

Lifting the Veil: Tussle between Freedom of Religion and Fundamental Rights and laying the cornerstone for Uniform Civil Code in India

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Abstract

The paper very widely aims to understand the meaning and extent of Muslim personal laws and whether personal law can be subject to the Constitution at all. The judgement of Supreme Court regarding discriminatory practice of instant triple talaq has made it unconstitutional. The Supreme Court has also paved the niche for the prevalence of fundamental rights enshrined in Part III of Indian Constitution (the practice being allegedly violative of Articles 14, 15 and 21) over the Personal laws. Triple Talaq is arbitrary and discriminatory which is against the spirit of Indian Constitution. The law on divorce by men is in misuse that on divorce by women is in disuse. Triple Talaq takes away their right to equality and right to live a dignified life. Values of democracy, secularism, equality, non-violence, human rights and justice as enshrined in the Constitution of India are guiding principles in our struggle for gender justice. In the light of landmark judgement given by apex court authors have critically discussed and did constructive analysis of conflict between religious freedom, given in Article 25 and the right to equality in Article 14.

The paper throws light on how the bench has contrasted the broader issues of constitutional rules versus the social norms. Judicial interpretations have also been looked into wherein the courts have laid the procedure of valid divorce by interpreting holy Quran. Paper also highlights that the enactment of Uniform Civil Code could bring an end to this form of injustice done to Muslim women and its implementation for curbing the atrocities being faced by a particular section of society. The provision aims to promote unity and integrity which is mentioned in the preamble of our constitution. This research paper is based on doctrinal research constructed on secondary data.

Keywords: *Fundamental Rights, Personal laws, Constitutionality, Uniform Civil Code.*

I. Introduction

By declaring the discriminatory practice of instant triple talaq as unconstitutional, the Supreme Court has sent a clear message that the personal law can no longer be privileged over fundamental rights. Three of the five judges of the Constitutional Bench have not accepted the argument that instant talaq is essential to Islam and therefore, deserves the constitutional protection under Article 25. The biggest virtue of the two opinions constituting the majority judgement is that they do not undermine any religious tenant to make their point. On the contrary, as Justice Kurian mentioned, the forbidden nature of triple talaq can be gleam from the Quran itself. Justice Rohinton Nariman, in writing his judgement, locates the practice in the fourth degree of obedience required by Islamic tenants, namely, makruh, or that which is reprobated as unworthy. The main ground on which the practice has been struck down is a simple formation, that, 'this form of talaq is manifestly arbitrary in the sense that the material tie can be broken capriciously

²⁹⁴Verse 65:1, Holy Quran, <https://www.quran.com/65/1>, accessed on 10th September, 2017.

and whimsically by a Muslim man without any attempt at reconciliation so as to save it'. In fact, the final summation is so simple that the court did not even have to elaborate on how triple talaq violates gender equality. The court deserves high accolades for undoing the gender injustice implicit in the practice so effortlessly, within the constitutional parameters as well as the Islamic canon. The present case was initiated suo moto by the court, but the opinion against triple talaq could not have been gathered critical mass and the case against it significantly bolstered it were not for a few women standing up to the community's conservative elements and challenging it. This essay is an attempt to understand the meaning and extent of Muslim 'personal laws' and its implications under Article 25 and Article 14, 15 and 21 of the Indian Constitution and the genesis and importance of Uniform Civil Code, read in lieu of the recent landmark judgement, pronounced by the apex court.

II. Muslim 'Personal Law'

Muslims are followers of Islam and consider Quran as their Holy book. For their personal relations, they follow the Muslim 'personal law' – 'Shariat'. The Muslim Personal Law (Shariat) Application Act, 1937, consists, "the rule of decision" in matters pertaining, inter alia, to marriage, dissolution of marriage including talaq, ilya, zihar, lian, khula and mubaraat would be the Muslim 'personal law' 'Shariat', and not, any custom or usage to the contrary. It is, therefore, through a statutory intervention, customs and usages in conflict with Muslim 'personal law' were done away with, in connection with 'personal law' matters. The Dissolution of Muslim Marriages Act, 1939 provided grounds for dissolution of marriage to Muslim women, under Section 2 of the above enactment.

The scrutiny of details pertaining to the legislation of India with regards to matters relating to 'personal law' and particularly to the issues relating to divorce and marriage for different religious communities reveals, that all issues governed by 'personal law', were only altered by way of legislation. There is not a singular instance of judicial intervention, except a few judgments rendered by High Courts, which attempted as an interpretative course rather than an invasive one.

Talaq-e-Biddat and its implications under Article 25 of Indian Constitution

Triple talaq is protected by Article 25 of the constitution of India, providing provision of guaranteeing religious freedom. Article 25, recognises the supremacy and enforceability of 'personal law' of all religions. Article 25 provides every person, subject of course to public order, health and morality and other provisions of Part III of the constitution including Article 17, freedom to entertain and exhibit by outward acts as well as to propagate and disseminate such religious belief according to his/her judgment and conscience for the edification of others. The right of the State to impose such restrictions are as desired or found necessary on grounds of public order, health and morality, which is inbuilt in Articles 25 and 26 of the Indian constitution.

²⁹⁵G Anantha Kishnan, (2017), SC walks fine line, The Indian EXPRESS, New Delhi, <http://indianexpress.com/article/india/triple-talaq-verdict-supreme-court-muslim-divorce-instant-triple-talaq-ban-4808897/> accessed on 10th September, 2017.

²⁹⁶S Valiraman, Women Rights Group Speak out to Government', The Wire, Dec 2017, article retrieved from <https://thewire.in/207493/triple-talaq-criminalised-bill-womens-rights/> accessed November 2017.

²⁹⁷Section 2 of Muslim Personal Law (Shariat) Application Act, 1937

²⁹⁸Rega Rao, Family Laws in India, Asia Law House, Hyderabad, 2015, Pg. 301

²⁹⁹Section 2 of Muslim Personal Law (Shariat) Application Act, 1937

³⁰⁰Archana Parasher, Women and Family Laws Reform in India, (1992) New Delhi, Pg. 194

Article 25(2) ensures the right of the State to make a law providing for social welfare including reforms, and any such rights of the State, or of the communities, or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the nation is to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17.

Supreme Court had tested the 'personal laws' on the touchstone of fundamental rights in the case of Daniel Latifi v. Union of India (by a 5-Judge Constitution Bench) The Supreme Court tried to maintain a balancing act, attempting to uphold Muslim women's rights without addressing the constitutionality of gender and religious discrimination in personal law. Court reiterated the validity of the Shah Bano judgment (by a 5-Judge Constitution Bench).

The content of Articles 25 and 26 of the Constitution came up for consideration before the Hon'ble Supreme Court in several other cases and the main principles underlying the provisions have been the following:

Firstly, the protection of these articles is not limited to matters of doctrine or belief; they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion.

Secondly, what constitutes as an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

The position seems to be clear, that the judicial interference with 'personal law' can be rendered only in such manner as has been provided for in Article 25 of the Constitution. It is not possible to breach the parameters of matters of faith, as they have the protective shield of Article 25.

Inference of Article 14, 15 and 21 of Indian Constitution over 'Talaq-e-Biddat'

So far as the challenge to the practice of 'talaq-e-biddat', with reference to the constitutional mandate contained in Article 25 is concerned, it would be pertinent to mention, that the constitutional protection to tenets of 'personal law' cannot be interfered with, as long as the same do not infringe "public order, morality and health", and/or "the provisions of Part III of the Constitution" . The remaining grounds on which 'talaq-e-biddat' could be challenged are, - if the practice of triple talaq divorce can be seen as violative of the provisions of Part III of the Constitution (the practice being allegedly violative of Articles 14, 15 and 21). Dr. Ambedkar had stated : "What we must do is not to be attained with mere political democracy; we must make out political democracy and a social democracy as well. Political democracy cannot last unless there lies at the base of it a social democracy." A social democracy has been described as "A way of life which recognizes liberty, equality and fraternity as principles of life" . It was therefore submitted, that in order to achieve social democracy, and in order to provide social and economic justice (as

³⁰¹(2001) 7 SCC 740

³⁰²Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556

³⁰³Ram Prasad Seth v. State of U.P. and Ors. AIR 1957 ALLD 411

³⁰⁴A Ghosh, Essential Religious Paradox? The Supreme Court's Interpretation of Article 25, Bar and Bench, 1st November 2017, article retrieved from <https://barandbench.com/essential-religious-practices/>, accessed November 2017.

³⁰⁵Laxminarayana Temple, Kothure v. Laxman Mahadu Chandore AIR 1970 Bom 23

³⁰⁶Closing speech on the draft Constitution on 25th November, 1949

envisaged in the preamble), namely, goals articulated in the fundamental rights and directive principles had to be given effect to.

Besides equality, Articles 14 and 15 prohibit gender discrimination. It was pointed out, that discrimination on the ground of gender was expressly prohibited under Article 15. In Charu Khurana case, it was concluded, that the “sustenance of gender justice is the cultivated achievement of intrinsic human rights and that there cannot be any discrimination solely on the ground of gender.” The right of a woman to equal dignity, social esteem and self-determination were vital facets, of the Right to Life under Article 21. Gender equality is a basic constitutional goal, contemplated by the framers of the Constitution. It is aptly mentioned in Article 51A (e) of the Constitution, that the State should take proper measures to renounce practices derogative to the dignity of a woman.

III. Split Judgement: The Tussle between Freedom of Religion and Fundamental Rights

In pursuit of justice, the bench has contrasted the broader issues of constitutional rules versus social norms. In doing so, it has not justified, to an extent, the tussle between freedom of religion and other fundamental rights that is a central issue in a liberal democracy.

Chief Justice of India J.S. Khehar and Justice S. Abdul Nazeer’s dissenting opinion has dismissed the appeal to invalidate talaq-e-bidat, on multiple grounds. In response to the petitioners’ argument that the practice was disproved by various hadiths—reports containing the sayings of Prophet Muhammad—the judges have accepted the All India Muslim Personal Law Board’s (AIMPLB’s) argument, that it was not the court’s role “to determine the true intricacies of faith”. It is not expected for a secular court to examine the hadiths presented by both sides, and untangle religious history and interpretation.

A point of contention here is whether the Muslim Personal Law (Shariat) Act of 1937 codified talaq-e-bidat into statutory law or not, since the statutory law is subject to fundamental rights. They conclude that it did not. They then have the option of examining whether personal laws are subject to fundamental rights even so. The Hon’ble apex court cites the 1951 case, *The State of Bombay v. Narasu Appa Mali*, to state that ‘personal laws’ are not subject to fundamental rights—and refuse to re-examine the issue.

Justice Kurian Joseph has taken a very different approach. He agrees with Justices Khehar and Nazeer that the Shariat Act does not codify instant triple talaq into statutory law. But unlike them, he examines the relevant surahs in the Quran and cites the precedent of *Shamim Ara v. State of UP & Anr* to argue that talaq-e-bidat is not in fact an integral part of Muslim personal law and thus “lacks legal sanctity” under it.

Like Justice Joseph, Justices R.F. Nariman and Uday Umesh Lalit have invalidated talaq-e-bidat, but they have adopted yet another approach. They raise the crucial question of whether “*Narasu Appa...* which states that personal laws are outside Article 13(1) of the Constitution is correct in law”. But the bench did not consider to clarify or unveil this legal question.

³⁰⁷K.N. Kadam, Dr Bababsaheb Ambedkar and Significance of his Movement, Bombay Popular Prakashan, 1991, Pg. 50

³⁰⁸18 (1997) 6 SCC 241

³⁰⁹Triple Talaq has not gone its entire distance, <http://www.livemint.com/Opinion/N3qknTP5WmCG1kGt1fF76I/Triple-talaq-verdict-has-not-gone-the-entire-distance.html>, accessed on 15th September 2017

³¹⁰AIR 1952, BOM 84

³¹¹AIR 2002, 465

Even as the judgement is welcome, it underperforms to establish broader principles about the relationship between freedom of religion and other fundamental rights. Justice Nariman has acknowledged that “the difficult task of determining the propriety or the validity of adjustments made either legislatively or by the executive action between the fundamental rights and the demands of socio-economic welfare has been ultimately left in charge of the High Courts and the Supreme Court by the Constitution”. But Justices Khehar and Nazeer have instead exercised judicial restraint at a time when reinterpretation was warranted.

Justice Khehar has argued: “Law is largely the formalized and enforceable expression of a community’s cultural norms.” In contrast, B.R. Ambedkar had famously said : “Constitutional morality is not a natural sentiment. It has to be cultivated... Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic.”It would be wise to heed Ambedkar. Allowing cultural and religious norms to dictate jurisprudence in India would not be essentially prudent.

IV. Uniform Civil Code and Gender Justice

In *Mohammad Ahmed Khan v. Shah Bano Begum*, popularly known as *Shah Bano’s case*, the Supreme Court held that “It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.” Though this decision was highly criticized by Muslim Fundamentalists, yet it was considered as a liberal interpretation of the law as required by gender justice. Later on, under pressure from Muslim Fundamentalists, the central Government passed the Muslim Women’s (Protection of rights on Divorce) Act 1986, which denied the right of maintenance to Muslim women under section 125 Cr.P.C. The activist rightly denounced that it “was doubtless a retrograde step. That also showed how women’s rights have a low priority even for the secular state of India. Autonomy of a religious establishment was thus made to prevail over women’s rights.”

However, in *Ahmadabad Women’s Action Group (AWAG) v. Union of India*, a PIL was filed challenging gender discriminatory provisions in Hindu, Muslim and Christian statutory and non-statutory law. This time Supreme Court became a bit reserved and held that the matter of removal of gender discrimination in personal laws “involves issues of State policies with which the court will not ordinarily have any concern.” The decision was criticized that the apex court had virtually abdicated its role as a sentinel in protecting the principles of equality regarding gender related issues of personal laws of various communities in India.

The Apex Court pursued the same line in *Lily Thomas etc. v. Union of India and others* and held: “The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when the social climate is properly built up by the elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.” The situation regarding the personal laws for Christians in India was different. In their case, the

³¹²A Rehman, To Clear the Path Ahead, *The Hindu*, 2nd September 2017, article retrieved from <http://www.thehindu.com/todays-paper/tp-opinion/to-clear-the-path-ahead/article19605726.ece> accessed 5th November 2017

³¹³*Prem Chand Garg v. Excise Commissioner, State of U.P.* 1963 AIR 996

³¹⁴*Shamin Ara v. State of U.P. & Anr* 2002 SC 465

³¹⁵<http://www.merchantkushagra.info/cm.html> accessed on 15th September 2017

³¹⁶(1985) 2SCC 556

³¹⁷*Amita Dhanda and Archana Praskar, Engendering Law: Essays in Honour of Lokita Sarkar*, Pg 137 (1999)

³¹⁸AIR 1997 SC 3614

³¹⁹*Ibid.*

³²⁰Rajeev Dhavan, ‘Apex Court and the Personal Law’, *The Hindu*, 14th March 1997

courts seemed to be bolder and took a progressive stand in terms of gender equality. For example, in 1989, in *Swapana Ghosh v. Sadananda Ghosh*, the Calcutta High Court expressed the view that sections 10 and 17 of the Indian Divorce Act, 1869, should be declared unconstitutional but nothing happened till 1995. In 1995, the Kerala High Court in *Ammini E.J. v. Union of India*, and Bombay High Court in *Pragati Verghese v. Cyrill George Verghese*, struck down section 10 of Indian Divorce Act, 1869 as being violative of gender equality.

Bigamy is punishable by law in all communities except Muslims, who are governed by the Sharia law. The Muslim Personal Law (Shariat) Application Act 1937 was passed by the British government to ensure that the Muslims were insulated from the common law and that only their personal law would be applicable to them. Bigamous marriages are illegal among Christians (Act XV of 1872), Parsis (Act II of 1936) and Hindus, Buddhists, Sikhs and Jain (Act XXV of 1955). Enactment of a Uniform Civil Code would impinge upon Muslim rights to polygamy. In almost all recent cases where the need for a Uniform Civil Code has been emphasised women were at the receiving end of torture in the garb of religious immunity. It took 15 years for Muslim women, from Shah Bano to Danial Latifi and another 15 years, (from Danial Latifi to Shayara Bano) to get where they are today. Things would have been much easier for them had a UCC been in place.

V. The benefit and importance of Uniform Civil Code

UCC will promote justice, equality and national integration. The enactment of UCC will promote Gender equality and welfare of women. It can be argued that Personal Law system violates the principle of equality of the Constitution because by having different personal laws for different religions, we are going against the secularism and equality. But UCC can promote equality and justice by incorporating similar laws for all citizens. Under our constitution, Article 44 provides that State shall endeavour to secure for its citizens a uniform civil code throughout the territory of India.

The paramount objective of unity and integrity of India as resolved by the People of India in the preamble could be achieved only when Article 44 is transformed into enforceable Uniform Civil Code. In India, secular laws like Special Marriage Act 1954, already exists. This law governs members of all the religions whether Hindu, Muslim, Parsi, Christian, etc. it is acceptable among all the citizens of India. This shows that there is no reason that why a uniform secular law cannot be extended and enacted for whole India.

It has been rightly pointed that UCC will not violate Article 25 and 26 and it will help in attaining secularism and Article 44. Further, it can be argued that marriage, succession etc. are secular matters and law can regulate them. Article 25 of the Constitution of India gives power to the state to interfere in matters of religion. So, the state can enact provisions for the welfare

³²¹ AIR 2000 SC 1650

³²² AIR 1989 Cal. 1

³²³ AIR 1995 Ker. 252

³²⁴ AIR 1997 Bom. 349

³²⁵ Ashok K.M., A Muslim Cannot be Prosecuted for Bigamy in Absence of UCC, LiveLaw.in, 6th September 2015, article retrieved from <http://www.livelaw.in/a-muslim-cannot-be-prosecuted-for-bigamy-s-494-ipc-in-the-absence-of-ucc-gujarat-hc/> accessed 11th November 2017

³²⁶ Nithya N.R, Uniform Civil Code for India: Prospects and Constraints, Global Research Analysis Journal Vol. 2 Issue 9 ,157(Sept.2013)

³²⁷ Shivam Garg, Uniform Civil Code: In Context of Secularism, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343500&download=yes, accessed on 18-09-2017

of religious entities and we can argue that UCC is welfare legislation because it will remove the inherent injustice and loopholes of Personal Law System.

The introduction of UCC will promote monogamy among all the citizen of India including Muslim and it will lead to betterment in the position of women. It will also remove prejudices against women regarding personal laws on divorce and maintenance.

VI. Conclusion

The genesis of reforms to 'personal law' in India, with reference to socially unacceptable practices in different religions, can be brought up only by the legislative intervention. Such legislative intervention is permissible under Articles 25(2) and 44, read with entry 5 of the Concurrent List, contained in the Seventh Schedule of the Constitution. This judgement provides interim measures as it restores woman's dignity and assures equality of gender by sticking down the practice of instant triple talaq. This judgement expresses an extremely valuable legal provision as well, that if there is any conflict between religious freedom, given in Article 25 and the right to equality in Article 14, equality will prevail.

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 citizens of India including Muslim and it will lead to betterment in the position of women.

If anyone had a tryst with destiny in the 70th year of the nation's independence, it was Shayara Bano. She seemed to have lost everything the day her husband, Riswan Ahmad of Allahabad, had sent her a letter in October 2015 with the words, 'I give talaq, I give talaq, I give talaq' written on it, after 15 years of marriage. But Shayara had picked herself up and faced up to her loss. She filed a writ petition in the Supreme Court in February 2016, becoming the first woman in India to challenge the constitutional validity of the age-old Islamic practice of instant divorce. Thirty-two years ago, when a 65-year-old Shayara Bano had decided to fight back, she had appealed to the courts for maintenance from her husband in 1985. The Supreme Court upheld her claim but her case kicked-off a political battle over personal laws. For Muslim women now, it is not just about the maintenance or mehr. They are challenging the very basis of the laws that deny them equal dignity. It has been a long-drawn battle and the verdict has meant victory for all women in India, not just Muslim women.

³²⁸Werner Menski, *The Uniform Civil Code Debate in Indian Law*, German Law Journal Vol9 Issue 3, 214 (2008)

³²⁹Shayara Bano v Union of India and Others, 2016 SCC 118, Pg. 264

³³⁰Datta Damayanti, 'The Leap of Faith', India Today Magazine, Volume XLII, Number 36, For the week August 29-Sept 4, 2017, Pg. 44-46

³³¹Mohd. Ahmad Khan v. Shah Bano Begum 1985 AIR 945

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