

# **Uniform Civil Code – the women’s movement perspective**

ON 01/10/2014 BY NIVEDITA MENON

The BJP has once again raised the issue of a Uniform Civil Code (UCC) for all Indian citizens, posed in a way that presents the BJP as ‘secular’ and pro-women, and opponents as communal or ‘pseudo-secular’ and anti-women. Since Independence, there has been very little change in the contours of the debate in the public domain, both within the BJP as well as among public intellectuals not necessarily aligned with the Hindu Right. The only change that has come about since the 1990s is that the UCC is now also posed as a ‘women’s rights’ issue and not only as a matter of national integrity, which requires the eradication of multiple legal systems. This new equation of ‘women’s rights’ with the UCC is at least partly a result of the interventions by the women’s movement in the debate in the 1990s. However, within BJP (and mainstream) discourse, it is assumed that only minority women need saving, for ‘we Hindus’ have already given ‘our’ women equal rights.

The women’s movement has developed this debate in complex and multiple directions over the decades, which this essay will briefly outline.

The debate over the UCC in contemporary India is produced by the tension between two notions of rights in the Fundamental Rights (Part III) of the constitution. The bearer of rights is both the individual citizen and the collectivity – the former is the subject of Articles 14 to 24 which ensure the individual’s rights to equality and freedom and the latter of Articles 25 to 30 which protect religious freedom and the educational and cultural rights of minorities [1]. It is from the latter that religious communities derive the right to be governed by their own ‘Personal Laws’. Since these Personal Laws cover matters of marriage, property inheritance and guardianship of children, and since all Personal Laws discriminate against women, the

tension in Part III of the constitution can be read as a contradiction between the rights of women as individual citizens and those of religious communities as collective units of a democracy.

However, the implication that uniform laws for all citizens is the properly modern goal for a nation-state, is reflected in the Directive Principles of State Policy (Part IV of the Constitution), which calls upon the state to bring about a UCC.

While the demand for a UCC is claimed on grounds of national integrity and women's rights, resistance to the UCC from self-styled community leaders comes on the grounds that its imposition would destroy the cultural identities of minorities, the protection of which is crucial to democracy. However, both positions are deeply problematic for feminists.

### **Was the Hindu law really 'reformed'?**

The argument that presents national integrity as the rationale for a UCC, and its conflation with 'women's rights', is unacceptable for two reasons.

First, the fundamental problem with the 'national integrity' argument emerges from the recognition of the homogenizing thrust of the Hindu Code. The entity of the 'nation' was constructed through the assertion of a dominant voice and the marginalization and exclusion of a multiplicity of other interests and identities, and is not a value that feminists can espouse.

Second, we need to address the explicit assumption that while Hindus have willingly accepted reform, the 'other' communities continue to cling to diverse and retrogressive anti-women laws, threatening the integrity of the nation state.

It is misleading to claim that Hindu Personal Law was reformed. It was merely codified, and even that was in the face of stiff resistance from Congress leaders. In fact, the proposed Bill

meant to overhaul laws relating to marriage and inheritance was dropped on the eve of the first general elections – (Ambedkar famously resigned as Law Minister on this issue) – and it was only in 1955-56 that parts of it were pushed through by Nehru as the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act and the Hindu Adoption and Maintenance Act.

What the Hindu Code achieved was the codification of the vast and heterogeneous practices of communities termed ‘Hindu’ if they were not Muslim/Parsi/Christian, bringing them into conformity with what was assumed to be the ‘Indian’ and ‘Hindu’ norm – that is, North Indian, upper-caste practices. Other practices that did not match this norm were explicitly dismissed during the debates in Parliament as being un-Indian. These new Acts were by no means an unqualified advance for women’s rights. On the contrary, codification put an end to the diversity of Hindu laws practiced in different regions, in the process destroying existing, more liberal customary provisions in many cases.

Conversely, there are features of Muslim Personal Law that are better for women than Hindu Personal Law – the Muslim marriage as contract protects women better in case of divorce than the Hindu marriage as sacrament; the Muslim law of inheritance protects women’s rights better than Hindu law, and the right of *mehr*, which gives Muslim marriage the status of a civil contract, is the exclusive property of the wife.

Thus, the anodyne statement sometimes offered by BJP leaders that a UCC will take into account ‘positive features’ of all Personal Laws is untenable in practice, because for instance, *mehr* cannot be introduced into Hindu marriages, nor the Hindu sacramental marriage made into a contract, though both of these are positive aspects of Muslim law vis-à-vis Hindu law.

### **The myth of the polygamous Muslim man**

As for that straw man, Muslim polygamy, the fact is that Muslim men who marry more than once are legally bound to fulfill responsibilities towards all the women concerned, while Hindu men who contract bigamous relationships (an extremely common phenomenon), escape this responsibility in their ‘non-legal’ second or third marriages.

In 1974, a government survey found that 5.6% of Muslim men were in bigamous or polygamous relationships, as were 5.8% of upper-caste Hindus. In terms of numbers, this makes a huge difference. Flavia Agnes points out:

*Statistics continue to indicate that bigamy among Hindu men (which includes, Buddhists, Jains, Sikhs and other denominations) is, in fact, higher than it is among Muslims. In 1974, a government survey found Muslims to account for 5.6 per cent of all bigamous marriages, with upper-caste Hindus accounting for 5.8 per cent. The difference may appear to be small but in real terms it is big. The 1971 census records 45.3 crore Hindus and six crore Muslims. Allowing for women and children to make up 65 per cent of each group, as many as one crore Hindu men had more than one wife in 1971, compared to 12 lakh Muslim men.*

Sociologist Nirmal Sharma points out that while a Hindu man will desert his lawfully wedded wife to live with another, the multiple wives of Muslim men are entitled to equal legal and social rights. “Closet bigamy in Hindus is worse than open polygamy among Muslims,” he says.

This is why feminist lawyer Flavia Agnes urges that attempts to codify the Muslim law to bring in legal monogamy ‘should not end up in subjecting Muslim women to a plight which is similar to that of the Hindu second wife. This is an important concern which needs to be taken on board while suggesting reforms within personal laws.’

**Why community rights are equally unacceptable**

On the other hand, feminists cannot accept the unqualified rights of communities to their cultural identity, although the providing of space for such identity is crucial for a democratic polity. For one thing, the ‘community’ identity that is claimed today as natural and prior to all other identity is no more primordial than the nation is. The colonial government in consultation with self-styled community leaders, organized vastly heterogeneous family and property arrangements within the ambit of four religious Personal Laws, Hindu, Muslim, Christian and Parsi. These Personal Laws today being defended by self-styled community leaders in the name of tradition and religious freedom, are thus, colonial constructions of the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Feminists also reject community rights over ‘their’ women because the gender discriminatory provisions of the Personal Laws are based on the same logic of exclusions that characterise the coming into being of the nation.

### **The Uniform Civil Code of Goa**

A quick look at the experience of Goa is useful, as the Civil Code of Goa is often touted by the BJP as an example of a UCC that works. This put in place by the Portuguese colonial authorities and is neither ‘uniform’ nor gender-just. Albertina Almeida has pointed out that marriage laws differ for Catholics and people of other faiths, and this affects the laws governing Catholics after they marry. If the marriage is solemnised in church, the Church can annul the marriage at the instance of one of the parties, as is permitted in church law.

In addition, the ‘customs and usages’ of the Hindus of Goa are also recognised. ‘Limited’ polygamy has been allowed to Hindus and bigamy has been recognised to have civil effects. Other inequalities – on issues of adoption and the rights of illegitimate children – are also allowed for in these laws. When it comes to taking an oath in court, differences on the basis of caste have been accepted.

The positive aspect of Goa's Civil Code is the Community Property Law, which guarantees each spouse 50% of all assets owned and due to be inherited at the time of marriage. Not only does a woman own half the property of her husband, and vice versa, but each partner must take the spouse's permission before disposing of any of those assets. However, this provision can be sidestepped in practice, given the power relations in a marriage, and it has not made any impact on the incidence of domestic violence.

It has also been pointed out that the supposed shared income between the spouses is welcome in higher income brackets with one principal earner, because it can result in lower taxes on the joint income.

Clearly, if gender justice is not placed at the centre of this discussion, both uniformity as well as its dilution only reinforces patriarchy as well as majoritarianism.

### **The women's movement and the UCC – seven decades of a debate**

The response of the women's movement to the UCC has taken different forms from the first articulation in 1937 of the demand for a Uniform Civil Code for all religious communities, by the All India Women's Conference. This demand continued to be made by larger sections of the women's movement till the late 1980s. By the early 1990s however, there was considerable rethinking on the issue.

By 1995, what emerged was a broad range of positions, from the continued demand for a UCC, to outright rejection of such a move, and calling instead for reforms within Personal Laws. The general consensus in the women's movement by the end of the 1990s was that the campaign for gender-just laws should be conducted at three levels:

a) Support for and initiation of attempts to bring about reform within Personal Laws

b) bringing about legislation in areas that are not covered by either secular or Personal Laws – such as domestic violence and right to matrimonial home – thus avoiding a direct confrontation with communities and communal politics, and

c) in the long term, setting up a comprehensive gender-just framework of rights covering not just areas covered by Personal Laws, but also the ‘public’ domain of work (crèches, equal wages, maternity benefits etc) which should be available to all citizens.

In the first two areas listed above, there have been distinct achievements. Divorce law for Indian Christians was made more gender just through sustained engagements within the community by feminists, resulting in the passing of the Indian Divorce (Amendment) Act of 2001. Different versions of model *nikahnamas* that protect the rights of women, have been prepared by Muslim reform groups, though these have yet to be accepted by the community leaders. Interestingly, there have been positive outcomes from even the Muslim Women (Protection of Rights on Divorce) Act of 1986 that was passed to override the Supreme Court decision in the Shah Bano case which asserted that Muslim women were covered by Section 125 of the CrPC, thus entitling them to maintenance under a secular provision. The Muslim Women Act of 1986 took Muslim women out of the purview of this secular provision, provoking outrage from the women’s movement and anti-patriarchal voices from the Muslim community, but studies of the working of the Act in the three decades since its passing, show that Muslim women have benefited from its creative interpretation by courts.

The tactic of focusing on areas not covered by Personal Laws has resulted in the Domestic Violence Act (2005) which gives women protection from domestic violence and rights to the matrimonial home, and in amendments to the Juvenile Justice Act (2006) that have enabled people of all communities to adopt children legally. The provisions of the Domestic Violence Act are often interpreted by courts in a manner that goes against a wife seeking to use it, but it remains nevertheless, an important legislation.

**Four features of the debate within the women’s movement at this stage**

It is significant that **the term ‘uniform’ has been dropped altogether as a positive value** from the debates within the movement, even in the positions which reiterate the need for state legislation. Thus, in the proposals made by Saheli and People’s Union for Democratic Rights (Delhi), for a compulsory code, or by Forum Against Oppression of Women (Bombay) for an optional code or by the Working Group on Women’s Rights (Delhi) for a negotiable common code, the terms used are ‘common’, ‘gender-just’ or ‘egalitarian’ codes, and not ‘uniform’ codes. This overall disavowal of uniformity by the 1990s is significant in that it marks the women’s movement’s recognition of the need to rethink both the Nation as a homogeneous entity, and of the legitimacy of the state to bring about social reform [2].

Uniformity as a value is compatible paradoxically, both with ‘secularism’ as well as with marginalizing minority cultures. As we see in France, where the ‘Muslim veil’ can become the problematic assertion of religious difference, while the norm continues to be invisibly marked with the values of the dominant community. For the BJP, it is possible to present itself as a Hindu nationalist party while simultaneously espousing the language of abstract citizenship. Hence the label of ‘pseudo-secularist’ for those who affirm the need for protection for minorities; or the charge that provisions like separate Personal Laws, special status for Kashmir and minority status for educational institutions are ‘anti-secular’. Within a framework of abstract citizenship, in other words, it becomes possible to claim that it is ‘communal’ to raise the issue of (minority) religious identity, and ‘casteist’ to assert (‘lower’) caste identity – while the norm is assumed to be the dominant community and caste.

The following of heterogeneous practices need not be inherently inegalitarian, nor the imposition of a uniform law necessarily the opposite.

The women's movement supports initiatives within communities to bring about reforms, so that the rights of women do not become a casualty to the fear of minority communities that reform of personal laws is only a pretext for eroding their identity in this sharply polarised polity. It is not a paradox that some Islamic states have managed to reform laws in the interests of women. When a minority community is threatened with annihilation, the obvious response is to close ranks. It is when a community is confident that it can afford to be self-critical. What the women's movement demands is the bringing about of gender justice within both religious and secular laws.

A second important development since the 1990s is **the stronger interrogation of the assumed heteronormative family** at the centre of Personal Laws. Even in the 1990s, Forum Against the Oppression of Women had in its Optional Code, broadened the concept of family to include homosexual relations and heterosexual couples living together outside marriage. Today, in 2014, the question of non-heteronormative relationships is even more central for the queer feminist movement, especially in the uncertain situation produced by the Supreme Court ruling (2013) striking down the Delhi High Court judgement (2009) that had legalised adult consensual same-sex relationships.

Third, an issue that had been raised during the 1990s is being foregrounded – rather than valorizing 'monogamy', the recognition that non-monogamy even if it is illegal, is very common. **The need therefore, to reconceptualise all intimate relationships in contractual terms that protect all the women living in them**, so that men in bigamous marriages as well as in relationships that are not formal marriages, are forced to take responsibility for all the women concerned.

A fourth and final point – **the question of women's equal rights to property may need to be reformulated** radically at this stage of the UCC debate. I suggest that the Personal Laws

on succession and property represent a point of conflict between the imperatives of the State and those of the Family. The modern state requires legibility in order to mobilize resources towards capitalist industrialization, that is, it must be able to 'see' and organize different forms of property in existence, especially land. Towards this end, the institution of individual rights to property is crucial. All forms of property must become completely alienable and transparent to the state – this development is essential for capitalist transformation of the economy.

The family on the other hand, has its own imperatives of controlling name, descent and passing on of property, a project disrupted by individual property rights. In the light of this, we must view the state's gradual granting of property rights to women under Hindu law – the most recent amendment in 2005 giving women rights to ancestral property as well – as more than a simple triumph of feminist demands. It also represents the establishment of a bourgeois regime of property for the Hindu community at least in principle, which makes land completely alienable by every separate individual owner. In the current climate of widespread resistance to land acquisition by the state, this is a considerable achievement for the state, as it is always easier to pressurize or tempt individual owners rather than communities, to sell land.

It is in this context that we must understand feminist legal scholar and activist Nandita Haksar's critique of some feminist initiatives to press for individual rights to property for tribal women over community rights. She urges the need for a struggle within tribal communities to evolve new customs that are more egalitarian, rather than forcefully introducing from above, individual rights to property [3]. Feminist land rights activists have also become cautious about focusing on joint titling of family plots while losing sight of the state's encroachment on commons and public lands. Common property, they realize, is the biggest impediment to market relations, and they would rather work for collective ownership

of the commons, rather than for ‘women’s rights to land’ – this would necessarily be a political, anti-state struggle, allied to other livelihood movements, and would not be a women’s struggle but a community movement.

Should the larger question of land rights and land acquisition by the state be set aside while discussing individual women’s rights to property? Clearly, the feminist debate over the UCC has reached a new stage of complexity, and conversations have begun afresh.

### **Notes**

[1] Although the right to equality is qualified by riders permitting the state to recognize disadvantaged groups (women, children, socially and educationally backward classes), the subject of this right remains the individual citizen.

[2] For a more extensive discussion of the Uniform Civil Code issue in the 1990s, see Nivedita Menon “Women and Citizenship” in Partha Chatterjee ed *Wages of Freedom* OUP Delhi 1998.

[3] Nandita Haksar “Human Rights Layering: A Feminist Perspective” in Amita Dhanda and Archana Parasher eds., *Engendering Law. Essays in Honour of Lotika Sarkar* Eastern Book Company, Lucknow, 1999

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