Breaking the Stalemate

Uniform Civil Code vs Personal Law

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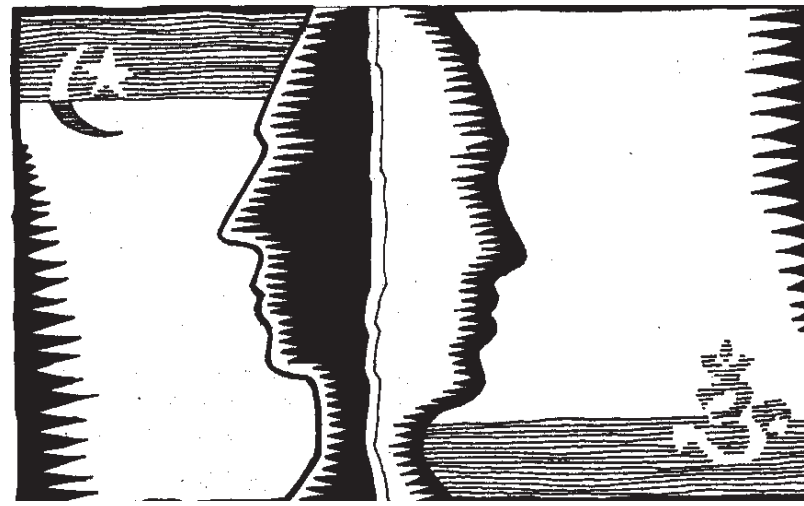

ONE OF THE most contentious political issues facing us today is the issue of uniform civil code versus personal laws of various minority communities in India. The bitter polarisation of opinion around this question has played a big role in worsening relations between various com-munities in the country, especially between the Hindus and the Muslims.

The government policy on this is-sue has always been at best confused. Based as it has been on narrow and shortsighted electoral considerations, it appears to the majority community as proof of dangerous appeasement of the minorities, and therefore, has come to be aggressively resented. In its at-tempt to placate sometimes one and sometimes another vote bank, the issue of a uniform civil code has been grievously mishandled by successive governments, thus sharpening the divide between the Hindus and the Mus-lims.

It is not often recognised that the trouble started with the manner and form in which the Hindu personal law was codified and "reformed" in the 1950s. The supporters of the Hindu Code Bill had described it as a major step towards "social revolution", one that would "eliminate ... all disparity in the rights of men and women in matters of marriage, succession and adoption". More important, it was projected as a step that would pave the way for a uniform civil code by up-holding a superior norm for emulation by the various minority communities that had insisted on their right to retain their personal laws untouched.

However, four decades later, most of those expectations have remained unfulfilled. Women, governed by the reformed Hindu law, continue to feel aggrievednoless than Muslim women, on accountof the fact that at the ground level, especially in rural areas, things have not changed substantially despite the fancy promise of equality given to them at the time of the reform of the Hindu law. A good indicator is the continuing and growing disinheritance of women, especially with regard to property in land, housing and other income-generating forms of wealth. Despite the existence of the Hindu Succession Act since 1956 and its projection as the key to improving women's status — for it was believed that gaining of economic rights would provide women with a strong base from which they could claim their other rights — inheritance rights continue to elude most women. It is the same story with divorce, mainte-nance and custody laws.

A close look at the reformed Hindu law indicates that:

1) the rights, envisaged for women in the draft Hindu Code Bill were ex-tremely limited and far from equal;

2) in the course of parliamentary debates even the limited provisions of the Hindu Code Bill were substantially diluted;

3) the new Acts set up an untenable and self-contradictory system that lent itself early to subversion;

4) the reformed law was a curious hybrid of Hindu law and British Vic-torian law, and in many cases, of the more irrational parts of the two sys-tems of law;

5) far from combining the most progressive elements of various branches of Hindu law, as was claimed by the proreform lobby in the government, the new Acts provided women with rights more restrictive that those laid down in many of the ancient texts or those sanctioned by some contemporary customs and practices. The reformers roadrollered out of existence a number of functioning local customary systems, some of which provide better protection to women in certain respects, not just in theory but in practice.

6) the flaws in the conception of the codified Hindu law were in large part owing to the fact that the Indian leg-islatures were hegemonised by certain North Indian castes and communities representing far more repressive social norms with regard to

women than those prevailing in most other parts of India, especially in the South and the North East. Their perceptions of what were and what ought to be the limits of women's rights came to dominate the codified Hindu law, thus causing a definite erosion of rights for women in many other parts of the country;

7) even the limited rights conferred by the Acts remained on paper in the absence of an adequate implementation machinery. Even so, the use of an exaggerated rhetoric of reform created the misleading impression that the changes brought about were aradi-cal move towards guaranteeing equality for women. Furthermore, the imposition of the legal reform on Hindus alone, leaving other religious communities to continue with their personal laws, created amongst the Hindus deep resentment against the minorities in general and Muslims in particular, thus aggravating the com-munal divide in the country.

What was meant to be a pacesetter for other communities ended up mak-ing the prospects of a meaningful, consensual uniform civil code even more bleak than was the case in the 1950s. The cause of a uniform civil code suffered a further setback fol-lowing the Shah Bano controversy. This has nowbeen adopted asapolitical weapon by the *Hindutvavadis* who insist that the minorities should follow the norms laid down by the majority as proof of their being loyal Indians. In theprocess, considerations of women's rights recedefar into the background. The advocates of the common civil code seldom pause to ask themselves the basic question: if the reformed law could not adequately protect the rights of Hindu women, nor protect them from domestic violence, what is the guarantee that a common civil code will prevent Muslim women's rights being violated by the men of their families?

However, even though the existing Hindu law is far from egalitarian, and its implementation has been shabby due to the inefficiency and corruption of our legal machinery, yet it has had substantial impact in changing social norms. The rhetoric of equality has encouraged Hindu women to believe that they are at par with men and given them confidence to demand further improvements in law whenever itdoes not pass the test of equality. Thus, Hindu law is constantly evolving, both through amendments and interpreta-tion by judges, and provides space for hope — something presently denied to Muslim women. The refusal of cer-tain sections of the Muslim leadership to consider urgently required changes in the Muslim Personal Law is extremely irresponsible andpatently anti-women.Even if one were to gracefully concede the right of the Muslim community in India to be governed by their religious personal laws, one can-not overlook the following facts:

1. That there is a wide diversity in the manner in which Koranic injunctions are interpreted and implemented among diverse Muslim communities in various parts of the world. Saudi Arabia, Egypt, Malaysia, Pakistan, and Sri Lanka are governed by laws and different customary practices regard-ing inheritance and other rights for women. Even within India, there are enormous differences in inheritance rights of Muslim women and other practices. For instance, Kashmiri, Malyali and Assamese Muslims have no tradition of *purdah* or *burqa* whereas Muslims of North India and Pakistan have treated it as an integral part of Islamic religious code.

2. Many Islamic countries including even Pakistan have introduced substantial changes in family laws. In Pakistan, a man cannot take a second wife without the permission of the court, which is supposed to allow bigamy in rare circumstances, that too with the consent of the first wife. Similarly, in Bangladesh, under the existing Muslim marriage law, & husband must have his wife's permission and clearance in writing from the arbitration council, which is headed by a village-level political leader, before going for a valid second marriage. Now, progressive sections are. supporting a parliamentary bill, moved by Farida

Divorced Muslim women under the banner of the Muslim Satyashodhak Mandal sitting on fast to demand change in talaq provisions

Rahman of the ruling Bangladesh Nationalist Party, that seeks to make court permission mandatory for a husband seeking divorce or a second wife. However, the Muslim personal law in India imposes no such restrictions on a bigamous marriage. Even so, Indian Muslims continue to propagate the myth that the personal law they uphold for Muslims in India is part of a universal pure Koranic code. In actual fact, it deviates considerably from many of the Koranic injunctions as well as from Muslim law practiced in many Islamic countries.

3. The Muslim religious leader-ship has failed to ensure that the rights sanctioned to women according to their own version of personal law or Koranic tenets are actually implemented. For instance, very few women inherit their due share (half that of brothers) that they are supposed to get in their parental property. Likewise, divorced wives seldom manage to get the promised *mehr* from their husbands (see accompanying article by Munira Mer-chant). Shah Bano herself came to the law courts only because her rights under the personal law were were not protected and her husband refused to give her the amount due to her as *mehr.* The task of ensuring that the husband honoured some of his re-sponsibilities and commitments had traditionally been performed at the community level. With the breakdown of those tradititonal safeguards, and the absence of alternative modern safeguards, Muslim women's position has become very vulnerable.

There are long term and formidable issues involved in introducing a uni-form civil code in India, requiring a delicate balance between the conflicting claims of minority rights of Muslims as a community versus citizenship rights of Muslim women. This already difficult problem has been made almost intractable because the political thinking on this issue has presented it in absolutely dichotomous terms as an "either" "or" option. The debate has consequently gothopelessly polarised. One is allowed no other position except being either "for" or "against" the common civil code. The Hindu chauvinists see the Muslim resistance to the common civil code as proof of their lacking national loyalty. The Muslim fundamentalists have made the retention of even the non-Koranic aspects of the Muslim per-sonal law the ultimate test of the secular credentials of the Indian state.

The recent debate within the Muslim community on the issue of triple *talaq,* isawelcomedevelopment and has been .undertaken by people who clearly want to address themselves to two crucial tasks —

a) how to provide the requisite protection for Muslim women;

b) how to curb the growing hostility between the Hindus and the Muslims. Unfortunately, a section of the Muslim leadership is insisting on mere theo-logical hair splitting on the length of time required between the three pronouncements of the word *'talaq'* and refusing to face the fact that such arbitrary powers in the hands of men and such hapless dependence of women is not conducive to the well being of their own community. Like the Hindu chauvinists, the Muslim fundamentalist leadership is also using the issue of personal law as a weapon with which to keep its own community ghettoised and in its political clutches.

Even those of us who oppose the politics of the Sangh parivar in forging the issue of a common civil code as a political stick with which to beat the Muslim community, cannot overlook the fact that the manner in which the *talaq* provisions are being currently practised in India, leaves the Muslim women totally defenceless in case their husbands choose to exercise certain.,, arbitrary powers currently at their disposal. This needs change.

Towards Solutions

One possible solution to the current stalemate is to forget the idea of imposing a uniform civil code on the Muslim community against its wishes and introduce an *optional* but *egalitarian* uniform code available to any person on demand, no matter what community he or she may belong to. This would involve that the state machinery not be made available for implementing any religious laws — Hindu, Muslim or Christian. Equal rights for women should be an under-lying principle of such a code. The Muslim leadershipcannot legitimately oppose the right of voluntary choice.

This also implies that the codified Hindu law, as incorporated in the Hindu Marriage Act, the Hindu Suc-cession Act, and the Hindu Adoption and Guardianship Act will also cease to be administered by the secular courts. Those who wish to be gov-erned by the Hinds, the Christian or the Muslim law, will have to devise their own institutional arrangements for the purpose. We had put forward this proposal at the time of the Shah Bano controversy, in **Manushi** issue no. 32.

Hindu, Muslim, Christian or other personal religious laws should be a matter for the believers to accept with-out being enforced by the State. En-forcement of religious law should be a private matter, resting solely on the voluntary moral commitment of the parties to any dispute. At the same time, the option of choosing the uni-form civil code should always be available to all the concerned parties to any domestic dispute. For instance, if a man or a woman feels dissatisfied with the manner in which his/her community administered the personal law in his/her case, the person should be free to approach the civil courts and demand that the provisions of the egalitarian civil code be applicable in their case.

So far, the existing maintenance laws even for Hindu women are

ex-tremely unsatisfactory and unwork-able. That is why most Hindu women seek maintenance under section 125 of the code of Criminal Procedure (CrPC). Even Shah Bano approached the court to ask for maintenance under section 125A of the CrPC. This sec-tion of the CrPC is not really the relevant provision for the maintenance of a divorced wife. It exists to safeguard all destitute women, children and old par-ents. Yet most divorced women have to sue for maintenance un-der this clause because it comes under criminal law and provides relief somewhat more quickly. But under this clause, a wife can get a maximum of only Rs 500 which is about one third to half the statutory minimum wage for unskilled labour. Shah Bano had approached the court under this provi-sion of the CrPC and got a paltry sum of Rs 179 as maintenance allowance from the Supreme Court after a 10-year long battle in courts.

Unfortunately, even this pitiful relief has been denied to Muslim women after the Congress government passed the Muslim Women's Act of 1986. Thus, the state is behaving unconstitutionally by discriminating against Muslim women. Muslim women ought to be treated at par with other women if they come to government-run courts.

Another interesting proposal has been put forward by Dhirubhai Sheth, my colleague at the Centre for the

Study of Developing Societies, in response to the recent debate on the triple *ialaq*. According to him, we should start with the assumption that the right of unilateral *talaq* is available to Muslim men under Koranic law. Instead of merely debating on whether simultaneous pronouncement of the word *"talaq"* is enough to make a divorce valid, or a certain amount of time must elapse between the three pronouncements, we have to accept the fact that in reality the simultaneous triple pronouncement of *talaq* is the given practice and large sections of orthodox opinion are in favour of retaining the one time *talaq*. The tradi-tional restraints imposed on making itan altogether whimsical affair have collapsed because of the rapid break-down of community life and the accompanying social restraints. For instance, according to tradition, *talaq* was supposed to have been executed

Meeting of Talaq Mukti Morcha, Jalgaon

in the presence of others of the community, that is, an assembly of some kind. This at least ensured that the husband abided by the terms of the marriage contract. But now one hears of an increasing number of cases of gross abuse of this provision — a husband pronouncing triple *talaq* over a minor quarrel, without any witnesses or merely sending off a letter, or communicating divorce though a long distance call, without any warning or

preparation. The Muslim religious authorities have not shown themselves equal to the task of ensuring that the conditions laid down for the protection of women in the Muslim personal law are honoured. This leads to frequent irresponsible and whimsical use of the provisions of *talaq*.

Dhirubhai suggests that while the triple *talaq* may be allowed to stay as an integral partof the Muslim personal law, the entire procedure ought to be brought under the jurisdiction of the government law courts. Thus a Muslim husband wishing to divorce his wife, would be required to give a legal notice and pro-nounce *"talaq"* in front of a judge in a full court. That would be some kind of a modern substitute for the community assembly. The secular court would not challenge the validity of Muslim men's right to resort to unilateral *talaq* but would declare the *talaq* to be operative only after scrutinising whether or not all the other terms and conditions of the *hikahnaama* (Muslim marriage contract) have been honoured. Thus, the Muslim personal law wouldremain intact and the courts would merely ensure that it is not J administered individually or cato be declared in the presence of legal witnesses.

This proposal is based on the premise that while the Muslim personal law may be considered sacred by the followers of Islam, the administering person does not enjoy any such status according to Islamic tenets. Since the Muslim marriage is in the nature of a contract, modem law courts are equipped to monitor whether or not the terms and conditions agreed upon at the time of marriage have been adhered to adequately by the parties concerned.

We invite **Manushi** readers to respond to these two proposals or make alternative workable suggestions. ❐