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CASE REVIEW

Righting *Sarla Mudgal v Union of India and Others*

Jhuma Sen[1]

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Abstract This paper presents a feminist alternative judgment or a feminist (shadow) judgment to the Supreme Court of India's judgment in Sarla Mudgal v Union of India and Ors. This shadow judgment is inspired by the Feminist Judgments Projects in UK, Australia, Canada, and other places to radically reimagine the role of a judge to adjudicate differently by remaining faithful to the legal and constitutional rules that bind her. The project situates writing alternative judgments to judgments that could have been written better or written differently by using a feminist lens. In *Sarla Mudgal*, the Supreme Court was specifically called to examine the validity of a Hindu marriage between a Hindu man and a Hindu woman and the issue of bigamy by the former after contracting a second marriage with another Hindu woman by a fraudulent conversion to Islam. However, instead of putting the responsibility of bigamy on the Hindu men, the SC blamed the act on the plurality of personal laws and the lack of a uniform civil code. *Sarla Mudgal* is an example how misplaced judicial zeal ends up as Hindutva's uniform civil code stick to beat minorities with. The shadow judgment, written in the form of a separate but concurring opinion, explores whether there was any possibility of denouncing bigamy of Hindu men and holding the bigamous men responsible without ascribing their bigamy as a product of Muslim personal laws.

Keywords Feminist judgment project · Uniform civil code · Sarla mudgal · Hindu bigamy

Jhuma Sen—Assistant Professor and Assistant Director.

✉ Jhuma Sen
jsen@jgu.edu.in

[1] Jindal Global Law School, O.P. Jindal Global University, Sonipat, India

1 Introduction

The Feminist Judgments Project (FJP) has taken over[1] feminist legal scholarship across the world by storm. The project situates writing alternative judgments to judgments that *could have been* written *better* or written *differently* by using a feminist lens. The project serves as a critical pedagogical tool bridging the distance between feminist theory and praxis by radically re-imagining the role of the judge to adjudicate differently by remaining faithful to the same constitutional and legal rules that bind her. Feminist scholarship has indicated how legal rules as well as their applications by the courts continue to remain sites of embedded patriarchy with the reasonable man[2] being the standard against whom reasonable expectations are evaluated. The reasonable woman as constructed by the courts is neatly folded in the categories of 'wife', 'non-wife' and the criminal.[3] This 'jurispathic governance'[4] traditionally has been reluctant to take into account the woman litigant's experience, or the feminist notions of autonomy, equality and selfhood. Similarly, courts have seldom made judicial notice of feminist 'common knowledge'. At the site of this hetero-patriarchal judicial institution, if one were to integrate feminism with lawyering and judging, would the nature of the institution transform into a more equal one?[5] 'Feminist lawyering', in the words of feminist

[1] In 2008, number of Canadian feminist scholars, activists and lawyers set up the Women's Court of Canada, a collaborative to rewrite Supreme Court decisions on section 15, the equality clause in Canadian Charter of Rights and Freedom. The goal of this 'shadow judgment' project was to see what substantive equality could look like in judicial expression. The Canadian experiment was repeated in Australia and UK. Thirty-one feminist legal academics rewrote legal decisions in Australia from a feminist perspective. Fifty academics, legal practitioners and activists rewrote twenty-three significant cases in English law in a similar vein. There have been similar shadow judgement writing projects by feminist law professors in USA. In Ireland and Northern Ireland, the methodology has taken into account the peculiar Irish and Northern Irish challenges and aspirations, and consequently themes of collective identity have interacted and intersected with the theme of women's experience with law. *See*, for example, FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al., eds. 2010); AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas, et al., eds. 2014); Diana Majury, *Introducing the Women's Court of Canada*, 18 CAN. J. WOMEN & L. 1 (2006).

[2] For example, *see* Naomi R. Cahn, *Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1991).

[3] Usha Ramanathan, *Reasonable Man, Reasonable Woman and Reasonable Expectations*, *in* ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR (Amita Dhanda & Archana Parashar, 1999).

[4] Robert M. Cover, *Nomos and Narrative,* 97 HARV. L. REV. 4 (1983).

[5] At the interface of feminism and power, the objective of liberal feminism was to get women in public institutions but there was little discussion on what happened after women 'got' there. Would the nature of the institution necessarily be transformed by the presence of women? This essentialist strand has been critiqued by feminist scholars since the presumption that only women can transform these institutions presupposes the existence of a universal quality of womanness shared only by women and blurs that presumes 'woman' to be a homogenized category without any difference. The presumption also overlooks the possibilities of institutions transforming women. For example, women as new entrants to hetero-patriarchal institutions are least likely to disturb the status quo to prove their legitimacy and worth. Feminist scholars have therefore argued that it is important to frame this in the language of feminism and power instead of women and power. *See* Rosemary Hunter, *Can Feminist Judges Make a Difference?* 15 INT'L. J. LEGAL PROF. 7–36 (2008).

scholars,[6] imagines the capacity to 'inform feminism' and 'transform lawyering'. Feminist litigation, according to them, involves feminist lawyering on feminist issues, with the recognition that there are multiple and often competing 'feminist positions'.[7] While feminist judging is based on this model of feminist lawyering, the feminist judgment project serves a pedagogical purpose as well; the emancipatory potential[8] of the feminist judgment project lies in the fact that the 'alternative judgments' or 'missing judgments' or 'dissenting opinions' reveal the extent to which cases could (and should) have been decided while remaining faithful to the legal and constitutional limitations. At the heart of the project is an attempt to engage in 'real-world' judgment writing exercise and move away from a detached exercise in feminist academic critique of judicial decisions. Since law is not merely a coercive force that operates in a gendered real world, but is also capable of producing a discourse that constructs the gendered narrative of that real world, the feminist judgment project serves as a powerful intervention to disrupt the latter.[9]

To imagine the possibility of a feminist judgment project emerging from the troubled relationship[10] of feminist politics with law in India partially serves this very goal of disruption especially since feminist analysis[11] of juridical

[6] *See* Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L. J. 1 (1991). Cahn critiques and builds on the dialogue between Ruth Colker and Sally Burns in Harvard Women's Law Journal about the meaning of feminist litigation and emphasizes that:

> feminist lawyering involves a process that recognizes power in legal relationships-of women to the law, and of attorneys to their clients. It is committed to identifying and overcoming such traditionally unrecognized forms of exclusion as sexual harassment, woman abuse, and rape. Naming these experiences requires the use of practical reasoning, a method that works toward resolutions by drawing on both the lawyer's and the client's experience of exclusion.

[7] *See* Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115 (1989).

[8] For example, the Women's Court of Canada in these parallel judgments came to radically different conclusions from the original judgments. For example, the court awarded a full Canada Pension Plan survivor benefits to a young widow when her husband died; a businesswoman was allowed to claim childcare costs as a business expense and despite budgetary constraints pay equity payments were maintained for government workers in Newfoundland. *See* Diane Peters, *The Women's Court of Canada*¸ UNIV. AFF., Sept 12, 2011, http://www.universityaffairs.ca/features/feature-article/the-womens-court-of-canada/.

[9] *See* Hunter et al. *supra* note 1.

[10] Feminist critique of law as a strategy has developed considerably in the last few decades. The women's movement in India has engaged with law substantially in the 1980s to address violence against woman, resulting in several legislative changes, but implementation of these laws remained conservative, uneven and partial leading to the inevitable conclusion that the law is severely limited as a transformative tool, especially in postcolonial societies, where the law was a product of the 'exigencies of colonial administration' and therefore does not come with the same emancipatory potential. *See* NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).

[11] *See*, *for example*, PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA (2014).

discourses has established amply how the judiciary[12] remains complicit in producing and perpetuating this narrative. The Supreme Court of India (SC),[13] even after it became SC of Indians,[14] has continued to categorize women in varying moral hierarchies of decency, chastity, womanly propriety in binaries of the good woman and the bad, of the wife and the 'concubine',[15] of the selfless wife and the 'home-breaking' *unscrupulous* wife,[16] the 'tradition-bound Indian

[12] In fact, judiciary, if one is to follow Robert Dahl's arguments is and never has been a counter-majoritarian institution. Judiciary, like legislature, tends to reflect the majoritarian aspirations and politics. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279–95 (1957). For a more contemporary discussion on the alignment of the priority of the court with the majoritarian (economic) culture, *see* MAYUR SURESH & SIDDHARTH NARRAIN, THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA (2014).

[13] It might also be useful here to glance at the notorious lack of gender diversity on the bench in India to understand the hypermasculine nature of the SC. In the sixty-six years since its establishment, the SC has appointed only six women judges, with the first appointment made in 1989. The HCs display an equally skewed ratio. For a note on under representation of women in the judiciary and an argument for gender diversity on the bench, *see* Latika Vashist, *Under-Representation of Women in the Judiciary: An Argument for Gender Diversity on the Bench*, INDIA L. NEWS, December 1, 2013, http://indialawnews.org/2013/12/01/under-representation-of-women-in-the-judiciary-an-argument-for-gender-diversity-on-the-bench/. While no discernible trend can be observed to make a case for more women on bench for feminist judgments, it might be useful to look at some of the 'feminist' judgments delivered by women judges. For example, Justice Sujata Manohar, the second woman judge of the SC, was one of the members on the bench in *Vishakha* which recognized sexual harassment at workplace as an issue of women's right to equality and non-discrimination at the workplace and in the absence of domestic legislation, looked at international law and outlined a policy to redress and prevent the same. Justice Ruma Pal, the third woman judge of the SC, delivered judgments in *A. Jayachandra* and *Vinita Saxena*, defining mental cruelty in marriage and cruelty as a ground for divorce. Similarly Justice Ranjana Desai was part of the bench that approved guidelines for the prevention and redressal of sexual harassment of women applicable to the SC complex and the lawyers chambers.

[14] *See* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985). Baxi famously introduced the SC *doing* social action litigation as the SC of Indians, a transformation he argued, which was largely characterized by 'judicial populism' of a post Emergency era institution redeeming itself.

[15] In *Indra Sarma v. V.K.V Sarma*, the SC was concerned with the question whether a 'live-in relationship' would amount to a 'relationship in the nature of marriage' falling within the meaning of Section 2(f) of the Protection of Women from Domestic Violence Act 2005 (PWDVA). The SC, while outlining eight indicators of relationships in the nature of marriage rejected the claims arising out of 18 years of cohabitation on the ground that the woman was aware of the pre-existing marriage of the man and therefore "could not have entered into a live-in relationship in the nature of marriage". It went on to create a false distinction between live-in relationships and relationships in the nature of marriage on a moral reasoning that all live-in relationships are not relationships in the nature of marriage because a woman, knowingly in a relationship with a married man deserves no legal protection. She has the status of a 'concubine' or a 'mistress'. Another SC ruling, few years before *Indra Sarma* denied maintenance to women who are in marriage-like relationships with married men on a similar moral musing. *See, Veluswamy v Patchiammal* (2010) 10 SCC 469.

[16] The litigious Indian 'wife' is variously projected in popular culture, men's rights groups and mass media as an 'unscrupulous' woman 'fabricating stories' to harass her husband by 'misusing' the law. The judicial language too has absorbed discourses, languages and rhetorics emerging from the outside "messy" world and ignored the assemblage of backlash politics and legal manoeuvres that shape the rhetoric of misuse. The two most notable cases in the SC that advanced the 'misuse' claim are *Sushil Kumar Sharma vs Union of India* and *Preeti Gupta vs State of Jharkhand*, both framing the judicial discourse on 498A in the language of 'legal terrorism' where 'exaggerated versions of the incident' and 'tendency of over implication' by the 'unscrupulous' wife potentially allowed her to 'wreck personal

woman'[17] and the gold-digging[18] 'western counterpart'. The High Courts (HC) have followed suit and (in)famously dictated that introducing constitutional law within 'home' is like introducing a bull in a China Shop and that in the privacy of the home and the married life neither Article 21 nor Article 14 has any place[19]; or that the wife should be like *Sita* and follow her husband everywhere.[20] Almost seven decades of constitutional history have resulted in the failure of the judiciary to articulate with clarity a jurisprudence of substantive equality. Article 15(3) has been consigned practically to a position of non-justiciable directive principle, and the interrelationship between Article 15 and 15(3) has not been adequately addressed.[21]

2 The methodology of writing judgments and the methodology of writing feminist judgments

The site of *righting* judgments therefore contains not only the judicial but the material and discursive world under the shadow of law to be explored and excavated. Writing *Sarla Mudgal v Union of India*[22] is firmly located here as an exercise that seeks to interrogate the (post)colonial encounters of personal law and

Footnote 16 continued
vendetta or unleash harassment against the husband. Both judgments claimed that 'many instances' have come to light where the 'complaints are not bona fide and have been filed with oblique motive' and such instances, the SC noted was 'a matter of common knowledge'. However, a preliminary engagement with some of the SC's judgments show that the language of 'misuse' is seldom anchored to any data and often tends to shift the category of facts *not proved* to the category of *disproved*, thus marking a case of domestic violence as potentially fraudulent.

[17] In the context of criminal law, more specifically laws on sexual violence, the fact that the criminal justice system has repeatedly failed to address the experience of the woman who comes in contact with it raises serious questions about meaning and scope of justice for the woman. The 'tradition bound Indian woman' very easily then positions herself between law's guarantees and its threats and *becomes* the morally 'loose' tribal girl who consents to sexual intercourse in police custody (Mathura) or the 'lower caste' 'lying' woman who *cannot* be raped by upper caste respectable men (as alleged by perpetrators against the victim).

[18] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (1983) 3 S.C.C. 217.

[19] A.I.R. 1984 Delhi 66.

[20] Bombay HC observed that wife should be like Sita and follow her husband everywhere in a divorce petition filed by a man on the ground that his wife was unwilling to relocate to his place of work. *See*, *A Wife Should be Like Goddess Sita: Bombay HC*, TIMES OF INDIA, May 8, 2012, http://timesofindia.indiatimes.com/city/mumbai/A-wife-should-be-like-goddess-Sita-Bombay-HC/articleshow/13054421.cms.

[21] For a longer discussion on this, *see* Indira Jaising, *Gender Justice and the Supreme Court*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, (Ashok H. Desai et al., eds., 2000).

[22] (1995) 3 S.C.C. 635.

the uniform civil code[23] and the consolidation of communal[24] undertones in judicial decisions pretending to 'modernize' and 'civilize' the Muslim community under the shadow of *Babri* demolition.[25]

The writing process is, however, severely limited by several factors characteristic of the project. First, the methodology is limited by its temporality. Legal and judicial developments subsequent to the original decision are not used. It is assumed that these writing processes are undertaken by the feminist judge as an additional, concurring and separate, or dissenting opinion on the date of the judgment. This means that plenty of useful authorities, decisions, developments could not be used by reason of this temporal limitation. It is important to note that this rationale of using contemporary materials is to primarily demonstrate that *even at the time of writing*, the original judgment could have been decided *differently*. This argument obviously disappears if the feminist judge makes use of subsequent materials. The point of the FJP methodology is to show that the case could have been decided differently at the time it was decided. The benefit of hindsight is therefore intentionally missing. Second, the feminist judge is confined only to the issues raised by the parties in the appeal, and the issues as well as the non-issues discussed in the original judgment. The third is a procedural concern of being the (invisible) third judge on the bench, where rules and conventions of the court dictate that the bench should be a division bench (two judges). This procedural gap has been ignored at present, but which needs to be thought to and explained in future feminist judgment writing endeavours. Last, is the more stylistic issue of writing and the difference between an academic writing and a judicial writing. Judges and academics have different ways of making truth claims.[26] Judges and academics also have different referencing practices, and while an academic writing is footnoted moderately to heavily, a judgment conventionally does not contain footnotes. Art of writing judgments, as many judges and jurists have indicated, is not one which may be described in the form of a set of rules. As early as 1925, the Civil Justice Committee (Rankin Committee) presided over by Justice George Rankin of Calcutta HC examined this question and opined that judgments in India were usually too long and too laboured. But the Committee also noted that no exact instructions can be given as to how a judgment should be prepared. The individuality of the judge must

[23] The women's movement in India has engaged with UCC in several ways. As early as 1937, the All India Women's Conference demanded a uniform law for all communities. Till 1980, this demand was articulated by a significant number of women. The women's movement by the middle of the 1990s, however assimilated a number of positions (including an outright rejection of UCC) and consensus, was built that a campaign for gender just laws will be done at three levels—reform within personal laws, legislating on areas which are not covered by secular or personal laws, setting up a 'comprehensive gender-just framework' covering 'public' domains as well. For a comprehensive summary of the UCC debate as late as 2014, *see* Nivedita Menon, *Uniform Civil Code – The Women's Movement Perspective*¸ KAFILA, Oct.1, 2014, http://kafila.org/2014/10/01/uniform-civil-code-state-of-the-debate-in-2014/.

[24] For an elaborate discussion, *see* FLAVIA AGNES, LAW AND GENDER EQUALITY 111–123 (1999).

[25] Babri Masjid, a sixteenth-century mosque in Ayodhya, Uttar Pradesh, was demolished on 6 December 1992 by Hindu Kar Sevaks, in an attempt to reclaim the mythological birthplace (Ram Janmabhoomi) of Hindu God, Ram. The demolition was carefully planned by an assortment of Hindu Right including Bharatiya Janata Party (BJP), Vishwa Hindu Parishad (VHP) and Rashtriya Swayamsevak Sangh (RSS), and the riots that followed were 'indicators of aggressive majoritarianism'.

[26] *See* Hunter et al. *supra* note 1.

be given the advantage. Judges, however, have noted certain stylistic guidelines to be followed while writing judgments.[27] The methodology of FJP therefore has two limbs—the methodology of writing judgments and the methodology of writing feminist judgments.

3 Misplaced judicial zeal

In *Sarla Mudgal,* four women had sued their husbands for bigamy after they converted to Islam in order to marry again without divorcing them first. Here, the SC was not called upon to discuss Muslim law or the rights of Muslim women in India. The SC was specifically called to examine the validity of a Hindu marriage between a Hindu man and a Hindu woman and the issue of bigamy by the former after contracting a second marriage with another Hindu woman by a fraudulent conversion to Islam. The SC held that the second marriages of the Hindu men even after fraudulent conversion violated Hindu personal law and were therefore rendered invalid. The SC also noted that the conversions were made only to escape the consequences of bigamy, thus setting out the fraudulent nature of the conversions. However, instead of putting the responsibility of bigamy on the Hindu men, the SC blamed the act on the plurality of personal laws and the lack of a uniform civil code. The SC seemed to suggest that the otherwise 'monogamous' Hindu men were tempted to enter into bigamous marriages under the shelter of Muslim personal laws, and therefore, with the establishment of a uniform civil code, Hindu marriages would be more stable and infallible by curbing bigamous tendencies of Hindu men. In doing so, the SC ignored the prevailing judicial attitude[28] towards bigamy by Hindu men, especially by the appellate courts and deflected the issue of Hindu monogamy which could have been subjected to an intense scrutiny. More dangerously, the SC set out to draw the parameters of a 'true

[27] For example, that a judgment should be based strictly on evidence on record, and the judge should not go out of the record and base his findings on matters within his personal knowledge and conjecture. Language of the judgment should be sober and temperate and in no case satirical or factious. Judges should see that their pronouncements are judicial in nature and do not normally depart from sobriety, moderation and reserve. They should refrain from being sarcastic in their judgments. The language of the judgments should be entirely devoid of anything approaching factiousness. It is not obligatory for the judge to discuss purely hypothetical questions which may never arise. He should as a matter of fact not give any finding on points which are not in issue. *See*, SHAMBHU DAYAL SINGH, JUDGMENTS AND HOW TO WRITE THEM (1968).

[28] *See Bhaurao Lokhande v State of Maharashtra*, A.I.R. 1965 S.C. 1564; *Kanwal Ram & Ors v Himachal Pradesh Administration*, A.I.R. 1966 S.C. 614; *Priya Bala Ghosh v Suresh Chandra Ghosh*, A.I.R. 1971 S.C. 1153. An examination of these judgments reveal that while lower courts have convicted Hindu males for bigamy, the SC has shown a more lenient attitude and acquitted them by demanding proof of essential ceremonies as a precondition for conviction, even when the husband and wife admit to the second marriage and cohabitation. In doing so, the court has ignored the pluralistic tendency of the Hindu society; the upper caste Brahmanical rituals served as the gold standard against which all other rituals and ceremonies had to be tested to fulfil the judicial standards of acceptable proof of bigamy.

Indian' identity, modelled on the dominant majority community,[29] the 'monogamous' Hindu. The SC through Justice Kuldip Singh[30] precariously used the largely Hindu Right rhetoric[31] that those who 'chose' to remain in India (implying Muslims since Parsees, Christians and other communities did not have a 'choice' in that matter) must give way to a homogenizing civil code for the sake of national integrity.

> The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India……Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation - Indian nation - and no community could claim to remain a separate entity on the basis of religion…..The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.

[29] *For example*, Werner Menski explains this process by articulating that the frequent argument now is that Hindu concepts should prevail in India because they constitute the intellectual property of the demographic majority. One can see how easily this line of reasoning turns the arguments in favour of a Uniform Civil Code towards attempts to Hinduise the nation and to simply get rid of Muslim and Christian personal laws. *See* Werner Menski, *Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9 GERMAN L. J. 211 (2008). Also *see*, Paula Richman & Geetha, *A View from the South*, *in* THE CRISIS OF SECULARISM IN INDIA 66–88 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan, eds., 2006).

[30] It is perhaps also useful to note an observation made by H.M. Seervai on the judicial frenzy of Justice Singh that purportedly eclipsed a *dissent* by Justice Sahai. Justice Kuldip Singh, however, gratuitously raised the question of a common civil code on the specious ground that the absence of such a code induced Hindu husbands to convert to Islam so that they could marry one or more wives although their wives were alive and had not been divorced, because Mohamedan law permitted a Muslim to marry four wives at a time. He further held that a common civil code did not violate the freedom of religion guaranteed by Articles 25, 26 and 27 of our Constitution. On this point, Justice Sahai *dissented* and referred to SC decisions which had held that religion was not merely a matter of faith and belief, but included rituals, ceremonies and prayers in temples, mosques, churches, etc. Justice Kuldip Singh praised Justice Sahai's 'concurring' judgment. But on the question of whether a common civil code would violate freedom of religion, Justice Sahai did not concur. Both judges inadvertently overlooked Article 145(5) which provides that no judgment shall be delivered in the SC except with the concurrence of a majority of judges hearing the case. Since the two judges differed as aforesaid, they could deliver no judgment at all on the point whether a common code did or did not violate the freedom of religion.

[31] BRENDA COSSMAN & RATNA KAPUR, SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW 33 (1998).

Sarla Mudgal is an example how misplaced judicial zeal ends up as Hindutva's uniform civil code stick to beat minorities with.[32] The judgment is routinely cited by lawmakers, judiciary and media alike to impress the need to have a uniform civil code. That said, I have deliberately tried to avoid a discussion on personal laws and religion i.e. if personal laws remain protected as faith and conscience under the umbrella of 'religion' when the state enforces them by sovereign will. Instead, I have responded to that 'non-issue' as I have referred to the discussion on uniform civil code as briefly as possible only to establish that an alternate view is possible. This discussion reflects more as a dialogue with the opinion of Justice Singh and has little to do with anything else.

Was there a possibility of denouncing bigamy of Hindu men and holding the bigamous men responsible without ascribing their bigamy as a product of Muslim personal laws? Was the bench obligated to frame monogamy in the language of national integrity? Wouldn't judicial propriety demand a disassociation from the rhetoric of 'nation' (one or many) since the latter is not a legal category anywhere and is subject to many interpretations? Was the SC justified in recommending uniform civil code as the cure to bigamy of Hindu men and thereby doing away with the regime of personal legal system? When the SC recommended[33] the same and demanded that the Government of India file an affidavit indicating steps it had taken in this regard (uniform civil code), was it not trespassing into the domain of the legislature? The following is exploring these complications, constraints and possibilities.[34]

4 Separate concurring judgment: righting in *Sarala Mudgal* case

A batch of four petitions under Article 32 of the Constitution of India has come before us on the issue of polygamy of Hindu men after conversion to Islam. The immediate issues for consideration before us are that of bigamy of Hindu men and the validity of their marriage contracted prior to conversion to Islam, validity of marriage *qua* the first wife who continues to remain a Hindu when the first marriage hasn't been dissolved and whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC)? I have had the privilege

[32] *See* A.G. Noorani, *Hindutva's Stick*, FRONTLINE, Nov. 27, 2015, http://www.frontline.in/the-nation/hindutvas-stick/article7866171.ece.

[33] However, by oral observation, a Division Bench comprising Justice Kuldip Singh and Saghir Ahmad, shortly after the judgment was pronounced, indicated that the directions given by the Division Bench comprising Justice Kuldip Singh and Justice R.M. Sahai in its judgment in *Sarla Mudgal v. Union of India*, requesting through the Prime Minister that the Government of India to have a fresh look at Art. 44 of the Constitution and 'endeavour to secure for the citizens a uniform Civil Code throughout the territory of India' and further directing the Government to file an affidavit before it explaining steps taken and efforts made and suggesting the measures that could have been taken in this regards were in the nature of obiter observations and hence not binding on the government.

[34] The alternate judgments are written as 'missing' judgments, or dissenting or separate but concurring opinions. I have chosen to (re)write *Sarla Mudgal* as a separate but concurring opinion, simply because the myths perpetuated by the 'concurring' judgment of Justice Kuldip Singh and Justice Sahai needed to be dismantled.

of reading the drafts of the judgments of Kuldip Singh J, and R.M. Sahai, J and I agree with the consensus in the per curiam opinions rendered by the bench affirming that the second marriage would be void in terms of the ingredients of Section 494 IPC and the apostate husband would be guilty of the latter. However, I would like to take this opportunity to comment on some observations that have come from my Learned brother Judges and to that extent disagree on judicial reasoning alone.

4.1 Facts

Petitioner 1 is the President of a registered society called Kalyani, an organization working for the welfare of women in distress and needy families. The other petitioners are Hindu women who have been affected variously by their Hindu husbands who fraudulently embraced Islam only for the purpose of facilitating the second marriage. For example, Petitioner 2, Meena Mathur, was married to one Jitender Mathur on 27 February 1978 and had three children out of the wedlock. Ten years later, the petitioner learnt that her husband had solemnized a second marriage with one Sunita Narula (neé Fathima) by converting themselves into Islam and had a son with her. Sunita in 1990 also filed a writ petition (W.P. 347/1990) making a startling submission, that Jitendar had 'reverted' back to Hinduism and agreed to maintain her first wife and children. In this cycle of conversion, Sunita was left as a Muslim woman without any protection under any personal law. Another petitioner Geeta Rani (W.P. No 424/1992) had a very similar experience when her abusive husband Pradeep Kumar, three years after their marriage, entered into a second marriage with a woman named Deepa after converting into Islam, the latter facilitating the second marriage. Yet another petitioner is Sushmita Ghosh, who encountered a fate similar to Geeta and Meena. Her husband G.C. Ghosh in 1992, almost eight years after their conjugal life, expressed an intention to part with her insisting that they file a petition to divorce by mutual consent. When Geeta refused, her husband informed her that he had converted to Islam and intended to marry one Vinita Gupta. Geeta prayed before the court that her husband be restrained from entering into a second marriage. A perusal of the contents of these writ petitions make it amply clear that in each of these cases, the Hindu man/husband married to a Hindu woman/wife deceptively and fraudulently converted to Islam to facilitate a second marriage, which is otherwise illegal and subject to prosecution under Section 494 of the Indian Penal Code (IPC). The conversions, it appears, have taken place solely with the purpose of circumventing the provisions of Section 494 IPC.

4.2 Issues

My learned brother judge has elaborated with great detail the judicial narrative on the subsistence/dissolution of Hindu marriage under Hindu Personal Law prior codification in 1955 and established that a Hindu marriage continued to survive/subsist even after one of the spouses converted to Islam, since there was no automatic dissolution of marriage.

The relevant laws for application and examination here are Hindu Marriage Act 1955 (the Act) and Section 494[35] of the Indian Penal Code (IPC).

Section 4 of the Act spells out the 'overriding effect of the Act' to reiterate that 'any custom of usage as part of that law in force immediately before the commencement' of the Act ceases to have any effect with reference to any matter for which provision is made in this Act. Section 5[36] stresses the condition of monogamy as a condition for a valid Hindu marriage. Section 17 affirms this by enumerating the void status of a marriage when either party had a spouse living and prescribes punishment in accordance with Sections 494 and 495 of the IPC. The Act is categorical in its insistence of monogamy for the subsistence of a valid marriage.

A marriage solemnized before or after the commencement of the Act can, however, only be dissolved by a decree of divorce on any of the grounds enumerated in *Section 13* of the Act, including the apostasy. Section 13 (1) (ii)[37] is therefore a *ground* available for divorce to parties who have already solemnized the marriage. Divorced persons may marry again subject to the constraints of Section 15 of the Act.[38] The first marriage of an apostate does not automatically dissolve unless a dissolution under the statute is prayed for. The second marriage of the apostate will be illegal and liable to be prosecuted for bigamy under Section 494 of IPC.

Prior to the Act, Hindu men were immune from criminal consequences of bigamy under Section 494. After 1955, a Hindu woman, who has her marriage solemnized with a Hindu man under the Act, can seek dissolution of marriage on the ground of bigamy and is also eligible to prosecute the husband under the penal law, apostasy notwithstanding. Under the personal laws of Muslim, a Muslim woman can also dissolve a marriage on the ground of bigamy under the dissolution of Muslim Marriages Act subject to inequitable treatment.[39] The criminal relief is, however, available only to the Hindu wife.

[35] **§ 494. Marrying again during lifetime of husband or wife**. —Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[36] **5 Conditions for a Hindu marriage.** A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

1. neither party has a spouse living at the time of the marriage;

……..

[37] **§ 13 Divorce**. (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

……..

2. has ceased to be a Hindu by conversion to another religion;

[38] **§ 15 Divorced persons when may marry again.** When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

[39] **§ 2. Grounds for decree for dissolution of marriage**. — A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: — A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: —

(viii) that the husband treats her with cruelty, that is to say,

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

The necessary ingredients of section 494 are:

1. Having a husband or wife living
2. Marriage
3. When such marriage is void
4. By reason of its taking place during the life of such husband or wife.

Therefore within the broader meaning of Section 494 IPC, I concur with my learned brother judges' findings that the second marriage of the apostate husband is void due to the subsistence of the first marriage, which has not been dissolved by conversion of the husband. The four ingredients of 494 IPC are also met and the apostate husbands are liable to be prosecuted. My concurrence is also strengthened by the fact that several bigamy decisions[40] by Indian courts have also held that a Hindu (or a Christian) who converts to Islam to remarry is not exercising his free conscience but converts fraudulently. I concur with the findings of the bench on the application of section 494 read with the relevant provisions of the Hindu Marriage Act to establish the validity of the marriages qua the first wife and to ascertain the satisfaction of the ingredients of Section 494 IPC.

4.3 Bigamy of Hindu men

I, however, disagree with the wisdom of my learned brother Judge when he indicates that for Hindus, monogamy has been a norm after the codification of Hindu laws and the only breach of this norm happens by conversion to Islam, where the otherwise monogamous Hindu man succumbs to the temptation of bigamy that Islam offers him. In my view, the issue of Hindu bigamy needs further scrutiny before a conclusion of that nature may be drawn.

Monogamy was introduced to Hindus through the Hindu Marriage Act 1955. The Report of the Committee on the Status of Women, *Towards Equality*, undertaken by the Central Government, however, indicates that the rate of polygamous marriages among Hindus, Muslims and tribal for the period 1951–1960 is more amongst Hindus (5.06 %) than Muslims (4.31 %). The nature of reform in Hindu personal laws is responsible for this statistics. Hindu marriage was transformed from an ancient Vedic sacrament to a modern dissoluble contract. The Hindu Marriage Act, however, did not require compulsory registration of marriages, unlike marriages contracted under other personal laws and all rituals inasmuch as they resembled the brahminised rituals of *homa* and *saptapadi* qualified as valid ritual to solemnize the marriage. While the Act recognized all customary forms of marriage and divorce, courts recognized rituals and ceremonies by a brahmanical standard. Only those ceremonies that resembled the rituals of saptapadi, vivaha homa, etc. have unfortunately fulfilled the judicial expectations to prove contracting a second marriage even when the parties to the second marriage acknowledge the existence of the same.

[40] *In Re Nagarassayya*, 1988 Mat. L.R. 123; *B. Chandra Manakiamma* 1988 A.P. L.J. 1848.

For example, this Court in *Bhaurao Lokhande v State of Maharashtra* AIR 1965 SC 1564 ruled that

> The two ceremonies essential to the validity of a Hindu marriage, i.e. invocation before the sacred fire and sapatapadi, are also a requisite part of a 'Gandharva' marriage unless it is shown that some modification of these ceremonies has been introduced by custom in any particular community or caste.

This Court acquitted the husband on the ground that essential ceremonies of a valid Hindu marriage were not performed in the second marriage. The court also noted that

> The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

The Bhaurao principle has been followed by this Court later in Kanwal Ram & Ors v. the H.P. Administration AIR 1966 SC 614, Priya Bala Ghosh v. Suresh Chandra Ghosh AIR 1971 SC 1153, etc., reiterating that proof of *essential ceremonies* is a precondition for conviction under section 494 IPC. The demand of proof of essential ceremonies by the apex court for prosecution under Section 494 IPC coupled with the ambiguity of rituals under the Act has created the lacunae for errant Hindu men. I therefore disagree that with my learned brother judge that 'there is an open inducement to a Hindu husband, who wants to enter into a second marriage, to become a Muslim.' In my view this lacuna of the Act together with the judicial requirement of essential ceremonies, has continued to serve as an 'inducement'. The illusory nature of Hindu marriage with its validity constantly depending upon observance of traditional upper caste rituals is what needs to be comprehended here to prevent Hindu men from being induced into bigamous marriages and suitable steps must be taken by the legislature to fill this lacuna by requiring compulsory registration of marriages under the Act. In my opinion, this may be one step in the right direction.

4.4 Non-issue: Article 44 and the relationship between personal laws and religion

My attention has also been drawn to, what I perceive with my utmost respect for Justice Singh, an unnecessary and undignified allusion to the Uniform Civil Code as Aladdin's genie curing the evil of fraudulent conversions by Hindu men, circumventing the penal consequences of bigamy. The Uniform Civil Code is a creation of Article 44, a Directive Principle of the Indian Constitution and sits between the the right to religious freedom and cultural plurality envisaged by Articles 25 to 28 and right to equality and non-discrimination (Articles 14 and 15). While equality, non-discrimination and religious freedom are justiciable, Article 44 desiring a uniform civil code is a non-justiciable aspect of the Constitution. I tend to agree with my learned colleague Justice Sahai when he distances his views from my

other learned colleague Justice Singh on the relationship between personal laws and religion. My learned brother Kuldip Singh, J. unequivocally stated that:

> Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus alongwith Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India.

Justice Sahai has respectfully disagreed with the above view and rightly so, in my opinion when he stated:

> What is religion? Any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely, practice and propagate religion. Reading and reciting holy scriptures, for instance, Ramayana or Quran or Bible or Guru Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara.
>
> Marriage, inheritance, divorce, conversion are as much religious in nature and content as any other belief or faith. Going round the fire seven rounds or giving consent before Qazi are as much matter of faith and conscience as the worship itself.

This view has been reiterated by this court on a number of occasions in the past asserting that personal laws are not merely an extension of religious practices, but on many occasions, essential to and part of such religious practices. For example, as early as 1954, in *Commissioner of Hindu Religious Endowments v Sri Lakshmindra Thirtha Swamiar,*[41] this court explained that 'matters of religion' in Art. 26 embraced not merely matters of doctrine and belief pertaining to that religion, but also the practice of, or 'to put it in terms of Hindu theology, not merely its Gnana but also its Bhakti and Karma Kandas.' This court emphasized:

> A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a

[41] 1954 S.C.R. 1005.

> doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression " practice of religion " in Article 25.

This view is the settled position of this court in my opinion, and therefore, if one is to debate the desirability of a uniform civil code, the demand for the same cannot come by a faux distinction of personal laws and religion.

A constitutional challenge to personal laws is more appropriately tenable on the 'essential practice doctrine' and less on a demand for UCC. *Commissioner of Hindu Religious Endowments* was quoted by the Allahabad High Court in Ram Prasad Seth v State of UP. The court was asked to decide whether government regulations prohibiting bigamy violated Article 25(1). It was argued that sons performed special religious duties in the Hindu religion; therefore, in case there was no son from the first marriage, bigamy was required to be practiced in Hindu religion. The court held that

> The act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion nor can it be regarded as practising or professing or propagating Hindu religion which is protected under Article 25 of the Constitution. Even if bigamy be regarded as an integral part of Hindu religion the impugned rule is protected under Article 25(b) of the Constitution.

I may also add that scholars predominantly perceive Islamic jurisprudence as an example of fusion of law and religion. For example, James Bryce in *Studies in History and Jurisprudence*[42] reiterates that in Islam

> Law is Religion and Religion is Law, because both have the same source and equal authority being both contained in the same divine revelation.

True to this view, this Court in *The Controller of Estate Duty vs Haji Abdul Sattar Sait & Others,*[43] while holding that in cases of conversion of a caste or community the converts might retain a part of their original personal law according to the hitherto held habits, traditions and the surroundings has noted

> According to Mohamedan Law a person converting to Mohamedanism changes not only his religion but also his personal law.

I am therefore inclined to agree with my learned colleague Justice Sahai, when he reiterates this position of the court. Uniform Civil Code as envisaged by Article 44 is an aspirational prescription in the domain of the legislature. The judiciary must

[42] VISCOUNT JAMES BRYCE, 2 STUDIES IN HISTORY AND JURISPRUDENCE 237 (1901); SAID RAMADAU, ISLAMIC LAW, ITS SCOPE AND EQUITY 15–16, 27–30, 42–47 (1961).

[43] 1973 S.C.R. (1) 231.

not embark upon this exercise of demanding uniformity of personal laws by wearing the mantle of the legislator.

However, as emphasized earlier, this batch of petitions in my humble opinion is not about rolling the ball of UCC with a (misplaced) understanding that the magic wand of 'uniform' civil code will do away with the lacuna inherent in the Hindu Marriage Act. I also disagree with the learned Judge when he implies that uniform codification of laws will achieve national integration. In my view, courts have a responsibility to base their decision on secular considerations by remaining true to the mandate of the Constitution and consciously steer away from notions of authentic Indian identity, which may be subject to sectarian politics. If anything, the courts have a duty to prevent such occurrence.

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