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Enforcement of Natural Rights of Women: A Comparative Study of India and GCC Countries

SHARMIN CHOUGULE¹ AND ANUKIRAT SINGH BAWEJA²

ABSTRACT

This research paper is restricted within the contemporary “Women’s movement” and addresses itself to the trends and currents within it. The analysis of Islamic and legal texts is undertaken within the framework of feminist jurisprudence. A comparative study on the women rights in GCC and India with reference to UDHR. This research critically analysis the CDHRI in order to show that male centricity still exists in the GCC countries despite promises, which the researchers thinks are pipedreams and just a façade of lies. This Research paper also critique’s the limited rights given to women under the name of Sharia in an international context.

The study is primarily a religious and legal exploration considering the nature of countries involved in the study – the GCC countries and India. The research is based on published material, such as legal texts, law journals, books, reported judgements, official fora of women groups.

The analysis in this paper will be built around thorough research pertaining to the provisions of the United Nations’ “Universal Declaration of Human Rights”, the consequent “Cairo Declaration of Human Rights in Islam” along guidelines from natural law through the lens of Catholic philosophers. In equal measure, the research will be augmented by comparative analysis of constitutional/Sharia provisions (women rights) in OIC member countries (including GCC states, Turkey and Syria) along with non-OIC member state - India, which theoretically is the world’s second largest Muslim country by way of population.

Therefore, the paper will be divided into two parts. While the first part will be assessing the very definition of natural rights from the perspective of western philosophers (Catholic Judaism), which has been relegated to being ‘relativistic’ by non-secularists. In the second part, the researchers will connect the dots by undertaking a comparative analysis of constitutional/ Sharia provisions among selected countries – in light of women rights/ gender equality.

Researchers has restricted to the scope of research to cover personal laws of Muslims and Hindus majorly, while only some references are made to the personal law of

¹ Author is a 2nd Yar LLM student at ILS Law College, Pune, India.

² Author is a 4th Year BA.LLB(H) Student at Amity Law School, Noida, India.

Christians and Parsis.

Keywords: UDHR, CDHRI, Women Rights, Sharia, GCC Countries.

I. INTRODUCTION

In GCC countries, women have been a subject of strong patriarchy. These countries are governed by their personal laws which have remained impenetrable. Sharia, which is basically interpreted through its sources, “*the Quran*”, “*the Sunnah*”, “*the Ijma and the Qiyas*”.³ has always been in the control of religious teachers, the *Maulanas*. These religious teachers have so far interpreted the personal law in such a manner that women have been assigned an inferior controlled (by men) position.

Surprisingly, even the most basic human rights mentioned in the universally guided covenants of “*Universal Declaration of Human Rights*” goes against Sharia as argued and is not accepted by these GCC countries.

India, on the other hand, which is a secular democracy with a constitutional *grundnorm*, the position of Muslim women being dominated by male members is not something novel. Polygamy, Triple Talaq are some of the very common examples of patriarchy amongst others that we come across.

The power dynamics binds the social structure amongst male and female members. We have not even evolved to deal with other gender related problems in these countries. Men and women are positioned in an unequal status hierarchy and economic inequality. Women’s rights and sex equality issues are a subset of a larger group of **gender equality issues** and **gender issues**. Researchers has dealt with this issue somewhere else⁴

Muslims in their personal law, *Sharia*, have rarely tolerated any agnostic intervention and therefore, be it in personal law governed GCC countries or in Indian secular state, the Islamic orthodoxy preponderates as final making it possible to keep the mindset of inequity rampant.

Despite its earlier objective of being an ‘innocent complement’ to the UDHR, it ultimately undermines many of the rights that were guaranteed by the former. When implemented, the CDHRI essentially removes the universality that underpins the UDHR, providing the 45 signatories to CDHRI and all of their citizens with a set of human rights based on an

³ “Sources of Sharia, LexisNexis, <https://www.lexisnexis.co.uk/legal/guidance/sources-of-shariah>; last seen on 09/05/2020.”

⁴ “Sharmin Chougule, Gender Justice And Secularism: A Perspective on India and Arab League Countries, Journal on Contemporary Issues of Law [JCIL] Vol. 6 Issue 10 [October, 2020], 25, available at https://jciil.syndicate.com/wp-content/uploads/2020/11/GENDER-JUSTICE-AND-SECULARISM-A-PERSPECTIVE-ON-INDIA-AND-ARAB-LEAGUE-COUNTRIES_3.pdf.”

undefined interpretation of Sharia Law.⁵ The CDHRI clearly limits the rights enshrined in the UDHR and the International Covenants and cannot be viewed as complementary to the Universal Declaration. In 2015, GCC countries adopted GCC Human Rights Declaration for its Member States. In its Article 44 it clearly provides for supremacy of Sharia.⁶ Having said that, even the OIC member states have interpreted human rights (especially women rights) differently. While on one hand, we have countries such as Saudi Arabia and Egypt along with other GCC members that initially abstained from signing the UDHR – remaining fastidiously non-accommodative, we also have progressive states such as Turkey and Syria. By the virtue of their progressive constitutional provisions, women enjoyed equal status despite having an overwhelmingly Islamic diaspora. Noting, one can't help but ask whether it is Islam that is the deciding factor for the Sharia's dominance or it is just a national policy based on vested interests?

Another notable example is India, which has world's second largest population of Muslims. While on the other hand, India has been a founding member signatory to the UDHR, in 1947 the country's Constituent Assembly had already deliberated on "**Part III fundamental rights of the Constitution**" and gained the insights through the Assembly deliberations to the drafting stages of UDHR. Even though India has not been accepted into the OIC despite its extraordinary status, the country has offered (or at least attempted to offer) equal rights to its women citizens.

Also, because the discussion is about natural rights, a quick look and reference of the history is also necessary, and here the origins of the thoughts from the vantage point of Catholic philosophers, such as Thomas Aquinas become paramount. At the very least, natural law (*lex naturale*) is a part of Divine law (*lex divina*) as reasoned by humans. Natural law is therefore, recognised by reason alone, without the aid of revelation and is closely related to the concept of natural rights. Perhaps, the concept is best explained by 'Free Will', which is especially relevant in the current context.

II. UNDERSTANDING THE EVOLUTION OF NATURAL RIGHTS OF WOMEN THROUGH HUMAN HISTORY: THE GENESIS

The conflict between what is ordained and what is to be obeyed is centuries old. Consequently, from Homer's pre-Athenian philosophy to that of Plato and Aristotle, the

⁵ "Article 24, CDHRI 1990 "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia""

⁶ "Article 44, GCC Human Rights Declaration "Without prejudice to the provisions of Islamic Sharia law and the regulation (law), the exercise and enjoyment of the rights and freedoms set out in this Declaration are the right of everyone"

concept of natural laws has had its fair share of scrutiny. To understand this in detail one must see natural laws in the light of yet another conflict pertaining to enforcement and observance of law. Perhaps, it can be observed that the question here is not what is ordained, which ultimately becomes the natural law, rather it is regarding whether it is observable in the first place. Enforcement and the logic therefore, come later as they are a function of a society's evolution and the role morality plays in it.

Delving deep, one realizes that the weakest in a society best serve as subjects in a study, undertaken to assess its evolution. All things equal, women have been at the receiving end for most of human history and perhaps fit best in the context.

Even though women do play a somewhat important role in great philosophies emanating from Rome and Greece, they have been mostly relegated to the position of mere ornamental. Western (Judeo- Catholic) thought has therefore, largely been non-receptive to women, despite much progress in liberalizing society. When considering the near east and the middle east, the advent of Islam and the resultant implementation of Sharia **influenced by customary practices of age of ignorance** totally reduced role of women in civil society to zilch.

Meanwhile in South Asia, dominant Hinduism offered virtually no rights to women other than being the wife or a mother – without such a status, the women of the regions were subjected to the whim and fancies of the dominant men. Far East and the Japanese archipelago also offer no such instances, when women were treated as equal citizens and limited to household chores and 'obedient comfort providers' to their men. Central Asia, Mangolia and Lower Siberian regions on the other hand, were home to horse riding marauders, who saw women nothing more than trophies from the conquered land.

It was not until, the French Renaissance and the evolution of German Idealism starting in the mid-18th century, that women began to hope for a brighter future. Closely intertwined, as the reinvigorated western thought began to spread its wings, there were semblances of women rights visible across the world. However, it wasn't before the world wars I and II, when the sexual revolution liberated women in the true sense. This happened because of two reasons, one, since the men were busy fighting wars, the women were the only ones left (apart from old people and children) to run economies and industry. Second, when women stepped out of the homes, they realized their economic potential and consequent independence that was experienced for the first time. Much of human progress, innovation and achievement happened during this time, women liberation and never in history has so much wealth has

been created in so little time.

Nevertheless, the progress was slow and was largely confined too **“Western Europe”** and **“The United States of America”**. For much of the rest of the world (including the GCC and India), women were still bound by societal pressures and religious philosophies. Logic and enactment of positive laws came much later, when the United Nations was formed, and women rights were finally formally accepted through charters, covenants and declarations.

Today, we have indeed come a long way from where we had started centuries ago. Despite this however, the same conflicts of the past exist and women in some pockets remain isolated and unaware of their rights. In all probability, there cannot be an equal, wealthy and just society without equal and able women. Concluding, time is therefore, ripe to study the past, compare the present and consider the future – with morality as a catalyst. Nonetheless, one must consider the fact, that these conflicts may remain without any solution, if half of the world’s population does not effectively play its role, as ordained.

III. POSITION OF GCC COUNTRIES AND INDIA – WHETHER ACCEDED TO INTERNATIONAL DEVELOPMENTS?

The UDHR urges member nations to promote a number of human, civil, economic and social rights, asserting these rights are a part of the "foundation of freedom, justice and peace in the world.”⁷

India took active part in drafting of the Universal Declaration on Human Rights. The Indian delegation to the United Nations made important contributions in drafting of the Declaration, especially highlighting the need for reflecting gender equality. India is a signatory to the six core human rights Covenants, and also the two Optional Protocols to the Convention of the Rights of the Child⁸. Since inception, the Indian Constitution incorporated most of the rights enumerated in the Universal Declaration in two parts, the Fundamental Rights and the Directive Principles of State Policy, that covered almost the entire field of Universal Declaration of Human Rights.

On the other hand, the original GCC countries were not even members of the UN General Assembly and only in the later times viz., 1960s and 1970s, these GCC countries admitted themselves as members. Saudi Arabia, although an original member to the UN General Assembly abstained from voting on UDHR, as it didn’t want to take a stand against the

⁷ “Universal Declaration of Human Rights, [https://www.un.org/en/universal-declaration-human-rights/;](https://www.un.org/en/universal-declaration-human-rights/)”

⁸ “Spotlight, *India.gov.in Archive*, available at https://archive.india.gov.in/spotlight/spotlight_archive.php?id=73; last seen on 09/05/2020.”

Sharia. However, as a general guidance for the member states of the OIC in the field of human rights, CDHRI was adopted as a declaration of the member states which provides an overview on the Islamic perspective on human rights, and affirms Islamic Sharia as its sole source and basis. A reference can also be made to the erstwhile Universal Islamic Declaration of Human Rights (UIDHR) which reiterates human rights from Islamic Jurisprudence point of view⁹ and was bias against *Shiites*.

While critics have analysed that OIC's (of which GCC countries is a part) human rights regime is an eclectic patchwork informed by the interests of leading countries, the pressures of the broader political environment, and the OIC's organisational needs. This regime displays a semblance of consistency because of excessive and vague references to Islam, Sharia, and the *umma*. Unlike most other intergovernmental organisations, which pass binding resolutions on human rights, monitor state compliance, and enforce decisions, the OIC has largely relied on unbinding resolutions and declarations. In essence, three factors – a diverse membership, a weak enforcement capability, and a deference to state sovereignty – prevent the OIC from establishing a strong human rights regime. In **“The Organization of Islamic Cooperation and Human Rights”** authored by Turan Kayaoglu and Marie Juul Petersen,¹⁰ it is argued that OIC's human rights activities – its legal instruments, organs, and collaborations with other international organizations – amount to a human rights regime. The Independent Permanent Human Rights Commission (IPHRC) is – at least in principle – the OIC's main human rights body. The IPHRC has raised expectations regarding the OIC's willingness to be a reliable partner to advance international human rights even though it lacks the mentioning and enforcement authority enjoyed by other regional human rights bodies. However, five years after its establishment, the IPHRC assumed a conservative and defensive stance on human rights, rather than a progressive and proactive one. The OIC's 57 member states provide it with significant voting power that allows the OIC to punch above its weight in the UN and other organizations, the OIC is thus able to present a formidable voting bloc to advance its human rights agendas, protect (with its own agendas) its member states, and oppose Western liberal progressive human rights agendas in the UN.

Muhammad Khalid Masud, talks about how the Universal Islamic Declaration of Human Rights (UIDHR) issued in 1981 and CDHRI largely agree with the UDHR however, they differ significantly with each other in details. The documents express reservations against six

⁹ “Universal Islamic Declaration of Human Rights available at <http://www.alhewar.com/ISLAMDECL.html>; last seen on 09/05/2020.”

¹⁰ “Organization of Islamic Cooperation and Human Rights, pg. 65-86 (Marie Juul Petersen and Turan Kayaoglu).”

out of 30 UDHR Articles, which suggests that the range of compatibility is wider than generally assumed. Regarding reservations, the two documents also differ from each other.¹¹ For instance, laws about marriage, particularly with reference to apostasy, but they stress the rights relating to political opposition to the state; the CDHRI shows more concern regarding restrictions on the state in dealing with the opposition. CDHRI is also silent on torture, fair trial, and free development of personality. CDHRI defines rights in the framework of nation state and the UDHR focuses on an intra Muslim states framework. UDHR is more emphatic on political freedom and CHDRI, being a state document is more concerned with the security of the state.

On the contrary, some authors have even celebrated the adoption of the GCC Human Rights Declaration. Khalifa A Alfadhel, in **The GCC Human Rights Declaration: An Instrumentation of Cultural Relativism** argues that *“for the first time the Gulf Cooperation Council (GCC) adopted a regional human rights declaration that codifies the relevant States’ commitment to human rights. The Declaration illustrated the content and scope of such a collective regional pledge to protect and respect fundamental rights and freedoms. Although a soft-law instrument, the Gulf Declaration provides the foundations for a doctrinal commitment to human rights, based on a normative framework adopted in a mutual manner.”*¹²

IV. POSITION OF WOMEN UNDER SHARIA AND THEIR RIGHTS IN GCC COUNTRIES

The researchers make a reference to the introduction here, before the advent of Islam in the early seventh century A.D. women in Arabia enjoyed little respect. The birth of a daughter was regarded as a disgrace and a matter of shame. Many unwanted female children were destroyed or buried alive soon after birth. Women were brought and sold like ordinary chattel without any right to express her feelings about the terms of the contract or the husband who was to be her new master. Women were not entitled to share the inheritance of husband or kinsmen. After the death of the husband, they were destined to live a life of destitution, or remarry even if they did not wish to do so. Their status was thus no better than chattels.

Islamic jurists believe that with the dawn of Islam, the social institutions of Jahiliya (the Age of Ignorance) underwent significant changes. A new social outlook and attitude was promoted. Efforts were made to remove the causes of the old practices, and to cure the

¹¹ Muhammad Khalid Masud, *Clearing Ground: Commentary to 'Shari'a and the Modern State'*, in *Islamic Law and International Human Rights Law*, 113 (A. M. Emon, M. Ellis, B. Glahn, 1st ed., 2012)."

¹² "Khalifa A Alfadhel - *The GCC Human Rights Declaration: An Instrumentation of Cultural Relativism*, 31 Issue I, Arab Law Quarterly, (2017) available at https://brill.com/view/journals/alq/31/1/article-p89_5.xml; last seen on 09/05/2020."

ailments of the society on the basis of Quranic prescriptions. In Islam, the honour and status of women as human beings and members of the social community, was acknowledged and granted protection from the Sharia or Islamic Law. One of the first acts of the Prophet of Islam was to denounce the practice of “female infanticide” and forbid it strictly on the authority of Koranic Directives.¹³ Amongst others few privileges to women were the right to stipulated Mehr, right to have the authority to give talaq delegated to herself, right to enter into *kabein nama* (pre-marriage agreement).

“The Empowerment of Women in Islam” Dr. Zeenat Shaukat Ali states that *“though the Quran and Sunnah including inter alia other sources were regarded as the major sources of jurisprudence, the old customary law, nevertheless, infiltrated into the system of jurisprudence in several ways”*.¹⁴ *“The retention of anything from old manners and customs, unless there was some living proof that the Prophet of God did not disapprove it”*.¹⁵

In **“Social Restrictions on Men and Women”** M. Mazheruddin Siddiqi observed that *“Islam has placed certain restrictions on men as well as on women in order to regulate their sex and family life both of which it regards as the foundations of a stable and a progressive civilisation. The restriction on men and women differ in accordance with their varying functions in society. To the extent that these functions differ in the case of two sexes, their rights and responsibilities also differ and the restrictions they are required to observe also differ”*.¹⁶ Among the common restrictions on men and women, the first relates to the duty of behaving with modesty in public. About this the Quran says *“Say to the believing men that they cast down their looks and guard their private parts; that is purer for them. Surely Allah is aware of what they do. And say to the believing women that they cast down their looks and guard their private parts and don not display their ornaments except.... To their husbands, or their fathers, or the fathers of their husbands, or their sons, or sons of their husbands, or their brothers or the sons of their brothers, or their sisters’ sons, or their women, or those whom their right hands possess, or male servants not having need (of women) or the children who have not ----- what is hidden of women, and let them not strike their feet, so that what they hide of their ornaments may be known (Quran xxiv. 30-31). There are two special restrictions on women, namely that they shall not make a display of their elegance and ornamentation or behave in such a way as to draw the attention of men towards their ornaments and beauty. For women the entire body, excepting hands, feet and face, is*

¹³ “Losers are they who kill their children foolishly... they have erred” – Quran.

¹⁴ “Dr. Zeenat Shaukat Ali, *The Empowerment of Women in Islam*, 96, (1st Ed., 1987).”

¹⁵ “F.B. Tyabji, Bombay, *Muhammadan Law*, 1940, p. 6.”

¹⁶ “M. Mazheruddin Siddiqi, *Women in Islam*, p 79 1992.”

included in the *Satr*”.¹⁷ The justification for these restrictions lies in the hidden springs of sex psychology. Some Islamic jurists thus argues that the Quranic restrictions on female dress (seclusive system) are not only rational but also necessary. Further, women are forbidden from using scents or perfumes because of the sexual effects of odours and perfumes.¹⁸ It has also been argued that all that has been said about with regard to the Islamic restrictions on the dress, movement and social intercourse of males and females that Islam insists on the segregation of sexes to the utmost extent compatible with individual and collective self-preservation.¹⁹ Further, these claims are made in the support of the ideology that all efficiency, interest and dynamic energy in men and women depend to a very great extent on a healthy and happy private and family life and if family is a permanent feature of human civilised life and cannot be satisfactorily replaced by alternative institutions, it is self-evident that its stability and betterment should have the first claim on a nation’s attention. If the family becomes disorganized and is not able to throw out healthy and happy individuals, not only will industrial efficiency disappear, all other spheres of human activity will suffer.

The old customary practices of the Age of Ignorance never found a way out of the philosophies and have been the very base of Patriarchy and women are seen as sexual beings.

V. RIGHTS OF WOMEN - INDIAN CONSTITUTION AND PERSONAL LAWS

One of the primary goals of the Constitution is to render socio-economic justice to all. The Constitution empowers the State to adopt measures of positive discrimination (both reservation and affirmative action)²⁰ in favour of women for neutralising the cumulative socio-economic educational and political disadvantages faced by them.²¹ In *Valsamma Paul v. Cochin University*,²² it was held by Supreme Court that “*human rights are derived from the dignity and worth inherent in human beings. Human Rights and fundamental freedoms have been reiterated by the Universal Declaration of Human Rights and they are inter-dependent and have mutual reinforcement. The human rights of women including girl child are therefore an inalienable, integral and indivisible part of universal human rights. All forms of discrimination on grounds of gender are violation of basic freedom and human*

¹⁷ “*Ibid.* Also, see Van de Velde at page 90.”

¹⁸ “The Prophet of God said that a woman who uses scent or perfumes when passing through streets is a profligate woman” – Trimidhi collection.”

¹⁹ “*Ibid.*”

²⁰ “Government of Andhra Pradesh v. P.B. Vijay Kumar AIR 1995 SC 1648.”

²¹ “*Women Rights Human Rights*, 210 (Rathin Bandopadyay, Sanjay Kumar Singh, Rajendra Dhar Dubey, Sangeeta Mandal, 1st ed., 2010.”

²² “(1996) 3 SCC 545.”

rights”²³.

In practicality, in spite of the constitutional mandates and plethora of legislations - violence and injustice against women has never stopped. The issue of women’s rights and family law reform has been increasingly entangled within the polemics of identity politics and minority rights. At one level, there is a tendency among social activists to project the demand for an all-encompassing **Uniform Civil Code** (UCC) as a magic wand which will eliminate the woes and sufferings of Indian women in general and of minority women in particular. The other point of view pertains to communally (intrinsic) vitiated political climate - the demand carries an agenda of ‘national integration’ and ‘communal harmony’. The demand is also laden with a moral undertone of abolishing polygamy and other ‘barbaric’ customs (not just those of the minorities) and extending to them the egalitarian code of the ‘enlightened majority’.

Although, the Muslim personal law is interpreted by religious leaders, the very awareness that the concept of marriage in Islam is that of a contractual marriage and provides wife with a unique right of *Mehr*, as a restraint upon the husband’s power of arbitrary divorce and further, that the Muslim law protects female heirs by restraining the male power of testamentary succession is confined to academic echelons. The wrong interpretation has always remained an issue because majority of the population falls in the lowest strata of the pyramid of knowledge (of religion or religious texts).

This is not just about Muslims. The power dynamics in our social structures have become so pervasive that we can relate to the quote from the text, ‘*Manusmriti*’ that a woman must be protected by her father in the childhood, by her husband in youth and by her sons in her old age, and that she is not entitled to freedom of common knowledge is something relevant in this context. But less so to the comprehensive principles laid down in *Manusmriti* concerning women’s separate property approximately two thousand years before the English legal system accepted this principle, and issued the warning; Friends or relations of a woman, who out of folly or avarice, live upon the property belonging to her, or the wicked ones who deprive of the enjoyment of her own belongings go to hell. These positive dictates are shrouded by an over emphasis on practices, which are not contained in the *smriti* texts, just as the universally accepted practices of Hindu law – widow immolations and infant marriages – are not.²⁴

Situation is not different for Christian community. When we talk about the Indian Divorce

²³ “(1996) 3 SCC 545.”

²⁴ “Flavia Agnes, Sudhir Chandra, Monmayee Basu, *Women and Law in India*, 3 (1st ed., 2016).”

Act, 1869 in this regard, it was only the 2001 amendment that brought in changes to bring the law in line with progressive laws. Although, the changes have been brought in the question of bringing UCC is something that cannot be outrightly answered right now and these changes have actually brought in the desired effects is another question and a topic for discussion.

Further a quick reference can be made to the initiatives of the Parsi communities. Initially, their demand to have a separate personal law was based on the argument that women rights shall be protected. However, their leaders did not let their law keep the time prevailing social norms of the British and that of the Hindus (after independence). This ensured that the preconceptions intrinsic within such customary practises, were reaffirmed and legitimised.

It must also be noted that within these two communities also sexist provisions existed – while section 10 of the Indian Divorce Act, 1869 was amended but section 50 of the Parsi Marriage and Divorce Act, 1936²⁵ still exists making their earlier claim for a separate law in order to protect rights of women untenable.

When we say that the religious texts have provided women with equal status. The question remains whether the natural rights so endowed on women have been in true sense obligated?

What does the Constitution have to say about Personal Laws?

In Indian secular democracy, at least on the statute book the natural rights of women are ensured however, the reality is a tough question to decipher.

Article 13 of the Indian Constitution clearly provides that Laws which are inconsistent with or in derogation of the fundamental rights shall be void. It reads, 1. All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. 2. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be bad. 3. In this Article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, by law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force: includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of

²⁵ “The law provides for settling the property of an adulterous woman in favour of the children –Section 50 of the Parsi Marriage and Divorce Act, 1936; The statute also treats women as legal minors and provides for a trust to be set up in respect of the maintenance allowance with the power to restrain women’s access to the maintenance – Section 41 of the same act.”

this Constitution and not previously repealed, notwithstanding that any such law or any part of may not be then in operation either at all or in particular areas."²⁶

Also, this Article 13 has to be read with Article 372 of the Constitution "Continuance in force of existing laws and their adaptation notwithstanding the repeal by this Constitution of enactments referred to in Article 395, but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

The primary question we need to ask is whether personal laws are void because they are not specifically mentioned in this Article 13 means that - the context and the words of this Article 13(3)(a) and (b) include personal laws? or whether such a specific reference was purposely omitted?

The understanding is that the term that is used in Article 13 is "includes" viz., it is not exhaustive. A reference to the debates on the enactment of this Article and of some other Constitutional provisions (Article 19, 25, 44)²⁷ show that there was no intention on the part of the Constituent Assembly to exempt personal laws from the legislative competence of the State. So, now going back to our primary question can it be concluded that the various personal laws are void when questioned under the terms of Article 13(1)?

VI. COMPARATIVE ANALYSIS & CONCLUSION

For India which is a pluralistic society, the position of Hindu women was better governed under the customary practices which were more pro women in southern part of India. The regions of south side and mostly the Dravidian regions were pro-woman with practices of property inheritance for women even under *smriti* law. Example of how Stridhana was construed under the Bombay and Madras schools can be cited as an example here. While, the upper castes of North India who followed the Brahminical-Aryan customs wielded strict control over women and their sexuality. Also, the status of women among them was lower as compared to that of the women from the Dravidian and the lower castes regions.²⁸ It seems that the present Hindu community governed by the Hindu laws with their Brahminical tilt and

²⁶ "Article 13, Constitution of India."

²⁷ "CAD, Volumes 4 to 7 available at https://www.constitutionofindia.net/constitution_assembly_debates; last seen on 09/05/2020."

²⁸ "Flavia Agnes, Family Law - Volume I (Ed., 1st 2011). Also, see Sharmin Chougule, Gender Justice And Secularism: A Perspective on India and Arab League Countries, Journal on Contemporary Issues of Law [JCIL] Vol. 6 Issue 10 [October, 2020], 25, available at https://jcil.lsyndicate.com/wp-content/uploads/2020/11/GENDER-JUSTICE-AND-SECULARISM-A-PERSPECTIVE-ON-INDIA-AND-ARAB-LEAGUE-COUNTRIES_3.pdf;"

an Anglo-Saxon base is more a legal fiction than a religious entity or a social reality. In effect, it was an attempt to impose an alien and higher caste system of law upon a pluralistic society. While for Muslims, their personal law lays greater claims to divinity. Although the Muslim law contains several positive provisions which would safeguard women's rights, examples can be given of few like: contractual marriage where terms of nikaah nama can be negotiated by a woman, right to stipulated Mehr, right to enter into pre-marriage agreement (kabein nama) to regulate matrimonial life and stipulations regarding dissolution of marriage. Recent studies indicate that among several Muslim communities, the amount of dowry is substantially higher than the amount of Mehr.²⁹

While it can be stated that within India the nature of rights of women differ under different religious aspects and customary practices, it can be argued that the position of women in GCC countries though under the same umbrella of Sharia is been interpreted wrongly. Though Quran has vested equal rights in women, in the name of protection and under the wrong interpretation of the Quranic verses' women were kept in the confines of homes and only the servant of the house could take the woman/women of the house outside. It is only recently that in 2018, the ban to drive in Saudi was lifted and women were issued driving licenses.³⁰

In Factbox: Women's rights in the Arab world Karrie Kehoe³¹ compares the countries of the Arab world by saying that Egypt is the worst country for women in the Arab world, followed by Iraq, Saudi Arabia, Syria and Yemen. While Comoros, Oman, Kuwait, Jordan and Qatar came to the top of the survey, which assessed 22 Arab states on violence against women, reproductive rights, treatment of women within the family, their integration into society and attitudes towards a woman's role in politics and the economy. While the research here is restricted to the GCC countries. Reference can be given to the part of this article where facts related to GCC countries have been stated – In Saudi Arabia, women could first time vote in municipal elections in 2015; women need a guardian's permission to travel, enrol in education, marry or undergo healthcare procedures. The penal code in Bahrain says that a rapist can avoid punishment if he marries the victim. In Dubai, women represent 14% of the total work force. About 100 expatriate women are jailed annually to have children out

²⁹ "Study conducted by Women's Research and Action Group, Mumbai 1994-96, most communities confirmed that they still follow the custom of Mehr but it has been reduced to a mere token. The communities have now adopted the practice of dowry. They further confirmed that the amount of dowry is always higher than Mehr."

³⁰ "N.A., *Saudi Arabia issues first driving licences to women*, BBC, <https://www.bbc.com/news/world-middle-east-44367981>; 05/06/2018 last seen on 09/05/2020."

³¹ "Karrie Kehoe, Reuters, <https://www.reuters.com/article/us-arab-women-factbox/factbox-womens-rights-in-the-arab-world-idUSBRE9AB00I20131112> 12/11/2013 last seen on 09/05/2020."

of wedlock. Kuwait has no laws for domestic abuse and marital rape (among other states of GCC). In Oman women can't transfer citizenship to foreign born spouses or children.

India, on the other hand is one of the founding members of the United Nations, a signatory to the UDHR and to the Convention on the Elimination of All Forms of Discrimination Against Women along with a reservation,³² strictly maintaining till date, at least on paper (amongst other international instruments). However, what this has done as a consequence is that it has left the sphere of personal laws untouched.

On their part, the GCC countries even after having ratifying the CEDAW (with certain reservations) have still not complied with it in real terms and enjoys a patriarchal position. As a matter of fact, the GCC Islamic countries have their own human rights instruments as mentioned earlier - claiming that every effort should be within Sharia and its ultimate compliance.

From the vantage point of a democratic, institutionally driven nation-state, the researchers believe that India's position also stands shall also be criticised for having ratified CEDAW with a reservation in place with respect to "non-interference in the personal affairs of any community without its initiative and consent". Although, this was in line with the secular idea under the Indian constitution however, it should be noted that such reservation has and may further lead to injustice (particularly in case of Muslim women where the community is governed by their uncodified personal law leaving the interpretation to the patriarchal religious leaders. If the very purpose of the treaty is thereby defeated through such reservations, we can conclude that there is no real and likely solution in place to fill the gap between the academic provisions, the religious texts and the practical implementations (or undo the wrong interpretation). In such a scenario, the questions one might ask pertain to the weighing of women's natural rights and the truth behind the documentation of various agreements to gender justice.

Upon an analysis of the various human rights instrument, we can conclude that the universality in terms of right is not achieved in actuality. While the majorly pervasive UN's instruments have been signed by India - with some conditions, the GCC countries have come up with their own declarations just to ensure compliance with Sharia, which itself is vaguely interpreted by religious leaders, unevolved and patriarchal (in its interpretation). Such interpretation has led to various problems including religious intolerance, defying science and

³² "Art. 5 (a) of the Convention on the Elimination of All Forms of Discrimination Against Women, *the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.* Available at: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>; last seen on 3/10/2019."

technological developments, preference to religious education (divine knowledge) over knowledge of the world. These problems are a different subject matter of discussion altogether and gender related issues are just a subset of these larger set of issues. It must be noted that as a matter of fact, the researchers have only covered women related issues in this paper, which is again a part of wider issues related to gender.
