

STRATEGIES FOR ADDRESSING DISCRIMINATION AGAINST WOMEN IN FAMILY LAW IN INDIA

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This paper traces the struggle for women's rights in the area of family law in India. Women in India, as no doubt elsewhere in the world, are not a homogeneous group. Their status within society and often in the law¹, varies inter-alia with class, caste, religion, age, marital status and sexual orientation. As a result the discrimination experienced by women is differential - it would vary, depending on the other possible sources of discrimination operating against a woman in addition to gender. Some of these multiple issues related to discrimination were foregrounded as a result of political developments over the past decade in India in relation to family laws. This has contributed to a shift in the parameters of the debate on women's rights in relation to the family law, from one based purely on gender to one that encompasses issues of minorities and religious identity for women, in addition to gender.

The attempts particularly in family law have been towards establishing optimum standards for gender equality but to also work within the religion/ community based options, which some women identify with more strongly and prefer to access. The focus of this paper is on the complex relationship between the discourse on women's rights and the larger political context influencing it. The paper therefore attempts to capture the women's rights strategies (evolved by the women's movement) and positions in response to the national level politics between majority and minority communities in India, rather than give a descriptive narrative of the discriminations in the different religion based family laws.

The Status of Family Laws:

The family laws or 'personal' laws (as they are referred to in India) are based on the different religions and customary practices in the country; and regulate marriage, divorce, adoption and succession. As these laws are based on religious norms relating to the institution of marriage and the family, they reinforce the unequal gender relations that discriminate against women. Although this discrimination contravenes the

¹. The term 'law' here is used to denote the written law as well as the interpretation, operation and implementation of both constitutional and statutory law.

Constitutional guarantee of equality and non-discrimination² on the basis of sex, it derives its justification from the another Constitutional guarantee - that of the freedom to practice religion³. Consequently there exist separate personal laws for the Hindus⁴, the Muslims, the Christians⁵ and the Zoroastrians⁶. With the exception of the Christian and the Muslim personal law, all the other personal laws have been codified and reformed to some extent (although gender based discriminations still exist in each). In addition to religion based personal laws, there exists a secular civil code called the Special Marriage Act of 1954⁷. This statute

2. The Articles 14 and 15 in Chapter 3 of the Constitution of India, 1950, on Fundamental Rights, contains provisions guaranteeing equality to women, non-discrimination, and affirmative action to overcome any historical disadvantage.

Article 14 "Equality before the Law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 15 "Prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall on grounds only ofsex...be subject to any disability, liability, restriction or condition with respect to (3) Nothing in this article shall prevent the State from making any special provisions for women and children."

3. Article 25, 26 and 27 in the Chapter on Fundamental Rights in the Constitution enshrine the freedom of religion.

4. Hindu law was codified in the mid 50's and is contained in: Hindu Marriage Act, 1955; Hindu Minority and Guardianship Act, 1956; Hindu Adoptions and Maintenance Act, 1956; and Hindu Succession Act, 1956.

5. The Indian Christian Marriage Act, 1872; and the Indian Divorce Act, 1869. The Christian women's property rights are governed by the Indian Succession Act, 1925.

6. The Parsi Marriage Act was amended in 1990s and made consistent with (the civil code option), the Special Marriage Act, 1954.

7. This Act allows the option of a civil marriage between persons of the same or different religions, without having to renounce their religion, under it. It also allows persons married under any of the 'personal laws' to register their marriage at any time under the Special Marriage Act and thereby be governed by its provisions.

makes available to persons married under it or registered under it (an option open to persons married under any of the religious laws) the choice of being regulated by secular (and 'less' discriminatory) laws.

In addition to the general gendered allocation of rights and responsibilities codified in all personal laws, there exist discriminations particular to each of the different personal laws. For example, the Hindu law discriminates against women in relation to their share in ancestral property and succession⁹; the muslim law allows polygamy, the triple 'talaq'⁹ and since 1986 has prohibited women from claiming maintenance from their divorced husbands¹⁰; the Christian

⁹. The Hindu property for the purposes of succession is divided and classified into ancestral and self acquired.

A Hindu male acquires an independent right to an equal share (along with the other males in the family) in the ancestral property upon birth. It is a right that accrues by birth and cannot be divested by an act of the other co-sharers to the ancestral property. The Hindu female however, acquires no such right upon birth. Her right is limited to claiming maintenance from the ancestral property, until marriage. She is also entitled to inherit a portion of the share of this ancestral property through a father or husband upon his demise. The brothers and the sons who are independent share holders to the ancestral property would also (along with the Hindu widow or daughter as the case may be) be entitled to an equal portion of the father's share on his demise. As a result, the Hindu female, in her capacity as a widow or an unmarried daughter, has a very small share and a limited right to the ancestral property.

The self acquired property can be 'willed away' by the father or husband entirely to the exclusion of the female heirs, if he so chooses. In the absence of a will, all the heirs (male and female) would have an equal share in the property. In practice however, it is common for sisters to relinquish their shares in the self acquired property, in favour of their brothers.

⁹. The word 'talaq' translates to 'divorce' in english. Triple talaq is the practice of effecting divorce in customary Muslim law by the pronouncement of the word, 'talaq' 3 times successively to the wife in the presence of a witness. This form of divorce may be oral or in writing and can be exercised by the husband alone.

¹⁰. The Muslim Women (Protection of Rights on Divorce) Act, 1986 extinguished the rights of divorced Muslim women to claim maintenance from their husbands through claims made under Section 125 of the Code of Criminal Procedure. This provision on maintenance is outside of the 'personal laws' and was until 1986 available to all women, including Muslim women. After the passing of this Act, Muslim women can claim maintenance after divorce only from their relatives or the

law contains differential divorce provisions for men and women, making it almost impossible for women to secure a legal divorce¹¹.

The response of the women's movement through the 70's until the mid 80's was to lobby for a 'Uniform Civil Code' (referred to as the UCC) in place of the religion based personal laws. The term UCC finds mention in the chapter on Directive Principles of State Policy in the Constitution, Article 44 of which urges the state to "endeavour to secure for the citizens a uniform civil code throughout the territory of India." Reliance was often placed on this Constitutional directive by the women's rights movement to advocate a secular civil code as a means of eliminating gender discrimination.

Political developments that followed from this period, introduced other critical issues of minority rights and identity into the women's rights debates, making the earlier choice of the UCC a difficult one to support. Feminist legal inquiry up until then used patriarchy as the only framework for understanding discrimination; as a result 'gender' was perceived as the dominant (and often the only) location of discrimination. With the resurgence of religion based politics in the late 1980s and the intimidation by the Right Wing Hindu groups claiming to represent the majority community, of the minority muslim community, other areas of 'discrimination' within law came to be visible. These events along with new trends in feminist thought challenged the assumption of women as a homogenous group, equal in their experience of discrimination. The debate on 'discrimination' against women had to take on board issues inter alia, of class, caste, marital status and particularly religion and minorityism in the context of the UCC.

The Construction of the UCC and Discrimination Against Women in Religion Based Politics:

The use of religion in politics, known in India as 'communal politics' or 'communalism' is premised on the "belief that because a group of people follow a particular religion, they have as a result, common social, political and economic

religious Charitable Trusts.

¹¹. Under the Christian law, the husband is entitled to ask for dissolution of marriage on the ground of adultery. The wife however, has to prove two grounds in order to claim dissolution. They are adultery in combination with one other circumstance: incestuous adultery, bigamy, cruelty, or desertion without reasonable excuse for two or more years.

^{wife}
The ^{wife} is entitled to dissolution on proof of ONE ground only, in the case of rape (not marital rape), sodomy, bestiality, or if the Christian husband has converted to another religion and entered into a second marriage.

interests."¹² The Hindu Right Winged political groups in contemporary Indian politics have been mobilising the support of the majority Hindu community on communal lines against the minority muslim community. In tandem with the re-surgence of Hindu communalism has been the rise of fundamentalism in the Muslim religious leadership which continues to represent the political, economic and social interests of the Muslim community in India.

The communal discourse of the Hindu Right posits the Muslim community as recipients of special privileges by the state, backward and consequently a barrier to national progress. This discourse has very strategically been used to re-interpret history, culture, and law reform to construct and re-inforce the minority community as being against national interest and development, while promoting the Hindu Right ideology as representing the best interest of the nation.

One of the areas in law that has become communalised is the UCC and along with it, the personal laws. The larger concern about discrimination against women in personal laws has over the past few years been reduced by the Hindu Right to inequality under the Muslim personal law. The focus of attention within the debate on women's rights has been diverted to the three main areas of discrimination specific only to muslim law: the 'triple talaq', polygamy and the inability of a Muslim woman ~~to~~ ~~right~~ to claim maintenance from a divorced husband. As these provisions distinguish Muslim law from other personal laws, this focus has succeeded in projecting the muslim community as the 'deviant other', obstructing women's development and equal status in the country. The Hindu Right has been strongly promoting a secular law for all without the three issues specific to Muslim law, whilst leaving untouched the other areas of gender and religion based discrimination in the personal laws. This instrumental use of the UCC in communal politics has become the point of departure for feminist support to the UCC.

The dominant construction of the UCC as it exists now, both in the mainstream politics and the law, aims at eliminating the abovementioned three areas which distinguish Muslim law from the other (equally discriminatory) personal laws. The primary emphasis is on 'uniformity' of laws for all communities as opposed to 'equality' for women. This is borne out by the following observation by the Supreme Court of India:

"The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, although the Constitution enjoins the establishment of a "common civil code" for the whole of India."

¹². Bipin Chandra (1984): Communalism in Modern India; Vikas Publishing House, Delhi.

And further, "Those who preferred to remain in India after the partition, fully knew that.....no community could claim to remain a separate entity on the basis of religion."
(Judgement dated May 10, 1995, in Smt. Sarla Mudgal and Others Vs. Union of India and Ors, Civil Writ Petition No. 1079 of 1989)

Viewed thus, the UCC comes across as a tool to facilitate national integration and ~~support to it~~ a measure of determining nationalism, rather than a means of eliminating gender based discrimination sanctioned in the existing personal laws.

Rethinking Gender Justice in Family Laws:

The larger political context has strongly influenced the process of rethinking positions on women's rights in family law within the women's movement. The appropriation of the UCC in communal politics brought with it three realities that the women's movement had to consider:

One, that the dominant support for the UCC was motivated by the *desire to erode the perceived 'privileges' of the Muslim community to ensure their integration within the nation.* The women's movement had to realise that the reasons, however different, for their support for the UCC would in such a political context be completely marginalised; instead it was likely that their support would reinforce and authenticate the claim of the Right Wing groups for a UCC.

The second reality that the women's movement has had to confront was the conflict between gender and community identity for muslim women that was generated by the communal politics, especially in relation to the UCC. The communal politics was played out along the lines of majority - minority community dynamics, which heightened the feeling of insecurity and exclusion of the minority community. For women within the muslim minority community, this environment foreclosed public spaces for resisting any symbol of their community identity, including the muslim personal law. In fact, for women across the communities, support for the UCC in that particular context and time, meant aligning with the communal forces rather than taking a stand on gender justice.

The third fallout of the political environment was the disempowerment of the broader issues of gender bias and discrimination in law that women had been struggling to highlight over the past few years. The communal discourse at its height, seemed to have in a short time effectively equated the struggle on women's rights with family law and the UCC in public minds, and further, to have reduced the UCC to reforming of the muslim personal law. The movement for reform of Christian laws by the women in the community was relegated to a backseat because of the need to exercise caution in inviting state reform of personal laws of (any) minority

community.

The responses to the political context by the women's rights movement has been at different levels. In relation to law, the effort has been towards emphasising discriminations in other personal laws, particularly the Hindu law, to reaffirm the struggle for 'equality' which has been at the core of feminist legal engagement. There have also been conscious attempts to articulate the heterogeneity amongst women, and to recognise the multiple identities of women. This has influenced contemporary formulations on women's rights to the extent in that these formulations have begun to grapple with complex concerns of minority and religious identities of women in addition to gender concerns. Some of the strategies formulated have consciously rejected the replacement of religion based personal laws by a Uniform Civil Code, in this point in time. These formulations however must be seen as strategic options to tide over the current political content, rather than a goal in itself. larger

The main formulations that have emerged out of the process of re-thinking within the women's movement on strategies that address discrimination against women in law in the background of communal politics are:

I. Reform Within Personal Laws:

This position is premised on the importance of community and religious identities for women, and has been formulated specifically in response to the communal politics surrounding the UCC in India. It opposes the replacement of the existing personal laws with a civil code. The existing option of a secular code co-existing alongside religion based personal laws is supported by this position because it is seen as accommodating of both community identity and individual choice (to opt out of religious laws by registering a marriage under the Special Marriage Act, a secular law).

This position is also premised on recognition of the agency of women within communities to challenge, re-interpret and reform the dominant religious norms regulating their role and entitlements within the family. As part of this strategy some women's groups have drafted model 'nikhanama' (marriage contract for a muslim marriage) containing some non-negotiable provisions guaranteeing rights to women.

II. Formulations on Special Legislations:

There are several areas of discrimination and violence, specific to women which are inadequately covered or not recognised at all by the existing civil and criminal laws. The focus of this strategy is to advocate & lobby for the enactment of special legislation on areas falling outside the personal laws. The efforts here have been to draft model bill on domestic violence, sexual harassment at the workplace, and on sexual offences (including

re-definition of the existing rape law). This strategy aims at working on areas that fall outside the religion based personal laws to indirectly secure to women greater rights even within the family.

III. Gender Just Laws:

This position re-affirms the need to replace religion based personal laws with a secular legal order. The emphasis however is on distinguishing this formulation from the UCC, and is underscored by the terminology used to describe the secular law - 'the gender just code'.

This position is based on the argument that compromising or even temporarily abdicating women's demand for a secular law in response to communal politics would amount to conceding to the dominant political forces. The strategy adopted by this position, is to confront the communal discourse on secular code by exposing its hidden agenda; and to distinguish the concept of secular 'gender just code' which aims at eliminating sex based discrimination rather than 'uniformity' of laws, so as to contrast it with the UCC.

Conclusion:

The above strategies formulated to address gender based discrimination in law are complementary rather than confrontational. The first formulation is more of a strategy than a goal, and needs to be understood within the context in which it has emerged. There seems to be a recognition even amongst some of its proponents of the limitations inherent in working towards equality within religious norms. The 'authenticity' of progressive interpretations of religion that come from non-religious leadership are likely to be challenged; however the exercise is still a critical step in facilitating discussion within communities through cultural idiom rather than an abstract notion of 'rights', on addressing discrimination against women. Besides, in the political environment illustrated above, it is the most workable option. The third option of a secular 'gender just law' could be categorised as a long term goal rather than a strategy that can be operationalised in the current climate. The effort towards creation of special legislation is complementary and in addition to the two formulations on reform of the family laws.

This paper argues for a need to explore issues of equality and non-discrimination using gender along with other influences operating against women in any given context. It attempts to make a case, through the illustration of the Indian experience in relation to family law, for a need to complicate the discourse on women's rights with issues that position women differentially while acknowledging the common thread of gender discrimination.

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