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The Dichotomy between Women's Rights and the Indian Personal Law System with Specific Reference to Hindu and Muslim Law

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ABSTRACT

Personal laws in India are made by the legislature, directly or indirectly by taking their sources from customs. Women, for a long time, have been marginalised by these customs or practices. The purpose of law is to reform the social state, to open the society to newer and better ideas and practices. Discrimination of women around the world has been blatantly committed, and tolerated, even in its legal form. The Indian personal law system very visibly portrays a conflict between India's international women's rights commitments and their application in the country.

Keeping this history of personal laws in India as the backdrop, this paper aims to examine the interrelationship between rights of women in India and statutory family laws. This paper aims to weigh religion-based rights of women in India with rights offered to them internationally. Through this paper, the author hopes to highlight the blatant discrimination faced by women of the Hindu and Muslim communities in India and aims to provide a legal analysis of the on-ground reality of the problems faced by women due to religion-based discrimination.

Keywords: *Hindu personal law, Islamic law, customs, women, discrimination.*

I. INTRODUCTION

Part III of the Constitution of India guarantees certain rights to its citizens that are fundamental in nature. These rights are bestowed on citizens irrespective of their religion, gender, social standing etc. India's multicultural and multireligious society brings up the possibility of a clash of faith with the laws of the country. Family law in India is governed by multiple statutes, a different statute for a different religion. These personal laws draw inspiration from age old customs, traditions, and religious practices. Family law and its Jurisprudence both stem from a pre-colonial era of a patriarchal societal setup where the entire household was dependant on the earning male member of the family. The British

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colonists brought social reforms to a certain extent by abolishing customs like Sati, however majority of women in India today still are bound by the clutches of religion based personal laws that deny them their rights in a familial setup.

Whenever religion and gender equality in India are spoken about in the same sentence, they generally have resulted in a conflict of ideas and opinions. One side of this conflict is governed by customs, traditions and the ancient nature of religion, while the other side portrays the need for an equality-based approach to between men and women when it comes to the laws that govern them. The question of “Can religion suppress the right to equality² offered by the Constitution of India?” arises.

When discrimination of women occurs, it not just hampers national interests, the law of the land, and the development of the society, but also acts as a failure to commit to international human rights law. International instruments, numerous treaties, multiple domestic legislations have affirmed the need for equality however its practice seems far to be found. India is a signatory to multiple international instruments and treaties that affirm the need to encourage rights of women all around the world, however, the religious practices in India have mostly fallen in contradiction to this idea.

Three major questions arise when religion based personal laws of women in India are spoken about. These issues have been studied by researchers around the world individually and reforms have been suggested about the same, however their incorporation into the Indian Familial legal system has been minimal. The first question: what particular aspects of religion-based family law have caused a hinderance to women enjoying their rights? The second one being: in what way have the Indian judiciary and legislature contributed to better the situation of women in the country? And the last and final question being: Are religion-based laws in India in pace with the transforming world?

II. ROLE OF THE INDIAN CONSTITUTION

The Indian constitution is the spine for upholding the basic decency of a human being. The Constitution upholds the fundamental principles of justice, liberty, equality, and fraternity for all its citizens irrespective of their religion, caste, or gender³. Secularism is the basic feature of the Indian constitution⁴. This means that personal laws that govern religions are engraved in the spirit of the constitution in order to continue a harmonious society. The Indian constitution upholds the spirit of the personal laws and provides Rights to women and men

² INDIA CONST. Art 14, & 15.

³ INDIA CONSTI, Art. 15.

⁴ S.R. Bommai v. Union of India, AIR 1994 SC 1918.

alike. Decisions by constitutional courts have also shown time and again that women's rights in India need to be upheld after years of repression by gender-based family laws. The framers of the constitution, in order to promote and protect rights of women, incorporated Article 15(3) that gives the state the right to make laws for the protection of women and children.

The Family Courts Act, 1984⁵ talks about the establishment of family courts to achieve the objective settlement of disputes within the family relating to matters of marriage divorce etc. however, the issue of interference by religious courts in such matters still persists. The picture of gender-based discrimination owing to personal laws exists in the country, however courts are reluctant to challenge their constitutional validity.

In case of a conflict between personal laws and fundamental rights, the courts have upheld the constitutionally guaranteed fundamental rights over age old customs⁶. The courts have, time and again, struck down the personal laws that were violative of women's rights under Article 14 & 15⁷. The way that the Supreme Court has suggested in order to solve these issues, is the formulation of the Uniform Civil Code⁸ under Article 44⁹. Under this provision, the country would be governed by one set of personal laws, that would be based on the civil society, rather than customs and traditions.

The Indian constitution has tried to meet the international standards set by the Universal Declaration of Human Rights¹⁰ and has made necessary amendments to its laws to meet this goal. A staunch supporter of women's rights on an international forum, the framers of the constitution have ensured that India would always strive to uphold the dignity¹¹ and rights of women. Hence the Constitution of India has provisions where it is the duty of the state to ensure equal pay to men and women¹², maternity relief¹³, political reservations¹⁴. All these provisions enable the state to fulfil its duty and ensure the protection and promotion of women's rights.

III. HISTORIC POSITION OF WOMEN IN HINDU AND MUSLIM LAW

The creation of a woman, as per Hindu law, was to provide companionship to a man, and continue to family lineage. Hence, customs and even legal practices treated women in a

⁵ The Family Courts Act, 1984, No. 66, Acts of Parliament, 1984.

⁶ C Masilamani Mudaliar & Ors v The Idol of Sri Swaminathaswami Thirukoil, (1996) 8 SCC 525.

⁷ Anil Kumar Mhasi v Union of India, (1994) 5 SCC 704

⁸ Lily Thomas v. Union of India, (2000) 6 SCC 224.

⁹ INDIA CONSTI, Art 44.

¹⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

¹¹ INDIA CONSTI, Art 51A(e)

¹² INDIA CONSTI, Art. 39.

¹³ INDIA CONSTI, Art 42.

¹⁴ INDIA CONSTI, Art 243.

similar manner, giving her secondary rights, as compared to her male counterpart. India maintains a comparatively reformed Hindu Law system when it comes to matters of inheritance, succession¹⁵, marriage¹⁶, divorce, guardianship¹⁷, adoption¹⁸ etc. Hindu women have different rights and obligations towards their families and the society.

Rights of Hindu women are substantively lower when it comes to matters of inheritance, marriage, custody, etc. the issue here is that rights of Hindu women are not just different from rights of women of other communities but also from their counterparts from the same community¹⁹. The application of Hindu law has largely been shaped by the understanding and interpretation of those laws by the judges of courts.

Islamic liberals argue that women are granted numerous rights by the Quran, however the interpretations of religious texts are why they are denied these rights. The rights of women in cases of divorce was extremely poor till laws²⁰ were drafted for their protection. The spirit of Islam is monogamous. Many Islamic countries have banned polygamy and have penalised it too.

The most contentious part of Islamic laws when it came to the rights of Islamic women was the right to divorce. Substantively, over a long period of time, Muslim women were suppressed by the arbitral use of the power to divorce by their husbands. It turned out to be a tool used by Muslim men to dominate their wives. The spirit of personal laws has been interpreted so as to enable one gender to be in superior control of the other, since a considerable amount of time, and this is the factor that has ruined, and continues to ruin lives of women pertaining to religious laws.

IV. ROLE OF THE JUDICIARY IN DETERMINING THE STATUS OF WOMEN

India has seen a huge advancement in women rights in the late 20th and early 21st century. These advancements were driven by the Apex court of the country. Be it getting daughters their property rights or getting wives their right to divorce, the Supreme court of India has, slowly but surely, brought about change in customary Indian values. 70 years since its establishment, the Supreme Court has played an important role in development of rights of women in India. It has taken up matters of gender discrimination, rape, familial rights, sexual freedom, and preferences, and has time and again proved to be the carver of Indian

¹⁵ *Supra* note 2.

¹⁶ *Supra* note 3.

¹⁷ Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956.

¹⁸ *Supra* note 4.

¹⁹ *The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84

²⁰ The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25, Acts of Parliament, 1986.

jurisprudence.

In case of *Vineeta Sharma v. Rakesh Sharma*²¹, the court gave a landmark judgement that a daughter has equal coparcenary rights in an HUF. Before this judgement, daughters were discriminated against when it came to inheritance. A Hindu son had an absolute right over the inheritance while a daughter had to forgo her rights upon marriage. The court even extended this judgement and gave clarity in *Prakash v Phulvati*²² making the daughter eligible to become a co-sharer even if she was alive on the date of the amendment. Religion in India has not only controlled a woman's rights when it came to matters of family but also the right to worship itself. In 2019, the Supreme Court of India adjudicated on the controversial *Sabrimala*²³ issue which gave women the right to enter the Ayyappa temple in Kerala.

Even when it came to Muslim personal Laws, couples that belonged to the Islamic faith were given the right to adopt, even though Islam does not recognize adoption.²⁴ After a long turmoil faced by Muslim women about the unnecessary provision of instant divorce, the *Sharyara Bano*²⁵ judgement was a landmark case that declared instant divorce (talaq-e-bidat) to be null and void and against the tenets of the Holy Quran. This judgement came as a deviation from the court's previous judgement that upheld triple talaq²⁶. A woman's rights to maintenance²⁷ from her husband was reaffirmed by the Supreme Court. Muslim personal law in India gave a husband the unilateral right to divorce his wife, however certain restrictions were put by the Supreme Court on the arbitrary use of this right²⁸.

The Supreme Court has been the beacon of women's rights in the past years. From rights in relationships to the right to sexual freedom, the Supreme Court of India has upheld rights and interests of women. The SC in 2018 clarified that a woman is not the property of her husband²⁹ and hence has full right to sexual freedom and bodily autonomy, decriminalising Section 497 of the IPC³⁰ which made adultery a crime.

Indian law has already criminalized the custom of dowry; however, the practice is still followed in multiple places all around the country. The Dowry Prohibition Act³¹ talks about

²¹ *Vineeta Sharma v. Rakesh Sharma*, Civil Appeal 32601/2018.

²² *Prakash v. Phulvati*, (2015) SCC SC 1114

²³ *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1.

²⁴ *Shabnam Hashmi v the Union of India* (2014) 4 S.C.C. 1

²⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1 Writ Petition (C) No. 118 of 2016

²⁶ *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 (3) SCR 844.

²⁷ *Danial Latifi and Another v Union of India* 2001 (7) S.C.C. 740.

²⁸ *Shamim Ara v State of Uttar Pradesh* A.I.R. 2002 S.C. 3551.

²⁹ *Joseph Shine v Union of India*, 2018 SC 1676.

³⁰ Indian Penal Code, 1860, No. 45, Acts of parliament, 1860.

³¹ Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961.

harassment of women for dowry³², dowry deaths by burning or suicide³³. The issue when it comes to dowry death is that death by suicide by the married woman gets only one person, generally the husband, convicted for the crime³⁴. Whereas, when it comes to death by burning, the entire family of the husband, and all concerned individuals³⁵.

The Supreme Court has even given landmark judgements in cases of bigamy under Section 494 of the IPC³⁶ and the Hindu Marriage Act, 1955. In the case of *Sarla Mudgal*³⁷, the Court held that conversion to Islam in order to marry again, while wife from a Hindu marriage is still alive, would qualify as bigamy. In judgements like *Madhu Kishwar*³⁸ and *Githa Hariharan*³⁹, the SC read down multiple discriminatory provisions regarding a widow's right to her husband's property, and a mother's right to natural guardianship over her child, respectively.

The Hon'ble Supreme court has played a significant role in steering the course of women's rights in the country. From the trial court to the Apex court, multiple judgements have been passed, that have caused a ripple effect in the arena of religious rights of women.

V. MARRIAGE LAWS

A legally recognized union of two individuals that establishes a relationship of rights and obligations among them, and their families, is a marriage. The right to marry is an integral part of one's liberty and right to life⁴⁰.

A. Hindu Marriage

According to Manu Smriti, a woman is the property of her father before her marriage, her husband once she is married, and upon his death, she becomes the property of her son. This basically portrays women as a dependant tutelage all throughout her life. The process of *kanyadaan* in Hindu marriage puts forth the idea that the daughter is gifted by her father to her husband. Hindu law shows a history of having eight different types of marriages, four out of which are approved while the other four are not practiced due to their gruesome nature of abducting, kidnapping or even raping the bride to gain control over her. Due to the inconsistency in rituals and customs within the Hindu religion, the Government of India

³² Dowry Prohibition Act, 1961, S. 498-A, No. 28, Acts of Parliament, 1961

³³ Dowry Prohibition Act, 1961, S. 304-B, No. 28, Acts of Parliament, 1961

³⁴ Vidhya Devi v. State of Haryana, AIR 2004 SC 1757.

³⁵ Kunhiabdulla v. State of Kerala, AIR 2004 SC 1731

³⁶ Indian Penal code, 1860, S. 494, No. 45, Acts of parliament, 1860.

³⁷ Sarla Mudgal Vs. Union of India, AIR 1995 SC 1531

³⁸ Madhu Kishwar & Ors v State of Bihar & Ors, AIR 1996 SC 1864.

³⁹ Ms Githa Hariharan & Anr v Reserve Bank of India & Anr, AIR 1999 SC 1149

⁴⁰ Shafin Jahan v. Asokan K.M & Ors, Criminal Appeal no 366 of 2018.

formulated the Hindu Marriage Act of 1955.

Under this act, procedures ranging from consent for marriage, to age of matrimony, and from grounds for divorce to nullifying of marriage are put forth. This act codified the various practices under the Hindu law into a unified law. There were multiple amendments in this Act to keep up with the social setup, in 1960⁴¹, 1978⁴², 2006⁴³, etc. This Act gave women the right to seek divorce and opt of judicial separations. The most important feature of the HMA is the recognition of consent of the man and the woman getting married.

The Hindu Marriage Act put forth the idea for registration of marriages for the first time. In addition to this, the Supreme Court made it mandatory for states to enact laws for compulsory registration⁴⁴. The National Commission for Women has enabled women's rights in matrimonial disputes by criminalizing child marriage, bigamy, desertation etc. Under Hindu Marriage Act, both spouses are deemed equal in rights and obligations.

The Hindu Marriage Act grants Hindu women a certain set of rights in light of those granted by the Constitution:

1. Right to protection against dowry: The Dowry Prohibition Act, 1961⁴⁵ makes demanding, giving, and taking dowry an offence. The husband⁴⁶ or any member of the husband's family⁴⁷ asking for dowry can be prosecuted under this act. The courts have given landmark judgements in the area of dowry demands and dowry deaths, however the sad reality is that a lot of dowry cases result in acquittal of the accused due to familial pressure on the wife, interpretation of the statute by the courts⁴⁸, or lack of proof⁴⁹. In some cases, the Supreme court has convicted those accused of dowry deaths even on circumstantial evidence⁵⁰.
2. Right to Streedhan: Hindu law defines Streedhan as the gifts that a woman receives prior to or during her marriage ceremony, or during her span of childbirth qualify as property⁵¹ over which she has absolute control⁵². All kinds of gifts, property (movable and immovable) that are given to the woman are her Streedhan. Hindu Law gives a woman

⁴¹ Repealing and Amending Act, 1960, No. 58, Acts of parliament, 1960.

⁴² Child Marriage Restraint (Amendment) Act, 1978, No. 2, Acts of parliament, 1978.

⁴³ Prohibition of Child Marriage Act, 2006, No. 6, Acts of parliament, 2006.

⁴⁴ Seema vs Ashwani Kumar, (2006) 2 SC, 378

⁴⁵ *Supra* note 42.

⁴⁶ Kamlesh Panjiyar v. State of Bihar, (2005) 2 SCC 388.

⁴⁷ Pamiben v. State of Gujarat, AIR 1992 SC 1817.

⁴⁸ K. Prema S Rao v. Yadla Srinivas Rao (2003) Cri L.J 69.

⁴⁹ Reema Aggarwal v. Anupam & Ors. (2004) 3 SCC 199.

⁵⁰ Thathamsetty suresh v State of Andhra Pradesh, (2010) 13 SCR 890.

⁵¹ Hindu Marriage Act, 1955, S. 14, No. 25, Acts of Parliament, 1955.

⁵² Pratibha Rani v. Suraj Kumar, (1985) 3 SCR 191

inalienable right over her Streedhan. Courts have also held that a woman can claim her right over her Streedhan even if she has separated from her husband⁵³.

3. Right to her matrimonial home: once a woman is married, she has rights on her husband's house⁵⁴. While the husband is alive, irrespective of ownership residing with the husband, the wife has the complete right to live in the same house as him. After the death of the husband, the wife still retains this right.

4. Right to restitution of conjugal rights: this right is available to both, the husband, and the wife, but mostly is used by the wife. Hindu law says that a spouse is entitled to the company of the other spouse⁵⁵. Hence in case of abandonment by any one of the spouses, the other can approach the court with this right⁵⁶. By definition, this right gives the couple the right to marital intercourse and each other's company.

B. Muslim Marriage

The Holy Quran defines Nikah, or a marriage, is a contract between the husband and the wife with the objective of having and raising children⁵⁷. Under the Islamic Sharia, the institute of marriage is strongly advocated, and celibacy is forbidden. Muslim marriages are treated as civil contracts. In Muslim marriages, consent is mandatory. The concept of "Qubool" in Muslim marriages show the willingness and consent of the parties involved. The presence of at least two male and two female adult witnesses is compulsory, who must belong to the Islamic Faith. The terms of the marriage are written down in a document known as Nikah Namah, which decides modes of payment, custody of children etc, in a gist, factors that the contracting parties want written down.

Muslim marriages, being a civil contract, guarantee the woman certain rights like the right to maintain her status, right to equal treatment in the household, etc. Muslim law prohibits inter-religious marriages, however inter-sect marriages are recognized. Muslim law allows for an inter-religious kitabia marriage, that is marriage between a Muslim man, and a woman of the Jew or Christian faith.

In every Muslim marriage, Mehr, dower, or bridal gift, is mandatory from the husband to the wife. It is money, or property, given by the husband to the wife for her personal use, as a consideration for the marriage. However, if the Mehr isn't paid at the time of the marriage,

⁵³ Economic Times, <https://m.economictimes.com/news/politics-and-nation/streedhan-can-be-claimed-even-after-separation/articleshow/49879002.cms>, (Last visited Nov, 21, 2020)

⁵⁴ S.R. Batra and Anr. v. Taruna Batra, (2007) 3 SCC 169.

⁵⁵ Smt. Saroj Rani v. Sudarshan Kumar Chadha, 1984 AIR 1562.

⁵⁶ Hindu marriage Act, 1955, , S. 9, No. 25, Acts of Parliament, 1955.

⁵⁷ The Muslim Women (Protection of Rights on Divorce) Act, 1986, S. 2, No. 25, Acts of Parliament, 1986.

she becomes financially dependent on her husband defeating the entire concept of the need for Mehr. Muslim law also has the concept of restitution of conjugal rights. In India, this concept was brought up by the courts in the case of *Abdul Kadir v. Salima*⁵⁸

Polygamy in Muslim law was unlimited and had no restrictions in the pre-Islamic times⁵⁹, but then the Quran placed a restriction of maximum four wives on a husband, however the Quran still emphasis on monogamy as the most ideal form of marriage. The reason Islam allows polygamy is to ensure that a man does not pursue his sexual needs outside the marriage. In Islam, a man must take the consent of the wife before marrying again, however, in India it is not necessarily followed due to the patriarchal set up.

Muslim law has been termed regressive by multiple scholars and even people who see the religion giving different treatment to women. Muslim law has given freedom to women since the time of its inception. The Muslim law in India, however, has been twisted to support the ideas of patriarchy and to subdue women from recognizing their rights. Muslim law provides for ample scope for rights of women, and when implemented in its true spirit, would demystify all misconceptions about repression of women by Islamic law.

VI. DIVORCE AND MAINTENANCE LAWS

When a marriage is terminated through a legal recourse, it is said to be a divorce. In this case, the couple decides to separate and asks for legal intervention. the Indian society still looks upon divorce as a taboo and shames the woman undergoing the divorce. The legislature has incorporated different laws for divorce for every religion. After divorce, the husband is bound to pay maintenance to the wife to maintain her well-being and standard of living. Maintenance is the legal obligation that the husband has towards caring for his wife and family.

A. Hindu Law:

In the Hindu Marriage Act⁶⁰, grounds for divorce have been laid down. These include:

1. Cruelty
2. Adultery
3. Desertion
4. Insanity

⁵⁸ *Abdul Kadir v. Salima*, (1886) ILR 8 All 149.

⁵⁹ *Amina vs Hassan Koye*, 1985 CriLJ 1996.

⁶⁰ Hindu marriage Act, 1955, S. 13, No. 25, Acts of Parliament, 1955

5. Presumption of death
6. Religious conversion or renunciation of the world.
7. Leprosy

These grounds are available to both, the husband, and the wife. However, there are certain conditions that are only available to the wife. In case of the husband committing bestiality, rape, sodomy, bigamy, or no cohabitation for more than one year, the woman is allowed to file for divorce. If the couple decides to separate by consensus, then Hindu Law also recognizes divorce by Mutual consent⁶¹.

A woman, in Hindu law can claim maintenance under two sets of laws, the Hindu marriage Act⁶², and the Hindu Adoption and Act⁶³. In cases of a wife not having any source of income or earning less than her husband, she is obliged to get maintenance from her husband⁶⁴. However, in cases where the wife earns more than the husband, or the husband has no income, the courts have allowed maintenance to the husband⁶⁵. But if the husband quits his job with the purpose of being maintained by the wife, the court does not grant maintenance⁶⁶. The concept of maintenance also exists under the Criminal Procedure Code⁶⁷. Under Hindu law, a man has the obligation to provide for his wife, children⁶⁸, and parents. As an extension of this obligation, the concept of maintenance has been incorporated. The only two conditions when a Hindu wife is not entitled to maintenance is when:

1. She has converted to another religion⁶⁹
2. She has become unchaste⁷⁰

Courts have also held that the wife from a void marriage is not entitled to maintenance⁷¹. Hence, maintenance is only available to a legally married wife.

B. Muslim Law

Muslim law recognizes different types of divorces. In Muslim law, a wife belonging to a consummated marriage has to follow the *iddat* period before she can remarry. Such a wife

⁶¹ Hindu marriage Act, 1955, S. 13(B), No. 25, Acts of Parliament, 1955

⁶² Hindu marriage Act, 1955, S. 24 & 25, No. 25, Acts of Parliament, 1955

⁶³ Hindu Adoptions and Maintenance Act, 1956, S. 18, No. 78, Acts of Parliament, 1956.

⁶⁴ Kulbhushan Kumar v. Raj Kumari & Anr, 1971 AIR 234.

⁶⁵ Rani Sethi v. Sunil Sethi, (2011) 179 DLT 414

⁶⁶ Yashpal Singh Thakur v. Smt. Anjana Rajput, AIR 2001 MP 67.

⁶⁷ Criminal Procedure Code, 1973, S. 125, No. 2, Acts of Parliament, 1973.

⁶⁸ Sukhjinder Singh Saini v. Harvinder Kaur, Cri. Rev. P. 494/2015.

⁶⁹ Kiran Dhar v. Alok Berman, (2014) 84 ACC 807

⁷⁰ Sachindra Nath Biswas v. Sm. Banamala Biswas And Anr, AIR 1960 Cal 575.

⁷¹ Krishna Gopal v. Usha Rani, 1982 CriLJ 901.

would get the entire amount of her unpaid Mehr back. In case of a non-consummated marriage, there is no necessity to follow the *iddat* period and no restriction has been placed on remarriage. However, such a wife would only get half of her Mehr amount back.

The most used form of divorce is talaq. Talaq, in its most basic sense means separation. Islamic law states that separation, or talaq, must always be for a reasonable cause⁷². The divorce initiated by the husband can be of three types, talaq, *ila* and *zihar*. In cases of talaq-e-tafweez and *lian*, the wife can initiate divorce without the consent of her husband. . In Islamic law, *khula* and *mubarat* are both divorce by mutual consent.

The Dissolution of Muslim marriages Act of 1939 lays down grounds for divorce⁷³:

1. Whereabouts of husband unknown for four years or more
2. Husband sentenced to imprisonment for seven or more years
3. Husband did not perform marital obligations for up to three years.
4. Husband has not provided maintenance for two years
5. Cruelty.⁷⁴
6. Irrevocable breakdown⁷⁵

Maintenance in Islamic law differs from maintenance in its categorical sense. In Muslim law, the wife will get additional maintenance only if she has no other source of maintaining herself. In Islam, a widow has no right over her husband's property. The Muslim women (Protection of right on divorce) Act, 1986 talks about maintenance⁷⁶.

The landmark *Shah Bano case*⁷⁷ on maintenance of a Muslim wife after divorce allowed the wife to receive alimony after the *iddat* period for her maintenance. But despite this landmark decision, multiple courts⁷⁸ still do not award maintenance to women. Muslim women still have to struggle for maintenance, not only to take care of themselves, but also their children.

VII. INHERITANCE AND SUCCESSION LAWS

Many times, throughout history, women have been deprived of their rightfully claimed property. At times of division of property, or inheritance, women are not given what is rightfully theirs. Reforms were undertaken to bring property rights under the radar of

⁷² *Shamim Ara v. State of U.P.*, (2002) 7 SCC 527

⁷³ Dissolution of Muslim Marriages Act, 1939, S 2, No. 08, Acts of Parliament, 1939.

⁷⁴ *Syed Ziauddin v. Parvez Sultana*, (1943) 210 IC 587

⁷⁵ *Umar Bibi v. Md. Din*, AIR 1971 Ker, 261

⁷⁶ The Muslim women (Protection of right on divorce) Act, 1986, S.3, No. 25, Acts of Parliament, 1986.

⁷⁷ *Supra* note 37.

⁷⁸ *Hefzur Rahman v. Shamsun Nahar Bagum and Others*, 59(1999), DLR, AD, 172.

women's rights under religious laws. These property rights, still disputed in their application, have received stimulus from the courts.

A. Hindu Law

After a lot of deliberation on a woman's right to property, Hindu women have been given a considerable access to their property rights. These reforms allowed women to take complete ownership of property instead of a partial one. The Hindu Succession Act of 1956 allows a woman to be a full owner of the property possessed by her⁷⁹. This act converted limited ownership by a woman to complete and absolute ownership. This act, however, applies to the Mitakshara and Dayabhaga schools of family law. Due to this, since in Mitakshara law, the joint family system exists, the share of the daughter in a family property is not equal to that of the son, but lesser. Mitakshara law did not recognize the position of a woman in property law, hence this could count as a major reform in that area.

The amendment to the Hindu Succession Act that was brought about in 2005, broadened the arena of rights of women by bringing widow's rights, coparcenary status of married daughters, joint family property under Mitakshara law under its ambit. Another path-breaking change brought about by this act was the inheritance rights of women over agricultural lands. According to this new amendment, the daughter can also ask for a division in the property of the house in which she is residing and does not need the consent of a male member to do so. The amendment not only covered unmarried women, but also women who have undergone a divorce. The new amendment says that a woman has rights to demand a share in the property that was acquired by the husband after marriage.

The precedent of this amendment was brought by the Hindu Women Right to property Act, 1937. This act introduced the concept of succession to women. It made women an equal stakeholder as coparceners, and her right in partition. The division of property between sons and daughters equally has clearly been written down. Hindu women now also have the power of alienation⁸⁰.

A Hindu woman's property under Streedhan is the property that a woman has absolute control over, irrespective of her marital status. The right of a woman over her Streedhan cannot be taken away. Streedhan acts like a safety deposit for women in case of need. A Hindu woman's right to her Streedhan has been recognized in Hindu Law. Streedhan also covers the property that a woman inherits from another woman, and everything that is

⁷⁹ Hindu Succession Act, 1956, S. 14(i), No. 10, Acts of Parliament, 1956.

⁸⁰ Sruthi Pandey, "Property Rights of Indian Women", available at: www.muslimpersonallaw.com

voluntarily given to her. However, the property that a woman gets from her husband is not a part of her *Streedhan*⁸¹.

A woman has the right over the property she has obtained by inheritance or obtained during the partition of a bigger property. However, during partition, two limitations are placed on the woman⁸²:

1. The next heir of the last owner gets her share of the property after her death.
2. The properties of a regular alienation do not apply to her

If a woman was in possession of a property before the partition of that property, then she gets absolute control over it⁸³. The property that a woman has received by way of an award has the sole ownership of the woman in contention⁸⁴. Any property that a Hindu woman gets by way of a gift from relatives or strangers become her absolute property⁸⁵. If any property is conferred on a Hindu woman, by a registered will, then she takes ownership of the said property⁸⁶.

B. Muslim Law

The verses of the Quran have depicted how inheritance must work in a Muslim household. The process for inheritance also considers the teachings of the prophet, and customs that have been followed since pre-islamic times. Neither the teachings of the Quran nor the Prophet, anywhere, mention the depriving of a woman's property rights. Long before Quranic verses were considered credible, women used to be the consideration for inheritance. Women were considered movable property and hence, no rights were conferred upon them. This practice was abolished by the Quran, and women were given a seat at the table.

The laws of succession for Indian Muslims is purely based on the Quran. This law provides for fixed shares for every member of a Muslim family. The first religion in the world that recognized a woman's right to inheritance was Islam. In Islam, a daughter can inherit from her parents, a wife from her husband, and a mother on the estate of her children, in case of untimely death of the children. In Islamic law, succession follows a fixed lineage. The daughter has one half of the son's share, but Islam gives her full control of the property owned by her.

⁸¹ *Bhugwandee Doobey v. Myna Bae*, (1867) 11 Moo. I.A. 487.

⁸² *Janki v. Narayansami*, (1916) 43 SCC 207.

⁸³ *Chinnappa Govinda v. Vallaimmal*, AIR 1969 Mad 187.

⁸⁴ *Badri Prasad v. Kanso Devi*, AIR 1970 SC 1963

⁸⁵ *Vinod Kumar Sethi v. State of Punjab*, AIR 1982 P& H 372.

⁸⁶ *Karmi v. Amru*, AIR 1971 SC 745.

Just like in Hindu law, the woman has absolute control over her Streedhan, the same way, in Muslim Law, a woman has absolute control over her Mehr amount. Be it prompt dower, or differed dower, once a woman has been committed an amount for dower, her absolute control over the amount begins. A woman can claim her dower through legal recourses if she is denied Mehr. Muslim law recognizes a daughter's right to inherit⁸⁷. Islam has always given women the right to own and inherit property.

However, the socio-cultural practices that surround Muslim women in India prohibit them from making optimum use of these rights. Despite the evolution of these practices, women cannot gain complete ownership of the property they inherit. Women in Muslim families face discrimination on a daily basis, be it in ownership rights, or inheritance rights, or the right to dispose property at will. The patriarchal setup in Muslim families have been followed since decades now, and it is this setup that has grossly undermined the rights of women. The lack of religious knowledge make Muslim men believe that women have no, or very little right when it comes to matters of property. Sometimes, certain initiatives are taken about women's rights without understanding the spirit of the teachings of Islam. Instead of promoting women's rights, these initiatives hinder their development. The issue is that even though right to property is awarded to a woman, it is not at par with that of her male counterparts.

This only goes on to prove that even though both Hindu and Muslim laws acknowledge a woman's right to property, the demographics that they are surrounded by do not allow the pure implementation of these law.

VIII. UNIFORM CIVIL CODE AS A SOLUTION

The Uniform Civil Code, in its essence, contradicts the basis of religious laws in India. These codifies, and certain uncodified laws have been governing citizens in respective communities since decades. The demand for a UCC has been on the rise since after independence. Though a lot of scholars continue to advocate for the unfeasible nature of the UCC calling it a redundant provision in the Constitution, the Courts in India continue to suggest the implementation of the UCC as a solution to India's religious discrepancies.

Whenever the issue of discrepancy in personal laws in India is brought up, the implementation of a Uniform Civil Code seems like the most suggested approach. A vision that has been advocated for, to end the discrimination against women in personal laws, is the claim for the UCC. The Indian Constitution encourages the formation of a Uniform Civil

⁸⁷ Ali Mohammad vs Mst. Karima And Ors, (1992) 102 PLR 136.

Code⁸⁸ with an aim of ending the disparity between genders when it comes to religious laws. The concept of the UCC stems from the idea that the concept of autonomy of religious laws comes on the same stature as state autonomy. The unification of laws accommodates religious identity, however, are not controlled by it.

The most basic feature of the UCC is its secular framework. The UCC brings in question the dichotomy between the state and other religious communities. The discrepancy in legislations, their applications, and legal procedures for recourse regarding maintenance, marriage, divorce, rights to property etc would be resolved with the formulation of a uniform law with countrywide application that does not discriminate on the grounds of religion. Such a uniform legislation would be the step to further obtain economic, cultural, and legal rights for women. These rights not only guarantee an equal platform for women in the society but also act as the first step for self-sustainability in their personal affairs.

The courts in India, on multiple occasions⁸⁹, the best example being the Shah Bano case, have called on states to formulate and implement⁹⁰ the UCC in order to inculcate a gender equal approach in personal laws. The Constitution, even after enlisting the UCC as apart of the Directive Principles of State Policy, considers it Fundamental for the governance of the country⁹¹. the courts have, at times, even read the DPSPs into the Fundamental Rights that have been guaranteed by the state⁹².

The recommendation of the UCC as a catalyst for change has been brought down by the same people who advocated for it. This has mostly happened due to the politicization of the issue. The UCC, rather than being seen as tool to bring about gender-friendly laws in the country, is now seen as a tool to suppress religious minorities. The secular spirit of the UCC has died down due to the rising political and religious hatred in the country. the egalitarian approach that the UCC stood for has been turned around due to the possibility of it being heavily biased towards the majoritarian rule in the country.

The universal concept of the UCC seemed unfeasible in a country where obligations placed on women are much higher than the rights conferred upon them. The condition of women in the country as of now, does not allow them to call for a complete paradigm shift once and for all. The introduction of a secular code might even solve the problem, but only on paper. The implementation of the UCC in such a religiously diverse country still feels like a far-fetched

⁸⁸ INDIA CONSTI. Art 44.

⁸⁹ Ms Jordan Diengdeh v. S.S. Chopra, 1985 AIR 935.

⁹⁰ Maharshi Avadhesh v. Union of India, 1994 SCC, Supl. (1) 713.

⁹¹ INDIA CONSTI, Art. 37.

⁹² Mohini Jain v. State of Karnataka and others (1992) 3 SCC 666.

dream. The organizations calling for the implementation of the UCC seemed to lack perspective. The futuristic aspect of how the country would accept the implementation of the UCC, in a country where the political scenario is constantly changing, was unknown to these organizations. The top-down approach of the UCC only vests more power in the hands of the people who are mastered in the art of mishandling it.

IX. ALTERNATIVES TO THE UCC

To begin with, the entire concept of UCC was declared unfeasible since the time it was implemented in the Indian Constitution. *The Warren Hastings Plan of 1772* advocated that for India to function smoothly, all religions must be governed by their own set of laws that have been built on centuries of faith and teachings⁹³. The UCC cuts down on an individual's right to religious freedom and can even threaten the faith and existence of certain religious minorities. What can be questioned, however, is the ultimate purpose of the UCC. It is disputed whether the ultimate goal of the UCC is actually bringing about gender equality or mere national integration and unity⁹⁴ into the "one nation, one law" concept.

Legal pluralism, as accepted by the religious communities, and the society at large, defeats the entire purpose of a UCC. A bottom-up approach that does not vest powers in the hands of the state to decide the future of personal laws in the country can be suggested. In furtherance to this, an alternative is the drafting of another code altogether that takes the secular concept of the UCC and combines it with a state-recognized mechanism that resolves disputes that arise on the basis of religious teachings. This approach can only be brought about by a reform that is led by the community. However, the precondition for any such reform is the acknowledgement of an intersection between gender and religion. A radical change that highlights the position of women in countries like India is necessary to even begin to think about a legislative reform. The alternative approach calls for multiple small community led reforms rather than one massive state led change⁹⁵.

The author believes that interference of courts in personal laws is a mandatory step to ensure the effective implementation of currently existing personal laws without any discrimination, till another possible set of laws is drafted. Making a mandatory civil code in a country like India and implementing it on ground calls for unwarranted number of problems stemming from religious disparity. However, what does seem feasible is the formulation of an optional

⁹³ Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Chang-ing Agenda*, German Law Journal 9 (2008), p. 224

⁹⁴ *Kesavananda Bharati v. State Of Kerala And Anr*, 1973, Judgment W.P.(c) 135 of 1970.

⁹⁵ Mary E John, *Women's Studies in India: A Reader*, 2008, Pg 494.

code which could be enacted for communities/individuals that would prefer to take a gender-just approach in their personal affairs. This optional code would keep the spirit of the UCC alive, without forcing it on religious communities without their consent.

X. CONCLUSION

Multiple opinions have been put forth about the need for a gender-friendly approach to personal laws. What India needs, however, is an intersection between secular ideas, religion-friendly reforms, and state support to bring changes in communities throughout the country. Many solutions can be brought up when the issue of gender injustice arises, however their feasibility need not be adequate to control such a religiously dense and diverse population. A radical shift can be seen, not only in the position of women's rights organizations, but also in their demands. These movements have gone from needing a different secular code altogether to discarding the same idea based on the concept of religious and legal pluralism.

The implementation of any law in the country must see the need of the hour and must be able to withstand the blows of time. Legal uniformity is needed within a community, and not between them. It is the role and responsibility of the State to ensure a smooth functioning and understanding between communities. A reason why women's rights issue in India remains unresolved is because of its weightage as a political issue. Promises made in during elections for the betterment of their conditions hardly ever see the light of day. The politicization of this issue has led to it always being a boiling topic up for debate. The ever evolving, or degrading, political scenario in the country calls for a slow but sturdy approach to bring about change in specific aspects of women's rights.

The only way to bring about reform, even a slow one, is to tackle the situation from the ground, a bottom-up approach. Areas of religious laws, that find themselves at the peak of political interests, need to be segregated from all political vendetta. The personal law system in India remains as constitutional as ever. What it does require is activism. The spineless provisions of personal laws that outright discriminate against women must be removed. These laws must support a woman's identity if not mark it. The question of whether this country has completely accepted its legal pluralism in its entirety still seems to be unanswered.

Measures to better the situation will have to be brought about overtime. An indigenous law that has universal application fails to achieve the goal set out by the women's rights organizations. Personal laws will have to be amended as to keep up with international norms and standards. The country cannot be at the peak of a technological or industrial takeover

while half of its population is still struggling to get access to their rights. the extensive nature of this issue needs to be a matter of concerns for all stakeholders and for all those who wish for an egalitarian society.

The role of the legislation and the judiciary to highlight and set pioneering judgements that must shape the future of women's rights in this country has been unparalleled. If done rightly, the currently existing personal laws would only need a few amendments to ensure a gender-just approach and application. It is necessary to expand the current laws to bring women friendly amendments under its ambit than to reset the personal law structure of the country altogether. Reforms need to be brought about with all stakeholders involved, women's rights organizations, the religious clergy, and the state. A holistic approach is much needed for personal laws to function in their true spirit.
