

A UNIFORM CIVIL CODE FOR THE ERADICATION OF DISCONSOLATE PRACTICES IN THE NAME OF RELIGION AND TO ENSURE SOCIO-ECONOMIC JUSTICE

Prof (Dr.) Mamata Biswal¹

Ideally, the UCC must address the Conflicting and Prejudicial areas of Personal Law, Socio-Economic Rights of Women and the object of the UCC must be to eradicate Disconsolate Practices in the name of Religion.

ABSTRACT

The practice of Sati, child marriage, Triple Talaq and Nikah Halala etc. - Are they fundamental to Religion and constitutionally valid? What are their economic origins and consequences?— Are they fundamental to Religion and Constitutionally valid?

Religious rights are fundamental to every citizen of India. Nonetheless the evil practices in the name of religion are not fundamental to religion. Religion and Religious practices are very closely allied with the rule of law. The right of 'freedom of religious practice' has its origin from the Constitution of India. 'Secularism' as the basic structure of the Constitution of India and Freedom of Religion (Article 25-28 of the Constitution) are the allure in the Constitution of our Country. These provisions provide the freedom to practice and profess religion, subject to morality, public order and health². But India has been witnessing many cruel practices in the name of Religion with no demarcated frontier. Although, the Legislative action, judicial intervention and social intermediation provide interim relief to the problems, but no permanent key. The yardstick for sanction all religious practices must be the Constitutional validity which factor in economic justice. The Triple Talaq Act 2019 is a welcome step to confront some issues but the enactment of many small pieces of legislations would create inconsistencies among the common men and incongruities for the interpretation and implementation. Seldom the Uniform Civil Code (UCC) had been proposed to be a solution to these evils, but to me 'Uniform Civil

¹ Professor of Law and ICSSR Senior Research Fellow,
Gujarat National Law University

² Article 25 of the Constitution of India

Code' is not the ultimate riposte for the prejudiced issues of Personal Laws. Initially, the proposed UCC must address the areas related to the deprivation of legal and economic rights of the citizens. The UCC can cover a complete code for each religion eliminating the religious practices which are not constitutionally valid having adverse gender based economic impact, would maintain the balance between the secularism, religious rights, economic justice and social equilibrium. Unified Personal law Codes for all Indian citizens like a Hindu Code for the Hindus, a Muslim Code for Muslims and likewise a special code for each religion in the matters of personal nature under the UCC would solve the purpose for few decades.

Key Words: *Uniform Civil Code, Secularism, Constitution, Religion, Violation, Fundamental right, Woman, Society.*

1. INTRODUCTION

‘Whatever is irregular and sinful cannot have the sanction of law.’³ Custom, Religion, Tradition, Culture are the integral parts and elegance of any civilisation. However, unfounded practices in the name of freedom of religion must not be endorsed by the society, which are societal injustices leading to economic inequalities. Our country was and has been witnessing such melancholies continuously. At different times, different flavours and colours have been added in different forms and features.

The economic realities of women in India, across all religions form the backdrop of the significance of the legal issues involved in evolving the UCC. Issues relating to gender-based poverty, women's participation in the workforce, literacy levels, the health status of women, issues of financial inclusion etc, remain predominant, albeit with improvements on account of government schemes for women.

Few decades back, the matter of Roop Kanwar, where an 18-year-old Hindu widow was burnt alive on the funeral pyre of her husband on 4th September 1987 for practice of sati, Shah Bano, a 60-year-old Muslim woman approached the Court for maintenance after she was divorced by her husband by pronouncement of irrevocable talaq ⁴, the plight of many Hindu women (Geeta

³ Shayara Bano V Union of India and others SC,2017.

⁴Mohammad Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945

Rani, Sushmita, Meena Mathur, Sunita cited in Sarla Mudgal case)⁵ whose husbands got married after converting to Islam, Shayara Bano⁶, whose husband divorced her by pronouncing triple talaq and so on and so forth. In all these incidents, those practices are linked with religion, neither the entire Hindu community practice this nor the Muslims. But due to the sanction of these practices in our society, one from us, is being victimised. A public Interest Litigation (PIL) was filed (March 2018) in the Hon'ble Supreme Court⁷ challenging the constitutional validity of polygamy and Nikah Halala as recognised under the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, which are unconstitutional and grossly violate the fundamental rights of married Muslim women under Article 14, 15 and 21 of the Constitution. Another controversy arose with regard to the Triple Talaq Act or The Muslim Women (Protection of Rights on Marriage) Act, 2019 since the time it was tabled in the form of a Bill i.e, [The Muslim Women (Protection of Rights on Marriage) Bill], 2017. The Bill was introduced subsequent to the judgement of the Hon'ble Supreme Court of India, pronouncing the instant Triple Talaq as unconstitutional and void⁸. Reference can be made to the Dissolution of Muslim Marriage Bill, 2016, which was introduced in the Rajya Sabha as a private member's bill (by the MP Husain Dalwai, August 2016) and which speaks about both triple talaq and nikah halala. The Triple Talaq Act. [The Muslim Women (Protection of Rights on Marriage)] Act, 2019, and the Dissolution of Muslim Marriage Bill, 2016, could have been merged and after due deliberation, a new law could have been brought to curb both triple talaq and nikah halala. These evil practices are not new to our country, they are prevalent in our society since inception in different forms.

There is a writ petition filed by the All India Muslim Personal Law Board challenging the criminalisation of triple talaq⁹. The Hon'ble Supreme Court had agreed to examine the newly enacted statute i.e. The Muslim Women (Protection of Rights on Marriage)] Act,2019. Such

⁵ AIR 1995 SC 1531

⁶ Ibid p-2

⁷ *Supreme court against polygamy*, Indian Express, 6th March, 2018, <https://www.newindianexpress.com/nation/2018/mar/18/pil-filed-in-supreme-court-against-polygamy-temporary-mariages-under-muslim-law-1789053.html> Last visited June,2018 (last visited May 2023_

⁸ Ibid 2

⁹ *Supreme court seeks centres response*, NDTV <https://www.ndtv.com/india-news/supreme-court-seeks-centres-response-on-plea-challenging-triple-talaq-act-2131965>, Last visited on 26/02/2020

disconsolate practices inevitably leave the wife in acute distress bereft of the security of a home and economic sustenance leading to states of destitution for her and her children. It is not only Hinduism or Islam, *Sati practice and Child marriage to Triple Talaq and Nikah Halala*, wherever such kind of social stigmas prevail, they ought to be removed by hook or crook. The practice of sati reminds us, how heinous can be our customary practice in the name of religion?

the question is, all those practices, with any belief or any form which deprives the right to life, dignity of women with increasing economic deprivation of women in the name of religion, 'are they fundamental to religion'?

SECULARISM AND FREEDOM OF RELIGION

'Secularism' as the basic feature of our Constitution and 'freedom of religion' as enshrined in Art 25-28 of the Constitution as fundamental right are the most important and very precious constitutional provisions and provides the right to every citizen to be governed by their own personal laws. The liberty to profess religious practices and freedom of religion within the secular Constitution has adverse social effect also. 'In a pluralist society like India, in which people have faith in their respective religions, beliefs or tenets propounded by different religious or their offshoots, the founding fathers, while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faith, born in different castes, sex or subsections in the society, speaking different languages and dialects in different religions and provided secular constitution themselves visualise diversity and attempted to foster uniformity among people of different faiths. This social cohesion was seen as fundamental to economic growth and development. A Uniform Civil Code (UCC), though is highly desirable, enactment thereof in one go perhaps may be counterproductive to unity and integrity of the nation¹⁰.

Religion is not created by any statute or any book, rather is a matter of faith and belief or beyond that, which has been derived from the readings of Holy Scriptures like Vedas, Bible, Quran, Ramayana, Guru Granth Sahib. Nevertheless, the bleak Practices in the name of religion are hindrances to the growth of any nation. Freedom of religion ought not to sanction the unreasonable practices which are callous to others. With the passage of time, the country had experienced with many such kind of desolate practices in the name of custom or religion

¹⁰ Lily Thomas Vs Union of India, SC, 2000

Nikah halala is another form of religious practice, where a Muslim married woman can't remarry to her ex-husband unless another person get her marry and divorces her. In the B.R Chopra-directed movie *nikah*, both triple talaq and nikah halala have been pictured, where one can understand the real position of a woman in the process of talaq and nikah halala. In this scenario, we can witness both women's empowerment and embargo in their own religion. Similarly, the plight of a Hindu woman is the same, when her husband converts his religion to Islam and gets married during the existence of the previous marriage just to escape from the punishment. Under the un-codified Hindu Inheritance law, before the enactment of the Hindu Succession Act, 1956, a Hindu woman was not entitled for property right. Even before the amendment (2005) to the Hindu Succession Act, 1956, a Hindu female did not have any right to ancestral property in a Hindu Undivided joint family property. Property right is integral to defining the agency of women and enhancing their bargaining power leading to economic autonomy and social protection. There are many such practices in the name of caste, community, religion which are immoral. To eradicate such kind of social stigmas the combined exertion of Legislative action, judicial intervention and social intermediation are required. There are numerous inconsistencies in the personal laws of India and ultimately resulted in social glitches. In Hindus almost all the laws are codified except very few, in case of Muslim Personal Laws, many of the personal laws are un-codified.

In the name of freedom of religion, not only customary practices but also new issues and challenges are emerging. Very interestingly, recently the matter of 'Azaan' and use of microphones as the freedom of Religion were discussed in the High Court of Punjab and Haryana. The tweet of well-known singer Sonu Nigam criticising use of microphones for Azaan was challenged in court as a violation of right to freedom of religion under Article 25 and 26 of the Constitution¹¹. 'Public Street' and 'Public Road' were claimed to be a place of worship as a matter of fundamental right i.e., right of freedom of religion¹².

ABUSE OF RELIGIOUS LIBERTY AND UNREASONABLE PRACTICES: GENESIS AND PREVAILING PRACTICE:

¹¹ Aash Mohammad V State of Punjab and Haryana, AIR 2017,Punjab and Haryana

¹²Hindu Front for Justice Thru. Secy. Ms. Ranjana Agnihotri V Union of India, AIR 2017, Allahabad

Our Freedom of Religion and Secularism are the essence of our Constitution and social fabric of our country, at the same time the ugly side of our religious practices are also uncalled-for. One can comprehend the reality, after going through the stories of Roop Kanwar,, Shah Bano, Geeta Rani and Meena Mathur Shayara Bano and so on and so forth. All these stories speak about the abuse of our freedom of religious practices. Shamim Ara¹³, a Muslim woman, whose claim for maintenance under section 125 of the CrPC was not granted by the (Family Court) on the ground that, she was already divorced by her husband. The single issue of the case before the Apex court was that, ‘whether Shamim Ara can be said to have been divorced or not?’ The strange and sad part of the case was the argument of the husband, that he had not communicated talaq by any mode oral or writing, rather in the written statement to these proceedings. The husband had claimed that he had divorced Shamim Ara 15 months before. He claimed the declaration in the affidavit in the written statement to this proceedings to be treated as the communication of divorce ‘Should Muslim Wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity.’¹⁴

Freedom of Conversion or Reconversion is another aspect of religious freedom. To convert into Hinduism, bona fide intention to be converted accompanied by conduct unequivocally expressing that intention is sufficient. A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu is sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion¹⁵.

The Hon’ble Supreme Court held that, a scheduled tribe person Converting to Christianity again professing Hindu religion and if accepted by members, he becomes member of his original caste On reconversion to Hinduism, a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. Since the freedom to convert

¹³ Samim Ara V State of U.P,SC, 2002

¹⁴ Justice V.R Krishna Iyer, quoted in the Shamim Ara judgment.

¹⁵ In Perumal Nadar (dead) by Legal Representative, Appellant v. Ponnuswami Nadar AIR1971, SC, 2352

and reconvert are the freedom of religion, the origin of the conflict there¹⁶Due to freedom of conversion and reconversion, the conflicting issues have emerged in relation to marriage, divorce, maintenance and inheritance, future of children.

FREEDOM OF RELIGION AND CONFLICTING ISSUES IN PERSONAL LAWS (BIGAMY TO NIKAH HALALA, AGE OF MARRIAGE, REMEDY UNDER MULTIPLE LEGISLATIONS ETC.)

Marriage, divorce, maintenance, inheritance etc. are the base of any religious belief. Because of the secularism and freedom of religion in Articles 25-28 of the Constitution, people in India are governed by their own personal laws with diversified religious ceremonies and practices.. In India, numerous marriage laws prevail under different personal laws. The Hindu Marriage Act 1955, The Special Marriage Act 1954., the The Indian Christian Marriage Act, 1872, The Parsi Marriage and Divorce Act, 1936, The Foreign Marriage Act 1969, The Anand Marriage Act, 1909, The Jammu and Kashmir Hindu Marriage Act, 1980, The Muslim Women's (Protection of Rights on Divorce) Act, 1986, The Dissolution of Muslim Marriage Act, 1939 and many more.

When it comes to rights and duties under the marital laws, the conflicts in marriage laws has been arisen from time to time. In Hindus polygamy is prohibited whereas, among the Muslims in India, it is not so. The Hindu husbands solemnise their second marriage during the existence of the first marriage, under the camouflage of conversion, converting themselves to Muslim religion, which are evident from the real stories (fact of Meena Mathur and Sunita, Geeta Rani, Sushmita Ghosh) recorded in the leading cases of the Supreme Court. (Sarla Mudgal and Lily Thomas). The controversy between the applicability and binding legal obligations under the personal laws, escape from the matrimonial duties and applicability of the penal provision for bigamy i.e., section 494 of the Indian Penal Code penalizing the Hindu husbands, were challenged on the ground of violation of the Fundamental right of freedom of religion as enshrined in article 25-28 of the Constitution.

¹⁶Sarla Mudgal V Union of India, AIR 1995 SC 1531

The core legal issue in these controversies is, whether the conversion would automatically bring an end to the previous marriage?

In the *Sarla Mudgal*¹⁷, four writ petitions were filed based on the various real stories relating to bigamy by Hindu husbands without the dissolution of the first marriage by converting to Islam. To analyse the conflicting issues in marriage laws within the religious liberty, it would be prudent to highlight the legal questions raised for consideration by the Hon'ble Supreme Court of India in the case.

- Whether a Hindu husband, married under Hindu law by embracing Islam, can solemnise second marriage before the dissolution of the 1st marriage?
- Whether the apostate husband would be guilty of the offence under section 494 of the Indian Penal Code?

.It was held that the second marriage of a Hindu husband after his conversion to Islam is void marriage in terms of S.494. It is violative of justice, equity and good conscience; said marriage would also be in violation of rules of natural justice(In *Sarla Mudgal*). Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry without getting his earlier marriage dissolved under the Act. The second marriage after conversion to Islam would, thus, be in violation of the rules of natural justice and as such would be void. The expression "void" under Section 494, has been used in the wider sense The second marriage of a Hindu husband after his conversion to Islam would therefore be in violation of the Act and as such, void in terms of section 494, IPC. Any Act which is in violation of mandatory provisions of law is per se void. And the apostate husband would be guilty of an offence under S.494. In such cases the Court shall act and the Judge shall decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494, IPC. The second marriage of an apostate-husband would also be in violation of the rules of natural justice. There was a hue and cry regarding the conflict between the applicability of the Hindu Marriage Act declaring the bigamy of the Hindu persons converting to the Muslim religion and getting married during the existence of the previous marriage as void, the applicability of section 494 of the Indian Penal Code declaring bigamy

¹⁷ Ibid 15

as an offence and on the other hand the freedom of religion under Article 25 to 28 of the Indian Constitution. Series of judicial decisions (like Sarla Mudgal vs. Union of India and Lily Thomas vs. Union of India) became the milestone in these areas, reflecting the judicial victory. When maintenance is concerned, the issue was raised about the differential treatment under section 125 of the CrPC and the personal laws of India. All married women were entitled for maintenance in under section 125 (Cr.P.C) with lot of controversies.

UNIFORM AGE OF MARRIAGE:

Recently, the Supreme Court said to examine a matter related to a conflicting issue between the Prohibition of Child Marriage Act, 2006 , The Hindu Marriage Act,1955 , the Special Marriage Act, 1954 and Muslim personal laws . Such kind of conflicts invite numerous issues in society. In this case, the girl was married to a Muslim boy at the age of 16 . The girl's father has lodged an FIR against the boy for kidnapping the girl. The legal question involved here is that as per the Muslim personal laws, a Muslim girl, after attaining the age of puberty (15) gets the right to take decisions about her marriage. At the same time, the age of marriage of a girl is 18, according to the other applicable laws of India. According to the Prohibition of Child Marriage Act, of 2006, this marriage is prohibited. Such kind of issues invite numerous legal issues like FIR against the male person, validity of the marriage, the age to be considered for such marriage to be considered under personal law or other applicable laws, future of the parties I the marriage is declared as void etc. UCC on such matters, can be a valuable way out. It can also pave way for bettering levels of education, health and economic independence for young girls who can significantly contribute and invest in their families and ensure better futures for their children. Maintenance and Conflicts Maintenance for women is another conflicting area for women. The right to maintenance is one of the valuable economic right of women in India. Nonetheless, multiple applicable laws create complications in terms of legal overlapping and as a result the women asking for maintenance are with no law. A long time goes to decide the applicable law and the provision has been misused by the petitioner in claiming maintenance before various forums and under different laws.

LEGISLATIVE ACTION, JUDICIAL INTERVENTION AND SOCIAL INTERMEDIATION

Law is an instrument for social change. In the past there are plethora of laws which have played very positive roles for social upliftment, like The Immoral Traffic (Prevention) Act, 1956, The Dowry Prohibition Act, 1961, The Child Marriage Restraint Act, 1929/2006, The Indecent Representation of Women (Prohibition) Act, 1986, The Widow's Remarriage Act, 1856, The Commission of Sati (Prevention) Act, 1987, The Protection of Women from Domestic Violence Act, 2005, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and many more. If we take the example of the practice of *Sati*, it is believed that the practice of sati / sati glorification was a very long (700-year-old) practice. The practice of sati is beyond the imagination of any mankind. There was a believe that the origin of sati glorification has been attributed to Vedas. In reality this practice stems from the basis of economic insecurity of the woman for the family and community. In 1829, when the constitutionality was not the yardstick to testify the reasonableness of the practice, the effort of Raja Ram Mohan Roy had brought the practice of sati to the limelight and was declared illegal first time by Lord William Bentinck, the then Governor General of the East India Company through the Bengal Sati Regulation, 1829 in British India. Roop Kanwar's sati glorification led to the enactment of state-level legislation to prevent the debauched practice amongst the Hindus. The Sati Prevention Act, 1987 the state-level law of Rajasthan, led to enact the Commission of Sati (Prevention) Act, 1987 by the Parliament. The punishment for the abetment of Sati was death or life imprisonment. (Section 3 of the Commission of Sati Prevention Act, 1987). To remove this social stigma, even an amendment was made to the Representation of People Act, 1951, that if any person convicted by the special court for contravention of the Commission of Sati Prevention Act, 1987, shall be disqualified from the date of such conviction and the disqualification shall continue for a period of five years since the date of his release.

The practice of Child marriage was looked into in different stages. Apart from its social injustice, child marriages deprived the girl child of any possibility of attaining capabilities towards economic freedom. The prevention of child marriage started with the Sarda Act and finally resulted in the enactment of The Child Marriage Restraint Act, 1929 and replaced by the Child Marriage Restraint Act, 2006 with suitable changes according to social needs. At present, the Triple Talaq Act 2019 has been passed by the lower house of the Parliament and

awaiting for approval in the upper house of the Parliament. In between the Bengal Sati Regulation 1829 and the Triple Talaq Act 2019 numerous legislations have been enacted to remove evil practices from the society.

JUDICIAL APPROACH

In parallel, the role of the Judiciary is very efficient in bringing social reformations with the pronouncement of landmark and leading judgments with guidelines and special directions. In particular, in response to the unfounded practices in the name of religion, the Supreme Court of India has been playing a key role. When the conflict of maintenance law came before the Court, the issue was raised about the differential treatment to the all married women under section 125 of the CrPC and the diversified personal laws of India. These reflect the persistent Gender gap in literacy, high drop out rate among girls in the secondary level, gender gap in women participation rates in labor force, low financial inclusion, low ranking in gender gap index etc.

With regard to the controversy of the maintenance right of a Muslim woman under section 125 of the CrPC, the Hon'ble Supreme Court had taken a very strong stand while considering the issue of the conflict between the provisions of section 125 of the CrPC and that of the Muslim Personal law on the liability of Muslim husband to provide the maintenance to his divorced wife. The Hon'ble Supreme Court held that, she is entitled to get maintenance under section 125 of the CrPC. (Shah Bano Judgment) The Shah Bano judgment was overturned by the legislation i.e. the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Similarly, with regard to bigamy by non-Muslim husbands converting to Islam, the Hon'ble Supreme Court held that, the second marriage of a Hindu Husband after conversion to Islam, without having his first marriage dissolved under law would be invalid. The second marriage would be void in terms of the provisions of section 494 of the IPC, and the apostate husband would be guilty of the offence under section 494 of the IPC. Also, the Apex court said the Government may also consider enacting the Conversion of Religion Act. It was further held that every citizen who changes his religion cannot marry another wife unless he divorces first wife and the provision should be applicable to every person whether he is a Hindu or Muslim or Christian or a Sikh or a Jain or a Buddhist. Also provisions be made for maintenance and

succession etc. to avoid the clash of interests after the death. (Sarla Mudgal Judgment). The Hon'ble Supreme Court ¹⁸pronounced that, the marriage between the parties has not been dissolved by mentioning about talaq in the written statement of the proceedings without any pronouncement orally or in writing and the payment of maintenance to be continued until the obligation comes to an end by law.

In the landmark judgment (Shayara Bano Judgment), the Hon'ble Supreme Court declared, that the practice of Instant Triple Talaq is arbitrary and in violation of the fundamental right under Article 14 of the Constitution of India. The practice of Triple Talaq under section 2 of the Muslim Personal Law Shariat Application Act, 1937, in so far as seeks to recognise and enforce Triple Talaq is within the meaning of the expression 'laws in force' in Article 13(1) and must be struck down as being void. It was declared void on the narrower ground of it being manifestly arbitrary¹⁹. In response to the PIL, the Hon'ble Supreme Court has asked the Centre and the law commission to make their stance to abolish the practices of polygamy and Nikah halala. (The bench of the Apex court headed by CJI Justice Dipak Mishra)

Social activism is also a very important instrument to eradicate such kind of social hindrances. If we examine the social reformations 19th to 20th century the social obstacles like the practice of sati, women's education, child marriage, property right of women, widow remarriage, cast system and untouchability, bonded labour and many others have been eradicated from society by active participation of the social reformers. Few names are always being remembered like Raja Ram Mohan Roy, Pandit Ishwar Chandra Vidyasagar, Swami Dayanand Saraswati, Dr. Atmaram Panduram, and Justice Mahadev Govind Ranade for the movement of social reformation in India, which was missing for some time.

There was a report ²⁰ (Bangalore Mirror) to overcome the uncertainty over the applicability of Muslim Personal law in the Indian Judiciary; several Muslim couples are opting for divorce declaration certificates from the family courts. This they do to avoid disharmony after the divorce. There is no centralised system in the community hence Muslim couples are approaching the family court. The Muslim Personal Law (Shariat) Application Act was

¹⁸ Ibid 12

¹⁹(The then CJI J. S Khehar, Justice Kurian Joseph, Justice R.F Nariman, Justice U.U Lalit, Justice S. Abdul Nazeer)

²⁰ *Muhammad Akbar Shariff, President Discover of Islam Educational Trust, 12/04/2018,*
<http://bangaloremirror.indiatimes.com/bangalore/others/parting-muslim-couples-take-the-legal-path-to-make-it-firm/articleshow/52841415.cms>

passed in 1937 with the aim of formulating an Islamic Law Code for Indian Muslims. The British, who were at this point of time governing India, were trying to ensure that Indians be ruled according to their own cultural norms. (Bangalore Mirror, Muhammad Akbar Shariff) .While introducing the private member's bill on triple talaq, i.e., The Dissolution of Muslim Marriage Bill, 2016, Mr Dalwai said, 'India must join the league of many other Muslim countries like Iraq, Turkey and our neighbours Bangladesh and Pakistan, which have codified the law related to divorce thereby bringing certainty and removing discrimination in the application of personal laws²¹. (The Telegraph, Hussain Dalwai, Private Bill on Talaq)

THE TRIPLE TALAQ ACT/ {THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019 AND THE PRIVATE MEMBER'S BILL, I.E. THE DISSOLUTION OF MUSLIM MARRIAGE BILL, 2016}: A LEGAL SCRUTINY

On 28th December 2017, The Muslim Women (Protection of Rights on Marriage) Bill 2017(Bill 247 of 2017) was passed in the lower house of Parliament. The proposed legislation became very controversial after being tabled in the Upper House of the parliament. Considering the pronouncement of talaq as cognisable and non-bailable is a very affirmative approach. As per the judgments of the Hon'ble Supreme Court, triple talaq is unconstitutional and void ab initio. So, there is no impact on the existence of the marriage after the pronouncement of triple talaq. The word 'void' (section 3) makes the pronouncement of triple talaq *void ab initio*, which is null and has no legal effect and most importantly, which can never be enforced by law. The use of the word *void* gives no legal sanction to the pronouncement of triple talaq. The section enables to nullify the pronouncement of the triple talaq. The combined reading of the Hon'ble Supreme Court verdict (Shayara Bano) with the word 'void' shall make the pronouncement of talaq unenforceable. Punishment for the pronouncement of talaq, would be required if any person will act out after the pronouncement of talaq. Similarly, the requirement of subsistence allowance and custody of children do not arise unless and until any person has not acted out after the pronouncement of talaq. The legal understanding of the section is, only if any person will act out after pronouncement of talaq, then the want of subsistence, and custody of children during his punishment has to be

²¹ The Telegraph, Hussain Dalwai, Private Bill on Talaq

mentioned. 'Punishment for pronouncing talaq' (section 4) requires more attention and analysis. This Act is very essential for our country, and as 66 cases of triple talaq have been reported even after the judgment of the Hon'ble Supreme Court. This piece of Legislation has shown success. According to a news report²² the cases of instant triple talaq has been dropped by 80 %. The Supreme court will hear the petitions filed challenging the constitutional validity of this Act in November 2023²³.

Private Member's Bill on Triple Talaq

The Dissolution of Muslim Marriage Bill,2016 (bill no XL of 2016), which was introduced as a *private member's bill* in 2016, speaks about the re-enactment of the Dissolution of Muslim Marriage Act,1939 in order to ensure that the Muslim women have equal opportunities to dissolve the marriage. This piece of legislation with 21 sections provides the grounds of divorce both for husband and wife. It provides the procedure, jurisdiction for the dissolution of Muslim marriage. Section 17(2) of the proposed bill would stop the nikah halala, which says that no Muslim woman shall be compelled to undergo a consummated marriage, and subsequent dissolution of that marriage in order to remarry a man with whom she was married earlier and that marriage is dissolved. [sec 17(2)]. Similarly, the proposed bill does not allow any other mode of dissolution of marriage outside the court. Any kind of dissolution of marriage by whatever name called initiated outside the court shall be concluded only through the procedure mentioned under section 9 [sec 11]. Section 11 indirectly prohibits the triple talaq. This bill could have been considered while enacting the Triple Talaq Act, 2019.

DOES INDIA NEED A UNIFORM CIVIL CODE?

Whether Uniform Civil Code is the ultimate riposte for the issues of Personal Laws? Can Practice of Sati to Triple Talaq and Bigamy to Nikah halala be resolved through a Uniform Civil Code? Since the Shahbano judgment (1985) to Shayara Bano judgment (2017), one of the core issue which has been raised time and again in the judicial forum is the demand for the formulation of the Uniform Civil Code. In these legal battles and judicial pronouncements , the issue has been

²² "Cases of Triple Talaq Dropped by 80% After Enactment of Law: Naqvi," NDTV accessed May 1, 2023, <https://www.ndtv.com/india-news/cases-of-triple-talaq-dropped-by-80-pc-after-enactment-of-law-naqvi-2499994>.(May 1, 2023)

²³ *Supreme court to hear batch of pleases*; THE DAILY GUARDIAN <https://theguardian.com/supreme-court-to-hear-batch-of-pleas-in-november-2023-challenging-triple-talaq-law/>,_ accessed on 5th May,2023.

raised again and again to formulate the Uniform Civil Code in India to tackle the conflicts in personal laws. But the biggest challenge before the Government of India would be the formulation and implementation of Uniform Civil Code. Most of the controversies related to UCC involve both religious feelings and the acts of secular nature. In 1954, the then Prime Minister of India Pandit Jawaharlal Nehru while introducing the Hindu Code Bill instead of a Uniform Civil Code said, 'I do not think that at the present moment, the time is ripe in India for me to try to push it (Uniform Civil Code) through'. 'A common Civil Code will help the cause of national integration by removing the disparate loyalties to law which having conflicting ideologies' (the then CJI Justice YV Chandrachud). The debate of Uniform Civil Code started after the judgment of the Apex Court in 1985 (Shah Bano judgment). It is very difficult to unify all the diversified practices under the different religions. India is a country with numerous, language, culture, tradition and customary practices as recognised by the practices under the personal laws. Even, the harmonisation of the religious and customary practices in one community or in a single religion is hard-hitting. So, it will be difficult for the Government to bring all practices together under one law? Without discussing the legal aspects of the 'secularism' under the preamble of the Constitution, 'Freedom of Religion' as fundamental right and the 'Uniform Civil Code' under the 'Directive Principles of State Policy', it can be stated that very unpretentious approach should be given to the introduction of a Uniform Civil Code in India, as Secularism, Freedom of religion and Uniform Civil Code are sensitive socio legal issues of the Indian society. Ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest 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 autonomy but oppression.' Therefore, a unified code is imperative both for the protection of the oppressed and the promotion of national unity and solidarity. (Justice R.M. SAHAI in Sarla Mudgal case)

'The respective personal laws permitted by the British to govern the matters relating to inheritance, marriages etc., only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code for all the citizens in the territory of India. The successive

Governments till date have been wholly remiss in their duty of implementing the constitutional mandate under Article 44. Therefore, Supreme Court requested the Government of India, through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavour to secure for the citizens a uniform civil code throughout the territory of India." (Justice Kuldip Singh)

In realistic view, the practices under any personal/religious law are so deeply rooted, it is very difficult to unify the practices. When it comes to Uniform Civil Code, it will take another couple of decades to change the mindset of the people and bring all religious practices under the Uniform Civil Code in the matters of personal in nature like marriage, divorce, maintenance, adoptions etc. Instead of thinking for a Uniform Civil Code, the Government of India must constitute high-power committees to look into the controversial usage and practices in each religion and recommend for suitable changes in legislation and introduce specific Codes for each religion, which may be workable for few decades focusing few questions: Why these practices? What is this practice? How can it be eradicated?

The UCC can positively bring uniformity in certain conflicting areas like Maintenance, Divorce, Succession and Inheritance Law, Age of Marriage etc, In *Rajnish Vs Neha*²⁴ the Supreme Court has passed directions to bring uniformity in conflicting issues of overlapping of jurisdiction in maintenance applications under the multiple laws and in bringing uniformity in the orders of Family Court, Magistrate Court, District Court throughout the country and has made mandatory for the applicant to disclose about the previous orders and proceedings in maintenance matters. Recently the Supreme court has dismissed the PIL filed to challenge the decision of the State forming committees for the enforcement of UCC. The Supreme Court held that there should not be any objection if states form committee for enforcement of UCC, because the subject matters of 'marriage and divorce' are mentioned in entry 5 of concurrent list of schedule VII of the Constitution.

CONCLUSION

Personal Laws exist in custom and practice and derives its validity from its reasonableness. Any practice, which in any form is disparaging is irrational and any custom which is unreasonable are constitutionally invalid. Without giving any colour of religion, caste, creed,

²⁴ Supreme Court, 2020

it should be removed from the society with cohesion. Various practices in the name of religion like practice of sati, child marriage, nikah halala, Triple Talaq etc should not be seen either as civil wrong or as criminal act rather very serious and sensitive socio-legal issues or violence against women in the name of religion. As held by the Hon'ble Supreme Court, the triple talaq is not integral to religious practice and violates Constitutional morality. Even as per the judgment, the holy Quran has attributed sanctity to permanency of marriage. It is a matrimonial offence against women. In case of various past instances, bigamy by Hindu husbands after conversion was declared illegal (Sarla Mudgal judgment, Lily Thomas judgment) and bigamy has been criminalised.

After a comprehensive assessment, it can be concluded that, at any point of time, whenever any issue or challenge relating to the socially absurd incidents due to abuse of religious freedom has been brought to limelight, there has been the instant judicial intervention followed by a legislation. Subsequent to any legislation, a social assessment must be done to know the social impact and effectiveness of the legislation. The first and foremost problem in our country is ignorance of law. Lack of awareness is the imperceptible reason. Even after the Child marriage Restraint Act, the child marriages are prevalent. The Hon'ble Supreme Court expressed consternation over an alarming figure of 23 million of child brides in the country and said that one out of every five marriages contravened the Child Marriages Restraint.²⁵ Legal literacy campaign about the law and rights with duties, can have greater impact. Accountability at different levels of the Governance system must be the feature of all socio welfare legislations.

'The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by social perspective and purpose and within its grammatical flexibility, must further the beneficial object. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the holy prophet or the

²⁵ "23 million child brides in India, Supreme Court expresses dismay." (2018, January 2). Retrieved from <http://www.livemint.com/Politics/PRft3fAiTAnZj6KVZR3FHN/23-million-child-brides-in-India-Supreme-Court-expresses-di.html>

holy book. Marginal distortions are inevitable when the judicial committee in Downing Street has to interpret Manu and Muhammad of India and Arabia' (Justice V .R. Krishna Iyer)

In the present scenario, the Government, must step in to rewrite the personal laws, by constituting high power expert committees. This is the high time to remove the anomalies and to make corresponding amendments to the major laws of the Country to tackle these issues.

The attempt for Uniform Civil Code is an option nonetheless very careful approach is required. The area of personal law is a socially and personally sensitive matter. The diversified and scattered custom and practices are deeply rooted in our society. Unification of all personal laws together would be a big challenge. The chairman of 21st Law Commission of India Justice Balbir Singh Chauhan said, 'UCC is not possible and even not an option'²⁶. With the existing plethora of legislations in India, enactment of many small pieces of legislations would create inconsistencies amongst the common man and incongruities for the implementation.

The 22nd Law Commission of India has started the process of public consultation for the Uniform Civil Code. The idealistic approach would be to bring UCC phase wise. In the first phase, the Government should identify the harmful, discriminative religious practices in different religious laws and provisions must be brought in the UCC to eradicate them. In the second phase the UCC may introduce a Code covering all religions. A complete code for every religion would maintain the balance between the religious right and social equilibrium. Unified Specific Personal law Codes within UCC for all Indians like a Hindu Code for the Hindus, a Muslim Code for Muslims in the matters of personal nature would solve the purpose for few decades. Today's embryonic religious issues are the key for tomorrow's national and international issues. A thorough reading of Article 25 manifests that 'freedom to profess religion is subject to public order, morality, and health. So, the time has come to elucidate all these issues under the scanner of constitutional validity and to protect the society from such atrocious practices and to make the country free from all these legal incongruities.

²⁶ "*Uniform Civil Code is Not Possible, It's Not Even an Option: Law Commission Chairman*," News18. aDecember 5, 2017, <https://www.news18.com/news/india/uniform-civil-code-is-not-possible-its-not-even-an-option-law-commission-chairman-1595623.html>.