



## Uniform civil code and conflict of personal laws

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### Abstract

India is the World's largest democracy, diverse with million communities and traditions with a secular fabric attached to her Constitution making her a diverse and tolerant nation with respect of guaranteeing its citizens under Part III Article 25 and 26, Fundamental Right to Freedom of Religion, but on the other hand, a growing need and controversy of implementing the Uniform Civil Code under Part IV (Directive Principle of State) Article 44 for bringing and clubbing the personal laws has stoked a conflict with Personal Law Boards still vehemently active in our politics making the time still immature for it to be in practice in a nation where polarization along the religious lines is still active in our society. This paper proposes to bring out the actual socio-political issues including literacy, religious and social mobility which are far more urgent for a well thought out and careful implementation of Uniformity in personal laws, ensuring integrity, unity and equality between genders, communities rather than forcing a still maturing democracy into further complications of intolerance and homogeneity. The framers of Constitution were convinced that certain amount of modernization is required as immediate enactment can affect the sentiments and religious freedom leading to insecurity and distrust among communities. Although the Apex has emphasized upon the need of Uniform civil code to settle the ambiguity which has arisen due to the different interpretations of various personal laws and through various judgments in Shah Bano's case and recently the Vallamattam Case have unified inclination towards the enactment of the Code, but the unity of Tamilians in the context of Jallikattu against the order of SC has well justified the fact that nothing can be above the PEOPLE OF INDIA. With a heterogeneous population consisting of Hindus (79.8%), Muslims (14.2%), Christian (2.3%), Sikhs (1.7%) and so on, it is very well important for the unity and integrity of the nation to keep in mind the history, composite culture, as well as the current social political dynamics before enacting and implementing of the Uniform Civil Code.

**Keywords:** uniform civil code, directive principles, constitution, secular, democratic

### Introduction

#### Personal Laws in India

India is a nation consisting of varied customs and communities. Many famous religions and cultures of the world are found in India. Religion has been an important part of the country's culture throughout India's history. Religious diversity and tolerance are both established in the country by the law and custom. A country that has secularism enshrined in its Constitution yet there is a contradiction in this whole concept of secularism, particularly when it is interpreted in comparison to the personal laws of its citizens. It has become a confusing melting pot when Hindus, Muslims, Christians and Parsees have different personal laws pertaining to marriage, adoption, guardianship, divorce, succession and so on. Almost all communities in India have their own personal laws in matters of marriage and divorce. These religious communities co-exist as part of one country yet the family laws in India differs from one religion to another. The reason is that the customs, social usage and religious interpretation of these communities as practiced in their personal lives depend hugely on the religion they were born in and that which they practice in the Indian society. Some of the codified personal laws relating to marriage, divorce, property and inheritance are:

- The Indian Christian Marriage Act of 1872 (applicable to whole of India except areas of erstwhile Travancore-Cochin, Manipur and Jammu & Kashmir),
- Cochin Christian Civil Marriage Act of 1920 (applicable for Travancore-Cochin areas),
- For Sikh marriages, the Anand Marriage Act, 1909,

- Muslim Personal Law (Shariat) Application Act, 1937 (making Shariat laws applicable to Indian Muslims),
- The Parsi Marriage and Divorce Act, 1937
- Hindu Marriage Act, 1955 (applicable to not merely Hindus, Buddhists and Jains but also to any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other law).

#### Conflict between Personal Laws and Part-III of the Indian Constitution

Two scenarios arise which are to be discussed to determine the conflict: -

- a. Personal laws, codified, customary in practice coming in conflict with the provisions of Part-III of the Indian constitution.
- b. Conflict of personal laws, which aims at reforming existing laws found to be arbitrary, unconstitutional with Article 25 of the Indian Constitution.

The Indian Judiciary, ever since the inception of the Indian Constitution, has been facing a dilemma in deciding the inter-relation of Personal Laws and Part III of the Indian Constitution.

One of the landmark and important judgment in this connection, which throw some light on this dilemma is the Narasu Appa Mali case.

#### State of Bombay v. Narasu Appa Mali

Relating to the "Bombay Prohibition of Bigamous Marriage Act, 1946, the validity of which was challenged on the basis of

Article 14, 15 & 25 of the Constitution of India, Major issues involving the case were:

- a. Whether the Personal laws of Hindus, is “Law” within the meaning of Article 13 (3) (b) and Article 372 (3), Explanation 1?
  - b. Whether an alteration of the personal law of one religious community, without a similar alteration in that of others, violates equality under law?  
It was held by the court that:
  - c. Personal laws are not included in the “law” referred to in Article 13 (3) and are not the “law in force” referred to Art. 372 (3). Bombay Prevention of Hindu Bigamous Marriage Act, 1946 was found not to be violative of Article 14 as the State was free to bring in social reforms in stages.
2. If religious practices are opposed to public order, morality or a policy of social welfare, duty of which is upon the State, then the good of the people of the State as a whole will be preferred over religious practices.

### **Constitutionality of Personal Laws With Respect To Judicial Review**

The Judicial review doctrine is explicitly reflected in Article 13 of the Constitution of India. Laws enacted by the State found to be inconsistent with that of provisions of Part III of the Constitution of India can be declared as ultra vires by the Supreme Court of India.

Issues such as Monogamy, Restitution of Conjugal Rights, Discriminatory grounds of divorce, Maintenance are always a challenge for the judiciary to strike a balance between personal laws based on religion and concerns of gender justice, equality and fairness of law.

### **Watershed Point of Judicial Review in Personal Laws- The Episode of Shah Bano**

This is the case where the Apex court of India had to go against the existing personal laws to take into consideration certain temporal, social and secular aspects, the landmark in the journey of development of personal laws.

Supreme Court of India in Md. Ahmed Khan v. Shah Bano Begum ruled against the tenets of Muslim personal law by providing maintenance claim to a Muslim divorced lady under Section 125 of Cr.P.C.52, despite prohibition under Muslim personal law giving a thought and a direction towards the concept of “One nation, one law”, the Uniform Civil Code.

There are number of such cases including Sarla Mudgal v. Union of India where personal laws and legal provisions pertaining to personal laws were challenged in relation to the above mentioned issues. In some cases, Courts, without indulging into the question of constitutionality of personal laws, made it point to recommend to the Union of India to bring UCC as a part of the legal system.

### **Judicial Restraint – Ahmedabad Women’s Action Group (Awag) V. Union of India**

Well, this case is the classic example of exercise of judicial restraint when it comes to dealing with or deciding a question in relation to personal law and Part III of Indian Constitution.

In this case Muslim personal law regarding polygamy and oral divorce by uttering the word ‘talaq’ thrice, which is popularly known as triple talaq, were challenged on the ground that they violated the fundamental right to equality. The Court held that the since the petition raised questions of social policy, this fell

outside the scope of its power. Although the Court had held in an earlier case that personal laws also had to be consistent with the fundamental rights, it has thought fit not to make such sweeping reforms in personal law through judicial process.

So this judgment shows that the court wanted to convey that in such cases remedy lies before Parliament. It is for the Parliament to take the steps to reform the personal law. In this connection, it is pertinent to note that Shah Bano case and Ahmedabad Women’s Action Group case are two different corners of the same thread. They represent two different approaches of the judicial attitude towards personal law. Shah Bano case, where Court has taken extremist approach and look at the case of Ahmedabad women’s Action Group, where court did not undertake to reform personal laws through judicial process. Court has thought it prudent to leave major reforms causing social change to be brought about through legislative process.

### **UCC and Gender Equality**

It is a known fact that gender injustice is inbuilt in the personal laws of all the communities. The socio- economic conditions are supposed to be the result under which the personal laws are evolved. This is the reason there is a need to reform the personal laws or bring about a uniform civil code to ensure not only equality between men and women but also to bring about gender justice. Women of our country undergo many difficulties and experience severe trauma in matters concerning day to day matters including marriage, divorce and inheritance. Polygamy, desertion, triple divorces are just a few instances to show the possibilities of harassing women. Indian women are legally granted equality in political rights by the Indian Constitution. But due to the difference in the personal laws, women generally experience inequality, deprivation and violence. Within the family, their position is pitiable. The question of women’s rights as humans is completely ignored. The personal laws are designed and formulated to keep the women always under the control of men. Even though the Constitution of India gives equality to women in legal and social areas, they are not effective enough to ensure their real equality. The Supreme Court in a few judgments has opted for a legislation on common civil code as enshrined in Article 44 of India’s Constitution. It said so in Shah Bano’s Case in 1985, in Sarla Mudgal Case in 1995 and in Vallamattam case in 2003. A critical look at the constitutional debate, legislative enactments and judicial decisions very clearly indicate the lack of seriousness in ensuring justice to women. Gender issues need to be addressed very seriously. A uniform civil code is, therefore, foremost a matter of gender justice. If it is implemented it will lay the foundation for women to overcome many social evils like dowry system, bigamy etc which makes a woman feel inferior and degraded. Some instances like: -

- In Hindus, sons, and not daughters, can inherit the property till recently. And a wife has fewer rights than her in-laws over her husband's property, but on the other hand, a husband has more rights than his in-laws over his wife's property.
- In Christian law, a husband can get divorce on adultery ground, whereas a wife has to prove adultery and cruelty.
- Even in Punjab, it is a common practice that all brothers marry one woman so that their property is not divided, and it is till now permissible by the Indian constitution.

The Law Commission has also proposed for the unification of Indian Divorce Act and Indian Christian Marriage Act for the purpose of National Integration.

### Triple Talaq

The procedure of talaq as mentioned in the Holy Quran is an elaborated procedure which includes reconciliation as quoted in Surah IV verse 35 “*And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]*”<sup>[1]</sup>, which means Allah wants reconciliation between the husband and wife via mode of arbitrators if the divorce is given by the husband in anger so that he can take it back within the Iddat period if he desires. Triple Talaq is irrevocable form of talaq where there is no possibility of reconciliation between the parties therefore it is also called *Talaq-i-Bid'ah* which means innovative (or sinful) form of divorce, which was not here during the time of Muhammad. In this form of divorce, the husband under his arbitrary power pronounces talaq thrice in one sitting when the wife is in the period of purity (*tuhr*) and it becomes effective as soon as the words are pronounced, i.e. when man says: *I divorce thee, I divorce thee, I divorce thee*, or in one sentence saying: “*I divorce thee thrice*, or “*I pronounce my first, second and third talaq.*” This mode of talaq is not permissible under Ashari and Fatimi laws but it is permissible under Hanafi law although it is legal under this law but also considered sinful.

### Factors challenging triple talaq

According to Ameer Ali this mode of talaq was post-prophet innovation by Omayyad Monarchs after the death of Muhammad as the escape lane from the restrictions imposed by the prophet because they found the checks in the Prophet’s formula of talaq inconvenient and endeavoured to find an escape from the strictness of law and was not there during the life time of first two caliphs i.e. caliph Abu Bakr and caliph Umar ibn al-Khattab. Holy Quran is the words given by god and must be followed but no reference of triple talaq in one sitting or instant talaq is mentioned in the quran. Holy Quran had emphasized on the reconciliation between the two so that they can take time and help of arbitrators for their reconciliation and take the right decision with calm mind, not in sudden and grave anger. Triple Talaq is alien to the Holy Quran and is a misinterpreted law, which has been innovated and molded according to their own convenience with time. Aristotle in his book “politics” quoted that “*The habit of lightly changing the laws is an evil... for the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.*” The interpretation by Omayyad Monarchs was against the Holy Quran as per surah 4 verse 35 which clearly defines the reconciliation which is absent in triple talaq and challenges the validity of triple talaq because no words of Caliph is above the orders of Allah i.e. Holy Quran

SURAH 4 verse 35-

This verse clearly defines the importance of appointment of two arbitrators, one from the husband’s family and the other from wife’s family so that they can help them in reconciliation if they wish to do so. In triple talaq there is no opportunity for reconciliation between the parties as it is a irrevocable form of

talaq and once it is pronounced it becomes effective from that particular moment only, which cannot be taken back and no justification of this arbitrary power is required to be given. Reconciliation with the help of both the sides is the linchpin of verse 35 which is absent in triple talaq and talaq is not effective without the interference by the arbitrators for reconciliation. If the husband want to take back the talaq he cannot take it back once it is pronounced as it becomes effective the moment it is pronounced and there is no option if reconciliation left with them, even though both want the reconciliation on realising that he pronounced it in heat of anger and not intentionally. They can only get back together in a status of husband and wife after following a very long procedure where the women has to go under the practice of Nikah Halala, where the women has to marry again to some other person and has to consummate the marriage with him, after the consummation of marriage when her husband will give talaq she need to maintain her iddat period and after the Iddat period expires then she is entitled to marry him again. The practice of marrying the new husband is called nikah halala. The procedure of re-marriage with the same person is very lengthy because of that reconciliation with the help of arbitrator as law was given by Allah so that if any of the decision was taken in anger or sudden provocation without thinking they might have a option of thinking over it again with calm mind and choose wisely to separate from each other, therefore it can be said that laws of Allah are above the sayings of any Caliph so the ongoing practice of triple talaq should be quashed down.

Justice R.C. Lahoti in *Shamim Ara v. State of U.P.*<sup>[2]</sup>, referred to the observation of eminent judge and jurist V.R. Krishna Iyer, J. in case *A. Yousuf Rawther v. Sowamma*<sup>[3]</sup> where it was observed that it is a disbelief that muslim man has an absolute power to liquidate the marriage as and when they want under Quranic law and instant divorce does not accord with Islamic injunction. The Holy Quran forbids to divorce his wife till she remains faithful to him. He supported his argument by quoting the Surah 4 verse 34 of the Holy Quran which says “*But if they obey you [once more], seek no means against them*”<sup>[4]</sup> Holy Quran clearly mentions the duty of the husband to take care of the wife and not to give her divorce if she is loyal to you and obeys you, if u will give her an arbitrary divorce than it will be a sin and will be considered as an spiritual offense. Divorce in Islam is permissible only in cases of extreme emergency, when all efforts for effecting a reconciliation have failed. Commentators on the Quran clearly specifies the duty of the husband to satisfy the court about the reasons for divorce and now this rule is administered in some Muslim countries where the husband has to prove that the wife is unable to carry out duties of a wife by her indocility or her bad character renders the married life unhappy.

In *Asha Bibi v. Kadir Ibrahim Rowthar*<sup>[5]</sup> observed that “an arbitrary or unreasonable exercise of the rights 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.” Nikha is described as “*Misaqan Ghaliza*” which means a strong bond, how and with whom one can create this strong bond and this bond cannot be dissolved without proper reason and method. This clearly indicates that marriage is a sacred contract which cannot be broken easily without justifiable reason and in extreme emergency with proper method to be followed in breaking this special bond. The method of reconciliation is of utmost importance in

breaking of the bond which is absent in triple talaq. It is termed as an spiritual offense because this as a marriage in Muslims is considered as a sacred contract so as in any contract if there is a breach of contract then it will be termed as offense, so the same principal of breach applies in this case where there is a sacred contract and breach of that contract will automatically result to sacred offense and Allah always commanded for reconciliation between the two so as to preserve this sacred bond between them, with providing talaq in extreme emergency only.

Verse 229-230 of the Holy Quran starts with “Al-talaqum marratam” which means divorce may be pronounced twice and Marratam implies gap between the two pronouncements. This implies that command of Allah clearly signifies that there must be enough time gap between the pronouncements and with this word of Allah triple talaq does not stand in any power. In triple talaq there no time gap between the two pronouncements and is opposed to the words of Allah. It can be explained like- if I have been to some place twice that means two times with some reasonable time gap in between the two and it cannot be interpreted like I have been to that place and again to that place without any reasonable time gap and I count it twice. Triple talaq never stand according to the rule of Holy quran so must be quashed down as it is alien to the quran and laws of Allah are above of the sayings of any caliph.

**International Validity**

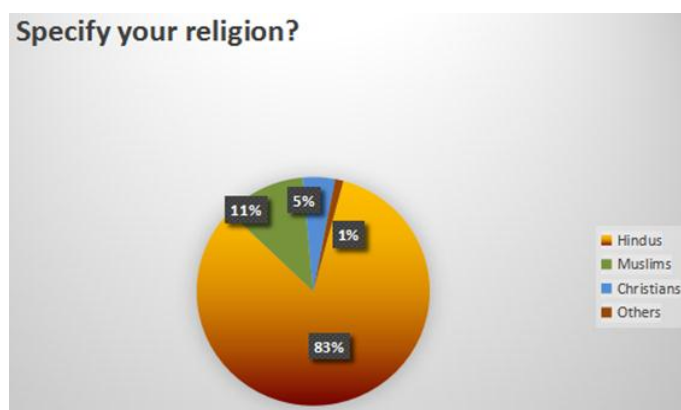
The All-India Muslim Personal Law Board is opposing the abolishment of triple talaq, which is a procedure a Muslim adopts to divorce his wife by pronouncing talaq three times in one sitting. Most recently, the AIMPLB has expressed ignorance over a petition requesting the Supreme Court to determine the constitutional validity of triple talaq. The position taken by AIMPLB is in sharp contrast and against to the dominant trend adopted worldwide. As many as 22 Muslim countries – including Pakistan and Bangladesh – and their provinces have taken measures for abolishing triple talaq either explicitly or implicitly. The list even includes Turkey, Cyprus, Tunisia, Algeria and the Malaysian state of Sarawak which have adopted secular family laws which do not recognise a divorce pronounced outside a court of law; and Iran, where triple talaq doesn’t have validity under its Shia law. It has often been argued in India that religious minorities of any country are relatively suspicious to change. They fear any alteration in their practices could lead to them losing their religious identity although this apprehension doesn’t affect the Muslims of Sri Lanka, where they constitute a little less than 10% of the population.

**The Core Issue**

Regardless of whether Sunni Muslims in India can or ought to change triple talaq has involved extraordinarily in the group for almost a century. Even the law specialists trust that the Ahsan (best) technique for separation requires the spouse to give a talaq to his better half in her tuhr, or without menses time. He can pull back the talaq amid the iddat, or holding up period, which is of around three months. Should he not do the same separation kicks in after the expiry of the iddat but the

separated couple can remarry at a future date, decisively why this talaq is called Ahsan. A talaq is called Hasan (great) when the spouse separates his better half a moment time, taking after a similar strategy received in the main occurrence. At the end of the day, the spouse is allowed to pull back the talaq before the time of iddat lapses. At the end of the day, the separated couple can remarry later on should they so wish. In any case, a talaq given the third time breaks down the marriage forthwith. There is no holding up period, no space for compromise, and the separation is unalterable. The separated couple can remarry just if the lady weds another man and who in this manner separates her. This arrangement of a mediating marriage before the triply separated couple can remarry each other is called Halala. The Halala framework is regularly misused to conquer the Islamic remedy denying couples from remarrying after they have been separated thrice. Commonly, the stratagem includes the triply separated couple going into an underhand concurrence with another man who weds the lady and separations her from there on. She is then lawfully allowed to wed the man who had separated her thrice already. It may appear to be entertaining that a lady would wish to wed the spouse who has separated her thrice, yet this is accurately where the brutality of the method which has the husband articulate talaq thrice in one sitting is brought out distinctively. Called Talaq-ul-Biddat, it is maybe as old as Islam itself. Under Talaq-ul-Biddat, the spouse includes "triple" to the word talaq, or basic rehearses three circumstances accordingly, "I am giving you talaq, I am giving you talaq, I am giving you talaq." This has an indistinguishable results from an irreversible separation and the marriage is broken up quickly. The couple can re-wed just through the arrangement of halala. Incomprehensibly, Talaq-ul-Biddat is regarded "evil however compelling." Usually, the speediest way a spouse can irreversibly separate his significant other is to articulate talaq in three progressive tuhrs, or sans menses time.

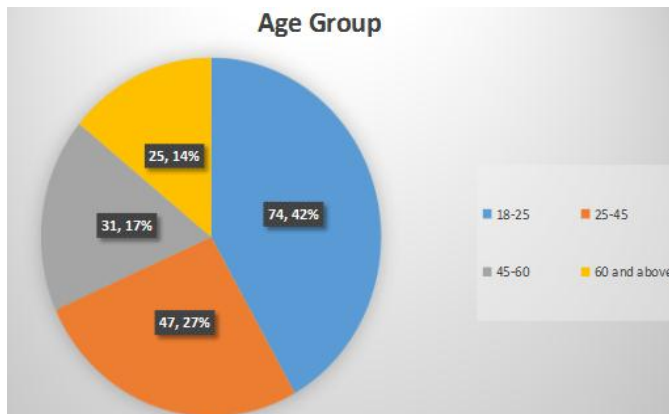
**Survey of 177 people on Application of Uniform Civil Code in India**



Author’s compilation

Fig 1

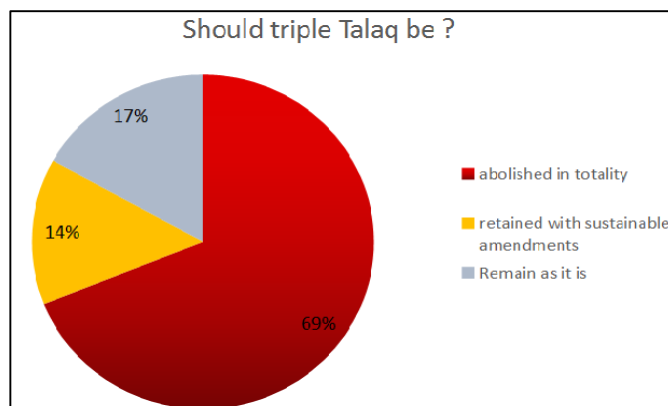
The survey was responded to by 83% (majority) of Hindus, followed by 11% of Muslims, 5% Christians and 1% others.



Author's compilation

Fig: 2

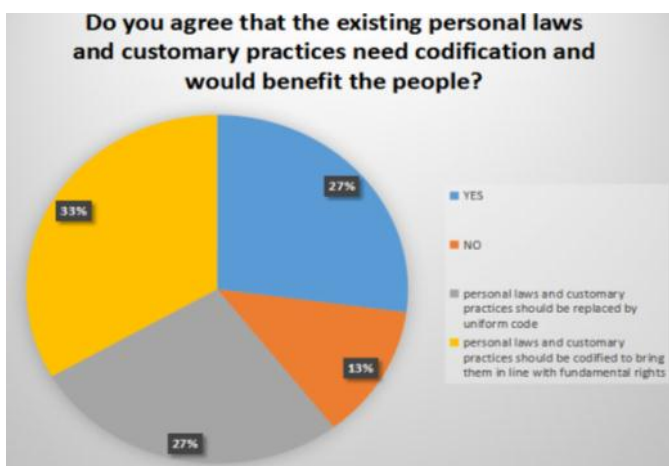
42% of the respondents were in the age bracket of 18-25 which shows that the result of the survey is the voice of the youth.



Author's compilation

Fig: 5

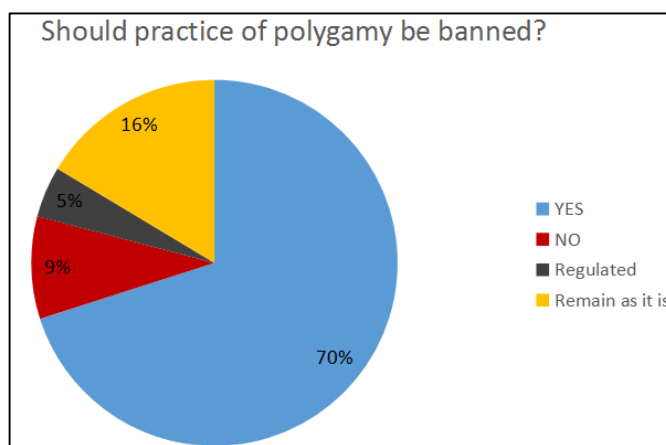
Again, a majority of 69% feel that Triple Talaq should be abolished in totality, although a smaller section of 17% still feel that it can be retained with sustainable amendments.



Author's compilation

Fig: 3

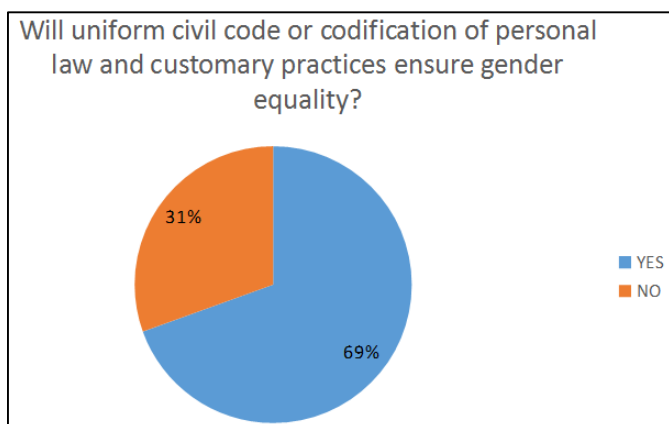
33% of respondents feel that personal laws and customary practices should be codified to bring them in line with the fundamental rights and not totally be codified.



Author's compilation

Fig: 6

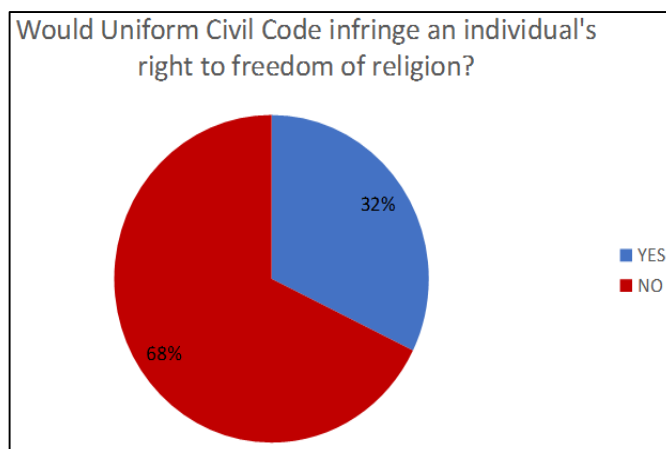
Here, a whopping majority of 70% respondents feel that Polygamy should be banned.



Author's compilation

Fig: 4

A majority of the respondents (69%) in this question, feel that a uniform code will ensure and enhance gender equality and give more power to women.



Author's compilation

Fig: 7

But, in the end, 68% people still feel that India is not ready for a Uniform Code since it will infringe an individual's right to freedom of religion, which clearly conveys the mind of the respondents without any doubt.

## Conclusion

As a conclusion it would be right to conclude that a secular India needs a uniform civil code but urgent need to force any uniform civil code on a population resistant to change is not necessary. Most people are not truly ready to adopt secular laws different from religious customs. The Uniform Civil Code can be successfully introduced only once we achieve improved levels of literacy, awareness on several socio-political issues, enlightened and legitimate discussions and increased social and religious mobility. The ultimate aim of reforming uniform civil code should be for ensuring equality, unity and integrity of the nation and justice both men and women.

While implementing the UCC throughout the country we will have to take into light the consideration of the fact that the problems of the minority religious groups should be properly addressed including insecurity, disenfranchisement, of complete loss of identity and marginalization within Indian society. It is because a uniform civil law cannot be successfully implemented until and unless it gets support and acceptance from all the concerned stakeholders and communities. At the same time while enacting the UCC only modern laws should be incorporated in it regulating the loggerheads of Triple Talaq, Polygamy and same.

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