

## MAINTENANCE TO DIVORCEES, GENDER JUSTICE AND UNIFORM CIVIL CODE IN INDIA: DANGERS OF JUDICIAL ACTION AND GOVERNMENT INACTION

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**Abstract:** Indian Constitution declares 'Justice' in unambiguous terms within the Preamble of the constitution and promises to ensure justice-social, economic and political to all its citizens. Uniform Civil Code as the objective of state is enshrined in Article 44 of the Indian Constitution and the **Stateshall endeavor** to secure for the citizens a uniform civil code throughout the territory of India. However, the government has not taken up the task of preparing the draft code in furtherance of the objective but has delegated the task to Indian Judiciary. This inaction on the part of government appears to be a threat to 'Justice – social, economic and political' and this danger becomes more pertinent when male-female ratio in the highest court is 28:1. As regards award of maintenance to divorcees under section 125 of Cr.P.C., the Supreme Court has demonstrated the insensitive approach by giving judgments which fails to cater the needs of the society and awarding arbitrary maintenance which are not based on cogent reasons and thus posing threat to justice. In this background, the researcher has studied the cases decided under section 125 of Cr.P.C. from 2000 to 2016 and highlights the need of proper guidelines and a positive step from state.

**Introduction:** Gender Justice is a universal concern. Indian Constitution in unambiguous terms provides for securing justice and obliges the state to secure uniform civil code for its citizens. It appears that the government has made no move towards achieving the same but the courts in India have taken up the task of achieving uniformity in laws by removing the contradictions in existing personal laws. The curiosity of the judges to bring the case relating to Muslim divorcees, under the ambit of Section 125 of the Criminal Procedure Code deserves special mention.

**Uniform Civil Code and Supreme Court:** The attempts of the Supreme Court to enforce Uniform Civil Code in India are clearly evident from the judgements in *Shah Bano* and *SarlaMudgal* etc. The Supreme Court in *Mohammad Ahmad Khan v. Shah Bano Begum* ordered Muslim husband to pay maintenance to his divorced wife and observed that Article 44 of the Indian Constitution has remained a dead letter. Also in *SarlaMudgal v. Union of India* while hearing a case of four Hindus who converted to Islam for the sole purpose of marrying additional wives which is allowed under Muslim law, the Supreme Court pointed the urgency of bringing Uniform Civil Code in India. The court declared the marriage as void and convicted the husband for bigamy while reciting *Shah Bano dicta* in favour of Uniform Civil Code. Again in **Vallamattom v. Union of India**, the apex court while hearing a case concerning the rights of Christians to make charitable or religious bequest declared Section 118 of Indian Succession Act as unconstitutional and restated the cause of national integration by removal of contradictions in ideologies and expressed *regret that Article 44 of the Constitution has not been given effect by the Parliament.*

The decisions of the apex court sparked nationwide debate and Muslim leaders have since made clear

their rejection of any proposed Uniform Civil Code. However it appears that though the Indian government has restrained itself from bringing Uniform Civil Code on document, the courts in India have taken the charge of bringing uniformity where social welfare agenda is in issue. Attempts have been made to harmonize all Indian personal laws without abolishing the personal law system.

**Maintenance to Divorcees u/s 125 Cr.P.C. and Uniform Civil Code:** The researcher has surveyed cases pertaining to divorce and maintenance under Section 125 of the Criminal Procedure Code 1973 from 2000 to 2016. The survey showed that lower judiciary has been prone to deliver judgments per in curium in ignorance of the law set by the Apex Court. The quantum of maintenance awarded by the Courts under Section 125 of the Criminal Procedure Code varied from 1/20<sup>th</sup> part to 1/1.5<sup>th</sup> part i.e. 85% of the salary of the husband. It was found that the Courts were not guided by any set of formula and preferred to fix the amount having been guided by the lifestyle of the parties during the subsistence of marriage. In most of the cases the Court did not find it necessary to ascertain the total income of the husband and proceeded on assumption that the husband is able to maintain his wife while awarding maintenance. Surprisingly in a case the court determined the amount while relying on the fact that husband was income tax assessee. Even in most cases, the income of the husband was not appreciated by the High Court in awarding, upholding or enhancing maintenance amount.

It is submitted that Indian society still works on the concept of "*patiparmeshvar*" and many women give up their career opportunities and contribute to the well-being of the family by child rearing and other household activities. In this way the husband's earning capacity is increased and wife's earning

capacity is decreased. It is submitted that wives even when divorced deserve special care and honour. In this background the indifferent attitude of the courts in determining the amount of maintenance and the procedural hurdles defeat the very concept of 'Right'.

**Income and Maintenance:** The study showed that in 50% of the cases, the High Court did not appreciate the income of the husband and upheld the amount of maintenance awarded by the trial court. However, where maintenance was enhanced or reduced, the income was also in issue. It is pertinent to mention that there was no proportionality in the quantum of maintenance to the income of the husband. In some cases the amount of maintenance was as low as  $\frac{1}{20}$ <sup>th</sup> or  $\frac{1}{10}$ <sup>th</sup> of the income of the husband, while in two cases the amount was as high as  $\frac{1}{1.16}$ <sup>th</sup> i.e. 85% and  $\frac{1}{2}$ <sup>nd</sup> of the income of the husband.

**Conclusion :** An important question arises when the problem of Uniform Civil Code is tested on the possibility of its enactment and enforcement in India. If the task is left to the judiciary it appears that the judicial attempts to enforce uniform civil code in India is unreliable and inadequate. It is submitted that such attempts will result in unending litigation and over burdening of the Courts in India, besides the poor and disadvantageous being further paralyzed by facing opposition in the attempts to seek justice. Justice demands uniform action and not case by case attempts. Also the insensitive observations like '*fatal point in Islam is the degradation of woman*' do not appease Muslims to rely on Judiciary. It is submitted that when Courts indulge in such sensitive issues in insensitive manner, it leaves no reason for the minorities to believe that their religion is being protected and will be protected. The unreasoned and arbitrary judgments delivered by the courts in India while awarding maintenance to women is a threat to gender justice. Awarding an amount which is excessive goes against the males and awarding an amount which is too less is injustice to

women. Gender justice is a serious concern, the courts should be cautious of the fact that '*injustice anywhere is a threat to justice everywhere*'.

Besides, the judges are not an elected set of people and therefore do not hold accountability directly to the people. Further, the Supreme Court can only express its eagerness to see Parliament to enact Uniform Civil code, but the Court cannot require action from Parliament. Even where there are courageous woman like Shah Bano Begum, to assert their rights in court, the Court can only remedy one wrong at a time. This piecemeal reform by Judiciary appears to the researcher as inadequate and unreliable.

On the question of reliability on Parliament to enact and implement fair code which is free from biasness, it appears that legislature cannot be trusted to implement a fair and legitimate Uniform Civil Code.

It is submitted that in every country, no matter how democratic it is, the cultural, traditional and historical values continue to guide the institutions of the society. In India, the minorities fear that any code presented as neutral and secular may not be free from biasness and could in fact be a reflection of majority values.

Thus it can be concluded that any attempt to bring uniform law in India would require great deliberation and discussion on different aspects of gender, law and society, its challenges and solutions. The religious minorities have to be satisfied and convinced that their religion is not at risk. Also it is submitted that changes be brought through piecemeal reforms and not through knee jerk reaction. Besides, the government should act positively and prepare a draft civil code, bring it in public domain and let the public debate and decide that it would serve the ends of justice in a pluralistic society like India by transforming the arbitrary, irrational and corrupt practices in a stream of progression which would be a step towards gender justice.

## References:

1. Under the Muslim Women (Protection of Rights on Divorce) Act 1986, the parties are given option to choose the law under which they want to be governed i.e. their personal law or the Central law
2. A.I.R. 1985 S.C.
3. A.I.R. 1995 S.C. 1531, 1533
4. A.I.R. 2003 S.C. 2902, 2906
5. See Muslim Law Board Rules Out Acceptance of Uniform Civil Code, Hindustan Times, Feb. 1, 2006 (spokesman for the Board stated that if a uniform civil code is ever implemented, Muslims should be exempt); Scrap Uniform Civil Code Provision: Muslim Board, Indo-Asian News Service, Feb. 1, 2006 (spokesman for the Board stated "[t]he provision of the uniform civil code as enshrined in article 44 of the Indian constitution dangles like a sword over our necks. It is therefore necessary to have the provision completely knocked off.").
6. Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda", 9 German L.J. 211 2008
7. The cases are analysed from popular Indian law journal known as Divorce and Matrimonial Cases
8. Jacob Kuruvila v. Merly Jacob II (2010) DMC 248(DB)

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9. Kesari Devi & Anr. v. Jagdev Singh II (2005) DMC 704
  10. Tapash Kumar Paul v. Soma Paul II (2007) DMC 541
  11. B. Janardhana v. Roopashri I (2012) DMC 289
  12. Anita v. State of Maharashtra II (2007) DMC 661
  13. However the court preceded this by quoting Manu, the law giver: "The woman does not deserve independence" which shows the similar traditional oppression of women in Hinduism.
  14. Shalina A. Chibber, Charting A New Path Toward Gender Equality In India: From Religious Personal Laws To A Uniform Civil Code, 83 Ind. L.J. 695 2008.

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