Religious Freedom Versus Gender Equity in Contemporary India: What Constitutions Can And Cannot Do

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ABSTRACT

This article attempts to answer the question "Is religious freedom incompatible with gender justice in a multi-ethinic society?" by examining the processes of legal reform in India. The paper looks, in deatil, at contemporary debates about the role of the state in religion from the perspective of ensuring inalienable rights for women.

RÉSUMÉ

Cet article tente de répondre à la question : « la liberté religieuse est-elle incompatible avec la justice pour les femmes dans une société multi-ethnique? » en étudiant le processus de la réforme judiciaire en Inde. Cet article étudie en détail les débats contemporains sur le rôle de l'état dans la religion, en partant de la perspective d'assurer des droit incommutables pour les femmes.

Is religious freedom incompatible with gender justice in a multi-ethnic society? In this essay I wish to explore this question by examining the case of India. India embarked on a rather ambitious programme of development fifty years ago; essential to this project was the idea of a modern state, which sought to embrace the principles of equity, social justice, and secularism to be guaranteed to its citizens by the constitution. Many of these foundational principles are being debated today, making for a re-thinking of the principle of secularism as it was originally enshrined in the Indian constitution. This re-thinking of secularism comes from two main sources: one is the increasing dissatisfaction of minorities with the implementation of secularism, and the other is the coming to power of the *Bharatiya Janata Party* (BJP).

One of the objectives of the BJP is to initiate a program of constitutional reform to abolish all religion-based personal laws and to replace them with a Uniform Civil Code (UCC). Not surprisingly, this has been resisted by all religious communities, who consider their right to practice religion-based personal laws essential to their religious freedom. Leaders of these religious communities, as well as part of the Indian academia, have opposed the proposal for a UCC and reaffirmed their demand for the continuation of religion-based personal laws.

The importance of this debate, as it is currently formulated, stems from the way in which it pits the need for religious freedom as *essentially incompatible* with the demands for gender justice. Those who oppose the formulation of a civil code refuse to take cognizance of the disastrous impact religion-based personal laws can have on women. More importantly, they criticize the ways in which the Indian state has historically intervened in religious law. On the other hand, those who champion the civil code proposal are more often than not insensitive to the potential problems of opening up family law to the intervention of the state.[1] This debate is important to women in the current Indian context where the agenda of formulating a civil code has been almost wholly appropriated by political factions who have proclaimed their often chauvinistic and anti-minority values.

As I will argue, this opposition between religious pluralism and legal uniformity derives from the communal and patriarchal tendencies which have come to dominate political discourse in India since the eighties. There are two primary theses that constitute this discourse. The first is a concern for reviving and defending indigenous traditions against all external subventions; the second is a tendency towards the unequivocal privileging of claims of religious communities over claims of communities which are based on principles other than religion (for example, those of women's groups and trade unions). This has made

for a situation where women's legal claims, which challenge conventional interpretations of religious law, have been interpreted as assaults on community identity and freedom - so that secularism and gender justice have emerged as competing - and indeed *incompatible* - principles.

The main purpose of this paper is to argue that there is a need to dissociate the current constitutional debate from this revivalist, anti-modern and traditionalist discourse. I argue that if it is dissociated, neither the demand for reforming religious law nor the proposal for a uniform civil code appear as essentially antithetical to secularism, democracy or freedom. The alleged intervention of the Indian state in matters of religion may cease to appear as an imposition on the freedom of minority communities and can be looked upon as interventions that help communities to *acquire* rights that might otherwise be denied to them. In most cases, the legal interventions of the Indian state have enabled non-religious communities - particularly women and "backward castes" - to acquire rights that a strictly religious interpretive schema would not have allowed. The critical task of Indian democracy at the present juncture is to decide which of these discourses more accurately reflects the "general will."

This does not mean that I wish to imply that state interventions in the private sphere should be unequivocally endorsed. Mine is a much more limited, historically contingent view which emanates from the comparison of two different modes of intervention in India: one that builds on some idea of universalist equity (however circumscribed by its modernist premises), and the other that draws upon a deliberately chosen traditionalist notion of equity.

In the first section of this paper I discuss the nature of secularism posited by the Indian constitution. Then I briefly review the history of legal reforms of religious law from the colonial times to the present, in order to argue that, at least up until the 1980s, state interventions sought to correct the innately unjust principles of religious law. In the third section, I discuss the historic judgment of the Indian Supreme Court with regard to an indigent Indian woman, Shah Bano, in a case that allegedly challenged some fundamental tenets of Muslim religious law. The controversy that followed the judgment most clearly pitted the demands for gender justice against the principles of secularism. Next, I will discuss the principal features of the constitutional debate that emerged out of the Shah Bano controversy. As I mentioned above, the debate centers on the proposal to develop a uniform civil code that will eliminate the influence of religious law.

Before I proceed, let me say that the following discussion is informed by the modernist pre-supposition that certain universal norms of equity and justice apply across cultures and need to be defended whenever they are threatened. Further, while laws in and of themselves are certainly not adequate for social change, I believe that challenging and changing extant legal systems remains one of the primary ways in which oppressive institutional/ideological structures can be confronted. There is also a need to resist the aggressive (neo-liberal) plea for the total dismantling of the State on the grounds that it administers cultural and economic oppression. As I hope to show below, the withdrawal of the State, more often than not, simply substitutes new forms of oppression. In fact, by withdrawing, the State affirms oppressive mechanisms that it could quite easily control.

THE NOTION OF SECULARISM IN THE INDIAN CONSTITUTION

As is well known, India is perhaps one of the most multi-ethnic societies of the world, comprising a wide array of religious, linguistic and sectarian diversities.[2] In confronting this staggering diversity, the framers of India's Constitution sought to shape an overarching Indian identity by adopting a "secular" state based on the three principles of equality, neutrality and liberty. According to the principle of *equality*, the state was to give no preference to one religion over another. The principle of *neutrality* demanded that the state did not interfere in religious affairs or organizations of religious communities. According to the principle of *liberty*, the state was to permit the practice of any religion, within the limits set by certain other basic rights, which the state is also required to protect (Articles 25-28).[3] In addition, the Indian constitution guaranteed to all Indian citizens the right to use and conserve their "distinct language, script or culture" (Article 29); and the right of "all

minorities, whether based on religion or language," to establish and administer educational institutions of their choice (Article 30). Most importantly, the principle of liberty gave different religious communities the permission to practice personal laws based on principles of their respective religions.

At least two notions of secularism are implied by these constitutional principles. First, there is the understanding of secularism in the Western liberal sense of the separation between religion and the state, and thereby, between the public and private realms. The Indian constitution thus accepts the liberal premise that legislation related to the family belongs in the private realm and so should be left outside the reach of the state. Second, the principles imply an understanding of secularism as the equal treatment of all religions by the State - which makes possible the peaceful co-existence of multiple religions in one polity. Mahatma Gandhi favoured this notion of secularism, which runs counter to the idea of relegating religion to the private realm. Instead it embraces the idea that the claims of religious communities should be addressed and protected in the public realm. In other words, in contrast to the liberal principle of separation of state and religion, this second notion of secularism provides a permanent place for religion in politics. More importantly, while the liberal notion of secularism pertains primarily to *individual* rights, the second notion concerns itself with *community* rights. So, in its attempts to incorporate both these notions of secularism, the Indian constitution also incorporated the tension between individual and community rights that is inherent in liberalism.

In fact, the framers of the Indian constitution seem to have taken a stand in favor of community rights. Thus, while Article 25 guarantees that "all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion," it preserves for the Indian state the right to protect communities that may be disadvantaged by such a propagation of religion. Similarly, at the same time that Article 29 guarantees formal equality of all Indian citizens, it reserves for the State the right to legally serve the needs of both religious and non-religious minorities (women and children, as well as "backward castes").[4]

Implicit in this combination of individual and community rights are multiple notions of equality. In granting the fundamental rights to its citizens, the constitution employs the notion of formal equality. However, in guaranteeing rights for minorities (both religious and non-religious), the Indian constitution also adopts the stronger principle of substantive equality. By creating special legal provisions, the constitution tried to arrest and redress systematic discrimination against certain groups.[5] It is in order to endorse these principles of substantive equality that the Indian constitution legitimized the authority of the state to enact laws that might contradict, or at least diverge from, the content of religious law, at the same time that it guaranteed to its religious minorities the right to religious freedom. In other words, there is an attempt here to balance the competing claims of religious and non-religious communities.

In fact the making of law in India has historically tended to privilege the claims of non-religious communities over religious communities. In particular, it has privileged the claims of gender justice over claims of religious freedom. For example, beginning from the colonial times, there have been several efforts to "reform" religious practices and override, through legal reforms, the content of religion-based personal laws. This project of legal reformism, which has been quite central to the nationalist-modernist project embraced by the independent Indian state, has been severely criticized in recent years. Before discussing these criticisms, let us briefly examine the nature of the reforms.

PERSONAL LAWS, RELIGIOUS REFORM AND THE INDIAN CONSTITUTION

It is possible to define two basic elements of the legal reforms of religious practice in India. The first of these concerned the Hindu system of caste. According to this system, an individual is born into a "caste," which is a particular social group that is "pre-ordained" to perform a specific kind of labor. Four such castes are usually identified: the Brahmins, the Kshtratiyas, the Vaisyas and the Sudras. Brahmins are responsible for tasks related to the production of knowledge, Kshatriayas for administration and politics, Vaisyas for trade and commerce, and Sudras for manual

labor. Within a strictly Hindu interpretative schema, Sudras cannot command the same social status as the other three castes and are to be prevented in certain specific ways from socializing with the other castes. There are, however, groups of people who are ranked even lower than the Sudras - their rank accruing from the specific tasks they perform. Of these, those who help in cremation and related activities and in disposing of the carcasses of dead animals, are of absolutely the lowest standing and traditionally have been treated as "untouchables." These castes were socially ostracized, barred from all public places and denied access to educational institutions.

The first step in religious reform taken by the framers of the Indian constitution was the abolition of untouchability. The declaration of untouchability as a legally punishable offence was accompanied by simultaneous legislation that provided for formal equality and non-discrimination on the basis of "religion, race, caste, sex or place of birth."[6] In addition to these efforts to secure formal equality, the state also attempted to secure substantive equality by reserving for itself the authority to take affirmative action for groups which have been historically subject to untouchability (or more generally, any form of disadvantage due to their caste). Given the centrality of the caste system in Hinduism, this was a remarkably progressive legal step in rationalizing religious principles which were unacceptable from the standpoint of justice.

The second element of religious reform in India concerns the reform of personal law.[7] These reforms were initiated as far back in 1829, with the abolition of the practice of widow-immolation (*Suttee*). Then, after a gap of almost a century, the *Child Remarriage Restraint Act* was passed in 1929. In 1947, another act outlawed the institution of dedicating young girls to a temple deity.[8] In 1955, a series of enactments deriving from the controversial Hindu Code Bill radically reformed almost every principle of family law based on Hindu religious beliefs. These enactments legalized inter-caste marriages and divorce and prohibited polygamy; they permitted the adoption of daughters as well as sons; and they gave the same rights of inheritance to daughters as sons.[9]

From the point of view of gender justice, perhaps the most important of these reforms were those relating to women's property rights. As early as 1937, the *Hindu Women's Right to Property Act* laid down that where a Hindu died intestate leaving separate properties, his widow, or if there is more than one widow, all his widows together, were entitled to the same share as a son. This was followed by an even more radical piece of legislation, the *Hindu Succession Act* of 1956. Cutting across various kinds of property rights arrangements under various schools of Hindu Law, this Act provided for a uniform rule of succession making the mother, the widow and the daughter equal heirs along with, or without, a male survivor.

Changes in Muslim personal law also began fairly early, with the *Shariat Act* of 1937. This legislation sought to clarify laws involving marriage, family and inheritance for all Muslims, to the exclusion of other laws throughout British India. Again, the most contentious element of this Act was the granting of inheritance rights to women. Interestingly, the granting of the right of inheritance to Muslim women did not constitute a departure from the religious principles of Islam in the same way that the Hindu Code Bill constituted a departure from the principles of Hindu orthodoxy; rather, as the parliamentary debates of the time clarified, the passing of the Shariat Act was simply a legal codification of a religious principle that, *in its original formulation*, gave property rights to women. As such, the passage of the *Shariat Act* was easier than the enactments related to the Hindu Code Bill. Also, some committed reformers from the Hindu community proposed a similar law for community ownership of marital property for Hindu women which met with no success (Hassan 1994).

Thus, the period 1829 to 1955 saw the establishment of a legislative framework that satisfied some critical principles of gender justice.[10] Further, the quite substantial departures from established religious principles reflected in these laws implied that at least in the "public realm," gender justice took precedence over secularism (understood as the inability of the state to intervene in religion-based personal law). In other words, there existed a consensus for challenging the rigid public/private divide that requires the state to refrain from intervening in familial relationships. More fundamentally they also reflected a departure from the traditional conceptualization of gender relationships as familial relationships only. Finally,

let us note that this legislative framework was established at a fairly early stage in the career of the modern Indian state, and was initiated during the colonial era. Some critics have argued that this "colonial" character of the religious reforms makes them essentially external to and inappropriate for the Indian people.[11]

Of course, the enforcement and implementation of these laws, however progressive they may be in principle, leaves much to be desired. The continuing exploitation of women in India points not only towards the bureaucratic problems of implementation of these laws, but the resilience of patriarchy as a societal norm. As the constitutional debates of the 1980s indicate, this resilience seems to have intensified over time, so much so that it resulted in a complete reversal in the progressive character of legal reforms of the 1950s. As the next section will discuss, the 1980s saw a period of desecularization of the political climate, within which it has become virtually impossible to raise questions of gender equity.

THE TURNING POINT IN LEGAL REFORMISM: THE SHAH BANO JUDGMENT

In 1978, Shah Bano, a sixty-two year old Muslim woman from the Indian city of Indore filed a case in the local court against her husband. Thrown out of her marital home by her husband of forty-six years - to whom she had borne five children - Bano demanded a living allowance of Rs.500 (a meager sum, hardly enough to cover the absolute basics for a family of that size). She claimed this maintenance under the Indian Criminal Penal Code (Section 125) which makes a man's refusal to pay for the maintenance of his wives, children or parents (in the case that they are unable to support themselves) a criminal offense. In the case that a man refuses to pay, the court can require him to pay up to a maximum of Rs.500 towards such maintenance. Soon after Bano went to court, her husband chose to divorce her under Muslim Personal Law, and thereafter, defended himself against her appeal by saying that he had already paid maintenance for the period 1976-78, and a divorced Muslim woman was not entitled to anything more under Muslim Personal Law. Implicitly, his counsel was arguing that in issues like marriage and divorce, the Indian Penal Code could not override Muslim Personal Law.

Somewhat unexpectedly, the provincial court in which Shah Bano filed her appeal ruled in her favor. Arguing that, like all other Indian women, Bano was entitled to maintenance under the Indian Penal Code, the Court awarded her a monthly maintenance of Rs.25 (a pitifully small sum). Bano appealed this decision to a higher court, arguing that the sum was not only inadequate but also unjust in view of the fact that her husband earned an annual income of Rs.60,000. The court ruled again in favor of Bano and increased the amount to Rs.179. This time Shah Bano's husband appealed the decision to the Supreme Court. In April 1985, the Supreme Court again ruled in favor of Shah Bano, and ordered her husband to pay her maintenance along with legal costs. The decision was immediately challenged by conservative factions within the Muslim community. The General Secretary of the All India Muslim League proposed a Private Member's Bill in the Indian Parliament that sought to deny a Muslim woman's right to seek maintenance under the Indian Penal Code. For some factions within the Muslim community, the judgment implied much more than simply deciding the fate of a divorced woman. They saw it as concerning the right of the Muslim community to practice their religion freely. In other words, the Supreme Court's ruling was taken as a revocation of the Indian state's commitment to secularism, which, as interpreted by certain conservative factions of the Muslim community, posed a serious threat to the community. It provoked a conservative patriarchal backlash from within the Muslim community, leading to a situation where Shah Bano herself petitioned the Supreme Court to rescind the judgment.

The government, headed by Prime Minister Rajiv Gandhi, was most concerned about the loss of the Muslim "vote bank." This concern led Gandhi to side with the conservatives, and accept the Muslim Women's (Protection of Rights on Divorce) Bill that the conservatives had proposed. The Bill, which became one of the most controversial pieces of legislation in India's legal history, had the following statutes:

1. The husband's responsibility should cease after three months from the date of

> divorce, (or after the delivery of her child in case the woman was expecting his child at the time of divorce); if, within this period, the husband failed or refused to pay his dues, then he could be penalized under the Indian Criminal Penal Code;
> 2. if, after these three months the divorced woman was not able to maintain herself, she should be maintained by those amongst her relatives who would inherit her property on her death.
> 3. If no such relatives were available, she would be maintained by the Muslim charitable institutions. Her right to be maintained by a charitable institution was legally enforceable and could be enforced by an Indian court.

As could be expected, the Act met with a public outcry, especially from the progressive factions of the Muslim community and from all factions of women (Engineer 1987).[12] I will refrain here from a discussion of the specific criticisms that were voiced. In general, what was most disturbing about the process was the complete defiance of democratic procedure. In particular, the major problem with the Bill was that it reversed the two principles that characterized the first phase of legal reforms in India. First, it gave priority to the claim of a religious community over a non-religious community, and second, it gave priority to religious freedom over gender justice. In doing so it accepted the understanding of religious freedom as non-intervention of the state in the private sphere; implicit here is also the substantive claim that religion, and issues such as marriage and divorce, belonged strictly to that sphere.

THE SHAH BANO JUDGMENT AND THE DESECULARIZATION OF POLITICAL DISCOURSE

The Shah Bano judgment helped to mobilize public opinion in favor of a uniform civil code (UCC), the greatest support for which came from women's groups. However, the cause for the UCC was appropriated by the Hindu nationalist party (the BJP) and this de-secularized the discourse to a large extent. While the BJP did not explicitly call for a civil code based on Hindu laws, their general agenda of establishing a Hindu nation-state implied that all religious minorities would have to be assimilated within the political-ideological norms associated with Hinduism.

The basic premise of such the "Hindu" model propagated by the BJP is that all social entities - the family, the workplace or the State - should be organized hierarchically, where the position of each person in the hierarchy is *ontologically* assigned. The best-known manifestation of this principle is the Hindu system of castes, which assigns specific tasks to specific social groups on the premise that such specialization and division of labor creates social stability. This same functional rationalization of hierarchy also informs the Hindu model of gender relations. In accordance with this model, the BJP seeks to define women in their traditional roles - as wives and mothers who are dutiful and sacrificing. As a declaration by the women's wing of the BJP states:

> We conceptually differ from what is termed as the women's liberation movement in the west. ... No fundamental change in values is desirable. Women in India ever had pride of place in the household, and the society. That has only to be re-established and re-affirmed.... The BJP pledges itself to restore to women the position of equality with men that the Indian tradition proposed and accepted.
> (Cossman and Kapur 1993)

Obviously, any proposal for a common civil code that is circumscribed by such an understanding of gender roles and gender equality is highly problematic. As some feminist scholars have pointed out, the notion of equality espoused by the BJP is, at best, a formal one. It thus asserts that men and women should be treated equally, and argues against the necessity for any special treatment of women (except perhaps in some patriarchal ways). The same argument also informs the BJP's treatment of minorities: each person and each community should be treated equally. In this view, secularism should treat each religious community similarly, *by subjecting them to the same set of laws*. Thus, the existing Indian legal system - in that it allows the practice of multiple

sets of laws - is inherently antithetical to secularism. In this view, the Shah Bano judgment and the Muslim Women's Bill contradicted the basic tenet of both gender justice and secularism. They violated the principles of secularism because they reaffirmed religious difference over legal uniformity; they violated gender justice because they called for treating Muslim women differently from women of all other religions.

The Hindu Right's aggressive demand to eliminate all ethnic and religious plurality from Indian political life not only alienated women, it sharpened religious differences. In fact, it has led to the articulation of a pervasive and fundamental critique of the modernist project of the Indian state and the kind of secularization it attempted. This critique (advanced primarily by postmodern scholars) contends that the supposedly universal forms of the modern state do not meet the demands of cultural diversity and/or religious freedom in the Indian context (or that of other post-colonial states). This is because its basic principles of liberty, equality and neutrality cannot be implemented without serious contradictions (and impinging on the rights of minorities). Thus, in place of the secular state and its uniform civil code, the postmodernists suggest that religious communities need to be given the political space to regulate their own practices. This would guarantee minorities the "right against governability, that is, a right not to offer reasons for being different," and to expect tolerance of its "unreasonable" ways. The major constraint that could be imposed on this right is that "each religious group will publicly seek and obtain from its members consent for its practices insofar as those practices have regulative power over members" (Chatterjee 1994,1768). What this means at the institutional level for religious communities is that its "institutions must have the same degree of publicity and representativeness that is demanded of all public institutions having regulatory functions" (1772).

There are several rather serious problems with the general position advanced by postmodernists as well as with the specific proposals for an alternative to the liberal-democratic secular state in India. We can begin with some of the institutional implications of this position and the likely effects they would have. First, if one accepts the existence of incommensurate discourses and the corresponding "right against governability," then what we are left with is a minimal state. The basic concern here is that, if the decision as to what constitutes valid religious praxis is to be decided strictly within a religious forum, then this minimal state cannot legitimately protect its citizens from any "abuse" done in the name of religion, since *the state cannot legitimately define abuse.* What this means is that such questions as whether a Muslim woman is entitled to alimony on desertion by her husband will be decided within a patriarchal religious forum dominated by conservative male theologians. While one may argue that the oppression of the Muslim women in India at the hands of chauvinist male theologians occurs only because of the lack of democracy and representativeness in the religious forums, this is not a solution to the problem. Rather it is to ignore the reality. Is one to expect democratic procedure in a religious forum which is governed by religious laws, where the power to interpret these laws is restricted? As the Indian experience has already shown, it is all too convenient for the state not to address such abuses even when it has the constitutional power to oppose them. Ceding the right to religious bodies to define such questions will only give the state further excuses for not intervening.

A second important institutional implication of the postmodern position is that by favoring religious communities, it inhibits and delegitimizes attempts by other non-religious collectivities (for example, trade unions or women's groups) to claim their democratic space. Thus, for example, if a Hindu "religious forum" decides, on an "authentic reading" of the Vedas, that lower caste Hindus are inherently more suited to manual rather than intellectual labor, then neither trade unions nor the state can intervene on the part of lower-caste Hindus to challenge this reading.

Underlying the unsavory institutional implications of the postmodern position are some fundamental epistemological problems, a fuller critique of which is beyond the scope of this paper. Let us note, however, some of the epistemological issues that are relevant to the issue at hand. The first is the general postmodern presupposition of the incommensurability of discourses across cultures. A second problem comprises a basic tendency to essentialize the Indian consciousness as immutably

and uncritically religious. Religious consciousness, in and of itself, is not problematic; what is problematic is the *politicization* of this consciousness, in particular if such politicization leads to intolerance based on religious differences. While postmodern authors acknowledge that the politicization of religious consciousness was, in large part, a deliberate construct of colonialism, they do not allow for the possibility that its effects can be overcome. According to them, any project of unification (such as the formulation of the Uniform Civil Code) is bound to fail if it does not respond to the underlying needs and religiosities of the Indian people.

IS THERE AN ALTERNATIVE?

As this discussion indicates, there are two apparently opposed proposals for constitutional change in India today. One seeks to eliminate religious difference by "normalizing" gender relations (and relationships between other social groups) within a secularised system. The other seeks a consolidation and reaffirmation of religious differences and the right of religious communities to decide how relationships between its members are to be structured. For our purposes, it is critical to note that despite their apparent opposition, they are actually united in their conceptualization of the relationship between gender justice and religious freedom: both unequivocally assign priority to the latter over the former. By prioritizing the claim of religious communities over that of women, both these proposals effectively translate into the displacement of egalitarian struggles against patriarchies.

Such a prioritizing of religious community over all other collectivities is problematic for women. As religious leaders seek to unify religious communities into aggressive political actors, they tend to become increasingly authoritarian and demand from their members an uncritical adherence to a fixed set of norms. The problem is aggravated in a Third World context where access to religious texts is often restricted because of impediments like illiteracy. Thus, individuals often see their membership in religious communities as a compulsion, a faith to which they are bound by birth and which they cannot leave. As women's experiences all over the world have proved, it is this lack of an exit option that has provided religions (and religious communities) with an important means to perpetuate patriarchy. This process of administering patriarchy through religion was revealed clearly in the case of Shah Bano, especially in her capitulation, when she asked the Supreme Court to rescind its judgment in her favour. Upon reflection and interaction with some leading theologians, she had realized that she was a "Muslim first."

The irreconcilable opposition between gender justice and secularism that emerged during the close of the 1970s intensified during the 1980s. The primary reason behind this was the BJPs quest for electoral success based on assimilationist solutions to the problem of religious strife in India. The obvious reaction from minority communities was to seek a defense of their identity - of which personal laws are an integral part. This defensive reaction is manifested in an opposition to the uniform civil code proposal, at the cost of other issues, such as gender justice. Thus, for women (and other non-religious communities, especially labor), it becomes difficult to endorse any of these positions, since none of them offer any escape from the dominant categories of religious identity.

While assimilationism remains problematic, and the postmodern suggestion highly dangerous, some of the more "secular" proposals for a uniform civil code are also problematic. A simple "melting down" of all religious personal laws in a way that "preserves the best of" the various systems of personal law is likely to result in a "homogenization of patriarchies"(Sangari 1995, 3289). In other words, it is not enough simply to replace the personal laws by a civil code, unless they can be *radically reformulated* in order to establish certain inalienable rights for all women. With this objective in view, it is not enough to argue that it should be the state, rather than religious communities, that should delineate women's rights, since the state is one of the foremost agents through which patriarchy is institutionalized. The critical point is to insist that the definition, reformulation and implementation of women's rights must emanate out of processes that undo these structures of patriarchy.

It is with the aim of radicalizing the state that I suggest the need to reassess the initial period of legal reforms in India. It was during this short

period that most of the gains for women were made. What factors were behind this? While a full account of this is beyond the scope of this paper, two crucial features that characterized the discourses of the period may be mentioned. The first was a critique of capitalism; the second was a rejection of imperialism, especially of the ways in which it *constructed* religious differences. It seems that it is time once again to connect the discourses on gender justice to these two discourses, namely, a critique of imperialism in all its contemporary forms – as well as a critique of capitalism. It is only then that substantive gains in gender justice can be realised.

ENDNOTES

1. Sangari (1995) argues that for women community jurisdiction is as problematic as that of the State. "The former is grinding because it intensifies the difficulties of daily, local interpersonal relationships, making it difficult to claim democratic rights contravened by personal law. The latter involves problems of implementation, functions through a self-contradicting, increasingly de-legitimized, often coercive and patriarchal state machinery."

2. To get an idea as to how diverse Indian society is, consider the following data: at present, there are 18 official Indian languages, 96 non-official Indian languages, and 844 recognised dialects in India. There are at least six major religions, most with multiple denominations.

3. Article 25 of the Indian constitution states:

> *Right to Freedom of Religion*:
> 25. Freedom of conscience and free profession, practise and propagation of religion:
> (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
> (2) Nothing in this article shall prevent the state from making any law
> (a) regulating or restricting any economic, financial or political or other secular activity which may be associated with religious practice;
> (b) providing for social welfare and reform and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

4. Article 25. "Nothing in this article shall prevent the State from making any special provision for women and children. Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

5. Two arguments are most commonly invoked in order to establish the necessity for substantive equality. The first, and probably the most common argument for substantive equality is based on some notion of essentialism, i.e. that certain communities are essentially weak or underprivileged and a just legal framework should be able to protect them. The second justification for substantive equality comes from the explicit recognition of discrimination that has occurred over time and cannot be redressed unless special provisions are put in place.

6. Article 17. Abolition of Untouchability: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

7. As a legal category, personal laws are to be distinguished from territorial law, where the latter applies to people by virtue of their connection to a particular territory or state. In general, personal laws operate only in issues regarding which territorial laws have not been drawn up. The British, allegedly in their efforts not to intervene in religious practices, ruled that personal laws, drawn from the religious texts of the respective religious communities were to be given precedence over territorial or civil law. The areas to be guided by personal law were to include issues such as inheritance, marriage, caste and other religious usages of institutions (Plan of Warren Hastings: Rule 23, cited in Subbarao, V. *Family Law in India*, (Madras: 1975), pg. 264.

8. The *Madras Devadasis (Prevention of Dedication) Act*, 1947. In the same year, the *Temple Entry Act* made it a punishable offence

to prevent any person on the ground of untouchability from entering or worshipping in a Hindu temple.

9. Between 1951 and 1955, the following Acts were passed in the Indian Parliament: *The Special Marriages Act* (1954); *The Hindu Marriage & Divorce Bill* (1955), the *Hindu Succession Act* (1956) and the *Adoption & Maintenance Act* (1956).

10. Table 1. Major Legal Reforms in Indian Religious Law

1829	Abolition of the practice of widow-immolation (*Suttee*).
1929	Child Remarriage Restraint Act
1937	Hindu Women's Right to Property Act
1937	Shariat Act
1947	Madras Devadasis (Prevention of Dedication) Act
1954	The Special Marriages Act
1955	Hindu Marriage & Divorce Bill
1956	Adoption & Maintenance Act
1956	Hindu Succession Act
1956	Immoral Traffic Prevention Act
1961	Dowry Prohibition Act

Source: V. Subbarao, *Family Law in India*, (Madras: 1975)

11. While I cannot enter into this debate here, I would like to make one observation. Some of the major legal reforms that occurred during colonial rule - the abolition of Sati, the remarriage of widows and the banning of child marriages - were initiated and championed by Indian social reformers. While they might have been influenced by Western ideas of modernity, there is no conclusive evidence that these reformers were drawing exclusively on Western principles of social justice. To argue that would be to deny the possibility of any indigenous sources of social change or resistance.

12. A similar controversy also surrounded *Sarla Mudga vs Union of India* (and others AIR 1995 Supreme Court 1531). The question in this case was "whether a Hindu husband, married under Hindu Law, by embracing Islam, can solemnize a second marriage. Whether such a marriage without having the first marriage dissolved under law would be a valid marriage, qua the first wife who continues to be Hindu? Whether the apostate husband would be guilty of the offence under section 494 of the Indian Penal Code"? After a careful review of Hindu personal law, and the Hindu Marriage Act 1955 as well as several decisions of the Indian courts, it was concluded that the "second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of section 494 of the Indian Penal Code."

REFERENCES

Chatterjee, P. "Secularism and Toleration," *Economic and Political Weekly* (July 9th, 1994).

Cossman B. and R. Kapur, "Communialising Gender/Engendering Community: Women, Legal Discourse and Saffron Agenda," in *Economic & Political Weekly* (April 24, 1993): WS-39.

Engineer, A. ed. *The Shah Bano Controversy*. New Delhi: Orient Longman Limited, 1987.

Hassan, Z., ed. *Forging Identities: Gender, Communities and the State*. New Delhi: Kali for Women, 1994, p. 45.

Sangari, K. "Politics of Diversity: Religious Communities and Multiple Patriarchies," in *Economic & Political Weekly*, December 23, 1995, p.3298.

Subbarao, V. *Family Law in India*. Madras: C. Subbiah Chetty, 1975.