Chapter 5: The Issue of Gender Justice in the Debate over Uniform Civil Code

5.1: The Uniform Civil Code and Gender Justice: An Introduction

As I discussed in the preceding chapter, when the women’s movement addressed the issues of rape and dowry, it was generally assumed that these issues affect all women irrespective of their social background, that is caste, community or class. Many feminists thought that gender concerns could be drawn up clearly and distinctly against a patriarchal society and state. Legislations and reforms in law concerning the issues of rape and dowry were passed without much opposition from the forces of caste, community or class. Thus to a certain extent, the issues of rape and dowry are gender issues per se, insofar as women across caste, community and class are vulnerable, though to varying degrees, to rape and dowry.

However as I have brought out in the previous chapter, the vulnerability of women to rape and dowry, beyond a minimal commonality, is differently conditioned by their caste, community and class affiliations. In other words, there is an interconnectedness of gender-based oppression and oppressions based on caste, community and class. This interconnectedness has become
more pronounced in the debate over the Uniform Civil Code (UCC). The debate over the formulation of a UCC in India has not only been about the secular state versus religious nationalism, but has also been about justice for women within the personal laws of different religious communities. In the debate over the UCC, questions about gender justice have figured prominently. Thus addressing the problem of gender justice in India without considering the debate over UCC is problematic. Similarly any account of the debate over the UCC without taking into consideration the issue of gender inequality involved therein, remains incomplete.

As mentioned above, the UCC has not only been about secularism and communal politics, it has also been about securing justice for women. Moreover the debate has also brought to the forefront a tension in the Constitution between individual rights and community rights. Hence while examining the issue of UCC from the perspective of gender justice, it is important to take into consideration these other questions that the debate has raised. This includes examining how, and to what extent, the discourse on the secular state versus religious nationalism, as well as the tension in the Constitution between individual and collective rights affect the prospects of justice for women.
The debate over the UCC has raised a number of questions for the Indian polity as well as for the women’s movement. From the perspective of gender justice, the issue of UCC has raised questions about women’s rights as citizens, which are being compromised at the altar of communal politics, and about the formulation of a gender-just code of family law without entering into the realm of identity politics.

The IWM had earlier campaigned for reforms in personal laws, which govern matters like marriage and divorce. It had also urged the state to institute a non-sexist, secular common code. However with the rise of communal politics this demand began bearing communal undertones, as communal forces began demanding the UCC but obviously for different reasons. While the Hindu communal forces branded the opposition to such a common code as anti-patriotic, the Muslims and Christians saw the imposition of such a code as a threat to their cultural identity and as a violation of the fundamental right to freedom of religion and conscience guaranteed by the Indian Constitution. Thus an originally feminist issue became the handmaid of majority-minority politics. In this manner the public discourse on the UCC has revolved round the secular state versus religious community and has been largely silent on UCC’s significance on women. As Nivedita Menon observes: “The debate on the UCC is invariably
set up in terms of the secular state versus religious community, and has rarely surfaced in public discourse as feminist issue”.\(^1\)

All these have severe implications on the issue of gender justice in India. Indeed the debate over the UCC has emerged as one of the most important issues of gender justice. It exemplifies the way in which concerns of women’s rights and gender justice are underplayed and appropriated by the patriarchal forces of community and state. Moreover the engagement of the IWM with the issue of UCC has raised some important concerns in theory and in practice regarding the relationship between gender justice, rights and citizenship and their implication on women in the context of the changing political scenario. The issue has given rise to concerns of women in the wake of Hindu nationalism and its critiques of the notion of secularism in India. The way gender and community are seen as mutually constituting has urged a rethinking on the issue of gender justice within the context of communalist politics. It has severely challenged the notion of rights and citizenship as understood in mainstream political discourse. It has also questioned the primacy granted to these notions in ensuring justice.

Using the debate over UCC in contemporary India I seek to enter into a discussion on justice for women that seems to be contingent on and
affected by the pre-eminence of community identity and the importance of personal laws in the defining this community identity. In the wake of Hindu fundamentalism, the debate has also given rise to a discourse on secularism and its implications on gender justice in the present Indian context.

One of the main reasons for the issue of the UCC becoming so debated, and which is the argument used by the Hindu communalists to back their demand for UCC, is the provision for such a common code in the Directive Principles of the Constitution. Many have questioned the lack of the fulfilment of this Constitutional ideal, and it has become a cause of conflict between the secularists and the communalists.

The provision for UCC is found in Part IV of the Constitution, that is the Directive Principles of State Policy. The Directive Principles were included by the framers of the Constitution to bring about a desired pattern of socio-economic changes, in the light of the change in the relationship between the state and its citizens. While the Fundamental Rights are justiciable and enforceable by law, the Directive Principles are non-justiciable. Nevertheless they are extremely important since they specify the duty of the state towards the citizens.
Article 44 of the Directive Principles gives expression to the goal of a UCC. It declares: “The state shall endeavour to secure for the citizens a uniform civil code throughout the territory”.

The UCC refers to the legal unification of civil code of different religious communities. The idea of a UCC was first introduced in the national political debate in 1940 by the National Planning Committee (NPC) appointed by the Congress. The sub-committee formed to determine the role of women in independent India suggested the idea of a uniform code to the NPC. And in its report presented in August 1940, the NPC recommended the idea of a UCC. Such a UCC was envisaged to be an optional code initially but which could replace the different personal laws gradually. Around the same time some leaders of women’s organisations like the All-India Women’s Conference (AIWC) also suggested the formulation of a UCC. The efforts of the AIWC efforts had led to some legislation securing women’s rights within marriage during the thirties. However the Charter of Rights prepared by AIWC had a mention of reforms in personal laws but did not extend the demand of a UCC.²

The inclusion of a UCC in the Indian Constitution was first proposed by Minoo Masani in the Constituent Assembly. As a member of the sub-
committee on Fundamental Rights, Masani suggested that “the State should be made responsible to enact a UCC in order to break down the barriers between various communities”. While Masani, Hansa Mehta and Dr. Ambedkar voted in favour of this move for a UCC, a majority of the sub-committee voted against it.

In the Minutes of Dissent presented by Minoo Masani, Hansa Mehta and Rajkumari Amrit Kaur, one finds a clear voice in favour of a UCC. This discontent was, however based on the idea of an integrated nation and ‘nationhood’. The report said: “One of the factors that has kept India from advancing to nationhood has been the existence of personal laws based on religion which keeps the nation divided into water tight compartments in many aspects of life”. During the Constituent Assembly debates K. M. Munshi held “that there was nothing sacrosanct about personal laws as they covered secular activities alike inheritance and succession”. Dr. Ambedkar argued that India had achieved a common criminal code but the civil law was diverse. He held this diversity to be in violation of the Fundamental Rights, which declared that there could be no discrimination between citizens.
The debates on UCC in the Constituent Assembly illustrate that Congress leaders influenced by Nehruvian secularism desired a UCC and felt that it was essential as a part of India's secular identity. However, Muslim members of the Assembly opposed this idea saying that the source of the Muslim personal law was the Koran and the laws could not be altered by the state by means of any legislation. Thinking that the time was not ripe for a UCC and that the consent of the Muslims could gradually be obtained, the provision for a UCC was put into the non-justiciable Directive Principles.

As the debates in the Constituent Assembly depict, a uniform code was conceptualised initially for the basic purpose of national integrity. However, since the members of the Constituent Assembly could not decide the feasibility and desirability of such a code, especially for a traditionally heterogeneous society like India, it was thought best to put the provision for a UCC under the Directive Principles.

Later in 1974, the Report of the Committee for the Status of Women in India, *Towards Equality*, also recommended the formulation of a UCC. It declared:

The absence of a uniform Civil Code in the last quarter of the 20th century, 27 years after Independence, is an incongruity that...
cannot be justified with all the emphasis that is placed on secularism, science and modernisation. The continuance of various personal laws which accept discrimination between men and women violate the fundamental rights, and the Preamble to the Constitution which promises to secure to all citizens 'equality of status', and is against the spirit of national integration and secularism.

The committee therefore recommended an “expeditious implementation of this Constitutional directive by the adoption of a Uniform Civil Code”.

While the demand for a UCC was premised on the argument for national integrity, and the concern for gender-justice, as is visible in *Towards Equality*, resistance to the UCC was based on the grounds that the imposition of the UCC would destroy the cultural identities of minorities. The recognition and preservation of these cultural identities was seen as important for a democracy. This argument is seen not only in the Constituent Assembly debates over UCC, but also in a similar debate during and after the Shah Bano case, which I shall discuss in the following section. As Menon opines: “The UCC debate remains poised on the polarity of State and community, rendering invisible the axis upon which it turns, that of gender”.
One of the major hurdles in accepting the national integrity argument for a UCC is that it presumes the reformed nature of Hindu laws, while assuming that other communities still follow retrogressive laws. Most scholars have however challenged the assumption of the gender-just nature of the reformed Hindu personal law. The Hindu personal law was reformed in the mid-1950s by passing a series of laws, which created a new Hindu personal code. However assuming it to be gender-just would be more that just misleading. Parashar notes that this codification of Hindu laws also led to the process of creating a 'Hindu' identity, which was used to describe those who were not Muslim, Christian or Parsi.

5.2: The Shah Bano Case

The debate over the Uniform Civil Code (UCC) and personal laws resurfaced in Indian politics and in the agenda of the IWM in 1985, after the Shah Bano controversy sparked off. Since then it has continued to engage the attention of contemporary IWM. Shah Bano was a seventy five year old Muslim woman whose husband had abandoned her. She filed a case for maintenance under section 125 of the Criminal Procedure Code, which provides for maintenance to women "to prevent vagrancy due to destitution". 
While Shah Bano’s claim to maintenance was still being considered by the court, her husband, Mohammed Ahmed Khan, an advocate by profession, divorced her using the triple *talaq*. The Indore Magistrate’s Court ruled that Shah Bano was entitled to maintenance under section 125 of the Criminal Procedure Code (CrPC). The amount was fixed to a meagre Rs. 25 per month. The Madhya Pradesh High Court raised the amount to Rs. 179.50. Mohammed Khan however appealed to the Supreme Court that the judgement of the High Court had exceeded its jurisdiction and violated the Muslim personal law as defined by the *Shariat*. Radha Kumar notes that Khan made his contentions on the following grounds: “First, that as a Muslim he was bound primarily by Islamic law; second, that as maintenance from a husband is related to the laws of marriage and divorce, which in his case fell under Muslim Personal law, Shah Bano’s application should be judged by this law and no other; and third that if marriage, divorce and maintenance regulations fell under personal law, then criminal law should not enter the picture at all”.

As a result of these contentions, by the time the case appeared before the Supreme Court, the distinction between maintenance on destitution (section 125 CrPC) and maintenance on divorce (falling under personal law) was highly obscured. Kumar further notes:
By virtue of [the above distinction] the distinction between criminal and civil law was also blurred: at the same time, criminal law was banished from the territory of maintenance. Finally, the entire problem of female destitution was itself placed outside the purview of the court, on the grounds that the text of personal law did not deal with it.  

The Supreme Court passed a judgement upholding Shah Bano’s right to maintenance under section 125 of CrPC. Shah Bano’s counsel had cited two verses from the Koran depicting that providing maintenance was the duty of the ‘righteous’, and based on this the Court ruled that Shah Bano had the right to maintenance also under the Muslim personal law. Moreover the Court also declared that section 125 transcended personal laws. Most importantly the Court stated that women have been subject to unjust treatment and hence it urged the government to frame a common civil code, which would be applicable to all communities.

As a reaction to this judgement the ulama (Muslim scholar-priests) issued a fatwa (proclamation) that the judgement had violated the teachings of Islam. The provisions under the Muslim personal law are considered to be proclaimed by God himself, and the Court had ruled against these...
provisions. As a result of the wide publicity given to the fatwa, the issue took the form of a communal agitation. However to understand why the Shah Bano case caused such an upheaval, one needs to look at the issue in the context in which it arose.

In 1984 the Vishwa Hindu Parishad launched an agitation demanding to build a Ram Temple in the place where the Babri Masjid stood in Ayodhya. The issue of Babri Masjid and the Shah Bano case began to be seen as an attack on the Muslim community by the Hindu fundamentalists. The threat of Hindu communalism seemed especially strong after the November 1984 Hindu-Sikh riots following the assassination of Indira Gandhi.

As a result the judgement in the Shah Bano case was deemed as an onslaught on the identity of a religious minority community. Thus there were demands for legislative changes in section 125. In August 1985 G. M. Banatwala, a Muslim League MP put forward a Bill to exclude Muslim women from the purview of section 125. In the beginning the ruling Congress Party opposed the Bill arguing that section 125 was intended to prevent vagrancy and was not in violation of any personal law as such. However this stand of the Congress cost it a number of Muslim constituencies in the state elections of 1985. As a consequence, the Congress
announced that the government would consider a Bill as suggested by Banatwala.

There were protests and demonstrations against the Bill by liberal Muslims, feminists and social reformers. However the communalisation of the Shah Bano case placed constraints on the Muslim liberals. Many liberal Muslims had earlier demanded for a reform in the Muslim personal law. But the agitation in the Babri Masjid issue saw no protest or opposition from the Hindus and this made the Muslims feel vulnerable to the Hindu majority. This resulted in the pro-reform Muslims also supporting the Bill.

The Bill was finally enacted in 1986 as the Muslim Women’s (Protection of Rights on Divorce) Act. Kumar observes:

For feminists, the agitation around Muslim women’s rights to maintenance consisted of a series of bitter lessons. Discovering the ease with which a ‘community in danger’ resorts to fundamentalist assertions, among which control over women is one of the first, feminists also confronted the ease with which the Indian state chose to accommodate communalism (by taking no action against the Vishwa Hindu Parishad agitation) and balance this by a concession to fundamentalism (allowing
personal law to cut into the application of uniform laws such as section 125).\textsuperscript{11}

The Shah Bano case gave a new dimension to the debate over UCC, that of gender justice. While the judgement in the Shah Bano case and the ensuing debate became a rallying point in the contest between the secularists and the Hindu fundamentalists, feminists pointed out that despite the formal equal citizenship granted to women, their realisation of this status, and of the rights connected therewith is affected by their membership of a community. Gender justice was thus stalled by one's membership of a particular community. The Muslim Women’s Bill had an impact on the question of women’s rights. Hasan notes how Muslim women who were unequal vis-à-vis Muslim men were now rendered unequal vis-à-vis other women in the absence of a reformed divorce law.

The debate over UCC in the light of the Shah Bano case also made apparent a tension inherent in the Fundamental Rights of the Constitution. Menon notes: “The bearer of rights is both the individual citizen and also the collectivity – the former is the subject of Arts. 14 to 24, which ensure the individual’s right to equality and freedom and the latter of Arts. 25-30, which protect religious freedom and the educational and cultural rights of
minorities". Thus Articles 25-30 grant religious minorities the right to be
governed by their own personal laws. This tension between the rights of an
individual and the collectivity present in the Constitution has specific
adverse implications for women. Menon notes:

Since these personal laws cover matters of marriage,
inheritance and guardianship of children, and since all personal
laws discriminate against women, the tension in Part III
[Fundamental Rights] of the Constitution is at one level a
contradiction between the rights of women as individual
citizens and those of religious communities as collective units
of this democracy.12

Similarly, Zoya Hasan also points out the problem inherent in the
Constitution. Hasan observes:

The Constitution provides for the religious liberty of both the
individuals-and association of individuals united by common
beliefs, practices and discipline. This has given rise to tensions
between two conceptions of rights, the rights of individuals
and the claim of communities.13
At the time of Independence, when communalism had broken loose, one way of integrating the minorities was by recognising them as members of a religious community. One aspect of this integration was the continuance of personal laws as a part of the legal structure. This was a way of recognising minority identity. Hence despite their being the most disadvantageous to women, these personal laws were allowed to function without any reform. As Hasan notes: "While these safeguards [for minorities] are important, no effort has been made to ensure that they are not monopolised by the most conservative elements in the society".14

Questions of women's rights have entered into a complex situation especially when a basically liberal Constitution like India's has allowed religious personal laws to continue as a part of its legal system. This was done with the basic intention of 'national integration' and 'communal harmony', overlooking the fact that most personal laws discriminate against women. It thus turns out to be a paradox for gender justice. On the one hand, the Constitution guarantees formal equality to women, and provides for non-discrimination on the basis of sex. However on the other, the all-important sphere of family law is left to be governed by codes that explicitly discriminate against women. The continuance of such discriminatory laws suggests that women are denied the fundamental right of equal protection of
laws guaranteed by the Constitution. Martha Nussbaum observes: “It is less than ideal for India to guarantee women all sorts of rights in the Constitution and then turn the all-important sphere of family law over to codes that explicitly deny women the equal protection of the laws”.

The Hindutva demand for a UCC, and the minorities’ opposition to it, is also based on a problematic within the Constitution. On the one hand Hindutva forces demand the formulation of a UCC, asking the Indian state to uphold the Constitutional guarantee of equality and non-discrimination on the basis of religion. On the other, the minorities demand the continuation of their respective personal laws as a part of the Constitutional guarantee of safeguarding minority rights.

The Constitution, on the one hand, guarantees legal equality to all citizens and on the other seeks to safeguard the religious rights of minorities. Such group specific rights are not viewed as privileges, according to the Indian Constitution, but as safeguards to minorities against a larger majority. This stand in fact defined the Indian notion of secularism. This idea of secularism has often been under attack from Hindu communalists. They have most severely attacked the State under the Congress government for appeasing minorities, especially Muslims to generate a vote bank in the name of
secularism. Hasan remarks: “The controversy over the UCC provides the BJP with a crucial means of challenging the ideological legitimacy of the secular state”.16 This has brought into effect a dialogue between Hindu rights claims and secular rights claims, wherein the debate over UCC is primarily debated as secular state versus religious community.

Thus in the coming years feminist were also faced, as Kumar notes, with “questions of secularism; its definition and practice, particularly by the state; and its relation to religious freedom”.17 In 1986 a petition was jointly organised by feminists, social reformers and Far Left groups. Among other things it argued that all personal laws have unjust provisions for women, which has resulted in an unequal and subordinate position for women in all religious communities. It was thus being suggested that religion should govern the relationships personal laws.

Kumar observes:

As against this, the government definition of secularism appeared to be radically different. According to Prime Minister Rajiv Gandhi, “Secularism is the right of every religion to co-exist with another religion. We acknowledge this by allowing every religion to have its own secular laws”.

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This implied that personal laws were secular. It also implied that while on the one hand all religions had the right to representation within the law, on the other they had the right to make their own laws. Kumar observes: "While to a certain extent these rights were not new, the supremacy they accorded to personal law reaffirmed the colonial codification of religion-based family laws and ran counter to the Constitutional promise of offering alternatives to personal laws and moving toward uniform rights".¹⁹

Any discussion on the UCC I feel would be incomplete without considering the confrontation between the Hindu rights claims and the secular rights claims. Moreover the idea of citizenship that forms the core of any secular state also bears an impact on the debate. According to Menon:

The three elements of citizenship, rights and justice are inextricably articulated with one another in the context of a modern democracy. Justice is to be ensured by the winning, granting and protection of rights, which are held by the citizen. This citizen is unmarked by any other identifying markers than that of ‘citizen’ itself – this is precisely what is supposed to give the category the potential to ensure justice.²⁰

Thus an examination of justice, rights and citizenship in the context of the present political system in India becomes important to my study.

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The present Indian political context is marked by what could be called the crisis of secularism. On the one hand, the Hindu communal forces challenge secularism and on the other, the state is urged to protect minority rights. It is within this context that feminists need to relocate and rethink the issue of justice for women. The interconnectedness between gender justice, rights and citizenship and the present challenges to the notion of citizenship itself, places the question of justice for women at a precarious edge. The notions of rights and citizenship have to be realigned according to the needs of dynamic political scenario. Moreover, the very concept of justice has come under severe scrutiny from feminists.

The complexity of the relationship between gender justice, rights and citizenship is made apparent in the context of the debate over the UCC. Several scholars have explored the ways in which the three elements of justice, rights and citizenship are articulated in modern democracy. The idea of an unmarked and abstract ‘citizen’ holding a set of inalienable rights is a marked feature of modern democracy. Justice then is linked to the protection of rights held by the citizen. But when the presence of
differences, of community for instance, stalls the status of a citizen and the rights thus held, citizenship is required to re-constitute along the axis of this difference. With the increased recognition that ‘differences’ are not to be overcome but used as a part of democratic discussion, the concept of citizenship needs to be repositioned within the new context.

The initial feminist demand for a UCC sought to highlight the discriminatory nature of personal laws which disadvantage women. The demand from feminist groups and women’s organisations was for reform of these laws, and UCC was seen as an embodiment of a non-sexist and secular code. However developments in Indian politics demonstrated that women’s identity is inextricably linked to community identity and a demand for changing women’s position in any form is considered a threat to the community. The concepts of rights and citizenship are further complicated by a complex relationship between women and community, where community identity is created and maintained through women. Moreover while the debate enables us to probe into questions about rights and citizenship, it also raises some more profound questions “exploring whether we need to reconsider the particular way in which citizenship in modern democratic theory is understood to be the basis for justice”.22
However before exploring the relationship between justice, rights and citizenship, it is important to glance at the relationship between secularism and citizenship in the present political context. After Independence while Pakistan adopted a state religion, India was determined to be a secular ‘nation’. Such a ‘nation’ had to be created by bringing together all communities and by making them equal before law. Nonetheless it was realised, as Tambiah notes that “India was pluralistic in religion, language and customs, and that it was necessary for the Indian state ... to be accommodating of religious diversity, while observing even-handed neutrality”. 23

Such considerations came to define the Indian notion of secularism. Secularism was thus defined, not merely as the separation of religion from politics, as in the western sense. Rather, it came to suggest that while the state will not associate itself with any faith, equal freedom would be given to all religious functions. Moreover, the state would not discriminate on the grounds of religions nor shall it extend patronage to any religion.

According to Menon, secularism in India did not merely relate to the state-religion relationship. It went further in that it “severed the purpose of mediating three key aspects of the anti-imperialist project of the Indian
elites: (a) bourgeois democracy, which here was about the interrelations among communities, individual citizens and the state at different levels, (b) social justice, to the extent that equality in a formal legal sense, for example, through the abolition of untouchability, was necessary for this project and (c) capitalist transformation of the economy through the creation of the mobile and unmarked citizen”.24

These three aspects have defined the ‘secular’ in India and the criticisms of such a notion of secularism have come from various factions: from the left to the Hindu communalists. Moreover the rights of a citizen as implied by this secularism then come to be defined within the set of specific arrangements of the above mentioned factors. Hence according to Menon: “‘Secularism’ has been the term which stands in for the entire modernising project of the Indian elites and has never been only about the relationship between the state and religion”.25

The notions of rights and citizenship have thus come to be defined along the lines of this definition of secularism. A ‘citizen’ is defined on the one hand as marked by religion, gender or caste and on the other as unmarked and abstract. This tension bears an implication on the notion of rights as well. The Fundamental Rights allow that an individual can ‘follow’ and
profess' any religion and each religion is given the right to preserve its own culture and identity.

The simultaneous provision of legal equality to individuals and of minority rights to a collectivity that the Constitution guarantees, as discussed in the previous section, has repercussions for the concept of citizenship in India. The state is expected to be both, a neutral arbiter among religious communities and also an agent of social justice within communities. Moreover while the notion of secularism separates religion from the public arena, it also enjoins upon the state to regulate religious practices. The complexity of the concept is magnified in the light of Hindutva politics and its critique of secularism. According to Kapur and Cossman: “The legal and political concepts of secularism and freedom of religion are currently the sites of a discursive struggles for ideological hegemony”.

Over the years political discourse in India has largely centred on the individual, community and the state. The interface between community and state has given rise to what could be called the ‘crisis of secularism’ in India. Tambiah defines this crisis as “a challenge to the Indian state’s responsibility and mandate to preserve its secular character”. This crisis is exemplified in the aftermath of the Shah Bano judgement. After the judgement on the
Shah Bano case, the state was asked to protect religious boundaries in two different ways. Firstly, there was a demand from Muslim religious spokesmen to exempt minorities from the application of the Criminal Procedure Code and secondly there was a demand from Hindu communalists for the formulation of a UCC.

Hasan points out the way in which the disadvantaged position of Muslim women under the Muslim personal law was used to critique secularism. She notes that issue of the backwardness of Muslim personal law and the discriminatory and exploited position of women therein was displaced by the focus on the problem of secularism in India. The status of the Muslim women came to be demonstrated as the drawback of Indian secularism. Thus Hasan observes: “The backwardness of Muslim women became the hope for launching the most trenchant critique of the state and its appeasement of minorities”.

Hindu communalists attack the state for protecting minorities under the garb of secularism, while secularists critique Hindu communalism as threatening the notion of the abstract citizen that the Constitution upholds. The absence of any other identifying markers is supposed to give the category of citizen the potential for ensuring justice. However such a
definition of citizenship endorses adherence to values of universalism. The creation and sustenance of false universalisms has resulted in exclusions of various kinds, for instance, the exclusion of working class, non-white races, women and colonised people from the rights of a citizen. Hence several critiques of 'abstract citizen' have challenged the exclusion of these groups from the values of citizenship.

However Menon finds that both the Hindu right claims and secularists in fact share the same argument – the protection of the abstract citizen. Thus demands made by Hindu communalists for a UCC when seen in this light, favour the rights of the abstract citizen. Hence Menon argues that Hindu communalism does not attempt to mark the citizen with 'Hinduness' but rather to erase all markers of difference. The endeavour for such an erasure of difference is what renders the category of citizenship its oppressive and exclusionary character. While feminist scholars have asserted the desirability of the recognition of difference for gender-justice, the erasure of markers of difference contravenes this.

Therefore what Hindu communalism actually does is to offer an alternate axis for the construction of the citizen. It does not negate or challenge the
ideal of abstract citizenship. In this regard, Menon finds both Hindu communalism as well as secularism as homogenising forces. She says:

The highly centralised capital intensive and high technology based development model adopted by the Indian elites requires the homogenous subject constructed by the discourse of citizenship. In response, the struggles against being marginalized have involved a positing of particularity and specificity against the universalising thrust of development discourse.  

In fact all citizens of India are guaranteed the Fundamental Right of equal protection of laws, irrespective of caste, class, sex or religion. Yet any government would face a problem if it wishes to impose general laws on matters such as welfare, health, fundamental rights or protection of children if they do not coincide with religious institutions or practices.

While the debate over the UCC has come to be dominated by the arguments for national integrity and legal equality, one of the most important implications that the debate has had is regarding the concepts of rights and citizenship. As mentioned earlier, the issue has highlighted the tension between the rights of a citizen and those of a community. The
Constitutional right to equality is substantiated by the public policy for equality by the state. For instance, the state policy of affirmative action or reservations for the Scheduled Castes was with an aim to reinforce and enhance equality as a right. Hasan however notes that when the question regards gender equality, which is enshrined in the Constitution, there is no policy to support or enhance this equality. Rather equality for women is stalled in the light of the conflicting claims of women’s rights and those of a cultural community.30

The pre-eminence of a cultural community and its importance in the construction and definition of identity has profound implications on the concept of citizenship. Hasan notes that the problem for citizenship arises when it is possible to construct more than one identity for members of the same community.31 This precisely has given rise to the conflict between the cultural claims of a community and women’s rights of equal citizenship. In a bid to safeguard community identity the state completely ignored the question of gender justice. Drawing from Mansfield, Hasan comments: “At issue is a contextualised notion of citizenship in which community identities are paramount, in contrast to notions of equality before law, equality of opportunity, or equality of treatment”.32 The passing of the Muslim Women’s Bill exemplifies this primacy accorded to community identity over
women's rights, where some citizens were exempted from the application of criminal law, which governed the others.

Nonetheless feminist scholars believe that this conflict between the claims of communities and women's rights cannot be reconciled easily. Most cultures are characterised by ideologies that encourage the continuance of oppressive gender practices, which hamper the rights of the individual members of the community. Hasan remarks: "By privileging community rights over the principle of equal rights, minority rights often reinforce existing hierarchies and gender inequalities within the group by restricting individual choice in the name of cultural integrity". By doing so it thwarts the capacity of the communities and cultures to survive changes. Moreover Hasan also notes how just one feature, the personal law, is considered as defining the community. It is essential to realise the underpinnings of paternalism of the state and of the community in appropriating the personal law as a primary distinctive feature of a community.

The debate over the UCC revolves round this conflict between the rights of a religious minority to cultural autonomy and a separate civil code as a guarantee of cultural identity on the one hand, and the claims of the state to articulate and realise the common good of all on the other. What seems to
be ignored in the entire debate however is the question of women’s rights, the concern for which is confined to the feminists and the Left parties. The Muslim leadership focuses on legal issues, linking women and family life to Islamic legal identity and also defends the definition of Muslim community as a legal entity. The government on the other hand defends the legislation on the ground that it conforms to the wishes of the Muslim community. While doing this, the state endorses the primacy of community rights over citizenship and thus it limits the application of its own laws by excluding certain citizens from the rights, which are available to others. Thus the role of the official state discourse in safeguarding community identity also becomes significant.

In contemporary times, the reality of community identity cannot be denied. Yet Menon feels that feminists need to reject the same because the rights that a community demands for itself from the state, like autonomy, selfhood and access to resources, is denied by the community to ‘its’ women. What exists today is a triangular relationship between the state, the community and the individual, where women as individuals have to often forsake their rights as citizens for preserving collective rights held by the community. Moreover in this discourse on the rights of an individual and those of a community, one needs to note that community too is marked by exclusions.
As the Anveshi Law Committee stated:

We hold that the women's question cannot be separated from the notions of 'democracy', 'equality', 'secularism' and 'modernity', which are under contestation at present. We also believe that the women's movement will have to evolve a new form of politics that will among other things, seriously engage with issues of caste and religious community that have risen today.34

In the above discussion I have tried to bring out the significance of the debate over UCC to the concepts of secularism, rights and citizenship and its implications for gender justice. In the constantly changing Indian political context we find these concepts acquiring new dimensions. Citizenship forms the basis for a secular state. The idea of an individual as an unmarked and abstract citizen supersedes all other identity in the eyes of the state. However the Indian state has often illustrated the primacy of community identity over that of a citizen. According to Hasan religious communities are constituted in relation to the state and by the political processes related to the state. Moreover as Agnes argues: "Any suggestion for reform in family laws which sets out to redefine gender relations within marriage and the
As mentioned earlier gender justice concerns did not surface initially since the entire debate over UCC was being projected in terms of secular ideas versus communal ones. However many feminist theorists and activists have unravelled the question of justice for women in the debate over UCC. Many have also pointed out that UCC is incapacitated in furthering gender-justice due to its appropriation by communal forces. More importantly they have also suggested certain alternatives to UCC, some of which I examine below.

5.4: Some Feminist Alternatives to UCC

In the present political condition, the question of women's rights is subordinated to majoritarianism and minoritarianism. Under such conditions, it becomes imperative to make a conceptual shift in the way family laws have so far been envisaged. There is a need to change the terms of the debate and rethink the whole issue from a broader perspective based on democratic principles.
Most feminist activists and theorists today do not favour a UCC. Rather they recommend such a set of common civil code that could be have equal support of all communities. Some others favour reform within personal laws as an immediate step towards gender-justice. Others advocate reforms through legislations. However before reviewing these positions as alternatives to UCC, I find it necessary to examine the inherent lacunae in UCC as an instrument in bringing about justice to women.

As discussed in earlier in this chapter the initial demand for UCC rested on the idea of integration of communities for the achievement of a modern nation-state. Moreover it did not consider the social differences within the society, and even sought to transcend them in the realm of rights. Hence what it attempted was bringing about uniformity in personal laws through legislation without unifying social life. In 1975 while the Committee on the Status of Women in India highlighted women’s rights it evidently did not distance itself fully from the national integrity argument. Thus over the years the question of women’s rights has either been underplayed or used as a rhetoric.

The difficulty in the conceptual separation of women’s equality from unity of the nation has several consequences. Firstly the nation seemed to swing
between the ideal of uniformity and the Constitutional guarantee of religious freedom. Secondly the opposition between gender justice and freedom of religion arose due to the contradiction between the justiciable and non-justiciable clauses in the Constitution. This opposition has been interpreted by communalists in a sectarian and patriarchal way. Thirdly it focussed on the differences between communities rather than on the inequalities between men and women of a community. Thus it did not actually question the injustices existing within personal laws. Lastly what set of laws would come under UCC was never made clear.

However according to me an important conceptual flaw in the original idea of UCC was that it compartmentalised civil law into private and public. The public aspect deals with the world of business, contracts and property while the private aspect deals with family and domestic matters. Thus all attempts to address the discrimination against women in the private sphere have (been) left unchallenged the public/private dichotomy. 

According to Menon, the post-emergency period “marks the beginning of rethinking in the women’s movement on the legitimacy of the national integrity argument”. Since then there has been considerable debate within the women’s movement, and some feminists and women’s groups have
suggested gender-sensitive or gender-just alternatives to the UCC. Some of these alternatives have been discussed below.

a) Compulsory Common Code: Saheli, a women’s organisation of Delhi, has put forth an idea for such a common code which would be equally applicable to all women. Saheli however, differentiates such a code from the UCC as defined in the BJP agenda. It argues that plurality of laws creates conflicts and more importantly works against the interests of women. Thus women should strive for a compulsory common code that would override personal laws. Personal laws however would continue to govern the cultural and other aspects of life that do not offend guarantee of equality by the Constitution. Thus while the rights of minorities would not be hindered, women would find some protection under such a common code.

b) Reforms from within: The argument here is that if a common or an all-encompassing code is brought about, it would in fact prove disadvantageous for women. Since the today’s society is polarised on communalism, women would have to suffer as a part of a community and also as women. Thus the efforts should be to bring about gender justice by introducing reforms within personal laws. This would
protect women since the community would not face the fear of losing its identity. As Menon comments: "The appropriate strategy in this situation is for communities themselves to undertake to rationalise those aspects of their personal laws that are in conflict with Constitutional provisions for equality, or which fail to pass the test of equity, justice and good conscience." 38

c) Legislation of Areas Not Covered By Personal Laws: This considers aspects of both of the above-mentioned positions. It is formulated by Majlis of Bombay and the All-India Democratic Women's Association (AIDWA), which is the women's wing of the CPI (M). Majlis has pointed out that UCC has come to mean reform of Islamic customs. However more important aspects like the protection of economic rights of women on marriage and divorce are never contemplated upon. Also it would not be possible to work out an all-encompassing code for a society so diverse and multicultural as India. Thus law reform can be used as a tool. In addition to supporting initiatives for reform within communities, Majlis holds that feminists should also aim for certain smaller, specific and focussed statutes that would address some immediate problems of women. Such areas would include domestic violence and economic rights. Since such.
areas do not fall under personal laws, there would be no problem of communalising the issue, and the rights of women could also be protected. AIDWA also finds immediate reforms possible only in those areas that do not directly conflict the existing personal laws.

**d) Optional Gender-just Code:** Due to an unclear nature of a common code, it is first necessary to evolve such a code. Ordinarily, personal laws would prevail, but if a dispute arises, women would have the choice of opting for this code, which would ensure their rights better than personal laws.

**e) Reverse Optionality:** This position is proposed by the Working Group on Women’s Rights (WGWR). Menon says that using this argument the WGWR hopes “to break through the impasse created by the polarisation of state/community and community/women”. Critiquing the UCC, WGWR says that UCC was based more on the ground of national integrity than on a genuine concern for women’s rights. On the other hand, patriarchal pressures have blocked the way for reforms within personal laws.
The WGWR thus proposes reform in three ways:

i. The preparation and institutionalisation of a comprehensive gender-just package of legislation that will cover equal rights for women not just within the family but also in the sphere of work.

ii. All citizens of India would be covered by this framework of common laws at birth or on taking citizenship.

iii. All citizens would also have the right to choose to be governed by personal laws if they so desire, while retaining the option to revoke this choice that they have made at some future date in order to return to their birth-right of gender-just laws.\textsuperscript{39}

In the present situation people are born into personal laws and can opt for secular laws that exist in areas covered by personal laws. But taking such a decision is difficult for women in the present circumstances. However if a person is born into secular gender-just laws, the interests of individuals especially those of women can be better protected. According to reverse optionality position, if there ever occurs a conflict between people covered by different laws the secular law should prevail over personal laws.
The most important tool to secure justice for women is the concept of rights. As the WGWR notes: “Since women’s oppression is located in organised and unorganised collectivities be it state, family or workplace, only a concept of rights can address these in their totality.”\textsuperscript{40}

However the group also notes that mere existence of formal rights would not facilitate the doing away of public-private dichotomy, or illegitimating hierarchical gender relations. Unless certain deeper structural changes occur “formal equality will not end oppression of women and might result in new forms of patriarchal control within the family, community, workplace and the state.”\textsuperscript{41}

Since women occupy vulnerable positions within the family and community, it is difficult for them to exercise their choice. But the WGWR feels that “it is possible that through the institution of legal rights in the political, economic and social arenas, hierarchical gender relations will be challenged, patriarchal authority would be undermined and the public-private dichotomy could be eroded”\textsuperscript{42}

The public-private dichotomy has been the target of all major feminist critiques of mainstream political theory. The major arguments over UCC .

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and the subsequent positions of the state over personal laws has in fact reinforced this dichotomy. On the one hand religion, which is considered a private sphere, has been excluded from public policy so as to exclude reforms within personal laws by the state. On the other, it has ignored the fact that this supposedly private matter acts as a site of discrimination and injustice. The reluctance of the state, not only in formulating a UCC as directed by the Constitution but also in reforming personal laws simply depicts patriarchal interests in upholding the public-private dichotomy.

Thus unless a redefinition of the public and the private takes place, justice for women would remain elusive and distant. There is also the need to rethink about those democratic principles that allow the infringement of women’s rights by community or group rights. Though minority rights are equally important for a healthy democracy, it cannot be denied that public policy should involve such measures that protect women’s rights as individuals within a community or group. This calls for the focus being shifted to working towards the non-negotiable and inalienable rights of citizens as distinct from an all-encompassing UCC.

At several junctures in the history of the IWM the struggle for women’s rights by reframing laws has been perceived as an attack on minorities.
Women's struggle thus has to be cautious of women's rights not being pitted against community or minority rights. Moreover campaigns for women's rights should also include the demand for widening the base of economic rights. As discussed in Chapter 4 women's campaigns were successful in bringing about changes in laws concerning rape and dowry. Agnes however feels that such campaigns are particularly lacking in the realm of economic rights. She argues: "Focussed and sustained campaigns around specific issues might prove more effective than following the mirage of an all-encompassing, ideal Uniform Civil Code".43

Moreover the suggestions of various women's organisations to bring economic rights at the centre of matrimonial reforms indicate a shift in the women's rights discourse. But Agnes argues, "a theoretical framework regarding the nature of matrimonial rights under different economic systems has not yet evolved".44 I endorse Agnes' views on enhancing economic rights for women within family law reforms. Considering the changing economic system and the unequal distribution of resources within a family, it can be said that women's empowerment would be incomplete without economic rights. Agnes opines:

Since patriarchy is reinforced through economic structures, be they of feudalism, capitalism or post-capitalism, a solution to
the oppression and destitution of women would have to be found primarily in the context of the economic structures and the state responsibility towards women within these structures. It is these directions that efforts of family law reform need to be forged.\textsuperscript{45}

The debate over UCC in the IWM has had critical implications on the concepts to rights, citizenship and secularism in India. The concept of inalienable rights has been stalled by concerns of community. Community concerns have also affected the notion of citizenship. The discourse has made apparent the tension between the rights of a citizen and those of a community. Gender justice in a multicultural society would be difficult to achieve unless the struggles for inter-group and intra-group equality are seen as related. It is important to view justice within groups as important as justice among groups. Moreover as Menon notes communities are set up in independent dynamics with each other. Thus while resolving the question of justice for women, based on cultural differences of a communities, we must also recognise “the more radical and the destabilising implications of communities constituting themselves continuously around difference axes, of which the ‘cultural’ is only one”.\textsuperscript{46}
Following Hasan I feel that the goal of gender equality cannot be postponed indefinitely, and common laws should be secular and democratic. These laws should provide justice for women within a wider egalitarian perspective, and hence need to be formulated from a non-religious position. Since it is through rights as citizens that women can participate actively in the democratic process, the concept of inalienable rights should be the guiding principle for these common and secular laws. Such laws have to take into consideration both the similarities and difference, by which they can preserve diversities without adversely affecting the overarching principles of equality and justice. They should provide spaces for the negotiation of conflicting claims without sacrificing rights related to citizenship. And while justice, rights and citizenship need to be redefined in the newer contexts, the recognition of differences and the impact on these differences in restricting the social, economic and political capacities of women cannot be overlooked.
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17. Radha Kumar, 'From Chipko to *Sati*', p. 78
18. Radha Kumar, 'From Chipko to *Sati*', p. 79
19. Radha Kumar, 'From Chipko to *Sati*', p. 79
20. Nivedita Menon, 'State/Gender/Community', p. PE-4
21. Refer for instance Nivedita Menon, 'State/Gender/Community'.
22. Nivedita Menon, 'State/Gender/Community', p. PE-3
24 Nivedita Menon, ‘State/Gender/Community’, p. PE-5
27 Stanley Tambiah, ‘The Crisis of Secularism in India’, p. 418
29 Nivedita Menon, ‘State/Gender/Community’, p. PE-6
30 Refer Zoya Hasan, ‘Religion and Politics in a Secular State’, p. 284
31 Zoya Hasan, ‘Religion and Politics in a Secular State’, p. 284
33 Zoya Hasan, ‘Religion and Politics in a Secular State’, p. 286
34 Anveshi Law Committee, p. 453
35 Flavia Agnes, Law and Gender Inequality: The Politics of Women’s Rights in India (New Delhi: Oxford University Press, 1999), p. 209
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38 Nivedita Menon, ‘Women and Citizenship’, p. 257
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40 Working Group for Women’s Rights, ‘Reversing the Option’, p. 1182
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42 Working Group for Women’s Rights, ‘Reversing the Option’, p. 1182
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47 Refer Zoya Hasan, ‘Uniform Civil Code and Gender Justice in India’.