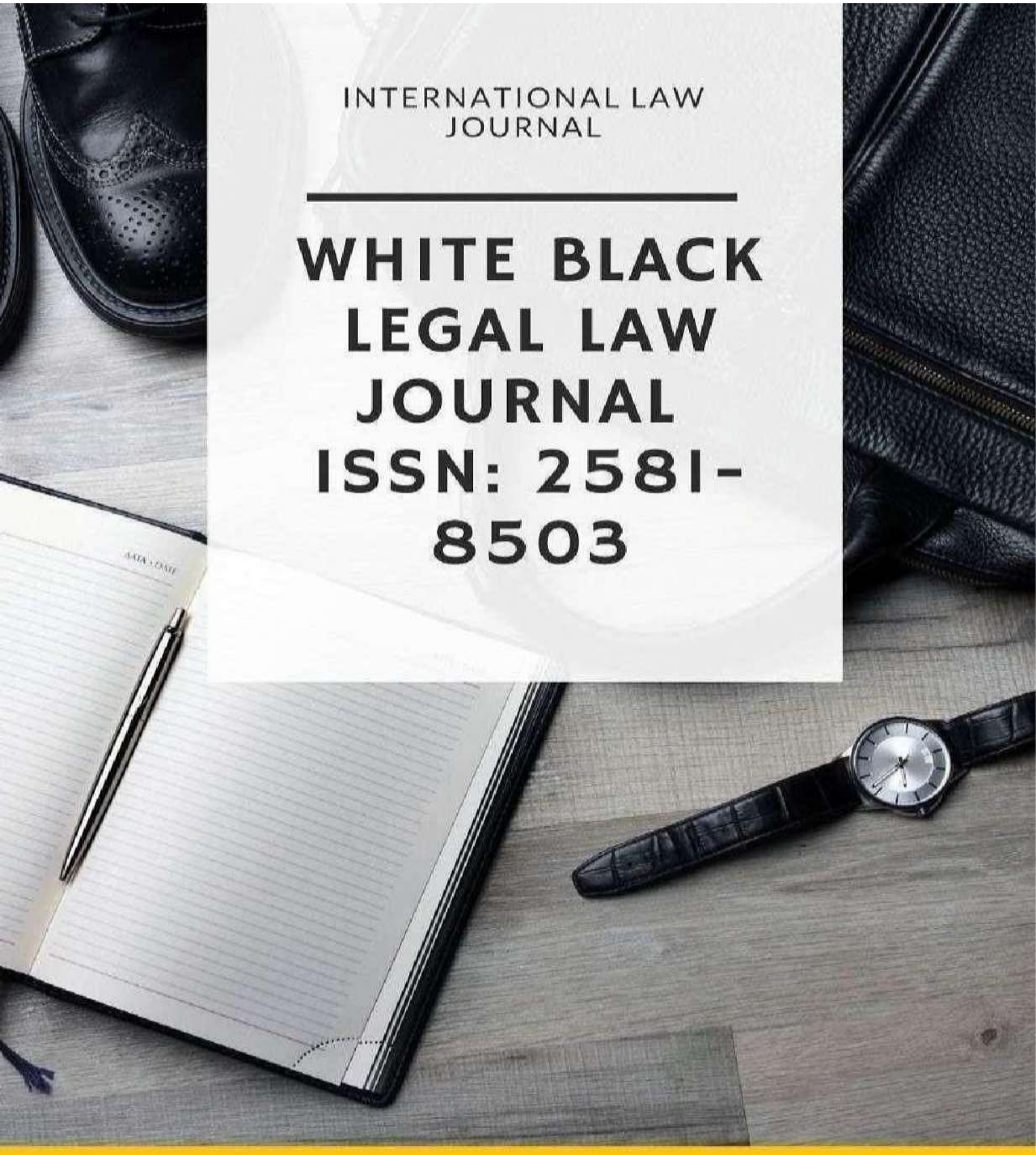

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONSTITUTIONAL PERSPECTIVE OF UNEQUAL POSITION OF WOMEN UNDER MUSLIM PERSONAL LAW AND THE MOVEMENT FOR UNIFORM CIVIL CODE: A LIGHT UPON SHAYARA BANO'S 2017 CASE

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Abstract

The Muslim Personal law (Shariat) Application Act,1937 which is the personal law for Muslims and other personal laws of various religions still have various provisions which depict the unequal treatment given to women. This research paper throws light upon the practices of Polygamy, Triple Talaq and the need of Uniform Civil Code in India due to the disfraction of various personal laws. The recent Constitutional Judgment about Triple Talaq is referred in depth for the study along with other cases. How the practices of **Triple Talaq and Polygamy** which are sanctioned by Personal law, fail to pass the litmus test of Article 14, 15 and 21 is hereby discussed. Furthermore, various verses from the Holy Quaran and the Hadith have been referred to. Moreover, the paper discusses about constitutional morality and balancing of the fundamental rights.

Keywords- Muslim,Hadith, Polygamy, Shariat, Triple talaq, Uniform Civil Code.

1. INTRODUCTION:

It is well-known fact that since time immemorial, women have been treated like a "pawn in the hands of men". Not only morally, socially but even in the laws and more specifically personal laws. When we read the Hindu Marriage Act, 1955 and other personal laws, we come to conclusion that still there are a few provisions which depict that women are still given unequal position in those provisions. After the recent hot-debate about the talaq-e-biddat (triple talaq) under the Muslim Personal Law, and the outspring of the judgment of the Hon'ble Apex Court in the case of Shayara Bano v. Union of

India (2017)[1],though it was held that triple talaq is unconstitutional by 3:2 majority, still the position is not clear and the bill is still pending before the Rajya Sabha. This research paper focuses upon the unequal position of women in the Muslim Personal law, especially with the detailed focus upon **Polygamy** and **Triple Talaq** and why these concepts give rise to the framing of Uniform Civil Code and the need to have Uniform Civil Code. The research paper will basically take into picture the constitutionality of these provisions with the help of various case laws.

2. PROVISIONS DEPICTING UNEQUAL POSITION OF WOMEN UNDER VARIOUS RELIGIONS:

- **Parsi personal law:**

1. If a Parsi woman marries someone who isn't a Parsi, their children are not accepted as part of the Parsi community. However this does not apply to a Parsi man marrying outside the Parsi community.
2. A non-Parsi woman who is married to or is the widow of a Parsi man cannot inherit on his death though their children can inherit

- **Hindu personal law:**

1. If a married woman dies without having any children, her property, under the Hindu Succession Act, is inherited by the heirs of her husband and not her own.
2. Section 6(a) of the Hindu Minority and Guardianship Act gives the father the status of the natural guardian in the case of a legitimate child. The need for equality of rights of natural guardianship between both parents is ignored.
3. Hindu men are also allowed to practise bigamy under certain conditions in Goa, although Goa claims to be the only State to have a Uniform Civil Code in place

- **Muslim Personal law:**

The Muslim Personal law is the Shariat Application Act,1937. The provisions which depict the unequal position of women in this Act are as follows:

[1] (2017) 9 SCC 1.

- The practice of Talaq-e-bidat (triple talaq) allows for a Muslim man to divorce his wife instantaneously by uttering the word talaq three times in one sitting, a Muslim woman must follow a legal procedure after obtaining her husband's consent to be able to get a divorce.
- Allows for a Muslim man to have multiple wives (Polygamy)
- The practice of Nikah Halala determines that a Muslim woman is not allowed to remarry the husband who has divorced her unless she first marries another man and consummates that marriage.

3. THE PRACTICE OF TALAQ-E-BIDDAT (TRIPLE TALAQ) AS UNCONSTITUTIONAL (WITH A LIGHT UPON THE RECENT SHAYARA BANO'S JUDGMENT):

The practice of *Talaq-e-Biddat* or *Talaq-e-Mughazallah* does not find any mention in the religious text *Quran*; however, it has remained prevalent for centuries. Instead, the all-powerful Hadith has stated, '***all forms of BIDDAT will leave you astray, and all that leaves you astray will lead you to hell'.***

A. Talaq-e-biddat does not pass the Litmus Test of Art. 14, 15 And 21.

Talaq-E-Biddat Is Violative of Art. 14 Of the Constitution of India: Muslim women are solely made to bear the burden of the practice counter of women belonging to the other religious denominations such as Hindu, Christian, Parsi. The classification, thus, is

i. firstly-***inter community wise***, i.e. women of one community are subject to such demeaning practice of Talaq-e-Biddat whereas other religion women have sound divorce through judicial recourse and;

ii. Secondly, ***intra-community wise*****,** wherein there is unreasonable classification between men and women of the same religion, giving one the upper hand to treat their counterpart unfairly. Moreover, the unfair unwarranted methods of Talaq, wherein a man can dissolve ties of marriage by proclaiming Talaq thrice but a woman if, choose the right to seek dissolution of marriage under the system of Khula, her seeking divorce would completely deprive her of whatever she may get from her husband, most importantly, a place to live.[2]

[2]A.S.Praveen Aklhar v. Union of India. 2002 S.C.C OnLine Mad 836 (India).

Also, there is also no ***intelligible differentia***, as Talaq-e-biddat paves the way for wider exploitation of Muslim women, and nowhere in Quran it is to be derived that men are placed or are deemed to be superior to women. There is no reasonable basis for classifying women to be placed on the receiving end of Talaq-e-Biddat, whereas grouping men to be in unilateral power of pronouncing the same, which in turn violates her natural right of *Audi AlteramPartem*. Also, there is no nexus between the classification and the object to be achieved,and **the test of reasonable classification accordingly fails.**

The practice also fails the ***Test of Minimum Rationality*** required by any statute law as discussed in *T. Sareetha v. T. Venkatasubbaiah*[3] as it subserves no social good and promotes no legitimate public purpose, the minimum requirement in the test.

B. Talaq-e-Biddat is violative of Art. 15 of the Constitution of India.

Art. 15 (1) specifically bars the state from discriminating against any citizen of India on grounds *only* of **religion**, race, caste, **sex** or any of them[4]. The Art. does not deny the need for affirmative action and amelioration; however, the principle of classification holds good to Art. 15 as does to Ar. 14[5], implying that there can be unequal laws but the same shall be founded on a reasonable ground, and religion, race, caste, sex and place of birth cannot be considered reasonable.

The abhorrent practice of Talaq-e-Biddat collapses on the front of Art. 15 as clearly this practice is discriminatory on two of the aforesaid grounds:

a. **On the basis of Sex**: The practice vests an arbitrary right in the male spouse in a Hanafi Muslim marriage, and constitutes a discriminatory law as such a right is not available to women. A woman's liberty to choose to live with a man she was married to was unilaterally bestowed on husband in the questionable practice. The wife never had personal liberty to give her consent if or if not she wanted this marriage to exist or not. Further, reliance is placed on the English ***"But for sex" test***[6]**,** propounded to mean that no less favorable treatment should be given to women on gender based criterion which would favor the opposite sex or prioritize

[3]A.I.R. 1983 AP 356 (India).
[4]INDIA CONST. art.15, cl. 2.
[5]*Supra*,note 28.
[6]India Cabin Crew Association v. Yeshaswinee Merchant, (2003) 6 S.C.C 277(India).

the opposite gender and women will not be deliberately selected for less favorable treatment because of their sex.

b. **On the basis of Religion**: The practice violates Art. 15 also since it lays out discrimination on the ground of **Religion.** The absence of such substantive rights puts Hanafi Muslim women at a status much lower than their counterparts in Hinduism, Buddhism, Jainism, Sikhism or any other religious faith, constituting active discrimination on ground of Religion, apropos which, the practice must be immediately struck down. Accordingly, violation of Art. 15 is established.

C. Talaq-e-Biddat violates Art. 21 of the Constitution of India

The institution of Talaq-e-Biddat is grossly violative of Right to life as provided under Art. 21 of the Constitution. Once a woman is divorced by her husband, she is bound to stay dependent on others, which even today is viewed as a taboo in the Indian Society. She is ostracised by the society and deemed as "rejected" or "impure". Her self-worth is lowered, and social esteem is jeopardised, taking away her very personal dignity.[7]

It is submitted that just as leading a life of dignity includes **"being married with dignity", a Muslim woman has the right to "divorce with dignity"**. There cannot be any justification for snatching a woman's dignity on one man's whims and capriciousness in the most discourteous of modes of divorce, at times even via WhatsApp and over phone. One must live with dignity, free from physical and mental harassment and exploitation. Clause (e) of Art. 51-A of the Constitution makes it a duty to renounce **practices derogatory to the dignity of women".**

It has been held by the SC in numerous cases[8] that a woman has to be regarded as an equal partner in the life of a man. Clearly, the woman is placed far beneath the man and the said practice assails her dignity vehemently.

D. Talaq-e-Biddat is a concededly sinful practice that has no sanction of Quran

Chapter IV, Verse 35 of the Holy Quran[9] says, "*Any if you fear a breach between the two, appoint*

[7] Common Cause (A Registered Society) v. Union of India and another (2018) 5 S.C.C 1 (India).
[8] Valsamma Paul v. Cochin University (1996) 3 S.C.C 545.
[9] ABDULLAH YUSUF ALI, THE HOLY QURAN: TEXT TRANSLATION AND COMMENTARY, 124 (14th ed. 2016).

*an arbiter from his people and an arbiter from her people. If they desire agreement, God will effect harmony between them."*The holy Quran emphasises on attempts at arbitration before pronouncing divorce, which is provided for in Talaq-e-Hasan and Talaq-e-Ahsan. Talaq-ul-biddat, on the contrary provides for no such attempt, and is accordingly considered to be **the most sinful form of divorce** going against the essence of Quran and Hadith. The view has been upheld by Indian High courts too[10].

In ***Jiauddin Ahmed v. Anwara Begum***[11], wherein the Gauhati High Court held that:

a) The divorce must be for a reasonable cause, and
b) Must be preceded by an attempt for 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 side. (as held in *Rukia* v. *Abdul Khalique*[12]).

The court also expressed disapproval of the notion **"Good in law, bad in theology"**, and observed that such a notion originates from the idea that women are chattels belonging to men, something the Holy Quran does not provide for.

Both of the conditions which are enshrined in holy Quran were left at the mockery of Muslim men who have bend the interpretation of Quran. In ***Shamim Ara v. State of Uttar Pradesh and Another***[13]**,** the Hon'ble Supreme Court referred to the decisions of the Gauhati High Court as illuminating, and observed that Talaq must be for a reasonable cause and should be necessarily preceded by **attempts at reconciliation between the husband and wife.** Accordingly, a practice that does not have sanction of Quran cannot prevail in the name of Islam and needs to be abolished.

E. <u>That Talaq-e-Biddat cannot be protected under Arts. 25 and 26 of the Constitution of India.</u>

Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Arts. 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression "religion" or matters

[10]Ahmed Giri v. Mst. Begha A.I.R. 1955 J & K 1; Sarabai v. Rabiabai ILR 30 Bom. 537; Asha Bibi v. Kadi Ibrahim ILR 33; Madras Ahmed Kasim Molla v. Khatun Bibi ILR 59 Cal 833;Dagdu s/o Pathan, Latur v.Rahimbi Dagdu Pathan, 2002 (3) Mh LJ 602;Must Rukia Khatun v Abdul Khalique Laskar, 1981 (1) GLR 375 (DB) (India).
[11](1981) 1 GLR 358.
[12](1981) 1 GLR 375.
[13]2002 (7) S.C.C 518 (India).

of religion or religious belief or practice[14]. Apropos the same, in order to bring about social reform for Muslim women, the Court must abolish the impugned practice[15], which is also provided for u/Art. 25(2)(b) of the Constitution.

Furthermore, as per ***Doctrine of essential practice,*** as per which only such practices are protected under Right to religion which are essential to that particular religion.[16]The presence of alternative methods of pronouncing Talaq establishes that the practice is not essential to Islam and is hence not protected under the said Articles.

4. POLYGAMY AND THE PLIGHT OF WOMEN:

Bigamy/Polygamy is violative of Article 21 Of the Constitution of India.The practice of Polygamy is in absolute violation of Art. 21 of the Constitution, which provides for a right to live with dignity. The practice gives men unbridled power to choose four wives, thereby portraying women as a mere option in the eyes of the society. It showcases women as if they are disposable properties which once made use of could be replaced by another. All of the aforementioned only shows that the practice of Polygamy as practiced in the present time deprives women of their very basic human dignity.

Moreover, Quran does not even consider Polygamy as a mandatory or discretionary law[17], but a provision for exceptional circumstances. It provides that if the husband cannot treat all his wives equally, which is practically impossible, Polygamy should not be practiced. Some relevant extracts from the Quran stating the aforementioned are extracted herein-under:

a) Surah 4 Ayat 3[18].

"And if you have reason to fear that you might not act equitably towards orphans, then many from among [other] women such as are lawful to you - [even] two, or three, or four : but if you have reason to fear that you might not be able to treat them with equal fairness, then [only] one - or [from among] those whom you rightfully possess. This will make it more likely that you will not deviate from the right course."

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[14]A.S. NarayanaDeekshitulu v. State of A.P 1996 9 S.C.C 548 (India).
[15]SrinivasaAiyar v. Saraswathi Ammal, A.I.R. 1952 Mad 193 (India).
[16]Ram Prasad Seth v State of U.P. And Ors., A.I.R. 1957 All 411; Sardar SyednaTaher Saifuddin v. The State of Bombay 1962 A.I.R. 853; Indian Young Lawyers Association v The State Of Kerala 2017 W.P. (Civil) No. 373 of 2006 (India).
[17]S.I. KoyaThangal v. Ahammed Koya, 1971 KLT 68 (India).
[18]R.V. BASIN, ISLAM- A CONCEPT OF POLITICAL WORLD INVASION BY MUSLIMS, 123, (1st ed. 2017) (Dr. Anil Mishra, trans.)

A. Practice of Polygamy/Bigamy is not in consonance with Right to Health

The practice further violates the Right to health of the wives, enshrined u/Art. 21. The SC has held that the right to live with human dignity, enshrined in Article 21, derives from the DPSPs, and therefore includes protection of health.[19] In *State of Punjab v. Ram LubhayaBagga,*[20] it was observed that "Pith and substance of life is the health, if this is denied, it is said everything crumbles".

Polygamy operates to create concurrent sexual networks within marriage between multiple wives and their husband, in addition to any extra-marital sexual contacts the spouses may have. Consequently, concurrent partnerships may play as significant a role as multiple, sequential partners or the existence of other infections in amplifying the spread of HIV/AIDS.

B. The practice of Polygamy violates international human rights law.

The United Nations Human Rights committee reported in 2000 that Polygamy violates the ICCPR as it violates "right to equality of treatment with regards to right to marry", enshrined under the said covenant. Furthermore, Art. 16 of CEDAW, Art. 12 of the ICESCR, Art. 25 of the UDHR, among others iterate about the right to the highest attainable standard of health.

5. UNIFORM CIVIL CODE AND GENDER JUSTICE:

The movement of Uniform Civil Code enshrined under Article 44 began with the case of Shah Bano[21] wherein it was held that Sec. 125 of Cr.P.C. is applicable to Muslim Women also and that was the focal point from where the demand of UCC started.

A. The Original Intent of the Constituent Assembly was that Uniform Civil Code be implemented with time

Art. 44 has remained a dead letter in the Constitution, as no tangible steps have been taken in that direction. However, that was not the intent of the Constituent Assembly. Reliance is placed here on the well-settled ***"Doctrine of Original Intent"***, whereby the primary task of this court is to pronounce the law in harmony with the purpose, *original intent* and true spirit of the Constitution; because only those pronouncements have to reflect the enduring principle of constitutional law and policy[22].

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[19] *Supra*, note 1.
[20] (1998) 4 S.C.C. 11 (India).
[21] Mohd. Ahmed Khan vs. Shah Bano Begum & Ors, AIR 1985 SC 945.
[22] Supreme Court Advocates on Record Association v The Union of India, (1993) 4 S.C.C 441 (India).

Rejecting the claim of a majoritarian over-sweep by means of Uniform Civil Code, K.M. Munshi stated, "***We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand***."[23]

Shri Alladi Krishnaswamy Aiyyar gave a much more realistic reason to aim for a UCC and bases his argument on the fallacy of having strict water tight existence of the communities. He states, *"We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue"*[24].

The objective of implementing Art. 44 is to bring about such reform. Personal law systems have always been manipulated to preserve traditional male privileges, since they existed at a time where there existed no equality between men and women. Thus, all personal systems, whether based on Muslim, Jewish or Hindu Laws, constructed through readings of sacred texts and traditions have come to discriminate heavily against women.[25]The High Court of Kerala has held thatif any personal law is contrary to principle of equality enshrined in Art. 14 and 15(1) of the Constitution, especially when it involves discrimination on the bases of sex, then it must face the wrath of Art. 13 of the Constitution[26].

6. CONCLUSION:

The Indian Judiciary has always been a staunch supporter of the Uniform Civil Code. Over the years, the Court has been of the opinion that such a code must be implemented in the country. In fact, the Apex Court was of the opinion that time is ripe for the implementation of the code back in 1985.[27]

In a leading case[28], the SC regretted that Art. 44 has remained a "dead letter" and there is no evidence of any "official activity for framing a common civil code for the country". The court acknowledged

[23]Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948.
[24]*Ibid.*
[25]Yuksel Sezgin, *Religious and Legal Pluralism in Global Comparative Perspective: Women's Rights In the Triangle Of State, Law, And Religion: A Comparison Of Egypt And India*, Emory International Law Review 248-251 (2011).
[26]Haseena Mansoor v. State of Kerala, ILR (2010) 2 Ker 891 (India).
[27]Ms Jorden Diengdeh v S.S. Chopra, A.I.R. 1985 S.C. 934, 940 (India)
[28]Mohd.Ahmed Khan v. Shah Bano Begum A.I.R.1985 S.C. 945 (India).

the difficulties in the implementation, but said that attempts have to be made if the Art.were to have any meaning whatsoever. V.R, Krishna Iyer J. who also pronounced the judgment in *BaiTahira v Ali HussainFissalliChowthia*[29]shares the Ambedkarian view point. He says that instead of being a majoritarian move, the code shall be a collection of the best from every system of personal laws. He was of the opinion that UCC must well be implemented, and it shall be the sum total of all the good practices of various religions.

Therefore, it concludes that keeping in line with the previous opinions, Union of India should take necessary steps toward the enactment of the UCC. Further, as per the ***Doctrine of Necessity***, which is a relatively newer doctrine vis-a-vis Indian Legal system. As per the doctrine, such actions as are intended to restore order, even if extra-legal, but necessary, are constitutional. The SC has applied the same in a significant number of cases[30] stepping out of water-tight boundaries to act in the interest of justice. Moreover, it is also seen that a step by step approach also fails to assess the damage the delay causes in realisation of women rights in personal spaces. Thus, the time has arrived that Uniform Civil Code should be implemented keeping in mind the pathetic plight of Muslim Women.

[29]A.I.R. 1979 S.C. 362 (India).
[30]Tata Cellular v Union of India, 1996 A.I.R. 11, 1994 S.C.C (6) 651; Ashok Kumar Yadav v State of Haryana, 1987 A.I.R. 454 (India).