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UNIFORM CIVIL CODE: INDIA'S STRUGGLE FOR GENDER JUSTICE

THE AUTHOR

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The article 14 of our constitution gives every citizen two rights that are equality before law and equal protection of law. It prohibits any discrimination on the basis of caste, race, religion, colour and gender. However in the garb of religious freedom the problem of gender injustice still continues to exist. India is a county with diverse population practicing a variety of religions with every religion having its own unique beliefs, norms and principles. This difference in religious norms and beliefs results in different personal laws. The secular status of Indian state gives protection to the personal laws of every religion. The state is prohibited from interfering in the personal laws of any religion. The civil code depends upon personal laws. Thus though a uniform criminal code applies throughout India no such uniform civil code is practised.

The framers of our constitution wanted to unite every citizen no matter of which caste, religion, race, place of birth or gender. They wanted to bind every citizen by equal laws thus they aspired for uniform civil code throughout India however they weren't able to shape this aspiration of their in form of a binding law. Their aspiration of uniform civil code found place in Indian constitution only in the form of non-binding directive principle of the state policy. The main reason behind this was that religious freedom was given superiority over gender equality. Thought the framers of our constitution wanted a uniform civil laws to apply all over the India ensuing equality to every citizen in both personal and national matters still they couldn't ignore the religious sentiments of the people. Even during colonial period the whole of India was covered under uniform penal code in 1830, but there was no attempt to replace the personal laws of different religions with a common civil code. Even the Britishers dared not to touch the personal laws of the Indian citizens in the view of 1857 mutiny. They brought uniformity in criminal law and abolished customary laws having inhuman and exploitative impact like the sati Pratha and Devdasi system. But they left the area of personal law untouched. Thus following the same line, the founder fathers of our constitution included the idea of uniform civil code only as a DPSP under article 44 of the constitution directing state to formulate policies to achieve the goal of uniformity in civil laws.

The subjects like marriage, guardianship, succession, adoption, divorce etc, are governed by personal laws. Thus laws related to these subjects are different in different religions like Hinduism, Islam, and Christianity. There are different laws like Hindu Marriage Act, 1955, The Hindu Succession Amendment Act, 2005, The Hindu Minority and Guardianship Act, 1956 which govern the personal laws of the Hindus. The Shariat Act, The Dissolution Of Muslim Marriage Act, 1939, The Muslim Women Protection And Rights On Divorce Act, etc are based on the Holy Quran and govern the personal laws of Muslim. Similarly, the Christians are governed by Christians Marriage Act, The Indian Divorce Act, And Cochin Christian Succession

Act, etc¹. Parsis are governed by different laws. So, it is clear that in India there is no uniformity in personal laws. All these acts lay down different personal law for governing people of different religion. In modern times, these laws instead of being an evidence of religious freedom are becoming a means of women exploitation. A detailed study of all these personal laws, would make it apparent that women are conferred an inferior status in most of the personal matters compared to men. The presence of different personal laws resulting in different civil codes for different communities not only makes their application difficult and complex, but they are discriminatory against women. On one hand Muslim personal laws like triple Talaq, Polygamy, Iddat, Halala etc, are discriminatory for Muslim women and on the other hand in Christianity a Christian woman is discriminated for inheritance of property. She gets no share in the property of deceased children while different rules apply to other communities.

Though other religions are not immune from this defect either, but the need of uniform civil code is most severely felt in the Muslim personal laws related to marriage, divorce, maintenance and adoption. Quran the holy book of Islam gives equal rights to men and women and award women a respectable position equal to men. However, many laws under Islam are discriminatory against women, making them inferior to men. The provisions of Triple Talaq, Halala and Polygamy etc under Muslim personal laws are in contradiction to the overriding principle of non-discrimination, dignity and equality.

The concept of triple talaq as known to people is very different from the original concept of talaq as explained in Quran. Triple talaq is understood as a unilateral divorce where the husband is capable to divorcing his wife instantly only by just pronouncing the word 'talaq' thrice. However this is not what actually Quran states about triple talaq. In reality the concept of 'three divorce at a time', does not exist in the Quran. It is something misinterpreted and invented by people. The Quran demands time and patience in executing a divorce in the hope of making the union possible knowing that the couple is bound to have differences. The word talaq derives from Arabic and means 'freeing or undoing the knot.' In Islamic terminology, it refers to a divorce². The Quranic message is very explicit about divorce. It leans more toward safeguarding marriage than dissolving it abruptly. The chapter on women in the Quran draws attention to the need for arbitration before husband and wife decide to part ways³. Triple talaq actually means period of waiting for 3 months before divorce so the spouses could reconsider their decision and resolve the problems between them. However, the misconception about triple talaq, or instant divorce, not only negates equality but is also against the dignity of Muslim women. Triple talaq which is the method of divorcing the wife by the husband by pronouncing the word 'taraq' thrice is highly discriminatory. This is in spite of the clear message of Holy Quran which discourages "Talak-Ul-Sunnat" and "Talak-Ul-Biddat" because the right of the husband to divorce his wife is unilateral and unfettered. In more than twenty countries, including Pakistan and Bangladesh the practice of Triple talaq is banned⁴. But in India, due to various political reasons the practice still continues.

¹ Chawla, Monika. "Gender Justice Women and Law In India", Delhi. Deep & Deep Publications Pvt Ltd, 2006 Print.

² Prasad, Anirudh And Singh, Chandrasen Pratap. "Judicial Power and Judicial Review", Lucknow. Eastern Book Company, 2012 print.

³ Ibid

⁴ Chawla, Monika. "Gender Justice Women And Law In India", Delhi. Deep & Deep Publications Pvt Ltd, 2006 Print

The prominent case in this is *Shamim Ara v. State of U.P.*⁵ where the two-judge bench which decided this case, after expressing its “respectful agreement”, ruled that a written statement of divorce by the husband without communicating about the same to his wife is not valid thus it doesn’t vanishes the wives right to maintenance from the husband⁶.

Another provision under Muslim personal law that needs to be reconsidered is ‘Halala’. Halala is the un-Islamic temporary marriage where a woman victim of instant talaq is forced to undergo marriage with another man in order to remarry her first husband. She is obligated to consummate her marriage with the second husband before divorcing him to marry her first husband. The concept of Halala was introduced to discourage impulsive divorces for furious reasons; it introduces a prohibited degree by warning the parties who opt for separation through triple talaq. Though the objective of introduction of the concept to Halala was to safeguard women from impulsive divorces however the concept has taken a negative form it instead of safeguarding women is against the dignity and self respect of a woman, she is forced to marry and consummate the marriage with another man to remarry her first husband.

Quran allows polygyny i.e. a Muslim male is allowed to have up to four wives at time. The concept of ‘polygyny’ have to be distinguished from ‘polyandry’ i.e. a women having more than one husband and ‘polygamy’ which includes both terms polygyny and polyandry. Polyandry is prohibited under Muslim law. The practice of polygyny is regarded as against principle of equality; it is discriminatory for Muslim women. Due to patriarchal nature of the society, though men are allowed to have more than one wife, no woman is allowed to do so. The actual reason why polygyny was allowed in Quran was to provide protection to widows and children orphaned as Muslims suffered heavy casualties in defending the nascent Islamic community in Medina. But now it has turned into a practice to satisfy greed of a man. Quran states “Marry women of your choice, two or three or four; but if you fear you will not be able to deal justly with them, then only one”⁷. Thus though Quran permits polygyny along with this, there is a condition that all wives must be treated exactly the same and today it is generally accepted by Muslims as impossible to do this.

Polygamous marriages have negatives effects on not only women but also for the male spouse. The financial burden on the husband multiplies as is expected to support all his wives financially; therefore the husband is required to earn a large amount of money to support for more than one wife and this create pressure on him. If a man has more than one wife he is more likely to be the father to many children, who he would also be responsible to support him, resulting in him having to earn even more money. As regard to women it has many negative impacts as well, not only that it is discriminatory but women has to suffer from loss of companionship and love. As more and more wives are added to a family, tension as well as jealousy is created making the living environment in the family home to be less comfortable. This lowers the feeling of affection and love between the siblings who have the same father but different mothers as they feel detached from each other. This also lead to arguments within the

⁵ Appeal (crl.) 465 of 1996

⁶ Ibid

⁷ [Quran \(4:3\)](#).

family. Polygamous marriages are also disadvantageous to women sexually as while a husband is given the right to indulge in sexual relations with more than one women, the wife is made to compete for the love of a single man. It therefore can be seen as disregarding to how women feel and what is important to them, thus putting them in a inferior position.

The provision of polygyny in Muslim law has led to the practice of religion conversion. The objective behind such conversion in faith is not transformation in religious beliefs but selfish material needs. Non-Muslims aspiring to have more than one wife have started the practice of conversion of religion. This practice is not only against the principle of equity and natural justice but is also insulting to the religious sentiments of the people. It is against the rights of the first wife who suffers from such practice. An important case in this is Smt. Sarla Mudgal & Ors V Union of India⁸. In the judgement of this case the principles against the practice of conversion to Islam for solemnizing second marriage was laid down, when the first marriage is not dissolved. In this case the question before the Supreme Court was whether the second marriage of a Hindu husband, by converting to Islam, would be regarded as a valid marriage or not. Delivering the judgement the hon'ble Court declared that it would be in violation of the principles of equity, justice and good conscience, as also those of natural justice if a Hindu man who is already married under the provisions of Hindu Marriage Act goes for a second marriage without dissolving the first marriage. Although under article 25-28 of constitution, a Hindu husband has a right to embrace Islam as his religion, but he doesn't have a right to impose a religion on other, second marriage without dissolving the first by embracing Islam would be imposing a forced religion on the first wife thus is discriminatory. Thus he has no right under these articles to marry again without getting his first marriage under the the Hindu Marriage Act dissolved, hence the second marriage will be void. Keeping in mind the interests of both the Hindu and Muslim communities and the plurality of laws, the court concluded that: "Since it is not the object of Islam nor is the intention of the enlightened Muslim community that the Hindu husbands should be encouraged to become Muslim merely for the purpose of evading their own personal law by marrying again, the courts can be persuaded to adopt a construction of the laws resulting in denying the Hindu husband converted to Islam the right to marry again without having his existing marriage dissolved in accordance with law"⁹. The Supreme Court thus held that one cannot impose another religion on their spouse thus the husband can't impose Islam religion on his first wife without her will. Legally speaking, the second marriage would be void under section 494 IPC and the husband would be guilty of the offence under Section 494 IPC. Justice R.M. Sahai went on to say that "Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not auctionary but oppression. Therefore, a Uniform Civil Code is imperative, both, for protection of the oppressed and for the promotion of national unity and solidarity"¹⁰. The validity of Smt.Sarla Mudgal & Ors. vs. Union of India judgement was upheld in Lily Thomas

⁸ AIR 1995 SC 1531

⁹ Ibid

¹⁰ Ibid

vs. Union of India¹¹. Marriage resulting from conversion to another religion without dissolving first marriage was declared void.

The Indian judiciary well aware of the injustice done to the women in matters of personal laws applicable to them by virtue of their religious identity. There are instances of many judgements where the judiciary has specifically highlighted necessity to have uniformity in personal matters of all the citizens. The issue of the applicability of the Muslim Personal Law in India and the skewed impact it has on gender relations within the Muslim community has been raised in many cases like Shan Bano case, Daniel Latifi case, Sarla Mudgal v. Union Of India, etc. The most prominent case in respect of uniform civil code is Mohd. Ahmed Khan vs. Shah Bano Begum and Ors¹². In this case a Muslim woman's right of maintenance after divorce came in question before the Supreme Court. The plaintiff, a 62 year old Muslim woman, challenged the Muslim personal laws related to iddat. In [Islam](#), iddah or iddat is the period a woman must observe after the death of her husband or after a divorce, during this period she is not allowed to marry another man. Its purpose is to ensure that the male parent of any offspring produced after the cessation of a [nikah](#) (marriage) would be known¹³. The iddah of a woman divorced by her husband is three monthly periods. A woman is entitled to receive maintenance from her husband only for the period of iddat not after it. The five judge constitutional bench of Supreme Court unanimously ruled in her favour. Held the Muslim personal laws to be discriminatory towards women. The then chief justice, Y.V Chandrachud, came out strongly in favour of uniform civil code and said that "a common civil code will help the cause of national integration by removing desperate loyalties to law which have conflicting ideologies. no community is likely to bell the cat by making gratuitous concessions on this issue. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so"¹⁴. Though in this case a woman's right to maintenance was given superiority before personal law however, she was subsequently denied the alimony when the ¹⁵Indian Parliament reversed the judgement under pressure from Islamic orthodoxy. Government under pressure from Muslim population passed The Muslim Women's (Protection of Rights on Divorce) Act (MWA) in 1986. This act suspended the applicability of Section 125 of the Criminal Procedure Code on Muslim women thus made them susceptible to personal laws. As a result of this act was that, now governed by personal laws, a Muslim husband is not liable to give maintenance to his wife beyond the iddat period after divorce, unless both the spouses expressly declares that they would like to be governed by Cr.P.C. However in a subsequent case Denial Latifi V Union Of India¹⁶, where the constitutional validity of Muslim Women's (Protection of Rights on Divorce) Act, 1986 was challenged, and court upheld that "a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well even beyond the iddat period must be made within

¹¹ Writ Petition (Civil) No. 490 Of 2005

¹² 1985 SCR (3) 844

¹³ <https://www.farhathashmi.com/articles-section/women-and-family/iddah/>

¹⁴ Ibid

¹⁶ Writ Petition (civil) 868 of 1986

the iddat period under section 3(1)(a) of the act”¹⁷. It was therefore held that a Muslim man is as much liable as men of other religions to provide maintenance to his divorced wife, the liability to pay maintenance is not confined to the iddat period. Here the court showed judicial dynamics to protect the rights and dignity of a Muslim woman from orthodox personal law. The decision of court was not in violation of right to freedom of religion given to every citizen but was in consonance with every person’s right to live with dignity.

From all the discussion on the pros and cons of various personal laws with specific focus to Islamic provisions of halala, tripe talaq and polygamy and need for uniform civil code and judiciary’s role in ensuring it we can conclude that the concern of uniform civil code prevails since independence. Every single government who ruled the country is somewhat responsible for absence of uniform civil code in the country yet and I think it will take a great courage to implement uniform civil code. UCC will promote justice, Gender equality and national integration and it will simplify the cumbersome legal matters governed by personal laws ¹⁸.The objective of unity and integrity of India enshrined in the preamble could be achieved only when Article 44 is transformed into enforceable Uniform Civil Code and it can promote monogamy among all the citizen of India including Muslim and it will lead to betterment in the position of women¹⁹. The first step towards uniform civil code would be resolving doubt in people’s mind that uniformity in civil code will lead to loss of identity, migration, weakening of religious beliefs etc. Every religion has many goods to take. Uniform civil code doesn’t mean imposing the personal laws of majority religion on minority rather it means taking the best from every religion to form a common code. Every religion has some good to offer, a uniform civil code is all about recognising that good and shape it into a common civil code applicable on all. A shining example of successful application uniform civil code in India is the state of Goa. In Goa there is Goa Civil Code, which is a uniform civil code in itself. It is followed since Portuguese time. Although there were chances to revoke the old law after the departure of Portugal but locals raised the voice against that decision. This is evidence that people are willing to accept uniform code regardless of religion if it is carefully framed. The successful implementation and working of uniform civil code in Goa highlights the importance of simplifying the Indian legal system to make Indian society more homogeneous; only then the idea of a secular society can be achieved and for these there is need for uniform civil code for all religions²⁰.

The idea of a uniform civil code for all India is very desirable to cultivate the sense of national unity and integrity in the citizens. But the biggest hurdle in achieving this objective is the orthodox public opinion against it. People though well acquainted with the fact that these personal laws are discretionary want to preserve it for their selfish reason. The traditional, conservative, religious opinion still holds sway over the Muslims, and the Government regarding it as a politically sensitive issue hesitates to proceed against it. Thus to implement uniform code

¹⁷ Ibid

¹⁸ Boodman, Martin. “The Myth Of Harmonization Of Laws”. The American Journal Of Comparative Law (Vol. 39, No. 4 (Autumn, 1991), Pp. 699-724).

¹⁹ Ibid

²⁰ Pragati Ghosh, article, “<http://www.shareyouressays.com/117258/essay-on-the-uniform-civil-code-in-india>”

there is a need of better appreciation among Muslims for it until than the ideal of uniformity in civil laws will only remain as a directive principle and wouldn't be able to shaped into binding laws. And State will continue dividing the people on a religious basis something which does not go well with the secular concept.

Finally it is recommended that bringing the UCC would help and reduce many technicalities and loopholes present in present existing personal laws, it was an aspiration of our Constitution makers. The Government must draft a common civil code with the view of all minorities and their best interests in mind by taking best provisions from every religion. The government must implement the uniform civil code in the true spirit of Article 44 of the Constitution.
