

FAMILY LAW REFORM: A PROPOSAL

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I INTRODUCTION

India is the largest country in the world by population with a personal law system. India is not alone though, one-third of the world's population lives under personal law systems.¹ The continued operation of personal law in India, as well as in other jurisdictions, is controversial. Despite efforts to reform India's personal law system, complex political, social and religious considerations have resulted in an impasse. Those who oppose the existing personal law system in India generally advocate replacing it with a uniform civil code (or UCC). While the constitutional status of the personal law system is complex,² the call for a UCC is given weight by the constitutional directive 'to secure for the citizens a uniform civil code throughout the territory of India'.³ Consistent with this constitutional directive, a uniform civil code has received political support from the Bharatiya Janata Party. They cite, as reasons for their support, the gender-related shortcomings of the existing personal laws,⁴ as well as the personal system's tendency to promote religious communalism⁵ and to undermine national unity.⁶

These calls for the enactment of the uniform civil code, have however been met with concerns, questions and opposition from various quarters. Some oppose uniform family laws because of concerns that they would reflect Hindu norms to the exclusion of others.⁷ Others are concerned about the negative subtext about Indian Muslims that accompanies calls for the UCC:⁸ that they are 'obscurantist and fundamentalist',⁹ 'barbaric' and not as committed as other groups to 'the cause of national unity and integration'.¹⁰ Many fear therefore that supporting the enactment of uniform family

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¹ Y. Sezgin, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India* (Cambridge University Press, 2013) 3.

² See F. Ahmed, *Religious Freedom under the Personal Law System* (OUP 2016) 33-35.

³ Constitution of India (1950) art 44.

⁴ Bharatiya Janata Party (2004) *Vision Document 2004*

<www.bjp.org/index.php?option=com_content&view=article&id=136&Itemid=548> accessed 26 August 2015.

⁵ See R Bajpai 'The Conceptual Vocabularies of Secularism and Minority Rights in India' (2002) 7 *Journal of Political Ideologies* 179, 184.

⁶ Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims*, (Oxford University Press 2011) 117.

⁷ M. Nussbaum, M, 'India Implementing Sex Equality Through Law' (2004) 2 *Chicago Journal of International Law* 35-58; Alok Kumar, 'Uniform Civil Code: A Heedless Quest?' (2016) 25 *Economic and Political Weekly* 10.

⁸ Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims*, (Oxford University Press 2011) 117-18; R. Kapur and B. Cossman (eds), *Subversive Sites: Feminist Engagements with Law in India* (Sage 1996) 260.

⁹ Z. Hasan, 'Governance and Reform of Personal Laws in India' in I. Jaising, *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia*, (Women Unlimited 2005) 363

¹⁰ Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims*, (Oxford University Press 2011) 163.

laws may be read as endorsement of this negative subtext relating to Indian Muslims.¹¹ Others have questioned how any meaningful public debate around the uniform civil code can occur in the almost complete absence of knowledge about its content;¹² there is indeed an element of absurdity in this when we reflect on the heat and passion with which this debate – on a Code with no agreed-upon content – is conducted. Those who oppose the enactment of the uniform civil code, and defend the personal law system, appeal to religious freedom,¹³ minority group autonomy and the danger that the UCC amounts to forced and oppressive¹⁴ assimilation.¹⁵ These competing views have resulted in a stalemate that seven decades of debate, activism and advocacy have not overcome.¹⁶

These debates in India are not without parallel in other jurisdictions. There are similar debates in some jurisdictions which share India's personal laws (e.g. Pakistan and Bangladesh)¹⁷ and jurisdictions which are influenced by the Indian personal laws (e.g. Uganda, Kenya and South Africa).¹⁸ The *millet* system in Israel — where religious communities are governed in some respects by state-recognised religious leadership — raises human rights concerns similar to those raised by the personal law system.¹⁹ Even in countries without personal law systems, the use of religious norms in family law, whether by informal decision making bodies, or through alternative dispute resolution mechanisms, has been controversial. Fierce debate was sparked in Canada by the establishment of an 'Islamic Institute of Civil Justice' to conduct state-recognized arbitration according to *sharia*,²⁰ in the UK sparked by remarks of the former Archbishop of Canterbury, Rowan Williams,²¹ and Lord Chief

¹¹ Redding, J. (2006) 'Human Rights and Homo-Sexuals: The International Politics of Sexuality, Religion and Law' *Northwestern Journal of International Human Rights*, 4, 436; R. Kapur and B. Cossman (eds), *Subversive Sites: Feminist Engagements with Law in India* (Sage 1996) 260.

¹² Alok Kumar, 'Uniform Civil Code: A Heedless Quest?' (2016) 25 *Economic and Political Weekly* 10. For a study of draft codes, see Flavia Agnes, *Family Law II* (OUP 2011) 170-182.

¹³ RV Williams, *Postcolonial Politics and Personal Laws: Colonial legal Legacies and the Indian State* (Oxford University Press 2006) 100-1.

¹⁴ J Spinner-Halev, 'Feminism, Multiculturalism, Oppression and the State' (2001) 112 *Ethics* 94-99; Noorani, A. G. 'Impossible Agenda', *Frontline* (11 June 2014) <<http://www.frontline.in/the-nation/impossible-agenda/article6097233.ece>> accessed 26 August 2015.

¹⁵ Z Hasan 'Introduction: Contextualising Gender and Identity in Contemporary India' in Z Hasan (ed), *Forging Identities: Gender, Communities and the State in India* (Westview 1994) xiii; G Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India* (OUP 1998) 107-108.

¹⁶ S Ahmed, 'Uniform Civil Code: A Dead Letter' (2006) 67 *Indian Journal of Political Science* 545; G. Larson, 'Preface' in GJ Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001) vii.

¹⁷ J Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 *IJLPF* 108 121; R. De, 'Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act' (2009) 46 *Indian Economic & Social History Review* 105.

¹⁸ Prakash A Shah, 'Attitudes to Polygamy in English Law' (2003) 52 *ICLQ* 369-400, 369, 371; PK Viridi, *The Grounds for Divorce in Hindu and English Law: A Study in Comparative Law* (Motilal Banarsidass 1972) 39-42; Christa Rautenbach, 'Phenomenon of Personal Laws in India: Some Lessons for South Africa' (2006) 39 *Comparative and International Law Journal of Southern Africa* 241.

¹⁹ M Galanter and J Krishnan, 'Personal Law Systems and Religious Conflict: A Comparison of India and Israel' in G Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana UP 2001).

²⁰ M Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Ministry of the Attorney-General, Ontario 2004) 3.

²¹ Rowan Williams, 'Archbishop's Lecture – Civil and Religious Law in England: A Religious Perspective' (2008) <www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective#Lecture> accessed 9 November 2011.

Justice Phillips²² on the place of religious alternative dispute resolution in the UK legal system, and in Australia by a call for greater recognition of Islamic norms.²³

This paper will reflect on the UCC debates and draw on the debates and developments in some of these jurisdictions to defend a model of reform to overcome the stalemate that has plagued India's personal law system. The next section of this paper will argue for reform principles which unsettle some assumptions which are prominent in the public debate. Section III will outline the central proposal defended by this paper. Section IV offers a study of how something akin to this proposal works in another jurisdiction. Section V argues that the proposal has important advantages, compared to the alternatives.

II. REORIENTING THE DEBATE

The UCC debate in India is deeply divisive and polarised. The battlelines of this debate encourage a number of widespread assumptions on both sides. One assumption is that uniformity is the highest virtue of any family law regime. Another is that we have to choose between a family law regime that is just to women, and one that is sensitive to religious and cultural difference; we cannot have both. A further assumption is that a good family law regime must exclusively focus on what state courts do, and that family disputes must be resolved by state courts. This section unsettles these assumptions.

A. *The myth of uniformity*

An assumption that saturates debates about the uniform civil code is that uniformity leads to better and more just outcomes for women. This assumption has been thoroughly undermined by researchers in this area.²⁴ As Flavia Agnes argues 'Rather than uniformity in law, women need an accessible and affordable justice system.'²⁵ Once we set aside the blinkers that keep us transfixed to the ideal of uniformity, other options emerge. One in particular, alternative dispute resolution – arbitration, mediation or conciliation – holds out great promise in family law disputes.

The constitutional directive to establish a uniform civil code does not preclude ADR, which has a settled place in India, and in other jurisdictions. Private arbitration, conciliation and mediation are recognised, facilitated and encouraged in many areas of law – including, to some degree, in family law.²⁶ Under Indian law, as in most jurisdictions, arbitration is binding on the parties to it.²⁷ Mediation

²² Lord Chief Justice Phillips, 'Equality before the Law' (East London Muslim Centre, 3 July 2008) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf> accessed 9 October 2011.

²³ See, eg, Australian Federation of Islamic Councils Inc, *Submission No 81 to Australian Parliament Joint Standing Committee on Migration* (Parliament of Australia 2011) <www.aph.gov.au/house/committee/mig/multiculturalism/subs/sub81.pdf>; Tim Soutphommasane, 'Avoid the Hysteria but Reject Sharia' *The Australian* (21 May 2011) <www.theaustralian.com.au/news/opinion/avoid-the-hysteria-but-reject-sharia/story-e6frg6zo-1226059621354> accessed 10 October 2011; Patricia Karvelas, 'Imam Wants Sharia Law Here, but A-G Says No Way' *The Australian* (18 May 2011) <www.theaustralian.com.au/national-affairs/imam-wants-sharia-law-here-but-a-g-says-no-way/story-fn59niix-1226057823890> accessed 10 October 2011; 'Even Muslim Jurists are Divided about what Sharia is' *The Australian* (23 May 2011) <www.theaustralian.com.au/news/opinion/letters-to-the-editor/story-fn558imw-1226060688189> accessed 10 October 2011; Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not To Recognise* (Melbourne University Press 2014).

²⁴ Flavia Agnes 'Liberating Hindu Women' (2015) 10 *Economic and Political Weekly* 14.

²⁵ *ibid.*

²⁶ Malhotra, A. and R. Malhotra 'Alternative Dispute Resolution in Indian Family Law – Realities, Practicalities and Necessities' (2010) 3 *Journal of the International Academy of Matrimonial Lawyer* 3; *Aviral Bhatla v Bhawna Bhatla* 2009 (2) KLJ 116 (SC) <www.indiankanoon.org/doc/320406/> accessed 26 August 2015. The

and conciliation are normally nonbinding²⁸ unless parties sign a settlement agreement binding them to outcome. Judicial decisions reveal a range of family law disputes that have been referred to binding arbitration.²⁹ The provisions in the Family Courts Act, 1984 regarding counsellors may also point to an appetite for alternative forms of dispute settlement.³⁰

ADR as a means of dispute resolution in family law has been adopted in other jurisdictions as well. In Australia, a cultural shift away from adversarial litigation and towards autonomous dispute resolution was facilitated by the establishment of government-funded Family Relationship Centres in 2006.³¹ These centres were designed to offer ‘highly visible entry points into the service system’, providing information, referral advice, and dispute resolution services to families in conflict.³² Furthermore, mediation has been integrated into the formal litigation process; engaging in mediation ‘is now a requirement before parents can apply for parenting orders’.³³ In the United Kingdom, while the jurisdiction of civil family courts, particularly to make orders with respect to the welfare of children, cannot be ousted by contractual agreement,³⁴ there has been significant movement towards ADR as a genuine alternative to court processes for resolving family disputes. For some time now, efforts have been made to encourage divorcing couples to use mediation.³⁵ There have been recent moves that encourage the use of arbitration in family law as well. The Institute of Family Law Arbitrators (IFLA) has a family arbitration scheme which provides guidelines for the exercise of arbitration by specialist trained arbitrators, as well as a framework for training for those who will act as arbitrators.³⁶ Its proponents emphasise its capacity to bring confidentiality and flexibility into the resolution of family disputes.³⁷ ADR in family law is therefore an unexplored yet promising avenue for reform in India.

B. The demands of diversity

Families display diversity in their constitution, norms, values and practices. When disputes arise, families have different needs. A one-size-fits-all approach to family law is not suited to supporting family members to resolve their dispute while protecting their interests and respecting their values. Across jurisdictions, there is growing acknowledgement that family law must be sensitive to

Bhatla judgment notes how effective the Delhi Mediation Centre (www.delhimediationcentre.gov.in) was at helping the parties reach a settlement.

²⁷ Arbitration and Conciliation Act 1996, s 30(2). The arbitral award is final and binding on the parties and persons claiming under them: Arbitration and Conciliation Act 1996, s 35.

²⁸ N. Atlas, S. Huber and W. Trachte-Huber (2000) 5–6, *Alternative Dispute Resolution: the Litigator's Handbook*, Chicago: American Bar Association 309–11.

²⁹ For example, *Chiranjilal Srilal Goenka v Jasjit Singh* (2000) Supp 5 SCR 313; *Syed Ghouse Mohiuddin v Syed Quadri* AIR 1971 SC 2184.

³⁰ S. 6; Flavia Agnes, *Family Law II* (OUP 2011) 299.

³¹ W Kennett, ‘It’s arbitration, but not as we know it: Reflections on family law dispute resolution’ (2016) 30 *International Journal of Law Policy and the Family* 10.

³² L Moloney et al, ‘Evaluating the Work of Australia’s Family Relationship Centres: Evidence from the First 5 Years’ (2013) 51(2) *Family Court Review* 234–49.

³³ W Kennett, ‘It’s arbitration, but not as we know it: Reflections on family law dispute resolution’ (2016) 30 *International Journal of Law Policy and the Family* 10.

³⁴ Farrah Ahmed and Jane Norton, ‘Religious tribunals, religious freedom, and concern for vulnerable women’ (2012) 4 *Child and Family Law Quarterly* 363–388.

³⁵ Jonathan Herring, *Family Law* (Pearson 2007) 128.

³⁶ Lucinda Ferguson, ‘Arbitration in Financial Dispute Resolution: The Final Step to Reconstructing the Default(s) and Exception(s)?’ (2013) 35(1) *Journal of Social Welfare and Family Law* 2.

³⁷ *ibid* 4, 8–11.

culturally and religiously diverse users.³⁸ This is important because family law plays an important role in ensuring that minorities, including children, have access to meaningful means of practicing their culture and religion. If minorities are compelled to follow state family law, and the law solely reflects the norms of the majority, minorities are disadvantaged to the extent that they are denied the opportunity to resolve their dispute in a way that aligns with their cultural and religious norms.

Sensitivity to needs of minorities is important because, as is too often forgotten, state regulation is not the only game in town. If the state system of family justice is not sensitive to people's cultural and religious values, there are alternate fora for the resolution of their dispute including *khap panchayats* (caste-based village councils)³⁹ and religious bodies such as the *Dar ul Qaza*,⁴⁰ which will be discussed further below. If the state system wants family disputes to be resolved under its supervision, it must be responsive to the demands of diversity.

III. THE PROPOSAL

This paper defends a two-pronged plan for the reform of family law in India, first proposed by one of us in earlier work.⁴¹ First, consistent with the constitutional directive, a uniform family law (or UCC) should be enacted in India that is sensitive to the needs, norms, culture and aspirations of minority groups. Second, and simultaneously, Indian family law should give people the *option* of using fair and just religious alternative dispute resolution mechanisms for their disputes. The outcomes of such religious alternative dispute resolution would be recognised by the state, and, through state-imposed threshold requirements, substantive and procedural safeguards would be guaranteed.⁴²

A Religious ADR

Religious alternative dispute resolution refers to arbitration, mediation or conciliation conducted according to religious norms. Not all disputes currently governed by the personal law system would fall within the ambit of religious ADR. For instance, statuses, such as marriage, divorce or adoption, are not usually subject to religious ADR.⁴³ But many would. In particular, religious ADR could be used to resolve the financial terms of a divorce, disputes relating to the maintenance and division of marital property, and disputes relating to inheritance.⁴⁴

The contractual norms governing religious ADR — the procedure to be followed, the person(s) who will arbitrate, mediate or conciliate, and the norms by which the dispute will be resolved — can be decided privately by the parties. Indeed, this degree of autonomy is a celebrated characteristic of ADR

³⁸ In Australia, this has led to calls for a stronger recognition in family law of the importance of culture to children's identities: Family Law Council, 'Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds' (February, 2012) 77

³⁹ Maarten Bavinck, 'Caste Panchayats and the Regulation of Fisheries along Tamil Nadu's Coromandel Coast' (2001) 36 *Economic and Political Weekly* 1088; Pratiksha Baxi, Shirin M Rai and Shaheen Sardar Ali, 'Legacies of Common Law: "Crimes of Honour" in India and Pakistan' (2006) 27 *Third World Quarterly* 1239.

⁴⁰ See Jeffrey A Redding, 'Institutional v Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems' (2010) 6(1) *Journal of Islamic State Practices in International Law* 1. TK Rajalakshmi, 'In the Name of Honour, Again' *Frontline* (16 October 2013) <<http://www.frontline.in/social-issues/in-the-name-of-honour-again/article5229025.ece>> accessed 11 July 2014.

⁴¹ Farrah Ahmed, 'Remedying Personal Law Systems' *International Journal of Law, Policy and the Family* (forthcoming).

⁴² *ibid.*

⁴³ Farrah Ahmed, *Religious Freedom under the Personal Law System* (Oxford University Press 2016) 172; *Malka v Sardar* AIR 1929 Lahore 394.

⁴⁴ Farrah Ahmed, 'Remedying Personal Law Systems' *International Journal of Law, Policy and the Family* (forthcoming) 6; *Chiranjilal Srilal Goenka v Jasjit Singh* (2000) Supp 5 SCR 313

generally, providing for flexibility of process, and party autonomy.⁴⁵ But the parties could also approach existing organisations which conduct religious ADR. These organisations may have standard-form contracts which assist parties in establishing an ADR mechanism to resolve their dispute. They can also provide access to arbitrators, mediators, conciliators, legal practitioners, social workers and other state actors such as the police.⁴⁶

Perhaps the most important component of this proposal is that outcomes of these disputes would be state-recognised. It is primarily through the process of recognition that the state can ensure that the religious ADR process meets certain minimum thresholds of fairness and justice.

B. Safeguards and state recognition

In previous work, Farrah Ahmed has argued for the need to create safeguards before recognising religious ADR.⁴⁷ First, it is important to ensure that those who participate in ADR do so freely, particularly given that account of dispute resolution systems in India shows that they are sometimes coercive, using tactics of social boycott, shame, intimidation and ridicule.⁴⁸ Second, it is important to ensure that religious ADR which is recognised by the state does not use norms which disadvantage women. Third, it is important that the processes used in religious ADR are procedurally fair. To address these concerns, it is important to introduce safeguards which prevent the recognition of ADR processes which are not fully consensual, unjust or unfair.

Safeguards for consent are already built into Indian law. Contract law doctrines of unconscionability, coercion and undue influence offer some protections for ADR agreements, or any contract, award or settlement arising out of the ADR, which were not entered into freely.⁴⁹ Further safeguards must be developed which would allow courts to intervene even in circumstances that do not rise to the level of unconscionability.⁵⁰ Indian courts should, like the Supreme Court of Canada, should be alert to ‘circumstances of oppression, pressure, or other vulnerabilities’ when reading ADR agreements, and should ‘assess the extent to which enforcement of the agreement still reflects the original intention of the parties’.⁵¹

The state must not recognise ADR processes, whether religious or not, which are procedurally unfair, based on unjust norms, or which have a patently unjust outcome. Beyond this, steps must be taken to foster, encourage and assist organisations such as Bharatiya Muslim Mahila Aandolan, the All India Muslim Women’s Personal Law Board, sharia courts and ‘jamaats’ run by women across the country.⁵² These organisations develop gender-just interpretations of religion for religious ADR⁵³ and

⁴⁵ Lucinda Ferguson, ‘Arbitration in Financial Dispute Resolution: The Final Step to Reconstructing the Default(s) and Exception(s)?’ (2013) 35(1) *Journal of Social Welfare and Family Law* 2,10.

⁴⁶ Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press 2011) 54.

⁴⁷ Farrah Ahmed, *Religious Freedom under Personal Laws* (OUP 2016) 179; Farrah Ahmed and Senwung Luk, ‘How Religious Arbitration Could Enhance Personal Autonomy’, *Oxford Journal of Law and Religion* (2012) 1(2):424; Farrah Ahmed ‘Remedying Personal Law Systems’ *International Journal of Law, Policy and the Family* (forthcoming).

⁴⁸ *ibid* 329.

⁴⁹ Indian Contract Act 1872; See generally Natasha Bakht, ‘Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women’ (2004) 1 *Muslim World J of Human Rights* 1, 3.

⁵⁰ Farrah Ahmed ‘Remedying Personal Law Systems’ *International Journal of Law, Policy and the Family* (forthcoming).

⁵¹ *Miglin v Miglin* [2003] 1 SCR 303. [81], [87].

⁵² Farrah Ahmed ‘Remedying Personal Law Systems’ *International Journal of Law, Policy and the Family* (forthcoming).

⁵³ Aawaaz-e-Niswaan, (2011) ‘Our Work’ <<http://www.niswaan.org/our-work.html>> accessed 26 August 2015.

have demonstrated a willingness and capacity to offer practical assistance to Indian women — conducting ADR and assisting with legal aid — as well as advocating for legal reform.⁵⁴ The state must license or accredit their ADR services, so that the outcomes of their processes are readily recognised and enforced by state courts. Equally the state could refuse to accredit or license religious ADR organisations which do not operate on gender-just principles. The state must also offer free or subsidised training to these organisations on the threshold requirements their processes must meet for state recognition and enforcement. Finally, the state must fund such organisations, and publicise the availability of their services.

This, in brief, is the proposal. To flesh out in more detail what the religious ADR prong of the proposal would look like, the next section offers the example of a recent case involving religious ADR in the UK. The case is used here merely by way of illustration, of how religious ADR has worked with appropriate safeguards in another jurisdiction.

IV. AN ILLUSTRATION

The case of *AI v MT*⁵⁵ concerned the marital separation of two observant orthodox Jewish people. In 2006, the parties were married separately in both a Jewish religious ceremony and a civil ceremony.⁵⁶ The parties had two children between 2006 and 2009. During this time, the parties lived together in Israel, Canada and London.⁵⁷ The parties disagreed about whether they had indefinitely moved to Canada at the time of the birth of their second child — the father's case was that they had; the mother's case was that they were living in Canada for a limited time to reconcile marital issues that had arisen.⁵⁸ The second child was born on 23 July 2009.⁵⁹ After the child's birth the father returned to Canada, and had booked tickets for the mother to return shortly after. The mother did not return though, and informed her husband by email that she would not be returning to Canada.⁶⁰ The crux of the legal dispute (at least as it initially arose) concerned the habitual residence of the parties and the children; the mother had brought a 'prohibitive steps order' against the father, and the father had served an application under the Hague Convention on Child Abduction.⁶¹ Prior to their listed hearing, the parties undertook extensive negotiation culminating in an agreement to explore alternative dispute resolution overseen by a New York *Beth Din* (rabbinical tribunal).⁶² The parties ultimately agreed to refer all disputes between them to arbitration by a senior rabbi, Rabbi Geldzehler of the New York *Beth Din*.⁶³

The English Court agreed to endorse the use of arbitration, but made clear that it did not oust the jurisdiction of the Court to address any issues raised by either party at any time.⁶⁴ The arbitration took 18 months to complete, and the New York *Beth Din* handed down an award covering all issues

⁵⁴ Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press 2011) 291–2.

⁵⁵ [2013] EWHC 100 (Fam) ('*AI v MT*')

⁵⁶ *AI v MT* [2013] EWHC 100 (Fam), [3].

⁵⁷ *ibid* [3]–[7].

⁵⁸ *ibid* [5].

⁵⁹ *ibid* [6].

⁶⁰ *ibid*.

⁶¹ *ibid* [7].

⁶² *ibid* [8].

⁶³ *ibid* [10].

⁶⁴ *ibid* [15].

between the parties, financial and child-related.⁶⁵ Justice Baker agreed to make court orders approving the award reached in arbitration, and the agreement thus became binding at law.⁶⁶

Many aspects of this case are interesting illustrations of how the proposal defended in this paper could work. First, the case provides an example of how courts could supervise religious ADR to ensure that it meets threshold conditions. Justice Baker observed that ‘insofar as the court has jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, that jurisdiction cannot be ousted by agreement’.⁶⁷ His Honour was, in this case, willing to endorse the arbitration process because it had the support of both parties in the dispute.⁶⁸ However, the jurisdiction to either accept or reject the decision reached by the *Beth Din* always remained with the English courts. This illustrates the importance of court supervision of ADR. State recognition of ADR processes and outcomes is the chief mechanism through which the standards of religious ADR would be guaranteed. If religious ADR lacks court oversight (and conditional state recognition), it would have little advantage over the *khap panchayats* and *Dar ul Qaza*, leading to a real risk of disadvantage for women and vulnerable people. *AI v MT* stands as a useful demonstration of how the authority of religious ADR organisations can be carefully qualified without undermining the many benefits of this form of dispute resolution, including party autonomy and the opportunity for religious practice and expression.

Second, *AI v MT* highlights the importance of vetting the organisations that provide religious ADR. Before agreeing *prima facie* to endorse the process of non-binding arbitration, Justice Baker enquired into: the principles adopted by the rabbinical authorities in resolving disputes, in particular as to the care of children; whether a Get (Jewish divorce) granted by the *Beth Din* in New York would be recognised elsewhere; and the status of the arbitration award.⁶⁹ Furthermore, while his Honour was prepared to accept the *Beth Din* as an arbitrator in this case, he held that it ‘does not, however, necessarily follow that a court would be content in other cases to endorse a proposal that a dispute concerning children should be referred for determination by another religious authority. Each case will turn on its own facts’.⁷⁰ This view resonates with proposal in this paper to license only gender-just religious ADR providers. Justice Baker’s endorsement of the New York *Beth Din* is illustrative as it was based a careful evaluation of the principles and procedures of dispute resolution employed by the *Beth Din* to ensure just outcomes and fair processes.

Third, *AI v MT* provides an example of how the court could intervene at various stages of the dispute resolution when necessary. In the words of Justice Baker, ‘the court was able not only to accommodate the parties’ wish to resolve their dispute by reference to their religious authorities, but also buttress that process at crucial stages’.⁷¹ For instance, a necessary precondition of the parties’ use of arbitration was Justice Baker’s willingness to grant an adjournment of their hearing date. Similarly, the Court was able to effectively intervene in the arbitration when it became apparent that the arbitration was going to take longer than the anticipated ‘matter of weeks’.⁷² The prolonged nature of the arbitration was of concern because, for its duration, it was undecided to what extent the father would have contact with his children. While the *Beth Din* made an arbitral order with respect to the

⁶⁵ *ibid* [22].

⁶⁶ *ibid* [23]–[25].

⁶⁷ *ibid* [27].

⁶⁸ *ibid* [12].

⁶⁹ *ibid* [12]–[14].

⁷⁰ *ibid* [33].

⁷¹ *ibid* [35].

⁷² *ibid* [17].

interim contact issue, it was subsequently referred to the Court via telephone, and Justice Baker made an order affirming the arbitral order.⁷³ A final demonstration of cohesion between the arbitration and court processes was the timing of the Court's final order. For cultural reasons, the mother would not agree to the arbitral award of the *Beth Din* unless the father had given the Get; while equally the father would not give the Get unless the Court approved the arbitral order. To resolve this impasse, Justice Baker agreed to convene a hearing indicating that the arbitration award would be accepted at English law, at which point the parties went through the ceremonial process for the giving of the Get. The Get was given and the order of the Court was finalised.⁷⁴ In the judge's words, one of the merits of the approach taken in this case was that '[t]he parties' devout beliefs had been respected' by following 'process rooted in the Jewish culture to which the families belong', and yet [t]he outcome was in keeping with English law.⁷⁵

There are other cases, besides *AI v MT*, which are instructive in thinking about how courts could use state-recognition (coupled with supervision) to foster a fair and just regime of religious ADR. To mention just one more, which dealt with a slightly different issue, in *Miglin v Miglin*,⁷⁶ the Supreme Court of Canada considered a spousal separation agreement. In doing so, the Court assessed both whether the agreement was freely entered into by the parties (addressing concerns of coercion of vulnerable parties), and whether the substance of the agreement reflected the object and purpose of the Canadian family legislation.⁷⁷ The Court thus acknowledged the need to 'recognize economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown; apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time'.⁷⁸ If it were a condition for the enforcement of every ADR agreement, including a religious ADR agreement, that it be substantially compliant with conditions such as those identified by *Miglin*, then agreements which are unfair or discriminatory are highly unlikely to be enforced. The consequence would be a family law system which affords citizens access to a dispute resolution process that contains the boasted efficiency, flexibility and autonomy of religious ADR, while ensuring just outcomes and processes.

It is important to be clear however, that neither *AI v MT* nor *Miglin* are being held up as ideal judgements which set up a path that Indian reform must follow. Rather, these cases are merely illustrations of how a state-recognised scheme of religious ADR may be structured: in particular, how religious ADR agreements and processes may be held to threshold requirements in order to be recognised or enforced by the state.

V. COMPARATIVE MERITS OF THE PROPOSAL

A. Accessible justice for women

⁷³ *ibid* [18].

⁷⁴ *ibid* [23].

⁷⁵ *ibid* [37]. The judge quoted Archbishop Rowan Williams' 2008 lecture 'Civil and Religious Law in England: a Religious Perspective': 'citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship' (at [35]).

⁷⁶ *Miglin v Miglin* [2003] 1 SCR 303.

⁷⁷ *Miglin v Miglin* [2003] 1 SCR 303, [81]–[82], [87].

⁷⁸ *ibid* [20].

When assessing the merits of the proposal in this paper therefore, it is important to identify its appropriate comparators. We must assess the merits of the proposal against the options currently available to women. The first option is to go to court. State courts do not currently offer disputing family members, particularly women, accessible and affordable justice. The reasons for this are complex. Courts may be perceived as “distant, [and] alien”.⁷⁹ There is also distrust and “fear among the general public regarding courts and lawyers”.⁸⁰ Courts are not seen as efficient or accessible options for dispute settlement since it is widely known that litigation in courts involved intractable delays and great expense.

These reasons are why many prefer another option: cheaper, speedier and more accessible dispute resolution from bodies such *khap panchayats* (caste-based village councils)⁸¹ and religious bodies such as the *Dar ul Qaza*.⁸² These bodies have little or no interaction with the state courts⁸³ and that they therefore lack important safeguards – access to courts, natural justice, prospective rules, and other threshold requirements – available to those governed by the religious ADR mechanisms proposed in this paper.

Thus it is important to appreciate that religious ADR, with the safeguards proposed here, has significant advantages compared to either state courts or informal dispute resolution bodies like *khap panchayat*. It has the potential to offer dispute resolution which meets the requirements of accessibility and affordability, as well as justice and fairness.

B. Religious community and religious expression

A recent survey on Muslim women’s views on Muslim personal law conducted by the Bharatiya Muslim Mahila Aandolan found that:

An overwhelming 86% wanted the community-based legal dispute resolution mechanism to continue but at the same time wanted the functionaries to be made accountable to law and to principles of justice. They wanted the government to help ensure this accountability through a legal mechanism. While 88.5% women wanted a partnership between the court and the qazi, 90% women wanted qazis to be brought under legal accountability mechanisms⁸⁴.

This overwhelming view accords remarkably closely with the proposal defended here. Religious ADR would allow community-based organisations to retain a role but hold them “accountable to law and to principles of justice” using the ‘carrot’ of legal recognition.

⁷⁹ Flavia Agnes, *Family Law II* (OUP 2011)112.

⁸⁰ Flavia Agnes, *Family Law II* (OUP 2011) 58.

⁸¹ See Maarten Bavinck, ‘Caste Panchayats and the Regulation of Fisheries along Tamil Nadu’s Coromandel Coast’ (2001) 36 *Economic and Political Weekly* 1088; Pratiksha Baxi, Shirin M Rai and Shaheen Sardar Ali, ‘Legacies of Common Law: “Crimes of Honour” in India and Pakistan’ (2006) 27 *Third World Quarterly* 1239.

⁸² See Jeffrey A Redding, ‘Institutional v Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems’ (2010) 6(1) *Journal of Islamic State Practices in International Law* 1. TK Rajalakshmi, ‘In the Name of Honour, Again’ *Frontline* (16 October 2013) <<http://www.frontline.in/social-issues/in-the-name-of-honour-again/article5229025.ece>> accessed 11 July 2014.

⁸³ See Jeffrey A Redding, ‘Institutional v Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems’ (2010) 6(1) *Journal of Islamic State Practices in International Law* 1. TK Rajalakshmi, ‘In the Name of Honour, Again’ *Frontline* (16 October 2013) <<http://www.frontline.in/social-issues/in-the-name-of-honour-again/article5229025.ece>> accessed 11 July 2014.

⁸⁴ Noorjehan Safia Niaz and Zakia Soman, ‘Muslim Women’s Views on Muslim Personal Law’ (2015) 51 *Economic and Political Weekly* 83, 85.

Indeed, as one of us has previously argued, religious ADR leaves room for more autonomy for religious communities than the personal law system currently does.⁸⁵ For under personal law, communities are unable to determine the boundaries of their own membership,⁸⁶ the norms by which they are governed, or their representatives and leaders.⁸⁷ In each case, the state assumes sole decision-making responsibility. If community organisations offered religious ADR, the state would recognise processes which were created and developed by religious communities, and are up to them, within the limits of the thresholds discussed earlier.

Moreover, since religious ADR allows parties to resolve disputes based on religious norms aligned with their beliefs, it facilitates religious practice.⁸⁸ Parties could use religious ADR to ensure that their disputes are settled according to their own religious norms, and, furthermore, settled by people that they trust to interpret those norms.⁸⁹ Heterodox religious individuals or groups could also set up religious ADR processes. It has the capacity to respond to diversity within religious communities, and allows competing interpretations of religious doctrine to flourish.⁹⁰ Further, those who reject religion or have no religious beliefs would be free to make ADR arrangements based on other norms, or indeed to follow uniform family laws. Thus, supplementing uniform family laws with religious ADR gives an opportunity to practice religion in family law matters to those who want it. This would allay the concerns about oppressive assimilation that are often raised against the enactment of uniform family law.

IV. CONCLUSION

The need for reform of our current system of family laws is clear: the rules of the personal law system are unjust, harmful, discriminatory against women, and contrary to constitutional guarantees of gender equality.⁹¹ At the same time, too many citizens lack access to affordable, speedy and accessible justice. This article has defended a proposal that seeks to address the stalemate that has arisen in Indian family law from the tension between a constitutional directive to enact a uniform family law, and the deep concerns about the UCC as well as how it is debated. The article has defended the implementation of a uniform family law in India supplemented by a well-regulated state-recognised regime of religious ADR. The hallmark of this proposal, setting it apart from informal dispute resolution systems already widely practiced in India, is that its outcomes would be recognised and enforced by the state if minimum thresholds of justice and fairness are met. The article defended this proposal by attempting to unsettle some assumptions that have become entrenched in the debate, through illustrative cases from other jurisdictions and by noting the significant advantages that the proposal has over its alternatives.

⁸⁵ Farrah Ahmed, *Religious Freedom under the Personal Law System* (Oxford University Press 2016) 170-185

⁸⁶ Farrah Ahmed, *Religious Freedom under the Personal Law System* (Oxford University Press 2016), chapter 6; Denise Réaume, 'Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation' (1995) 29 *UBC L Rev* 117, 121.

⁸⁷ R. Ahdar and I Leigh, *Religious Freedom and the Liberal State* (OUP 2005) 338-46.

⁸⁸ For further argument on this, see Farrah Ahmed (2016) *Religious Freedom under the Personal Law System*, Oxford: Oxford University Press 170-185; Farrah Ahmed 'Remedying Personal Law Systems' *International Journal of Law, Policy and the Family* (forthcoming).

⁸⁹ Farrah Ahmed (2016) *Religious Freedom under the Personal Law System*, Oxford: Oxford University Press 170-185

⁹⁰ Farrah Ahmed, *Religious Freedom under the Personal Law System* (Oxford University Press 2016) 176.

⁹¹ See generally, Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Law in India Series, OUP 1999); I. Jaising, Jaising I (ed), *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South India* (Women Unlimited 2005).