Personal Laws versus Gender Justice: Will a Uniform Civil Code Solve the Problem?

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Personal Laws in India present a situation where abolishing them in the interest of gender justice also inadvertently benefits the reactionary side.

In light of the triple talaq judgment that has now criminalised the practice among the Muslim community, there is a need to examine the politics that guide the practice and reformation of personal laws in India.

1) Why Do We Need Personal Laws?

The history of personal laws in India is rooted in India’s colonial past. Both Hindu and Muslim Personal Laws were brought in the early 20th century to protect the private realm of the household from the colonial state.

These “Hindu” and “Mohammedan” laws were largely retained by the Constitution at the time of independence. Consequently, personal laws as they exist today have largely been drawn from the customs that were favourable to the native patriarchy. Taking this argument forward, Nalini Rajan compared two seminal cases of personal laws being challenged at court—Rakhmabai (a Hindu woman) and Shah Bano (a Muslim woman)—to suggest that “owing to the complicity between religion and patriarchy”, reforming personal laws may not be a tenable idea unless it is driven by women. Even after independence, when Hindu
Personal Law abolished polygamy, there was a violent public backlash where Hindu men threatened to convert to Islam because they felt that they were being stripped of their “customary rights.”

Should we be discussing the fine points of Koranic or Hindu sacred texts, or should we be discussing equity and gender justice today? While feminists are wary of vesting too much faith in legal state institutions for the sake of ensuring gender justice in society, they are equally suspicious of political parties’ capacity to treat communities with equal respect and concern.

2) Are Personal Laws Oppressive to Women?

The primary critique of personal laws in light of the triple talaq debate in the past few years has been that personal laws, especially Muslim Personal Laws, are regressive and disempower women. Based on these grounds, a demand for the implementation of a Uniform Civil Code (UCC) was raised. It is, however, incorrect to suggest that only Muslim Personal Laws are regressive. Ayushi Singhal, in her article on the Hindu Succession Act has pointed out the many peculiarities that make this act discriminatory towards married Hindu women.

Succession in Hindus is governed by the Hindu Succession Act (HSA), 1956. A peculiar fact about this act is that it differentiates between men and women in matters of intestate succession. Female intestate succession is dependent on the source from which the deceased female received the property.

3) How Are Personal Laws Appropriated?

While there is no denying that personal laws are oppressive to women, the discourse of gender justice is often appropriated by political parties in the interest of vote-bank politics. The authors of this 1996 article in EPW have argued that while personal laws are problematic, the introduction of a UCC will not necessarily solve those problems. They suggest that what is required to address the issue of women’s legal disenfranchisement is a total reconceptualisation of personal laws based on democratic principles.

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.

4) Are Personal Laws Unconstitutional?
The issue of personal laws has always depended on the state of Hindu–Muslim relations in the country, argues Razia Patel. While personal laws have been based on religious texts, the way in which they are implemented has always been mediated by the Constitution. No religious texts have been retained verbatim as law.

There are many elements included in this personal law, which are not based on the shariat, and which are applied as a matter of “justice, equity and good conscience” and yet others were abolished - for instance, the judge need not necessarily be a Muslim; apostasy and adultery are not punishable by death; the giving and taking of interest by a Muslim is not illegal; the hand of a thief is not cut off; Muslims and non-Muslims can lawfully marry without changing their religion and their children are legitimate and have rights of inheritance under the Special Marriages Act, 1954; the existing nikah between two Muslims can be turned into a civil marriage by registration under the Special Marriages Act, 1954. This proves that MPL in this country is not “non-negotiable”, and progressive reforms can be demanded and be made from time to time. Moreover, there have actually been some changes made post-independence.

5) Where Do Personal Laws Derive Authority From?

“What is the source of authority behind personal laws in India? Is it religion or is it the secular state’s law-making?” asks Saptarshi Mandal in his 2016 article. If personal laws are drawn from scriptures, is religion the ultimate legal authority with regard to these laws? Through an analysis of a series of cases and contradictory judgments, Mandal concludes that, it is in fact the secular state that personal laws derive their authority from.

Historically, Hindu and Muslim personal laws have implicated civil authority in different ways and are shaped by secular elements to different degrees. While Muslim Personal Law has a closer relationship to religious scriptures, both Hindu and Muslim and religious personal laws in general emerge out of sociopolitical considerations like any other law, which rely on the coercive power of the state for their authority.

6) Does India Need a Uniform Civil Code?

The demand for a UCC has followed the triple talaq judgment, with certain sections arguing that the retention of Muslim Personal Law is in contravention to the Constitution. The suggestion has been that the existence of personal laws has benefitted India’s Muslim population disproportionately, and so a need for a UCC has been raised. However, as Alok Prasanna Kumar has pointed out, there is actually no concrete conception of what a UCC
should contain. Furthermore, he argues that the perception that personal laws are skewed in favour of Muslims is incorrect, because Hindu Personal Law also protects diverse customary laws.

Even the Hindu code, which sought to create a uniform law governing all Hindus, is not uniform in some of the most fundamental aspects of family law. The validity of a marriage is linked to the customs and ceremonies of the particular community; the inheritance rights of the members of the family is different for communities in Kerala and Tamil Nadu; who is capable of being adopted also depends on the custom and usage; the Hindu Minority and Guardianship Act, 1956 does not automatically apply to members of Scheduled Tribes. The claim that “since Hindus are governed by a uniform law, why not everyone else” falls flat at the very first step—the law is not uniform for all Hindus in the first place. While, no doubt, the Hindu code makes several aspects of Hindu personal law uniform, it leaves custom and local practice undisturbed in several aspects.

Read More:

Muslim Women's Rights in India: Codified Personal Laws Needed | Qazi Sarah Rasheed and A K Sharma, 2016

Losing Your Religion | EPW Editorial, 2017

Reforming Muslim Personal Law | Anees Ahmed, 2001

Muslim Women: Historic Demand for Change | Jyoti Punwani, 2016

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