UNIFORM CIVIL CODE: THE NECESSITY AND THE ABSURDITY

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Abstract

The question as to whether after 68 years of the Constitution India is ripe enough to have a uniform set of civil law has been raised yet again. The Uniform Civil Code (UCC) has always been piped as an effective tool to realise and effect the empowerment of the Indian women and uplifting their status in the social institutions such as family and marriage. This paper tries to evaluate the entire dialogue around the UCC, the arguments on its necessity and the various doubts on its nature, so as to ascertain the extent to which the question of women gets addressed. It is of the utmost importance to scrutinise how the judicial and political intelligentsia has been trying to address the subject of gender parity through the discourse UCC.

I Introduction

"Raw haste, half sister to delay"

-Lord Alfred Tennyson[1]

THE HUMAN rights of women in India have always been associated with the personal laws which involve social institutions like marriage and family. Indeed, it is the personal laws which lay down the legal contours of the status of women in these social institutions. Unlike the west, India is far from being a homogenous nation-state and is a home to one of the most diverse and variable melange of a population. It is ethnically diverse, linguistically diverse, culturally and religiously diverse, these not being water tight categories either. Thus they mingle up and create a mash up of an extremely vibrant but difficult to handle populace.

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[1] Lord Alfred Tennyson in his poem Love Thou Thy Land, With Love Far Brought, first published in 1842.

Hence, a Kashmiri Brahmin woman will have different existential realities than a Sarayupari Brahmin woman. A Brahmin woman in West Bengal will not only have different social and religious norms than a Bengali low caste woman, but also a Namboodiri Brahmin in Kerala. The oppression of patriarchy seems to be a common experience to all these women from a distance, but when one tries to get into the skin of each and every such woman we find that what seems similar is actually very different in its form and nature.

In such a landscape, a formula of a uniform personal law is introduced and uniformity is presented as a solution to undo all the repressive evils that have crept inside our existing personal laws. UCC as envisaged under our Indian Constitution is time and again hailed to be the miraculous cure for all the social problems faced by the Indian women. The Indian Supreme Court has been incessant in reminding the legislature the glorious promise of a uniform civil law which was deferred to the future by the makers of our Constitution.

Recently, the debate of UCC has yet again gained momentum due to a petition filed before the Supreme Court by *Shayara Ban*o,[2] a 35 year old Muslim woman which calls to ban the practice of triple talaq and declare it as unconstitutional. The practices of polygamy and *halala* have also been brought under the judicial scanner. This has once again raised the question that whether UCC will be the magic solution in weeding out such practices which are being considered as oppressive and anti-women not only by people belonging to other religion but even group of people belonging to the same religion?

The principle of UCC essentially involves the question of secularism. Secularism is a principle which needs to be analysed at great length. There are various interpretations of secularism and it is on the altar of all these interpretations, the UCC is both glorified and criticised. Some factions of our society consider the UCC anti-secular while some regard it as the harbinger of communal harmony and secularism. Lastly, the question of the human rights of Indian women looms large in the background of the UCC. Hence, it is needed to be understood whether uniformity in personal laws will definitely lead to the equal status of women in the society or would just remain a communal agenda.

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[2] Draft of the Writ Petition *available at*: https://www.documentcloud.org/documents/2725467-Shayara-Bano-Writ-Petition-FINAL-VERSION.html. *last visited on* Oct 5, 2016.

II Uniform civil code: Reasons given for its imminent necessity

The Colonial India witnessed many of her laws getting codified by the British such a as the criminal law, the law of contract and transfer of property *etc*. These laws were made by the British while divesting away with all religious, cultural factors. Hence, we observe that the law of contract is purely along the law that existed in Great Britain around that time. The only sphere which was left behind was the personal laws which governed various aspects of the lifestyles of the people, such as marriage, family, succession *etc*. The British considered such civil topics to come within the purview of the religion and thus specific religious principles should govern these civil laws. The transfer of sovereignty from the colonisers to the colonised in our nation was marred by the high communal tensions. Restoration of communal harmony which was weakened to a very great extent was in the mind of the Constitution makers. Article 35 of the draft Constitution of India was added as a part of the directive principles of the state policy in part IV of the Constitution of India as article 44. It was incorporated in the Constitution as an aspect which would be fulfilled when the nation would be ready to accept it and the social acceptance to the UCC could be made. However, after 66 years of the adoption of our Constitution, UCC remains to be a constitutional dream to be fulfilled. The judiciary has time and again reminded the legislature the need to have a UCC through its various judgments.[3] How judiciary has stated UCC to be a necessity in Indian polity has to be understood as well.

Uniform civil code and constituent assembly debates

As referred before, UCC was originally encapsulated in article 35 of the Draft Constitution. There was a demand to add a proviso in article 35 which would make the UCC, whenever it would have been enacted, not obligatory in nature and personal laws be kept out of its purview. The proviso read as, ñProvided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law.ò[4]

UCC was considered to be a threat to the religious freedoms envisaged by the Constitution. However, there were many reasons given in favour of a common civil code. K.M. Munshi took a very rigid view in negating the claims of majoritarian over sweep over the minorities. He states:[5]

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[3] *Mohd. Ahmed Khan* v. *Shah Bano,* AIR 1985 SC 945, *Ms. Jorden Diengdeh* v. *S.S. Chopra*, (1985) 2 SCC 556, *Sarla Mudgal* v. *Union of India*, (1995)3SCC635.

[4] Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948.

[5] Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948.

> It is not therefore correct to say that such an act is tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand.

Munshi presented the unifying force of secularism, that one way of life shall be *the* way of life for all. However, this view is the most controversial of all since it seems to muffle the voice of diversity. The other reason backing the UCC was the issue of empowerment of women. Since right to equality was already acknowledged to one of the most coveted rights, the unequal footing of genders through the word of law could no longer be validated. Thus, the practices which undermined a womanôs right to equality would necessarily be done away with. A common civil law governing the personal matters would bring all the women under one single umbrella and irrespective of race and religion the discriminatory practices would be put to an end.[6]

Shri Alladi Krishnaswamy Ayyar gives a much more realistic reason to aim for a UCC and bases his argument on the fallacy of having strict water tight existence of the communities. He states that in a country like India there is much interaction between the various different communities which leads to the altercations between specific personal laws. Not only altercations but one legal system gets influenced by other legal system. He states:[7]

> In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are

[6] *Ibid.*
[7] *Ibid.*

> departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue.

He questions the very core of the dialogue of excessive cultural relativity and the cons of it. Having separate personal laws governed entirely by religion, which has as many interpretations as its followers, would limit the scope for reform. He took the dialogue of K.M. Munshi to another level by treating uniformity not as a necessary evil unlike Munshi who gave examples of other Islamic countries where forceful application of the majoritarian law was considered to be justified by him as long as it brought reform.

B. R. Ambedkar was also a staunch supporter of the UCC. He denied the claims that a common civil code in a vast country, like India, would be impossibility. He stated that the only sphere which did not have a uniform law was that of marriage and succession; rest all areas of civil law, such as transfer of property, contract, the Negotiable Instrument Act, easement act, sale of goods etc. were uniform in nature.[8] Let us not forget that Ambedkar was a man who believed in reform along the western line. He differed from Mahatma Gandhi in this respect and considered the western model of law and social relations to be an apt reference point to bring social reforms in Indian setup. He did not wish to add the proviso to the already unenforceable article 35, but was open to the slow inclusion of the communities with their voluntary consents once the legislature fulfils its promise to have a UCC. He stated:[9]

> I quite realise their feelings in the matter, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. *It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens.* 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 purely voluntary.

[8] Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.
[9] Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.

> Parliament may feel the ground by some such method. This is not a novel method. *(Emphasis Supplied).*

It is a well known fact that Ambedkar has always been a great critic of the dominant Hindu religion. In 1936 he had already underlined one of the many dogmas that infested Hinduism*, i.e.,* casteism and untouchabilty, to the extent that he went on to denounce himself as a Hindu.[10] Yet in the Constituent Assembly he denied the claims of UCC being a mouthpiece of the majority, or the tyranny of the majority. He stated that the manner in which the Shariat Act, 1936 was made applicable to all the Muslims in India was nothing but an example of how convenient uniformity in laws is and was welcomed by the Muslim brethren. The Muslims which were being governed by the Hindu laws in certain specific areas were all collectively and uniformly brought under the purview of this uniform law, for their own benefit. Similarly, if certain principles of the majoritarian religion, i.e. Hinduism would be incorporated in the UCC, it would be not by virtue of them belonging to Hinduism, but because they were suitable to the progressive society. This should not be qualified as a tyranny of the majority. He stated:[11]

> Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.

This statement made by Ambedkar speaks loudly for itself and his commitment towards having a UCC to bring about the much necessary changes in the personal dimensions of an Indian irrespective of her religion and community. Post independence his tooth and nail fight to pass the Hindu Code Bills, which also lead to his resignation from the cabinet, is yet again a proof of his drive to bring UCC. Although the proposed amendment to article 35 was not passed, yet there was no clear cut majority on the issue of the UCC, some of the reservations echo even in the debates of 2016.

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[10] Dr. B.R. Ambedkar, *The Annihilation of Cast: The Annotated Edition, 11* (Navayana Publication, New Delhi, 2014).

[11] Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.

The intent of the judiciary

The Supreme Court of India has always been an ardent supporter of the UCC. It was the legendary case of *Mohd. Ahmed Khan* v. *Shah Bano*[12](hereinafter referred as *Shah Bano case*), that once again brought the issue of UCC on the preface. In this much celebrated case the Supreme Court brought a divorced Muslim woman within the cover of section 125 of the Code of Criminal Procedure, 1973 and declared that she was entitled for maintenance even after the completion of her *iddat* period. Although Supreme Court had assumed the role of a social reformer in many other previous cases,[13] *Shah Bano case* usurped a landmark position in the history of debates on religion, secularism and the rights of women. If we carefully side-step the political drama that later unfolded, we would be able to trace the problems the courts of our country have been facing due to the separate conflicting personal laws.

As pointed out in the Constitutional Assembly debates, there already exist a number of uniform laws in our country. The courts were taken by surprise in situations where such uniform laws came at loggerheads with the various personal laws, as was the case in *Shah Bano*. With articles 14[14], 15[15] on one hand and article 25[16] on the other, the courts found themselves in a fix so as to decide to give precedence to which fundamental right. The Supreme Courtôs use of a uniform law to provide remedy to Shah Bano proved to be a much easier path to protect the basic rights of women. Had the Supreme Court taken recourse to the specific personal laws, it might have found itself embroiled in debates of theology thus neglecting the plight of the women. The court has stated:[17]

> Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria

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12 *Supra* note 3.

13 *Fazlunbi* v. *Khader Ali*, 1980 SCR (3)1127.

14 The Constitution of India, 1950, art: 14: Equality before law.ð The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15 The Constitution of India, 1950 art. 15 (1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

16 The Constitution of India, 1950, art. 25 (1) : Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

17 *Supra* note 10.

> which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. *True, that they do not supplant the personal law of the parties but, equally the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes*. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. (*Emphasis Supplied).*

Shah Bano case highlights the need for a uniform law which addresses the core need of a woman in distress. It tries to state that it is the suffering of the woman that should be at the core of any gender justice law. The refusal of the husband to maintain his wife after conveniently giving her a divorce is the issue which the law should address rather than addressing what the specific religion has laid down for that woman.

V. R, Krishna Iyer J. who is known to have given a scintillating judgment in *Bai Tahira* v. *Ali Hussain Fissalli Chowthia*[18]also has an Ambedkarian view point on common civil code. Instead of being a majoritarian undertaking, the common code is supposed to be a collection of the best from every system of personal laws. He states:[19]

> Speaking for myself, there are several excellent provisions of the Muslim law understood in its pristine and progressive intendment which may adorn Indiaôs common civil code. There is more in Mohammed than in Manu, if interpreted in its humanist liberalism and away from the desert context, which helps women and orphans, modernises marriage and morals, widens divorce and inheritance.

Iyer J insists that cultural autonomy is not an absolute anathema to national unity. However, religious practices cannot be justified and upheld by sacrificing the human rights

[18] AIR 1979 SC 362.

[19] V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act*, 32 (Eastern Book Company, Lucknow, 1987).

and human dignity. Religion cannot and should not be allowed to suffocate dignity and freedoms of the citizens.[20]

The judiciary has faced a plethora of problems in upholding the social reforms in the private sphere that the legislation tries to bring through various enactments. Surprisingly enough the recourse to fundamental rights is taken in challenging such enactments. It becomes extremely difficult to gauge the effects of such social reforms on a large scale since it might be possible that one community might be impervious to such social change due to its religious canons. This raises another question of discrimination on the grounds of religion which is once again prohibited by the Constitution vide article 14. How can the Supreme Court declare one practice as unconstitutional and violative of human dignity for one section of women but let it remain constitutional for another section of women since their personal laws allow it to be so?

In the case of *State of Bombay* v. *Narasu Appa Mali,*[21] the Supreme Court was face to face with such a situation. The constitutional validity of the Bombay (Prevention of Hindu Bigamous Marriages) Act, 1946 was to be determined by the High Court of Bombay. One of the two major contentions was that it was violative of articles 14 and 15 since the Hindus were singled out to abolish bigamy while the Muslim counterparts remained at full liberty to contract more than one marriage and this was discrimination on the grounds of religion. Questions such as these were raised due to an absence of a common civil code and clash of different principles in different personal laws. M.C. Chagla J. upheld the validity of the Act by stating that it was not violative of any Fundamental Right since such prohibition should not be seen through the lens of religious discrimination. He argued that the Muslims and Hindus differed from each other not only in religion, but in historical background cultural outlook towards life and various other considerations. Gajendragadkar J. stated:

> The State Legislature may have thought that the Hindu community was more ripe for the reform in question. Social reformers amongst the Hindus have agitated for this reform vehemently for many years past and the social conscience of the Hindus, according to the Legislature, may have been more in tune with the spirit of the proposed reform. Besides, amongst the Mahomedans divorce has always been permissible and marriage amongst them is a matter of

[20] V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act*, 32 (Eastern Book Company, Lucknow, 1987).

[21] AIR 1952 Bom 84.

> contract. If the State Legislature acting on such considerations decided to enforce this reform in the first instance amongst the Hindus, it would be impossible in my opinion to hold that in confining the impugned Act to Hindus as defined by the Act it has violated the equality before law as guaranteed by Art. 14. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail.

High Court of Madras also in *Srinivasa Aiyar* v. *Saraswati Ammal*[22] upheld the validity of Madras Prohibition of Bigamy Act on similar grounds.

The trend which we have to notice is that the courts took a roundabout way to justify such discriminatory laws through extra-religious methods. Otherwise such discriminatory yet laudable attempts by the legislature to bring social change would have been rendered unconstitutional on the touchstone of article 15. Hence justifications such as personal laws not falling within the purview of article 13 and separate, distinct historical subject positions of religious communities were given. M.C. Chagla J. later on himself conceded, ñAll my sympathies were in favour of this argument, but with a great reluctance I had to come to a conclusion that I could not strike down the law.[23]

Such examples merely cite the problem of excessive reliance on relativity in the field of personal laws. Sadly, in political debates and public discussions, this has always been projected from the perspective of a man. That since a Hindu man is subjected to such discrimination, all men should give up their privilege of having gender specific superiority. Equality definition is portrayed in this manner and not through the subject position of the woman.

III Downside of a uniform civil code: Generalization of oppression of women

Where does the woman find her voice in the entire hullabaloo around the protection of her rights and change in her social status and how? Uniformity in civil law has for a long time been advocated in order to secure the rights of the women and social reforms to empower the women suppressed by the diseased ways of religion and culture. The debates around a uniform civil code have always sidetracked the lived experiences of different

[22] AIR 1952 Mad 193.
[23] M.C. Chagla, *Roses in December,* 160 (Bhartiya Vidya Bhawan, 2000).

categories of women from their perspective. Not only people against a UCC but also the proponents of the code failed to address the core issues of the rights of women.

Two statements around which the concept of UCC has been spun are firstly, that it seeks to achieve gender justice and national integrity and secondly, that it seeks to suppress the identity of the minorities and is a grave threat to the cultural diaspora. The two downsides of a common civil code which can be culled out are hence, firstly, the threat to the different diverse identities of the people and the collective identity of the communities, and secondly, the dubious and somewhat failed formula of uniformity sufficient to secure the rights of the women. The former is a more discussed and more stressed upon argument against the UCC while the latter is a much ignored argument lost in the political cacophony.

The threat of majoritarian dominance over minorities

The Constituent Assembly Debates around the UCC and the erstwhile article 35 saw a lot of dissent towards it. The issue of dominance by the majority communities was the main bone of contention. The members had concerns that their separate culture and beliefs would get over ridden by others. It was contended that a secular State did not necessarily meant a uniformly regulated state rather a state where all its subjects can enjoy following of their specific faiths and belief equally. Secular State, if understood from a laymanôs perspective it means a State which has no official religion. Thus France is a secular state since it has no specific religion governing the matters of the State and law. Secularism has been a gift of the ñcivilizedò western nations where the State was free from any religious influences, and due to our inexplicable biasness towards the ñcivilityò of the west, their secularism is considered to be some ideal to be achieved.

However, the fool proof secularism of the west has indeed resulted into the suppression of many faith systems, beliefs and has created hegemony of one set of principles which are considered to be better, more progressive than other faith systems whose principles are adjudged to be oppressive and archaic. The members of the Constituent Assembly who rose against the common civil code had there well founded fear of the majoritarian notions of progressive laws, social reform swallowing the various other minor views on progress and modernity. Mehmood Ali Baig Sahib Bahadur laid down the different understanding of secularism. He states:[24]

[24] *Supra* note 4.

> People seem to have very strange ideas about secular State. People seem to think that under a secular State, there must be a common law observed by its citizens in all matters, including matters of their daily life, their language, their culture, their personal laws. That is not the correct way to look at this secular State. In a secular State, citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them. Therefore, I hope the framers of this article have not in their minds the personal law of the people to cover the words "Civil code".

In the recent *burkini* ban controversy in France we can see the tyranny of the majority. The secular country in question is hung up on the popular notions of secularism and modernity. The ways of the French majority who need not cover their heads and need not wear a full bodied clothing on a beach consider *hijaab*, *burkini*, head turbans etc. to be medieval, backward and oppressive. There are very dissimilar takes on the way of life in different communities and by making a fixed uniform law one way of life will be taken as the standard take on modernity and progressiveness. The Muslim members of the Constituent Assembly pointed out the excessive western colonial influence on understanding upliftment and modernity. B. Pocker Sahib very aptly stated:[25]

> It is very easy to copy sections from other constitutions of countries where the circumstances are entirely different. There are ever so many multitudes of communities following various customs for centuries or thousands of years. By one stroke of the pen you want to annul all that and make them uniform. What is the purpose served? What is the purpose served by this uniformity except to murder the consciences of the people and make them feel that they are being trampled upon as regards their religious rights and practices? Such a tyrannous measure ought not to find a place in our Constitution.

Uniformity in personal laws is not a harbinger of communal harmony. Perhaps, in 1948 when these debates were happening to construct our Constitution, the need for having a secular State was embedded in the minds of the Constitution makers and the nationalist leaders of our country. The aftermath of partition served as a gruesome, but clear example as to how dangerous communal tensions can be. The British concession on not interfering in the

[25] *Ibid.*

personal laws of the various communities did not arise from the desire to let the distinct communities thrive and for easy administration. Rather the non interference in the personal spheres of the communities was used as a tool of appeasement and creating a divide which later on resulted into the partition of India. The nationalist leaders such as Jawaharlal Nehru had this communal clash at the back of their minds when they aimed to construct a secular state with no religious affiliations.

A non-religious state is absolute anti-thesis of an anti-religion state however similar they might appear from outside. A non-religious secular state does not give precedence to one religion over the others and all communities have the liberty to practice and follow their religious beliefs and laws. The role of the state is minimalistic in nature and its only function is to prevent any conflicts between separate systems and protect the private spheres of the communities. An anti-religion state also is a state which does not have inclination towards any one religion. However, an anti-religious state would be one where religion and its distinct provisions would be completely discarded from the legal and political system of the state. The role of the state then becomes overbearing, since the laws and the political setup will have to be created and regulated by those principles which the State deems to be appropriate. The State will have the power to be intrusive and authoritarian to govern the people along the secular line which it considers to be progressive and modern.

The occidental concepts of modernity cannot be considered to be the uniform standards of a progressive society. Universalisation of laws, especially personal laws would necessarily have to dodge this question, *i.e.,* modern according to whom; oppressive and backward according to whom?

Uniformity and rights of women: A myth debunked

UCC is always harped on around the movement around the rights of women. It is lauded as the ultimate solution to do away with many of the discriminations between the genders that have seeped through religious edicts and social structure. Even in the Constituent Assembly Debates the discrimination against women and much needed social reforms for elevation of their status in the society was the moot point in favour of article 35. The members against a common civil code ignominiously dodged the question of elevation of the status of women and focused only on the cultural disparity and dominance of the majority. No one tried to question the practical working of a common civil code and how would it be beneficial in the drive for rights of women in our country. Ironically, none of the

women members participated in the debate on article 35 and the proposed future prospect of securing a uniform civil code. K.M. Munshi appealed to the House that absence of uniform personal law would amount to all discriminatory practices being covered under the purview of religious freedom and hence rendering impossible for legislative reforms to correct them as they would be struck down on the premise of religion.[26]

Blind drive for social reforms, without addressing the distinct subject positions and the living reality of the women have been the bane of rights of women and change in their status. Muslim woman is assumed to be oppressed and downtrodden and comparison is made with corresponding Hindu woman having the protection of a codified uniform personal law. Since the Hindu personal law has been codified, the rights of Hindu women have taken a backseat, assumed to be well protected by a codified personal law and in a better position than a Muslim woman who still suffers the brunt of their archaic personal law. Despite the codification of Hindu personal law and universal application of the codified law, it has not been able to address the question of social reform properly. The voice of the Hindu women, which speaks about the partial failure of uniform law, was lost in the din of secularism, unnecessary glorification of uniform civil law and obsession with the protection of diversity and minorities.

Social reform without a social consensus was as sharp as a cotton bud. Madhu Kishwar, a renowned legal scholar states, ñIn their stated determination to put an end to the growth of custom, the reformers were in fact-putting an end to the essence of Hindu law, yet they persisted in calling their codification 'Hindu'.ò[27] It would be incorrect to say that codification of Hindu personal law did not bring and change or reform. The biggest contribution of this move was that the equality rights of women were acknowledged greatly as an issue extremely necessary to be contemplated. However, it only went there and not further. Soon codification of Hindu law was hauled as a path breaking in the field of social reform and was subjected to incessant citation in the prospective debates on uniform civil code.

The Indian legislators merely assumed the roles of their western colonizers and drafted the codified Hindu law, unifying various categories within the definition of Hindu and sifted through the different diverse religious practices and principles to cull out only

[26] *Supra* note 4.

[27] Madhu Kishwar, ñCodification of Hindu Law: Myth and Realityò *Economic and Political Weekly,* Aug. 13, 1994. *Available at* http://www.economicandpoliticalweekly.org/ (last visited on accessed on July 20, 2017).

those principles which were appeasing to their western British homogenous minds. Indeed, many provisions were borrowed from other religions and world views, such as divorce, but it was because of the different personal laws, which worked separately in a close knit society, that such references and examples could be taken as social reforms.

Hence, before celebrating aspects of universality, it is necessary to see the darker side of the codification of Hindu law. The status of Hindu woman still suffers from inferiority complex even after the codification of the Hindu personal law. The western ideals of monogamy, divorce and maintenance indeed cured some of the plaguing diseases in Hindu law, but for those Hindu communities who were much ahead of the western ideals were brought back into a much more regressive personal law regime. For instance, the *marumakattayam* system prevalent in Kerala, which was applicable to the Kerala Muslims prior to the Shariat Act, 1937, had a well developed and advanced divorce and maintenance systems. The system rooted in matrilineal law had well developed succession laws for women as well. It was seen that the universality of north Indian sanskritized system washed away probability of a better social reform. As an afterthought such customs which conferred rights upon the women excepted from the general law. This move also opened a can of worms.

> Giving these forms of divorce the right to co-exist with the contrary requirements of the Hindu Marriage and Divorce Act, amounts to declaring that the new law has no teeth at all. It is not surprising, therefore, that barring a small section of the urban educated elite in India, very few people go to court to get their marriages dissolved. Often the women are abandoned by their husbands and thus divorced *de facto* without any formal procedures, or the matter is settled through the mediation of biradari elders.[28]

In fact, if any example has to be carved out of the present codified Hindu law then it should be that how without recognizing the difference in stature and socialization of women, social reforms can in fact become regressive. There has to be an internal mass development of social conscience first and then the reforms are to be heralded.

Monogamy as a uniform law imposed on the Hindu men after the codification of Hindu law serves as a good example. The unrest of Hindu community towards monogamy on

[28] *Supra* note 25.

one religion and exempting other was obvious even before the Supreme Court.[29] Introduction of monogamy and prohibition of polygamy without stirring the social conscience resulted in the continued practice of polygamy in Hindu men, except that now they were safer to escape the clutches of law since the Hindu Marriage Act, 1955 had fixed the definition of a valid marriage. A pell mell of brahmanic rituals such as *saptapadi*, *lajja home* etc. were made essentials of a valid Hindu marriage. The other forms of marriage which might have been accepted in other Hindu communities were ignored. The Hindu man could now have a perfect defence ready for his second marriage that it was not valid according to the fixed, unified Hindu Marriage Act, 1955.[30] Instead of empowering, the status of the second wife was in fact demolished. The woman who was a second wife had no protection left under her own codified unified personal law.[31]

> Moreover, the realisation of the goal of equality for women is not realizable by law alone. Whatever laws, including the Dowry Prohibition Act, 1961, Section 498-A of the Indian Penal Code, 1860, the Protection of Women from Domestic Violence Act, 2005 and the Hindu Succession Act, 1956 as amended in 2005 have not been able to give much relief to women. Much needs to be done for the social and economic empowerment of women before they are able to take any advantage of any laws ensuring equality to them.[32]

This sums up the lesser taken route of discussing the pitfalls of having a UCC and coaxes us to take the question of rights of women, women who do not belong to homogenous groups and come from different social and religious setups looking forward to specific reforms endemic to their specific existential realities and not a uniform social reform which might lose its progressiveness in the effort to unite. Hence uniformity cannot be expected to be a perfect solution to multitude and diverse gender inequalities.

IV Conclusion

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[29] *Supra* note 19.

[30] Flavia Agnes, ñHindu Men, Monogamy and Uniform Civil Codeò *Economic and Political Weekly,* Dec. 16, 1995. *Available at:* http://www.economicandpoliticalweekly.org/ (last visited on accessed on Aug. 10, 2016).

[31] Flavia Agnes, ñLiberating Hindu Womenò ò *Economic and Political Weekly,* Mar.7, 2015. *Available at* http://www.economicandpoliticalweekly.org/ (last visited on on June 20, 2017).

[32] M.P. Singh, ñOn Uniform Civil Code, Legal Pluralism and Constitution of Indiaò 5 *J. Indian L. & Soc'y* (2014).

One has to identify what is the moving jurisprudence behind UCC that is it national integration with one nation-one people motto or is it the eradication of the gender based injustices engrained in the all personal laws. These two future results of the UCC are quite distinct from each other. It has been observed that the original dialogue around UCC was more inclined towards the idea of national integration, with the cause of gender equality as an ancillary effect. However, today in the contemporary times UCC has come up as a champion of the gender equality. If so, then the dialogues around UCC have woefully missed their mark.

It is not that uniformity in laws is undesirable. Extensive cultural diversity is the truth of India, but absolute heterogeneity in laws is also not desirable. Uniformity very rightly leads to a constricted scope for arbitrariness and equal protection of law to all the subjects irrespective of the diverse backgrounds they come from. The clarion call for UCC in India has always been with the idea of divesting law from all kinds of religious influences. That law, even the personal laws should be stoic without specific religious and cultural hurdles creeping in. Religion and culture since a very long time have been the ultimate explanation to any and every social evil that exists in the society. Sati, therefore was justified because the religious tenets supported it. One could find a number of justifications ranging from pure religious fanaticism to scientific rationalism and sociology. However, in a country where Hindus shared their day to day lives with other religions where women who need not deliberately die with their husbands existed, questions were raised that why Hindu women be subjected to such atrocity? In fact those who raised such questions became the beacon lights for a movement of social reform such as Raja Ram Mohan Roy, Ishwarchandra Vidyasagar and others.

In a heterogeneous society like ours comparisons are normally to be made. These rigid and compartmentalized personal laws which cannot, in any probability, be influenced by others might have the tendency to throttle any scope of social reform.

Codification of scattered laws and legal norms, religious edicts, traditions and cultural laws gives a fixed recognition to rules and eases the enforceability of laws. The rights and duties which flow out of such laws and rules also get due recognition and traceability. Indeed, a uniform law with all populace equally and uniformly governed by it is the desired goal and as Dr. Ambedkar had said the society to inch towards its complete realisation.

However, the taking example of a uniform criminal law as a benchmark for the goodness of uniformity in personal laws is not correct. Personal laws govern the unique and peculiar realms of family and marriage which are endemic to each and every diverse group of people. Unlike the criminal law, personal laws govern the way of life of the people which can differ from one community to other. And therefore uniformity in personal laws has to be treated much more delicately.

Two questions need to be addressed which are being completely ignored in the present din around UCC. *Firstly,* how can uniformity in personal laws are brought without disturbing the distinct essence of each and every component of the society. What makes us believe that practices of one community are backward and unjust? If one does not address these questions with gravity and depth, then we would commit the same horrible mistake of the Americans who considered the indigenous population as savages, needed to be liberated from their customs and rescued by the progressive, civilised norms of Christianity.

The second question is that whether uniformity has been able to eradicate gender inequalities which diminish the status of women in our society? This question is interlinked with the previous question. The definitions of inequality may differ from community to community. It is necessary to determine the layers of gender injustices and inequalities that work separately in one society than in the others. The personal law of one society, without a doubt are dotted with many aspects which are contradictory to the sense of gender equality existing in that society. The first step therefore is to eradicate those unjust practices which are endemic to that specific society. Instead of hurriedly creating a uniform definition of injustice and inequality, which is the dominant point of view, it is necessary that all these societies first recognise the definitions of inequality and injustice within their peculiar sphere of life. Otherwise, what is happening is that these societies become defensive against the demands of uniformity and injustices within their communities are rendered invisible.

This positive side of the debate on UCC time and again reminds the people to tend to the diseases in their personal law system and adjust them to the contemporary times, by taking inspirations from another community which might be more progressive in some aspect. It must never be forgotten that all this is a slow process and any undue haste would only result in failure rather than the desired outcome.