



FREEDOM FROM CHAINS OF INEQUALITY: A NEXUS BETWEEN UCC & GENDER JUSTICE

By: Deepti Sharma¹

ABSTRACT

Article 44 of the Indian Constitution provides for *Uniform Civil Code* for the citizens throughout the territory of India. UCC has always been debated in the region of its conflict with the personal laws since the contriving years of Indian Constitution. Amidst all the hoopla, from *Shah Bano* to *Shayara Bano*, it was discovered that there also exists a gender dimension to the debate. The author attempts to look at the debate of UCC through a gender-lens. India has been a home to legal pluralism maintaining different personal law systems under different religious heads. Application of these personal laws in various civil matters has precluded women from enjoying the perks which are available to their counterparts through secular law or under their personal law systems. Predicaments of *maintenance*, *adoption*, *divorce* etc. have always been surrounding the women, placing them nether to the opposite sex. Safeguarding the empowerment of women is tantamount to a blooming democracy like India. The asymmetry between the genders within personal law systems can be ameliorated by the uniformity of laws only. As the author suggests, state of affairs in contemporary India requires a pursuit of '*uniformity in rights*' rather than a '*uniform law*', if seen through the gender-lens.

INTRODUCTION

Gender justice is more than simply questioning the relationship between men and women. It involves crafting strategies for corrective action toward transforming society as a whole to make it more just and more equal. Moreover, it implies moving away from arbitrary to well-reasoned, justifiable, balanced and fair social relations. India maintains a system of legal pluralism and in the area of family law, a multifarious personal law system. The different religious communities – Hindus, Muslims, Christians, Jews, and Parsis – are governed by their respective laws which consist of either codified or non-codified rules on matters regarding marriage, divorce, maintenance, adoption, and inheritance. It is a known fact that in the personal laws of all the communities gender injustice is inbuilt which is supposed to be the result of the socio-economic conditions under which they evolved. Hence there forth, is a

¹ Department of Law, Aligarh Muslim University, Aligarh, Reasearch Scholar



need to reform the personal laws or bring about a uniform civil code to ensure not only equality between men and women but also to bring about gender justice. Women undergo many difficulties and experience severe trauma in matters concerning their marriage, divorce, and inheritance. Polygamy, desertion, triple divorces are just a few examples to show the possibilities of harassing women. Indian women are formally granted equality in political rights through the Indian Constitution but due to the different personal laws, women experience inequality, deprivation, and violence. Within the family, their position is pitiable. The question of women's rights as human beings is completely ignored. The personal laws are designed to keep them forever under the control of men. Even though the Constitution of India gives equal rights to women in certain areas – legal and social, they are not effective to ensure real equality. The Supreme Court in a few judgments has opined that legislation for a common civil code as envisaged by Article 44 of India's Constitution should be enacted. It said so in Shah Bano's Case in 1985, in Sarla Mudgal Case in 1995 and in Vallamattom case in 2003. A critical look at the constitutional assembly debates, legislative enactments, and judicial decisions very clearly indicate the lack of seriousness in ensuring justice to women. Gender issues need to be addressed very seriously. A uniform civil code is, therefore, foremost a matter of gender justice. If it is implemented it will lay the foundation for women to overcome many social evils like dowry system, bigamy etc. which makes a woman feel nether to the other sex.

BACKDROP: CONSTITUENT ASSEMBLY DEBATES

The inclusion of a UCC in the Indian Constitution was first proposed by Minoo Masani in the Constituent Assembly. As a member of the sub-committee on Fundamental Rights, Masani suggested that "the State should be made responsible to enact a UCC in order to break down the barriers between various communities". While Masani, Hansa Mehta, and Dr. Ambedkar voted in favor of this move for a UCC, a majority of the sub-committee voted against it. Two objections raised against the making of a uniform civil code were:

- It will violate the freedom of religion ensured in article 25 of the constitution;
- It will amount to tyranny to the minorities.

The first objection is not proper as directive contained in Article 44(then article 39), in no way infringes the freedom of religion guaranteed by the constitution under article 25 as



clause (2) of Article 25 saves secular activities associated with religious activities. Reply to the second objection was given by K.M. Munshi as²:

‘Nowhere in the advanced Muslim countries, the personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of the code. Take for instance Turkey and Egypt. No minority in these countries is permitted to have such rights. But I go further when the Shariat Act, 1937 was passed, or when certain laws were passed in the central legislature in the old regime, the Khojas and the Kutchi memons were highly dissatisfied. This is not amounting to tyranny on the minority.’

Dr. Ambedkar argued that India had achieved a common criminal code but the civil law was diverse. He held this diversity to be in violation of the Fundamental Rights, which declared that there could be no discrimination against citizens.

The debates on UCC in the Constituent Assembly illustrate that Congress leaders influenced by Nehruvian secularism desired a UCC and felt that it was essential as a part of India's secular identity. However Muslim members of the Assembly opposed this idea saying that the source of the Muslim personal law was the Koran and the laws could not be altered by the state by means of any legislation. Thinking that the time was not ripe for a UCC and that the consent of the Muslims could gradually be obtained, the provision for a UCC was put into the non-justiciable Directive Principles. As the debates in the Constituent Assembly depict, a uniform code was conceptualized initially for the basic purpose of national integrity. However, since the members of the Constituent Assembly could not decide the feasibility and desirability of such a code, especially for a traditionally heterogeneous society like India, it was thought best to put the provision for a UCC under the Directive Principles.

THE DEBATE OF UCC: GENDER DIMENSION

A Uniform Civil Code (UCC) is one where a common set of civil laws replace the personal laws i.e. laws that find their authority from customs, religious scriptures etc., for the citizens. Personal laws mainly deal with issues of adoption, maintenance, divorce, marriage, and inheritance. UCC has been a point of contention for several decades, has emerged as a political tool to fuel election campaigns rather than a truly acted upon development agenda. While highly politicised debates surround it, a key issue that has emerged in the UCC is the submergence of equal rights for women under personal laws. Personal laws stem from highly

² D.C. Manooja, “Uniform Civil Code: A Suggestion” 42 *JILI* 2000.



patriarchal structures and women have historically not been engaged in their formation. While some effort has been made to bring greater uniformity and reforms in personal laws, the efforts remain in the form of piecemeal offerings.

"The debate on the UCC is invariably set up in terms of the secular state versus religious community, and has rarely surfaced in public discourse as a feminist issue".³ Undoubtedly, legislation and reforms in the law concerning the issues of rape and dowry were passed without much opposition from the forces of caste, community or class. Thus to a certain extent, the issues of rape and dowry are gender issues per se, insofar as women across caste, community and class are vulnerable, though to varying degrees, to rape and dowry. The vulnerability of women to rape and dowry, beyond a minimal commonality, is differently conditioned by their caste, community and class affiliations. In other words, there is an interconnectedness of gender-based oppression and oppression based on caste, community, and class. This interconnectedness has become more pronounced in the debate over the Uniform Civil Code. The debate over the formulation of a UCC in India has not only been about the secular state versus religious nationalism but has also been about justice for women within the personal laws of different religious communities.

For illustration, despite the codification of Hindu laws, there are some discriminatory provisions and disparities existing till date. In the context of maintenance, gender, and communal biases exist. A non-Hindu wife cannot claim maintenance from her Hindu husband whereas a Hindu wife enjoys right to live separately from her husband on his conversion without forsaking her right of maintenance. The conversion of spouse furnishes ground for divorce to non-covert spouse only, thus treats the change of religion as a matrimonial offence. The children born to convert Hindu are disqualified from inheriting the property of their Hindu relative.

Some disparities have been remedied by the court in various significant cases. The mother cannot be natural guardian of her children during the lifetime of her husband. When the matter relating to mother as natural guardian was questioned, the court held that relegation of mother to an inferior position to act as natural guardian is a violation of Articles 14 and 15. The guardianship right of women has undergone sea change by this interpretation by the Court in *Gita Hariharan's* case. A significant judgment of Supreme Court in *Sarla Mudgal*

³ Nivedita Menon, "State/Gender/Community Citizenship in Contemporary India", 30 *EPW* 1998.



case and *Lily Thomas* case concerning polygamy of Hindu and Christian men respectively after conversion to Islam raised the debate of discrimination and demand of UCC.

The Muslim personal law had incorporated more rigid and unfair usages. The Muslim law permits polygamy to Muslim male but wife do not have the same option. Husband can pronounce unilateral divorce but the wife, in order to remarry the same husband, has to go through 'halala' process which is very inhuman and discriminatory; her status is inferior in customary divorce also as in all forms divorce depends on her husband's consent. There is gender discrimination in matters of succession like the presence of brother make sister a residuary. There is no maintenance provision of divorced wife. Though Supreme court has taken a progressive step in Shah Bano case entitling women for maintenance under criminal code beyond Iddat period the government of India for doing so-called justice with male community passed Muslim Women (Protection of Rights on Divorce) Act 1986 (MWA, 1986) to nullify the effects of Shah Bano case. According to this Act, a Muslim husband is bound to maintain his wife only during iddat period unless both spouses submit to court at the appropriate time that they would desire to be governed by Criminal Procedure Code.

In the debate over the UCC, questions about gender justice have figured prominently. Thus addressing the problem of gender justice in India without considering the debate over UCC is problematic. Similarly, an account of the debate over the UCC without taking into consideration the issue of gender inequality involved therein remains incomplete.

JUDICIAL DEVELOPMENTS

The Indian judiciary has clearly outlined the negative impact of personal laws on women and gender equality in varied judgments over the period of time. The debate of UCC and personal laws resurfaced in the Indian politics in 1985 after the controversy in *Shah Bano* sparked off. Since then it has continued to engage the attention. Shah Bano, a seventy-five-year-old Muslim woman who was abandoned by her husband, filed a case for maintenance under section 125 of the Criminal Procedure Code, which provides for maintenance to women "to prevent vagrancy due to destitution". While Shah Bano's claim to maintenance was still being considered by the court, her husband, Mohammed Ahmed Khan, an advocate by profession, divorced her using the triple talaq. The Indore Magistrate's Court ruled that Shah Bano was entitled to maintenance under section 125 of the Criminal Procedure Code (CrPC). The amount was fixed to a meager Rs. 25 per month. The Madhya Pradesh High Court raised the amount to Rs. 179.50.



Mohammed Khan, however, appealed to the Supreme Court that the judgment of the High Court had exceeded its jurisdiction and violated the Muslim personal law as defined by the Shariat. The Supreme Court passed a judgment upholding Shah Bano's right to maintenance under section 125 of CrPC. Shah Bano's counsel had cited two verses from the Koran depicting that providing maintenance was the duty of the 'righteous', and based on this the Court ruled that Shah Bano had the right to maintenance also under the Muslim personal law. Moreover, the Court also declared that section 125 transcended personal laws. The court stated that women have been subject to unjust treatment and hence it urged the government to frame a common civil code, which would be applicable to all communities. As a result, the judgment in the Shah Bano case was deemed as an onslaught on the identity of a religious minority community. Thus there were demands for legislative changes in section 125 and the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

The Shah Bano case gave a new dimension to the debate over UCC, that of gender justice. While the judgement in the Shah Bano case and the ensuing debate became a rallying point in the contest between the secularists and the Hindu fundamentalists, feminists pointed out that despite the formal equal citizenship granted to women, their realisation of this status, and of the rights connected therewith is affected by their membership of a community. Gender justice was thus stalled by one's membership of a particular community. The Muslim Women's Bill had an impact on the question of women's rights. It has been noted how Muslim women who were unequal vis-a-vis Muslim men were now rendered unequal vis-a-vis other women in the absence of a reformed divorce law.

The Court reiterated the same issue a few weeks later in a slightly different context, that of a marriage between a Christian woman and a Sikh man under the Indian Christian Marriage Act, 1872 in *Jordan Diengdeh v S S Chopra* (1985). This time, the Court was concerned with the irretrievable breakdown of the marriage between the parties and the fact that a divorce could not be granted on this basis alone.

The Court urged the government to come up with a UCC once again a decade later in a public interest litigation seeking to outlaw the practice of Hindu men abandoning their wives, without lawfully divorcing them, and converting to Islam for the sole purpose of marrying a second time (*Sarla Mudgal, President, Kalyani and Others v Union of India and Others*). This time, the justification offered was to prevent Hindu men from converting to Islam for the sole purpose of getting married a second time. Why a UCC is necessary to tackle fraud,



beyond existing legal principles and criminal laws, is never fully articulated by the Court. In the Sarla Mudgal case, the Court explicitly held the Hindu Code as the model on the basis of which the UCC should be drawn up.

This was clarified later by the Supreme Court to some extent in *Lily Thomas v Union of India and Others* (2000) to say that the Court could not direct the centre to introduce a UCC, but that did not stop the Supreme Court from once again affirming the necessity and desirability of one in *John Vallamattom and anr. v Union of India* (2003), this time in the context of succession. A little more than a decade after this, the Supreme Court has once again lamented the absence of a UCC in the context of the guardianship of a Christian child, without going into why a simple change in the Guardians and Wards Act would not suffice (*ABC v The State (NCT of Delhi)* 2015).

The writ petition filed in the Supreme Court by Shayara Bano questioning the constitutional validity of the “triple talaq” (2016) has brought into the public domain once again the debate on the question of a uniform civil code (UCC) for all of India. Of course it is true that a UCC has its own pros and cons, and that political parties promoting a UCC may have ulterior motives. But for Muslim women, a UCC will definitely be a boon – it will bring more gender equality to personal laws and expand their rights when it comes to marriage, divorce, inheritance, guardianship and other personal matters.⁴

CONCLUSION

J.L.Nehru said, ‘The British policy of non- interference with personal laws and mechanical interpretation or perpetuation of Hindu customs stopped the natural growth of Hindu law and give rise to petrified rules’. Thus justice with fair sex and concept of gender equality could not be achieved till date. Seeing gender justice as an outcome and as a process helps in differentiating between what is to be achieved and how it is to be achieved. As an ongoing process, gender justice brings an additional essential element: accountability, which implies the responsibility and answerability of precisely those social institutions set up to bestow justice. Unless the women, irrespective of their religious affiliation have been conferred equal rights on par with men in personal matters, the constitutional mandate of the right to equality of status and opportunity cannot be implemented.

⁴ Available at : <https://thewire.in/gender/muslim-women-uniform-civil-code>



The Indian Judiciary has also done a lot but it is the ground reality that there are some limitations on the judiciary and cannot take over the functions of other organs of the State viz. Executive and Legislature. In this connection, the Uniform Civil Code, a constitutional mandate, is awaiting the mercy of Indian legislature to take the form of law providing equal status to men and women, who are victims of diversities in personal laws. However, adequate care should be taken to see that only the rights are made uniform and not the rituals which are an inherent part of the culture and religion as otherwise, it would violate the basic structure of our beloved constitution i.e., secularism. Also, uniformity of rights for men and women should be the underlying principle, if not the sole objective, behind any enactment, be it the uniform civil code or any other enactment or codification of the civil laws (like the Hindu Code). Uniform civil code should not be viewed as panacea for all the ills of the society. Enactment of a uniform code will unerringly ameliorate the existing situation of the fairer sex in the society, but it should not be done at the cost of undermining the boasted feature of secularism. Gender justice, in other words, *uniformity of rights*, is the need of the hour and so should be taken care of by other possible means (laws and regulations) till the nation gets ready for a Uniform Civil Code.