

Need for Uniform Civil Code in India: A human rights perspective

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The debate surrounding personal religious law and the need for a uniform civil code constitutes a key concern in the concept of secularism and religious freedom in India. Though the substantive laws of crime, commerce, economy etc are now governed by secular law based on the principles of 'justice, equity and good conscience', personal religious laws continue to operate in the private domain of citizens. Certain personal laws, especially of the Hindus, have been codified (i.e. incorporated into statutes) accompanied by certain amendments in light of the compulsions of modern times, while others continue to apply to the respective religious groups in their long-established, traditional forms. The British colonial government, fearing antagonism, thought it fit to not interfere in the 'religious' matters of the 'natives' and thus customary personal law remained untouched. They did, however, bring about certain enactments in the name of 'reform' to bring an end to certain reprehensible practices like *sati*. Successive Indian governments have tended to follow the footsteps of colonial rulers so that in the present day, India has a complex system of personal laws governing inter-personal relationships despite a Constitutional directive to the Legislature to enact a uniform civil code applicable to all religious groups which should govern all family relationships such as marriage and divorce, maintenance, custody of children, guardianship of children, inheritance and succession, adoption and the like. This Constitutional directive has not been acted upon in more than six decades since independence due to lack of political arising from the fear of offending electoral vote bank groups and backlash from religious communities. The prevalence of personal laws in the country has had far-reaching ramifications in terms of its implications on the human rights discourse.

I. Personal laws and status of women

The most significant manner in which personal laws in civil matters affect the rights discourse is by delineating rights for women belonging to their respective religious communities. The 'family' remains one of the most contested sites of women's rights. One of biggest criticism working against personal laws is that these antiquated provisions are discriminatory towards women and seek to undermine their position within the private domain. Personal religious laws need to be tested for their conformity with principles of egalitarianism that are the touchstones of our Constitution as well as international declarations/agreements to which India is a party.

There are five broad sets of family laws in India based on the religions professed by its different communities. Hindu law governs all Hindus, as also Buddhists, Jains and Sikhs. Muslim law applies to Muslims, Christian law governs Christians, Parsee law applies to the Parsees. Jews have their own personal law. Many provisions of the various Indian personal laws are notorious for being discriminatory towards women. A brief description of how women's rights are undermined under various personal laws follows:

Marriage: The right of all men and women of certain to marry through free consent and with complete freedom in the choice of a spouse is recognized internationally. However, Indian personal laws are

found wanting in this aspect. **Muslim** law, for instance, appears to recognize the right of a guardian to contract his minor ward into marriage. There is a remedy in the form of 'option of puberty' (right to repudiate marriage on attaining puberty) but it is restricted for as far as women are concerned. Under **Hindu law** (Hindu Marriage Act, 1955) too, it is not the mere absence of consent but the obtaining of consent by *fraud* or *force* or vitiation of consent by proved unsoundness of mind that renders the marriage void. Fortunately, Special Marriage Act, 1954, possibly the most progressive piece of Indian legislation enacted under family law, overcomes the bar or strict restrictions on inter-religious marriages under personal law. **Polygamy** is a contentious issue in today's world where monogamy, fidelity and family welfare are the norm. This institution used to prevail in Hindu society previously but modern legislation (The Hindu Marriage Act, 1956) prohibits bigamy (covering both polygamy and polyandry) the Penal Code makes it an offence. Muslim personal law, however, recognizes and permits the institution of polygamy. Many scholars believe that under Indian circumstances, polygamy is largely an anachronism from patriarchal times and that very few Indian Muslims practice it. This view may be correct to some extent but ignores that such a practice that is the prerogative of a select few creates fissures and religious tensions in society. There have been many instances in the past of abuse of this practice as permitted under Islam. Often, non-Muslims convert to Islam in order to marry more than once and while Courts examine the intention behind such conversions to decide on the question of validity of second marriages, such a phenomenon generates strife and also affects rights of the parties involved.

Divorce: Traditional **Hindu** law did not recognize the concept of divorce but modern law provides for it under the Hindu Marriage Act, 1956, which largely provided for fault-grounds which either spouse could avail in order to obtain a divorce.

The most remarkable, and most discriminatory, feature of **Islamic** law of divorce is the recognition of the concept of unilateral divorce, wherein the husband can divorce his wife unilaterally, without any cause, without assigning any reason, even in a jest or in a state of intoxication, and without recourse to the court and even in the absence of the wife, by simply pronouncing the formula of repudiation. Muslim law also entitles the woman to ask for a divorce under certain restricted circumstances. Modern law (The Dissolution of Muslim Marriages Act, 1939) allows a wife to obtain a divorce through the intervention of a judge, before whom she must establish one of a limited number of acceptable bases for divorce. The fact that on a moral plane, divorce is reprehensible in Islam and has been denounced by Prophet does not provide relief to women as unilateral divorce continues to be an accepted practice in many countries including India.

Maintenance: Under Indian law, the right to maintenance is civil in nature but it is also placed under the criminal code and can be pursued therein.

Under **Hindu law**, a wife has a right to be maintained during her lifetime as per the provisions of the Hindu Adoptions and Maintenance Act, 1956. In what can be called an attempt to reinforce the conservative idea of a Hindu wife, an "unchaste" wife is not entitled to separate residence and maintenance. As far as **Muslim law** is concerned, many interpretations of the shari'a do not grant divorced women a right to maintenance from their former husband's beyond the three-month waiting period following the divorce, called the *iddat* period. In India, the Dissolution of Muslim Marriages Act,

1939 denies divorced Muslim women the right to claim maintenance. In the famous *Shah Bano* judgment, the judiciary attempted to get rid of this anomaly by explicitly bringing such Muslim women under the purview of the secular Code of Criminal Procedure, 1973 (wherein a wife is entitled to claim maintenance against the husband on the ground of the husband's neglect or refusal to maintain her). *Shah Bano* case was a classic conflict situation between the secular criminal code and religious personal law. In this case, an old Muslim woman had been divorced by her husband who invoked the Muslim personal law to deny maintenance to his wife. The Supreme Court, however, applied and interpreted the secular law, the Criminal Procedure Code, to grant maintenance. Though the judiciary is to be commended for giving a humane and holistic meaning while applying the relevant provisions, the judgment is often criticized for entering into a discourse of the *Quran*, taking pains to explain that the secular law was not in conflict with the *Quran* and in the process, sidelining the constitutional question of examining the personal law of husband on the anvil of equality and deciding the dispute as an *equality* issue. The deliberate use of *Quran* and the endeavors to interpret it in a particular manner evoked the wrath of the Muslim conservatives, who stressed community fears of the loss of freedom of religious practice. Finally, the Government, yielded to pressure from the orthodox members of the Muslim community and, without any consultation, passed the Muslim Women's (Protection of Rights in Divorce) Act, 1986, in spite of protest from progressive Muslims and feminists. This Act ostensible protects women but in reality protects the husband by not requiring him to pay maintenance. It is highly discriminatory towards Muslim women in that they are now precluded from the purview of S.125 of the Criminal Procedure Code which had originally protected Shah Bano. Specific requirements of the new Act also make it much more likely that a Muslim woman will be required to conduct a court case in order to obtain any maintenance at all. Thus, although the Act nowhere stipulates this, the rights available to the Muslim women at the time of enactment of this Act were abrogated. By indulging in votebank politics, the government of the day hastily drafted this piece of legislation so as to confirm to the conservative and traditional view of the Muslim law governing 'maintenance' of divorced women.^[1]

Inheritance: Under the **Hindu law**, the *Mitakshara* branch of law that primarily governs succession amongst Hindus in the country denied to a Hindu daughter a right by birth in the joint family estate and this flowed logically from the fact that her place in the paternal family was only temporary as she was belonged to her husband's family on marriage. Modern day amendments to Hindu law of succession gave Hindu widows the right of succession her husband's estate. Till recently, Hindu law was still discriminatory in that the Hindu Succession Act, 1956 excluded the daughter from coparcenary ownership of ancestral property. In 2005 the Parliament, by an amendment, took a radical but much-awaited step towards ensuring equality between Hindu men and women as far as succession is concerned, and conferred upon daughters the status of coparceners in the family of their birth, thereby bringing an end to the centuries-old rules of Hindu inheritance that have lost their relevance and justifications. Though the full extent of implications of this amendment are yet to be observed, it is nonetheless a commendable and desired step in the effort to check in-built biases against women in personal laws of this country. More importantly, this radical amendment was brought by the Parliament without facing any resistance or impediment on the part of the Hindu community.

Islamic law prescribes, in almost all instances, that a man's share of the inheritance is double that of a woman in the same degree of relationship to the deceased. This aspect of Islamic rules is most vehemently criticized for its discrimination against women, as it is a manifest sample of unequal treatment.

Guardianship and Adoption: A mother has been assigned a statutorily subservient position in the matter of guardianship and custody of her children. The father is designated the first natural and legal guardian of his minor; the mother is the natural guardian only *after* the father. Under Muslim law, the father is the sole guardian of the person and property of his minor child. Adoption is a salient feature of Hinduism, more so because the concept is alien to Christian, Muslim and Parsi law unless custom and usage among the above sects permit it. The Hindu Adoptions and Maintenance Act, 1956 statutorily recognizes adoption and is applicable to Hindus. The Act brought about significant changes to the law of adoption amongst Hindus and has improved the position of women in this regard. However, despite these changes, adoption is another area in family relations where a female suffers discrimination based purely on her marital status. As with other aspects of Hindu personal law, amendments have recently been proposed so as to give women the same rights as men to guardianship and adoption of children irrespective of marital status.

II. India's commitment to Human Rights: Constitutional guarantees and International human rights covenants

There is a compelling need to study the personal religious laws from a human rights perspective. India has time and again pledged its commitment to upholding the normative regime of human rights, be it in the provisions of the Constitution or the terms of the various international covenants and treaties. Principles of equality, non-discrimination and fairness which form an essential part of the human rights discourse are the subject matter of the debate regarding personal laws of India. These principles are enshrined in the Preamble to the Constitution, Fundamental Right and the Directive Principles. Gender equality is a facet of equality and it is one of the basic principles of the Constitution. Moreover, the doctrine of equality as enshrined in Article 14 of the Constitution of India is not merely formal equality before the law but embodies the concept of *real* and *substantive* equality which strikes at all the inequalities arising on account of vast historical, socio-economic and customary differentiation. Thus, we see that Article 15(3) of the Constitution empowers the State to make special provisions for protection of women and children. Article 25(2) mandate that social reform and welfare can be provided irrespective of the right to freedom of religion. Article 44 which directs the state to secure for its citizens a Uniform Civil Code throughout the territory of India is the cornerstone for women's equality in the country and must be urgently implemented so as to eliminate antiquated discriminatory norms of religious laws.

The **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** is a unique international convention in that it was based on the need for special formulation that would assert, protect and promote women's human rights. The Convention expressly states that discrimination against women is socially and culturally constructed and encompasses public and private spheres, thereby bringing within its fold the domain of the family. An important feature of the CEDAW has been to fix responsibility upon the state for actions of private actors, particularly when such actions

constitute a systematic pattern of violations within the community. This is because gender-discrimination has socio-cultural underpinnings and is practiced by private actors. The State's reluctance to intervene in such patterns of discrimination would amount to a condonation of the violations. The CEDAW has contributed significantly in setting new normative standards for human rights law and practice but it is regrettable that CEDAW has the distinction of being the most reserved human rights convention today, i.e. state parties have modified or waived obligations in relation to certain parts of the treaty by means of reservation clauses.

India too has ratified CEDAW with a declaration to limit its obligations relating to changing the discriminatory cultural practices within the community and the family. Hence, with regard to articles 5(a)^[2] and 16(1)^[3] of the Convention, the India declares that "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent". India's reservation is an *unqualified* exemption from state interference into customary practices and it also fails to specify a time frame. This reservation can only be construed as being inconsistent with the objectives and purpose of the Convention and an indication of the utter lack of political will on part of the Indian state, even in face of international duties and obligations, to bring about an egalitarian, uniform civil law in the country.

III. Personal Law, Human Rights and Supreme Court

A major feminist critique of the current human rights discourse is that anti-discrimination measures cannot concern themselves only with conduct of public officials, that is to say, with relations between individuals and government. Discrimination in the 'private' sphere of home, workplace and school must also be addressed, given the power vested in the institutions of family and the community to arbitrate the women's rights and freedoms. The apex court of the country has often fallen prey to this false public-private dichotomy by failing to intervene in the personal laws governing *privatedomain* in order to check discriminatory practices therein, probably regarding the need for changes in family matters etc. as 'social' and 'developmental' issues. Most interventions have been piecemeal. In the instances where the court has been sympathetic towards the aggrieved party, it has circumvented the need to declare the relevant sections personal law as unconstitutional by reading and interpreting the impugned provision in such a manner that somehow or the other, relief could be provided to the party who has suffered.

On the contrary, the Supreme Court has done a commendable job in addressing discrimination in the public domain and has taken cue from the international covenants for this purpose. For instance, it has laid down a number of guidelines amounting to judicial legislation in the field of sexual harassment at work place. However, personal laws have often been kept beyond the reach of fundamental rights by shifting the burden of sanitizing the discrimination in personal laws to the Parliament. Surprisingly, Supreme Court has not hesitated in giving full effect of certain *other* Directive Principles of State Place, such as the right to education, and elevating them to the status of a Fundamental Right. A similar approach has not been forthcoming on the Constitutional directive to bring about a uniform civil code, though the courts have time and again exhorted the government of the day to take necessary steps in this direction. As recently as February, 2011, the Supreme Court, while discussing lack of uniformity in marriageable age and age of consent, pulled up the government

for its failure to overhaul personal laws of the minority communities, saying that it was a reflection on their secular credentials. Notably, the Court also observed that the government's attempts to reform personal laws had not gone beyond Hindus who have been more tolerant of such initiatives. Perhaps the *Shah Bano* episode served as a landmark in the policy of judicial intervention in personal laws. The backlash of the community was not as unfortunate as the complete disregard by the then government of Constitutional directives, egalitarian values and notion of justice.

IV. Conclusion

Not much progress has been made towards achieving the ideal of a uniform civil code which still remains a distant dream. The only tangible step taken in this direction has been the codification and secularization of Hindu law. The codification of Muslim law still remains a sensitive matter. The unique feature of Islam is that the historical foundations of Islamic religious law, i.e. shari'a, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of shari'a to regulate the behaviour of Muslim derives from its moral and religious authority as well as the formal enforcement of its legal norms. Many authors hold the view that the nature of shari'a reflects *specific* historical interpretations of the scriptural imperatives of Islam. However, to an overwhelming majority of Muslims today, shari'a is the sole valid interpretation of Islam, and as such *ought* to prevail over any human law or policy. This becomes extremely problematic because shari'a conflicts with international human rights standards in that it discriminated against women and non-Muslims. The divinity of shari'a insulates it from challenge by an average Muslim and prevents a successful criticism from the human rights perspective from taking place. What needs to be remembered, however, is that India is a secular country where the Constitutional philosophy reigns supreme. Personal laws, howsoever sacred, should not be allowed to encroach upon the inviolable collective values of the nation. India is not an Islamic country and in fact, has a secular code for criminal law. If the Muslim community has accepted a non-shari'a code in one sphere, then logically, it should be amenable to such a code in other spheres as well.

It is necessary that law be divorced from religion. With the enactment of a uniform code, secularism will be strengthened; much of the present day separation and divisiveness between various religious groups in the country will disappear, and India will emerge as a much more cohesive and integrated nation.