

# Uniformity vs equality

## *The concept of uniform civil code*

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AN important issue concerning Indian women today is that of the uniform civil code (UCC). The secular principle that women of all communities should be governed by a uniform law, free from discrimination on the basis of caste or religion, was first asserted by Indian women during the freedom struggle. That principle is no less valid today. But how is this to be achieved? Is the slogan for an immediate common civil code in the interests of Indian women today? What Indian women need are gender-just laws in areas of crucial concern to them which go beyond the framework determined either by laws based on religious belief or even existing secular laws in the country. Gender justice and the fulfilment of constitutional guarantees of equality need not necessarily be linked to an umbrella legislation. In fact, within the *present legal framework*, an umbrella legislation could well be counterproductive. Raising the issue itself could also be a diversion from what is immediately achievable in the field of legal reform.

The concept of a uniform civil code has two aspects: uniformity *between* communities (Hindus, Muslims, Sikhs, Christians, Scheduled Tribes etc., all being governed by one law) as well as uniformity *within* communities (between men and women). A gender-just secular code would have to take into account *both* aspects; otherwise it could end up as a code for the uniformity of male privilege. It is no coincidence that although the fundamentalists of the majority and minority communities are sharply divided on the issue of the UCC and the relevance or otherwise of Section 44 of the Constitution, the arguments both for and against the UCC are limited to the single aspect of uniformity *between* communities.

Take, for instance, the arguments of the main protagonists for an immediate common civil code, namely, the Bharatiya Janata Party (BJP)-led com-

munal platform. The basis of their lopsided and motivated approach is that since Hindu laws have been reformed, there is already equality *within* the community. The target, so to speak, of a uniform civil code would therefore be the personal laws of minority communities. Unfortunately, this untruth has been strengthened by the misplaced assertion of the recent Supreme Court judgment that Hindu laws have been adequately reformed. This is a great disservice to Hindu women who are victims of unequal laws in matters pertaining to marriage, inheritance, guardianship and adoption. Those who claim to represent best the interests of Hindu women have not amended a single one of these legal inequalities in any of the States where they rule.

On the contrary, in a revealing legislation which was *unanimously* passed by the Haryana Assembly in 1987 (including assent by both the BJP and the Congress), *the equal rights granted to Hindu women in non-ancestral property were cancelled. It was also specifically mentioned that women would not have equal rights to agricultural land as it would divide and fragment families.* It is another matter that political developments, including elections, prevented the confirmation of the Bill.

In practice also it is women of the majority community who are the worst victims of atrocities and discrimination, including in those areas where the reformed Hindu laws were supposed to have liberated them. This includes the question of bigamy. As has been argued by many commentators quoting from census statistics, the incidence of bigamy is most among the Scheduled Tribes, followed by Buddhists, then by Hindus. The lowest percentage is of Muslim men. Thus, neither in practice nor in the example of laws can Hindu laws form the basis for a uniform code.

The BJP, which had been earlier committed to a UCC based on Hindu laws, has now once again shifted the grounds of its arguments to declare that the UCC proposed by it will not be based on Hindu laws alone but on the "best in all laws". It has been good enough to include Muslim laws in their scope without specifying exactly what

they mean. But is this argument any different or any better? It is still based on the aspect of uniformity *between* communities. In fact, as far as women's rights are concerned, it is deceptive since there are no existing laws which are "best laws". There may be laws which are *comparatively* better but these are still based on inequality between men and women and cannot form the basis for an umbrella legislation.

For instance, which existing law of which community or even the secular law would form the basis for equal laws on inheritance? Muslim women may have enhanced rights in this area compared with Hindu women under the Mitakshara system, but they are still not equal with men. No existing law deals with the problem of disinheritance of the female heir through a will, which is an extremely common occurrence. This is an important aspect of equal rights in property which has been ignored precisely because it

**Muslim women at a polling booth in Uttar Pradesh... gender injustice is not confined to the Muslim community.**



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attacks the common denominator uniting men of all communities, that is male control of family and property.

In 1976, the Special Marriage Act was amended to ensure that those couples who chose to get married under this Act, would in matters of property, if they were Hindu, still come under the discriminatory Hindu Succession Act. If a Hindu married a non-Hindu, the former ceased to be a member of the Hindu joint family. By this retrograde amendment in a supposedly secular law, a person who got married outside the community was automatically disinherited.

Which law would form the basis for a law against bigamy? At present the law is so weak that it is virtually impossible to prove; which is why there are so few convictions in spite of the increase in bigamous marriages.

As far as divorce rights are concerned, the related issues of maintenance and custody of children are extremely weak. In this area Christian women are even worse off since the Indian Divorce Act 1869 applicable to them discriminates on grounds of divorce. Adultery on its own is not a ground of divorce for women although it is for men. There are many other examples. The point is that even the "best" in all existing laws will still be a bad law for women.

Another important aspect is that there are some crucial issues of common concern to women of all communities which no personal law deals with. This is also true of the completely

inadequate secular laws. Therefore, the very framework of the best of laws for a uniform civil code is severely limited. For example, the incidence of violence within the family against women has increased to a great extent in all communities but there is no comprehensive legislation to deal with this either in personal law or in secular law. The increasing problem of child abuse within the family also needs to be dealt with.

Another example is the increasing incidence of desertion. In such cases there is no law to ensure that the property accumulated by the couple after marriage would be in both their names. At present such property is invariably claimed by the male as he is often the earning member. The law for joint matrimonial property requires recognition of the unpaid work being done by women within the household as being equally important for the survival and welfare of the family.

There are other such examples available. However, none of these important issues has even been discussed by the fundamentalists of the various communities precisely because none of them even considers the aspect of uniformity *within* communities as relevant.

An umbrella legislation at this stage would therefore amount to building a skyscraper on the meagre plinth of a cottage. It would require a complete overhauling of all existing laws to meet the ends of justice. The women's movement has been asking for just such an overhauling but its experience even in the sphere of the limited legal reform it has achieved has not been very encouraging. One aspect is of course the lack of political will to ensure reforms even on what should be completely non-controversial issues. For instance, even today there is no specific law against child rape.

The other aspect of the experience is that whenever reform, however inadequate, has been pushed forward, it has been on the basis of a single issue approach which helped to focus and fight for different questions raised within a particular issue. This was the experience in the struggle to amend both the rape and dowry laws. That is why when the National Commission for Women wanted the abolition of the Dowry Prohibition Act and proposed instead an omnibus legislation to cover all crimes against women, it was opposed by the national

women's organisations. It was felt that in the present context it would have been unable to deal with the social aspects of crime against women which different laws in specific areas could. What was demanded then were specific amendments in the different laws.

This logic is equally, if not more, valid for the argument against the immediate civil code as it deals with the family, an area sacrosanct for patriarchal domination. What is required is the rebuilding of the foundation, the expansion of the concept of social "uniformity," equal rights between men and women as reflected in the legal framework. This is only possible through a step-by-step approach which will also limit the scope for compromise of women's interests. *It means ongoing secular legislation in identified areas and as the area of intervention increases so also the foundation for a gender just family code will strengthen.*

Three steps could be taken as the starting point which are important for women and are outside the framework of personal law. With the emphasis on decentralisation and the importance given to panchayats, it would be appropriate if the panchayats and local bodies would start compulsory registration of all marriages, just as births and deaths are registered. This would not interfere in any way with the nature or rituals of the marriage ceremony of any community. Secondly, changes in the laws on property could be started with a new law applicable to women of all communities giving them equal rights in matrimonial property. Thirdly, the enactment of a comprehensive law against domestic violence to protect the mental and physical well-being of women of all communities within the family.

The other aspect of equality *within* the community is the need for a redefinition of the term "community". At present at least as far as minority communities are concerned, in the popular perception "the community" means its fundamentalists. This is not derived from traditions or cultural patterns but is a conscious part of the political practice of dominant parties. The Central Government, for example, has consciously encouraged this identification as was seen in the Shah Bano case. A recognition of reformists within the community would shake the *status quo* and would not be in the interests of vote bank politics.

The most recent example of this crass political opportunism has been the refusal of the Central Government to give recognition to the reformed personal laws framed by the Christian community, including important



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reformist sections of the clergy. The Bill has been pending for over a year with the Government.

Another example in the reverse form comes from Arunachal Pradesh. Here, the State Government has taken the lead in passing a Bill codifying customary law without any prior discussion within the community. Women in Arunachal Pradesh have strongly protested, as this Bill sanctions all traditions and practices without specifically excluding even polygamy, bride price, unequal property rights. What is significant is that the challenge to the *status quo* has come from within the community, but instead of the Government strengthening the reformists, the opposite is happening.

If a similar situation had existed in the 1950s, there would have been no reform in Hindu laws. Even the limited reform was possible only because of Government backing and the fact that the demand for reform came from within the community, not outside. In fact, in the parliamentary debates at that time Muslim members were silent on the issue or were on the side of Hindu orthodoxy, led by the then Jan Sangh and the Hindu Mahasabha, in opposing reform. At one stage when the issue of monogamy was being discussed one of the arguments put forward by the Hindu fundamentalists was that if Muslims could have the right to have four wives, they too should have that right.

The argument of religion being in danger because of intervention in personal laws used by the Hindu lobby, cutting across party lines at that time, is almost exactly the same as that used by Muslim fundamentalists today. Even though the fundamentalists were in a minority, the Government of that time brokered a compromise with them at the cost of equal rights of Hindu women. Ironically, if the BJP platform today can make the demand for a UCC, it is only because of the limited reforms in Hindu laws which were pushed through in the face of their adamant opposition. At that time Hindu women who demanded change in personal laws were reviled, abused and even physically attacked by the followers of the Hindu "right".

If women of the majority community had to suffer then, how much more difficult it is for women of the minority community to raise their voice for reform today. They are in a situation where, first, there is a vicious and violent communal polarisation threatening the security of the minority communities, particularly women. Secondly, the Government recognises only the fundamentalists as being the community.

The communal propaganda of the BJP and its sister organisations, which increases as elections draw closer, puts reformists in the community, including women struggling for equality, completely on the defensive. So much so, that they are unable even to take advantage of the favourable example of reforms made in Muslim laws in many Muslim countries.

For instance, nowhere in the world are divorce or marriage laws so advantageous to Muslim men as they are in India. If Muslim women are to get rid of the unjust and inhuman laws of polygamy and divorce, of which they are victims; it is necessary to build a conducive secular climate.

One such essential step would be a law to prevent the misuse of religion for political purposes. Such a ban will lessen communal polarisation and help remove the feeling of insecurity among the minority community which disables them in their struggle against the fundamentalists in their own community. It is also necessary for the Government to give public recognition to reformers in the community, including women.

In a series of meetings Muslim women have been discussing a charter, on which they propose to campaign within the community highlighting certain immediate issues like a ban on bigamy, end to arbitrary divorce, and so on. This is a significant development and strengthens the struggle of all women, including Hindu women, for change in their personal laws as a step forward for gender-just legal foundations.

It is also argued that a single law for all citizens is essential for national integration. For almost a century Indian citizens have been governed by uniform laws in all other areas like transfer, contract, civil and criminal procedure, penal code and so on. This is more uniform than even the U.S. where each State has its own laws. If this uniformity has not led to national integration, why should a uniform civil code be any different?

The issue of national integration goes beyond uniformity to equality. If equality becomes the basis, the process of national integration will be strengthened. At present, inequalities between communities are clearly illustrated by available figures. For instance, 52.3 per cent of the Muslim population lives below the poverty line as compared to 36 per cent among Hindus; 35 per cent of Muslims are landless compared to 28 per cent of Hindus. Only 29 per cent of Muslims are in regular or salaried jobs as compared to 47 per cent Hindus. Of all those who have

high school education, only 4 per cent are Muslims. It is such inequalities which strengthen the forces of division. *They also strengthen one dimensional community identity in which personal laws are defined as the symbolic expression.*

There are some secularists who argue that the whole concept of a uniform civil code is misplaced in a pluralist society like India and reform in personal laws is the only strategy for gender justice. Such an argument is contrary to the reality experienced by women, of the highly patriarchal nature, in the main, of laws based on religion. Reform within that framework can therefore only be limited. At the same time, given the necessary political will, pluralism need not necessarily be a victim of such a code.

As an example, even if one looks at the Hindu Marriage Act, all the different traditions of marriage and customary practice are given equal recognition. For instance, it is customary practice which forms the basis to decide which marriages are prohibited, thus allowing for the recognition of marriages between cousins or between uncle and niece as in certain parts of South India, which are prohibited in the North.

In fact, one argument used against the code is that since even the Hindus do not have a common code, how can others? *It is not the concept of one law which is misplaced but the present realities, both political and legal, which make such a slogan counterproductive today.* In fact, in the history of countries it was only the socialist countries which could evolve gender-just civil codes because it was part of the restructuring of the entire system towards equality.

Thus, the slogan for a uniform civil code should at the present juncture be preceded with the slogan of equal rights, equal laws. As has been argued earlier in this article, this platform envisages taking the legal framework of gender justice further, as the starting point, in the spheres of matrimonial property, domestic violence, registration of marriages for women of all communities so as to strengthen the common secular ground. More such issues can be identified.

At the same time, women and men committed to reform in all communities need to push forward the frontiers of gender justice within their own community and laws. This struggle will be strengthened by a ban on the misuse of religion for political purposes. Such a simultaneous combination will help meet the ends of justice and equality both *between* and *within* communities. ■