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1.

Domestic Violence and Gender Neutrality

By: Megha Solanki

Pg.: 01-13

Abstract

Domestic violence is an intrinsic part of Indian Society with its roots deeply influenced by social stigma and psychological problems; it is an offense prevailing in human society since the beginning of time with the notion of victimization of females by male counterparts. Yes, it is a matter of fact that females are the majority of victims of domestic violence but the male gender and members representing the LGBT community are no exception to it. In a patriarchal society, a man being subjected to violence by a woman is unthinkable due to extreme gender stereotypes that we inherited from ancient times.

The UN Declaration on Elimination of Violence against Women (1993) defines violence against women as *“any act of gender-specific brutality that results in physical, psychological, sexual harm or suffering through threats, coercion or arbitrary deprivation of liberty, whether occurring in public or private domain”*

The Domestic Violence Act 2005 defines *“domestic violence as an act, omission that threatens health, safety, life and limb recognizing not only physical torment but also implications to mental health and psychological well-being”*. The DV act specially caters to female victims and betrays the spectacular ignorance of the nuts and bolts of access to gender-neutral justice.

The objective of this research is to establish the male gender and members of the LGBT Community as a prominent victim of Domestic violence in Indian society; it aims to decentralize the abuse of domestic violence only to the female gender. It is solely based on research, legislation, programs, policies, and responses to male domestic violence in the Indian Society.

This paper seeks to confine the discussion of domestic violence in Indian society because of the need to shift from patriarchal nature to a more general modern society. It must be noted that gender neutrality is a critical part of violence prevention and hence are considered two sides of the same coin.

Keywords: Intimate Partner Violence, Gender Neutral Law Enforcement, LGBT Community, Male Victims.

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1. Introduction

“Violence against women is the consequence of the historical division of unequal power between men and women, which has prompted dominance over and discrimination against women by men and has acted as an obstacle to the full development of women...” - The UN Declaration on the Elimination of Violence against Women, General Assembly Resolution, December 1993.

Domestic violence is ancient, the most prevalent yet relatively hidden offense even in modern times. In layman's language, it can be described as abuse at home that not only limits itself to physical harm but also impacts the mental and psychological well-being of a human being. It is evident that home is a place the environment of which has a serious impact in shaping the individual and is a factor that has a considerable effect on the mental stability of human beings. Due to the patriarchal structure of Indian society and socially prescribed gender roles, there is a notion that women are the victims of domestic violence and men are the perpetrators. This is also because in ancient India the role of women was limited to taking care of the household; they were denied basic independence growth and were forced into a subordinate position as compared to men. Since the times have changed and women are stronger than they were before, there is a need to de-generalize the association of crimes with a particular gender and understand that all genders in the world are equally capable of committing breaches of the law. It is evident that gender-based violence is no stranger to the largest democracy in the world, but does domestic violence fall within the ambits of gender-specific brutality?

Domestic violence is a legal, economical, and human rights issue. Domestic violence includes abuse committed by partners and other family members by means of physical maltreatment such as beating, arm twisting, stabbing, slapping, threats with a weapon or an object, and murder. Sexual abuse such as sex through threats, intimidation, or physical force, forcing unwanted sexual acts, or forcing sex with others. Psychological abuse that incorporates threats of abandonment, confinement to the home, threats to take away custody of the children, verbal

humiliation. Economic abuse means refusal to contribute monetarily, denial of food and fundamental requirements, and predominant access to health care, employment, etc.¹

The National Crime Records Bureau of India 2012 report reveals a dowry homicide rate of 0.7 per 100,000 and the rate of domestic violence by a husband or his relatives as 5.9 per 100,000. The 2006 National Family Health Survey reported urban women reporting a 6% rate of domestic violence in their lifetime, while 10% of women in rural areas reported experiencing domestic violence in their lifetime. Sexual violence was revealed to be lowest against women in the 15–19 age groups. The report highlighted the need for education and revealed that women with ten years of education experienced sharply less sexual violence, compared to women with less education.

Due to the nation-wide lockdown that was imposed in order to prevent the spread of Coronavirus,² there has been an alarming rise in cases of domestic violence.³ The data provided by State Legal Service Authorities suggest that Uttarakhand recorded 144 cases of domestic violence, the highest number of domestic violence cases in the two months of lockdown. Haryana with 79 cases ranks on number two and the national capital Delhi with a total of 69 cases on number three. Women in Telangana had to face a spike in domestic violence as 89% of the total number of cases registered was of domestic violence.⁴ In 2020, the year of an unknown pandemic, statistics reveal that between 25th March and 31st May, 1,477 domestic violence complaints were surfaced in India. This 68 days period recorded more complaints than those received between March and May in the last 10 years.

There is a need for the law to evolve into a modernized perspective with the changing needs of society. Recognition of Intimate partner abuse against men is still a debatable topic in Indian society. Most of the Indian laws are established over heterosexual relations that the members of the LGBT Community has felt exclusion. Inequality of law based on sexual orientation is a clear violation of Article 14 of the constitution of India. In 2018, the Supreme Court of India struck down Section 377 of the Indian Penal Code legalizing same-sex marriage, there is a need

¹ United Nations Children’s Fund Innocenti Research Centre, Domestic Violence against Women and Children, June 2002 <https://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

² NDMA, Government of India, Ministry of Home Affairs order, 24th March 2020 https://www.mha.gov.in/sites/default/files/MHAorder%20copy_0.pdf.

³ National Legal Service Authority, <https://www.latestlaws.com/latest-news/nalsa-legal-aid-widened-as-domestic-violence-rises-amid-lockdown>.

⁴ Sakhi one, Stop Centre, Telegana, April Statistics, 13th May 2020

to recognize civil as well as criminal rights that are associated with Marriage. This horrific toll will not be mitigated until families, governments, and institutions address the issue.

2. Need for Centralized and Unified Law Enforcement

In the last few decades, activism, attention, and legislation have solidified domestic violence into an issue of international as well as national concern. Domestic violence against women is termed as the next pandemic as its numbers are increasing at an alarming rate. Various complex and interrelated social and cultural norms have kept women particularly susceptible to violence; all of them are the result of the historical distribution of unequal power between men and women. Elements aiding to these unequal power relations include: socioeconomic forces, household where power relations are compelled, control over female counterparts, belief in the inherent supremacy of males, cultural prohibition that have denied women an independent status.

Systematic discrimination and neglect toward female children is evident in the sex ratio of 108 males per 100 females in India⁵ and 101 males per 100 females across the globe.⁶ Globally there has been considerable research, legislations, identification of domestic violence against women as an offense by international organizations as well as state laws. In the past decades, there has been a noticeable difference in the situation of female counterparts such as emergence into independence, participation into various spheres of the public domain but the irony is the more laws and policies are formulated to achieve Gender Equality, the more and brutalized forms of offense are witnessed against women in the modern era. Laws determine the legal rights of an individual and societal acceptance in the State. In the world's largest democracy there are no specific laws that protect men from domestic violence. It is evident that gender symmetry does not exist in India in form of physical violence and sexual abuse but more in the shape of mental and psychological torment. In a study conducted to research violence against men in Haryana,⁷ it was found that the prevalence of intimate partner violence against men is

⁵ Ministry of Statistics and Program Interpretation, 18 March 2020, Statistics time <http://mospi.nic.in/statistical-year-book-india/2018/171>.

⁶ CIA Fact Book, The Central Intelligence agency of United States <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>.

⁷ Malik, JS Nadda, A Cross Sectional study of Gender Based Violence Against Men in the Haryana State, Indian J Commun Med 2019, 44(1) 35 <http://www.ijcm.org.in/article.asp?issn=0970->

51.5%. In a study report conducted by the Save Family Foundation⁸ in 2005-2006 on domestic violence against men, the review of the study revealed that Indian women were abusive and dominating. International Organizations such as the World Health Organization and UNICEF do recognize domestic violence against men; however, there is less research to determine the magnitude and scope of the offense. Domestic Violence against men is highly unreported worldwide⁹ due to Socio-Cultural factors such as disbelief by authority if reported, question on masculinity, pressure from families, fear of losing social respect and position.

Same-sex Marriage though legalized is still unthinkable in India, same-sex relationships are still considered a concept of the western world which Indians have a hard time accepting into their societal norms. Domestic violence that occurs within same-sex relationships is a problem that largely exists “under the radar” for national governments, domestic violence agencies.¹⁰ There is still a strong belief that same-sex are devoid of intimate violence.

The legal support to members of the LGBT community and the violence they face is considered less serious than heterosexual domestic violence.

There are no laws in India that protect victims of Domestic Violence in same-sex relationships; there is no research and statistics to determine the enormity of the offense.

As revealed by the Centers for Disease Control and Prevention, lesbians, gays, and bisexuals experience sexual savagery at comparative or higher rates than straight individuals. No statistics, literature review, or research solely focuses on domestic violence against transgender. It is because that the entire LGBT community has experienced barriers in recognition by the Indian society for so long that protection from domestic violence hasn't been highlighted as their primary battle.

Understanding intimate partner violence in LGB may be difficult because of the silence that has revolved around violence in the LGB Community. LGBT domestic violence survivors are more susceptible than opposite sex survivors due to homophobia that exists in their societies. It must be understood that domestic violence is not about genders but control dynamics. LGBT

0218%3Byear%3D2019%3Bvolume%3D44%3Bissue%3D1%3Bspage%3D35%3Bepage%3D38%3Baulast%3DMalik.

⁸ Sarkar et al., Domestic violence against men: A study report by save family foundation, New Delhi <https://www.ipc498a.files.wordpress.com/2007/10/domestic-violence-against-men.pdf>.

⁹ Strong et al., Feb 16, 2010, The Marriage and a Family Experience Intimate Relationship in Indian Society.

¹⁰ Kathleen F Duthu, Why doesn't anyone talk about gay & lesbian domestic violence? 18T. JEFFERSON L. REV. 23.29 (1996).

survivors experience the same infringement of human rights, dignity, and body integrity when abused by their accomplices. A discussion of same-sex domestic violence must be included in emerging aspects of law both by international as well as domestic laws.

3. Critical Analysis of Domestic Violence Laws in India

3.1. The Protection of Women from Domestic Violence Act, 2005

Domestic Violence is one of the most reprehensive and condemnable wrongs that has shocked the social conscience and must be eliminated without any waste of time. The Protection of Women from Domestic Violence Act is a progressive enactment aimed to stop the turbulent flow of Violence.

Obtaining legal redress for victims of domestic violence is a serious challenge for women in India, the existing laws were inadequate to protect against many forms of violence against women. Domestic violence legislation in India historically has been focused on combating violence related to dowry demand, thereby excluding the possibilities of Domestic Violence for reasons other than dowry demands. Perpetrators of domestic violence unrelated to dowry demands have escaped conviction, contributing to the tolerance of other forms of violence against women. To combat this issue, the Indian parliament enacted The Protection of Women from Domestic violence act in September 2005.

This milestone legislation is targeted at expanding existing definitions of domestic violence to incorporate verbal, emotional, sexual, and economic abuse, and provides women civil/criminal relief for contravention of the Act. This Act represents a dynamic measure for a nation where patriarchal social structure runs deep and women endure appalling abuse at the hands of their intimate partners.

It is an effective legislation as it elaborately deals with all possible spheres of domestic violence; The legislation is sensitive towards the victim of domestic violence, the act directs the judiciary to provide shelter home, medical assistance, protection officers, residential orders, custody orders, compensation orders and monetary relief to the complainant, thereby focusing

on the well-being of the child out of the wedlock. It is a civil law meant for protection orders, not to be enforced criminally.

The new legislation covers all women, regardless of whether the accused is a spouse or someone in a live-in relationship. This Indian legislation for the first time introduced the concept of “shared household” that covers women in Non-Matrimonial relationships.

This act has been criticized for lacking gender neutrality and for merely serving as a civil approach and rather than serving as a criminal law. The Act is ambiguous and lacks clarity. It is appropriate to note that the victim is always a “woman” according to the preamble of the Domestic Violence Act, 2005. ‘Man’ and members of the LGBT Community do not fall within the ambit of such definition.

In the words of the Indian Minister for Women and Child Development, Renuka Chowdhury *“an equal gender law would be ideal but there is too much sustainable evidence to confirm that woman are majority victims who suffer at the hands of man.”*

However, let us not forget, ‘All power tends to corrupt and absolute power corrupts absolutely’. In **Dr. N. G. Dastane V. Mrs. S. Dastane** the Hon’ble Supreme Court of India held that the cruelty can be a sole or a combination of, mental and physical cruelty. Indeed, physical force is generally imposed by the husband being muscularly strong but at the same time, it is not universally applicable. In the majority of lawsuits, it is the wife who causes mental agony to the husband but it can also be vice versa.

3.2. Section 498A Indian Penal Code

The addition of section 498A to the Indian Penal Code has been one of the progressive steps by law-makers. It was enacted in 1983 with the aim to curb matrimonial cruelty towards married women. The enactment of Section 498A IPC as a penalized provision, combined with subsequent provisions in the Code of Civil Procedure is constructed to act as a component of hindrance. Section 498A criminalizes cruelty to a woman by her husband or any relative of her husband, punishable with imprisonment for a term of three years and also with fine. Subsequent changes were also made to cooperate with the amendment in the Code of Criminal Procedure

1973 and the **Indian Evidence Act 1972** to effectively tackle dowry deaths and cruelty to married women by the husband and his relatives.

Section 306 of the Indian Penal Code also plays a crucial role in Section 498A cases. Abetment to commit suicide will be sentenced to imprisonment which may extend to 10 years with a fine.

It has been argued that this law has been used less as a shield and more as a weapon. National Crime Records Bureau Report has revealed that approximately 1, 00,000 cases are filed under section 498a yearly. The rate of conviction where the accusation was proved guilty varied between 20% in 2011 and 14% in 2015. The Supreme Court observing the gap between the cases filed and the conviction rate put an end to automatic arrests and held that no arrest shall be made in cases of Section 498A IPC unless the case is investigated by the Family Welfare Committee. However, this rule is not applicable in case the victim is deceased or suffers injury.

3.3. Section 304B Indian Penal Code

Section 304B of the Indian Penal Code explains dowry death. If a woman is deceased within seven years of marriage due to burns or bodily injury or it was revealed that before her death she was subjected to cruelty or harassment by her husband or any other relative of the spouse in connection to dowry demand then the death of the woman will be considered as a dowry death.

Punishment for dowry death is a sentence of minimum imprisonment for seven years which can extend to imprisonment for life. Section 113B of the Indian Evidence Act provides presumption of judiciary in case of dowry death. The applicability of this section remains in force for 7 years of marriage.

4. Shortcomings in Domestic Violence Legislation

4.1. Lack of Gender Neutrality

There is no protection of men in the Domestic Violence Act 2005; there is no provision which provides a remedy for men as in Section 125A of Code of Criminal Procedure i.e. maintenance of husband under the act, there is no provision like section 498A of the Indian Penal Code. The Indian legislation only comprises of laws that are women-specific and has a clear exclusion of the male section of the country providing legal assent to the assumption that men cannot be victims of domestic violence. Not only in India but the majority of the world does not have domestic violence-specific laws for males. In **Krishan Lal Vs Union of India**,¹¹ the honorable court was of opinion that Article 14 of the Constitution of India accords equal treatment to all persons. It was further held that any invidious discrimination is obnoxious to equality and therefore the Constitutional validity of the Domestic Violence Act has been questioned numerous times.

The Indian laws are clear abuse and discrimination against men who can also be victims of domestic violence but have been bluntly eliminated from the purview of the Act. In **Vijaylakshmi V. Panjab University**¹² it was held that as a result of association of Article 15(1) and (3), the State may discriminate (Doctrine of reasonability) in favor of women against men but it may not discriminate in favor of men against women. The protection against domestic violence is a civil right, the misuse of which must be rigorously punished.

While the Domestic violence Act is well known as an umbrella legislation that has achieved its purpose of providing justice to helpless female victims, unfortunately, it still fails to recognize that there is no hard and fast rule as to who is the victim and the perpetrator.

International organizations such as UNICEF as well as the judicial system in India have started to comprehend the impact of Domestic violence on Children. However, at the hotline, it is

¹¹ 1994 Cr LJ 3472: ILR 1994 2 P&H 422.

¹² AIR 2003 SC 3331.

evident that Domestic Violence can affect anyone- including men. All violence matters, and where men are the victims of Domestic Violence they should be heard and supported.

4.2. Ambiguities

The Definition of “Abuse” Under the Domestic Violence Act, 2005 is too detailed leaving opportunities for manipulation and misuse of the statute. The authorities that are constituted under the Act such as the Family Welfare Committee are not outlined in a certain manner leaving scope for technical glitches.

The statute includes terms "insults" and "jibes" under the definition of "verbal and emotional abuse" in Section 3 of the Act, without providing a legal definition to these terms. The terms "mental and verbal abuse" have the potential to be misinterpreted and thus these ambiguities must be resolved by the judiciary. In some cases, the term “mental and verbal abuse” can be extended to mere domestic quarrels that were not intended to fall under the definition. The courts must interpret the statute in order to remove ambiguities and reveal the true intention of the legislature.

5. Relationship between Domestic Violence and Gender Inequality

Domestic violence and gender inequality are correlated to one another. The incidents of domestic violence are higher in communities that have a negative correlation with socio-economic and cultural inequalities between the genders. Communities that have progressive levels of gender equality have low rates of Domestic Violence.

Gender is seen as the basic organizing principle for relationships, institutions, cultures in human societies. Human beings are socialized according to the array of gendered expectations and roles, which not only create and maintain differences between women and men but also tend to assign unequal value and privilege to men and women. Cultural traditions have provided

superior status to masculinity, and have developed gender orders which legitimize male authority and control over females and other subordinates.

The role that families associate with a particular gender, the rights that the legislature recognizes towards a gender has a severe impact on the levels of domestic violence. A dominant cultural attitude that Indian society has towards females having low social value and being less deserving as compared to men are the bedrock of gender-biased behavior in India.

The norms and notions, rigid gender stereotypes are factors of gender inequality which has encouraged violence against women. Gender disparity in India renders women susceptible to high risks of domestic violence. Gender inequality between men and women in a country can be demonstrated by the severity of the consequences of domestic violence experience. Women are more likely to experience innumerable episodes of domestic violence from the same perpetrator; the use of physical violence by women to men is less likely to cause severe injuries than the violence committed by a man. Men experience a majority of domestic violence in form of mental torment than physical force. The ancient culture of manliness and femininity ensures that the definition of brutality will differ when used by women against men. Studies reveal that women are more likely to experience violence from a known person, mostly an intimate partner.

While all the genders have different roles to play in a community, they should be subjected to the same level of independence, rights, and respect. Gender baseness is an inevitable evil that must be eradicated by formulating laws and policies that provide an equal platform to all the genders.

6. Conclusion

Domestic violence is a gender-inclusive conception. There is substantial evidence pointing towards shortcomings in research, law, and policy directed towards domestic violence against men and the LGBT Community. The task of addressing intra-gender violence is the need of the hour. Gender-inclusive approach towards domestic violence shall retain values of fairness and social justice ensuring victim safety and perpetrator accountability. A pondered gender-neutral methodology can provide the frame for progressive reformation.

2.

Legal Personality of Artificial Intelligence

By: Divyanshi Singhal

Pg. No.: 14-27

Abstract

The role of technology has been deliberately increased in our lives. From the usage of virtual personal assistants like Siri, Alexa, OK Google in our daily lives to the use of robots in our professional life, we have seen tremendous changes in Artificial Intelligence. The use of Artificial Intelligence has become imperative in the whole world but only a few people know about the legal framework related to it. This paper explores the Artificial Intelligence from its genesis to its recent Developments and its legal framework. The researcher has adopted a qualitative approach to the study.

This paper begins with a brief introduction to Artificial Intelligence wherein its background and relevance have been discussed. Further, this paper discusses the meaning of the legal personality of Artificial Intelligence in detail. This paper also talks about how Artificial Intelligence can lend its helping hands in the Legal profession. This paper throws light on the Legal framework of Artificial Intelligence in India. It tells about the Government intervention in the wider implication of Artificial Intelligence. Then, it discusses the legal status of AI in other countries by emphasizing cases from Saudi Arabia and Japan. This paper identifies the pitfalls in Artificial Intelligence and concludes that as the need for AI in our daily lives increases, the need to frame suitable legislations in order to provide adequate legal safeguards also increases.

Keywords: Artificial Intelligence, Legal Personality, Legal Framework.

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1. Introduction

We have seen tremendous inventions in the world of technology, one such innovation is Artificial Intelligence. Innovators were curious to know whether a machine can truly think. The term ‘Artificial Intelligence’ was coined in 1956 by John McCarthy who was regarded as the Father of Artificial Intelligence. To innovate an artificial intelligent being, innovators went through the utmost struggle. Between 1974-1980 various reports were published to criticize the progress in AI, due to these reports Government funding went down. But in 1980, the British Government again started funding it. Artificial Intelligence captured headlines when IBM’s Deep Blue became the world’s first computer to win a chess championship after defeating Russian Grandmaster Garry Kasparov in 1997. Later in 2011, the talking computer “chatbot” became the talk of town who tricked judges in a Turing test.¹³

If we talk about the development of AI in India, actual research started in 1986 when the Indian Government launched the Knowledge Based Computing Systems program with UNDP. Various prestigious institutions have undertaken several projects on AI.

The first thing usually come to people’s mind when they hear the term ‘Artificial Intelligence’ is a robot. Well, to have more clarity on the term Artificial Intelligence let's understand its meaning. According to the Cambridge Dictionary, Artificial intelligence or machine intelligence is the study of how to produce machines that are programmed with the imitation of human intelligence or possess some qualities that the human mind has.

The most impertinent function of AI is to organize or collect that information which is beyond of manual processing. We have seen applications of AI in various areas such as expert systems, Natural Language Processing, Speech recognition, Computer vision, and of course robotics.

From adding value to our life-style to assist in various professions, businesses, AI has come a long way. Its importance is just not limited to any specific area. AI plays a vital role in almost every sector.

¹³ Lewis, T., (2014, December 4), *A brief history of Artificial Intelligence*, LIVESCI=NCE, <https://www.livescience.com/49007-history-of-artificial-intelligence.html>.

2. Legal Personality of AI

Whether AI should be granted legal personality? This question has repeatedly become the subject matter of various debates. Let's first understand the meaning of Legal personality in-depth then we will come to the above question. Personality is a very broad term and it has various meanings. The word personality originated from the Greek word 'persona' which means a person who could bear rights and duties. Legal personality refers to get recognized in the legal system of a particular country. It also refers to the ability to enjoy rights and obligations. Also, a legal person doesn't need to be human but the one who can confer rights and duties such as an idol or a body corporate.¹⁴

Artificial Intelligent beings are not recognized as a legal person. As we know that corporates are considered as legal persons, this gave the precedent to consider whether AI should be considered as a legal person. But Corporations and AI are different. The basis for distinguishing between corporations and AI is that corporates are independent but are liable through their shareholders whereas AI is independent. This again raises the question of whether AI can be held liable for its independent acts? As AI is not considered as a legal person it cannot be held liable in its motion.¹⁵

There are many questions which remain unanswered related to the ascertaining liability of AI due to the absence of laws for AI in the current legal system. At the end of the research paper, a researcher will propose some ideas to consider for determining the liability of an AI.

3. Uses of AI in the Legal Profession

The use of AI is just not restricted to any particular sector. Similarly, the use of AI has been extended to all the professions including the Legal profession. Though still there are some tasks

¹⁴ Aslam, M., *Legal Personality in the light of Jurisprudence*, Legal Service India, <http://www.legalserviceindia.com/legal/article-1904-legal-personality-in-the-light-of-jurisprudence.html>.

¹⁵ Tavawalla, H., (2018, June25) *Can Artificial Intelligence be given Legal Rights and Duties*, Mondaq, <https://www.mondaq.com/india/new-technology/712308/can-artificial-intelligence-be-given-legal-rights-and-duties#:~:text=Legal%20personhood%20is%20inherently%20linked,AI%20as%20a%20legal%20person.&text=The%20general%20rule%20has%20been,liable%20in%20its%20own%20capacity.>

in the legal profession that cannot be replaced by an artificial intelligent being such as negotiating, making briefs of Supreme Court cases, appearing in a court proceeding to argue, etc. But still, AI can be used in diverse areas in the legal profession. Following are the ways by which AI can be utilized for the benefit of lawyers and law firms:¹⁶

- a) **Legal Research:** Legal research is very pertinent in the legal field. It is a very diligent and time-consuming process. Legal practitioners can easily delegate their legal research tasks to AIs. These AIs are embedded with special software that helps them to do Legal research accurately and speedily.
- b) **Due Diligence:** Due diligence involves reviewing various unorganized documents. AI has made this process simple. It organizes and converts various documents in a particular format in just half of the time, if done manually.
- c) **Contract Drafting:** Drafting is one of the key areas in the Legal profession. AIs with their special legal software can assist lawyers and law firms to draft various documents such as contracts, commercial agreements, petitions, etc.
- d) **Legal Analytics:** Lawyers need precedents in the relevant area. AIs are embedded with software to furnish judgments. The AI form pattern and research in line with that pattern. Through this mechanism precedents and judgments can be established.
- e) **Technology of Prediction:** It was found that AIs are capable of predicting the probable result of a case with remarkable accuracy. Even if less information is available, AIs can predict the result very easily.
- f) **Electronic Billing:** AIs help legal professionals to prepare the invoices according to the work done by them. The legal software helps in the accurate preparation of invoices as well as helps in making adjustments in respective invoices.

4. Legal Framework of AI in India

As we have already discussed that there is currently no law in force related to AI in India but the Government has developed some policies on a national level to develop Artificial Intelligence.

¹⁶ Barua, P., (2019, February 24), *Artificial Intelligence and Law*, Law times journal, <https://lawtimesjournal.in/artificial-intelligence-and-law>.

4.1. Report of the Artificial Intelligent Task Force

The main attributes of AI are complexity and pervasiveness. As the study of Artificial intelligence is a multi-disciplinary, it requires astute minds from diverse fields to understand the concept of AI. This task force constitutes an eighteen member from different field who gathered to formulate the content of this report. V. Kamakoti was appointed as the chairman of this report. The contents of this report are- 1) Introduction 2) AI grand challenges relevant to India 3) Enablers for AI Entrepreneurship/ Technology product commercialization 4) Ensuring Responsible use of AI Ethics and social safety 5) AI and employment 6) Specific Recommendations to Government of India¹⁷. This report attempted to answer the following three questions:

- (1) What are the areas where the Government of India can play a significant role?
- (2) How AI can solve problems for Indian citizens and how can it improve quality of life?
- (3) What are the sectors which can grow and develop due to the use of AI?

The significant section of this report is recommendations made to the Government of India. The report recommended 8 key recommendations.

- (1) Report suggested for maintaining fund under Union Budget to give effect to an inter-ministerial National Artificial Intelligent mission, which will help in coordinating AI-related activities in core areas.
- (2) Establishing Digital Data banks, exchanges, marketplaces so that cross-industry data and information shall be made available after certain regulations.
- (3) Participation of India in the standards evolving across the nations related to AI.
- (4) The government of India should put in place policies to encourage and facilitate the growth and deployment of AI-based products.
- (5) Devised AI education strategy to develop human resources in the field of AI.
- (6) Professional education policy for Human resources so that they can vest with required skill sets.
- (7) Participation of India in international policy discussion.
- (8) Bilateral cooperation with other countries to develop AI solutions.

¹⁷ (Mar. 30, 2018), *India: Government-appointed Task Force Issues Recommendations on AI*, GIP DIGITAL WATCH, <https://dig.watch/updates/india-government-appointed-task-force-issues-recommendations-ai>.

4.2. National strategy for AI

The then Finance Minister Arun Jaitley suggested that India's think tank would lead the National Program on AI on February 1, 2018, then the meeting was constituted on February 8, 2018, and the task was given to Niti Aayog to formulate a national strategy on AI. The committee was constituted and as a result, they presented a report titled "National Strategy for Artificial Intelligence #AIFORALL".¹⁸

It considered almost similar points as the report of the AI task force considered. Five sectors have been identified by the committee to focus such as healthcare, smart cities, transportation, Agriculture, Education. This report too suggested some actions for the government along with the Global developments in AI, Study of AI in the context of India, key challenges, etc. There were almost thirty policy recommendations suggested by this report.¹⁹

4.3. Ministry of Electronics and Information Technology Committees

This ministry constituted four committees to research and development a framework on AI.

- (1) **Platforms and data on Artificial Intelligence:** This report is made available to the public as the committee felt that if the report is made available to the public, young or bright minds will be able to understand the problem and will come up with the astute decision. Another reason behind making this report public is to enhance the knowledge related to AI among students, teachers, professionals, etc. Finally, to help the Government in taking initiatives for the development of AI. This report recommended the above 15 recommendations.²⁰
- (2) **Leveraging for identifying national missions on key sectors:** This report recommended to develop the National Artificial Intelligence Resource Platform in India. This platform will accumulate all the information, tools, data, resources, etc to

¹⁸ (June, 2018) *National Strategy for Artificial Intelligence #AIFORALL*, https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf.

¹⁹ Ibid.

²⁰ (July, 2019), *Report of Committee – A on Platforms and data on Artificial Intelligence*, Ministry of Electronics and Information Technology, Government of India, https://www.meity.gov.in/writereaddata/files/Committee_A-Report_on_Platforms.pdf.

enable the public to take up AI tasks individually and in cooperation. It was also recommended by this report that the funding for establishing this platform will be done by Government through Meity. This report further discusses the various functions that would be performed by the National Artificial Intelligence Resource Platform.²¹

- (3) **Mapping technological capabilities, key policy enablers required across sectors, skilling, re-skilling, and R&D:** This committee considered the International scenario to develop the national strategy for AI. Further, this committee also gave some recommendations.²²
- (4) **Cybersecurity, safety, legal and ethical issues:** This report started with the challenges in cybersecurity, further it analyzed the role of AI in cybersecurity. It also considered AI in relation to privacy.²³

4.4. Defense and AI

A multi-stakeholder task force has been established in February 2018 by the Indian Government. It involved various professionals from Government departments, academia, different services, etc. This force was constituted to study the role of AI in national security. This report suggested some recommendations related to AI in the field of aviation, cyber, naval, nuclear, etc. On June 30, 2018 task force submitted its report to the Minister of Defence.²⁴

²¹ (July, 2019), *Report of Committee- B on Leveraging for identifying national missions on key sectors*, Ministry of Electronics and Information Technology https://www.meity.gov.in/writereaddata/files/Committees_A-Report_on_Platforms.pdf.

²² (July, 2019), *Report of Committee- C on mapping technological capabilities, key policy enablers required across sectors, skilling, re-skilling and R&D*, Ministry of Electronics and Information Technology https://www.meity.gov.in/writereaddata/files/Committees_A-Report_on_Platforms.pdf.

²³ (July, 2019), *Report of Committee- D on cyber security, safety, legal and ethical issues*, Ministry of Electronics and Information Technology, https://www.meity.gov.in/writereaddata/files/Committees_A-Report_on_Platforms.pdf.

²⁴ *Regulation of Artificial Intelligence: East/ South Asia and the Pacific*, Library of Congress, <https://www.loc.gov/law/help/artificial-intelligence/asia-pacific.php#india>.

4.5. Justice B.N. Srikrishna Committee

The Government constituted a committee of experts known as Justice B.N Srikrishna committee. This committee presented a draft Bill on Protection of personal data as well as a report titled “A Free and Fair Digital Economy Protecting Privacy, Empowering Indians”²⁵

An analysis was done in relation to this Bill by the Centre for internet and society. In its opinion, the Bill was created to address harms done by AI. It doesn’t empower the individuals to settle how the processing of its data has been done. The issue of ‘Black Box’ also remained unanswered. The Bill was focused mainly on determining the responsibilities to prevent harm to companies.²⁶

4.6. Bill on use of AIs in Automatic Vehicles

The regulation related to motor vehicles is subjected to a concurrent list. Automated vehicles are not allowed in the current Motor Vehicles Act. However, a bill was passed in relation to automatic vehicles in India in Lok Sabha on 10th April, 2017. The Bill hasn’t passed yet in Rajya Sabha. The Ministry of Road Transport and Highways refused to allow automatic vehicles in India as it will adversely affect employment. He further said, India already facing unemployment, so the technology which end up taking people’s job will not be fruitful.²⁷

4.7. Facial Recognition by Artificial Intelligent beings

The private sector with the help of State police tries to deploy AI for facial recognition and predicting tools to detect crimes.²⁸

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

5. Legal status of AI across countries

The technology of AI has been accepted worldwide. From the AI feature in Siri, Alexa, OK Google to the use of robots, AI has come a long way. Various countries have accepted the role of AI in their daily lives. Let's take examples of various countries and then understand the relevance and the legal framework in the respective countries. The list of countries who take steps on AI is non-ending but let's consider a few countries. If we talk about Australia, in a survey it was found that out of 10, 9 businesses have deployed AI. Australia also developed its policies related to autonomous weapons systems and automated vehicles. Indonesia launched its first AI research center in 2018 as its Government itself uses the AI. The Government of New Zealand also took significant steps to develop AI in its country.²⁹

Generally, the implementation of the approach of AI is done in two ways: software packages such as assistants, virtual platforms, programs, chat-box, etc., and the ones who have material shells which are programmed such as robots, drones, etc.

Many countries adopted the AI approach which contradicts current national legal norms. The two most famous cases are from Saudi Arabia and Japan.

5.1. A case from Saudi Arabia

The capital of Saudi Arabia, Riyadh launched 'Sophia', a woman robot in 2017. Sofia was granted the Citizenship of Saudi Arabia under the Saudi Arabia Citizenship Act. The decision to grant citizenship to a robot contradicted the number of laws. It contradicts the Saudi Arabia Citizenship norms. Under Saudi Nationality System, 2018, Saudi Arabia Citizenship can be obtained: a) By Birth; b) By marriage; c) By naturalization under various conditions such as reaching the legal age; fluent in Arabic; settlement over 10 years; a legitimate way of earning; no criminal record; compliance with the norms of conduct set out in the country.³⁰

²⁹ Supra at 12.

³⁰ Atabekov, A & Yastrebov, O., (2018), Legal Status of Artificial Intelligence Across Countries: Legislation on the move, *European Research Studies Journal*, Volume XXI, Issue 4, 2018, pp. 773-782, file:///C:/Users/Singhal/Downloads/Legal%20Status%20of%20Artificial%20Intelligence%20Across%20Countries_%20Legislation%20on%20the%20Move.pdf

The society of Saudi Arabia has introduced some specific requirements in relation to female activities such as hijab-wearing, limits to traveling abroad, travel obligation accompanied by a male mahram, limits on job placement, inheritance rules, and some other restrictions. So, the opportunity was given to speak out on the rights of women of Saudi Arabia.³¹

5.2. A case from Japan

A 7-year-old robot boy Shibuya Mirai, (a chatbot) was provided residence under special regulation (Cuthbertson, 2017) in Japan, 2017. This decision contradicted the laws related to the residence permit procedure of Japan. The Law associated with citizenship is regulated by the Law on citizenship of Japan. Shibuya Mirai was also granted citizenship under Japan Citizenship law. The Law grants citizenship in two cases 1) By birth- if the child is born in Japan and either mother or father holding the citizenship of Japan. 2) By naturalization- The person should reside in Japan for over 5 years, have legal capacity, and reach the age of twenty, etc.³²

5.3. Analysis

If we consider the above cases, it can be analyzed that:

- (1) Both robots didn't apply to the citizenship of their respective countries.
- (2) Both the robots didn't meet the eligibility criteria for getting citizenship according to their respective countries.
- (3) Both the robots do not speak the national language of their respective countries which has been set by law. (Arabic & Japanese respectively)

As we discussed above the society of Saudi Arabia has some restrictions over females. Also, Sophia, the robot does not follow the laws related to clothing, ethics of behavior which could be a reason for attracting penalty under administrative and criminal laws of Saudi Arabia for

³¹ Supra at 18.

³² Supra at 18.

females. Similarly, the age of Shibuya Mirai does not comply with the citizenship laws of Japan.

In relation to this researcher suggests that the respective countries should come up with separate laws for granting citizenship to AIs.

6. Conclusion

This paper highlighted every legal aspect related to AI. Indeed, AI has enhanced our life-style as well as played a significant role in professional life. AI is a very important aspect of technology, still there are no laws that recognize AI. The government of every country which has the technology related to AI should work on their respective countries laws to recognize AI.

AI is very advantageous in every sector, but it also has some pitfalls. One of the major concerns is privacy breaches from the use of AI. Because of this people became more cautious about sharing information. Adoption of AI may lead to unemployment, as most of the work will be dealt with by the programmed robots. As there are no specified laws on AI, it's very difficult to decide the liability of AI.

If we talk about the cases of Saudi Arabia and Japan, the robots of both the countries didn't meet eligibility criteria still they were provided with citizenship. Hence, stringent laws are required for almost every country in relation to developing AI, granting of citizenship of AI, determining its liability, etc.

For ascertaining the liability of AIs, it has been argued that, at this point, technology still is in its infancy, so it is not necessary to grant legal personhood to an AI. Contrary to this, the researcher understands the need of bringing laws for AI. The researcher also proposes that the liability of AI should be determined on a principal-agent basis. The AI entities should be considered as an agent, so accordingly, liability can be determined in similar lines with principal-agent human relation. Firstly, it is necessary to decide the nature of AI entities, then it becomes pertinent to decide whether liability can be shifted from AI's creator to AI. There were constant debates on applying the law of strict liability or absolute liability on Artificial Intelligent beings.

Pertain to this, there are various questions in the minds of researchers, professionals, academicians, etc. As the need for AI in our daily lives increases, the need to frame suitable legislation in order to provide adequate legal safeguards also increases.

3.

Secularism in India

By: Lumina L

Pg: 28-39

Abstract

India is a multi-religious and multi- Cultural Country. India was the birthplace of four major religions namely Hinduism, Buddhism, Jainism, and Sikhism. Though the word “Secularism”, is said to be first coined by a British Writer George Holyoake in 1831, Hindu Ethos for centuries practiced Secularism as a way of life. They advocated and followed “Sarva Dharma Sambhava”. Our Pre- Independent India which was ruled by rulers from Ashoka to Akbar was also preserving Secularism in India. When our Constitution was formed our constitution did not have the word “Secularism” anywhere. But the flavor of secularism was well mixed in our constitution. We were able to taste them in Articles 14, 15,25,26, 27, and 28 of the Indian Constitution. Later, through the 42nd Constitutional Amendment, the word “Secularism” was added to the Indian Constitution. Slowly, India is going through a phase where India’s inherent trait “Secularism” is being questioned. Starting from Rajiv Gandhi’s action after the judgment after the Shah Bono’s case to Ram Janmabhoomi India’s Secularism is being shaken. To preserve India’s Secularism some fundamental changes should be made in our constitution, civil law, and criminal law. Moreover, laws should be made to prevent the usage of Religion as a means to achieve political endeavors in India.

This Research Paper focuses on the history of “Secularism”, comprehends the concept of “Secularism” in our Indian Constitution, and tries to bring out the current problems affecting Secularism. The Research Paper will also provide solutions to prevent “Secularism” from being faded away with time.

Keywords: Secularism, Hindu Ethos, Threats, Solution.

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1. Introduction

“Secularism must be applied everywhere because that is how everyone will be able to live in peace with each other”

- Manuel Valls, Former Prime Minister of France.

Secularism is one of the most important virtues that do not have a precise meaning or a meaning that everyone agrees upon. It was beautifully said by Jawaharlal Nehru in his autobiography that “no word perhaps in any language is more likely to be interpreted in different ways by the people as the word ‘religion’. That being the case, ‘secularism’ which is a concept evolved in religion to religion can also not have the same connotation for all”. There is a very popular notion that there are two models of Secularism. First Model is where the State and Church are completely different entities. It is like they have an invisible and unbreakable wall and the church will not interfere with the affairs of the State and the State will not interfere in the affairs of the church. This could be seen in the United States of America. The second Model is where all religions are treated equally by the State.

This Secularism is embedded in our Indian Culture and that’s how we have given birth to four different religions. This article analyses the History of Secularism in various timelines of Indian History and tries to make the reader understand that India and Secularism are interwoven. It also highlights the various threats that are faced by Secularism in the Present Indian Society and tries to bring out the different solutions that can revive the Secularism in India.

2. Secularism in Hindu Ethos

Our traditional Hindu Ethos has always supported Secularism in its real form. One of the common tenets of Hindus is “Sarva Dharma Sambhava”. This means the way to truth may be different but the ultimate truth is the same. This may be illustrated as, one may in order to reach their office may choose bus or car, the means may be different but the destination (i.e.) the office is the same. “Sarva Dharma Sambhava” is widely interpreted to mean that one may

choose any religion as a means, but the ultimate destination is the same for all religions. Such a type of idea widely prevalent among Hindu Ethos.

The Hindu Ethos also collectively believed in the concept of “Vasudhaiva Kutumbakam”. This can be found in Maha Upanishad. It is almost similar to the Tamil Phrase “Yaadhum Oorae Yaavarum Kealeer” which means all people in the universe are the same family. Irrespective of the difference between all the people in the universe are a family. This is the inherent value that Hindus collectively had in early Indian Society³³.

3. Secularism in Pre-Independent India

Ashoka, though promoted Buddhism, aimed in a society where all the religions existed peacefully with mutual respect. The Mughal Ruler Akbar should be acknowledged for his Secularistic Rule in India. During his rule, he tried to give equal space for all the religions.

During the British Rule, though there was a mass spread of Christianity in India, the policy of the Britishers ensures neutrality.

This sense of Secularism can be found when India was fighting for its independence. Mahatma Gandhi not only felt that a person’s religion should stop in his or her private space but also felt that recognition of various religions in the public space. One could infer this in the Khilafat Movement in 1919 where Gandhi joined hands with Muslim leaders. Mahatma Gandhi also believed that the Muslims should not be forced to give up cow slaughter. He always advocated his followers to make Muslims stop cow slaughter by peaceful means³⁴.

India not only had people who promoted secularism but also had people who had progressive thoughts like Raja Ram Mohan Roy, E. V. Periyar etc., who condemned the backward ideas of Hinduism.

³³ Sanghi, A. (2020, August 9). *Want to preserve secularism in India? Well, preserve the Hindu ethos first*. ThePrint. <https://theprint.in/opinion/want-to-preserve-secularism-in-india-well-preserve-the-hindu-ethos-first/477972/>

³⁴ Abhinav Chandrachud. (2020). *Republic of religion: the rise and fall of colonial secularism in India*. Penguin/Viking, An Imprint Of Penguin Random House.

4. Secularism after Independence

When the Constitution was made in Independent India, the word “Secularism” was not found anywhere in the Indian Constitution. But that does not mean that India didn’t have the idea of Secularism in the Constitution when the constitution was made. Indeed, it didn’t have the word “Secularism” but it had many articles that provided Secularism to its people.

Article 14 of the Indian Constitution talks about equality before the law and equal protection of the law. Article 14 has the word “any person”. Hence a person may belong to any religion, but the law gives equal protection. Article 15 explicitly states that a state shall not discriminate against any person based on religion. Article 16 also explicitly states that a person shall not be discriminated against based on religion. Apart from treating the minority religion people equally with majority religion people, Article 25 gives the right to a person to not only practice but also profess and propagate his or her religion. Also, Article 26 gives freedom to manage religious affairs and Article 27 restrains or protects the people from compulsorily paying religious taxes. Again, in Article 28 no religious instructions can be taken in a school wholly managed by the state. In addition to these rights, our constitution has bestowed with Article 29 and 30 where special rights are given to minorities³⁵. In *St. Xavier College V. State of Gujarat*,³⁶ the Supreme Court rightly pointed out that though the word “Secularism” was not found in our Constitution one could interpret it in the words of Article 25 to 28 of the Indian Constitution. Hence our Constitution although did not have a “Secularism” written anywhere in the constitution before 1976 one could infer that our Constitution indeed guaranteed Secularism.

In 1976, through 42nd amendment the word “Secularism” was added in our Indian Constitution. The Supreme Court in the case of *S.R. Bommai V. Union of India*³⁷ held that “Secularism is the basic feature of the Constitution”. Also, in *Aruna Roy V. Union of India*³⁸, the Supreme Court held that Secularism means developing, understanding, and respect towards other religions. A landmark progress in the area of Secularism occurred in the case of *Kesavanandha Bharati V. Kerala*³⁹. In this case, the meaning of the word Secularism was enunciated by the

³⁵ *Secularism and the law SECULARISM AND THE LAW National Foundation for Communal Harmony New Delhi August 2010 i.* (2010). <https://nfch.nic.in/documents/E-Books/Secularism.pdf>

³⁶ AIR 1974 SC 1389

³⁷ (1994) SCC 1

³⁸ AIR 2003 SC 3176

³⁹ AIR 1973 SC 1461

Indian Supreme Court for the first time. It stated that the word “Secularism” meant that the state has no state religion. Also, in this case, the Supreme Court that the basic structure of the Constitution cannot be amended through the power given under Article 368 of the Indian Constitution and that Secularism is one among the “basic” structure.

So does things make us Secular. Well, that’s a question that we need to ponder. Simple, giving special privileges to minorities based on religion in itself can be regarded as an unsecular activity.

5. Threats to Secularism

Though there were a lot of Secularistic ideas prevalent in the Indian Society, one should not forget that India is not fully Secular. Of course, no society can be secular. But something that one needs to remember is that we are a country that was divided based on religion. So, is India Secular? The answer is NO. Nothing could be perfect. India is not an exception to that rule. The following are some of the things that made India fall back from being Secular.

When the Supreme Court gave its judgment in the case of Mohammad Ahmed Khan Vs. Shah Bano Begum⁴⁰, allowing a Muslim divorced wife to get maintenance under Section 125 of CrPC, due to the pressure given by the Muslims, Rajiv Gandhi Government overturned the judgment by passing Muslim Women (Rights on Divorce Act) 1986. A state which has guaranteed the right to equality to all people has, merely because of the pressure of the Muslim religious group has made such a law. By failing to treat all religions equally, India chose an unsecular path.

And then Secularism was again in threat when India became the very first country to ban Satanic Verses a book written by Salman Rushdie. Now very recently P. Chidambaram has said that banning of Satanic Verses was a “mistake”. Just to make sure that Muslim Votes are secured a Government has invariably went against the principle of Secularism.

Again, when the Babri Masjid was demolished in 1992, the principle of secularism was bedridden the pre-planned demolition of Babri Masjid and the aftermath of communal riots

⁴⁰ AIR 1985 SC 945

affected all over India. And a sovereign was unable to take any effective action. Till now, after nearly 28 years, the people who demolished the Babri Masjid has not been traced out. A problem that should have been solved through judicial machinery was taken by some religious mobs and the state was ineffective to stop it.

Gujarat Killing of 2002 is one of the shocking reminders that how an argument can lead to a very big communal riot. Many people were mercilessly killed. Many were slaughtered. This has may be described as the death knell of Secularism⁴¹.

After the Ayodhya Judgment, there was a lot of speculation that a Prime Minister who practically leads the state, chose to attend a particular religious festival, hence it is an unsecular activity. Well, this could be considered as unsecular. As we look into the history, we would find that our Former Prime Minister Jawaharlal Nehru was against the then President Rajendra Prasad who visited the Somnath Temple for its inauguration⁴². If we look at it in that way, it can be said as an unsecular activity.

6. Legal Changes needed to revive Secularism in India

Now after the 42nd Constitutional Amendment, we have the word Secularism in India. But what is the use? Our Constitution does not define the meaning of Secularism. Hence, till now the real meaning of “Secularism” is being continuously the question of law in our Indian Courts. If we look at the Constitutional Assembly debates we would that on 3rd December 1948, Mr. K. T. Shah, tried to include the meaning of Secularism in the Indian Constitution. His definition was that, state being secular shall have no concern for religion, creed, or profession of faith. This definition did not take its place in the Indian Constitution. This could be treated as a problem in our Indian Constitution that needs an immediate solution.

⁴¹ Gupta, S. (2020, August 8). *Modi redefined secularism with Ram Mandir as Hindu voters were fed up of Sonia-Left version*. ThePrint. <https://theprint.in/national-interest/modi-redefined-secularism-with-ram-mandir-as-hindu-voters-were-fed-up-of-sonia-left-version/477422/>

⁴² ShivShankar, R. (2020, August 2). *What critics of PM Modi's Aug 5 Ayodhya Puja chose to forget*. Times of India Blog. <https://timesofindia.indiatimes.com/blogs/beyond-the-headline/what-critics-of-pm-modis-aug-5-ayodhya-puja-chose-to-forget/>

The word Minority in Article 30 of our Indian Constitution does not have a clear-cut definition for the word “Minority”. Of course, in *T. M. A Pai Foundation Vs. State of Karnataka*⁴³ it was held that “Minority” status would be determined based on the demographic composition of States. But after that case also the question remains unsolved. It is the duty of the legislature to make a clear law with regard to the Minority status. Also, the other part of the question, that is how to determine the Minority Institution? As to Whether it should be composed of Minority Management or is the majority need to be minority students? Remains unanswered. In this regard also, the legislature needs to make a clear law.

India is always being said to be a secular state where all the religions are treated equally. But that is not true. Till today people are treated based on their religion. Till today, in India Hindus follow Hindu Personal Law, Muslims follow their Shariat Law and Christian follow the Special Marriage Act and the Indian Succession Act. This itself could prove that India is not a Secular Country. Article 44 of our Indian Constitution talks about the creation of the Uniform Civil Code. But no Government so far has enacted a law to enforce the Uniform Civil Code. The Supreme Court while deciding *Sarala Mudgal V. Union of India*⁴⁴ advises the Prime Minister to have a fresh look at Directive Principles of State Policy and to secure the Uniform Civil Code. This view of the Supreme Court was again reaffirmed in *Lily Thomas V. Union of India*⁴⁵. But the Legislature has and is neglecting both the constitutional and judicial recommendation⁴⁶. Enacting the Uniform Civil Code would necessarily help us solve many problems. Some practices like Triple Talaq and polygamous marriage are valid under the Shariat Law. Under these laws, women are treated differently from men and women suffer a lot because of these laws. These are some of the Social evils that should not be practiced in the name of religion. This can necessarily be treated as unequal treatment to people based on religion. Moreover, here not only the Secularistic Principle of India is getting violated, but many Fundamental Rights like Article 14 and 15 of the Indian Constitution are also getting violated. People are treated differently based on Religion and also based on Gender. This type of discrimination needed to be wholly eradicated from society. In order to eradicate these discriminations, the legislature should make unbiased legislation not favoring any religion. In

⁴³ AIR 2003 SC 355

⁴⁴ AIR 1995 SC 1531

⁴⁵ AIR 2000 SC 1650: (2000) 6 SCC 224

⁴⁶ G C Venkata Subbarao. (1979). *Family law in India : Hindu law, Mahomedan law, and personal law of Christians, Parsis, etc., including law of testamentary and intestate succession ...* C. Subbiah Chetty.

other words, the only way to end discrimination is to end this discrimination is the enforcement of the Uniform Civil Code. In that way, India would try to be Secular in the near future.

Communal Violence is again a very big problem that a secular India faces today. A Communal Violence like that in Gujarat in 2002 has killed hundreds and hundreds of people. Religions in general talk mainly about loving each other. But we the Human Beings do not understand them and we fight in the name of religion. Religion has always tried to show us the way to reach eternal happiness. But we the Human Beings interpret it in different ways according to our convenience and cause social stratification and create problems by oppressing other people. “Religious Intolerance” can also be regarded as a source of Communal Violence in India. It won’t be an exaggeration to say that the main reason for Communal Violence is “Religious Intolerance”. This problem can be solved only by Education. A child should be grown with the of “Religious Tolerance” and that he or she should be aware that different religions practice different things but ultimately all our Indian Citizens and that all views need to be accepted as natural. Also, strict laws should be enforced to stop the Communal Violence in India. There is no mention of the words like “Communal Violence” or “Hate Crimes” in our Indian Penal code. Indian Government had tried to pass the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, an act to punish the people who resort to Communal Violence in India. But this bill remains as a bill till now. There is an immediate need to either include the special section for “Communal Violence” and “Hate Crimes” in India and punish the doers of these crimes very aggressively or to pass a separate bill to prevent such an act from occurring in India. In this way, India would move a step forward in becoming a Secular Country.

Usage of Religious Leader to gain more votes is one of the Classical technique that many political parties follow to secure votes. Here Religious Leaders formally or informally make an announcement or appeal before the people to vote for a particular party. There is a high risk of some people may be influenced by that Religious Leader and would vote in favor of the Political Party recommended by those Religious Leader. This practice needs to be stopped immediately because it does not support the Secular nature of India. In order to control these kinds of acts, many countries like Bhutan has made laws in this regard⁴⁷. Our Parliament has also many a times tried to bring such a law which prevents the usage of Religious People to Secure votes. In 2017, there was a private member bill in our Indian Parliament to amend the

⁴⁷ Katyal, A. (2018, November 16). *As the line between religion and politics blurs, should India take a cue from Bhutan?* Scroll.In. <https://scroll.in/article/901191/as-the-line-between-religion-and-politics-blurs-should-india-take-a-cue-from-bhutan>

Religious Institution (Prevention of misuse) Act, 1988. The proposed amendment bill stated that no Religious Leader shall appeal to people asking them to vote in favor of a particular political party or asking them to refrain themselves from voting for a particular political party. This Bill further stated that those Religious Leaders who do not follow this law would be punishable with imprisonment for a maximum of seven years⁴⁸. However, this act was not passed in our Parliament and is hence is not enforceable in India. However, such a law is the need in today's India where all political parties compete with each other and use Religion as the means to reach their political heights. It is in the hands of Parliament to enact such a law that would help India to continue to be a democratic and Secular Country as stated in our Indian Constitution. In absence of such a law, India's Secularism will always be questioned.

7. Conclusion

India is a Diverse Country. It is known for its Unity in Diversity. But for the past few decades, this diversity has caused problems and division rather than Unity among us. The Division is caused in the name of religion. The very old principle of our India, "Secularism" has been continuously forgotten and India is facing continuous tensions in the name of religion. Many use this as their political advantage and make use of this state. This may not be a problem now, but in long run, this would erupt as an unsolvable problem if not treated early. First of all. All should identify themselves as Indian. The sense of Nationalism alone can solve this problem. Of course, Secularism is not at all easy to be practiced. But we should not try being secular. The secularism of our country, should not be compared with other countries. We are one of a country with a rich secular background. Comparing ourselves with others would be quite foolish. It is in the hands of the Indian Legislatures to make laws that could solve all the threats

⁴⁸Dec 3, P. /, 2017, & Ist, 18:41. (2017, December 3). *Parliament may take up bill seeking jailing of religious leaders seeking votes for party* | *India News - Times of India*. The Times of India. <https://timesofindia.indiatimes.com/india/parliament-may-take-up-bill-seeking-jailing-of-religious-leaders-seeking-votes-for-party/articleshow/61904294.cms>

to the Indian Secularism. In that way, not only Indian Secularism but also Indian Democracy would be preserved. Once, a long time ago, the Britishers came to India, divided us, and ruled us quite comfortably. Now also, history repeats itself, the only difference is during that period it was Britishers who divided us and now it is the native Indian Politian who divide us. One should not forget, what was the result of such a division in India. Hence, the need of the hour is to preserve our most cherished value of Secularism and to secure peace in our society by practicing Religious Tolerance. In that way, India would remain Secular till the end of the world.

4.

Marital Rape: A Comprehensive Analysis

By: Shivani Singh

Pg. No.: 40-53

Abstract

Marital Rape is the demonstration of sex or sexual assault with one's partner without the partner's assent. The absence of assent is the fundamental component and need not include physical violence. Conjugal rape is viewed as a type of aggressive behavior at home and sexual maltreatment. Albeit, truly, sex within marriage was viewed as a privilege of companions, taking part in sexual intercourse without the life partner's assent is now extensively categorized as sexual assault or rape all around the world, denied by global caucuses, and progressively criminalized.

A wife is presumed to deliver a never-ending agreement to have intercourse with her better half subsequent to going into marital relations. While unwilling sexual intercourse between married couples is perceived as a criminal offense in pretty much every nation of the world now, India is one of those few nations that despite everything have not criminalized marital rape.

The idea of marital rape in India is the height of what we call an implied consent. Marriage between a man and a woman in India infers that both have assented to sex and it can't be inferred otherwise. The Indian Penal Code, 1860 also conveys the same, section 375 describes the offense of rape with the six categories. It also has several exceptions to this offense one of which is sex or sexual acts by a man with his own significant other or spouse, the spouse not being under fifteen years old, isn't rape. This paper traverses the statistics on marital rape, its consequences on people, the legal aspect for the same in our country, the issues that occur in prosecuting marital rape, laws regarding the same around the world, and relevant judgments and case laws that brought a change in perspective of people and shone a light upon such a serious issue.

Keywords: Marital Rape, Sexual Intercourse, Criminalized, Wife, Marriage.

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1. Introduction

Any sexual activity that includes intercourse, oral sex, anal or, involuntary carnal conduct with other persons, or any other conduct that is considered as degrading, humiliating, painful, and unwanted by the spouse between a married couple is referred to as marital rape. Society and the people around us need to understand that it does not matter if a person is unmarried or married forcing someone to engage in sexual activities without their consent will always be rape. In a marital relation, if a woman assents to sexual intercourse due to intimidation or threat of harm to her kids or herself, denying the woman the right to remain in the house or get maintenance, it is not a legitimate consent. It is no less than rape.

Rape is a crime, which centers on the lack of consent of the woman. It is crucial to realize that the lack of consent need not be present only in the form of the word ‘no’. It must be presumed from the context of the situation. Indian law does not even consider marital rape as a crime. Females who are sexually assaulted by their partners are likely to be diagnosed with severe psychological consequences as well. A few of the immediate consequences of marital rape comprise apprehension, fright, depression, intense fear, suicidal thoughts, and post-traumatic stress. Whereas, lasting effects mostly include disorderly eating, depression, sleeplessness, and difficulties in forming relations, and intensified pessimistic feelings about themselves. Psychological effects are likely to be more long-lasting.⁴⁹

2. Statistics on Marital Rape

The legal age to marry in India for girls is 18 years, and our legal system and section 375 of the Indian Penal Code considers only those situations where the wife is below the age of 15 and is enforced to perform sexual intercourse as a crime,⁵⁰ nothing in our legal system says or suggests that if a married woman is involuntarily forced to have sex with her spouse who Is

⁴⁹ *Marital Rape*. (n.d.). Lawteacher.Net. Retrieved August 29, 2020, from <https://www.lawteacher.net/free-law-essays/family-law/marital-rape.php>.

⁵⁰ Delhi March 12, I. T. W. D. N., March 12, 2016 UPDATED:, & Ist, 2016 16:06. (2016, March 12). *Marital rape in India: 36 countries where marital rape is not a crime*. India Today. <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>.

above 18 years i.e. the legal age, it will also amount to rape because the fact that a person is married or unmarried or is of any age is inconsequential. Consent is the same for everyone and force, abuse and unwilling sexual intercourse affects everyone equally.

According to statistics from the National Coalition against Domestic Violence (NCADV), 10 to 14 percent of wedded women encounter and suffer marital rape. 18% of woman survivors of marital rape express that their children witnessed the crime, said the same report.

77 percent of females raped by their spouse or partner did not report it to the police, whereas, in comparison, 61 percent of women were raped by an acquaintance and 54 percent by a stranger.⁵¹

Conferring to a report released in 2019, there are 17 states which still have a certain form of legal defenses for people who rape their partners when they are incapacitated or under the influence. The states which exempt the same are- Alabama, Connecticut, Alaska, Idaho, Kentucky, Iowa, Maryland, New Hampshire, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Michigan, Mississippi, Washington, and Wyoming.⁵²

Marital rape is an enormous issue in India. 1 in 3 men confess to have sexually assaulted their wives, and 1 Indian female is raped by her spouse every 3 seconds. It is awful that even now when we call ourselves a developing country, marital rape has not been criminalized in this nation.⁵³

3. Psychological and Physical effects on Victim

It has been recorded that most women who are raped in marriage also experience severe forms of physical abuse. Studies found that half of the women had been forced to have sex when ill, and almost half were intimidated or mistreated immediately after discharge from the hospital, often after childbirth. Almost half of the females had been burned, beaten or kicked, during

⁵¹ Callie Marie Bjs Rennison, Statistician, Callie Marie Rennison, Bjs, S., Callie, M., Rennison, B., & Rennison. (n.d.). <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>.

⁵² Smith, E. W. (2019, October 4). *5 Statistics That'll Change How You Think About Marital Rape*. Refinery29.Com; Refinery29. <https://www.refinery29.com/en-us/marital-rape-in-relationships-statistics>.

⁵³ *Marital rape is not a crime in India. It needs to be*. (n.d.). Equality Now. https://www.equalitynow.org/marital_rape_is_not_a_crime_in_india_it_needs_to_be.

sex. It was seen that common injuries of ruthlessly abused and raped women involved black eyes, cracked bones, and blood clots in their heads, and stab gashes.⁵⁴

Married women may be indecisive to question involuntary and forced sex because most of them deem that they have no right to deny sexual advances made by their partners. Rather, raped wives will often not recognize themselves as such. Instead, a wife may regard the rape as part of a marital conflict for which she is to blame or that her sexual insufficiency was responsible. The severe result is that the individual shame and self-blame that women who are raped experience is every so often reinforced by an equivalently blaming society.⁵⁵

Not only this but Bodily injuries include damage or wounds to the vaginal and anal parts, torn muscles, cuts, soreness, fatigue, bruising, and vomiting. Gynecological results include vaginal stretching, unsolicited pregnancies, pelvic infections, and miscarriages, death of a fetus, bladder diseases, STD's, HIV, and infertility.⁵⁶ Women in our society are taught from a very tender age that adjustments are necessary in marriage and even though things are tough you do not fight, go against or leave your husband, and even though times have changed a lot still there are a no. of women out there who are struggling and suffering just because of some notion ingrained in their brain or responsibility and some of them due to helplessness because they have nowhere to go and their families refuse to accept or help them.

Maximum rape survivors suffer a deeper psychological impact in the initial period after their assault, however, numerous survivors may experience long-term psychological damage. Many survivors of rape have post-traumatic stress disorder (PTSD). The National Victim Center and the Crime Victim's Research and Treatment Centre published information that found 31% of women who were raped develop PTSD at some point in their lives following their attack. The same report projected that 1.3 million females have rape-induced PTSD.⁵⁷

Not only this, but rape victims are subjected to inquiries and, in certain cases, maltreatment. Sufferers endure medical examinations and are questioned by police. Throughout the criminal trial, victims undergo a loss of privacy and their credibility may be questioned. Sexual

⁵⁴ Mahoney, P., & Williams, L. M. (n.d.). *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*. http://www.ncdsv.org/images/nnfr_partnerviolence_a20-yearliteraturereviewandsynthesis.pdf.

⁵⁵ Bennice, J. A., Resick, P. A., Mechanic, M., & Astin, M. (2003). The relative effects of intimate partner physical and sexual violence on post-traumatic stress disorder symptomatology. *Violence and Victims, 18*(1), 87–94. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2981038>.

⁵⁶ *Marital Rape: New Research and Directions*. (2016). VAWnet.Org. <https://vawnet.org/material/marital-rape-new-research-and-directions>.

⁵⁷ RESICK, P. A. (1993). The Psychological Impact of Rape. *Journal of Interpersonal Violence, 8*(2), 223–255. <https://doi.org/10.1177/088626093008002005>.

assault victims may also experience secondary victimization like slut-shaming and victim-blaming and cyberbullying.⁵⁸

A topic that has not been highlighted yet in a sufficient manner is how marital rape disturbs children. In one of the few researches to inspect this problem, it was found that 5% of the females in the research put forward that their children had been enforced by their significant other to take part in the sexual violence and 18 percent of the females disclosed that their children had witnessed the occurrence of marital rape at least once.⁵⁹

4. Legal Aspect of Marital Rape

The exemption or defense of marital rape became more broadly seen as incompatible with the emerging notions of human rights and parity. Marriage does not give anyone a right to exploit someone and degrade their choice and privacy. In December of 1993, the High Commissioner for Human Rights, United Nations announced the *Declaration on the Elimination of Violence against Women*. This institutes marital rape as a human rights violation. The significance of the right of women is progressively being acknowledged as fundamental to women's rights.

In 2012, Navi Pillay, High Commissioner for Human Rights stated that-

Infringements of women's human rights are every so often connected to their sexuality and reproductive role. In several nations, married women who are not able to deny having sex with their partners, often have no say in whether or not they use birth control. Ensuring that women have complete freedom of their bodies is an important first step in achieving a dignified balance between women and men. Personal opinions such as when, with whom, and how to choose to have sex, and when to choose to have children, and with whom are at the heart of living a dignified life.⁶⁰

Although as a nation we have progressed in a lot of arenas, marital rape is yet not counted as a crime in India. Despite amendments, law committees, and novel statutes, one of the most

⁵⁸ *Effects and aftermath of rape.* (2020, August 28). Wikipedia. https://en.wikipedia.org/wiki/Effects_and_aftermath_of_rape#Psychological_impact.

⁵⁹ Bergen, R. (n.d.). *Marital Rape: New Research and Directions.* https://vavnet.org/sites/default/files/materials/files/2016-09/AR_MaritalRapeRevised.pdf.

⁶⁰ *Wayback Machine.* (2017, March 13). Web.Archive.Org. https://web.archive.org/web/20170313210726/http://www.chr.up.ac.za/images/files/news/news_2012/Navi%20Pillay%20Lecture%2015%20May%202012.pdf.

mortifying and devastating acts is not a crime in our country. The list of next to nothing options a female has to safeguard herself in a marriage, clearly conveys that the rules and laws have been abstruse and absent and every case just depends on the interpretation by the Courts.

In India, marital rape exists factually but is not recognized by the law. Whereas, in another country each the judiciary or legislature has criminalized marital rape, portrayed an active role in recognizing it as an offense, in India however, the judiciary seems to be operating at cross-purposes. Marital rape is the most familiar, vulgar, and objectionable form of sadism in our society, it is hidden behind the iron curtain of marriage.⁶¹

Section 375, the provision of rape in the Indian Penal Code (IPC), echoes outdated sentiments as set out in Rule 2 of its Exemption, which states that sex between husband and wife when the wife is above the age of fifteen years is not considered as rape.

Section 376 of IPC prescribes a penalty for rape. According to this section, the offender should be imprisoned for a minimum of 7 years or more, but this can be punishable by up to life imprisonment or up to 10 years and a fine unless the woman who was raped by his wife, and above 15 years of age. Under Article 21 of the Constitution of India, there is a right to life with human dignity and it is considered a fundamental right. The Supreme Court has stated in several cases that the crime of rape violates the right to life and the right to live with human dignity of the person who has suffered the crime of rape.⁶²

the Law Commission of India proposed more than nine years ago to the Government of India advising that Legislature should substitute the present definition of rape under Section 376 IPC with an extensive definition of sexual assault, which is both age and gender-neutral, yet nothing has been done till date.

The misfortune is that it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife obey and follow the man's every impulse, especially sexual, it is supposed to thrive, mutual respect and trust. It is much more traumatic being raped by someone known, a family member, someone whose responsibility is to protect and provide comfort in times of need, and worse to have to cohabit with him. Exactly how can the law and the

⁶¹Mishra, A. (2018, April 13). *Law On Marital Rape – A Much Needed Reform In Our Legal System - Criminal Law - India*. Www.Mondaq.Com. <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

⁶² Id.

government ignore such a gigantic violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?⁶³

5. Prevalence of Marital Rape

The commonness of marital rape rests upon the predominantly legal, cultural, national, and social context. The government of India has put forward that those on the lookout to stop females from being raped by their spouses were thoughtlessly following Western customs. This nation has its distinctive complications due to several factors like illiteracy, deficiency of financial empowerment to the majority of females, the patriarchal mentality of the society, poverty, immense diversity, etc., and these should be considered cautiously before criminalizing marital rape.⁶⁴

The government states that since the majority of people in our country are illiterate, destitute, uneducated, poor, environmentally friendly, and religious, unlike the USA, our government chooses to believe that a man cannot rape his wife on the grounds that the Indian wife will agree and devote herself to her partner forever, and anything that happens is a implied consent.⁶⁵

The Supreme Court also agrees that criminalizing marital rape does not threaten marriages in any way. Through *Independent thought v. Union of India*⁶⁶, the court made it clear that marriage is personal and criminalizing marital rape will not destroy the institution of marriage in any way. The court stated that if judicial separation and divorce have not wrecked the foundation of marriage, criminalizing marital rape certainly cannot either.⁶⁷

⁶³ Gupta, B., & Gupta, M. (2013). Marital Rape: -Current Legal Framework in India and the Need for Change Marital Rape -An Understanding. *Galgotias Journal of Legal Studies*, 1(1). <https://www.galgotiasuniversity.edu.in/pdfs/issue2.p>.

⁶⁴ *What the Union government's submissions on marital rape in the Delhi high court reveal*. (2017, August 30). Times of India Blog. <https://timesofindia.indiatimes.com/blogs/jibber-jabber/what-the-union-governments-submissions-on-marital-rape-in-the-delhi-high-court-tell-us>.

⁶⁵ Swaddle, T. (2020, January 20). *Why It's Still Legal For Indian Men to Rape Their Wives*. The Swaddle. <https://theswaddle.com/marital-rape-india-decriminalized-crime>.

⁶⁶ *Independent Thought vs Union Of India*, (D Gupta October 11, 2017).

⁶⁷Supra at 65.

6. Difficulties in Prosecuting Marital Rape

Recognition is the primary phase for any solution. Only when we recognize that marital rape is an age-old issue that needs to be addressed, we can fight it. Labeling it as “an act against the institution of marriage” and characterizing it as western is an attempt to belittle and disparage the crime and escape responsibility.⁶⁸

The reason that government always gives in marital rape situation is that how will it be proved that a person was raped, but the evidence of rape has always been circumstantial, and if in case of marital rape the probability of the same happening multiple times is way more and so the government needs to come with stronger laws to protect the women of our country rather than excuses to avoid or delay defense on such severe crimes.

The Protection of Women from Domestic Violence Act, 2005 states that any act of domestic violence in which a consenting adult harms or endangers a woman's mental, physical, health, safety, life, physical injury or well-being and so on, and may involve physical, sexual, verbal, emotional and financial insults. "Sexual harassment" is sexual behavior that abuses, damages, degrades, or violates a woman's dignity.⁶⁹

Even after this, the punishment as per the DVA for domestic violence is not imprisonment but according to the discretion of the magistrate along with all the reliefs granted to the aggrieved party the accused could be made to pay compensation for the damages induced by him for both physical and mental injuries. Although it says that the husband on failing to pay compensation will be imprisoned for a month.

So basically, the domestic violence act is civil and even if it is proven in a court of law that a woman was raped by her husband during the marriage he will only have to pay for damages and compensate and will not be imprisoned for the same. The laws of our country are in itself hypocritical because at one time the law and the court say rape is a heinous crime and infringes one's fundamental rights and is punishable by the law but at the same time it also does not criminalize marital rape. The simple question that arises is why? Are married women not

⁶⁸ Chaudhuri, P. C. (2017, September 1). “*Marital Rape Laws Will Be Misused By Women*” Is A Flawed Argument; Here’s How The Accused Can Be Punished. Thelogicalindian.Com. <https://theologicalindian.com/story-feed/awareness/marital-rape-can-be-proven/?infinite-scroll=1>.

⁶⁹ Id.

supposed to have their own choices and once they get married they lose their privilege to fundamental rights?

the Indian law gives ‘marital immunity’ to a man for raping his wife, penalizing him only with monetary compensations or one month jail time, that too only if he does not pay the damages.

7. International Perspective

If we talk about the rape laws in different nations, more than several countries punish rape within marriage and outside of marriage. Now starting with different countries by 1991 every state in Australia had abolished the marital rape exception, and it was also the first common law country to do so after several feminism movements. The first country to have a law explicitly making it a criminal offense was Poland in 1932.⁷⁰

In New Zealand, a person under 20 years of age but over 16 years old can only marry with a guardian’s consent. The age of sexual consent for women is also 16 years. There was no exception for marital rape in the Crimes Act, 1961 of New Zealand. The marital rape immunity was put an end to in 1985.

In the United Kingdom, a marriage under the age of 16 does not apply. The election of marital rape was completely abolished in 1991. The average age for being in all legal services outside of marriage in Egypt is 21 years. The age of consent is 18 years and the law says that having sex with a girl under the age of 18 is rape. In the United States of America, different countries have different laws. Not only this, but marital rape has been eliminated in all 50 US States. Indonesian Domestic Violence Laws Punish for Domestic Violence with a maximum punishment of fifteen years.⁷¹

Nepal dismissed the issue of marital rape in 2002 after the Supreme Court ruled that it violated the constitutional right to equal protection and the right to privacy. According to a UN Women's

⁷⁰ Nair, S. (2017, August 31). *Marital rape a crime in many countries, an exception in many more*. The Indian Express. <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403>.

⁷¹ *Marital Rape*. (2019, July 18). Wwww.Lawteacher.Net. <https://www.lawteacher.net/free-law-essays/family-law/marital-rape.php>.

2011 report, out of 179 countries where statistics were available, 52 had amended their laws to make marital rape a criminal offense. The remaining countries include those that do not have marital rape in their rape laws, as well as those where there are exceptions.⁷²

Only 36 countries in the world have still not outlawed marital rape. India needs to get out of this list which stocks, among others including, Pakistan and Afghanistan. Unfortunately, we are still questioning whether or not a married woman has rights over her own body. Nearly all developed and developing countries around the world have criminalized marital rape. It is way past the appropriate time for India to join them.⁷³

8. Case Laws

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a participant, has regarded that this sort of discrimination against females violates the norms of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its 51st session, in its report titled "The elimination of violence against women", suggested that marital rape should be criminalized.⁷⁴

In *Bodhisattwa Gautam v. Subhra Chakraborty*,⁷⁵ the court declared that rape is a crime in contradiction of the basic human right and violation of the right to life preserved in Article 21 of the Constitution and provided a selection of guidelines for granting compensation to the rape victim. The Supreme Court of India has ruled in many cases that rape is a violation of the right to life and the right to live in the dignity of the victim.

⁷² Nair, S. (2017, August 31). *Marital rape a crime in many countries, an exception in many more*. The Indian Express. <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>

⁷³ *Do you think marital rape isn't a crime? Here are five reasons why you are wrong*. (2019, February 7). Wwww.Dailyo.In. <https://www.dailyo.in/variety/marital-rape-shashi-tharoor-countries-where-marital-rape-is-legal-consent-sexual-assault/story/1/29347.html>

⁷⁴ Mishra, A. (2018, April 13). *Law On Marital Rape – A Much Needed Reform In Our Legal System - Criminal Law - India*. Wwww.Mondaq.Com. <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

⁷⁵ 1996 AIR 922.

One example is *The Chairman, Railway Board v. Chandrima Das*⁷⁶. The Apex court noted that rape is not just a crime according to the Indian Penal Code, but a crime against society as a whole.

In a chain of cases like *Kharak Singh v. State of U.P.*, *Govind v. State of Madhya Pradesh*, *Neera Mathur v. LIC* etc., the Highest Court has remarked that a right to privacy is inherently ensured under the extent of Article 21.⁷⁷

In the case of *State of Maharashtra v. Madhukar Narayan*⁷⁸, the Highest Court has held that every single woman is warranted her sexual privacy and it is not ajar for every person to violate her privacy whenever he wished.

Also, In the landmark case of *Vishakha v. State of Rajasthan*, the Apex Court expanded this right of privacy in employed atmospheres as well. Further, along a parallel line, we can interpret that there exists a right of privacy to get into a sexual relationship even within a marriage.⁷⁹

9. Conclusion

In conclusion, it is verified to say first and foremost that marriage is not a license to rape one's spouse and a woman is no one's property irrespective of the fact that whether she is married or single. As a person, a woman has equal rights to say no to any activity which makes her feel ashamed or uncomfortable, and the countries that still reside with the patriarchal belief system that anything in a marital relationship is justified and should be between two people, and have no laws against marital rape should not consider themselves as developed or developing countries because a nation cannot be recognized as a developing nation if it cannot understand the basic concept that rape affects everyone equally and with severe consequences, that has nothing to do with a woman's relationship status.

It's the duty of the state to protect and provide justice to its citizens against such offenses, sadly India is one of those few nations that still doesn't consider marital rape as a crime in

⁷⁶ 28 January, 2000.

⁷⁷ legal Service India. (2018). *Marital Rape*. Legalservicesindia.Com. <http://www.legalservicesindia.com/article/2369/Marital-Rape.html>.

⁷⁸ AIR 1991 SC 207.

⁷⁹ Supra at 74.

India. No laws speak directly of marital rape neither in the domestic violence act nor the Indian Penal Code which is also a reason that this crime has increased so much and has a comparatively very low report rate. It's high time now that this issue should be more highlighted and brought to notice so that changes are made and women can at least have a positive ray of hope towards justice.

5.

**Gender inequality under Muslim Law in India: An alleyway for
Uniform Civil Code**

By: Pankhuri Pallavi

Pg. No.: 54-72

Abstract

The Indian constitution exhibits the concept of an egalitarian civilization. The prime perception of draftspersons of the Indian constitution was to inculcate India, as a state where all the persons heedless of their religion, caste, sex, place of birth conjointly has equality before law and also equal protection of the law. Constitutional rights are an inherent right which all human species have just after birth. On the soil of democratic India, there has always been much ado in the Muslim community about the conservancy of what is popularly known in India as the Muslim personal law. Diverse personal laws prosper in India to administer the personal lives of the humans in concurrence with the belief. However, it's instinctive that in a secular nation like India, the public associated with numerous religious dominations have been relinquished the constitutional independence to be ruled by their particular personal laws regarding certain amenable matters like marriage, divorce, and succession. Several laws have been specifically enacted for the protection of women since they have been deprived of legal status and egregiously affected by the family laws which became a hindrance for their progressive future. All over the globe women have always been subject to discrimination much of it is in a flagrant and legal form. Therefore, for protecting women's right many treaties has been signed. Being maintained or getting maintenance after or during marriage is legal also qualifies as Human Rights for women. The elementary outlook behind the nascence of a civil code is to terminate unfairness arising out of religion. It's the ugly truth of the community that women are the worst sufferer of discrimination under personal laws. A uniform civil code would make certain that all citizens of India are ruled by an identical set of secular civil laws. In this paper the author would first like to study up on the history of Muslim law, the present scenario of the legal regime under Muslim law, and the injustice given that. Then, this paper suggests the enactment of a uniform civil code in India also including other measures that could be a progressive stride for the forthcoming situations.

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1. Introduction

India is acknowledged as a multi-religious country, and each religion has its philosophies, own concepts, and rules about marriage, divorce, adoption, etc. and our constitution protects all religions. India has no religion by which it is recognized. It treats all religions equally. The basic ideology behind the conceptualization of a civil code is to finish discrimination relying on different religions. It's the bitter truth of our society that women are the worst victims of discrimination under personal laws. In a polarized habitat too, where 'neutral, secular, liberal and also progressive' voices that demand equity for Muslim women are placed in opposition to the 'bearded, misogynist and patriarchal' Muslim clerics, which ultimately closes the door for Muslim women to express a nuanced perception regarding the present controversy of triple talaq and reinforce upon them an artificial identity question. B. S. Sherin, a research scholar of literature in Hyderabad, articulates her concern:

“It is genuinely unlucky that Muslim women’s integrity is displayed only in terms of personal laws, especially after the Shah Bano case. This overshadowing locus on personal law presents any development of Muslim women’s lives as contingent only on rectifying personal laws. By lifting the query on personal laws and on a community-binding, the larger association of culture, class, and region on the lives of Indian Muslim women are protracted. Muslim women themselves have come out together opposing the present campaign on Triple Talaq to say what’s more urgently required is empowerment and education. But the voices of those women don’t receive a larger audience. Recently, those Muslim women have challenged ‘progressive voices’ has been written as ‘encouraged by patriarchal forces’ or maybe ‘indoctrinated’.”⁸⁰

Although Islam is among the fastest-growing religion, yet it is the most misunderstood belief in the world because many claim that it's unjust to women. Although the Indian constitution grants women the same and equal rights and prospects, also some of liberal laws such, e.g. Equal Remuneration Act signify this value, India's adaptation of law differentiate contrary to women. This is most apparent in two areas: the inheritance laws, divorce and maintenance laws. Uniformity of law has been a larger question pertaining to Indian democracy ever since India emerged as a sovereign nation. During the course of life, females are always the sufferers of

⁸⁰ B.s, S. (2018). Intersections of Justice: Gender, Uniform Civil Code and the Muslim Question in India. *Www.Academia.Edu*, vol.25 no. 2. https://www.academia.edu/37371728/Intersections_of_Justice_Gender_Uniform_Civil_Code_and_the_Muslim_Question_in_India.

various vicious acts like discrimination, injustice, and violence, within the nation as a whole, at the workplace too. Laws that directly discriminate are a baptism of fire. Public dissertation on removing legal perception against females has paved a way to the target on the need for a uniform civil code.

2. History: Muslim Law

The nucleus of Muslim law had come into existence along with Islam. Its original sources were the Quran also the Hadith (sayings of Prophet) or Sunnat (known as traditions of Prophet). Muslims believe in the divine origin of their Holy book which according to their belief was revealed to Prophet Mohammad (PBUH) by Angel Gabriel. Islam recognizes all the former Prophets and considers Zaboor, Taurate, and Injeel, as divine books besides Quran. Islam is solely a religion in which the lawgiver is God. It can't be (Islamic Law) amended, repealed, or altered since it's a divine law, while all other laws can be repealed, amended, or altered. It's pertinent to those who are believers and have belief in God and acknowledge his authority over their actions. Islam, meaning 'to surrender to God, law and thus to be an integral whole' and Muslims, is a person who so surrenders.⁸¹

Muslim law in India signifies "that part of Islamic Civil law which applies to Muslims as a personal law". It consist of the injunction of Quran⁸², also of traditions brought by 'practice' of Prophet, of common jurist opinion (Ijma), also analogical conclusion of these three (Qiyas), and pre Islamic customs not annulled by Prophet. Further, it's been supplemented by jurist preferences (Istihsan), precedents (Taqlid), and independent interpretation (Ijtihad) also modified by legislature and judiciary.⁸³ Earlier to the disclosure to Muhammad, the Arab tribes weren't having a formal legal system, but they did have traditional methods of performing things that, even if they were not written down, did regulate and guide their lives. The custom of Arab tribes survived the dominance of Islam. In reality, Arab tribal law, even some Roman and Sasanian law as practiced in Egypt, Syria, and Iraq were included in the sharia. In Sharia,

⁸¹ Rahman, F., & Mahdi, M. S. (2018). Islam | religion. In *Encyclopædia Britannica*. <https://www.britannica.com/topic/Islam>.

⁸² The word QURAN, derived from word Qara signifies proper reading or rather than which ought to be read , by which name, the Muslim denotes not only the entire book of Quran but also many particular chapters , just as jew call entire scripture or any part of it by name of 'Korroh' or 'mikrah' words of the same origin and import.

⁸³ Ahmad, A. (2016). *Mohammedan Law* (twenty sixth, pp. 1-5). Central Law Agency.

custom isn't generally an official source of law, and when it is, it's not given much importance. Although in practical life it had a huge impact. Custom is imbibed in the sharia. Sunna consist of that which Muhammad said and had done, and also included things which he tacitly approved of. There were also other schools of law in Sunni Islam, but only the Maliki, Hanafi, Shafi'i, and Hanbali survive. The Abbasid's followed the Hanafi school. It's mainly followed in India and to east Africa and Southeast Asia.⁸⁴

Important changes were made inapplicability of Islamic law. Islamic criminal law was replaced by IPC in 1862 and Islamic law of evidence by Evidence act in 1872. Islamic law recite to contract, tort, civil and criminal proceedings, and practically every field except personal law, e.g., dissolution of marriage, waqf, maintenance etc have been touched by legislation regardless not in manner repugnant to Islamic law. As Fyzee states, "Mohammedan law as received in our India is the Shariat modified by principles of English common law and equity, in the varying social and cultural conditions of India. The Shariat Act, 1937 in effect abrogated local customs and revive to the Muslims to have their law."⁸⁵

3. Present Legal Framework: Muslim Law

Muslim law is applied to Muslims all over India in some matters only. Before moving ahead, perhaps there's a demand to disclose the complicated terrain of family laws. Within our laws and legislation dwelling in India, a choice of civil law of marriage coexists inextricably with religion-centric family laws and also customary practices. The goal to have a secular and uniform family law is enunciated in Article 44 of the Indian Constitution. The potential of courts to apply Muslim law to Muslims is derived from and regulated partly by statutes of British parliament along with article 225 of the Indian constitution⁸⁶ and mostly by Indian legislations. Thus, the whole body of this law may is classified under the following three headings –

⁸⁴ Rahman, F., & Mahdi, M. S. (2018b). Islam | religion. In *Encyclopaedia Britannica*. <https://www.britannica.com/topic/Islam>.

⁸⁵ Supra 5.

⁸⁶ Durga Das Basu, Roy, S. R., & S P Sen Gupta. (2011). *Indian constitutional law*. Kamal Law House.

- Those that have expressly directed by the legislature that has to be implemented to Muslim, such as, rules of succession.
- Those that are applied to Muslims as an issue of justice, equity, and good conscience, e.g. the rules of Muslim law of pre-emption run down, now to Article 19(1)(f) of the Indian constitution.
- And those that are not applied at all, though they are Muslims such as, Muslim Criminal Law and also Muslim Law of Evidence.

A. Muslim Personal Law (Shariat) Application Act, 1937: An analysis of this Act shows that various subjects which come under the ambit of Muslim law are placed under three different categories as (i) those subjects in view of which the Muslims will be compulsorily ruled by the Muslim personal law, notwithstanding any custom/usage to the contrary. These include: marriage (including all matters incidental thereto), including all forms of divorce, gifts, maintenance, inheritance, trusts, and waqfs⁸⁷ (ii) Those subjects regarding which a Muslim may, if he/she so desires, adopt the Shariat. A procedure is given by the Act which is binding on an individual who desires to do so. Once a person adopts this law of Shariat by complying with the necessary proceeding, not only that person but also their minor and the descendants become subjected to Muslim law on these subjects. So long as it's not achieved, a Muslim will be ruled accordingly, regarding these subjects, by custom or statute law. The subjects covered by this category are: testamentary succession, legacies, and adoption.⁸⁸ (iii) Since certain subjects that would ordinarily be regulated by personal laws are not in the legislative competence of the central legislature and belong to state jurisdiction. The Shariat Application Act, that's a central law, doesn't apply to them. Hence it's for the state legislatures to rule if the cases among Muslims involving such subjects will be driven by Muslim personal law. Among these subjects are: succession to agricultural lands, charities, and endowments. The state legislation relating to the application of Muslim personal law in these fields is not uniform.⁸⁹

B. Dissolution of Muslim Marriage Act, 1939: Marriages as it's said are decided in heaven and executed on earth. Now marriage isn't considered as an indissoluble relation. In present days the laws regarding divorce are constantly modified and liberalized. The act

⁸⁷ Shariat Application Act, 1937, S. 2.

⁸⁸ Id. at ss, 3-4.

⁸⁹ See, for instance, the Madras Act XVIII of 1949 (as amended by Act XXVI of 1957) and the Andhra Pradesh Act, VIII of 1949. However, in most of the states succession to agricultural land is governed by the local tenancy laws and not by personal laws.

got assent on 17 march by a governor-general. Under this, a woman can get a divorce by methods that include talaq, ila, zihar. Also, the wife can claim divorce under judicial process by mode of lian (Noor Jahan Bibi v. Kazim Ali)⁹⁰ and the doctrine of fask. There are a variety of grounds specified in the act for divorce like the husband is missing for four years, not able to give her maintenance for a period of two years, cruelty, unsuccessful to perform his duty without reasonable cause for a period of three years, imprisonment for 7 years or more, any other ground which is recognized as valid for the dissolution of marriages under Muslim Law. The judicial observations in some recent cases, e.g., Shahulameedu v, Subaida Beevi⁹¹ and Yusuf Rowthan v. Sowrammaw,⁹² may provide valuable guidance in the revision of the Act of 1939

- C. Special Marriage Act, 1954:** The act was introduced to secularize the family personal laws concerning marriage and other related concepts. It deals with different caste, religion etc. act applies to the Indian citizens but also NRI's can be included. For marriage under this act consent of parties is of utmost importance. Upon a genuine registration, parties are awarded with marriage certificate. Chapter 2 of the act reads about the solemnization of marriage with conditions of age (18 of bride, 21 of the groom), the required soundness of mind, free consent, absenteeism of any living spouse, and following degree of prohibition. This act restricts the filing of any divorce petition till one year after marriage. Also, the parents having a child under this act of marriage has a right to the property of his/her parents. Divorce under this act may be granted on the scope of venereal disease, sodomy, adultery, cruelty i.e. stated in S.27 and 28. This act removes obstacles of casteism.
- D. Muslim women (Protection of rights on divorce) Act, 1986:** This is a Central law enforced in 1986 to secure the rights of divorced Muslim women who got separated from their spouse either by themselves or by the will of the husband himself. The Act was passed to invalidate the decision of the Supreme Court in Mohammed Ahmed Khan v. Shah Bano Begum,⁹³ in which the Court observed that where a Muslim woman isn't marrying again and isn't able to maintain herself, she can ask for maintenance from her ex-husband as long as she remains single.

⁹⁰ AIR 1977 Cal. 90.

⁹¹ Shahulameedu v, Subaida Beevi, (kerala high court December 8, 1969). <https://www.lawyerservices.in/SHAHULAMEEDU-Versus-SUBAIDA-BEEVI-1969-12-08>.

⁹² Yusuf Rowthan v. Sowrammaw, (kerala high court June 24, 1970). <https://indiankanoon.org/doc/1322686>.

⁹³ Hawley, J. S., & Hawley, P. and C. of the D. of R. B. C. D. of the S. A. I. J. S. (1994). Fundamentalism and Gender. In *Google Books*. Oxford University Press. https://books.google.co.in/books?hl=en&lr=&id=pdW1vIicp1oC&oi=fnd&pg=PA63&dq=shah+bano+case&ots=1NCu7ragtD&sig=TNBzkFV0ip1Ve9EudesprTXsryc&redir_esc=y#v=onepage&q=shah%20bano%20case&f=false.

S.3 and 4 were the principles sections under attack. Section 3 states that a divorced woman is titled to procure from her former husband ‘maintenance’, ‘provision’, and ‘*mahr*’, also to regain from his possession her belongings, dowry and the Magistrate to direct the payment or recovery of these amounts or property. Section 4 enables the magistrate to sanction an order for paying the maintenance to the divorced woman. The Act indicates that it condenses and regulates the responsibility of a Muslim woman divorcee by putting them outside the ambit of Section 125 Cr.P.C. The maintenance is paid by the husband for the tenure of the *iddat* period and this obligation doesn’t go beyond the *iddat period*. The Court noticed the function of the Act was to permit the Muslim husband to keep his freedom of dodging payment of maintenance to the ex-wife after divorce and the period of *iddat*. The judgment was subject to denunciation from its inception that the main agenda of the Act was to rescue men and not women. Additionally, the Act has been made a long time ago and till now no steps have been taken to rectify the dubious provisions and protect a weaker section of Indian society. It’s contended that the Act is not in compliance with the thoughts of the Constitution and it wouldn’t aid the purpose articulated in the Preamble.⁹⁴

E. S.125 of Cr.P.C.: In India, we will find various personal laws supervising respective religions and communities. Although these laws too have genesis and are secured under fundamental rights but then also situation arises where bring such common laws to deter the weakness which these personal laws fail to mitigate e.g. maintenance of illegal child is on such matter that should be cut across religion and community. This provision reads about the protection and maintenance of wives, parents, legitimate and illegitimate children as these sections of society need greater attention because of their present condition. In an era of equality, it’s really concerning the question, whether the second wife shall be enabled to seek maintenance under the respective personal or uniform law or not? The second wife isn’t even treated as a wife. Law may not give her the same status as of first wife however, she indeed is a sufferer. She has to struggle not just with disgrace but also with her illegal status in the prevalent Indian laws. She has her own set of rights which when infringed entitles her to seek remedy. Contrary to that, the majority of courts in India have the opinion that she shouldn’t be entitled to maintenance and have taken conflicting views relying on the facts and situation of each case and interpreting the

⁹⁴ The Muslim Women (Protection of Rights on Divorce) Act, 1986. <https://indiankanoon.org/doc/1933289>.

expression ‘wife’ under s.125 of Crpc either liberally or narrowly. In Shah Bano’s case,⁹⁵ she appealed the court pleading for the maintenance under §125 of CrPC, the law doesn’t apply to Shah Bano because it doesn’t come under the ambit of Muslim Law, therefore the husband would be only liable to pay till iddat and Mehr in this case came with the historic decision as it was in the favor of Shah Bano that even a Muslim women can ask maintenance under CrPC. And after that MWPRDA was passed which overturned the decision of Shah Bano's case of claiming maintenance in this section. Thus, s.125 helps in speedy, effective, and inexpensive recovery against the person who denies maintaining their wives, children, and parents.⁹⁶

4. Injustice Considering Various Aspects

For a long time women have been barbarized, predisposed, diminish, degraded, disempowerment, disenfranchised, subjugated, also silenced. In old times, widows were burnt alive on the pyre of their dead husbands. A division Bench has ruled for enrolment of a PIL and questioned the CJ to allocate a Special Bench for gender discrimination issues tolerated by Muslim women. Thirty years after the SC urged the government to frame a uniform civil code⁹⁷ to “help in the cause of national integration” in the Shah Bano case⁹⁸, a two-judge Bench of the court has suo motu ordered registration of a public interest litigation petition and asked the Chief Justice to set up a Special Bench to consider gender discrimination suffered by Muslim women owing to “arbitrary divorce and second marriage of their husbands during the currency of their first marriage”.

Judge Anil R. Dave and Adarsh Kumar Goel passed notice to the Attorney-General and the NLSA of India to reply, on if “gender discrimination” which Muslim women face shouldn’t be considered as a breach of the fundamental rights under Articles 14, 15 & 21 of the Constitution⁹⁹ and international laws. The 16th October ruling refers to a number of its

⁹⁵ Supra 15.

⁹⁶ Kant, A. (1996). RIGHT OF MAINTENANCE TO INDIAN WOMEN. *Journal of the Indian Law Institute*, 38(3), 392-404. Retrieved September 4, 2020, from <http://www.jstor.org/stable/43952393>.

⁹⁷ Whether “gender discrimination” suffered by Muslim women can be considered as violation of their fundamental rights? (2015, October). Lawweb.In. <http://www.lawweb.in/2015/10/whether-gender-discrimination-suffered.html?pfstyle=wp>.

⁹⁸ AIR 1985 SC 945.

⁹⁹ Mahabir Prashad Jain. (2014). *Indian constitutional law*. Haryana, India Lexisnexis.

judgments since the 1990s to record the court's growing realization that gender discrimination because of personal laws breached the constitutional rights of those women.

Maintenance under Muslim Law: Means a periodic amount of sum that is given by the husband to the wife for the divorce or the termination of the marriage in the name of support by spouse or alimony. In Muslim Law men are eligible to marry up to four therefore if he marries more than once and living with one wife and abandon the others then he is liable to pay maintenance to the abandoned wife/ wives. The liability of a husband is limited/ restricted because of the nature of Muslim Marriage.¹⁰⁰ Therefore, the husband needs to maintain the wife/wives till the iddat period only in Muslim Law which made the condition of the wife/wives egregious. Therefore, for safeguarding the interest of the Muslim wife/wives, the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into existence. The wife is only entitled to ask for the maintenance when she respected the husband and his decision and if she does not she becomes Nashuza and she is not entitled to claim maintenance. Shah Bano's case showed the real picture that how women faced difficulties after divorce when no financial support is given to her by her husband.

In *Danial Latifi v. Union of India*,¹⁰¹ “the efficacy of the MWPRDA, 1986 was questioned on the grounds that the law was prejudicial of the right to equality i.e. Art.14 as it robs Muslim women of maintenance benefits similar to those provided to other women under § 125 of Criminal Procedure Code. Further, it was inferred that the law would leave Muslim women poor and also was breach of under Art.21. The SC, on the MWPRDA, 1986, favored its constitutionality.” Under § 3 (1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 “the husband has to make a fair and reasonable provision for the maintenance of the wife beyond the iddat period.” One situation under Muslim law is also there which describes that a divorced woman can file an application in regards to maintenance from her relatives or Wakf board but only when she is not in a position to maintain herself from her husband, this section imposes two requirements: She is unable to maintain her after iddat period and she hasn't remarried.

In an era of equality, it is a very concerning question, whether a second wife shall be entitled to seek maintenance under the respective personal or uniform law or not? The second wife is

¹⁰⁰ Maheshwari, P., & Pandey, A. (n.d.). *Breaking the Law of Maintenance into its Components – Under Hindu and Muslim Law*. file:///D:/Documents/Research%20Papers/Gender%20justice%20under%20muslim%20law/02d95543-5027-4411-a174-221aba1442b6.pdf.

¹⁰¹ *Danial Latifi v. Union of India* (2001) 7 SCC 740.

not even considered as a wife. Law may not give her the same status as of first wife however, she indeed is a sufferer. She has to struggle not just with disgrace but also with her illegal status under the prevalent Indian laws. She has her own set of rights which when infringed entitles her to seek remedy. Contrary to that, the majority of courts in India are of the opinion that she should not be entitled to maintenance and have taken conflicting views depending on the facts and situation of each case and interpreting the expression ‘wife’ under Section 125 of CrPC either liberally or narrowly. In *Savitaben Somabhai Bhatiya v. State of Gujarat*,¹⁰² an appeal to accord maintenance by the second wife was not granted by the Gujarat High Court on the grounds that the plaintiff was not her husband’s legally wedded wife. The issue of maintenance for the second wife was settled by the apex court when the matter reached the aforementioned court. The Supreme Court took into account the provisions of Section 125 of CrPC which provides for maintenance of an illegitimate child but does not include a woman not lawfully married. It observed that it was an insufficiency of the law to not protect women who unwittingly got into a relationship with a man who had suppressed the fact of an earlier marriage. But the court believed that such lacunas could be cured by the legislature and so she was denied maintenance. The law must change with the change in societal reality and therefore, interpretation of provisions to advance the social cause of justice is the demand of the hour.

Marriage and Divorce Laws: A Muslim marriage called *nikah* is not a sacrament but a civil contract made for procreation. Consent of the bride and the bridegroom is the basis of this contract. So, if the parties are adults, then their free consent is essential for a valid marriage and nobody else’s consent is required. If there is no free consent, then there is no marriage. In the case of a minor or person of unsound mind, consent can be given by the guardian. In such cases, the minor on attaining majority can either ratify the marriage or repudiate the marriage. It is called the option of puberty. So, a girl cannot be forced into marriage. Even if she is forced into it, it is not a valid marriage. She can exercise the option of puberty and dissolve the marriage. This legal provision seems to be in favor of women giving their right to decide about her marriage. But she can exercise the option of puberty, only when she can support herself or where somebody is there to support her. Unrestricted powers are given to the Muslim husband to dissolve the marriage. But, a Muslim woman has no such rights. She can dissolve her marriage only according to the provisions of the Dissolution of Muslim Marriage Act, 1939.

¹⁰² AIR 2005 SC 1809.

Hence the grounds available are limited and the same constraint follows. A Muslim woman can opt for divorce only when she can support herself or somebody is there to support her.

Under Muslim Law, a Muslim husband is permitted to have four wives at a time. Quran says: ‘Marry of the women, who seem good to you, two or three or four, if you fear that you cannot do justice to so many, the one.’ But a Muslim woman can have only one husband. If she contracts a second marriage during the subsistence of the first marriage, then the second marriage is void. She can be punished for bigamy under the IPC, 1860. A Muslim man can marry a Muslim girl, a Christian, or a Jewish girl. But a Muslim girl can marry only a Muslim man. If she marries a Hindu, Jew, or a Christian man, the marriage is void.¹⁰³

Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty, and security of person while Article 7 provides that everyone is equal before the law and is entitled without any discrimination to equal protection of the law.¹⁰⁴ Since the adoption of the Universal Declaration of Human Rights, universality and indivisibility of human rights have been emphasized and it has been specifically recognized that women’s human rights are part of universal human rights. In the year 2000, on the grounds that it violates the dignity of women, the United Nations Human Rights Committee considered polygamy a destruction of the internationally binding International Covenant on Civil and Political Rights (to which India acceded on 10.04.1979) and recommended that it be made illegal in all states.¹⁰⁵ It’s well recognized in international law that polygamy critically undermines the dignity and worth of women.

Social ills in Muslim Inheritance: The present practice is that the women as mothers, wives, daughters, and widows do not have equal rights, while Qur’an gives equality to them. The customary practices are highly discriminatory and it excluded daughters and others, like widows in the bottom line of the succession order. This practice runs contrary to the Shariat, where a daughter and a widow cannot be excluded by any other heir and also have the protection from the testamentary restrictions. While most Muslim women (75 percent) were well informed about the share of daughters in inheritance, but when asked about whether (especially married) they had claimed their share (in case not given), most of them had relinquished their share of property to their brothers in the name of emotional

¹⁰³ Lakshmi, P. (1970). Personal Laws and the Rights of Women. *Christ University Law Journal*, 1(1), 91–99. <https://doi.org/10.12728/culj.1>.

¹⁰⁴ United Nations. (2018). *Universal declaration of human rights*. United Nations; United Nations. <https://www.un.org/en/universal-declaration-human-rights>.

¹⁰⁵ Ashwini Kumar Upadhyay v Union of India, (2018) 9 SCC 64

attachment.¹⁰⁶ Secondly, they felt the Gift at the time of marriage given to them as well as expenses incurred on their marriage is another form of giving the daughters share. In most of the cases, Mehr was not given to women not even after divorce had taken place, neither in Khula nor in Fasakah. No divorced women were given maintenance either for themselves or for their children despite their persistent approach of Shariat Courts. A few of them got back their dowry. The practice of Islamic principles and laws are far behind the gender justice for which Islam stood and advocated 1400 years ago. Most of her rights are confined within the pages of the rule book. The rights granted to women by Islam have given them desirable rights, exalted status, and a constructive role in society.

5. Recent Reforms

The position of Muslim women in India is eminently contentious. Most importantly by women facing atrocities of triple talaq, inheritance, maintenance has drawn much attention. Though, our Constitution has lent equality and exemption from discrimination relying upon gender or religion, then also there are customs that are based on vicious conservative culture. A huge part of Muslim Personal Law is yet uncodified and most of the legal sentence relying on the rule mentioned in Quran and hadith. The acknowledgment of the judiciary on the status of women under this law is conflicting. The following elements affected the motif of judgment and legislation: (1) legal mobilization, especially by women's organizations and other rights organizations for women's rights and cultural pluralism, and by community organizations to promote visions of group identity and to uphold particular versions of group law; and (2) policymakers' orientations toward the regulation of family life, their understanding of group norms and group initiatives, and their normative vision of family life. Differences in these fields over the last era subsidized to gender-equalizing advances in personal laws.¹⁰⁷

To give the color of feminism to the issue of changes in Muslim personal law is in itself wrong. The question concerns the whole Muslim community irrespective of sex. It is fallacious to say that only women suffer on account of the drawbacks in Muslim personal law. In many cases

¹⁰⁶ Supra 25

¹⁰⁷ Subramanian, N. (2008). Legal Change and Gender Inequality: Changes in Muslim Law in India. *Law & Social Inquiry*, 33(3), 631–672. Retrieved August 30, 2020, from <https://iproxy.inflibnet.ac.in:2060/stable/20108777>.

men suffer; and in some circumstances, men and women both share the consequences of the drawbacks. For instance, a very low amount of mahr, coupled with the husband's arbitrary freedom to pronounce a divorce, may prove disastrous for women; but an exorbitant mahr, coupled with a pre-marriage stipulation curtailing man's right to dissolve the marriage, and might play havoc with the man. Again, as regards the hardship faced, under the Islamic law of inheritance, by issues of predeceased children, the magnitude of men's suffering is no less than that of women's. Some important judgments regarding this are as follows - Ahmad Khan v. Shah Bano Begum¹⁰⁸ (which ultimately led to the enactment of the MWPDA also criminalizes triple talaq), Danial Latif V. Union of India¹⁰⁹ (The court observes that the “ MWPDA, 1986 doesn't try to act out unconstitutional laws” but Court dictate an authentication of the constitutional validity of this statute), in Shamim Ara v. s/o UP¹¹⁰ (decree provides with few standards and limits in which the husband would be able to pronounce a talaq. The right of unilateral triple talaq was attacked). From these cases, it's apparent that the court had played a chief role in the security of the women's rights in Muslim law, but still, the expedition of equality is to be pursued.¹¹¹ Women in the independence movement began to demand formal equality for women. And the contemporary women's movement structured its activism around the concept of patriarchy and sought to identify and understand women's subordination and oppression.

6. Way Forward

A. Need for Codification: The Muslim personal law isn't godlike when compared to rules in the Quran. Shariat is mostly an attempt to understand the divine will and it's for this reason that we have various interpretations of the Quran and four schools in Sunni- Hanafi, Shafii, Maliki, and Hanbali, aside Zahiri and Shiah Schools like Ithna Ashari and Ismaili. Had these included the true meaning of the Quran the status of women would have been quite fair. Quran neither sanction divorce nor free polygamy. It's real that these hadiths of marriage and divorce have been differently portrayed; the Ulama will have to develop a general agreement around

¹⁰⁸ AIR 1985 SC 945.

¹⁰⁹ (2001) 6 SCALE 537.

¹¹⁰ AIR 1979 SC 362.

¹¹¹ Yadav, A. (2015). *Rights of Muslim women: An Analysis of Indian Muslim personal Law*. https://www.researchgate.net/publication/274702838_Rights_of_Muslim_women_An_Analysis_of_Indian_Muslim_personal_Law.

the interpretations best for the women. Many Muslim countries have worked upon this earlier and since here Muslims are in the minority the ulama shouldn't change the method of reform and alter within the Islamic framework. Everyone should keep in mind that Muslim women are also a minority within the Muslim minority and justice should be served to them as well. The sad state of the Muslim personal law in India offers an action provoking contrast to the existing position of Islamic family law and succession in a large number of Muslim countries. It is an intriguing experience to compare the personal law of Indian Muslims with the following developments in the countries where Muslims are in a ruling or predominant majority – (i) replacement of the traditional Islamic law by modern civil codes in Turkey and Albania; (ii) substantive reform of the Muslim personal law in Egypt, Sudan, Lebanon, Jordan, Syria, Tunisia, Morocco, Algeria, Iran, Pakistan and Bangladesh; enlargement of the surviving spouse's right to inheritance in Egypt, Sudan, Syria, and Tunisia; and (iii) unqualified recognition of the validity of bequest in favor of an heir-apparent in Egypt, Sudan, and Iraq. (iv) restriction of extra-judicial and unilateral divorces, or compulsory interposition of reconciliatory proceedings, in Turkey, Tunisia, Algeria, Iraq, Iran, Indonesia, Pakistan, and Bangladesh; (v) enlargement of women's rights relating to dower, divorce, maintenance and custody of children, etc., in a large number of Muslim countries. There is indeed much in the legislation promulgated in Muslim countries, illustrated above, to show that some of the principles of the Muslim personal law still applicable in India have outlived their utility and need an imminent reconsideration. A unified, codified, and modernized Jaw of personal status is now the order of the day in a large number of countries where Muslims constitute overwhelming majorities. In India, the Muslims have to live in the company of a dominant non-Muslim majority and other communities, all of whom are now governed by largely modernized and codified personal laws. How can they afford to insist on an undisturbed continuance of their classical and uncodified personal law? And if they do so it would be to their sheer detriment.

B. Alleyway for Uniform Civil Code: There's an urgent necessity for comprehensive legislation to be formulated under the guidance. Islamic law is so dynamic that it can become the foundation for a Uniform Civil Code. Traditional Muslim society pulled the Quran declaration to its level and brought in, through human reasoning various verse, which hindered women's rights. Despite various Muslim countries following ulma still equality isn't

achieved.¹¹² The Supreme Court of India has repeatedly put great emphasis on the enactment of the Uniform Civil Code for the past two decades. Is it not too late or do we still have enough time to make this common covenant with modernity? Our country has always been paternalistic in its moves. Apart from the practical problems involved in this case, there is a larger question of the symbolism inherent in the institutions' acknowledgment of the problem. Personal religious laws need to be examined for their compliance with principles of equality.¹¹³

The Indian constitution in DPSP provides us **Uniform Civil Code in Article 44** that “**The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.**” The UCC will contain uniform provisions pertinent to all and planted on social justice and gender equality in personal matters. It will be fair and impartial so that every member of the society may feel equal in terms of social status necessary for social change and will thus create a national identity. Several Muslim members had apprehension that enforcement of Art. 44 would revoke their personal law. Persons, who were of opposing views, contend that India is a secular state and as mentioned in Art. 25 to 29 as there's liberty of religion.

It widens its cases in affair of religion such group of persons strongly obstruct implementation of UCC and claim that the code is unlawful to the freedom of religion. They oppose the code, because of the existence of conservatism among certain sections of the Indian population, and Governments defer to these sentiments because of political considerations; political parties, (Legislature) oppose this code because of their selfish interest; they do not interfere in the personal laws of Muslim or minority population because if they give support to uniform civil code, it becomes dangerous to their vote bank thus because of their personal interest, they oppose the code and it becomes extremely difficult to have any progressive measure in the area of family law. A common civil code will help the cause of National Integration by removing disparate loyalties to laws that have conflicting ideologies according to the present position. Just like medicines are important for a healthy India, Uniform Civil Code is necessary for a secular India so that the same laws are valid for every citizen without taking religion into consideration. At present Goa is a single state in India that has UCC irrespective of religion, gender, caste. In Goa, every religion be it Hindu, Muslim, or Christian all are obligated to identical laws related to every aspect like marriage or divorce. When Goa was included as a part of the union territory in 1961 by Goa Daman and Diu administration act 1962 the

¹¹² Asghar Ali Engineer. (2004). *Abolishing Triple Talaq what next?* JSTOR. <https://www.jstor.org/journal/econpoliweek>.

¹¹³ Madhushala, 'Need for Uniform Civil Code in India: A human rights perspective' (Centreright, 13 Oct 2011) <http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/#.UY9iDaKmiSo>.

parliament ratified the Portuguese civil code of 1867 to Goa and should be amended and repealed by the qualified legislature.¹¹⁴

Despite the rising disputes, India has to find a way towards the road of development by enforcing UCC. A vast number of interests and sentiments must be addressed as it shouldn't be executed carelessly. Otherwise, it could create turmoil. Implementing UCC would prove to be a social transformation and needs to be done evenly, not hastily. A UCC incorporate justice and there shouldn't be any bargaining on that.

C. Additional Changes: Media awareness, only when one's mindful of their rights, be able to secure them. Hence spreading legal awareness is critical— particularly about a standard nikahnama and another way of evading the disadvantages of the systems currently in place, are the so called “women's courts” (Mahila Adalat or Mahila Mandal). These are dispute-resolution fora run by government bodies or voluntary organizations that are designed to address women's marital and related family problems.¹¹⁵ They aim to provide a safe and unthreatening environment in which women can air their grievances, work out satisfactory settlements with their husbands and in-laws or find ways to escape their difficult situations altogether. Declaring triple talaq to be illegal by SC was not a bed of rose but the step was initiated thus change will automatically follow. But it's definitely not enough to bring in reforms on the ground and reach it to the lowest social strata. The strategy that seems to be somewhat acceptable is bringing about an ‘Optional Code’. The optional code would necessitate acceptance on a large chunk of our population and indicative of their approval of the new law. The above-mentioned strategies are not mutually exclusive but they should operate in tandem to further the objectives.¹¹⁶ While the piping hot discussion flares on, people ask themselves if UCC is that important. Instead, they plan on that provisions shall be made for women to opt for a common civil code. If the religious head themselves aren't welcoming the changes it will be troublesome for women to accept the law and the changes will be only on surface, leaving the amendment completely useless. Therefore for changes to be effective for Muslim women again there comes a situation where it has to be accepted by people dominating the religion or one in whom people of that community have blind faith.

¹¹⁴ Ram, S. (2014, September 16). *Uniform Civil Code: The Unique Goa Experience*. Wwww.Livelaw.In. <https://www.livelaw.in/uniform-civil-code-unique-go-a-experience>.

¹¹⁵ Sylvia Vatuk, ‘The “Women's Court” in India: An Alternative Dispute Resolution Body for Women in Distress’ (2013) 45 *The Journal of Legal Pluralism and Unofficial Law* 76.

¹¹⁶ Krishnayan Sen, ‘Uniform Civil Code’ (2004) 39 *Economic and Political Weekly* 4196.

7. Conclusion

The journey of Muslim personal law in India has not been less than that of a roller coaster ride. After the discussion of all the above aspects, it can be noted that the opinion of consensus demands to be heard in facilitating such liberal judgments and certain uniform codified laws which assist them invaluable way to revoke to some range the inequities in the existing prevailing personal laws. Shayara Bano's case too produced a new dialogue on law reform. This had a positive impact when it produces attempts to reconsider those laws that are biased against women or draw on patriarchal and patronizing understandings. The admixture of religion and law is perplexing. Indian women demand a Uniform Civil Code- one that is just, reasonable, and protective of women's rights. We should complete the unfinished agenda of our founding fathers. Educate women, empower them and not do things in haste. We need to move slowly and start to test newer and innovative methods.