Reversing the Option

Civil Codes and Personal Laws

In the present political situation where the issue of women's rights continues to be subordinated to the imperatives of majoritarianism and minoritarianism, it is necessary to make a conceptual shift in the way in which family laws have so far been envisaged. This note presents a proposal prepared by a Working Group on Women's Rights which, while restoring the focus on women's rights, also aims to change the terms of the debate. The members of the Working Group are Amrita Chhachhi, Farida Khan, Gautam Navlakha, Kumkum Sangari, Neeraj Malik, Nivedita Menon, Ritu Menon, Tanika Sarkar, Uma Chakravarti, Urvashi Butalia and Zoya Hasan.

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 – support for a uniform civil code (UCC), 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 continues to be 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, the result of intensive discussions, which, while restoring the focus on women's rights (as other democratic and feminist groups are trying to do), also aims to change the terms of the debate. 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 so far been envisaged.

Problems with UCC

The early notion of a uniform civil code, as presented in the 1940s and 1950s, was developed within a nationalist framework with a double agenda of improving the status of women and unifying the different religious communities through a set of common laws. We recognise the pioneering work and commitment of the early feminists to more gender-just laws than the personal laws operative in the 1940s (and importance within that historical context); nevertheless their early conception of the UCC was problematic on three inter-related counts. These problems are related not to uniformity *per se* but to its ideological deployment.

1 The idea of the UCC rested on a mechanical notion of the integration of different communities through uniformity of laws; it also linked integration to the achievement of a modern nation-state. Thus, while demanding the UCC in the Constituent Assembly, M R Masani, Hansa Mehta and Amrit Kaur – who dissented from the decision of the sub-committee to not include UCC in Fundamental Rights and took admirable positions on several issues – bemoaned the continuance of personal laws as keeping India back from advancing to nationhood. Further, it did not attempt to take into account the social differentiation that exists in India, even as it sought to transcend them in the realm of rights. While the question of national unity was sought to be resolved legalistically, national integration was to be based only on the legal integration of religious communities. Uniformity was thus attempted only in personal laws and not in social life as a whole, as for example, in the equitable distribution of resources.

2 Since the UCC was seen to be a corrective for divisive colonial policies and a formula for integrating people into one nation in the 1940s and 1950s, this approach has made it possible to underplay the question of women's rights. The Committee on the Status of Women (1975) returned the spotlight to the rights of women, but even so, it did not fully distance itself from the earlier conception of the UCC as furthering national integration. The focus on the need for a UCC to integrate the nation has enabled its appropriation as a campaign issue for the BJP. Over the years the question of women's rights has either been underplayed or used as a convenient rhetorical position.

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 it 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".

In the recent Supreme Court judgment 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." They added: "The Hindus and Sikhs have forsaken their sentiments in the cause of national unity and integration; some other would not..."

What is more disconcerting, even disturbing, is the way the UCC is invoked routinely, almost reflexively, 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 judgment 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. The judgment ignored the high incidence of Hindu bigamy that exists even without recourse to Muslim personal law. It 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 kinds 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 in line 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 the nation has had three consequences:

First, 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 to 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 exists within each personal law. The emphasis was less often on equality and most often on uniformity among 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, the latter restricted to the family and domestic matters. All attempts to address the discrimination against women in the latter sphere have left unchallenged the public/private dichotomy. The UCC has been regarded as merely a substitute that is still confined to family and domestic matters. This creates several problems; for instance, the fact that inheritance comes under both sets of laws, compounds the nature of discrimination 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 because most of these laws were being codified and enacted by the state.

We feel that we cannot sympathise with a defence 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 presented 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 communalisation. 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 coming 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 privilege, and rests on achieving a parity of such privilege between men of different religions.

Problems with Personal Laws

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

1 Personal laws are as conceptually flawed as the UCC since they deny to women *within* communities the rights that communities claim for themselves – that is, the right 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 outside 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 cancelling itself out by advocating homogeneity within existing communities. Moreover defence of personal laws on the grounds of defence of community is no different, in theory, from defence of a UCC on the ground of defence of the nation – it is simply that different types of particularity are being defended and the choice between them is either 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. Where community rights infringe the rights of women and other groups within the community, they are to be rejected. We feel that the focus must be shifted unambiguously to working towards the non-negotiable and inalienable rights of citizens.

We, as a group, feel we cannot speak on behalf of community identities and that our own role cannot be that of working out the modalities from within. Reform from within involves adopting the role of interlocutor within a community as also the question of the reinterpretation of religious texts.

We also see the limited success of the historical process of reforms in all personal laws (Parsi, Christian, Hindu and Muslim) and its failure to 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 reform, 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 impasse by the prevarications of the state.

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 beleaguered by majoritarianism. This is all the more so because reframing laws is perceived to be 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 are 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 especially given the structural discrimination against minorities. 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 killing have hitherto tended to go 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.

Reversing the Option

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 the 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 other words, equal rights that can procure gender justice should not exclude affirmative action or protection 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 options 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 begin suggested by some 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 for two reasons: one, we wish to challenge the way in which women (and men) are legally fixed into birth-based religious communities; and two, because such a primordial location makes shifting out of it more difficult, especially for women.

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 and would be far wider in its scope than existing laws, including the personal. This package would cover not only equal rights for women within the family in terms of access to property, guardianship rights, right to the matrimonial home, etc; it would also cover equal wages for equal work, creche facilities at the workplace, anti-discriminatory provisions in recruitment, promotions and job allocation, etc. This must be accompanied by a package of social security measures which will make women less vulnerable and bolster their economic rights in all spheres.

(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 deliberate decision by an individual citizen expressly seeking the application of personal laws. 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. Further, since the gender-just laws will cover an area much wider than the personal laws, only those provisions of the new laws which cover the same areas as personal laws will be revocable.

We would like to clarify here that the choices that is to be made will be about remaining within secular laws or choosing to be governed by personal laws, not about belonging to a religious community. That is, we make a distinction between religious community/religious practice on the one hand (which is not our focus in this context), and personal laws administered along community lines, on the other which is our concern. By being born within gender-just laws citizens do not cease to have religious affiliations, they simply are no longer automatically subject to the personal law of their community.

This proposal would mean a major reversal of the present situation where all citizens are governed by personal laws unless they make a decision to opt for secular laws. As things stand, this can only be done at marriage, which then automatically entails the operation of a set of succession and other laws. Our proposal reverses the option in a manner that ensures both democratic principles and the right to choose in a more enabling way.

The new gender-just laws should be open to contest and further change on the grounds that they are not secular, democratic or gender-just. In this sense we do not consider this to be a final solution but an enabling provision. Thus, if a more gender-just provision exists in customary law, then it should be taken into account.

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 preforce born under personal laws. It is one-sided because in practice this right has been asserted primarily 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 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 exercised. 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 an impetus for genuine social change.

At the same time, given the infringement of citizens' rights by different levels of state administration, particularly in a communal context, the legal enforceability of the proposal for reverse optionality has to also ensure that there are countervailing organisations which prevent the abuse of this option for sectarian interests.

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. In fact, we see reverse optionality challenging current wisdom and shifting 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.

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 recognise 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.

We also recognise that the possibilities of exercising choice are conditioned by the vulnerable position that women occupy in society and the pressures exerted by the family and 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.

Suggestions for Discussion

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 matrimonial 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 are governed by common gender-just laws, (b) citizens who express an option for personal laws, and (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.

(6) The decision to be governed by personal law should be revocable at moments of legal conflict. The principle of revocability 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.

(7) The content and ambit of the gender-just laws will be far wider than the present laws, since it will bring in new legislation as well as change the scope and content of the present laws. Only those provisions of the new laws which cover the same area as personal laws will be revocable.

In our discussions with women's groups and civil rights points/groups, the various points of criticism have emerged.

There is the argument that

(a) to permit a return to unjust personal laws is undemocratic. We would respond that our proposal takes away no right that women already have, and further, enables many more women to be covered by gender-just laws. At present we have a set of personal laws and a few secular laws. Structured as they are at present, and in an atmosphere of growing communalisation which inhibits the process of secularisation, the effectivity of secular laws has been negligible. Also, under pressure from orthodox sections of various communities, these secular laws has been diluted over the years. By reversing the option, that is, by privileging the gender-just laws as citizen's rights and making personal laws a matter of choice, we feel that a larger number of people will be able to avail of, from our perspective, the more desirable package. Women are already constrained in at least two ways – in getting access to any legal arbitration and in choosing secular laws above personal laws, ie, *vis-a-vis* the legal system in general and personal laws in particular. Our proposal will ease the latter constraint.

Further, we hold that retaining a space for the operation of personal laws is not merely a strategic compromise with existing political realities. Rather, in order to bring about a thoroughgoing democratisation and secularisation of civil society, it is not sufficient to have secular policies imposed by the state. This has to be made possible by leaving open the space for social transformation.

(b) It is suggested that our proposal of gender-just laws as citizen's rights will backfire upon the moves in some quarters to reform personal laws from within, and that such initiatives will be blocked. This fear, we feel, is misplaced. By incorporating the personal laws in the system of options, we have actually provided for the continued existence of personal laws. Further, the process of reform can in fact be accelerated by providing a concrete and positive horizon of non-patriarchal gender-just laws against which personal laws can be measured. Individual citizens and democratic groups can then push for reformed personal laws as laws that they would prefer to opt for if they measured up to standards of justice and equality.

(c) Many groups see the UCC as an ultimate horizon but feel that the present situation is not conducive for such a move. We agree with their analysis of the present situation as constituted by a compromised state and a communalised society in which the agenda of gender-just laws has been set back even further. However, precisely for this reason we feel that our position is a viable one as it leaves no room for the endless deferral of equal laws while it allows for the continuance of the personal laws for those who might wish to be governed by them. There is thus no need to wait for a politically conducive moment to introduce these equal laws.

Some groups advocate the expansion of the secular ground through strategies in the interim period. They have suggested the introduction of specific egalitarian laws in areas not covered by existing personal laws. However, recent experience has shown that orthodox elements in communities respond to initiatives for gender-just laws by claiming exemption from these, for the whole community. The policy of granting exemptions is dangerous as it can lead to further communalisation. The option suggested by us will allow individuals to choose to be governed by personal laws, but will prevent whole aggregates from being excluded at one stroke from the ambit of gender-just laws without having any say in the matter.

(d) It is suggested that the form of legal option we are advocating is impracticable and likely to create legal confusion. However, multiple laws covering the same areas already exist. For instance, the Special Marriages Act functions alongside the personal laws, while in certain areas such as maintenance the choices are already operating. The confusion will be no greater than it already is.

The kind of problems that will be created by moving from one set of laws to another, the 'bridging' clauses that may be needed, can be worked out law by law and clause by clause.

Can we all agree in principle on the ultimate need for a body of thoroughgoing legislation which will benefit all women in the long run. We ask those groups who might not share our view of the option to come together for drafting and concretising a new package of gender-just laws.

[Working Group on Women's Rights wish to thank Saheli (Sadhna, Vrinda Grover, Ranjana Padhi and Lata Singh), Rajeev Dhawan, Lotika Sarkar, Kirti Singh, Rajni Palriwala, Indu Agnihotri, Joseph Mathai, Gouri Chowdhury, and Usha Ramanathan for their participation in some of the discussions and to PUDR for their written comment.]