

LEGALFOXES LAW TIMES

One Nation, One Personal Law: Need of the Hour

By: Smriti Kumari

ABSTRACT:

This paper is analysis of judgement of triple talaq judgement with respect to implementation of Uniform Civil Code. The revolutionary judgement of Supreme Court in **ShayraBano v. Union of India &ors**¹ (The triple talaq case), banned the centuries old custom of Triple Talaq in India on pretext of Article 14. As per Muslim religion is concerned, personal laws are strongly linked with religious views. In Muslim society triple Talaq is a well-established and frequently used procedure for divorce which facilitates the highly male dominated society. Talaq-e-biddat was only recognised by few sects and most prominently by Hanafi sect of Sunni Muslims, even these sect regard this form as a bad law. It is eliminated or reduced in most of the Muslim countries such as Egypt, Iraq, Syria, Kuwait, Algeria etc. Now after many years of struggle by Muslim women it is banned in India as well.

While analysis of above judgment, this paper ponders upon the question of need of UCC and finds the answer for whether the present judgement is an indication that we need to establish Uniform Civil Code in our country as provided by Directive Principles of our constitution. The ban on triple talaq is an initiative taken by judiciary and many such steps are required to achieve Uniform Civil code.

Key Words: Uniform Civil Code, Triple Talaq, Secular, Democratic, Directive Principles, Fundamental Rights

Introduction:

Islamic law provides for three types of divorce: (a). At the instance of husband-‘Talaq e hasan’, ‘Talaq-e-ahasan’, ‘Talaq-e-biddat’ (b). At instance of wife;-khula (c). By mutual consent;- ‘Mubbarat’²Talaq-e-hasan and talaq-e-ahasan both are approved by the ‘Quraan’ and ‘hadith’, talaq-e-ahasan is considered as most reasonable form of talaq, whereas ‘talaq-e-hasan’ is considered as only reasonable. Talaq-e-hasan is practiced more in islam by all the communities. If we see validity of talaq-e-biddat, it is neither approved by ‘Quraan’ nor by hadith³, **biddat** itself means **sinful** or **bad**. This form was introduced by ‘Ommeyad’ Kings in order to dissipate the law⁴. It is practiced by few sects in Islam, most prominently by Hanafi sect of Sunni Muslims,

¹*ShayraBano v. U.O.I. &ors*. Writ Petition [C] No. 118 of 2016

² Prof. Kusum, Family law lectures(Lexis Nexis),2016, p.g. no. 389

³*ShayraBano v. U.O.I.&ors*. writ petition [C] No. 118 of 2016

⁴“Supreme Court scraps instant triple talaq”, Hindustan Times, by HT correspondent, dated on Aug 22, 2017

even they describe it as a sinful form of divorce, still this triple talaq was so much in trend that matters of divorcing wives on whatsapp, through e-mail, through letters became very frequent but not challenged many times due to social pressure. It is worth considering that Quran do not support divorce instantly but it is advised by Prophet to avoid divorce and look for conciliation and mediation for that purpose the period of abstinence is observed during which talaq can be revoked but the case of talaq-e-biddat is completely opposite, it is irrevocable from the moment it is given i.e, in one go talaq, talaq, talaq.

The judgement delivered by majority in **Shayra Bano v. Union of India & Ors.** Supreme Court struck down Triple talaq, declared the practice as unconstitutional, void and illegal and is against the basic tenets of Quran. The ratio behind the judgement is the current practice is violates fundamental rights, it violated the right to equality of Muslim women, right to non-discrimination and right to live with human dignity. It violates article 13 of the constitution which mandates, that no law can be in contravention with fundamental rights⁵. The part of Sharia Act, 1937 which recognised and allowed the practice of triple talaq among Muslims following Hanafi School is struck down.

Uniform Civil Code And Its Need in India:

Uniform Civil Code means a standard code for all governing rights regarding **property, marriage, divorce, inheritance, adoption** and **maintenance**. It's often considered that a State is merely concerned with the relation between man and man. It is not concerned with the relation of man with God, so the state is nowhere concerned with having diverse personal laws for all the communities to ensure religious pluralism. However, a welfare state should be concerned with all those which are affecting the interest of people at large and will try to harmonize the laws and it becomes more emphatic and imperative when it is more about the rights given in constitution i.e. supreme law of the land.

Rebecca J. Cook rightly points out that although the Indian Constitution contains articles mandating equality and non-discrimination on the grounds of sex, strangely however, several laws exist that apparently violate these principles and continue to be there especially in personal laws of certain communities with provisions that are highly discriminatory against women.

India have ratified the International convention on civil and political rights, 1966 and the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, so bound to enforce relevant provisions and ensure gender equality in its National laws.

Supreme Court first directed parliament to frame Uniform civil code in the year 1985 in the case of **Mohd. Ahmed Khan v. Shah Bano Begum**, Justice Y. V. Chandrachud observed that; "A common civil code will help the cause of national integration by removing disparate legalities to law which have conflicting ideologies".⁵ The judgement was nullified by then ruling govt.

⁵ See Supra note 3

Congress Party by bringing Muslim women (right to protection on divorce) Act, 1986. Sec 125 of Cr.P.C. curtailed the right of Muslim women for maintenance.⁶

The court has sought for uniform civil code a few times but many at times even judiciary hesitates to interfere with personal laws due to religious intolerance in the country. In the case of **Lily Thomas v U.O.I**⁷ & **John Vallamaton v. U.O.I**⁸, the Supreme Court disclaimed the need of Uniform civil code in the country. It was held by Supreme Court in **Lily Thomas v. Union of India**, that;

“The desirability of Uniform Civil Code can hardly be doubted. But 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.”

This non-acceptance for any changes in personal law will exist until some strong guidelines are provided by a uniform code which is applicable to all civilians. In India we have uniform codes in criminal laws and civil laws except marriage, divorce and succession. India is a secular and democratic country which means it does not have any official religion but when it comes to personal laws the country is divided into number of different laws, which are often discriminatory towards women. The honourable court through its judgement in **Sarla Mudgal v. U.O.I** held, article 44 is relied upon the concept that there is no necessary connection between religion and personal law in a civilised society⁹. Article 25¹⁰, guarantees freedom whereas article 44¹¹ seeks to divest religion from social relation and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under articles 25, article 26¹² and article 27¹³.

Justice Kuldeep Singh opined in **Sarla Mudgal v. U.O.I**, where more than 80 per cent of the citizens have already been brought under the codified personal law, there is no justification whatsoever to keep in abeyance anymore, the introduction of Uniform Civil Code for all citizens in the territory of India¹⁴.

At the time of framing of constitution, the country was not ready to embrace the secular code and which is common to all and give up on the old customs which regulated the personal laws, keeping this in the mind the matter of implementing the Uniform Civil Code was kept in directives for the state to strive towards achieving the Uniform Civil code for all the citizens under article 44.

⁶*Mohd. Ahmed Khan v Shah Bano Begum*, (1985) 2 SCC 556, para 32, p. g. no. 8

⁷*Lily Thomas v Union of India*, (2000) 6 SCC 224, para 44

⁸*John Vallamattom v Union of India*, (2003) 6 SCC 611.

⁹*SarlaMudgal v Union India* (1995) 3 SCC 635.

¹⁰.Article 25, Freedom of conscience and free profession, practice and propagation of religion.

¹¹Article 44, Uniform Civil Code for citizens; The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

¹²Article 26, Freedom to manage religious affairs.

¹³Article 27, Freedom as to payment of taxes for promotion of any particular religion.

¹⁴*SarlaMudgal v Union India* (1995) 3 SCC 635.

Supreme court throwing light on the need of UCC, held in the Shah Bano's case that, 'It is also a matter of regret that article 44 of our constitution has remained a dead letter'¹⁵.

Legal Framework for UCC:

The founding fathers of our republic wanted to constitute a modern and secular democracy, and not a theocratic Hindu image, so the civil code governing the personal law must be secular. Instead of providing the aim in the directive principles only limited progress can be seen till date as Dowry and Domestic violence, Hindu personal laws, and the Special Marriage Act which is completely secular in nature, reflects modern sensibility.

In August 2015, a commission was set up under the Law commission to prepare a report on Uniform Civil Code to give detailed recommendations by the department of Legal Affairs a recommendatory body of Government, which will be submitted by 2018.

What could be the essentials of UCC?

The new code will be based on gender equality and comprising best elements of all the personal laws. The practice of Marriage and Divorce will be uniform in all communities. Monogamy must be strictly followed, because it adheres to article 14 and article 21 and above all basic human values. Age of marriage must be at least the age of majority i.e, 18 yrs. for girls and 21 yrs. for boys in all religions. Registration of marriage must be made compulsory to check bigamy and unfair practices. Laws relating to succession and inheritance and adoption should be made similar.



"OUR MISSION YOUR SUCCESS"

Triple talaq Judgement and UCC:

The matter of Uniform Civil Code has been always connected with Triple talaq. Muslim Personal law is not codified and it contains many sources as Quran, Hadith, Ijma, Quiyas and different schools follow some different customs.

There are many practices in Islam that are derogatory towards women. Islam is the first religion to give women rights to property provided in Quran in '**Surah-an-nisha**' and right to divorce (delegated by husband though), when no religion recognised woman's right in property or their status in a bond of marriage. But, after many years all the religions have come forward and recognised equal status of women as men, as pointed out in triple talaq judgement that women in Muslim community do not have equal rights as of husband to divorce, which the women's of the Hindu, Christian, Zoroastrian and other communities have. Talaq-e-biddat is against the tenants of

¹⁵*Mohd. Ahmed Khan v Shah Bano Begum*, (1985) 2 SCC 556 , para 32, page 8

Islam because Islam implements the duty upon men to protect their women and be righteous in their course. Talaq-e-biddat is irrevocable from its very inception so in case a woman or the man himself wants to restore the marital status, they have to go through 'Halala' which is provided in Islam that;

If he has divorced her (for the third time), then she is not lawful to him afterward until (after) she marries a husband other than him. And if the latter husband divorces her (or dies), there is no blame upon the woman and her former husband for returning to each other if they think that they can keep (within) the limits of Allah¹⁶.

It may be justiciable for other two instances where divorce is revocable; the parties are given three months period of abstinence, during which they may restore cohabitation. So, the proper time is given for them to think about separation or restoring conjugal rights. But the case of triple talaq instant break down of marital status does not give parties any say once pronounced, hence completely derogatory and discriminating towards women.

Dissolution of Muslim Marriages Act, 1939 gives right to a woman to obtain a decree for dissolution of marriage on the grounds provided in Shariat Act, 1939 but there is no ground provided in Hanafi code for dissolution of marriage by women, which is again problematic for jurists as they do not want to interfere with personal laws.

Will this help to implement UCC?

The judgment by a Supreme Court's Constitution Bench, outlawing instant 'triple talaq' divorce by Muslim men, is a turning point for India. This judgment has shown courage to say no to what is discriminatory and not only upheld the values of Indian constitution but also has messaged this very strongly that laws of God can also be tested and checked on the points of constitutional values. India has stood up to that. However, UCC has been untouched in such endeavors, where it is need of Indian people due to its high diversity. Under UCC, all personal laws based on scriptures and customs of every religion will be replaced with a common law governing every citizen, which would also facilitate protection of person's basic personal rights which may have been disguised on the name of personal laws.

This judgment has sensitized people about their rights.

Conclusion:

Article 44 has been the essence of the constitution in order to govern the nation with the common set of laws in every facet. Nowhere being country of divergent religion this article has always been contemplated as a dead letter from its inception¹⁷.

Late Atal Bihari Vajpeyee in his speech said, there will be a new code based on gender equality and comprising best elements in all the personal laws. The Uniform Civil Code should not be

¹⁶ Quran, Sura 2, al baqara Ayah 230

¹⁷ A dead letter to constitution; addressing structural inequalities, Nirma University law journal : Vol-6, Issue-2, July 2017

confused with the Hindu law repackaged in the form of Uniform Civil Code but it will be a whole new set of law which will include the good practices of all the personal laws. It must be gender neutral. Such a small state like Goa have Uniform Civil code named '**Goa Family Law**' from year 1961, which was originally the Portuguese civil code, unanimously accepted by all citizens of the state continued to be in force after its annexation.

Uniform civil code is required to settle the ambiguity which has arisen due to the different interceptions of various laws, to ensure justice towards women of all communities, to achieve equal status of men and women in property rights, to get women equal status in a marriage and right to divorce and get maintenance, it imperative for both, the protection of the oppressed and the promotion of national integrity and unity.



• LEGAL FOXES •

"OUR MISSION YOUR SUCCESS"