Muslim Personal Laws vis-s-vis Uniform Civil Code: Prospects and Constraints

Sukdeo Ingale, University of Pune
Priyanka Gawai

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Muslim Personal Laws vis-a-vis Uniform Civil Code: Prospects and Constraints

**Mr. Sukdeo Ingale* & Ms. Priyanka Gawaiα

1. INTRODUCTION:

In India all the family laws are based on the religion of the parties concerned. For that purpose Hindus, Sikhs, Jains and Buddhists are presumed to be ‘Hindu’ and hence governed by Hindu personal laws, whereas Muslims and Christians have their own laws. Hence the laws relating to marriage, divorce, maintenance, guardianship and succession etc. personal matters are different and varies from one religion to other. The family laws of all communities except the Muslims are well codified by various Acts of the Parliament after Independence. There are different laws like the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; the Hindu Adoption and Maintenance Act, 1956 governing the personal matters of Hindus. On other hand Muslims are still governed by the Shariat Act, 1937, the Dissolution of Muslim Marriage Act, 1939 etc., which are based on the tenets of Holy Quran, govern the personal matters of Muslims. The only enactment about Muslim personal laws after independence is the Muslim Women (Protection of Rights on Divorce) Act, 1986; which seems to be in contravention with the idea of Uniform Civil Code (hereinafter referred as UCC).

Similarly the Indian Christians are governed by the Indian Christian Marriage Act, 1872, the Indian Divorce Act, 1869, and the Cochin Christian Succession Act, 1916, etc. The Parsis are governed by a different set of laws e.g. the Parsi Marriage and Divorce Act, 1936.

Thus it is clear that there is no UCC in India. There is no uniformity in all personal laws as they confer unequal rights depending on the religion and the gender.

Though there is no UCC dealing with family laws of different communities, a uniform codes do exists in the matters of Criminal Laws, Transfer of Property, Contract Laws and Torts, etc. The Criminal law is equally applicable to all citizens irrespective of their religious affiliation.

2. WHAT IS UNIFORM CIVIL CODE?

The term ‘Uniform Civil Code’ is originated from the concept of a civil law code. The term civil code is generally used to cover the entire body of laws governing rights and duties.

* Asst. Professor, DES’s Navalmal Firodia Law College, Pune.
α Student, DES’s Navalmal Firodia Law College, Pune.
relating to property and other personal matters like marriage, divorce, maintenance, adoption and inheritance, etc.

In short, UCC generally refers to that part of law which deals with family affairs of an individual and denotes uniform law for all citizens, irrespective of his/her religion, caste or tribe.

In India the policy of different personal laws for persons belonging to different religions is in direct conflict with the Constitution’s call under Art. 44 for a ‘uniform civil code throughout the territory of India’. With the passage of time, the Muslim Personal Law has been under assault from many directions, and it is important to examine how this legal principle of a separate religious law has survived in a country whose constitution is modelled after the secular liberal states of the west.

3. CONSTITUENT ASSEMBLY DEBATE:
When India attained independence and the issue of UCC arose, much was debated at the Indian Parliament in 1948. While the founding father of our constitution Dr. B. R. Ambedkar, supported by eminent nationalists like K. M. Munshiji, Anantasayam Iyengar, Alladi Krishnaswamy Iyer, Gopal Swamy Iyenger and others favored the implementation of the UCC; it was strongly opposed by Muslim fundamentalists.¹

On 23rd November 1948 a Muslim member, in Parliament, gave an open challenge that India would never be the same again if it tried to bring in Uniform Civil Code and interfere with Muslim personal law.² Dr. Ambedkar was also clear in his feeling when he said, ‘No government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion.’ ³

Hence the enactment of a UCC was placed under the Directive Principles of State Policy in Article - 44.

Dr. Ambedkar, speaking about future of Article 44 and its calls for a UCC, observed, ‘It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be

² ibid, 545.
³ ibid, 551.
purely voluntary. He further gave example of application of Shariat Act, 1937 which was purely voluntary in initial stage when it was applied to Territories other than the North-West Frontier Province.

4. JUDICIAL DISQUIET:

The Supreme Court first directed the Parliament to frame a UCC in the year 1985 in the case of Mohammad Ahmed Khan v. Shah Bano Begum, popularly known as the Shah Bano case. In this case, a Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure after triple talaq from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The then Chief Justice of India Y. V. Chandrachud observed that, ‘A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies.’

This decision resulted in hot debates, discussions, meetings, and agitation; which were held nationwide. The then Rajiv Gandhi led Government overturned the decision of Court by way of Muslim Women (Protection of Rights on Divorce) Act, 1986 and curtailed the right of a Muslim woman for maintenance under Section 125 of the CrPC. The explanation given for implementing this Act was that the Supreme Court observation for enacting the UCC, not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

The second instance in which the Supreme Court again directed the government about implementation of Article 44 was in the case of Sarla Mudgal v. Union of India. In this case, the question was whether a Hindu husband, married under the Hindu law, by converting himself to Islam, can solemnise second marriage lawfully under Muslim personal laws. 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 to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the Act. And, thus, a second marriage solemnised after converting to Islam would be an offence under Section 494 of the IPC.

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4 ibid.
5 AIR 1985 SC 945.
6 AIR 1995 SC 1531.
Justice Kuldip Singh also opined that ‘Article 44 has to be retrieved from the cold storage where it is lying since 1949.’ The Hon’ble Justice referred to the codification of the Hindu personal laws and held, ‘Where more than 80 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 ‘uniform civil code’ for all the citizens in the territory of India.’

The court suggested that the personal laws of the minorities should be rationalized to develop religious and cultural amity preferably by entrusting the responsibility to the Law Commission and Minorities Commission. The Bench further directed the Government of India to file an affidavit indicating the steps taken and efforts made to have a fresh look at Article44 in August, 1996. However, the latter direction was treated as ‘obiter dicta’ by the Court itself subsequently in John Vallamattom v. Union of India.7

In John Vallamattom case Section 118 of the Indian Succession Act, 1925 was challenged as discriminatory against the Christians as it impose unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench comprising of Chief Justice of India V. N. Khare, Justice S. B. Sinha and Justice A. R. Lakshmanan struck down the Section declaring it to be unconstitutional. Chief Justice Khare stated that, ‘We would like to state that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code 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, as seen above, the apex court has on several instances directed the government to realise the directive principle enshrined in our Constitution and the urgency to do so can be inferred from the same.

5. POLITICAL DIVERSION:

The ruling of Shah Bano case received prompt and reactionary response and resulted in political diversion. The government of Rajiv Gandhi, acted quickly, passing the Muslim Women’s (Protection of Rights on Divorce) Act in 1986, a law that essentially provided for maintenance for Muslim women outside the criminal code, thus ensuring that Muslim women

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7 AIR 2003 SC 2902.
were not protected under the constitutional right to equality, as well as section 125 of the Criminal Procedure Code.

The ideology of legislature behind this was one whereby non-Muslims claimed that Muslims must themselves change and reform their Personal Laws and until the Muslim population of India and its spokesmen such as the All India Muslim Personal Law Board or the Jumiat al-Ulama called for change nothing would be done. The reason is- the Muslims saw their law as an essential part of their culture. Any attempt to dismantle the personal law, the Muslims feared, would destroy Muslim culture on the subcontinent.

6. FREEDOM OF RELIGION AND HUMAN RIGHTS:

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 Rights as well as the Directive Principles of State Policy.

The preamble of the Constitution states that India is a ‘secular, democratic, republic’. This essentially means that there is no State religion. Hence it is indispensable that a secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man.

It is to be noted that in India, there exist a concept of ‘positive secularism’ as distinguished from ‘doctrine of secularism’ accepted by America and some European states; where there is a wall of separation between religion and State. On other hand in India, positive secularism separates spiritualism with individual faith. 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. 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.
In India, Articles 25 and 26 guarantees right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution.

Hence it needs to be noted that UCC is not opposed to secularism or will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The UCC will not and shall not result in interference of one’s religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law. The same analogy was used by Supreme Court in Sarla Mudgal case.

The whole debate and approach of Supreme Court on it can be summed up by the judgement given by Justice R. M. Sahai in Sarla Mudgal case where he said, ‘Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the oppressed and for promotion of national unity and solidarity.’

7. UNIFORM CIVIL CODE FOR MARRIAGE:

When the British had arrived in India, it has been shown that Muslim women actually possessed more rights than their Hindu counterparts. The argument was based on the regulations in the Quran regarding Mahr, divorce, and maintenance. The then Hindu women, likewise, faced many of the inequalities as compared with Muslim women and in some cases more -like the practice of sati, polygamy, polyandry, etc.

The Holy Quran gives equal rights to men and women and places women in a respectable position. However there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior for example, a Muslim male is permitted conditionally to marry as many as four wives at a time. It is important to note that the polygamy among Muslim men is only permission under certain exceptional cases but not a
compulsion. The Shia Muslim male can contact *muta* marriages for an agreed period of time. There is no ceiling on the number of *muta* marriages that may be contracted by a Muslim male. It is to be noted that in 1974, a government survey found Muslims to account for 5.6% of all bigamous marriages and upper-caste Hindus accounting for 5.8% which means one crore Hindu men had more than one wife in 1971, compared to 12 lakh Muslim men. According to the third National Family Health Survey (2006) the polygamous marriages were found in 1.77% Hindu, 2.35% Christian, 2.55% Muslim and 3.41% Buddhist.

The first case which came to the Court regarding the conflict between right to freedom of religion and directive towards UCC for marriage was the *State of Bombay v. Narasu Appa Mali*. In this case, the Bombay Preventive of Hindu Bigamous Marriages Act, 1946 was challenged and was held *ultra vires* the Constitution. Former Chief Justice M. C. Chagla of the Bombay High Court rightly observed that every community must be prepared to work for social reform.

Gajendragadkar, J. rightly opined, ‘Article 44 of the Constitution is an important Article which recognizes the existence of different courts applicable to Hindus and Mohammedans in the matters of personal law and permits their continuance until the State succeeds in its endeavor to secure for all citizens a uniform civil code’.

In 1952, the Madras High Court had to face the similar problem when Madras Hindu (Bigamy and Divorce) Act, 1949 was challenged in *Srinivasa Aiyar v. Saraswathi Ammal*. In this case, the Madras High Court took the view that evolution of polygamy does not interfere with religion because if a man does not have a natural son, he can adopt one from the other family. The court bravely has held that religious practices are always subject to the State regulation and can be governed through appropriate legislations irrespective of their religious emotions.

In *Shahulameedu v. Subaida Beevi*, Krishna Iyer, J. while upholding the rights of a Muslim wife to cohabit with her husband who had taken a second wife yet held her entitled to claim maintenance under section 488 of the (old) Criminal Procedure Code. He went on to plead for

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10. AIR 1952 Bom 84.
11. AIR 1952 Mad 193; also see *Ram Prasad v. State of U.P.*, AIR 1957 All 411.
monogamy among the Muslims. He referred to the Muslim scholarly opinion to show that the Quran enjoined monogamy upon Muslims and departure there from was only as an exception.

8. UNIFORM CIVIL CODE FOR DIVORCE AND MAINTENANCE:

In the matter of divorce the position of the Muslim women is the most inferior and insecure compared to others. Particularly the method of divorcing the wife by the husband by pronouncing triple ‘Talak’ is highly discriminatory.

In *Lily Thomas v. Union of India* the petitioner drew attention of S. C. to the many ‘extra-judicial’ methods of divorce allowed to Muslims under the Muslim Personal Law. These include *talaq* form which only men may perform. The *ila* form takes place when the Muslim man vows to abstain from intercourse for four months. *Zihar* takes its name from the word ‘back’ and literally means when the husband decides that his wife’s back is comparable to the back of his mother thus making it a prohibited relationship. The divorce by mutual consent or *Khula* takes place when the wife pays an agreed upon sum of money to the husband in exchange for his releasing her from marriage. As noted, all these methods are at the behest of the husband, and they are ‘extra-judicial’ because they do not involve the court system.

According to the personal law of Muslim in the matter of maintenance, the divorced Muslim wife is not required to be maintained beyond the ‘Iddat’ period. However, in the case of *Danial Latif v. Union of India* the Supreme Court Constitution Bench held that, ‘where the constitutional validity of the Act of 1986 [the Muslim Women (Protection of Rights on Divorce) Act, 1986] was challenged, and upheld that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well even beyond the Iddat period must be made within the Iddat period under section 3 (1) (a) of the Act.’ It was therefore categorically held that the liability of a Muslim husband to his divorced wife arising under section 3(1) (a) of the Act to pay maintenance is not confined to the Iddat period.

It is to be noted that the judiciary has always tried to narrow the gap between the general provision of law and the personal law. It is crystal clear from *Bhagwan Dutt v. Smt. Kamala Devi*, *Bai Tahira v. Ali Fissali*, and *Fuzlumi v. Khader Valt* where the S.C. made it clear

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15 AIR 1975 SC 83- 87.
17 AIR 1980 SC 1730.
that the personal law can never hold water against the policy of public law which is designed to achieve the objective of the welfare of the community at large.

The Court has shown unprecedented courage in famous Shah Bano case where the court held, that the literature available on the issue is inadequate to establish the proposition that Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. To quote Justice Chinnappa Reddy, ‘The time has now come for a complete reform of the law of marriage and makes a Uniform law applicable to all people irrespective of religion or caste. Now, it is time for the legislature to take initiative in this direction.’

The same view has been reiterated in Begum Sabanu alias Saira Banu v. A.M. Abdul Gafoor and Mangila Biwi v. Noor Hussain wherein the court held that the explanation of sub-section 3 of section 125 of Cr.P.C. is of uniform application to all wives including Muslim wives whose husband have either married another wife or taken a mistress. The recent decision of the Hon’ble Kerala High Court in M. Alavi v. T.V. Safia also is a strong testimony to the fact that the ambit of personal law should be curtailed if it comes in conflict with public law.

9. UNIFORM CIVIL CODE ON INHERITANCE & SUCCESSION:
The Indian Succession Act of 1925, which dealt with inheritance and succession, specifically exempted Hindu, Muhammadan, Buddhist, Sikh or Jaina. Afterwards some parts of it were made applicable to Hindu, Buddhist, Sikh or Jaina. But it is not applicable to Muslims even today.

In the matter of succession, a Muslim woman is discriminated. The legal position is that when two or more residuary of opposite sex but of the same degree inherit the property of the deceased, the Muslim male gets twice the share of the female. For example if brother and sister inherit the property as successors, the brother gets two shares whereas the sister gets only one share.

19 AIR 1987 SC 1103.
20 AIR 1992 Cal 92.
21 AIR 1993 Ker. 21.
22 Section 4, 20 (2) (b), 22 (2), 23, 29, etc of the Indian Succession Act 1925.
23 Section 57 as amended by Amendment Act 18 of 1929.
24 Quran 4:11.
The judiciary has followed a favourable trend towards the philosophy of UCC while deciding matters relating to property and succession.

In Mohammad Abu Zafar v. Israr Ahmad and others\textsuperscript{25} a case before Allahabad High Court the main issue was that whether a person who is a bhumidhar under Zamindari Abolition and Land Reforms Act, 1951 (U.P.) can make a valid Waqf of his bhumidhari rights in the land.

The court while interpreting the provisions of zamindari and land reform laws held that one has not to be carried away by the notions of personal law but allow the transfer of property in favour of mosque in the shape of Waqf keeping in view the religious purpose of the transfer of property.

Similarly, Justice Krishna Iyer clearly opined that the provisions of personal law must always run in accordance with the provisions of the Constitution. It is the function of judiciary to construe the words of personal laws with the passage of time which is the need of the hour in the light of constitutional mandate. It is now a high time to read the personal laws in the light of the philosophy contained in the Article 44.

10. CONCLUSION

In India, the experiment of personal laws has been a failure. It is to be noted that most of the Muslim countries have reformed their personal laws. Under the 1961 Muslim Family Law Ordinance of Pakistan every person who desires to take a second wife has to obtain a written permission from a government appointed Arbitration Council.\textsuperscript{26} The interesting point regarding Pakistani Personal Law is that until 1947 both India and Pakistan had governed Muslims under the Shariat Act of 1937. However, by 1961 Pakistan, a Muslim country had actually reformed its Muslim Law more than India had and this remains true even today. Similarly the Muslim personal laws in other Muslim countries like Tunisia and Turkey were reformed and thereby polygamy was abolished. Iran, South Yemen, and Singapore all reformed their Muslim laws in the 1970s.

If Muslim countries can reform Muslim Personal Law, and if western democracies have fully secular systems, then why are Indian Muslims living under the laws passed in the 1930s?

\textsuperscript{25} AIR 1971 All 366.

\textsuperscript{26} The Muslim Family Laws Ordinance, 1961 (VIII of 1961), S. 6 (1).
In India only one State has UCC. In the small state of Goa, a UCC exists, and adherence to Muslim Personal Law is prohibited.\(^{27}\) While talking on Goa law, Margaret Mascarenhas writes, ‘For the most part, the civil laws currently in force in Goa that pertain to marriage, divorce, protection of children and succession are non-discriminatory in terms of caste, ethnicity or gender.’\(^{28}\) Even today the state of Goa has remained the exception about UCC in India.

To sum up, it can be concluded that for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a UCC is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of Secularism. India needs a unified code of family laws under an umbrella of all its constituent religions. Whether it is the endeavor of the State, the mandate of the court or the Will of the people is an issue which only time will decide.

**11. SUGGESTIONS:**

The personal laws of each religion contain different and sometime contradicting provisions regarding marriage, divorce, maintenance, succession and inheritance, etc. Hence the idea of formulating UCC can be one of the main causes of communal conflict among people. India has a long history of personal laws and it cannot be given up easily. The only practical way out for evolution and implementation of Uniform Civil Code is by way of Voluntary Uniform Civil Code. The state can enact UCC and give option to the citizens belonging to minorities. Such option can be exercised at the time of marriage and afterward all the civil matters of such family can be regulated as per the provisions of Voluntary Uniform Civil Code. The proposed Voluntary Uniform Civil Code should have the basic essentials provisions as follows:

**a) MARRIAGE AND DIVORCE:**

(i) Monogamy should be respected banning multiple marriages under any religion.

(ii) The minimum age limit for a male should be 21 years and for a female should be 18 years.

(iii) Registration of marriage should be made compulsory.

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\(^{27}\) This is a result of the occupation of Goa in 1961 by India, when the Indian government promised the people that their laws would be left intact.

(iv) The grounds and procedure for divorce should be specifically laid down.

b) MAINTENANCE:

(i) A husband should maintain his wife, if she is unable to maintain herself, during the existence of marriage and also after divorce till the wife remarries.
(ii) The son and daughter should be equally responsible to maintain the parents.
(iii) The parents should maintain their legitimate as well as illegitimate children till he/she is capable of earning or gets married.

(c) SUCESSION AND INHERITANCE:

(i) Son and daughter should be equally entitled for equal shares to the property of the father, whether self acquired or joint family property.
(ii) Son and daughter should be equally entitled for equal shares to the property of mother, which she has self acquired or acquired through her father or relatives.
(iii) There should be no limitations imposed on the extent to which the property can be bequeathed, the persons to whom such property can be bequeath and the donation of the property by will for religious and charitable purpose.