M. Mehra Nov. 95
PMS paper.

CIVIL CODES AND PERSONAL LAWS: REVERSING THE OPTION

WORKING GROUP ON WOMEN'S RIGHTS

The terms of the current discussion on the uniform civil code and personal laws were set by the political positions which crystallised around the Shah Bano case, so that at present there appear to be only three options -- either support for a uniform civil code or reform within personal law or an optional uniform civil code. Though there are different nuances within these, we feel that all three options are limited. In the present political situation where the issue of women's rights is continuously subordinated to the imperatives of majoritarianism and minoritarianism, it is necessary to rethink the whole issue from a broader perspective based on democratic principles. We are presenting a proposal, based on intensive discussions, which aims to change the terms of the debate and to restore the focus on women's rights. Our intention is to intervene in the present controversy surrounding the question of legal reform and to provoke a debate on somewhat different lines. Our proposal does not offer a package of laws or deal with legal technicalities, but attempts a conceptual shift in the way in which family laws have been so far envisaged.

The early feminist notion of a uniform civil code (UCC), as presented in the 1940s and 50s, was developed within a nationalist framework and it was problematic on three inter-related counts. These problems are related not to uniformity per

se but to the ideological deployment of uniformity.

1. The idea of the UCC rested on a mechanical notion of integration through uniformity of laws. It did not attempt to take into account the social diffferentiation that exists in India while transcending these in the realm of rights. The question of national unity was sought to be resolved legalistically; national integration was sought to based only on the legal integration of communities, that is on the principle of community rather than citizenship; finally, uniformity was sought only in personal laws and not in social life as a whole, that is, in the equitable distribution of resources.

2.This approach had undeniable problems even before the UCC became a campaign agenda for the BJP. In the 1940s and 50s the UCC was seen as a corrective for divisive colonial policies and a formula for integrating people into one nation and underplayed the question of women`s rights. Although later, the Committee on the Status of Women (1975) highlighted the rights of women, it did not distance itself from the earlier conception of the UCC as furthering national integration.

However, these problems have been most evident in, indeed intensified by, the judiciary. In cases involving Muslim personal law, Supreme Court judges have foregrounded and explicitly regarded the `oneness' of the nation as well as loyalty to the nation to be at stake if different minority groups follow different family laws. In the Shah Bano case (1985) judges said that "a common civil code will help the cause of national

integration by removing disparate loyalties in laws which have conflicting ideologies". And added that: "The Hindus and Sikhs have forsaken their sentiments in the cause of national unity and national unity and integration; some other would not...." In the recent Supreme Court judgement on Sarla Mudgal vs Union of India (1995) the judges repeated this and further held: "In the Indian Republic there was to be only one nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion."

What is more disconcerting, even disturbing, is the way the UCC is invoked routinely, almost in a reflex action, by judges pronouncing on cases involving Muslim personal law -- whether maintenance or triple talaq or bigamy -- but never when confronted with the inequities of Hindu personal law in court. Thus in the Sarla Mudgal case, the Supreme Court judgement dealt with bigamy from the point of view of the provision for polygamy in the Muslim personal law, which was represented as being the main reason for hindu bigamy. They ignored the high incidence of hindu bigamy that exists without recourse to Muslim personal law. They also ignored the fact that in allowing hindu marriage rituals to be the sole proof of marriage, the lacunae in Hindu personal law have combined with the judiciary's own interpretations to facilitate bigamy. They also did not ask for the strengthening and uniform application of the existing penal provisions for prosecution of bigamy or for better laws on divorce.

When these two types of judicial statements are considered together, the first upholding patriotic hindus and sikhs, and the second invoking a UCC only when faced with gender inequities under Muslim personal law, they assume the following dangerous logic: hindus have reformed themselves; others have to be brought on par with them or, more patronisingly, raised to their level; and minority communities are anti-national in retaining 'special privileges' through personal laws.

The difficulty of conceptually disentangling equality for women from the unity of nation has had three consequences.

Firstly, it produced an idea of the nation that could only veer between the ideal of uniformity and the Constitutional guarantees of religious freedom. By pitting the two against each other, it provided an easy weapon in the hand of communalists, who latched on either to the one or to the other. A second level of contradiction, between the justiciable and non-justiciable clauses in the Constitution, also set up a problematic opposition between gender justice and freedom of religion; this too has been used by communalists and interpreted in an entirely sectarian and patriarchal spirit.

Second, it severely limited the ways in which the question of gender justice could be posed. The focus remained on the inequalities and differences between communities because of the existence of separate personal laws, rather than on the injustice that existed within each personal law. The emphasis was less often on equality and most often on <u>uniformity between</u>

communities.

Third, the particular package of laws that would comprise the UCC was never made clear.

3. There was another conceptual flaw in the original premise of the UCC, that has been unquestioningly repeated. It compartmentalises civil law into the public and private, the former dealing with and related primarily to the world of business, contracts and property while the latter is restricted to the family and domestic matters. The division locates women, in conventional fashion, in the domestic sphere; while the fact that inheritance comes on both sides of the division multiplies the nature of discriminations against women. This division, as well as the naming of civil law governing the family as `personal' and `religious,' can both be traced back to the colonial period and British ideologies of rule and methods of consolidating political power. This naming was also problematic since most of these laws were being codified and enacted by the state.

We feel that we cannot sympathise with a defense of the UCC on the ground of these ideological notions of national unity or uniformity. Nor can we support either resistance to or attacks on legal reform from any quarter (even if phrased as resistance to imposed `uniformity'), when they are based on preserving patriarchal privileges. We feel the question of gender justice has to be delinked from national unity and uniformity. Equally we

feel it has to be delinked from communalisaton. The UCC as posed by the BJP and Sangh `parivar' never takes into account even existing secular provisions that are more gender just than personal laws let alone come up with concrete proposals. Either they suggest, as Sushma Swaraj has done, that the UCC should be based on the best from all personal laws, or, as the VHP has done, that the Hindu personal law should be imposed on all citizens. Further, more often than not, their advocacy of a UCC seems to hinge on a contest over male patriarchal privileges, and rests on achieving a parity of such privilege between men of different religions.

As far as personal laws are concerned, all of them without exception are riven with problems, problems that have repeatedly been posed by feminist groups in the past decades. The problems are not confined to the content of personal laws but extend to the foundational principles of personal laws as well.

1. Personal laws are as conceptually flawed as the UCC since they deny to women <u>within</u> communities the rights they claim <u>as</u> communities -- that is, the rights to self-determination, autonomy and access to resources.

2. All personal laws are highly discriminatory against women since they are based on an interpretation of religion that sanctions patriarchy and resists democratic and egalitarian relations between men and women as well as within the family. This is evidenced by the fact that hindu laws were reformed in

the teeth of orthodox opposition and are still far from granting justice to women in matters of inheritance, adoption, maintenance and custodial rights.

3. Historically, reform and codification of personal laws eroded some of the customary variations and diversities within communities. In other words as a principle of plurality it has so far been in danger of canceling itself out by advocating homogeneity within existing communities. Moreover defense of personal laws on the grounds of defense of community is no different, in theory, from defense of a UCC on the ground of defense of the nation -- it is simply that different types of particularity are being defended and the choice between them is either merely arbitrary or self-interested and politically motivated.

4. Personal laws are applicable to all members of a community by virtue of being born into that community. As such these laws do not allow any choice to individuals who may be non-believers or dissenters, or believers who do not wish to be governed by discriminatory and unjust laws which are violative of their fundamental rights.

As feminists, we are committed to the right to chosen political affiliation that rests neither on biological difference nor on belonging by birth. Our commitment is to a broad-based struggle against patriarchal oppression.

5. Equally, we need to think about the democratic principles infringed in allowing so-called group or community rights to

override women's individual rights. Community rights negate the concept of universal and inalienable rights.

We feel that the focus must be shifted unambiguously to non-negotiable and inalienable rights of citizens.

6. We feel that reform from within involves adopting the role of interlocutor within a community or arguing for a radical reinterpretation of religious texts. The historical process of reforms of all personal laws (parsi, christian, hindu and muslim) have been limited and did not abolish patriarchal privileges. Current attempts at reform flounder against the entrenched patriarchal and institutional power of religious leaders; they are setting limits on who can be the agents of reforms, on the terms of these reforms as well as on the strategies for such reforms. As a result proposals for reform are either watered down or curtailed or are simply not enabling for women. Present attempts, as in the case of the proposed Christian Marriages Act, are also being brought to an impasses by the prevarications of the state.

Therefore we do not see our own role as working out the modalities of reform from within, nor do we see it as a satisfactory solution for the abovementioned reasons. At the same time we feel that all efforts within any community for reform are intrinsic parts of a wider political process and the larger debate on equal rights for women. We hope they will respond to and enter into a dialogue with our suggestions.

We realise the difficulty of our project for rethinking laws in a climate where minorities feel beleagured by majoritarianism. This is all the more so since reframing laws is perceived as an attack on minorities. However, we feel that the struggle for formal equality and rights for all women including those belonging to minorities cannot be surrendered. And the struggle for the rights of all women should attempt not to contribute to a situation in which minority rights get pitted against women`s rights.

This struggle must be accompanied by a genuine commitment to the protection of minorities on the part of citizens and state. A firm commitment to the protection of minority interests necessitates ensuring the punishment of those guilty of riot violence. Those guilty of loot, arson and kiling have hitherto tended to get away scot-free. We are opposed to the political manipulation of all religious identities. Further, the state`s indulgence towards the criminal activities of the Hindutva brigade, the absence of criminal prosecution, combined with the government`s recognition of the religious leadership of every denomination as legitimate interlocutor in fact promotes the erosion of popular sovereignty.

****

Our effort is to extract the discussion on the UCC from the framework of the comparative rights of communities -- between each other and between communities and the nation-- and to recast this discussion in terms of rights of women as citizens occupying

the public sphere, with rights to work, to equal wages, to equality within the family, in a way which does not compartmentalise the public and the private. In our view, equal rights that can procure gender justice should not however exclude affirmative action or protections for women.

Since women's oppression is located in organised and unorganised collectivities be it state, family, community, workplace, only a concept of rights can address these in their totality. Here lies the possibility of a tangible gain in the shape of law as well as a marked advance in intellectual and political life, since in the struggle to protect and actualise these rights there would be mobilisation and wider debate among feminist, left and democratic groups or organisations.

We have devised a system of option in keeping with a) our commitment to rights, b) our understanding of the present political situation, in which personal laws not only have a legal presence, but have further become 'symbolic' of community identity and an object of communalisation. We are in full agreement with all feminist, left and democratic groups who would like to expand the number of secular laws. However, we differ with the modalities of options being suggested by feminist groups at present: these rest on making it more possible for women to opt out of personal laws and choose secular laws. We would like to reverse this modality.

The three central planks of our proposal, which will enlarge the scope for democratic participation of citizens are :

1. The preparation and institutionalisation of a comprehensive package of legislation which would embody gender justice. This package would cover not only equal rights for women within the family in terms of access to property, guardianship rights, right to matrimonial home etc., but it would also cover equal wages for equal work, creche facilities at the work place, anti-discriminatory provisions in recruitment, promotions and job allocation, etc.

2. All those who are born as or become citizens of India would come under the purview of this framework of common laws. That is, these laws would be the birthright of every man and every woman who is or becomes a citizen of India.

3. All citizens would also have the right to choose at any point in their lives to be governed by personal laws if they so desire. The choice to be governed by personal law has to be a conscious decision by an individual citizen. If such a choice is not made, the new gender-just legislation would be applied. In keeping with our conceptual framework of gender-just laws as the rights of citizens, we believe that citizens who have chosen personal laws should be able to revoke their choice and move back to the common laws at a moment of legal conflict.

This proposal would mean a major reversal of the present situation where all citizens are governed by personal laws unless they make a conscious decision to opt for secular laws. Our proposal reverses the option in a manner that ensures both, democratic principles and the right to choose in a more enabling way.

In the present context, the exercise of democratic rights is assumed rather than consciously asserted as well as one-sided. It is assumed or taken-for-granted because citizens are perforce born under personal laws. It is one-sided because in practise this right has been largely asserted by self-proclaimed representatives of communities and has in fact worked against the right of women from different religious groups to exercise their choice.

It is precisely because of the denial of democratic rights to women in all communities, that we feel that it is important to ensure that common gender-just laws are established as the right of every citizen. This then should be the norm against which the choice to be governed by personal laws should be asserted. This will imply that communities would have to justify personal laws to their own constituencies. It would lead to a truly democratic process of the mobilisation of women by different groups and movements as well as act as a trigger for genuine social change. Our proposal does not preclude the possibility of further change.

Since this proposal ensures the principle of democratic choice and initiates a democratic process for the assertion of rights, it cannot be seen as an imposition or violation of minority rights or as targeted at any one community.

We are aware that legal reform as a means to counter oppression, whether of women or of any other group or class, is a limited strategy. It does not necessarily challenge the deeper relationships of inequality which would continue to prevail despite formal equality. Further, the access to law is differentiated across class, caste, gender and so on, while the application of the law by judicial and other agencies is very often discriminatory.

We recognize that the mere existence of formal rights does not address the public/private dichotomy, illegitimise hierarchical gender relations, or do away with proprietary rights of men over women, with the unequal division of labour and the power to allocate resources. Unless these 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.

The possibilities of exercising choice are conditioned by the vulnerable position that women occupy in society and the pressures exerted by community representatives. The conditions of

choice become even more limited in communalised situations.

Nevertheless, 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 get eroded.

The provision of Reverse Optionality would thus offer a real challenge to some forms of oppression even if it cannot necessarily end them.

Reverse Optionality also challenges current wisdom and shifts the terms of the debate which poses the problem only in terms of the following pairs of dichotomies - Nation/Community, Individual/Collective, Majority/Minorities - in all of which women as a category are rendered invisible.

Given the infringement of citizens rights by different levels of state adminstration, particulary in a communal context, the legal enforceablity of the proposal for Reverse Optionality has to also ensure that there are counterveiling organisations which prevent the abuse of this option for sectarian interests.

We outline below the broad principles in our proposal as suggestions for discussion:

1. All citizens are guaranteed the common secular gender-just law, but can choose to opt for their personal laws.

2. These laws will be based on the principle of equal rights for women as well as on the principle of affirmative action wherever necessary.

3. These laws will be comprehensive covering areas of marriage, compulsory registration of marriages, divorce, inheritance, guardianship, rights of residence, rights to matromonial property, domestic violence as well as access to resources, rights to work, equal wages and benefits.

4. Once the principle of reverse optionality is operationalised there would be, at a point in time, three categories of citizens:

   a. citizens who opt for personal laws

   b. citizens who continue to be governed by common gender just laws.

   c. citizens who are caught in a situation of conflict if one party has chosen personal law.

5. In the case of a conflict, contest or unforeseen contradictions between secular law and personal law, the broad principle should be that secular law should prevail.

4. The decision to be governed by personal law should be revokable at moments of legal conflict. The principle of revokability is important because the decision to choose personal law can be forced on young women, particularly at sensitive moments (such as marriage) when they would find it difficult to express their own opinion. Therefore the right to gender-just laws should not be irretrievably lost.

****

Signatories- Amrita Chhachhi, Farida Khan, Gautam Navlakha, Kumkum Sangari, Neeraj Malik, Nivedita Menon, Ritu Menon, Uma Chakravarti, Urvashi Butalia, Zoya Hasan and Tanika Sarkar.

We wish to thank Vrinda Grover, Rajeev Dhawan, Lotika Sarkar, Kirti Singh, Sadhna, Rajni Palriwala, Indu Agnihotri, Ranjana Padhi, ~~Tanika Sarkar~~ Gauri Chowdhury and Rajeev Bhargava, for their participation in some of the discussions.