

UNIFORM CIVIL CODE- A STUDY ON RIGHTS OF WOMEN

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Abstract

This paper tries to highlight how in the course of evolution of law, women have been at disadvantage and the failure of current laws to uphold their rights, under the influence of various personal laws. The purpose of this paper is to bring to notice the actual plight of women and urge them to facilitate reforms which will enable the formation of more egalitarian society by bringing into the fold minute details in personal laws for minute loopholes in personal laws which have enabled some vested interest within and without the community to suppress or compromise the position of women. It has been understood that the cause of suffering for women is not the difference in personal laws but the discrimination against women across all sections. An attempt is made to address the debate whether or not personal laws fall under the ambit of Article 13 of Constitution of India, or they enjoy complete protection under Freedom of Religion (Article 25-28), with specific focus towards laws governing marriage and divorce, in personal laws.*

It is crucial to understand that social evils hide behind the garb of religious customs and should not be allowed to prevail in society. Therefore, an understanding of personal laws and various acts will allow us to understand such a conflict and resolve it, to move forward towards a more inclusive society.

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“I believe in equality of men, and I believe that religious duties consist in doing justice, loving, mercy and endeavouring to make our fellow creatures happy.”

- THOMAS PAINE

INTRODUCTION

Evolution of the society of a nation consists of legal, social and political perspectives, in the endeavour of which the framers of the Constitution have facilitated a way, under Part-IV, consisting of Directive Principles of State policy to facilitate the state in making legislation which will bring more Equity in the society, these directive principles espouse, socialistic, Gandhian, Scientific and Altruistic elements the pursuit of which, mankind has been doing the time immemorial.

Article 44 has been one of the most sensitive subjects to handle in a country like India with its vast array of linguistic, communal, cultural and social diversities, Under this regard, whenever there has been a conflict between a universal code and a religious personal law, we see a great deal of ambiguity as there are elements of religious and cultural conventions, to which the communities are deeply attached. This has been one of the main reasons for India to have different laws for different communities, for e.g. Hindu Marriage Act, 1955; Muslim Dissolution of Marriage Act, 1939; Indian Succession Act, 1925.

One of the areas of concern has been the conflict between Right to equality and freedom of religion. Here one has to bear in mind freedom of religion does not envisage practices which are

discriminatory and hurting to individual human rights for e.g. sati, devadasi, triple talaq.²

However, our constitution framers also felt that a uniform civil code requires more synchrony and focus among communities to address the issue of discrimination and differences to guarantee to all its citizens basic human rights.

With the same spirit various personal laws have been codified in the country, gradually to align them with the values of the Constitution of India, for instance making bigamy punishable under Hindu Marriage Act, 1955; giving back the right of Muslim women to seek divorce by way of Dissolution of Muslim Marriages Act, 1939.

Access to such basic human rights gets buried under crossfire between the debate of Freedom of Religion and Right to Equality though for any healthy democratic and secular country, celebration and survival of differences is necessary, but no citizen should be made to choose between the two Rights. Although religious rights cannot be undermined, but at the same time, any discriminatory practice cannot receive protection in name of protection of religious identities. On taking a closer look we feel that majorly women are the one facing discrimination and unequal treatment across all religious beliefs under the guise of personal laws.³

² LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 2.

³ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 2.

Article 14 of The Constitution of India guarantees equality and Article 15 guarantees no discrimination on grounds of caste, religion, sex, race and place of birth propounding the Principle of Equality of Men, but such a right to equality cannot be seen as an absolute right in a country like India, where there are extreme social and economic inequalities.

Therefore, we need to build up on a concept of "Equity", and not merely on concept of Equality, in order to protect vulnerable and disadvantaged sections of the society, like women and children.⁴ And also to support them to have equal opportunity with other sections of the society.

INTERNATIONAL CONVENTIONS RECOGNISING THE NEED OF SOCIAL REFORMS AND ESTABLISHING GENDER EQUALITY

India along with other countries has signed various covenants and conventions. India is a signatory to *Universal Declaration of Human Rights, 1948*, Article 16 of which gives men and women right to marry and provides them with equal rights in respect of marriage and dissolution of marriage. It further makes state responsible for the protection of family as a unit in society.⁵

Further India is also signatory to United Nations Development Programme and its 2030 agenda for Sustainable Development Goals.

⁴ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 3.

⁵ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 15.

Goal 5 of Sustainable Development Goals talks about gender equality by way of:

- 1) Ending all forms of discrimination against women and girls everywhere.
- 2) To eliminate all forms of violence against all women and girls in the public and private sphere.
- 3) Eliminate all harmful practices such as child and early marriage.
- 4) To draw reforms to give women equal rights over economic resources and give them access to ownership of forms of property and inheritance.⁶

Therefore, Indian courts are obligated to interpret domestic laws and fill up the void in domestic laws to effectuate, such international covenant which is also recognized by the Constitution by the provision contained in Article 51(c) of the Constitution of India.

CONSTITUTIONAL PROVISIONS

India is one of the fastest emerging global power in the world, but sadly most of women population, irrespective of their caste or class are vulnerable to the societal norms. Personal laws are largely based on patriarchal norms in the society, which have not been reformed in accordance with the evolution of the society. With a view to reform such laws, The Constitution of India provided a provision under part IV of Directive Principles of State Policy, under Article 44 which requires the state to secure for the citizens a uniform Civil Code. In a modern society such a step can lead towards

⁶<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-5-gender-equality/targets.html> (Sep.1, 2020, 10:30 AM).

promoting gender equality while accommodating the aspirations of younger generations, thus leading to achieving of larger goal of providing equal status to all citizens and promoting national integration.⁷

However, the Constitution follows The Spirit Of Secularism and also under Part -III of The constitution of India, guarantees fundamental rights, provided through, Article 14 (Right to Equality), Article 15 (Prohibition of discrimination on Grounds of religion, race, caste, sex or place of birth), Article 21 (Right to life and personal liberty) Article 25-28 (Right to freedom of religion) which come in direct conflict with any attempt to draw such a reform. Due to huge variation and conflicts between various personal laws there have been various instances where people have taken undue advantage of personal and religious laws for wrongful acts.

PROVISIONS IN VARIOUS PERSONAL LAWS

As observed in *Sarla Mudgal v/s Union of India*⁸, Hindu marriage continue to exist even after one of the spouses has converted to Islam, in backdrop of a provision like this - a Hindu man married under Hindu law got converted to Islam and married another woman without dissolving his first marriage. The court declared the second marriage as void and made the husband liable to be prosecuted for bigamy under section 494 of Indian Penal Code.

⁷<https://www.clearias.com/uniform-civil-code-ucc/> (Sep3, 2020,11:00 AM).

⁸ *Sarla Mudgal v. Union of India*, A.I.R 1995 SC 1531.

The court has deliberated on various instances of abuses regarding and relating to various personal laws.

While deliberating on question of Uniform Civil Code, Kuldeep Singh J, correctly mentioned that Article 44 is largely based on the concept where there is no connection between religious and personal laws in a civil society. He also pointed out that such practices of polygamy are injurious to public morals and the State has a duty to regulate such practices.⁹

Hence it will ultimately come to the sphere of the duty of the state to safeguard its citizens against excesses which arise out of subjective interpretations of personal laws and their bearing on the fundamental rights guaranteed under part III of The Constitution Of India.

Marriage is observed in various lights in different religions, for example- in Hindu law a marriage is sacrosanct, a Muslim marriage is a contract, a Christian marriage it is considered to be instituted and ordained by God and therefore, divorce is stigmatized.

In the case of a Christian marriage, earlier under section 10 of Indian Divorce Act, 1869, a Christian wife could not seek divorce only on the grounds of adultery, she also had to prove cruelty while seeking such a relief, thus forcing her to carry on a married life which has lost its dignity and was broken down. The above provision was struck down by Bombay High Court in *Pragati Varghese v/s George*

⁹ Dr. J. N. PANDEY, CONSTITUTIONAL LAW OF INDIA, 493(56th ed. 2019).

Varghese¹⁰ and further the act was amended in 2001, giving both men and women equal right to seek divorce on grounds of cruelty and adultery.

Whereas in case of adultery we have such a huge difference in our laws for instance Section 497¹¹ of Indian Penal Code, make adultery a punishable offence only for men and the women are exempt, but in Jammu and Kashmir Section 497 of Ranbir ,1932 the women are also made responsible for adultery.¹²

In Muslim Law women cannot seek divorce on grounds of adultery as it is only recognised if adulterous relationship is committed with a woman of evil repute or leads an infamous life as these two conditions are included under cruelty. Hence there is a necessity to amend Muslim Dissolution of Marriage Act ,1939 to include such a provision as living in an adulterous relationship and not be able to find any relief, fundamentally leads to violation of freedom of life and dignity of the individual.

In Parsi community under The Parsi Marriage and Divorce Act ,1936 an application for divorce can be filed only within two years of discovery of adultery.¹³ However, the Law under Section 497¹⁴ of Indian Penal Code takes a condescending view towards women by

¹⁰ Pragati Varghese v. Cyril George Varghese, A.I.R 1997 Bom. 349 (India).

¹¹ This provision has been struck down by the Supreme Court in Joseph Shine v. Union of India, 2018 S.C 4898.

¹² LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG.2018, 18-19.

¹³ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG.2018, 19.

¹⁴ This provision has been struck down by the Supreme Court in Joseph Shine v. Union of India, 2018 S.C 4898.

considering that only women can be victims. It also provides that a woman can enter into an adulterous relationship with consent of husband, thereby reducing her status to that of a commodity.

Thus, all family laws recognize adultery, and the option to seek relief should be equally available to both the spouses, for which continuing efforts are being made by various civil society organisations.

As per Indian majority Act ,1875, an individual attains majority at the age of eighteen, which is gender neutral which essentially means they are mature enough to chose their governments, whereas legal age to get married is eighteen and twenty-one for girls and boys respectively. This distinction just adds to the generalisation that the bride must be younger than the groom. Such a distinction has no premise in law as couples going into marriage are by all means entering into a partnership of equals.¹⁵

Whereas in Muslim law age of majority is considered as age of puberty for girls and 15 years of age for boys. In Hindu law marriage of a girl whose age is below eighteen years is voidable, though such a marriage subsists, but until the girl either expressly or implicitly accepts it upon attaining majority, such a marriage does not receive status of a “valid marriage”. The issue becomes more complicated if both the husband and wife are minor.¹⁶

As per National Family Health Survey (NFHS-4), across communities, 45 percent of the

¹⁵ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG.2018, 23.

¹⁶ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG.2018, 24-25.

women who got married in 2005-2006 were underage. Underage women are both physically and emotionally immature for the responsibilities of marriage and face risks like complications in pregnancy and child birth, domestic violence, sexual exploitation and are devoid of education and hence cheated out of empowerment and better economic opportunities.¹⁷ It not only affects the development of children who get married ,since early marriages mostly result in early pregnancies, it causes adverse effect on health of both women and children thereby adversely affecting the health of upcoming generations ,resulting in physically and educationally deficient offspring ,turning into a vicious circle for women"s health ,and eventually impacting the economic growth of individuals as well as the country. Though the State wishes to eliminate child marriages, through various acts as such as the Prohibition of Child Marriage Act ,2006 which prohibits child marriage, criminalizes sex with a child bride and penalizes those promoting and solemnizing such marriages, still child marriage remains a harsh reality in India.

Therefore, a uniform age of consent for marriage among all citizens will help not only in tackling the legal confusion but will also lead the society towards social maturity and promote gender equality across all sections of Indian society.

As observed in *Seema v/s Ashwini Kumar*¹⁸, the issue of different ages of consent, provided under various laws and repeated infringement of Prohibition of Child Marriage Act had created circumstances which warrants immediate attention. As suggested by the 270 th Law Commission of India report on Compulsory Registration of Marriages (2017) an amendment to include marriages must be done in Registration of Births and Deaths Act ,1969, mandating Compulsory Registration of Marriages. If implemented properly, it would deter parents from marrying their minor children, since such marriages will not be registered.¹⁹

In absence of Compulsory Registration there have been instances, especially in case of marriages of non-resident Indians, where women are deceived into marriage and conditions of valid marriage are not performed, thereby leaving them vulnerable without legal protection and societal recognition. In spite of various reforms and laws, practices of child marriages, bigamy, gender violence still prevail in the society, thereby requiring a blanket law, impacting all parts of society to provide protection to women within a marriage. These laws can gradually be honed to apply to any community or religion, helping in reducing the disparities with which women are treated in different communities and religions.

¹⁷<https://www.thehindu.com/news/national/karnataka/Il-effects-of-child-marriage-stressed/article14004328.ece/amp/>, (Sep. 1,2020,10:30 AM).

¹⁸ *Seema v. Ashwini Kumar*, (2006) S.C.C.578(India).

¹⁹ LAW COMMISSION, REFORM OF FAMILY LAW,31 AUG.2018,22-25.

Hinduism considers marriage as sacrosanct and considers a marriage as union for lifetime, however with codification of Hindu laws and with passage of Hindu Marriage Act, 1955, either of the spouse can file a petition for divorce for dissolving the marriage on the grounds provided in the act and also claim maintenance provided their marriage fulfils conditions of a valid marriage.

Indian Divorce Act of 1869 was amended in 2001, with a focus to reform Christian Personal Law by eliminating the discriminatory provisions in the act. In Indian Divorce Act of 1869 there was a provision where husband can compensate wife for indulging in adultery, and wife had to prove cruelty along with adultery, to obtain a decree of divorce. Considering the sentiments of Christian community, which is against providing sanction to divorce, the government kept the clause of two year separation and refrained from the use of word "divorce", referring it to as "dissolution of marriage". Such a difference in personal law compared to other religions, has been condemned by various organisations for Christian women.²⁰

The marriages in Parsi community are recognised under The Parsi Marriage and Divorce Act, 1936 under which it requires a jury to confirm divorce. Thus the process of divorce has an exhausting effect on the couples, and will also take a very long time, considering which Family Courts were established to provide a

speedy trial, which was otherwise denied by such complicated process.²¹

On the other hand, Muslim law has recognised right of a woman to seek divorce, within the religious laws, but the issue arises on the question of maintenance and the procedure of divorce essentially regarding triple talaq. Muslim law considers a marriage as a civil contract, where consent of both the parties is essential. It also recognises the individuality of women after marriage and woman remains absolute owner of her property, therefore giving her the right to enter into contract of marriage with her husband and also go against him in the court of law, if required.²²

The form of divorce practiced in India by Muslims known as triple talaq has been an issue of major contention regarding the formation of a Uniform Civil Code and the debate of Freedom of Religion versus Right to Equality.

Though triple talaq, also known as talaq-ul-biddat, is recognised in Sharia, but is viewed as a disapproved form of dissolution of marriage in Islam. In Quran scholars find no mention of practice of pronouncing „three divorces „in one sitting, with an irrevocable effect. It is argued that, this practice was introduced by Umayyads“ to evade the strictness of law, during the times where they were invading and conquering new territories in Central Asia.²³

²⁰ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 55.

²¹ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 55-56.

²² AQIL AHMAD, MOHAMMEDAN LAW, 107 (26th ed. 2016).

²³ AQIL AHMAD, MOHAMMEDAN LAW, 169 (26th ed. 2016).

However, India Muslim Personal Law (Shariat) Application Act 1937, recognises triple talaq but in *Yousuf v/s Sowramma*²⁴, High Court of Kerala, made an observation that in India, Muslim law has taken a contrary view to spirit of Holy Quran or Holy Prophet causing a misinterpretation which ignores the right of wife seeking divorce. The High Court of Kerala also observed that the Quranic Law does not give the male unbridled authority to liquidate the marriage. It was also argued that if the source of Sharia law is Quran, and Quran has no mention of Practice of talaq-ul-biddat, then the practice does not have any religious sanction.²⁵

In *Must. Rukia Khatun v Abdul Khaliq Laskar*, the Court observed that the correct law and procedure of talaq in Islam, as ordained by Holy Quran, is (i) that 'talaq', if instituted must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation of differences between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. And if even their attempts fail, 'talaq' may be effected.²⁶ Therefore, while considering the question of triple talaq, the Supreme Court held that section 2 of the Muslim Personal Law (Shariat) Application Act, dealing with Talaq-ul-Biddat falls directly within Article 13(1) of The Constitution of India and is not in accordance with Islamic jurisprudence and is permitted within a limited sect of Hanafi school of Sunni Muslims, and hence, is not a part of Sharia and

²⁴ *Yousuf v. Sowramma*, A.I.R 1971 Kerala 261 (India).

²⁵ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 46.

²⁶ *Must. Rukia Khatun v Abdul Khaliq Laskar*, (1981) 1 G.L.R 375 (India).

therefore is arbitrary.²⁷ In *Shayara Bano v. Union of India*²⁸ the court while the question of Triple Talaq, held that Section 2 of the Muslim Personal Law (Shariat) Application Act 1937, through which the power and procedure for dissolution of marriage by triple talaq is said to be derived, is declared void (only to the extent that procedure is „arbitrary,„). Once this provision was struck down as ultravires and void, the arbitrariness of this procedure ceased to be a part of personal law and therefore does not qualify for protection under the fundamental rights guaranteed under Articles 25-28 of the Constitution.²⁹ Since the judgment, the practice of talaq ul biddat is outlawed. And as such a pronouncement of Triple Talaq will have no effect on the marriage, and any man resorting to the practice of Triple Talaq can be penalised by law under the provisions of Protection of Women from Domestic Violence Act, 2005.

The next issue of debate is on the maintenance that has be provided to a divorced wife by her husband.as , In this matter The Supreme Court held the view, that there was no contraction between Muslim personal law and Section 125 of Criminal Procedure Code, 1973, regarding maintenance of children, parents, and wives (including a divorced wife).³⁰ The actual position is that, the husband is supposed to provide maintenance to the wife for a period of three months referred in Sharia as *Iddat*. If the

²⁷ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 46-47.

²⁸ *Shayara Bano v. Union of India*, A.I.R 2017 SC 4609 (India).

²⁹ LAW COMMISSION, REFORM OF FAMILY LAW, 31 AUG. 2018, 46-47.

³⁰ *Fazlunbi Bivi v. Khader Vali*, A.I.R 1980 SC 1730 (India).

divorced wife is competent to maintain herself, the husband's liability ceases to provide maintenance to her after the expiration of three months of period of *iddat*. And if she is unable to maintain herself, she is entitled to take recourse to section 125 of the Criminal Procedure Code, 1973 provided she remains unmarried. In *Shah Bano Begum v. Mohammad Ahmad Khan*,³¹ case the argument between right to freedom of religion and right to equality got intensified, the Supreme Court held that the husband must provide maintenance to his divorced wife who is unable to maintain herself even after expiration of period of *iddat*, rejecting the contention that Section 125 of Criminal Procedure Code, 1973, is not applicable to Muslims, The Supreme Court held a view that the above provision is a measure meant to provide social justice to women and therefore, the religion of the spouses has no bearing on the applicability of the code. The court also pointed out that *Aiyats*, of Quran recognise the obligation of husband to maintain his divorced wife.³² This decision of the Apex Court was largely criticised by Religious groups and was perceived as an interference with Muslim personal laws. The social and political stir it caused and the pressure it created on the Legislature resulted in the passing of, The Muslim Women Protection Rights on Divorce Act, 1986, which overturned the above judgement. Later in *Danial Latifi v. Union of India*³³, it was explained that section 3(1) incorporates the concept of „*mata*“ which is the

provision for maintenance of the divorced Muslim woman, as a right. This will be in addition to „*meher*“ or „*dower*“. and the maintenance to be provided for the period of *iddat*. While the procedure of seeking maintenance may be settled, negotiating and even receiving the amount of *meher* becomes so cumbersome due to judicial delays, and also increasing expenditure forces them to withdraw their claims.³⁴

Another issue has been the practice of polygamy in Islam, which is surrounded by the question of morality and also Right to Equality. This provision within the religion, is seldom practiced by its followers in India, but is frequently misused by persons of other religions, who for the purpose of solemnising another marriage, convert to Islam. In its 227th report “Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings”, (2009), The Law Commission of India, has deliberated on the applicability of Section 494, of Indian Penal Code, 1860 which considers bigamy as an offence, to persons under various personal laws and also to Muslim women. In case of Muslims the commission held the view that the provision in Islam that treats bigamous marriage by a married woman as void but not the bigamous marriage by men. Under a general reading of Muslim law men are allowed to contract plural marriages. This provision should be scrutinised further in the light of Right to Equality.³⁵

³¹ *Shah Bano Begum v. Mohammad Ahmad Khan*, A.I.R 1985 SC 945 (India).

³² AQIL AHMAD, *MOHAMMEDAN LAW*, 236 (26th ed. 2016).

³³ *Danial Latifi v. Union of India*, A.I.R 2001 SC 3958.

³⁴ LAW COMMISSION, *REFORM OF FAMILY LAW*, 31 AUG. 2018, 43-45.

³⁵ LAW COMMISSION, *REFORM OF FAMILY LAW*, 31 AUG. 2018, 52-53.

Legislations like Indian Administrative Service (cadre) Rules, 1954, the Central Civil Services (Conduct) Rules 1964, penalise bigamy by barring the appointment to service, of a person who has contracted a bigamous marriage. However, exceptions are allowed if the personal law validates such a marriage.³⁶

Therefore, the formation of a uniform civil code by way of reforming personal laws, should not be viewed as a policy that is against the religious sensibilities and sentiments of individuals but merely as a way of promoting harmony between religions and constitutionalism, in such light that no citizen feels that he is left disadvantaged on account of their religion and at the same time securing to each individual their right to freedom of religion.³⁷

CONCLUSION

In a civilized society, diversity in religious orientation should be the reason for celebration, not the cause for hatred and differentiation. A matured civilised society is established on certain principles, which provides equal rights and obligations to its members, and a steady structure from where they can move toward physical, mental, and emotional progress. Our constitution framers with a similar thought gave the responsibility to the State to come up with a Uniform Civil Code. We as human beings will always be part this journey, to evolve but somewhere in this journey women of the country have been left behind, due to various societal obligations on them. In modern

times with aid of education and equal opportunities, though they are becoming more independent financially and have built a place for themselves, still a lot of them face discrimination in various areas of life be it personal or professional. The fight for equity and equality of genders will receive a huge fillip by refining and reforming various personal laws, which will further enable the women in the world to achieve their fullest potential and true empowerment.

Our Constitution is a constantly evolving one, which brings in dynamism and adaptability enabling it to absorb the modernities of the society. What was once a law gradually became a way of life, which evolved into religion as seen in Islam and Sikhism. Our laws have to follow the evolutionary footsteps to be relevant to the society and make life more simplistic rather than induce complexity. The idea of Uniform Civil Code, necessitates evolution of civil laws to be consistent with the basic human rights, in pursuit of which all societies and nations are progressing, for this first there should be unbiased scrutiny and reform of various personal and religious laws by themselves internally. In the course of time these internal reforms will help bring about both Equality and Equity between different genders in religions themselves. Slowly, these reformed laws can be integrated and provisions in them be refined to evolve a uniform civil code which guarantees basic civil and human rights across all castes, religions, and sects.

³⁶LAW COMMISSION, REFORM OF FAMILY LAW,31 AUG.2018, 52-53.

³⁷ LAW COMMISSION, REFORM OF FAMILY LAW,31 AUG.2018, 47-48.