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ANALYSING THE SCOPE OF A UNIFORM ADOPTION CODE IN THE CONTEXT OF MUSLIM PERSONAL LAW

AUTHORED BY – SHIVANGI B

Introduction

Multicultural accommodation is present in the very roots of our constitution. From rights which promote pluralistic form of religious freedom to its liberal framework ensuring maximum protection of cultural rights to minorities, Indian laws hold a noteworthy global reputation when it comes to protection of cultural practices without the compromise of constitutional values. So what happens constitutional values go against these personal laws? A similar question was raised with the introduction of the Adoption Bill, 1972.

The bill was a part of the Uniform Civil Code, that was later rejected by the AIMLPB (All India Muslim Personal Law Board) after being proposed in the Rajya Sabha. The Uniform Civil Code as promised under Article 44 of the constitution is a partially-forgotten secular set of laws which, if codified, promises to promote unity among citizens irrespective of their religion in various civil matters. The proposal for a unified code of personal laws regarding matters was frequently brought up in the legislature ever since the Constitution came into force but was not enacted due to constant uproar from the Muslim community for being violative of Article 25. The adoption bill was an attempt to fill the gap for an actual codified law for adoption other than the Guardian and Wards Act, 1890, and it focused on the welfare of children. It aimed to remove differences between Hindus and all other faiths with regard to the adoption procedure. Since the concept of adoption is not recognized under Islam and the prevalence of personal laws regarding guardianship, the AIMPLB considered the new reform to be unnecessary. Since then, there has been no judicial participation about this matter. However, few questions pertaining to this still remain unanswered. This paper attempts to find out whether it is plausible to introduce a uniform code for adoption in these conditions.

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RESEARCH QUESTIONS

- Is there a valid legal justification for the rejection of the Adoption bill, 1972 under UCC?
- Is there a necessity for new reforms regarding adoption laws with regard to the current Muslim Personal laws?
- Is it possible to reintroduce the uniform code for adoption under Islamic law without any form of constitutional compromise?

RESEARCH OBJECTIVE

The primary objective of this research is to investigate the feasibility and implications of establishing a uniform code of adoption in India, with a specific focus on ensuring compliance with Article 25 of the Constitution, which safeguards the right to freedom of religion.

HYPOTHESIS

The study posits that developing a uniform adoption code in India, respecting the tenets of Article 25 safeguarding religious freedom is viable. Furthermore, it is anticipated that a well-crafted uniform code can reconcile religious freedoms with a consistent framework, promoting the welfare of adopted children in India.

RESEARCH METHODOLOGY

Doctrinal methodology of research has been adopted for this paper. The collection of data and information is from published papers, relevant articles, relevant cases, Google books, Legislations, Treaties, and internet websites.

CONCEPTUAL ANALYSIS

Rejection of the adoption bill and the validity of the given legal justification

The All-India Muslim Personal Law Board which consists of members from the Muslim community. In its first historic Convention "Uniform Civil code, Adoption Bill 1972, Protection of Islamic Shariah" they urged that adoption is not a part of Islam and thus created a block for the consideration of the adoption bill. The legislature has not considered this bill ever since. In addition to that, both the Judiciary and executive seem to have taken the egalitarian approach to leave communal matters to the community; however, this deviation can cost us the welfare of ill-

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fated children. Article 25 of the Constitution promises freedom of conscience, practice and propagation of religion and the Supreme Court further strengthened the article by ensuring that the State cannot interfere with matters which are essential to the religion. However, is rejecting adoption essential? Article 25 was previously highlighted when the apex court held that the right to excommunicate is considered as a fundamental right pertaining to the religious belief of the Dawoodi Bohra community. An assurance was given to the Muslim community that "*laws providing for social welfare and reform are not intended to enable the legislature to reform the religion out of existence or identity"*[1] and that article 25 and 26 not only protects freedom of opinion, but also religious activities and traditions and that it is the denomination itself which has a right to determine the essential parts of its religion.[2]

Islam which essentially means "submission to God" has derived from the Arabic translation of the word "peace" and it demonstrates peace and tolerance as its main virtue. Renowned author of Islamic jurisprudence, Asaf Ali Asghar Fyzeew once said,

> *"In order to understand Islamic law, one has to be familiar with historic and cultural background of the law".*[3]

Under Article 25 it was held that religion is not confined to religious belief but includes the practices which are regarded by the community as part of its religion and that for deciding whether something in an integral part or not will always depends upon the evidence adduced before it as the conscience of the community and the tenets of its religion.[4]

To truly understand what the community holds to be integral, it is important to look into the cultural background. The practice of adoption was not always met with denial in the Islamic community. The Prophet Mohammad himself took Zaid, the son of Haris in adoption which also led to other pre-Islamic followers to be inspired to do the same. Similarly, adoption was glorified in the commentary of Holy Quran by Mushaf Al-Madinah An-Nabawiyah (*Outlines of Muhammadan law* n(32)). One excerpt from the glorified interpretation is,

[1] Sardar Syedna Taher Saifuddin vs The State Of Bombay 1962 AIR 853
[2] Bhatia, Gautam. "Gautam Bhatia." *Indian Constitutional Law and Philosophy*, 8 Dec. 2023, indconlawphil.wordpress.com/author/gautambhatia1988.
[3] Asaf A.A. Fyzee, Tahir Mahmood. *Outlines of Muhammadan Law*. 5th ed.
[4] Tilkayat Shri. Govindlalji Maharaj Vs. The State of Rajasthan, *AIR 1963 SC 1638*

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> *"The reference is to the Muhajirin and the Ansar, the Emigrants and the Helpers, the people who forsook their homes and adopted voluntary exile from Makkah in company with their beloved Leader, and their good friends in Madhinah, who gave them asylum and every kind of assistance, moral and material. Under the magnetic personality of the Holy Prophet these two groups became like blood-brothers, and they were so treated in matters of inheritance during the period when they were cut off from their kith and kin."*[5]

It is also argued that the concepts of *Mahram* and *Sura-al-Nisa* exist to protect women from any form of injustice will be affected if the Adoption bill is passed. A Muslim woman's *Marham* is a person whom she is forbade from marrying because of their close blood relationship, because of *radaa'ah* (breastfeeding), or because they are related by marriage. The main concern of Muslim communities is that the adopted child is not a Mahram to his mother, if the adopted child is a girl, she will not be a mahram to her father; and because of which the mother or the adopted girl will have to put hijab when adopted son becomes mature or adopted girl becomes mature. Both the reasoning and the orthodox concept of *Mahram* is undoubtedly outdated as it is both unlikely and immoral that a Muslim father would marry his own adopted daughter, especially given the fact that morality is a virtue in Islam. Breastfeeding the adopted child is also a solution to this. *Sura-al-Nisa* says that if a woman does not have a son, she will get 1/4th of the property. The argument made here was that if there is a unified code of adoption, women can only get 1/8th of the property which will not be justifiable and injustice will be done to women. There is also a provision of gifting 1/3rd of the property to others.

These provisions are made in good faith and for the women's benefit but acts as a hindrance to her at the same time as it might stop her to practice adoption. If the adoption code comes with a reform which gives women the right to choose whether she wants to give away her property to her adopted ward or not, it will give her protection against injustice in a better manner as wanted by the Muslim community. Another major argument is in *the Sura 33 Ayat 4-6* of the Holy Quran, the biological parents must be respected and the original identity should not be altered and if kids are to be adopted, the Kafala system (adoption without the severing of family ties, the transference of inheritance rights, or the change of the child's family name) is the right way to do it. Much like

[5]Mushaf Al-Madinah, An-Nabawiyah ,. *The Holy Qur-an (Quran) English Translation*. Presidency of Islamic Researches (Editor).

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Mahram, the previous verse can also be considered outdated due two reasons. First, the verse was made in the context of slaves being taken away from their actual parents and has nothing to do with the currentscenario and secondly, in these times where children are found grieving for a proper identity, giving them the identity of their new parents seems more of an appropriate way to go. The very existence of Kafala proves that adoption is seen to be a virtuous act by the Quran, family name and inheritance issues being a mere hindrance to the acceptance.

The prevalence of adoption is also backed up by Section 3 of the Shariat application act, 1937 which allows wills and legacies for adopted children and Section 6 of the Shariat act permits custom to override the Mohammedan law in cases where the parties are Muslims and the question is one regarding the matters specified in Section 2 and section 3 of the Act. All of this proves that adoption is not only recognized as a practice in Islam, the prophet himself indirectly carried out the practice which makes it nothing if not holy in nature. Thus, the cardinal principles on which Islam is based are on unity of God and Mohammed's Messenger ship and the introduction of the adoption bill does not trump over any major principle of the personal law.

Necessity and possibility of bringing new reforms in Islamic law

Now that it has been well established that new reforms in Islamic law are necessary for the welfare of underprivileged children, it is necessary to check whether it is possible to do so without violating any provision laid down in the constitution which promises religious freedom. Attention should be paid to the fact all other codified laws that are followed by Indian citizens are secular in nature, and if the adoption bill is passed, it will fall right in place. When the Uniform Civil Code was first introduced by Dr. B.R. Ambedkar, it faced a lot of criticism along with its initial support. Despite the bill not passing, some critical points regarding the dissent shown to the idea was observed. Shri Guru Golwalkar, the late Sarsangchalak of the RSS, dissented to the passing of UCC by saying, "*India has always had infinite variety. And yet, for long stretches of time, we were a very strong and united nation. For unity, we need harmony, not uniformity."*[6] *Law Minister Veerappa Moily found* it impossible to implement a uniform code in a multi-cultural, multi-racial and multi-dimensional country like India. Both these opinions hold a very strong

[6] "Uniform Civil Code – a Muslim Point of View." *The Milli Gazette — Indian Muslims Leading News Source*, www.milligazette.com/news/6-issues/16801-uniform-civil-code-a-muslim-point-of-view.

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weight as it is in fact true that bulldozing traditions will do the opposite of holding up constitutional heritage. The Minorities sub-committee were also concerned about Hindu values being imposed on them. In light of the concerns, Dr. B.R. Ambedkar assured that,

> *"No one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India … No Government can exercise its powers in such manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad government if it did so".*

To carry forward with his ideology and to ensure that personal laws are not violated, reforms need to be made in a way Article 15 and Article 25 are both protected. In order to do that, we need to take a look at the adoption bill that was previously rejected. Article 39 of the Constitution[7] provides inter alia that the state shall protect the youth of the country from abandonment or any form of exploitation and taking that into consideration, the bill deemed all personal laws regarding adoption as parochial and orthodox and wanted all cultural customs (including Hindu laws) to be replaced with a new codified law. It was outright said that the "*Muslim community never accepts change in their personal laws."* This was no doubt an unforgiving statement made against the Islamic community of India, and it is definitely does not seem to be true in the modern times.

Present reforms in Muslim Personal Law

If a feminist perspective is taken, Indian Muslim Law has come a long way since the 1970s and has significantly reduced the extent of gender inequality through these laws. These laws were surely unexpected since conservative Muslim elites had substantial indirect control over them, but whenever plausible reasons were found to bring reforms in group norms, group initiatives and not just in constitutional law, they let the reforms change the law. Muslim women were granted permanent alimony, the right to restrict men from unilaterally giving them a divorce without proper procedure[8] (Triple Talaq), and the right to get a divorce if their husband practices polygamy. The case of *Mohammad Ahmed Khan v. Shah Bano Begum*[9] led to the MWPRDA act

[7] Art.39, Constitution of India
[8] Shayara Bano vs. Union of India (2017) 9 SCC 1
[9] Mohd. Ahmad Khan V/S *Shah Bano* Begum *(1985) SCR (3) 844*

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being passed in 1986 after maintenance being granted to a divorced Muslim woman and it is thus used in almost all subsequent cases[10] for maintenance issues. As for alimony, before the amendment made to Section 125 of the Criminal Procedure Code[11], alimony was given to ex-wives only till they were serving the *Iddat* period as given in the personal laws. Since post colonization, courts were often hesitant to take too much of an independent action when it came to solving disputes related to uncodified traditions of Muslim personal laws and it were mostly the Islamic scholars known as '*ulama'* who interpreted the law to bring in new reforms. Triple Talaq was also ultimately interpreted as *R'ajai*(revocable) by influential Hanafi Jurists and some schools of Islamic Law like the *Itna Azhari*, *Ismaili*, *Musta'lian* and the *Ahl-i-Hadith* which govern many Indians. In the Quareshi cow-slaughter case[12] reforms were brought forward only after it was held that the proposed law had economic and secular purposes. It was also said by the court that, if the Quran mandated only cowswere to be sacrificed, the state would have considered it an essential and would not have passed the law. However, the Quran lists five animals that can be sacrificed and therefore, the law was passed without violating Article 25.

All these instances prove that the muslim community plays a huge role when deciding new reforms for themselves or as Jawaharlal Nehru once put it,

> *"It is obvious that no change can be imposed from the top. It will thus become the duty of the Government of the day to try to educate public opinion so as to make it accept the changes proposed…and that any change of this type* ***will only apply to a community when the community itself accepts it****".*[13]

It can clearly be deduced that when it comes to constitutional and social welfare, policy-makers, scholars and the muslim community as a whole have the full power to make reforms in muslim law and continue to do so. In fact, Abdel Hakim Ourghi, a German- Algerian Islamic Scholar, philosopher and religious educator wrote in his book that,[14] both Muslims and Neo-Muslims often given in to the belief that, Islam unlike other religions cannot reform its own teachings. He believed that the reluctance shown around questioning the canonical sources law should not be there as the holy Quran is subjected to provisional interpretation by its subjects and is made for accommodating to the current reality. Now the question that still remains is whether

[10] Danial Latifi v. Union of India (2001) 7 SCC 740
[11] S.125, Criminal Procedure Code
[12] *Hanif Quareshi* & Others. v. The State Of Bihar 1958 AIR 731
[13] Id.8
[14] Ourghi, Abdel-Hakim. *Reform of Islam: Forty Theses for an Islamic Ethics in the 21st Century*. 2019.

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the unified adoption code is necessary given the pre-existing laws in Islam. Adoption is a practice that restores familial atmosphere contributes to the all-around development of a child's personality. As earlier discussed, Hindu laws regarding adoption hints towards favoritism and other non-Hindu laws like Muslim and Christian personal laws do not recognize adoption (Other than the customary ones as mentioned in the modifications made to the Shariat Application Act).

Gaps in the law and viable reforms

The Adoption of Children Act, 1972, if enacted, promised to have a cosmopolitan and secular composition without any form discrimination against any religion. This ensures maintenance of Article 14 and 15 of the constitution and also puts the concern of minority religions imbibing Hindu values, at rest. Few remarkable clauses of the bill which highlights the need for a similar code today were clause 15ensured licensing of the adoptive parents and clause 14 which gave the court permission to ask for the production of the child in court, all in order to prevent fraudulent adoptions and ill-treatment of the adopted child[15]. This bill does not however define adoption or the rights given to the adopted child and is silent on whether people with no children of their own can adopt. Another change that needs to made in this bill is that it explicitly states the need of children to be unmarried for getting adopted. This will be wrong for children or teen who are forced to indulge in an illegal child marriage and it takes away their scope from getting a chance at making their lives better. This clearly shows that with a few changes in the bill, the act will not only reform personal laws for the better, they will have a huge impact on not only India's youth but it gives a chance to parents unable to conceive as well.

Muslim personal law is silent with regard to a childless couple and it a major flaw in the Muslim personal law. There is no law in place to grant protection to orphan Muslim children. There are other social and psychological problems attached to the restriction imposed by the Muslim law regarding adoption. If the child's former parent happens to be a criminal, then his attachment to the surname can cause both societal and trauma-induced damage. Keeping these drawbacks regarding adoption in muslim personal law and the changes that need to be introduced in the bill in mind, if the Adoption of Children Bill is reintroduced in the legislature, it highly likely that the AIMPLB will be convinced as the welfare of the people of their community is involved. Chapter

[15] Rao, R. Jaganmohan. "A UNIFORM LAW OF ADOPTION. A CRITIQUE ON THE ADOPTION OF CHILDREN BILL, 1972." *Journal of the Indian Law Institute*, vol. 17, no. 2, 1975, pp. 287–98. *JSTOR*, http://www.jstor.org/stable/43950486. Accessed 11 Dec. 2023.

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IV of the Juvenile Justice Act, 2000[16] highlights the importance of protection and care as an essential for all children. Adoption, unlike other civil matters under personal laws has gone through no changes and has not been given the importance it requires. It is high time that the legal fraternity takes notice of this because further reluctance shown to this subject will be nothing but judicial slack.

Conclusion

This pith of this article lies at the plausibility of whether the Adoption of Children Bill that was previously introduced in 1972 could be reintroduced without violating any essential Muslim personal laws or constitutional laws. The hypothesis for the paper was that the entire bill is fit for being enacted, but it was found that there are quite a few errors which need to be fixed in order for the bill to be introduced which will lead to the enactment of a uniform code for adoption. To conclude, interpretation of the laws also helped in finding out viable reforms that if applied, will be highly beneficial for social welfare and the maintenance of secularism and through that, the very spirit of constitutionalism.

[16] Chapter IV, The Juvenile Justice (Care and Protection) Act, 2000