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A COMPARATIVE JURISPRUDENTIAL ANALYSIS OF TRIPLE TALAQ AND THE EXAMINATION OF ITS POSITION IN INDIA

Alex Koshi*

Abstract

Triple talaq has been a long and contentious issue in India. It assumes a high degree of importance considering the fact that it requires delicate balancing between two rights which are considered as quintessential to living a life with basic human dignity. The history of talaq-e-biddat or triple talaq as it is popularly called, had a tumultuous history spanning decades, exacerbated by communal relations. The Indian government is getting ready to enact The Muslim Women (Protection of Rights on Marriage) Bill, 2017, which criminalizes any form of talaq-e-biddat, the backlash to which has been immense. Furthermore, there is an urgent need to correct the blatantly wrong trajectory taken by legislature and to put the spotlight back on the actual stakeholders of the issue, Muslim women.

I Introduction

MARRIAGE IS considered as a covenant of highest commitment between two people. The Qur’an itself gives a lot of importance and sanctity to the institution of marriage. As a result Qur’an has imposed certain guidelines that have to be followed before the union can be dissolved. The process of separation, with the inclusion of such guidelines, of the union is commonly referred to as talaq.\(^1\) The interpretation of triple talaq, however, has often found the scholars of the Muslim community at odds. The Muslim community has polarized to majorly to factions, Shia and Sunni. Majority of the Sunni scholars argue that triple talaq can be issued in one sitting. This is in stark contrast with other Muslim religion dominated countries such as Egypt, Sudan, Syria, Morocco, Afghanistan (who incidentally also have Sunni muslims), who have formed their own laws regarding the issue and follow the teaching of Ibn Taimiyah, who profess that the pronouncement of triple talaq in one sitting will only amount to a single talaq pronouncement. The Sri Lankan Marriage and Divorce (Muslim) Act, 1951, amended up to 2006, contains one of the most progressive and ideal legislations regarding talaq. The nature of the change is thus, there is an ever increasing shift

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to viewing triple *talaq* as a Islamic divorce proceeding with judicial consequences. As a result, the conditions of upholding such a *talaq* becomes less dire. The main questions that will be addressed by this paper will be, first, an analysis of *talaq* in foreign countries and extent of conformity of India to international practices of *talaq*; secondly, the viability of the stance taken by the judiciary in light of all relevant circumstances will be assessed and thirdly, contrasting the current trajectory and the ideal one, to point out corrective measures to be taken. In Part II, the focus will be on Islamic mandate of marriage and divorce. Focus of the Part III will be on the legislative practice of *talaq* throughout the world. Part IV will trace the legislative history while Part V will lay down the stance taken by the judiciary and the legislature and lastly Part VI will contain the final suggestions and recommendations.

**II Analysis of religious importance of marriage in Qur’an**

Marriage is considered as a sacrosanct concept in Islamic law. The issue of marriage and divorce takes utmost importance in the Qur’an.² Triple *talaq* in the Qur’an has to be spaced over a period of three months with each pronouncement taking place when the wife is in a state of *tuhar* which is the stage of purity after a menstrual cycle. The three-month cycle must be followed for even those who have reached the stage of menopause; and for women who are pregnant, *talaq* can’t be imposed until the child is born.

*Talaq* as practiced in India (Deviations)

The type of *talaq* taking place in India now, *talaq-e-biddat*, also known as innovative form of divorce, is a varied form of *talaq* being practiced among Sunni Muslims. This variation however, is not only deviates from Qur’an but also violates the divine nature of marriage and union in the Qur’an. Even before following the normal three-month process of *talaq* as prescribed in the Qur’an there are certain objective criteria and corrective steps that must be taken. During this period, the couple must abstain from sexual relations and there must be a conscious effort to resolve the dispute between a married couple and is encouraged to be solved among the confines of the home itself. Since marriage is considered as something holy in Qur’an, steps must be taken to not separate what God has joined. In the Hadith of the Prophet it is stated that of all the things that is allowed in the Qur’an nothing more is hated by Allah than divorce. This is simply referring to the method as prescribed in Qur’an and not to the later deviations formed by scholars, which significantly deviates from the principles of equity laid down in Qur’an, which would certainly be looked upon in a egregious manner by Allah.³


Guidelines for *talaq* as according to *Qur’an*

_Qur’an_ details that if a stage is approaching where both parties are having an issue between them and are not able to settle it, two arbitrators must be appointed, one from each family and that God will resolve the matter if the parties wish for peace in their minds.⁴ Such is the idea that is set forth in the *Qur’an*, one of understanding and reconciliation. Even after this if the husband wishes to divorce the wife, he can do so in a span of three months, but even then she cannot be turned out of her own house and the *Qur’an* mandates that the parting must be done on equitable grounds.⁵ In addition to this, presence of two witnesses who are of upright standing in the community, is mandatory to make the procedure of *talaq*, as according to the *Qur’an*, to be binding. After the pronouncement of the third *talaq* the woman enters a period *iddat* which is a final waiting period of three menstrual cycle.⁶ If at the end of that time, the woman is found to be with child the divorce procedure is stayed and will only be granted after the child is born, otherwise the divorce become final at the end of the *iddat* period.⁷ After it is finalized, the former partners are not allowed to have sexual intercourse and can only remarry after the woman has married someone else, gets divorced and observes another *iddat* period.⁸

**Equity consideration extended to women in *talaq* under *Qur’an***

The Holy Prophet brought about significant and valid changes to the law regarding marriage and divorce at the time. The Holy *Qur’an* established a proper system with guidelines for divorce and imposed a check on the husband’s unbridled powers. Islam, for the first time recognized woman’s right for divorce on grounds of incompatibility.⁹ Furthermore, Islam reiterated that divorce must only be resorted to in case of extreme circumstances. The procedure established in the *Qur’an* is one based on equity, balancing men’s rights against women’s. Women

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⁷ _Id_. at 65 (vol. I).
cannot be turned out of their house of residence, children must be taken care of, and women cannot be divorced while she is with child. This is to ensure the right of the child to the father’s property is ascertained. The iddat period is also enforced as a safeguard measure and sexual intercourse is prohibited after divorce to ensure divorce is not exploited. The talaq-e-biddat however is ostensibly against most the principles of equity of justice as laid down in Qur’an and goes against the remarkable progressive ideals laid down in Qur’an (if interpreted in the right spirit) and it takes away from the divine nature of Islam, to something oriented for the convenience of men, which is apparently a man-made construct.

As a result of this analysis, it must be seen as divorce is not a fundamental practice for Muslims, considering the fact divorce is frowned upon, and even if this is overlooked, talaq-e-biddat can be justified in no way considering the fact that it does not lay its foundation even in the holy book of Qur’an.

III Talaq regulations in countries around the world

In this section, the author would like to examine the return of prominent Muslim majority countries to the basics of Islam. Furthermore, the author will examine how egalitarian and developed countries have tackled the issue of talaq and balanced it with personal rights vis-à-vis human rights, which assumes importance in the Indian context.

Modern position of talaq which is practiced in Muslim majority countries

Ibn Taimiyah is a prominent scholar who vehemently opposed deviations from the Qur’an and sought to return the masses to the roots of Islamic belief: the Qur’an and the sunnah. From the beginning of the twentieth century when reformation of Muslim law started in various countries around the world, they turned to the teaching of Ibn Taimiyah which argued Islamic fundamentalism rooted in the Qur’an and the words of the Prophet. Egypt was the first country to deviate from the position of the jamhur, which contained teaching which deviated from Qur’an especially in respect of marriage, divorce and conjugal rights, in 1929. Egypt established law regarding talaq which essentially resulted in the fact that the number of pronouncement of talaq in one tuhr, would only count as one and would be revocable. This would only be irrevocable if talaq is pronounced in three consecutive tuhr cycle. Syrian law also adopted a law along similar lines but with addition of different divorce proceedings before the consummation

of marriage. Various other Muslim majority countries have adopted Taimiyah’s opinion on personal rights. These countries include Qatar, United Arab Emirates, Libya, Yemen, Tunisia among many others. Around fifteen countries of Muslim majority have modified such personal laws.

Model law in practice, harmonious with both the Qur’an and women’s rights

There are three countries who stand at the forefront of progressive legislation which is in consonance with Islamic law. These are Tunisia, Algeria, Sri Lanka and Sarawak (state in Malaysia). In Tunisia, the pronouncement of divorce should strictly happen within the confines of the court and the court should make active efforts to inquire about the entire scenario and a conscious effort to bring about reconciliation between the parties. A similar provision has also been adopted in Algeria which prescribes a maximum time duration for this process at three months. Although the initial conception of the idea can be lauded, the execution of the idea resulted in further emancipation of the rights of Algerian women. It can easily be argued that in the era of post-independence of Algeria, the rights of women took a harder road. Certain dissent, albeit small, has come up from certain parts of the Muslim community saying divorce should not become strictly a legal manner. Maybe it is in this regard that Sri Lanka has adopted a slightly different approach. In Sri Lanka, the party must approach the Qauzi and give a notice stating the intention to divorce. The Qauzi will take all possible steps to attempt a reconciliation by trying different mediators which includes people from both sides of the family and influential members from the Muslim community. If this effort remains fruitless, the husband can decide to go forward with the divorce in the presence Qadi and two witnesses. A similar approach to that of Tunisia can be seen in Sarawak, a state in Malaysia which also involves the court for the final pronouncement of divorce.

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13 Law of personal status of Syria, 1953, s. 92.
15 The Tunisian Code of Personal Status, 1956, arts. 30, 32.
17 The Algerian Family Code, 1984, s. 48.
18 Supra note 11.
19 Sri Lanka’s Marriage and Divorce (Muslim) Act, 1951, s. 29.
20 Supra note 14.
IV Judicial interpretation of triple *talaq* in India

From the very outset, the protection granted to religious beliefs has been a contentious issue as was evidenced in the constituent assembly debates.21 The courts were initially very reluctant to take up religion related cases on article 13 and read down its ambit.22 This approach changed with the advent of *constitutional morality* which led to a series of progressive judgements by the court.

**Extent of insulation of fundamental rights in religious matters**

The ambit of legislative interference and the subsequent powers regarding the same in a jurisprudential manner was considered in *Maneka Gandhi v. Union of India*23. Article 25(2)(b) and article 26(2) are the primary articles that deal with the protection of religious rights in the Constitution of India. The primary question that came up before the court was this: what aspects of the religion should be protected. The question was finally answered by the Supreme Court of India in *John Vallamattom v. Union of India*24 where it held that only the essential and integral elements of practising the religion would be afforded such protection. This was a landmark judgement and further refinements were carried out around religious protection in light of this new judgement.25

**Scope of law falling under the purview of article 13**

There was a debate regarding the scope of article 13 of the Constitution of India. The contentious term in article 13 was ‘laws in force’ and what was actually covered under this. This position of law was finally settled in India in *Bharat Cooperative Bank (Mumbai) v. Employees Union*26 where the court held that the term ‘laws in force’ must be construed in a broad manner and should not be restricted by any linguistic technicalities, which would defeat the purpose of the article 13. This judgement essentially brought the personal laws under the ambit of article 13.

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23 AIR 1978 SC 597.

24 *John Vallamattom v. Union of India*, AIR 2003 SC 611.


26 *Bharat Cooperative Bank (Mumbai) v. Employees Union*, AIR 2007 SC 2320.
Proposals for Uniform Civil Code (UCC) and establishment of certain pre-requisites to prevent misuse of *talaq*

Specifically coming to the issue of *talaq*, in the case of *Shamim Ara v. State of U.P.*, the court held that arbitrary use of *talaq* is not permitted since it is against the very concept of *talaq* as laid down in the Qur’an. Furthermore, the court held that any interpretation of the law should aid in reducing the disparity that may exist between two sections of the society.

Before discussing the *Shayara Bano* case, there is a need to discuss the complex realm of personal laws and conflicting individual which plays an important role in understanding the judgement. Article 44 of the Constitution of India lays down the foundation for a UCC in the form of a directive principle of state policy. Furthermore, in the myriad of personal laws existing in the country there is an option for civil marriage which surprisingly, subsists with the personal laws. The conflict however exists between fundamental rights laid down under articles 14 and 15 and between right to religious freedom and cultural identity (articles 25-30). There are a multitude of personal laws which deals with each aspect, such as marriage, divorce, inheritance etc. which stand as an insurmountable barrier to the proper enactment of secularism and gender equality.

Another important moment was the *Shah Bano Begum* case. This was an extremely polarizing decision which brought out strong views from both sides. There were strong comments against Islam and a subsequent push for a UCC. The backlash for this mounted a huge pressure on the government which led to the adoption of the Muslim Women’s Act, which excluded women from the secular purview of Code of Criminal Procedure, 1973. The stakeholders quickly polarized, on one side those arguing for UCC and right wing Hindu nationalist groups, and one the other the ones trying to preserve their religious freedom and identity. As the issue progressed, the ones who opposed the new act, and hence supporting the UCC, were seen as modern and progressive, striving for an egalitarian society, and those who stood opposed to it were seen as traditional, unrelenting patriarchs who wanted to maintain their grip on power. Muslims clearly saw this as a threat to their very ideals and that to strengthen their position, the right wing parties under the pretext, were vying for power used it to further

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28 *Shayara Bano v. Union of India*, AIR 2017 SC 4609.
30 The Muslim Women (Protection of Rights upon Divorce) Act, 1986.
32 Ibid.
their propaganda. Among this furore, the right questions were not asked and hence were not answered. Subsequently, this narrative around UCC was forced to take another path. This was due to the several communal events the happened around the country. The first major event was the demolition of Babri masjid in 1992, then Gujarat riots in 2002, attack on Christian minority churches in 2005, Muzaffarnagar riots in 2013. The narrative around UCC became that the Hindu majority party, the Bharatiya Janata Party (BJP) was using the demand for a UCC to strongarm the Muslim minority into submission. Communities throughout India recognized the problem of such a demand and balance tilted in the favour of letting the communities bring about the changes by themselves in a gradual manner, which would be comfortable for them. This was seen as a model and viable way to bring about actual change and bring about parity between genders.

**Maintenance of Muslim Women Act: Silver lining and further development of women’s rights**

Even though the Maintenance of Muslim Women Act was seemingly biased, there was a silver lining that favoured an important stakeholder, arguably the most important stakeholder, the Muslim women themselves. The Act gradually rolled out in the lower courts with an interesting result. The entire issue came about when Muslim women tried to defend their economic rights, and this Act in a convoluted way solved the problem. When Muslim women approached the court for maintenance under section 25 of the Code of Criminal Procedure, the husbands resolved to the practice of proclaiming *talaq* to not pay maintenance amount after the *iddat* period, as according to the provisions of the new Act. The court, however within the ambit of the act itself, started awarding lump sum amounts. A perceived act of injustice was finally able to protect, at least up to a certain degree the economic rights of women. The husbands aggrieved, started challenging this position. The dispute was finally settled by the supreme

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court in the *Danial Latifi* case. After years of marital persecution, women were finally able to ascertain their economic predicament at the final pronouncement of divorce. This status quo was unheard of in any community in India. This was the element that further legislation should have focused upon, the rights of women during and after marriage. The tangent unfortunately was not explored in the landmark *Shayara Bano* case. Even though it cannot be denied that the ruling in that case is certainly a victory for women’s rights, the actual problem still stands. Muslim women still lack status and rights such as inheritance rights.

The position and status of Muslim women in the country is of paramount importance if gender parity is to be achieved. This is what *Shayara Bano* case and the subsequent legislative effort, The Muslim Women (Protection of Rights on Marriage) failed to address.

**V Constitutionality of talaq-e-biddat**

This part analyses the judgement itself, *Shayara Bano* case. There are several angles from which this judgement must be looked at. First and foremost, was the stance taken by the supreme court correct. Supreme court ruled to abolish the practice of talaq with a 3:2 majority.

**Judgement and reasoning of Shayara Bano case**

Much criticism has been levied on the judgement, with some going on to even say the judgement would not stand. The main question that has been asked is whether religious customs, which is deviating from the fundamental tenants of the religion be given constitutional protection against fundamental rights. The then C. J. Khehar, gave the dissenting judgement saying it would extend; while the majority verdict given by Kurien Joseph, J. vehemently opposed the stance taken by the C. J. Khehar. Kurien Joseph, J. said the fundamental rights form the foundation on which the rest of the constitution is built upon and if something is

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43 *Shayara Bano v. Union of India*, AIR 2017 SC 4609.
to be given priority over it, it must be logical and the reasoning for such priority must match the principles of natural justice. From this, he reached the conclusion that only the most customs which is essential for the practice and propagation of the religion must be given that protection.\textsuperscript{46} This, in many ways, reaffirmed the verdict given in \textit{John Vallamattom} case,\textsuperscript{47} which was discussed earlier. It was decreed that \textit{talaq-e-biddat} was not an essential practice and hence would not be given priority over fundamental rights. Furthermore, the court directed that the legislature should form a law regarding the same.\textsuperscript{48}

**Response by legislature**

The Bill passed by the legislature, The Muslim Woman (Protection of Rights on Marriage) Bill, 2017 has drawn a large amount of criticism from the Muslim community. After the court decreed triple \textit{talaq} as unconstitutional and declared in void, government has gone another step, arguably uncalled for, and made the practice illegal with mandatory imprisonment upto three years.\textsuperscript{49} One cannot help but think whether the court was hasty in making this call and overlooked some practical aspects of the Bill. The offence was further made cognizable and non-bailable.\textsuperscript{50} This has struck fear into the heart of the Muslim community, whether these provisions will be misused. Considering the scenario, ever since the BJP came to power in 2014, they have promoted their agenda of establishing a Hindu \textit{rashtra}, and Muslims are often projected as the kind of behaviour that one should not emulate. The secular fabric of the country has been strained.\textsuperscript{51} In these circumstances the fear and apprehension projected by the Muslim community is justifiable.\textsuperscript{52} The \textit{Qur'an} promotes reconciliation between the parties but the Bill the way it is framed, makes \textit{talaq-e-biddat} illegal, and adds an element of criminal liability for the same. Even if the parties have resolved the

\textsuperscript{46} “This is what the Supreme Court said in Triple \textit{Talaq} Judgement”, \textit{available at: http://www.livelaw.in/supreme-court-said-triple-talaq-judgment-read-judgment/ (Last Modified August 22, 2017)}.

\textsuperscript{47} \textit{Supra} note 24.


\textsuperscript{50} \textit{Ibid}.


dispute it is unclear whether the case can be withdrawn or settled out of court. Moreover triple *talaq* was pronounced as a strict liability crime, which means that mental element to commit *talaq* need not be proved for it to attract a penal punishment. This is an extremely precarious position and makes the offence a grave one.

The Bill on the other hand does nothing to confer further protection of the rights of women regarding marriage or divorce. The same protection that was available to women from other legislations subsists. Not only does the Bill completely miss the grievances of the Muslim women, it adds to their woes by threatening penal action on the men and thus fragmenting families and compromising the economic position of women (the dispute had the possibility of being resolved by arbitration but the act would penalise it anyway).

**VI Conclusion**

Throughout the course of the paper, the author has shown the practices adopted by different Muslim countries around the world, striking a proper balance between rights and beliefs. The Indian judiciary however, has not followed through, but has had its moments. Danial Latiffi, *Shah Bano Begum* and *Sharaya Bano* are notable examples where the court came close to delivering the ideal position. In the *Latifi* case, the court finally gave importance to the practicality and economic rights of women. In the *Shah Bano*, court reined in the unbridled rights of husband and shot down the arbitrary proclamation. In *Sharaya Bano*, what the apex court should have ideally done is combine the reasoning of the first two cases and deliver a harmonious verdict which takes into account both the fundamental rights and the needs of Muslim women which would empower the latter. This is not to say *Sharaya Bano* case was a wrong holding but rather not an ideal holding. The consequences stemming from it however, namely the legislative attempt by the government, paints the entire scenario in a negative light. The government trampled on the progress made, completely missing the essential points and putting Muslim women in a more deplorable state by threatening their very family bonds. The ideal way the legislature should go is examine what the other countries, like Tunisia, Algeria have done and model the law accordingly with special significance on the practical aspects.

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53 Abhishek Singhvi, “The triple *talaq* bill is a distortion of the essence of the Supreme Court judgments” *Hindustan Times*, Jan. 3, 2018.

54 *Supra* note 46.
CHALLENGES AND INCONSISTENCIES OF UNIFORM CIVIL CODE

Anirudh Vijay*

Abstract

Secularism and religion are two contrasting ends of a same road. A country is formulated by a multiple factor, two of which majorly stays to be the government and the citizens. India being a multifarious country with an abundant religious practices and cultural norms witnesses a humungous conflict of interest of the two major stakeholders. Where on one side the government aims to be secular in nature and maintain due order in the society, a large number of personal laws contravene to the very essence of the governance. Amidst all such contravening possibilities, the attempt of the Govt. to prepare and implement the Uniform Civil Code taking the Goa Civil Code as a skeleton guide is a matter of heavy debate. This paper aims at highlighting varied notions allied to the uniform civil code. Further, it provides for not so uniform provisions of the Goa Civil Code followed by an analysis of the viability of taking the said code as a model framework in creating a comprehensive code for the entire country. The paper concludes with the criticism of the Uniform Civil Code and reasons for not bringing a uniform code in a diverse country.

I Introduction

THE UNIFORM Civil Code (UCC) of India is a term referring to the concept of a comprehensive civil law code in India. Under UCC, all people are governed by a set of secular laws irrespective of their religion, caste and tribe. This supplants the right of citizens to be governed under different personal laws. The term civil code is used to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance.

Codified laws, similar to these, are in place in most modern nations. Laws related to acquisition and administration of property, marriage, divorce and adoption are some of the common areas which are governed by the civil code. The directive principles of state policy enshrined in the Constitution of India attempts to set a UCC for its citizens as a goal to be achieved.

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The consolidation of personal laws to have one set of secular laws dealing with the aspects that will apply to all citizens of the country, irrespective of their community, is the main aim of the UCC. It should be taken into account that the exact outline of such a uniform code has not been spelt out; it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those, which are retrograde.

The Constitution of India came into force in 1950. Figuratively speaking, it has remained a dead letter. This terrible condition covers the essence of the Constitution of India a thousand fathoms deep. According to article 44, the State shall endeavor to enact a UCC for citizens throughout the country. The civil code, if enacted, will deal with the personal laws of all religious communities relating to marriage, divorce, adoption, custody of children, inheritance, succession to property etc. which are all secular in character of Indian state and to enhance fraternity of unity among citizens by providing them with a set of personal laws which incorporates the basic values of humanism. Much misapprehension prevails about bigamy in Islam. Ironically, Islamic countries like Syria, Tunisia, Morocco, Pakistan, Iran etc. have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely curtailed to check the misuse and abuse of this obnoxious practice.

II Evolution vis-á-vis judicial approach

In 1985, the Supreme Court of India first directed the Parliament to frame a UCC in the case of Mohammad Ahmed Khan v. Shah Bano Begum, popularly known as the Shah Bano case. Here, a Muslim woman who was deeply struck by poverty demanded maintenance from her husband under section 125 of the Code of Criminal Procedure after she was given triple talaq by him. The Supreme Court of India held that the Muslim woman has a right to get maintenance from her husband under section 125 of Code of Criminal Procedure. The court also stated that article 44 of the Constitution has remained a dead letter. In this case, the then Chief Justice of India Y.V. Chandrachud observed, “A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies”.

Nationwide discussions, meetings, and agitation were held after this decision. The then Rajiv Gandhi led government overturned the Shah Bano decision by way of The Muslim Women (Right to Protection on Divorce) Act, 1986, which curtailed the right of a Muslim woman for maintenance under section 125 of the Code of Criminal Procedure.

2 AIR 1985 SC 945.
3 Ibid.
In *Sarla Mudgal v. Union of India*, the question was whether a Hindu husband who was married under the Hindu law, by embracing Islam, can solemnise second marriage. The court held that a Hindu marriage solemnised under the Hindu law can only be dissolved on any of the grounds specified under the Hindu Marriage Act, 1955. Conversion would not dissolve the Hindu marriage under the Act. Thus, a second marriage solemnised after converting to Islam would be an offence under section 494 of the Indian Penal Code. Kuldip Singh, J. stated that article 44 has to be retrieved from the cold storage where it is lying since 1949. In this case, Kuldip Singh, J. referred to the codification of the Hindu personal law and held, “Where more than eighty per cent percent of the citizens have already been brought under the codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of the ‘UCC’ for all the citizens in the territory of India”.

In *Pragati Varghese v. Cyril George Varghese*, section 10 of the Indian Divorce Act was challenged under which a wife could claim divorce by proving adultery coupled with cruelty as a ground for divorce as violative of articles 14 and 21 of the Constitution of India. The court held that right to life under article 21 takes in its sweep a right to life with dignity, without cruelty, mental or physical and without constant fear of torture and violence. The right to life guaranteed by the Constitution of India includes the right to seek dissolution of marriage if its existence is an unbearable suffering. Section 10 denies the Christian woman the right to get dissolution of marriage on the grounds of cruelty even when the marital relationship has been broken. Such a law that compels her to live with a person who is her tormentor till death is oppressive, arbitrary and violative of articles 14 and 21 of the Constitution of India.

In *Noor Saba Khatoon v. Mohd. Quasim*, the court held that children of Muslim parents are entitled to claim maintenance under section 125 of the CrPC till they attain majority or are able to maintain themselves, whichever is earlier; and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorced wife’s right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under section 3(1)(b) of the 1986 Act.

The apex court in the case of *Danial Latifi v. Union of India* upheld the validity of Muslim Women (Protection of Rights on Divorce) Act 1986. The five judge bench held that a Muslim divorced woman has a right to maintenance even

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5 Ibid.
6 AIR 1997 Bom 349.
7 AIR 1997 SC 3280.
8 AIR 2001 SC 3262.
after \textit{iddat} period. If relatives are found incapable of maintaining the women then the state \textit{wakf} board would pay the maintenance.

The Supreme Court of India reminded the government of its constitutional obligations to enact a UCC in July 2003 when a Christian priest approached the court challenging the constitutional validity of section 118 of the Indian Succession Act.\footnote{John Vallamattom v. Union of India, AIR 2003 SC 2902.} In this case of John Vallamattom, a Christian priest filed a writ petition in the year 1997 stating that section 118 of the said Act imposes unreasonable restrictions on Christian donation of property for religious or charitable purpose by will and is thus, discriminatory against Christians. The bench comprising V.N. Khare, C.J., A.R. Lakshmanan, J. and S.B. Sinha, J. declared the said Act as unconstitutional. Khare, C.J. stated that: \footnote{Ibid.}

We would like to state that article 44 provides that the State shall endeavour to secure for all citizens a UCC throughout the territory of India. It is a matter of great regrets that article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

Thus, the apex court has on several instances directed the government to realise the directive principle enshrined in the Constitution of India and the urgency to do so can be inferred from the same.

Triple \textit{talaq} issue is a major step towards UCC and the Supreme Court of India in the case of \textit{Shayara Bano v. Union of India}\footnote{(2017) 9 SCC 1.} declared the practice of triple \textit{talaq} as unconstitutional by a 3:2 majority. Kurian Joseph, UU Lalit and RF Nariman, JJ. delivered the majority judgment. Khehar and Abdul Nazeer, JJ. dissented.

On December 28, 2017, the Lok Sabha passed The Muslim Women (Protection of Rights on Marriage) Bill, 2017.\footnote{Sandeep Phukan, “Lok Sabha passes triple \textit{talaq} Bill” \textit{The Hindu}, Dec. 28, 2017.} The Bill makes instant triple \textit{talaq} (\textit{talaq-e-biddat}) in any form — spoken, in writing or by electronic means such as email, SMS and WhatsApp illegal and void, with up to three years in jail for the husband.

**III Overview of Goa Civil Code**

The law, known as ‘Goa Family Law’ can find its source in the Portuguese Civil Code of 1867. It is a procedure of civil laws that governs all the Goans
regardless of the religion or the ethnicity to which they belong. The Goa Civil Code was confined and upheld by the Portuguese pilgrim rulers through different legislations in the 19th and 20th centuries. The Portuguese Civil Code, 1867/13 and Civil Procedure Code, 1939 encompasses the scope of the civil law there. By a decree of 18 November 1869, the Civil Code of 1867 was stretched out to the overseas provinces of Portugal. In Portuguese India, however, the utilizations and traditions of the new conquests, and those of Daman and Diu, as compiled in their individual codes, were preserved by that decree, seeing that they were not contrary to morality and public policy. Parties to whom this exception applied could nevertheless opt in for the Civil Code. Thus, when Goa, Daman and Diu were integrated in the Indian Union as territories thereof, the Civil Code of 1867 was fully applicable there.14

When Goa became a part of India in 1961, the government guaranteed to keep the Goan Civil Code intact.15 In 1962, an enactment of the Indian Parliament called the Goa, Daman and Diu Administration Act, kept Portuguese civil laws in constrain until or unless repealed by the legislature or other competent authority. From that point, some legitimate demonstrations of the Indian Union concerning civil law matters, for example, the Indian Contract Act, 1872 and the Indian Transfer of Property Act, 1882, were extended to Goa, Daman and Diu and the relating arrangements of the Civil Code were repealed. Only those enactments with respect to family laws and utilizations have so far endured the incursion. These incorporate the laws fitting to marriage and separation, progression, guardianship, property, torts, residence, ownership, get to and conduits. The rest of the arrangements of the Code, especially those concerning family and succession law16, apply not only exclusively to Christians conceived there amid Portuguese organization and to their relatives, but also additionally to non-Christians in all issues not managed in their Codes of usages and customs in this sense, the civil code ought to be portrayed as a uniform (although local) code, not as a personal law. In these domains of India, the goal to a UCC, as given in article 44 of the Constitution of India, has thus found its realisation.

The measure up to division of salary and property regardless of gender between husband and wife and furthermore between children is permitted

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14 Ave Cleto Afonso, The Portuguese Law of Goa (Succession and Inventory) (Sucessão e Inventário, Goa, 2009).
under the dynamic law of uniform common code in Goa. Each birth, death and marriage must be mandatorily registered, for divorce there are astonishing courses of action. Muslims who have their marriage registered in Goa cannot take more than one spouse or separation by articulating *talaq* thrice. Throughout marriage, all the property and wealth possessed or gained by each spouse is usually held by the couple. Each spouse in case of divorce is entitled to a half share of the property, and if one dies the ownership of over half of the property is retained by the other.

**IV Inconsistencies in the Goa Civil Code**

The Goa Civil Code is not entirely a uniform common code. In spite of it being more than once specified that Goa as of now has a uniform code, in all actuality the Hindus of Goa are still represented by Portuguese family and progression laws. The transformed Hindu law of 1955-56 is as yet not material to them. The unformed *shastric* Hindu law on marriage, divorce, adoption and the joint family is especially legitimate. This likewise remains constant for Goan Muslims, as *The Muslim Personal Law (Shariat) Application Act, 1937* is not applicable to Goa. Therefore, Goan Muslims are governed by Portuguese law and in addition the *shastric* Hindu law, and not by Muslim personal Law.\(^\text{17}\)

Utilization of the Portuguese Civil Code in Goa to Hindus is liable to the arrangements of the Goa Hindu Usages Decree of 1880. In this way, the authentic picture on the ground is that there are several aberrations with respect to the tall claim of uniformity. For instance, Hindu men are permitted to remarry under specific conditions indicated in the 1880 Code of Usages and Customs of Gentile Hindus of Goa, particularly, if the companion fails to conceive a child by the age of twenty five, or in case she fails to pass on a male adolescent by the age of thirty. For other communities, the law restricts bigamy.

Marriage laws vary for Catholics and people of different religions, and this influences the laws representing Catholics after they get married. Roman Catholics can solemnize their relational unions in church subsequent to acquiring a No Objection Certificate from the Civil Registrar. For others, just a civil registration of the marriage is acknowledged as a proof of marriage. The Catholics wedding in the church are excluded from divorce provisions under the civil law. Divorce relies upon what individual law they have been married under. There is no obvious separation of the Church from the State. On account of the individuals who select to solemnize their marriage in Church, the Church can repeal the marriage at the case of one of the parties, as is set laid down in church law.

It can even be known as strange, that these 19th century colonial laws are

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\(^{17}\) Nandini Chavan and Qutub Jehan Kidwai, *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code*, 245 (Hope India Publications, Gurgaon, 2006).
reliably praised, in light of the fact that they are a far from equal, or even fit for adapting to contemporary prerequisites. There are different imbalances as well, as on issues of adoption and the rights of illegitimate children. With regards to taking an oath in court, differences on the basis of caste have been accepted.

Further, it is essential that despite the laws of Goa advancing ‘absolute equality’ as specified hereinabove, the issue of domestic violence is very prevalent. This demonstrates family laws, regardless of how impartial, do not automatically convert into the absence of domestic violence. Along these lines, this description of Goa’s law as the constitutionally mandated UCC is very deceptive and even perilous.

V Criticism of UCC

In a multifaceted country like India, where the diversity and plurality form the very basis of the colour of the society, implementation of a UCC is not practically possible due to the following reasons:

Laws such as those pertaining to the arena of contractual obligations, civil procedures etc. are uniform in nature owing to their detachment to religious and customary deeds. However, laws related to inheritance, succession, marriage, divorce, adoption, maintenance etc. vary from one religion to another based on their customary practices. For example, where on one hand, bigamy is deemed to be an offence under the Hindu Marriage Act, 1955; polygamy is acceptable under the Muslim Laws. It is not possible to bring a uniform legislation which would bring in line such contrasting laws.

Secondly, India, despite being a democratic secular nation, has a population which is majorly driven by its religious sentiments. The reason for all communal riots is the conflicting opinion of different religious and cultural groups. Though the proponents of an UCC would proclaim that a uniform code would end all sorts of communal tension in the society, however, it would be a futile attempt since protection and promotion of their religious identity is their sole motive. This would lead to a further disintegration of the nation instead of bringing uniformity.

One view majorly taken in favour of UCC is that in order to suit the diversity of India, it would incorporate all the best things from all religions and remove the worst from all religions. However, the notion of ‘best of one religion and worst of another is present’ owing to its prevailing customary practices. Almost all the practices followed in a religion are backed by some historical evidences. The act of handpicking necessary best things of any religion becomes highly subjective and arbitrary, especially when one religion has multiple sub divisions based on different factors. Best of one may not be acceptable to people
of other religion owing to their spiritual beliefs. For example, the mode of succession and inheritance followed in Hinduism is based on the structure of family of Dayabhaga or that of Mitakshara which is different other that followed in Shia Muslims or Sunni Muslims. Here, it can be seen that the entire process of handpicking becomes highly complex owing to the presence of subdivision of religious identities within a single religion. Now the decision as to which mode of inheritance of which religion’s sub division is to be deemed as best cannot be determined in presence of a multitude of linguistic and cultural disparities, let alone major religious bifurcation.

In encouragement of the previously mentioned conflict, it is correlated to take note of the assorted diversity of India isn’t just constrained to Hindu, Muslims, Christians, Sikh, Parsis and so forth., however is comprehensive of those hailing from tribal, inter religious and other geological dissimilarities. Obliging the interests of all and in the meantime bringing a far reaching civil code isn’t a conceivable option in India.

In India, regardless of the fact that the government should be secular in nature, the political parties have an arrangement of ideologies favoring particular community of society. The ruling party takes into account the necessities of the majority community. This sort of managerial set up instils a fear in the mind of the minority class of the society that their character and interests would be done away for the sake of getting consistency of laws in the country.

Numerous communities, significantly minority communities comprehend UCC as an infringement on their rights to spiritual freedom. They worry that a UCC can disregard their customs and force rules which will be primarily dictated and influenced by the majority spiritual communities. The Constitution accommodates one’s preferred privilege to freedom of religion. With codification of uniform standards and its compulsion, the extent of the freedom of religion will be diminished.

Another major area to be catered to before implementing UCC is that related to reservation. Reservation has been enshrined in the Constitution of India for empowering different sections of society which have been victimised by those on upper level. The women, children, poor, dalits, backward tribes are provided with reservation in the field of education, promotion, etc. in order to uplift them and bring them on equal footing with the rest of the society. How the legislature would cater to this stratification is yet another challenge as any special status to the abovementioned groups would be a direct contradiction to the very spirit of UCC and if there would be an exception; who all would be covered in the ambit of said exception and to what extent is yet again a question to be deeply pondered over.

Such a code, in its true spirit, ought to be directed to by getting
uninhibitedly from totally distinctive personal laws, making steady changes in each, judicial pronouncements ensuring gender equality, and adopting expansive interpretations on maintenance, adoption, and succession by recognizing the benefits of one community secures from the others. This assignment will be exceptionally requesting time and human asset insightful the govt. should be delicate and impartial at each progression while tending to the majority and minority communities. Else, it may end up being more disastrous in a form of communal violence.

Lastly, on a careful scrutiny, it can be evaluated that implementation of article 44 calls for removal of article 25 and article 26 of the Constitution of India. The reason for such an assertion is backed by the logical explanation that where the state seeks to provide a uniform code for all in the entire country, any sort of protection and promotion of religious entities would be an endangered matter. It can be easily deciphered that the genesis of both the provisions are contradictory to each other and hence results in an overriding effect.

VI Conclusion

The Constitution of India envisages a secular state by guaranteeing religious freedom to all under the umbrella of a religion free state. This is apparent from an examination of articles 25 to 30. The religious freedom is however subject to certain limitations. Similarly, though the state is forbidden from propagating or promoting any religion, it can constitute a general fund through taxation for the promotion and maintenance of all religions, and to provide aid in suitable cases, without discrimination. These provisions clearly indicate the great role played by religion in certain aspects of our life. It is true that in bringing a common code for all religions is no easy task for the legislature. Indian secularism has, therefore, to develop the philosophy of coexistence. To achieve the philosophy of coexistence the support of two powerful factors are necessary- a high degree of tolerance by all religions sects and strict adherence by all concerned to the principles of equality and non-discrimination, which are the keystones of our constitutional edifice.

However, everything depends upon the government’s urge to implement it. If the government makes it compulsory that everybody will have to wear helmet while driving, then will it ask Sikhs to take off their turbans; or if the government legalizes the abortion to control population growth, will the Christians accept it; or if the government legalizes killing of cows, will it not hurt Hindus. It has to be dealt with carefully. Religion is a sentimental and sacred issue. The government should listen to everybody before doing anything. It is high time that the government takes some concrete action in order to implement the UCC rather than dilly-dallying around the issue for the sake of short-term political gains. A slow, steady and a persuasive approach is necessary because justice delayed is
justice denied but if justice is hurried, justice may be buried. No matter how arduous and long stand the task be; the legislature should leave no stone unturned in achieving this constitutional ideal. But bringing uniform legislation should not jeopardize the harmony of distribution of legislative powers envisaged in the schedule VII of the Constitution of India.
ADOPTION UNDER CENTRAL ADOPTION RESOURCE AUTHORITY: ANALYSING EFFECTIVENESS OF THE CENTRALISATION OF ADOPTION AND ONLINE SYSTEM

Arati Kamat*

Abstract

Adoption, as a practice, has been present since centuries. Various regulations have developed in the times to help the orphaned and the childless. Recently, the online system was established as the primary means of adoption in India. The Act and guidelines laid by the government regulate the same. The aim of the paper is to understand the reason and history behind the adoption process now established and followed, to appraise the adoption scenario before and after the shifting of control to Central Adoption Resource Authority specifically evaluating the merits and demerits of the online adoption registration system, the change in the guidelines and give possible and feasible suggestions. Also, the improvements of 2015 Guidelines done by the Regulations of 2017 is also scrutinised. The paper also seeks to recognise the shortcomings and provide recommendations for better applicability.

I Introduction

MOST PERSONS think child bearing and parenthood is a natural process of life. Even when infertile, they prefer to adopt a young infant so as to get the same experience as they would've gotten with a child of their own. They only resort to adoption of an older child when they have no option of younger ones.1 In a country with millions of orphans in institutions and on the streets, the rate of adoption is very low- around 3000 per year within the country with almost negligible adoptions of the disabled. Adoption at present is regulated by the Central Adoption Resource Authority (CARA). The guidelines issued by it in 2015 governing adoption have been in a state of dispute. Many questioned the effectiveness and validity of an online procedure, whereas many applauded it. As a result of non-conformity with the Juvenile Justice Act, 2015 and the directions of the court, Regulations, 2017 have come into force on January 16, 2017. In the discussion below, the paper seeks to present the issue of adoption under CARA, especially the online system with utmost clarity and place arguments for and

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II  History and development of CARA

The Supreme Court of India, in a landmark case of Laxmikant Pandey v. Union of India laid down the procedure to be followed in adoption of children by foreigners. The court observed the fact that children are a supremely important national asset and the future well-being of the nation depends upon how the children grow and develop. The court said:

While supporting inter-country adoption, it is necessary that great care is exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents or be subjected to moral and sexual abuse or forced labour or experimentation for medical or other research and may be placed in worse situation than that in his own country.

As a result of this judgement, the Central Adoption Resource Agency (CARA) was established in 1990 under the Ministry of Welfare. It was a body formed for regulating adoption of Indian children and was mandated to monitor and regulate in-country and inter-country adoptions. It had the responsibility of upholding the provisions of the Hague Convention on Inter-country Adoption, 1993, ratified by government of India in 2003. It became an autonomous body in 1999 by registering it under the society under the Societies Registration Act, 1860. After the passing of the Juvenile Justice Act 2000 and its amendment in 2006, CARA was transferred to the Ministry of Welfare and Child Development. The establishment of CARA led to change in the monitoring and regulating systems of adoption.

The development of the guidelines led to a more transparent process for placements. The guidelines stated that the agencies listed for inter-country adoption must do a minimum of fifty per cent of their placements with the country. This boosted in-country adoptions. The consolidated waiting lists by the agencies made the adoption processes easier. The adoption in-country was highest in around 2010-2012. However, many of the agencies were motivated by the financial consideration rather than the welfare of the children.

III  Pre CARA scenario: Abuse of the system

The scenario before the development in adoption laws in 2015-16 saw various shortcomings. Case laws can be highlighted where the doubt on the

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2 AIR 1984 SC 469.
system grew even larger. In the case of *Laxmikant Pandey v. Union of India*, the court said that there are instances where large amounts are demanded by so called social or child welfare agencies in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses supposedly for the child and it is absolutely necessary to put an end to it by introducing safeguards. In the case of *St. Theresa's Tender Loving Care Home v. Parchuri Jamuna*, it was alleged that there were certain irregularities in the matter of adoption of children and that the various voluntary organizations, who are acting as placement agencies have violated certain procedures prescribed by the government. The main allegation against these organizations is that no *bona fide* attempt is being made to ensure that the children are adopted by Indian parents and that these organizations were usually interested in ensuring that the children are adopted by foreign parents. In the case of *Child Welfare Committee v. Govt of NCT of Delhi*, the court observed yet another instance where Rs. 23000 was given in exchange for adoption of a new born baby. The Ministry for Child and Women Development has also stated that there were bottlenecks, idleness, unconcern and deliberate lying by the adoption agencies and that Child Welfare Committees did not do home-checks up to two years. The adoption in India has come down from 5964 in 2011 to a little above 3000 in 2016.

IV Post CARA scenario: After the guidelines

CARA has issued guidelines governing adoption from time to time in exercise of the powers under sub-section (3) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000. It issued separate policy guidelines for inter-country and intra-country adoptions. The main policy adopted was placement agencies involved in adoption should strictly follow and comply with the guidelines of CARA and register with respective state governments. No Objection Certificate (NOC) from CARA was made mandatory in case of all inter-country adoption before placement agency process the application in competent judicial courts. In 2015, CARA had released new guidelines governing adoption of children effective from August 1 that year, replacing 2011 guidelines for greater transparency and clarity, to simplify adoption procedure, minimise delays and expand the adoption base by setting up linkages and introduce e-governance in the system. The new guidelines include transferring the entire adoption procedure online, creating a centralised national waiting list.

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4 AIR 1984 SC 469.
6 ILR (2009) 2 Del 508.
8 Guidelines for In-country Adoption, 2004 and Guidelines for Adoption from India, 2006.
monitoring adoption agencies more closely and treating non-resident Indians on par with domestic Indian adoptive parents. Further, the Juvenile Justice Care and Protection Act 2015 came into force and to streamline adoption procedures, the existing CARA was given the status of a statutory body to enable it to perform its function more effectively. 9

There have been a number of cases challenging the adoption legislations. In Santosh Digambar Honkarape v. The Central Adoption Resource Authority,10 a PIL challenged the Guidelines governing Adoption of Children, 2015. The petitioners had alleged that the new procedure established by the guidelines, of viewing the children online, was unfavourable to these children and had become obsolete being framed for the earlier legislation. It was pointed out that under sub section (1) of section 74 there is a complete prohibition on publication of a picture of the child in need, care and protection and in fact, the contravention of which has been made an offence. The court held that the 2015 Guidelines would continue till Regulations are framed by the central government. But the court refused to answer based on the factual contentions of the petition and asked them to adopt appropriate proceedings for redressal of their grievances.

In PKH v. Central Adoption Resource Authority,11 the Delhi High Court directed CARA to streamline and simplify the procedure for adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015. A writ petition was filed by Canadians seeking a direction to CARA to grant a ‘No Objection Certificate’ (NOC) for taking her adopted child to Canada. The petitioners stated that even after nine years of adoption, CARA has not issued NOC. The court also observed that, though there is some ambiguity as to whether the Juvenile Justice Act of 2015 applies to inter-country direct adoptions, yet it is of the opinion that the scope of section 60 of the Act should be expanded to cover all forms of inter-country direct adoptions. On 16th January, 2017, the Adoption Regulation 2017, framed by CARA came into force.12 The Adoption Regulation, 2017 was amended and newly framed in order to overcome the challenges faced by the adoption authorities and Prospective Adoptive Parents (PAPs). The Ministry of Women and Child Development added that “this will further strengthen adoption programme in the country by streamlining the adoption process”.

V The online system

With the introduction of the Adoption Regulations 2017, a lot of change

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9 Juvenile Justice Act 2015, s. 68.
10 2016 SCC Online Bom 1239.
11 2016 SCC Online Del 3918.
has been brought about in the adoption process which will be discussed below. However, the online centralised registration and listing system remains the same. The bigger advantage of a centralised waiting list is the increased transparency, especially about the availability of babies as individual agencies will no longer be able to cite lack of children to the parents without a reason. Previously, the prospective adoptive parents, if they wanted to transfer their registration to a different agency, it would mean getting onto a new waitlist. A national waiting list would be able to match parents to available children anywhere in India, while also allowing them to keep track of where they are on the list. The online system has also removed the difficulty of exorbitant fees charged by the adoption agencies. The ministry and CARA have also begun cracking down on illegal adoptions and unauthorised agencies. It removes corruption to a big extent.

However, the disadvantages also raise an alarm for further improvement. If the prospective adoptive parents fail to reserve one child from among six pictures displayed on the online portal after registering, they reach the end of the list of prospective parents. Further, parents have to submit everything from their health and financial details to recommendations from friends, employers and relatives, and errors made during the lengthy process cannot be easily corrected. The new guidelines failed to expand the number of children adopted which was their motive as the numbers have not increased. There are other concerns as well, like access to computers, knowledge of English and societal expectations for perfect, flawless babies. The whole process of adoption was easier for the agencies to explain when it was offline as well as for the parents who might be from the uneducated crowd, and the in-person interactions also gave them a better understanding of how keen the parents were to adopt.

The three categories of children: Children with disabilities, older children, and siblings suffer the most as most Indian couples prefer adopting babies under the age of one and are unwilling to accept a child with any medical complication or physical disability. They languish in child care centres and the new system could just skirt around them. There is also a scope for black market for babies who try to escape the new regulations. An online match will tell you the age and physical characteristics of the child, but there are many things you cannot be formally expressed.

Changes due to the Adoption Regulations, 2017

Adoption regulations of 2017 which came into force on January 16, 2016 have distinguishing features. The time given after reserving child for matching

13 Rakesh Dubbudu, “The number of Children available for adoption is less than 1/4th the demand despite the simplification in adoption process” Factly, available at: https://factly.in/number-children-available-adoption-less-14th-demand-despite-simplification-adoption-process (Last Modified July 11, 2016).
and approval has been increased from fifteen days to twenty days for the domestic prospective adoptive parents. The age criterion for prospective adoptive parents has been relaxed for relatives and in-family adoptions and adoption by step-parents. So, all kinds of adoptions, even those adoptions by relatives shall be reported to CARA for timely maintenance of records and regular follow-ups. Now, even a child of a relative or a step child can be adopted. This scope has been newly expanded. A panel will be formed of professionally qualified social workers as a part of the district child protection unit in order to increase the legitimacy of home study report. Couples with three or more children shall not be considered for adoption except in cases where they are ready to adopt those kids with special needs or kids hard to place as mentioned in regulations. The condition is not applicable for relative adoption and adoption by step-parents. This is another progressive step taken. This move aims to strengthen the adoption programme in the country by reforming the adoption process to be followed. The new regulations have been framed to overcome issues and challenges faced by adoption authorities and the prospective adoptive parents.

Other shortcomings in the present scenario of adoption

The current system for adoption in India is lacking in various facets. Also, the socio-economic scenario creates difficulties. In case of babies who are undernourished or have a disease or are disabled, they are mostly rejected by Indians. Only foreigners are ready to adopt such kids because they have better medical facilities. The Missionaries of Charity, a Catholic congregation which runs children’s homes, refused to give children for adoption to single parents. Many religious organisations are reluctant to implement the new Act and 2017 Regulations due to ethical and moral reasons. The records of the government regarding the number of abandoned children are also highly underestimated. Unofficial records show much less. Even with the current developments, the illegal procuring and selling of children is still prevalent. Corruption and malpractices in the form of children being sold for money needs to be stopped. Prior to the centralisation of registration, the forms were also available in Hindi, making it easier for registrations to be transferred from one state to another. After the introduction of the Guidelines in English, many found it difficult to use the system, however this barrier was removed by the way of the 2017 Regulations.

15 Atir Khan, “All child adoptions violating 2017 regulations to be considered illegal, say new guidelines” India Today, Jan. 18, 2017.
VI Conclusion

The adoption system in India has come a long way from the traditional and conservative approach and we have seen the development of the practice of adoption. From being a taboo, now it is considered as more of a virtuous deed. Yet many are trying to corrupt this practice. We have seen that the government has framed the laws and regulations and put in effective measures to promote the adoption in-country as well as intercountry. Nevertheless, the statistics of adoption have not improved beyond the mark. The set goals are yet to be achieved. Though a lot of criticism is done about the online system, it is the only way through which the situation can be improved and the malpractice eradicated so that the young and bright future of India is placed in a conducive and loving environment. The procedure might take a bit longer, but the backhand money exchanging with kids will stop.

Further, it is suggested that rules should be framed by the states to evaluate the workings of the agencies as greater participation of the recognised agencies can be useful for proper implementation. Also, special provisions for children in need of special care such as children with disabilities must be made by the states. Greater scope for inter-country adoption must be provided with rather than a conservative approach which is followed. States should come up with schemes regarding foster placement of children before adoption like that of adoption (CARA). This also can help in the availability of more precise and accurate data.

Though the development of the laws and regulation system has improved, a few shortcomings are yet to be corrected. More importantly, awareness must be created. Adoption still remains an unfavoured method of making a family. Nobody thinks of adoption as a social contribution which can cause wonders. This must be propagated. Better and efficient system for recognition of the orphans and trafficked children to get them into the adoption system and find them a home. With over 50,000 orphans languishing in child care homes with a few young being adopted, the foster system which could be used for older children is severely unutilised. It could benefit children above the age of five years old who are called ‘unadoptable’ because no one wants them. Another important thing is the execution of the laws which mostly remains a problem after laying down the law. For this, the corruption must be eradicated in institutions: governmental as well as nongovernmental; only then the plan may succeed.
NEED TO REFORM PERSONAL LAWS WITH A SPECIAL EMPHASIS ON HINDU LAW AND MUSLIM LAW

Byomakesha Kumar Singh*

Abstract

Muslim women are distressed by the provisions like triple talaq, halala, polygamy and many more provisions, thereby violating articles 14 to 18, and article 21 of the Constitution of India. The paper then deeply stresses on the Hindu community, where despite so many reforms in personal laws, not much is done. One recent controversy was where women were not allowed to enter the Sabrimala temple in Kerala, hence violating articles 25-28 of the Constitution of India which guarantee the right to freedom of religion. After analysis of the issues, the paper lays a special emphasis on personal laws and secular laws. Should personal laws be subject to reasonable restrictions? If yes, then what are those restrictions? Also, this paper discusses whether the personal laws need be codified. What is known and called as ‘Hindu and Mahomedan laws’ were created by the colonial state after a complicated process of rationalisation, and not a simple codification of religious commands. The paper also tries to address the grievances due to these personal laws and tries to suggest reforms.

I Introduction

ACCORDING TO Merriam Webster Dictionary, personal laws are “laws that applies to a particular person or class of persons only wherever situated - distinguished from territorial law”, i.e., unlike the constitutional laws they are not applicable uniformly to all citizens of India. Issues like adoption, succession, marriage, etc. are decided by the provisions of these personal laws for different communities. There are opposing views and objections regarding the application and extension of constitutional provisions which protect the religious practices to those which are not in concurrence with the fundamental rights. There are two things which need to be looked upon. First, there is article 25, which talks about preservation of freedom of practice and propagation of any religion; and second are those practices which do not go well with the concepts of dignity and equality, which are fundamental rights. This is something which the judiciary needs to deliberate upon and have to carefully evaluate and analyse before adjudicating the

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validity or invalidity of these practices.

II Muslim law, its flaws and current scenario

James Bryce said, “in Islam, law is religion and religion is law, because both have the same source and equal authority being both contained in the same divine revelation”.\(^1\) Islam claims its jurisdiction on almost each and every aspect of Muslim’s life. Arab pagans were given a choice of either converting or death.\(^2\) However, the same was not the case in India due to the vast number of population of non-Muslims.\(^3\) There are many aspects of Muslim law which need to be discussed, but this study would focus mainly the concept of *talaq* amongst Muslims which is one of the controversial issues of recent times.

*Talaq*, in its real sense means, repudiation or rejection. It means release from a marriage tie either eventually or immediately. It is basically of two types-revocable and irrevocable. Revocable form is considered to be the approved form, while irrevocable form is considered to be the disapproved form. In India, Muslims mostly follow the approved form of *talaq*. The approved forms of *talaq* (*talaq al-sunna*) is further divided into *ahsan* (most approved) and *hasan* (approved).

In *ahsan*, one single pronouncement is made in a period of *tuhr* (purity) which is followed by abstinence from sexual intercourse during the period of purity and *iddat*, a period of four months and ten days in case of the death of the husband and if she is pregnant until the delivery of the child. Pronouncement made in *ahsan* is revocable during the period of *iddat*. Revocation may be by expressing words or by conduct.\(^4\)

In *hasan*, three successive pronouncements are to be made during three consecutive periods of purity. It is to be noted that these pronouncements must be made when no sexual intercourse has taken place during the particular period of purity.

It is important to note that a Muslim wife has also got the right to repudiate marriage, known as *khul*. However, the problem with this is the unenthusiasm and reluctance of a group of experts of Muslim theology (*Ulama*). Their reluctance to intervene on this issue might be due to the fact that *talaq* is considered as one of the most abhorred practices in Islam.

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Indian judiciary has, many a times, interpreted the law of *talaq* to give relief to Muslim women facing adversities because of *talaq*. At times, the court had applied a very restrictive interpretation of the relevant rules. In *Parthayi v. Moideen*, the court held that: ⁵

...the only condition necessary for the valid exercise of divorce by a husband is that he must be a major and of sound mind at that point of time. He can give divorce whenever he desires, even if he divorces his wife under compulsion or in anger that is considered as perfectly valid. Further, it is not necessary to address her; it comes into being the moment it comes to her knowledge.

In *Ghansi Bibi v. Ghulam Dastagir*,⁶ the court strictly adhered itself to the principles of Muslim law. The court held that the intention of husband is insignificant. If a man says to his wife that he divorced her yesterday or earlier, even if there is no proof, it leads to their divorce.

However, with time, the courts, applying international principles and the constitutional mandate of equality, slowly started to change their path of adjudication. One of the landmark cases is *Shamim Ara v. State of U.P.*,⁷ where the court discussed in detail the concept of *talaq* with the emerging changes in the society. In this case, it was held that if the *talaq* had to be effective, it has to be pronounced. The term ‘pronounce’ means to utter formally, to utter rhetorically, to articulate. A mere plea in a written statement pronounced somewhere in the past will not suffice. Similarly, *Fazlunbi v. K. Khader Vali*⁸ and *Ahmed Khan v. Shah Bano Begum*⁹ dealt with the maintenance of the wife, where it was ensured that proper maintenance should be given to the wife.

On August 22, 2017 the Supreme Court in its landmark verdict ruled that the practice of triple *talaq* is void and illegal by a 3:2 majority.¹⁰ The five judge bench comprising of J.S. Khehar, CJ. and Kurian Joseph, Rohinton F. Nariman, Uday U. Lalit and S.A. Abdul Nazeer, JJ. heard the matter. Rohinton F. Nariman and Justice Uday U. Lalit, JJ. declared it unconstitutional and violative of article

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⁵ *Parthayi v. Moideen*, 1968 Ker LJ (Cr) 763
⁷ AIR 2002 SC 3551.
14,\(^{11}\) while Kurian Joseph, J. sheld that it is against the teachings of the *Quran*.\(^ {12}\) The Supreme Court also referred to abolition of triple *talaq* in various Islamic countries and asked why India cannot do it. Justice Nariman said:\(^ {13}\)

> In our opinion, therefore, the 1937 Shariat Act, in so far as it seeks to recognize and enforce triple *talaq*, is within the meaning of the expression “laws in force” in Article 13(1) of the Constitution and must be struck down as being void to the extent that it recognizes and enforces triple *talaq*...

Detailing on the relevance of article 14 in this context, the court further held:\(^ {14}\)

> If a constitutional infirmity is found, Article 14 will interdict such infirmity. Positively speaking, it should conform to norms, which are rational, informed with reason and guided by public interest, etc. Applying the test of manifest arbitrariness to the case at hand, it is clear that triple *talak* is a form of *talaq* which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical form of *talaq*... triple *talaq* is instant and irrevocable, it is obvious that any attempt at reconciliation...cannot ever take place. It is clear that this form of *talaq* is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it.

### III The problem with Hindu law

After independence, many changes have occurred in the Indian society and culture. The age-old customs, taboos and prejudices, which hampered the development of Hindu society have been curbed by legislations. This period is sometimes called the period of ‘Hindu Renaissance’. Monogamy has been introduced, grounds for divorce was equally available to both men and women =. Inter-caste marriage is no more impossible. Social evils like of *sati-pratha*, was abolished, inter-caste marriages were encouraged. The custom of child marriage has reduced considerably. Women's right to property has also been recognized. The rights of adoption and guardianship of children have been conferred on women as well. Moreover, wife and husband both can claim maintenance from

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14 Ibid.
each other.

All these legislations are aimed to improve the status of women in society. Hence, what we can conclude is that Hindu laws is a effort of social justice rather than social reform. The Hindu law has made the socio-economic status of women considerably at par with that of men. Thus, for Hindus, the State has established a ‘socio-economic justice’ envisaged by the Preamble and ‘equal society’ contemplated under article 38 of our constitution.

Hindu law is applicable to communities which includes Buddhists, Jains and Sikhs but does not include the *adivasis*. It is clearly mentioned that “to the members of any schedule tribe within the meaning of clause 25 of article 366 of the Constitution unless the central government, by notification in the Official Gazette, otherwise directs”. 15 There are many defects in the personal laws of *adivasis* which can only be removed only when they come under the ambit of Hindu law.

However, Hindu law suffers from various drawbacks as well. A child is legitimate even if the marriage between his mother and father is void or voidable.16 Hence, a child who is born under void or voidable marriage has been legitimised, but until and unless that marriage is solemnized, the child born will not be governed by this Act. What this section necessarily implies is that a child born before marriage of his parents cannot be conferred the status of a legitimate one, albeit the fact their mother and father subsequently married each other. Moreover, a Hindu wife has the right to claim maintenance from her husband but there is no provision which confers the same right to Hindu husband.17 He is not even considered as dependent on his wife.18

Under section 20 of the Hindu Adoptions and Maintenance Act, 1956, every child of a Hindu has the right to maintenance, but the same is not the case with a step-child. Widowed daughter also comes under the ambit of this section, provided she does not remarry, and is unable to maintain herself even from her property or earning. Divorced daughter too comes under this section, provided she is a minor. But in the case of a major divorced daughter who has not remarried and is not able to maintain herself, section 20 is quite ambiguous, however, she can claim maintenance under section 25 of the Hindu Marriage Act, 1955. Section 20 also states that a Hindu is bound to maintain his/her parents if they are aged and infirm and cannot maintain themselves from their earnings.

15 The Hindu Marriage Act, 1955, s. 2(2); Hindu Adoptions and Maintenance Act, 1956, s. 2(2); Hindu Succession Act, 1956, s. 2(2), and The Hindu Minority and Guardianship Act, 1956, s. 3(2).
16 The Hindu Marriage Act, 1955, s. 16.
17 The Hindu Adoptions and Maintenance Act, 1956, s. 18.
18 *Id.* at s. 21.
The term *parent* includes natural or adoptive father and mother, and step-mother having no child of her own, but it does not include step-father.

There is a discrimination against married women, which is based on sex and marital status. A married male can adopt a child with the consent of her wife but the same is not applicable vice-versa. It is clearly a discrimination based on sex. A divorced, unmarried or widowed female can adopt a child without anyone’s consent but a married female cannot adopt even with the consent of her husband. If we see it from a legal point of view, a male, whether divorcee or unmarried has the right to adopt, but a married woman does not have the same right.19 It is a discrimination which is totally based on marital status.

A number of relatives succeed the property of a Hindu male when he dies intestate, i.e., when he dies without a Will, however illegitimate children are kept away on the ground that ‘related’ means ‘related by legitimate kinship’.20 By excluding illegitimate children from property rights, the Hindu Succession Act, 1956 has violated the human rights and the fundamental right of equality. Section 30 of the Hindu Succession Act, 1956 has given power to men to Will away property from women. It is violation of equality and non-discrimination.

Another area that needs urgent attention is the criminalisation of marital rape. The legal definition of rape excludes sexual intercourse by a man with a minor girl above the age of fifteen if she happens to be his wife. Laws must protect married girls between the ages of fifteen to eighteen, from forced sexual acts by their spouses.21 Hence, it can be clearly seen that there are many loopholes and drawbacks in the Hindu law, which basically oppresses communities like *adivasis* and in a way creates discrimination between men and women. Many laws have a clear patriarchal character - the section on adultery in the Indian Penal Code, for instance, treats women as mere property. Law reform must keep pace with social progress, and promote the constitutional rights of equality. Despite codification, and several reforms of Hindu law, there is still a long way to go. Perhaps a UCC that focuses on rights and gender justice will iron out the discriminations, patriarchal biases, and some of the rituals that persist. Accompanied by mass legal awareness, this would be a victory for women.22

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19 Supra note 15 at s. 8.
20 The Hindu Succession Act, 1956, s. 3 (j).
22 Ibid.
IV Personal laws: Are they really codification of religious commands?

In the case of *The State of Bombay v. Narasu Appa Mali*, Gajendragadkar, J. wrote: 23

It is well-known that the personal laws do not derive their validity on the ground that they have been passed or made by a Legislature or other competent authority in the territory of India. The foundational sources of both the Hindu and the Mahomedan laws are their respective scriptural texts.

What we know and call as Hindu and Mahomedan laws were created by the colonial State after a complicated process of rationalisation, and not a simple codification of religious commands. Rachel Sturman quoted “a process in which the state operated through religious law, shedding the ritual significance of that law into the domain of social life while absorbing its governing functions into the state”, 24 while describing the relationship between colonial state and religious laws. The endeavour to change social life by the State can be traced to the legal developments of the colonial period, in which, both the Hindu and Muslim laws were shaped by the political and economic imperatives of each elite male groups of both the communities.

In Hindu law, whenever a change was being reintroduced, the reformers relied heavily on the law making authority of the State as there was no support for reformation that could be found in religious scriptures. For example, Mitakshara coparcenary, as elucidated by the colonial judges was that if joint family funds were used for educating or for training of a member, then the earning of that person will go back to the common family pool of property; but the Hindu Gains of Learning Act, 1930 interpreted that such earnings will be the individual property of the earner. 25 There are many legislations which are part of Hindu law, but which do not have a precedent in the regional practices of the Hindus. However, due to civil authority, it has been expanded and has completely reconstituted the form of Hindu family.

In Muslim law, the motive behind reform by using the State’s authority was more of a political one, than economic. For example, the Dissolution of Muslim Marriage Act, 1939, which codifies the rules of divorce of the Hanafi school of

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25 Saptarshi Mandal, “Do Personal Laws Get their Authority from Religion or the State—Revisiting Constitutional Status” 51 (50) *EPW* (2016).
Islamic law. In *hanafi* law, a minor cannot repudiate his/her marriage, unless, upon attaining puberty, he/she can show that the guardian who had given him/her in marriage had acted fraudulently or show that the marriage contract was to his/her disadvantage. This is known as *option at puberty*. The 1939 Act modified it for Muslim women (not men). Hence, today when a Muslim woman exercises this power to repudiate her child marriage, it is to be remembered that the source of her right was the State, and not religion.

**V Conclusion**

It can be concluded that both Muslim and Hindu laws have in a way oppressed different classes of people such as women, children and *adivasis*. Furthermore, they have been shaped and emerged out of socio-political considerations just like every other law. It is therefore unreasonable to think that personal laws derive their origin and validity from religion, and not the State.\(^{26}\) Even though it is the State’s legislation that forms the basis of personal law, there can be no rational reason as to why it cannot be subjected to the Constitution of India. The question which is worth pondering over is when a UCC will be enacted by the legislature.

\(^{26}\) *Supra* note 25.
UNIFORM CIVIL CODE: AN UNTOUCHED DISTANT RAY OF HOPE

Lakshay Bansal*

Abstract

India is a multi-religious and multi-lingual country that is divided on many facets, yet united by nationalist spirit. All people are today governed by their personal laws with respect to marriage, succession, divorce, etc. If we look at the Preamble of the Constitution of India, there is a term 'secular', because of which the citizens are guaranteed their freedom of religion, and being a secular State, it should not interfere in matter of individuals' religion. Indian secularism imposes a negative command on the State to not identify with any specific religion and treat its citizens with the spirit of sarvadharm sambhava. It has been argued by a few scholars that the Indian society is not socially developed enough to utilize the Uniform Civil Code. Enforcement of the Uniform Civil Code can be seen as an unnecessary imposition of State law, which would infringe many religious practices and cultures, including that of tribal population which prefers to be governed by their customs and was promised freedom of such practice. Secular procedural laws and other pieces of legislation also create an exception in this regard. To bring a Uniform Civil Code throughout the country in recent times would need an exceptional consensus amongst the communities.

I Introduction

A UNIFORM Civil Code (UCC) essentially means unifying all the personal laws to have one set of common civil laws dealing with aspects that will apply to all citizens of India irrespective of the community they belong to. Although the exact contours of such a uniform code has not been spelt out, it should presumably incorporate modern and progressive aspects of all existing personal laws while discarding retrograde rules. The directive principles laid down in the Constitution of India says: “The State shall endeavour to secure for the citizens a UCC throughout the territory of India”. 1 Although the Constitution of India itself makes clear, the directive principles shall not be enforceable by any court, 2 nevertheless, they have a fundamental role in the governance of the country. This shows that although our Constitution says that UCC should be

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1 The Constitution of India, art. 44.
2 Id. at art. 37.
implemented in some manner but its implementation is not mandatory. Hence, the debate on formulation and implementation a UCC for India still continues.

The Constitutional Assembly debated the implementation of UCC at length, and some members did not agree to the inclusion of UCC in the Constitution of India. B. Pocker Sahib Bahadur questioned the meaning of term UCC and what it stood for. Absence of any particular law which could be taken as the standard was a subject of concern for Muslim member as they wanted to avoid any imposition of majoritarian law. Absence of any particular law which could be taken as the standard was a subject of concern for Muslim member as they wanted to avoid any imposition of majoritarian law. Unfortunately, this unwarranted concern prevailed over the need of a strong national character of the nation. The Muslim members opined that the word civil code should not cover strict personal law of a citizen. Allowing the fears of the members who questioned the connotation of the word UCC and the object of having such a provision in the Constitution, K.M. Munshi said: “The whole object of this article is that as and when the Parliament thinks proper, or rather when the majority in parliament thinks proper, an attempt may be made to unify the personal law of the country”.

The Chairman of the Drafting Committee, B.R. Ambedkar, while replying to the questions on the provision of the UCC in the Constituent Assembly by the minority community said, “it was intended to have a Code which provided for uniformity of law in matters of marriages, divorce, succession etc. irrespective of religion, community” etc. M.C. Chagla, J. while making a vehement plea for UCC wrote:  

Article 44 is a mandatory provision binding the government and it is incumbent upon it to give effect to its provision. The Constitution of India was enacted for the whole country, and every section and community must accept its provision and its directives.

The personal laws of major religious communities had traditionally governed marital and family relations, with the government maintaining a policy of non-interference in such laws in the absence of a demand for change from individual religious communities. India is a land of diverse religions: Hindus,

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4 Ibid.
5 Ibid.
7 United Nations, Report of the Committee on the Elimination of Discrimination against Women, Supp. No. 38 (A/55/38), available at: http://docstore.ohchr.org /SelfServices/FilesHandler.ashx?enc=dtYoAzPhJ4NM4u1TOebDeBL%2b0vTZR0cnQc7VgU87xtMtswnNg5anan0jF42ig34S%2bL18cglfS4pKVip0xRReN7twnmTRNz6jDqfQyDqHIMOb41uk5Yt84qY6NPU (last visited on June 20, 2018).
Buddhists, Jains, Christians, Muslims, Parsees, and Sikhs form the nation. Unity in diversity is the core feature of India. Each community has its own laws governing marriage and divorce, infants and minors, adoption, wills, and succession. These personal laws go with an individual across the states of India, and the individual is entitled to have that individual's own personal law applied and not the law which would be applied in the local territory. Personal laws are statutory and customary, that apply to particular religious or cultural groups within a national jurisdiction. They govern family relations in such matters as marriage and divorce, maintenance and succession.

In the above context, it can be noted as the reason of introduction of UCC in part IV of the Constitution of India, rather than any other enforceable part of it. The framers of the Constitution understood the importance of a UCC, but nevertheless could not make it a mandatory provision under the Constitution. The confederation of Indian States, during independence, was a very fragile combination that had diverse cultures, religion and practices under its large sway. The fabric of Indian Unity could have been disturbed if UCC was mandated at that time.

Like the concepts of democracy, socialism, unity and integrity of the nation, secularism is also an essential and inseparable factor of our country and is enshrined in the Preamble of our Constitution. Law of a State must be uniform and regular in its meaning and application, enforcement of different laws, only on the basis of religion creates disparity in the uniformity of law. It can be argued that equality is to be enforced only amongst the equals, but religion cannot be taken a sole ground of equality or inequality. In cases where the personal laws stand in derogation of basic human rights or are opposed to public policy, the need for uniformity in such laws can be felt. Uniformity could bring equal rights for every citizen in respect of basic human rights, guaranteed by municipal legislations and advocated by international law regimes.

The Preamble of the Constitution of India states that India is secular, democratic and republic country. This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A religion is only concerned with relation of man with God. The process of secularisation is intimately connected with the goal of UCC. In other words, the religion of an individual should only determine which God or entity shall he worship and not what laws shall be governing him. Laws as such should not emancipate from religious understanding but from the sovereign text of the nation, i.e. the Constitution. Jeevan Reddy, J. while making an observation in S.R. Bommai v. Union of India, held that religion is the matter of individual faith

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8 Supra note 1 at art. 37.
and cannot be mixed with secular activities and can be regulated by the State by enacting a law.

Secularism, in Indian context, has a unique meaning and understanding, owing to its demography. Indian secularism cannot be compared with its meaning, as accepted in America and Europe. One of the reasons for not making such comparison lays in the fact that America and the European countries went through the stages of renaissance, reformation and enlightenment. In the West, thus, a law can be enacted stating that State shall not interfere with religion. In India, on the other hand, there is a wall of separation between religion and State, secularism separates spiritualism with individual faith. On the contrary, India has not gone through these stages and thus, the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State.

The word secular does not have a precise definition. It is opposed to religion, in the sense that the secular State cannot be a religious State. In this context, some feel that a secular State is an anti-religious State. The State, which has no religion of its own, does not necessarily mean an anti-religious State. It may be a State respecting all religions. Though the term secular was added to the Preamble by way of 42nd Constitutional Amendment Act, 1976. This secular spirit formed the foundation of religious equality before law and right to practice religion.

The personal law of the Hindus, relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. It would not be a wrong observation to note that the Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of national unity and integration, though some other communities are reluctant to do so even when the Constitution of India enjoins the establishment of a UCC for the whole of India. It has been stated that:

UCC is a term referring to the concept of an overreaching Civil Law Code in India. A UCC administers the same set of secular civil laws to govern all people, even those belonging to different religions and regions. This supersedes the right of citizens to be governed under different personal laws based on their religion or ethnicity. Such codes are in place in most modern nations. There is no doubt that the idea of UCC is by and large, a child of independent India.

10 Sarla Mudgal v. Union of India, AIR 1995 SC 1531.
II Legislative efforts towards UCC

Although it was rightly pointed out that not all Hindus were in favour of UCC in the Constituent Assembly. However, the concept has been permanently associated in the post-independence constitutional history. They felt that the personal law of inheritance, succession, etc., is a part of their religion. If that were so, Indian women can never be given equality at par that of a man, who is enshrined in article 14 of the Constitution. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Hindus have been comparatively more accepting towards a modern uniform law theory. Several laws have been legislated from British era till date, the most recent amendment being in the Hindu Succession Act, with respect to the coparcenary inheritance.

British period

Indian Succession Act, 1865, which was also one of the first laws to ensure women's economic security, attempted to shift the personal laws into the realm of civil laws. Then Marriage Act, 1864 had reformed for Christian marriages. There were law reforms passed which were beneficial to women like the Hindu Widow Remarriage Act of 1856, Married Women’s Property Act of 1923 and the Hindu Inheritance (Removal of Disabilities) Act, 1928. The women’s organizations demanded a UCC to replace the existing personal laws, basing it on the Karachi Congress Resolution which guaranteed gender-equality. The Special Marriage Act, which gave another option to the Indian citizens of a civil marriage, was enacted first in 1872. It had a limited application because it required those involved to renounce their religion and was applicable only to Hindus. The Special Marriage (Amendment) Act, 1923 provided that Hindus, Buddhists, Sikhs and Jains to marry under their personal laws. It has to be noted that Hindus have been comparatively more accepting towards a modern uniform civil law than other religions.

Post-British period

After independence, a group of progressive thinkers under the leadership of Jawaharlal Nehru, the first Prime Minister of India, advocated for a UCC to be implemented through the introduction of a Hindu Code Bill, a series of laws passed in the 1950s that aimed to codify and reform Hindu personal law in India. The Hindu Code Bill received criticism and one of the main issues was that the provisions of the Bill failed to curb the prevalent gender discrimination. In the Bill,

the laws related to divorce gave both partners equal rights, but majority of those could be initiated only by males. Also, the Act applied only to Hindus, making women from the other communities remain subordinated. For instance, Muslim women, under Sharia law, could not inherit agricultural land. Nehru accepted that the Bill was not complete and perfect, but was cautious about implementing drastic changes which could stir up specific communities. He agreed that it lacked any substantial reforms but felt it was an outstanding achievement of his time.

The Special Marriage Act, 1954, provides a kind of civil marriage to any Indian citizen irrespective of their religion, thereby permitting every Indian to marry someone outside the religion. The law was applied to all of India, except Jammu and Kashmir. In many respects, the Act was almost identical to the Hindu Marriage Act of 1955. The Special Marriage Act allowed Muslims to marry under it and thereby retain the protections, generally beneficial to Muslim women that could not be found in the personal law. Under this Act, polygamy was illegal, and inheritance and succession was to be governed by the Indian Succession Act, rather than the respective Muslim personal law.

After the passing of the Hindu Code Bill, the personal laws in India had two major areas of application: the common Indian citizens and the Muslim community, whose laws were kept away from any reforms. The frequent conflict between secular and religious authorities over the issue of uniform civil code eventually decreased, until the Mohammad Ahmed Khan v. Shah Bano Begum. Bano was a 73 year old woman who sought maintenance from her husband, Muhammad Ahmad Khan. He had divorced her after forty years of marriage by triple talaq (saying ‘I divorce thee’ thrice), and denied her regular maintenance; this sort of unilateral divorce was permitted under the Muslim personal law. She was initially granted maintenance by the verdict of a local court in 1980. Khan, the respondent, a lawyer himself, challenged this decision, taking it to the Supreme Court, saying that he had fulfilled all his obligations under Islamic law. The Supreme Court granted her relief in 1985 under section 125 of CrPC, which provides for the maintenance of wives, children and parents, which applied to all citizens irrespective of religion. It is further suggested that a UCC be set up. As a result of this decision, an independent Muslim parliament member proposed a Bill to protect their personal law in the parliament and the Muslim Women’s (Protection of Rights on Divorce) was passed in 1986, which made provision of maintenance under section 125 of the Code of Criminal Procedure would not be applicable to Muslim women.

III Secularism, Constitution and UCC

The spine of controversy revolving around UCC has been secularism and

14 (1985) 2 SCC 556.
the freedom of religion enumerated in the Constitution of India under articles 25 and 26. Reddy, J. stated that the religion is a matter of individual faith and cannot be mixed with secular activities as secular activities can be regulated by the State. UCC is not opposed to secularism nor will it violate articles 25 and 26. Article 44 is based on the concept that there is no need for a connection between religion and personal law in a civilized society. The conflict between secular and religious authorities over the issue of UCC eventually decreased, until the Shah Bano case, where then the Y.V. Chandrachud, C.J. observed that “a common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies”.

The Preamble of the Constitution of India states that India is a secular democratic republic. A secular State does not discriminate against anyone on the ground of religion, it is only concerned with the relation between humans in a society, and not with the relation of a man with God. In India, positive secularism distinguishes spiritualism with individual faith. Positive secularism is a common doctrine of secularism accepted by America and some European states i.e. there is a wall of separation between religion and State. The reason is that America and the European countries went through the stages of renaissance, reformation and enlightenment and thus, they can enact a law stating that State shall not interfere with religion. Whereas, India has not experienced such stages, and thus there is interference of State in the matters of religion so as to remove the impediments in the governance of the State.

The right to freedom of religion is guaranteed under articles 25 and 26 of the Constitution of India. Article 25 provides every person the freedom of conscience and the right to profess practice and propagate religion. It envisages power to the State to regulate or restrict any economic, financial, political or other secular activity, which may be linked with religious practice and also to provide for social welfare and reforms. The protection of articles 25 and 26 extends to acts done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion. UCC is not against secularism, nor does it violate articles 25 and 26 of the Constitution. It is just that article 44 is based on the concept that there is no obvious link between religion and personal law in a civilized society. Marriage, succession etc., are matters of a secular nature and, therefore they cannot be chained down by the laws. No religion permits deliberate distortion. Implementation of UCC will not result in interference of one’s religious beliefs relating, mainly to maintenance, succession and inheritance. The debate for UCC, with its diverse implications and concerning secularism in the country, leads to one of the most

15 Supra note 9.
IV A critical review of existing laws

The UCC is not a part of the fundamental right but it is part of directive principles of state policy that’s why no special laws available about this matter. Some statute and law provides the provision related to the UCC.

A futile attempt was made in the direction of UCC by the judiciary through the *Shah Bano* verdict. Nevertheless, the government of India went ahead in passing the Muslim Women (Protection of Rights on Divorce) Act, 1986, rendering sections 125-127 of the Criminal Procedure Code redundant, this ‘women-muted’ law cannot take the community forward as it lacks social legitimacy. For this, the mandate of article 44 is that the State shall endeavour to secure, which recognizes the fact that the different personal laws do exist in the country which needs to be uniform in its applicability. This article enjoins that the State shall endeavour to secure for the citizens a UCC throughout the territory of India. It has been over seventy years that India has gained independence, and yet it has not attained the social progress to accept and adopt this constitutional mandate. Questions have also been raised as to whether it should be a UCC or a common code: 18

Do we want a Uniform Civil Code or a Common Code? Are these two same? Do we want to put together a Common Code which borrows all that is best from existing personal laws in India? We have not put our minds to these questions. Moreover, is there an existing ‘perfect’ law to be taken as a standard for other personal laws to be legislated?

There is an ambiguity in the constitutional mandates as the Preamble makes India a secular State, while on other hand, for its governance, the State has the power to interfere in the personal laws of the citizens. Furthermore, the Constitution guarantees freedom of conscience and free profession, practice and propagation of religion and freedom to manage religious affairs by articles 25 and 26. Article 44 also has been very cleverly worded in as much as it does not say that all personal laws should be abrogated and that the proposed UCC imposed on all citizens. 19 In the author’s opinion, the Indian society is not yet ready to accept a UCC.

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V Judicial interpretation with respect to UCC and secularism

Even after more than five decades since the framing of the Constitution, the ideal of UCC under article 44 is yet to be achieved. However, the efforts in this direction continue to be reflected in various pronouncements of the Supreme Court from time to time.

In the Shah Bano case, the Supreme Court observed that it is also a matter of regret that article 44 of our Constitution has remained a dead letter. Despite section 127 of the CrPC (which provides that if a woman has received an amount under personal law, she would not be entitled to maintenance under section 125 of CrPC after divorce), a Muslim woman would be entitled to maintenance, if the amount received by her as dower under personal law is not sufficient for her sustenance. Though the decision was highly criticized by Muslim fundamentalists, it was considered a liberal interpretation of law as required by gender justice. Later on, under pressure from Muslim fundamentalists, the central government passed the Muslim Women’s (Protection of Rights on Divorce) Act, 1986, which denied right of maintenance to Muslim women under section 125 of the CrPC. Activists rightly denounced that it “was doubtless a retrograde step. That also showed how women’s rights have a low priority even for the secular state of India. Autonomy of a religious establishment was thus made to prevail over women’s rights.” 20

In Sarla Mudgal v. Union of India,21 Kuldeep Singh, J., while delivering the judgment, directed the government to implement the directive of article 44 and to file affidavit indicating the steps taken in the matter and held that: 22

Successive governments have been wholly remiss in their duty of implementing the constitutional mandate under article 44. Therefore, the 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 its citizens a UCC throughout the territory of India.

He also suggested the appointment of a committee to enact a Conversion of Religion Act. R.M. Shahai, J., while agreeing with Kuldip Singh, J., too agreed that “ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentiality civil and material freedoms, are not autonomy but oppression.”23

22 Ibid.
23 Ibid.
In *Danial Latifi v. Union of India*,\(^4\) the court upheld the validity of sections 3 and 4 of the Muslim Women (Protection of rights on Divorce) Act, 1986, as not being violative of articles 14, 15 and 21 of the Constitution of India. Under section 3 of the Muslim Women (Protection of rights on Divorce) Act, 1986, a Muslim husband is liable to make reasonable and fair provision for future of divorced wife which includes maintenance also, so she is not entitled to claim maintenance under section 125 of the CrPC. Under section 4 of the Act, a divorced Muslim woman unable to maintain herself after iddat period can proceed against her relatives or *wakf* board for maintenance.

Rajendra Babu, J., on behalf of a five judge bench consisting of Patnaik, Mohapatra, Doraiswamy and Patil, JJ. observed that:\(^5\)

> In interpreting the provisions where matrimonial relationship is involved we have to consider the social conditions prevalent in our society. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized by persons belonging to all religions.

In *John Vallamattom v. Union of India*,\(^6\) the Supreme Court, in a PIL by a Christian priest, John, and other members of the Christian community, challenging the validity of the section 118 of the Indian Succession Act, 1925. While striking down the said section as being violative of article 14 of the Constitution; the court expressed its concern over the contradictions in marriage laws of various religions and emphasized on the need for legislative reforms as a UCC. Stressing that there was no ‘necessary connection’ between religious and personal laws in a civilized society, a three judge bench held that it was matter of regret that article 44 of the Constitution of India, which provided for the State to endeavour to secure a UCC for its citizens throughout India, had not been affected. The Court further observed that “parliament is still to step in for framing a UCC in the country. A UCC will help the cause of the national integration by removing the contradiction based on ideologies.” It can be said, after mentioning the apex court’s view regarding the implementation of UCC, that article 44 needs to be interpreted keeping in view the pluralistic character of the nation. On all its decisions, the court enjoined upon the parliament, to enact a UCC without specifying it means. However, the word ‘uniform’ should not mean the same law for all, but similar laws for all rooted in quality and gender justice.

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\(^4\) (2001) 7 SCC 740.


\(^6\) 2003 (5) SCALE 384.
In *Shayra Bano v. Union of India*, the apex court, while joining six petitions on the subject matter, invalidated the practice of *talak-ul-biddat*. It has been hailed as a victory for Muslim women with respect to their basic human rights and right to equality guaranteed under the Constitution of India. The judgment, although, cannot be held in favour of UCC *stricto senso*. The grounds of invalidating the said form of *talak* have primarily been the non mandatory and unapproved practice under the respective holy text of Muslim. The bench did not go into the question of violation of fundamental right alone, mentioned in the Constitution. The answer to the question, whether a personal law can violate the fundamental right of any citizen seems to be in negative. In presence of such judicial precedent, every provision of the personal law needs to be studied on particular and specific level, that too, with respect to respective religious text and not the Constitution of India.

**VI Conclusion**

After considering the facts, judgments and social history of our nation and forming a holistic approach towards UCC, it can be concluded that some provisions of the Constitution of India makes implementation complicated as article 44 of the Constitution of India talks about UCC for the citizens and on other hand, article 37 imposes a duty of the State to make UCC for its citizens because it is fundamental in the governance of the country. It appears to be a duty against which there exists no legal right that can be enforced on the breach of such duty by the State.

The Preamble of the Constitution of India makes India a secular republic, and the citizens are granted freedom of religion, the State should not interfere in matter of individual’s religion. However, we can also say that individual right does not affect the unity and integrity of India because religion is only matter of individual faith which cannot mixed with secular activities and can be regulated by the State enacting a law which is already held by the supreme court in the case of *S.R. Bommai*. It can be concluded by saying that the UCC amounts to equal laws for all sections of society. All the people of India must be governed by one set of laws. For national unity and for secularism, UCC is necessary. However, the Indian society is not ready to accept a UCC. The reason behind it is that India is a multi-religious country. It is full of diversity. Though we say India offers unity in diversity, but not in all respect, otherwise UCC would have been enacted long back.
THE WELFARE OF THE CHILD: GUARDIANSHIP IN INDIA AND SOUTH ASIA

Nayantara Bhattacharyya*

Abstract

In the study of personal laws, concepts of custody and guardianship play a major role, primarily because it deals with the welfare of the child principle, which is one of the most integral parts of personal law. This study will focus on the guardianship laws in India and other south asian countries. It has been observed that in majority of divorce proceedings, it is the children, and especially minors, who are the worst affected as they become victims of the custody battles. The existence of guardianship laws in India have been in place since the time of the British rule, and hence, have a long history. This study will further analyze important case laws in this regard which speaks about the different facets under the branch of guardianship laws in India and countries of South Asia.

I Introduction

IN THE scope of personal laws, one of the most important concepts is that of guardianship. However, the laws regarding guardianship developed during the British rule. It has been often seen that the terms guardianship and custody are used interchangeably. However, there exists a thin line of difference between the two. A guardian can be defined as a person who has the care of the person or property of another. Section 4(b) of the Hindu Minority and Guardianship Act 1956, (HMGA) defines that a guardian, as a person having the care of the person of a minor or of his property or of both his person and property.1 In other words, the guardian is a person who takes care of the property as well as the person; however, in custody the person has only the care of the child.

The father is the natural guardian of a child and after his death the mother becomes the natural guardian. Under Hindu law, the supreme guardianship of a minor is defined under the HMGA. In all cases of guardianship, the foremost concern is that of the welfare of the child. Not only physical but as well as moral wellbeing is of importance.2 In cases of divorce proceedings, it has been seen that it is the children who are the worst affected, hence, it is to be kept in mind that the laws should be such that it serves in the best interest of the child. Section 13

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1 Hindu Minority and Guardianship Act, 1956.
of the HMGA talks about the same. In the international scenario, the United Nations Convention on the Rights of the Child, states that “the state will always act in the best interest of the child while taking into consideration the rights and duties of the guardians. The state shall ensure all institutions government or not adhere to this dictum”.3 Under common law, the father is the natural guardian of the child. In case the father is non-functioning or has died, then the mother can be the natural guardian.

The welfare of the child has remained the primary concern of the law and order system from the beginning of time and which is why in spite of India being a patriarchal society, there have been instances in which the father has been removed as the natural guardian. If the father fails to function or refuses to function as guardian, the mother will be able to exercise all the functions.4 In cases where the parents have been living separately for twenty years or more, and the mother has been looking after the minor daughter, then the rights will rest with the mother. This principle was laid down in the landmark case of Jija Bai v. Pathan.5 An issue which has often come up in the courts is the question whether an unwed mother can opt for guardianship of a child. In a recent judgement, the Supreme Court upheld the right of an unwed mother to have the sole guardianship of her child.6

India is a multi-religious and multi-cultural country. Hindus form eighty per cent of the population, Muslims, 13.4%, Christians 2.3 % and 3.8% of other communities. For such a large and diverse population, it is necessary to have laws which will be fair and just to all. The Guardians and Wards Act, 1890, conferred on the district courts the power to appoint guardians for minor children belonging to any community. The concept of guardianship can be traced to the vedas. In the Hindu community, the custom was of a joint family which is known as the Hindu undivided family. It was predominantly patriarchal and the son was considered as the property of the father. This was similar to the fact that the king was the father of all his subjects. A conflict which arises between the personal laws, with that of provisions of the Guardianship and Wards Act (GWA) is that in cases where the laws of the minor are in conflict with that of the GWA, then the personal laws apply.7 In Muslim law, the mention of guardianship can be seen in certain verses of the Quran and a few ahadis.

The guardianship laws of the minor are an essential element in personal laws. This paper will explore the various provisions for the same in Hindu, Muslim and Christian law.

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5 AIR 1971 SC 315.
Muslim, Parsi and Christian laws. In India, the laws regarding guardianship differs from religion to religion.

II Guardianship of minor under Hindu law

In Hindu law, the statute followed is the Hindu Minority and Guardianship Act 1956. As discussed before section 4(a) of the Act defines who falls under the ambit of a minor. A minor is any person who has not completed the age of eighteen. However, the definition also covers children who have not reached full state of maturity and are physically as well as intellectually immature. For, someone who is unable to take care of themselves, it is necessary that, there be someone who takes care of them and protects them. A guardian is defined under section 4(b) of the HGMA. There are four kinds of guardians and they are as follows: natural guardians, testamentary guardian, guardian appointed by or declared by court and a person empowered to act as such by or under any enactment relating to any court of wards. Among all the above four, the natural guardian is the most common form in Hindu Law. Apart from these four, there also exist two other kinds of guardians under Hindu law, the de facto guardians and guardians by affinity.

A natural guardian in Hindu law is the father, mother or husband in case of a married woman. It is defined under section 6 of the HMGA. The 257th Law Commission Report of India provides and guarantees that both mother and father shall be regarded as natural guardians.8 Under this Act, the natural guardian of an unmarried girl and boy will be with the father and after the father, with the mother. However, if the child is below the age of five years, the guardianship will remain with the mother.

If the child is illegitimate, then the mother will be considered as the natural guardian and after her, the father. A thought which may come to the minds of many is that, should an unwed mother who has an illegitimate child be allowed to have custody over the child. However, the Supreme Court has ruled that the unwed mother can be appointed the sole guardian of the child without the consent of the father.9 In case of a married girl, the guardian is the husband. From the beginning of civilization, the husband has been considered the protector of the wife and that has evolved into law. However, there exist two exceptions regarding the above mentioned rules. Firstly, if the person has ceased to be a Hindu and secondly if he has renounced the world, then he will cease to

9 Utkarsh Anand “Unwed Mother can be Guardian of Child Without Father’s Nod: Supreme Court” The Indian Express, 7th July 2015.
be a guardian.

In the case of *Gita Hariharan v. Reserve Bank of India*, a dispute arose over the word ‘after’ in section 6(a), and its constitutional validity was challenged. It was held by the honourable court that ‘after’, need not mean after the death of the father. It could be in the absence of the father. Hence, it was concluded that the mother could be the guardian even in the lifetime of the father. Another similar case was *Vandana Shiva v. Jayanta Bandhopadhaya*, where a contrasting view of this set rule is that in certain cases, the mother was awarded custody even though the father was not unfit for guardianship.

In all circumstances, the welfare of the minor is of paramount concern of the judiciary. Along with the physical well, the moral and ethical well being is of equal importance which was held in the case of *Gaurav Nagpal v. Sumedha Nagpal*.

The second category of guardian that is present in Hindu law is testamentary guardian. In this form, the father appoints the guardian, to be effective after his death. However, if the mother of the child is still alive, then she becomes the natural guardian. If the mother appoints a testamentary guardian, then the appointee of the father will become invalid and the mother’s appointee will have authority. In case of illegitimate children, the mother is the only one who has the right to appoint a guardian on her behalf. The testamentary guardian so appointed will have all the rights as that of a natural guardian.

Under the Guardians and Wards Act, 1890, the courts have the power to appoint guardians, but this category of guardianship is used in very rare cases. The district court has the power to appoint a guardian keeping in mind the age and the wish of the parents, along with the personal laws of the child, the welfare of the child. In cases where the welfare of the child is in question, especially that of a minor child, the court takes precautions for the same. For example, in *Jai Prakash Khadria v. Shyam Sunder Agarwalla*, the child’s educational benefits were kept in mind before a decision was taken in relation to its guardianship.

The concept of guardianship includes taking care of the property of the minor along with the minor. This is the difference which exists between custody and guardianship rights. Section 8(1) of the HMGA lays down the powers of the

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10 (1999) 2 SCC 228.
11 AIR 1999 SC 1149.
13 AIR 2009 SC 557.
14 The Guardians and Wards Act 1890, s. 17.
16 Sonali Abhang, “Guardianship and Custody Laws in India- Suggested Reforms from
natural guardian with regard to the property of a minor. As a guardian of a minor, it is the duty of the guardian to take all measures for the welfare of the minor. The welfare in this case includes the benefit and welfare of the estate of the minor as well. The guardian cannot, without prior permission of the court, mortgage or charge or transfer by sale, exchange any part of the immovable property of the minor. If either of the above mentioned actions are performed, then it will be voidable at the instance of the minor. Along with these, the guardian cannot lease out any part of the minor’s property for a term exceeding that of five years or for a term exceeding more than one year beyond the attainment of majority of minor.

In the case of Subramanyam v. Subba Rao, the court held that any contract for purchase or sale of any immovable property entered into by a guardian on behalf of the minor is capable of binding the minor for enforcement. However, in a later judgment of Vedakattu Suryaprasam v. Ake Ganganaju, it was held that if by the time of such a decree, the situation has changed so much as to be prejudicial to the interests of the minor, the court is likely to reject specific performance.

The alienation of property of the minor without the permission of the court is voidable. This was observed in the case of Iruppakutty v. Cherukutty. The guardian cannot bind the minor by any personal covenants. He can in no way make the minor liable. The guardian can enter into marriage contracts. However, the minor is liable for the contracts of debts entered into by the guardian for the legal requirement or the welfare of the estate. This clause is in accordance with section 8(1) of the Hindu Minority and Guardianship Act.

The guardianship of minor is a fiduciary relationship more than anything else. It is based on trust. No guardian is entitled to any form of remuneration unless it is specified in the will. He does not have the right to take ownership or possession of the property of the minor. Under Hindu law, the concept of guardianship is of prime importance and especially that of a minor as a minor is helpless and unable to take decisions on their own. Hence, it becomes imperative that someone reliable is there to do that for them.

19 AIR 1948 PC 95.
20 ILR 1955 AP 311.
21 AIR 1972 Ker 71.
III Guardianship under Muslim law

The source for guardianship in Muslim law are certain verses in the Quran and few ahadis. Like Hindu law, there exists certain similarities with respect to the different kinds of guardians. The kinds of guardians found in Muslim law are natural guardians, testamentary guardians and guardians appointed by court.

The guardians are required, for the purpose of marriage, for protecting the minor's person and for protecting the minor's property. It has been seen that in many aspects the beliefs in the Shia and Sunni schools differ. However, in respect of guardianship both the schools have certain basic principles which they agree upon. Under Muslim law, the father is the natural guardian in all respects. The mother on the other hand, is not considered as a guardian in either of the schools. The reason behind this is that she has no right to alienate the minor's property through a contract. This rule applies even if the father is not alive and also in cases of minor illegitimate children. However, she has the right to custody. Like in certain societies, the Muslim society is staunchly patriarchal, i.e. the father's word is the final word in most cases. The father has the right and power to control every aspect of a child, including social and educational. Thus, it can be said that the father is the supreme and only guardian of his minor children.

In case of the Sunnis, the father is considered as the only natural guardian of minor children. However, after his death, the guardianship right passes on to his executor. Among Shias, the guardianship passes on to the grandfather even if an executor has been appointed by the father. According to Rudd-ul-Mukhtar, the executor of the father assumes guardianship only in the event of the death of the grandfather. In both schools, the minor cannot be represented by the grandfather when the father is alive.

After the natural guardian, the second most important kind of guardianship is that of testamentary guardianship. In the Sunni school of thought, the father has the authority to appoint a testamentary guardian. In cases where both the father and the appointed guardian are not present, then in those cases, it is the grandfather who has the right to appoint an executor. However, no person other than the above mentioned has the authority to appoint a guardian. In two very rare instances, the mother can appoint a guardian. They are as follows: firstly, if the mother has been appointed as the executor of the Will or testament of the father. In this case she can appoint an executor through her Will. Secondly, the mother can appoint an executor in respect of her own property which will devolve after her death on her children.

22 Abdul Azz v. Nanhe, AIR 1927 All 458.
23 Imambandi v. Mutsaddi (1918) 45 Cal 887.
If the mother is a non-Muslim, then her appointment as guardian among the Sunnis is valid, however in case of Shias it is not. There have been certain instances, though rare where the mother loses guardianship of her daughter. If the mother re-marries a person, not related with the child, within the prohibited degrees, then she loses guardianship and it passes on to the paternal grandmother.25

Similar to Hindu law, in Muslim law as well, the concept of the guardianship of a minor’s property is very important. A distinction has been made between movable and immovable property. The guardian has the power to dispose or sell of the property of the minor in rare cases. Unlike Hindu Law, the sale of property of a minor is allowed, though there is one restriction which is imposed on it. If the sale of the property is seen as a profitable undertaking, then in that case, the sale will be considered as valid and not violative of any provision. In this scenario, the guardian has the authority to take reasonable risks, if necessary to the business transaction.

There are certain cases in which the authorities consider the sale of the property of the minor valid. The foremost of it being when the guardian can get double of the profits and the sale is for the benefit of the minor. Another instance is when there exist certain clauses in the Will which relate to the payment of legacies and debt, the sale of the property is considered as valid. Lastly, when there is an immediate danger of the property being destroyed or decaying. These clauses are however restricted to that of immovable property. The power of alienation which exists with the guardian is on the basis of the need and necessity of the minor. Once again, it can be seen that the welfare of the child becomes the prime concern, whether it is Hindu or Muslim law.

A similarity which is seen with that of Hindu law is in relation to the granting of lease. The property of the minor can be leased only till the time the minor has not attained majority. The guardian has the legal right to make partition. It is a qualified right. However if the guardian separates the shares of each minor then the entire partition becomes invalid. The de jure guardian has the power to acknowledge the debts on behalf of the minor.

The kind of guardians who are found under Muslim Law, are Guardians appointed by the court. The laws relating to this aspect are not exclusive to Muslim Law. It is regulated by the Guardians and Wards Act 1890. Under this Act, section 27 lays down the provisions which outline the obligations of the guardians. Section 29 lists the provisions with relation to the limitations in respect of the powers of the guardians. The permission for alienation will be given only when it is seen by the court that it is for the benefit of the minor. Lastly, section 33 of the Act lays down the laws which empower the court to define and extend the powers of the guardian from time to time.

IV Guardianship under Christian and Parsi law

Under Christian and Parsi laws, the guardianship laws are not as vast and detailed as in Hindu and Muslim law. However, there exist certain specific laws with regard to the custody of minor children under Christian law. The Guardianship and Wards Act, 1890 governs the laws of guardianship under Christian Law and Parsi Law.

In the case of *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka B*,26 it was held that the decision has to “be considered and decided only from the point of view of the welfare and interest of the minor, the Court has a Special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest”.27 However, in a contradicting judgment, in the case of *Rosi Jacob v. Jacob A. Chakrammakka*28 it was held that there is no duty or obligation cast on the part of the court to interview the minor for ascertaining the wishes of the minor before deciding the question of the child custody. This was in accordance with section 49 of the Parsi Marriage and Divorce Act.

Christian and Parsi Law are different from Hindu and Muslim law when it comes to the question of guardianship. When it comes to custody, the basic principles are similar, wherein the welfare of the minor is considered as the supreme objective along with the characteristic of the guardian who is being granted custody of the minor child. Although the religions might be different, the basic principles remain the same and so do their ideals.

V Guardianship laws in south asian countries

India is surrounded by various neighbours on all its sides. All the neighbouring countries along with India form what is known as the Indian sub-continent. Now however, the southern region of Asia is known as south asia and comprise the sub-Himalayan SAARC countries. South Asia is bound by the Indian ocean in the south and by land from the west. The countries which comprise the south asian region are Afghanistan, Pakistan, Bangladesh, Maldives, Nepal and Sri Lanka.

Pakistan

The law followed for guardianship in Pakistan is the Guardians and Wards Act, 1890 and the court has jurisdiction in the place where the minor ordinarily resides. If the application is with respect to the guardianship of the property of the minor, then it may be made either to the court having jurisdiction in the place

26 AIR 1982 SC 1276.
27 Ibid.
28 AIR 1973 SC 2090.
where the minor ordinarily resides, or to a court having jurisdiction in a place where the minor has property. Like in India, the prime objective is to safeguard the interest and welfare of the minor.

A guardian can be *de facto* (a person who takes continuous interest in the welfare of the minor’s person or in the management and administration of his property without any authority of law) or *de jure* (a guardian who exists as a result of law) one. The father is the natural guardian in Pakistani law for any person under the age of eighteen, *i.e.* a minor. A mother is the next possible guardian after a father, unless the latter, by his will, has appointed another person as the guardian of the child. She, under certain circumstances, can appoint a guardian by will. She can do so during the lifetime of her husband, if he is incapable of acting, or after his death.

The laws related to guardianship in Pakistan are strict, there are provisions in which guardians can be removed. Some reasons for it can be abuse of trust, continued failure to perform the duties of his trust, for incapacity to perform the duties of his trust, for ill-treatment, or neglect in taking proper care of the ward, or for continuous disregard of any of the Guardians and Wards Act’s provisions or of any of the court orders. It has been perceived that Pakistani society is very conservative and primitive in its ways, however there are certain aspects in which it is progressive as well. Pakistan has not banned inter-country guardianship unlike other countries.29

**Sri Lanka**

In Sri Lanka, the age of majority is 18 years as per the Age of Majority Ordinance (1865) as amended in 1989.30 However, the amending Act also states that its provisions shall not be construed as affecting the right of any person under 21 years of age to receive any benefit he is entitled to under any other law. The Ordinance also recognizes the right of a person attaining majority before he reaches 18 years.

The law relating to guardianship and custody of minor children in Sri Lanka has been strongly influenced by Roman-Dutch law and to a lesser extent, by English law. In case of illegitimate children, the mother has the natural custody of the child and not the father. In case of legitimate children, the father is the natural guardian. The latter is influenced by the Roman-Dutch law. This right is interfered with by the courts acting as upper guardians of minors only on

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special grounds such as danger to the child’s life, health and morals. Decisions made on basis of the English law, however state that the interest of the child is the overriding concern. It is in these cases that the mother’s importance in the life of the child is seen. However, in these cases, it has to be proved beyond any reasonable doubt that the father’s influence is detrimental to the health of the child. A topic of discussion which has come up on many instances is whether the financial position of the parents is a reason to not grant them guardianship. Poverty of a parent per se, unless coupled with neglect, is insufficient to deprive a parent of the custody or guardianship of his child.

In relation with the educational, religious and cultural aspects of a minor, the natural guardian has the right to take decisions. Under Muslim law in Sri Lanka, the mother and maternal relations are regarded as the guardian of the minor child in preference to the father. However, in spite of all the existing laws, it has been said that there is an immediate need for a reform in guardianship and custody laws of the country.

Bangladesh

Bangladesh is one of India’s closest neighbors. Like India, Bangladesh too follows the Guardians and Wards Act and along with that, Family Courts Ordinance, 1985. The father is the natural guardian, until they attain the age of majority under the general law of the land, namely the Majority Act, 1875, but when the question is of custody, the mother has the right of custody up to the age of seven years in the case of a male child, and up to the age of puberty in the case of a female child. This right, however, is to be exercised under the supervision of the father, who is responsible for the maintenance of the children.

Bangladeshi family law courts are directed to consider several factors when considering the appointment of a guardian of a minor, including: the best welfare of the minor, the age, sex, and religion of the minor, the character and capacity of the proposed guardian and his closeness to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. Further, courts also may consider the minor’s preference if the minor is old and mature enough to form a suitable choice. Similar to India, Pakistan and Sri Lanka, the prime objective of the Bangladeshi laws is the welfare of the child. It considers the safety and security of the child and puts them under a guardian who will look after them and fulfill all the necessary duties. The concept of guardianship is such that it exists in all societies,

31 Kamalawathi v. De Silva, 64 NLR 252, Fernando v. Fernando, 70 NLR 534.
irrespective of their country, state or religion. Hindus, Muslims, Christians and even Parsis have certain laws designated for guardianship.

VI Conclusion

The guardianship laws in India and in most parts of the world focus on one thing primarily, and that is the welfare of the child. Regardless of their religion and nationality, the guardianship laws give paramount importance to the welfare of the child. It was also stated that the father’s right over the guardianship of the minor child is neither absolute nor is it an indefeasible one. The welfare of the child should be of paramount consideration.\(^\text{34}\)

As discussed before, guardianship is a sector of personal laws which have to be dealt with utmost caution, for along with the safety of the child, it also includes a monetary perspective, i.e. the property of the minor. In India, the main statute which deals with guardianship is the Guardians and Wards Act, 1890. It is uniform, irrespective of all religions. For Hindu law, the law which is followed is the HMGA. One aspect of the guardianship law which is very important is that gender should not be a reason in deciding the appointment of a guardian by the court. The question of amending the Guardian and Wards Act has also risen as early as 1980. This was done by a report submitted by the Law Commission of India asking for an amendment in the Act. It was said that the mother should have custody of the child till the minor has reached the age of twelve years.\(^\text{35}\)

Guardianship has numerous facets, one of them being the fact that whether the opinion of the child is taken when the guardian is appointed by the court. If the child is competent enough to give their opinion with regard to the guardianship, the court is entitled to listen to it. It is said that a child above ten years of age has the right to voice their opinion. However, along with the opinion of the child, the court will take into account the relationship among parents and with the child.\(^\text{36}\) In *C.Chenna Basappa v. Smt Lingamma*,\(^\text{37}\) it was stated that, “the wishes of the minor shall not be the sole factor to be taken into account in adjudging proper custody of minor”.\(^\text{38}\) On the other hand, in *Roxann Sharma v. Arun Sharma*,\(^\text{39}\) it was decided by the Supreme Court that in a battle of


\(^{37}\) AIR 2007 Kar 130.

\(^{38}\) *Ibid.*

\(^{39}\) AIR 2015 SC 2232.
guardianship and custody, that the minor child will remain with the mother till they completes the age of five years. This yet again highlights the fact that for the court, the prime concern is the welfare of the child.

Children are the future of a nation and for the same reason maintaining the central importance of welfare of child in proceedings will help in securing the future of India.\footnote{Carla Gannon v. Shabaz Farukh Allarakhia, 2009 SCC Online Bom 962.} Hence, it is essential that they are nurtured in the best possible way. It is for this reason that the laws were made in relation to guardianship. However, instances have risen in which the child is not under satisfactory conditions. The guardian so appointed, or in some cases, the natural guardian himself treats the child in improper ways. The opinion of the children should be considered and taken seriously because in spite of their young age, they have a right to make a decision. It should be make sure the children are not brainwashed by either parties who have an ulterior motive. Lastly, the implementation of the laws should be accurate to prevent the exercise of any unscrupulous activities of either parties.
SECULARISM AS WARP AND WOOF OF COMMON PERSONAL LAWS

Nitin Balu
Pranav Kumar Kaushal

Abstract

From time to time, courts as well as politicians have laid the importance of common personal laws but none of them has been able to influence the lawmakers or the legislative assembly who is entrusted with the power of making law regarding the same. The principal object of this paper is an attempt to understand the concept of common personal laws – and the issues surrounding the concept in the Indian context. The paper tries to understand the importance of common personal laws and how it is important and relevant within the Indian context? What are the legal complications of pursuing or not pursuing common personal laws? In the process of analysing the concept, the paper also gives a historical account of the idea of common personal laws during various eras, its impact on nation. The paper also discusses the role of the State in maintaining the secular fabric of the country, whether it is truly maintaining that balance or is the State is favouring the majoritarian practice and imposing it as a rational position that the other religions need to take. The paper also discusses about the constitutional guarantees vis-a-vis religion and the contradiction that the Uniform Civil Code has with the fundamentally guaranteed right to religion.

I Introduction

“THE LAW embodies the story of the nation’s development through centuries and to know what it is, one must know what it has been, and what it tends to become”. The object behind stressing out the history of common personal laws is not to enter into the vast galaxy of various personal laws that prevailed in the world or to find out the philosophy behind them. It has limited purpose of looking into the status of and policy on common personal laws in a historical perspective. The universe is famously dubbed as the land of the cultural diversities, with multiple languages, cultures and religions. While the diversity is always appreciated, it often leads to the problem of integrations and governance over the citizens. There are specific codes that govern the different communities, religions and cultures. Personal law governs the legality of marriage, adoption,
divorce, succession, etc. as per the belief and customs of religions.\textsuperscript{2} India is well identified with the phrase ‘unity in diversity’ Indian society has always been governed by the Hindu, Muslim and British Legal system.\textsuperscript{3} Apart from it, a human being is the creation of God. Every human being is similar in feature. A human being may belong to different religions. He or she may be Hindu, Muslim, Christian, Parsee, Buddhist or anything else, but he or she cannot be denied the fact that he or she is a ‘human being’ first. So every person who belongs to different religion is entitled to have certain basic and fundamental human rights. Human right is an absolute fundamental right of all human beings irrespective of their nationality, culture, tradition, sex, etc. The Preamble of the Universal Declaration of Human Rights which was adopted on December 10, 1948 states: “Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the Human family is the foundation of the freedom, Justice and peace in the world”. Articles 12 to 35 of the Constitution of India guarantees certain fundamental rights like right to equality, right to life and personal liberty, right to equal opportunity, right to religion and the principles incorporated under article 36 to article 51 of the Constitution of India, like right to equal pay for equal work, equal justice and free and legal aid etc. realise most of the provisions of the Universal Declaration of Human Rights. It is indeed a matter of pride for all Indians that India stands united in spite of diversities in cultures, traditions, religions, clothing, belief and resources. The country has however witnessed religion being used to generate inequality by unreasonably suppressing the rights of some others. Dissenting voices were either threatened or pacified in the name of religion or religion beliefs.

II Historical background of common personal laws in India

The historical background of the common personal laws is divided into two periods:

Pre independence era

\textit{Hindu practices}

The basic principles of Hindu law are found in the \textit{vedas} or the texts which are reputed to have been divinely inspired. Mythology has it that God \textit{Brahma}, the creator and the first member of Hindu Trinity himself uttered the \textit{vedic} texts.\textsuperscript{4} They were regarded as infallible and as supreme to the early Hindus. One can


\textsuperscript{4} U.C. Sarkar, “Hindu law: Its Character and Evolution” \textit{6 JILI} 214 (1964).}
also discover in ancient India sacred works like the puranas, the two great epics, the Ramayana and the Mahabharata. The Bhagvat Gita, the moral foundation upon which was built the Hindu law which has been in continuous application to this day. The vedas, which are also called shrutis, which means ‘what is heard’ is also revealed text. Like any other revealed texts, the vedas contains many titles of positive law. They believed that the sages of immemorial antiquity heard it and transmitted it for next generation. There is another class of scripture known as the smritis which means tradition or ‘what is remembered’. Smritis are different from shrutis as they are not a direct perception of the divine precepts but are an indirect perception founded on memory. These two sources are considered as fundamental sources of Hindu law. In ancient society, the Hindu sages were the leaders of the community and they were revered both for their holiness and their profound learning. The rules laid down by them formed the basis on which the society was organised. In addition to their religious duties they also served as a code of ethics and morality but also governed social matters, and matters relating to politics and government. However, in the early writings of these sages, no distinction was made between civil laws and religious and social laws. It is only the later treatises that dealt them separately. That is why it seems that in early society, law and religion were inter-twined and was often indistinguishable from each other. It is therefore, that the Hindus regarded the law as an integral part of their religion. Even though the religion has its vital role in controlling and guiding the behaviour of the people, the local customs and approved usage had also acquired the force of the law.

Muslim practices

Muslim scripture was applied by the Qazis, during the Muslim rule in India. Muslim jurisprudence furnishes us with the example of complete union of law and religion. James Bryce says that in Islam, law is religion and religion is law, being both in the content of the divine revelation. Similarly, Schacht, J. says that “Islamic thought is the most typical manifestation of the Islamic way life, the core and kernel of Islam Itself.” The word Islam is derived from the Arabic root which means, among other things, peace, purity, submission and obedience. In a religious sense, the word Islam means submission to the will of God and obedience to his law. The connection between the original and religious meanings of word is strong and obvious. Only through submission to the will of God and by

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5 H.S. Maine, Dissertions on Early Law and Custom (BiblioLife, Charleston, 2010).
7 Salim Akhtar and Ahmad Naseem, Personal Laws and Uniform Civil Code 3 (Aligarh Muslim University, Aligarh, 1998).
obedience to ‘his law’, one can achieve true peace and enjoy lasting purity.\(^9\) **Quran** consists of very words of God revealed to the Prophet Mohammad. The **Quran** is in the form of addresses which were revealed by God on different occasions starting from the time when the Prophet made his first call to the people to submit to the religion of God, and continuing till the Prophet completed his task in the form of a society fully organised, well integrated and patterned with all the basic institutions.\(^10\) Tradition has it that the **Quran** was a transcript of a tablet preserved in the Heaven, upon which is written all that has happened and all that will happen. During Muslim rule, all non-Muslims were governed in matters of their personal laws by their own traditional and customary laws. Grady writes:\(^{11}\)

Hindus enjoyed under the **Mussalman** government, a complete indulgence with regard to the rites and ceremonies of their religion as well with respect to various privileges and immunities in matters of properties - and in all other temporal concerns the **Mussalman** law gave the rule of decision excepting where both parties were Hindus, in which case, the point was referred to the judgement of the pandits or Hindu lawyers.

### British era

Criminal law was the only law during the Muslim rule, which was largely common to Hindus and Muslims, with the exception of the application of oaths and ordeals. The Muslim rule came to an end with the disintegration of the Mughal empire. Towards its end, the empire had already weakened to such an extent, that the Governors of different provinces had virtually usurped the whole power and became independent functionaries. It is at this juncture that the British company came to India as innocent traders, however, ultimately turned out to be the mercenaries and became the forerunners of British rule in India.\(^{12}\) During the British rule in India, as a matter of colonial policy, it was politically expedient for the British not to interfere with existing personal laws, in so far as they related to family and inheritance rights alone. As the main object of the East India Company was trade, commerce and exploitation on the natural resources of the country, their primary motive was with law relating to trade and commerce. During the British rule in India, there was an attempt on the part of the British government towards the end to codify the personal laws.\(^{13}\) The British felt hesitant to interfere with the customs and religious-cum-legal principles applicable to the Hindus

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and the Muslims. In 1832, Lord Macaulay was appointed as the commissioner of Board of Control for India. Subsequently, he became the Secretary of Board of Control when Charter Bill was being debated and was pending; during the second reading of the Charter Bill, he made a strong plea for a codification of Indian laws. Perhaps as a result, he was made the law member and subsequently the Chairman of first law commission. The first law commission, however, preferred a desire to prepare the code for the personal laws but thereafter it became accepted that the British government through these policies want to interfere with the religious setup prevailing in India. By passing the Charter Act, 1853, the second law commission put forward policies and principles of further codification in India. In 1861, another law commission was appointed for the preparation of draft code regarding law in India. After that, fourth law commission was appointed with the goal of codifying all the substantial law prevailing in British India. By the efforts of various law commissions, criminal laws were codified by 1898 and came into force and became applicable to the whole of India irrespective of their religion. The British government was successful in forming a criminal code for the Indians, and which continues even today. However, the British effort to form a civil code was not pushed, mainly due to the reason that to ensure stability of British government in India, personal laws had to stay as it is. Warren Hastings had declared in 1772 that in matters of inheritance, marriage and other such religious affairs, the laws of the Quran with respect to the Mahommedans and those of the Shastra with respect to the Hindus shall be invariably adhered to. 14 According to Hastings, it would be a great evil to impose on the Indian people a foreign legal system.

**Post independence era**

After independence, the personal laws attracted the attention of the Constituent Assembly and heated debates for and against Uniform Civil Code (UCC) took place. In the assembly, Muslim members strongly opposed it, whereas most of the Hindus members supported it. Dr Ambedkar, the chief architect of the Constitution of India was in the favour of the interference of the personal laws. On the floor of the Constituent Assembly, the issue of the common personal laws suffered convulsions caused by the utterance of the progressive legislators, dissenting voices of their so called conservative brethren, apprehension echoed by the spokesmen of the minorities, bricks and buckets thrown from outside by laymen and lawmen. 15 Mohammad Ismail from Madras believed that the personal laws were a part of the way of life of the people and they were the part and parcel of religion and culture. He used section 35 with section 33 which provides that any group, section or community of people shall not be obliged to give up its own

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14 Supra note 13 at 382.
personal law in case it has such a law.

Nazir Alimad, another member of the Constituent Assembly moved a provision to article 35 which read as follows: Provided that the personal law of any community which has been guaranteed by the statutes shall not be changed except with the previous approval of the community ascertained in such a manner as Union legislature may determine by law. He further remarked that the common personal law would create inconvenience not only to Muslims but to all religious communities who had religion oriented laws. He further pointed out that the very concept of common personal law clashed with the religious and cultural freedom guaranteed to every citizen. He was also apprehensive that under article 35, the State may violate the religious freedom of the citizens.

### III International obligation in consonance with common personal laws

Under international law, a State becomes legally obliged to implement the provision of an international instrument, if that state ratifies that instrument. Accordingly it is embedded in directive principles of state policy under article 51(c) that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. India, having ratified the International Covenant on Civil and Political Rights (ICCPR), 1966, and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, is bound to enforce the relevant provisions and ensure gender equality under its national laws. Personal laws in India create discrimination in relation to marriage, adoption, divorce. People from different religions are governed by their personal laws and these personal laws cause chaos and are unjust. The preamble to the ICCPR speaks about the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, which is the foundation of freedom, justice and peace in the world. Accordingly, article 16 of CEDAW puts a similar obligation on States to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular, ensuring, on a basis of equality of men and women.

Article 16 of CEDAW is clearly inconsistent with the prevailing situation in India. Referring to the notable cases like *Mohammad Ahmed Khan v. Shah Bano Begum*\(^{16}\), *Danial Latifi*\(^{17}\) and personal laws like nikah, muta marriages, divorce, maintenance, adoption it is apparent that how these laws are different for man and women. Whereas article 5 of CEDAW states that states parties shall take all appropriate measures to modify the social and cultural patterns of conduct

16 AIR 1985 SC 945.
of men and women, with a view to achieving the elimination of prejudices and
customary and all other practices which are based on the idea of the inferiority or
the superiority of either of the sexes or on stereotyped roles for men and women.
India has failed to comply with these articles and the only justification given by
it is that it doesn’t want to interfere with the personal affairs of a community.
India has embodied in its Constitution of India both secularism and equality, so
it must make efforts for the putting together these principles in consonance with
international law without caveats.

IV  UCC as a directive principle of state policy

The Constitution of India has enumerated certain directive principles of
state policy with a view to achieve amelioration of the socio-economic condition
of the masses. In this era, these policies strengthen and promote this concept by
seeking to lay down some welfare goals to promote the welfare of the people and
achieve economic democracy. One such directive principle is the constitutionally-
enshrined UCC. Article 44 requires the state to strive to secure for the citizens
of India, a UCC throughout India. This article is considered fundamental to the
governance of the country. The mandate of article 44 is addressed to the State,
which includes the government and the Parliament of India and the government
and legislatures of each of the states and all other local and municipal bodies,
and other bodies under the government of India. The founding fathers of the
Constitution of India could anticipate the issues related to such legislation.
They wanted the Code to be enacted and enforced at the end of an evolutionary
process, whereby each and every person is in a position to accept and actually
practice the same in their everyday life. Article 44 of the Constitution of India
which is central to the discussion of the common personal laws provide that the
“State shall endeavour to secure for the citizens a UCC throughout the territory
of India”. The concept of UCC is one of the directive principles of state policy
which are not enforceable in any court, but the principles laid down in part IV
of the Constitution of India has been considered fundamental in the governance
of the country. Scholars have suggested that: “Directive principles of state policy
are not justifiable they are as much part of the Constitution as the fundamental
rights….they deserve as much attention and importance as the fundamental rights
does”.  

The court has also held that not only the fundamental rights must be
harmonised with the directive principles of state policy, but such harmony is the
basic feature of the Constitution of India.  

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18 M.P. Singh “The Statics and the Dynamics of the Fundamental Rights and the Directive

19 and 21 to be the fundamental and held as a part of the basic structure. One of the fundamental duties imposed by the Constitution of India on all citizens of India, who definitely include our parliamentarians and state legislators, is to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities. The directive principles mentioned in article 44 is expected to be harmonised with this duty. If consensus may be arrived at between different communities of people in consonance with this duty, process of realisation of a UCC may be conceived of. But so long as such a consensus does not arise, the process of realisation of a UCC will have to wait.

V Personal laws and fundamental rights

Life is more than an animal existence and the inhibition against the deprivation or truncation of life extends to all those limits and faculties by which life is enjoyed. Fundamental rights represent the basic values cherished by the people of this country since vedic times and they are calculated to protected the dignity of the individual and create conditioned in which every human being can develop his personality to the fullest extent. No society is free; no State is democratic, unless human rights, in widest commonalty spread, are actualized by every citizen. The Constitution of India, in its richer and fuller sense is not just a document constituting and limiting the government, but an embodiment of the values and morals that we, the people wanted to be embodied in our political community. Part III of Constitution of India is its core and soul and provides fundamental rights. Any law in force at the time of coming into force of the Constitution of India or enacted after that which is in conflict with the chapter on fundamental rights will be void to that extent. Khanna J., in Kesavananda Bharati v. State of Kerala emphasized upon the importance of judicial review in following words:

As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these rights are not contravened... Judicial review has thus become an integral part of our Constitutional system.

The Supreme Court in its landmark judgement Shayara Bano v. Union of India, through R.F Nariman and U.U Lalit, JJ. held that triple talaq is
within the expression ‘laws in force’ in article 13(1) is void and arbitrary, making a luminous way of filtering the laws through strainer the definition of laws in article 13 inclusive of custom and usage has to pass the litmus paper test of article 13. Article 25 talks about right to freedom of religion and article 26 speaks about freedom to manage religious affairs but these freedoms are available subject morality, Public order, health and other provision of part III. The cardinal principle of interpretation of the Constitution of India was that all provisions must be harmoniously construed, so that there remained no conflict between them. So, articles 14 and 15 on the one hand, and articles 25 and 26 on the other, must be harmoniously construed with each other so that no violation of fundamental rights can be caused.

VI Secularism and legal pluralism

Secularism

The Preamble of the Constitution of India states that India is a secular, democratic, republic. This means that there is no state religion. A secular state shall not discriminate against anyone on the ground of religion. A religion is only concerned with relation of man with God. It means that religion should not be interfering with the mundane life of an individual. The process of secularisation is intimately connected with the goal of UCC like a cause and effect. In the case of S.R. Bomai v. Union of India,25 as per Jeevan Reddy, J., it was held that religion is a matter of individual faith and cannot be mixed with secular activities and can be regulated by the State by enacting a law. In India, there exists a concept of positive secularism as distinguished from the doctrine of secularism accepted by the United States and the European States, i.e., there is a wall of separation between the religion and the State. In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European states went through the stages of renaissance, reformation and enlightenment and thus, they can enact a law stating that State shall not interfere with the religion. On the contrary, India has not undergone any kind of renaissance or reformation and thus the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State. The reason why a country like India cannot undergo a renaissance is very clear: there is prevalence of not only different religions in the country but also their own personal legislative laws. This is why chances are, that the conflicts, instead of decreasing may go on increasing and showing reverse effects on the laws that are made. For instance, a practice or a tradition in one’s personal law may be acceptable but on the other hand, it may not be acceptable to the people of other personal laws. So, when the traditions will be in practice, the nature of the conflict will transform itself from

general differences to hardcore animosity. The Preamble of the Constitution of India resolves to constitute India as a secular democratic republic. This means that there is no state religion, or in other words, the State does not promote any particular religion and shall not discriminate on the ground of religion. Article 25 and 26 of the Constitution of India, as enforceable fundamental rights, guarantee freedom of religion and freedom to manage religious affairs. At the same time, article 44, which is not enforceable in a court of law, states that the state shall endeavour to secure a UCC in India.

UCC is the uniform method or a Code that governs people as uniformly without discrimination on the basis of religion or faith. In unification of the personal laws, an important question that arise is what will be the ingredients of the UCC. Since the personal laws of each religion contain separate provisions, their unification will bring not only resentment, but also enmity in the public towards one another, therefore, the UCC will need to bring in such laws that strike a balance between the protection of the fundamental rights and the religious principles of the different communities that exist in the country. Issues such as marriage, divorce, maintenance etc. can be matters of secular nature and law can regulate them.

**Pluralism**

Legal pluralism is concomitant of social pluralism: the legal organisation of a society is congruent with its social organisation. Legal pluralism refers to the normative heterogeneity attendant upon the fact that social action takes place in the context of multiple overlapping, semi-autonomous social fields, which it may be added, is in practice a dynamic condition.26

Diversity is natural while uniformity is forced. Therefore, in the natural state, which Hobbes described as state of nature,27 people lived by their group norms, which, in one or the other respect, differed from group to group. However, Hobbes gave a harrowing depiction of that society and developed the idea of a sovereign to whom all people expressed their allegiance in exchange for establishing order. Austin28 used that concept to define law in top down terms that all law was direct or indirect command of the sovereign and whatever could not be so proved could not be law. 20th century scholars, like Kelsen29 and Hart30

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gave a bottom up description of all law by propounding that any norm or rule of conduct, to be law, must be capable of being traced back to a *grundnorm* or rule of recognition.

According to positive school, unless it is capable of being so traced, it is not law. But from 1930s, several scholars, most prominently, Ehrlich\(^31\) started questioning this notion of law. They noticed the difference between the state law either there was no reference in the state law or even if there was such a reference, people behaved differently without coming into conflict with it. People indulged in many activities by making clubs or associations or religious groups or any other informal organisation without coming in conflict with the state law. The norms set by these bodies or groups could regulate large part of their lives, sometimes even larger than regulated by state law. Initially, all societies lived like that by their customary laws. Even after the establishment of the state they continued to live like that except in criminal activities for which generally the same law applied to all of them. Accordingly, they claimed that legal centralism is a myth while legal pluralism is the reality, the fact of life.

India is known for its enormous diversity and social heterogeneity. But the same should apply to any society which is so diverse and heterogeneous. All societies are becoming more and more heterogeneous with globalisation resulting in movement of people of different backgrounds to a commonplace. Consequently, legal pluralism becomes their condition too and therefore, more and more countries are now looking for solutions of legal problems that have been caused by social heterogeneity. Even in legal theory and facts of life, India is not unique in having more than one legal systems or laws operating within certain fields under the overall umbrella of a state legal system, willing to accommodate its social heterogeneity.

### VII Precedents

The judiciary with the powers pertaining to it, in various circumstances, through their judgments, have insisted on bringing in UCC for the welfare of the country and all its citizens. The judicial organ have been advising the law-making organ to take necessary steps in drafting a common code for marriage, divorce, inheritance, adoption and maintenance. In *Shah Bano* case,\(^32\) an attempt was made by the judiciary for the establishment of UCC with regard to law of maintenance. The issue in this case was whether a Muslim woman is entitled to claim maintenance under section 125 CrPC It was held that Muslim women are entitled to claim to maintenance under section in 125 CrPC This is a secular

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\(^{32}\) AIR 1985 SC 945.
provision and the benefit is available to every citizen irrespective of their caste or religion etc. It was further held that although the Muslim law limits the husband's liability to provide for maintenance of divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by section 125 of the code of criminal procedure. The court also held that it is a matter of regret that article 44 of our Constitution has remained a dead letter. Kuldip Singh J., in the case of Sarla Mudgal v. Union of India, while delivering the judgment directed the government to implement the directive of article 44 and held that successive governments have been wholly remiss in their duty of implementing the constitutional mandate of article 44. The court also stated that, “when more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of UCC for all citizens in the territory of India”. In a concurring judgment, R.M. Sahai, J. wrote: “But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression”. In 2006, Khare, CJ., in the case of John Vallamattom v. Union of India said that article 44 provides that the State shall endeavor to secure for all citizens a UCC throughout the territory of India. It is a matter of great regret that article 44 of the Constitution of India has not been given effect to. The parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies. The apex court in Lilly Thomas v. Union of India referred to the necessity for a UCC. The desirability of UCC can hardly be doubted. However, it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change. Sahai, J. was of the opinion that while it was desirable to have a UCC, the time was yet not ripe and the issue should entrusted to the law commission which may examine the same in consultation with the minorities commission.

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 of India, were confronted with problems to unify and integrate people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different languages and dialects in different religions and provided a secular Constitution

33 AIR 1995 SC 1531.
34 Ibid.
to integrate all sections of the society as a united country.

The directive principles of the Constitution of India themselves visualize diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages. In the landmark case, Seema v. Ashwani Kumar,\(^{38}\) which brought about registration of marriage compulsory, the Supreme Court stated that it is high time to took a second look at the entire gamut of central and state laws on registration of marriages and divorces to assess if a uniform regime of marriage and divorce registration laws is feasible in the country at this stage of social development and, if not, what necessary legal reforms may be introduced for streamlining and improving upon the present system.

**VIII Conclusion**

The pure form of religious practices prevailing in the societies has turned into impure unorthodox religious practices by cruel minds just to widen the discrimination between the dominant and suppressed group. This conversion has affected the personal laws deeply and has led to the mass violation of human rights which has resulted in the need for an event statute for all individuals living in the society that can uphold the basic rights without discrimination on religion and gender. An urge for the common personal laws has kept this topic, common personal laws, a hot topic to be debated even today after seventy one years of Independence. The implementation of UCC will make the work of settling of disputes much easier for the judiciary rather than looking into the personal laws of each religion which is time consuming and can ensure equality, liberty, fraternity and can bind the citizens of India by making them feel the same.

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UNDERSTANDING HINDU GUARDIANSHIP THROUGH GITHA HARIHARAN CASE

Prajwal Kushwaha

Abstract

This paper is an attempt to critically analyze the provisions of Hindu guardianship with the help of the famous Githa Hariharan judgement. In this, we will be first understanding the underlying principles of concepts like guardianship and parental responsibility. We will see how some laws still run on very patriarchal assumptions and how it is detrimental to the society. We will talk about the rights and duties of the natural guardian. In this paper, we will discuss that how the court failed to realize the real issue and while judging the landmark Githa Hariharan case, the court relied on ratios of other cases, which were different from the current one. There will be some discussion on the rights available to a natural guardian as to person of the minor in the Indian and English context. By the end, we will see how this judgement fails to remove the gender inequality present in the statues in question and few alternate ways will be suggested to approach the issues similar to what were brought forth in the present case.

I Introduction

LAWS RELATING to children must be formed by various guiding principles, primary among which, should be that the essential duty of upbringing the child rests with the guardians. Guardianship is an idea of relationship emerging from the common inadequacies of children and people of unsound personality and once in a while different types of people, to deal with their affairs. The history of guardianship can be traced to ancient Greece and Rome, where this concept began as a right over one’s ward’s property to protect the interests of the group. In ancient India, the concept of guardianship can be found in puranas and others texts. Later, it developed into a duty to preserve the interests of the wards itself.

In modern India, the legislations in operation regulating the guardianship of a minor are the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 (HMGGA), where the latter acts as mere extension, and not in derogation, to the former. However, the HMGGA continues to have few of the existing pillars of a patriarchal society. In Hindu law, a mother has been given a very significant position, where she falls in the category of class 1 heir of

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her son's property if he dies intestate, *i.e.* without a will, whereas a father only classifies as a class 2 heir.\(^1\) However, when it comes to guardianship, the mother is on a lower pedestal; as in the presence of the father, the mother cannot be a natural guardian of her minor.\(^2\)

This constitutional validity of this provision was challenged in *Githa Hariharan v. Reserve Bank of India.*\(^3\) Although the validity of the section in question was upheld, the Supreme Court changed the interpretation of this section as to bring it in conformity with the constitutional values.

This paper will try to analyze the issues brought forth in the *Githa Hariharan* judgment, discuss the rights and duties of a natural guardian and how they are different from a guardian, will question whether the grounds outlined in the judgment for treating a father to be ‘non-existent’ are sufficient to consider the mother, a natural guardian? Or any more grounds can bring more clarity as to when can a natural guardian be considered non-existent.

**II An analysis of the decision**

In this case, Githa Hariharan (first petitioner), along with her husband (second petitioner), had applied to the Reserve Bank of India (first respondent) in 1984 for relief bonds in the name of their minor sons. The petitioners state that it was agreed between them that the first petitioner will take charge as guardian in investment related matters of their minor son. The respondent, upon receiving the application, replied by asking the petitioner to either get the form signed by the father or produce of certificate of guardianship by a competent authority.

The bank based their argument on the section 6(a) of the HMG Act, which says:

> The natural guardians of a Hindu, minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are- (a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

It cannot be refuted that the correct interpretation of this section, at that time, was that mother cannot be a natural guardian of a minor in presence of the father.\(^4\)

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1. The Hindu Succession Act, 1956, ss. 8, 10.
3. AIR 1999 SC 1149.
The petitioners challenged the constitutional validity of this section along with section 19(b) of the Guardians and Wards Act, 1890, on the ground of them being in violation of article 14 and 15 of the Constitution of India. Articles 14 and 15 embody the values of equality of law and equal protection of law, irrespective of a person's religion, caste, sex or place of birth.

For reference, section 19(b) of the Guardians and Wards Act, 1890, limits the power of judiciary to appoint a guardian of a minor whose father is living and is not in the opinion of the court, unfit to be the guardian of the minor. This section reflects patriarchy, where it completely ignores the existence of the mother of a minor whose guardianship is in question.

The division bench of judiciary decided partially in favor of the petitioners, by differing the interpretation of the section 6(a) and said that where father is not actively taking care of the child or managing its affair, the mother would be the natural guardian. Further, it said that the word ‘after’ in the section should be interpreted to mean not ‘after death or lifetime’ but ‘in the absence of’. This decision, however, did not strike down any sections in question, but merely said that when a minor is in the exclusive care and custody of the mother, she would be entitled to act as a legal guardian of the minor.

While reaching the conclusion, the court discussed a few precedents and concepts like custody, parental rights, and international conventions. The court also uses the term ‘natural guardian’ again and again. A ‘natural guardian’ is one where the guardian is someone appointed by the wisdom and policy of the law to take care of a person and their affairs, who by reason of their imbecility and want of understanding, is incapable of acting for their own interests. Natural guardians is defined under section 4(b) of the HMGA. Section 4 was well comprehended in the judgement of Rajalaxmi v. Ramachandran, which said a guardian means a person having the care of the person of a minor or of his property or of both and includes (a) a natural guardian, or (b) a guardian appointed, that can be a natural guardian or a guardian appointed by the will of the minor’s father or mother, and (c) a guardian appointed or declared by a court, and (d) any person empowered to act as such by or under any enactment relating any court of wards.

To understand natural guardianship, the concept of ‘natural child’ has to be discussed, which is different from a child being a legitimate offspring. Natural child is a biological child. In most cases, the child is both natural and legitimate, i.e. born in a wedlock. Similarly, a natural guardian is the one, who gives birth

6 AIR 1967 Mad 113.
7 Ibid.
8 Ibid.
to the child in question.

In law, the concept of natural guardians, when read with section 4 of the Guardians and Wards Act, 1890 and sections 2 and 6 of the HMGA applies to cases when both the parties involved in a guardianship are both Hindus.9

In this context, it is necessary to differentiate guardianship from custody. Custody of a minor can shift between person to person, without taking away the rights of either guardian.10 The idea of guardianship is likened to trusteeship. A guardian is a trustee in connection to the minor, of whom he is so selected. The position of guardian is serious than mere custodian. The custodial care might be for brief term and for particular purposes.11

Section 8 of the HMGA, defines the powers of a guardian in relation to the minor’s estate. It empowers the natural guardian to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor’s estate, but lays down that the natural guardian cannot, in any case, bind the minor by a personal covenant. 12 Under this law, there is no explicit provision relating to powers of guardians over the persons of the minor children. However, the position of common law in this respect is well settled. Earlier, parental powers over children were considered absolute but today these rights and powers are subjected to the welfare of the minors.13

While deciding this case, the court elaborated the decision of Jijabai Vithalrao Gajre v. Pathankhan.14 In this case, the appellant applied before the tehsildar for termination of the tenancy of the respondent as the appellant was in need of the land for personal cultivation. The tehsildar decided in favor of the appellant but it was found that the lease deed was executed by the tenant in favor of the appellant’s mother, when the appellant was minor and her father was alive. The tenant, through a writ petition, challenged the decision of the tehsildar on the ground that when father of a minor is alive, then only he can be considered as a natural guardian and thus he can enjoy the rights on property of the minor. The high court held that the lease deed was valid as the mother was a natural guardian and because of the disinterest of father in the minor appellant’s affairs. The court said, “the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant

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12 N. Srinivasan, The Hindu Minority and Guardianship Act, 1956 130 (Delhi Law House, Delhi, 2nd edn., 2010).
14 AIR 1971 SC 315.
Similarly, in *Pannilal v. Rajinder Singh*, a property belonging to the respondents were sold to the appellants when the respondents were minors, by their mother under a registered sale deed. On attaining majority, the respondents sought the land back on the ground that sale deed was voidable as it lacked the permission of the court. To part (in any manner, sale/gift/mortgage) with any immovable property of the minor, the guardian can only do so if the parting is in the interest of the minor and has to first obtain permission of the court.

The main argument of the appellant in the *Pannilal* case was that the sale deed was attested by the father and it should be considered and was validly made by the natural guardians of the minor. Unlike the *Jijabai* case, this case was not decided on the fact that the deed was executed by the mother and there was no reliable evidence to show that the sale took place for the benefit of the minors, or the father was not actively involved in affairs of the minor. The Supreme Court decided in the favor of the respondents by holding that the case is different from the *Jijabai* case as this case is decided in favor of the respondents because of lack of a statutory requirement for transfer of the immovable property of the minor.

While deciding *Githa Harihan*, the Supreme Court said that the two cases referred above, viz. *Jijabai* and *Pannilal*, are different on account of their facts and circumstances and thus, having contradictory ratios. The court, in its judgement shed some light on the situations where the father can be considered as non-existent. These situations could be when the father is completely indifferent to the matters of the minor even if he is living with the mother; or by mutual understanding between the father and the mother, the mother is given the exclusive charge over the matters of the minor; or if the father is physically unable to take care of the minor; either because of his staying away from the place where the mother and the minor are living; or even inability of the father by reason of ailment. In all such situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor.

It is not disputed that the judgement resolved the primary issue of the present case. However, it is not sufficient to resolve the central issue of the case, because to consider the mother a natural guardian, only possible when the father is not in a position to take care of the minor or non-existent in reference to the minor’s affairs and the grounds outlined for a father to not be the natural guardian are very narrow and these guidelines cannot keep pace with this fast.

15 *Supra* note 14 at para 12.
16 *(1993) 3 SCR 589.*
17 *Supra* note 1 at s. 8(3).
18 *Id.* at 1 at s. 29; *Education Act, 1996.* (UK).
evolving generation where child welfare is taking new definitions.

The author has discussed before how natural guardians are attributed with certain rights and duties as to person and property of the minor and a lot of analysis has already been provided on the rights on property of the minor, while discussing the judgement. The position of English law is much clearer when it comes to the functions of parents over person of the minor. In many situations, a parent can be considered to be non-existent, whenever any of the following functions are not performed in the interest of the welfare of the minor by the guardian in question.

The first right of parents over a minor is the right to physical possession. In common law, a parent has the right to possession of the child. A person who had parental responsibility could require any other person who is having possession of the child to hand him or her back. To enable parents and guardians discharge their rights and duties effectively, they are entrusted with the custody of the children.

The second most important function which parents fulfil is that they control and direct the child’s upbringing. The Scottish laws, in this regard, enacted a statutory right in these general terms to more specific rights relating to education, religion, and medical treatment. A parent’s right in relation to education is protected by European Convention on Human Rights, 1998. Many other domestic legislations oblige parents to ensure that their child receives education suitable to age, ability and aptitude. Both in England and in India, the natural guardian’s power to control the education as important as the power to control their religion.

The Indian judiciary has also decided that the guardian is entitled to regulate the mode of education and the place of it, and if the ward refuses, the court can compel them to go there. A person with parental responsibility is also entrusted with the right to consent to medical treatment, as a minor’s consent is considered to be invalid under the global laws of contract, only the parent or guardian can give the consent for medical treatments. It is also not debated whether parents reserve the right to control the religion of their ward.

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19 Re Agar-Ellis (1883) 24 Ch.D. 317.
21 Scottish Law Com. No. 135, para 2.21; Children Act, 1995 (Scotland), s. 2 (1)(b).
22 Protocol No. 1, art. 2.
23 Education Act 1996, s. 9; School Standards and Framework Act, 1998, s. 86.
24 Tremain’s case (1891) 1 Stra 167.
25 In Re Lovejoy Patel, AIR 1944 Cal 433.
or not. Judgements has clearly stated the importance of the role of parents in regulating the religion of their child.\textsuperscript{27} This includes the authority of a parent to inflict moderate and reasonable chastisement,\textsuperscript{28} the right of parents to marry their children, \textit{etc}. In the early traditional (read patriarchal) social structure, the concept of guardianship holds a special significance in marriage of a daughter, as it is a duty on the part of the parents to give away the daughters before they menstruated. However, this patriarchal structure has been diluted and there has been many instances, where a mother can perform the rites of marriage without necessarily consulting the father.\textsuperscript{29}

Another important responsibility of a parent or guardian is to represent the minor in legal proceedings. A person under the parental responsibility is \textit{prima facie} entitled to act in this capacity, unless there exists an interest of the person representing, adverse to the child’s.\textsuperscript{30}

The common factor in all the above mentioned functions of the parents, is the ‘welfare’ or ‘interest’ of the minor. The fundamental principle behind the concept of guardianship and the rights associated with guardianship is that a minor cannot take care of themselves and thus the state, as \textit{pater patriae}, holds the responsibility to all acts and things necessary for the minors’ protection.\textsuperscript{31} Welfare includes material, moral and physical well-being.\textsuperscript{32} The word welfare must be interpreted in the widest sense; and should not be restricted to mere monetary factors. The usual and religious well-being must be accounted.\textsuperscript{33}

Thus, it can be concluded that physical inability or disinterest of a father in matters of a minor is sufficient to consider the mother a natural guardian, as said in the \textit{Githa Hariharan} case, does not do any justice to the present day requirements of a minor’s welfare.

### III Criticism

The court, in the present case, did not address the actual issues of the case but dealt with them on a mere superficial level. This petition was filed on the grounds of it being in derogation to the principles of equality enshrined in the

\textsuperscript{27} \textit{Talbot v. Earl of Shrewsbury} (1840) 4 My&Cr 672.


\textsuperscript{29} \textit{Brindabun Chandra v. Chundra Karmokar}, ILR 12 Cal 140.

\textsuperscript{30} \textit{Woolf v. Pemberton} (1877) 6 Ch.D 19.

\textsuperscript{31} K.R. Ramaswamy Iyengar, \textit{Commentary on The Guardians and Wards Act, 1890} 198 (Delhi Law House, Delhi, 2nd edn., 2010).

\textsuperscript{32} \textit{Wazid Ali v. Rehana Anjum}, AIR 2005 MP 141.

\textsuperscript{33} \textit{In re: McGrath (infants)} (1983) 1 Ch D. 143.
Constitution of India. The court should have, in the first place, examined this petition and the sections in question as an opportunity to set loose the laws from the shackles of a patriarchal outlook towards society. Section 6 of the HMG Act is still a patriarchal provision, where the father is considered to hold a superior position than the mother in affairs of the minor. The court, in this case, has simply puts more responsibility on the father and have completely failed to elevate the position of the mother. This judgement essentially says that father is the natural guardian and it is only in certain circumstances that a mother can act as a natural guardian. The court failed to bring both men and women on an equal pedestal. This judgement is simply an extended form of the Jijabai verdict. Ideally, both parents must be given the status of natural guardians, without any proviso.

At the same time, the judgement is silent on the validity of section 19(b) of the Guardianship and Wards Act, 1890. This section still explicitly says that the court cannot appoint a guardian to a minor if the father is alive and if he is “not in the opinion of the court, unfit to be guardian of the minor”. This section completely neglects the existence or say of a mother in matters of a minor.

**IV Conclusion and suggestions**

The paper has discussed the rights and duties of a natural guardian. It is an established theory that rights and duties go hand in hand. To enforce one's right, one must fulfil its duty. In the author’s opinion, any guardian, be it the mother or the father can be considered non-existent, if the facts and circumstances show that they have failed to act in the interest of the minor and their welfare and have not fulfilled their role as a parent. The most important duty of a parent, which is to provide their children with care and protection, is accepted internationally. It should be enough for a court to believe that a guardian is of no use if the guardian fails to provide basic care and protection, sense of belonging and redresses the problems of the minor.
GENDER INEQUALITY IN INDIAN SUCCESSION LAWS: ANALYSIS OF WOMEN’S RIGHT IN FAMILY BUSINESS

Aishwaryaa A*

Abstract

For generations, the onus of taking forth family business was upon the shoulders of men due to the fact that our society has ingrained patriarchy. But now, in the twenty first century, there are women who have started taking up responsibility of the family businesses. This has resulted in lots of issues that are emerging regarding the role of women in such businesses. Moreover, the disparity of women with regard to various personal succession laws are also analysed in this paper. There is a need for unification of such succession laws. The paper analyses the hindrance present in the personal laws which act as an obstacle for women to achieve in this economy. The economic status of women is considered to be the touchstone for the development of the society. Therefore, this paper aims to conceptualize the family business and compares the same in global and Indian perspective.

I Introduction

HISTORICALLY, WOMEN had the unfortunate fate of bearing the brunt of discrimination in all spheres of life. Access to education, employment, property and opportunity to participate in social and political life, on a footing equal to that of men, and for a better life, were denied to them. Even now this continues in some spheres. However, in responsibilities like housekeeping, child bearing/caring and in the upkeep of family’s spirit and ethos, their roles are practically exclusive. Also, advancements in medical science have rampantly been misused for female foeticide.

As distinct from sex, which is a personal biological factor based on nature, the image of gender surpasses mere distinction between women and men and represents socio- economic, cultural and psychological factors that make one category dominant over the other. Gender stands for characteristics of men

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1 Ishwar Bhatt, Law and Social Transformation 515 (Eastern Book Co., Lucknow, 2009).
2 Id. at 621.
and women, which are socially determined rather than biologically identified. It determines the social role, access to opportunities, entitlement to resources for these two categories of persons and builds cultural implications upon them. In practice it generates biases in favour of men and against women in relation to birth, sharing of benefits, enjoying of human rights and following of traditions. Gender justice is conceptualised as an aspect of social justice, which essentially means elimination of institutionalized domination and oppression.

II Women’s legal status in succession laws in India

Before June 17, 1956 the succession of Hindus was regulated by classic Hindu law. The Hindu Succession Act is a codification of the Hindu law of intestate succession and came into operation on June 17, 1956. It introduced key changes to classic Hindu law of intestate succession. The provisions of chapter III of the Indian Succession Act regulates the Hindu law of testamentary succession. Another important aspect of laws in India, is the fact that states may legislate on matters pertaining to succession. As a result, some states have amended the law relating to coparcenary property. However, a discussion of these Acts falls outside the scope of this article.

The Hindu Succession Act, is, to a large extent, a codification of the Hindu law of succession. It makes provision for certain changes to the classic Hindu law of succession, and although it is in essence, a codification of the Mitakshara law of succession, it is uniformly applicable to all the schools of Hindu law in India. It has no links to religion and is based on relationship through blood.

Modifications to the classic Hindu law of intestate succession

Devolution of the coparcenary property

The classic Hindu law allows two modes of devolution, namely survivorship of coparcenary property, and succession of separate property. Only males are entitled to a share in the coparcenary property. Upon the death of the male coparcener, his share in the coparcenary property falls back into the coparcenary and the rest of the surviving coparceners’ shares are adjusted accordingly. The wife or other female heirs of the deceased coparcener have no right to the coparcener’s

4 Supra note 3.
6 K Gill, Hindu Women’s right to property in India 12 (Deep & Deep Publications, New Delhi, 1986).
in the coparcenary property. Section 6 of the Act, before its amendment in 2005, introduced the first major change to the Hindu law of succession by affording a female heir, and the son of a daughter of a deceased Hindu, a share in the coparcenary property. If a coparcener dies leaving a female heir, his share in the coparcenary property will devolve by means of succession, and not survivorship.

A Hindu male can always side-step the effects of section 6 of the Hindu Succession Act, 1956 by bequeathing his share of the coparcenary property to other heirs by means of a will. The continuance of the Mitakshara system of coparcenary in the Hindu law of succession resulted in discriminatory practices against female heirs, to promote equality between the sexes, the right by birth in the Hindu law should be abolished. In 2005, section 6 as discussed above, was replaced by a new section 6, which removed the gender discriminatory provisions in the ‘old’ section 6. In terms of the new provisions, a daughter of a coparcener in a joint Hindu family becomes a coparcener in her own right. She has equal rights and responsibilities in the coparcenary property and is allotted the same share as a son. Although these changes have been applauded by Indian scholars, some are of the opinion that the changes are not comprehensive enough to remove all gender discriminatory provisions in the Hindu law of succession.

Limited women’s estate

The abolition of the limited women’s estate was the second most important inroad into the classic Hindu law of succession. In terms of classic Hindu law, if a female inherited property from a male or stridhana from another female, she receives only a limited woman’s estate, which mean that she was the owner of the property for as long as she lived, with full and exclusive ownership of the property during that time, but her ownership was restricted in all other respects. For instance, she could not sell the property, or give it away, or bequeath it in a will. After her death, the property she inherited from the male devolves upon the heirs of the male she inherited it from, and the stridhana she inherited from the female, devolved upon the heirs of the female she inherited it from. Section 14(1) of the Hindu Succession Act, 1956 abolished the limited women’s estate and converted existing limited women’s estates into full estates. If a female acquires property in any way whatsoever, she becomes the full owner of such property.

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8 Hindu Succession Act, 1956, sch: List of Heirs.
without any limitations. Furthermore, section 14(1) is retroactive and applies to limited women’s estates and property acquired before the commencement of the Act. In such a case, a woman will only become full owner of property that is in her possession. Possession does not refer to actual physical possession. To him it refers to ‘a right to the property or control over the property’. This is also the view taken by the Supreme Court in *Jagannathan Pillai v. Kunjithapadam Pillai*,¹³ where it held that section 14 would come into operation if the female has the right to claim title to the property regardless of whether she is in physical possession.¹⁴ Section 14(1) also applies where a widow acquires her deceased husband’s interest in terms of the women’s right to property. In terms of this Act, the widow of a deceased who was a coparcener takes the same place as her husband. She has the right to claim partition of the joint property, if she so wishes. The Supreme Court held that a woman’s right as a coparcener in the joint property of a Hindu family, is also property in terms of section 14(1) of the Hindu Succession Act. Section 14(2) of the Act provides for an exception. If a female acquires the property by way of gift, under a will or by decree or order of a civil court, and the terms of the gift, will, decree or order prescribe a limited woman’s estate, she will not become full owner of the property. In such a case the classic Hindu law of succession will apply to the property.¹⁵

**Muslim law of succession**

If a Muslim dies without leaving a valid will, their property is divided according to the rules of Muslim intestate succession. A male generally gets a share twice as great as his female counterpart.¹⁶ For example, a brother inherits twice as much as his sister, a husband inherits twice as much as his wife, and so forth. Furthermore, the widow of the deceased can never inherit more than a quarter from the deceased if he died without children, and an eighth, if he died with children. There is no reason why this situation should prevail today. Women have surged forward to occupy equal status with men. They participate in every field of human activity and are equally qualified or competent. Article 14 of the Constitution of India affords women equality before the law and equal protection of the law, and article 15 prohibits the state from discrimination on the ground of sex. The rule of a double share to a Muslim male is discrimination on the ground of sex and is violative of articles 14 and 15 of the Constitution of India. It is the responsibility of the male to maintain his wife and children, and a greater share should be allocated to the male to allow him to fulfil his obligations. Seen this

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¹³ AIR 1987 SC 2251.
way, the rule does not discriminate on the ground of sex alone, but also on other grounds, and is therefore not a violation of the Constitution of India. If a Muslim solemnises or registers his marriage under the Special Marriage Act, he acquires full testamentary capacity and may bequeath his entire estate as he pleases.\textsuperscript{17}

\textit{Muslim personal law Reforms in India}

Attempts by the courts and the legislature to reform Muslim personal law in India have met with resistance. Legislative action is indispensable for the reform of Muslim personal law in order to give due recognition to the rights of women in India. There are three available options, namely the codification of personal laws, the framing of a Uniform Civil Code (UCC) applicable to all citizens, or the framing of an optional UCC. There are Muslim scholars who are ready for change, but the vast majority of them frown upon any change or reform of Muslim personal law. These scholars are of the opinion that Muslim personal law is immutable due to its religious character.

\textbf{Indian Succession Act, 1925}

The Indian Succession Act, 1925 is a secular territorial Act that was originally intended to apply to the whole of India. However, it contained so many exceptions that today it only applies to a limited number of people in India. Apart from Jews, the Act is applicable to Europeans, Anglo-Indians, Armenians, Indian Christians, Parsees and persons marrying under the Special Marriage Act.

The Jewish law of succession in India is codified in terms of the Indian Succession Act, and deviates a large extent from the classic Jewish law of succession. Although, in general, the personal law of a deceased governs the rules of succession in India, the same is not true for Jews. Their law of succession is not governed in terms of their personal law, but in term general secular Act, namely the Indian Succession Act, 1925. In matrimonial matters, they are still governed by their classic Jewish personal law. It is clear from the provisions of the Indian Succession Act that there is no discrimination between male and female beneficiaries. Brothers and sisters, husband and wife, and daughters and sons all inherit equally from a deceased male or female. There is, however, one aspect of the Act that may be seen as discriminatory. The Act favours the father of the deceased when there are no lineal descendants. He only has to share with a surviving wife/husband of the deceased. If there is no surviving wife/husband, he inherits the whole of the estate. On the other hand, the mother of the deceased inherits only if the father of the deceased is predeceased. Furthermore, she has to share with the surviving wife/husband and brothers and sisters of the deceased.\textsuperscript{18}

\textsuperscript{17} The Indian Succession Act 1925, s. 213(2).
\textsuperscript{18} Christa Rautenbach, “Indian succession laws with special reference to the position of
Anomaly and possible reformation for Indian Succession Act, 1925

The widow of the deceased cannot inherit in full unless there is no kindred relation. This is a major step back for women as they are the suffering ones who are in need of the property while the kindred inherit half of the property. It is also pertinent to note that predeceased son’s widow inherits nothing while the child in the womb does. The mother’s share is always associated with the brother/sister of their children. The father always gets preference over the mother. These are the explicit inequalities set out in this act. One of the ‘progressive statutes’, when it comes to personal law, is filled with such disparity as mentioned. The need of invoking UCC amounts to equal laws for all sections of society. All citizens of India must be governed by one set of laws. For national unity and for secularism, UCC is necessary. The plurality of laws in personal law matters is a blow and direct threat to national integrity and solidarity. This can be the only possible reform.

III Conceptualizing family business

A family business/company comprises of two sections, viz. a family and a business. The family and the business are basically separate frameworks, each with its own particular individuals, objectives and qualities that cover in the family. The primary motivation behind a family is to tend to and build up its individuals, while the fundamental reason for a business is to create and disseminate products and additionally benefits. A family’s primary objective is to guarantee that every relative is completely created, and in addition giving equivalent openings and prizes to every individual from the family. The fundamental objective of a business is to survive, produce merchandise or benefits, and wind up gainful. Accordingly, privately-owned companies are a one of a kind business write as they take into account the concurrent concurrence of both family and business connections. Therefore, privately-owned companies are never again being viewed as single frameworks or two separate frameworks, yet rather as two covering, related frameworks. These two frameworks give assets to and make requests on each other, using assets in either framework as a reaction to a need or disturbance inside the contrary framework. Particular intense subject matters identifying with a customary family and authentic issues identifying with the business are additionally displayed by these two frameworks. The fruitful blend and administration of these parts may end up being very troublesome.

Family business in global context

The family businesses are the oldest form of multiparty business enterprise. Generally, family businesses constitute the largest category, in terms of ownership females: a model for South Africa?” 41(1) CILJSA 105 (2008).
of businesses worldwide. In fact, one of the world’s oldest continuously operated family business is the Japanese temple builder Knogo Gumi’s, which began in 578 AD. Since then, the family businesses have succeeded and grown through all commercial development phases. Some of the oldest family business firms running with fifth generation in USA were: Avadis Zildjian (1623) Laird & Co (1780); George Ruhl & Sons (1789); Loane Bros (1815); Bevin Brothers Manufacturing Co. (1832); Antorne’s Restaurant (1840); Verdin Co. (1842); Baumann Safe Co. (1843); AE Schmidt (1850); Hick’s Nurseries (1853). The principals and agents in these businesses were family members only. Whereas, in another type of business, the family has majority stake and the remaining is with others. Some of the businesses were: Wal-Mart; Fiat; Cargill; Ford; News Corp; Hyundai; Nike; Viacom; Virgin; Reliance Industries; Wipro, etc.\textsuperscript{19}

Family business in Indian perspective

Today’s Indian industrialists or business owners began their businesses from the traditional bazaars. Their roots in modern industry are relatively recent, going back largely to the World War I. Before that, they were traders and money lenders engaged in the hustle and bustle of the bazaar. Even in Mumbai and Ahmedabad, where the cotton textile mills came up earlier in the last half of the 19\textsuperscript{th} century. Initially, they were small business which required small investment, letting the families manage the business on their own. Once they entered into manufacturing sector (industry), they felt the need for big investments. However, they were also aware of the fact that if they allow anyone and everyone to invest, then they can lose their control over the management of entire business. To spread the risk, therefore, the families setting up industrial undertaking enlisted the cooperation of other, usually close friends or relatives and allotted to them blocks of share, while making sure that it was trading communities who became industrialist. Aggarwals, and Guptas in the North, the Chettiars in the South, the Parsee, Gujrati, Jains and Banias, Muslim Khojas and Memen’s in the West and Marwaris all over India were the major trading communities in those days.

According to Business Today, family run business account for 25\% of India Inc.’s sales, 32\% of Profits After Tax (PAT), almost 18\% of assets and over thirty seven percent of reserves. It is estimated that ninety five percent of the registered firms in India are family businesses.\textsuperscript{20}

The contribution of family businesses was also high in India in terms

\textsuperscript{19} “Women in family business management – A study of Indian family businesses”, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/105683/8/08_chapter%201.pdf, (last visited on April 12, 2018).

of employment and income generation and wealth creation. Several visionaries had established their business ventures at different places of the country and also abroad. Some of the India’s richest business families were: Azim Premji (Wipro); the Ambanis (Reliance Industries); Sunil Mittal (Bharti); Shiv Nadar (HCL); Dilip Sanghvi (Sun Pharma); Birla KM (Hindalco, Grasim); Rahul Bajaj (Bajaj Auto); Hamied Y K (Cipla); Munjal B (Hero Honda). On October 29, 2007 billionaire Mukesh Ambani became the richest person in the world, surpassing American Software czar Bill Gates, Mexican business tycoon Carlos Slim Helu and famous investment Guru Warren Buffett (Retailer – 2007). It has been a male dominated sector historically, however, the recent times witness more women entering and managing businesses, start, own, operate and manage family owned businesses.²¹

### IV Women in business

Women are becoming progressively vital in the financial advancement of both created and creating economies as they represent critical percent of the administrators of small and medium enterprises (SMEs). Ladies business visionaries make a considerable commitment to national economies through their support in new businesses and their development in little and medium businesses. Their interests and exercises in the monetary development and improvement particularly in the territory of SMEs have gotten exceptional enthusiasm of analysts. Worldwide Entrepreneurship Monitor (GEM) (2005) affirmed that females partake in an extensive variety of entrepreneurial exercises over the thirty-seven GEM and their exercises in various nations have paid off in type of numerous recently settled ventures for occupation and riches creation. This in any case, enterprise is typically observed from the point of view of men driven economy because of its multifaceted nature, especially its sex issues, the part of ladies business people has not been legitimately reported.

### Women in Indian family business context

Across centuries and across time, the role of women remains rooted into eternity. It forever remains the same and at the same time goes through many transitions. It took centuries for women’s role to unfold in different forms, shapes and sizes and move in new directions. Earlier, the business environment was designed in such a way that only men could only set up enterprises. Later on, there were women, who, by compulsion of circumstances took up income generating activities to sustain themselves and their families. The role of women in the Indian society has important implications for women in businesses and, in turn, is shaped by the institutional environment which included various historical, political, economic and cultural factors.

²¹ Supra note 19.
The shifts in policy evidence a trend towards encouraging women to explore their hidden entrepreneurial potential. Education, rising awareness levels are not only making women increasingly conscious of their existence, rights and work situation but also some of them are exploring newer avenues of economic participation and development. Among the reasons betterment, their skill and knowledge, talents and abilities and more importantly a compelling desire and urge to excel are cited from women taking to entrepreneurship.


V Critical analysis

While there are a growing number of contemporary laws which give inheritance rights to daughters when they are recognized as individuals among the communities, the process of marriage and the traditionally patrilineal customs have remained largely unchanged. Thus, there remains a mismatch between marriage practices and inheritance laws, with the strength and biases of the marriage practice often overriding inheritance laws. Levels of education, often products of restrictions on women's interaction with institutions which are primarily composed of men, create a mystique and illusion about legal actions.

The time is ripe to convert the de-jure status of gender equality in property rights, into de-facto status. For the accessibility of these rights at a better level here are some suggestions being put forth-

- Access to family business can reduce household’s risk of poverty

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23 Rica Bhattacharya and Kala Vijayraghavan, “Family Businesses in India see a rise of women as promoters and leaders” The Economic Times, Apr. 22, 2014.


26 Ibid.

• Taking part in the family business are likely to benefit not just women, but also children. Evidences are that women spend, especially in poor households, most of the earnings they control on basic household needs, while men spend a significant part of theirs on personal consumption, such as alcohol and tobacco etc.

• Women with revenue from family business have greater bargaining power, which can lead to more gender-equal allocations of benefits even from male incomes.

• In case of desertion, divorce or widowhood, women without independent resources are highly vulnerable to poverty.

• Empowerment though control over family business can have impact towards decrease of incidents of domestic violence.28

• The common personal law is one solution which can end this disparity in women’s succession to business which is vital for their empowerment. The unification of codified laws have more advantages and hence must be invoked for the betterment of the society and country as a whole.

• The attempt should be made to enact a UCC embodying what is best in all personal laws. It must be the synthesis of the good in our diverse personal laws. It should represent one, drawn up by the constitution between the different communities in India on the principle of give and take.

• The parents should resist from spectacularly spending on the marriage of their daughter rather they should make efforts to give ‘her’ share.

• In recent times, women have taken over business and have shown remarkable success which proves their eligibility to inherit such business.

VI Conclusion

To conclude, the theme of this article not only holds a significance, given the current situation of disparity of women in succession laws, but there is more to it. It is because there are anomalies in each of the codified or uncodified personal law which always puts women in the lower pedestal. The Hindu concept of coparcenary has no equivalent. The testamentary capacity to Muslims is one by third which differs from Hindu, Christians and Parsis. The Muslim women always inherit lesser than their male counterparts. The anomaly in Indian Succession Act is that the widow inherits fully only when kindred is not present. Father gets preference over mother. These divergence in various laws must be met with one UCC which is based on the constitutional principles of gender equality.

28 Supra note 27.
which would supersede the existing personal laws. It is worth mentioning the name of a few countries where a UCC has been functioning successfully *viz.* Germany, France, Spain, Canada, Japan, Turkey, and Portugal. The government of India should take initiatives for enacting a UCC, which should contain the best elements of different civil laws of the various religion communities of the country and thus fulfil its positive obligations imposed upon it by article 44 of the Constitution of India.

Every individual rather should see woman as a person with all the right and not just someone who is defined as a ‘person’ by law. There should be a moral obligation towards them towards inheriting every single entity they deserve, and especially, the family business. Women’s contribution towards family business should not be trifled with. Therefore, it becomes the duty of the State, to not only grant women with sufficient rights but also to get to the ground reality and work at grass-root levels to ensure all the rights that were granted do just and fine. Women have been remarkably leading various companies including the ones that come under Fortune 500, women therefore must be preferred and these businesses should be accessible to them for a better economy. They shouldn't just be seen as burden to whom the marriage expenses and such attached too, instead they should be given rights to business and education for the same for their empowerment. The gender differences are not a hindrance for women to run business. The solution to this deep-rooted patriarchy can be answered by making a UCC which could grant equal rights to both men and women.
AMALGAMATION OF PERSONAL LAWS INTO THE UNIFORM CIVIL CODE IN INDIA

Diksha Sharma
Rohan Bhambri®

Abstract

The issue of implementation of Uniform Civil Code has emerged in India's political discourse recently, mainly because Muslim women, being adversely affected by the personal laws, have begun knocking the doors of the supreme court to uphold their fundamental rights to equality and liberty. In the absence of a uniform code or common personal laws regarding matters such as marriage, succession, adoption, etc., numerous personal laws which derive their authority from different religious texts, rituals or customs are applicable. This paper examines the need for the Uniform Civil Code in association with personal laws that are prevalent in India. The authors present and justify the argument that the enforcement of common personal laws is essential for the harmonious development of India.

I Introduction

THE UNIFORM Civil Code (UCC) in India proposes to replace the personal laws which are based on the scriptures and customs of each major religious community in the country, with a common set of regulations to govern every citizen of the country. The analysis for the enactment of UCC has drawn diverse opinions, both positive and negative, which may be reflected if this code becomes operative. The UCC will not only promote the gender parity but it will also facilitate the national integration by ensuring equality and prevention of discrimination on various grounds, as all citizens, irrespective of the religion practiced by them, shall be governed by a single civil code.1 Presently, various personal laws have diverse provisions which may or may not provide equal treatment to both genders. However, some personal laws have undergone changes to achieve gender equality. For instance, the 2005 Amendment to the Hindu Succession Act, 1956 has been a turning point with section 6 now providing equal rights to a woman to be a coparcener in the family property.2

However, it is practically difficult to emanate a common and uniform

* Students, LL.B., Lloyd Law College, Greater Noida.
2 The Hindu Succession (Amendment) Act, 2005, s. 3.
set of rules for matters like marriage, divorce, succession of property, adoption etc., due to socio-economic and cultural diversity prevalent in India across the religions, sects, castes, states. The concern is that the enforcement of the UCC may adversely affect the secular nature of India.\textsuperscript{3} It has been perceived by numerous communities; particularly the minority communities, that the UCC will fundamentally encroach upon their rights to religious freedom and with the codification of personal laws into uniform rules and their compulsion, the scope of the freedom of religion will be reduced.\textsuperscript{4}

\section*{II Personal laws in India}

The Constitution of India lays down a provision for UCC under article 44 as a directive principle of state policy which states that “the State shall endeavour to secure for the citizens a UCC throughout the territory of India.”

**Hindu personal law**

The Hindu law in India is codified under various statutes, viz. the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoptions and Maintenance Act, 1956 and the Hindu Disposition of Property Act, 1916.

Hinduism was not a religion in the ancient period, but it grew gradually. Historically, the people who lived near river Indus or river Sindhu were called a Hindu. There was no relation of the religion with the term Hindu. A person was called a Hindu on the basis of geographical conditions only. During the medieval period, Islam started to develop in India after Islamic invasions. With the arrival of the European imperialists, Christianity also gained prominence in the country. In this context, the Hindu identity got transformed further into a religious identity. However, Hindu law still lays major importance on *karma*, which means that if a person does anything good or bad in their life, then the rewards for that will be given to them in the next life and not in the present life. This basic notion of *karma* and *dharma* formulated Hindu personal laws.

At a certain point of time, Hinduism became very rigid, its peaceful nature declined due to the development of caste system, whereby the *Brahmins* became more powerful and started exploiting the lower caste/class. This led to the formation of the *varna* system, which caused division in the society according to the castes of the people. A major drawback of this system was that it began


discriminating the lower castes at the highest level. For example, the upper caste/class did not even consume food in the presence of lower class. This evil practice led to many social reformation movements. For example, Guru Nanak Dev Ji started the concept of community kitchen where each individual could consume food without being labelled to belong from a certain caste.6

The onset of the varna system in India also led to the inception of various other evil practices which hindered the growth of the society. Practices such as sari, child marriage, untouchability, etc. started to gain prominence. With the passage of time and changes in the behaviour and mind-set of the Indian society, these traditions and beliefs soon started to fade away and Hindu laws evolved into the above mentioned statutes.

The Hindu Marriage Act, 1955 considers marriage as a sacrament. It is considered as a pious relationship for procreation and continuation of family lineage. Marriage can be solemnized between two individuals, who belong to any of the religion which fall within the category of Hindu, are covered under this Act.7 A Hindu marriage shall be recognised if the parties are competent to such a marriage in the sense of soundness of mind, relevant age of the parties, sapinda relationship as well as the prohibited degrees of relationship and bigamy.8 These restrictions and formalities have been retained which are expedient for the solemnisation of a valid Hindu marriage under this Act. Conversely, the non-compliance of any of these grounds may result in the nullity of marriage in form of voidable or void marriage.

The grounds for divorce under the Hindu laws are governed by Hindu Marriage Act, 1955. It comprises of such grounds which can be pleaded by either of the parties. Divorce can be demanded because of any mental or physical injury, recognised as cruelty, or if any of the spouse is suffering from temporary or permanent form of leprosy, mental disorder or any venereal disease,9 if any of the parties has either renounced the world or there is no knowledge of such a person being alive or such person has converted into any other religion, then it will constitute to the valid ground for seeking divorce.10 Moreover, adultery includes a single act of sexual intercourse by either spouse while the marriage subsists, desertion, which is also referred to as wilful neglect of a person by his/

6 Supra note 5 at 16.
8 The Hindu Marriage Act, 1955, s. 5.
10 Supra note 8 at s. 13.
Further, an additional ground has been added to the provisions of divorce which is termed as ‘irretrievable breakdown of marriage’. This includes the dissolution of marriage where the couple fails to co-habit or where there is no restitution of conjugal rights. The supplementary was made due to the increase in the number of cases related to such issues.12

Adoption under Hinduism is recognized under the Hindu Adoption and Maintenance Act, 1956. Adoption refers to the transplantation of the adopted child from one family in which he is born to another family in which he is adopted. On adoption, ties of the child with his old family are severed and he is taken being born in the new family, acquiring rights, duties and status in the new family.13

The Hindu Succession Act, 1956 lays down the general rules as to the order of succession when a Hindu male dies intestate. These rules incorporated devolution of the property of the male dying intestate. The preferential rights were given to the relatives under the class I category while the persons under class II category succeeded the property in the event of absence of class I heirs. The view of agnates over cognates was applicable when class I and class II heirs are significantly missing. Females earlier were not eligible to be a part of the coparcenary and inherit the property of the intestate, but after the amendment made in 2005, females were granted the right to be a part of the coparcenary and the intestate succession.14

Hinduism and the UCC

Scrutiny of the prevailing statutes under the Hindu laws makes it evident that even though speedy amendments in the Hindu laws are being made the implementation of the UCC is practical as it will ensure that all the exploiting provisions which depict gender inequalities and preferential status given to significant classes in the society are eliminated. Discrimination in any form will also diminish. The formulation of the UCC would safeguard the interests of the minority within the religion of Hinduism as separate personal laws of different groups, sects or sub-sects of Hinduism would be disregarded and unified personal laws would be recognized.

11 The Marriage Laws (Amendment) Act, 1976, s. 7.
13 The Hindu Adoptions and Maintenance Act, 1956, s. 12.
Christian personal laws

Christian laws in India are elaborated under the legislations such as the Indian Christian Marriage Act, 1872, The Indian Divorce Act, 1869, the Marriage Dissolution Act, 1936, the Juvenile Justice (care and protection of children) Act, 2006 and the Indian Succession Act, 1925. The expression ‘Christians’ under the Christian personal law means persons professing the Christian religion and ‘Indian Christians’ include the Christian descendants of natives of India. This expression also includes the persons who have been converted to Christianity.15

Succession under the Christian personal laws in India is administered through the Indian Succession Act, 1925. As per this statute, only those relationships that arise from a lawful marriage are considered for the succession of a property. Property of the intestate is apportioned amongst his widow and his children, with due consideration to the testament or will of the male intestate.16

Corresponding to the Christian marriage laws, every marriage must be conducted and solemnized between the hours of six in the morning and seven in the evening. Marriages should be sanctified by a minister of religion/priest in the territories of a church only. Before a marriage is solemnized, its intention has to be notified to the minister/priest, who is licensed to perform a marriage by stating the names, profession, condition and other requisite information of both the parties.17 Such marriages are void on the grounds of unsoundness of mind of either of the parties, absence of credible witnesses, etc.

The right of adoption for Christians in India has been judicially recognised, but it has to be pleaded and proved on the facts of each case. In the absence of customary adoption laws under the Christian personal laws, the provisions of the Juvenile Justice (Care and Protection of Children) Act 2006 are applied. The adopted children will not be treated in law as children and upon the death of the foster parents; their estate would be distributed among the legal heirs of the intestate, as adopted children are given no rights in succession.

Christianity and the UCC

In the event of the implementation of the UCC in India, the people governed by the personal laws of Christianity will also be governed by a single civil code without being victimised by their own personal laws. For instance, according to the customary laws of Christianity, couples are under an obligation to serve the period of two years as the period of separation and shall have to live separately for such period before they are adjudged eligible to seek divorce. Conversely, in

15 The Indian Christian Marriage Act, 1872, Statements of Objects and Reasons.
16 The Indian Succession Act, 1925, s. 33.
17 Supra note 15 at s. 12.
the cases of other religions, couples shall have to serve only a period of one year so as to be called as judicially separated before becoming suitable to apply for divorce. A UCC would preserve the interests of the Christians by eradicating such distinguishing provisions and maintaining uniformity among all the religions.

**Muslim personal law**

The religion of Islam is well equipped with the set of personal laws which regulates the people practicing this religion. The Muslim laws encompasses certain personal laws, namely, the Muslim Women (protection of rights on divorce) Act, 1986, the Dissolution of Muslim Marriages Act, 1939, The Muslim personal law (shariat) Application Act, 1937, The Mussalman Wākīf Act, 1923. A person is said to a Muslim if he practices the religion of Islam and is considered to be a Muslim, the person must believe in Allah as his Lord, believe in Muhammad as the messenger of Allah and accept the Quran as the holy book of Allah.

Succession under Muslim customary laws are constituted through some elements of The Holy Quran. Muslim law recognizes two types of heirs; sharers and residuaries. Sharers are the ones who are eligible for the share in the property of the deceased, whereas, residuaries are those who take such a part in the property that is remaining after the sharers have taken their part. The property of the deceased is devolved amongst his widow and children with respect to the testamentary document of such an intestate. The daughters are not eligible to be the sharers in the property, instead they become residuaries.\(^{18}\)

Adoption under Muslim law was not recognised and those who desired to adopt a child can only take the guardianship of such a child under The Guardian and Wards Act, 1890. But, in a landmark judgment, the Supreme Court ruled that any person can adopt a child under the Juvenile Justice (Care and Protection of Children) Act 2000 irrespective of that person’s religion. In case of a conflict between the personal laws and this Act, the Act will prevail.\(^{19}\)

Marriage/nilai in Islam is not a sacrament like in Hinduism, but it is a civil contract between a man and woman to live as husband and wife. Before the ceremonies of marriage takes place, the wife is entitled to dower or mahr by the husband as a mark of respect. It is the fixed sum of money or property which is decided beforehand between the parties.\(^{20}\) The husband is duty-bound to provide for the maintenance of the wife in the form of such things as may be needed to support life, provided the wife is not a minor incapable of consummation,

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18 **Supra** note 16 at s. 33.
is faithful, lives with her husband and obeys his reasonable orders, even if the wife is proficient enough to support herself and the husband is not. A marriage is suspended in consequence of the parties being either within the degrees of prohibited relation, or the parties to the contract have not completed the age of majority or such age as may be prescribed by the Muslim laws or the consent of the parties is not free.

Divorce in Islamic laws is based on the Dissolution of Muslim Marriage Act, 1939, where a Muslim woman can seek for divorce when the whereabouts of her husband are unknown or where the husband is incapable to provide for such maintenance as mentioned under the contract of marriage or the wife is the victim of cruelty by her husband or such other condition that has been prescribed by the Muslim laws.21

Islam and the UCC

The enforcement of the UCC would benefit Muslim women the most by eliminating discrimination and rigid practices of triple *talaq*, polygamy, *nikah halala*, etc. Triple *talaq* is a tradition where a Muslim husband is allowed to divorce his wife by uttering or writing the word *talaq* three times to his wife. Whereas the Islamic practice of polygamy permits a Muslim male to be married to four wives at a time. According to *nikah halala*, a woman who has been divorced through triple *talaq* has to marry another man and consummate her marriage with him before being eligible to remarry her ex-husband. The UCC will ensure standardisation in such provisions of personal laws and widespread gender discrimination could be curbed with the onset of the UCC.

III Goa Civil Code

The civil law in Goa which has been descended from the Portuguese Civil Procedure Code, 1939, has proved to be worthwhile since it has constructed Goa to be the first and only place in India to formulate a structured and UCC for itself. After its liberation in 1961, the coastal region scrapped all the colonial laws but continued with its practice to treat all the communities alike, with respect to family laws, even after it was considered as a part of Union of India. It has created a standard civil code, regardless of religion, gender, caste which binds all its citizens with the same law related to marriage, divorce, succession, adoption, maintenance etc.22 Marriage in Goa is a contract between two people irrespective of their religion, caste, race etc., with the purpose of living together, which constitutes a legitimate family, and is required to be registered before the office of civil registrar. Certain rules and regulation are compulsorily to be followed by the

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21 The Dissolution of Muslim Marriage Act, 1939, s. 2.
parties after which they can live together. Moreover, there are specific restrictions which are imposed on these persons and prohibit them to perform marriage, that is, any spouse convicted of committing or abetting the murder of other spouse.

Therefore, it can be seen that India has a number of personal laws with diverse and at times, discriminatory provisions, and it is essential for the government to conduct a comparative and comprehensive study to review such obsolete legislations which have necessitated the requirement of a UCC in the country.

IV Secularism and UCC

When there is separation of functioning of State with all the aspects of religion, then the foundation of secularism takes place. In other words, secularism means substantial independence from the State in the affairs of the religion and vice versa. Secularism seeks to ensure and protect freedom of religious belief and practices for all citizens. It does not curtail the rights of any individual to practice any religion to the extent that the right to manifest religious belief impacts the rights and freedoms of others. Since State does not promote or practice any particular religion, in a secular democracy, all citizens are equal before the law. No religious or political affiliation gives advantages or disadvantages and all citizens enjoy equal rights and obligations in the country.23

Thus, secularism simply provides a framework for a democratic society, and it does not seek to challenge the ideologies of any religion or belief, neither does it seek to impose atheism on anyone. An UCC should be imposed in India so that an atmosphere is created, within which all sections of society would feel secure and a harmony exists among them. UCC is not opposed to secularism and articles 25 - 26. Article 44 basically states that the religion, their customs and their personal laws can be prevailed. It must be comprehended that the purpose of UCC is not to interfere with the customs and their tradition rather its main objective is equality that should be bestowed upon each and every citizen of India.24

V Judicial decisions on UCC

The judicial system of India has passed various judgements pertaining to the UCC. The judgment delivered by the judiciary in these cases upheld gender

equality among other forms of justice. In the case of *Mohammad Ahmed Khan v. Shah Bano Begum*, the Supreme Court upheld the right of alimony of the woman from her divorced husband. In the case of *Sarla Mudgal v. Union of India*, the apex court directed the central government to implement article 44 and to secure a UCC for its citizens. In the case of *Pragati Verghese v. Cyrill George Verghese*, the High Court of Calcutta struck down section 10 of the Indian Divorce Act, 1869, as being violative of gender equality. The recent judgement of the supreme court in the case of *Shayara Bano v. Union of India* abolished the practice of triple *talaq*.

**VI Conclusion**

The idea of an UCC for India is regarded as eminently encouraging as it will give the idea of national unity and integrity and will also argue the motto of ‘one citizen one law’. However, the concern remains as we live in a democratic country, where people from different backgrounds and faiths reside, and they have their respective personal laws and integration of all these laws needs a reasoned and sensitive approach. It is widely opposed by many patriarchal orthodox community members/groups, who consider reforms to their personal laws would dilute the power of religion over its followers. The concern is that the imposition of UCC in India might violate the fundamental rights of all citizens, which needs addressing.

The underlying principle should be that constitutional principles must override religious sentiments in the interest of the secular republic. Therefore, for safeguarding the interests of all the citizens of our country, the State may introduce an UCC. It is inappropriate to consider that right to religion and right to worship conferred by the Constitution of India and personal laws in relation to succession, inheritance, marriage, divorce, adoption *etc.* are similar because the personal laws are derived as per the customs and norms of every religion. Enforcing a UCC for these diverse personal laws will not infringe one’s right to religion, but it shall only seek to dissipate such practices that are being carried out in the name of religion. Its main objective would be to deliver equality amongst all citizens by administrating them through common personal laws.

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25 (1985) 2 SCC 556.
26 AIR 1995 SC 1531.
27 AIR 1997 Bom 349.
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