

# Gender Inequality and Religious Personal Laws

The Limits of a Uniform Civil Code from an Intersectional Perspective and its Illusion of Secularism

by

**Rajdeep Johal**

with a comment by

Tirthankar Chakraborty



**En-Gender!**

Working Paper Series  
Volume 3  
Issue 4  
2021

ISSN: 2700-1415

Editor: Jessica A. Albrecht  
Layout and Publishing: Jessica A. Albrecht  
Reviewer: Tirthankar Chakraborty

## **Gender Inequality and Religious Personal Laws**

### **The Limits of a Uniform Civil Code from an Intersectional Perspective and its Illusion of Secularism**

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**By *Rajdeep Johal***

Rajdeep Johal is a Law graduate from the University of Warwick. Having engaged heavily with Family Law and Human Rights Law, she possesses a keen interest in issues affecting women. She is currently pursuing a gap year and participating in further opportunities to expand her interests

#### **To cite this article:**

Johal, Rajdeep. 'Gender Inequality and Religious Personal Laws. The Limits of a Uniform Civil Code from an Intersectional Perspective and its Illusion of Secularism', *En-Gender!* 3:4 (2021): 1-18.

#### **Keywords**

India, Religious Personal Laws, Uniform Civil Code, Gender Equality, Secularism, Intersectionality

#### **Abstract**

Women's rights in India are constantly evolving. However, what hinders progress is the existence of prejudiced religious-based laws that violate women's constitutional rights. The opinions on the solution to these laws are divided. Many women's groups, as well as the current Indian government, support abolishing religious law in favour of secular uniform laws known as a Uniform Civil Code. Other advocates for women's rights support retaining religious-based law where each religious community reforms their laws to promote gender equality. A third approach is also being advocated whereby an optional Civil Code is implemented alongside reformed religious laws. This paper argues against the solution to replace religious laws with a Uniform Civil Code. It questions the uniformity approach offered by revealing how nationalistic interests may overshadow aims of gender equality. It also explains why abolishing religious-based law is too simplistic of a solution. The underlying aim is to illustrate that religious rights and women's rights are not mutually exclusive concepts.

## Introduction

In India, Hindus, Muslims, Christians and Parsis have their distinct religious personal laws (RPLs). These are laws based on the faith, religious doctrines, and culture of a community that govern 'personal' matters such as marriage, divorce, maintenance, and succession. These issues are thus not determined by universal laws applying to all citizens but one's religion. Whilst they are substantively different, 'a common thread woven through'<sup>1</sup> RPLs is 'the patriarchal dominance of men and the unequal treatment of women.'<sup>2</sup> Consequently, debates have been focused on the solution to these laws.

The solution that the current Indian government, under the Bharatiya Janata Party (BJP), seeks is to impose a Uniform Civil Code (UCC) applying to all citizens regardless of their religion. Indeed, Article 44 of the Indian Constitution (1950) states the 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.'<sup>3</sup> The notion of a UCC was introduced into the Indian political debate by the National Planning Committee appointed by the Congress Party in 1940.<sup>4</sup> The desire for a Code was rooted in an attempt to secure national unity amongst the different religious groups in India. Initially, the proposal to insert the enactment of a UCC in the Constitution was opposed by religious groups, particularly by the Muslim members of the Constituent Assembly. They perceived a UCC to be a threat to their minority status.<sup>5</sup> However, a compromise was met whereby the enactment of a UCC was agreed to be a Directive Principle, meaning that it did not create 'justiciable rights...nor can a law be declared to be unconstitutional [where] it contravenes'<sup>6</sup> Article 44. This ensured the Muslim members that 'their personal laws would not be upset'.<sup>7</sup> Thus, the notion of a UCC was traditionally concerned with national unity. It was only from the 1960s onwards when the UCC debate was perceived to be linked to women's rights, and in the 1980s, women's groups 'began to vehemently push'<sup>8</sup> for a UCC to ensure gender-just laws.

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<sup>1</sup> Shalina Chibber, "Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code," *Indiana Law Journal* 83 no. 2 (2008): 695, accessed April 29, 2020, <https://www.repository.law.indiana.edu/ilj/vol83/iss2/10/>.

<sup>2</sup> Ibid.

<sup>3</sup> The Constitution of India 1950, art 44.

<sup>4</sup> Archana Parashar, *Women and Family Law Reform in India* (New Delhi: Sage Publications India Pvt Ltd, 1992): 230.

<sup>5</sup> Ibid.

<sup>6</sup> Tanja Herklotz, "Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's movement and the Indian Supreme Court," *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 49 no. 2 (2016): 152, accessed April 10, 2020, [www.jstor.org/stable/26160070](http://www.jstor.org/stable/26160070).

<sup>7</sup> Chibber, "Charting a New Path Toward Gender Equality in India", 700.

<sup>8</sup> Herklotz, "Dead Letters?," 155.

The question this paper will answer is whether replacing the RPLs in India with a UCC adequately advances women's interests. It will be asserted that a UCC cannot yet be adopted as a solution and that the system of RPLs should be retained where reforms come from the community. This paper will begin by demonstrating why RPLs need reforming, referring to examples of discriminatory laws and their problematic status under the Constitution. The proposal to introduce a UCC will then be evaluated where it will be argued that the benefits of a Code can also be achieved by retaining the RPL framework. The criticisms of a UCC will then be discussed. It will be revealed that it is not feasible under the BJP government to adopt a Code which focuses on serving the needs of women. Additionally, a UCC may fail to promote change and will not be meaningful to minority women and their intersecting identities.

### **The Problems with RPLs**

Before evaluating the case for a UCC it is important to understand why RPLs need reforming. Scholar Tanja Herklotz writes that the problems with the personal law framework can be linked back to their heritage.<sup>9</sup> Before the British arrived in India, Hindus and Muslims deemed themselves predominantly bound by their religious laws.<sup>10</sup> The British maintained this under the Warren Hastings Plan (1772) providing that in personal matters ('inheritance, marriage, caste, and other religious usages or institutions'<sup>11</sup>), Hindus and Muslims were to be governed by their religious laws. Although the British excluded religious laws from their intervention, in reality, 'the colonial system largely shaped the content of personal laws'<sup>12</sup> as the British interfered through legislation and judicial interpretation. For example, Williams reports that more than twenty Acts were passed between 1865 and 1939 that affected personal law in some manner.<sup>13</sup> Scholars have noted that Acts that were targeted at social reform to benefit Indian women, had little 'practical effect' and was even seen to have 'deteriorating effects' on women<sup>14</sup>. This resulted in Williams to conclude that the reforms 'tended to favour religious orthodoxy and male conservatism'<sup>15</sup>. This is

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<sup>9</sup> Tanja Herklotz, "Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective," *Indian Law Review* 1 no. 3 (2017): 255

, accessed March 17, 2020, <https://doi.org/10.1080/24730580.2018.1453750>.

<sup>10</sup> Archana Parashar, "Religious personal laws as non-state laws: implications for gender justice," *Journal of Legal Pluralism and Unofficial Law* 45 no. 1 (2013): 7 accessed March 17, 2020, <https://doi.org/10.1080/07329113.2013.773804>.

<sup>11</sup> Ibid.

<sup>12</sup> Herklotz, "Law, religion and gender equality," 255.

<sup>13</sup> Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (New Delhi: Oxford University Press, 2006): 73.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., 74

problematic as reform of RPLs has so far been limited. Some laws as they exist today, therefore, continue to reflect practices that favoured the native patriarchy.

For example, Flavia Agnes states that one of the aims of the codification of Hindu law in the 1950s was to grant women equal inheritance rights.<sup>16</sup> Yet as this was met with opposition from conservative national leaders, provisions empowering women had to be ‘constantly diluted to reach the minimum level of consensus’.<sup>17</sup> Thus, the reforms ‘continued to reflect patriarchal ideology’.<sup>18</sup> Agnes uses the example of the Hindu Succession Act (1956) retaining the notion of ‘Hindu Undivided Family’ property due to severe opposition from Hindu leaders.<sup>19</sup> This benefitted Hindu men at the time as Hindu women could not inherit ancestral property. The Hindu Succession (Amendment) Act (2005) now allows women to be coparceners.<sup>20</sup> Yet, this Act did not abolish other unjust provisions. For example, Section 15 of the 1956 Act still provides the scheme for the succession of property when a Hindu woman dies intestate.<sup>21</sup> The consequence of this scheme is that a woman’s self-acquired property divests firstly upon the heirs of her husband’s and only then to her mother and father. Singhal rightly criticises this order as ‘highly discriminatory’<sup>22</sup> as a distant relative who is the heir of the husband is preferred over a woman’s parents to receive property that she obtained herself.

Moreover, it is not just Hindu laws but other religious systems also discriminate against women. For example, the Parsi Marriage and Divorce Act (1936) states that the property of a Parsi woman who has committed adultery can be settled by the court for the benefit of her children.<sup>23</sup> No such provision exists for adulterous men. Additionally, under Muslim Personal law, Muslim husbands can practice polygamy whereas Muslim women cannot.<sup>24</sup> Also, it was only in 2017 where the practice of ‘triple talaq’ (where a Muslim man unilaterally divorces<sup>25</sup> his wife by repeating ‘Talaq’ three times) was declared unconstitutional.<sup>26</sup>

Another issue is the limited protection women have in response to RPLs violating their fundamental rights. Articles 14 and 15 of the Indian Constitution promote gender equality. Article

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<sup>16</sup> Flavia Agnes, “Personal Laws,” in *The Oxford Handbook of the Indian Constitution*, ed. Surjit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (Oxford: Oxford University Press, 2017): 908.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Hindu Succession (Amendment) Act 2005, s3.

<sup>21</sup> Hindu Succession Act 1956, s15.

<sup>22</sup> Ayushi Singhal, “Female Intestate Succession under the Hindu Succession Act 1956: An Epitome of Inequality and Irrationality,” *Christ University Law Journal* 4 no. 2 (2015): 148, accessed March 28, 2020, <http://journals.christuniversity.in/index.php/culj/article/view/501/378>.

<sup>23</sup> Parsi Marriage and Divorce Act 1936, s50.

<sup>24</sup> Herklotz, “Dead Letters?,” 157.

<sup>25</sup> A unilateral divorce is where one spouse decides to terminate the marriage without the other’s consent.

<sup>26</sup> *Shayara Bano v Union of India* (2017) 9 SCC 1 (SC).

14 states: ‘the State shall not deny to any person equality before the law or the equal protection of the laws...’<sup>27</sup>. Article 15 supplements this providing that ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex...’.<sup>28</sup> Article 13 protects these guarantees stating ‘all laws in force... in so far as they are inconsistent with [these provisions] shall... be void.’<sup>29</sup> Thus, discriminatory RPLs should be void under article 13 for being in conflict with articles 14 and 15. However, not all RPLs are easily accepted as ‘laws in force’ for the purposes of article 13. The case *Narasu Appa Mali [1952]*<sup>30</sup> is known for the premise that RPLs are not ‘laws’ for the purposes of article 13 as they are based on religion.<sup>31</sup> The court made no distinction as to whether this premise applied only to the statutory RPLs and not non-statutory RPLs.<sup>32</sup> Following the judgment, ‘it became a stumbling block to test the constitutionality of personal laws’<sup>33</sup> as courts followed this ruling.

However, courts today increasingly test statutory RPLs against fundamental rights. The approach is to either ‘read down’, reinterpret or strike down a statutory provision. Yet for non-statutory RPLs, *Narusa Appa Mali*’s non-interference approach persists. The renowned ‘triple talaq case’, *Shayara Bano v Union of India*<sup>34</sup> in 2017 confirmed this. A Muslim woman sought a declaration that her husband’s pronouncement of triple talaq was void, and that Section 2 of the Muslim Personal Law (Shariat) Application Act (1937) be declared unconstitutional.<sup>35</sup> She argued that her rights under articles 14 and 15 were violated. Three out of the five judges agreed thus a majority was secured in her favour. However, the majority took two different approaches.<sup>36</sup> The first approach of Justice Nariman and Justice Lalit was to argue that the Act authorised triple talaq. They stated Section 2 implies ‘all forms of Talaq recognised and enforced by Muslim personal law are recognised and enforced by the 1937 Act’<sup>37</sup>. Thus, as this was a statutory RPL, it was a law that could be declared void under article 13. The second approach was Justice Joseph’s. He decided that the Act did not authorise triple talaq as ‘the specific grounds and procedure for Talaq have not been codified in the 1937 Act’<sup>38</sup>. Subsequently, as he believed it was a non-statutory RPL, he felt compelled by the precedent under *Narasu Appa Mali* and thus could not test it against the

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<sup>27</sup> The Constitution of India 1950, art 14.

<sup>28</sup> Ibid., art 15.

<sup>29</sup> Ibid., art 13.

<sup>30</sup> *The State of Bombay v Narasu Appa Mali* (1951) 53 BOMLR 779.

<sup>31</sup> Agnes, “Personal Laws”, 910.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> *Shayara Bano v Union of India* (2017).

<sup>35</sup> Ibid.

<sup>36</sup> Saptarshi Mandal, “Out of Shah Bano’s shadow: Muslim women’s rights and the Supreme Court’s triple talaq verdict,” *Indian Law Review* 2 (2018): 96, accessed April 14, 2020 <https://doi.org/10.1080/24730580.2018.1510162>.

<sup>37</sup> *Shayara Bano v Union of India* (2017) [47] (Justice Nariman).

<sup>38</sup> Ibid., [4] (Justice Joseph).

Constitution. Instead, he concluded triple talaq was not an Islamic practice as it was ‘against the basic tenets of the Holy Quran, and consequently, it violated the Shariat’<sup>39</sup>. He argued that the Act’s purpose was to abolish customs contrary to Shariat and thus the Act abolished triple talaq. Thus, he strikes down triple talaq for being ‘un-Islamic and illegal’.<sup>40</sup>

Overall, although courts test statutory RPLs against fundamental rights in the Constitution, the approach of *Narasu Appa Mali* is maintained for non-statutory RPLs. Thus, for some women, articles 14 and 15 are ‘hollow promises as these laws are not subject to real constitutional scrutiny.’<sup>41</sup>

### **The ‘Not-so’ Unique Benefit of a UCC**

Having highlighted the issues with RPLs, the solution of replacing RPLs with a UCC can now be evaluated. Firstly, I will explain the two ways a UCC promotes gender equality but then demonstrate how this does not make it necessary to abolish RPLs as they can also achieve this.

#### *Free from religious patriarchy*

The core feature of a UCC is that it will not be based on religious doctrines. It could be argued the benefit of this secularism is that it avoids relying on patriarchal interpretations of religious texts and doctrines as a source of law. The leaders of religious communities are predominantly male.<sup>42</sup> It is these men who determine the content of RPLs. Subsequently, they interpret religious texts in a way to assert and maintain dominance in the community. Consequently, religion has been used to authorise patriarchy despite these interpretations being challenged by other adherents to the religion. For example, Muslims supporting triple talaq argue that although the Qur’an does not specify the method of divorce and Prophet Mohammed demonstrated his anger towards it, he never indicated that triple talaq would not be valid.<sup>43</sup> Engaging in this interpretation demonstrates how religion can be tactically used by men to justify a discriminatory practice as having a basis in the religion. This interpretation has been challenged constantly. As demonstrated in the previous

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<sup>39</sup> Ibid., [12] (Justice Joseph).

<sup>40</sup> Mandal, “Out of Shah Bano’s shadow,” 102.

<sup>41</sup> Chibber, “Charting a New Path Toward Gender Equality in India,” 717.

<sup>42</sup> Archana Parashar, *Women and Family Law Reform in India*, 244.

<sup>43</sup> Asghar Ali Engineer, *The Rights of Women in Islam* (New Delhi: Sterling Publishers, 2008): 9.

section, it has been argued that triple talaq has no basis in Islam for it violates Qur'anic principles.<sup>44</sup> Syed Mohammed Ali discusses the validity of triple talaq further and refers to Islamic figures who reject the practice.<sup>45</sup> For example, Imam Ahmed Bin Hanbal rejected the legal validity of triple talaq in one sitting once realising there was no mention of it in the Qur'an and that such a divorce was revocable.<sup>46</sup> Thus, a secular Code can help achieve gender equality as it need not rely on interpretations of religious sources that undermine women.

*CEDAW will have greater meaning*

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>47</sup>, often referred to as 'the International Bill of Rights for Women'<sup>48</sup> imposes obligations on States to ensure equality for women in 'education, health and work, politics and ensure freedom from violence'<sup>49</sup>. India ratified CEDAW in 1993 but made a declaration that it will only implement Articles 5(a) and 16(1) 'in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.'<sup>50</sup>

These provisions are important in protecting the private lives of women. Article 5(a) obliges States to take 'all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving elimination of prejudices...'<sup>51</sup>, whereas, Article 16(1) obliges States to 'take all appropriate measures to eliminate discrimination in matters relating to marriage and family relations'<sup>52</sup>. NGOs that advance women's rights find this declaration 'deeply troubling'<sup>53</sup> as it seriously undermines the impact CEDAW could have in obliging States to ensure women are treated equally in private matters such as marriage, divorce or succession of property. These are

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<sup>44</sup> *Shayara Bano v Union of India* (2017) [12] Justice Joseph.

<sup>45</sup> Syed Mohammed Ali, *The Position of Women in Islam: A Progressive View* (Albany: State University of New York Press, 2004): 65.

<sup>46</sup> Ibid.

<sup>47</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, Vol. 1249.

<sup>48</sup> Carolyn E Holmes, "Conventions, Courts, and Communities: Gender Equity, CEDAW and Religious Personal Law in India," *Journal of Asian and African Studies* 54 no. 7 (2019): 965, accessed April 2, 2020, <https://doi.org/10.1177/0021909619846535>.

<sup>49</sup> Ibid.

<sup>50</sup> United Nations Treaty Collection, 'Status of Treaties', accessed April 2, 2020, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4).

<sup>51</sup> CEDAW, art 5(a).

<sup>52</sup> Ibid., art 16(1).

<sup>53</sup> Susan Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (Philadelphia: University of Pennsylvania Press, 2008): 366.



governed by the discriminatory RPLs and as the government adopts a non-interference stance when implementing CEDAW, women's rights are not protected here. For example, Ross refers to how a Hindu woman's right to the family home is subordinate to men's and how Hindu wives cannot initiate adoption.<sup>54</sup> This opposes CEDAW's proposals under article 16, and even other articles that India has not made reservations on, such as article 15 which concerns the equal access to administer property<sup>55</sup>. The consequence of the government's declaration means RPLs are not scrutinised by CEDAW, and thus, women continue to be undermined in private life. Therefore, NGOs have argued that so long as the patriarchal RPLs govern these areas, women cannot adequately exercise their rights 'in a meaningful way.'<sup>56</sup> Thus, replacing RPLs with a UCC could mean the State can better carry out its obligations under CEDAW to promote gender equality in the private lives of women as well as their public lives.

*RPLs can be reformed*

Whilst the aforementioned points are valid, I argue that gender equality can also be achieved by retaining RPLs. The preceding arguments work on the assumption that a UCC is the only solution that can ensure gender equality as RPLs cannot be reformed. Yet, RPLs are capable of being reformed. Flavia Agnes, a vocal proponent for retaining and reforming RPLs, argues that the amendments to the Indian Divorce Act (1869) in 2001 demonstrate reforms from the community are possible.<sup>57</sup> These reforms meant Christian women no longer had to prove 'dual ground adultery' where adultery had to be established with either cruelty or desertion to obtain a divorce.<sup>58</sup> Additionally, the provision empowering the court to settle the adulterer woman's property in favour of her husband or children was removed.<sup>59</sup> Thus, RPLs can be reformed such that the law is no longer discriminatory.

Of course, there are hurdles. Feminist scholar, Archana Parashar who evaluated arguments for and against a UCC noted that 'at least some sections of each community are likely to insist on the religious sanctity argument and would thwart any reform measures.'<sup>60</sup> In response to the resistant leaders, I would stress reforming RPLs is not reforming the actual religions, and thus, would not

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<sup>54</sup> Ibid.

<sup>55</sup> CEDAW, art 13.

<sup>56</sup> Ross, *Women's Human Rights*, 366.

<sup>57</sup> Flavia Agnes, "Minority Identity and Gender Concerns," *Economic and Political Weekly* 36 (2001): 3975, accessed April 18, 2020, <https://www.jstor.org/stable/4411251>.

<sup>58</sup> Ibid., 3976.

<sup>59</sup> Ibid.

<sup>60</sup> Parashar, *Women and Family Law Reform in India*, 244.

be undermining the actual religion itself. The two are distinct. For example, Zakia Soman, the Co-founder of the Bharatiya Muslim Mahila Andolan (BMMA) (a Muslim Women's Rights group) argues that all Muslim Personal Laws 'are man-made and hence can be amended by men... Allah did not discriminate between men and women'<sup>61</sup>. Indeed, I illustrated earlier how some scholars believe triple talaq arguably has no basis in Islam. Thus, to reform RPLs is not to threaten religious freedom. Rather it is to challenge the patriarchal utilisations of religion and religious customs.

To ensure equality, I propose that where an existing RPL or a proposed new RPL violates a woman's rights to equality under Articles 14 and 15, that law must be repealed, reformed or abandoned. This is not a foreign mechanism as the judiciary currently upholds statutory RPLs against fundamental constitutional rights. Now, this should be extended to non-statutory RPLs. I believe this is a fair compromise for religious leaders between either subjecting their RPLs to the Constitution or having no RPLs. Religious sanctity cannot and should not be given preference over gender equality, especially as conflicting interpretations exist that suggest the religion does not promote the patriarchal practice in question.

Thus, overall a UCC does not render it necessary for RPLs to be abolished as they too can be reformed such that they no longer rely on discriminatory interpretations of religions. Consequently, this would also mean the State is better carrying out its obligations to promote women's rights.

### **Why a UCC Will Not Enhance Women's Interests**

There are two arguments against a UCC, and both challenge the concept of uniformity. The first argument is that any solution of uniformity implemented by a Hindu nationalist government is not desirable for it may fail to be secular and will not protect women's rights. The second argument criticises the notion of uniformity as a form of gender essentialism. It will fail to challenge the real source of discrimination and could have little relevance to minority women.

#### *The influence of Hindutva*

In their 2019 manifesto, the BJP reaffirmed that 'there cannot be gender equality' until a UCC is adopted 'which protects the rights of all women'.<sup>62</sup> Although the BJP project themselves as

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<sup>61</sup> Perna Katiyar, "Muslim personal law needs reform, but UCC is not a solution: Zakia Soman." The Economic Times, 2016, accessed April 19, 2020 <https://economictimes.indiatimes.com/opinion/interviews/muslim-personal-law-needs-reform-but-ucc-is-not-a-solution-zakia-soman/articleshow/55003454.cms?from=mdr>.

<sup>62</sup> "Bharatiya Janata Party Manifesto," BJP, 2019, accessed April 23, 2020. <https://www.bjp.org/en/manifesto2019>.

feminists, this is a misnomer. The BJP and other Hindu nationalists use the idea of a UCC and gender equality discourse to undermine the Muslims, thus fuelling the long-established tensions between the Hindu majority and the Muslim minority in India. As a Hindu nationalist party, the BJP ‘propagates the Hindu nature of India and its ideology known as Hindutva’.<sup>63</sup> Resting on three pillars: ‘geographical unity, racial features and common culture’<sup>64</sup>, Hindutva involves excluding ‘others’ who are not Hindus. Achieving this entails engaging in propaganda campaigns against Muslims.

Chavan and Kidwai argue that the BJP’s push towards a UCC is an example of this. They argue that the BJP’s approach to gender equality corresponds with their approach to ‘secularism’. Thus, where the BJP seeks to treat all women equally, they mean all Muslim women be treated the same as Hindu women.<sup>65</sup> For the BJP, implementing a UCC enables the subordination of Muslims to Hindu norms and practices’.<sup>66</sup> Chavan and Kidwai refer to the famous *Shah Bano* (1989)<sup>67</sup> case to illustrate this point. The Supreme Court held a Muslim woman could rely on Section 125 of the Indian Criminal Penal Code (1973)<sup>68</sup> to obtain maintenance following a divorce rather than Muslim Personal Law which provided that Muslim women are only entitled to maintenance within the ‘iddat period’<sup>69</sup>. This is approximately a three-month period following divorce during which remarriage is prohibited.<sup>70</sup> Angered by the interference with Islamic law and the judges’ ‘disrespectful tone’<sup>71</sup> towards Islam, Muslims’ groups, including the All Indian Muslim Personal Law board, organised demonstrations across the nation<sup>72</sup>. In response, the Indian National Congress passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. This overturned the judgment and exempted Muslim men from Section 125.<sup>73</sup> Hindu nationalists including the BJP criticised this and demanded a UCC. They argued that this violated norms of secularism ‘as Muslims were being treated differently’<sup>74</sup> and also of equality ‘as Muslim women were being treated differently from Hindu women’.<sup>75</sup> By referring to Hindu women and not all

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<sup>63</sup> Lars Tore Flaten, *Hindu Nationalism, History and Identity in India: Narrating a Hindu past under the BJP* (Oxford: Routledge, 2016): 1.

<sup>64</sup> Nandini Chavan and Qutub Jehan Kidwai, *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code* Kidwai (Haryana: Hope India Publications, 2006): 138.

<sup>65</sup> Ibid., 151.

<sup>66</sup> Ibid.

<sup>67</sup> *Mohd Ahmed Khan v Shah Bano Begum* (1985) SCR (3) 844.

<sup>68</sup> S125 of the Code of Criminal Procedure (1973) empowers Magistrates ‘upon proof of such neglect or refusal’ to his wife, to order a husband ‘to make a monthly allowance for the maintenance of his wife...’

<sup>69</sup> *Mohd Ahmed Khan v Shah Bano Begum* (1985).

<sup>70</sup> Chibber (n 1) 704

<sup>71</sup> Ibid.

<sup>72</sup> Nawaz B. Mody, “The Press in India: The Shah Bano Judgment and Its Aftermath,” *Asian Survey* 27 no. 8 (1987): 946, accessed October 14, 2020, <https://www.jstor.org/stable/2644865>.

<sup>73</sup> Muslim Women (Protection of Rights on Divorce) Act 1986.

<sup>74</sup> Chavan and Kidwai, “Charting a New Path Toward Gender Equality in India,” 138.

<sup>75</sup> Ibid.

women in general, it seems Hindu norms are treated as the standard. Chavan and Kidwai argue that this reflects how the BJP is concerned with subjecting minorities, particularly Muslims, to their norms. I believe this claim is valid as there is already evidence of subordination whereby major religions such as Buddhism and Sikhism do not have their own RPLs but must comply with Hindu Law.

The issue is that the BJP's vision of uniformity is problematic. They present themselves as offering a secular Code, however, it is possible that their Code is one that would represent Hindu practices and would subject other minorities to these standards. The consequence of this lack of secularism is that gender equality is neglected as a priority. There is evidence to suggest Hindu Law may not be equally scrutinised in the reform process. In 2016, the Indian Law Commission circulated a questionnaire on the matter of a UCC. Agnes commented on how the questionnaire rarely referenced controversial Hindu practices such as the denial of rights to the Hindu second wife.<sup>76</sup> Consequently, many Muslims perceive the UCC to be a 'sham exercise to deprive them of their religious and cultural identity'.<sup>77</sup>

Additionally, the BJP's response to the triple talaq case of 2017 demonstrates that the reforms led by the BJP undermines minority groups rather than enhances women's rights. Four months after the Supreme Court declared Triple Talaq unconstitutional, the BJP introduced 'The Muslim Women (Protection of Rights on Marriage)' Bill which became law in 2019. This makes the pronouncement of Triple Talaq a criminal offence and will send the husband to prison.<sup>78</sup> The BJP has clearly prioritised their agenda of undermining Muslims over helping Muslim women. Criminalising Triple Talaq is not in the best interests of women. For example, Esita Sur argues that criminalisation ignores the 'the direct relationship between imprisonment, livelihood, earning and maintenance'<sup>79</sup>. She questions how an imprisoned husband can earn to provide maintenance for his wife and their dependent children. Moreover, Muslim women may face stigma from their community for making decisions resulting in their husband's imprisonment. Additionally, the BJP failed to consult women's groups when preparing the Act. To promote gender equality, the BJP would need to incorporate diverse voices and concentrate on listening to the voices of women. As they have failed to do so, it is questionable whether they are truly motivated by aims of gender equality.

Therefore, a UCC enacted by the BJP may not have women's interests at heart but rather uniformity. Uniformity from the perspective of a Hindu nationalist party is controversial. It is

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<sup>76</sup> Praneta Jha, "Women don't need a uniform civil code, but better access to courts: Flavia Agnes." Catchnews, 2017, accessed November 22, 2020, <http://www.catchnews.com/india-news/women-don-t-need-a-uniform-civil-code-but-better-access-to-courts-flavia-agnes-1477151476.html>.

<sup>77</sup> Ibid.

<sup>78</sup> The Muslim Women (Protection of Rights on Marriage) 2019 Act Sections 3 and 4.

<sup>79</sup> Esita Sur, "Triple talaq Bill in India: Muslim Women as Political Subjects or Victims?," *Space and Culture India* 5 no. 3 (2018): 7, accessed April 10, 2020, <http://spaceandculture.in/index.php/spaceandculture/article/view/299/194>.

likely the Code will not be secular and other religions will be subjected to Hindu Law that is poorly reformed. It is because of this criticism that women's groups, which advocate for a Civil Code, emphasise that the Code they desire is distinct from the one that Hindu nationalists desire. For example, the organisation 'Saheli' speaks of an 'Egalitarian Civil Code'<sup>80</sup> emphasising women's rights. This will recognise 'women's domestic labour, right to both ancestral and matrimonial property, and an equal right to child custody and divorce'.<sup>81</sup> Such a Code is not problematic – and I believe there would be no reason why this Code could not be an optional one, co-existing alongside RPLs. Yet, the problem is how such a Code can be achieved where there is a Hindu government in power which might obscure the process to achieve their agenda of Hindutva. Thus, for now, I argue against any Code being implemented when the party in power is one that does not implement the secular rules they proclaim.

*Essentialism v Intersectionality*

A system whereby religious laws are replaced with a UCC can be criticised as 'essentialism [sic] prioritising gender over other identifications and in doing so excludes other axes of power'.<sup>82</sup> The Anveshi Law Committee describes the gender essentialism of the Indian women's movement.<sup>83</sup> Firstly, the notion of 'gender' represents only the female sex and gender differences linked to 'differences of class, caste, culture, community are overlooked to construct a universal feminist subject'<sup>84</sup>. Subsequently, the women's movement equates the patriarchies of different religious communities and 'adopts a similar stand of denunciation'<sup>85</sup> to them. Thus, a solution implementing a UCC merely equates the different forms of discriminations which Muslim women, Parsi women, Christian women and Hindu women face altogether. This is an error since a Muslim woman participating in the Muslim religious community suffers a distinct form of oppression from that of a Hindu woman participating in the Hindu community. Each community discriminates against women in different ways. This links to Kimberlé Crenshaw's notion of 'intersectionality'. She

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<sup>80</sup> Saheli, "Egalitarian Civil Code Every Woman's Basic Right", 1997, accessed April 20, 2020, <https://sites.google.com/site/saheliorgsite/communalism/personal-laws-debate/egalitarian-civil-code-every-womans-basic-right>.

<sup>81</sup> Laxmi Murthy and Rajashri Dasgupta, *Our Pictures, Our Words: A Visual Journey Through the Women's Movement* (New Delhi: Zubaan, 2011).

<sup>82</sup> Lakshmi Arya, "Imagining Alternative Universalisms: Intersectionality and the limits of liberal discourse" in *Intersectionality and Beyond: Law, Power and the Politics of Location*, ed. Emily Grabham (London: Routledge Cavendish, 2008): 329.

<sup>83</sup> Anveshi Law Committee, "Is Gender Justice Only a Legal Issue? Political Stakes in UCC debate," *Economic & Political Weekly* 32 no. 9/10 (1997): 454, accessed April 16, 2020, <https://www.jstor.org/stable/4405147>.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

argues where multiple identities including race, religion and gender converge in individuals, these individuals ‘suffer from the effects of multiple subordination.’<sup>86</sup> Subsequently, Crenshaw argues that strategies overcoming the effects of only one of these identities such as sexism is insufficient to address the marginalisation by the interaction of these multiple systems of power.<sup>87</sup>

Implementing a UCC is one of these insufficient strategies. The relationship between the Civil Code already enacted in Goa and Goan Muslims reflects this. Sriranjani demonstrates that despite civil divorce procedures being complied with by a Muslim couple, divorce ‘is acknowledged within the community only after the community’s norms have been adhered to’.<sup>88</sup> Thus, a Muslim couple obtaining a civil divorce without a talaq is not considered favourably in the community. Where there is no talaq, the wife would be unable to remarry someone within the community as Muslim women cannot practise polygamy. Yet, the divorced husband could marry a Muslim as he is permitted to engage in polygamy.<sup>89</sup> This illustrates the problem of imposing a compulsory Code onto the communities as it fails to address the source of patriarchy: the community’s norms and culture. Imposing a uniform system does not respond to the different norms that harm women in their different communities. As illustrated here, a civil system of divorce did not address the Muslim community’s treatment of women following a divorce. Therefore, what is needed is not a single solution imposed on all communities, but an individualised response to each community and their unique patriarchal norms. This can be provided for by allowing reforms to come from within the community which will affect a deeper psychological change in the community.

Furthermore, it is also beneficial to not implement a Code as women may continue to participate in their communities. Flavia Agnes applies such thinking. She argues ‘small and significant reforms within personal laws...have greater relevance to minority women than the rhetoric of an all-encompassing and overarching UCC’<sup>90</sup>. The issue is because of their ‘intersecting identities’, religious women feel obliged to choose between the conflicting political agendas of their religious community and the women’s movement. Agnes illustrates this by referring to the comments of *Shah Bano*. Despite the Supreme Court allowing her to obtain maintenance under the Civil law, she rejected it stating that if the ‘entitlement was against my religion, I would rather be a devout Muslim than claim maintenance’<sup>91</sup>. This demonstrates how some women may feel obliged to express their religious identities, and thus, do not feel comfortable participating in practices undermining this. Alternatively, perhaps some may wish to preserve both the rights they possess as a woman and as a member of the religious community. Accordingly, I believe implementing a secular Code will not

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<sup>86</sup> Kimberlé W. Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour,” *Stanford Law Review* 43 (1991): 1251, accessed April 15, 2020 <https://www.jstor.org/stable/1229039>.

<sup>87</sup> *Ibid.*, 1246.

<sup>88</sup> V. Sriranjani “The Goan Muslim” in *Religion, Community & Development: Changing Contours of Politics and Policy in India*, ed. Gurpreet Mahajan and Surinder S. Jodhka (London: Routledge India, 2010): 312

<sup>89</sup> *Ibid.*, 313.

<sup>90</sup> Agnes, “Minority Identity and Gender Concerns,” 3973.

<sup>91</sup> *Ibid.*

be appealing to these women. As Jenkins states, understanding the ‘religious freedom’ of women ‘means considering the intersection of gender and religious identities’<sup>92</sup>. Therefore, it is important that community norms are also challenged by allowing reforms from within. If not, women, continuing to engage with their communities, will still suffer.

## **Conclusion**

This paper has argued that replacing RPLs with a UCC will not adequately advance women’s interests. Whilst a UCC may be free from patriarchal interpretations of religious teachings and ensures the rights of women are promoted, this does not make it necessary to abolish the RPL framework. RPLs are also capable of being reformed in a way to enhance women’s rights.

Uniformity as a sole solution would be too simplistic whereby to impose a single secular framework is to overlook the differences in religious communities and the multiple identities Indian women possess. A Civil Code should only be implemented as an additional alternative framework and not as a substitution for RPLs. Yet, currently, we should be hesitant to accept any Code whilst the BJP are in power. Uniformity under this government will seek to advance Hindu nationalistic interests and not adequately advance women's rights.

As suggested earlier, to ensure gender equality is achieved during the reform process, all proposed RPLs coming from the community must comply with rights protected in the Constitution. I believe this is a fair compromise between religious rights and women’s rights and reflects that religion and gender equality can co-exist.

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<sup>92</sup> Laura Dudley Jenkins, “Diversity and the Constitution in India: What is Religious Freedom?,” *Drake Law Review* 57 (2009): 927, accessed April 14, 2020 <<https://heinonline.org/HOL/P?h=hein:journals/drklr57&i=921>.



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**Commentary on:**  
**Gender Inequality and Religious Personal Laws**

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**By *Tirthankar Chakraborty***

**To cite this commentary:**

Chakraborty, Tirthankar. 'Commentary on: Gender Inequality and Religious Personal Laws', *En-Gender!* 3:4 (2021): 19-21.

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At a time when India is witnessing a rapid deterioration of its constitutional ethos, when the fabled Preamble is reframed and reinterpreted, when the national priorities are shifting from progress and development to the golden traditions of yesteryears, one has to closely observe and study how institutions are being used to achieve all the aforementioned. Rajdeep Johal tries to document the understudied facets of gender rights intertwined with religious doctrines and patriarchal practices from a legal perspective by looking at the formulation of a Uniform Civil Code (UCC) that would seek to bring uniformity in the pluralistic society that has been a cornerstone of the idea of India. India, with its plethora of religious and sectarian groups, has witnessed piecemeal changes with regards to women's rights. The constituent assembly, after India gained independence, had twelve women members. However, it failed to secure specific rights for women and had to settle with the fundamental rights enshrined in the Constitution of India. The religious personal laws (RPLs), on the other hand, sought to establish practices that would uphold the erstwhile patriarchal views by conveniently resorting to the guarantees of the Constitution gives prohibits the State to impinge on the rights of the people to form religious associations and practise it in accordance to their scriptures.

The paper sets off by genealogically tracing the idea of a UCC. The author makes the point that much before the Hindu Nationalist party suddenly discovered the 'unequal treatment of women', the grand old party Indian National Congress had broached the idea but was opposed by the

Muslim members of the Constituent Assembly. The many problems that plague the men-dominated religious bodies who define and create the religious laws have been at the forefront of any change to the status quo, perpetuating gender inequality and discrimination. By carefully analyzing the court cases that have been adjudicated in the highest courts, the author tries to make the case of how the RPLs have been seen a mixed reception, based on the personal interpretation of laws by the justices. The author then focuses on the limited advantage of a UCC as it would ideally be free from religious interpretation, drawing an important focus on the need to discern state and religion, and also that a UCC will draw from various charters on women emancipation drafted across the globe that might serve as guiding principle. But the author highlights that all of these can also be possible if there are institutional changes within the RPLs, brought by the governing bodies, which would not only have a wider appeal but would also pay particular attention to nuances of each religion. However, one may ask the progressive change-agents in particular religion would have enough power or influence within the institutional structure to create change by overruling the dominant actors.

The author presents her scepticism about a UCC under the Right-wing Hindu Nationalist Bharatiya Janata Party (BJP). While little light is shed on the nuanced understanding of 'hindu', 'hindutva', the author gives unsatisfactory reasoning as to why the BJP would not be successful in creating a truly secular UCC. One could argue that against the popular perception of BJP being anti-Muslim or anti-women by pointing out the Muslim wing of the BJP and its parent organization RSS fighting to empower women and positioning of women BJP leaders in key cabinet positions in the government. Of course, the irony also lies in the fact that a larger section of Hindu women is abandoned or separated and the Hindu men at the helm of a UCC are not too perturbed with their plight. For decades, political parties of all hues and shades have used minorities as vote-banks to tap in during elections, so the scepticism against just one party would be tad bit unfair to the collective patriarchal practices of the rest. The author breaks down the problems of the recent judgements which have criminalized the practice of *Triple Talaq* but the consternations aired is not just limited to the response of the BJP but also the so-called secular parties, including the Indian National Congress, as they supported the *Triple Talaq* legislation. The important point of intersectionality sums up the argument against any uniform policy since women and sexual minorities face many layers of discrimination within and around the structures that bind them.

The article points out the perils of imposing uniformity on an issue which requires a nuanced yet detailed method of proposing reforms, not only because of the nature of the severely-fraught societal structures of the subcontinental politics but also because a broad brush cannot be used to understand or unravel gender and sexuality. The author makes an argument for piecemeal endogenous institutional change within the religion, rather than exerting an exogenous, sudden

change brought about by external actors. The author has given an adequate reference to the evolving jurisprudence and legal history, with little recourse to intersectional perspective. The article would have also gained from a thorough methodological framework of understanding institutions, as is inherent in sociology or political science. However, well-written and lucid arguments effectively make the case of the impracticability of a UCC. Overall, one would learn more about the changing dynamics of gender politics in India and the drawbacks that need to be addressed advocacy and reform.