Drafting Gender Just Laws

Author(s): Nandita Gandhi, Geetanjali Gangoli and Nandita Shah

Source: *Economic and Political Weekly*, Oct. 26, 1996, Vol. 31, No. 43 (Oct. 26, 1996), pp. 2858-2860

Published by: Economic and Political Weekly

Stable URL: https://www.jstor.org/stable/4404704

Drafting Gender Just Laws

Nandita Gandhi
Geetanjali Gangoli
Nandita Shah

The debate around the uniform civil code has become polarised into pro-UCC, pro-BJP position versus a pro-personal laws and anti-UCC one, quite blurring the real problems about evolving gender just laws.

EVOLVING laws for women, whether for preventing atrocities on them or for gender justice, have always encountered problems and opposition. Early social reformers had to persuade a reluctant British raj as well as face a hostile Hindu orthodoxy. Later, the All India Women's Conference had to struggle within the nationalist movement to bring in new laws. The Hindu Code Bill was dubbed 'anti Hindu', vehemently opposed and watered down considerably. The Uniform Civil Code (UCC) as envisaged by some of the framers of the Constitution was meant to bring laws which would provide women with more favourable provisions in the areas of marriage, divorce, maintenance, custody and adoption. It was opposed on the grounds of religious freedom and interference with each community's personal laws.

Today the Hindutva forces, which have traditionally opposed any change regarding women's role and position, have placed the UCC on their political agenda. The debate has become polarised into a pro-UCC and pro-BJP position versus a pro-personal laws and anti-UCC position. This has pushed some groups within the women's movement to take a pro-personal law position or become programmatically paralysed. Rather than be caught in this unfortunate, limiting personal laws versus UCC discourse and acknowledging that there never is an 'opportune' time for women's issues nor an undiluted political commitment to gender justice by any political party, four groups decided to hold a workshop on 'Drafting Gender Just Laws' in Mumbai from May 30 to June 2, 1996.

At the outset, the four co-organisers, namely, the Human Rights Law Network, the Forum Against Oppression of Women, Lawyers Collective and the Kashtakari Sanghatana stated that it was not meant to formulate a UCC but discuss the contents of gender just laws. These laws could then be introduced as amendments in personal laws, as secular laws like the Special Marriage Act, or as an optional code. The 150 participants who had come from various parts of the country were mainly interested in information on different laws, sharing their drafts and visions of specific laws, introducing new laws, sharpening old debates on issues like customary laws and in discussing what could be gender just laws.

The structure of the workshop was a mix of lectures, small workshops on different issues and panel discussions. The first day began with a number of presentations on the history of codification of Personal Laws (Indira Jaisingh), Discrimination against Women in Personal Laws (Madhu Kishwar), specific problems in Hindu Personal Law (Lakshmi Paranjpe), in Muslim Personal Law (Muslim Satyashodhak Samaj) and in Christian Personal Laws (Jean D'Cunha) and on the little discussed issues of Tribal and Customary Laws (Pradeep Prabhu) and on Gay and Lesbian Rights (The Working Group).

On the second day, the Forum Against Oppression of Women presented their draft entitled Visions of Gender Just Laws which had been evolved through dialogue amongst Forum members and others from different groups. It is based on real experiences of women and formulated as a forward looking, idealist proposal for laws. Some of the more contentious issues discussed were as follows:

Legal texts have not defined marriage. The Forum departed from the conventional notions by seeing it as a contract for companionship which included as well as transcended the usual notions of marriage for procreation and a family. And it was not necessary that only formal relationships be considered marriage. Co-habitation which could be proven could also be seen as a contract. This gave the same rights to the co-habitee as the wife. There was some opposition to this proposal as it was felt that the second woman/wife should not get equal rights in matrimonial property rather she should be given only maintenance.

In most divorce cases, it finally does not matter who was wrong or how the marriage broke down. One of the partners would like to terminate the marriage and in that case the law has to make it as easy as possible without encouraging quick divorces and by maintaining the rights of women. The Forum proposed no fault divorces by mutual consent or as an irretrievable breakdown. However the separation period was more for men to prevent quick divorces. Property accumulated after marriage had to be divided equally between the partners and the custody of children had to be given with their welfare in mind. Divorce could only be finalised after all property and maintenance matters were settled.

One of the most debated areas was inheritance. Should women inherit from their natal families or from their matrimonial ones? Then how does one perceive the rights of single women? 'Visions' put forward the view that women and children, both boys and girls, should inherit from parents' property. If there were no immediate inheritors then the wealth should be placed under the social security funds of the state.

A strong criticism of the Forum's draft was that it was extending the same rights given to heterosexual couples/marriages to homosexual couples/marriages. Some participants felt that same sex relations were different and needed new laws.

The participants divided themselves into three workshops on violence, marriage and divorce and tribal laws.

The workshop on violence began with two organisations: Snehidi, Madras and Sakshi, New Delhi making presentations on their observations and experiences. It raised two important issues for debate. Snehidi felt that the family needed to be de-constructed and the social and legal hypocrisy surrounding it needed to be discussed. The matrimonial family as a rule was quite violent, basically unequal and unstable. The natal family and the home was a forbidden place for a married woman. There was an immediate reaction to this criticism of the family and many instances of support and sense of belonging were quoted. A few participants raised the issue of the misuse of Section 498 A for arresting violent husbands or in-laws. Like all laws, this one could also be misused but it still underlined that violence and/or inequality is very much a part of the glorified family.

Sakshi had formulated a draft bill, redefining rape and making some amendments to the laws pertaining to rape as they did not include the invisible area of child abuse. Legal procedure was one problem area. It was a traumatic experience for women and children who were made to give testimonies in court in front of the rapist and repeat them several times. Medical evidence was often missing because the police had not gathered it. The other was the interpretation of judges who mostly reduced the number of years for imprisonment, had no or little understanding of bodily integrity and were prejudiced by the woman's past sexual history.

The discussion in the workshop on marriage and divorce (organised by the FAOW) centred around the forms of marriage, age of marriage, prohibitory degrees, its registration and bigamous relations. Participants felt that marriage could not be seen only as a sacrament because then it would be undissolvable. Neither could it be seen as a contract because it assumed equality

between two partners which did not exist between men and women. The option was that it had to be deemed a contract between two unequal partners with women having some unrelinquishable rights. There seemed to be no logical or medical reasons for the difference in the higher age of marriage for men and a lower one for women. But the participants found it difficult to peg the age of marriage at either 18 years or 21 years.

The traditional belief is that marriage between close blood relations caused abnormalities. Today we have sophisticated technology to detect such abnormalities like the amniocentesis tests. Do we still need prohibitory degrees for marriage between individuals? There was a near-unanimous opinion for compulsory registration of marriage as it provided proof and ensured women their rights. Creating the required infrastructure and implementation of registration would have to be the state's duty.

Monogamy only exists as an ideal and principle in society. The numerous bigamous relationships present a challenge to law. How can it deal with second marriages without violating the rights of the first wife? Some participants were of the opinion that both women should have equal rights to maintenance and inheritance which might mean that in poor families the first wife would be deprived of a decent standard of living. Others felt that the second one could only have maintenance rights in case the marriage broke up. There were numerous cases of men specially NRIs, cheating women into marriage without revealing their first marriage. Instead of claiming maintenance, such cases could be treated as cheating and should be heard in the family courts.

The workshop on tribal and customary laws was organised by Kashtakari Sanghatana (Dahanu). Customary laws emerged amongst the tribals through an organic process between those who enacted laws and those who were affected by them. This process stopped about 150 years ago during the colonial period and the post-independence period. Today tribal society is patriarchal, disinherits women, and pressurises them to be subservient through customs such as witch-hunting. However, remnants of the older tribal and customary laws remain which give greater autonomy to women, freedom in marriage and divorce and the community elders include women. And these provide the basis for gender justice in customary laws. Legal reforms are necessary and important as are their implementation. This is possible only if women struggle for them. Participants felt that there should be a non-negotiable charter of women's rights. Codification can only be done with cultural sensitivity. And lastly every struggle for land rights, resources, self-rule and a fair development process should keep gender justice in mind.

The third day began with a plenary session on the remedies and the speedy implementation of family law. Asha Bajpai and Sarah Mathew in their presentation emphasised the need to make family courts a 'real' option to dispense gender justice. The low rate of disposal of cases, inaccessible and bureaucratic structure of family court was severely criticised. There were suggestions for bringing all family related disputes under the jurisdiction of the family court, abolishing court fees, setting up more counters to guide litigants, and set up referral services. All judges, lawyers and counsellors of the family court needed to be gender sensitised.

The three parallel afternoon workshops were on maintenance, adoption and custody; matrimonial property and inheritance; commercial sex workers, AIDS and the law. In the first workshop conducted by Marg and Saheli (New Delhi), there was a general agreement that the ceiling of Rs 500 in Section 125 Cr PC be increased substantially and that the notion of prevention of vagrancy be done away with. Maintenance should be calculated on the basis of the number of years of marriage, the wife's contribution in marriage, and the loss of income because of domesticity. The general approach of judges and society towards maintenance is that of a dole given to women and not as their right. However in fighting for maintenance, it is mostly true that women are never able to get it. So far it is considered the wife's duty to find the way of getting maintenance, appealing again in case of default, etc. For some women this becomes a serious problem. It was suggested that the state set up a maintenance fund which pays women on behalf of the husband in case he is destitute or unable to. The state should take over the responsibility of recovering maintenance from the husband if he is absconding or delaying payment.

The Maharashtra Adoption Bill came in for severe criticism. Adoption which is still surrounded by prejudice and social rejection needs to be promoted by making it child centred, gender just, secular and optional. It was discriminatory to have only the father as natural guardian. Participants were united in saying that guardianship should be joint.

The workshop on commercial sex workers, AIDS and the law (ARCON and Jean D'Cuhna) felt that women are discriminated twice over, as women and as sex workers with/without AIDS. The Immoral Traffic (Suppression) Act is hypocritical and discriminatory as it targets prostitutes but not their clients. Police raids are few and far between and only prostitutes are picked up whereas brothel-keepers and pimps go scot-free. A new, amended act has been enacted but it does not address the basic problems of preventing trafficking, the socio-economic problems of sex workers, or of rehabilitation. Participants felt that there should be a blanket penalisation which would act as a deterrent.

Should prostitution be decriminalised? Should it be treated as trade and/or as labour relations? On the other hand, decriminalisation would lead to its proliferation, increased violence against sex workers and more trafficking. Perhaps there should be a distinction between legalisation and decriminalisation of prostitution. Any suggestions on the eradication of prostitution, should first be followed with proposals and alternative plans. Compulsory testing for AIDS as suggested by the AIDS Bill, 1989 and the Goa Public Health (Amendment) Act, 1987 would only mean that the AIDS victim or HIV positive persons would go underground. Confidentiality is important, all testing should be voluntary and there should be an emphasis on pre- and post-testing counselling.

The Lawyers Collective (Mumbai) had formed a panel for the workshop on matrimonial property and succession rights with one of their own members, Indira Jaisingh, Madhu Kishwar (*Manushi*) and the Indian Law College Group (Pune). The discussion which followed these presentations dealt with the issues of inheritance, matrimonial home and matrimonial property.

It is necessary to de-link dowry and inheritance. The former is related to marriage and it cannot be used to deny or substitute inheritance. In communities where a large dowry is given, dowry murders still persist. Women are deprived of their inheritance through wills. So the right to will away should be restricted to half or one-third of the property. Women whould be trained to look after their property.

The participants felt that the matrimonial home acquired before marriage could not be considered matrimonial property. But the one acquired after marriage should be considered joint property. In Goa all property is considered joint but is actually controlled by the husband. In case of violence, the wife has to leave the joint property. There should be a facility of injunction to stay in the matrimonial home. In England one can officially register the matrimonial home making it easier to prove and claim. At present there is no law for matrimonial property. All property acquired by the husband and wife (after marriage) should be considered joint property. Gifts can be considered separate property and can be given to daughters at any time.

An evening plenary was held by Albertina on the Goa Code, some of its provisions and practical problems. The Goa Code is a series of laws which are uniform as well as optional, e g, there is one section applicable to 'genteel Hindus'. According to the Mankurian Law, daughters have no right over the dwelling

place. The Dowry Prohibition Act does not extend to Goa even though the dowry problem persists. Customary and personal law practices like polygamy, triple talaq, etc, continue. In theory, sons and daughters have an equal share in natal property but it can be circumvented by the provision for gifting the property to the son and/or relinquishing of rights for the daughters. Legally married men and women are joint owners of property but it is the husband's prerogative to handle to dispose of the joint property before the divorce.

In the evening there was an optional session on Gay and Lesbian Rights held by the Working Group (Mumbai) which was attended by about 25 participants. It began by tracing the history of homosexuality in ancient India to refute that it was a 'western' phenomenon. Criminal repression came with colonisation and continues today with the use of Section 377 of the IPC which is used to harass and convict homosexuals. Participants supported the repealing of the act.

Homosexuals and bisexuals are forced to assume an invisible face due to abuse, discrimination and legal negation of their relationships. Participants felt that Article 14 which talks about non-discrimination on the basis of various grounds should also include sexual orientation. Law should also recognise the rights of homosexuals to form families and have inheritance and other rights. One of the significant features of this workshop was the support it received from numerous participants as a struggle of marginalised people.

The final day began with a plenary on 'State, Religion and the Law' at which justice Jagirdar, justice Suresh, FASA (Madras) and Vasudha Dhagamwar (MARG, New Delhi) spoke on different aspects of laws applicable to state functioning, use of religion especially during elections, etc.

The afternoon was devoted to a discussion on strategies, a contentious issue that has so far been the focus of the debate around the UCC. Three positions were presented: reforms within personal laws; optional code; and compulsory code. Vasanthi Raman, an activist from Assam presented her position against the notion of a compulsory UCC. She suggested that an imposition of laws by the state was a negation of the rights of communities to carry on their religious and cultural beliefs, i e, it was a threat to pluralism. She pointed to the communalisation of the UCC by the Hindutva forces and the direct attack on the Muslim minority. Raman's stand was that the state cannot force change and people's voices have to be heard for reform and development. She put forward the view that while reforms within each personal law be encouraged there should be broad principles of non-discrimination which all communities have to follow.

Zoya Hasan and Uma Chakravarti from the Working Group on Women's Rights (WGWR) presented a different viewpoint. Their strategy was called 'reverse optionality' which meant that all women and men are born into a set of laws based on the principles of equality and justice. At any time, citizens can revert back to their personal laws if they so desired though such a reversion was not final or binding in future. WGWR thought that whilst communities and their leaders asked for self-determination and autonomy they denied them to their own women. The strategy of reverse optionality has to focus on creating, not laws but legal principles which are unalienable.

Ranjana Padhi (Saheli) presented the group's position on equal laws for all women. She felt that right wing resurgence and communalism has profoundly impacted the women's movement by leading sections of it to postpone the struggle for gender justice. Many groups within the women's movement have suffered a disenchantment with the legal process. Whilst it is important that alternatives to the legal process and legislative reforms be worked out, they cannot be totally dismissed as legal changes have aided women in their quest for justice. She felt that the community was more often than not represented by religious leaders and the voices of women were not heard. So far, these leaders had not given much thought to women's issues and their rights for over 40 years. The agenda for gender just laws cannot be indefinitely postponed.

There were numerous responses from the floor which ranged from sharp criticism to support. The workshop ended with a suggestion that a national coalition be formed by women's groups, human rights groups, NGOs and lawyers for gender just laws. It could hold follow-up workshops in different parts of the country on specific laws like adoption, divorce, etc. Secondly, it could monitor judgments by highlighting the favourable or unusual ones as precedents. It could have a newsletter for communication. Lastly, it could lobby for certain laws like the formulation of a matrimonial property law, and changes in the maintenance laws, guardianship laws, amongst others.

The CIA and Vietnam

M S Shivakumar

The declassified documents on the Vietnam war have further embarrassed the CIA, the prime American intelligence agency. While supporters of CIA have formed 'critic groups' and are calling for a revamp of the agency, this should also provide an opportunity to question the role and responsibilities of any intelligence agency, especially in war.

IN analysing the long and costly US entanglement in Vietnam, with its many tragic consequences, it is important to look at performance as well as policy. Whatever the wisdom of US intervention on the side of South Vietnam, the resulting immense disparity in strength and resources between the two sides would have suggested a different outcome. Yet why did a cumulatively enormous US contribution – on top of South Vietnam's own great effort – have such limited impact for nearly two decades? Why, almost regardless of the ultimate outcome, did US intervention entail such disproportionate costs and tragic side effects? Regardless of what one thinks of US policy in Vietnam, there was a yawning gap between its policy and its execution in the field. Granted that many failures of leadership at various times and at various levels marred the checkered history of US's involvement in Vietnam. But it is too simple to ascribe the Vietnam travail primarily to bad leadership that failed to come to grips with the unique situational characteristics. The reasons are many, complex, and interrelated. They include the unique and unfamiliar conflict environment in which US became enmeshed. They repeatedly misjudged the enemy, especially his ability to frustrate US's aims. Another constraint was the poor performance of US's intelligence network. The second reason was unknown for many years but now readily acknowledged.

The Pentagon Papers, now gradually declassified, amply document the persistent pessimism about non-Communist prospects and about proposals for improving them, almost unrelieved, often stark – and in retrospect, creditably realistic, frank, cogent – that runs through the intelligence estimates and analyses from 1950 through 1975. The declassified documents are full of perceptive insights, not just from intelligence or outside sources but from inside the US as well. As new documents are analysed, American intelligence agencies face more embarrassment, and many former and present officials are seeking cover to protect themselves.