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Politics of Diversity

Religious Communities and Multiple Patriarchies

Kumkum Sangari

This essay reviews the current debate between maintaining religion-based personal laws and instituting a uniform civil code in the context of gender inequality and Hindu majoritarianism. It challenges the assumptions on which positions that advocate legal pluralism and defend personal laws have based their case.

The essay argues that prevailing notions of community are bureaucratic, reductive, static and essentialist and defeat their own declared objective of maintaining social pluralism, critiques the enmeshing of religious community with personal laws as a form of new orientalism that is both patriarchal and ideologically laden, and argues against positions advocating reform of personal laws by state or community.

The author critiques ideologies of cultural diversity that rest on assumptions of discrete homogeneous communities, on religion as the singular axis of diversity, on a conflation of religion, culture and patriarchies, and on a confusion of social disparity with diversity, as all being incapable of reckoning with existing cultural diversity.

The concluding section of the essay argues against the perception of religion or religio-legal systems as the sole determinant of patriarchies. Patriarchies cut across all primordial principles of social organisation, call into question the very principle of demarcating communities and personal laws that prevails at present and cannot be fought from 'within' by an identitarian politics. Multiple yet overlapping patriarchies should underpin new common laws that take into account existing axes of social differentiation even as they transcend such differences in the realm of rights. New laws must encourage a genuine religious plurality and be based on both the differences and overlaps between existing patriarchies. Inalienable rights for all women must be established while a new type of legal particularism should be instituted responding to the situational specificities of patriarchal arrangements.

[The paper is published in two parts. The second part will appear next week.]

Introduction

SHOULD religion-based personal laws be maintained or should a uniform civil code be instituted? The debate stretches back to the colonial period, and was prominent in nationalist and early feminist agendas in the 1940s and 1950s. It is one of the most fraught and urgent issues at present, in part because gender justice has not yet been written into the law, and in part because following on the Shahbano judgment the BJP not only appropriated this demand for a uniform civil code, but also reshaped it as a weapon with which to attack the continuance of Muslim personal law. By now, the question of a uniform civil code is so overdetermined by communalism that it tends to appear mainly as a device in the hands of Hindu majoritarianism, even though the deployment of this device on their part is manifestly more rhetorical than substantive. At present the Hindu right is busy occupying most available positions on the uniform civil code including some hitherto liberal and feminist platforms. However, though they mimic some of the liberal and feminist arguments defending a uniform civil code and rest their case on 'gender justice' and 'secularism', their anti-Muslim bias is pronounced, and a closer examination reveals that their version of gender justice is no more than a pragmatic design for a moderate Hindutva.[1] Clearly, as an anti-Muslim party whose past and future existence mainly depends on Hindutva, the BJP does not have the right to draft a uniform civil code.

However, the sequence of events that have increasingly communalised the issue has led feminist groups themselves into taking opposing positions. In the present political climate the fact that feminist groups had only a few years ago undertaken campaigns against the rapes of Mathura and Rameezabi without pausing to ascertain their denominations, seems remote if not subsumed by the present emphasis on discrete religious identities; while any insistence on the desirability of political solidarities across religious lines is now liable to be dismissed as an extinct species of naive secular idealism.

The issue has to be addressed with precision because gender justice remains a desired horizon, though the means of its legal institution have become controversial. Further it has to be addressed in ways that do not surrender to the present ideological rationale of the Hindu majoritarian right for a uniform civil code: an aggressive anti-Muslim agenda that takes shelter under the insignia of a unified nation. The Hindutva notion of a 'unified nation' is both increasingly used as and perceived to be a code for Hindu supremacy and Muslim incorporation. However, in my view, the political and theoretical ground for a rejection of the Hindutva version of 'unified nation' will have to be different from the now fashionable post-modernist diatribes against the 'nation' and 'unity' *per se*. These provide neither a determinate answer to communalism nor a solution for gender inequality.

Among the numerous positions on the issue, those that are explicitly or implicitly based on some degree of genuine concern for gender justice and secularism, range from briefs for legal uniformity to versions of legal pluralism. Legal uniformity is crudely posed as a 'melting down' or pot-pourri of personal laws into a 'composite' uniform civil code that will be a means for social unification, communal harmony and (implicitly or explicitly) national unity. Or, it is posed in a more nuanced way as a uniform civil code that can be gradually instituted with the consent of minorities; in this view, gender justice is seen to depend on legal uniformity, and uniform access to secular laws to be a precondition for democracy. On the other hand, those committed to the present form of legal pluralism envisage a reform of personal laws 'from within' (and in a more extreme

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form, the institution of self-legislating communities) or a reform of personal laws from 'above', that is by the state. These reforms are envisaged in three overlapping ways – making all personal laws consonant with gender equality as enshrined in the Constitution, reforming all of them along 'uniform' principles of gender justice, or making different packages of gender justice within each personal law. Most of these rely in different degrees on re-interpretation of religious texts, while some perceive such reforms as a prelude to the uniform civil code. Finally, in an an effort to reconcile the existing legal pluralism with a desired unity, some advocate working towards an extended set of gender-just common laws that can coexist (either for the time being or indefinitely) with personal laws; here more concrete proposals have been made for common secular laws on joint matrimonial property and domestic violence.

There are a number of assumptions, often less explicit than these articulated positions, that are nevertheless vital to their formulation. The case for legal uniformity, for example, rests on uniformity as signifying a consolidated nationhood, social homogenisation and harmony as well as democracy, legal equality and individual rights for women. By contrast, the assumptions on which the case for legal pluralism rests include a presumed antagonism between the religious community and the nation-state, the right of 'communities' to their own laws, the presupposition that personal laws are tied up with religious belief, and a tacit division of public and private. Legal pluralists also assume (or argue) that uniform laws will be an agency of homogenisation, that the preservation of social plurality or cultural diversity depends on maintaining personal laws, that gender justice need not depend on legal uniformity, and that women struggling for justice cannot unite across religious divisions.

The case for legal pluralism is further overdetermined by a confluent current of theoretical tendencies that seek to unsettle all forms of homogenisation associated with nationalism, the nation-state, derivatives of European enlightenment and rationality such as a 'unified legal subject'; to establish diversity or heterogeneity *per se* as a value, and to re-esconce the notion of 'community' – mostly religious community – as the privileged social project especially for countries formerly subject to colonialism and at present to an equally rapacious form of 'globalisation'. This influential, transnational academic discourse is appealing for, and finds a resonance with several intellectuals: on the one hand those committed to anti-modernity types of indigenism, and on the other with those whose own critique of the Indian state has come from a different kind of political experience of the growing delegitimation of the Indian state (its authoritarian suppressions in Punjab, Kashmir and Assam, a subsequent cynicism about all state-centred solutions, as well as a corollary and justifiable suspicion about enlarging the areas of the state's jurisdiction over persons), but is now compounded by a loss of confidence in the historic left agendas for the transformation of such states.

As regards legal uniformity, we need to address a number of issues that are usually elided: Is it not the case that the present conception of the uniform civil code itself replicates some of the very assumptions that form the basis of the personal law? Is a conception of uniform laws possible that can truly take into account the existing social stratifications and heterogeneities? Do we at all require an idea of nationhood based on legal assimilation and uniformity? In what ways may it be possible to recuperate its more positive aspects – namely, the desire to procure secular, democratic and equal rights for women – without duplicating its problems?

Meanwhile, three types of issues are raised by legal pluralism. One set centres on religion and community, involving a whole host of specific concepts of religion, community, public and private domains, etc, that underpin the defence of personal laws and culminate in posing an intractable opposition between individual rights and primordial 'community' rights. A major question that gets suppressed or elided here is simply this: why, if gender justice is commonly desired, should it be sought within the framework of separate personal laws? This elision involves at least two sets of conflations: of law with religion and belief on the one hand, and of women with religion, belief and community on the other. The argument is usually sought to be clinched by questioning the legitimacy of the state as a source of laws for women, that is, by pitting 'the community' against 'the state' in such a way that though women remain the object of legislation for both, 'community' is nevertheless presumed to be a more reliable or intimate legislative authority.

A second set of questions emerge from prevailing notions of legal pluralism. These notions have a broader significance since they are implicated in the very terms which seek to define cultural diversity in India: they often tend to presume that religion is the singular, or at least the privileged, axis of this cultural diversity and that this so-called cultural diversity is synonymous with or dependent on legal pluralism. Feminists need to interrogate these assumptions and discuss the dangers that prevailing ideologies of religious community and cultural diversity present for women as well as the implications these ideologies have for feminist theory as it confronts the nature of the divisions among women. Finally, another triad of questions arises from legal pluralism: (a) the problematic relation of laws, both uniform and personal, to specific types of social homogenisation and social plurality; (b) the nature of existing patriarchies and whether they are to be opposed through legal pluralism or legal uniformity; and (c) the possible relations of feminist theory and strategy to particular types of homogeneity and plurality.

The opposition that has been set up between personal laws and a uniform civil code is so manichean and politically peremptory that even the earlier ideal/idea behind the uniform civil code – as an enquiry into the possibility of gender equality, democratic rights and full access to equitable laws regardless of denomination – cannot be recuperated without altering the terms of the debate. Such manichean dualities can be undone only if the stake is neither 'community' nor 'state' but gender justice as a principle and as social horizon – whether this is to be striven for through new sorts of legal homogeneity or through legal pluralism, or, even through legal pluralism accompanied by a hitherto unavailable freedom of choice for women. I propose to discuss the aforementioned issues as a way of clearing the ground in order to shift the terms of the debate.

As these issues indicate, the question of personal law hinges crucially and connectedly on notions of community, religion, state and cultural diversity, and the compatibility of each of these with gender justice. In the first part of the paper I will take up these in the form of a critique of the extant ideologies of religious community, of personal laws and their reform by either community or the state. In the second part of the paper, I will discuss the ideology of cultural diversity and sketch an alternative notion of cultural diversity through a discussion of religious pluralism and legal pluralism, and then present a preliminary analysis of multiple and overlapping patriarchies in the last section. Religious and legal pluralism alongside multiple yet overlapping patriarchies are in my view crucial co-ordinates in rethinking the question of gender justice outside the constrictive opposition between personal laws and a uniform civil code; a fresh understanding of these can help to formulate a material basis for new laws.

A substantial part of my essay discusses the concept of religious community for a number of reasons. Firstly, in various ways this concept underpins the defence of personal laws and plays into some liberal and majoritarian projects for a uniform civil code; in turn, the academic and the political discourses which privilege the idea of community are moulding and even setting the parameters for the present debate on laws. Secondly, community claims are not confined to minorities but a central feature

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of pan-Indian Hindu majoritarianism. Thirdly, the prevailing definition of community is so reductive, static and essentialist that a defence of community in the name of social pluralism defeats its own declared objective of maintaining cultural diversity.

I believe that a feminism which is based on a critique of biologism and of the sexual division of labour rests, definitionally, on the right to chosen political affiliation, and privileges social identities (as the terrain of contest, affirmation or remaking) above birth-bound ones; it cannot flirt uncritically with primordialism. Primordial claims cannot be a feminist principle because they are a principle of irrevocable division and will divide women by region, caste, religion and race. We can only take principled positions on the basis of non-primordial collectivities

Thus, if it is true that religious community is at present to some extent a political identity (though an exclusionary one), it is equally true that there are political collectivities that do not insist on or trade in either the primacy or the exclusivity of primordial identities. In fact, most political parties appeal even now to identities other than the religious; so do numerous organisations and movements involving women, peasants, and workers. Women's struggles within left-democratic frameworks rest on a view of women as bearers of a distinct political identity and a community of interests neither primordial nor biologistic nor exclusive of class or cultural claims. Should we strengthen these political arenas where religious affiliations can be downplayed or should we, as present communitarian-identitarian and communal politics would prefer, force them to remould or discard their agendas in favour of religious communities?

Arguments that uphold the 'autonomy' of personal law and place the onus of reform on internal change within a minority community, as I will show, rest on a thoroughly and dangerously ideological set of interrelated assumptions: the problems of Muslim women appear to arise from Islam and personal law, religion and patriarchy appear to be absolutely identical, Muslims are decontextualised by being presented as living in their 'own' world, a world sustained by religious differences alone. In fact, much more than Muslim personal law goes into making up the oppression and inequality of a patriarchy, and all of that is at work for non-Muslim women as well. The communalist intensification of religious differences, and the increasing primacy of religion as an analytic category for a section of the non-communal, well-intentioned intelligentsia, are both tending to veil this common reality as well as to displace egalitarian struggles against patriarchies.

The most reprehensible and communal form that a projected uniform civil code has taken is replete with majoritarian and 'Hindu' nationalist assumptions – this holds up the reformed Hindu personal law as an exemplary model for minorities to imitate. However, most secular projections of the uniform civil code are also problematic: they have replicated the personal laws in significant ways, or have set out to solve the 'problems' raised by personal laws on the same terms. A uniform civil code envisaged as either a melting down of all personal laws into a common mass, or as a composite code drawn from what is 'best' in each religion are far from useful; both, as formulas for national unity, rest on a homogenisation of patriarchies and replicate the community assumptions of personal laws. Projected uniform civil codes are usually formulated as a *replacement* for personal laws, and intended to fill the same space these occupy, a problematic space that rehearses a principle of legal division on the lines of public and private domains. Finally, projected uniform civil codes have by and large replicated the reductiveness of personal laws in not reckoning with heterogeneity or plurality save as a matter of levelling. As such, the new laws can best realise their secular and egalitarian aims and premises only if they are conceptually different from the uniform civil code in the way it has so far been projected.

The struggle for legal rights for women is a product of earlier and common struggles for equality: they are neither a project of community cohesion nor a project of national and social unification. Thus personal laws and most projections of the uniform civil code have been tied not only in a binary but also a symbiotic relation that has stifled, even deflected, a reappraisal of laws in their entirety.

My own position, arrived at through a questioning of certain prevailing notions of heterogeneity and specific forms of homogenisation, is in favour neither of personal laws nor of a uniform civil code as it is presently projected; rather, it rests on different conception of both homogeneity and heterogeneity – that is, a notion of common laws that can take into account the multiple existing axes of social differentiation in India even as they transcend such differences in the realm of rights. I envisage a set of universal and inalienable rights for all women accompanied by a legal particularism that is determined neither by religion, community, nor for that matter by the present categorisation of family laws, but, situationally, in terms of legal provisions designed to address the specificities of patriarchal arrangements. While we should adopt a strategy which does not isolate minorities, it is naive to imagine that any change would occur without conflict with patriarchal interests; such interests are by no means the monopoly of minorities but are spread across religions. However, I am not presenting a finalist solution. Rather, I am attempting to establish the analytic parameters for a common directionality as well as a fresh starting point for devising new laws which I will detail at the end of the essay. There has to be a participation of women across castes, classes and denominations in deciding what new common laws should look like, and the results of that are not a foregone conclusion.

I
Religious Community: A Critique

The conception of community that underpins many of the positions committed to the continuation of personal laws is quite tendentious. In this conception community is static, fixed and primordial; religious ties are privileged above all other primordial ties of kinship, language, region, caste or custom; birth-bound vertical bonding on primordial religious lines is further privileged above that based on class, contiguity, occupation, and certainly above that based on chosen forms of collectivity; the maintenance of religious communities appears to be the favoured social project primarily for non-European countries that were formerly subject to some form of colonialism. This is accompanied by a complementary conception of religion as inert, self-standing, isolated from social processes and from other religions – a conception that rests on a naive conflation of faith and community. My objections to these are both historical and political.

(1) Communities, Class Formation and the Fluidity of Religions

It is well established that present day community claims are unarguably modern and mutable. I want to stress *the contradictory logics of community formation*, especially in northern India – a feature seldom acknowledged by those who believe that politically defined communities are here to stay. Not only does the use of the category 'community' by itself constitute a severe analytic reduction, but its own history ensures that it can neither be abstracted from class nor be used to displace class with 'culture'. The specific development of capitalism within a colonial political economy, paradoxically provided the imperative both for making new communities and for disintegrating earlier communities based on religions, castes and jatis, while it also set up a dialectic between class and community as avenues for social mobility and recognition from the colonial state. Community claims were becoming a tried and tested path both to mobility and for bargaining.[2] One feature of even a partial embourgeoisement was cutting free from reciprocal, patterned and ritual

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relations with low castes, combined with a belief that community prosperity and organisation could be vectors of class mobility and/or retention of status and class power; in practice too the cross-hatching relation between class and community determined entitlements, property, authority, education and jobs.[3] In the nineteenth century a variety of social processes helped to constitute a double pull and a tense logic of class formation and community claims: census and administrative operations, forms of legal codification, avenues of upward mobility for individuals as well as through caste or denominational clusters, that is a cross-class bonding which undercut individuation.

The combinations of class formation and community claims were especially evident in the redefinition of major religions in nineteenth century northern India. The structural similarities of reform movements that were thrown up by what was a common historical process, are themselves an indication of the confluent and contradictory imperatives of class and community. Not only was there a visible complementarity in reform movements but the re-formation of major religions in the north was virtually a mirroring process. The assertion of identity by new elites, the removal of syncretic elements that drew on more than one religious system or 'bridged' a variety of religions, the excision of popular forms of worship, and the 'purification' of religions, the insistence on discrete marriage and funeral rites, the new obsession with scripturalism/textualism; the attempt to establish and function through voluntary associations, educational institutions and the popular press; the policing of boundaries by religious spokesmen in a tacit but unspoken relation of mutuality and reciprocity with each other; their matching visions of uniformity as a principle of community cohesion – all these bespoke a roughly similar notion of religious community though in each case the religion was different. (The structures of Christianisation, Islamicisation and Sanskritisation were remarkably similar though their respective etiquettes and modalities differed.) At the same time these very similarities revealed that religious re-formations were at once cross-cut, overdetermined and shaped at their deepest levels by class formation, that common class and caste anxieties were underwriting religious assertions. A logic of caste was also at work within this process. In the late nineteenth century in the north, it was often upwardly mobile middle castes who not only universalised a selective version of brahminical texts and domestic ideologies, achieving a certain levelling of high, upper caste culture by making it less high and more commonly available in print, but who were the most strident in their self-distantiation from lower castes. Excising lower caste/class elements and making caste-based communities were equally implicated in class mobility. Thus class mobility occupied every stage (being prior to, part of as well as product of) of the formation of communities based on caste or jati and religion.[4]

This process of the formation of modern urban classes and the re-formation of religions was at one level consonant with British policy. One push to form and redefine groups and communities came from the typologies of British administrative categorisation which produced *discrete*, well-formed bureaucratically negotiable units,[5] that in fact could only reproduce themselves by repressing all kinds of less easily definable diversity. However, despite the confluence of forces, homogenising attempts succeeded only in segmentary ways.

Hindu, Muslim and Sikh identities in the nineteenth century were plucked out of a far more shifting and multiple field of practices in the north. Normative elements and orthodoxies already existed in the eighteenth century – these now took a new shape and stridency and occupied new social locales.[6] And yet, despite this, denominational categories retained varying degrees of amorphousness, both in social perception and as legal categories: Brahmo Samajis, sikhs, Jains, and Buddhists, etc, were 'Hindus' for some but not for others. Hinduism, Sikhism and Islam were all in-the-making through similar strategies and often with similar aims, preoccupied with the Hinduisation, Sikhisation and Islamicisation of unclassifiable or 'interstitial' groups with loose practices by separating the 'signs' associated with each religion. Yet no single version of these religions emerged, though some versions were more hegemonic than others. Nor did they manage to actually produce homogeneous, monolithic, undivided 'communities' – virtually no single regional and/or jati cluster coincided with a single religious affiliation (as the censuses of the late-nineteenth and early-twentieth centuries bear out).

However, the docketing and labelling of different religions – produced in the interaction of colonial administration, class formation and politically vocal community claims often made from communal positions – did form a descriptive overlayer that muffled a far more extensive, unclassifiable diversity. It also assisted the gradual erosion not only of the diversity within these religions (largely loose constellations of denominations, sects, orders, movements), but also of their common histories, overlapping beliefs and practices, their many interfaces, and the many in-between areas that have been thrown up through continuous interaction and contiguity.[7] It involved ignoring religions or belief systems that were unable to spawn communities. In this sense clear-cut division assisted the voracious incorporation of a number of diverse sects and practices into the subsequent legal definitions of a 'unified' 'Hinduism' or 'Islam', said to constitute internally coherent cultural communities, and helped to set them up as opponents.[8] Ironically, it was this severely limited definition of religions, one that was in fact implicated in the partial erosion of extant religious diversity, that is today going under the names of religious plurality and/ or cultural diversity. I will return to this later in the essay.

(2) On So-called Inertia of Religions

The very notion of a mechanical replication or reproduction of *monolithic, sealed* religions is, in historical terms, a falsification. Religious pluralism in India is not 'multicultural' – in the liberal usage of the term – that is, as a physical agglomerate of *discrete* majority or minoritised identities. (This may in the future be the end-product of intense communalisation.) Rather, religious pluralism must be characterised as a network of overlaps and differences as well as a field of interactions, and it is this which has made religious practices relatively more resistant to homogenisation, though not, of course, immune to it.

Further, a dialectic of change is at the heart of the formation of communities. They are made, unmade, recomposed, pulled in several directions. And of course they need not be made on religious lines at all or be an 'effect' of religious beliefs. Both in the past and in the present it has been possible to be religious without belonging to a 'community': there are innumerable instances where even shared belief, for instance in a pir or a guru, does not constitute a community. Not only did every variant of religious belief not produce a concomitant 'community' amongst its followers but there has been active resistance to religion and/ or caste-based primordialism and institutions in medieval bhakti and sufi cults and some of their latter day successors. The religious history of the subcontinent has been one that has frequently honoured and enacted the twin principles of personal choice and of resistance to religion and caste-based primordialism and accompanying forms of institutionalisation.

If religion has been an arena of birth-bound obedience it has also been one of individual volitions. To change from one belief to another clearly defined belief, to mix-up beliefs and religious repertoires, to hold concurrent beliefs, to choose beliefs from a non-primordial set, to allow beliefs to strengthen, weaken or fall away – these are processes of choice and selection that from a historical point of view have informed the creation of religious orthodoxies as well

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as the opposition to such orthodoxies, and have featured in both 'tolerant' and militant traditions.[9] It is these possibilities that have been one of the preconditions for the prodigious subcontinental proliferation, over the centuries, of subsets and sects within religions as well as of the emergence of new religions that both drew from and broke away from older religions. Whether the many Hinduisms, Islams, Sikhisms and in-between variants are indeed subsets of the 'major' religions, that is, constitute a diversity *within* a wider boundary, or are distinct overlapping, affiliated religions that in fact defy boundaries, still needs sustained historical explanation.

At any rate, this fluidity not only calls into question the contemporary privileging of the strategic, organised identities of religious primordialism in the social and legal domain but it also calls into question any static definition of religion. Because generational choices and changes have been a continuous feature, it has been possible on the retroactive basis of past generations to see some degree of *change* as a living social *prospect*, even when it was not personally available or desired. Consequently, this same fluidity has been an object of foreclosure or pre-emption in different conjunctures. It has even determined the recurrence of an extraordinary prescriptiveness, the emphases on socialisation of every generation afresh in order to guarantee the reproduction of religions, as well as increases in orthodoxy whenever avenues of choice have increased. A workable notion of religious plurality would have to take into account the processes of both change and fixity, as well as the conjunctural availability and/or proscription of choice for individuals or groups.

(3) Community, Communalism, Capitalism

The tendentious nature of the concept of religious community that I have set out to critique becomes even more apparent if two of its major locations are examined, that is, a defensive placement in relation to Indian communalism and to capitalism. This defensiveness, which accounts for some of the effective appeals of the idea, is replete with anti-modernity sentiments and even carries some valences of left utopianism. I will argue that the first is misplaced and the second misleading.

The most aggressive 'community formation' in India today is Hindu majoritarian; its communal violence has tightened the grip of religious community as the language of assertion on minorities. However, a defensive relation to 'religious community', even when it comes from a genuine sympathy for beleagured minorities, cannot effectively challenge majoritarianism and may even strengthen it. This is because arguments either based on or supporting primordial religious community and impermeable boundaries between religions are similar in many of their premises and procedures to those of the hindu majoritarianism they have set out to oppose. To assent to 'Islam' is tacitly to assent to 'Hindu' and vice versa. Further, Hindu majoritarianism thrives in a political arena dependent on or mortgaged to competing 'community' claims since it is itself invested in building and encashing an 'inter-community' competition through ideologies of Muslim male virility and uncontrollable demography. Finally a defence of the idea of religious community reinforces the structural relations between religions and patriarchies, and sharpens the emerging relations between religions and communalism.

The idea that religious communities can provide a bulwark against capitalism, popular among indigenist intellectuals, seems, at least in India, to be equally misconceived. Their positioning of 'community' – as a sign of an 'unhomogenised' localism or as mark of the precapitalist still resistant to capitalism and its ideologies or as a sign of autonomy vis a vis the nation-state – is naive and untenable. Religious communities are neither local, nor precapitalist, nor have their 'leaders' ever made such claims. The processes of community formation would be difficult to separate from the rationalities that accompany and legitimate capitalism while community claims often have a politically transactional character. In recent decades there has been a notable intensification in the commodification of religion; a closer alignment of religion with capitalist processes is visible in the proliferation of sites of institutionalisation (eg temples, deras), personnel for exploiting them (sadhus, mahants) and funds (eg. national and international donations to temples, gurudwaras, the VHP).[10] Indeed what is called a religious 'community' may, at certain levels of its local, national and/ or international organisation, amount to economic and institutionalised structures of profit relying simultaneously on intra-'community' exploitation and consent. At many levels communalism and capitalism become compatible rather than opposed terms. Further the complicity of the (far from secular) state with a version of 'community' espoused by the 'leaders' of different religions, as an electoral device, is so notorious that a defence of community now ironically runs the danger of colluding with the state!

Religious communitarianism, as a projection of anti-modernity, is not an answer to capitalism either within advanced capitalist countries or when prescribed as panacea by intellectuals from 'third world' countries. Anti-modernity has been a dogged companion of European modernity with different ideological locations: for instance, as liberal angst over 'western' technology, hyperindividuation and the onslaught of the market, or as romantic strand in nationalisms that located a primordial and essentially unchanged identity in the past, or as a conservative modernist lament for the lack or disappearance of authoritative cohesive religious systems and 'organic' communities, or as a right-wing critique of capitalism predicated on utopian visions of the premodern.[11] Even if the quality of belated rehearsal in turning towards religious communities in India to provide a depth and meaning accruing from tradition is put aside as a type of nostalgia, the standpoint of these invocations as a critique of modernity – in a situation where capitalism under the auspices of international monopolies and imperfect market competition continues to produce skewed 'development' and pauperisation, where the procurement of basic necessities and the implementation of basic rights is not achieved, and where communalism is intense and violent – still remains open to critique. The efforts to 'contain' modernity is odd in a country which has yet to acquire the material co-ordinates of modernisation, and where the ideological modalities of containment usually spell soft communalism, *status quo* for the masses, regression for women and/ or anti-feminism. There is also the further oddity of a neo-conservative critique of western liberalism in a social formation where liberalism itself is not entrenched; and where liberal values have often served as a defence of the limited and beleagured freedom that women require to struggle against old and new conservatisms.

The recourse to valences of left utopianism by defenders of religious communities in India are at once inappropriate, more affective than substantive, and stripped of their political intent. One type of left utopianism has viewed specific forms of human collectivity and community in ideal terms as an anti-market principle of bonding which does not privilege greed or fear and stresses commitment to fellow human beings.[12] This seems peculiarly inapposite when applied to *religious* communities as such, and even more so to the type now obtaining in India which are usually formed on political self interests, on aggression and othering, on defensiveness and fear. While there is an undeniable value in human communities as a non-contractual, anti-market principle of social bonding that can function as an antidote to a dehumanising capitalism, it does not follow that I/we should now proceed to privilege an obligatory birth-bound religious community over and above collectivities that assume rights of entry, exit and chosen affiliation for their members. Dare I add that if utopianism is still desirable then how come non-religious challenges to capitalism, like the socialist-feminist, that uphold and struggle for a utopian principle and forms

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of bonding, are not equally or more desirable? Maybe, because the valences of left utopianism carried in this tendentious choice of religious communities, as the specialised markers of being outside exchange and the market, above other primordial claims and chosen affiliations, have been relocated in, even recruited for, an anti-Marxism, and of a type that is deeply indebted to orientalism and to some of the worst ideological, sectarian tendencies in nationalism. This is, to say the least, somewhat paradoxical, since the explicit targets of many indigenist and postmodernist defenders of community also happen to be colonialism and nationalism!

It may be more productive, though less popular, to speak of communities not as 'given' on religious lines but to speak of the political, economic and electoral processes that are producing and privileging this particular sort of 'community' and facilitating specific types of ideological investment in it. It would then follow that secular feminist interventions could be directed at these processes, and not confined to finding just means of arbitration between 'given', pre-formed religious communities (a nagging reminder of colonial policies, even if partly justified by the present situation).

(4) Religious and Non-Religious Community Claims

The question of religious community cannot of course exhaust the issue of primordial community. Primordial community claims co-exist or intersect with claims to non-primordial collectivities – class, work and occupational identities, forms of contiguity in neighbourhoods and villages – which along with gender, have been the bases for non-community specific mobilisation. Many contemporary 'community' claims themselves are not claims for 'cultural autonomy' alone but simultaneously a contest over the distribution and appropriation of resources and a feature of political organisation. If the issues of material resources and political power were to be equitably resolved then the substantive content of 'cultural autonomy' would be different. The democratic assertions in some claims based on community as in the case of dalits, in fact, intersect with and even rely on other forms of collectivity. Their invocation of 'material interests' is often a strong notation for, or emphatically indicates, identities premised on class-based, non-primordial aspects of social identity and the exploitation of labour.

Other forms of collectivity exist alongside, in tension or even in a struggle with primordial community claims precisely because the social, economic and political forces of capitalism in India pull in both directions. Should we strengthen those existing or possible political arenas where social inequities can be challenged without invoking or consolidating primordial religious identity and where primordial affiliations can be downplayed; or should we, as present community-identity and communal politics would prefer, force them to remould or discard their agendas in favour of religious communities?

The question is further complicated by the fact that despite increasing communalisation, even now religion is neither the only basis of primordial community claims nor the only practical and symbolic co-ordinate of political mobilisation on primordial grounds. In fact religion does not have the foundational status ascribed to it by intellectuals and claimed for it by 'community spokesmen'. Politically volatile or active 'community' claims (that subsume myriad and diminutive primordial communities) on the basis of geographical territory or region, caste, tribal identity, broad linguistic distinctions (such as Hindi or Urdu) as well as narrower linguistic distinctions (such as local dialects), are being made alongside those based on religion whether configured as broad pan-Indian denominations such as Hinduism, Sikhism or Islam or as smaller particularised sects.

Now if we were to imagine forms of 'decentralised' legal pluralism based on these primordial community claims, several problems would arise. Would a *single* basis for definition such as language or territory or caste or religion, be compatible with justice? And if so what would be the rationale for suppressing all other conflicting claims? Why, for instance, should a caste-based community claim be less valid than a claim based on a major religious denomination? On what basis, if any, will any one of them be prioritised, and how many will such a prioritisation satisfy? Even in the abstract, religion would not qualify as a contender for differential rights on the ground of unilateral past victimage and historical wrong.[13] At present the most dubious but vociferous claim of victimage and assertion of a violent 'righting' of historical 'wrong' is coming from Hindu majoritarianism, though by far the greatest historical wrongs have been to low castes and tribals.

Settling for legal pluralism on any *one* primordial basis brings up the irresolvable paradox of differential rights: the notion of 'right' if it is to be legitimate must be potentially universalisable, eg. right to education, to work, to vote. So differential rights based on a primordial claim would keep creating new grounds for inequality and dissent even as they set out to resolve some existing areas of conflict. And in such a situation there would be, logically, no recourse to a language of common, potentially universalisable rights whether as basis for possible equality or as the *basis* for conflict resolution and arbitration or as basis for instituting need-based particularist rights or even as a *means* for calling the state to account.

It is important to argue this because it would be literally *impossible* to institute a 'decentralised' legal particularism on the basis of *all* primordial community claims – religious, sectarian, linguistic, territorial, caste or life-context. This would be a self-cancelling procedure, since the sheer multiplicity, even of politically articulated claims, would throw one back, ironically, on notions of the individual and individual rights.

Each and every basis or definitional category for primordial 'community' claims is fissiparous and open to further sub-division, either on the same lines, that is, more and particularised units of any one category, or through being undercut/cross-cut by other categories. Thus a linguistic or religious community can fracture within the country on lines of dialects, sects, castes, region of origin or residence, class, language, and so on; while diasporic location of Indians can further fracture primordial groups and set up new logics of differentiation on grounds of nationality and assimilation of local culture.

Again, few of these 'communities', will now or in the future exist on co-residential, contiguous or interpersonal bases: not only are languages, castes, religions, etc, widely distributed over India and even internationally, but spatial distribution relocates them in different economies and in locally varied hierarchies. Not only does spatial distribution deterritorialise communities and community claims in the simpler senses of dislocation or migration, but new forms of contiguity change the identities of persons thereby altering the meaning of a community claim in its local registers and substantive contents.

Such heterogeneity is not merely a jural or jurisdictional issue which can be solved on a passport model of portable identities that can be carried around. It challenges the very definition of community. This kind of heterogeneity within each nomenclature can be assimilated into a legally defined 'community' only through an artificial *decontextualisation* – by making it a given or pre-formed entity, and through *closure* – by making it impervious to change and indeed to the very lability of the continuous processes of identity formation.

Two major conclusions are inescapable. First, any single basis of 'community' will not only be ephemeral or provisional, liable to fragmentation by other cross-cutting affiliations, but it cannot represent the full spectrum of social divisions and locations, cultural diversities and aspirations. Second, if all except geographical territory is movable or mobile, if even claims to territory can be made at long distance, if belonging

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does not involve presence, then 'community' claims are disguising a very real heterogeneity – they are in fact at this level hardly, or not at all, claims for recognition of existing cultural plurality. They are claims for homogenising groups of people who have one notional thing in common into mobilisable discrete units, that is, they are seeking homogeneity but are not *a priori* based on it. This is true as much of pan-Hinduism as of pan-Islamism.

II
Community, Religion, Women

(5) Communities, Patriarchies and Religious Identity

The broad ideological conception of religious communities has uncomfortable implications since religious 'communities' are not only inegalitarian or class differentiated but also specifically undemocratic regarding women. Community identities can be as much punitive as protective for women, and that too, protective on patriarchal and proprietorial assumptions. If, as the more extreme arguments for reform of personal laws from 'within' seem to desire,[14] communities were to legally govern, reform and adjudicate themselves, taking full responsibility for being either agents of change or protectors of the status quo, what will prevent them from trying to be self-legislating patriarchies; from strengthening local, interpersonal patriarchal control; and from continuing to hand power over to mullas, priests, pandits or other chosen interpreters? There is little evidence to show that communities are committed to internal democratisation of gender differences. And if such democratisation will remain as pressing an issue (if not more pressing), even after communities have retained or achieved some measure of legal autonomy, then why not simply struggle for a thorough-going democratisation on wider non-denominational principles of collectivity, in the first place?

Women's own religious beliefs, consent to a religious identity and community as well as their agency in maintaining these, are often presented as a rationale for maintaining personal laws and reforming them only from within. This is a complex issue, partly because it can be argued for women from beleagured minorities as well as from the chauvinistic majority.

In certain kinds of contemporary analysis, overly anxious to establish that religion is not false consciousness, religion is simply turned into a matter of faith or belief alone, thus eliding the issue that religion prevails as an *institution* more than consciousness, true or false. This formulation not only serves as a catchall but irons out the complexity of the relations between gender and religion; it is then followed by the proposition that religious belief is giving agency to women. More often than not, the implication is that the presence of such an agency for women makes secular feminism questionable or even redundant. Thus a pernicious continuum is made between primordial denomination, women's belief and women's agency.

As a result, some serious questions are never asked. What is the nature of women's consent? When they consent to the punitive aspects of religious identity or community are they in fact consenting to the patriarchies with which these are meshed, or vice versa or both? Or, is their consent effectively consent to the host of other social factors in which both religions and patriarchies are enmeshed? Thus women's consent to religious definition may go beyond questions of individual faith and reflect the ways in which religions and patriarchies are articulating with other social structures. Should we confuse women's consent to patriarchal assertions of community, their inability or fear to step out of these, in this particular political conjuncture with the sum of their needs and aspirations? For instance women's consent to Muslim community and to Hindutva enacts very different and antagonist relations of power; while women's active investment in Hindutva (a complex historical, political, economic, class/caste differentiated and conjunctural phenomena), may have little to do with religious belief *per se*. Instead of conflating such consent with 'feminist agency' (a current preoccupation with some anti-communal feminists), a different type of analysis could be undertaken. Women's consent to a patriarchy has in the past and still does empower them for *selected* forms of social agency; further, this consent works through appropriating available hegemonic and/or legitimating languages thereby forcing these languages into new ideological locales and pushing their previous proponents into more stringent political self-definition or at worst, into apology and retraction.[15] Or to give another instance, many Muslim women may be caught in a double impasse: first, because a uniform civil code is seen to endanger the identity of physically endangered Muslims, the very claim to gender equality now implies disloyalty or antagonism towards the community;[16] second, belief in Islam now appears to entail being prepared to accept patriarchal personal laws.

It is argued, in discussions and in writing, that opposing minority personal laws denigrates the laudable efforts as well as subsumes the initiatives of women involved in reforming personal laws from within. Undoubtedly, some Muslim and Christian women have religious yet reformist standpoints, oppose a uniform civil code, and, as believers, struggle to remove some gender inequities or 'corruptions' from their personal laws. I believe that the issue needs to be posed differently – it should be disentangled from belief and concentrate instead on the nature and pitfalls of reform from within. Second, we have to determine if the strategies of religious reformism from within also have space for those other women who may or may not be believers, but find consent punitive, or who find primordial belonging an impediment to choice, if not an imposition, or who do not consent,[17] or more to the point, who *need alternatives* in order to dissent in an effective way. This is important for two reasons. A feminist politics must account for women's consent to patriarchies, but it can scarcely afford to give political or theoretical primacy to women's will to consent to forms of social oppression *over and above* their will to contest these; since such a primacy is already on offer by a standard form of male conservatism.[18] Nor can feminist politics take on board a divisive (or for that matter a unifying) politics based on essentialist identities whether primordial or biologistic.[19]

(6) The Question of Representing 'Other' Women

In this context, confining women to community identity and personal laws becomes a way of dismantling and pre-empting cross-denominational or extra-religious feminist collectivities. Against the potential dangers of representing 'other' women, that is women of other denominations, we must place the dangers of refusing to represent each other. Refusal of a common ground of struggle is also a form of othering. Particularism can be segregationist in its logic. Unless universality is granted in principle (though not necessarily as a strategic mode of organisation) as the possibility of mutual representation, feminist groups run the danger of replicating the structures of communalism.

The right to scrutinise and interrogate our entire social milieu is a democratic right for all and one that is particularly crucial for feminists, and this cannot be a right confined to or reserved for one's own primordial denomination. If it is suspended in the name of religious community,[20] then it will prevent women from critiqueing a significant determinant of patriarchal oppression in India, namely religion. Indeed it may altogether silence women – some in the name of belonging and loyalty to their religious group, and others because they have no 'right' to speak of any religion but their 'own'. It is ironic too that inhabitants of a subcontinent, rich in irreverence, in both *comparison* and *critique* of religious philosophies, hierarchies, institutions and practices that were not limited by personal belonging, as well as rife with oppressions in the name of religions, should now be

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asked to piously desist from criticism of any but their 'own' religion, within the rubric of a postmodernist politics of (self)-representation. Not only does this version of postmodernism, when transposed to the question of Indian personal laws, become unfaithful to its basic tenets of deconstructing the demarcation between withins and withouts, but it ignores the material evidence of the fluidity of religions that I have discussed earlier. More significantly for feminists, this proposition of self-representation rests on a proprietorial view of religions (and as a corollary, even separate 'life-worlds'), as the exclusive property of particular groups, and as I will discuss later, one in which assumptions about owning religions 'naturally' extend to ownership of women.[21]

The women who are (or are sought to be) united on the bases of systemic, overlapping patriarchies are nevertheless simultaneously divided along other lines. Three such divisions are pertinent to my argument: first, by class, overdetermined by caste, and the accompanying power to oppress other women and men; second, by consent to patriarchies and their compensatory structures and an accompanying delegated power to oppress other women; and third, by the choice of a right-wing politics that gives them a political armoury for 'othering' men and women from other religions.[22] And here, the way in which feminists take up particular issues determines whether they are or are not classist, casteist, undemocratic or compromising with patriarchal arrangements. If they are, then, and only then, do these turn effectively into divisions among women, instead of being, as they should be, divisions that must be *challenged* by feminism.

I do not think, however, that differences in religious faith can by themselves produce equally significant divisions between women. The particularity of religious belief need not by itself either constitute a division along lines of power or alter the distribution of social power. To the extent that all religions are implicated in and enter into the broad process of social legitimation of patriarchies, a challenge to patriarchies constitutes a threat to specific forms of religious legitimation. In this regard religious affiliation makes a difference *to* women but need not produce a conflict *between* them; especially if women are willing to question the casteist or communal discriminations that inhere in some religious practices and are ready to consider that aspects of religions may be working to reconcile them to patriarchal oppression.

It is only when religious affiliation is translated into a politics and is aligned with institutions that maintain forms of power and privilege that it has the capacity to divide women. Thus, the institutionalisation and communalisation of religions have acted as a powerful divisive force aggravated by the involvement of some women in entwining religion with the politics of the Hindu right. The right wing appropriation of feminists' agendas or the language of citizenship and democracy is not unique to India and its function here as elsewhere is to divide and derail left, democratic, feminist agendas.

If this is an acceptable line of reasoning then the question arises as to why we should recede from a secular democratic agenda and from a commitment to common struggles? The divisions among women along lines of class, consent and political choices have to be fought through persuasion and/or political confrontation, not through a capitulative politics of difference, exclusivism or hyper-particularism.

One issue posed by feminists in the light of the recent riot-torn communal situation is whether gender unity can withstand communal hostility. Feminist groups, Flavia Agnes argues, are already overinflected with 'Hindu' assumptions – an evidence of this overinflection is their past failure to mount a thorough-going critique of Hindu personal law – and cannot be isolated from the wider political contradictions; moreover, she argues that in the aftermath of the riots, women do not have a separate existence away from their communal identity where legal issues can be discussed on a common platform.[23] Her argument may fit well with another argument claiming that at present religious identities have acquired a pre-eminence and the only way to break out is by working within them or by 'negotiating' them. In practice this could mean that the patriarchal systems operating in the country may henceforth have to be separately opposed by women from within different denominational groupings, while the range of these groupings could now expand beyond designated minorities and stretch to women opposing patriarchal practices from within the fold of Hindu communal organisations. If so, we will be unable to address the fact that the political play of denominational 'communities' with its logic of aggression and defence impedes women's individuation, and now being added on to inequalities in waged and unwaged work as well as in inheritance, is driving women further back.

I think the question of why women consent to religious definition and the answer to this question, as well as the path to a common politics, hinge on our understanding of patriarchies: on the way patriarchies are embedded in or articulating with class structures, caste-class inequality, religious practices, wider dialectics of social legitimation, and other political formations. It is only if we see patriarchies as self-sufficient, unrelated to each other, isolated from wider social processes, and determined by religion alone that we can support singular, separate struggles against them along denominational lines. If we see them as part and parcel of the wider social formation then we have to devise modes of organisation and struggle that can encompass all the social inequalities that patriarchies are related to, embedded in and structured or enabled by. Attacking patriarchal oppressions is not a sectoral issue confined to women but central to any agenda for social change. Can we afford yet again to separate the 'women question' from a wider struggle, and this time as victims of the divisions enforced by communalisation? If feminism is to be an egalitarian, democratic and secular force allied with other such forces, then this, along with the very nature of patriarchies (to which I will return), requires a common politics.

(7) Community, State, Religion, Patriarchy

It is untenable to draw a sharp line between community and state on either the question of religions or of patriarchies since there are structural, ideological, political and administrative linkages between the two. Indeed the kind of religious communities discussed here have been constituted precisely in relation to the state.

The separation between state and civil society rests on an *analytic* distinction. At a structural level, they can and often do interpenetrate – state structures can be replicated *in* family or community. The family's patriarchal arrangements, like that of a community, though in somewhat different ways, can be complicit with the state and its juridical institutions.[24] The relation of the state to women is patriarchal, undemocratic and class differentiated: the state has persistently defined women in relation to men, used and made labour grids, perpetuated the invisibilisation of domestic labour, governed both land relations and distribution of resources, enforced the rule of property in ways specially unjust to women, created class and gender inequities through 'development', reproduced women's economic dependence, co-opted many women's initiatives, and is now (with the new economic liberalisation) withdrawing from its welfarist functions (which could have mitigated the patriarchies operating in family, community and workplace).

At the political and administrative levels, it colludes with 'local' and 'community' patriarchies. A triangular relation has obtained between personal laws, 'representatives' of a community and the state.[25] It is possible to trace a history of both tussle and co-operation between the community and the state's control at different times. Effectively, however, though a demand for separate shariati courts has recently been made, it is the state which administers all the personal laws. Further, the state itself has built loopholes in laws and has sustained discriminatory laws, including personal laws, in order to water

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down the constitutional horizon of gender equality. Its own collusions frequently contradict its stated reformist aims. It has tolerated patriarchies in the state apparatus (e g, police and judiciary), and barely implemented the better laws that do exist.

Similarly the state has supported patriarchal interests on religious grounds both ideologically and in practice. There is a long history not only of representing the defence of patriarchal arrangements, privileges and/or the sexual regulation of women as the *defence* of religion but also of the interested representaton of patriarchal arrangements as religious *rights* by 'community' spokesmen. Virulent instances, from every denomination, whether minority or majority, can be found in the debates surrounding the Special Marriages Act, the Hindu Code Bill and the Uniform Civil Code.[26] The coding of patriarchy as religion by community spokesmen has been and is by and large shared by the state which selected *denomination* above differential class, caste and regional practices and above an uncompromising secularism as the primary basis for defining family laws. Insofar as personal laws curtail women's rights they define and defend male privileges; only the institution of women's rights can dismantle them. Thus male privilege is preserved in personal laws through coparcenary provisions, male testamentary rights, unilateral divorce, bigamy, restitution of conjugal rights, inadequate maintenance, lack of residence, guardianship and custodial rights for women.

Another major dilution of the line between state and community has occurred in the way the state has been called upon to maintain religious boundaries, and has often done so despite the fact that it had successfully established itself as the authority that could 'allow' people to opt for laws (such as provisions in the CrPc) other than their personal laws.[27]

The state has been asked to *protect* religious boundaries in two different ways – through demands for exemption by minority religious spokesmen, and through demands for a uniform civil code by Hindu communalists. I will argue that despite differences, *both* have *de facto* functioned as demands to close boundaries, deny possibilities of individual exit, and ensure the internal cohesion of a religious 'community' through appropriate laws. (This also raises a question about whether so-called religious communities are indeed internally cohesive, since asking the state to ensure community cohesion through laws suggests that they may in fact be tenuous or precarious.)

In a mode similar to earlier Hindu protests upon the introduction of an optional civil law on marriage and divorce, which lasted from the 1860s to the 1950s, Muslim religious spokesmen have also persistently perceived the very institution of enabling, optional civil laws as threatening. Their objection to the Special Marriages Act (1954) rested on the belief that its presence would encourage Muslims to circumvent their religious laws and obligations and they asked for exemptions that were not conceded. A similar demand for exemption was made (along with tribals, and later with a section of Parsis) regarding the proposed Adoption of Children Bill (1972). With the notorious Muslim Womens Act, the government helped Muslim religious leaders by blocking off the access of divorced muslim women to the minimal yet relatively more liberal provisions for maintenance in the CrPc.[28]

The Hindu communal demand for a uniform civil code, as for instance following on the recent conversion/bigamy judgment, is an attempt to abolish personal law so that Hindus cannot convert and thereby gain access to Muslim personal law. It is not as if Hindu communalists are seriously invested in removing bigamy as a patriarchal practice prevalent among Hindus. Rather, they object to hindus gaining legal access to polygamy through conversion. That is, they object first and foremost to Hindus choosing to become Muslims. (There is an especial ideological embarrassment here: how will the Hindu right pose as the liberator of Muslim women from a patriarchal personal law if Hindu men are converting to Islam for the sake of polygamy?) And secondly they wish to equalise male privileges.

Hindu male opposition to Muslim personal laws has most frequently been made (in the past as well as now by the BJP) on a competitive patriarchal ground of equivalence of male 'rights' – either the state should encroach on the patriarchal privileges or 'religious rights' of all men or of none – and is suffused with male jealousy.[29] The prehistory of current Hindu male opposition to Muslim personal law lies in their failed attempts to fully protect male privileges in the 1950s. In the debates on the Hindu Code Bill, Hindus had not only defended polygamy as having shastric sanction, as being a means for fulfilling the ritual necessity for sons and thus of ensuring spiritual benefit, but had also administered a warning to the effect that if polygamy became illegal Hindu men would have to convert to Islam to marry more than one woman or would be forced to keep concubines.[30] The confusion between spiritual benefit and male promiscuity must have been amazing. If men could be willing to renounce Hinduism and convert in order to have more wives then surely male privilege must be stronger than primordial loyalty, since presumably all spiritual benefits would be lost on conversion!

In recent judgments, the judiciary has also assisted in closing routes of exit from personal law. In the 19th century, and even uptil the 1930s, conversion of an individual, family, caste group or community to either Sikhism, Islam or Christianity did not always lead to a change of personal law which was in part retained and engrafted as a custom on personal law.[31] Since 1887, personal law had applied only in disputes between two people of the *same* religion, whether by birth or by conversion, and ceased to do so if one party converted; subsequently, if a personal law was still applied to such a dispute it was for discretionary and contextual reasons, that is, because it was more conducive to justice and relevant in specific cases. This principle of arbitration has been gradually eroded. A tendentious 1983 judgment gave an unprecedented, formulaic, virtually religious sanctity to Hindu personal law by insisting on a supreme and unchangeable regime of primordiality. Justice Leila Seth of Delhi High Court ruled in *Vilayat Raj v Sunila* not only that if a hindu spouse converts to Islam the marriage could only be dissolved under the Hindu personal law in which it was solemnised, but further that "even if *both* the parties to a Hindu marriage get converted to a religion other than Hindu, their earlier Hindu marriage can only be dissolved under the provisions of the Hindu Marriage Act (1955)". An indefensible and dubious extension of the Special Marriage Act (which was meant for inter-religious marriages and justifiably allowed dissolution of marriage, conversion notwithstanding, only under the same Act), was made to Hindu personal law.[32]

The consequences of such precedents are visible in the Supreme Court judgment on *Sarla Mudgal and Ors vs Union of India* (1995, 3 SCC 635). This being a dispute between a husband converted to Islam and his Hindu wife, the court could have used earlier precedents in which neither Hindu nor Muslim personal law was applied and sought the remedy in secular laws governing divorce and bigamy under which the offence was already punishable. Instead Justice Kuldip Singh invalidated the application of Muslim personal law through an argument of claims and counterclaims, sought a practical remedy in an application of *both* Hindu personal law and section 494 IPC but rested his statement on an ideologically loaded reinforcement of religio-legal boundaries, in which the very existence of Muslim personal law was represented as an encouragement for Hindu bigamy.

> ...till the time we achieve the goal – Uniform Civil Code for all the citizens of India – there is an open *inducement* to a Hindu husband, who wants to enter into a second marriage while the first marriage is subsisting, to become a Muslim. Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, an *errant* Hindu embraces Islam

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to circumvent the provisions of Hindu law and to escape from penal consequences [my emphasis].

He seems to forget that the major inducement to bigamy is not legal pluralism but male privilege, and that most instances of Hindu bigamy occur without conversion.[33] The judgment invokes a familiar comparative schema between men of different communities; legal change is advocated to suppress Muslim polygamy and Hindu conversion, but bigamy is scarcely an issue in its own right. Instead the rhetoric of the judgment absolutises the rule of Hindu personal law, overdramatises conversion,[34] and in what is obviously a complementary move, demands a uniform civil code. A principled attack on bigamy would have distanced itself from Hindu communal rhetoric, confronted gender inequality and all prevailing patriarchies, sought to improve secular laws on bigamy, divorce and intra-community marriages, and critiqued the ambiguities of Hindu personal law that assist bigamy.[35]

Muslim religious spokesmen want to close all routes from Muslim personal law to common laws through exemptions. Hindu communalists want to block any route from Hindu personal law to Muslim personal law by abolishing personal law. In each case the very existence of other laws seems to undermine 'community'. Though from apparently contradictory positions – the former from a position upholding existing legal pluralism and continuation of muslim personal law but opposing any further pluralisation by way of either optional or common non-religious, gender-just laws, the latter by demanding legal uniformity and abolition of personal laws – both want to foster exclusivity, foreclose choice and movement from personal to non-religious laws (for Muslims) or traffic between denominations (for Hindus). Both want to harden and freeze boundaries. Hindu communalists are, in addition committed to attacking Muslim legal particularity, even if it is at the cost of uniform civil code. And the reason why they express little concern about losing their personal law is that they assume that the Hindu personal law will be the model for a uniform civil code, so that *only* Muslim legal particularity will be eroded.

Evidently the acts of defining as well as the definitions of religion and community are predicated on patriarchal privileges, and the state has more often than not been complicit in these because the state itself is implicated in patriarchies, in the exploitation of religious identities and in encashing denomination for electoral purposes. For instance, though the state did not accede to a continuation of polygamy in the Hindu Code Bill in the 1950s, it did introduce some new clauses with no textual religious sanction that made conversion legally punitive for Hindus. These are based on the non-secular assumption that different religions cannot co-exist within a family: conversion is a ground for immediate divorce in the Hindu Marriage Act; the Hindu Adoption and Maintenance Act decrees that only Hindus can adopt Hindus, a widow cannot adopt a Hindu child if she has converted, and a wife is not entitled to maintenenace if she ceases to be a Hindu; the Hindu Minority and Guardianship Act rules that ceasing to be Hindu will deprive either spouse of their claim to guardianship of their children, while children and descendants of a convert lose their claim to the property of a Hindu relative unless they are Hindu when succession opens.[36] It appears that religious primordiality was more important than primordial ties based on kinship, family and nurture; further conversion is assumed to produce grave incompatibility or repugnance while a change in belief is equated with vicious misdeeds. The state also communalised the Special Marriage Act in 1976 along similar lines.[37]

Since communities have themselves become a device which helps the state to mitigate class polarisations and co-opt groups, it is doubtful if consolidating religious communities can 'challenge' the state. In this sense a multiplication of 'community rights' over and above those that already exist (freedom to worship, to open schools and to practise personal laws) may well assist the state but are not likely to guarantee the full protection of the civic and democratic rights of minorities. And the maintenance and institution of 'community rights' over, above or opposed to the rights of individual women, who form half of every community, is likely to intensify male privilege. Since defense of community rights has been an undemocratic way of enhancing individual male patriarchal privileges, it is unethical to support them, especially in the name of democracy.

(8) Community versus State: Problems of Reform from Within or Above

The absolute and binary opposition between state and community on the question of personal law is false; it needs to be dismantled and reconstructed as an argument for the rights of all women. For that matter, the opposition between community and nation on the question of personal law is equally misleading: if a uniform civil code has sought legitimacy from a concept of nation as a homogenous entity, the personal laws have also sought legitimacy from another concept of the nation as a conglomerate of discrete 'major' religions defined through equivalent reductions and homogenisation. However, since the issue has been frequently posed in this way, it has acquired a contentious resonance that first needs to be addressed on its own terms.

Beneath the opposition between a state-imposed uniform civil code and personal laws that are sought to be reformed from 'within' a community (and the related opposition between reform of personal laws from within and from above by the state) lies an unresolved but entirely patriarchal concern: who will control and regulate women and in whom will the agency for reform be vested? Is patriarchal control and/or reform to be excercised by the state and its institutions or by the community? Will community control act in tandem with the state or independently of it, as in the recent demand for separate shariati courts?

The choice between personal laws and a so-called uniform civil code at one level appears to hinge on a choice of patriarchal jurisdictions. Does this choice have any meaning for women? Will the jurisdiction of 'community' representatives, usually male, functioning either independently or through a surrogate state be preferable to that of an impersonal state? Significantly, the experience of reform of personal law from within, has in the case of christians met only with procrastination from the state,[38] while for Muslims it has been one of entrenchment of religious elites and a 'community' patriarchy complicit with the state. The reform of Hindu personal law from above by the state did challenge religious elites[39] but culminated in the promulgation of patriarchal laws by the state instead.[40] The legitimacy of the state is dubious whether in supporting reforms from within or in reforming from above. In both, reform of personal laws is a bargaining counter for the state which retains the power to decide whether or not to reform the personal law of any community.[41]

Posing the question of laws in binary terms of community versus state thus is pre-feminist and carries the patriarchal legacy of male reformism. Nineteenth-century male reformism, it must be remembered, was invested less in eliminating patriarchies than in reformulating them. It is pre-feminist in the way it elides feminists[42] as agents of choice, decision and change and makes state and community the major actors. Indeed it is only if feminist agency is omitted or denied (or restricted to the primordial religious group), that the question can be turned into the male-reformist one of whose patriarchal jurisdiction women should come under, or posed as one of whose patriarchal jurisdiction will be a *better* option – that of community or of the state.

Till now, feminist initiatives to reform personal laws have been baulked as often by the state as by the pandits, mullas or priests who supposedly represent the 'community'. In my view, *any attempt to either reform personal laws or to make new common laws with a feminist agenda* will come up against both the state and religious 'community' patriarchal arrangements.

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For women, community jurisdiction is as problematic as the state, the patriarchies of neither are acceptable. The former is grinding because it intensifies the difficulty of daily, local, interpersonal relationships, making it difficult to claim democratic rights contravened by personal law. The latter involves problems of implementation, functions through a self-contradicting, increasing delegitimised, often coercive and patriarchal state machinery.

A major difference, however, between state and community is that of a theoretical horizon. In personal law, women claim as wives, mothers or daughters and have a schizophrenic relation with citizenship, upholding a pernicious opposition between private and public, between being members of a community and having full rights as citizens. Unlike communities, the state is theoretically committed to ensuring the rights of citizens as citizens. In striving for new common laws (formulated differently from existing laws by feminists) ratified by the state, women can define and claim a direct relation to the state, unmediated by community, as citizens with fundamental democratic rights; only as citizens can women potentially challenge divisions based on denomination, on public and private, on legal categorisations, and seek, if they wish, secular collectivities. If elements of contestation and struggle are fundamental determinants on construction and implementation of legislation, then the history of state intervention is also itself partly a history of struggles *against* patriarchal relations institutionalised through the state.[43] Finally, the implicit recognition in the Constitution that religions have sustained and legitimised caste and gender discrimination[44] led the state to be at once a 'protector' of religious freedom and a reformer of injustices based on religion – this contradiction too can be purposively and subversively used by feminists.

Apart from the risks of isolation and failure, a struggle to reform personal laws from within, puts the onus on a small number of persons.[45] While making a bid for new common laws, the complicities of the state in encashing religious differences, drawing on and using particular sets of patriarchal relations, should be opposed; at the same time it should be asked to provide juridical spaces, live up to its arbitrating functions and be held systematically accountable as an agency of change and implementation. Such a strategy would have the added advantage of being a struggle in which feminist, left and democratic forces could join.

(9) Religion, Law and the Private Domain

The orientalisms which flourished in imperialised formations turned religion, which they saw as immutable, into a primary axis of social classification. One long-standing orientalist axiom was that India in its past and present yields no distinction between religion and law. This ascribed fusion of religion and law, accompanied by a corollary characterisation of the Indian masses as desiring and enacting a cosmic, holistic life, is now employed by the contemporary successors of orientalists to defend traditions,[46] of which personal laws are assumed to be a part, on the ground that all attempts towards secular laws are intrusive, violent and 'western' devices.

The early orientalist identification of religion and law now survives primarily as the identification of religion with *personal* laws and with *religious* community. The present discourse on religious community seeks to make it fully determining in the social, legal and political arena. In a characteristic combination of Eurocentric theory and indigenist sentiment, this theoretical tendency continues, implicitly, to deny to Indians the dignity of choice and political affiliation while subsuming the question of rights, especially those of women, under primordial denomination.

I doubt if the Indian past or present would bear out the orientalists. The undeniably wide sprawl of religion in social life is not identical with the so-called indivisibility of religion and law. From ancient times (as in the Arthashastra and the Smritis) to the Mughal period it is possible to see religion as a mode for legitimating law, kingship and extraction of surplus, that is, to see the very indivisibility of religion and law as an aspect of a working and workable ideology. Manipulation of the 'sources' of laws and customs dates back to ancient India.[47] Plural systems of legal arbitration, the legal force of local non-religious customs, and the lack of coincidence between any single religion and any one legal system, also challenge a simplistic conflation of religion and law. It is thus possible to approach the question contextually and contingently, to see how the lines between religion and law were drawn differently at different times, along lines of region, caste and strata, delimiting or extending the purview of religion as the case may be.

I will argue that the present legal purview of religion, confined to personal laws, that is, to matters related to family, marriage and certain types of inheritance and impinging most heavily on the lives of women, certainly puts the orientalist axiom and its modern mutants themselves into the realm of ideology.

From the 19th century the legal purview of religion has steadily narrowed, coming increasingly into conflict with the exigencies of capitalism and its legal structures which seek to promote both individuation and class reproduction. Ambedkar's impatience with the spread of religion in social life and his argument for its legal delimitation came from the viewpoint that management of class relations and distribution of resources could not be tied to religion.[48] Since the colonial era there have been successive and cumulative attempts to split religion off from most areas. Male inheritance was one of these: male individuation was sought even within coparcenary systems but female individuation was blocked off in the name of preserving the family and the personal affairs of religious communities.[49]

Religion no longer determines the laws related to the ownership of agricultural land, tenancy, crime, commerce, international relations and so on but is largely confined to laws related to family, marriage and some forms of inheritance,[50] thereby producing an uneasy and unreal division between public and private. Unreal, because in practice the areas in which personal laws operate are interdependent with and related to all the other areas in law and in women's lives: women are governed not by family laws alone but by most other laws; inheritance, in different regional and legal combinations,[51] straddles the public and private domain; while the legal compartmentalisation of public and private, of work and family life, is at once illusory since women's family lives and work capacities are completely intertwined and mutually determining as well as utterly prejudicial for women.[52] Uneasy, because this division simultaneously esconces religion as a means for the public regulation of 'private' family affairs on the one hand and on the other effectively puts religion into the domain of the 'private' in the sense that its legal purview is restricted to family matters.

Several definitional questions arise from such a division. The peculiar bracketing of laws related to marriage and family as 'personal' laws produces a gendered definition of religion that falls more heavily on women. Does not this display the collective interests of men from different religions in maintaining gendered power hierarchies? The location of religion in the 'private' domain has repercussions too. It serves to transpose the liberal rationale of the family as a private sanctuary ideally beyond state intervention (which has proved so detrimental for women)[53] onto the religious community and its personal laws. It also shifts the onus of maintaining community identity onto women in marriage and women *in* familial relations. Finally, this notion of religion assists in the replay of a classic logic, honed by colonial administrators and middle class Indians in the early-19th century, in which patriarchies had to be "a[illegible]ed and reformed",[54] but this time on the ground of personal laws. Is this demarcation of private and public consolingly pre-modern or eminently 'modern'? In other words, is it in fact an instantiation of the cliched liberal division of public and private, with the public as the

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sphere of universality, nationality, impartiality, equality in the eyes of the law, built on consent, and the private as the sphere of particularism built on the 'natural' subjugation of women?

It is important to discuss the ideological rationales implicit in several types of conflations of law, religion, community, belief and women that are being made in defence of personal laws and the social diversity they are presumed to represent.

In arguments resting on the conflation of religion, law, community and belief, any critique of the bases of personal laws is seen as an attack on community rights, on religion and on matters of belief. Yet why should group rights or a sense of community not be rebuilt and claimed on lines other than the patriarchal? If the educational and cultural rights of minorities deserve to be protected, why should their, or anyone else's, 'patriarchal rights' be protected? Or are we going to define patriarchies sometimes as religion and sometimes as culture? Are patriarchies the sole determinants or 'guarantors' of religion? Are patriarchies to be treated as an essential or an alterable part of religion, that is, does the solution lie in atheism or in reform? Why should a separation of law and religion *per se* undermine either the sense of belonging to a community, or professing and practising a religion? If that was the case how come the presence of common laws in most areas other than the family as well as of some secular laws governing the family have not already destroyed religion and belief?

In my view, there can only be three implicit rationales for a conflation of religion, law, community and belief, and the corollary fear of any critique of the principles or bases of personal laws. The first is that religion should be ratified by the state as family law. This is fairly dubious and could simply amount to a means for maintaining patriarchies. The second is that once family law is split off from religion, the triad of religion, community and faith will be weakened. This amounts to saying that religion, community and belief depend on the continuation of patriarchies, or worse that group rights cannot but be based on a supersession of women's individual rights. In either case this is scarcely feminist. There is a third implicit rationale, which is, that while all other laws can be shared by different denominations and by believers and non-believers alike, family laws must be singled out for religious legitimation, and can only be changed, even on lines of gender justice, if their religious legitimation is not challenged. This third implication also has serious consequences for women – it is tantamount to saying that women in their family relations, must both signify and be kept forcibly in an ideologically precapitalist and pre-contractual realm, never mind if the world is changing. Even if women acquire further rights through reform of personal laws, these *rights must be seen to fall under the rule of religion*, be ratified by it, and must not contradict it. And since all three rationales come into play *only* in the domain of family law, the conclusion is inescapable that the covert conflation is in fact one of *women* with religion and belief and community identity. That is, women are uniquely required to be guarantors and preservers of a precapitalist enclave produced by modern political and economic procedures. This is so conservative a position, so rehashed over 200 years, and so obsessed with creating cultural spectacles geared to neocolonialism and global consumption,[55] that it does not even be deserved to be entertained, least of all from a feminist standpoint.

It is also possible to outline another slightly different conflation in which the legitimacy of personal laws is derived from identifying them with social plurality while social plurality hinges on a conflation of law, religion and women's rights. Would the delinking of law from religion destroy cultural plurality and diversity of beliefs and religious practices? Surely it would only curtail sanctification of patriarchies through religion and its further ratification by law. (Indeed it may partly *free* religions from the tyranny of legal definition.) It need not stop the practice of religion in non-patriarchal ways. Or is it that the introduction of the *same* rights for all women will destroy plurality, that is, is it that *unevenness* of rights makes for social plurality? This latter is both anti-modernist and anti-feminist. Or is it that the nominal existence of personal laws is crucial regardless of how much their content is altered through reform? But if that is the position of the upholders of social difference, then surely theirs is a tokenist, non-substantive particularism alone.

(10) Personal Laws and Homogenisation

A major sticking point in these positions is a fear of homogenisation. However, the belief that personal laws express religious plurality, and the expectation that they will continue to do so if reformed with a view to gender equality, is borne out neither by the history of their formation nor by their contents.

The pluralism that personal laws supposedly represent is in fact premised on an enormous reduction while the very notion of religion which underlies personal laws is one formed through a process of homogenisation. The British homogenised personal laws through codification and further codified custom through the accumulation of case law, scarcely incorporating the enormous diversity or variations of belief, sect and practice in different regions and classes that existed even within the rubric of the major denominations. Subsequent reforms of personal law have shown no respect for or commitment to this substantial diversity. In fact the reformed Hindu law and the Shariat Application Act helped to create newly unified versions of Hindu and Muslim. This did not happen by default: the reformers of personal laws first directly confronted then sought to erase the diversity of customs in order to homogenise the various Hindu and Muslim 'communities' across the subcontinent. Even now, reform of personal laws from within, 'without' or above is likely to continue this process and intensify the conception of sharply defined, bounded and exclusive religions on which such laws are based. And what is worse, it resembles a specific logic of communalisation on which much of the present politics of electoral blocs rests.

The reforms of Hindu and Muslim personal laws so far have produced two different models of homogenisation, though both are in part, facets or extensions of a common history of 19th century reformism. The colonial regime had already introduced a degree of anglicisation, privileging textual over customary law in what have been called processes of Islamicisation and brahminisation;[56] and it had codified customary law in piecemeal ways. As the realm of common statutory law expanded creating the still extant division between the public and the private, the personal laws governing the private domain came to be labelled religious laws, though they were either actually state enactments or the contents of their rules had substantively changed.[57] Subsequent reforms of these personal laws[58] made similar attempts to homogenise the variety of regional customary laws, though only with partial success.

The reform of Hindu personal law after independence displays certain notable characteristics. Firstly, the state veered between secular and religious legitimation. The first proposals for the reform of Hindu law used a religious basis but the final proposals (e g, for divorce) could not be traced to religious texts, and the claim of pandits to be legislators was disallowed; at the same time, some rules were allowed to continue because they were religious, even though they contravened Constitutional principles of gender equality.[59] Consequently the Hindu Code Bill was both Hinduising and dehinduising: in an arbitrary way it made the law both less and more religious.

Secondly, it produced a tendentious legal description of a 'Hindu'. It purposively included the Buddhist, Jain and Sikh despite protests. The plea of Sikhs and some Buddhists to be governed by their own laws was rejected. So too was that of Jains on the ground that their few differences from Hinduism were not fundamental! It further included anyone who was *not* a Muslim, Christian, Parsi or Jew; and it also mentions

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that this code would apply to any Hindu, Buddhist, Jain or Sikh, who has merely deviated from the orthodox practices of his religion but has not embraced the Muslim, Christian, Zoroastrian or Jewish religion. Next, it was extended to cover even those who did not 'profess' Hinduism and were not 'active followers'. Finally it was reluctant to make or continue regional exemptions.[60]

The bill thus attacked most principles of religious plurality and choice; it first recognised the existence and claims of in-between and unclassifiable areas, discrete belief systems, overlapping religions, non-believers, regional specificity, and then proceeded to deny them any legal provenance. The negative description of a Hindu, as one who was not a member of the four excluded religions produced a Hindu so tightly manacled to his/her birth that even non-belief could not provide an exit. Even though the Constitution provided for the right of non-belief and atheism,[61] the reformed Hindu law *took away the freedom of legal self-definition and self-designation* from individuals born in 'Hindu' families. Thus despite its crass assimilationism, it instituted a new primordialism; even as it decribed more people as 'Hindu' than had ever been done before and included people who had no stake in being so defined, it made a new boundary. And what was worse, this description of Hinduism solely in relation to four excluded religions, meant that these religions inevitably became its legal 'others'. This could be partly related to the punitive laws on conversion discussed earlier – once non-belief had been de-recognised as a mode of exit from personal law, it remained only to try and seal the remaining possibility of exit through conversion. Since the legal definition of Hinduism had been artificially so enlarged, presumably all that a 'Hindu' could now convert to was to the four excluded religions. Thus even the social meanings of conversion were narrowed, since much mobility that would have amounted to conversion in the past would now look like movement *within* the spacious ambit of this Hinduism. With the Hindu Mahasabha's 'shuddhi' campaigns from the 1920s and the accompanying fear they whipped up about Hindus converting to Islam, conversion had become a volatile issue entangled in communal violence, and remained so in the aftermath of partition. Though the attack on religious fluidity also had other antecedents in the colonial period which had made Christianity and Islam the main opponents of Hinduism, and even this 'negative' definition of Hinduism can be seen taking shape in the 1891 Census,[62] the state now virtually handed a completed agenda to the Hindu communalists. Ironically, all this was subsequently defended in the name of Hinduism being at once a culture and a cultural synthesis. When the reform proposals were discussed in the Lok Sabha it was claimed that Hinduism was not a religion but a culture – a synthesis of the varied beliefs, customs and practices of different people![63] The Hindu as legal entity became difficult to distinguish from the one desired by the Hindu Mahasabha.[64]

Thirdly, the erratic homogenisation of diverse schools of hindu law, premised on a northern upper caste model,[65] at one level attempted to create a homogenised 'Hindu' patriarchy through forms of levelling. Even women who had more rights in some areas of inheritance were now to make do with less under the Hindu Code Bill.[66] It preserved and universalised coparcenary law, derived from the Mitakshara, that is prejudicial for women. However, there was no uniformity in some clauses (such as inheritance or adoption), while some unexplained exceptions were made with the result that many customs and practices of Hindu laws continued to operate.[67]

Finally, the uneasy and inconsistent break from its upper caste, shastric origins and models, made it difficult for the Hindu Code Bill to either fully absorb lower caste and class practices into homogeneous laws or to consider them separately. These were carelessly overridden,[68] with the exception of customary divorces which were saved since 80 per cent of 'lower caste Hindus' already followed various customs of divorce.[69] The state tried to act as an agent of unification, at certain levels, of different castes and patriarchies but with uneven results. Ironically, attempting to iron out the inconsistencies and remaining diversities in Hindu law may amount to another round of homogenising the 'Hindu.'

The reform of the 1930s homogenised Muslim personal law on somewhat different lines: it involved an onslaught on customary law and customary variations as well as on the way customary law constituted contiguous, syncretic collectivities that were not 'Huslim' communities; it introduced legal homogeneity among Muslims as a basis for common religious identity, entrenched religious elites, and achieved a predominance of scriptural law *through legislation*. Many of these features make the homogenisation of personal law appear to be a facet of those 19th century reformist movements that had set out to Islamicise by purging syncretism. Like the reforms of Hindu law, it had also set out to fasten Muslims to their personal law.

Till the 1937 codification of the Shariati Application Act, Muslims had followed Islamic law in certain matters and customary usage in others while regional laws and usages had been continuously engrafted as customs.[70] Haryana Muslim landowners preferred customary law (more consonant with class and patriarchal interest) over and above the shariati law. The objectives of this bill were legal reform, "securing uniformity among Muslims in all their social and personal relations", to thereby "do justice to the claims of women for inheriting family property, who, under customary law are debarred from succeeding to the same".[71] More specifically, it was initiated by the ulema to bring Muslims of Punjab, North West Frontier and Central Provinces, hitherto under customary law, under a central personal law that would apply to all Muslims in the country. The Act improved women's property rights but by representing the customary domain as one of corruption and deprivation alone and its own task as that of 'restoration;' Muslim women, governed by a range of customary laws, now came under a more textual regime.[72] The ulema wanted to establish the principle that Muslim personal law and not custom should be applied to Muslims. The bill attacked local customs and usages as too 'changeable', sought to ensure certainty and definitiveness in laws by divesting them of all custom and usages as well as 'obedience' of Muslims to their own laws. As a compromise with Jinnah who wanted an option between the shariat and customary law, benefiting property rights of traders and landholders, options were allowed for adoption, wills and legacies.[73]

This process of homogenisation continued with the passing of the Dissolution of Muslim Marriages Act 1939. This was an amalgam of liberal features from four schools of jurisprudence, giving Muslim women limited rights to seek divorce.[74] The 1937 Act tackled the discrepancy between women's shariati rights to property and customary practice in such a way that attacking custom became a means for homogenisation. The 1939 Act, using the same rhetoric of restoration made a notable departure from classical Islamic law in ruling that apostasy of women would no longer be a ground for dissolution of marriage. Whereas this could have been a provision encouraging intra-religious marriages, tolerance and individual choice, the fact that it was restricted to women (male apostasy remained a ground for dissolution of marriage), gave it a different ideological location. It curtailed the opportunity for women to get out of a difficult marriage by apostasy;[75] and was initated by the ulema upon discovering that a number of Muslim women were renouncing Islam or claiming conversion to qualify for divorce under Hanafi law, and their fear that women would continue to do so.[76] Women could simply have been granted better rights to divorce, while prevailing judicial practice of either not using or employing discretion in the application of a personal law to cases of the conversion of married women seeking to dissolve the marriage, could have continued.[77] Muslim fears of shuddhi and of the abduction and

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conversion of women may have played a role alongside the notion of women as 'community' property. If the 1937 Act asserted the rule of personal law over a singular Muslim community, the 1939 Act asserted the rule of personal law and community over Muslim women, but in doing so it reversed the methods of the earlier Act: now men were more fully governed by classical Islamic law than women. Boundaries were tightened to keep women in. Conversion would not affect the marital status of a woman but nor could it any longer free her from conjugal bonds or from her husband's personal law.

Significantly, conversion functioned as a customary loophole for seeking divorce not only for Muslim but also Hindu, Christian and Parsi women. In some cases where the courts declared their marriages not dissolved by conversion, the reasoning seems patriarchal.[78] For instance in Robasa Khanum, a Parsi woman converted to Islam claimed her marriage was dissolved; the judgment praised the exemplary modernity of the 1939 Act, interpreted her action as a unilateral repudiation of marriage and upheld the sanctity of the Zoroastrian vow![79] Male unilateral divorce both legally and extra-judicially was a norm, but women moving from one religion to another to seek a divorce threatened *everyone* – Hindu, Muslim, Parsi, Christian – since it challenged religious boundaries, male proprietorship and patriarchal laws.

If patriarchies, like violence, have to be legitimated, and on the same ground, as representing the 'whole' community, then community spokesmen have as much interest in suppressing difference as communalists, and as I have tried to show, the state itself has been invested in tendentious ways of suppressing difference. In this context, reform of personal law has been homogenising, whether it was carried out from within or without. Ironically all these reforms claimed to be working on behalf of improving the status of women.

The belief that reform of personal laws will at once uphold gender justice and guarantee social diversity[80] is groundless. Indeed reform of personal laws from within or above is, in our context, itself an issue of the reduction of diversity, the suppression of cultural differences, and the negation of space for choosing, changing or disavowing religions. Personal laws have been a principle of homogenisation on religious lines; from the colonial to the contemporary period, they have selectively and arbitrarily universalised high textuality, regional or upper caste practices, and reformulated patriarchies both in their initial codification and in successive reforms. Further they failed to sift the customary domain and incorporate its more egalitarian aspects, oscillated between bourgeois patriarchy and non-interference in 'native' religions or capitulated to upper caste/class patriarchal interests.

My further questions is – how much of the 'religious character' and 'diversity' of personal laws will remain after a further reform on the lines of gender justice? Even if we were to differentiate our feminist perspective and our sensitivity to social plurality from these earlier attempts, would reform of personal laws from the point of view of gender justice be less homogenising? Gender justice can only push all the different personal laws into a *similar* direction since there are not at the moment an infinite number of ways to bring it about.

The question then needs to be posed not as one of homogenisation per se but of its nature, principles and limits. New common laws for women would also be homogenising: however, while personal laws sought to unify denominational groups, such laws would seek common rights on a non-religious, egalitarian and emancipatory principle. I will return to this but let me say here that fully developed precedents for an unoppressive form of homogenisation, based in an intelligent relation with social diversity, that adds to existing legal and customary rights and eliminates existing legal and customary disabilities, are unlikely to be found in colonial India or in contemporary laws.

III
Cultural Diversity

(11) An Ideology of Cultural Diversity

The issue of cultural diversity has two drastically different locations. One is an ideology of cultural diversity and the other is a renewed reckoning with the diversity of existing social practices in order to formulate laws that are not unilaterally destructive of all forms of diversity.

As my earlier discussion indicates, the ideology of cultural diversity rests on the assumption of discrete homogeneous communities each governed by its own tidy primordially determined package of legislation. They are deprived of internal diversity, looseness, and open boundaries, as well as assumed to cohere along lines of religious identity. Religion is the singular determinant, and that too a religion not subject to regional or class variations. Ironically, it is precisely this ideology that also informed the processes of homogenisation through personal laws.

I will argue that existing diversity challenges the very principle according to which cultural diversity is presently defined as the property of pre-formed, sealed religious communities, transgenerationally outside the ambit of change and choice, and on the basis of which community rights are defended/recommended. And further, I will argue that if we do reckon with the diversity of existing social practices then the very principle of social plurality would have to include the 'rights' to change, make, break, segment and re-form 'communities' – without these it would be merely a principle of fixation, not a principle of plurality.

In the Indian context, those features attributed to cultural diversity that become distinctly ideological can be enumerated. First, the spatial coexistence of many sharply defined, sealed religions, ordained by birth, never chosen or changed, each the separate possessor of its own tenets, own way of life and own culture: virtually a proprietorial notion of separate ownership. The privileging of religions defined along potentially hegemonic lines suppresses all other axes of cultural diversity and ironically suppresses the diversity within religions themselves. Second, these multiple religions become the main opposition that India offers to western modernity, rationalism and the language of rights. Third, the maintenance of cultural diversity rests on maintaining or procuring community rights – which in practice boil down to personal laws – and opposing a homogenising uniform civil code, an opposition that is maintained without questioning the underlying categorisation of public and private or the homogenisation sought by personal laws. Fourth, the definition of community itself rests on a conflation of religion and culture, and more seriously, of both with patriarchy, running the danger of turning the defence of cultural diversity into a defence of diverse patriarchies.

Several persons have equated personal laws with plurality while elements of this definition can be found in many places; the concluding proposals of a recent essay by Partha Chatterjee brings them together and carries them to a logical conclusion by recommending self-governing minorities, defined as 'religious groups', whose 'cultural right' needs to be defended.[81] In a somewhat rhetorical confrontation of 'them' and 'us', our cultural diversity, community rights and non-western post-colonial modernity make up one bundle weighed against their 'unitary rationalism of the language of rights', individual rights and western modernity. He believes that 'cultural diversity and the right of people to follow their own culture' which a secular\democratic state must protect is a

> demand, *[that]* cannot be easily squared with the homogenising secular desire for, let us say, a uniform civil code...the respect for *cultural diversity* and different ways of life *finds it impossible to articulate itself in the unitary rationalism of the language of rights*... there is no viable way out of this problem within the given contours of liberal-democratic theory which must define the relation between the relatively autonomous domains of state and civil society in terms always of individual rights. As has been noticed for many other aspects of the

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emerging forms of non-western modernity, this is one more instance where the supposedly universal forms of the modern state turn out to be inadequate for the postcolonial world [my emphases].[82]

The notion of diversity implied in his essay seems to be one of a finalist cultural differentialism in which India is a spatial agglomerate of separately owned, solipsistic cultures – Muslim, Hindu, Sikh.[83] The threat to this cultural diversity would seem to arise not so much from pressures of the market but from political mobilisation, on the basis of a unitary language of rights, against inequality and gender discrimination.

Since the content of religion as an operative category, and the history of 'community' legislation and its effects on women remain unexamined, (the question of women is not directly raised), while minority cultural rights seem to be, by and large, confined to the right to personal laws, a conflation of religion, 'culture' and patriarchy results. Further, the idea of difference seems to be based on an active deferral or denial of commonality – in this case the privilege of having a basic quantum of shared, individual democratic rights, citizenship for women and an accountable state. A diffuse, over-encompassing notion of post-colonial, non-western modernity combines with the inadequacies of enlightenment rationality to tacitly preclude 'non-western' women from any other horizon of self-definition but their 'own' culture. This is rather daunting since it is on women that personal laws press the most heavily. As Sabina Lovibond has eloquently analysed, dismantling the as-yet-incomplete project of modernity for egalitarian, feminist social movements runs the danger of political quietism, parochialism and anti-feminism.[84]

In Chatterjee's essay we have the added paradox of a self-consciously pluralist, anti-essentialist, anti-enlightenment postmodern position, that is led by its very over-investment in excoriating the enlightenment as responsible for all the sins of the Indian polity, to propagate a version of cultural diversity that is based on an essentialist, bureaucratic description of religious community, premised on fixity: this description of religious community is a product of the artifice of the colonial regime, formed in the exploitative relations of colonisation, marked by the settlements, compromises and patriarchal assertions of both emerging and ruling classes, and crystallised through community claims predicated on a series of 'unifications'. While religious communities are pitted against the essentialising procedures of the enlightenment, they are never themselves interrrogated as bearers of a host of essentialisms. Further, this definition of religious communities as 'sealed', has in the Indian context been shared by the Hindu, Muslim and Sikh communalists, indigenists, as well as liberal theorists trying to accommodate community rights.

The idea of cultural diversity becomes largely ideological whenever any excercise of the right to assimilate ideas of rights, justice, equality, and citizenship by non-western moderns is challenged *per se*, regardless of its political affiliations, aspirations and social effects, on the sole ground that the ideas originated in the 'west', since (in nearly tautological fashion) these ideas destroy cultural diversity. Cultural diversity in India (and some of its definitions) are themselves partially a product of colonisation, but in this ideology, cultural diversity begins to carry an undercurrent of 'authenticity' through the prohibition on the appropriation of anything 'western'. Is cultural diversity then to be based on the stasis of perpetual othering? Or (in Kwame Anthony Appiah's phrase), on the 'manufacture of alterity'?

Thus the first question in an argument for cultural diversity sensitive to gender justice would be – in which social terrains is diversity being privileged? With some regional variation, substantial areas of social life have been 'legally' homogenised by the state. Since ownership of agricultural land, crime, commerce, tenancy, international relations are 'public' domains, they are either presumed to be homogeneous or to require homogenisation. The onus of maintaining cultural diversity rests on 'personal' or 'family' laws while the very principle of cultural diversity so defined is based on an insidious and discredited division of public and private. Is there a hidden patriarchal agenda, that is, are old prejudices simply being rebottled in new academic languages? Is the 'personal' a male sanctorum, and are familial patriarchies the privileged site of cultural diversity?

Another favoured terrain of diversity is rights and this has alarming implications for women. Is the institution of common rights for women an agency of homogenisation and deculturation? And is depriving women of uniform rights a way of preserving cultural diversity? The doubts about a proliferation of the language of rights can imply a return to premodern and customary languages of 'entitlement' and 'obligation' which were embedded in patriarchal arrangements.

In which situation is such a diversity being privileged by a section of the intelligentsia? Are they opposing capitalism, the relations of exploitation that underlie it and the culturally homogenising imperatives of multinational capital or merely displacing their unease and confining their protest to the cultural *effects* of capitalism? Is an argument for a diversity of personal laws based on sealed denominational communities simply a new addition to the range of anti-modernity positions that have accompanied capitalism, overdetermined by notions of pluralism that have been introduced and debated in cultural contexts very different from the Indian? And is this particular form of pluralism resistant or hospitable to multinational capitalism and its redivisions of labour and capital?

And can we have the one sort without the other, that is, global capitalism without individual rights? Can women function under capitalism (which exploits individual labour) unprotected by commensurate rights between individuals and rights protected by the state? The limited rights available under personal laws are not commensurate with present needs. We also need to differentiate between forms and agencies of homogenisation and heterogeneity associated with capitalism – market, media, technology – from those associated with religion and law. Surely we can question the historical terms in which the abstract idea of universal rights, as derived from a purportedly ungendered or de-gendered rationality, were initially expounded, without giving up the concept of rights *per se*: the validity or invalidity of these concepts would then emerge from an intelligent exchange between the material and necessarily different situations of women on the one hand, and on the other, the promise of rights made initially in the name of abstractions. That is, between abstract and concrete rights, with the understanding that any concretisation of a universal principle must be contextual. This cannot emerge from a prescription of anti-modernity for the 'third world'.

(12) Ideology of Diversity and a Uniform Code

The ideology of cultural diversity makes its appearance not merely in defence of personal laws but also in defence of uniform laws. Most especially in the reiterated suggestion from liberals of making a uniform civil code that derives from the best of all religions. Any serious appraisal of religions, their relation to patriarchies, is alien to the theoretical horizon of these positions, however good their intentions may be towards women. The uniform civil code is expected or assumed to occupy the *same* area – personal, religious, gendered – as is currently occupied by the personal laws.

A recent essay by S N Roy exemplifies the way certain types of demand for a uniform civil code can simply rehearse the same ideological assumptions about religion, community and cultural diversity, as most arguments for personal law. He describes the uniform civil code as a minimum common basis for inter-communal harmony with the capacity to reduce present hostility. He considers 19th century reforms to have been reforms from 'within' carried out by 'Hindus', and upholds

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them uncritically as a model for Muslims now, even castigating their failure to reform from within in a similar fashion. Reform from within, he says, will take away the BJP's tool for communal hostility. In case reforms from within cannot take place, he argues, then 'secular' elements from all religions should arrive at a 'consensus' for a uniform civil code, so that it is not imposed on any one. In the process, the basic tenets of religion should not be harmed; only the misusable elements (such as talaq and polygamy) can be taken out.[85]

In a remarkably uncritical and voluntarist view, 19th century reforms are recast as religious reform from 'within' effected by a fully formed 'community' and the onus is now put on Muslims, while the projected uniform civil code becomes a device for inter-'community' conflict arbitration. Such a uniform civil code will not be less religious than personal laws – it will be a compound of the benevolent aspects of all religions; no critique of religion seems to be required. Nor will it be different – it will only be a selection, on the principle of omission, from existing personal laws. Nor will it be based on an analysis of patriarchies – the laws may be for women but in practice they are a matter of religion-based arbitration by secular elements of religious communities. Nor indeed will it be secular – it will seek legitimation from secular elements whose own authenticity rests in belonging to a 'community'. This is a version of the uniform civil code that resolves the question of personal law by sorting the wheat of religions from their chaff, by being a more transcendant religious law, 'personal' to all rather than one religious group. It rests on the same communitarian and gender-blind premises that I have discussed earlier.

It may help to move from questions of community, and, in the light of its cross cutting constitution, follow two other questions – a fresh definition of cultural diversity and the extent to which it depends on legal pluralism – before discussing how much diversity the laws can address in relation to rights for women.

(13) Cultural Diversity: From Another Standpoint

In my view, a reckoning with social heterogeneity would have a standpoint radically different from that of the ideology of cultural diversity. This involves articulating diversity as an historical explanation and disentangling different types of plurality – religious, legal, customary as well as those which result from the systemic inequalities of castes and patriarchies – in order to formulate an alternative politics based on evaluation. The ideology of cultural diversity is committed to a stance of anti-modernity and resists evaluation of anything 'non-modern.' Whereas the nature of existing cultural diversity necessarily entails evaluation to distinguish between strength and hazard as well as between cultural diversity and social disparity. Further, accepting this ideology of cultural diversity based on discrete religious communities may involve simply opting for different patriarchal arrangements.

The history of social plurality in India has to be disentangled from concepts of ethnicity and multiculturalism in their liberal and postmodernist registers. The segregationist differentialism carried in the liberal ideas of the ethnic and 'multicultural' not only implies many cultures residing together with a boundary distinguishing one culture from another,[86] but does not square either with precolonial social formations or with the type of colonisation India underwent.[87] Postmodernist pluralism privileges a kaleidoscopic hypermobility, bricolage, and spatial concurrence over those processes of material structuration which determine the nature, priority and relationships between cultural differences; since national boundaries are perceived as a major antagonist of pluralism, its politics rests on the autonomy of little identities and decentred networks that can enter into global intra-communal alliances.[88] Theoretical difficulties aside, I do not see how the question of rights for women can be posed from within a claim to infinite pluralisation or from outside the parameters of the nation-state. Further, the structured cultural networks that obtain here makes both integrating or balkanising attempts equally wilful and artificial.[89]

(14) Religious Pluralism and Cultural Diversity

As far as religions are concerned, religious plurality is not a product of the mere existence of many religions – *of being more than one* – but of the nature and quality of their substantive social interactions, the field of overlaps and choices and the determinate historical repertoires so created. Diversity would also partly be that historical principle and process which has in precolonial, colonial and contemporary India continued to challenge discrete religions and their boundaries. It would be concerned with medieval (and later) traditions of comparativism, the richness and complexity of historical fashioning, the contexts in which religions were shaped, lived out, contested or became hegemonic, as well as with the significance of conversions in shaping a multi-religious formation. It would investigate how far 'cultures' in India are and are *not* separately owned or separately made, and make distinctions between the composite and the syncretic. It would be concerned with the nature and location (in terms of class and region) of syncretic spreads, and would see both the purging of syncretisms, the reassertions of fluidity and renewed avenues of multiple choice as a continuing process. The ideology of cultural diversity based on given religious communities with impermeable boundaries, assumes that the purging of syncretism is *completed* and irrevocable. It represses recognition of those diversities that can still be a cultural strength and ignores contemporary evidence of religious fluidity. There is a vast gulf between the theological systems and ideological purity of dominant religions and everyday religious practices of ordinary people that mix concepts, rituals, symbols from different systems.[90] Popular religions exist at the intersection of many denominations, may implicitly call them into question and are now produced as much through urbanisation and urban subcultures as they were in the past by local agrarian subsets of superstition and belief.

The alternative standpoint I propose would, however, reject religion as the singular determinant of cultural diversity. Just as religion is not the sole type of primordialism, and primordial community is not the only available form of social collectivity, so religion is not the *singular* axis of cultural diversity. One major reason for this is because cultural diversity is an effect of multiple primordialities[91] in dynamic relation with class and other non-primordial collectivities. I would also reject as unhistorical the perception of religion an undifferentiated axis of cultural diversity.

The inflation of religion as the singular axis of cultural diversity involves collapsing politically articulated difference with social plurality *per se*. The actual cultural diversity in the country exists in a politically unarticulated and politically unselfconscious realm. And it is this rather than four personal laws, a product of political articulation by the state and community spokesmen, that constitutes genuine plurality. It would be a sorry state of affairs indeed if plurality could only be preserved now through the artifices of contemporary 'Hinduism' or 'Islam'. Ironically, 'deen' and 'dharma' have crystallised as realms of political difference, while social commonality is taken for granted since it never obtrudes on the political arena of communal conflict save as tolerance or human decency. In fact the unselfconscious and inarticulate character of commonality leads to the assumption that is has no history and is not accompanied by historical memory – historical memory becomes the monopoly of only those who claim antiquity, loss, decline and seek rejuvenation.

Finally, regarding religion as the solitary axis of diversity has produced an extraordinary fetishisation, arising, as also in the case of religious community, from a narrow focus on the byproduct or endproduct without at the same time

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analysing social processes. A democratic, sensitive social project cannot and should not be inimical to cultural differences or diversity; nor can it afford, however, to fetishise them. People, practices and institutions change as well as fossilise, and some changes may be actively desired or desirable. One possibility is to see cultural diversity as the *end product* of short and long historical processes, rather than as *direct* object of annihilation or preservation. A 'mobile' cultural diversity *cannot* be the direct object of preservation, *rules* cannot be prescribed for maintaining in-between spaces. The major question as I see it, is not about religious pluralism or cultural diversity *per se* but about the social processes that have produced these phenomena in the past and can sustain them now under capitalism. We can only support those *social processes* which permit more religious fluidity over and above those others which do not.

(15) Religious Plurality and Syncretism

If we discard the notions of sealed religions and religions as sole determinant of diversity, and theorise religious plurality as characterised as much by syncretising interactions or processes as by the making of discrete religions, how do we evaluate these syncretisms? Syncretism is neither free of ideologies, nor does it have a single or singular moral, political and cultural valence. Its meanings may conjuncturally alter.[92]

Syncretism is a site which has been resistant to orthodox patriarchies. For instance, the in-between areas produced by syncretism, conversion, or atheism, have posed a continuous threat to the interrelated formation of religious orthodoxies, community claims and (usually upper caste/class) patriarchies. They have been most resistant to (and threatened by) clear-cut definitions, legal codification and homogenisation, and have provided a degree of fluidity and social choices. The categorisation of some laws as 'personal' has itself acted as a denominational pressure, enforcing unsought clarity of definitions and the tyranny of the denominational 'name' on those converts who have followed bits of different 'religious' laws or those for whom conversion was a form of rejection of religious or patriarchal oppression (some low caste groups or some women). Non-believers and atheists, men or women, are as threatening for present-day votaries of religious community as for orthodox believers. Their legal rights seldom enter the debate and are assumed to be covered by the Special Marriages Act! In such a context the (usually anti-modernist) characterisation of unbelief as 'western' becomes ironic – the refusal to be named can singly or together invoke premodern traditions of atheism, an enlightenment secularism and/or resistance to the way denominational description assists communalisation.

The definition of syncretism as 'influence', whether as benign or malign, can be distinctly ideological and needs to be discarded. Syncretism both resides in and is a product of a wide field of interaction. Commonalities resulting from coexistence cannot be reduced to influence, whereas a notion of two-way interaction has the advantage of speaking of structures and conjunctures, attending to the common contexts and mutual re-formations involved in cultural change. An influence-centred theory of interaction involves a passive relay and reception, a possibility for re-constituting ancestry/roots, a filiacentrism regarding originator of influence. Resting on a them-and-us on singular lines, it can lend itself to a reification of roots and projects of purification. Change is perceived as internal to religious traditions not a function of contexts. Each religion becomes a discrete, autonomous unit which squirrels away little nuggets of 'influence' into its own hoard and discards them at will. This was one of the ideological premises of Sikhisation, Islamicisation and Hinduisation – influence was something to be weeded out. Syncretism was defined in hard versions of Sikhism and Islam as 'reversion' to pre-conversion practices and in hard versions of Hinduism as the corruption wrought by the invasion of Islam and Christianity. Under the guise of erasing influence they tried to erase the social space of interaction with a canny knowlege that prohibiting interaction may be the best way for wiping out syncretisms.

However, questions have to be raised about the specific structural locales and social agency of syncretism – that is, whether it is imposed or the product of co-existence and gradually accumulating choices, whether it aims to/results in erasing other differences, the nature of the resistance or challenge posed by a specific interactive network to existing structures, whether it is implicated in class, caste, gender and nationality based discrimination. Syncretisms have to be conjuncturally evaluated according to their own selective procedures, functions, transactions, and teleologies. For instance in-between areas have also functioned as nodes of incorporation and assimilation and can be equivocal buffers from 'religious orthodoxy'. Syncretisms especially in the customary domain, may be the site where patriarchal consensualities operate: that is, an area of shared oppressions for women. Thus though syncretism is a corrrective to ideologies of religious community, birth-bound identity and cultural diversity, it cannot be offered as a panacea since it has itself to be opened to an equally rigorous interrogation.

(16) Disparity and Diversity

Syncretism has never been articulated as a concrete coherent political position from which lessons of resistance can be learnt by feminists. Before it can be so articulated, syncretism and other forms of diversity have to be opened to even sharper questions of patriarchal ideologies and privilege by confronting the subtle conflations of and explicit refusal to make distinctions between social diversity and social inequalities.

Cultural diversity is formed in a complex play of power, resources, geography and political systems. Ideas of 'essential' difference have been a notorious basis for discrimination. Do 'differences' produced on the basis of class, caste, race or gender, the products of systemic inequality, now need to be preserved as indices of cultural diversity? Can plural practices resulting from the discriminations or exclusions of caste and gender usefully be called diversity, and if so is it a desirable diversity?

While we cannot afford to politically confuse cultural diversity with social disparity, we have to simultaneously recognise that in our history disparities have indeed produced specific forms of diversity. For instance, diversity can also be a product of the differential distribution of patriarchal oppressions/protections and customary rights/disablements. This in fact can be an evaluative standpoint from where the question of *which* cultural differences are sought to be maintained can be addressed: that is, do they help women and substantively enlarge their choices or simply entrench diverse patriarchal arrangements. Unless cultural diversity is confronted with such questions it runs the danger of becoming a localised replay of the angst of colonial anthropologists or of the bad faiths of bourgeois anxiety vacillating between destroying and preserving its 'others'.

(17) Religious Pluralism, Custom, Patriarchies

Similar questions have to be addressed to the diversities in the customary domain. The customary domain is not reducible to personal laws (these are a compound of new statutes, derivations from customary law and a suppression of customary variation) and is far wider than religious plurality since it incorporates primordial and non-primordial forms of social organisation, and relates to most material aspects of life. The conflation of custom, religion and fixity, as by British administrators led by William Jones in the late-18th and early-19th century, is utterly misleading.

Customs display innumerable relations to textual religion or scriptural tenets ranging on a continuum from co-operation to antagonism. They may be formed in ignorance, in tacit contravention, or as rejection of religious texts, or through

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exclusion by scriptural texts (as of low castes). They may be a way of resolving the needs of changing social formations against a fixed, static body of texts, or part of the gradual and relatively non-conflictual adaptation of religions to social change. They may take advantage of discrepancies in texts.[93] They invent practices not covered in texts, authorise present needs or desires, and may defend obvious deviances on the ground of custom.

Customs thus are differential or varied embodiments of more or less univocal texts. What is more important, they show that religion is not and has seldom been the unalterable letter of the law. Custom is the battleground on which the full, embodied sociality of religious texts is established. To complicate matters further, many of these relations of custom to religion are replicated in the range of relations between custom and statutory laws whether personal or general.

In some situations, not all, customs have *united* men and women across denominational lines, on rationales of region, class and/or syncreticism, but at others they have reinforced caste and religious divisions. Syncretic customs, including some of women's religious practices, take effect in a context of sociological norms and social tolerances.[94] But custom is also a major field of patriarchal assertion in the form of class and caste differentiation – subject to both consensus and conflict. Upper caste customs can be guarded as privileges and lower groups not be allowed to practice them. Customs are equivocal about patriarchies – they may grant or deny entitlements to women, and as a form of local pressure can work both for and against women. Customs which challenge religious texts or commentaries or assist cross denominational social unities may be as patriarchal as those that conform to texts or maintain religious boundaries.

Thus if the customary domain is indeed the largest single determinant of cultural diversity, it is also the most difficult and necessary to evaluate for a secular feminist project. It may provide lessons in the way social processes challenge high textuality and throw up secular norms or non-religious law but it is far too ambivalent to be a source for laws.

(18) Legal Pluralism

There are two existing types of legal pluralism: as established through the laws and functioning of the state, and as practised in the realm of non-state customary arbitration. Both have helped to sustain regional and religious diversity but as entwined with class, caste and gender inequality. If they have helped to maintain social plurality, they have given similar assistance to diverse patriarchies. However, there is no simple fit between legal pluralism and religious pluralism, and this could help in thinking of the boundaries between law and religion historically, contextually and contingently.

Legal pluralism has a complex, tortuous history. Ancient Indian law was structured around demarcating different categories of persons on lines of caste, gender or denomination (atheists were a persistent 'other'). Thus one source of legal pluralism was the order of castes that determined claimable entitlements, obligations, privileges, as well as punishments and violations for each group on a descending scale. Consequently, no right was theoretically universalisable, and no crime was the same, that is, open to identical punishment. The Smritis further allowed for discrete, overlapping, intersecting patriarchal arrangements for different castes. The logic of northern conquests and expansion was another source of legal pluralism. For instance the *Manusmriti* enjoins leaving the customs of the conquered intact (opening both text and custom to conjunctural use). This logic brought into play a variety of practices ranging from non-interference to partial incorporation (as of tribal groups), and produced a long-standing tension between the customary and the textual.[95] New interpretations and commentaries as well as different schools of law, often tied to denominations, made for a theoretical pluralism, compounded by customary variations in regions and social groups. The inconsistency of texts as well as the leeway they gave to well-instructed brahmins to decide cases for which there were no general rules, both made for a structured looseness and a built-in heuristic space that was sought to be kept as the monopoly of brahmins. However, there probably existed a multiplicity of jural sites based in tribal organisation, caste division and localities alongside the powers vested with the monarch and in the state.[96]

Some of these features can still be seen in the medieval period, though a common criminal law was introduced, sometimes with provisos of differential application on the basis of denomination (Akbar tried to minimise these), and new legal principles were also sectorally introduced. A new notion of contractual, alienable and claimable 'rights' was implied in *haq* and entered into different relations with earlier concepts of 'entitlement.' There is also evidence for the multiplicity of jural sites in a number of regions. [97]

The colonial regime only effected piecemeal homogenisation; it introduced many legal changes but did not or could not end legal pluralism. The British discovery of, alliance with, and/or usurpation of local sources of power and authority dates back to the selective non-interference of the late-18th century, and was a source of legal heterogeneity. So too was the oscillation of the colonial state between non-interference and the desire to selectively institute a version of bourgeois patriarchy. British policies involved attempts to homogenise certain laws, especially those governing land relations and crime, an extremely problematic codification of personal laws, a practical extension of the principle of denominational categorisation beyond Hindu and Muslim personal law, but effectively allowing for immense regional variation depending on which problem was being tackled where and in which political conjuncture.

Laws in the presidency areas differed, and often on patriarchal lines: in some places selected and reconstructed versions of Hindu upper caste laws were sought to be universalised – for instance the *Manusmriti*, was scarcely popular in the south; in other areas like Punjab customary laws were sanctioned.[98] Despite the fears of homogenisation it raised, the Special Marriages Act functioned as a form of legal pluralism, making civil marriage available for the English educated, the 'secular', those who favoured choice of partner, and/or wished to make inter-caste marriages. Disputes between persons who were neither Hindu nor Muslim, in presidency areas, were arbitrated through the application of English law, or by applying existing custom or even the law of the country of origin.[99]

The areas under indirect rule followed differing trajectories. Some princely states like Baroda and Indore instituted a civil marriage act before the presidency areas.[100] Others became patriarchal havens – for instance those which did not institute a minimum age of consent even when it was instituted in the presidency areas, provided avenues of selection. Both Hindus and Muslims crossed borders to obtain child marriages more beneficial to patriarchal arrangements – a 'diversity' that did not benefit women.

While the colonial state was divided or inconsistent, people often excercised choices, in matters relating to marriage and family, between non-British customary law and statutory British law depending on what seemed more appropriate, easily available and favourable. Customary law was not fully codified while personal laws had only partly homogenised the variety of regional and customary laws, and people often used a combination of personal and customary laws. The rule of personal law was far from absolute: laws for Christians, Muslims and Hindus varied according to domicile throughout the colonial period.[101] Further, different laws in different states under direct and indirect British rule alongside the continuation of non-state jural sites produced legal shopping. Simultaneously, most people were under the jurisdiction of caste-law which remained relatively independent of court-law and could be as inhibiting and pervasive.[102]

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The present forms of legal pluralism also exist at both state and non-state sites. and some of these are simply continuations of earlier forms. The state enacts its own brand of legal pluralism through politically motivated, selective interference and non-interference in personal laws.[103]

At one level, the contradictions between Constitutional provisions for gender justice and fundamental rights and some of the statutory laws (both personal and general) have produced a multiplicity of competing interpretations, some of which are useful for feminists and some not. This is complicated by the contradiction in the Constitution itself, recognised by its architects, between the freedom of religious practice and reforms oriented to gender justice.

At a second level there is a plurality built into the laws through the variations in state laws,[104] through continuation of colonial laws, partial codification and internal inconsistencies,[105] as well as through available options and exemptions positing different principles and\or categories of persons. For instance, personal laws, exemptions for tribal women and for some bodies of customary law, a small pool of general laws, sections of the criminal code relevant to women, the Special Marriage Act and Indian Succession Act – all govern family relations but are not formed on identical principles. The distinction between religion-based and secular laws is not clear-cut. Some particularistic provisions from personal laws have seeped into non-religious laws. Other interrelationships between the two also exist or have been introduced.[106] The mutual contamination of religion-based and secular laws seems to function through connections, segregations and dispersal. Some areas like inheritance are governed piecemeal by personal and non-religious laws. Personal laws work in tandem with other statutory laws – neither domain is autonomous – while there are some routes of access from a personal law to some secular laws.[107] (This is not to speak of an unintended plurality arising from the unhomogenised, labrynthine, and unrationalised aspects of the law as a whole.)

In some cases, combinations of customary and personal law are still available, while in some other cases customary laws alone are practised. Customs are legally established and become efficacious through precedent and case law; they can in theory overrule statutory law but in practice this tends to be arbitrary. Statutory law does recognise certain customary areas if precedent can be proved and if no statute has previously cut across or overridden it.[108]

Custom is the interface between law and practice[109] and was given different recognitions in different legal systems – for instance brahminical, mughal and colonial. Customary variations are not subjected to any single convincing rationalisation. At present one aspect of custom exists in active relation to statutory law, seeking either exemption or inclusion. However, there is a vaster domain of customary and juridical practice and extra-legal jural sites that is either tacitly propped up by statutory laws, or demarcated (and so restructured) by being left out, or runs parallel to statutory law and court procedures bearing no direct relation to them, or even has a relative autonomy from them. It is implemented by customary arbitration, caste councils, caste and village panchayats as well as village elite. Here the faces of practised patriarchies are visible whether in widow-immolation, punishments for intercaste marriage or 'community' virginity tests.[110] These forms of customary arbitration, with their independent roster of customs, laws and 'crimes,' personal to local groups, can be more punitive than law courts. And with no recourse. Indeed their greater flexibility and efficient implementation, can for the same reasons lead to greater oppression and become a feature of local patriarchal coercion. Patriarchal customary practice enforced by the punitive capacity of local yet powerful consensualities, the frequent coincidence of jural 'communities' with the holders of economic, social, or cultural power (for example village elites), effects all sections of the oppressed including women.

In many cases such jural groups have been coming into conflict with the new legal system; often local institutions and the daily power of village elites are at stake. But these conflicts are not of a single type. Therefore in each case feminists have to ask the question of whether the shift from customary to statutory enhances or reduces the agency and the rights of women. The question is one of extraordinary complexity since local customs are imbricated in the local economy of types of agricultural production, division of labour and labour requirements, ecology, nature of commerce, caste divisions, distribution of land and the market for land, as well as related to and responsive to changing economies, the pressures of the market, the law itself, and to caste and class mobility.

The centralising laws of the colonial and contemporary state have thus co-existed with a number of uncentralised, operative jural sites, jurisdictions, juridical and arbitration processes. (Indeed some centralising laws were, in theory, consciously instituted *against* these multiple jurisdictions.) While the presence of these jurisdictions does imply levels of non-intrusion in civil society on the part of the state, it does not imply any commitment to social pluralism. In ancient India, legal pluralism was partly an *effect* of state expansion accompanied by selective non-interference in the customs of conquered peoples, displaying a tacit investment in social hierarchies. With both the colonial and contemporary state, legal pluralism and jural multiplicity continue to imply varieties of pragmatism, while with the contemporary state they further imply a reneging on the promise of democratisation. This is so because prior to 1947 no state had been even theoretically committed to social and gender equality.

However, in part legal pluralism has also been an effect of the continuing implication of civil society itself in inequality and patriarchies. The range of choices that extra-judicial systems provide has never been accompanied by the institution of equality; nor are these necessarily *enabling* for women.

We can idealise neither existing statutory nor customary laws. The patriarchies enforced in non-state jural sites have to be resisted as much as those of the state and its laws. Given this equivocative character of legal pluralism, whether statutory or extra-statutory, a feminist legal project would need to keep in mind the difficulties of squaring legal reform with the ground realities of extra-judicial legal pluralism, given the small number of women who take recourse to the legal systems compared to those governed by the extra-judicial domain. Further, if until now neither legal homogeneity nor heterogeneity *per se* have been a guarantee of justice for women or the removal of patriarchy, then the question of legal inequality has to be addressed to both the state and civil society and its customary practices. (Even supporters of reformed personal laws or of a uniform civil code cannot escape this question).

The question of rights for women then cannot be reconciled or even posed within religious pluralism, within existing types of statutory and extra-statutory legal pluralism, or within existing forms of legal homogenisation. The crucial question of the most enabling forms of homogeneity and diversity can be approached only through a discussion of multiple patriarchies.

(To be Concluded)

[Author's Note: This essay began in Kanpur at a workshop of women activists in March 1993. Presentations based on different sections were given at a seminar on fundamentalism in Melbourne, October 1994; Kasauli, March 1995 (seminar on Governance in Multicultural Societies); Slovenia, May 1995 (conference on The Nation and its Others); School of Oriental and African Studies, May 1995; and a public meeting on the Uniform Civil Code organised by Saheli in Delhi, August 1995. I am deeply grateful to Aijaz Ahmed, Gautam Navlakha, Amit Gupta and Swati Joshi for their comments. The responsibility for the views expressed, however, is entirely mine.]

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Notes

1 In framing the demand for a uniform civil code as an implementation of a directive principle in the Constitution, the BJP seeks not only to prove its own legalism but to present itself as fulfilling the promise of independence both in its ideals and in its legality. In doing so it is pretending to forget its own illegality and denigration of the Constitution during the destruction of the Babri masjid. Further, in order to propagate the uniform civil code, it is now quoting chapter and verse from the same Nehruvian secularists who are otherwise its special targets, such as Ambedkar, Munshi and Masani (Madan Lal Khurana, *The Times of India*, August 12, 1995). This excercise is intended to blur their own ideological affiliation to the Hindu Mahasabha that had opposed reforms of Hindu law. It is also intended to disguise the fact that their propagation of a uniform civil code has the same rationale as the destruction of Babri masjid – that was a revenge by self-designated victims against a 'historical injustice', now the uniform civil code is to be a revenge by 'victims' of a partially reformed Hindu law that took away some male privileges.

At present the BJP is staking its claim for 'one nation and one code' on the 'equality' and 'dignity of womanhood'. Their uniform civil code would be the amalgamation of the best from each community: the best from various codes would be culled and incorporated, while the bad and outdated would be deleted (retd judge Gumanmal Lodha, *The Times of India*, August 3, 1995; Sushma Swaraj, *Indian Express*, July 31, 1995). Advani promises that a uniform civil code will 'strengthen the secular fabric and deliver gender justice' (*Hindu*, July 18, 1995) and some spokespersons are presenting themselves as above religious divisions. They claim that the uniform civil code will not be an imposition of Hindu personal laws on minorities, it "would also do away with the evils afflicting the Hindu society" (*Indian Express*, August 2, 1995), for instance the discrimination against hindu women in matters of custody and inheritance (*Hindu*, July 24, 1995), while some take protective positions *vis-a-vis* minority women. Desertion of wives with pitiful alimony is common among Christians and Hindus in Meghalaya according to Sushma Swaraj.

However, their anti-Muslim bias leaks out in a number of ways. First, in showing up the 'backwardness' of Indian Muslims by pointing out that Islam is capable of reform and has been reformed in other countries (D K Jain, *Indian Express*, August 2, 1995), without acknowledging how their own aggression retards reform and change by putting minorities on the defensive and silencing minority women. Second, in pointing at the 'exemplary' nature of the Hindu personal law's accommodation to change, (Sushma Swaraj says if the Hindu 'civil code' could be evolved why not those of other groups); and thirdly, in localising polygamy as a 'Muslim' issue (V H Dalmia, VHP president, *The Times of India*, August 3, 1995) partly by focusing on the handful of Hindu men who converted to Islam in order to marry again, and forgetting the innumerable Hindu men who commit bigamy without bothering to convert.

Further, their political strategy, in which the women's wing or Mahila Morcha will take up gender justice through a uniform civil code, makes it clear that the emphasis on gender justice is a form of moderate Hindutva (*Hindu*, July 18, 1995). This is borne out too by its wariness in concretising either the content of the proposed code, (the uniform civil code will be drafted by constituting a law commission [Sushma Swaraj, ibid]), or even of the proposed anti-polygamy law for BJP ruled states which has remained a controversial issue in inner party debates (*Statesman*, July 24, 1995). Vajpayee felt that even drafting the anti-polygamy law was best left to the centre (*Indian Express*, July 23, 1995).

2 For some of these complex logics of pre-modern and 19th century corporate 'jati' mobility see Hitesranjan Sanyal, *Social Mobility in Bengal*, Calcutta, Papyrus, 1981, pp 42-44, 48-49.

3 For a discussion of this process in the Hindustani belt in the 1870s see Kumkum Sangari, "Differentiating between 'Hindu' and 'Muslim' Women – on Domestic Sites", presented at seminar on 'Appropriating Gender: Women's Activism and the Politicisation of Religion in South Asia', Bellagio, August 1994.

4 The fact that religious reformation was at the time understood as a politically efficient compound of class, caste and community claims is well illustrated by the massive conversion of the Punjab chuhras to Islam, Sikhism, Christianity as well as the Arya Samaj. For an account of these as well as other lower caste conversions to these religions see Duncan B Forrester, *Caste and Christianity: Attitudes and Policies on Caste of Anglo-Saxon Protestant Missions in India*, London, Curzon Press, 1980, pp 73, 81-2, 87-88.

5 As Lucy Carroll has pointed out "those seeking patronage or protesting proscription had to speak in the name of a bureaucratically recognised category ('Colonial Perceptions of Indian Society and the Emergence of Caste Associations', *Journal of Asian Studies*, 37 (1978), p 249).

6 Forms of Hinduisation emerged in the 18th century as shifting, pragmatic modes of legitimation accompanied by enlarging avenues of mobility and the growth of an intermediary strata following the parcellisation of the mughal empire. On this latter see Burton Stein, 'Toward and Indian Petty Bourgeoisie: Outline of an Approach', *Economic and Political Weekly* 26:4 January 1991.

According to Harjot Oberoi, the production of a uniform Sikh identity in the 18th and 19th century through class formation was an aid to bargaining with the British and buttressed by the colonial state through institutions like the army which recruited on the basis of religious affiliation; this process of Sikhisation worked at the expense of participation in popular religions and festivity, syncretic worship of non-Sikh deities, the fluid diversity of sects within Sikhism, as well as the ambiguous categories and borders between Sikhism, Hinduism and Islam. See *The Construction of Religious Boundaries: Culture, Identity and Diversity in the Sikh Tradition*, Oxford University Press, Delhi, 1994.

7 For instance the labelling and compartmentalising of major religions meant suppressing or eroding huge variations among Sikhs, Muslims and Hindus as well as shared practices among them. Of the 40 million 'Hindus' returned by the 1891 census, one-and-a-half million were "unable to record the deity they worshipped", two-and-a-half million worshipped Muslim saints, and four million indulged in varieties of animism and "superstition" (William Crooke, *Northwestern Provinces of India*, Cosmo, rpt Delhi, 1987, pp 240-42.

8 From the late 19th century, an increasingly 'negative' and absorptive definition of Hinduism as all that was not Islamic, Christian or Zoroastrian, at first made both Christianity and Islam the main 'opponents' of a newly 'unified' Hinduism, and later, after independence, mainly Islam. Whether dalits can be said to 'belong' to the Hindu fold remains an open question — there are histories of successive, partially successful attempts to Hinduise and incorporate them into a reformed Hinduism by upper castes as well as histories of resistance by dalits ranging from anti-brahminism to emphatical refusal to be defined as Hindu.

9 Ironically, some of this is visible in the choices of some of the forebears of the Hindu right such as Lala Lajpat Rai. Born into an Agarwal 'bania' family, his grandfather belonged to a Jain sect, his mother was a Sikh, his father was a 'partial' convert to Islam, while Lajpat Rai himself, after some dabbling with the Brahmo Samaj, chose the reformed 'Hinduism' of the Arya Samaj.

10 It is worth keeping in mind that one component of contemporary communal riots has been the appropriation and destruction of the 'other' community's capital — shops, factories, stock, real estate. For the survival and growth of precapitalist institutions in symbiotic co-existence with highly exploitative modes of surplus appropriation see Amiya Kumar Bagchi, 'From a Fractured Compromise to a Democratic Consensus', *EPW*, 26: 11-12, Annual Number, March 1991, p 615.

11 On this point see Frederic Jameson, *Postmodernism or, the Cultural Logic of Late Capitalism* Durham: Duke University Press, 1991, pp 304-05, 337, 390. Jameson's remark that when contemporary religious doctrinal reaffirmation appears within "an environment of completed modernisation and rationalisation, it may be considered to have a simulated relationship to the past rather than a commemmorative one," is also pertinent in this context.

12 For a discussion of this meaning of community see G A Cohen, 'Back to Socialist Basics', *New Left Review*, 207 (1994), p 9.

13 In the precolonial period influential groups (such as Muslims and rajputs) were formed from both immigrants and prior residents, occupied every social strata including ruling elites, were both law-makers and subject to local laws with a complex intertwined history. Religious group had ups and downs, there were intermittent religious persecutions of different religious groups over the centuries, but no single religious group has a history of *only* victimage.

14 For instance Partha Chatterjee recommends self-governing religious communities. His concern is to find "a defensible argument" and a "strategic politics" for minority cultural rights" in the present situation. He bases these rights in the self-justificatory potentials of a

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minority – and these are in turn based on the "consent" that each "religious group" will seek from its members through some forms of internal elective democracy and representative institutions (such as the Gurudwara Prabhandak Committee) thrown up from political processes within each minority group ('Secularism and Toleration', *EPW* (July 9 1994, pp 1775-77). There are several evident difficulties in his formulation. The somewhat voluntarist assumptions that religious groups can generate internal political processes separate from the wider polity and that these will be 'democratic' are fairly problematic. His idea that an 'elective' process will throw up 'true' representatives of each religious group does not take operative power structures into account while the belief that 'community' representation will be just in its own terms (to women?) seems ungrounded. The conception of community consent does not tackle consent to gender inequality; where and how women will become agents in the internal transformation of religious groups or challenge their "regulative powers" is left undiscussed; nor does the essay consider the likelihood that the democratic aspirations of many women may not or cannot be tied to communitarian or denominational identities.

15 For a discussion of the question of consent and that of women committed to Hindutva see Kumkum Sangari, 'Consent, Agency and Rhetorics of Incitement', *EPW*, 28:18, May 1, 1993.

16 On this point see also Archana Parasher, *Women and Family Law Reform in India*, Sage, Delhi, 1992, p 184.

17 For instance muslim and non-Muslim women protested against the Muslim Women's Bill in 1986, while Shahbano was made to withdraw her case by religious leaders (Prasher, pp 311-13).

18 It is worth remembering that after the Deorala widow-immolation the imagination of metropolitan ideologues, overdetermined by a nativist anti-colonialism, was gripped by the idea of a 'voluntary sati' as an expression of the widow's own 'free will', and that their notions coincided with the views of those locally involved in this and similar episodes. See Kumkum Sangari, 'Perpetuating the Myth', *Seminar*, 342 February 1988.

19 Lovibond's attempt to describe an anti-essentialist universalist politics may be useful. She points out that "the ultimate goal of liberation movements is not to invent new 'identities' along the lines laid down by existing structures of domination, but to dismantle these structures and so release the energies of each individual for the work of active (as opposed to reactive) self definition. In this sense a universalist politics, far from leading to 'essentialism', calls into question every 'essence' arising from social arrangements which could be amended through collective choice." See Sabina Lovibond, 'Feminism and Pragmatism: A Reply to Richard Rorty', *New Left Review*, 193, 1992, p 74.

20 Chatterjee argues through a Foucauldian notion of 'governmentality' for an acceptance in the present political context of a situation "where a group could insist on its right not to give reasons for doing things differently provided it explains itself adequately in its own chosen forum" (p 1775). He does not explain the principles by which such inscrutability will be withheld from or denied to majority religious communities or to 'minorities' within majorities. For instance one ground for defence of widow-immolation after the Deorala episode was that 'westernised' women were strangers to the niceties of Hindu belief and therefore had no right to oppose it.

21 In our context, self-representation may give communalism and proprietary patriarchies a new lease of life.

22 For an elaboration of these see Sangari, 'Consent, Agency'.

23 Flavia Agnes, 'Women's Movement within a Secular Framework', *EPW*, 29:19, (May 7 1994), pp 1123-27.

24 Madhu Kishwar has pointed out that exploitative family structures which keep women subjected receive crucial support from the state through laws and rules of behaviour which legitimate the authority of the male members over the lives of members of the family ('Some Aspects of Bondage: the Denial of Fundamental Rights to Women', *Manushi* 31, (January-February 1983).

25 Not only did the government accept religio-political leaders as sole spokesmen for the entire 'community' but the state has been party to the construction of the shariat as immutable (Prasher, p 172). Hasan has also emphasised the mutual complementarity of government and religious leadership in reinforcing community identity and the narrow construction of this identity in terms of personal law; Congress ideology and political practice reduced minority rights to personal law and reduced this in turn to religious rights. The protests of Muslim women against the Muslim Women's Bill involved confrontation of both state and community, but liberal and progressive opinion was ignored. See Zoya Hasan, 'Communalism, State Policy, and the Question of Women's Rights in Contemporary India', *Bulletin of Concerned Asian Scholars*, 25:4 1993, pp 11, 14; 'Minority Identity' in *Forging Identities: Gender, Communities and the State*, Zoya Hasan (ed), Kali, Delhi, 1994, pp 63, 68.

26 Hindus initiated this style of defence in their opposition to the proposed Special Marriages Act from 1868 to 1872, and to its later amendments in the 1920s and 1950s; this, among other things, was made on the ground that the Act challenged the notion of marriage as sacramental and indissoluble, threatened to constrict the unrestricted polygamy of Hindu men, undermined the ways in which religion prevented the free choice of spouse and regulated sexuality, undercut the patriarchal authority of the family and the social authority of caste Muslim opposition, which first appeared in the 1930s and 1950s, was focused on the way it sanctioned intercommunity marriages. (I owe this information to Amrita Chhachhi's excellent and as yet unpublished paper entitled 'Of Blood and Race: the Special Marriages Act Debates, 1862-1976'). In the arguments against the Uniform Civil Code and Hindu Code bill patriarchal arangements continued to be defended as religious rights. Hindus were vocal in defending polygamy and opposing property rights for women on religious grounds. An identical conception of patriarchal arrangements has underwritten the defense of minority personal laws by community spokesmen. The underlying assumptions of these interested representations were so well understood in the 1940s-1950s that Raj Kumari Amrit Kaur, Hansa Mehta, Ambedkar and Ayyar argued against freedom of religion *and* religious practices in the constituent assembly debates on the ground that inclusion of the word 'practice' would be used to prevent reform (Prasher, pp 223-25).

27 On this latter point also see Prasher, p 274.

28 Prasher, pp 161-62, 169-72, 309-10. Muslims objected to the Uniform Civil Code clause in the Constitution. The Minorities Commission to whom the Adoption bill was later referred recommended that religious groups should not be excluded because "minorities within a religious minority have the freedom to believe, profess and practice their own version of their religion" (ibid, pp 17, 231). Regarding the Muslim Women's Bill, it has been pointed out that rather than opposing state intervention in the internal affairs of the Muslim community, Muslim fundamentalists in fact secured state backing to enforce control over women (Amrita Chhachhi, 'Forced Identities: the State, Communalism, Fundamentalism and Women in India' in Women, Islam and the State, Deniz Kandiyoti (ed), Temple University Press, Philadelphia, 1993, p 167.)

29 The desire for an equivalence of male 'rights' was evident in the common argument in the 1950s (one still being made), that by not enacting a uniform civil code the government was encroaching only upon the religious rights of Hindus but was afraid to encroach similarly on the rights of others (Parasher, p 237). The most vociferous opposition to the Hindu Code bill in the 1940s came from the Hindu Mahasabha; Shyama Prasad Mukherjee argued for a uniform civil code instead of reform of Hindu laws but even that code had to be optional! So even at that time the opponents of the Hindu Code bill, that is defenders of patriarchal privileges, were also proponents of a uniform civil code! (See Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance', NMML Occasional Papers April 1992, pp 15-18).

30 Prasher, p 114; Shahida Lateef, 'Defining Women through Legislation' in *Forging Identities*, p 50. In fact some argued that Hindus would accept monogamy only when Muslims did (ibid, p 52)! Others compared compulsory monogamy to "racial suicide": it would destroy India the way it had destroyed the Roman Empire (Som, pp 20-21).

31 A M Bhattacharjee, *Muslim Law and the Constitution*, 2nd ed, Eastern Law House, Calcutta, 1994, pp 33-34; John Malcolm, *Sketch of the Sikhs*, London, np, 1812, p 133.

32 Bhattacharjee, *Muslim Law*, pp 89-91, 99-104.

33 The learned judge seems unaware of the figures for bigamy and polygamy presented by the Census Commission of India, 1961: tribals 15.2 per cent, Buddhists 7.9 per cent, Jains 6.72 per cent, Hindus 5.8 per cent, and Muslims 5.7 per cent. See also *Report of Committee on the Status of Women*, Government of India, 1975.

34 The judgment even suggests framing a Conversion of Religion Act to check abuse of religion! This would be somewhat farcical if it did not fuel communal organisations seeking to whip up hysteria over conversions; the VHP announced soon after the judgment that it was working towards setting up 10,000 Hindu missionaries to meet the challenge of

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Islamicisation and Christianisation and the consequent demographic decline of Hindus (*Hindu*, July 3, 1995).

35 Hindu personal law assisted polygamy by validating customary rituals and ceremonies; if saptapadi and vivahahoma cannot be proved then the marriage becomes invalid (Agnes, p 1125; and Flavia Agnes, *State, Gender and the Rhetoric of Law Reform*, SNDT University, Bombay, 1995, pp 199-200.

36 For a discussion of these and other clauses and their creation of new anti-secular biases in some areas see A M Bhattacharji who points out that many of these clauses violate Art 15 of the Constitution (*Hindu Law and the Constitution*, Eastern Law House, Calcutta, 1994, pp 130-42; see also J Duncan Derrett, *Religion, Law and the State in India*, Faber and Faber, 1968, London, pp 332-33, 342; K G Kannabiran, 'Outlawing Oral Divorce: Reform through Court Decree', *EPW*, 29:25, June 18, 1994, p 1510; Bhattarjee, *Muslim Law*, pp 112-13; Prasher, p 100; Madhu Kishwar, 'Codified Hindu Law: Myth and Reality', *EPW*, 29:33 August 13, 1994, p 2156. While the laws do not altogether preclude inheritance on conversion they do make it more difficult and arbitrary.

37 See Prasher for details, p 272; Since 1976 for instance Hindus who marry under Special Marriage Act inherit under Hindu personal law and not under the Indian Succession Act. This amendment by which Hindus would continue to be governed by Hindu Succession Act could deter a Hindu from marrying a non-Hindu woman because then he would forfeit his rights to ancestral property (Agnes, *State, Gender*, p 200). The Act also has loopholes that can be used to prevent intercommunity marriages (Chhachhi in *Forging Identities*, p 82).

38 Christian women seeking reforms have produced a draft bill of Christian Marriage Act with the unanimous assent of heads of churches which is in abeyance since early 1994.

39 Prasher, p 139.

40 For instance the new testamentary provisions introduced in the Hindu Succession Act with regard to ancestral property rendered property more mobile in the hand of individual male owners, prevented fragmentation of urban family business or family agricultural holding, and assisted fathers to obviate the newly given right of property to daughters, thereby taking away women's limited customary rights and making the man's will paramount (Som, pp 45-46; Kishwar, p 2156). In fact the testamentary provisions were explicitly offered as a loophole through which to avoid giving women property (Prasher, p 128). For a detailed discussion of gender inequalities in this Act see Bina Agarwal, 'Gender and Legal Rights in Agricultural Land in India', *EPW*, Review of Agriculture, 30:12 March 1995, p A-43.

41 On this point see Prasher, pp 271-273.

42 For me feminist agency is not merely women's agency but the organised initiatives of women and men committed to distributive justice and women's equality within a democratic and egalitarian framework; it does not include women committed to a right wing politics.

43 Rachel Harrison and Frank Mort, 'Patriarchal Aspects of Nineteenth Century State Formation' in *Capitalism, State Formation and Marxist Theory* ed, Philip Corrigan (ed), Quartet, London, 1980, pp 81-82.

44 The clause on social reform was added due to the stated fears of Ambedkar and others that freedom to propagate and practice would perpetuate these injustices.

45 It also carries the inflections of voluntarism. The historical co-ordinates of reforms during the colonial period were predicated on struggles within denominations, class formation, degrees of embourgeoisement – effectively part of a historical process in which public male agencies were formative and preceded those of women. The same historical process cannot mechanically repeat itself, and more creative, broad-based strategies need to be evolved.

46 For a discussion of new orientalising discourses see Kumkum Sangari, 'Introduction: Representations in History', *Journal of Arts and Ideas*, nos 17-18, June 1989.

47 In fact brahminical law had a regionally variant status, and was often reduced to a useful embellishment for kshatriya hegemony.

48 In the debates on the Hindu Code bill, Ambedkar, noting the consequences of a conflation of religion and law, complained:

The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved I am sure about it that in social matters we will come to a standstill...There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary, that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion.... I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent legislature from encroaching upon that field (*Constituent Assembly Debates*, vol 7, p 781).

K M. Munshi too wanted to split religious imperatives from class reproduction. He argued against the protection of personal law from state intervention in 'secular' areas of religion or those that fell within the purview of social welfare or reform; he said if succession or inheritance related personal laws were believed to be a part of religion it would contradict the Constitutional promise of sex equality (Parasher, p 227).

49 Male individuation did not conflict with the family or 'religion' in the way that female individuation did and still does. The Hindu Gains of Learning Act (1930) provided for individual ownership of the income a person earned by virtue of his 'learning', it no longer had to be part of the coparcenary. This trend continued after independence and with the Hindu Code bill men were allowed to keep their own earnings giving them the double benefit of male individuation as well as continued share in the coparcenary. As Agnes points out while a space was carved for men's individual property rights within the joint family, 'stridhan' for women was rolled back (*State, Gender*, p 191). For a discussion of some of the gaps between male and female individuation see Kumkum Sangari, 'The Amenities of Domestic Life': Questions on Labour', *Social Scientist* 21:9-11 September-November 1993, p 20.

50 Prasher, p 249.

51 For discriminatory and patrilineal forms in devolution and tenancy rights in agricultural land, as well the variations in these in each state and in specific personal laws see Agarwal, pp A39, 43-45, 51-52.

52 Legal compartmentalisation simultaneously reflects and assists a wider process of class differentiation by devaluing or excluding certain categories of women's labour from 'work'. See Sangari, 'The Amenities', pp 2-3, 11-20.

53 The conception of the family as private and beyond the appropriate intervention of the law has been an important dimension of legal reinforcement of women's subordination; it has been used to insulate from legal review the discrimination women face within the family (Ratna Kapur and Brenda Cossman, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism', *National Law School Journal*, 1 1993, p 56).

54 See Kumkum Sangari, 'Relating Histories: Definitions of Literacy, Literature, Gender in Early Nineteenth Century Calcutta and England', in *Rethinking English*, Svati Joshi (ed), Trianka, Delhi, 1991, pp 39, 50-58.

55 Sangari, 'Perpetuating the Myth', p 30.

56 Prasher, pp 72-3

57 Prasher, p 76

58 Personal laws were a compound of custom, statute, usage and case law (Bhattacharji, p 68). For the transformatory effects of case law see Bernard S Cohn, 'Law and the Colonial State in India' in *History and Power in the Study of Law: New Directions in Legal Anthropology*, June Starr and Jane F Collier (ed), Cornell University Press, Ithaca, 1989.

59 Prasher, pp 272, 99-100. The Anti-Hindu Code Committee headed by Swami Karpatri was claiming that only pandits could sanction change (Latif in *Forging Identities*, p 49).

60 For instance of Punjab which had till then been under customary law. For details of these provisions see Prasher, pp 102-03, 108.

61 Article 25 says that the right to freedom of religion must include the right not to believe in any religion and even to be entirely atheistic.

62 The 1891 Census of the North-Western Provinces, faced with the amorphousness or syncretism of lower caste and class popular religions, eventually classified 'Hindus' by "striking out the members of fairly recognisable religions" such as Islam and Christianity and calling "everyone else a Hindu" (Crooke, pp 240-42). The further expansion of the term Hinduism, both backwards in time and by assimilating more and more sects occurred in the early 20th century and bestowed a spurious unity (Heinrich von Stietencron, 'Hinduism: On the Proper Use of a Deceptive Term" in *Hinduism Reconsidered*, Gunther D.Sontheimer and Hermann Kulke (eds), Manohar, Delhi, 1991, pp 13-16. Even Gandhi who believed in communal harmony had opposed conversion to non-Hindu faiths (Forrester, p 82).

63 Prasher, p 104. In fact this legal definition of the Hindu was further extended, in order to protect *male* coparcenary rights, to those Hindus not married under Hindu personal law by the 1976 amendment of the Special Marriages Act.

64 Veer Savarkar of the Hindu Mahasabha, who hated conversions of Hindus, wanted a national definition of a Hindu that could embrace Sanatani, Sikh, Brahmo and Arya Samaji and argued for a "racial and cultural

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unity" (Dhananjay Keer, *Savarkar and his Times*, A V Keer, Bombay, 1950, pp 130, 230.

65 Prasher, p 109; Kishwar, p 2163.

66 The Hindu Code bill imposed patrilineal inheritance on many groups that did not practice it. Since it was designed to bring about a unity of Hindus through legal uniformity, it overrode textual and customary laws or practices even when they were beneficial to women (Kishwar, p 2152, 2158, 2163). The rights of Jain women to hold property absolutely (Prasher, p 120) would now get watered down by the testamentary provision. For its other gender injustices see Prasher, pp 107, 118-19, 128-29.

67 Customs relating to ceremonies of marriage, to prohibited relationships, and to customary divorces were saved and could continue to be operative, but no explanation was provided (Prasher, pp 109,111).

68 The coparcenary clauses of the Hindu Code bill would chiefly be applicable only to upper caste/class Hindus, since as Jack Goody points, the prolonged association of upper groups was with 'joint undivided families' and of the poor with stem households (*The Ancient, the Oriental and the Primitive*, Cambridge University Press, Cambridge, 1990, p 475).

69 Prasher, p 109; Derrett, *Religion*, Law, pp 357-58.

70 Bhattacharjee, p 32.

71 Bhattacharji, p 26; Lateef in *Forging Identities*, p 43, 45; Chhachhi in ibid, p 82; Maitrayee Mukhopadhyay, 'Between Community and State: the Question of Women's Rights and Personal Laws', in ibid, p 111; Prasher pp 147-48; it did not apply to agricultural land, 99 per cent of all property (ibid, p 148).

72 The Act had adverse effect on women in matrilineal communities (Agarwal, p A52). Significantly M S Aney opposed the bill on the ground that it would constitute a barrier between Hindus and Muslims who interacted at many levels (Lateef in *Forging Identities*, p 44).

73 Such an option existed in Cutchi Memons Act of 1920. See Prasher, pp 146-48, 150; Bhattacharji, p 26; Shahida Lateef, *Muslim Women in India: Political and Private Realities*, Kali, Delhi, 1990, pp 70-71.

74 Lateef, *Muslim Women*, p 71.

75 Prasher, p 155.

76 John L Esposito, *Women in Muslim Family Law*, Syracuse, New York, Syracuse University Press, 1982, p 81; Prasher, p 151; Chhacchi in *Forging Identities*, p 82.

77 Judges had used Muslim personal law in case of conversion by a non-Muslim wife to Islam to release her from a bad marrriage as well as to release a Muslim woman from a marriage she loathed by converting *from* Islam (Bhattacharji, pp 86-87, 90-91).

78 Ram Kumari 1891 Calcutta 244; *Budanśa vs Fatima* 1914 IC 697 MHC; Nandi Zainab vs the Crown ILR 1920 Lahore 440; *Robasa Khanum vs Khodadad Bomanji Irani* 1946 BLR 864 and AIR 1947 Bom 272.

79 Significantly Muslim personal law was not applied to this case because both parties were not Muslim, but the same reasoning was not extended to Parsi personal law – in effect, the husband's personal law predominated. They entered into a solemn pact that the marriage could be monogamous and could only be dissolved according to the tenets of the Zoroastrian religion. It would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it as a unilateral act. It would be tantamount to permitting the wife to force a divorce upon her husband although he may not want it and although the marriage vows which both of them have taken, would not permit it. (Bhattacharji, p 88)

80 Most recently expressed by S P Sathe who argues for a reform of different laws for different communities from the standpoint of uniform principles of gender justice, equality of sexes and liberty of the individual: "such uniformity can sustain the diversity of the laws" ('Uniform Civil Code: Implications of Supreme Court Intervention', *EPW*, 30:35, September 2, 1995.

81 Chatterjee, pp 1775-76.

82 Chatterjee, p 1773.

83 Aziz Al-Azmeh has shown how problematic such a differentialist culturalism is in the context of Euro-American racism. Comprehending "both a libertarian streak and segregationism" as "mirror images" it is like "racist heterophilia [which] wants 'cultures' to coexist in mere spatiality without interpenetrating": "Thus we find fused in racist and antiracist discourse alike the concept of non-transmissible life styles". He critiques the finalist understanding of difference in cultural relativism, where the relations between self and other are of "difference and intransivity; their ensemble is sheer plurality, mere geographical contiguity". The non-European world is relegated to "irreducible and therefore irredeemable particularism." Each 'culture,' for example Islam is represented as "a monadic universe of solipsism and impermeability, consisting in its manifold instances of expressions of an essential self". He points out that "Islam is not a culture but a religion living amidst very diverse cultures and thus a very multiform entity". The "manifold historical formations – the European, the Arab, the Indian" are each "highly differentiated but these differences or the cluster of such differences, are globally articulated and unified by the economic, political, cultural and ideological facts of dominance. Each historical unit is, moreover multivocal, and Europe...is no exception to this." "In this light the notion of incommensurability and its cognates appears quite absurd," partly because historical units are not "homogeneous, self-enclosed and entirely self-referential entities, as would be required by the assumption of univocal irreducibility." Such assumptions elide history, "lead to barren and naive relativist temptations" "dressed up" as "intercultural" "philosophical hermeneutic" and to "absolute relativism" (*Islams and Modernities*, Verso, London, 1993, pp 5, 21, 40-41).

84 Lovibond has persuasively argued that feminists cannot be indifferent to the modernist promise of social reconstruction or the enlightenment promise of an emancipation from traditional ways of life and their arbitrary authority. From the point of view of feminists 'tradition' has an unenviable historical record. Yet it is in the area of sexual relations that 'traditional values' are proving hardest to shift. Thus for feminists the project of modernity is incomplete. "What then are we to make of suggestions that the project has run out of steam and that the moment has passed for remaking society on rational egalitarian lines? How can anyone ask me to say goodbye to 'emancipatory metanarratives' when my own emancipation is still such a patchy, hit-and-miss affair?" Lovibond critiques the distaste shown by postmodernist pluralism for modernist social movements towards sexual equality. Her description of "quiet pluralism" is almost presciently appropriate for Chatterjee's essay: the postmodernist discovery of the local and customary, the advocacy of a pursuit of truth or virtue within *local, self contained* discursive communities which should neither be made commensurable nor evaluated from a universal standard; the attraction for legitimation excercises carried out in a self-consciously parochial spirit.
She points out that if feminism is not to be mere reformism it must call into question parish boundaries to achieve a thoroughgoing global redistribution of wealth and resources, work and leisure, and requires "a systematic approach to questions of wealth, power and labour," and to "address the structural causes of existing sexual *inequality*. This...will entail opening a door once again to the enlightenment idea of a *total* reconstitution of society on rational lines. Otherwise the new pluralism is simply status quoist, and there are reactionary implications in the proposed return to customary ethics". Sabina Lovibond, 'Feminism and Postmodernism' in *Postmodernism and Society*, Roy Boyne and Ali Rattansi (eds), St Martins Press, New York, 1990, pp 161, 169, 171-73, 179
Terry Eagleton points out that the universal values of the revolutionary bourgeoise – freedom, justice, equality – at once promoted its own cause and occasioned it grave embarrassment when other subordinated classes began to take these imperatives seriously (*Ideology: an Introduction*, Verso, London, 1991, p 57). This contradictory character of enlightenment values, at once enabling as a ruling class ideology but threatening in their political universalisation, is as true of the erstwhile theatres of colonisation as of Europe. As Samir Amin shows, the universalism of the enlightenment was undercut by its own racism, western exceptionalism and exclusivism (*Eurocentrism*, 1989, p 105).

85 S N Roy, 'Uniform Civil Code', *Frontier*, July 29, 1995, p 5-6. The judgment in the Sarla Mudgal case also implicitly upholds the Hindu personal law as a model for a secular uniform civil code in a way that is difficult to distinguish from Hindu majoritarians.

86 Peter Ronald deSouza, 'Righting Historical Wrong', (unpublished ms, 1995), p 12.

87 A differential set of histories of the constitution of ethnicity could be extracted from colonisation. The imposition of colonial rule on tribal modes of production, on those that were feudal or tributary, the subsequent migration of colonised groups to imperialising countries, and the demography of white settler colonisation, have themselves produced at least four *distinct* registers of ethnicity, with many specific subsets and with each of producing its own further constellations.
Unlike many colonised countries, India already had complex and variable patterns of demographic settlement and migration over the centuries accompanied by new knowledges and technologies, as well as a non-settler British colonisation without a substantial influx of migrants or a wholesale

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decimation of native populations with its accompanying logics of guilt and reparation. In the precolonial period influential groups were formed from both immigrants and prior residents while no single religious group has a history of *only* victimage.

The static, ascriptive definitions of ethnicity (and corollary policies of multiculturalism) as they have emerged in relation to immigrant populations in Europe, derive from a conflation of 'origins', race and culture, at the expense of the dynamic multiple constitutive components and differences in the so named 'race'. Ethnicity claims are promised little except a superficial cultural 'autonomy' since processes of economic assimilation and concomitant homogenisation have continued apace.

The close asssociation of ethnic identity claims with community claims stems from the way emigration can function to reduce differences of stratification, mute or erode complex local hierarchies, regional chauvinisms and class differences, producing a coherent community identity for emigres. (See for instance Winston James, 'Migration, Racism and Identity: the Caribbean Experience in Britain', *New Left Review*, 193 1992, pp 24-25, 29, 35.) Further, as the integrative capacity of class and class mobilisation declines, ethnic identities and community mobilisation have become the language of social action.

Multiculturalism can function as an attempt to break with the model of hierarchical assimilation in Euro-American countries where migrant workers are at the bottom of the ladder. (See Kevin Macdonald, 'Identity Politics', *Arena*, June-July 1994, pp 19-20). Minorities in India cannot be similarly identified as underclasses or victims of forcible transplantation by the capitalist labour market, and have been historically subject to both processes of exclusion and inclusion, assimilation and othering.

88 Postmodernist multiculturalism is presented as an alternative to liberal pluralism. While the latter was shaped by a modern anthropology stressing the organic unity and boundedness of cultures, the former is allied to a postmodern anthropology stressing permeability of cultural boundaries, the impurity and contamination of cultural systems, and multiply constituted subjectivities. Critical of Eurocentrism, ghettoising discourses, and hierarchies between minor and major communities, it rejects unified, fixed, essentialist identities or communities, advocates a relational multiculturalism committed to changing power relations, and to giving sympathy and an epistemological advantage to the oppressed.

Earlier variants of postmodernism were primarily interested in the psychic interfaces of hybridisation between Europe and its so-called 'others' as determined by colonisation, indifferent to those forms and processes of hybridisation on the subcontinent that were prior to or unrelated to colonisation, and largely ignored the interfaces of hybridisation among non-Europeans. These omissions, paradoxically, helped to assimilate India (and other imperialised formations) into the liberal problematic of ethnicity and multiculturalism. The preoccupation with colonisation has contirued: a celebratory, transgressive, border crossing, hybrid, syncretic, multiply valenced multiculturalism, is envisaged as a protest against or a reversal of colonial violence. But some recent versions now extend to precolonial syncretism and non-European multiculturalism, as well as to the cosmopolitanisms produced through the conjunctural overlays of European colonisation. These otherwise sharper recognitions of precolonial formations and social disparities are, however, located in a dream of decentred hypermobility or flux in which all types of mobility exist on a level plane of equivalence – whether of culture, power, subalternity, communities or multiple individual identities. Material structuration is replaced by a spatial concurrence of all that is from the 'past', ie, a coexistence of diversities in postmodernist terms which approaches, if not simulates the synchronicity of the marketplace. (For a recent example see Ellen Shohat and Robert Stam in *Late Imperial Culture*, Michael Sprinker (ed), Verso, London, 1995).

With the end of earlier forms of colonialism, the major obstacle to this multiculturalism defined as a systematic principle of differentiation appears to be present national boundaries. The answer seems to lie in an autonomy for restructuring intercommunal relations, within and beyond the nation-state, according to internal and partially overlapping imperatives of diverse communities. Howsoever plural or mobile these communities may be, I do not see how such intra-communal alliances can help to resist economic imperialism or the finitude imposed by economic expoitation or to formulate an ethical horizon against which to pose the question of common rights.

89 The cultural history of the subcontinent involved a prolonged process of alliances, collaborations and antagonisms between incoming groups and earlier inhabitants leading to many types of 'mutual' re-formation at each stage. For instance the transnational ideological configurations formed during the early colonial period are one such instance of 're-formation' (see Sangari, 'Relating Histories').

90 deSouza, p 8.

91 In regional and linguistic groupings such as Jat, Punjabi, Rajput, numerous denominations exist including Christian, Hindu, Muslim and Sikh.

92 For earlier attempts to critique instances of syncretisms that consolidate patriarchal ideologies see the section on Kabir in Kumkum Sangari, 'Mirabai and the Spiritual Economy of Bhakti', *EPW*, July 1990; and Sudesh Vaid and Kumkum Sangari, 'Institutions, Beliefs, Ideologies: Widow-immolation in Contemporary Rajasthan', *EPW*, 26:17, April 27, 1991, p WS14-15.

93 For instance if texts are contradictory regarding widow immolation then the textual sanction had to be bolstered by customary sanction.

94 Devaluing women's belief systems was part and parcel of the attack on syncretic customs in the north in the late-19th century; a large number of women occupied neither orthodox Hindu nor Islamic spaces in their religious pratices. See Sangari, 'Differentiating between 'Hindu' and 'Muslim' Women'.

95 On the lack of practical unity of 'Hindu' orthodoxy as well as the tension between customary law and the shastras see Goody, p 229.

96 In actual practice law would often depend on the king's will, subject to variation, while its transcendant horizon remained unaltered (J Duncan Derrett, *The Dharmashastra and Juridical Literature*, History of Indian Literature 4:4 Wiesbaden, Otto Harrowitz, 1973, p 13).

97 For instance in 18th century Maharashtra there were three normative centres – peshwa, caste group and dharamadhikari – making it possible to punish a person three times for one offence (Sumit Guha, 'An Indian Penal Regime: Maharashtra in the 18th Century', NMML Occasional Paper, 1994).

98 See Sangari, 'The Amenities of Domestic Life'.

99 Prasher, p 302.

100 Reforms of Hindu law in Mysore and Baroda were more comprehensive than in presidency areas (Derrett, *Religion, Law*, pp 327, 356.

101 Agarwal, p A52; Prasher points out that several legislative measures mention local customs rather than religious laws (p 68). For choices between customary and personal law see Derrett, *Religion*, p 359.

102 On caste-law see Derrett, Religion, Law, p 287.

103 See also Hasan in *Forging Identities*, p 60.

104 Such as Goa, Maharashtra and Andhra.

105 In some respects personal laws are universalisations of specific region and caste based laws (such as the coparcenary provisions in Hindu personal law) and\or sustain an 'internal' inconsistency or diversity despite universalising attempts. Some provisions are merely a continuation of laws in force prior to the drafting of the Constitution, some are unchanged carryovers from British laws. 'Hindu' law remains uncodified in areas related to caste councils, joint family, partition, religious endowments in all aspects except control of finances – and to confound confusion, falls into an amorphous area described as customary/personal law (I owe this latter point to Rajeev Dhawan).

106 For instance in the Special Marriage Act, see note 37.

107 I owe this point to Vrinda Grover.

108 I owe this point to Vrinda Grover.

109 E P Thompson, *Customs in Common*, New York, New Press, 1991, p 97.

110 Events of widow-immolation in contemporary Rajasthan have been not only structured in full knowledge of prohibitory law but also assembled around the inability of existing law to deal with either community crimes or the nexus between religion and patriarchal ideologies (Vaid and Sangari, p WS 60). Last year, when a young married woman was raped, the Mina caste panchayat decided, in the absence of her husband, that since this had brought shame upon the community she could neither file an FIR nor be given medical attention; she bled to death. A Sansi caste panchayat authorised punishment of a bride for failing a customary community virginity test – she was tortured, stripped and paraded publicly in the village (*The Times of India*, June 28, 1995). A great deal of work needs to be done on the role of family, kin-group, caste association, class segment in determining what is customary, who the arbitrating 'communities' will be, and the choice between the customary and statutory.

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