

Secularism vis-a-vis uniform civil code with reference to triple talaq

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India is a country of people from diverse religions and backgrounds. As there are many religions, so there are number of personal laws too, that govern the people of different religions. Every religion has its own personal law relating to marriage, divorce, maintenance and succession. There is no uniform civil code in India.

One of the undesirable practices prevailing in our society is divorce. Supreme Court of India recently remarked that the practice of triple talaq (divorce) is the “worst” and “not desirable” form of dissolution of marriage among Muslims under Islamic law.¹ But sometimes, due to existence of some physical and mental defects or according to the condition stipulated in separate binding contract, one of the parties has given the right to the other party to dissolve the marriage. The women have fewer rights than the men under the personal laws.² The personal laws give rise to many taboos; for instance patriarchy, early marriage, dowry, domestic violence etc. The society has plonked verdicts on the women. The women not only feel inferior but also helpless. Though the government has made efforts to lift the status of women via implementing civil code, yet there is need to change the thinking pattern of people to give sense of credence to women about their potential.

Divorce under Islamic Law

Islamic law provides four kinds of dissolution of marriage, which are at the initiation of husband, or the wife, or by mutual agreement, or by judicial process. Under Muslim law in general and the Hanafi law in particular, divorce at the instance of husband is prominent and rather simple. One such type is Talaq-ul-Biddat, popularly referred to as Triple Talaq.

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1. Sidharth Pandey, *Triple Talaq is 'Worst, Undesirable' way to end Marriage*, NDTV (Jul. 6, 2017, 10:04 AM), <http://www.ndtv.com/india-news/triple-talaq-is-worst-undesirable-way-to-end-marriage-supreme-court-1692703>

2. Archana Parashar, *Gender Inequality and Religious Personal Laws in India*, *BJWA*, Spring/Summer 2008, at 103, 105.

Talaq-ul-Biddat (Triple Talaq)

It is a disapproved and sinful form of Talaq.³ It was introduced by Ommeyyads in order to escape the strictness of law. To be a valid Triple Talaq, it must satisfy the following conditions:

- (1) Three pronouncements may be made during a single tuhr in sentence form (e.g. “I divorce thee thrice”). or in three sentences (e.g. I divorce thee, I divorce thee, I divorce thee.).
- (2) A single pronouncement made during a tuhr clearly indicating an intention to dissolve marriage irrevocably (e.g. “I divorce thee irrevocably”).).

Talaq-ul-Biddat becomes irrevocable when it is pronounced irrespective of the period of iddat. Thus once pronounced, it cannot be revoked.

In *Saiyyad Rashid Ahmad vs Anisa Khatoon*,⁴ one Ghayas Uddin pronounced triple Talaq in the presence of witnesses though in the absence of the wife. Four days later a Talaqnama was executed which stated that three divorces were given. However, husband and wife still lived together and had children. While the husband treated her like a wife, it was held that since there was no proof of remarriage, the relationship was illicit apart from it also conforms the validity of the outcomes. It has been said that this type of Talaq is theologically improper.

In *Fazlur Rahman vs Aisha*,⁵ it was held that Quran verses have been interpreted differently by different schools. Thus, it is legally valid for Sunnis but not for Shias.

Triple Talaq: A Clash between Rights and Traditions

Triple Talaq is a recognised but a disapproved form of divorce. It is considered as an innovation within the fold of Shariat by the Islamic jurists. It commands neither the sanction of Holy Quran nor the approval of the holy Prophet.⁶ At the present time, much inconvenience is being felt by the Muslim Community, so far as this law of 'triple talaq' is applied in India.

3. *Fazlur Rahman vs Musammat Ayasha And Ors.* (1929) 115 Ind Cas 546 (India).

4. *Saiyyad Rashid Ahmad v. Anisa Khatoon*, (1932) 34 BOMLR 475 (India).

5. *Fazlur Rahman v. Aisha*, (1929) 115 Ind Cas 546 (India).

6. *Parul Chaudhary, Gender Inequality in Hindu and Muslim Personal Laws in India, IJHS, Apr. 2015, at 34, 35.*

Triple Talaq Infringes the Rights of Muslim Women

1) Against the progressive spirit of Quran

Holy Quran, the paramount source of Islamic jurisprudence has not ordained that three divorces pronounced in single breath would have the effect of three separate divorces.⁷ Instead Quran provides that in case of conflict between husband and wife, it should be referred to arbitration and the result of failing of peaceful settlement, divorce is permitted but subject to observation of the period of iddat which keeps open the possibility of reconciliation between both.

This idea is expressed in **Chapter II Verse 229** of Quran

“Either retain them with humanity or dismiss them with kindness”⁸.

In *Dagdu Chottu Pathan v. Rahimbi Dagdu Pathan*,⁹ a full bench of Bombay High Court took the view that a Muslim can give talaq but subject to certain conditions:

- a) On a reasonable ground
- b) Has to follow the provision of arbitration or reconciliation

In *A. Yusuf Rawther vs. Sowramma*, V.R. Krishna Iyer, J. (as His Lordship then was), observed that:

*“It is a popular fallacy that Muslim men enjoy unbridled authority to liquidate their marriage under Quranic law and the view that Muslim men enjoy an arbitrary unilateral power to inflict instant divorce does not accord with Islamic injunctions. It was also observed in this case that commentators on the Holy Quran have rightly observed that the husband must satisfy the Court about the reasons for divorce, which view tallied with the law administered even at that time (almost five decades ago) in some Muslim countries like Iraq. Although Muslim law as applied in India has taken a course contrary to the spirit of what the Prophet or the Holy Quran propounds and the same misconception also vitiates the law dealing with a wife's right to divorce.”*¹¹

7. Frances Raday, *Traditionalist Religious and Cultural Challengers- International and Constitutional Human Rights Responses*, ILF, Mar. 2009, at 595, 601.

8. S.N. Balasundaram, *The Conflict Between Tradition and Modernity – the Desire for a Common Civil Code in India*, DJRP, Mar. 1986, at 236, 242.

9. *Dagdu Chottu Pathan v. Rahimbi Dagdu Pathan*, (2003) 1 BomCR 740 (India).

10. *A. Yusuf Rawther v. Sowramma*, JT 2010(10) SC 202 (India).

11. *A G Noorani, Uniform Civil Code vs. Triple Talaq*, T.I. EXPRESS, December 15, 2016, at 13.

2) Ultra Vires the Constitution

The practice of Triple Talaq gives a unilateral and absolute right to Muslim men to give irrevocable talaq even without the consent of their wives. This practice is highly discriminatory in nature because it deprives the Muslim women of their protection, economic security and marital status within a matter of seconds. This practice not only disturbs the social fabric of the society by making the institution of marriage extremely fragile but also diminishes the status of women in the society by taking away their right to equality and right to live a dignified life. Strangely, the wife would have to go to Darul Qaza and prove the atrocities committed by her husband in order to get a divorce while the husband can pronounce talaq as and when he wishes even without any reasonable cause. Thus, it is evident that in such situations the wife is under the constant fear of being divorced which compel her to accede to all the demands of her husband.

In *Praveen Akhtar vs. Union of India*,¹² the Madras High Court observed that:

“The inequality and arbitrariness of the provision of Triple Talaq clearly reflects in the fact that the woman was not even told directly by the husband about the talaq but was informed by her father”.

Therefore, this practice of triple talaq is a clear violation of the fundamental rights of the Muslim Women as enshrined under Article 14, Article 15 and Article 21 of the Indian Constitution. As reference to the practice of religion, the courts have ruled in many cases that only those practices of whichever religion, as are its essential parts must be legally protected. In other words, protection of non-essential religious practices would be the discretion of the state and can't be claimed to be protected on the name of fundamental rights.¹³

3) Triple Talaq violates CEDAW to which India is signatory

India has ratified many International Conventions and human right treaties and have committed to securing equal rights and protection of women in all spheres of life. One of such convention is Convention on Elimination of All Forms of Discrimination against Women (CEDAW) which was ratified by India in 1993. Under this convention India is obliged to observe the Article

12. *Praveen Akhtar v. Union of India*, (1979) 2 SCC 316 (India).

13. *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388 (India).

51(A) (e), 15 (i), 15 (3), 39 (a) & 39 (d) of its Constitution and endeavour to make special provisions for the upliftment of women.

4) From a Human Right Perspective

It is evident that some of the very basic human rights of the Muslim women are being violated by the practice of Triple Talaq in India. When referring to the brief format of the **United Nations Declaration of Human Rights**, Article 2-7 states that,

*“Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, **religion**, political or other opinion, national or social origin, property, birth or other religious status...Everyone has the right to life, liberty and security of person...No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...Everyone has the right to recognition everywhere as a person before the law...All are equal before the law and are entitled without any discrimination to equal protection of the law...”*¹⁴

Further, Article 16, 1 states that,

*“Men and women of full age, without any limitations due to race, nationality or religion, have the right to marry and to found a family. They are entitled **rights as to marriage, during marriage and at its dissolution**”*¹⁵

Thus **United Nations Declaration of Human Rights** provides for rights of women, however, it fails to take note of the oppression that women face due to religious and cultural practices. Therefore, this UNHCR document does not address the underlying issue of religion used as a means to deny basic human rights.

Uniform Civil Code (UCC) and Secularism

The debate for Uniform Civil Code, with its diverse implications, is one of the most controversial issues of the Indian politics in twenty-first century. The Apex Court of the Country in its various judgements has pressed the legislature for framing the Uniform Civil Code which will regulate all the religions with the same yardstick.

14. United Nations, *United Nations Universal Declaration of Human Rights 1948*, UN, (Jul. 7, 2017, 10: 18 AM), http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

15. *Id.*

Meaning of Uniform Civil Code (UCC)-

Uniform Civil Code means that all sections of the society irrespective of their religions shall be treated equally with regards to the personal matters (i.e. marriage, divorce, maintenance, inheritance, adoption etc.). It is based on the premise that there is necessarily no connection between religion and personal laws in a civilized society. In simple terms, Uniform Civil Code is a proposal to replace the personal laws based on the scriptures and customs of each major religious community in India with a set of governing laws for every citizen.

Constitutional Provisions for Uniform Civil Code

Part IV, Article 44 of the Indian Constitution states that,

“The State shall endeavour to secure the citizen a Uniform Civil Code throughout the territory of India”.¹⁶

Further, Article 37 of the Constitution itself makes it clear that the Directive Principles of the State Policy *“shall not be enforceable by any court”*. Nevertheless, they are *“fundamental in the governance of the country”*. This indicates that although our Constitution itself believes that a Uniform Civil Code should be implemented in some manner, but it does not make this implementation mandatory.¹⁷

Once during the Constituent Assembly debates, K.M. Munshi, a member of the Constituent Assembly, said by quoting the examples of Egypt and Turkey,

“Nowhere in advanced Muslim countries has the personal laws of each minority been recognized as so sacrosanct as to prevent the enactment of a Civil Code”.¹⁸

Changing Perceptions of Secularism

Secularism has become an accepted notion universally, but time and again due to religious institutional framework of mala-fide intention, the world peace is threatened over the years. “Secular” could be equated to

16. Sattwik Shekhar, *Has The Time Come For A Uniform Civil Code In India?*, MANUPATRA (Jul. 7, 2017, 11: 02 AM), <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=77d942f9-1b04-4418-9c7b-78d495455b3d&txtsearch=Journal:%20www.mightylaws.in>

17. M.P. Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, JILS, Monsoon 2014, at 5, 8.

18. Shalina A. Chibber, *Charting a New Path Towards Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, ILJ, Spring 2008, at 695, 708.

'mercury' which could adapt to the shape of container, thus people and government interpret the term at their whims and fancies.

The concept of secularism was imported from Europe by Jawahar Lal Nehru. Although the term 'secularism' was not included anywhere in the Constitution as it was originally passed in 1949, the framers of the Constitution had in their mind as to what they meant by secularism. Dr. B.R. Ambedkar, Chairman of the Drafting Committee, while participating in the debate in Parliament on the Hindu Code Bill in 1951, explained the concept of secularism as follows:

*“It (Secular State) does not mean that we shall not take into consideration the religious sentiments of the people. All that a Secular State means is that this Parliament shall not be competent to impose any particular religion upon the rest of the people. This is the only limitation that the Constitution recognises”.*¹⁹

Constituent Assembly Debates concluded with 'Equal respect' theory and Jawaharlal Nehru formulation of secularism was followed i.e. **Sarvadharmā Sambhava** (Goodwill towards all religion) and **Dharma Nirpekshata** (religious neutrality). However, secularism in India has strayed from the stipulated path. Nehru did not define secularism properly and politicians took advantage of his failure to elucidate the concept. Instead of shedding religious partisanship, the pseudo-secularists fomented it in order to capture vote banks.²⁰

Therefore, The Preamble of the Constitution of India was amended by the 42nd Amendment Act 1976 to incorporate the term 'Secularism'. But Goa Uniform Civil Code upholds the Indian Secularism.

In **S.R. Bommai vs. Union of India**,²¹ B.P. Jeevan Reddy, J., observed:

“...while the citizens of this country are free to profess, practise and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e. from the point of view of the state, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally.”

19. M.V.Pylee, *Our Constitution, Government and Politics* 52 (Universal Law Books 2000).

20. Anand Shankar Pandya, *Indian Secularism: A Travesty Of Truth And Justice* 10 (Aswad Prakashan Pvt. Ltd., 1st ed. 1998).

21. *S.R. Bommai v. Union of India*, AIR 1994 SC 1918 (India).

In *Sardar Taheruddin Syedna Saheb vs. State of Bombay*²² wherein Ayyangar, J., explained:

“Article 25 and 26 embody the principle of religious tolerance that has been the characteristics feature of Indian civilisation from the start of history. The instances and periods when this feature was absent being merely temporary aberrations. Besides, they serve to emphasise the secular nature of the Indian democracy which the founding fathers considered to be very basis of the Constitution”.

In *Kesavananda Bharti vs. State of Kerala*,²³ Sikri, C.J. named 'secular character of the Constitution' since independent India was to be democracy, secularism was a *fait accompli* it was further observed:

*“It is essential for the proper functioning of democracy that communalism should be eliminated from Indian life.”*²⁴

Further, in *T.M.A. Pai Foundation case*,²⁵ Ruma Pal, J., artistically distinguished Indian secularism from American secularism by calling Indian secularism “a salad bowl” and not a “melting pot”.²⁶

Finally in *A.S. Narayan Deekshitulu vs. State of A.P.*,²⁸ A Ramaswamy, J. quoting extensively from the scriptures states:

*“The word 'Dharma' or 'Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well being and progress of mankind; whatever conduces to the fulfilment of these objects is Dharma, it is Hindu Dharma and ultimately 'Sarwa Dharma Sambhava'. Dharma is that which approves oneself for good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat”.*²⁹

22. *Sardar Taheruddin Syedna Saheb v. State of Bombay*, AIR 1962 SC 853, 871 (India).

23. *Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 292 (India).

24. B Shiva Rao, *The Framing of India's Constitution: Select Documents*, GOIP, Apr. 1968, at. 585, 593.

25. *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 (India).

26. *Christian Medical College Vellore & Ors v. Union of India And Ors.*, LNIND 2013 SC 662 (India).

27. *Khusheer Ahmed Khan v. State of UP & Ors.*, (2015): Civil Appeal No 1662, SC (India).

28. *A.S. Narayan Deekshitulu v. State of A.P.*, 1996 AIR 1765 (India).

29. Vikramjeet Banerjee and Sumeet Malik, *Changing Perceptions of Secularism*, EBC (Jul. 7, 2017, 11:07 AM), <http://www.ebc-india.com/lawyer/articles/9807a1.htm>

The Judiciary has with minor deviations, stuck to its original stance of 'secularism' not being a wall between the Church and the State, but a sense of toleration between people of different religions through “*Sarva Dharma Sambhava*’.

Judicial Pronouncement in Favour of the Implementation of Uniform Civil Code

***Sarla Mudgal and Others vs. Union of India*³⁰**

In this case, the question was whether a Hindu husband married under the Hindu law, by embracing Islam, can solemnise second marriage. The Court held that the Hindu marriage solemnized under the Hindu law can only be dissolved on any of the grounds as specified under Section 13 of the Hindu Marriage Act 1955. Conversion into Islam and marrying again would not by itself dissolve the Hindu marriage under the Act and thus, a second marriage solemnized after converting into Islam would be an offence under Section 494 of the Indian Penal Code.

Justice Kuldeep Singh, while delivering this landmark judgement remarked:

*“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 'Uniform Civil Code' for all citizens in the territory of India”.*³¹

Arguments in Favour of Uniform Civil Code

- (a) Since Indian society is patriarchal and misogynistic in nature, by allowing old religious rules to continue to govern the family life, we are condemning the Indian women to subjugation and mistreatment. Therefore, uniform civil code will help in *improving the conditions of women* in India.
- (b) Personal laws have loopholes. By allowing personal laws, we have constituted an alternate judicial system which operates according to thousands of years old values. Therefore, uniform civil code would change that.

30. *Sarla Mudgal and Others v. Union of India*, 1995 AIR 1531 (India).

31. *Mr. K G Balakrishnan, Individual Rights in India: A perspective from the Supreme Court*, IRC, Apr. 2007, at 1, 14.

- (c) Uniform civil code doesn't mean that it will limit the freedom of people to follow their religion, it just mean that every person will be treated same and all citizens of India have to follow the same laws irrespective of their religions. Therefore, it will *promote real secularism*.³²
- (d) Since *change has been law of nature*, minority people should not be allowed to pick and choose the laws under which they want to be administered. These traditional personal laws were framed in specific spatio-temporal context and should not stand in a changed time and context.
- (e) The unification and codification of the variegated personal laws will produce a more coherent system of laws. UCC will reduce the existing confusion and enable easier and more efficient administration of laws by the judiciary.

Challenges

- (1) The task of actually devising a set of rules that will govern all communities is a very formidable and tedious one considering the vast range of interests and sentiments to be accounted for.³³
- (2) Misinformation about UCC the content of UCC has not been spelt out leading minorities to believe that it is the way of imposing majority views on them.
- (3) Lack of political will due to the complexity and sensitivity of the issue.

The opponents of the Uniform Civil Code argued that personal laws are derived from their religious beliefs. It may be prudent not to disturb them by enacting a common code, as this runs the risk of engendering a great deal of animosity and tension between various religious communities. Since, India being a secular country guarantees its minorities the right to profess and promote their religion, culture and customs as enshrined under Article 29 and 30 of its Constitution. Therefore, implementing a Uniform Civil Code will hamper India's secularism. Thus, the implementation of the uniform civil code has become next to impossible.

32. Amrita Tripathi, *The Uniform Civil Code in India*, LAW FIRM BLOG (Jul. 7, 2017, 10:09 AM), <https://lawfirm.in/blogs/the-uniform-civil-code-in-india--analysis-of-the-pros-and-cons>

33. Werner Menski, *The Uniform Civil Code Debate in Indian Law; New Development and Changing Agenda*, GLJ, Mar. 2008, at 211, 216.

Conclusion- The way forward

India is a unique blend and merger of codified personal laws of Hindus, Muslims, Christians and Parsis. There exists no uniformity in family related laws in a single statutory book for all Indians which are acceptable to all religious communities who co-exist in India. However, majority of them believe that uniform civil code is definitely desirable and would go a long way in strengthening and consolidating the Indian nationhood but differ at its timing and the manner in which it should be realized. Instead of using it as an emotive issue to gain political advantage, political and intellectual leaders should try to approach a consensus on this sensitive issue.

“Religion is a matter of belief, belief is a matter of conscience, and freedom of conscience is the bedrock of modern civilization. In a multi-religious country like India which has opted for a secular State, it is the right of every citizen to elect to be governed by secular laws in matters personal and it is the duty of the State to provide an optional secular code of family laws. But, the Indian Parliament is adopting an ambivalent attitude due to political compulsions”.³⁴

Here, the question is not of minority protection, or even of national unity, it is simply one of treating each person with the dignity that he deserves; something which personal laws have so far failed to do.

The **Kochi High Court** recently very well remarked:

“The need for common civil code though it is debated at different levels still it remains a mirage for want of agreement among different groups. There are many areas in which religious laws can be reconciled with secular law without there being a conflict of each other. It is possible to have a common code at least for the marriage law in India”.

34. SAKader, *Muslim Law of Marriage and Succession in India* 45-55(Eastern Law House 1998).

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35. Mahir Haneefi, Kerala HC wants talaq power taken away from Muslim Men; Recommends Uniform Marriage Code, TOI, December 17, 2016, at 2.