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FEMINIST DILEMMAS:

THE CHALLENGES IN ACCOMMODATING WOMEN'S RIGHTS WITHIN RELIGION-BASED FAMILY LAW IN INDIA

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ABSTRACT

As with other postcolonial states, India maintains a so-called "personal law system" in the area of family law, according to which individuals are governed by the laws of their respective religious community. For feminist and women's rights activists in India — as in other parts of the global South — these personal laws create a positioning dilemma. On the one hand, there is the critique that personal laws are patriarchal and in need of reform as they often violate international human rights law by discriminating against women. On the other hand, many Indian feminists do not want to mimic the secular agenda of their Western counterparts when considering the reform of personal laws, but rather seek to accommodate cultural and religious identities.

Against the backdrop of broader debates on Third World Feminism,[1] intersectionality, legal universality and cultural relativism, this paper will outline the manifold feminist engagements with personal laws. Drawing on feminist scholarship and publications by Indian activists and women's rights groups, I will differentiate: 1. the call for major state-led reforms (such as the introduction of a secular Uniform Civil Code), which draw on specific ideas of modernity and secularism, constitutional provisions and international human rights law, and 2. the call for community-led reforms, which accept legal pluralism as a fact and acknowledge the intersection of gender and religion. I relate these two positions to Amartya Sen's[2] distinction between "arrangement-focused" and "realisation- focused" views of justice.

[1] The terminology refers to Mohanty's work. Her concept of Third World Women as an "imagined community" will be elaborated in the paper. Chandra Talpade Mohanty (1991). Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism. In C. T. Mohanty, A. Russo & L. Torres (Eds.), Third World Women and the Politics of Feminism: Indiana University Press.

[2] Amartya Sen (2009). The Idea of Justice. Cambridge, Massachusetts: Harvard University Press.

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I. Introduction

Speaking about religion and gender equality often means speaking about conflict, regardless of which religion is concerned or which part of the world one looks at. In this conflict, one side stresses culture, tradition and religious freedom, whereas the other side stresses a right to equality between men and women. The Indian "personal law" system, according to which the individual is governed by the family law of her or his religious community, is one field in which this conflict is particularly visible. India's personal laws are a contested terrain, in which not only religious freedom is played out against gender equality, but in which these aspects are also intertwined with arguments around identity, nationality, modernity and secularism. While "the gender aspect" of the personal laws is often mentioned in a way that suggests a coherent viewpoint on the issue from a women's rights perspective, this paper will show that one such feminist position vis-à-vis the personal laws does not actually exist but that there are multiple feminist positions.

When positioning themselves on the issue of personal laws, many feminists and women's rights activists in India face a dilemma. On the one hand, the fact that personal laws often discriminate against women has led feminists to criticise these laws as patriarchal and in need of reform. On the other hand, many Indian feminists do not want to mimic the secular agenda of their Western counterparts when thinking about the reform of personal laws, but seek to accommodate their own cultural and religious identity. Against the background of broader debates on Third World Feminism,[1] intersectionality, legal universality and cultural relativism, this paper will outline the manifold feminist engagements with personal laws. Drawing on feminist scholarship and publications by Indian activists and women's rights groups, I will differentiate between two main positions. The first one is the call for a Uniform Civil Code (UCC) and other major *state-led* reforms. This approach draws on specific ideas of modernity and secularism, constitutional provisions and international human rights law. Its focus on a "perfect law", however, bears the risk that the provisions on paper will not be implemented on the ground. The second approach calls for *community-led* reforms. This position accepts legal pluralism as a fact and acknowledges the intersection of gender and religion. While this approach is more embedded in the "real world" of Indian women, its downside is that it compromises the aim of gender equality.

[1] The terminology refers to Mohanty's (1991) work. Her concept of Third World Women as an "imagined community" will be elaborated below.

The two approaches that I juxtapose here can be related to Amartya Sen's (2009) distinction between "arrangement-focused" and "realisation-focused" views of justice. With this distinction, Sen not only draws on European Enlightenment philosophy where one approach[2] concentrates on "perfect justice" through certain institutional arrangements whereas another approach[3] is concerned with the social realisation of justice through the removal of the world's "manifest injustice" (A. Sen, 2009, pp. 5-7). He further makes out a similar distinction in Sanskrit literature: that of *niti* and *nyaya* (A. Sen, 2009, p. 20). While both words stand for justice, *niti* denotes an arrangement-focused concern, suggesting that the active presence of some institutions, regulations and behavioural rules would indicate that justice is being done, while *nyaya* is a concept of realised justice based on evaluating people's actual lives and the situations that they experience (A. Sen, 2009, p. 20 et seq.). In the context of the Indian personal law system, the aspiration of a Uniform Civil Code could be seen as an arrangement-focused (*niti*) approach, aspiring to "perfect justice", while the attempt to bring about small-step community-led reforms could be seen as a realisation-focused (*nyaya)* approach, i.e., focusing on the actual life of the people.

In what follows, I will first outline the controversies around the personal laws in India (II). I will then embed the positions of Indian feminist scholars and women's rights activists vis-à-vis the personal laws in broader debates on Third Wold feminism, intersectionality, legal universality and cultural relativism (III.) Against this backdrop, I will present the two main feminist positions with regard to the personal laws: the call for state-led reforms (IV) and the call for community-led reforms (V). The conclusion will indicate a possible way forward (VI).

II. Contesting India's Personal Law System

Like many other post-colonial states, India maintains a personal law system, according to which certain family and property matters (marriage, divorce, maintenance, guardianship, adoption, succession and inheritance) of Hindus, Muslims, Parsis and Christians, as well as Jews, are governed by their respective religious laws.[4] While personal laws per se are an ancient phenomenon, the Indian system of personal laws in its present form dates back to the late 18th century when the administrators of the East India Company exempted parts of "religious" law from the purview of their regulatory action (Bajpai, 2011, p. 183; Menski, 2003, p. 161; Parashar, 1992, p. 62). Although the area of family law was not completely excluded from

[2] The concept that Sen calls "transcendental institutionalism" is related to a contractarian mode of thinking put forward by philosophers like Thomas Hobbes, John Locke, Jean-Jacque Rousseau and Immanuel Kant.

[3] Different versions of "comparative" approaches have been put forward, for instance, by Adam Smith, Marquis de Condorcet, Mary Wollstonecraft, Jeremy Bentham, Karl Marx and John Stuart Mill.

[4] Buddhists, Jains and Sikhs are counted in the "Hindu"-category; see, for instance, Section 2(1)(b) of the *Hindu Marriage Act* of 1955.

intervention,[5] the British colonisers refrained from a unification process comparable to the reforms in penal law with the enactment of the *Indian Penal Code* in 1862.

Demands for a secular Uniform Civil Code to replace the personal laws were articulated during the Indian independence movement (Austin, 2001, p. 17) and continued after independence and during constitution-making (Mansfield, 2005). The main features of this discourse were nationalism, secularism and modernity on the one side versus religious and cultural freedom, community identity and minority protection on the other (Agnes, 2011, p. 150; Baird, 2005, pp. 19-20; Parashar, 1992, pp. 230-231). The issues of gender-justice and equality were not very prominent at this time. The "intricate compromise" (Menski, 2008, p. 221), which both advocates and opponents of the UCC eventually agreed upon, was to make the introduction of the Code a non-enforceable Directive Principle. Article 44 of the Constitution states: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".[6] Other than the Fundamental Rights in Part III of the Indian Constitution, the Directive Principles in Part IV function as "instruments of instruction to the Government" (Das Basu, 2013, p. 158), but do not directly create any justiciable rights in favour of individuals, nor can a law be declared unconstitutional on the sole ground that it contravenes a Directive Principle. As of the present day, a Uniform Civil Code has not been enacted.

From a gendered point of view, the personal laws are problematic as they contain inherent inequalities. Not only do these laws treat women of different religious communities differently — Hindu, Muslim, Christian, Parsi and Jewish women have different rights and obligations — but also the personal laws treat men and women within the same religious community differently — women (in all religious communities) have different rights and obligations than men. This usually equates to discrimination against women, for instance with regard to inheritance rights, polygamy, divorce grounds, child adoption or guardianship rights.[7] Due to this inherent discrimination, the personal laws were already featured among feminist discourses in pre-independence times (Menon, 2012, p. 151), and they became a central issue of debate with the so-called "third" women's movement beginning in the 1970s.[8]

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[5] Legislative reforms occurred with regard to specific topics. In addition, the colonisers also modified the personal laws through the interpretation by British judges, making the personal laws a "curious amalgam of religious rules and English legal concepts" (Parashar, 1992, p. 307).

[6] Article 44 of the Constitution of India, 1949.

[7] For a more in-depth analysis of the problematic aspects see for instance Parashar (2005), Jenkins (2009) or Agnes (2011) or the publications of women's rights organisations like *Saheli* and the *Working Group on Women's Rights*.

[8] This movement is regarded as the "third" women's movement because it follows firstly the social reform movement of the 19th century and secondly the engagement of women during India's independence struggle. Its beginning is usually located in the state of Emergency (1975-76) that was declared by Indira Gandhi, although numerous formal and informal women's groups had already formed in the early 1970s (Agnihotri, 2001). The 1970s also mark the emergence of women's studies centres at Indian universities. For a more detailed analysis of the women's movement's engagement with the topic of personal laws and the UCC see Herklotz (2016).

But while it might be assumed that feminist scholarship and women's rights activism have disapproved of the personal laws per se and have favoured their replacement through secular law, this is not actually the case. Rather, the Indian scenario shows us that there are manifold conflicting feminist positions vis-à-vis the personal laws, ranging from a call for large-scale state intervention to small-scale reforms through community work. It is consequently not possible to speak about *the* feminist position on the personal laws; one can only make out different strands of positions and argumentations. By contextualising the gendered notion of personal laws, we understand that this is not merely a conflict between women's rights and tradition, religion and culture in which one side or the other prevails. Rather, the topic of personal laws and gender is a multi-dimensional and highly complex issue in which various aspects are intertwined and Indian feminists and women's rights activists are confronted with difficult challenges and dilemmas. Understanding and untangling the different arguments and viewpoints (to ultimately suggest ways of solving the conflicts) renders it necessary to first locate Indian feminism in a broader context.

III. Contesting Western Feminism: Contextualising Gender Discrimination

Although allied in its fight for gender equality and its critique of patriarchal structures, feminism in India (and more broadly in the global South) not only differs from,[9] but has also explicitly distanced itself[10] from, "Western" feminism. While it is difficult to make general

[9] Firstly, Indian feminist topics to a certain degree differ from Western feminist topics, when thinking, for instance, about dowry related or caste related crimes. Secondly, the organisation of the Indian women's movement and to a certain degree its means of agitation are also distinct. In particular, the early Indian women's movement was based on a concept of "autonomous" organisations (R. Sen, 2014, p. 335); it drew on voluntary members rather than paid staff and was sceptical towards (Western funded) NGOs. These features still shape Indian women's rights activism today. In terms of means of agitation, activists often drew on posters, songs and street theatre (Kumar, 1993, p. 143; R. Sen, 2014, p. 434) - means that could easily be assessed by illiterate women too. While Epp's (1998, p. 107) assessment of the Indian women's movement as institutionally "weak" seems one-sided and inappropriate, it is of course correct that Indian women's rights activism is located in and adapts to specific cultural, social and political contexts. For a more elaborate analysis of Indian women's rights activism see Kumar (1993), Agnihotri (2001), and Sen (2014)

[10] Some Indian women's rights activists and scholars have gone as far as dropping the term "feminism" altogether, due to its association with Western feminism. A prominent example of those who "disclaim the label and yet support the cause" (Desai, 2006, p. 14) is the activist, scholar and journal editor Madhu Kishwar. In her essay entitled "Why I do not call myself a Feminist", she states that though standing "committed to pro-women politics" she resists "the label of feminism because of its over close association with the western women's movement" (Kishwar, 1990, p. 3). While this position is not necessarily representative and "most active spokespersons" among the Indian women's movement would indeed "claim a feminist identity for themselves" (John, 2004, p. 54), it nevertheless exemplifies the difficulties in positioning

statements about "Third World" or "global South" feminism on the one hand and "Western" or "global North" feminism on the other without essentialising either group, some general aspects nevertheless illuminate the following engagement with the Indian feminist discourse on personal laws. Of course, neither of these feminisms constitutes one coherent bloc; they are heterogeneous within themselves.

Third World feminism emerged in opposition to mainstream, second-wave Western feminism. It criticised the latter for defining the meaning of gender primarily in terms of "middle-class, white experiences" (Mohanty, 1991, p. 7), and largely subscribing to an oversimplified idea that women everywhere face the same oppression merely by virtue of their gender (Seodu Herr, 2014, p. 2).[11] It accuses Western feminism of drawing on cultural imperialist concepts of global South cultures as "backward and patriarchal", and of regarding the oppression of women from the global South as "simply *worse* than that of white women in the West" (Seodu Herr, 2014, p. 5). Mohanty understands Third World women as an "imagined community" — a concept that allows for an analytical exploration of "the links among the histories and struggles of third world women against racism, sexism, colonialism, imperialism, and monopoly capital" (Mohanty, 1991, p. 4). The community of Third World women is "imagined" not in the sense that it is not real, but "because it suggests potential alliances and collaborations across divisive boundaries" (Mohanty, 1991, p. 4). Third World feminism addresses the multiple and complex forms of women's oppression in specific social, historical and political contexts. In their attempt to provide an adequate picture of women in the global South, Third World feminists have stressed, in particular, the intersection of gender, race, class, religion and ethnicity (Mohanty, 1991; Seodu Herr, 2014, p. 5). This intersection has several consequences. For instance, women who belong to two disadvantaged groups are "multiply burdened" and often marginalized to the advantage of more privileged group members (Crenshaw, 1989). In addition, these women often have to choose between the conflicting political agendas pursued by the different groups to which they belong (Crenshaw, 1990-1991, pp. 1251-1252).

For the Indian context, two aspects thus need to be kept in mind. First, the reality in which Indian women live differs significantly from that of women in the West. The specific post-colonial and socio-cultural context in which Indian women live brings its own issues and struggles with it. Western feminist arguments and concepts, which merely focus on the gender aspect and leave aside more complex forms of discrimination, cannot be transferred to this different locale without being adapted to its context. Second, women in India may belong to

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themselves that many feminists and women's rights activists in India and the global South face.

[11] Another branch of feminism related to women in the global South is transnational feminism. The two concepts are, however, distinct from each other: Third World feminism "aims at generating descriptively reliable feminist analyses by Third World women themselves of Third World women's diverse forms of oppression and different modes of resistance" while transnational feminism is "primarily interested in feminist organizations, networks, and movements occurring outside and beyond individual nation-states at the *transnational* level" (Seodu Herr, 2014, p. 2).

more or less privileged communities and consequently their lives, their concerns and their priorities may differ. The early Indian women's movement largely ignored such differences. It was primarily led by and focused on urban middle or upper class Hindu women (Agnes, 1995, p. 138; Kumar, 1993, p. 106)[12] while minority women (like Muslim women or Dalit women) fell out of the visual range and were marginalised.[13] Only more recently, Indian feminists and women's rights activists recognise "that 'women' do not exist as a single homogeneous category" (Menon, 2012, p. 157) and that an intersectional approach requires a "double commitment" from Indian women's rights activists who "cannot confine their struggles to women's interests alone" but must "be sensitive" to minority claims as well (Sunder Rajan, 2008, p. 80). This might in practice render it more complicated to pursue a feminist agenda as it means combining "respect for the local" with the aim of gender equality (Jeffery, 1999, p. 231).

The challenge of balancing broader feminist aims and values with the particularities of local culture and tradition plays out in a specific way when it comes to the law. Here, when thinking in broader terms of international law, the issue is often framed in terms of the universality of human rights versus cultural relativism or, when thinking in smaller dimensions of national or local law, legal universalism versus legal pluralism. This discourse is central for Indian feminists' positions vis-à-vis the personal laws. Indian feminists need to balance between those approaches that regard a universal set of (human) rights — including gender equality — as a panacea against women's oppression, and those approaches that stress the importance of their societies' intrinsic values and warn of cultural imperialism. They must navigate between a universalistic approach calling for a uniform set of secular laws to replace personal laws on the one hand, and a cultural relativist approach that advocates for the maintenance of the religion-based laws as markers of religious community identity on the other hand.

The next two sections will discuss in detail how far Indian feminists and women's rights activists can maneuvre between these two different standpoints. I will present and categorise the manifold different feminist positions and arguments on the personal laws. In order to structure these, I differentiate between two main standpoints: state-led reforms and community-led reforms. Both approaches are further diversified by different lines of argumentation.

IV. State-Led Reforms

Some feminists and women's rights activists call for major state-led reforms in the ambit of personal laws. They follow what Sen (2009) calls a *niti* approach, attempting to establish a "just institutional arrangement". Most prominently, such reforms refer to the introduction of a Uniform Civil Code to replace or complement the personal laws. But other than an all

[12] Agnes (1995, p. 139) further stresses that initially the women's movement drew largely on Hindu symbols like Shakti and Kali.

[13] To be sure, today the dual discrimination is addressed by a number of very specific women's groups, for example Muslim women's organisations such as *Bharatiya Muslim Mahila Andolan* or *Aawaaz-e-Niswan* or Dalit women's groups such as the *National Federation of Dalit Women* or the *All India Dalit Mahila Adhikar Manch*.

encompassing UCC, other major interventions through secular state law — similar to the enactment of the *Special Marriage Act* (SMA) in 1954 — are imaginable too. While feminists and women's rights activists who favour state-led reforms always draw on gender equality, they often employ additional reasons for their argumentation and phrase their arguments in different ways. Slightly outdated in the context of the demand for a UCC is the argumentation that draws on secularism and modernity, which used to be dominant during the late 1970s and early 1980s (see IV 1). Today's arguments mainly draw on the Indian Constitution and international human rights law (IV 2). Furthermore, some authors explicitly repudiate the perception of religious personal laws as sacrosanct and unamendable (VI 3).

1. Secularism and Modernity

As elaborated in section II above, grounding the call for a UCC on ideas of secularism and modernity was commonplace in the decades that followed India's independence. The Indian women's movement — which in its early phase largely supported the introduction of a UCC — took up these arguments and linked them to gender equality. The 1974 report of the *Committee on the Status on Women in India*[14] is representative of this line of argumentation. It bases its call for the "expeditious implementation" of a UCC on gender equality, but also holds that the absence of such a Code is "an incongruity that cannot be justified with all emphasis that is placed on secularism, science and modernisation". Similar lines of argumentation can be in found in Dhagamwar's work (1989, p. 53 et seq.), early newsletters of the Delhi-based women's organisation *Saheli* (1986) and publications of the *Working Group on Women's Rights* (WGWR) (1996). In *Saheli*'s view (1986), "most religions are products of a less developed society, and to implement religious codes of conduct which might have been appropriate at some point of time would be to negate all growth and development and would be regressive". Family law should thus undergo the same unification and secularisation process that criminal law underwent long ago. Just as nobody would demand that a criminal be punished according to religion based customs — "[n]obody promotes chopping off of limbs" — it would be unreasonable to ask for different standards when it comes to family law (Saheli, 1986; similarly Dhagamwar, 1989, p. 54). The argument here follows a concept of a linear development from less developed to modern societies in which modernity includes the unification and secularisation of laws and the banning of religion-based customs.

Today, the concept of modernity (or rather "modernities", see Eisenstadt, 2000) has changed. Among other aspects, it is less tied to the idea of uniform law. Instead (as I will show below), the concept of legal pluralism has taken hold. But till today, scholars still bemoan that personal laws, which were developed during the British colonial rule, are outdated and remain "frozen in time": "While the English law has moved on, Indian personal laws are fossilized in the name of religious inviolability" (Parashar, 2005, p. 307). Thus, the idea that a UCC is necessary in order to bring about modernity, is still present.

[14] "Towards Equality: Report of the Committee on the Status of Women in India," 1974. Available at: http://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf, last accessed 27.4.2016.

2. Constitutional and International Human Rights Law

Feminist scholars and women's rights activists today draw less on the idea of modernity and more on legal provisions — first and foremost the Indian Constitution and besides that international human rights law. According to Article 14 of the Indian Constitution "[t]he State shall not deny to any person equality before the law or the equal protection of the laws".[15] According to Article 15(1), "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".[16] With regard to these equality provisions, the personal laws are not only problematic because they treat the different religious communities differently, but also because they treat men and women within the same religious community differently (Dhagamwar, 1989; MacKinnon, 2006; Parashar, 2005; Pradhan Saxena, 2008).[17] Feminist scholarship also draws on Article 44, which explicitly envisions the introduction of a Uniform Civil Code (MacKinnon, 2006) and stresses that as long as India maintains different personal laws, it cannot fulfil the Preamble's promise of secularism (Jaising, 2011, p. 9). Scholars further employ the provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[18] and the *Universal Declaration on Human Rights* in order to argue for an abandonment of discriminatory personal law provisions (Jaising, 2011). Small-scale reforms carried out in collaboration with the people, leaders and spokespersons of the religious communities would not do justice to either the constitutional provisions or to international human rights law. It is "naive to believe that the religious community leaders of Muslims, or any other community for that matter, will work for attaining gender equality" (Parashar, 2005).

One suggestion is that of an *optional* Code, according to which "a sex-equal family law would be available to all religious communities at the initiative and with the consent of the women of those communities" (MacKinnon, 2006, p. 201).[19] Women would "decide for

[15] Article 14 of the Constitution of India, 1949.
[16] Article 15(1) of the Constitution of India, 1949.
[17] Indeed, a famous Mumbai High Court ruling (*The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84) did not see a conflict here. It held that personal laws were not "laws in force" within the purview of Article 13 of the Constitution and were therefore not void even when they came into conflict with the provision of equality under the Constitution. This argumentation was - indirectly - dismissed in an *obiter dictum* of the Supreme Court (*C. Masilamani Mudaliar & Ors v. The Idol of Sri Swaminathaswami Thirukoil*, 1996 AIR, 1697), where the court stated that personal laws must be consistent with the Constitution's fundamental rights provisions.
[18] India signed and ratified CEDAW in 1980 and 1993 respectively, but made reservations to specific provisions. Most importantly, with regard to Articles 5 (a) and 16 (1) of CEDAW, the Indian Government declared that it ensures "these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent".
[19] To a certain degree such an optional Code is already in place with the *Special Marriage Act* (SMA) of 1954. Here it has been suggested to further enlarge the scope of the SMA. A model for such an optional Code was drafted by the *Forum Against the Oppression of Women* in the 1990s (see Menon, 1998, p. 258).

themselves which legal regime to elect" (MacKinnon, 2006, p. 200). Others regard an optional Code as insufficient unless at the same time the discriminatory provisions within the personal laws were also amended (Jaising, 2005, p. 16). Indira Jaising, a feminist scholar and executive director of the *Lawyer's Collective* writes: "if the choice is to be meaningful at all, it must be between gender-just secular law and personal laws that comply with the requirements of equality. Unequal laws ought not to be enforced by the State" (Jaising, 2005, p. 16). The state must thus interfere to guarantee those equal rights for all women that are guaranteed to them by the Indian Constitution and international law.

3. Disenchanting Personal Laws

Lastly, scholars who favour major state-led reforms argue that there is no reason that personal laws should *not* be amended, abolished or replaced. This reasoning repudiates the objection that personal laws — often referred to as "religious personal laws" — are somewhat sacrosanct and unamendable. This argumentation acknowledges the importance of religion in a society but separates religion-based personal laws from religion itself. Along the lines of Voltaire's opinion that the Holy Roman Empire was neither holy, nor Roman, nor an empire, I bring the feminist argument in this regard down to the phrase that "religious personal laws" are neither "religious", nor "personal", nor even "laws".

Religious personal laws are not "religious". Legislative interference in personal laws is often rejected with the argumentation that "religious rules are sacrosanct and eternal or that no one else but the religious experts may introduce change" (Parashar, 2005: 295). It is also argued that for the members of a religious community, these laws are important "markers of identity" and that they must be protected by the constitutionally guaranteed freedom of religion.[20] For instance, in a recent newsletter, the *All India Muslim Personal Law Board*, along with other Muslim organisations, argued that personal laws "are derived from religious texts or scriptures"; they are of "unique relevance" for "cultural identity", and consequently "any kind of interference [...] is not only a violation of religious freedom in the constitution but will put an end to [the community's] unique cultural identity".[21] Contesting these arguments, feminists stress that personal laws are human-made "constructs" and therefore are anything but sacrosanct (Parashar, 2005, p. 307). The debates during colonial times on reforms regarding *sati*, Hindu widows' remarriage or the removal of caste disabilities as well as respective legislative interventions and the re-interpretation of personal laws through jurisprudence expose the personal laws' "immunity to change" as "fictitious" (Parashar, 2005, pp. 293-294). Furthermore, women's rights groups have stressed that the constitutional protection of religious freedom will not override the right to gender equality, which is equally protected by the Indian Constitution (Saheli, 1986).

[20] Article 25 of the Indian Constitution guarantees the right to free profession, practice and propagation of religion. Article 26 grants religious denominations among others the right to manage their own affairs in matters of religion.

[21] http://aimplboard.in/images/media/Press13-10-2016%20ENGLISH.pdf, last accessed 3. March 2017.

Religious personal laws are not "personal". The labelling of religion-based customs as "personal" laws is related to a dichotomy between the public and private spheres. Family law is supposed to fall into the private sphere, in which the state is reluctant to interfere (Jaising, 2013; MacKinnon, 2006, p. 194 et seq.).[22] Feminists and women's rights activists have long tried to disrupt this notion by arguing that "the personal is political" and that the state has an obligation to protect women's rights in the "private" realm too (Parashar, 2005, p. 297). They argue that family and religion must not be beyond the control of external values (Parashar, 2005, p. 297) and that by calling personal laws "personal", women would be denied their legal right to equality (MacKinnon, 2006, pp. 196-197).

Religious personal laws are not "laws". Lastly, feminist scholars have argued that the various religion-based customs and social practices should not even be termed "law", as this labelling would achieve an "implied immunity" from questioning them (Parashar, 2013, p. 17). Parashar (2013, p. 13) stresses that the "fact that people organize their lives by reference to various systems of rules" does not mean that such systems must be termed legal systems. On the contrary, the "appending of the label 'law' carries a message of the authoritative nature" (ibid, p. 17). The reliance on the discourse of legal pluralism and the invocation of the status of law for all kinds of practices may legitimize gender discriminatory regimes (ibid, p. 10-11) and thereby enable "institutional discrimination" (ibid, p. 17). Law, in her opinion, must not simply reflect what is being practised in society, but must "construct social reality" (Parashar, 2005, p. 309). Consequently, there is no need to safeguard personal laws from state interference, but the personal law system must be replaced by a UCC in order to bring about equality in the society.

4. Summary and Critical Thoughts

With references to modernity, secularism, constitutional provisions and international law, a number of feminist scholars and women's rights activists have called for major state-led reforms of personal laws. They also, rightfully, have unmasked the argument put forward by religious community spokespersons that personal laws are immutable as hypocritical. But are these feminist suggestions and lofty plans for a UCC feasible for application in the real world? Or is the idea of "perfect justice" (A. Sen, 2009) just an idea, not suitable to be practised in reality?

To be sure, there is some concrete engagement with the possible content of a UCC too. Scholars and women's groups have elaborated draft codes,[23] none of which have, however, come close to being debated in parliament. The reform proposals often remain vague and refrain from detailed explications of how and by whom these reform processes should be brought

[22] In 1983, for instance, the Delhi High Court in *Harvinder Kaur vs. Harmander Singh Choudhry* (AIR 1984, Delhi 66) held that in the "sensitive" private sphere of marriage "the cold principles of Constitutional Law" could not be applied, as this was like pushing "a bull in a china shop".

[23] See an overview of the different projects and draft codes in Agnes (2011, p. 177).

about. Recently it has been suggested that the enactment of a Uniform Civil Code be supplemented by a well-regulated, state-recognised regime of religious alternative dispute resolution (Ahmed, 2016) to accommodate both women's rights and religious identities. According to this proposal, uniform laws would apply to statuses such as marriage, divorce, or adoption, while other family law matters — like the financial terms of a divorce or disputes related to maintenance or the division of marital property — could be resolved using alternative dispute resolution (Ahmed, 2016). This suggestion, to a certain degree, maintains the current "mix and match" system where state and non-state law coexist, but likewise seems to try to bring more clarity into this system. But whether the introduction of a UCC or other secular laws could in practice "tidy up" the messy system — the dense web of different laws, actors and dispute resolution forums — and do away with the fact that many people do not access state law and state institutions is highly questionable.

V. Community-Led Reforms

Opponents to state-led legislative approaches would like to see reforms from within religious communities, even if this means slowing down the reform process and watering down feminist goals. This approach — arguably initiated by Flavia Agnes and her Mumbai-based organisation *Majlis* — seems to be the dominant position among Indian women's rights groups today.[24] In Agnes' view, "small and significant reforms within the personal laws governing minority communities have greater relevance to minority women than the rhetoric of an all encompassing and overarching Uniform Civil Code" (Agnes, 2001, p. 3973; similarly Rahman, 1990, p. 498). This position fits with studies showing that

> Third World women's resistance often does not involve an explicit demand for gender equality or radical social restructuring in order to achieve feminist goals. Instead, Third World women tend to opt for gradual changes that result from their collaboration with their male counterparts to enhance their communal influence vis-à-vis other members and improve living standards of their families and of the community itself (Seodu Herr, 2014, p. 5).

[24] Throughout time, a number of organisations have followed the path that Majlis struck early on. The left-leaning *All India Democratic Women's Association* (AIDWA), which initially promoted a UCC, now favours a gradual change from within the communities (Hasan, 2014, p. 268; Murthy & Dasgupta, 2011, p. 129). The Muslim women's organisation *Bharatiya Muslim Mahila Andolan* pushes for reforms within Muslim personal laws and has drafted a gender-just *Muslim Family Act.* Organisations like *Awaaz-e-Niswan* and the *Women's Research and Action Group* in Mumbai, the *Confederation of Voluntary Associations* (COVA) in Hyderabad, the *Muslim Women's Forum* in Delhi and the *Tamil Nadu Muslim Women's Jamaat* have constantly pushed for reforms in Muslim personal law (Murthy & Dasgupta, 2011, p. 124). Other groups like the *Joint Women's Programme* have been working with some success to reform the Christian personal laws since the 1980s (Murthy & Dasgupta, 2011, p. 129).

Concurring with Sen (2009), they follow a *nyaya* approach that is concerned with the "social realisation" of justice.

The pitfalls of this approach are indeed its "slow and gradual" transformation (Agnes, 2001, p. 3976) and the danger that in the process of bargaining for reforms with religious communities feminist goals might be watered down (Parashar, 1992, p. 229). Nevertheless, for the advocates of this position, the advantages — its actual effect on the ground due to the autochthonous character of the laws — seem to outweigh the disadvantages. The argument for community-led reforms is often based on the acceptance of legal pluralism as a fact (see V 1). In the Indian context, the issue is also related to politics and the feminist positioning vis-à-vis the *Bharatiya Janata Party* (BJP) (V 2). Lastly, scholars claim that only through community-led reforms can intersectionality truly be practised, as this approach does not focus exclusively on gender but also takes into account the crucial role that religion plays for many women (V 3).

1. Accepting Legal Pluralism

In its argumentation for community-led reforms, one strand of literature draws on the discourse of legal pluralism and the limited power of state law in impacting on people's behaviour. Legal pluralism refers to the presence of multiple legal orders within one social field (Griffith, 1986), such as state law or customary law based on culture or religion or other value systems. Legal anthropologists have depicted that the contemporary Indian legal system "exhibits thriving legal pluralism"; different sets of norms coexist and people navigate between "a variety of formal and informal, rural and urban, large and intimate options" of dispute settlement (Basu, 2015, p. 97). Solanki (2011) speaks of a model of "shared adjudication" according to which the Indian state enjoys only restrained autonomy and willingly splits its adjudicative authority with informal societal sites such as sect councils, mosques, "doorstep courts", women's organisations and lawyers' offices. Even if secular laws are in place, people tend to make little use of them and rather manage their affairs outside of the realm of the state.

In this scenario, where a wide gap exists between the law on the books and the law as practised on the ground (Menski, 2000, p. 143), and where many people do not use the state legal system, it might be naive to believe that a coherent set of state law could change society and enhance the situation for women. Instead, it might be wiser to follow academics, international organisations and NGOs that are all trending towards accepting legal pluralism as a fact and dealing with it, rather than holding on to an idea of modernity through state-centred legal unification processes (Sezgin, 2010). Indian feminists and activists who favour small-scale, community-led reforms tend to dismiss the one-size-fits-all approach promised by "universal" human rights and favour "a more nuanced and culture specific theory of women's rights" and "a position which is rooted within Third world realities" (Agnes, 2011, p. xxviii). With their approaches, they take into account the reality of people on the ground and work at this level to bring about change.

2. "Strange bedfellows":[25] The Political Angle of the Personal Law Debate

Other standpoints favouring community-led reforms face the political realities in India and the fact that the Hindu right wing party BJP has also articulated calls for a UCC. While it is debatable whether this call is seen as a serious political agenda or as mere lip service to the perceived expectations of their voters, the BJP's pro UCC articulations have certainly had an impact on feminist positioning. Feminist scholars have complained that the BJP used the UCC rhetoric as a "political weapon" (Kishwar, 1993, p. 3) to silence religious minorities (Mullally, 2004, p. 673). Some scholars accuse the BJP of "hijacking of the secular agenda" (Mullally, 2004, p. 673). In a climate marked by inter-community tensions — fuelled by the Supreme Court's ruling in the *Shah Bano* case[26] in 1985 and the demolition of the *Babri Masjid* in Ayodhya in 1992 — many feminist scholars and women's rights activists realised that their call for a UCC would support the "wrong" side. They found it difficult to pronounce again and again how different "their" UCC was from the one that the BJP aspired to, and in large part, they drew back from the "uneasy alliance with Hindu right-wing groups" (Agnes, 2012, p. 35).[27] As a consequence, many of them gave up their call for a UCC and instead began to favour small-scale reforms within the religious communities.[28] This strategy ensured that feminists would not accidentally become the handmaidens of the BJP and their anti-Muslim politics.

3. The Intersection of Gender and Religion

In their call for small-scale reforms, many feminist scholars and women's rights activists draw on the importance of intersectionality (Agnes, 2011, p. xxvii; Menon, 2012, p. 157). This topic became especially relevant with the *Shah Bano* case, which exemplified the identity conflicts for religious women. While Mrs. Shah Bano won her case, the Supreme Court judgment created such strong repercussions among the Muslim community and Shah Bano came under so much pressure that she eventually gave up the maintenance the court had

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[25] Murthy and Dasgupta (2011, p. 154).

[26] *Mohd. Ahmed Khan v. Shah Bano Begum and Ors,* AIR 1985 SC 945. The case was an appeal by a Muslim man against a High Court judgement that (following earlier Supreme Court decisions) had granted maintenance to a divorced Muslim woman. The Supreme Court rejected the ex-husband's claim that under Muslim personal law he was not required to pay maintenance after the *iddat* period (roughly three months) and after having paid her an amount as *mehr* (a form of dower). Instead, the judges held that the secular provision of Section 125 *Code of Criminal Procedure* applies to all citizens irrespective of their religion and hence overrides the personal laws. The judgment led to severe agitation among the Muslim population, stirred further by the *Muslim Personal Law Board*, which regarded the judgment as an interference in Muslim personal law.

[27] Some women's groups maintained their position but changed their terminology, dropping the term "uniform", and now speaking of a "common", a "gender-just" or an "egalitarian" civil Code, see for instance Saheli (1995). Most groups, however, gave up their call for a UCC completely.

[28] For a more elaborate description see also Herklotz (2016).

approved for her (Gangoli, 2007, p. 41; Menon, 2012, p. 153).[29] The case exemplified that playing gender against religion did not work and that it was crucial to acknowledge the intersection of gender and religion. For a reform of personal law, this would mean that the idea of a uniform Code which provides for gender equality, but that does not acknowledge religious identity, is of little help to accommodate the interests of religious women. Working towards small-scale reforms in a step-by-step approach and in collaboration with the religious communities might be a better alternative.

One positive example of such small step reforms was the reform of Christian personal laws, which was brought about in a long and difficult process through the initiatives of individual Christian women, women's rights activists and other actors and largely included the Christian churches (Agnes, 2011, p. 73). Various discriminatory provisions among the Christian personal law, such as provisions that made it harder for a wife to divorce than for a husband[30] and discriminatory law of succession,[31] have been challenged during the last decades. It took a series of High Court judgments,[32] interventions from the Indian Law Commission, joint meetings of the leaders of various Christian religious denominations, legal experts, and community representatives, and the submission of bills to the Indian government (Agnes, 2011, pp. 71-72) to finally bring about the desired change: in 2001, the Indian parliament passed a bill amending the Christian personal law and abolishing the discriminatory provisions.[33] The example shows that if reforms are brought about in collaboration with the religious community leaders, they have a more autochthonous character and might therefore also enjoy a larger degree of acceptance among the people than a UCC that was forced on the people would have.

4. Summary and Critical Thoughts

The second feminist approach favours small-scale, community-led reforms over large-scale, state-led reforms. The proponents of this position draw on the fact that India's legal landscape is pluralistic; the topic of the UCC is highly politicised; and community-led reforms best accommodate intersectionality. The disadvantages of this approach are exemplified in the

[29] This is not to undermine the fact that many Muslim women were also emboldened by the *Shah Bano* decision, as subsequent cases show.
[30] Section 10 of the *Indian Divorce Act* stipulated that while a husband could get divorced only on the grounds of adultery, the wife had to prove additional grounds such as cruelty or desertion complementing the man's adultery (Agnes, 2011, p. 69).
[31] Under the *Tranvancore Christian Succession Act* of 1910 the daughter's right to inherit was limited to one-fourth of the share of the son or 5000 Rupees, whichever was less.
[32] On the right to divorce see *Swapna Ghosh v. Sadananda Ghosh*, AIR 1989 Cal 1 SB; *Mary Sonia Zachariah v. Union of India*, 1990 (1) KLT 130 and *Ammini v. Union of India*, AIR 1995 Ker 252 FB. On the right to succession see *Solomon v. Muthiah, (1974) 1 MLJ 53* and *Mary Roy v. State of Kerala*, *AIR 1986 SC 1011* as well as *Ammini v. Union of India, AIR 1995 Ker 252* and *Pragati Varghese v. Cyri George Verghese, AIR 1997 Bom 349*.
[33] The most significant aspect of the amendment was that it made cruelty, adultery, and desertion independent grounds of divorce. It further introduced the remedy of divorce by mutual consent and a change in the regulation on maintenance (Agnes, 2011, p. 72).

reforms of Christian personal laws: it took several decades and it was extremely cumbersome to bring about the desired legal changes. It is difficult to tell how far the process in which "Christian women [...] shed the century-old shackles under which they had been burdened for well over a century" (Agnes, 2011, p. 73) really changed women's situations on the ground. "Perfect justice" is certainly not brought about with this approach, but then that is also not the aim of this *nyaya* approach. Rather, the aim is the "removal of manifest injustice" (A. Sen, 2009, p. 7), or in our context, a step towards equality.

VI. Conclusion

This paper has distinguished between two main feminist positions on religion-based personal laws. The first position — the *niti* or "arrangement-focused" approach — is a more theoretical or academic approach that draws on constitutional values and international human rights law. Its proponents suggest the introduction of a UCC as a "just institutional arrangement". At the same time, they refrain from providing concrete explanations of how such a Code should look, who should be involved in the drafting process, how the concerns of different societal groups would be taken into account and how far the introduction of such a Code would change the world in which Indian women live. The second position — the *nyaya* approach — is favoured by women's rights organisations that are familiar with the situation "on the ground". It accepts legal pluralism as a fact and stresses the intersection of gender and religious identities. Its advocates tolerate the imperfectness of community-led reforms, because they believe in the effectiveness of such reforms in making a change to the lives of many women.

Can either of these two approaches be considered better than the other? Sen (2009) seems to prefer the *nyaya* approach, concerned with the *advancement* of justice, to the *niti* apporach, the search for "perfect justice". He writes: "If a theory of justice is to guide reasoned choice of policies, strategies or institutions, then the identification of fully just social arrangements is neither necessary nor sufficient" (ibid, p. 15). Sen gives us some guidelines for the advancement of justice. Most importantly, he stresses that we must focus on "the choices that are actually on offer" "rather than speculating on what a perfectly just society [...] would look like" (A. Sen, 2009, p. 106). Applying this argument to the context of personal laws in India means putting aside the idea of perfect justice through the introduction of a UCC and focusing on community-led reforms.

But maybe, this is not so much an either-or-question. Feminists and women's rights activists could also strive for both aims: advance the concrete situation of women living under personal laws and at the same time enter into a dialogue with state institutions in order to have a say in the discourse around the long term goal of a UCC and not leave this project to the BJP. It would certainly also help to advance feminist goals on a large scale, if feminist scholars and women's rights activists would not oppose each other, but rather see where they can work together and formulate joint positions. Also, reality shows us that many reform approaches

cannot actually be clearly categorised as either "community-led" or "state-led", and that the different approaches often go hand-in-hand.

In the Indian plurilegal scenario, gender justice can be advanced on different levels, through different means and with the help of different actors. Change is brought about through the (inter)action of activist judges, skilful lawyers, women's organisations and social workers (Solanki, 2011). Particularly the courts play an important role in bringing about gender justice on a case-to-case basis (Agnes, 2011; Serajuddin, 2011, 2015; Subramanian, 2014). When considering the "options that are actually on offer" (A. Sen, 2009, p. 106), these different levels of law, actors involved and connected topics should be taken into consideration by feminists and women's rights activists. Only through an effort on many levels, and through constant reassessment, dialogue and negotiations can they bring about the advancement of justice for women in personal law systems.

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