



## Deconstructing the uniform civil code debate in India

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### Abstract

The debates on human rights of women in the context of gender-discriminatory personal laws have implications for secularism in India. The state has intervened and reformed Hindu Personal Laws. But non-Hindu religious traditions in India have been left out ostensibly in the name of secularism. The Article 44 of Indian constitution has failed to convince policy-makers to enact a Uniform Civil Code so many years after independence. Many Islamic countries have codified personal laws whereby practices inimical to dignity of women like polygamy have either been abolished or restricted. But ours is a great secular democracy where personal laws continue to exist in brazen defiance of the spirit of constitution which mandates gender equality. It is in this context; this article seeks to analyse the debate on Uniform Civil code in India. This article argues for a desirability of the Uniform Civil Code for the sake of national integration in substantive terms. It also delves into various judicial pronouncements on the issue, the options available before the government, the minority syndrome that inhibits the development of progressive voices within religious communities clinging to their personal laws. It also looks into the position of women's movement of India on the tricky issue of Uniform Civil Code.

**Keywords:** gender justice, constitution, secularism, uniform civil code, minority

### Introduction

The development of human rights up to the 1948 Universal Declaration of Human Rights is often criticised for having western genesis. Cultural relativists argue that human rights are an essentially western idea which cannot be universally applied. It is being held that human rights represent western value system and does not take into account cultural specificities and value systems of the non-western world. Multiculturalists prefer respecting diversity of different cultural groups. However, generally such as an understanding restricts state intervention in some of the abhorrent anti-women personal laws within different religious communities. Several discriminatory legislations continue to exist which tend to deny the claims of equal citizenship to women.

One of the vexed dilemmas of the contemporary times is the problem of reconciling the norms of equality with the conflicting claims of socio-cultural differences. Despite the universality of human rights mortal human beings are dissimilar in various respects (Heywood 2004) <sup>[1]</sup>. However, the idea of the universality of human rights has always been contested. There is a discernible degree of conflict between multiculturalism and the claims of gender equality. Multiculturalism tends to fortify and sanctify the socio-cultural norms of gender inequality. India is a secular state which has no religion of its own. It is duty bound to protect all religions equally without any discrimination. The state is supposed to maintain a 'principled distance' vis-a-vis religion. However, in practice this 'principled distance' is not really principled which manifests in the form of blatant compromises the state has made on the issue of secularism. All religions are governed by their personal laws according to which the conditions for marriage, divorce, adoption, maintenance, etc., vary from one religion to another. This leads to several problems and matrimonial conflicts.

The implementation of the uniform civil code is inextricably inter-connected with the issue of gender justice as promised in the constitution. The need for a uniform civil code is mandated under Article 44 of the Directive Principles of the

State Policy of the Indian Constitution. It provides that the state shall endeavour to secure for the citizens a uniform civil code. However, the lack of political will and certain inherent complexities in drafting a code acceptable to all communities has ensured that Article 44 has remained unimplemented. Recently, a new debate has started on the desirability of such a code. The steps taken by the Modi government like scrapping of Article 370 have also generated renewed interest in the Uniform Civil Code (UCC) debate in India. Indeed, these historic steps taken by our visionary Prime Minister have opened new avenues for reformulating and recasting the debates around contested issues like Triple Talaq and the Uniform Civil Code. The recent steps by the state governments of Uttarakhand and Gujarat regarding forming a panel on the Uniform Civil Code in the year 2022 are also praiseworthy. Those who favour the UCC say that it is necessary to bring about national integration and ensure gender justice. However, critics oppose it under the pretext that it goes against the religious freedom. The issue has been a political hot potato. It is often reduced to a communal Hindu versus Muslim issue producing a prejudiced debate thereby obfuscating the real issue of gender justice.

### Historical legacy of the personal laws

The Indian Penal Code (IPC), 1860 had left the problematic issue of personal laws untouched. The Hindus and the Muslims had followed the "common customary Hindu civil code" smoothly till 1937 when "the Muslim League-British combine" divided them by imposing Sharia on Muslims through the Muslim Personal Law (Shariat) Application Act (Rahman 2014) <sup>[2]</sup>. Mohammad Ali Jinnah played a leading regressive role in promulgation of this act (Mahmood 2009) <sup>[3]</sup>. The issue of uniform civil code was vigorously debated in India's Constituent Assembly but a consensus on the issue proved elusive owing to divergence of opinion amongst members. The members belonging to the minority religious communities were strongly opposed to the uniform civil code (hereinafter referred to as UCC). However, the UCC

was supported by some members on the grounds of gender justice and national integration. K.M. Munshi was in favour of adopting the uniform civil code to bring about the equality of sexes (CAD Vol. VII 1948-49)<sup>[4]</sup>.

It needs to be pointed out here that the UCC was mentioned in Article 35 of our Draft Constitution. The legal luminaries like Dr. B.R. Ambedkar (also chairman of the Drafting Committee of the Constituent Assembly) also favoured drastic steps for reforms in gender-discriminatory personal laws in India. However, there was a lack of consensus the personal laws with built-in features of gender inequality were retained under the 1950 Constitution. This was virtually a negation of the principle of justice and equality inscribed in our constitutional architecture in the Preamble and Fundamental Rights chapters. As Sadhna Arya points out "Thus, if the constitution treats gender inequality as not a problem needing special attention and care, nor feels the need to create a culture, through its laws and legal ideology wherein the values of social inequality are accepted in everyday life, it only means that the constitution quietly and tacitly supports a male-dominated society" (Arya 2000)<sup>[5]</sup>. In the post-independence India, the Hindu Code Bill was considered a step in the right direction and even a precursor to the adoption of the UCC (Gajendragadkar 1971)<sup>[6]</sup>. Nevertheless, the state exhibited a remarkable political will in tinkering with Hindu Personal laws exemplifying that Indian secularism is compatible with the idea of state-supported religious reforms. Unfortunately, no uniform standard has been followed and there has been a visible reluctance on the part of the political executive over the years on the issue of reforms in Personal laws belonging to minority religions.

#### **The UCC debate: A contested terrain for the judiciary**

There has been an inconsistency in the stand of the courts regarding the status of community-specific personal laws. This is largely a result of the ambiguity of the provisions of the constitution relating to such laws. The provisions of the Indian constitution incentivize this ambiguity by supporting both positions- for and against the reforms of religion-centric personal laws (Padhy 2004)<sup>[7]</sup>. An eminent legal scholar, Upendra Baxi says, "While the constitution mandates reform of Hindu religious beliefs and practices that manifestly violates human rights, non-Hindu religious traditions are allowed constitutional impunity principally through the perpetuation of the personal law rights-violative formations" (Baxi 2002)<sup>[8]</sup>.

In the state of Bombay vs Narasu Appa Mali (1954)<sup>[9]</sup>, the apex court upheld the religion-centric personal even if they contravened our fundamental rights. This understanding was overruled in the Shah Bano judgment of 1985 by our Supreme Court. The Shah Bano Judgment said "Section 125 of the Criminal Procedure Code overrides Muslim Personal Law (Shariat) in matters of divorce" (Padhy 2004)<sup>[10]</sup>. The Shah Bano judgment led to widespread protests by the fundamentalist Muslim groups which forced the government to nullify the progressive judicial pronouncement via a legislative enactment. Vrinda Narain says, "The state absolved itself of the responsibility to enforce constitutional principles in the private sphere of the family, abandoning Muslim women to greater control by male religious leaders" (Narain 2008)<sup>[11]</sup>. She further adds, "The Shah Bano case tested the limits of constitutional rights and the commitment to fundamental organizing principles of India's multicultural democracy- secularism, religious freedom and women's equality" (Narain 2013)<sup>[12]</sup>.

The protests by the patriarchal sections of the Muslim community after the Shah Bano judgment raised uncomfortable questions about women's right in Islam. The passing of the Muslim Women's Right on Divorce Act, 1986 by the government of the day was cited as an ugly instance of vote-bank politics which also served to strengthen chauvinistic trends in Indian politics. It was quite unfortunate that women's rights were violated in terms of their religious identity negating progressive spirit of the Indian constitution in terms of gender justice (Narain 2013)<sup>[12]</sup>. The successful passing of the Muslim Women's Right to Divorce Act, 1986 was the most oppressive and tyrannical step by the union legislature which bolstered the regressiveness of the conservative sections of the Muslim community to the detriment of the rights of Muslim women (Sathe 1995)<sup>[13]</sup>.

All personal laws are discriminatory against women. But the judiciary has tended to critique only Muslim personal law. However, the legal provisions have been lenient and have also focussed less on matters related to legal loopholes in Personal Laws from other religions (Agnes 1995)<sup>[14]</sup>. The norms of monogamy promoted by the legal provisions have failed to deter instances of polygamy and other forms of violation of gender rights of women in marital relationships (ibid).

#### **The Muslim personal law: A political hot potato**

The Muslim personal law system which shields anti-women practices like polygamy, unilateral divorce etc. represent the most unfortunate aspect of personal law system in India. An eminent scholar A. Fayzee says, "Muslim Personal law was applied to Muslims in British India as a matter of policy, and not as a matter of religion" (Fayzee 1971)<sup>[15]</sup>. However, the specific trajectory of minority politics in post-independence India has ensured that the Muslim Personal law system has become an instrument of religious identity assertion at the hands of bodies like Muslim Personal Law board. Since 1972, the Muslim Personal Law Board has received significant support from conservative Muslims, while Muslim intellectuals of progressive persuasion have critiqued the representativeness of the Muslim Personal Law Board (Patel 2009)<sup>[16]</sup>.

Certain practices sanctified by the Muslim Personal law have made Muslim women very vulnerable in marital life with sword of 'talaq' hanging over her head always even on flimsy grounds. Within this arrangement Muslim women are treated virtually like a slave with huge responsibilities without any rights. We cannot tolerate such inhuman practices ostensibly in the name of secularism (albeit a distorted version of secularism). Women rights are of paramount importance. Our modern secular democracy cannot absolve itself of the responsibility of protecting the same. We need to detoxify and de-communalise the debate on reforms in Personal laws and the uniform civil code for upholding the paramourcy of gender justice.

The Women's movement in India has been unable to espouse the cause of a uniform civil code in a consistent manner. Also, the lack of political will on the part of successive governments for the UCC has handicapped the Women's groups. These groups are also constrained by the wider societal pressures. Moreover, the Bhartiya Muslim Mahila Andolan is also not sufficiently empowered because of the stranglehold of regressive religion-centric world-view on the Muslim community catalysed by the vote-bank politics and appeasement policy especially towards the conservative sections in India. The politically surcharged debate around the UCC is also guilty of promoting a fear

psychosis amongst minorities which leads to magnified concern and over-protective attitude towards Muslim minority identity. This works well for Muslim fundamentalist forces which use this to maintain their hold on the community. Gender justice becomes a casualty in this vicious cycle of the discourse of regressive communal politics.

### Conclusion

In a frontal assault on secularism in India the highly discriminatory personal laws continue to exist. The personal laws represent an unfortunate compromise on the question of gender justice despite the solemn commitment of our constitution to this effect. There are personal laws for Christian and Parsi minorities in India. But the Muslim women are more vulnerable in marital relationships because of lower educational attainments and economic disempowerment. These factors tend to compound the agony of Muslim women due to the ills of patriarchal personal laws. It is high time that India should adopt a uniform law dealing with marriage, divorce, succession, inheritance, maintenance etc. Ideally it should have been enforced but the scenario in India regarding personal laws is having multi-layered complexity. Recently there has been a proposal to evolve a consensus on the issue of uniform civil code.

As a short-term measure, we should implement the idea of compulsory registration of marriages mooted by the apex court in the *Seema versus Ashwini Kumar* (2006). It has the potential to check child marriages, bigamous and polygamous marriages. Irrespective of religious differences or variation in local customs under which marriages are solemnised, it should be registered with the government. A marriage certificate would come in handy for women in distress when their husbands decline to accept the marital relationship on the pretext of dowry or for entering into another marital relationship.

The fundamentalists are opposed to modern norms of gender equality. Interestingly, the conservative Muslims had even opposed the idea of compulsory registration of marriages citing the old bogey of interference in religious sphere. They tend to harden their attitude as they consider the implicit support of the political class as a fait accompli. Our distorted version of secularism has served to nourish obscurantism in the Muslim community whereby they are treated as captive vote-banks. It seems that the system has a vested interest in keeping the Muslim community backward. However, this does not absolve the role of regressive leadership from within the community. But for how long are we going to bow down to the diktats of vote-bank politics? This is a million-dollar question. The conservative Muslims must be reminded that India is a secular state and not a theocratic Islamic state. The entire Muslim community cannot be taken hostage by the obscurantist and patriarchal ideas represented by the conservative sections of the Muslim community. And we must abandon the politics of appeasement towards the conservative sections in the larger interest of gender justice. A progressive interpretation and reforms of personal laws in conjunction with the acceptance of compulsory registration of marriages can prepare the ground for the eventual emergence of a uniform civil code.

The steps like criminalising the practice of 'Triple-Talaq' are quite welcome. They are empowering for Muslim women. Apart from this the state can bring in separate laws dealing with inheritance and adoption. Hopefully, such a development will change negative stereotypes about minorities and help in national integration. It is also

indispensable for the sustenance of our vibrant secular democracy in an inclusive way in substantive terms.

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