu-Muslim discord, which is “communalism.” Communal is defined in the Compact Oxford English Dictionary as “1 shared or done by all members of a community. 2 (of conflict) between different communities, especially those having different religions or ethnic origins.” COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH 195 (3d ed. 2005), available at [http://www.askoxford.com/concise\\_oed/communal?view=uk](http://www.askoxford.com/concise_oed/communal?view=uk).

<sup>5</sup> *See, e.g.,* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

<sup>6</sup> *See* DIVERSITY OF MUSLIM WOMEN’S LIVES, *supra* note 3.

being codified nearly seventy years ago, has never been reformed and is outdated. Under this code, Muslim women continue to be disadvantaged.<sup>7</sup>

This Article argues that, in order for Muslim women to be fully emancipated from an unjust and discriminatory family law, their unique position and experience at the intersection of gender discrimination and religious discrimination must be taken into account.<sup>8</sup> Proposals for reform that fail to reconcile communitarian religious loyalty and the importance of Muslim-Indian identity with individual gender rights will hold little appeal for the majority of Muslims.<sup>9</sup> This Article argues that Muslim Personal Law has become so interwoven with significance for Muslim identity that dismantling the law or even reforming it constitutes a threat to this identity. This is true regardless of the fact that the actual impact of the formal law on the everyday lives of Muslims may be minor.

Furthermore, the way in which Indian secularism operates reinforces religious identity and protects religion in the public sphere. Following the ancient maxim *sarva dharma sambhava*, or “all religions are valid,” India’s founding fathers wrote respect for all religions into the constitution. This allows each religious community to be governed by its particular set of family laws, while a universally applied secular law governs all other areas of the law. However, this respect for religious pluralism has come at the cost of many women’s rights.<sup>10</sup> It has meant that

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<sup>7</sup> See, e.g., Indira Jaising, *Gender Justice and the Supreme Court*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT IN INDIA 288, 298-99 (B.N. Kirpal et al. eds., 2000).

<sup>8</sup> It should be noted that this Article continues to place an emphasis on formal laws as one avenue of relief from subordination. Many feminist political and legal theorists have criticized such reliance or faith in the law. This Article recognizes the limits of the law to impact social norms and effect substantial change in the lives of women, and takes up these considerations in the final section. For an example of this critique in the Indian context, see DIVERSITY OF MUSLIM WOMEN’S LIVES, *supra* note 3, at 4 (critiquing the focus on Muslim Personal Law); NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW 3-9 (2004) (critiquing the reliance on “rights” and the law in effecting positive change).

<sup>9</sup> See Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women’s Rights in India*, 23 BERKELEY J. INT’L L. 201 (2005); Vrinda Narain, *Women’s Rights and the Accommodation of “Difference”*: Muslim Women in India, 8 S. CAL. REV. L. & WOMEN’S STUD. 43, 50-58 (1998); Vijayashri Sripathi, *Human Rights in India—Fifty Years After Independence*, 26 DENV. J. INT’L L. & POL’Y 93, 132 (1997).

<sup>10</sup> Not all Muslim women are impacted in the same way by the Personal Laws. For example, poor women who have less ability to bargain for better dowers or resist divorce, as well as women who are less able to avail themselves of the law, are clearly disparately

Muslim Personal Law remains in the limbic state of being subject both to state intervention, through codification and enforcement, as well as non-intervention, as part of the private religious sphere of Muslims. This Article explores this impasse and its effects on formal gender injustice and inequality in the areas of dower, marriage, divorce, and maintenance under Muslim Personal Law.

In order to eliminate these inequalities and injustices encoded in the law, a number of solutions have been advanced. This Article evaluates the two most enduring solutions. First, there has been a recurrent call for the passage of a uniform civil code (UCC) that would either supplant personal laws entirely, resulting in the abolishment of state recognition of religious law, or offer an “opt-in” alternative, under which each woman can choose (at the time of her marriage or in later litigation of family law issues) to have the union governed by either secular or religious law. Support for the UCC has come from the Hindu Right, which demands the abolition of personal laws generally. Support has also come from secular feminists both within and outside of India, including Muslim secular feminists, who generally prefer the half-measure of an opt-in code. The second solution, offered by Muslim traditionalists, calls for a more faithful and strict application of existing Muslim law. Proponents claim this is both just and protective of women.

Neither the secular feminist UCC nor the traditionalists’ solution is adequate to provide Muslim women the rights they deserve.<sup>11</sup> The secular feminist approach of an opt-in UCC fails to recognize certain key limitations. First, it assumes that a robust secularism exists in India and would produce a code that operates neutrally across all religions. Second, it assumes that there is political will for gender justice, as opposed to, for instance, gender protectionism based on patriarchal notions of

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impacted by formally unequal laws that they cannot mitigate. This is true of all Indian women regardless of which personal law they are subject to and it is often the case that poor Hindu and Muslim women have more in common with each other than with wealthier women of the same religion. See, e.g., ZOYA HASAN & RITU MENON, *UNEQUAL CITIZENS: A STUDY OF MUSLIM WOMEN IN INDIA* 4-8 (2004).

<sup>11</sup> The Hindu Right’s solution of abolishing personal laws and replacing them with a “secular” code has been shown to be a thinly disguised attempt to assimilate minorities. As such, feminists have abandoned it as a wholesale approach and it is therefore not treated with any depth in this Article. Rather, the focus of this Article is on the most popular feminist version of the UCC solution, an opt-in code. See Nivedita Menon, *Women and Citizenship*, in *WAGES OF FREEDOM: FIFTY YEARS OF THE INDIAN NATION-STATE* 244 (Partha Chatterjee ed., 1998).

womanhood.<sup>12</sup> An examination of the influence of the Hindu Right in Indian politics and on secular institutions reveals that neither of these assumptions is warranted. Therefore, a “secular” code would be unlikely to operate neutrally or give women the kind of equality and justice they desire. Moreover, a secular opt-in marriage law already exists. Examining this law reveals the limits of Indian secularism and its vulnerability to majoritarianism.<sup>13</sup> The opt-in UCC approach also fails to recognize the limits of formal rights and makes assumptions about the effects of these rights that may not be defensible.

Traditionalists, on the other hand, take the position that Islamic law already adequately provides for women’s rights, and that all that is required is more robust enforcement. Relying on the divinity of the Islamic law, traditionalists further argue that human reform of the law is unadvisable, if not forbidden.<sup>14</sup>

These two dominant options pose a difficult choice between a secular code that requires women to abandon religion and acceptance of a traditional patriarchal construction of religious law. This Article offers a third approach—albeit also a half-measure—to improving Indian-Muslim women’s lives. This Article argues for an intermediate move that couples a renewed commitment to personal law reform—through direct community action and with the support of secular feminists—with the drafting of a mandatory Uniform Civil Code with a feminist focus advocated for by secular feminists. This dual approach, inspired by the grassroots efforts of Muslim women in India and worldwide,<sup>15</sup> pushes both the Muslim traditionalists and the state to move women’s rights forward. It is more likely to succeed because it creates pressure both within the community and on the state to change, but does not threaten the edifice of personal laws, at least in the short term. This approach, which argues that religious laws are flexible and capable of being just, preserves the role of religion in family law while challenging religion to meet women’s substantive justice demands. It is a solution that has not been seriously considered by secular feminists who assume that religious laws can only be patriarchal and

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<sup>12</sup> See generally Brenda Cossman & Ratna Kapur, *Secularism’s Last Sigh?: The Hindu Right, the Courts, and India’s Struggle for Democracy*, 38 HARV. INT’L L.J. (1997).

<sup>13</sup> *Id.*

<sup>14</sup> See *infra* notes 219-221 and accompanying text.

<sup>15</sup> See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1399-1472 (2003) (discussing the work of Women Living Under Muslim Laws and its efforts to redefine Muslim identity).

unjust—a curious mirroring of the position of religious traditionalists who make similar claims of immutability. Further, this approach recognizes that personal law is an important element of Muslim identity and that attempting to remove it would be considered a threat to the community. At the same time, it challenges Muslims and other religious minorities to commit to the secular nature of the Indian State and to move toward a universally-applied code that realizes the social justice concerns of Islam. Though the code may not be a religious document, if properly drafted without communal bias, it can and should be construed as not conflicting with Islamic norms and, therefore, as legitimate.

Before discussing the legal reform proposals, two contextual considerations require elaboration in Part I. First, in order to explain why personal law is such an important symbol to Muslims in India, so much so that any attempt to reform it by the state has been met with strident and successful resistance, a genealogy of a specifically “Muslim” identity is key. The purpose of tracing this history is to illuminate how religious legal concessions made by the British in order to create a separate group became entrenched as the bedrock of Muslim identity in the Indian State. Moreover, this genealogy demonstrates how the independence movement later used religion to reinforce the separation of Muslims from “Indians.” It also shows how Muslims began to see themselves as a separate political identity group with specific, common needs for representation and security in a state increasingly defined and created by majoritarian discourse. The genealogy also explains, to some degree, the reasoning behind traditional Muslims’ unwillingness to shed the personal law system entirely.

A second genealogy, that of Indian secularism, helps to explain how secularism in India has been able to accommodate religious law and practice in ways that reinforce separation and make it difficult to enact a civil code that supersedes personal law. Moreover, it puts the role of religion in public life into context and underscores the strikingly different attitudes regarding secularism of Indian jurists and constitutionalists as compared to their American counterparts. This second genealogy, consequently, explains the different evolutions of jurisprudence regarding religion in the public sphere.

With this historical background in place, Part II lays out the black letter of Muslim Personal Law. While Muslim Personal Law covers a number of areas, this Article focuses on the most contentious: dowry, marriage (including polygamy), divorce, and maintenance. One important reason for laying out the law in this manner is that customary practice is too often mistaken for law, even when the two conflict. By clarifying what the law actually is, rather than assuming that it is unjust, this Article gives the

law a more even-handed treatment than it has previously received.<sup>16</sup> This Article concludes that although Muslim Personal Law is inevitably gender-biased, as can be expected of any family law codified seventy years ago, it is amenable to reform, as evidenced by changes to law in other Muslim countries. However, reform of the personal law is only one option in an array of competing options available to the Indian legislature, the judicial establishment, and to Muslims.

Part III of this Article analyzes the two main solutions to Indian-Muslim women's inequality as outlined above: an opt-in UCC and the "better adherence/application" approach of Muslim traditionalists. By analyzing the underlying assumptions made by proponents of these solutions, this Article shows that the assumptions are unwarranted and ultimately render the solutions unworkable. In their place, this Article presents a different solution that calls for a dual approach combining a movement towards gender justice in both religious and secular communities.

Finally, Part IV considers the place of law reform in feminist activism and the arguments against investing energy in law reform. First, feminist activists and scholars argue that the black letter law is limited in its ability to genuinely effect transformation in society. The second argument concerns the (im)possibility of "women" as coherent legal subjects and the desirability of inscribing the boundaries and enshrining the definition of "womanhood" through and in the law. Both of these arguments call into question the legitimacy of legal reform and its effects. While recognizing the importance of these arguments, this Article argues that law reform remains a significant avenue by which to broaden the scope and change the negative effects of the rules governing women's lives.

Managing conflicting allegiances of religion and gender in a political climate of hostility is not easy. Nevertheless, the rights of Indian Muslim women should not be sacrificed in order to preserve a group identity, whether that group is "women" or "Muslims." This Article presents a solution which makes such a sacrifice unnecessary. More effective than a single solution that forces Muslim women to make a seemingly impossible—and certainly unfair—choice is an approach combining movements for internal reform: pressure from Muslims by Muslim women and pressure from a feminist-led movement towards a uniform civil code that preserves rights and distributions of wealth benefiting women. By bringing both sides of the debate substantively

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<sup>16</sup> See generally *supra* note 9 and accompanying text (these authors assume that the Muslim Personal Laws are uniformly discriminatory to women).

closer, women will have less difficulty reconciling their intersectional position.

## I. A GENEALOGY OF IDENTITY AND SECULARISM IN INDIAN LAW

### A. Muslim Identity and Personal Law: Personal Law as Muslim Identity

The following section traces the history of Muslim identity, beginning with the codification of Muslim law by the British from the independence movement era until partition. The idea of Muslims as different from other Indians, and the role of law in creating that identity, has its genesis in the Mughal period which lasted from the sixteenth to the mid-nineteenth century. When Muslim rule was introduced in India during this time, the legal system was bifurcated into public and private spheres governed by two distinct traditions of law: the former by Islamic and temporal law and the latter by the particular religious law of the parties.<sup>17</sup> The Mughal policy of allowing non-Muslims to be governed by their religious family and inheritance law was continued by the British, who extended it to all religious communities including Muslims.<sup>18</sup> Thus, in

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<sup>17</sup> ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY 60 (1992); Rajeev Dhavan & Fali S. Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT IN INDIA 256, 257 (B.N. Kirpal et al. eds., 2000). Pre-colonial India was not a unified state ruled by a single Emperor. Rather, it was a collection of princedoms with both Hindu and Muslim rulers governing a population diverse in faith, language, and custom. While the Mughal monarchs acknowledged the supremacy of *shari'a*, they also used the *qanun-i-shahi*, or the law of sovereigns, to extend their temporal power. As minorities ruling a very different majority, they allowed Hindus and other religious communities to be ruled by their own personal laws (family law) while reserving to themselves the right to impose Islamic civil and criminal laws and the *qanun-i-shahi* without regard to religious difference. Thus, for Muslims, there was no distinction between the private and the public realms; with regard to the law, they were subject to Muslim law in all spheres of their lives. For all other religious communities, however, by the time the British became a permanent ruling presence in India, the distinction between personal laws and public law was already in place. See AYESHA JALAL, SELF AND SOVEREIGNTY: INDIVIDUAL AND COMMUNITY IN SOUTH ASIAN ISLAM SINCE 1850, at 140 (2001) [hereinafter JALAL, SELF AND SOVEREIGNTY].

<sup>18</sup> The first attempt by the British to sort out the legal morass of religious and temporal laws came from the privately-owned mercantile East India Company. See PARASHAR, *supra* note 17, at 61-63. The Company began by setting up courts in certain towns to administer justice within their "factories." Eventually, under charter from King George I, they set up mayoral courts, although they had no jurisdiction over Indians. *Id.*



British India, all subjects were governed by secular public law and religious private/personal law. Through this practice, law and religious identity have remained closely connected. However, the notion that Muslims were of a different ethnicity altogether did not develop until after the Mughal period. It arose from the enumeration of Muslims as a separate category in the census, the creation of separate electorates, the codification of religious laws for India's religious communities, and the administration of these laws by the colonial judiciary during the independence movement.<sup>19</sup> In fact, this separation by the British was exploited by both Congress and Muslim leaders during the anti-colonial struggle, thereby consolidating a separate Muslim identity with both religious and political dimensions.

Nevertheless, one of the most important steps toward legal recognition of difference was the process of codifying religious laws. Codification of religious law was a complicated undertaking. Although there were textual sources for both Hindu and Muslim law before the advent of British authority over the courts, a dizzying array of customary practices complicated the matter of finding the law that should be applied in any particular case.<sup>20</sup> The complexities of such variant practices and norms of

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Finding the local alternatives inefficient and unpredictable, people outside the factories began resorting to these courts, and the Company obtained the right to civil administration from the Mughal ruler in Delhi. *Id.* Believing that the efficient administration of justice was in the colonists' economic interest, Warren Hastings, the first Governor-General of the East India Company, submitted a plan in 1722 for the establishment of both civil and criminal courts. *Id.* at 62. With this move, all civil and criminal matters were brought under the control of the British. *Id.* at 62. However, setting up courts with jurisdiction did not resolve the issue of what substantive law was to be applied to the various disputes that arose. Article xxiii in Regulation II of 1722 "explicitly saved for the Hindu and Muslim communities the right to apply their own religious laws in the matters of inheritance, marriage, caste, and other religious usages and institutions." *Id.* at 62. However, it shed no light on what precisely that law was.

<sup>19</sup> The ideological creation of Muslim Personal Law has had the effect of creating Indian-Muslims. This is not to say that the Indian-Muslim community is monolithic. On the contrary, there are several groups that jockey for position within each sub-community, there are sectarian divisions between Sunnis and Shi'as, and there is a sizeable educated Muslim contingent of staunch secularists. Indeed, the varied nature of Indian-Muslims creates a certain amount of difficulty in speaking about "Indian-Muslims" at all. However, this Article is primarily concerned with those elements of the community who are most visible, hold the most political leverage, and are able to block reform. Such elements would include the All-India Muslim Personal Law Board, Ahl i-Hadith, and other conservative groups.

<sup>20</sup> See Michael R. Anderson, *Islamic Law and the Colonial Encounter in British India*, in INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER 165, 176-78 (David Robb & Peter Robb eds., 1993), available at <http://www.wluml.org/english/pubs/pdf/occpaper/OCP-07.pdf>.

several religious communities were forcibly simplified by the British into codes that could then be applied by judges in a more systematic manner.<sup>21</sup> However, ignoring the local and customary practices meant that such codification of the so-called “personal law” created a sizeable gap between the reality of social practices and the code.<sup>22</sup> In other words, the laws that the codes purported to fix into a coherent form were non-normative. Even so, the process of codification resulted in the Muslim Personal Law and the Hindu Code which British judges began to apply to their respective religious communities.<sup>23</sup>

There were politically expedient reasons for the British to accommodate Hindu and Muslim personal laws and custom, rather than overriding them with English liberal, universalist legal norms.<sup>24</sup> First,

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<sup>21</sup> *Id.*

<sup>22</sup> See JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 145 (discussing the Punjab and North Western Frontier districts). While the *dharmashastras*, which are the Hindu religious laws, were being codified, Muslim laws were also transmogrified from a law that applied in both the public and the private realms—indeed, a legal system—into a law that operated only in the private sphere of family. Although, in reality, adherence to the *shari'a* has been heavily mediated by local custom and legal norms (with the latter often taking precedence), *shari'a* is not understood as a *choice* for Muslims. As such, relegating *shari'a* to family and “personal” matters presents an odd incongruence: as a divinely decreed law, it is meant to be obeyed in every field including commerce, war, and statecraft, and not just in marriage, inheritance, and family. The question of what *shari'a* contains and its interpretation is another matter entirely, and it has been common for local custom to be legitimized via some grounding in *shari'a*. See ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 11 (1990).

<sup>23</sup> The fact of customary practices often superseding the code was dealt with by judges in a practical manner: if custom could be shown, it prevailed. JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 152. Thus, after codification “the problem was not so much discovering what Muhammadan Law was as much as discovering the extent to which it was followed.” *Id.* One example of this, as Jalal notes, is in the predominance of customary practice among the tribes of the North West Frontier provinces, who are governed by their own tribal laws. These were often determined by family, rather than by Islamic law of which they had very little knowledge. The same was true for Punjabi Muslims who were more likely to be governed by their own custom than by *shari'a*. *Id.* at 153. Take, for instance, the Punjab Laws Act of 1872, which carves out agricultural property from the domain of *shari'a*. *Id.*

<sup>24</sup> For instance, the British were aware that reforms that cut against Indian sensibilities could result in strong resistance. Despite their willingness to “preserve” the religious law of its subjects, the British began a set of legal reforms that imported into the communitarian culture of India a liberal universalism that went against the grain of most Indians. A series of enactments such as the Freedom of Religion Act that allowed a convert from Hinduism to inherit family property, the Gains of Learning Act that allowed an

because Hindu and Muslim laws in their entirety are considered sacred regardless of whether or not they are actually followed,<sup>25</sup> the act of carving out the personal laws as “religious” law—as opposed to the other, equally religious parts, such as criminal law—was an important concession because it preserved those areas of the law that were considered important to identity.<sup>26</sup> Second, and more importantly, because the British did not confer the rights of citizenship to their subjects, personal laws increasingly became a way to press for civil rights.<sup>27</sup> One consequence of using personal law as proxy for citizenship rights was the beginning of a slow transformation of the Muslim populace, which had never before seen itself as a *nation* apart from their Hindu compatriots, into a distinct interest group.<sup>28</sup> Nevertheless, there remained a tension between the liberal notions of nation that separated Hindus and Muslims into separate peoples and the communitarian realities of their interaction and interdependence.<sup>29</sup> Indeed, Muslims at the turn of the century were far less likely to see themselves as part of an overall Muslim nation with common interests dictated by religious affiliation. Their politics were to a much greater extent determined by their local context than by their religious affiliation.<sup>30</sup>

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individual educated by the joint family to keep the fruits of education for himself, and the Widow Remarriage Act, eroded the rights of the joint family and privileged individuals over groups. See PARASHAR, *supra* note 17, at 71-72.

<sup>25</sup> *Id.* at 63.

<sup>26</sup> See generally JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 144.

<sup>27</sup> See *id.* at 141.

<sup>28</sup> *Id.* at 153. As Anderson notes:

Under the colonial state, the category of “Muslim,” or often “Muhammadan,” took on a new fixity and certainty that had previously been uncommon. In theory, each individual was linked to a state enforced religious category. Identities that were syncretic, ambiguous, or localised gained only limited legal recognition; for the most part, litigants were forced to present themselves as “Muhammadan” or “Hindu”. Courts repeatedly faced the problem of accommodating the diversity of social groups within these two categories.

Anderson, *supra* note 20, at 181-82.

<sup>29</sup> See JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 153.

<sup>30</sup> *Id.*

With the advent of the nationalist movement that sought to rid India of colonialism, the distinctions and the divide between Hindus and Muslims sharpened. Early on, the moneyed classes of Muslims (particularly in Bengal) called for unified representation of "Muslim" interests.<sup>31</sup> Part of the reason for this increasing vociferousness was a reaction to the emerging nationalist rhetoric of the Congress movement which categorized Indian interests into majority and minority.<sup>32</sup> Moreover, there was a concerted shift to exclude Muslims through a construction of "Indian" identity in a Hindu mold, an unfortunate trend that has followed Muslims into the present.<sup>33</sup> The pressure placed on the British to protect Muslim interests, such as they were, resulted in the creation of separate electorates along communal lines in the Government of India Act of 1909, more commonly known as the Minto-Morley Reforms.<sup>34</sup> This watershed moment's significance cannot be overstated. With separate electorates, Muslims became a legally-recognized minority.<sup>35</sup>

The upshot of the creation of separate electorates was that Muslim attempts to hedge against the majoritarian impulse in the nationalism of Congress and to secure rights were seen as an assault against the majority and as a departure from the umbrella of Indian identity.<sup>36</sup> However, amid rising Hindu nationalism, the Muslim leadership perceived that the Hindu majority's articulation of *swaraj*, meaning self-rule, with its heavy emphasis on religious motifs, left them three choices: to leave their homeland entirely for Muslim lands; to press for recognition as a separate nation; or to assimilate and become "Hinduized."<sup>37</sup> The independence movement's mainstream leadership was clear about their preference. They

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<sup>31</sup> *Id.*

<sup>32</sup> Ayesha Jalal, *Exploding Communalism: The Politics of Muslim Identity in South Asia*, in NATIONALISM, DEMOCRACY & DEVELOPMENT: STATE AND POLITICS IN INDIA 76, 90-95 (Sugata Bose & Ayesha Jalal eds., 1998) [hereinafter Jalal, *Exploding Communalism*].

<sup>33</sup> See JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 258.

<sup>34</sup> *Id.* at 160.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 80-90.

<sup>37</sup> See Jalal, *Exploding Communalism*, *supra* note 32, at 258. See also PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD 74-75 (1986). Chatterjee discusses the thought of Indian nationalist poet Bankimchandra Chattopadhyay (1838-1894) who believed that "the new national religion had to be 'based on a purified "Hindu" ideal.'" *Id.* at 75.

wanted Muslims to commit wholeheartedly to the national movement and give up any focus on lands beyond Indian borders.<sup>38</sup>

As the independence movement progressed, its leadership claimed that Muslims had a divided loyalty, because their sacred lands lay outside of India and because they belonged to a pan-Islamic community of Muslims (the *ummah*). This was used as justification for reconstructing an indigenous Indian-Muslim population, descended from converts and intermarried settlers, into an alien Other.<sup>39</sup> This racism will be addressed more fully below in the discussion of the Hindu Right and failing secularism. It is mentioned here to point out that the accretion of the Indian-Muslim identity as something apart from the Hindu and even “Indian” identity, as well as the development of Muslims into a minority, occurred and was constructed by and through discourses of difference engaged in by the British, the Hindus, and the Muslims. The common perception that Muslims alone set themselves apart is an incomplete and inaccurate account of the evolution of Indian-Muslim identity.

The First World War pitted Britain against the Muslim Ottoman Empire—the center of the Islamic world at the time—and consequently jeopardized Indian Muslims’ cooperation with the British.<sup>40</sup> The question became whether the loyalties of Muslims should lie with their co-religionists or their colonial rulers.<sup>41</sup> There was no uniform response. Certain Muslim factions chose to continue their support of the British as a counterweight to a more threatening Hindu majority.<sup>42</sup> Others concluded that supporting the British would pit them against their fellow Muslims, and chose to ally more closely with the Congress-led independence movement even while supporting the Ottomans.<sup>43</sup> This ecumenicalism was encouraged by British atrocities such as the events in Punjab in 1919, when the colonial government opened fire on peaceful protestors, killing many and imprisoning many more on sedition charges.<sup>44</sup>

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<sup>38</sup> See Jalal, *Exploding Communalism*, *supra* note 32, at 96-97.

<sup>39</sup> *Id.*

<sup>40</sup> See JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 196.

<sup>41</sup> *Id.* at 200-03 (discussing the *khilafat* movement and the forging of Hindu-Muslim unity in the anti-imperialist struggle).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> As Jalal describes:

Unfortunately, communal discourse had become too entrenched to abandon by that time. With each side vilifying the other, the 1920s saw increases in communal fractiousness as well as internecine, sectarian fighting.<sup>45</sup> However, the decade was not devoid of gains for Muslims. For one, the Shariat Act was passed, ending courts' reliance upon and codification of local custom where it contradicted the law of the *shari'a*.<sup>46</sup> While this may not have been a universally beneficial legal achievement for Muslims, it was a further realization of the separation between Muslims and Hindus along "national" lines that had begun earlier, empowering Muslims to take ownership of their personal law instead of having it interpreted by the British.

The late 1930s saw the further development of the idea of a Muslim nation, which had hitherto been primarily a discursive tool of differentiation rather than a reality. A variety of territorial schemes were entertained in reaction to the Congress's increasing willingness to carve Muslims out of power even in regions in which they were a majority.<sup>47</sup> The various schemes envisioned are beyond the scope of this Article; it suffices to say that the frontrunner was a two-nation idea that envisioned a separate Muslim territory.<sup>48</sup> During this period, Muslim leaders continued to

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Rumors that the raj was at an end and the bazaars open to plunder saw villagers from the neighboring districts flocking to the city. Ignoring the *Seditious Meetings Act*, announced in the early hours of the morning of April 13, 1919, thousands gathered in Jallianwalla Bagh for a meeting to condemn government repression. As many as 379 were brutally gunned down and some 1200 injured when Brigadier General Dyer ordered his troops to fire without forewarning the crowd. The atrocities in Amritsar and Gujranwala, which was subjected to indiscriminate aerial bombing, bolstered the Gandhian non-cooperation movement in the province.

*Id.* at 205.

<sup>45</sup> *Id.* at 247-53 (discussing the fighting between Arya-samajists and Muslims and among Muslims, especially against the Qadianis).

<sup>46</sup> See PARASHAR, *supra* note 17, at 146-48 (discussing the Muslim Personal Law (Shariat) Application Act, 1937).

<sup>47</sup> See JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 388-400. For an overview of the struggle between the All India Muslim League and the Congress Party to represent Muslim interests in pre-partition India and the complicated problem of balancing provincial interests with those of the "centre," see SUGATA BOSE & AYESHA JALAL, MODERN SOUTH ASIA: HISTORY, CULTURE, POLITICAL ECONOMY 140-45 (2004).

<sup>48</sup> In the 1940 meeting of the All India Muslim League in Lahore, the "Pakistan Resolution" was passed calling for a partition of India to provide a "homeland" for India's

demonstrate disunity, using religion to legitimate their own positions while de-legitimizing others.<sup>49</sup> At the same time, Muslims failed to agree on the finer points of what a separate state would actually look like.<sup>50</sup> These divisions notwithstanding, the exclusion of Muslims from cabinet posts after their good showing in the 1945-46 central and provincial elections helped create more of a consensus behind the notion of a separate territory, a notion that was now supported by the British.<sup>51</sup>

The 1947 Partition of India was among the most traumatic moments in the region's history.<sup>52</sup> There is no doubt that much of the violence that accompanied the transmigration of Muslims and Hindus from one state to another was communal in nature<sup>53</sup>—an animus that was neither born at the moment of partition nor unaided by a number of parties. Religious difference as cultural difference had been deployed by the British to enumerate and classify its subject population.<sup>54</sup> The institution of separate electorates along religious lines and the codification of personal laws—developments supported by upper-class Muslims—further solidified this separation.<sup>55</sup> Additionally, the nationalism of the Congress party, which attempted to include all of the various minorities while both retaining the rights of the majority and making clear use of a religious vernacular, further consolidated the use of religion as a major marker of difference.<sup>56</sup>

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Muslims. See C.H. PHILLIPS ET AL., *THE EVOLUTION OF INDIA AND PAKISTAN, 1858 TO 1947: SELECTED DOCUMENTS* 354-55 (1962); PETER ROBB, *A HISTORY OF INDIA* 201 (2002).

<sup>49</sup> See JALAL, *SELF AND SOVEREIGNTY*, *supra* note 17, at 247-53.

<sup>50</sup> GOWHER RIZVI, *LINLITHGOW AND INDIA: A STUDY OF BRITISH POLICY AND THE POLITICAL IMPASSE IN INDIA, 1936-43*, 82-85 (1978).

<sup>51</sup> See BOSE & JALAL, *supra* note 47, at 148.

<sup>52</sup> *Id.* at 157.

<sup>53</sup> *Id.* However, it is important to underscore here that the victims of this violence were primarily women. As Jalal notes with irony, the first experience of citizenship in a state for many women was tainted by rape, abduction, and murder. This theme of women's victimization is picked up further on in this Article. It is mentioned here simply to show that while there were communal tensions amongst Hindus, Sikhs, and Muslims at the frontiers of the new states, one group bore the brunt of that violence without regard to their religious affiliation and as such there is a commonality among women in the subcontinent even if it is a thin one. See JALAL, *SELF AND SOVEREIGNTY*, *supra* note 17, at 562.

<sup>54</sup> See *supra* notes 17-30 and accompanying text.

<sup>55</sup> *Id.*

<sup>56</sup> See *supra* notes 31-51 and accompanying text.

## B. Symbols of Honor, Symbols of Nation: Women, Identity, and the Legacy of Violence

This Article's account of the separation of Muslims from the "norm" of Indian identity has not been a gendered account. It focused more on the discursive formation of a fantasy character or identity defined singularly by Islamic affiliation rather than the story of any particular Muslim or group of Muslims. Moreover, regardless of how important and alluring the fantasy of a discrete Muslim was to the political players during partition, the story of Muslim women is certainly not adequately told by such politically focused histories; indeed, such histories preserve the silence surrounding the ways in which partition violence and rhetoric was enacted upon women's bodies.

Ritu Menon and Kamla Bhasin's study of women's experiences of violence during partition provides an important corrective to traditional histories of the period. Instead of concentrating on the aggregate characteristics of the half million dead and twelve million displaced during the partition of India,<sup>57</sup> they focus on the stories of the large number of women who were abducted, those who were forced to convert, and the thousands who were raped and killed.<sup>58</sup> According to government estimates, 55,000 Muslim women were abducted into the Indian State and 33,000 Hindu and Sikh women were abducted into Pakistan.<sup>59</sup>

It is important to understand the ways in which poor Muslim women have been made into symbols of honor by their community and objects through which punishment can be visited upon that community by hyper-patriarchal fundamentalist organizations. As Jalal notes, "[a]ll said and done, the commonality of masculinity was thicker than the bond of religion. There were men in all three communities who delighted in their momentary sense of power over vulnerable women; such was the courage of these citizens of newly independent states."<sup>60</sup>

Those women who survived the atrocities of partition and remained on the "wrong side" of the border were subjected to the horror of being

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<sup>57</sup> Swarna Aiyar, "*August Anarchy*": *The Partition Massacres in Punjab, 1947*, 18 S. ASIA: J. S. ASIAN STUD. 13, 13 (1995).

<sup>58</sup> RITU MENON & KAMLA BHASIN, *BORDERS & BOUNDARIES: WOMEN IN INDIA'S PARTITION* (1998). Unfortunately, they do not provide any insight with regard to gendered violence committed against men during partition.

<sup>59</sup> *Id.* at 70.

<sup>60</sup> See JALAL, *SELF AND SOVEREIGNTY*, *supra* note 17, at 561.



“repatriated” to their proper country long after their families had given them up for dead or abandoned them, without regard to the fact that many had chosen to stay with their abductors.<sup>61</sup> Abducted women from all three communities were not universally welcomed home to their families and communities of origin. Once returned, many were seen as polluted and irreparably broken. The insistence of nationalist parties on either side that the “property” that was “their” women be returned reduced women to symbols of nationalism: “in the classic transposition, the woman’s [body] became the body of the Motherland (Woman-as-Nation) violated by the marauding foreigner.”<sup>62</sup> By extension, then, the boundaries of women became the borders of the nation. Muslim women have played the role of representatives of the Muslim nation and as such, during partition and after, they have been targeted as an alien within the Motherland—a Muslim woman is, therefore, never simply an Indian woman but the means of procreation by the “foreign.”<sup>63</sup>

With the advent of independence, the new Indian state had to contend with sizeable minorities that remained within its borders. Both the majority and the minorities continued to use religion to define themselves as they had been defined in the previous decades and to press for separate rights based on religious difference.<sup>64</sup>

Three points from the foregoing discussion need to be underscored. First, there is a tendency to lay the blame for the partition of India on Muslims. The common perception is that either Muslims were manipulated by the British into their separatism, or they saw themselves as so different from other Indians that they could not share a homeland. In either case, a consequent suspicion exists that Muslims who remain in India are disloyal and always harbor a desire to escape to Pakistan. The prejudice of these ideas continues to color the experience of Indian-Muslims.<sup>65</sup> The second

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<sup>61</sup> MENON & BHASIN, *supra* note 58, at 70, 90, 104-05.

<sup>62</sup> *Id.* at 109; *see also id.* at 63-78.

<sup>63</sup> *See, e.g.,* Ram Puniyani, *India: “Our” Women, “Their” Women: Communal Ideology and Women*, SOUTH ASIA CITIZENS WEB, Aug. 25, 2005, <http://www.sacw.net/DC/CommunalismCollection/ArticlesArchive/RamPuniyani15082005.html>.

<sup>64</sup> *See generally* JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 558 (discussing the violence of partition and the attacks on Muslims in Delhi).

<sup>65</sup> An interesting commentary on the situation of Indian-Muslims has come from the movie industry. In the film *Anwar*, a young Muslim man escaping from the tragedies of his past takes refuge in an abandoned temple. A young boy, seeing him pray, reports him as a terrorist to the local Hindu nationalist party. The matter then escalates into a full-scale gathering of Hindu fundamentalists shouting nationalist slogans and threatening Anwar with

point is that, for traditional Indian-Muslims, the Muslim Personal Law has become a key symbolic element of identity and an important political right which is guarded vigorously whenever attempts at reform are made. The third is that women, as bearers of community honor and identity, occupy a specific space within religious communities, defined by identity politics and the violence of partition. This means that at present, communal violence against women is a continuing threat, following these same patterns.

### ***1. After Independence: Secularism, the Constitution, and Religious Identity***

An examination of the historical context and operation of Indian secularism is required in order to understand the UCC/Personal Law debate. India's approach to secularism underscores the tension between group life and rights and individual rights. Additionally, because of Indian secularism's willingness to accommodate religion in the public sphere, it permits religion and religious racism to seep into the public secular domain and erode secular institutions. This latter point is addressed further in the section on the UCC below. This section traces the tension between groups and individuals and briefly touches on how even secular laws in India have some religious content.<sup>66</sup>

India is a country with plural traditions, histories, religions, and languages all vying for recognition and respect.<sup>67</sup> Religion plays a particularly important role in the everyday public and private lives of most

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death. In a particularly interesting scene, the police bring the Muslim priest of the community to speak to the suspected terrorist. The Imam, or priest, tells Anwar that all the Muslims have hidden in their homes. If he harms anyone or the temple, it will be their death. His best course is to stay in the temple and kill himself, or the community will be slaughtered. In any event, he advises Anwar that he will not survive. In another scene, Anwar's Hindu friend Udit asks him why Muslims consider themselves different and Anwar replies that India failed to deliver on the promise of equality to Muslims and that every Muslim in India is considered a terrorist after 9/11. This is a peculiar and interesting statement reflecting how acts done by Muslims in any quarter of the world can turn into an indictment of Indian-Muslims. ANWAR (Dayal Creations 2006), *trailer available at* <http://www.indiaglitiz.com/channels/hindi/trailer/8897.html>.

<sup>66</sup> It can be argued that all secular laws derive from earlier religion-based morality and norms, and as such they are all "tainted." However, this Article argues that, specifically with regard to family law, there is a bias towards Indian "native" religions, which is demonstrated in anti-conversion provisions. See *infra* notes 197-208 and accompanying text discussing the Special Marriage Act, 1954.

<sup>67</sup> See SHASHI THAROOR, *INDIA: FROM MIDNIGHT TO MILLENNIUM* 7-13 (1997).

Indians.<sup>68</sup> The framers of India's Constitution had to take this central role of religion into consideration when settling the matter of how secularism would operate in the newly independent state.<sup>69</sup> Given the political role that religious identity had played in the decades before independence, it was clear that assimilative secularism that places religion in the private sphere, as in the American model, would not have had much appeal, let alone probability of success.<sup>70</sup> Rather, the framers sought to accommodate religions equally. In other words, instead of attempting a neutral position towards religion in general, India adopted neutrality among the various religions.<sup>71</sup> The sensitivity towards religion is demonstrated by the fact that, in spite of secularism's importance to the framers of the Constitution, they declined to put it into the Constitution itself. As one prominent member of the constituent assembly remarked:

The omission of the term "Secular" or "Secularism" is not accidental but was deliberate. It seems—that the Constitution Makers were apprehensive that, if the words "Secular" and "Secularism" were used in suitable places in the Constitution, they might unnecessarily introduce by implication the anti-religious overtones associated with the doctrine of secularism as it had developed in Christian countries.<sup>72</sup>

Unfortunately, such solicitude towards religion has meant that the Indian courts have continued in the British vein of adjudicating religious personal laws, which often require them to interpret religious scripture and norms.<sup>73</sup> Furthermore, there is no bar to the state's promulgation of reform within the religious laws.<sup>74</sup> India's ameliorative secularism thus allows for and

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<sup>68</sup> See GARY JEFFREY JACOBSON, *THE WHEEL OF THE LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* 92 (2003).

<sup>69</sup> See *id.* at 91-121.

<sup>70</sup> See *id.* at 92.

<sup>71</sup> R.L. CHAUDHARI, *THE CONCEPT OF SECULARISM IN INDIAN CONSTITUTION* 90-91 (1987).

<sup>72</sup> *Id.* at 94 (citing P.B GAJENDRAGADKAR, *SECULARISM AND THE CONSTITUTION OF INDIA* 52 (1971)).

<sup>73</sup> See JACOBSON, *supra* note 68, at 97-102 (discussing judges determining the "essentials" of religion in determining whether to protect certain practices such as polygamy).

<sup>74</sup> *Id.*

regulates religions in the public domain, attempts to balance the need for social reform against the rights of groups to retain or maintain their group identity, and works towards gradual social change and uniformity.<sup>75</sup> Such balancing has resulted in a built-in tension between accommodation of religious groups and the emancipation of the individual, which is also guaranteed in the Constitution.

On the one hand, for the protection of individual liberties, the Constitution includes a section akin to the United States' Bill of Rights that guarantees fundamental rights to the Indian people. Article 13 voids all laws in force before the enactment of the Constitution that are inconsistent with the fundamental rights to the extent of the inconsistency.<sup>76</sup> Articles 14 and 15 guarantee equality and non-discrimination on the basis of religion, race, caste, sex, or place of birth, but reserve the right of the state to make special provisions with regard to women, children, and the "backward classes."<sup>77</sup> Article 25 guarantees the freedom of religion while reserving the rights of the state to regulate secular activities associated with religious practice and to provide for social welfare and reform.<sup>78</sup> For group protection, on the other hand, Article 26 guarantees every religious denomination the right to manage its own affairs with regard to religion.<sup>79</sup> And Article 29 guarantees citizens the right to conserve their distinct culture.<sup>80</sup>

Although groups are allowed to govern themselves internally, the Constitution makes it clear that the goal is to eventually unify the Indian "nation." Article 44—a non-justiciable hortatory provision—directs the state to endeavor to pass a uniform civil code that would trump all the religious personal laws throughout the territories of India.<sup>81</sup> Article 246, read in conjunction with List III, Entry 5 of the Seventh Schedule,

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<sup>75</sup> *Id.*

<sup>76</sup> See INDIA CONST. art. 13, § 1, available at <http://lawmin.nic.in/coi.htm>.

<sup>77</sup> *Id.* art. 14-15. "Backward classes" refers to underrepresented ethnic and religious minorities who face social and economic discrimination but are not defined in the Indian Constitution as Schedule Castes or Schedule Tribes. See Government of India, National Commission for Backward Classes, <http://ncbc.nic.in/html/creamylayer.htm> (last visited Jan. 14, 2008).

<sup>78</sup> INDIA CONST. art. 25, available at <http://lawmin.nic.in/coi.htm>.

<sup>79</sup> *Id.* art. 26.

<sup>80</sup> *Id.* art. 29.

<sup>81</sup> *Id.* art. 44.

empowers Parliament and states to make laws that, before the enactment of the Constitution, were categorized as personal law and therefore outside of the domain of the legislature.<sup>82</sup> And Article 372 declares that “all laws in force in the pre-Constitution period shall remain in force unless lawfully altered, repealed, amended [or adapted] by a competent authority.”<sup>83</sup> As Tahir Mahmood has argued, the above provisions

can be condensed into the following three basic postulates:

- I. That each of the personal laws in force till the end of the pre-Constitution era shall continue to apply unless the State considers it advisable [as part of its function to set up social order based on social justice, or otherwise] to repeal, modify or replace it.
- II. That henceforth all laws enacted in the area of personal law must conform to the provisions of part III of the Constitution dealing with Fundamental Rights.
- III. That the State shall gradually lead the nation on a voyage of progressive uniformity in the area of civil laws.<sup>84</sup>

Unfortunately, the provisions conflict with each other. There is clearly no way to reconcile the Constitution’s fundamental rights of individuals with the pre-constitutional personal laws that *do* discriminate (particularly against women), and which have been given a constitutional pass until a “competent authority” can reform the law in conformity with Article 13.<sup>85</sup> This conflict has been resolved by a judicial interpretation that

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<sup>82</sup> See TAHIR MAHMOOD, *PERSONAL LAWS IN CRISIS* 6 (1986). Article 246 (2) states: “Notwithstanding anything in clause (3), Parliament, and subject to clause (1), the Legislature of any state also, have power to make laws with respect to any matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the “Concurrent List”).” INDIA CONST. art. 246(2), *available at* <http://lawmin.nic.in/coi.htm>. List III of the Seventh Schedule, Entry 5 is comprised of “marriage and divorce; infants and minors; adoptions; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.” INDIA CONST. list III, *available at* <http://lawmin.nic.in/coi.htm>.

<sup>83</sup> See MAHMOOD, *supra* note 82, at 144.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 15.

allows personal law to trump fundamental rights.<sup>86</sup> In *Bombay v. Narasu Appa Mali*, the Supreme Court carved out statutory personal laws such as the Hindu code and the Muslim personal laws from the purview of Part III of the Constitution.<sup>87</sup> This exception has yet to be overturned. Indeed, there has been a trend in the courts to protect group norms such as caste classifications, discrimination against women, and discrimination against non-marital children against Part III's fundamental rights guarantees.<sup>88</sup> These provisions in the Indian Constitution indicate the delicate balancing of individual rights and the desire for a secular political system against the reality of a plural, religious society.

It is clear that the framers of the Constitution meant for there to be continuity between the pre- and post-Constitution eras, allowing the various religious communities to have their own religious Personal Law (Article 372), while giving the State the concurrent authority to enact laws in that area. They ensured that the ability of the State to enact social reform measures was not constitutionally subsumed under the duty to protect India's religious communities. Ultimately, the aspiration was to pass a uniform civil code that would apply to every citizen, but political considerations mandated that the British plural system remain in effect in the interim.<sup>89</sup>

This is not to say that there has been no progress towards secularization of family law. In the years after the enactment of the Constitution, in one of the first attempts to create a secular family law system, the state took steps to pass an amended Special Marriage Act of 1872. The Special Marriage Act of 1954 (SMA 1954) is an opt-in provision for those who wish their marriage to be governed by secular laws. The SMA 1954 goes further than the religious laws in providing women with equitable family law rights. For instance, under the secular law, women are allowed to sue for divorce, there is a provision for divorce by mutual consent, the court may award women maintenance or alimony for their lifetime if necessary, and plural marriages are prohibited.<sup>90</sup> However, the

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<sup>86</sup> *Id.* at 16-19.

<sup>87</sup> *Bombay v. Narasu Appa Mali*, A.I.R. 1952 S.C. 84 (India).

<sup>88</sup> *Id.* See also, e.g., Susanne Hoeber Rudolph & Lloyd I. Rudolph, *Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 36 (Gerald James Larson ed., 2001).

<sup>89</sup> *Bombay v. Narasu Appa Mali*, A.I.R. 1952 S.C. 84 (India).

<sup>90</sup> KUMUD DESAI, INDIAN LAW OF MARRIAGE AND DIVORCE 21-28 (1978).

SMA 1954 incorporates certain discriminatory provisions of the Hindu Code.<sup>91</sup>

Unlike the Muslim code which has not been revised since the British promulgation,<sup>92</sup> a new Hindu Code was enacted in several stages in the post-independence decade.<sup>93</sup> However, this iteration of the Hindu Code continues to enshrine several anti-conversion provisions, and the SMA 1954 adopts these.<sup>94</sup> Specifically, according to Section 21 of the SMA 1954, Hindus, Sikhs, Buddhists, and Jains who are not in a mixed marriage—that is, both partners belong to one of these faiths—are allowed to retain their inheritance laws. However, if it is a mixed marriage or the partners are Muslims or Christians, they are defaulted into the Indian Succession Act of 1925. While the Succession Act, which is based on British law, may be more equitable towards women than the religious laws, the point here is that the exemption for “indigenous” religious groups indicates a serious bias in India’s secularism that goes beyond neutrality among religions to favoritism of the majority.

India’s secularism, based on the ancient maxim *sarva dharma sambhava* or “all religions are equal,” purports to accommodate religious groups equally. However, the constitutional provisions that guarantee individuals equal protection come into conflict with clearly discriminatory personal laws, which have acquired a judicial exemption from the requirements of Articles 13, 14, and 15 of the Indian Constitution. This conflict could be eliminated if personal laws of all groups could be reformed. But the rise of the Hindu Right, its significant power even as the opposition party, and its use of secular institutions while in power in the 1990s, have bred distrust and severely compromised the state’s ability to

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<sup>91</sup> See MAHMOOD, *supra* note 82, at 26-28.

<sup>92</sup> PARASHAR, *supra* note 17, at 159; See also JALAL, SELF AND SOVEREIGNTY, *supra* note 17, at 140-45.

<sup>93</sup> See PARASHAR, *supra* note 17, at 79-81. Interestingly, there have been several revisions of Hindu law under the British as well as after independence. Before these revisions, Hindu widows were not allowed to remarry, but Muslim widows were. Hindu women were not allowed to inherit, but Muslim women were. Polygamy was practiced by men of both religions. It is arguable, thus, that at least historically, Hindu women have reaped some benefits from the “Islamization” of Hindu law.

<sup>94</sup> See MAHMOOD, *supra* note 82, at 23-26. For example, the conversion of one spouse is given as a ground for divorce. See Hindu Marriage Act, 1955, Section 13(1)(ii), available at <http://www.indialaws.info/search/acts/?2edca491-2590-4e88-9b59-a15546b6acd9>.

maintain the balance between group identity and individual liberty.<sup>95</sup> Moreover, the discourse of *Hindutva* that conflates Indian identity with the dominance of Hinduism has inevitably inspired backlash from Muslim hardliners, and as a result has made any attempts at personal law reform through judicial decision-making nearly impossible.<sup>96</sup>

## II. THE MUSLIM PERSONAL LAW: BLACK LETTER LAW AND CUSTOMARY PRACTICE

In a recent article by a prominent Western legal scholar, Muslim Personal Law was characterized in the following manner:

Muslim personal laws require a Muslim wife to be monogamous, while a husband can have up to four wives. They also allow husbands but not wives to divorce unilaterally without fault, *institutionalize dower arrangements that arguably amount to selling women in marriage*, grant male heirs twice the share of female heirs, and do not allow mothers to be guardians of minor children.<sup>97</sup>

Historically, there has been a considerable gap between customary practice and the black letter of the law that emerged from the process of codification. Muslim practices still diverge significantly from the code and are occasionally mistaken for “the law,” or conversely “the law” is taken as a reflection of common practice, as in the understanding of dower arrangements cited above.

While this Article does not dispute the basic observation that Muslim Personal Law treats women unequally, it argues that a more nuanced approach is necessary. Practices vary regionally and by class; generalizations that rely solely on the formal law, as those made above, are difficult to maintain. Certainly, many Muslims would consider the perspective of the Western legal scholar quoted above as a charged and perhaps unfair interpretation that oversimplifies a rather complex arrangement of family relations. It certainly merits some scrutiny and interrogation.

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<sup>95</sup> See JACOBSON, *supra* note 68, at 109-10.

<sup>96</sup> *Id.*

<sup>97</sup> Catherine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects and “Personal Laws”*, 4 INT’L J. CONST. L. 181, 192 (2006) (emphasis added).



In order to foster a more complete and nuanced understanding of the laws and customs that impact Muslim women, this section outlines the formal law in four areas regarding Muslim marriage that have been flashpoints for debate and the site of contests for rights. The first subsection below describes the Muslim Personal Law, particularly after the Shah Bano decision, in three family law areas: dowry, divorce, and maintenance. The second subsection briefly discusses the laws with regard to polygamy—a practice which the Hindu Right, the secular, liberal feminists, and many Muslim women agree should be abolished. Where relevant, divergence between formal law and actual practice is noted.<sup>98</sup>

By outlining the law in such detail, this Article departs from the traditional treatment of Muslim Personal Law by scholars publishing in the United States, who generally take the position that all the laws are unjust to women because they are formally unequal.<sup>99</sup> It also departs from the dominant discourse in India that has taken the oppressiveness of Muslim family law as axiomatic. Avoiding the temptation to make conclusory statements assuming injustice and bias, this Article seeks to demonstrate that there are areas of the law that, though unequal, are actually meant to benefit women. Additionally, this exploration of the Muslim Personal Law lays the groundwork for the argument that there is at least one area of Muslim Personal Law that is progressive and should be retained and other areas that are amenable to reform in a manner that could substantially better women's rights without losing the law's "Islamic" quality.

### A. Dower, Divorce, and Maintenance

It has been said by some scholars that Muslim marriages are essentially contractual in nature. There is offer, acceptance, and consideration.<sup>100</sup> Yet, it would be a mistake to reduce marriage to such a mere contractual formality similar to a contract for services or goods. Marriage is considered a sacred institution that all able Muslims are enjoined to enter.<sup>101</sup> It is of central significance in the ordering of group life

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<sup>98</sup> See MAHMOOD, *supra* note 82, at 49-94 (discussing the misinterpretation of various provisions).

<sup>99</sup> See, e.g., *supra* notes 9 and 17 and accompanying text.

<sup>100</sup> M. A. QURESHI, *MUSLIM LAW OF MARRIAGE, DIVORCE AND MAINTENANCE* 95 (1995).

<sup>101</sup> See MAHMOOD, *supra* note 82, at 63-66.

and, consequently, gender relations.<sup>102</sup> Moreover, Muslim marriage laws reflect a traditional understanding of how partners in a marriage relate to each other and outline a set of duties and rights for each partner.<sup>103</sup> These duties and rights begin at the very onset of marriage through the requirement of *mahr*, or consideration that must be given or promised before a marriage can be solemnized.<sup>104</sup>

*Mahr* (dower) is money or property given to the bride by the groom as part of the solemnization of marriage. The value of the property or the money may be any amount not less than ten dirhams.<sup>105</sup> The amount may be fixed before the marriage, at the ceremony, or after the ceremony.<sup>106</sup> The money that is given as *mahr* is payable to the wife and becomes her sole property, as opposed to family property or the property of her father or her husband after a second marriage.<sup>107</sup> She is entitled to the whole amount after consummation of the marriage or upon the death of her husband and where "a claim is made for an amount named in a contract of dower the court will award the full amount provided in the contract."<sup>108</sup> If she divorces her husband before consummation, she is entitled to half of the dower.<sup>109</sup> If her husband dies without paying the *mahr*, it must be paid out of his estate before his heirs can inherit and upon his wife's death, the *mahr* is payable to her heirs.<sup>110</sup>

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<sup>102</sup> See DESAI, *supra* note 90, at 129-30. Note that for the Muslims who marry non-Muslims (or, for Muslim men, outside the Abrahamic faiths) that marriage is not void *ab initio* but irregular. *Id.* But *c.f.* Narain, *supra* note 9, at 52 (stating that for Muslim men interfaith marriages are permitted but not encouraged, while for women they are void *ab initio*).

<sup>103</sup> See MAHMOOD, *supra* note 82, at 63-66.

<sup>104</sup> *Id.* at 66-68.

<sup>105</sup> See DESAI, *supra* note 90, at 134. The dirham, currently the currency in only a few Muslim countries, was for several centuries used as an Arab and Muslim currency in various communities around the Middle East, Mediterranean, and South and Central Asia, although India as a whole had the rupee as its currency.

<sup>106</sup> *Id.*

<sup>107</sup> See MAHMOOD, *supra* note 82, at 63-67.

<sup>108</sup> DESAI, *supra* note 90, at 134-35.

<sup>109</sup> *Id.*

<sup>110</sup> See QURESHI, *supra* note 100, at 133-37. Unfortunately the Indian courts have held that the dower debt is *pari passu* with other debts and the wife is not first among creditors if a husband dies with other debts. *Id.*

The Indian codification of Muslim law allows for several ways of arranging the payment of *mahr*, among which the families choose at the time that the *mahr* is negotiated. The *mahr* may be paid in part at the time of marriage with the remainder due at a later time.<sup>111</sup> It can also be paid in full either at the time of marriage or at a later date. If the *mahr* is not fixed at the time of marriage and there is a dispute as to the amount, the wife gets an amount determined by custom and reasonableness.<sup>112</sup> In any event, there is a minimum amount of required *mahr* without which a marriage cannot be valid. However, according to case law, a wife in her majority can remit or renounce her dower.<sup>113</sup>

Similar to any other debt, non-payment of the *mahr* allows the wife several avenues by which she may enforce her rights. She may refuse to cohabit with the husband or enter into the husband's household if the marriage has not already been consummated.<sup>114</sup> She may also refuse to engage in intercourse until the *mahr* is paid.<sup>115</sup> Nonpayment of dower is a bar to any suit by the husband for restitution of conjugal rights.<sup>116</sup> If the marriage has been consummated, the court may award restitution of conjugal rights conditioned upon the payment of the dower.<sup>117</sup> The Muslim wife, therefore, has a viable cause of action to recover her debt while her husband is alive. If her husband has died before paying the *mahr*, the widow can also exercise a kind of widow's lien on his property.<sup>118</sup>

In general, *mahr's* purpose is to ensure that a wife is provided for independently, even though after marriage she has the right to proper maintenance and support from her husband.<sup>119</sup> In other words, she may save her entire dower and bequest it to her heirs or dispose of it at will without affecting her right to be supported by her husband. One might consider such a contract one of the first forms of pre-marital agreement, a type of contract

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<sup>111</sup> See DESAI, *supra* note 90, at 135.

<sup>112</sup> *Id.*

<sup>113</sup> See QURESHI, *supra* note 100, at 126-28.

<sup>114</sup> See DESAI, *supra* note 90, at 136.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 135.

<sup>119</sup> See MAHMOOD, *supra* note 82, at 66-71.

that has only recently become common in the United States.<sup>120</sup> *Mahr* is negotiated in a similar way to American pre-nuptial agreements, but with the wife's father or male guardian acting in her interest, rather than a lawyer. In the event of divorce, she is bound by the bargain made on her behalf. Whether a father or guardian can be counted on to make a good bargain and whether that bargain reflects the wife's wishes is beyond the scope of this Article, but is a subject worthy of separate treatment. That aside, *mahr* agreements provide the wife with a hedge against the risk of destitution upon dissolution of her marriage or death of her spouse.<sup>121</sup> Thus, in the absence of an adequate welfare system, *mahr* distributes important religiously- and legally-sanctioned financial means for Muslim women.

*Mahr* agreements could also be construed as a disincentive (for men) to divorce, addressing a perennial problem for Muslim women. In Islamic law, the area of divorce has been the subject of many disputes between the sexes. It has been argued that in the time of the Prophet, Muslim women had the right to contract their own marriages and to divorce on "reasonable grounds."<sup>122</sup> Unfortunately, over the past millennium, women's access to divorce has been eroded, while the right of men to divorce at will has been greatly augmented.<sup>123</sup> This disparity in ability to divorce has generated a significant need for reform to secure equality for Muslim women.

Classically, Islamic law allows several kinds of action by which divorce can be obtained. First, *talaq* is divorce that is initiated by the

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<sup>120</sup> RANDY FRANCES KANDEL, FAMILY LAW: ESSENTIAL TERMS AND CONCEPTS 73 (2000).

<sup>121</sup> KHAN NOOR EPHROZ, WOMEN AND LAW: MUSLIM PERSONAL LAW PERSPECTIVE 166-73 (2003) (citing the Lahore High Court holding that *mahr* was "not exchange or consideration, as understood in technical sense in the *Contract Act* . . . but . . . as a token of respect, for its subject, the woman"). According to Ephroz's impact analysis surveying educated women and housewives, housewives considered *mahr* as a security and a check to unilateral divorce versus educated women who tended to view it as a sign of respect and a check to unilateral divorce (approximately half of educated women saw it as such). *Id.* at 176-77.

<sup>122</sup> See QURESHI, *supra* note 100, at 187-88. It should be noted that reasonable grounds include incompatibility, lack of maintenance, cruelty, and withholding of sexual intercourse.

<sup>123</sup> Divorce was considered a last resort in Islam during the first millennium even while it was recognized as a necessary evil. Before parties could divorce, there had to be a good faith attempt at arbitration by both families to bring the parties together. Only when the couple was irreconcilable or there was a defect that could not be overcome (such as impotency or insanity), divorce was granted. See EPHROZ, *supra* note 121, at 220.

husband at will, without any cause. It can be revocable or irrevocable, done through written or oral pronouncement, and does not require the wife's presence. A revocable *talaq* becomes irrevocable upon the passing of the *iddat*, a period of time during which it is ascertained whether the wife is pregnant with a child from the marriage.<sup>124</sup> Second, a wife can initiate or obtain divorce through *khul*, or mutual consent, in which she agrees to give the husband consideration for dissolution of the marriage.<sup>125</sup> Similar to the marriage contract, the arrangements of *khul* are negotiated by the families of the husband and the wife at the outset of the marriage. A wife may also negotiate the right to divorce under certain conditions as part of her agreement to marry and the husband may also confer such a right of his own accord.<sup>126</sup> "It is lawful for a Muslim husband to delegate to his wife power to divorce on certain conditions or in specific contingencies. The husband marrying a second wife is such a condition."<sup>127</sup> The exercise of such a right would act as an irrevocable divorce. Finally, where both parties seek dissolution, the *mubara'at* form of divorce can be used.<sup>128</sup> This form of dissolution may be initiated by either the wife or the husband, but for it to take effect, both parties must agree to divorce.

Women's right to divorce unilaterally is codified in the Dissolution of Muslim Marriages Act, VIII of 1939. The Act gives Muslim women the right to divorce under nine conditions. A Muslim woman may divorce her husband if:

1. his whereabouts have not been known for a period of four years;
2. he has failed to provide maintenance for her for a period of two years (for which she may sue him even if she is able to maintain herself);
3. he has been imprisoned or sentenced to be imprisoned for more than seven years;

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<sup>124</sup> See QURESHI, *supra* note 100, at 205-08.

<sup>125</sup> *Id.* at 226-28

<sup>126</sup> *Id.* at 254-55.

<sup>127</sup> *Id.* at 260.

<sup>128</sup> *Id.* at 233-34.

4. he has failed to perform his marital obligations for a period of three years;
5. he was impotent at the time of marriage and continues to be so;
6. he has been insane for a period of two years, or suffers from leprosy or a virulent venereal disease;
7. the wife was given in marriage by her father or guardian before the age of fifteen and repudiates the marriage before the age of eighteen;
8. he treats her with cruelty, that is, either physical or mental, associates with women of ill-repute, attempts to force her to lead an immoral life, disposes of her property and refuses to allow her to exercise her legal rights over it, obstructs her ability to perform her religion, or has more than one wife and does not treat her equitably; and
9. she has any other grounds which are recognized as valid for dissolution under Muslim law.<sup>129</sup>

Upon divorce, a Muslim woman has the right to maintenance during her three month *iddat* period, until the time when she receives notice of divorce, if any notice is given.<sup>130</sup> After that time, her family resumes the responsibility to maintain her.<sup>131</sup> Thus, the objective of maintenance is not to compel the ex-husband to provide for the divorced wife, as in the Western concept of alimony.<sup>132</sup> Rather, because Islam considers marriage to be a union that can be dissolved, rather than an eternal bond, a woman is never considered a part of her husband's family to the exclusion of her own paternal family.<sup>133</sup> She is not half of a couple, but rather a fully cognizable

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<sup>129</sup> *Id.* at 263-83. See also The Dissolution of Muslim Marriages Act, No. 8 of 1939, available at <http://indiacode.nic.in/rspaging.asp?tfnm=193908>.

<sup>130</sup> QURESHI, *supra* note 100, at 366-67; Muslim Women (Protection of Rights on Divorce) Act of 1986, available at <http://www.indialaws.info/search/acts/?c9106177-abc7-43e2-b33a-9c02e52c14fb>.

<sup>131</sup> See MAHMOOD, *supra* note 82, at 68, 87.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

legal personality with independent rights who is capable of remarriage.<sup>134</sup> In fact, remarriage is encouraged in Islam and is the underlying rationale behind the short alimony period provided after divorce.<sup>135</sup> The passing of three months ensures that the wife is not pregnant. If she is pregnant, however, her husband is responsible for the child's maintenance until it reaches majority and all children from the marriage, in turn, "belong" to their paternal family.<sup>136</sup>

Prior to the Shah Bano case, discussed below in Part III, and the passage of The Muslim Women (Protection of Rights on Divorce) Act of 1986 (MWA 1986), divorced Muslim women who were inadequately supported and rendered destitute could sue under Section 125 of the Indian Criminal Procedure Code for long-term maintenance beyond the *iddat* period. Section 125 applied to all women regardless of religious affiliation. However, for Muslim women, the passage of the MWA 1986, which provided support to those who had contracted for insufficient *mahr* in event of divorce, closed that avenue of legal recourse. Under the MWA 1986, maintenance to ex-wives terminates after three months, regardless of individual circumstances.<sup>137</sup>

## B. Polygamy

Polygamy has been a source of ongoing conflict both within the Muslim community and between Muslims and other communities in India. Moreover, polygamy deserves significant consideration in light of the fact that it is held up as the ultimate evidence of Islamic law's injustice towards women. Although some Muslim countries have either regulated or banned polygamy, India continues to allow plural marriages for Muslim men, though Muslim women are generally protected against criminal charges for leaving their polygamous husbands.<sup>138</sup>

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<sup>134</sup> *Id.* at 82-88.

<sup>135</sup> *Id.*

<sup>136</sup> See DESAI, *supra* note 90, at 156-57.

<sup>137</sup> See Narain, *supra* note 9, at 43, 55.

<sup>138</sup> See LAW AND RELIGION PROGRAM OF EMORY UNIVERSITY, ISLAMIC FAMILY LAW GLOBAL SURVEY: INDIA, <http://www.law.emory.edu/IFL/legal/india.htm> (last visited Oct. 15, 2006). The Survey notes that:

With regard to polygamy, the Criminal Procedure Code establishes that a woman who refuses to live with her husband on just grounds will still be entitled to maintenance and those just grounds, as defined in the Code,

According to Tahir Mahmood, the practice of polygamy is legal under Islam so long as each wife is treated co-equally.<sup>139</sup> It is impermissible to marry a second wife as a “replacement” or to forsake a wife without divorcing her.<sup>140</sup> However, the reality of polygamy where it is practiced rarely observes these constraints.<sup>141</sup>

It should be noted here that polygamy as a practice is not particularly widespread among Muslim communities in India. In fact, the incidence of polygamy among Muslims is approximately 6%, which is the same as the rate of polygamy among Indian Hindus.<sup>142</sup> Even so, the right to plural marriage is possibly the most objectionable of formal legal rights accorded to Muslim men at the expense of Muslim women. Given that it has been restricted, if not formally abolished, in other Muslim countries, the time has come for such antiquated rights to be changed in India.<sup>143</sup>

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include the contracting of a polygamous marriage by the husband, even if the personal law applicable to the parties permits polygamy. This proviso only actually applies to Muslims as polygamy has been abolished for all other communities. In *Itwari v. Asghari* [A.I.R. 1960 All 684], a suit for the restitution of conjugal rights by a Muslim husband against his first wife, the Allahabad Court stated that the onus was on the husband to prove that his second marriage did not constitute any insult or cruelty to the first wife. Although the Muslim husband has the right to contract a polygamous marriage, the Court held that it does not necessarily follow that the first wife should be forced to live with him under threat of severe penalties after the husband has taken a second wife. Even in the absence of proof of cruelty, the Court would not pass a decree for restitution of conjugal rights if it appeared that it would be unjust and inequitable to compel her to return to her husband under the circumstances of the case.

*Id.*

<sup>139</sup> See MAHMOOD, *supra* note 82, at 68-71.

<sup>140</sup> *Id.*

<sup>141</sup> See *id.* (arguing that polygamy is incorrectly practiced by Muslims).

<sup>142</sup> See Flavia Agnes, *Women, Marriage and the Subordination of Rights*, in SUBALTERN STUDIES XI: COMMUNITY, GENDER AND VIOLENCE 106, 130-31 (Partha Chatterjee & Pradeep Jeganathan eds., 2000). Polygamy is a subject that elicits strong emotion among women, particularly those who have no cultural reference for the practice.

<sup>143</sup> For examples of Islamic family law codes that depart from classical laws, see summaries of Bangladesh Family Laws, Tunisia Family Laws, and Indonesia Family Laws. LAW & RELIGION PROGRAM OF EMORY UNIV., ISLAMIC FAMILY LAW GLOBAL SURVEY, <http://www.law.emory.edu/IFL/index2.htm> (last visited Oct. 15, 2006).



The following section addresses the form of change that India's personal law should take. The relevant question is: Can women's position be ameliorated within the current legal regime? Or must Muslim Personal Laws be eliminated in order to ensure equality?

### III. WOMAN, MUSLIM, INDIAN: IMPROVING RIGHTS IN THE CONTEXT OF CONFLICTING ALLEGIANCES AND FAILING SECULARISM

Muslim women's formal rights in the area of family law clearly have not kept pace with those of women in other Indian communities or other nations. The relevant section of the family law in question has not been revised by the state since its enactment more than seventy years ago. For several years, the call for reform has been growing.<sup>144</sup> These calls have come from a number of different sources including secular Indian feminists, Muslim women, and the Hindu Right. More recently, the "plight" of Muslim women in India has even garnered the attention of some American legal scholars.<sup>145</sup>

This section examines the proposals for improving the status and rights of Muslim women and discusses the assumptions and problems inherent to these proposals. The solutions presented fall broadly into two categories. First, there are those who propose the enactment of a uniform civil code either as a replacement for the personal law or as an opt-in code. Within this category, the two major proponents are the Hindu Right, which challenges the "privileges" given to religious minorities and calls for their immediate end through the promulgation of a uniform civil code, and secular feminists, who, from a gender perspective, challenge the inequity of religious personal laws.<sup>146</sup> Since, as shall be discussed below, the Hindu Right has no real concern for gender justice, its position is not examined in any depth. Rather, this Article focuses on secular, liberal feminists who have called for a move to a secular opt-in code.

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<sup>144</sup> See Narain, *supra* note 9 (discussing the discriminatory aspects of Muslim Personal Law). See also Sripati, *supra* note 9, at 132 (arguing that a uniform civil code needs to be passed in order to secure rights for Muslim women). These authors focus on Muslim Personal Law without placing that law in broader context, giving the impression that the other personal laws are not discriminatory and that Muslim women are the only Indian women in need of liberation. This is a false impression.

<sup>145</sup> See MacKinnon, *supra* note 97; see also MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 223-30 (2000).

<sup>146</sup> See RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA 149-50 (2003).

The second category comprises those who propose to leave the personal law regime intact. Within this group, the main proponents are traditionalists who consider the law immutable and perfect. They argue that the laws as written are equitable, but that the application is improper, which accounts for their unjust impact on women.

The final part of this section offers an alternative solution to the problem of Muslim women's rights, taking the view that the religious personal laws are facially inadequate and are likely to always harbor formal inequalities due to the societal and political realities of male privilege in Muslim communities and in Indian society in general.<sup>147</sup> However, Muslim Personal Law is neither immutable nor stagnant; it offers enough interpretive flexibility to achieve the substantive gains in rights that Muslim women deserve. There is potential for Muslim Personal Law reform, as an alternative to a secular code or as a step towards ultimate uniformity. This Article argues that reform supported by the state and undertaken by progressive members of the community in partnership with secular feminists and other groups interested in gender justice is the best option for the immediate future.

#### **A. A Secular Feminist Solution: An Opt-in Uniform Civil Code and the Problems of Failing Secularism**

As discussed above, Article 44 of the Indian Constitution, an aspirational provision, directs the state to "endeavor to secure for the citizens a uniform civil code throughout the territory of India."<sup>148</sup> The purpose of this code is to universalize all family law and to eradicate the dual secular-religious system.<sup>149</sup> However, as of this writing, the code remains no closer to realization than when the Constitution was enacted. Over the years, movement toward a uniform civil code has met sustained resistance from conservative Muslims who take a communitarian/minority rights position.<sup>150</sup> This opposition became acute after the Shah Bano decision, which led to hyper-politicization of the issue of women's rights and of personal law in general. Minority rights supporters and communitarians are concerned that a uniform civil code would essentially

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<sup>147</sup> *Id.* at 147-56.

<sup>148</sup> INDIA CONST. art. 44, available at <http://www.lawmin.nic.in/coi.htm>.

<sup>149</sup> See RAJAN, *supra* note 146, at 147-56.

<sup>150</sup> *Id.*

universalize the majority Hindu law. In effect, they argue, such a move would force the relinquishment of minority religious law and practice which are central pillars of Muslim identity.<sup>151</sup> In opposition, the calls for the enactment of the code have become an unfortunate point of convergence for secular feminists and Hindu fundamentalists who have vociferously called for its immediate passage as “a means of removing the ‘privileges’ of minority men.”<sup>152</sup>

According to the Hindu Nationalist view, the Uniform Civil Code would be a version of Hindu law, and would thereby secure Hindu hegemony.<sup>153</sup> The Hindu Right’s position makes Indian feminist positions on the UCC particularly difficult. Although secular feminists have been the only group to foreground gender in their critique, the very fact that they at one time supported a mandatory UCC that supplanted personal laws puts them into an uneasy and unavoidable alliance with the Hindu Right. In order to distance themselves from the Right’s majoritarianism, they have had to take positions either in support of minority rights that conflict with their feminist principles, or in favor of reforms that are in essence half-measures.<sup>154</sup> Given that communities are often the primary sites of women’s subordination,<sup>155</sup> feminists have had to contend with complex and deeply-rooted conflicts between gender and religious affiliation: “This double commitment . . . lead[s] to acute dilemmas for feminist understanding and to the paralysis of feminist praxis.”<sup>156</sup>

Despite reaching a consensus on the inadequacies of religious laws, the feminist movement has been less cohesive about what direction it ought to pursue to improve gender rights. Nivedita Menon has summarized the different goals promoted by factions within the feminist movement as the following:

1. compulsory egalitarian civil code for all citizens

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<sup>151</sup> *Id.* See also SHAHIDA LATEEF, *MUSLIM WOMEN IN INDIA: POLITICAL AND PRIVATE REALITIES* 198-99 (1990).

<sup>152</sup> RAJAN, *supra* note 146.

<sup>153</sup> *Id.* at 148-49.

<sup>154</sup> *Id.* at 151.

<sup>155</sup> For a critique of community, see MIRANDA JOSEPH, *AGAINST THE ROMANCE OF COMMUNITY* xviii-xxvi (2002); see also ESTELLE B. FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* 8 (2002).

<sup>156</sup> RAJAN, *supra* note 146, at 151.

2. reforms from within communities without state intervention
3. reform from within as well as legislation on areas outside personal law
4. optional egalitarian civil code
5. reverse optionality where all citizens come under the code's jurisdiction and can choose to opt out.<sup>157</sup>

As the first of these positions has been co-opted by the Right, it has lost support among most women's rights activists. The remaining options fall into two camps. In the first camp are the communitarians who support the second option of internal change; the second camp is comprised of various feminist groups calling for legislative action, regardless of the reforms that take place within the community.<sup>158</sup> The next section examines the arguments for internal change, particularly those made by Muslim traditionalists, in greater depth.

First, this Article considers the most enduring of the above positions—that of an opt-in code. The opt-in solution calls for the promulgation of a UCC that women can elect as the law governing their marriage. This solution allows women an alternative, while not threatening the traditional religious personal law regime. Most recently, the proposal for an opt-in code has been revived by Catherine MacKinnon.<sup>159</sup> In MacKinnon's formulation, in contrast to the SMA 1954, a woman need not elect the civil code in its entirety at the time of the marriage; a woman might marry under her own personal law, but could then choose a civil code

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<sup>157</sup> See *id.* at 157-58.

<sup>158</sup> See *id.*

<sup>159</sup> See MacKinnon, *supra* note 97, at 199. MacKinnon proposes:

[O]ne possible way out of the legal and political thicket—a compromise that faces the fact that many of these laws violate sex equality standards but recognizes the judicial reluctance (however unprincipled) to invalidate them—could be to enact a uniform code of family law pursuant to Directive Principle 44 that provides for sex equality in all respects between women and men on its face and in application, with its use optional at a woman's discretion, including as relief for proven sex inequality in a community's personal law.

remedy in the event of litigation involving sex discrimination. Women are given the choice of the secular and more favorable law, without threatening the existence of the personal law as a whole.<sup>160</sup> The benefit of such an approach is that rather than having to choose between the secular law in its entirety and personal law, it allows women to invoke the remedies of the civil code at the time when she is most in need of an empowering option, without invalidating the personal code. This is certainly a far more politically expedient approach than a wholesale elimination of personal laws.

However, MacKinnon's proposal rests on the same problematic underlying assumptions that generally plague secular feminist solutions that propose an optional code. First, these positions all depend on the crucial assumption that the state is capable of producing a secular code that is fair and neutral across all religions, and is capable of administering it accordingly.<sup>161</sup> To be able to enact a neutral code, the state itself must be robustly secular and neutral in its institutions, while simultaneously accommodating the vibrant religious life of Indians of all creeds. Second, these positions assume that the state has the political will to enact and enforce gender-equitable laws. Third, there is an assumption that formal equality will improve Muslim women's lives. An examination of certain provisions of SMA 1954 and the Hindu Code 2005 may be instructive as to the limits of such legislation. These problems and this assumption are given closer scrutiny below.

### ***1. The Assumption of a Robust Secularism***

Secularism is an essential prerequisite to establishing the trust of minority communities in the state. Without confidence in the neutrality of the government, minorities, particularly Muslims who have faced discrimination for decades, are unlikely to acquiesce to a surrender of their

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<sup>160</sup> *Id.* Though this proposal adds a layer of complexity to family law in India, it is certainly more workable than the proposal to amend the Constitution that invalidates any laws that conflict with the Articles that guarantee sex equality.

<sup>161</sup> MacKinnon correctly notes that constitutionally, India has a guarantee of both formal and substantive sex equality. However, the issue has never been one of constitutional inadequacy but rather of jurisprudence. Indian courts, as she also acknowledges, have been reluctant to enforce the constitutional guarantees in the area of family law. Yet, in addition to the unwillingness to rule in favor of sex equality, there has been a strain of anti-Muslim sentiment in personal law jurisprudence, not to mention a tendency to formulate secularism, that favors the majority religion. This is taken up below. *See infra* notes 186-190 and accompanying text.

own laws. The religious laws have traditionally guaranteed at least some measure of autonomy for the community within a sometimes hostile state. Unfortunately in the Indian-Muslim experience, ameliorative and accommodationist secularism has been no defense against an ideology that seeks to assimilate or excise all differences through a discourse of equality and neutrality.<sup>162</sup> In fact, because secular institutions have been co-opted by the Hindu Right to promote *Hindutva*, Indian-Muslims have had some cause for mistrust and concern.<sup>163</sup>

For instance, in the *Hindutva* cases of the mid-1990s, the Indian Supreme Court held that references by the Hindu Right to ideologies of Hindu nationalism or *Hindutva* were not violations of Section 123(3) of the Representation of the People Act of 1951 (RPA 1951) which bars appeals to religion and communalism in attempts to gain votes.<sup>164</sup> Rather, *Hindutva* was construed by the Courts as a general reference to Indian culture and a "way of life."<sup>165</sup> Relying on two cases, *Yagnapurushadji v. Vaishya*<sup>166</sup> and *Commissioner of Wealth Tax v. Sridharan*,<sup>167</sup> the Court concluded that it could give no definition to Hinduism, Hindu, or *Hindutva*. It concluded that the *Hindutva* is a synonym for Indianization and "the development of a uniform culture by obliterating differences between all the cultures co-existing in the country."<sup>168</sup> This construction delineates a boundary excluding as aliens those who are not Hindu or legally-constructed Hindus (Buddhists, Sikhs, and Jains).<sup>169</sup> The Court found nothing troubling with

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<sup>162</sup> See Cossman & Kapur, *supra* note 12, at 114. The secularism of India is very different from that of the United States. At the time of independence, there were two competing philosophies. Nehruvian secularism was more in line with the liberal secularism of the West while Gandhian secularism was based on pluralism and tolerance. There is no concept of the complete separation of religion and politics with the former squarely placed in the private sphere. Rather, India has chosen, for better or worse, to embrace its multiple cultures and religions and take an active role in religion by administering religious law and religious trusts and appointing religious personnel in some cases. See also RAJAN, *supra* note 146, at 151-56; FLAVIA AGNES, *Law and Gender Inequality*, in *WOMEN & LAW IN INDIA* 94-106 (2004).

<sup>163</sup> See RAJAN, *supra* note 146, at 151-56.

<sup>164</sup> For a description of these cases, see JACOBSON, *supra* note 68, at 14-16.

<sup>165</sup> *Id.*

<sup>166</sup> *Yagnapurushadji v. Vaishya*, A.I.R. 1996 S.C. 1119 (India).

<sup>167</sup> *Commissioner of Wealth Tax v. Sridharan* 1976 S.C.R. 481 (India).

<sup>168</sup> *Prabhoo v. Kunte*, (1996) 1 S.C.C. 130 (India).

this definition that overtly demands the assimilation of Muslim religious differences—the very differences that have, at least in discourse, since pre-partition days become equivalent to a separate Muslim culture—by equating Indian culture and Indian identity with Hinduism.<sup>170</sup>

The Court went on to state that speech promoting *Hindutva* was acceptable in the promotion of secularism and that it was an issue of fact whether or not there had been a violation of the RPA 1951.<sup>171</sup> “The decision was immediately claimed by the Hindu Right as a vindication of their vision of *Hindutva*.”<sup>172</sup> The Hindu Right’s discourse of secularism and equality has been unequivocal in its majoritarianism and its program to eliminate “special treatment” of minorities. By equality, it means that everyone is equally subject to Hindu norms.<sup>173</sup> By neutrality, it means that no group will receive special treatment, obscuring the fact that the majority legislating such “reform” would itself receive special treatment by virtue of being in the position to codify its religious laws as every religious community’s law.<sup>174</sup> Under these circumstances, liberal calls for uniformity and secularism take on a sinister tone. Consider Gerald Doppelt’s suggestion with regard to minorities:

[A] robust liberalism would require that Indian people transform these illiberal religious cultures and identities. A key step in this process would be to abolish their group rights of civil self-legislation, bringing all groups under a uniform secular law and culture of equality and freedom in the civil sphere. Clearly, this is a case where the law plays an essential role in transforming illiberal cultures and identities . . . .<sup>175</sup>

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<sup>169</sup> See Cossman & Kapur, *supra* note 12, at 116.

<sup>170</sup> See *supra* notes 37-65 and accompanying text.

<sup>171</sup> *Prabhoo v. Kunte*, (1996) 1 S.C.C. 130 (India).

<sup>172</sup> See Cossman & Kapur, *supra* note 12, at 116.

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., Asghar Ali Engineer, *Can India ‘Shine’ Under Hindutva?*, COUNTERCURRENTS, Mar. 4, 2004, <http://www.countercurrents.org/engineer040304.htm>.

<sup>175</sup> See Gerald Doppelt, *Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 J. CONTEMP. LEGAL ISSUES 661, 681 (2002).

Read against the Hindu Right's program of Indianization and Bal Thackeray's racist invective against Muslims, whom he compares to the Jews of Europe, Doppelt's argument highlights the way in which liberalism fails to account for the privilege of those doing the "equalizing" and the costs of such assimilation. Bal Thackeray baldly states the position of the majority Hindu Right who were so recently in power: "Have they behaved like the Jews in Nazi Germany? If so, there is nothing wrong if they are treated as Jews were in Germany."<sup>176</sup> Following the Bombay riots of the 1990s, his remarks reflected a similar hatred: "I want to teach Muslims a lesson," and: "If they're going, let them go. If they are not going, kick them out."<sup>177</sup> Moreover, the focus on women during the riots reveals the particular space that women occupy:

Going a step further in the communal riots of 92-93 in Mumbai and Surat and the Gujarat riots of 2002 Muslim women were targeted in a horrific way. In all communal ideologies women are regarded as the property of men and as the vehicle of community honor. *Rape is used as the weapon to humiliate the "other" community. The rapists coming in Khaki shorts with saffron underwears [sic] in Gujarat gave a message of sorts. The communalized section of Hindu women helping "their" men in committing of this heinous crime spoke volumes as to how the perversions of communal ideology can influence the victims of communal ideology, the women themselves.* The other aspect, which has got linked up with the communal ideology, is the dangerous fertility of "others" and "their" women. The selective targeting of women's reproductive organs in the Gujarat carnage stared in our face telling the tale of the success of this propaganda which subsists as the fodder that Muslims are increasing their population. The fact that the relative rise in Muslim population has nothing to do with religion, or that it has more to do with the poverty, illiteracy and social development does not have any place in such thinking. In a sense when all these acts are being perpetrated on the hapless victims it is regarded as a service to a particular nation as the case may be, in this case, the Hindu Nation!<sup>178</sup>

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<sup>176</sup> See Cossman & Kapur, *supra* note 12, at 116-17.

<sup>177</sup> See *id.*

<sup>178</sup> Puniyani, *supra* note 63 (emphasis added).



It strains reason to assume that a political system in which such ideologies have substantial purchase, and in which parties espousing these ideologies are elected to state and central government, could craft and legislate a secular code that acts neutrally.

## **2. *The Assumption of Political Will to Better Women's Status***

Cossman and Kapur have argued persuasively that secular institutions, such as the judiciary, have been co-opted by the Hindu Right.<sup>179</sup> Therefore, liberals, including liberal feminists, make dangerous assumptions about the effects of a uniform civil code, particularly on minorities, when they fail to examine how equality, neutrality, and secularism are subject to ideological deployment by the Right in furtherance of an assimilationist agenda.

Given the precariousness of Indian secularism and the continuing force and appeal of Hindu Right ideology, the state's commitment to gender justice and legal reform remains unclear. Two events, viewed in contrast with one another, indicate a troubling picture of the state's political will with regard to women's rights. First, the enactment of the Muslim Women (Protection of Rights on Divorce) Act of 1986 shows the extent to which women's rights are susceptible to political pressure and manipulation.<sup>180</sup> The Act, which overturned the Shah Bano judgment, was passed by a politically fearful Congress government under pressure from Muslim conservatives. This is a prime example of how communal politics can serve up gender justice on a platter if it furthers their other priorities.

Shah Bano, a seventy-three-year-old woman, was divorced by her husband of forty years through the pronouncement of *talaq* and turned out of her house.<sup>181</sup> She sued for prolonged support from her husband beyond her *iddat* period under Section 125 of the Criminal Procedure Code. The Supreme Court of India ruled in her favor, granting her continued maintenance. In reaction, fundamentalists, both Hindu and Muslim, mobilized a discourse of identity that threatened to unseat Congress, the leading party, and to tear Indian society apart along communal lines.<sup>182</sup> Muslim conservatives pejoratively labeled Muslim progressives who fought

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<sup>179</sup> See Cossman & Kapur, *supra* note 12.

<sup>180</sup> See *supra* note 151 and accompanying text.

<sup>181</sup> See Zakia Pathak & Rajeswari Sunder Rajan, *Shahbano*, in *FEMINISTS THEORIZE THE POLITICAL* 261 (Judith Butler & Joan W. Scott eds., 1992).

<sup>182</sup> *Id.*

to uphold the verdict as “Westernized” or non-Muslim.<sup>183</sup> The incumbent Congress government, fearing the loss of the Muslim vote and under pressure from the All-India Muslim Personal Law Board and conservative Muslims, passed the MWA 1986. The Act reversed the Court’s prior decision and foreclosed the right of Muslim women to sue for continued maintenance beyond the *iddat* period.<sup>184</sup> In the process, the reality of Shah Bano’s predicament was abstracted in such a manner as to occlude her completely.<sup>185</sup> The case became about the Muslim community’s identity and rights as opposed to a woman’s right to receive maintenance after divorce. The fact that Muslim women had sued and received maintenance under Section 125 in the past raises the question as to why this particular case became the flashpoint between Muslim fundamentalists and progressives as well as between Hindu fundamentalists and Muslim fundamentalists.

Undoubtedly, one reason for the contentiousness is that the Court engaged in an unnecessary Qur’anic exegesis to conclude that Shah Bano deserved maintenance, where it could have easily decided the matter on other grounds, such as public policy or the state’s interest in ensuring women were not rendered destitute.<sup>186</sup> Instead, the Court chose to engage in an ill-advised interpretation of Islamic law in a manner that shoehorned the state’s position on maintenance into an Islamic position. This move inflamed Muslim conservatives at a time when their position in Indian society was already threatened.<sup>187</sup> Moreover, the Chief Justice’s comments betrayed a prejudice against Muslims that made matters much worse:

[I]t is alleged that the “fatal point in Islam is the degradation of woman.” To the Prophet is ascribed the statement, hopefully

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<sup>183</sup> See, e.g., Pathak & Rajan, *supra* note 181, at 263.

<sup>184</sup> See Vibhuti Patel, *The Shah Bano Controversy and Challenges Faced by Women’s Movement in India*, in PROBLEMS OF MUSLIM WOMEN IN INDIA 140 (Asghar Ali Engineer ed., 1995).

<sup>185</sup> See *id.*

<sup>186</sup> See *Fuzlunbi v. Vali*, A.I.R. 1980 S.C. 1730 (India). But see *Latifi v. Union of India*, A.I.R. 2001 S.C. 3958 (India). In interpreting The Muslim Women (Protection of Rights on Divorce) Act, 1986, the Court held that the Act would be unconstitutional if not interpreted to mean that women would get a reasonable and fair provision and maintenance. The Court stopped short of declaring the Act unconstitutional, but at least it did not base its interpretation of the Act on theology, but on the Constitution. See Indira Jaising, *All Unjust Personal Laws Must Go, Be They Hindu, Muslim or Christian*, COMMUNALISM COMBAT, July 2004, <http://www.sabrang.com/cc/archive/2004/july04/cover7.html>.

<sup>187</sup> See Cossman & Kapur, *supra* note 12.

wrongly that “Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore, treat your wives kindly.” . . . It is too well known that “A Mahomedan may have as many as four wives at the same time but not more.”<sup>188</sup>

Muslim conservatives have been roundly excoriated for their role in pressuring the Congress government to reverse the judgment favoring Shah Bano, and rightly so.<sup>189</sup> However, the role of the judiciary in inciting such a predictable reaction through their inflammatory dicta has been treated as minor in comparison.<sup>190</sup> The dominant discourse interpreted these events in a manner that cast Muslims as an overly sensitive community. An equally plausible, yet downplayed, interpretation is that the judges acted in a “racist” manner. This case underscores how communal politics—deployed by both the minority community and the state, even in the halls of justice—can have devastating effects on women. But Muslim women are not the only ones who are vulnerable to this sort of manipulation. Hindu women are similarly vulnerable, albeit for very different reasons.

The Bharatiya Janata Party (BJP), the Vishwa Hindu Parishad (VHP), and the Rastriya Swayam Sevak (RSS), which comprise the Hindu Right, supported the long-banned practice of *sati*, the immolation of widows on their husbands’ funeral pyres, when it reared its head once again in the 1980s. The groups’ support of the heinous practice belied their support for women’s rights as reflected in their call for the enactment of the UCC.<sup>191</sup> Indeed, the Right’s agenda has troubling implications for women, as became evident with the second illustrative event. In 1987, when Roop Kanwar, an eighteen-year-old Rajasthani widow was burned on her husband’s funeral pyre, there was a dual public discourse of condemnation and glorification of the act.<sup>192</sup> Although the Congress government

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<sup>188</sup> Khan v. Begum, (1985) 2 S.C.C. 556 (India), *reprinted in* SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON: THE RIGHT OF THE DIVORCED MUSLIM WOMAN TO MATAA, at 79 (Lucy Carroll ed., 1998), *available at* <http://www.wluml.org/english/pubs/pdf/misc/Shah-Bano-eng.pdf>.

<sup>189</sup> See Pathak & Rajan, *supra* note 181, at 259-60.

<sup>190</sup> See PARASHAR, *supra* note 17, at 173-75; Jain, *supra* note 9, at 217; Narain, *supra* note 9, at 55.

<sup>191</sup> See, e.g., LESLIE J. CALMAN, TOWARD EMPOWERMENT: WOMEN AND MOVEMENT POLITICS IN INDIA 162 (1992).

<sup>192</sup> See Paul B. Courtright & Namita Goswami, *Who Was Roop Kanwar?: Sati, Law, Religion and Postcolonial Feminism*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 200 (Gerald James Larson ed., 2001).

disavowed the practice, 300,000 people attended the *chunri mahotsav*, a ritual that marks the thirteenth day after the sati.<sup>193</sup> Prominent community leaders attended, including representatives of the Rajasthan branch of the BJP and its youth wing.<sup>194</sup> Rather than decrying the living immolation of a young woman, the Right glorified this as an act of piousness. The lack of concern for the life of this Hindu woman, who may have been coerced by her in-laws, as compared to the high-profile concern over the plight of Shah Bano, highlights the disingenuousness of the right wing's co-optation of women's rights in general.<sup>195</sup> Whereas Shah Bano's case was used against the Muslim community as a way of decrying the fate of Muslim women, the discourse regarding Hindu women was not similarly tragic when it came to Roop Kanwar.<sup>196</sup> The former was seen as a symbol of the oppression of Muslim women, whereas the latter was exalted as a symbol of the purity and holiness of Hindu women. In fact, both women suffered at the hands of a culture that subordinates women regardless of whether they are mourned as victims or glorified as heroines.

Though it is possible that a just and neutral UCC may be promulgated, the state's failing secularism and the lack of political will make such a prospect bleak. Nevertheless, we can safely consider the current laws as the floor to secularism and neutrality—assuming that they are unlikely to become more discriminatory. By examining certain provisions of the Hindu Marriage Act of 1955, which is more gender equal, and the Special Marriage Act of 1954, one might find an indication of the provisions that could be enacted in a secular code. They also reveal the limits of formal rights in improving women's lives.

### **3. Limits of Formal Legal Rights: Lessons from the Special Marriage Act of 1954**

The secular law of marriage as codified by the Special Marriage Act of 1954 allows all citizens to contract civil marriages.<sup>197</sup> However, for a secular law, it reveals a pervasiveness of majoritarian privilege that has caused minorities to be wary of a move to universalize personal laws. The

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See Pathak & Rajan, *supra* note 181.

<sup>196</sup> See *id.*

<sup>197</sup> See DESAI, *supra* note 90, at 3-43.

SMA 1954 is not a strictly neutral law; rather, it allows Hindus, Sikhs, Buddhists, and Jains—religions of Indian origin that are constructed as Hindu—to retain their personal law of succession on contracting a civil marriage.<sup>198</sup> Conversely, one who contracts an inter-religious civil marriage, or a Muslim, Christian, Parsi, or Jew—religions constructed as foreign—who contracts a civil marriage, loses his or her personal law of succession and is governed by the Indian Succession Act 1925.<sup>199</sup> This means that Hindus are able to inherit from their families under Hindu personal laws, while others are defaulted into a “secular” law by contracting a marriage under the same civil statute.<sup>200</sup> In other words, Hindus, Buddhists, Sikhs, and Jains are permitted to remain part of a joint family structure so long as they are married to an adherent of one of those religions. If they “intermarry,” they lose this privilege.<sup>201</sup> Interestingly, such “inequality” may actually benefit Muslim women who would otherwise be subject to a discriminatory Muslim inheritance law.

Yet, to give the SMA 1954 and its framers credit, the Act has a number of provisions that promise greater rights to women: it allows for a judicial determination of custody based on a flexible best interest of the child standard and awards maintenance according to need for as long as deemed necessary, although an order of permanent alimony may be rescinded if the wife is “not leading a chaste life.”<sup>202</sup> Further, it prohibits bigamy by anyone who chooses to marry under its provisions.<sup>203</sup> Therefore, a person may not choose to marry under the secular law and then decide later to marry another under religious law. The SMA 1954 also liberalizes divorce and allows women to dissolve a marriage on equal footing with men.<sup>204</sup> Similarly, according to the more egalitarian reformed Hindu Marriage Act of 1955, men and women are both able to sue for divorce. In addition, either partner can be liable for maintenance.<sup>205</sup>

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<sup>198</sup> *Id.* at 12-14.

<sup>199</sup> See MAHMOOD, *supra* note 82, at 26-27.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> DESAI, *supra* note 90, at 34.

<sup>203</sup> *Id.* at 39-40.

<sup>204</sup> *Id.* at 21-28.

<sup>205</sup> *Id.* at 113.

While the formal equality encoded in these provisions may seem to be a progressive development, one that may be adopted in a new secular code, the realities of Indian women's lives bespeak caution about their effects. For instance, making both partners liable for maintenance may have some perverse effects in a country where gender disparities abound, women are abandoned to raise their children alone, and men often spend their earnings on themselves instead of their families.<sup>206</sup> It is only too easy to imagine a situation in which a husband loses or spends his income while a working wife saves a modest amount in order to provide for her children. Upon divorcing his wife, this husband could sue for maintenance from his better-off wife. Moreover, none of her property would be sheltered from him. Regardless of formal equality, such a law distributes income away from women in a society where women are generally economically vulnerable. In contrast, if administered as written in the code, Islamic law at minimum shelters a wife's property from her husband and from her family. Moreover, a husband may not sue for maintenance.<sup>207</sup> Fortunately, the current SMA 1954 also disallows suits by husbands. While it is not gender neutral, it is substantively more just.<sup>208</sup>

Other laws have similar negative distributive impacts as that of the Hindu maintenance provision. The current law makes dowry illegal as it is practiced by Hindus (and erroneously by some Muslims).<sup>209</sup> Moreover, the Dowry Prohibition Act of 1961 allows for dowry to be paid to the wife, but it is not a condition of a valid marriage.<sup>210</sup> Men can choose not to pay any dowry at all.<sup>211</sup> If the UCC were to have a similar provision, or a provision that eliminated all dowries, it would eliminate a source of income and security that Muslim women rely on for survival.<sup>212</sup> Where women's

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<sup>206</sup> See, e.g., NUSSBAUM, *supra* note 145, at 113 (discussing the situation of Jayamma); Amarnath Tewary, *India's Feisty Untouchable Woman*, BBC NEWS, Feb. 19, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/4723680.stm](http://news.bbc.co.uk/2/hi/south_asia/4723680.stm).

<sup>207</sup> See DESAI, *supra* note 90, at 149-51.

<sup>208</sup> *Id.* at 33-34.

<sup>209</sup> *Id.* at 44.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> It has been argued that the requirement of *mahr* has been heavily influenced by the Hindu practice of bride-price or dowry; however, it should be noted that despite regional variations, *mahr* remains an essential part of the marriage agreement in Islam. It is therefore

economic position is insecure, the right to contract for and keep *mahr* out of the reach of men may be the only financial security that a Muslim woman has. It is certainly not guaranteed that her paternal family will support her or that the Muslim religious trusts (*Waqf*) are solvent enough to provide for all divorced women.<sup>213</sup>

Another area in which formal rights have had limited efficacy is polygamy. As noted above, the SMA 1954 criminalizes plural marriages for those who marry under its auspices, and Hindu law similarly prohibits polygamy for all Hindus.<sup>214</sup> Yet, the rates of bigamy or polygamy in the Muslim community are comparable to those of the Hindu community. In both communities, about 6% of marriages are bigamous or polygamous.<sup>215</sup> Formal abolishment of plural marriages has not made a perceptible difference in the actual rates of such marriages. For Hindu women, the only difference is that she may divorce her husband and he is punishable for his conduct. But such disincentives have not been effective in preventing the harm.

Finally, there are two further problems with the opt-in code that deserve mention. One has to do with the maintenance of a private sphere in which unjust religious laws can operate, and the other has to do with the possibility of “free choice.” An optional code, particularly one that requires Muslim women to opt-in by entirely abandoning Muslim laws, preserves a public/private dichotomy. By creating an equitable opt-in code in the public realm, the state would allow Muslim traditionalists to retain their hegemony in the private/religious realm. It would, moreover, give credence to their claim that religious law is unchangeable and allow them to construct religion and religious identity unchallenged. Such a development is unacceptable because it fails to challenge patriarchal norms throughout society, making a truly equitable ordering of gender relations impossible.

Furthermore, by reinforcing the public/private split, Muslim women would still be presented with a choice between exit from the religion and possibly the community or acquiescence to unjust patriarchal constructions of religious law. In order for Muslim women to opt into a secular law over

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not simply a formal right but a religious obligation without which a marriage is invalid. See MAHMOOD, *supra* note 82, at 66-68.

<sup>213</sup> See generally SALEEM AKHTAR, SHAH BANO JUDGEMENT IN ISLAMIC PERSPECTIVE (1994). In the *Shah Bano* case, it was argued that the increased pressure on the *Waqf* boards would place them in serious financial jeopardy.

<sup>214</sup> See DESAI, *supra* note 90, at 101.

<sup>215</sup> See NUSSBAUM, *supra* note 145, at 227. See also Agnes, *supra* note 142.

their religious law, they would have to convince their own family and their prospective spouse's family that such a choice is beneficial for both sides and that it is religiously effective (that is, the marriage is still valid under the religion). Faced with such a choice and the subsequent pressures that are likely to be placed on them to not opt into a secular family law, Muslim women may be unable or unwilling to jeopardize their religious and familial affiliations. This is particularly true in a society where they face discrimination from the majority and need their communities for protection and support.

Furthermore, an assumption of free choice in a traditional society is unwarranted and fails to account for the disparities in class or economic capability, and therefore agency among Indian-Muslim women.<sup>216</sup> Codes that require Muslim women to make a choice and put the burden on them to secure their own rights with respect to their religious community do not sufficiently *guarantee* rights to those Indian-Muslim women who are most vulnerable—the poor and uneducated women.<sup>217</sup>

Muslim women's subordination cannot be remedied by a solution that places the onus on vulnerable women and reinforces the public/private split through the enactment of another optional code. As evidenced by the ongoing debate, the SMA 1954—which is, in fact, an opt-in secular law—has not replaced the dominance of Muslim Personal Law. Another secular opt-in statute may find itself in similar disuse or under-use. Moreover, in light of the ideological erosion of secularism due to co-optation by the Hindu Right, formal rights enacted by a state without the political will to challenge gender inequality may not amount to real gains for women. Nevertheless, Muslim women deserve change and equality. The following section examines both the justifications for resistance to change and the solution to gender discrimination offered by Muslim traditionalists.

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<sup>216</sup> For more on capabilities and development, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000).

<sup>217</sup> See MacKinnon, *supra* note 97, at 199 (describing how women would invoke the opt-in code). Indeed, MacKinnon acknowledges that her option requires women to actively make a choice via litigation. She claims that once one woman has litigated in the area, many other women would pursue the same choice and the social pressure to conform to traditional rules would dissipate, leading ultimately to the invalidation of the personal laws as they stand. *Id.* at 202. This raises the question of enforcement of the law. While the area of family law may be settled, it is unclear whether women would not have to litigate to enforce their choices. One may note that alimony and child support judgments routinely require enforcement action in the United States.



## B. Muslim Personal Law as Immutable: Identitarian Arguments from Muslim Conservatives

Muslim scholars have argued from a variety of positions that Muslim Personal Law ought not to be tampered with by the Indian judiciary.<sup>218</sup> Because the Muslim Personal Law is such a key element of group identity, attempts to control, change, or reform the law by the judiciary or the state are perceived as a direct threat to Muslims. And since the state is put in a position where its legal right to reform or enact new laws in the area of Personal Law is socially impolitic, the result has been a stalemate. Where the state has enacted law, it has been in response to conservative Muslim pressure and at the expense of women, as exemplified by the legislative response to the Shah Bano case.<sup>219</sup> Conservative Muslim men who control the Muslim Personal Law Board (which has fashioned itself as the ultimate authority on Islamic law in India)<sup>220</sup> typically make arguments like those of Tahir Mahmood and Saleem Akhtar, relying on formal arguments about Islam and its benevolence towards women to discredit the real subordination of women in their communities. Armed with verses from the Qur'an and sayings of the Prophet, they seek to challenge the allegations made by progressive Muslims and Hindu nationalists alike.<sup>221</sup>

The first argument from conservatives is that the law is immutable. The sacredness of the law, or so the argument runs, prevents it from being changed to suit the preferences of certain elements of the community.<sup>222</sup> This argument simply does not hold up under scrutiny. Islamic law has been an evolving body with a great deal of variation between *madhahib*, or

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<sup>218</sup> See, e.g., MOHAMMAD SHABBIR, *MUSLIM PERSONAL LAW AND JUDICIARY* (1988).

<sup>219</sup> See Narain, *supra* note 9, at 58.

<sup>220</sup> See M. J. Akbar, *How Personal is the Law?*, ARAB NEWS, July 28, 2003, <http://www.arabnews.com/?page=7&section=0&article=29460&d=28&m=7&y=2003>.

<sup>221</sup> See, e.g., MAHMOOD, *supra* note 82.

<sup>222</sup> See, e.g., All India Muslim Personal Law Bd., *Aims and Objectives*, <http://www.aimplboard.org/aims.html> (last visited, Nov. 13, 2007); see also SHABBIR, *supra* note 218, at 324 (“[*Shari'a*] is not the creation of moral beings and worldly agencies. It is a *Divine Endowment* to the Muslims and is true, authentic, and well-tested for all time to come. The allegation that radical departure from *Shariat* are demanded for and necessitated by the changing concept of state and society and their consequent obligations towards individuals as a unit as well as a group, are unfounded and baseless.”).

schools of jurisprudence, and sects.<sup>223</sup> Moreover, the colonial intervention in most Muslim countries has meant a grafting of European juridical constructs onto Islamic law and the replacement of Islamic law with civil codes.<sup>224</sup> Indeed, in many countries, all but the family law is governed by imported European legal norms.<sup>225</sup> But most importantly, the argument that law is immutable can be dismissed for the reason that the British codification does not reflect all the law, or even the most important parts of the law. As Jalal notes, the very act of codification required the exercise of choice and the imposition of a nationwide uniformity that was absent in the real practices of Muslims.<sup>226</sup> This argument, deployed one-sidedly by Muslim patriarchs, should not bar attempts at reform towards greater gender equity.

The second argument from conservatives is that the law is misapplied. First, with regard to *mahr*, as Mahmood argues, the current practices in the Muslim community are often based on customary usage rather than classical Islamic law.<sup>227</sup> Traditionally, Hindu families paid the groom a bride price as part of the marriage.<sup>228</sup> Oftentimes, this price was exorbitant, putting the bride's family into debt upon her marriage.<sup>229</sup> The Dowry Prohibition Act of 1961 banned dowry or bride price in the Hindu tradition in India after women began to be murdered by their husbands on

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<sup>223</sup> See, e.g., Alan M. Guenther, *Hanafi Fiqh in Mughal India: The Fatawa-i Alamgiri*, in *INDIA'S ISLAMIC TRADITIONS*, 711-1750, at 209, 209-10 (Richard M. Eaton ed., 2003) ("[T]he shari'a as interpreted by all the schools retained a dynamism enabling it to be adapted by the theorists and practitioners to meet the needs of the evolving Muslim communities. The rulings attributed to the founders of the school [madhab] were thus expanded, with the resulting commentaries and abridgments becoming further authorities for succeeding generations.").

<sup>224</sup> See Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 813-23 (discussing European legal scholars' tendency, despite this grafting, to study traditional Muslim law as distinguished from the transplanted Western law that is applied in Muslim countries).

<sup>225</sup> *Id.* at 814.

<sup>226</sup> See JALAL, *SELF AND SOVEREIGNTY*, *supra* note 17, at 145.

<sup>227</sup> See MAHMOOD, *supra* note 82, at 42, 67.

<sup>228</sup> See, e.g., *id.* at 67 (discussing the confusion of *mahr* with dowry); PARASHAR, *supra* note 17, at 26 (discussing dowry deaths); RAJAN, *supra* note 146, at 203-06.

<sup>229</sup> RAJAN, *supra* note 146, at 203-06.

account of insufficient dowry.<sup>230</sup> The Islamic dower, unlike a bride price, distributes wealth to women rather than away from them. Moreover, a woman has full rights to this property and it is unalienable by her husband or her father.<sup>231</sup> The position advocated in this Article is in agreement with Mahmood that if the giving of *mahr* is practiced according to Muslim law, it is a source of security for women in a society that provides no social safety net. Moreover, because they are able to negotiate the amount, a bride's family can stipulate a high *mahr* to deter unilateral divorce and abandonment; in fact, some states enacted legislation in the late nineteenth and early twentieth centuries to protect husbands from having to pay unconscionably high *mahr*, which indicates that *mahr* was historically used broadly and effectively as a protection for Muslim brides.<sup>232</sup> If the law were enforced, Muslim women would be financially more secure and less likely to be divorced without their consent. Second, the triple *talaq*, which is the most disfavored form recognized in Islam, is incorrectly practiced by Muslim men. The way in which men have used it—in one sitting—is disapproved of because it contravenes the rules set out in the Qur'an.<sup>233</sup> Nevertheless, it is still a valid form of divorce, even if there is a "mild" exhortation against its use. And finally, maintenance for three months may be adequate if a divorced wife has contracted for an adequate *mahr* that she may leave with or has prospects of remarriage or self-support. According to apologists like Mahmood, women's "independence" from their husbands (their status as members of their paternal families and their ability to remarry) is the underlying reason for the lack of adequate maintenance at the end of a divorce.<sup>234</sup>

But ultimately, arguments that dismiss the gender inequities of the formal Muslim law are unconvincing in light of experiences like that of Shah Bano who, at the age of 73, did not have many prospects of remarriage, nor is it likely that there was much of her paternal family left to support her. Assessed realistically, and as it is currently formulated and

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<sup>230</sup> See ROMA MUKHERJEE, *LEGAL STATUS AND REMEDIES FOR WOMEN IN INDIA* 116 (1997).

<sup>231</sup> See *supra* notes 100-121 and accompanying text.

<sup>232</sup> See Agnes, *supra* note 142, at 109.

<sup>233</sup> Ramala Baxamusa, *Need for Change in the Muslim Personal Law Relating to Divorce in India*, in *PROBLEMS OF MUSLIM WOMEN IN INDIA* 18, 21 (Asghar Ali Engineer ed., 1995).

<sup>234</sup> See MAHMOOD, *supra* note 82, at 75-77.

interpreted, except with regard to *mahr*, Muslim Personal Law is undeniably unjust towards women. As the various reform attempts by Islamic states attest, formal inequality of the law, as well as its impact upon women's lives and relationships, is an issue that even countries far more religiously homogenous than India must grapple with.<sup>235</sup> Further, the ways in which the laws have been interpreted have exacerbated their discriminatory effects. Since the start of British colonization, the *shari'a* has been misconstrued by those who sought to apply it without any background in Islamic jurisprudence.<sup>236</sup> The British abolished the Qadi courts in 1864, transferring jurisdiction to civil courts with an attached *mufti* (legal advisor).<sup>237</sup> Eventually, British judges began to read Islamic law and apply it themselves, often erroneously.<sup>238</sup> This tendency in the courts has outlasted British rule, as evidenced by the dicta in the Shah Bano judgment.<sup>239</sup> The result has been misapplication of *shari'a* to the detriment of women.

Solutions for the improvement of Muslim women's lives that rely exclusively on better and more rigorous application of the Muslim Personal Laws cannot remedy the effects of formal inequalities in the law. As such, they cannot be taken as workable proposals. Yet, religious laws and interpretation should not be abandoned to the hegemony of traditionalists. In the next section, this Article offers an alternative approach that seeks to reform religious laws in partnership with secularists and with the support of the state.

### C. Internal Reform, Legal Assistance and External Reform

Misapplication of the Muslim Personal Law and the patriarchal construction put on it has disadvantaged women a great deal. Changes in substantive practices to conform to the laws as they are written would indeed be an improvement over what is now practiced. However, proper application is simply not enough. In the absence of an impartially-applied, secular, and feminist uniform civil code, reform and change of the Muslim

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<sup>235</sup> See e.g., *infra* note 240 and accompanying text.

<sup>236</sup> See MAHMOOD, *supra* note 82, at 51-52.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> SALEEM AKHTAR, SHAH BANO JUDGEMENT IN ISLAMIC PERSPECTIVE 255 (1994) (quoting Muhammad Ahmad Khan v. Shah Bano, A.I.R. 1985 S.C. 945, 951 (India)).

Personal Law is the only option available for Muslim women to better their lives until such a time when the code can be effectively promulgated.<sup>240</sup> I suggest a three-pronged approach to internal reform.

### ***1. Internal Change: Muslim Personal Law Reform***

First, Muslim personal laws be must be changed to give women rights similar to those of their counterparts in other communities. However, this Article proposes that those laws, such as *mahr*, that distribute wealth towards women, be maintained and enforced. Although the state must ultimately promulgate a reformed code, it is clear from the above arguments that under the current circumstance, such a move originating from the state would be unlikely. As such, reform must come from within, with elite Muslim women and men taking the lead in reinterpreting Islamic texts in favor of gender equity and advocating for poorer Muslim women.

As An-Naim has argued, Islamic texts can bear several different interpretations.<sup>241</sup> A progressive hermeneutics would create the space for women to press for their rights under Islamic laws as an alternative to the unpredictable secularism of the state. Changes to prohibit the triple *talaq*, grant women the right to initiate divorce, and prohibit polygamy would be the first steps towards gender justice. Such measures have already been

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<sup>240</sup> See Sunder, *supra* note 15. Many Muslim women are attempting to create an alternative to either acceptance of traditional constructions and codifications of *shari'a* or leaving the faith for secularism. However, this third approach of “finding” or “interpreting” Islamic texts in line with gender-just laws and human rights—an approach that this Article advocates—is still a half measure compared to ensuring completely fair laws. Regardless of interpretation, there are provisions in the Qur'an that, notwithstanding feats of hermeneutical acrobatics, admit little by way of formal equality for women. One example of such a provision, despite the fact that it was at the time a protective and perhaps progressive revelation, is that women inherit only half the share of that of a brother:

Allah enjoins you concerning your children: The male shall have the equal of the portion of two females; then if they are more than two females, they shall have two-thirds of what the deceased has left, and if there is one, she shall have the half; and as for his parents, each of them shall have the sixth of what he has left if he has a child, but if he has no child and (only) his two parents inherit him, then his mother shall have the third; but if he has brothers, then his mother shall have the sixth after (the payment of) a bequest he may have bequeathed or a debt.

QUR'AN 04:11 (Pickthall translation), available at <http://www.usc.edu/dept/MSA/quran/004.qmt.html>.

<sup>241</sup> See AN-NA'IM, *supra* note 22.

instituted in other Muslim countries such as Tunisia.<sup>242</sup> Moreover, standardization of the *nikahnama* (marriage contract) to limit the right to triple *talaq* has been proposed and promulgated.<sup>243</sup> Though in this iteration it remains inadequate and far from the model proposed by progressive Muslim women, it is a sign of progress indicating that Muslim women are impacting the debate within religious institutions.

It is unfortunate for Muslim women that the Muslim Law Board, the institution with the most power over law reform, has not been able to come to a consensus about these issues.<sup>244</sup> Yet, pressure for change continues to mount from Muslim women through the All India Muslim Women's Law Board (AIMWLB) which was organized in 2005 to press for gender-sensitive reform of personal laws.<sup>245</sup> It is hoped that Muslim women and the AIMWLB will to continue to press for change without being deterred by the strategic political claims that such long overdue concessions threaten Islam. As in other countries, essential elements of Islam in India will withstand such changes and, indeed, this Article argues that such reform would be more in keeping with the spirit of justice integral to Islam than the current laws are.<sup>246</sup> Further work on model reforms needs to be

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<sup>242</sup> See LAW & RELIGION PROGRAM OF EMORY UNIV., *supra* note 143 (example of Tunisian law).

<sup>243</sup> See Balraj Puri, *Nikahnama—A Reply to Triple Talaq*, DECCAN HERALD, Aug. 13, 2004, available at <http://www.deccanherald.com/archives/aug132004/edst.asp>; 'Nikahnama' Cites Uniform Code for Muslim Marriages, ECONOMIC TIMES, May 2, 2005, <http://economictimes.indiatimes.com/articleshowarchive.cms?msid=1094570> (noting that while the accepted uniform Nikahnama is an improvement, it still allows for the use of triple *talaq* as a last resort). Unfortunately, this may not be much of a disincentive to men who wish to discard their wives. Arguably, Islamic law has always considered the use of triple *talaq* as a last resort. The amendments to the Nikahnama proposed by women members of the AIMPLB and women activists such as the Muslim Mahila Organization, such as an advocate for the woman during the marriage, the limitation of *talaq*, and the right to restrict polygamy, were not adopted. See Ravi Sharma, *A Missed Opportunity*, FRONTLINE, Nov. 11-24, 2000, available at <http://www.frontlineonnet.com/fl1723/17231010.htm>.

<sup>244</sup> See e.g., *India Muslim Divorce Code Set Out*, May 2, 2005, BBC NEWS, [http://news.bbc.co.uk/2/hi/south\\_asia/4504889.stm](http://news.bbc.co.uk/2/hi/south_asia/4504889.stm); Sutapa Mukerjee, *India's Muslims Face Up to Rifts*, BBC NEWS, Feb. 9, 2005, [http://news.bbc.co.uk/2/hi/south\\_asia/4235999.stm](http://news.bbc.co.uk/2/hi/south_asia/4235999.stm); Geeta Pandey, *Muslim Women Fight Instant Divorce*, BBC NEWS, Aug. 4, 2004, [http://news.bbc.co.uk/2/hi/south\\_asia/3530608.stm](http://news.bbc.co.uk/2/hi/south_asia/3530608.stm).

<sup>245</sup> See K.S. Dakshina Murthy, *Bid to Reform Muslim Personal Law Fails*, HINDUSTAN TIMES, Oct. 31, 2000, available at <http://www.hvk.org/articles/1000/101.html>.

<sup>246</sup> See generally *supra* note 143 (where other countries have changed their laws to more equitable arrangements).

undertaken by groups such as AIMWLB in cooperation with secular feminists, and then vigorously advocated among Muslims.

## **2. Practical Assistance: Both Economic Empowerment and Teaching Women to Use the Law**

Lest reform become a hollow formality, a second prong of this solution is the need for community action and the provision of legal aid to the poor beyond criminal matters.<sup>247</sup> Few writers have taken up the class dimensions of the subordination of Muslim women in India.<sup>248</sup> Undoubtedly, family wealth and education has a large part to play in whether a woman will be deprived of her rights, whether she has the agency and the support to be able to bargain effectively or litigate, and the extent to which religious laws will be deployed against her.<sup>249</sup> In a comparable context, it has been found that ignorance of the law has been used against women particularly with regard to property rights. In Bangladesh, nonprofit organizations have begun an aggressive campaign to educate women about their legal rights:

The legal aid clinics are designed to help BRAC members as well as poor community members resolve their conflicts either through local arbitration or through the formal legal system by providing them with legal advice and assistance. The legal aid programme deals with issues like dowry, dower and maintenance, polygamy, divorce, *hila* marriage, physical torture, land related matters, money related matters, rape, acid throwing, kidnapping, trafficking and fraud.

Through this legal intervention, BRAC has begun changing the traditional system of arbitration that discriminates against the poor and particularly against women. Instead of having decisions imposed upon them by traditional elites (mostly men) through the system of *shalish* (informal village courts), women can now participate in a process of arbitration facilitated by BRAC, which

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<sup>247</sup> See INDIA CONST. art. 39A, available at <http://lawmin.nic.in/coi.htm>.

<sup>248</sup> See RAJAN, *supra* note 146, at 159.

<sup>249</sup> See Sushila Jain, *The Process of Modernization in India and the Changing Status of Muslim Women*, in PROBLEMS OF MUSLIM WOMEN IN INDIA 52 (Asghar Ali Engineer ed., 1995); Syed Mehdi Husain, *Muslim Women and Higher Education: A Case Study of Hyderabad*, in PROBLEMS OF MUSLIM WOMEN IN INDIA 72 (Asghar Ali Engineer ed., 1995).

tries to enforce laws established to protect the rights of women. Although BRAC has no formal power to enforce the decisions taken during the process of arbitration, the people against whom complaints are made always know that a formal case could be brought against them if they do not comply with the informal arbitration. When arbitration fails, BRAC forwards the complaints to ASK selected panel lawyers and they in turn take necessary action to file a regular case in the local court.<sup>250</sup>

Similarly, the United States-based organization Global Rights has instituted a program that uses hairdressers and quilting clubs in Morocco as channels through which vital information about women's rights regarding marriage contracts and *mahr* agreements is disseminated.<sup>251</sup>

In India, the need for education of the Muslim population with regard to the current misunderstanding and misapplication of *mahr* has been recognized within the communities.<sup>252</sup> Poor Muslim women and Indian women in general would benefit greatly from such practical assistance that gives meaning and substance to the formal rights that they may have. Such an endeavor would require investment by the elites within the communities, partnered with external agencies and progressive feminist movements, to create and foster effective channels for legal information.

### ***3. A Parallel Code: Drafting a Model UCC and Advocating Its Passage***

Finally, it is suggested that Indian secular feminists, in partnership with religious feminists, draft a model UCC. While it may never be legislated, a model UCC drafted by women would give women a standard by which to judge their formal rights. It would make concrete the aspirations of Indian women and create a point of focus around which women can rally for their rights. Moreover, it would potentially prevent the

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<sup>250</sup> Bangladesh Rural Advancement Committee (BRAC), Social Development, Human Rights and Legal Services, <http://www.brac.net/legalaidclinics.htm> (last visited Mar. 21, 2006).

<sup>251</sup> Interview with Aisha Bain and Jennifer Rasmussen at Global Rights on Jan. 16, 2007 (notes on file with author). *See also* GLOBAL RIGHTS, CONSOLIDATING REGIONAL INITIATIVE: LOCAL NETWORKS FOR WOMEN'S HUMAN RIGHTS IN MOROCCO (Jan. 2006), available at [http://www.globalrights.org/site/DocServer/GR\\_Morocco\\_Regional\\_Initiative\\_Interim\\_Report.pdf?docID=4583](http://www.globalrights.org/site/DocServer/GR_Morocco_Regional_Initiative_Interim_Report.pdf?docID=4583).

<sup>252</sup> Maulana Asrarul Haque Qasmi, *Dire Need of Reform in Muslim Society*, MILLI GAZETTE ONLINE, May 1-15, 2005, <http://www.milligazette.com/Archives/2005/01-15May05-Print-Edition/011505200564.htm>.



promulgation of a UCC by ideologues intent on using women's rights as an instrument for furthering an assimilationist agenda and without regard for improving the experience of Indian women.

Several model codes have already been proposed by various groups in India. Flavia Agnes has reviewed some of the most important ones; however, she concludes that none of the codes are satisfactory.<sup>253</sup> Despite the common goals of improving the lot of women and children, the codes grapple with and are ultimately unable to reconcile formal equality with substantive equality. The more important contribution of Agnes's work is that it provides a basis on which to differentiate a new attempt at a secular code. Her analysis of the codes drafted thus far reveals the following issues:

1. The imposition of a Uniform Civil Code from above is not recommended. Education and a campaign for the code must also be undertaken.<sup>254</sup>
2. If the goal is to improve the circumstances of women and children, then the recommendations must be based on notions of substantive equality. Use of undifferentiated terms such as "spouse" is likely to deteriorate women's rights.<sup>255</sup>
3. Abolishing polygamy through compulsory registration of marriages forms the "core of the controversy over Uniform Civil Code." The codes recognize the problem of polygamy but are unsuccessful in recommending viable solutions. There have been two contradictory tendencies in the proposed solution: i) more stringent punishments of breaches of the anti-bigamy provisions, and ii) the recognition of women and children in de facto bigamous/polygamous relationships.<sup>256</sup>

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<sup>253</sup> AGNES, *supra* note 162, at 186-88.

<sup>254</sup> *Id.* at 186-87.

<sup>255</sup> *Id.* at 187.

<sup>256</sup> *Id.*

4. Women's organizations have begun to move away from marriage as a moral idea and a means to regulate sexual relations to marriage as an economic contract.<sup>257</sup>
5. The drafts are based on one of two premises:
  - i) Women as a class are non-working spouses and their only contribution is unpaid domestic labour, or
  - ii) Men and women are equal partners and hence their rights, duties and responsibilities are equal and of a similar nature. A third category of women, who are the sole providers of their families, are invisible in this debate. The recommendations do not protect these women who shoulder the double burden as wage earners and home makers. The implications of introducing the concept of joint family property and equal right to matrimonial home and maintenance etc. using a gender neutral term spouse would be detrimental to the rights of these women, most of whom belong to the marginalized sections of society.<sup>258</sup>

It is interesting to note that the Muslim Personal Law has none of these issues to beleaguer it. It acknowledges the economic nature of the marriage relationship.<sup>259</sup> As it protects women's property by removing it from the reach of a husband or father, Muslim law prevents the divestment of resources from women.<sup>260</sup> Thus, regardless of whether a woman is the sole earner, an equal partner, or a dependant, her property is legally protected. Further, by acknowledging polygamy, it protects women and children who are in de facto polygamous relationships.<sup>261</sup>

Naturally a secular code would have to resolve these issues in order to be applicable to all women without regard to religion. Women's groups working together are more likely to produce a viable code if they place economic considerations at the fore and demote the importance of

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 188.

<sup>259</sup> See *supra* notes 100-121 and accompanying text discussing *mahr*.

<sup>260</sup> *Id.*

<sup>261</sup> See *supra* notes 139-143 and accompanying text on polygamy.

polygamy in the code. The polygamy issue will only become less sensitive when the Muslim community itself is forced or chooses to reform it.

In the end, the byzantine system of personal law in India that requires familiarity with a number of religious traditions is a burden on the judiciary. Although it may be in keeping with the ethos of religious pluralism and equality among religions that the framers held so dear, the state cannot continue to uphold religious laws that conflict with fundamental rights and justify the subordination of women on this basis. Further, male leaders of the religious community cannot continue to use and control women as a symbol of identity by politicizing their rights. For these reasons, an effort needs to be made to move towards a system that can afford women their rights while respecting their religious communities. As either a step towards a civil code or as an end in itself, Muslim Personal Law reform is long overdue.

#### IV. WHEN AND WHY LAW MATTERS: THE PLACE OF LEGAL REFORM IN FEMINIST ACTIVISM

Law reform may be overdue; however, the question remains as to whether it will make a difference in women's lives—whether it will matter. In its final section, this Article considers the arguments about the relevance of law in the lives of women. The first is a general argument about limitations on the ability of the law to transform the norms of a society. Nivedita Menon's *Recovering Subversion: Feminist Politics Beyond the Law* extends Western feminists' legal critiques to the Indian context and, therefore, it is fair to use her as an example of this important line of critique.<sup>262</sup> While Menon does restate the critique of formal rights—a subject that has already been discussed above—this Article is more interested in her observation that projects focused on legal reform are a proxy for serious movement-building. Thus, the focus is on the part of her argument that discusses social movements as a better alternative to legal reform.

Menon argues that rather than working to change laws or legal norms, such social movements should seek to do the much harder work of changing societal norms. This is an extremely important argument because it highlights the weaknesses that can exist in feminist activism where it conflates laws with the norms by which women actually live. Such a conflation considers changes in law as having a consequential transformative impact on society. For the most part, such normative

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<sup>262</sup> See MENON, *supra* note 8, at 3-9.

changes are either non-existent or very slow to materialize.<sup>263</sup> However, this is not to say that change driven by the law does not happen. In the Indian context, despite the tortured history of law as a tool of the civilizing mission of empire upon its subjects,<sup>264</sup> it has had a visible effect in some areas. For instance, the laws banning *sati*, though they have not completely eradicated the ritual, have made *sati* difficult to practice on a broad societal scale.<sup>265</sup> This is not a negation of the anti-formalist argument that law has a limited impact; nevertheless, a limited impact may be better than no change at all. The lesson from this experience ought to be that law reform should not be abandoned because of the limited impact of “rights.” And in the absence of evidence of the real harms that institutionalization of a different configuration of rights may produce, such arguments are unpersuasive.

Furthermore, the importance of legal change for subaltern groups cannot be so easily dismissed by members in the dominant community. As Patricia Williams says about the Critical Legal Studies movement, which has been the chief theoretical location of these critiques, and its dismissal of “rights”:

For blacks, . . . the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the denial of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide.<sup>266</sup>

While it cannot be said that Muslim women have had no rights, there has been little by way of progress in obtaining more equitable rights. Further, enforcement of whatever rights exist has been heavily mediated by

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<sup>263</sup> *Id.* at 34-35.

<sup>264</sup> *Id.* at 8. See generally UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999).

<sup>265</sup> See, e.g., Monmayee Basu, *Hindu Women and Marriage Law: From Sacrament to Contract*, in *WOMEN AND LAW IN INDIA* 34 (2004) (noting that social reformers, women, and legislators sought to tackle the various problems facing Indian society).

<sup>266</sup> Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 89 (Richard Delgado ed., 1995).

customary practices, societal norms, and political considerations.<sup>267</sup> And, as Williams so aptly notes with regard to the Black experience in the United States, the law has enshrined “rights” for dominant groups at the expense of the subordinated.<sup>268</sup> Translating this to the Indian context, rights have similarly privileged majority groups (whether they be religious or gender groups, including those constructed as such) in ways that have harmed Muslim women. Thus, while focusing solely on rights may be unwise, to give up on them completely is premature despite the relevance of the critique. Put another way, rights are already encoded into the law and, for the most part, they distribute resources toward Muslim men and prefer Muslim men to Muslim women. To give up on the fight for just laws, even in the form of rights, does nothing to redress the already existing imbalance that these encoded entitlements provide.

Second and equally important are the arguments that *shari’a*—at least in its formal sense—has a limited impact on the quotidian lives of Muslims, that legal considerations do not necessarily shape the identity or behavior of Muslims, and that economic factors are far more important with regard to both than the legal codes to which Muslims are subject. Zoya Hasan’s *The Diversity of Muslim Women’s Lives in India* articulates this line of critique.<sup>269</sup> According to Hasan, far too much attention has been paid to the legal codes that govern Muslims and far too little to the actual subjects of the code.<sup>270</sup> As a result, rather than illuminating the needs of the diverse body of people who adhere to Islam in India, these attempts have obscured those needs by reducing them to the singular identity fixed in those codes.<sup>271</sup> In other words, the fantasy Muslim contemplated by the imperial creators of the personal law code has overshadowed the multi-dimensional, diverse, and much more complex people who adhere to Islam (or who are secular Muslims) in India. Furthermore, concentration on law obscures the more important issues facing Muslims that are primarily socio-economic.

Undoubtedly, economic considerations are of paramount importance to the vast majority of Muslims, far more so than proposed legal codes that may never come into play in their lives. Nevertheless, many

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<sup>267</sup> See *supra* Part I.

<sup>268</sup> See Williams, *supra* note 266.

<sup>269</sup> See DIVERSITY OF MUSLIM WOMEN’S LIVES, *supra* note 3.

<sup>270</sup> *Id.* at 3.

<sup>271</sup> *Id.* at 3-4.

Muslims still consider Islamic legal justifications to be important to their behavior and often seek to justify their actions by referring to the *sunnah*, or the ways of the Prophet according to Islamic tradition, as evidence of their rectitude. Despite the largely symbolic nature of this linkage (that is to say, *shari'a* in its entirety is not adhered to in any coherent way), the very fact that *shari'a* enters the conversation to Islamicize and therefore legitimize various practices requires one to take the formal law somewhat more seriously.<sup>272</sup> If the law can be shown to be different than common usage and practice, as it classically is, and women are given the power to refute facile justifications based on dubious religious law, perhaps some normative change would be aided. For instance, as mentioned above, Global Rights uses quilting bees and hairdressers to disseminate legal information to women.<sup>273</sup> Such information, which has often been denied to women, is critical in protecting them from divestiture and fraudulent appropriation of their resources. Thus, to claim that law or knowledge of the law has no impact on women's lives would be an oversimplification.

Of course, the positive impact of the law is greatest when it is deployed in protection of women's economic resources, so legal reform must be done in conjunction with economic protection and redistribution that assists poor Muslim women. Keeping in mind the role that law might play, as has been argued above, part of that redistribution ought to be in the form of legal aid that prevents those Muslim women from losing what few resources they may have.

The other side to this critique is a warning that law reform and legislative actions tend to create ossification and diminish the fluidity of identities. This has been well theorized by Wendy Brown in *States of Injury* and by Menon.<sup>274</sup> It is also clearly reflected in the empirical research of Hasan, who warns that the focus on Islamic law has occluded Muslims as subjects and agents who have multifaceted, complex identities and experiences.<sup>275</sup> These are extremely valuable contributions in correcting the way that Muslims are viewed by dominant society and also in the way that they have been projected by Muslim Traditionalists. Nevertheless, the problem remains that, regarding the codification of Muslim Personal Laws,

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<sup>272</sup> *Id.*

<sup>273</sup> See GLOBAL RIGHTS, *supra* note 251 and accompanying text on Global Rights Morocco program.

<sup>274</sup> See DIVERSITY OF MUSLIM WOMEN'S LIVES, *supra* note 3, at 47-54; WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 128-29 (1995).

<sup>275</sup> See DIVERSITY OF MUSLIM WOMEN'S LIVES, *supra* note 3, at 3-4.

a certain fantasy of a unitary persona or community as “Muslims” has already become part of the bedrock of the Indian family law system. Moreover, that identity has been shaped, as discussed above, first by the administrative needs of the British during colonialism, and second by the politics of nationalism and partition. The laws that exist as Muslim Personal Laws are an amalgam of different legal sources (including customary practice, classical *shari’a* and British liberal traditions reinterpreting classical laws to be less “illiberal”).<sup>276</sup> A fear of enshrining a different set of identities is certainly anxiety-provoking and legitimate, but less so than leaving unchallenged or unchanged the current identities that were determined by a colonial ruling authority. The warning that this critique offers is that, without a great deal of thought and care, legal reform may result in the formation of identities and relationships between dominant and subaltern that are undesirable and that may become ossified. Thus, in light of this risk, legal reform must proceed from careful assessment of the impact of changing or reformulating identities in such a way that reveals what actual distribution of resources such moves would yield.

Given the dual nature of Indian law, having both a secular and a religious component, any movement towards unification of the code into a singular instrument raises the question of legitimacy. That is to say, in addition to being subject to the critiques raised above, a secular code would also require some grounds on which it would be acceptable to the majority of Indians. The Muslim Personal Law, insofar as it purports to be based on *shari’a*, derives its legitimacy from religion, as do the other religious personal law codes. However, in order for a secular code to be acceptable, it too must be legitimized. Generally, the proponents for such legitimacy have resorted to some form of shared values, experience, or “universal” norms.<sup>277</sup> Yet, such notions of universality raise concerns of assimilation, as argued above, and in a nation as diverse as India, it is hard to advocate for any kind of “cultural” universality that might undergird such a reform.<sup>278</sup> This problem is part of the “sameness versus difference” debate that Menon outlines.<sup>279</sup> However, here we are confronted with the issue of similarity among women in different religious groups. The assumption that all women

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<sup>276</sup> See *supra* notes 20-42 and accompanying text.

<sup>277</sup> See, e.g., NUSSBAUM, *supra* note 145, at 34-41.

<sup>278</sup> Nussbaum’s arguments notwithstanding, it seems that one of the main problems in India is the difficulty of discovering truly “universal” values that are comprehended in the same manner in different contexts and cultures. See *id.*

<sup>279</sup> See MENON, *supra* note 8, at 54-59.

have some shared experience from which legal reform might derive legitimacy hides the many differences that also exist. Such a presumed and legally constructed difference was the basis for the enactment of the various personal law codes.<sup>280</sup> This is a dilemma that cannot easily be overcome because the problem of finding legitimacy for the code arises in part from the problem that legal reform is often a proxy for movement building—that is, differences overshadow similarities such that agreement about similarities is hard to come by. In order for a secular code to have legitimacy, there must be a strong social movement with members of the various groups in agreement about the goals of the code. The multiple constituencies that the code purports to govern must be equal stakeholders in the formulation of a gender-equitable code that is sensitive to difference as well. Where there is a lack of such a movement or the movement is led by dominant groups, the result may simply be the kind of encoding of privileges for dominant women that the personal law codes provide with regard to men. In other words, for the secular code to be accepted, it must be the product of a social movement that encompasses subalterns and that is not a top-down imposition of “universal” values. Such a movement has yet to materialize with force in India, particularly one that reconciles the class and economic differences among women. However, it is a goal towards which many women’s organizations strive. And as this Article has argued, a draft model code that emerges from such a broad coalitional movement would be a legitimate reflection of the demands and desires of many if not most Indian women.

## CONCLUSION

With the continued politicization of law and the equation of religious law as identity, India has moved farther away from the goal of a uniform civil code. Yet it is unfair to hold the religious minorities solely culpable for this unfortunate development. As argued above, the rise of Hindu nationalism in the 1990s and continuing to the present has created a situation in which “secular” law has been deployed as a punitive, assimilative instrument against minorities.<sup>281</sup> The vernacular of *Hindutva* and its acceptance by the judiciary has reserved to Hindus the very identity of “Indian,” constructing Muslims, Christians, and Jews as “other.” More

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<sup>280</sup> See *supra* notes 20-42 and accompanying text.

<sup>281</sup> See, e.g., AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (2006); AMARTYA SEN, THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY (2005).



disturbingly, the co-optation of secular institutions—including the judiciary, long held to be the least political institution of the state—for the purpose of propagating *Hindutva*, gives minorities very real reasons to be wary of a precipitous move towards more secular laws.<sup>282</sup> Moreover, the Right's co-optation of the issue of women's rights has made it difficult for women's groups to push for a uniform civil code without aligning themselves with the Right. While a uniform civil code, under the right circumstances—a more robust secularism, a depoliticization of religious identity, more support for progressive Muslims—would improve the formal rights of women, the likelihood of these circumstances occurring is uncertain at best. This Article has argued that the best approach in the interim is for radical reform of Muslim Personal Law coupled with the drafting of an aspirational code that is then advocated for vigorously.

Muslim women are not mute subalterns as they have sometimes been portrayed, nor are they the victim-caricatures that many feminist scholars seem to believe them to be.<sup>283</sup> They have been at the forefront of major reform movements all over the Islamic world and India is no different. It is unfortunate that organizations like the Muslim Personal Law Board have exerted a monopoly over the conversation about Muslim women's rights; however, even in such conservative organizations, Muslim women are making inroads and pushing back.<sup>284</sup> Unfortunately, their efforts have been hampered. The co-optation of their cause, the discourse engaged in by women's rights groups that pits religion against gender, and the discourse of the Right that pits Muslims against Hindus have taken on a patina of colonialism.<sup>285</sup> As a result, religious communities, which are both a location of succor and support for Muslim women, are also a location of control and a barrier against outside influence. Muslim women find themselves caught between the Scylla of community and the Charybdis of a sometimes hostile state, a racist majoritarian ideology, and a majority population that seems to support it. Until the state is no longer a major site of oppression for all Muslims, until Muslim women's particular experience at the intersection of gender and religion is taken seriously by dominant women's groups, and until the discourse of women's rights in general is

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<sup>282</sup> See *supra* notes 161-177 and accompanying text.

<sup>283</sup> See, e.g., *supra* note 9 (these authors are good examples of such scholars).

<sup>284</sup> See, e.g., Pandey, *supra* note 244; Geeta Pandey, *Women Battle on with Mosque Plan*, BBC NEWS, Aug. 19, 2005, [http://news.bbc.co.uk/2/hi/south\\_asia/4165440.stm](http://news.bbc.co.uk/2/hi/south_asia/4165440.stm).

<sup>285</sup> See RAJAN, *supra* note 146.

reclaimed from the Hindu Right, the efforts of Muslim women to enact reforms within their own communities and to foster dialogue with secular feminist groups are the most effective ways to change their lived experience.