

## WOMEN EMPOWERMENT THROUGH PERSONAL LAW LEGISLATIONS

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### ABSTRACT

*The Family unit and the relations of women with the family are at the core what we call family law or personal law. In India different laws govern this thorny and closed off terrain of law, namely, the Hindu Marriage Act, 1955, The Hindu Succession Act, 1956, The Special Marriages Act 1954, The Indian Christian Marriage Act, 1974, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and many more. The clear Picture that can be drawn here that the multitudes of women in India do not have recourse to the same law for their Personal Law rights. This Discrepancy has been noted by the Court Time and again and the Supreme Court has on multiple occasions<sup>1</sup> urged the Central government of India to frame a Uniform Civil Code<sup>2</sup>. The Recent judgment<sup>3</sup> of the Supreme Court has banned the practice of Triple Talaq which was termed as regressive by the NGO's fighting against it. The government of India in a rare show of action had presented an Act to criminalise the practise.. Not only this, the practices of Polygamy in Muslim marriage and Nikah Halala are also being challenged in the court<sup>4</sup>. These are perhaps early and positive signs of movement towards the framing of an Uniform Civil Code. Its, however, also apparent prima facie that only judicial decrees and Legislative Acts are not the cure for all social evils, what is needed is a deep study of why and how the landscape of law has developed in this peculiar way and what exact reforms can lead a hidebound society towards bettering itself and recognizing the Personal rights of women of all religions. The paper thus attempts to map out whether women, who are at the centre of many if not all personal law legislations, are empowered from these same legislations or not.*

**Keywords:** Women Empowerment, Legislation, Hindu Marriage Act, NGO's, Uniform Civil Code.

### Introduction

For years, women of India, arguably equal citizens of the Indian nation state have been fighting for jobs, education, and representation in the political sphere—all valid and necessary steps of progress for any democracy. However any noticeable change in the status quo, where an atmosphere of male dominated protectionist-patriarchal nationalism perpetuates increasing violence within and outside of India's conflict zones, can only be sought by political and judicial means. And while these are all honourable attempts, they fail to lift the veil from the traditional Indian family, the small but inescapably powerful social unit in which the country's egalitarian constitution and liberal politics hold little sway. Therefore all these are arguably second-order solutions, a shoring up of support for a more fundamental battle to remake the family unit. Thus the real battle is that to regulate family, which done through the branch of law called family law or personal law.<sup>5</sup>

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<sup>1</sup> In *Sarla Mudgal v. Union of India* (1995) 3 SCC 63, the Supreme Court had directed the then Prime Minister Mr. Narsimha Rao to take a fresh look at Article 44 of the Indian Constitution which provides for the state to secure personal rights through a Uniform Civil Code. Then in *Daniel Latifi v. Union of India* AIR 2001 SC 3262 and *John Vallamattan v. Union of India* AIR 2003 SC 2902, the Supreme Court expressed regret that Article 44 remained a dead letter and no Uniform Civil Code had materialised yet.

<sup>2</sup> Article 44 of Part IV (Directive Principles of State Policy) of the Indian Constitution enshrines that State shall give effect to a Uniform Civil Code.

<sup>3</sup> *Shayara Bano v. Union of India and Others*

<sup>4</sup> <https://timesofindia.indiatimes.com/india/after-triple-talaq-centre-targets-nikah-halala-and-polygamy/articleshow/64800186.cms>, last accessed on 11:05 AM, 2-07-2018

<sup>5</sup> <https://www.theatlantic.com/international/archive/2018/04/india-kashmir-vicious-patriarchy/558530/>, last accessed on 7:15 AM, 2-07-2018

more. The clear Picture that can be drawn here is that the multitudes of women in India do not have recourse to the same or a uniform law for their Personal Law rights. This Discrepancy has been noted by the Apex Court time and again and the Supreme Court has on multiple occasions<sup>1</sup> urged the Central government of India to frame a Uniform Civil Code<sup>2</sup>. Comprehending the need of a unified code for personal laws or of a civil code, first forces us to examine if legislation or even judicial decisions have been successful in empowering women.

### Constitution of India and Personal Laws

The Indian constitution recognises two concepts "secularism" (धर्मनिरपेक्षता) and freedom of religion (धार्मिकस्वतंत्रता) and these concepts can be found most prominently in article 25-28. Most noteworthy is article 25 which posits that freedom to practice, profess and propagated religion is subject to public order, morality, health and "other provisions of this part" The line other provisions of this part means that freedom of religion is subject to the fundamental rights enshrined in the other articles of part III of the constitution such as right o equality, right to life, right to freedom of speech and expression, abolition of untouchability, to name a few. Also Article 13(3)(b) recognizes customs having force of law in the territory of India as part of definition of the word "Law" which can be judicially reviewed. The result of these constitutional provisions read together is that the personal laws, which are a result of patch work of legislation over religious customs, can be judicially reviewed and are many a time subject to the essential religious practices test<sup>3</sup>.

### The ERP Test, Religion and Gender Bias

The ERP test has been notably used to determine what is or is not an essential part of the religion, for a person to be recognized as part of that religion. An easy example to understand the ERP test and its relation to the personal laws and effect on gender relations is the case of Sarla Mudgal v Union of India<sup>4</sup>, in which multiple instances of Hindu men converting to Islam for the purpose of marrying a second time as Muslim law permits polygamy. Bigamy or polygamy is not an essential practice of the Muslim faith. In fact bigamy is an offence under section 494 of IPC<sup>5</sup>. The court reiterated its judgement in the case of Lily Thomas v Union of India<sup>6</sup>. The ERP has been recently used in the Sabrimala temple case, the Triple Talaq case and the Hijab case.

The Essential religious practices test is relevant in this context to be discussed along with article 25 restrictions on freedom of religion because the secular and transformative nature of the constitution coerces the constitutional courts, viz, the High courts and the Supreme court to interpret religious customs, personal law legislation in gender neutral or gender affirming ways. A glaring example of this is the case of Danial Latifi v Union of India<sup>7</sup> where the court held that a Muslim Women (Protection of Rights on Divorce) Act, 1986 is valid and a Muslim divorced woman is entitled to maintenance even after the period of iddat<sup>8</sup> has been completed. The Danial Latifi case was a PIL filed to resolve the divergence of opinions by multiple High courts in cases related on the Muslim Women (Protection of Rights on Divorce) Act, 1986 which was enacted after the much contentious Shah Bano case<sup>9</sup>. The MWA is controversial because although it claims to be providing for protection for Muslim women in the vent of divorce in the form of maintenance, in effect it had made it so that the husband had to provide maintenance only during the period of iddat.<sup>10</sup>

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<sup>3</sup> First articulated in the case The Commissioner, Hindu Religious Endowments, Madras vShriLakshmindar Tirtha Swamiyar of Shri Shirur Mutt in 1954. A seven judge bench of the Supreme Court decided that what constitutes essential practices of a religion are essentially found in the teachings of the religion itself.

<sup>4</sup> (1955) 3 SCC 635

<sup>5</sup> Indian Penal Code (1862) section 494 reads "Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

<sup>6</sup> Lily Thomas vs. Union of India (UOI) and Ors. (05.05.2000 - SC) : MANU/SC/3519/2000

<sup>7</sup> Danial Latifi and Ors. vs. Union of India (UOI) (28.09.2001 - SC) : MANU/SC/0595/2001

<sup>8</sup>Iddat is the period of three months after death of husband or divorce of the coubple in the muslim religion, mainly with the intention to determine paternity in the case of pregnancy of the widowed or divorced women.

<sup>9</sup> Mohd. Ahmed Khan V. Shah Bano 1985 (2) SCC 556

<sup>10</sup> Mody Zia, (10 Judgements that Changed India), Shoba De Books, 2013, pg. No. 47

### Legislation or Judicial action: The Way Forward for Gender Equality

One can draw the reasoning that although the course of legislation is political, the bend of judicial decisions has been towards gender equality even though the course of legislation may not have been in accordance with article 14 notions of equality before law. The Recent judgment<sup>1</sup> of the Supreme Court has banned the practice of Triple Talaq<sup>2</sup> which was termed as regressive by the NGO's fighting against it. The government of India in a rare show of action had presented a Bill to criminalise the practise and had been mulling the route of an ordinance to achieve this goal. Not only this, the practices of Polygamy in Muslim marriage and Nikah Halala are also being challenged in the court<sup>3</sup>. Currently the practice of Triple Talaq has been criminalised in the Muslim Women (Protection of Rights on Divorce) Act, 2019. The Act declares the instant divorce granted by pronouncement of divorce three times as void and illegal. It provides for imprisonment for the man for a term up to 3 years and fine to the husband who practiced instant Triple Talaq. Muslim woman, who have been affected by this were also granted custody of children and subsistence allowance to be paid by the husband.

This progressive legislation is the result of the Shayara Bano case where the court has used the ERP test to reject the argument that the practice of Triple talaq was in any way an essential practice of the religion of Islam, in fact the Apex court urged the legislature to take a policy decision in this regard and again brought up the need for Uniform Civil Code to provide a framework for governance of personal laws. Similarly in the case of Anup Disalva and Ors .v. Union of India<sup>4</sup> section 10A of the Divorce Act (erstwhile the Indian Divorce Act) was in contention. Section 10A of the Act was inserted as a provision for dissolution of marriage by mutual consent in addition to Section 10 of the Act, the grounds for dissolution of marriage on fault basis in 2021. The mandatory waiting period of one year provided for in section 10A was dispensed with by the Court in this case as being violative of fundamental rights and provided relief to the wife.

Its, however, also apparent prima facie that only judicial decrees and Legislative Acts are not the cure for all social evils, what is needed is a deep study of why and how the landscape of law has developed in this peculiar way and what exact reforms can lead a hidebound society towards bettering itself and recognizing the Personal rights of women of all religions.

Perhaps the Questions proposed by Heather Ruth Wishik<sup>5</sup>, that according to her should be posed while inquiring into the set legal frames of patriarchal laws:

- "What have been and what are now all women's experiences of the "life situation" addressed by the doctrine, process or area of law under examination?
- What assumptions, descriptions, assertions and/or definitions of experiences- male, female or ostensibly gender neutral- does the law make in this area?
- What is the area of mismatch, distortion or denial created by the differences between women's life experiences and the law's assumptions or imposed structures?
- What patriarchal interests are served by the mismatch?
- What reforms have been suggested in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?
- In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation?
- How do we get there from here?"

These questions lead the researcher to believe that any research related to women's rights recognizes that there needs to be an emancipatory commitment to change: the conditions of life that are oppressive for women need to be transformed. There are two theories regarding how to achieve this transformation: reformist (liberal) and radical theories. The reformist theory aims at creating a space in the current and existing legal structure for women. On the other hand the radical viewpoint is that there should be totally different treatment and different laws for women.

<sup>1</sup> ShayaraBano v. Union of India and Others

<sup>2</sup> Talaq-e-Biddat or triple talaq is the practice of divorce prevalent in Islam, where the husband could divorce his wife by pronouncing divorce three times, without citing any reasons for the divorce. The presence of wife at the time of pronouncement of divorce is immaterial.

<sup>3</sup> <https://timesofindia.indiatimes.com/india/after-triple-talaq-centre-targets-nikah-halala-and-polygamy/articleshow/64800186.cms>, last accessed on 11:05 AM, 2-07-2018

<sup>4</sup> Anup Disalva and Ors. vs. Union of India (09.12.2022 - KERHC) : MANU/KE/3568/2022

<sup>5</sup> Wishik, Heather Ruth, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 Berkley Women's L.J. pg no. 64 (1985)

The issue remains objectively of equality and rights. Since our collective view of equality is caught up in measuring the rights we have, this gives a skewed perception of the term equality and the path to achieving it. This is then essentially the debate between formal and substantive equality. For there to be equality, one has to first remove the inequalities and to do so it must be recognized that there is discrimination. This is the core issue of why even though the Constitution of India enshrines equality, the law mostly focuses on formal equality and not substantive equality. This approach quietly but resoundingly which defeats the purpose of article 14. Apart from the issue of equality and rights, there is also the issue of protecting women against criminal acts that are typically and systematically directed mostly against women: rape, sexual harassment and battering. Some forms of these actions were not considered actionable offenses under the law for a long time and the laws which have at last come into force are focused on not wrongly punish men, which is achieved at the cost of not protecting women. This was largely due to the history of understanding women not as independent and autonomous agents, but as property belonging to men. Underlying all these problems are assumptions about gender and agency which encourage the law to place responsibility for their own harm on women rather than on the men who cause it.

The first and foremost area of research and information in this field of study are the judicial pronouncements. Family law, as the personal law field is popularly called, is an immense area of litigation and leads to frequent judicial pronouncements on the varied subjects which come under the aegis of personal laws. The most recent ruling<sup>1</sup> which prompted the Supreme court to clarify the position of a daughters share in property or her position as a co-parcener is one such example. In the instant case the court had to clarify that women born before the enactment of the Hindu Succession amendment act, 2005 were also eligible for a share in the property is also an eye opener in the sense that only judicial pronouncements are not enough while studying women's personal rights. The researcher has to study the outlook of the members of a society which is not eager to provide full equality to women. This obviously can be achieved through an empirical study of selected groups.

The Supreme Court has been an instrument of great change in the landscape of personal rights for women, going from granting maintenance to a Muslim wife under a law<sup>2</sup> which almost certainly does not provide for it<sup>3</sup> to announcing that a woman in a live in relationship is also entitled to maintenance from her partner<sup>4</sup>. The Court has also provided for advanced grounds of Divorce like that of mutual consent and has very recently done away with the waiting period of six months which as necessary for getting divorce. Furthermore there are a number of legislative acts that are in force detailing the rights of women in different spheres of interpersonal relationships, like marriage, divorce, succession, adoption and guardianship. Most of these laws are made for one religious group at a time except for laws like the Special Marriage Act. The study of these laws and why they are created and designed in such a way is one of the most important avenues of research for this study.

## Conclusion

Since the time Mary Wollstencraft wrote a Vindication of the Rights of women, there has been awareness around oppression of women and the steps that can be taken to eliminate it. Such steps range from increasing age of marriage and consent for women, to increase literacy rate of women and to give women the right to body autonomy. Since Roscoe Pound terms Law as an instrument of social transformation, it stands to reason that laws and policies of the legislature are at the fore front of societal transformation for gender equality. The constitutional document insisting on equality is one of the foremost examples of this claim. The Medical Termination of Pregnancy Act 1970, The Prohibition of Child Marriage Act, 2006, The Protection of Children from Sexual Offences Act, 2012 etc are also similar representation of this determination to bring about societal change and reach gender equality. With laws and policies in place, there has been a trickle down effect in this sphere, the society has been forced to accept certain changes which it has been resistant to in the past due to stringent laws. The dowry prohibition laws and Domestic Violence Acts have been instrumental in this. Although women are moving towards their rightful equal place in society, laws, policies and legislations have hastened and smoothened the way.



<sup>1</sup> <http://www.livelaw.in/daughters-equal-rights-ancestral-property-even-born-enactment-hindu-succession-act-holds-supreme-court-read-judgment/>, last accessed on 02-07-2018

<sup>2</sup> Muslim Women(Protection of Rights on Divorce) Act, 1986

<sup>3</sup> Noor SabaKhattoon v. Mohd. Qasim, AIR 1997 SC 3280

<sup>4</sup> <https://www.legallyindia.com/views/entry/right-of-maintenance-to-women-in-live-in-relationships>, last accessed on 02-07-2018