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Can a Uniform Civil Code Address Injustices for Muslim Women in India?

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Abstract: Despite a long history of legal pluralism, India attempts to unify its diversity by codifying religious personal laws. Indian law currently permits multiple family law systems to function, which respect the beliefs of tribal and religious communities. However, Islamic personal law has been accused of discriminating against women because Islam contains different rights for men and women in accordance with the Islamic *Shari'ah* law, derived from the *Qur'an* and teachings of the Prophet Muhammad. *Shari'ah* law aims to foster equity between the genders and not strictly equal rights. Due to this, the application of personal laws within the Muslim community in India is argued to be the cause of injustices towards Muslim women, who are one of the marginalised groups in Indian society. The removal or restriction of the application of Muslim personal law is argued to be the remedy to such a situation. Governance of family law matters currently in Muslim personal law would be abrogated by the introduction of a Uniform Civil Code (UCC) in India, irrespective of gender or religion. However, there are questions about the effectiveness of such a proposal to accomplish the goal of justice for Muslim women. Adding to existing literature on the topic of the UCC, personal laws and gender equality, this article takes a broader lens and argues that a UCC would only scratch the surface of what are multiple root causes of the injustices that Muslim women endure in India. The article argues that a UCC could not only exacerbate the injustices against Muslim women, but, crucially, would ignore the root causes of such injustices. The 21st Law Commission Report in 2018, in its assessment of the potential adoption of a UCC in India, flagged the 'dangers of forcing uniformity' on India's diverse population. However, just four years later, the 22nd Law Commission Report of 2022 has taken up this debate once again. This article attempts to further the analysis of a UCC by addressing how the adoption of such a code might impact on the injustices Muslim women face in India. The article offers suggestions for ways forward to address the root causes of injustices that Muslim women face in Indian society.

Keyword: Uniform Civil Code; Gender Injustice; Personal Laws; Muslim Laws; Muslim Women's Rights; Marginalisation of Muslim Women

I. INTRODUCTION

Despite historical accommodation of the application of religious laws for its major religions, India attempts to unify its diversity by codifying personal laws through the drafting of a

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Uniform Civil Code (UCC). Personal laws are distinct from public laws and cover issues of private life such as marriage, divorce, and inheritance. In relation to such topics, India functions not on dual, but multiple family law systems tailored to the religious beliefs of various tribal regions and communities. Whilst there is no defined scope of what the content of a UCC might be, the public discourse suggests that the UCC aims to set out uniform laws for areas of personal life currently governed by the personal laws of different communities in India.¹ This uniform code would be intended to apply to all persons equally, irrespective of religion. Thus, it is anticipated that a UCC might override the unique religious practices and customary norms that religious groups in India, including Muslims, have observed for centuries. The debate is one of diversity against civil homogeneity. Whilst the possible adoption of a UCC has been on the cards since the beginning of the time of India's independence from British rule, the recent calls for its adoption have been politically charged and inarguably targeted towards Islam.² In what is seen by Muslims as Islamophobia, proponents of the UCC argue that uniformity can remedy the marginalization of, and injustices faced by, Muslim women in India because these result from the practices of gender inequality in *Shari'ah* law, implemented by Muslim personal laws in India. To propose the adoption of a UCC on this reasoning makes the examination of arguments relevant to Muslim women on the subject indispensable.

Accordingly, this article analyses the potential value of a UCC in addressing injustices faced by Muslim women. It argues that addressing issues of discrimination, inequality, poverty and marginalisation of Muslim women in India requires more than a notion of equality as access to equal rights, as might be the position of a UCC. In particular, it requires more than what could be achieved by removing freedom of religion from Muslim women. Adding to existing literature on the topic of the UCC, personal laws and Muslim women,³ this article takes a

¹ 'What's Uniform Civil Code (UCC): What Does Constitution Say & Why it's Such a Controversial Topic in India?' *The Economic Times* (4 August 2023) <<https://economictimes.indiatimes.com/news/how-to/what-is-uniform-civil-code-what-does-constitution-say-about-it-why-its-such-a-controversial-topics-in-india/articleshow/101348565.cms>> accessed 19 November 2023; Aneesha Mathur, 'Uniform Civil Code: Tough Challenges and Raging Debates Over the Years' *India Today* (28 June 2023) <<https://www.indiatoday.in/law/story/uniform-civil-code-challenges-and-debates-over-the-years-2393239-2023-06-15>> accessed 19 November 2023. See also: 'Jamiat Appeals to People of India to Submit Response to LCI on UCC' *Jamiat Ulama-i-Hind* (9 July 2023) <https://www.jamiat.org.in/news_app/jamiat_press_release_detail/103> accessed 04 January 2023 (responses from communities critiquing such an intention); Vatsala Gaur, 'AIMPLB Sends Objections to Law Commission on UCC' *The Economic Times* (6 July 2023) <<https://economictimes.indiatimes.com/news/india/aimplb-sends-objections-to-law-commission-on-ucc-demands-religious-minorities-be-kept-out-of-its-ambit/articleshow/101523254.cms>> accessed 19 November 2023.

² Hilal Ahmed, 'How Did UCC Become a Muslim Issue? There's an Invisible Apparatus at Work' *The Print* (11 July 2023) <<https://theprint.in/opinion/how-did-ucc-become-a-muslim-issue-theres-an-invisible-apparatus-at-work/1662820/>> accessed 8 November 2023. See also: Haris Zargar, 'India Threatens New Gendered War on Muslim Community' *Middle East Eye* (12 July 2023) <<https://www.middleeasteye.net/opinion/india-muslim-community-new-gendered-war-threatens>> accessed 8 November 2023.

³ Vrinda Narain, *Gender and Community: Muslim Women's Rights in India* (University of Toronto Press 2001); Justin Jones, 'Towards a Muslim Family Law Act? Debating Muslim women's Rights and the Codification of Personal Laws in India' (2020) 28 (1) *Contemporary South Asia* 1; T. K. Rajalakshmi, 'Empowerment or exploitation? How UCC Will Impact Women's Rights in India' *Frontline* (27 July 2023) <<https://frontline.thehindu.com/the-nation/empowerment-or-exploitation-how-uniform-civil-code-will-impact-womens-rights-in-india/article67109276.ece>> accessed 10 October 2023; Nabeela Jamil, 'Who Decides Morality? Uniform Civil Code and the Delusion of Gender Justice' *Quint* (7 July 2023) <<https://www.thequint.com/gender/uniform-civil-code-and-the-delusion-of-gender-justice>> accessed 10 October 2023; Nabeela Jamil, 'Uniform Civil Code: Not Men Vs Women, Muslims' *Maktoob Media* (17 August 2021) <<https://maktoobmedia.com/opinion/uniform-civil-code-muslim/>> accessed 10 October 2023.

broader lens and argues that a UCC would only scratch the surface of what are multiple forms of injustices that Muslim women endure in India, and indeed the dismantling of Muslim personal laws might exacerbate injustices. Instead, justice for Muslim women requires a diverse set of state responses to address a broad range of root causes of Muslim women's marginalisation in Indian society.

The following discussion in this article is structured as follows: Part II, presents an outline of religious pluralism within the Indian Constitution, and what pluralism has meant for Islam in India. It also introduces the aims of a uniform civil code in India. Part III then examines what impact the enactment of a UCC might have on Muslim women, situating this within debates of legal pluralism, freedom of religion, socio-economic equality, and empowerment and agency of Muslim women. It argues that it is optimistic to presume that a UCC can resolve issues of injustices faced by Muslim women, in place of broader legislation and measures to address the root causes of such injustices. In part IV, the article offers thoughts on the possible ways forward, beyond - and as alternatives to - the restriction of their freedom of religion.

II. INDIAN CONSTITUTIONAL LAW, SECULARISM AND RELIGIOUS PLURALISM

A. Understanding Freedom of Religion in India

In this section of the article, the approach of Indian Constitutional law to the issue of freedom of religion in India is presented. India is a richly diverse country in multiple ways. It is home to a number of religions, with significant membership numbers.⁴ Hindus are the majority group in India at 80% of the population. Muslims in India make up around 14% of the population, amounting to almost 200 million people and constituting India's largest minority group.⁵ The diversity within India has not gone unrecognised in its legal framework and the founding vision of India was intrinsically plural and egalitarian in conception.⁶ The roots of legal pluralism in India date back to the Mughal and British eras, where different religious communities were permitted to retain their personal laws.⁷

This diversity has such high accord in law, that it is protected by Indian Constitutional Law and respected and applied by the Courts. Under Articles 25⁸ and 26⁹ of the Constitution, India guarantees the fundamental freedom of citizens to profess, preach and propagate their religion, and to apply religious personal laws in matters of private life, such as marriage, divorce and inheritance. Examples of such laws are the Christians Marriage Act 1872, Indian Divorce Act,

⁴ 'A Treatise on Indian Censuses Since 1981' (Government of India, 2011) <<http://censusindia.gov.in/>> accessed 31 October 2023. According to Census 2011, total Population in 2011 is 121.09 crores; Hindu 96.63 crores (79.8%); Muslim 17.22 crores (14.2%); Christian 2.78 crores (2.3%); Sikh 2.08 crores (1.7%); Buddhist 0.84 crores (0.7%); Jain 0.45 crores (0.4%), Other Religions & Persuasions (ORP) 0.79 crores (0.7%) and Religion Not Stated 0.29 crores (0.2%).

⁵ OHCHR, 'Citizens Against Hate – India' Submission to Special Rapporteur on Freedom of Religion or Belief on his report on anti-Muslim Hatred and Discrimination to the 46th session of the Human Rights Council, 1.

⁶ Zoya Hasan and Ritu Menon, *Unequal Citizens: A Study of Muslim Women in India* (Oxford University Press 2004), p 14

⁷ Manik Tanwar, 'UCC: In Light of Legal Pluralism in India' *Times of India* (17 June 2023) <<https://timesofindia.indiatimes.com/readersblog/legal-thoughts/ucc-in-light-of-legal-pluralism-in-india-55316/#>> accessed 1 October 2023.

⁸ The Constitution of India 1950, art 25..

⁹ The Constitution of India 1950, art 26..

1869 and the Indian Succession Act, 1925, which apply to the Christian community in India.¹⁰ The Jewish population is governed by their uncodified customary marriage law and the Indian Succession Act of 1925. The Parsis have their own Parsi Marriage and Divorce Act, 1936, and their own separate law of inheritance contained in the Indian Succession Act.¹¹ The two most prominent religious groups- Hindus and Muslims - also have their own separate personal laws. Hindus are regulated by the Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, and Hindu Adoptions and Maintenance Act, 1956. Muslims are primarily governed by the Muslim Personal Law (Shariat) Application Act, 1937 (which under Section 2 permits the application of personal laws to Muslims),¹² the Dissolution of Muslim Marriages Act 1939, the Muslim Marriage Act 1954, and the Muslim Women (Protection of Rights on Marriage) Act 2019.

Personal laws in India operate alongside the competing value of secularism embodied within the preamble of the Indian Constitution,¹³ which commonly implies that no religion is favoured within the law. However, as already noted, the Indian Constitution also permits individuals to follow their respective religious beliefs in several matters of private life, as outlined in various personal legislations. Thus, India espouses a very particular form of secularism.¹⁴ Indian secularism does not require a banishment of religion from societal or even state affairs. The only demand of secularism, as mandated by the Indian Constitution, is that the state must treat all religious creeds and their respective adherents absolutely equally and without any discrimination in all matters under its direct or indirect control.¹⁵ Secularism is not just a normal constitutional goal but a basic feature of the Constitution,¹⁶ an integral pillar to realize the grandiloquent vision of promoting fraternity amongst the entire citizenry of India.¹⁷ This unique notion of secularism contrasts with secularism, which in some Western states separate religion and state affairs to ensure neutrality on religion.¹⁸ Instead, India exercises neutrality by permitting multiple religious laws to operate in certain spheres of private life and thus not formally favouring one religion over others, at least in black and white.¹⁹

¹⁰ Emanuel Nahar, 'Minority Rights in India: Christian Experiences and Apprehensions' (2007) 45 (1) Mainstream Weekly <<https://www.mainstreamweekly.net/article98.html>> accessed 1 October 2023.

¹¹ Priya Kanojia, 'The Rights of Parsi Women: A Study of Marriage and Divorce Laws in Parsi Personal Law (1830-1988)' (2021) 27 (2) Summerhill: IIAS Review 61.

¹² Asaf A. A. Fyzee, *The Reform of Muslim Personal Law in India* (Indian Secular Society 1992) 12.

¹³ Constitution of India 1950, 42nd amendment 1976 added the terms 'socialist' and 'secular' to the preamble of the Constitution of India. 'WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC...'

¹⁴ S. M. A. W. Chishti, 'Secularism in India: An Overview' (2004) 65(2) The Indian Journal of Political Science 184; V. M. Tarkunde, 'Secularism and the Indian Constitution' (1995) 22 (1) India International Centre Quarterly 143.

¹⁵ Tahir Mahmood, 'Religion, Law, and Judiciary in Modern India' (2006) 31 (3) Brigham Young University Law Review 755.

¹⁶ *Kesavananda Bharati v State of Kerala*, 1973 (4) SCC 225.

¹⁷ Amiya Kumar Bagchi, 'Multiculturalism, Governance and the Indian Bourgeoisie' in Rajeev Bhargava, Amiya Kumar Bagchi and R. Sudarshan (eds), *Multiculturalism, Liberalism and Democracy* (Oxford University Press 2010) p 219-47

¹⁸ Himanshu Roy, 'Western Secularism and Colonial Legacy in India' (2006) 41 (2) Economic and Political Weekly 158; Silvio Ferrari, 'Religiously Based Personal Laws and Management of Diversity in Europe' (2022) 25 Law & Business 1.

¹⁹ However, authors have widely written on communal nature of the Constitution of India. See: Pritam Singh, 'Hindu Bias in India's 'Secular' Constitution: Probing Flaws in the Instruments of Governance' (2005) 26 (6) Third World Quarterly 909; Mathew John, 'The Communalisation of Religion in Indian Constitutional Law' in *India's Communal Constitution: Law, Religion, and the Making of a People* (Cambridge University Press 2023) 17.

The operation of multiple religious and tribal personal laws in India has been the case despite segments of the Indian population disagreeing with personal laws. Personal laws, although long embedded in the history of India, have not been wholly unchallenged. There were a few strong calls for a uniformity in civil laws during the Constituent Assembly debates at the time of Indian independence, which advocated that a UCC would establish and promote national unity, modernity, and secularism.²⁰ However, these efforts were unsuccessful and after much deliberation, the goal of a UCC was left as a matter of future endeavour only when the Constitution was drafted in the 1940s. This was embodied within Article 44 of the Constitution under the chapter on Directive Principles, which is non-binding²¹ as opposed to the chapter on Fundamental rights, which is legally binding.²² Moreover, the establishment of a UCC in the future was subject to the proviso that it is accepted voluntarily by communities.²³ It has been argued that such a legislative step was a measure to alleviate the concerns of Muslims in the newly formed nation and secure their loyalty.²⁴ This demonstrates that Islam has long been a central factor in the debate on the adoption of a UCC in India.

Personal laws have enabled Indian Muslims to freely practice their religion in India in line with the Islamic *Shari'ah*. Although some legislation has been adopted to mandate deviation from the personal law for matters of 'justice, equity and good conscience',²⁵ these have been few and far between. Examples include those under the Special Marriages Act 1954, a piece of legislation which enables marriage between inter-faith or inter-caste couples without them giving up their religious identity or resorting to conversion. For example, Muslims can marry a non-Muslim without having to change their religion; children out of these marriages are legitimate and have equal rights of inheritance; and a *Nikah* can be converted to a civil marriage by registration under the Act.²⁶

The discussion so far indicates the legal protection that is enjoyed by Muslim personal laws in India. However, as also seen, whilst the Indian constitution gave legal backing to these personal laws in 1950, a vision for a UCC was also made a part of the Constitution. Criticism of Islam has often been singled out in discussions which reason that a UCC is indispensable to Indian society to overcome archaic and discriminatory practices in Indian society. For instance, the year 1967 sparked great controversy over a UCC, and the Jan Sangh (right-wing) attempted to use the adoption of a UCC as a tool with which to tarnish Muslims.²⁷ Since then, the debate on

²⁰ Tanja Herklotz, 'Religion-Based Personal Laws in India from a Women's Rights Perspective: Context and Some Recent Publications' (2015) 5 *Südasiens-Chronik - South Asia Chronicle* 369, 371-372 (highlighting debates from the Constituent Assembly in the 1940s); Moin Qazi, 'What did the Constituent Assembly Say on the Uniform Civil Code?' *The Leaflet* (9 October 2020) <<https://theleaflet.in/what-did-the-constituent-assembly-say-on-the-uniform-civil-code/>> accessed 14 October 2023.

²¹ The Constitution of India 1950, art 37.

²² Herklotz (n 20).

²³ See: Constituent Assembly of India, Debates (Proceedings), [1948] vol [VII] 540 (for instance, the following was proposed as a proviso to draft article 35; later adopted as article 44 – "Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law").

²⁴ Asghar Ali Engineer, 'Islam and Muslims in India. Problems of Identity and Existence' (2004) 23 (84) *Oriente Moderno* 71.

²⁵ Razia Patel, 'Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice' (2009) 44 *Economic and Political Weekly* 44.

²⁶ sec 15-18, sec 21, The Special Marriage Act, 1954.

²⁷ Patel (n 25) 2; Milan Vaishnav, 'Religious Nationalism and India's Future' in Milan Vaishnav (ed), *The BJP in Power: Indian Democracy and Religious Nationalism* (Carnegie Endowment for International Peace 2019) 5. See also: Ghazala Jamil, 'Uniform Civil Code: Another Step Towards Making India a Hindu Rashtra?' *Frontline* (27

India's UCC has repeatedly targeted Islam,²⁸ usually during elections. In the next sub-section of this article, we look at the aims of a UCC, before applying it to Muslim women in part III of the article.

B. A Uniform Civil Code: Aims and Purpose

In this section, the article analyses the potential aims and purposes of a UCC vis-à-vis religious pluralism in India. Whilst there is no current draft of a UCC, the 22nd Law Commission of India in 2022 sought the views of the public and religious organisations on the matter.²⁹ This comes five years after the previous Law Commission of 2018 noted that a uniform civil code 'is neither necessary nor desirable at this stage.'³⁰ The primary aim of a UCC is to provide a uniform set of rules for civil matters for all citizens irrespective of, *inter alia*, their religion. However, it is noteworthy that several aspects of civil law are already codified in India. The UCC as discussed here, would pertain to uniformity of, *inter alia*, some aspects of family matters which are currently governed by religious personal law. It is imagined that this would completely revoke the right of individuals to apply their religious norms as part of Indian law. More specifically, a UCC is envisioned as a comprehensive set of laws that will govern personal matters, such as marriage, divorce, adoption, inheritance, and succession, for all citizens regardless of their religion. Additionally, the Uniform Civil Code Bill was also introduced in the Lok Sabha as a Private Member's Bill in 2018. Section 2 (a) of the Bill explains that "Uniform Civil Code", means the common civil code or common law for every citizen residing in India irrespective of religion and caste.³¹ The implementation of such a goal would challenge the practice of religious freedom in India under personal laws.

The UCC has been interpreted differently by different sets of people. For some jurists, it is a dead letter;³² judges have pronounced that it is a law to ensure national integration;³³ secularists say it is a code that will make India a truly secular state³⁴; some scholars and constitutional

July 2023) <<https://frontline.thehindu.com/the-nation/uniform-civil-code-another-step-towards-making-india-a-hindu-rashtra/article67101084.ece>> accessed 15 October 2023; Tahir Mahmood, *Uniform Civil Code: Fictions and Facts* (India and Islam Research Council 1995).

²⁸ Kaushik Deka, 'The Politics of a Uniform Civil Code' *India Today* (2023) <<https://www.indiatoday.in/magazine/cover-story/story/20230814-the-politics-of-a-uniform-civil-code-2415996-2023-08-05>> accessed 12 October 2023; Sagnik Dutta, 'From Accommodation to Substantive Equality: Muslim Personal Law, Secular Law, and the Indian Constitution 1985–2015' (2017) 4 (1) *Asian Journal of Law and Society* 191; Harshita Vatsayan, 'India's Quest for Secular Identity and Feasibility of A Uniform Civil Code' (2017) 1 *Indian Law Institute Law Review* 30.

²⁹ Public Notice on Uniform Civil Code Regulations, [2023] Law Commission of India (14th June 2023).

³⁰ Anna Issac, 'UCC: Here is What a Progressive Civil Code Would Look Like' *The News Minute* (11 July 2023) <<https://www.thenewsminute.com/news/ucc-here-what-progressive-civil-code-would-look-179580>> accessed 15 October 2023.

³¹ The Uniform Civil Code in India Bill, 2018 HC (2018) [250].

³² See: *Mohd. Ahmed Khan v Shah Bano Begum* ([1985] AIR 945) (Justice Y. V. Chandrachud observed: "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter... There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law..."). See also: Tanja Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court' (2016) 49 (2) *South Asia Chronicle* 61.

³³ *Mohd Ahmed Khan v Shah Bano* ([1985] AIR 945); *Sarla Mudgal, President Kalyani and Others v Union of India and Others* ([1995] AIR 1531); *Shayara Bano v Union of India* ([2017] 9 SCC 1); *The State of Bombay v Narasu Appa Mali* ([AIR 1952] Bom 84).

³⁴ S. P. Sathe, 'Uniform Civil Code: Implications of Supreme Court Intervention' (1995) 30 (35) *Economic and Political Weekly* 2165.

draftsmen construe it as a means to end gender inequality based on personal laws.³⁵ Muslims have concerns over the implications of the UCC on their religious identity.³⁶ First, there is an objection to the general idea of abandoning religious pluralism in India. Hindu law expert Werner Menski commented that legal pluralism coincides with religious pluralism, and that cannot be thrown away for the modern form of unity that the UCC aims for.³⁷ Second, the basis of adopting a UCC by its proponents seems very much to be fixated on targeting and restricting the practice of Islam. UCC debates in India have been heavily politically charged around the place of Islam in India,³⁸ and a concern remains that the restrictions on the practice of Islam in India could substantially threaten unity in India, as opposed to ensuring ‘national integration’ and ‘communal harmony’.³⁹ In this regard, the words of Dr Justice BS Chauhan become pertinent as he said that ‘cultural diversity cannot be compromised to the extent that our urge for uniformity itself becomes a reason for threat to the territorial integrity of the nation.’⁴⁰ On a topic which provokes such heated arguments, it is important to stand back and assess it through a broad lens. Part III of this article takes such a broad lens to the issue of Muslim women and the potentials of a UCC of remedying the injustices they face in Indian society.

III. MUSLIM WOMEN AND THE UCC

This section examines the debate on personal laws and the UCC from the perspective of Muslim women specifically. The UCC debate in India involves a complex interplay between the goals of achieving gender justice and that of freedom of religion. As part and parcel of politicising Islam within India, proponents of the UCC argue that Muslim personal laws discriminate against Muslim women and leave them in a position of marginalisation in India. Reasons have included the right of men to unilaterally divorce wives⁴¹ and pay maintenance only during the 90 days *iddat* (period of waiting) period,⁴² or the fact that women are not entitled to inheritance on equal terms with male relatives.⁴³ It is contended that the UCC – by

³⁵ Constituent Assembly Deb (UCC) 4 November 1948 to 8 January 1949.

³⁶ ‘Jamiat Appeals to People of India to Submit Response to LCI on UCC’ *Jamiat Ulama- i -Hind* (2023) <https://www.jamiat.org.in/news_app/jamiat_press_release_detail/103> accessed 19 November 2023.

³⁷ Werner Menski, ‘The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda’ (2008) 9 (3) *German Law Journal* 1.

³⁸ Ghazala Jamil, ‘Uniform Civil Code: Another Step Towards Making India a Hindu Rashtra?’ *The Frontline* (2023) <<https://frontline.thehindu.com/the-nation/uniform-civil-code-another-step-towards-making-india-a-hindu-rashtra/article67101084.ece>> accessed 4 October 2023; Peter Ronald Desouza, ‘Politics of the Uniform Civil Code in India’ (2015) 50 (48) *Economic and Political Weekly* 50 <<https://www.jstor.org/stable/44002900>> accessed 1 October 2023.

³⁹ *Mohd Ahmed Khan v Shah Bano Begum and Others* ([1985] AIR 945) para 32; *Sarla Mudgal, President Kalyani and Others v Union of India and Others* ([1995] AIR 1531), *John Vallamattom and Another v Union of India* (Writ Petition ([Civil] 242 of 1997) and *Jordan Diengdeh v S.S Chopra* (SC [1985] AIR 935).

⁴⁰ Manik Tanwar, ‘UCC: In Light of Legal Pluralism in India’ *The Times of India* (2023) <<https://timesofindia.indiatimes.com/readersblog/legal-thoughts/ucc-in-light-of-legal-pluralism-in-india-55316/#>> accessed 30 September 2023.

⁴¹ *Shayara Bano v Union of India* ([2017] 9 SCC 1). See also: Archana Parashar, *Women and Family Law Reform in India* (Sage Publications 1992) p105..

⁴² The Muslim Personal Law Shariat Application Act (1937). See also: Rohit De, ‘Personal Laws: A Reality Check’ *Frontline* (21 August 2013) <<https://frontline.thehindu.com/cover-story/personal-laws-a-reality-check/article64764402.ece>> accessed 13 October 2023.

⁴³ Zoya Hasan, ‘Gender Politics, Legal Reforms and Muslim Community in India’ in Patricia Jeffery and Amrita Basu (eds), *Appropriating Gender: Women’s Activism and Politicized Religion in South Asia* (Routledge 1998) p73. See also: ‘Is Gender Justice Only a Legal Issue? Political Stakes in UCC Debate’ (1997) 32 (9) *Economic and Political Weekly* 453.

offering equal treatment between citizens – can address gender bias in personal laws and improve the socioeconomic position of Muslim – and other – women in India.⁴⁴

However, framing justice as equal treatment offers limited scope for justice for Muslim women. As Grover pointed out, consistency in the law does not mean gender equality: ‘equality and gender justice—promoting dignity rather than uniformity and legislative clarity—are the end goals.’⁴⁵ Improving the situation of Muslim women in India is not a straightforward and uncontested task. Muslim women are not a homogenous block that demand a specific type of common conception of gender justice. Instead, there is inequality within the equals⁴⁶ and Muslim women have diverse views and interests and are differentiated by, amongst other factors of diversity, ‘class, caste, community and region’.⁴⁷ Further, the marginalisation of Muslim women in India is a result of a complex system of root causes and cannot be reduced to simple notions of unequal access to rights in personal laws.⁴⁸ This argues for a holistic and broad approach to gender justice than is found in the analysis which seeks gender justice only within the context of religious practices.⁴⁹

Another criticism is that the call for UCC since its inception has been anti-Muslim rather than pro-woman.⁵⁰ Women’s rights groups and organisations underscore the tension between a UCC and Muslim personal laws, which are demonised for retaining gender-biased practices.⁵¹ This assumption is not only precarious to India’s pluralism but also makes the call for UCC dubious, questioning the true objective of the code. The organisation *Bebaak Collective* highlighted that Indian Muslims are not a homogenous block, but have multiplicity of voices within the community. Therefore, search for uniformity even within the community can be detrimental to the community. They also added that the right-wing government is trying to foster its cause in the garb of rescuing Muslim women.⁵² Other organisations, including Bombay-based Majlis,

⁴⁴ S. K. Vasudevan, ‘Resolving the Constitutional Dilemma of the Uniform Civil Code in India through the Women’s Convention’ (2023) 44 *Liverpool Law Review* 157; Nivedita Menon, ‘A Uniform Civil Code in India: The State of the Debate in 2014’ (2014) 40 (2) *Feminist Studies* 480. See also: *Shah Bano Begum v Mohd. Ahmed Khan* ([1985] AIR 945); *Ms. Jorden Diengdeh v S.S. Chopra* ([1985] 3 SCC 62); *Sarla Mudgal, President Kalyani and Others v Union of India and Others* ([1995] AIR 1531); *ABC v The State (NCT Of Delhi)* ([2015] SCC Online SC 609); *Jose Paulo Coutinho v Maria Luiza Valentina Pereira* ([2019] 20 SCC 85).

⁴⁵ Vrinda Grover, ‘Constitution and Custom: Women’s Rights and Access to Justice in Pluralistic Legal Societies’ *NYU Law News* (30 November 2015) <<https://www.law.nyu.edu/news/Vrinda-Grover-Rubin-Symposium>> accessed 6 October 2023.

⁴⁶ Hasan and Menon (n 6) p8; Qazi Sarah Rasheed, ‘Transcending Binaries Through Self-Empowerment and Personal Development: Exploring the Role of Muslim Women Activists in Community Reforms’ (2023) 30 *South Asia Multidisciplinary Academic Journal* 1.

⁴⁷ M. Shahbaz Saeed, ‘Status of Muslim Women in India’ (2005) 25(3) *Strategic Studies* 25(3) 118.

⁴⁸ *ibid* 124.

⁴⁹ Ratna Kapur, ‘Gender and the “Faith” in Law: Equality, Secularism, and the Rise of the Hindu Nation’ (2020) 35(3) *Journal of Law and Religion* 407. See also: Marie Juul Petersen, *Promoting Freedom of Religion or Belief and Gender Equality in the Context of the Sustainable Development Goals: A Focus on Access to Justice, Education and Health: Reflections from the 2019 Expert Consultation Process* (Danish Institute for Human Rights 2020) p 31.

⁵⁰ Nivedita Menon, ‘Women and Citizenship’ in Partha Chatterjee (ed), *Wages of Freedom* (Oxford University Press 1998) 241.

⁵¹ Rohini Dahiya, *Gender Justice in India: Outlook on Uniform Civil Code* (Social & Political Research Foundation 2021) pp7-8.

⁵² T. K. Rajalakshmi, ‘Empowerment or exploitation? How UCC will impact women’s rights in India’ *Frontline*, (27 July 2023) <<https://frontline.thehindu.com/the-nation/empowerment-or-exploitation-how-uniform-civil-code-will-impact-womens-rights-in-india/article67109276.ece>> accessed 13 November 2023; ‘Bebaak Collective

All India Democratic Women's Association (AIDWA) and the women's wing of the Communist Party of India, Bombay-based *Majlis*, All India Democratic Women's Association (AIDWA) and women's wing of Communist Party of India have called out the fundamentalist nature of the demand of UCC.⁵³ The Maharashtra based *Bhartiya Muslim Mahila Andolan* (BMMA) on the contrary though advocates in favour of UCC deviates from the majoritarian motive and puts forward the demands of Muslim women for establishing laws concerning divorce, custody, adoption, maintenance, and inheritance as priority.⁵⁴ BMMA has always been in the frontline in empowering Muslim women and they believe that UCC may prove to be a good chance to ensure gender justice. However, the kind of uniformity BMMA envisions is that of Ambedkar and Nehru, and not the despotic paternalism of majoritarian power.⁵⁵ Given such tensions around the UCC, arguments around its value in the topic of justice for Muslim women are assessed in more depth below.

A. Hindrance to Exercising Freedom of Religion

The imposition of a UCC will likely restrict Muslim women's exercise of their religious freedom.⁵⁶ Whilst cases such as *Shah Bano*⁵⁷ have shown that not all Muslim women accept the Muslim personal law version of the Islamic *Shari'ah*, other women choose to practice their religion in line with Muslim personal laws.⁵⁸ Whilst it is clear that Islam does not provide strictly equal rights between genders, the *Shari'ah* framework provides equitable treatment between men and women and protects women from a range of consequences that might otherwise befall them. This is because of the rights ensured to Muslim women in Muslim personal laws, such as the right to maintenance, autonomy over their earnings, divorce, right to inheritance, *Mehr*, the prohibition on willing away more than one-third of one's property (thus ensuring women also receive inheritance) and the right to add reasonable conditions in the contract of marriage. The 21st Law Commission in 2018, when concluding that a UCC was not desirable in India, also noted such benefits to women of the practice of their Islamic faith.⁵⁹ These benefits are granted exclusively to Muslim women by virtue of their personal laws. Hindu women had to fight a prolonged legal battle to gain for themselves the right to divorce

Speak Out Against Triple Talaq and UCC' *The Wire* (03 November 2016) <<https://thewire.in/rights/bebaak-ucc-triple-talaq>> accessed 13 November 2023.

⁵³ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (online edn, Oxford Academic 2012) p59

⁵⁴ 'BMMA Affirms Unwavering Commitment To Advocating Muslim Women's Rights Despite UCC Outcome' *The Free Press Journal* (22 August 2023) <<https://www.freepressjournal.in/mumbai/bmma-affirms-unwavering-commitment-to-advocating-muslim-womens-rights-despite-ucc-outcome>> accessed 6 November 2023.

⁵⁵ S. Balakrishnan, 'Face To Face: UCC Is A Good Chance To Ensure Justice For Muslim Women, Says BMMA's Zakia Soman' *The Free Press Journal* (18 June 2023) <<https://www.freepressjournal.in/interviews/face-to-face-ucc-is-a-good-chance-to-ensure-justice-for-muslim-women-says-bmmas-zakia-soman>> accessed 6 November 2023

⁵⁶ See: International Covenant on Civil and Political Rights art 18 and 27.

⁵⁷ *Mohd. Ahmad Khan v Shah Bano Begum* ([1985] AIR 945). In this case, a Muslim woman challenged the unilateral right of her Muslim husband to divorce her with finality (utilising the rule of 'triple talaq'), leaving her without maintenance beyond the 90-day iddah period. As a result of this case, the right to triple talaq was limited by The Muslim Women (Protection of Rights on Marriage) Act, 2019. See also: Siobhan Mullally, 'Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case' (2004) 24 (4) *Oxford Journal of Legal Studies* 671; Alok Prasanna Kumar, 'Uniform Civil Code: A Heedless Quest?' (2016) 1 (25) *Economic and Political Weekly* 671.

⁵⁸ Utsa Sarmin, 'Why, as a Woman Born Into a Muslim Family, I Have Reservations About the Uniform Civil Code' *The Indian Express* (2 July 2023) <<https://indianexpress.com/article/opinion/columns/muslim-woman-reservations-uniform-civil-code-8694271/>> accessed 12 November 2023.

⁵⁹ Law Commission, *Reform of Family Law* (CP, 2018) 12.

and to inherit property.⁶⁰ Furthermore, while the court pronounced against the Hindu wife's right to live separately from her in-laws,⁶¹ Muslim women have always been awarded this right by way of religious laws.⁶² Given the recognized benefits of Muslim personal law, reform of Muslim personal laws and their manner of implementation could be debated, to address genuine concerns of gender injustice that may be caused by the application of Muslim personal laws, for instance, but not limited to, remedying the misinterpretation of *Shari'ah* or addressing community practices which deprive Muslim women of the rights bestowed on them by personal laws.

Related to the argument that a UCC would deny religious freedom to Muslim women, the imposition of uniform laws may contribute to the homogenization of religion and culture in India. Preserving social plurality or cultural diversity relies on maintaining personal laws. The argument is that a UCC might be used as a tool to further the agenda of majoritarianism at the expense of minority freedom. Contrary to the values of equality which a UCC seeks, a UCC is seen as aiming to project Hinduism as the unifying value of India.⁶³ Behind this projection of the value of Hindu law, is the conception of Muslims as 'others'.⁶⁴ The judiciary, in several instances has either made a veiled or direct insinuation against Muslim Law.⁶⁵ This creates a myth about Hindu religious codes being egalitarian and gender-just, which should be followed by Muslims to draw them into gender justice and modernity. Such a UCC would be in direct contravention of the religious freedom of all other communities. A UCC should be inclusive of all personal laws and not exclusive to the laws of one community. Alternatively, to the UCC projecting Hindu values, if the UCC is an atheist law, the chances are that almost all religious communities will spurn it. In a country where polytheism and monotheism are mainstream cultural ideologies, an atheist law will be a failed attempt to unify the legal framework.

Additionally, legal pluralists assert that gender justice does not necessarily hinge on legal uniformity.⁶⁶ A UCC which prohibits religious personal laws would restrict the rights of Muslim women to practice their faith. Accordingly, Muslim women may find themselves at a disadvantage, facing difficulties in reconciling their personal beliefs with the imposed legal framework of religious assimilation. Discrimination against Muslim women in the workplace already takes place (for instance, due to visible religious practice, such as the wearing of the

⁶⁰ Flavia Agnes, 'Liberating Hindu Women' (2015) 50 (10) Economic and Political Weekly 14.

⁶¹ *Kailash Wati v Ayodhya Parkash* ([1977] 79 PLR 216).

⁶² Alamgiri Mohd. Mohinuddin Aurangzeb, *Fatwa-i-Alamgiri, An-Nafqa*, vol 1, Chapter 556 (1700) 17; Allama Ibn Abideen, *Fatawa Shaami*, vol 2, 544; Mufti Muhammad ibn Adam al-Kawthari, 'A Wife's Right to Housing Separate from Her In-Laws' *Hanafi Fiqh* (7 October 2009) <<https://seekersguidance.org/answers/hanafi-fiqh/a-wifes-right-to-housing-seperate-from-her-in-laws/>> accessed 13 November 2023. See also: Nabeela Jamil, 'Why Don't Indian Courts Get a Muslim Wife's Right to a Separate Accommodation Correct?' *The Leaflet* (17 May 2022) <<https://theleaflet.in/why-dont-indian-courts-get-a-muslim-wifes-right-to-a-separate-accommodation-correct/>> accessed 13 November 2023.

⁶³ Vaishnavi Suresh, 'Uniform Civil Code for the Citizens' (2022) 4 (1) Indian Journal of Law & Legal Research 4 (1) 8; Dr. Prachi Tyagi and Adrija Ghose, 'Uniform Civil Code: One Code, One Rule' (2021) 4(3) International Journal of Law, Management and Humanities 3201.

⁶⁴ Flavia Agnes, 'The Supreme Court, Media and UCC Debate' in Ram Puniyani (ed), *Religion, Power and Violence: Expression of Politics in Contemporary Times* (Sage 2005)p231

⁶⁵ *Mohd Ahmed Khan v Shah Bano* ([1985] AIR 945); *Sarla Mudgal, President Kalyani and Others v Union of India and Others* ([1995] AIR 1531); *Shayara Bano v Union of India* ([2017] 9 SCC 1).

⁶⁶ Kumkum Sangri, 'Gender Lines: Personal Laws, Uniform Laws, Conversion' (1999) 27 (5/6) Social Scientist 350.

hijab),⁶⁷ presenting enormous challenges to the free practice of religion, and religious practice would be further curtailed if a UCC resulted in the loss of protection of religious law for Muslims. A legal system which permits the practices of Muslim religious rules offers more justice for women than uniformity does by protecting women's rights to freedom of religion. This article argues that a UCC in India, given the historical context of religious pluralism in India, must permit personal laws and not require Muslim women to bid farewell to their rights under personal law. Furthermore, if people had a choice between religious laws and uniform law, this would remove any objection to such systems on the grounds of personal autonomy.⁶⁸ Some personal laws may be subject to reform, and this may be the most appropriate way forward to tackle gender inequalities which arise from community practices which do not implement women's rights found in Muslim personal laws or which arise from a skewed application of *Shari'ah* rules in personal laws.

B. Addressing Root Causes of Injustices for Muslim Women in India

Muslim women's issues in Indian society have been in the academic, civil and political spotlight since the 1980s. Muslim personal laws have come under populist attack and are alleged to discriminate against Muslim women.⁶⁹ However, taking away personal laws will not automatically improve the situation for Muslim women. Achieving gender equality is challenging due to existing social inequalities.⁷⁰ In a democracy, everyone is purportedly equal before the law. However, the subjugation of women by the state and its laws is not a new phenomenon in India. It can be regarded as a product of colonial patriarchal manoeuvring, which continues to exist today. A woman's lived experiences are seldom taken into consideration when questions of access to justice and judicial and/or legislative reforms arise.⁷¹ Despite advancements in many societies, gender disparities still persist. For instance, systematic discrimination at workplace⁷² or access to educational opportunities⁷³ is still a challenge for the majority of women in India, not just Muslim women.

Muslim personal laws are attacked for gender disparities, while critics overlook the prevalence of similar practices and consequences among Hindus, which suggests that the root cause of gender injustices is not (or not only) the application of Muslim personal laws. The focus of critics on Muslim personal laws intensified notably following the Supreme Court's 1985 ruling

⁶⁷ Nuzhat Khan, 'Islamophobia in the Indian Workplace: A Tale of 3 Muslim Women' *Article 14* (14 July 2023) <<https://article-14.com/post/islamophobia-in-the-indian-workplace-a-tale-of-3-muslim-women--64b0b20313dbb>> accessed 10 October 2023; Rakshitha Arni Ravishankar, 'Research: Muslim Women in India Face Hiring Bias for Entry-Level Roles' *Harvard Business Review* (30 September 2022).

⁶⁸ Farrah Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24 (2) *International Journal of Law, Policy and the Family* 222.

⁶⁹ Hasan and Menon (n 6).

⁷⁰ *ibid*

⁷¹ Pranusha Kulkarni, 'Multi-Culturalism or Malestreamism: A Feminist Jurisprudential Critique' (2017) 4 *Journal of Law and Public Policy* 68.

⁷² Cailin S. Starnski and Leanne S. Son Hing, 'Gender Inequalities in the Workplace: The Effects of Organizational Structures, Processes, Practices, and Decision Makers' Sexism' (2015) 6 *Frontiers in Psychology* 1.

⁷³ Gray Group International, 'Gender Disparity in Education: An In-Depth Examination' *GGI Insights* (June 30 2023) <[Gender Disparity in Education: An In-Depth Examination \(graygroupintl.com\)](https://www.graygroupintl.com/gender-disparity-in-education)> accessed 16 November 2023.

on permanent alimony in the case of Shah Bano Begum.⁷⁴ However, such arguments have misrepresented the impact of Muslim personal laws on women and the successes of Hindu practices. As Rasheed summarises:

“Studies of family law in India, however, do not support these contrasts and suggest that issues faced by women in terms of marital problems (dowry, domestic violence) and marriage breakdown (separation, divorce, maintenance) are similar across all faiths. Also, economic dependency in marriage and economic vulnerability after divorce are a common phenomenon among Hindu and Muslim women.”⁷⁵

Sweeping generalisations about Muslim personal laws have also neglected the full picture of the injustice that Muslim women face and, therefore, other causes of their marginalisation in India.⁷⁶ The challenging social conditions faced by Muslim women are a phenomenon prevalent due to their underprivileged position in India. In economically improved strata of Muslims, oppressive practices are less common. Poverty serves as the root cause of the conservative belief system in some Muslim families. A High-Power Panel on Minorities, Schedule Castes, Schedule Tribes and other Weaker Sections was set up in 1980 under the chairmanship of Dr. Gopal Singh to study the conditions of Muslims.⁷⁷ The Committee, in its report, concluded that the poor among Muslims could not avail themselves of opportunities in education, employment and economic activities because of isolation and various historical factors like conservative outlook, poverty, lack of good education, absence of proper infrastructure, etc.⁷⁸ The Sachar Committee Report, which was published in 2006 on the Social, Economic and Educational status of the Muslim community of India, found that the community was ‘seriously lagging’, and also highlighted their condition of poverty coupled with a sense of fear and insecurity.⁷⁹ The findings of the Kundu Committee Report (2014) confirmed that the relative employment situation, poverty, and other forms of marginalisation of the Muslims, has not undergone much change since the report of the Sachar Committee.⁸⁰ Addressing the obstacles to access to education, employment and economic activities is key to improving the

⁷⁴ Narendra Subramaniam, ‘Legal Change and Gender Inequality: Changes in Muslim Family Law in India’ (2008) 33 (3) Law & Social Inquiry 631.

⁷⁵ Rasheed (n 46). See also: Saumya Uma, ‘What a Gender-Just Uniform Civil Code Could Look Like’ *The Wire* (2 July 2023) <<https://thewire.in/law/what-a-gender-just-uniform-civil-code-could-look-like>> accessed 5 October 2023 (Uma advocates for reforming Indian laws guided by Hindu principles to ensure a gender-just Uniform Civil Code (UCC). She highlights the necessary changes that would need to be implemented in the legal framework to promote gender equality while staying true to Hindu values.).

⁷⁶ Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press 2011) p268 See also: Saeed (n 47); Hasan and Menon (n 6).

⁷⁷ Ministry of Home Affairs, *Report on Minorities*, vol 1 (1983) <https://ncm.nic.in/home/pdf/special_report/REPORT%20ON%20MINORITIES.pdf> accessed 15 October 2023.

⁷⁸ *ibid.* See also: S. Nazrul Islam and John Winkel, ‘Climate Change and Social Inequality’ (2017) Working Papers 152 United Nations, Department of Economics and Social Affairs. <<https://ideas.repec.org/p/une/wpaper/152.html>> accessed 5 October 2023.

⁷⁹ Ministry of Minority Affairs, Prime Minister’s High Level Committee, *Social, Economic and Educational status of the Muslim community of India: A Report* (2006).

⁸⁰ Ministry of Minority Affairs, *The Post Sachar Evaluation Committee Report* (2014); Sabah Khan, ‘Social Exclusion of Muslims in India and Britain’ (2020) 6 (1) Journal of Social Inclusion Studies 56. See also: Amit Pandya, ‘Muslim Indians: Struggle for Inclusion’ (2010) 48 The Henry L. Stimson Center Washington (“participation in the workforce is lower for Muslim women than non-Muslim women; that health indicators among Muslim women are exceptionally poor; that they suffer high incidences of domestic abuse; and that in access to services they are twice disadvantaged, as Muslims and as women”).

injustices that Muslim women suffer. One of the most pressing issues facing Muslim women today is economic, and while civil rights remedies may not fully address these challenges, concerted public and private efforts to promote economic development could provide relief. More than religious redemption, women need economic redemption.⁸¹ They need inclusive models of development that will help to eliminate their poverty and destitution and help to build an egalitarian world.⁸²

Therefore, it is imperative for the achievement of gender justice that the full nature of the marginalization of Muslim women are addressed in order to improve the position of Muslim women in Indian society. Bettering Muslim women's socio-economic conditions may improve the situation of Muslim women in India. These can include affirmative actions like reservations in educational institutions, workplace and government jobs.⁸³ A holistic approach to gender equality would also meet the aims of the Constitution. The founding fathers of the nation believed in the foundational philosophy that the principal responsibility of the state is to ensure and promote the welfare of the deprived and disadvantaged people. Justice and Equality have since then been an obligation on the Indian state and central tenets of the Preamble of the Constitution.⁸⁴ Given the high levels of marginalisation of Muslim women across various spheres of Indian society, there is a greater need to address a number of wider socio-economic issues, instead of focusing on religious uniformity.⁸⁵ A uniform civil code is being oversold as a silver bullet for gender justice, which it is not. It is unlikely to produce the utopian conditions for Muslim women that are being promised, given the diverse factors of inequality of Muslim women in India. Recent evidence indicates that gender inequality within the family bears a greater correlation to socio-economic conditions than the form of religious law. But perhaps, most importantly, the new areas of focus on family law reform address issues such as domestic violence which transcends community identities and concerns.⁸⁶

It is also argued that the inability to practice their religion may exacerbate marginalisation of Muslim women. For instance, a UCC might override Islamic family laws, which could potentially lead to the loss of certain rights. For instance, the right to separate accommodation for married women could be lost, as well as maintenance from their husbands for all basic life necessities, the right to *mehr* (translation- dower), inheritance and so on.⁸⁷ The Muslim woman secured for herself the right to determine her economic rights at the time of the divorce and receive a lump sum settlement. A right, which is lacking in matrimonial laws of other communities. The positive impact of the law is greatest when it is coupled with the protection of women's economic resources. Therefore, legal reform must be done in conjunction with economic protection and redistribution that assists poor Muslim women.⁸⁸ Finally, it is not contended that Muslim personal laws operate optimally. Restrictive understandings of religious

⁸¹ Qazi (n 20).

⁸² Agnes (n 60).

⁸³ Some educational institutions such as Aligarh Muslim University (AMU), Aligarh, Uttar Pradesh and Jamia Millia Islamia, New Delhi have these clauses, but they are too few to address the issue, it should be a nationwide action.

⁸⁴ Zoya Hasan, *Politics of Inclusion – Castes, Minorities and Affirmative Action* (Oxford University Press 2009) 170.

⁸⁵ Menon (n 50) 258.

⁸⁶ Moin Qazi, 'The Tinderbox of the Uniform Civil Code' *Muslim Mirror* (23 June 2023) <<https://muslimmirror.com/eng/the-tinderbox-of-the-uniform-civil-code-ucc/>> accessed 1 November 2023.

⁸⁷ See: part II (B) of this article.

⁸⁸ Cyra Akila Choudhary, '(Mis)Appropriated Liberty: Identity, Gender Justice and Muslim' (2008) 17 (1) *Columbia Journal of Gender & Law* 45.

laws or cultural practices which lead to communities denying Muslim women the rights that *Shari'ah* law affords them are unjust and can be addressed by law reform.⁸⁹ Such misapplication of Islamic religious laws is often the cause of gender inequalities in Muslim personal laws, rather than the religion itself.

C. Empowering Muslim Women in the Process of Reform

It is essential to note that the women's argument on the UCC cannot be divorced from the ideas of democracy. The replacement of personal laws with a UCC will be a top-down approach which will impair the rights and interests of religious women without changing much in practice. The role of women, individually and collectively, in overcoming and challenging structural and practical barriers and their active participation in the legal process plays a significant role in shaping the legal landscape. Real, lasting equality is not just about top-down equality mandates, rather, it's about the grassroots efforts and acceptance that this progress will be gradual and negotiated with the passage of time.

To ensure a solution which works in favour of Muslim women requires the active participation of Muslim women in law reform. To be counted in the current discourse, it is crucial that women engage with the issues of religious communities to add legitimacy to the gender justice argument.⁹⁰ Recent developments across the country have brought to light that a vast majority of Muslim women have come out to assert their rights and liberated themselves from the stereotypes knitted around them.⁹¹ Muslim women have evolved to claim their political identity.⁹² Since 2019 in India, there has been a notable development of Muslim women's agency through protest movements and the assertion of their rights to claim public spaces and rise above the stereotypes. This phase of Muslim women's activism began with the enactment of the Citizenship Amendment Act in December 2019⁹³, which led to mass protests across the nation. Interestingly and surprisingly, these protests were led by Muslim women and supported by people across religions, gender and classes.⁹⁴ The burqa-clad Muslim women, while professing their constitutional rights on the streets of India, liberated the idea of liberalism by redefining the concept.⁹⁵ They have remodelled the Western idea of liberalism in a cultural sense. This sense of liberation comes from the decorous balance of religion and education. The various interpretations of religious scriptures equipped women to practice their rights granted by religion and the enhanced realization of the importance of education has enabled them to

⁸⁹ For a discussion of some examples, see: Qazi Sarah Rasheed, 'Transcending Binaries Through Self-Empowerment and Personal Development: Exploring the Role of Muslim Women Activists in Community Reforms' (2023) 30 *The Digitalization of Urban Governance in India* <<https://doi.org/10.4000/samaj.8629>> accessed 18 January 2024.

⁹⁰ Hasan (n 43).

⁹¹ Kiran Bhatia and Radhika Gajjala, 'Examining Anti-CAA Protests at Shaheen Bagh: Muslim Women and Politics of the Hindu India' (2020) 14 *International Journal of Communication* 6286; Irfanullah Farooqi, 'Citizenship as Participation: Muslim women protesters of Shaheen Bagh' (2020) 55 (4) *Economic and Political Weekly* 13; 'Women take to streets in Mumbai as hijab row expands in India' *Dawn* (14 February 2022) <<https://www.dawn.com/news/1675074>> accessed 11 November 2023.

⁹² Nida Kirmani, 'Beyond the impasse: 'Muslim feminism(s)' and the Indian women's movement' (2011) 45(1) *Contributions to Indian Sociology* 1; Nida Kirmani, 'Claiming Their Space: Muslim Women-led Networks and the Women's Movement in India' (2009) 11 (1) *Journal of International Women's Studies* 72.

⁹³ Although such activism has a long history. See: Rasheed (n 89).

⁹⁴ Arshia Sana, 'Women-led Protests in India - A Study with Reference to Anti-CAA Shaheen Bagh Movement' (International Conference on Protest Movements and International Law Heidelberg 2023).

⁹⁵ *ibid.*

assert their constitutional rights.⁹⁶ What is interesting for our purposes, is what these women were fighting for. These women made clear that what they demand is not appeasement of Constitutional law to Islam but an affordable justice system that promises to treat them equitably.

In the post-independence India, women activists equivocally supported the enactment of UCC across the nation. However, the paradigm shift in this feminist demand for UCC in 1980s-90s is a sad story that lost hope of equality and justice to communal politics and appeasement. During 1980s when communal politics rose, women's movement started rethinking its espousal of the 'protection of national integrity' argument in favour of UCC. The 1985 Shah Bano judgement made it clear that in whose interests this 'integrity' was being protected.⁹⁷ While the judgment brought Muslim men within the purview of S.125 of the Criminal Procedure Code, 1972⁹⁸ making it mandatory for Muslim husbands to pay maintenance beyond the 90 days of *iddat* period, the judgment was followed by legislation which precluded Muslim men from the bounds of S.125 of CrPC.⁹⁹ Though done for appeasement of Muslim men, the legislation was received as a government favour towards Muslim men which gave Hindu nationalists a reason to take UCC as one of the agenda in their manifesto.¹⁰⁰ Hindu nationalists perceived this move as 'preferential treatment' to the minority.¹⁰¹ These developments together with the forced opening of the locks of Babri Masjid and finally its demolition in 1992 made it clear for the feminists that their call for UCC for 'national integration' and gender justice cannot go hand-in-hand with the anti-Muslim notions of 'national integration' of the Hindu extremist nationalism.¹⁰² Thus, feminists decided to drop their desire for a UCC, which has the same goal as BJP.¹⁰³ As Menon puts it, 'clearly, national integrity could no longer be a value the women's movement could subscribe to unconditionally.'¹⁰⁴ This realisation, together with regular incantation of 'national integrity' to admonish minorities gradually led to the divorce of national integrity argument from the gender justice argument.

⁹⁶ Arshia Sana, 'Hijabis – Women with More Faith Than Fear' *Clarion India* (13 February 2022) <<https://clarionindia.net/hijabis-women-with-more-faith-than-fear/>> accessed 10 November 2023.

⁹⁷ Menon (n 50) 252.

⁹⁸ The Code of Criminal Procedure 1973, sec 125. See the description in Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford University Press 2011) 183.

⁹⁹ The Muslim Women (Protection of Rights on Divorce) Act 1986, sec 3, 4.

¹⁰⁰ See: Herklotz (n 32) 160. (The Shah Bano judgment led to mass agitation among the minority community and was regarded as judicial interference in Muslim personal law. Shortly after the judgment, the then Congress government headed by Rajiv Gandhi passed a legislation named the Muslim Women (Protection of Rights on Divorce) Act 1986 that excluded Muslims from the bounds of Section 125, CrPC. The legislation was widely criticised as a step away from UCC, especially by the then supporters of UCC which explicitly involved feminists and women's rights activists. Many of them labelled the law as 'a glaring defeat of principles of gender justice and secularism'.)

¹⁰¹ Rajeev Dhavan, 'The Road to Xanadu: India's Quest for Secularism' in Gerald James Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington 2001) 317.

¹⁰² This shift is studied in various contemporary works that started to re-examine Hindu personal laws to claim that Hindu laws were not reformed but only codified which ended the diverse practices in different regions and led to the destruction of liberal provisions for women in many instances. See: Flavia Agnes, 'Women's Movement within a Secular Framework: Redefining the Agenda' (1994) 29 (19) *Economic and Political Weekly* 1123; Ruth Vanitha, 'The Special Marriage Act: Not Special Enough' (1990) 58 *Manushi* 15 (Other works have studied the leeway provided to Hindu men by way of amendments in the secular legislations like Special Marriage Act, 1954 and dismantled the idea that only minority men benefit by not implementing a UCC).

¹⁰³ Herklotz (n 32) 160.

¹⁰⁴ Menon (n 50) 253.

The judiciary played an equally important role in bolstering the agenda of Hindu nationalists. Words used by learned judges in the *Sarla Mudgal* case include ‘in the Indian Republic, there was to be only one nation - the Indian nation - and no community could claim to remain a separate entity on the basis of religion.’¹⁰⁵ Various women’s rights groups criticise the judicial approach towards UCC. Women’s Research and Action Group raised the question in 1995 ‘why did the judiciary consistently raise the demand for a UCC only in the context of cases dealing with Muslim Personal Law, and never in dealing with cases of discrimination in Hindu Law?’¹⁰⁶

Another reason for opposing the UCC on democracy grounds is that transferring complete control of family matters to the State, especially in matters relating to the formation and dissolution of marital relationships, is not perceived as a desirable measure for women’s empowerment. Such an approach may undermine individual autonomy and freedom of choice within a family. This lack of autonomy could be counterproductive to women empowerment, as it diminishes their ability to make choices that align with their personal circumstances and preferences. Family matters are often deeply rooted in cultural and social contexts and transferring control to the State may result in lack of cultural sensitivity that can negatively impact women who find themselves subject to laws that don’t accommodate or respect their cultural or religious diversity. Thereby, one can conclude that women’s emancipation is better served by a balanced approach that acknowledges and respects individual agency and diverse cultural contexts while ensuring legal frameworks that protect fundamental rights and promote gender equality.

Of concern also to Muslim women regarding the implementation of UCC is the scars of the past due to religious discord elevating to communal clashes. History narrates the account of such incidents at length. Whether it was the communal riots at the time of partition, the violence during the Babri Masjid demolition in 1992 or the Gujarat barbarity of 2002, Muslim women have always been the targets of sexual violence.¹⁰⁷ Considering the lessons of the past, any political or legal action in a religiously charged society should be taken with appropriate precaution and prudence. The enactment of UCC cannot be foresighted without internal conflicts and hence, should be deferred until a social consensus has been reached.¹⁰⁸ Any resulting disturbances will breach the rights and security of Muslim women who have always been at the receiving end. These predicaments can well be avoided if the lessons learned from the history are called to mind.

IV. MOVING FORWARD

The above discussion has argued that a UCC could impose a uniform set of civil laws in Indian society and that this would not serve justice for Muslim women. Taking into account the arguments presented, the most appropriate suggestion for the way forward is to place on hold the project of uniformity and pursue reform within personal laws to tackle, inter alia, issues of injustice against women. This would permit the continued practice of religious freedom whilst

¹⁰⁵ *Sarla Mudgal, President Kalyani and others v Union of India & others* ([1995] AIR 1531).

¹⁰⁶ Geetanjali Gangoli, *The Law on Trial: The Debate on the Uniform Civil Code* (Akshara: A Women’s Resource Centre 1996) 3.

¹⁰⁷ Megha Kumar, *Communal Riots, Sexual Violence and Hindu Nationalism in Post-Independence Gujarat (1969-2002)* (PhD thesis, University of Oxford 2009).

¹⁰⁸ Bushra Noor, ‘Uniform Civil Code: Should Be or Should Not Be’ (2016) 2 (1) *Amity International Journal of Juridical Sciences* 151.

addressing concerns. The 21st Law Commission of India was of the view that inequality stems from discrimination and not merely from differences. To address this, the Commission recommended a range of amendments to the existing family laws and suggested codification and clarification of certain aspects of personal laws to avoid ambiguities.¹⁰⁹ While a UCC was not universally agreed upon, the Commission proposed preserving diversity in personal laws and at the same time ensuring they align with fundamental rights guaranteed under the Constitution of India. To achieve this, the Commission suggested codifying family-related personal laws as much as possible. It further stressed that the focus should be on ensuring equality within communities particularly between men and women, rather than seeking uniformity between communities. The concept of ‘equity’ rather than ‘equality’ was emphasized, suggesting that preferential rights and protections should be safeguarded for vulnerable or historically marginalized groups. This, according to the Commission, is a more effective way to address discriminatory laws rather than imposing a uniform civil code.¹¹⁰

A survey conducted among Muslim women in an area in Delhi suggests that astute reforms in personal laws can reasonably achieve the objectives that a UCC seeks.¹¹¹ Ferrari argues that religion-based personal laws can be acceptable if these three conditions are met: firstly, granting effective opting-out rights from the religious group, secondly, putting in place mechanisms that offer a secular alternative to religiously inspired legal practices, and lastly, encouraging reforms that reduce the level of disparity that affects the weakest group members.¹¹² Eminent scholars like Fyzee¹¹³ and Engineer¹¹⁴ also support the third argument and have proposed draft changes in personal law. Majlis, a women’s legal-aid group in Bombay, for instance, has categorically opposed the drafting of uniform family laws at this point in time and has instead emphasised the importance of initiatives for change within religious communities¹¹⁵ and need for codification of Muslim personal law to ensure gender justice.¹¹⁶ Such an approach would ensure that freedom of religion can be practised and dialogues can take place around select issues of reform.

Women’s rights lawyer and activist, Flavia Agnes supported the solution proposed by the 21st Law Commission report of 2018 of reform of personal laws. She added that, ‘they recommended that the discrimination against women in all personal laws should be taken up and amended. So, I think that is a better strategy for gender justice than a UCC which is particularly controversial for the minorities.’¹¹⁷ Sarasu Thomas, a family law expert, also opines that there can be better gender justice without a UCC by having smaller uniform laws which promote gender justice.¹¹⁸ She takes the example of Domestic Violence Act¹¹⁹ which

¹⁰⁹ Law Commission, *Reform of Family Law* (CP 2008).

¹¹⁰ *ibid.*

¹¹¹ Sabeeha Bano, ‘Muslim Women’s Voices Expanding Gender Justice under Muslim Law’ (1995) 30 (47) *Economic and Political Weekly* 2981.

¹¹² Ferrari (n 18).

¹¹³ Fyzee (n 12).

¹¹⁴ Asghar Ali Engineer, ‘Muslim Women on the Move’ (2003) 6 (13) *Secular Perspective* 1.

¹¹⁵ Hasan (n 43).

¹¹⁶ Justin Jones, ‘Towards a Muslim Family Law Act? Debating Muslim Women’s Rights and the Codification of Personal Laws in India’ (2020) 28 (1) *Contemporary South Asia* 1.

¹¹⁷ Sravasti Dasgupta, ‘BJP Equates UCC With Gender Justice. But Can it End Discrimination In-Built in Personal Laws?’ *The Wire* (06 July 2023) <<https://thewire.in/women/bjp-ucc-with-gender-justice-discrimination-personal-laws>> accessed 30 October 2023.

¹¹⁸ Sarasu Esther Thomas, ‘A Struggle for Equality in the Private Realm of Family Law’ in Payal Kumar (ed), *Unveiling Women’s Leadership* (Palgrave Macmillan 2015) 181-190.

¹¹⁹ The Protection of Women from Domestic Violence Act, 2005.

applies to all women across the country and calls it as ‘a uniform civil code in that sense in a particular area’.¹²⁰ Smaller laws which are uniform in nature will fetch more fruits than trying to repeal all the laws. Small incremental changes are more deliverable than a huge mass of laws.¹²¹ In this task, the role of Muslim women in educating themselves on Islam and becoming empowered, and leading, the reform debate is key.¹²²

A project of reform of personal laws should take place within a wider project of legal and social reforms to address the multiple (and not only religion-based) causes of inequalities for Muslim women. The low socio-economic position of Muslim women in Indian society is a complex phenomenon, and thus a complex range of responses is needed. Moreover, necessary legal reforms should be approached with participation and empowerment in mind. A dialogue of reform should be opened, and the debates and outcomes are ones which must be processed hand in hand with the Muslim women community, and not imposed on them. This is the approach favoured by the 21st Law Commission. Maulana Abul Kalam Azad in his Presidential address at Ramgarh Session of the Congress in December 1940 mentioned that ‘minorities should judge for themselves what safeguards are necessary for the protection of their rights and interests. The majority should not decide this. Therefore, a decision in this respect must depend on the consent of the minorities and not on majority vote.’¹²³ Therefore, the call for reform of personal law should come from all groups constituting a society, and should include sub-categories within those groups, in this case, Muslim women.

V. CONCLUSION

The debate on the adoption of a UCC has come to the forefront of Indian law and politics once again. One of the pull factors in favour of a UCC has been the argument of its proponents that Islamic personal laws are damaging the plight of Indian Muslim women and that Muslim personal laws must therefore give way to a uniform civil code. This article has argued that the debate on reform needs to take a broader stance and follow a holistic approach to the achievement of gender justice for Muslim women. This would involve the state addressing the marginalisation of Muslim women in, *inter alia*, spheres of education, employment, health and housing. Moreover, rather than imposing forced uniformity regarding religious practice, the article has argued that reform of personal laws may be a better option to address concerns around the interpretation and application of Muslim personal laws and their impact on Muslim women.

The acceptance of cultural pluralism, both in practice, and by law, can promote justice for Muslim women in the legal system – by recognising diverse legal norms, creating an inclusive legal system and preventing religious assimilation. Addressing the injustices of discrimination and marginalisation of Muslim women in India is a complex process that involves negotiation and not a one-size-fits-all approach. It involves a process of finding common ground, understanding diverse perspectives and working towards legal and social structures that respect and promote the rights and equality of all faiths and genders. Moreover, where the aims are the improvement of Muslim women’s rights, then Muslim women should be at the centre of participation and empowerment in these debates. In their struggle for reformed laws, Muslim

¹²⁰ ‘Letter To Law Commission Regarding Personal Law Reform’ *Women* (01 January 2017) <<https://cpiml.org/first-page-category/women/letter-to-law-commission-regarding-personal-law-reform/>> accessed 4 November 2023; Dasgupta (n 117).

¹²¹ *ibid*.

¹²² For a discussion, see: Rasheed (n 89).

¹²³ Hasan (n 84).

women expect the State and the judiciary to reform personal laws on the basis of justice, equity and fairness and not based on the muscle power of majoritarianism.