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Source: *The Brown Journal of World Affairs*, Vol. 14, No. 2 (SPRING/SUMMER 2008), pp. 103-112

Published by: Brown Journal of World Affairs

Stable URL: <https://www.jstor.org/stable/24590717>

Accessed: 11-04-2020 03:47 UTC

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# Gender Inequality and Religious Personal Laws in India

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CONTEMPORARY INDIA IS A MULTICULTURAL society that is pluralistic with regards to religious law. Different groups in India have separate religious personal laws (RPLs), which India's secular state is reluctant to reform. However, these laws have generated debate about the meaning of gender equality in India, since all RPLs to various extents give women fewer rights than men, but Indian women have been promised equality as a constitutional right. Though the RPLs allow for inclusiveness in religion, the history of these laws in India shows that they have been used selectively as a tool of governance and often to the disadvantage of women. In the past, feminists argued that various differences of identity—such as race, ethnicity, and sexuality—should be recognized and accounted for in the law. But in the case of India's cultural pluralism, religious difference comes into conflict with gender equality. I argue for replacing the religious personal laws with gender-just family laws. Though this argument may seem exclusionary, cultural identity and gender justice do not have to be antithetical values. One way of pursuing both goals is to keep the historical and social specificities in the forefront of any discussions. It is possible to argue for common rights for all women by re-conceptualizing the feminist project as one of constructing inclusive legal theory that is sensitive to demands of differences but also those of justice.

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This article is divided into four broad parts. The first part explains the origin of the concept of religious personal laws and their selective reform by the state. The second part traces the development of various feminist legal responses to the issue of gender equality and the post-structural proliferation of differences. Here an argument is made for contextualizing the demand for recognizing differences and examining whether feminists can argue without contradiction that different religious personal

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SPRING/SUMMER 2008 • VOLUME XIV, ISSUE 2

laws can be replaced with a common family law. The third part illustrates how the shape of RPLs has repercussions for the design and scope of other laws. The example of domestic violence legislation is used to argue that law can recognize the different social contexts of women in India and women in the global North, but must also pursue the goal of justice. Legal feminists must carry the responsibility of generating legal discourse that can be context-specific. The fourth and last part of the article develops an argument for a reconceptualizing of categories that allow for pursuing differences and justice together.

### THE ORIGIN OF THE CONCEPT OF RELIGIOUS PERSONAL LAWS

India's legal system is a common law system—a relic of British imperialism that is at the same time very different from the original British common law. During colonization, novel ideas of utilitarianism and legal positivism informed many English innovations in India.<sup>1</sup> The usual organic relationship between a legal system and its society was violently disrupted doubly by this experiment. Indians came to have a legal system developed in response to the needs of a very different society, that of England. But whereas laws in England have abandoned or modified most of these legal concepts, India maintains the “tradition” of the colonial laws. The concept of religious personal laws is one of those ideas.<sup>2</sup>

Historically, in Europe, the law made a distinction between personal (often ecclesiastical) laws and the legal codes of the territory as a whole. In India before colonization, however, Hindus and Muslims—with very few exceptions—were governed by their own respective laws. Colonization in India happened in a complex and geographically varied manner. Different parts of the country came under colonial control under different legal arrangements. British laws were introduced gradually and selectively and “personal matters” were to remain governed by the religious laws of these communities. However, the content of personal laws was determined almost randomly in the successive charters and regulations. Moreover, the substantive content of these rules was modified in judicial and legislative actions. The judicial role in this regard was significant even if unintentional. Gradually legislative changes were also introduced, but despite these changes the idea has persisted that the RPLs are immutable.<sup>3</sup>

The practice of applying laws of religious communities in personal matters was regarded as the “saving” of religious laws, in part because of the language used. Different communities in India were identified by the religions they followed and the personal laws that the English administrators had decided to save were also in turn understood as religious, although in practice they could be community customs rather than scriptural rules. Thus religious laws and personal laws became interchangeable, and in the process

it was forgotten that before the arrival of the British administrators, all aspects of the laws of Hindus and Muslims were religious. Moreover, British policies determined what should be designated as a personal matter, and of course the final shape of the laws governing such personal matters—whether administered by the English courts or legislated by the colonial parliaments—modified the religious laws of the people.

One marked feature of most RPLs is that women have fewer rights than men. The history of legislative reforms of RPLs in the independent Indian state shows that the goal of gender equality is frequently subordinated to other political considerations. The state has selectively used the argument of religious sanctity of these laws but at other times introduced legislative changes. Most of the changes have been introduced in the Hindu Laws but the changes in the minority communities' laws have been more halting. Ostensibly the minority status of some communities has been given priority over gender equality, but Hindu women have also not managed to gain complete parity of rights with men. The most recent reform, in 2005, of the Hindu Succession Act was proposed in order to make daughters equal coparceners; however, the legislation nevertheless still leaves women with lesser rights than men.<sup>4</sup> It is in these particular circumstances that gender equality for Indian women is more likely to be achieved by introducing a regime of common family law that would formulate rules so as to recognize the principle of gender equality as the defining feature of the law.

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#### **CULTURAL IDENTITY AND COMMON FAMILY LAWS**

The dilemma faced by feminists asking for a common family law for all Indian women is that they must simultaneously answer the mainstream critics of feminism who challenge the demand for gender-sensitive laws and the men and women of minority communities who demand respect for cultural identity. In the following part I will briefly explain the context of feminist critiques of mainstream understandings of law and then argue that difference cannot be treated as good per se but must be pursued in a specific context.

#### *Uniform Law as the Guarantor of Fairness and Justice*

Liberalism and positivism have joined to formulate a view of modern law as autonomous of the economy and society, in contrast to earlier conceptions of law that relied on historical or theological explanations.<sup>5</sup> In this widely accepted view, the legitimate authority of law is dependent upon universal, neutral, and abstract principles. The law defines who is a legal subject and everyone who meets these requirements is entitled to

the same rights irrespective of their religion, wealth, gender, or any other characteristic. Liberal legalism in particular finds its legitimacy in this guarantee of non-arbitrariness, of fairness to everyone irrespective of their specific characteristics or differences.

Legal feminists have extensively critiqued claims about the neutrality and universality of law. Traditionally feminist engagements with law are divided into three broad phases.<sup>6</sup> The earliest feminists, liberal feminists, argued for equal legal rights based upon the idea of the essential sameness of women and men.<sup>7</sup> However, even after women gained formal equality it was obvious that men and women remained in a gender-based hierarchical relationship.<sup>8</sup> Feminists now explained that neutrality of law in effect maintained male privilege while portraying legal rules as gender neutral.<sup>9</sup>

This in turn gave rise to the sameness–difference debate in the feminist discourse: whether law should be gender neutral or gender specific.<sup>10</sup> Feminists who demanded that the different needs and interests of women be acknowledged in law had to confront the charge that any deviation from neutral rules amounts to special or preferential treatment. The emphasis on difference has become more complex with the advent of post-structural critiques about the essentialism of modernist thought. Post-structural theory has challenged the idea of universal rules on the grounds that any closure of definitions is exclusionary and therefore unjust. The category of woman is thus deconstructed to make evident the differences among women (e.g., race, ethnicity, sexuality, etc.). If *woman* is not a unified category, the implication is that not all women have similar interests, and thus feminist politics of reform and especially of legal reform becomes problematic. This development, known as the anti-essentialism idea in post-structural theory, has a consequence that cultural pluralism often comes at the cost of gender equality.<sup>11</sup> I wish to challenge this reification of differences and argue that recognizing differences is not a virtue in itself.

These developments of western feminism did not have exact parallels for women in India. The political and social context for women in India was very different from the world of European women. The formal equality guaranteed in the Indian constitution has not been understood as extending to gender parity in RPLs. This contradiction rests on the use of religious (minority) identity for political purposes. The same constitution that guarantees gender equality also ensures the right to religious freedom and minority identity. That Indian women of different communities have yet to gain complete gender equality lends credence to feminist political philosopher Susan Moller Okin's suggestion that multiculturalism is bad for women.<sup>12</sup> However, rather than simply reverting to the orthodoxy of universal rights, it might be more useful to contextualize the demand for different rights. It could and should be made incumbent upon those demanding different rights to explain how these demands are not antithetical to gender equality. The feminist challenge therefore is to acknowledge that gender equality demands more

than gender-specific laws; the very legal concepts need to change.<sup>13</sup> This is the radical potential of feminist legal theory—it can reorient all legal theory to become more contextual and inclusive. Thus whether universal laws or different laws will serve the interests of women can only be answered in a specific context.

### *Differences Matter*

The challenge now is to re-conceptualize categories of law in a manner that women's interests are neither dismissed nor marginalized.<sup>14</sup> Post-structuralism does not mean either that all women must be treated the same or that no general rules can be formulated. Rather it demands that attention is paid to the consequences of recognizing differences. Therefore feminist analyses of law must constantly theorize the complex relationships between women and law by conceptualizing law as a site of struggle, meaning that law is not a pre-given or final. It is always an outcome of contestation and women like any other community have to constantly argue for gender-just laws.<sup>15</sup> Moreover, what constitutes gender justice can only be a contingent definition under constant scrutiny, always available for redefining—which allows for many different voices to inform the content of law. This can be illustrated with a brief analysis of the enactment of domestic violence legislation in India.

## RELIGIOUS PERSONAL LAWS AND OTHER LAWS

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The enactment of the 2005 Domestic Violence [Prevention] Act (DVA) in the Indian Parliament raises a number of relevant issues for feminists seeking to understand law as a site of struggle. It is also an example of how the “wrong” of domestic violence needs very different remedies for women of Northern and Southern nations. The differences between the conditions of women in different societies ought to be recognized but always with the proviso that such recognition leads to a just or fair outcome. Women's groups' demand for a law on domestic violence was reiterated by the National Commission for Women and later adopted by the government.<sup>16</sup> It is reasonable to ask what prompted the women's groups to articulate this demand for a legal response to violence against women and what is it that the backers of the act hoped to achieve. Domestic violence arises in a specific socioeconomic context for most Indian women. The lack of real economic independence of most Indian women underpins the cultural construction of women as dependents.<sup>17</sup> **The so-called religious personal laws deny women even formal legal equality in personal relations.** In this context it is no surprise that domestic violence is a real problem. The efforts of women's groups to name this

problem and to seek legal redress for it are understandable but are informed by certain problematic ideas about the law.<sup>18</sup>

The DVA is an example of the effort to name certain social realities as a gender-specific harm suffered by women in India. Naming domestic violence as a subject of civil law is an important re-conceptualization. The proposed remedy for domestic violence however, is less than encouraging. The DVA has defined the major issue as the “right” of the woman complainant to stay in the matrimonial home. Thus when a woman, subject to violence, makes a legal complaint, the courts are empowered to allow her (to the exclusion of the violent husband) to occupy the home. In the absence of this law her only option would be to walk out of the house. Presumably, this law gives her time to make arrangements for getting out of a violent marriage, but this is where the wider social, economic, and cultural conditions block her exit. The high cultural premium on the idea of a woman’s place in the husband’s house is a social reality for most women. The economic underpinning of this cultural norm is the fact that most women are financially dependent. Furthermore, they cannot realistically expect either maintenance or a share of property on divorce. The right of residence in the matrimonial home (legally the husband’s house) therefore, is an empty achievement. The woman cannot live there indefinitely and nothing else in her circumstances has changed to enable her to be financially independent. Even if this law is a limited advance, why are Indian feminists so modest in their demands? No doubt they are acknowledging the particular social realities of Indian women, but a more integrated response is required.

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The domestic violence law is as much limited by the wider social, economic, and political contexts as our failure to challenge the inequalities built into the religious personal laws. A woman who seeks the protection of the DVA will invariably be economically dependent, and that dependence in itself is to a large extent underpinned by various laws. For example, the lack of rights in matrimonial property, illusory maintenance rights, deficient rights in agricultural land, and absence of employment opportunities maintain the inequalities. How then can the DVA change anything?<sup>19</sup> Still, it is undeniable that for all its limitations, the law is a step forward in working towards gender justice. It of course does not mean that the struggles for all other kinds of equality rights are no longer necessary.

Legal feminist discourse in India at present does not deal adequately with these fundamental issues. A possible explanation of this state of affairs is that, as a specific legacy of the history of colonization, legal scholarship in India is mostly caught in a time warp. In keeping with the conservative view of legal knowledge as technical know how, most legal analyses in India restrict themselves to doctrinal emphases.<sup>20</sup> Legal scholarship that confines itself to examining the minutiae of the doctrine cannot engage with the interdisciplinary developments in legal theory elsewhere. This absence of theoretical

concerns can be illustrated by examining the developments related to the reform of aspects of Christian personal laws.

#### **DIFFERENCE AND JUSTICE AS DUAL FEMINIST GOALS**

The Divorce Act of 1869 governs the dissolution of marriage for two Christians. The British colonial administrators originally enacted this act to govern Indian Christian subjects. The act was reformed in 2001, after protracted community consultations and persistent demands by women's organizations. There is no doubt that the amendments to the act are a major gain for Indian Christian women. Nevertheless, it is disturbing that in 2001 the Indian legislature, in consultation with women's organizations, could endorse ideas about fault-based divorce laws, the concept of dependent domicile, and the concept of restitution of conjugal rights.

In order to assess the scope of the amendments to this legislation and its suitability for the Indian Christians it is necessary, at the very least, to know the reasons behind this act and the relevant legal model used. The original IDA of 1869 was enacted as a follow up to the first Divorce Act in England. English law up to that point, in keeping with the ecclesiastical principles, did not allow for a Christian marriage to be dissolved. Social, economic, and religious changes in Europe resulted in a gradual acceptance of divorce in certain circumstances, manifested in the Married Women's Right to Property Acts and the Divorce Act. In other words there was a correspondence between the social changes and the legal changes.<sup>21</sup>

None of this correspondence existed in colonial India. Yet, the IDA of 1869 was enacted as a religious law for the Christian community. The model derived from the English divorce law, which was a major legislative innovation that was duly transferred to India in 1869. However, when the legislature of a long-independent India enacted an amendment to this law in 2001 and it insisted on retaining the "religious" grounds of divorce, it is surprising that legal scholars do not see this as incredulous.

Feminist legal thinkers must surely be able to point out the anachronistic nature of this law, but instead the amendments are portrayed as a major gain for Indian Christian women. There is an almost total lack of discussion as to the ideal divorce law for women in the twenty-first century. The continued presence of fault-based grounds of divorce, the lack of recognition of marriage as a partnership, no mention of the concept of matrimonial property, or the anachronistic continuation of the idea of father as the natural guardian of a child makes divorce a very problematic remedy for women. The fact that women's groups are the main force behind these changes makes it even more difficult to accept that appeasing religious and other community leaders takes priority over gaining a realistic right of divorce for Christian women. Political contingencies



constrain the political activists, but no such hurdles exist for the legal feminist scholars: theirs is a disappointing silence. Unless systematic theoretical analysis becomes part of Indian legal scholarship, the level of critique will remain limited and gender equality will continue to be an afterthought rather than a core component of the law.


Even though most of the international legal feminist literature is Eurocentric, it can nevertheless be a good starting point for Indian legal feminists to build specifically Indian legal theory. One of the peculiar legacies of being in a postcolonial country is the fact that the scholars can neither ignore the scholarship in the developed world countries nor employ it directly. Most legal thinkers in the developed world write as if the developing world simply has to catch up with the developed world, and ignore the specificities of postcolonial societies. For thinkers in the developing world, however, all scholarship is judged by its engagement with contemporary developments in the global North.<sup>22</sup> That being said, Indian legal feminists can use these developments to illustrate that what constitutes knowledge, including feminist knowledge, has an effect of silencing the marginalized voices.

The postmodernist insight that knowledge is constructed and partial can allow a space for arguments about the justice of law recognizing differences among people. Feminist legal thinkers can make the theoretical issues relate to the specific Indian conditions. For example, with regard to RPLs, the fundamental issue for legal scholars is whether the divide between religious and secular spheres is an adequate conceptual category. It is necessary to examine who deploys the religious–secular conceptual divide and to what effect. In the Indian context the construct of religious identity of the various communities and in particular minority communities is in turn worthy of analysis. How and why religious personal laws become the chief marker of religious minority identity is a question that should lead into an in-depth analysis of the role of law in maintaining communities. The existence of religious personal laws that deny equality to women is usually discussed as an example of conflict in rights of equality and the right to culture, especially by the minorities.

In liberal democratic societies the right to freedom of conscience is routinely recognized. But nowhere does this right extend to imposing one's view of religion on other people, even other members of one's own community. This is not a particularly novel situation faced by Indian thinkers. In all European states, personal laws originated in religious laws, but family laws are now secular. Nowhere has the existence of modern family laws given rise to the argument that they prevent people from being good Christians. Neither is there a credible argument made that in a Protestant country where divorce is allowed, the Roman Catholics are denied the right to cultural autonomy. It is not particularly radical to formulate the issue as one of comparing the compatibility of group rights and individual rights. In a liberal polity, how far the law

can or should go in upholding communal identities is a question that legal scholars ought to concern themselves with. It is worth repeating here that cultural/religious differences are not a good per se. If the discourse of difference is being used to deny women legal equality, it is incumbent upon the analysts to point that out and argue for a discourse of fairness in the law.

The religious autonomy that various communities claim in turn invokes a simplistic notion of choice. Invariably there is no discussion of who is making the choice and whether the structural nature of hurdles in exercising choice makes it a futile concept for most women. With regard to personal matters it could be imagined that law, rather than enforcing religious authority, can facilitate equality by making all family laws gender non-discriminatory. Such a family law would not interfere with anyone's religious autonomy but neither will it enforce religiously sanctioned inequalities.

The conceptual issue for legal scholars is to develop arguments that gender and religious autonomy can coexist. India, being a religiously plural society, faces this tension more so than many other societies. It is no surprise that most legal theory, developed in industrialized countries, does not concern itself with this issue. The specific responsibility of Indian legal scholars, feminists, and others is to develop ideas about the relationship between law and their social institutions. It is not enough to simply replicate ideas developed elsewhere and end up with the absurd situation that in contemporary India women are denied equality by reference to anachronistic laws that are now supported in the name of progressive pluralism. 

## NOTES

1. Eric Stokes, *English Utilitarians and India* (Oxford: Clarendon Press, 1959).
2. The following account is based on Archana Parashar, *Women and Family Law Reform in India*, (New Delhi: Sage Publications, 1992).
3. Legislative changes of "religious" practices were introduced in pursuance of humanitarian considerations, public policy, demand by the public, etc. Examples of such laws include, The Caste Disabilities Removal Act (1850), The Hindu Widows Remarriage Act (1856), The Native Converts Remarriage Act (1866), Hindu Inheritance (removal of Disabilities) Act (1928), and The Child Marriage Restraint Act (1929). All of these laws modified practices that were considered an integral part of their religion by the local populations.
4. See Poonam Saxena, "Succession Laws and Gender Justice," *Redefining Family Law in India*, eds. Archana Parashar and Amita Dhanda (New Delhi: Routledge, 2008), 282–305; see also Bina Agarwal, "Bargaining, Gender Equality, and Legal Change: the Case of India's Inheritance Laws," *ibid.*, 306–354.
5. Ian Ward, "The Politics of Positivism," *Introduction to Critical Legal Theory*, 2<sup>nd</sup> ed. (London: Cavendish Publishing, 2004); see also Brian Bix, "H.L.A. Hart and Legal Positivism," *Jurisprudence: Theory and Context*, 2<sup>nd</sup> ed. (London: Sweet & Maxwell, 1999).
6. Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen and Unwin, 1994), 1–19.
7. Susan Atkins and Brenda Hoggett, *Women and the Law*, (Oxford: Basil Blackwell, 1984); Albie Sachs and Joan Hoff Wilson, *Sexism and the Law*, (Oxford: Martin Robertson, 1978).
8. Indian women are however, denied even formal equality in the area of family relations under the

guise of Religious Personal Laws.

9. For example, most of the legislators, judges and administrators of law are men and it is inevitable that they bring their experiences into the creation and application of the laws. A possible method of rectifying this bias was to have more women in the echelons of the legal system so that another world-view could inform the creation and the interpretations of law. Diane Polan, "Toward a Theory of Law and Patriarchy," *The Politics of Law*, ed. David Kairys (New York: Pantheon Books, 1982), 294–303.

10. Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1989).

11. Elizabeth Spelman, *Inessential Women: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988). In legal scholarship Carol Smart has explored the implications of poststructural thinking. For example, see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

12. Susan Moller Okin, "Inequalities Between the Sexes in Differential Cultural Contexts," *Women, Culture and Development: A Study of Human Capabilities*, eds. Martha Nussbaum and Jonathan Glover (Oxford: Oxford University Press, 1995), 274–297. For an interesting debate, see the collection of articles in Joshua Cohen and Mathew Howard, eds. *Is Multiculturalism Bad for Women: Susan Moller Okin and Respondents* (Princeton: Princeton University Press, 1999).

13. Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1991); Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, eds. *Deconstruction and the Possibility of Justice*, (New York: Routledge, 1992).

14. See a collection of essays on this theme in Margaret Thornton, ed. *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995).

15. Martha Fineman, "Feminist Theory in Law: The Difference it Makes," *Columbia Journal of Gender and Law* 2, no. 1 (1992): 1–23. For another view, see Carol Smart, *Feminism and the Power of Law*, (London: Routledge, 1989).

16. Indira Jaisingh of the Lawyers Collective was at the forefront of the demand for a DV bill. For a brief history, see Indira Jaisingh, "Reconsidered: Dangerous Bill," *India Together*, November 2002, <http://www.indiatogether.org/women/violence/domvolbill.htm>

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17. See Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia*, (Cambridge: Cambridge University Press, 1994) for the glaring disparities in the land holding entitlements for women in a primarily agrarian economy.

18. For a comprehensive critique, see Rajeshwari Sunder Rajan, "Rethinking Law and Violence: The Domestic Violence (Prevention) Bill in India, 2002," *Gender and History* 16, no. 3 (2004): 769–793.

19. We must look at the role of law in a nuanced manner as argued by Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984), 112–124; see also Angela Harris, "The Jurisprudence of Reconstruction," *California Law Review* 82, no. 4 (1994): 741.

20. This is supported by the articles appearing in law journals and the conventional textbooks in various areas of the law.

21. For further details, see Archana Parashar, "Do Changing Conceptions of Gender Justice Have a Place in Indian Women's Lives? A Study of Some Aspects of Christian Personal Laws," *Changing Conceptions of Rights and Justice in South Asia*, eds. Michael Anderson and Sumit Guha, (Delhi: Oxford University Press, 1998), 140–178.

22. The same point, in a slightly different context, is made by Maitrayee Chaudhari, "Introduction," *Feminism in India*, ed. Maitrayee Chaudhari, (Delhi: Kali for Women, 2004), xviii.