



THE CONCEPT OF SECULARISM VIS- A - VIS UNIFORM CIVIL CODE – WITH SPECIAL REFERENCE TO MARRIAGE AND DIVORCE IN ISLAMIC LAW – A CRITIC.

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Introduction

As rightly pointed out by the Seventh Central Pay Commission of India, November 2015 India is a vast country measuring 3,214 km from north to south, 2,933 km from east to west, with an area running to 3.3 million square km. It has a land frontier of 15,200 km and a coastline of 7,517 km. It shares borders with the neighboring countries of China, Pakistan, Bangladesh, Bhutan, Nepal, Myanmar, Afghanistan and Maldives. We also share maritime borders with Malaysia, Sri Lanka and Thailand. The longest borders are with China and Pakistan, measuring 3488 km and 3,323 km respectively. Apart from its physical size India has a large population of about 1.2 billion. Our country also has immense diversity in its culture, caste, religion, customs, languages that give it uniqueness. Keeping in view these features, our forefathers conceived a Constitution which captures all its unique features. The Indian Constitution is unitary as well as federal in character¹. The Preamble of the Indian Constitution reads as under:

“**WE THE PEOPLE OF INDIA** having *solemnly resolved to constitute India into* a SOVEREIGN, SOCIALIST, **SECULAR**, DEMOCRATIC REPUBLIC and to secure to all its citizens

JUSTICE- social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

IN OUR CONSTITUENT ASSEMBLY THIS TWENTY-SIX DAY OF NOVEMBER, 1949 DO HEREBY, ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.” Part IV of the Constitution by way of Article 44 while saying that “The State shall Endeavour to secure for the citizens a uniform civil code throughout the territory of India”, Article 37 – Declares that the provisions contained in this Part shall not be enforceable by any court, *but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*

No doubt, under the second part of Article 37, the state having the power to legislate any enactment for providing UCC to its citizens throughout the territory of India.

Right to freedom of Religion and the power of State to regulate Secular Activities

Under Article 25², all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. But this right is Subject to public order, morality and health and to the other provisions of this part.

Under Article 25 (2)³ the state is permitted to make any law—

(a) **Regulating or restricting any** economic, financial, political or **other secular activity** which may be **associated with religious practice;**

From Article 25(2)(a), it is categorically clear that the power is given to the State to regulate or to restrict the **other secular activity** which is associated with religious practice.

Secular Activity, Meaning of: The concept of Secularism has been defined and understood in in different ways in different countries. In India, the State has no religion in other words; it means that the State will treat all the religion equally.

¹ Report of the Seventh Central Pay Commission, Foreword by Justice A.K. Mathur, Chairman, Seventh Central Pay Commission.

² Article 25 - Freedom of conscience and free profession, practice and propagation of religion: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

³ See Article 25 (2) of Indian Constitution.



Apex Court of India has explained the secular character of the Constitution thus “secularism is neither anti - God nor pro – God. It treats alike the devote, the antagonistic and the atheist. It eliminates God from the matters of State and ensures that no one shall be discriminated against on the ground of religion”.

Religion is otherwise termed as “faith” in English. Because, faith involves usages, customs and practices that are being followed by the people for a quite numbers of years. Custom has been given the status of Law only because of the reasons stated above. Yajnavalkya defined custom as “that which a person practices whether it is a dharma or not because it is the usages of the country”. And this definition is based on the concept of *respecting the sentiments of the people of this country*. Sir James Colville in *Collector on Madura Vs Mootoo Ramalinga Sethupathi* 12 MIA 397 observed “Under the Hindu system of law clear proof of usage will outweigh the written text of the law⁴”.

Now coming to Marriage Concept

The marriages of particular religion is performed in accordance with their personal Laws (Ex. Hindu Marriage Act, 1955, The Christian Marriage Act, 1872, Parsi Marriage Act, Special Marriage Act, 1956 etc.)

The personal laws are governed the following categories

1. Marriage, 2. Succession, 3. Divorce, 4. Adoption and 5. Maintenance etc.,

Concept of Marriage

The Hindu Marriage Act, 1955 under Section 5(1) says that to constitute a valid marriage “the party to the marriage should not have a living spouse” at the time of the marriage. If the condition is violated then the concerned spouse shall be punished under section 17 of the H.M Act, 1955. The Punishment shall be in accordance with Section 494 and 495 of Indian Penal Code, 1860. Further under section 11 of the H.M. Act, 1955 the second marriage shall be void. Void means, from the inception of marriage, the second marriage will be invalid. i.e. in the eye of law, it is presumed that the second marriage is not at all performed.

Hence, from the above, it is vividly clear that polygamy is prohibited under the H.M. Act, 1955. The same is applicable for Indian Christians and for persons who are going to solemnize their marriage under Special Marriage Act, 1956.

With respect to Muslims in India, *we are not having any Codified Law pertaining to marriages, adoption.*

For Maintenance of Muslim women, we are having **Muslim Women (Protection of Divorce) Act, 1986**, For Divorce; we are having **Dissolution of Muslim Marriages Act, 1939**. This Act can be utilized only by Muslim Women **and** for men we are having **Muslim Personal Law (Shariat) Application Act, 1937**.

Marriages under Islamic Law

Under Islamic Religion, marriage is not sacramental like that of Hindu Marriage. It is only a civil contract.

Age factor for marriage

Since we are having Prohibition of Child Marriage Act, 2006 if any marriage held in contravention of the age mentioned under Section 2(a), then the marriage being child marriage will be void only at the option of contracting party to the marriage. “**Contracting Parties**” in relation to Marriage means either of the parties whose marriage is or is about to be thereby solemnized⁵. Since the Act is applicable to all irrespective of any religion, this Act is a welcoming step towards attaining the goal enumerated under Article 44 of the Indian Constitution. Hence no doubt, to enter into a marriage the male must have completed age of 21 years and the female 18 years.

Polygamous Marriage in Islamic Religion

In the past, there have been many incidents of non-Muslim men converting to Islam solely with the purpose of practising polygamy legally. In December 2008, a controversy arose when the then *Deputy Chief Minister of Haryana, Chander Mohan*, and *Anuradha Bali*, the former Assistant Advocate General of Haryana, converted to Islam adopting the names Chand Mohammad and Fiza, so that the *Deputy C.M* could marry *Anuradha Bali* as his second wife⁶. Such events raised alarms over the use of Islam for polygamy.

⁴ Prof (Dr) T.V.Subba Rao., “Prof.G.C.V Subbarao’s Family Law in India”, Updated Reprint 2014, S.Gogia & Co.,Hyderabad., P.55.

⁵Section 2(c) of Prohibition of Child Marriage Act, 2006.

⁶ <http://indiatoday.intoday.in/story/Haryana+deputy+CM+adopts+Islam+to+marry+twice,+sacked/1/22089.html>



On February 09, 2015, Supreme Court of India in *KHURSHEED AHAMED KHAN VS. STATE OF U.P*⁷ quoting the verdict delivered in *JAVED VS STATE OF HARYANA*⁸ ruled that “polygamy was not an integral part of Islam and justified the firing of a Uttar Pradesh government employee for violating UP Government Servant Rules following his marriage to a second woman”. Further the court observed that “What was protected under Article 25 (right to practice and propagate any religion) was the religious faith and not a practice which may run counter to public order, health or morality. Polygamy was not integral part of religion and monogamy was a reform within the power of the State under Article 25.” further the court stated that “a practice did not acquire sanction of religion simply because it was permitted. Such a practice could be regulated by law without violating Article 25”.

Whether Quran propagates polygamous marriage and prohibits monogamy?

To answer this question, we have to refer the Holy Quran.

As regards the polygamy Quran Says “...Marry such women as seem good to you two and three and four; but if you fear that you will not do justice between them, then marry only one...” - {Holy Quran IV:3}.

The explanation to the verse is that a Muslim man may marry up to four women. However, if he cannot deal justly with each of the wives then he has or he is *forbidden* to marry that many; and can marry only one wife, to prevent treating women unfairly. Muslims explain that the use of the word "Justice" or "Justly" refers to the man's ability to treat each of his wives *exactly the same* in every regard: not just materially (ie. food, clothing, shelter, time, money, etc..) but also that he must be able to love them all exactly the same. He must be able to *feel* the same amount of affection and love for each of his wives. If he cannot do this, then, according to Qur'an he cannot marry more than one wife⁹.

In verse 4:129¹⁰, Quran says that “men are unable to deal justly with more than one wife”. This means that men are generally not allowed to engage in polygamy. However, Allah included the allowance for multiple wives under specific circumstances. These include war, gender imbalance in certain regions/countries and women's preference.

But as a general rule, as stated, men are prohibited from engaging in polygamy unless absolutely necessary (*monogamy is a norm and polygamy is an exemption*¹¹).

Hence, from the above analysis, it is very clear that Islamic religion is also propagates monogamy and allows polygamy only in extreme exceptional circumstances.

With Respect to Divorce/Talaq, Quran says

Prior to Islam divorce among the ancient Arabs was easy and frequent occurrence and this tendency has persisted to some extent in Islamic law. Prophet showed his dislike to it in no uncertain terms. Prophet said that “with Allah the most detestable of all things permitted is divorce”. And towards the end of his life he practically forbade its exercise by men without intervention of an arbiter or a judge.

With respect to talaq the holy Quran says:-

“If ye fear a breach, Between them twain, Appoint two arbiters, one from his family and the other from hers; if they wish for peace, God will cause their reconciliation; for God hath full knowledge, And is acquainted with all things” – Sura IV verse 35.

From this verse, it is categorically clear that there is a condition precedent that must be complied with before the talaq is pronounced.

Ameer Ali in his treatise on Muslim Law has observed: “the prophet pronounced talaq to be a most detestable thing before the Almighty God of all permitted things... if talaq is given without any reason it is stupidity and in gratitude in God”.

⁷ SLP (c) No: 5097 of 2015.

⁸ 2003 (8) SCC 369.

⁹Source: [http://wikiislam.net/wiki/Dealing_Justly_with_Wives_and_Orphans_\(Qur'an_4:3\)](http://wikiislam.net/wiki/Dealing_Justly_with_Wives_and_Orphans_(Qur'an_4:3)). Last visited on 17/11/2015.

¹⁰Ibid, Note 4.

¹¹See also FazlurRahman, “The Quran” in T.N.Madan “Religion in India”, Edi.1991, Oxford University Press, New Delhi.P. 35.



Madras High Court in *Asha Bibi Vs Kadir Ibrahim Rowthar*¹² in 1909 is itself observed *that an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence.*

Situation is like this, currently we are saying that under Islamic Law, it is open to the husband to divorce his wife “without intervention of the court and without assigning any reasons for his actions”. This is the unique features of Mohammedan law.

Under the present uncodified Mohammedan Law, there are three types of talaq in which the Mohammedan husband can exercise his power of talaq.

1. Talaq – Ahasan
2. Talaq – Hasan
3. Talaq – ul–Biddat

Out of the above mentioned three kinds of talaq, the first two types are approved by Prophet Mohammed and the third type is not approved form of talaq. The third type is otherwise called as “triple talaq”.

The difference between the three modes of talaq is that the “Talaq – Ahasan” and the “Talaq – Hasan” can be revoked at any time during the waiting period. Waiting period means, *Talaq – Ahasan mode* is consist of single pronouncement of talaq made during the “*thur*” period (the interval between two menstruations) followed by abstinence from sexual intercourse/coitus . If during this period, if he had sexual intercourse the talaq is regarded as revoked. Yes, it is a revocable talaq. Sufficient opportunity is given to reconsider his decision and to revoke it if he had pronounced the talaq in a hastily manner.

Talaq Hasan consist of three pronouncement of talaq made during successive “*thur*” period. No intercourse takes place during any of the *three thurs*. The first pronouncement should be made during a *thur*, the next pronouncement should be during the next *thur* and the third pronouncement should be in the third *thur*. Here also there is sufficient to time to reconsider his decision. Hence it is accepted as a proper method of talaq.

Talaq – ul – Biddat

Biddat means Biddat means “innovation or new or irregular”. This was introduced by Omeyyade monarchs in the second century of Mohammedan era.

Talaq – ul – biddat or *talaq – ul – badai* is consists of three pronouncements made during a single *tuhr* either in one sentence, e.g., “I divorce thee thrice”, - or in separate sentence e.g., “I divorce thee”, “I divorce thee”, “I divorce thee”. or A single pronouncement made during a *tuhr* clearly indicating an intention irrevocably to dissolve the marriage, e.g., “I divorce thee irrevocably”. Such a talaq is lawful, although sinful, in Hanafi Law; but in Ithna Ashari and the Fatimi laws, it is not permissible. This is called “talaq – ul – ba’in”, irrevocable divorce. *Talaq – ul – biddat* becomes irrevocable immediately it is pronounced, irrespective of *iddat*. This method of *talaq* is not approved by Islamic theology.

A welcome step of the Hon’ble Apex Court of India in matters concerning “Talaq” Shamim Ara Vs State of U.P & Anr¹³

In this case the Hon’ble Supreme Court of India quoting the judgment¹⁴ delivered by Hon’ble eminent judge and jurist V.R. Krishna Iyer, J., observed that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The learned Judge further observed that:

The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, ‘if they (namely, women) obey you, then do not seek a way against them’.” (Quran IV:34).

The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the

¹²Date of Judgment 03/09/1909; Available at <http://indiankanon.org/doc/437107/Last> visited on 17/11/2015.

¹³Appeal (crl.) 465 of 1996. DATE OF JUDGMENT: 01/10/2002. Available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=18797>. Last visited on 18/11/2015.

¹⁴A. YousufRawtherVs. Sowramma, AIR 1971 Kerala 261.



eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously¹⁵."

"After quoting from Quran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting conciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. . . .

Further the Apex Court accepted the view rendered in *Sri Jiauddin Ahmed Vs. Mrs. Anwara Begum*¹⁶ and *Rukia Khatun Vs. Abdul Khalique Laskar*¹⁷, which says that "The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and wife by two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected". In these two cases the court observed that "the correct law of talaq as ordained by Holy Quran is

(i) That talaq must be for a reasonable cause' and

(ii) That it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, talaq may be effected.

Hence, after the verdict by the Apex Court of India, now the use of the words talaq capriciously and whimsically is not effected. Only after the conciliation attempts by both side failed, then only the talaq will be effected irrespective of whether the talaq is single or of triple talaq.

Suggestions and Conclusion

From the above analysis it is, categorically clear that the monogamy alone is propagated in Islam and polygamy, according to the strict interpretation of the Quran, is an exemption. According to the 1961 census (the last census to record such data), polygamy was actually less percent prevalent among Indian Muslims (5.7%) than among several other religious groups. Incidence was highest among Adivasis (15.25) and Buddhists (7.9%); Hindus marriages and upper-caste Hindus accounting for 5.8%. The difference may appear to be small but it is big, in real terms. The 1971 census records 45.3 crore Hindus and six crore Muslims. According to sociologist Asghar Ali Engineer, Head of Mumbai's Institute of Islamic Studies bigamy is not as rampant among Muslims as believed. The Quran only offers conditional permission for a man to take four wives: in times of war or a crisis that sees women outnumber men. "The 2001 Cenus found 935 females for every 1000 males in India. Among Muslims it was 930:1000. So it would be difficult find even one wife for every man," he says. Engineer says polygamy will never cease to exist Perhaps it's better to regulate it¹⁸.

Hence, here my suggestion is that to curb the practice of polygamy in Islam the following suggestions are recommended.

1. To perform the second marriage in Islam, the procedure followed in Pakistan can be followed. where, to enter into second marriage during the subsistence of first marriage, the husband/groom has to prove that the first wife is unable to carry out the duties of a wife and he has to prove that he is potent to satisfy the second wife and has to assure that the equal rights and justice can be provided by him to both the wives. Further the consent of the first wife has to be obtained for the second marriage. To follow the above mentioned procedure, an arbitrator has to be appointed (namely Kazi) who will hold an inquiry and during the enquiry he has to consider the following circumstances apart from others:

Sterility, physical infirmity, physical unfitness for the conjugal relation, will avoidance of a decree for restitution of conjugal rights or insanity on the part of an existing wife. At the end of the enquiry, if he satisfied that the second marriage can be performed, he can allow the second marriage, but at the same time the power has to be given to Kazi to fix the amount of Mahar to be paid by the man to his first wife.

2. With respect to Talaq, there is no contradiction in "*Talaq Hasan*" and "*Talaq Ashan*". These two types of Talaqs are approved by Prophet Mohammed. The dispute arose only in Talaq-ul-Biddat. Even this dispute is settled by Honourable Supreme Court of India in *Shamim Ara vs. State Of U.P (supra)*. And what the Apex Court has dealt

¹⁵ See also *E-Book Triple Talaq: An Analytical Study with Emphasis on Socio-legal Aspects* By Furqan Ahmad. Available at https://books.google.co.in/books?id=PsB5LY2NowOC&pg=PA90&lpg=PA90&dq=1.%09Talaq+-+Ahsan&source=bl&ots=0-0jMgFKSv&sig=4JUi6410ez6NREp_TCwmastQl10&hl=en&sa=X&ved=0CCYQ6AEwAWoVChMI7rrl7ZiZyQIVCRyOCh3-HA5Z#v=onepage&q=sameem&f=false. Last Visited on 17/11/2015.

¹⁶ (1981) 1 GLR 358

¹⁷ (1981) 1 GLR 375.

¹⁸ *Bigamy: An issue of one too many* by Divya A, TNN | Sep 13, 2009, 01.41 AM IST available at:

<http://timesofindia.indiatimes.com/home/sunday-times/Bigamy-An-issue-of-one-too-many/articleshow/5004493.cms?> Last visited on 19/11/2015.



with in this case has been frequently mentioned on various high courts' judgments. Hence here my suggestion is that all the Talaq/divorce has to be effected only through the court of law and reasons has to be given for talaq. And no talaq whatever may be its form could be validated unless there is an attempt for conciliation.

3. The new concept of dissolution of marriage other than talaq may be created and the grounds mentioned in other personals Laws may be brought into force. And if any of the conditions is violated punishment with simple imprisonment for a period of one year or fine upto ten thousand rupees or with both shall be imposed.
4. All the marriages should be mandatorily registered.

My conclusion is that, while drafting Indian Constitution, though there was hectic opposition to bring Uniform Civil Code in the Constitution {(Article 35 (Now Article 44))} and pressure for amendment to insert a proviso clause¹⁹ to Article 35, Dr.B.R Ambedkar opposed the amendment. Finally, he said that *Article 35 (Uniform Civil Code) merely proposes that the State shall endeavour to secure a uniform civil code for the citizens of the country. It does not say that after the code is framed the State shall enforce it upon all citizens merely because they are citizens.* It is perfectly possible that *the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary,* Dr.B.R Ambedkar observed²⁰.

Instead of initiating for the introduction of uniform civil code, which may create communal problem, an attempt may be made for codified legislative change in Muslim Law, wherever needed, have to be effected without displacing it from its Islamic base as has been done in many Islamic countries having a substantial population²¹. And also it is suggested that the major portion of the uncodified area of the Hindu Law can also be codified.

Finally what I want to suggest, is to introduce the *Optional Civil Code* like ***Special Marriage Act, 1956*** or to introduce the uniformity in law wherever it is possible and feasible. That could be the best idea and would allow all people/communities the option between adopting a law guided by their faith and their customs, or one guided by the modern concerns of equality and justice. This could definitely lead to a slow but sure change to secular law.

¹⁹ "Provided that any group section or community of people shall not be obliged to give up its own personal law in case it has such a law".

²⁰ *Constituent Assembly Debates, Volume VII pg. 551.*

²¹ *Dr.(Prof)K. Nilamudeen - "Matrimonial Causes in Islamic Law and the Concept of Human Rights" - A Ph.D thesis submitted to The Tamilnadu Dr.Ambedkar Law university, Chennai, P.315.*