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Uniform Civil Code : Road to Gender Justice

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Indian democracy has proved its resilience and ability to achieve gender justice and equality for women in every sphere of national life. With the enactment of four statutes in 1955-56 for Hindus relating to marriage, succession, maintenance, guardianship and adoption, the position of Hindu women has improved to a greater extent by providing monogamy, permitting divorce, and by revolutionizing their position to become the absolute owners of the estate of deceased husband and coparcener in HUF. But their Muslim counterparts continue to suffer from vices of polygamy, absolute power of husband to give extra judicial divorce. In famous Shayara Bano case, the Supreme Court has outlawed Triple Talaq. The amendment of the Hindu Marriage Act to incorporate irretrievable breakdown of marriage as ground of divorce is the need of hour. By reference to landmark judicial decisions and enactments, the author has analyzed in the article how far the legislature and

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the judiciary had come in helping women to achieve equality, the challenges to Uniform Civil Code. and suggested useful guideposts.

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I. Introduction

> *Woman is described as man's better half. As long as she has not the same rights in law as man, as long as the birth of a girl does not receive the same welcome as that of a boy, so long we should know that India is suffering from partial paralysis. Suppression of woman is denial of Ahimsa.* —***Mahatma Gandhi***

India is a 'cradle of religions' Rao (Rao/1970). Each religious community has its own personal laws. Personal laws which are based on religious beliefs of different communities govern the family matters of each community. Despite the professed constitutional guarantee of equality and social justice, the different personal laws perpetuate unequal and dependent status of woman. These personal laws are inequitable to woman and deny her the same socio-economic freedom and status which is provided to man in our society. The biggest minority in India is its womanhood subjected to generations of gender injustice (Iyer, 1987 : 5). The status occupied by woman in society and the treatment accorded to her have been justly regarded as an index of the degree of civilization and culture attained in any country (Venkataramiah, 1985).

2. Constituent Assembly Debates : Sentiments of the Framers

At the time of the framing of the Constitution, constitutional framers were fully conscious of the fact that to evolve a strong and consolidated nation, there should be no discrimination against sex and that the position of woman should be elevated to that of man. Article 44 was, therefore, incorporated in our Constitution giving a direction to the state to implement Uniform Civil Code (UCC) throughout the territory.

The clause on UCC generated substantial debate in the Constituent Assembly. Some members of the Assembly took starkly contrasting stances on the UCC. They felt that India was too diverse a country for the UCC and UCC would be against the freedom of religion. While some were not against the idea of a uniform civil law,

they argued that the time for that had not yet come, adding that the process had to be gradual and not without the consent of the concerned communities.

Member K. M. Munshi however, rejected the notion that a UCC would be against the freedom of religion. He advocated for the UCC, stating benefits such as promoting the unity of the nation and equality for women. He said that if personal laws of inheritance, succession and so on were seen as a part of religion, then many discriminatory practices of the Hindu personal law against women could not be eliminated (Munshi, CAD 548).

Dr. B. R. Ambedkar had more of an ambivalent stance. He felt that while desirable, the UCC should remain "purely voluntary" in the initial stages. He stated that the Article "merely" proposed that the state shall endeavour to secure a UCC, which means it would not impose it on all citizens (Ambedkar, CAD 551).

The Constitution of India was ahead of its time, not only by the standards of the developing but also of many developed countries, in removing every kind of discrimination against women in the legal and public domain of republic (DWCD, 2002-03). The Constitution has given special attention to the needs of women to enable them to exercise their rights on an equal footing with men and participate in national development.

3. Personal Laws of Hindus

There are four communities in India - Hindus, Muslims, Christians and Parsees. Sikh, Jain and Buddhist though constitute minorities are governed by Hindu law. Personal law applies to a person solely on the ground of belonging to or professing a particular religion. (Bhattacharjee, 1986). Personal laws that are based on religious beliefs of different communities govern the family matters of each community. The provisions of various personal laws are discriminatory in the sense that the rights granted or liabilities imposed by one are not granted or imposed by the other. Despite the professed constitutional guarantee of equality and social justice, the different personal laws perpetuate unequal and dependent status of woman. These personal laws are inequitable to woman and deny her the same socio-economic freedom and status, which is provided to man in our society. Justice Krishna Iyer opined that "Our history is the history of repeated injustices and usurpations on the part of man

towards woman in the name of personal laws. The biggest minority in India is its womanhood subjected to generations of gender injustice" (Iyer, 1987).

Before 1955, the traditional Hindu laws and customs were extremely unfavorable to women. "Religion, as a system of beliefs and rituals, undoubtedly accords an inferior and dependent status to Hindu women" (DSW, 1975). Discrimination in personal matters concerning marriage, divorce, property rights and reproductive rights was particularly widespread. In India, women have been major victims of discrimination under personal laws. When the Constitution came into force in 1950, it ensured right to equality to all men and women and enactment of a Uniform Civil Code to provide equality to women. With the enactment of four statutes in 1955-56 for Hindus relating to marriage, succession, maintenance, guardianship and adoption, the position of Hindu women has improved to a greater extent. They have now been guaranteed monogamy and permitted divorce or dissolution of marriage. Now their disability to inherit absolute estate as heir to male property has been removed. Her rights are now no more limited to life estate. Their position has now been revolutionized by entitling them to become the absolute owners of the estate of deceased husband. Hindu women were not coparcenary in joint Hindu family, but with the passing of the Hindu Succession Amendment Act, 2005, they have become coparcenary in joint Hindu family acquiring their share in joint family property since birth.

The Supreme Court in its path breaking judgment of ***Gita Hariharan*** (1995), provided millions of women what was long due to them. The Court declared the mother to be the natural guardian of the child during the lifetime of the father thus giving a blow to century's old patriarchal traditions. In historic judgment of ***Naveen Kohli*** (2006), the Supreme Court recommended the Government to amend the Hindu Marriage Act, 1955 to include irretrievable breakdown of marriage as one of the grounds of divorce to Hindu couples staying separately since long time having no chance of reconciliation. In ***Smt.Seema*** (2006) the Supreme Court has directed that all marriages, irrespective of the religion be compulsorily registered and has asked the Centre and State Governments to frame rules. It will protect women against bigamy, polygamy and enable them to exercise their right of maintenance and custody of children.

4. Personal Laws of Muslims

But no such legislation could be passed for their Muslim counterpart and other communities. The Muslims continue to suffer from vices of polygamy and absolute power of husband to give extra judicial divorce. In historic judgment of ***Shayara Bano*** (2017) confirming ***Shamim Ara*** (2002), the Supreme Court declared Triple talaq as illegal and void. Hindus are taking undue advantage of polygamy provisions to enter into second marriage while the first is subsisting. In famous ***Sarla Mudgal*** case (1995) and in ***Lily Thomas*** (2000) Supreme Court has given a right lesson to those Hindus who embrace Islam to enter into another marriage. The Court held that they should be prosecuted under the Hindu Marriage Act and the Indian Penal Code. Thus bigamy has been outlawed for all Hindus. Polygamy under the guise of Muslim law is now banned. It is high time to recount how far the legislature and the judiciary have come in helping women to achieve equality.

So far as the question of maintenance of Muslim women is concerned in one of the significant decision of Supreme Court in ***Danial Latifi*** (2001), Justice B. Patnaik has set at rest the controversy in this regard and now divorced Muslim women are entitled to reasonable maintenance from their husbands for a period which may extend beyond the period of iddat. A dangerous trend of talaq by SMS or while in sleeping has been confirmed by Maulvis which has led to a controversy. Muslim women have constituted their Indian Muslim Women Personal Law Board to resist the discrimination perpetrated on Muslim women. Religious fundamentalists should leave their obstinacy. In this regard, their fears that Uniform Civil Code will tantamount to interference with the way of life and thus contrary to right to religion are baseless. Muslim women are still suffering discrimination in matters of inheritance also. When a number of other Muslim countries like Pakistan, Turkey, Iran, etc. have passed legislations for banning polygamy and unilateral divorce, the Muslim women should also be ensured justice in these matters by bringing about uniformity of law amongst Indian population.

5. Maintenance to Divorced Wife beyond Iddat

The Supreme Court has always adopted an approach that welfare laws such as Sec. 125 of Cr. P.C., passed in the spirit of Art.

15 (3) of the Constitution must be so read as to effectively fulfil its salutary objects when the beneficiaries are weaker sections, like neglected wives, discarded divorcees and destitute women claiming maintenance for their survival. In ***Bai Tahira V. Ali Hussain*** (1979) the bench consisted of V.R. Krishna Iyer, V.D. Tulzapurkar and R.S. Pathak, (JJ), The question before the Supreme Court was whether a woman who has been divorced by her husband and received a sum under any customary and personal law applicable to parties and which was payable on such divorce was entitled to any maintenance under sec. 125. Justice Krishna Iyer observed :

> The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. Law is dynamic and its meaning cannot be pedantic but purposeful (Ibid, 565-366)

In ***Fuzlunbi v. Khader Vali*** (1980) Supreme Court again emphasized that Muslim law shows its reverence for the wife in the institution of mahr (dower). Explaining its meaning it was held that it was neither dowry nor price for marriage. The quintessence of mahr whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce.

6. Mohd. Ahmad Khan v. Shah Bano Begum

Again in leading case of Mohd. Ahmad Khan v. Shah Bano Begum(1985), the Supreme Court rejected the argument of the appellant, that his liability to provide for the maintenance of his divorced wife was limited to the period of iddat, despite the fact that she was unable to maintain herself. The Court observed that Muslim Personal law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125

The Court referred to the Aiyats 240 to 242 of holy Quran, the sacred book of Islam and observed that verses (Aiyats) 241 to 242 of the holy Quran showed that there was an obligation on Muslim husbands to provide maintenance for their wives.

According to senior advocate of Supreme Court, Danial Latifi, the decision of the Supreme Court for the maintenance of the divorced Muslim women would surely consolidate their better future (Latifi, 1986). "Justice to women becomes one of the most

fundamental questions. Whatever other reasons, one can hardly deny that the Supreme Court judgment was also inspired by the sense of justice to women" (Engineer, 1986) It was unfortunate that the then Government enacted The Muslim Women (Protection of Rights on Divorce) Act, 1986 with the intention of nullifying the decision in Shah Bano case. The act absolved Muslim husband from his responsibility of maintaining divorced wife after the period of iddat and made it a responsibility of the relatives of the wife i.e. children, parents, etc. and in case relatives were unable to bear the responsibility, it was to be borne by State Wakf Boards.

7. The Main Issue again in Melting Pot

The question of maintenance to divorced Muslim women after the period of iddat from her husband settled by the judgments of the Supreme Court in Bai Tahira, Fuzlunbi and Shah Bano case was again thrown in a melting pot. Contradictory opinions have been laid down by the various High Courts in this respect. In one of the most significant decisions of Supreme Court in ***Daniel Latifi v. Union of India*** (2001) the constitutional validity of the said Act was upheld. It was challenged that the exclusion of Muslim women from the applicability of Sec. 125 of Cr. P.C. was violative of their fundamental rights as guaranteed under Article 14, 15 and 21 of the Constitution of India. Supreme Court held that a Muslim husband is liable to pay reasonable maintenance for the future of divorced wife which may extend beyond the period of iddat and also that the liability of Muslim husband towards his divorced wife arising out of Sec. 3(1)(a) of the Act to pay maintenance is not confined to the iddat period. It was alleged that the said Act was unislamic, unconstitutional and it had the potential of suffocating the Muslim women and it undermines the Secular character of the constitution.

8. Mode of effectuating Talaq : Shamim Ara (2002)

In the leading case ***Shamim Ara v. State of U.P.*** (2002) the Supreme Court laid down the guidelines and the principles for extra judicial talaq to be effective. The Muslim lady claimed maintenance for herself and for her two children from her husband which was denied by the husband on the ground that she was already divorced by him. The lady emphatically denied having been divorced at any time. The Court observed that a mere plea taken in the written statement of a divorce having been pronounced in the past could not

by itself be treated as effectuating talaq on the date of delivery of copy of the written statement to the wife. The Court affirmed the decision of Guhati High Court in ***Rukia Khatoon v. A. K. Laskar*** (1981) where division bench stated the correct law of talaq as ordained by the holy Quran as follows:

1. that 'talaq' must be for a reasonable cause; and
2. that it must be preceded by an attempt of reconciliation 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. If their attempts fail, 'talaq' may be affected.

The Court observed that the husband was not able to prove divorce as per the standards laid in the above case and no reason was substantiated in justification of talaq. The ruling of the Court brings about progressive interpretation of the laws relating to talaq which is in tune with the pace with which our country is marching ahead in all walks of life.

9. Shayara Bano v. Union of India (2017)

In leading case of Shayara Bano (2017), the Supreme Court considered the validity of triple talaq on the petition of Shayara Bano, several batches of other petitions as well as Supreme Court PIL. In this case the Judges of the Supreme Court differed in their views. The Majority view was taken by Kurian Joseph, Rohinton Fali Nariman and Uday Umesh Lalit, JJ. and the minority view by Jagdish Singh Khehar, CJI and S. Abdul Nazeer, J. The petitioner-Shayara Bano, approached the Supreme Court, for assailing the divorce pronounced by her husband Rizwan Ahmad on 10.10.2015, The petitioner sought a declaration, that the 'talaq-e-biddat' pronounced by her husband be declared as void ab initio. Such a divorce which abruptly, unilaterally and irrevocably terminates the ties of matrimony, purportedly under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, be declared unconstitutional.

Practice in Islamic and non-Islamic countries : It was submitted on behalf of the petitioners, that the practice in question is not an essential religious practice. Even Islamic theocratic States, have undergone reform in this area of the law, and therefore, in a secular republic like India, there is no reason to deny women, the rights available all across the Muslim world. A large number of

Muslim countries, or countries with a large Muslim populations such as, Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia, Turkey, Indonesia, Egypt, Iran and Sri Lanka had undertaken significant reforms and had regulated divorce law. It was pointed out, that legislation in Pakistan requires a man to obtain the permission of an Arbitration Council. Practices in Bangladesh, it was pointed out, were similar to those in Pakistan. Tunisia and Turkey also do not recognize extra-judicial divorce, of the nature of 'talaq-e-biddat'. In Afghanistan, divorce where three pronouncements are made in one sitting, is considered to be invalid. In Morocco and Indonesia, divorce proceedings take place in a secular court, procedures of mediation and reconciliation are encouraged, and men and women are considered equal in matters of family and divorce. In Indonesia, divorce is a judicial process, where those marrying under Islamic Law, can approach the Religious Court. In Iran and Sri Lanka, divorce can be granted by a Qazi and/or a court, only after reconciliation efforts have failed.

The Supreme Court thus declared Section 2 of the 1937 Act to be void to the extent of recognizing and enforcing Triple Talaq. The Court by a majority of 3 : 2 set aside the practice of 'talaq-e- biddat'-triple talaq.

Recommendations of the Law Commission of India

The Central government in 2016 requested the Law Commission of India to undertake an examination of various issues relating to the implementation of UCC. In 2018, the Law Commission submitted a 185-page report on the reform of family law. The paper stated that a unified nation did not necessarily need uniformity.

The commission noted that, the term "secularism" had meaning only if it assured the expression of any form of difference. The report recommended that, discriminatory practices, prejudices and stereotypes within a particular religion and its personal laws should be studied and amended.

The Commission suggested certain measures in marriage and divorce that should be uniformly accepted in the personal laws of all religions. Some of these amendments include fixing the marriageable age for boys and girls at 18 and simplifying the divorce procedure. It also called for the abolition of the Hindu Undivided Family (HUF) as a tax exempted entity.

10. The Muslim Women (Protection of Rights on Marriage) Act, 2019

Subsequently, The Muslim Women (Protection of Rights on Marriage) Act, 2019 was passed by the Parliament which declares triple talaq to be a cognizable offence u/s 7(a). It has also been made compoundable u/s 7(b). The provision has also been made for the maintenance of victim women and also for the guardianship of the minor children. The relevant provisions are given below :

Sec 3 : Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

Sec. 4 : Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine

Sec 5 : Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

Sec. 6 : Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate.

11. Irretrievable Breakdown of Marriage : The Ground of Divorce

In plethora of judgments, the Supreme Court has strongly recommended that the Government should amend the Hindu Marriage Act (HMA) to include "Irretrievable breakdown" of marriage as one of the ground for divorce where the marriage for all practical purposes has broken down without a chance of reconciliation. In leading judgement of ***Naveen Kohli v. Neetu Kohli*** (2006), Naveen Kohli industrialist and Neetu Kohli, had married in 1975 but had stayed separately since 1994 having number

of cases pending in the courts against each other where couple had stayed separately for long years without a chance of reconciliation. Supreme Court observed that the courts in such cases should not withhold divorce even though irretrievable breakdown of marriage is not a ground for divorce under law. A three Judge Bench of the Court observed as under :

> Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to severe that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

The Supreme Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution of India for dissolution of a marriage where the Court found that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. The Supreme Court in **R. *Srinivas Kumar v. R. Shametha*** (2019) observed as under :

> Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist.

In this case, the appellant husband filed a divorce petition in the year 1999 before the Family Court at Hyderabad. The said petition was filed for a decree of divorce against the respondent wife under Section 13(1) (ia) and (ib) of the Hindu Marriage Act, 1955. That the learned Family Court dismissed the said divorce petition. High Court also dismissed the appeal against it. Feeling aggrieved, the appellant preferred an appeal before the Supreme Court. The appeal of the husband for dissolution of marriage was allowed by the Supreme Court in exercise of powers under Article 142 of the Constitution of India on the condition and as agreed the appellant

husband shall pay to the respondent wife a lump sum permanent alimony, quantified at Rs.20,00,000/ (Rupees Twenty Lakhs).

The Court allowed the appeal observing that the appellant husband and the respondent wife have been living separately for more than 22 years and it will not be possible for the parties to live together. In the similar set of facts and circumstances of the case, the Supreme Court in the case of ***Sukhendu Das v. Rita Mukherjee*** (2017) has directed to dissolve the marriage on the ground of irretrievable breakdown of marriage in exercise of powers under Article 142 of the Constitution of India.

12. Uniform Civil Code is a Must

Sweeping modifications have been affected in Hindu Personal laws covering marriage, divorce, adoption and succession etc. and Hindu society has shown a remarkable tendency to adjust and adopt to the changing needs of the time. In majority of the Muslim countries, personal laws have been altered to bring it to conformity with the changing needs of their societies (Mahmood, 1975). It is unwise for the Muslims of India to shut their eyes to the tremendous progress in the field of personal laws. 'A unified, codified, and modernized law of personal status is now the order of the day in a large number of countries where Muslims constitute overwhelming majority' (Mahmood, 1972). Supreme Court has played a purposive, dynamic and consciously creative role in fulfilling and furthering the object of uniform civil code. In Shah Bano case the Supreme Court observed :

> A common civil code will help the cause of national integration by removing desperate loyalties to laws 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.

In ***Ms. Jorden Diengdeh v. S. S.Chopra*** (1985) Supreme Court observed 'We suggest that time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations……'90

13. Conclusion

To conclude, the arduous journey from Shah Bano to Shayara Bano has proved to be a hallmark in establishing Muslim women's rights as human rights. The dawn of new era has begun with Shayara Bano case and Act 20 of 2019. The positive impact is being noted in desired direction where in a case on allegations of triple talaq aganist husband by muslim wife, enquiry was set up and husband denied from triple talaq to escape from the penal consequences of the said Act. It has come to relief of innumerable number of muslim women. Now it is to be seen that law of divorce under the Hindu Marriage Act (HMA) is also soon amended to provide irretrievable break down of marriage as one of the ground of divorce in the statute book. Supreme Court has recommended time and again to add this ground to the existing grounds of divorce. It is high time that the Government should rise to occasion and prove that power of justice will defeat injustice.

Uniformity in family laws is primarily meant for improving the legal status of women in India. Gender justice demands that justice should be done to millions of women. If religious beliefs of practices come in conflict with matters of gender justice at the time of legislation, such religious practices must yield to the higher requirement of gender justice. The best from the personal laws of each community in the country as well as codes in force elsewhere in the world should be incorporated in the proposed uniform civil code. The purpose of law is to ensure that all sections of society get justice.

At present, there is a need that the Government should take up the lead to educate the people and to organize public opinion in favour of the uniform civil code. Mass education at all levels moulding the value system of people should be done on a large scale. Means of communication should be pressed into service for publicizing drawbacks and reforms which have already taken place and the need for further development. We must be committed to what is said by former CJ of India, P.B. Gajendragadkar for UCC. "In any event, the non implementation of the provision contained in Art. 44 amounts to a grave failure of Indian democracy and the sooner we take suitable action on that behalf, the better. In the process of evolving a new social order, a common civil code is a must" (Gajendragadkar, 1977 : 85-86).

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