

## UNIFORM CIVIL CODE AND CONFLICTS OF PERSONAL LAWS

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### Abstract

*Uniform Civil Code is one of the most progressive mandates of the Indian Constitution. The term 'Uniform Civil Code' connotes the idea of same set of civil rules for the citizens irrespective of their religion and caste. Directive Principles of State Policy connote personal law contained in Article 44 stipulates that: "The State shall endeavor to secure for citizens a uniform civil code throughout the territory of India." However, the bill could not see light of the day due to strong oppositions from religious minorities, especially Muslims and a certain section of Hindu. After 70 years of Independence, UCC stands as a distant dream leading to various ambiguities in the interpretation of personal laws. Since, personal laws are an integral part of every religion, modification or abrogation of personal laws will have its own complications. While one section of people criticize that implementation of UCC will bring country's pluralism to an end and paint all in 'one colour', the other section of people demand that change in personal law is essential as it would directly affect the status of women. The paper presents a judicious study on the much debated and controversial topic of implementation of Uniform Civil Code and its conflicts in personal laws. Further, in this paper, an important section is devoted to the approaches of personal laws of different religions toward codifying civil laws, but it requires fighting the communal and political overtones that overshadows the innate merits of UCC. An equal platform in the form of a legislation created for all classes of society will definitely be a challenging task. Creation of its structure, its objective and finally implementation needs a different outlook so that it shall not create further disparities and uphold the secular character of the State.*

**Keywords:** Uniform Civil Code, Article 44, Indian Constitution, Personal Laws in India

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### PREFERRED CITATION

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- Haniya Anwar & Ancy Jacob, Uniform civil code and conflicts of personal laws, *The Lex-Warrier: Online Law Journal* (2019) 4, pp. 219 - 229, ISSN (O): 2319-8338

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## INTRODUCTION

The theme of UCC in the context of personal laws needs no particular introduction to the informed and discerning readers. UCC is a part of one quest for a new and integrated natural identity based on the composite culture of India and on enlightened rationalism. The mandate of Article 44 was not addressed to the legislature only-its addressee was the State<sup>3</sup>. Moreover, the State shall “endeavor to secure a UCC, not that it shall enact it straight away.”<sup>45</sup> The fathers of the Constitution wanted the code to be enacted and enforced at the end of an evolutionary process during which the people would be prepared to accept and actually practice the same in their day-to-day domestic life. The State can pursue its programming of social reform move it safely if it moves safely if it moves step by step and makes transitory concessions to traditions coeval conditions. Every social change requires a nexus with the past; a sudden break with the past is neither happy nor a sure way for the nation to heap into a modern phase of progress. Critics of UCC are of the opinion that it is simply a majoritarian stick to browbeat minority groups. While the supporters interpret UCC as a mandate having respect towards the ‘differences’

which removes the discrimination within one multi cultured country.

However, the article is wholly based on one perspectives and views. It might contradict with some of the of the prevailing beliefs. Nevertheless, we demand the freedom of expression and wish to convey the thought, which might have erred in findings or judgment. We are always open for corrections.

## HISTORICAL BACKGROUND

The movement for a UCC kicked in around the beginning of the 20<sup>th</sup> century in demand for women rights, equality and secularism.<sup>5</sup> It is perhaps pertinent to being the historical analysis from the colonial period. In a multicultural society like India, there is a divergent system of personal laws. Personal laws were first framed during the British Raj, mainly for the Hindus and

Muslim citizens. Legislature immunity was granted by Britishers to certain specified topics of Hindu and Muslim laws as they considered interference in religious matters was not at all conducive to their friendly trade. In the early 19<sup>th</sup> century, the legal system was a heterogeneous mass of various legislations. Due to the confusing state of applicability of law, it was necessity to systematic and rationalize the legal system.

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<sup>3</sup> Article 12 (Part III). Article 36 says that ‘State’ in part IV has the same meaning as in part III

<sup>4</sup>Tahir Mahmood , Indian Civil Code and Islamic Law; page:6

<sup>5</sup> India Today, New Delhi, Oct 2014, 2016

Thus, they took the initial footstep towards codification of laws. They realized the general law of the country was under an imperative need of change. The purpose of the codification appears to have been to achieve certainty and uniformity<sup>6</sup>.

Codification of laws were made possible with the active assistance of scholars from both communities. The next major historical location for the UCC debate was when the imagination for a free India was forged in the debates in the constituent assembly.<sup>7</sup> The decision to place it in the Directive Principles of State Policy, Article 35 in the draft and Article 44 in the final Constitution was based on assurance given by Nehru and Gandhi to Ulema that the enactment of UCC would be postponed, although it would remain as an aspiration of the State. However, this compromise was severely objected saying that the religion based personal laws creates divisions within the country by compartmentalizing various aspects of life. UCC controversy in subsequent decades has taken place in the space created by the tension between individual rights and group rights, on how to reconcile the contrasting positions of inviolability that each set of rights claim for itself. Later on, during the first 10 years of Independence, Indian

Government passed Hindu Code bill even though it faced strong oppositions from conservative Hindus. It was the first major movement of democratic State. Until Independence in 1947, a few law reforms were passed to improve the condition of women; Dissolution of Muslim Marriage Act 1939 is an example. In subsequent years, records of legislature wing of the State in making efforts to unify the nation under a common Civil Code includes enactment of

- Special Marriage Act 1954
- The Hindu Code 1955-56<sup>8</sup>
- Dowry Prohibition Act 1961

UCC received major attention in the height of the Shah Bano case in 1985. It heads too many debates over the controversial issue of UCC.

## IMPLEMENTATION OF UNIFORM CIVIL CODE

The founding fathers of the constitution by incorporating article 44 in the constitution which provide for the establishment of uniform civil code, mooted to have one law for all the citizens of this country.<sup>9</sup> Article 44 of the constitution states that “The state shall endeavour to secure for the citizens a uniform civil code.” The provision is cautiously worded and calls upon the state to

<sup>6</sup> UCC, In retrospect and prospect Kiran Dishta; page:62

<sup>7</sup> EPW, Nov 28, 2015, VOL NO:48, Politics of UCC in India

<sup>8</sup> By Hindu Code we mean Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship, Hindu Adoption and Maintenance.

<sup>9</sup> Constituent assembly debates 1948 vol VII pg no 548

‘endeavour’ to secure and not to enact a uniform civil code. It is neither time bound nor carries a compulsive urgency.<sup>10</sup>We cannot also read this provision in isolation with other provisions of the constitution which provides for equality before law and equal protection of law.

The success of democratic process lies in harmonizing the group interests leading ultimately to common good. However, the idea of UCC as a mere academic exercise or as a means to do away, prompted by ulterior motives, with denominational character of legal system can only be productive of more mischief than the benefits it seeks to confer. There is a need to shun away will of the people to carry out the spirit of article 44. The true spirit of this provision is to establish a homogenous society which is pure and is not divided on religion and caste lines, in consonance with the other provisions of the constitution.

Fact is not denied that, India is a land of diversities and different religions follow their own personal laws in family matters, which largely differ, from one another<sup>11</sup>. In the words of Krishna Iyer, A common civil code is no ideal, it is a goal we must hasten slowly but not practice the fine art of standing still. Our jurists and judges, our statesmen and

leaders of communities must go to the good in every personal law and nationalize it.

Such a blend of principle and tactic will help establish the new dharma – a progressive, just, common, family code. A common civil code is the manifestation of equalization in family relations among persons who hold different religious views, but are like – situated on temporal affairs. It is very unfortunate that even today after seventy years of independence the concept is still a dream, which was considered by our constitution makers as a golden thread for unity and integrity of the country. Thus, at this point it is very important to know the opinion of various religious communities in this respect.

## **UCC AND CONFLICTS OF PERSONAL LAWS**

### **Conflicts in Muslim personal law**

The idea of a common civil code for India advocated in article 44 of the constitution has assumed the colour of a nightmare in the eyes of a vast majority of Muslim citizens. The areas of domestic relations which can be expected to be covered by the civil code are family law which includes marriage, divorce. Minority, guardianship, legitimacy, custody of children and maintenance, adoption, inheritance and

<sup>10</sup> V.R KRISHNA IYER J., Unifying personal laws, sep 06 2003, online edition, THE HINDU

<sup>11</sup> R.B Sharma, A uniform code for India, civil and military law journal, 1985, vol 21, No 3-4, pg no 21

bequests In the province of marriage law ,it seems ,the common civil code will be more in conformity with Islamic jurisprudence than with any other legal system.

- a. Complete freedom of both men and women in regard to marital choice
- b. Solemnization of marriage without any religious ceremonies
- c. Independent legal status of wife in her husband's home
- d. Facility of dissolution of marriage available to both spouses
- e. Unqualified validity of the remarriage of a widow or divorcee

The way in which these ideals are now practiced by the Muslims of India is not Islam's creation. With regard to age of marriage ,maintenance of wife ,legitimacy of children,the muslims of India already share with the followers of other religions the provision of :

- a. The child marriage restraint act 1929
- b. The criminal procedure code<sup>12</sup>
- c. Indian evidence act 1872

Thus it will hardly make a difference if these discrete legal provisions are incorporated into common civil code.

- As regard to adoption, it is the misconception that Islam absolutely prohibits it .It wouldn't impose the

legal fiction of adoption on an unwilling Muslim, but if one voluntarily adopts a child one doesn't violate any religious principle of Islam.<sup>13</sup>

- The law of succession under the UCC ,if based on the concept of equal rights for men and women would conflict with the Quranic text under which ,degree of proximity to the propositors being equal ,men get a share double to that of a women.<sup>14</sup>
- The provision of mehr (dower),conflicts with the ucc but it will be unwise to abandon such exclusive privileges available to women under traditional marriage law of Islam
- The most debated topic under Muslim personal law includes triple talaq ,bigamous marriage and unilateral divorce. The Muslims fail to appreciate how different is Indian Muslim personal law from that of conditionally permitted laws of Quran . Quranic laws are amendable in nature and it doesn't close door towards progressive reforms.

Required, therefore is a period of acclimatization attention would better be focused at present on the reforms and

<sup>12</sup> S.488 of the old code ,by sec.125-127 CrPC 1973

<sup>13</sup> A secular law of adoption, Hindustan times, aug 13 1972

<sup>14</sup> Holy Quran, 4:11

codifications of Muslim personal law which may be expected to draw it nearer to the proposed civil code.

### **Hindu Law**

There is a fallacious belief that Indian civil code will be a replica of the ancient Hindu juristic doctrines; since a large number of those doctrines have been abandoned under the modern Hindu law itself<sup>15</sup>. For instance, under the Dharmashastras, marriage was an eternal bondage not liable to be terminated even by the husband's death women did not have an independent legal status and so on. All these concepts moved into limbo. In the field of Hindu matrimonial law there has been a gradual movement from sacrament to contract, so that under The Hindu marriage act of 1955 the court can grant a divorce on as many as 11 grounds. The Hindu law has undergone various revolutionary changes. But recent revival of the discussion on enacting a ucc, which its proponents believe will give all women equal rights, overlooks the reality of the discrimination that Hindu women continued to face despite amendments, including on issue of inheritance and maintenance.<sup>16</sup> The main focus of the reform were to transform sacramental Hindu marriages into contractual obligations by introducing a

divorce and other matrimonial remedies. Given the urgency one would imagine that the process would be smooth and national leadership would be united in this mission but this didn't happen.

### **CHRISTIAN LAW**

The Indian Christian Marriage Act 1872 governs the Indian Christians in all matters of marriage. The concept of Christian marriage is the actual union of a man and a woman who becomes united through the marriage covenant. Catholics especially during the Medieval period considered marriage to be sacred, divine, and called a holy union. Marriage among Christians are looked at from two stand points, viz, the law of the land and canon law.

Marriage performed in compliance with the law of land will make the marriage valid and offspring legitimate. Under the canon law, a marriage performed by Schismatic priest where the parties to the marriage are Roman Catholics will not be recognized as valid by the Catholic Church and the offspring will be declared as illegitimate. However, such a marriage would be perfectly valid under SEC.4 and 5 of the Act and the progeny perfectly legitimate.<sup>17</sup> Thus, Catholics whose marriage has been annulled by a Church

<sup>15</sup> Thahir mahmood, Changing law and the hindu society, 1968

<sup>16</sup> Flavia Agnes, Liberating Hindu Women Commentary, Vol 50, issue no 10

<sup>17</sup> Shiv Sahayi Singh, Unification of Divorce Laws in India 1993, page:31

Court but not a Civil Court run the risk of being prosecuted under the IPC if they remarry in Church. Further, the priest who solemnizes second marriage runs the risk of being prosecuted for abetment.

In addition, the Church has demanded that the term 'divorce' be changed to 'dissolution of marriage' on the basis that Christians do not accept divorce. This is indeed ironical as the Indian Divorce Act, which is so to be revised by the present bill, contains the word divorce in its very title. The scope of canon law is also completely different as it mainly deals with the sacramental aspect of marriage and, thus does not make provisions that address marriage as a legal contract. Consequently, canon law makes no provision for civil effects maintenance, custody of children, right to marital home etc. All of these have to be addressed by the Civil Courts. In addition, the Indian Marriage Act 1872 extends to the whole of India except territories which immediately before 1<sup>st</sup> November 1956, constitute the territories of Travencore. Similarly the Act is applicable to Roman Catholics alone and not for any other denominations of Christians. The determination of capacity of the parties to the marriage and the essential validity of the marriage is left to the personal law applicable to the parties intending to marry. But the personal laws are not defined anywhere.

## **PARSI LAW**

Mr. K J Gandhi, Secretary of the Federation of Parsi, Zoroastrian Anjuman of India reiterated that Parsis do not believe in conversion as conversion to Zoroastrian is prohibited by religion. Also in adoption, the Parsis would not like to adopt a non-Parsi child. Hence, UCC in this respect would conflict with the personal laws, and the Parsi matrimonial Courts are unique in India, no other body of law uses a jury<sup>18</sup>.

## **JEWS**

Nothing is known about the reach of the small Jewish minority in India to the idea of reforming, the religious law or replacement of it by a Common Civil Code. The laws of marriage and divorce of Jews are not codified. Even today they are governed by their religious laws. The Jews however marry under the Special Marriage Act 1954 in lieu of religious formalities as prescribed by the personal law.

## **APPROACHES OF PERSONAL LAWS OF DIFFERENT RELIGIONS TOWARDS CODIFYING CIVIL LAW**

There is no denying to the fact that Muslims are the largest minority group in India. Within the Muslim community, people have different opinions about having a UCC for all citizens. The Muslim public opinion if that could apply to the views of overwhelming

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<sup>18</sup> Jamshed Irani v. Banu Irani 1967 MhLJ.33

majority, is deadly opposed to the replacement of their personal law by common Civil law. Whereas Chaudhry Haider Hussain opinion that UCC is the juristic solution of the communal problem. He strongly urged the necessity of having one single Court to be named as the Indian Civil Court applicable to everybody living within the territory of India irrespective of caste, creed or religion persuasions.<sup>19</sup>

In the opinion of Dr. Thahir Mahmood, a sociologist-cum-jurist, Muslim personal law is to be eventually merged into the Indian Civil Code altogether by a UCC. He supports reforms in Muslim personal law rather than bringing up completely new set of common law. The views held by the progressive Muslims may carry intellectual weight, but they do not have numerical strength. Many enlightened Muslims who are conscious of the drawbacks in their personal laws keeps away from reform due to the aversion towards UCC.

Those Muslims demanding for the reforms in existing personal laws argue that the principles of Indian Muslim personal laws are detached from the real teachings of Islam. They point out that Quran has amendable nature, which does not close the doors of liberal interpretation. The religious minorities namely Christians, Parsis and Jews

have not raised any noticeable voice against the mandate of Art. 44. They have not spoken either against or in favour of the mandate. They seem to have adopted a policy of wait and watch.

Majority of people following Hinduism, demands for the quick implementation of the UCC. However, some Hindu leaders have openly opposed the implementation of UCC and expressed their preference for the retention of various religion-oriented personal laws.<sup>20</sup> Prominent leader of sanathana dharma Swami Kripatriji opinioned that he doesn't object UCC as such. He is of the idea that something cannot become desirable only because it is mentioned in the Constitution. He criticized Constitution for being a hotch potch of foreign Constitution.<sup>21</sup> Even the Dalit community expresses a strong resistance to the Uniform Civil Code.

### **REFORM OR UNIFORMITY?**

The demand for UCC is unfortunately, a rather simplistic reading of reality. India's size and diversity dictate that the solutions required are complex and cannot be simply imported as is from 19<sup>th</sup> Century Europe. India will have to think whether uniformity of Civil laws or reformation in personal laws had to be done towards the progress of its modernity. Far from having one law for all

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<sup>19</sup> " A unified Court for India, AIR 1949, Journal sec.,Vol.36,Page:71

<sup>20</sup> An Interview to the Daily Motherland in Aug 1972

<sup>21</sup> The Motherland New Delhi, Aug 1972

citizens, India has been unable to create uniform code even within each religion. Diversities in personal laws leads to politicization and UCC has become next to impossible.

The necessity of otherwise of a UCC cannot be debated in the absence of a coherent conception of what the UCC will be and what it will do. Although it has urged the government to enact one, the Supreme Court's own judgements reveal the hollowness in its understanding of the UCC. Perhaps uniformity itself is no answer to the myriad problems of personal laws.

The first time that the Courts spoke of a UCC was when the Supreme Court in *Mohammed Ahmed Khan v. Shab Bano Begum and ors* (1985;para 3) exhorted the Central Government to enact a "common Civil Code" in the interest of national integration. Mentioning of common Civil Code on the facts of this case is mystifying as the law it had interpret an apply in that case- sec.125 of Cr.PC had long been help to apply across the adherence of all religions, respective of their personal laws. The Court urged the government to come with the UCC once again a decade later in a PIL seeking to outlaw the practice of Hindu men abandoning their wife without legally divorcing them and converting to Islam for the sole purpose of marrying a second time.<sup>22</sup>

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<sup>22</sup> *Sarla Mudgal, President, Kalyani and ors v. UOI and ors* 1995

UCC is widely demanded as though the only problem with India's personal laws misogyny or obsolescence but their lack of uniformity.

It is true that a common Family Court for all citizens alike maybe a solidarity factor strengthening a sense of fraternity. However, national unity is not in peril by the absence of such a Court nor does the enactment of such a Court eliminates religious fumes and divisive feelings.<sup>23</sup> At present, all religious groups in India, except Muslims and Jews are governed by reforms and codified laws. In matrimonial law, Christians were the first community to be given a codified law which was followed by Parsis. The law succession for both these communities was laid on in the Indian Succession Act 1925. Jewish religious laws have not been reformed in any aspect as the followers of this religion constitute a microscopic sect in India, no attention seems to have been given to their personal laws.<sup>24</sup> The Islamic personal law is not wholly unreformed. Married woman's right to seek dissolution was reformed by central legislature in 1939.

Soon after the Independence, the legislative wing of the State made efforts to unify the nation under a UCC.

- a. Special Marriage Act 1954
- b. The Hindu Code 1956

<sup>23</sup> *Supra* 10

<sup>24</sup> For an account of Jewish personal law, see S.W Falk

c. The Dowry Prohibition Actc1961

To a very large extend these laws have not been taken notice by majority of citizens. The purpose of utilization of Special Marriage Act was to overcome customary disapproval towards the marriage in contrary to an actual dissatisfaction towards personal law. Even the Hindu law which sort to create a uniform law governing all Hindus, is not uniform in some of the fundamental aspects of family law. Even the much-touted example of a UCC, the Portuguese Civil Procedure Code 1939 applicable to all communities in Goa is not actually applicable to all communities. The Dowry Prohibition Act remains as a dead letter ever since its enactment. Thus, unifying legislation has miserably failed to achieve the desired objectives in the past.

### SUGGESTIONS

The current trends indicate how little has been achieved in securing a UCC and how very stupendous a task is till ahead. The following suggestions are made in this regard:

- A uniform law though it is highly desirable, enactment thereof in one go perhaps maybe counterproductive to unity and integrity of nation. In a democracy governed by rule of law, gradual progressive law should be

brought about. The process of law can remedy the mischief of defect, which is most acute, at stages.<sup>25</sup>

- A comparative study of the various personal laws should be made with a view to ascertain the similarities as well as dissimilarities between their provisions. A law of personal status based on those principles, which are almost identical under all the personal laws can then be enacted and enforced immediately.<sup>26</sup>
- A family law Board should be up in the Union law Ministry in the pattern of the company law Board working under the Ministry of Industrial Affairs.<sup>27</sup>
- The Government must also prepare a good environment and find out means to fight the obscurantist who oppose the move of UCC.
- The reasons for the ineffectiveness of the existing family legislation such as the Dowry Prohibition Act, The Hindu Code, and The Dissolution of Muslim Marriage Act should be investigated.
- The solution to the problem under review seems to be the introduction of a transitory dual system of family law.<sup>28</sup>

<sup>25</sup> Supra 10

<sup>26</sup> Thahir Mahmood, An Civil Code and Islamic Law, 1976, page:20

<sup>27</sup> Ibid page:20

<sup>28</sup> Ibid page:38

The personal laws of the religious communities may not be scrapped in one go, thus it must be perched of all unsatisfactory elements. On the other hand, we may enact a UCC based on the cream of modern family jurisprudence and put it in referendum. If the majority of members of a particular community work for its adoption, then it shall be made compulsorily applicable to them; otherwise it may be allowed to continue to be governed by its separate personal laws as reformed and modernized wherever necessary and if such a dual system has really virtue in it, the separate personal laws shall die out in the course of time. Hence, a successful completion of this task leading to a smooth materialization of the ideal of Art.44 needs a wise exercise of its

authority and a liberal use of its resources by its State.

## CONCLUSION

To conclude, we endorse a pragmatic view in this respect, taking into account the sociopolitical commotion of this country, to effect an awakening among the masses before the legislation is initiated. Progressive changes shall be brought in the personal laws of each religion keeping their identity intact. The personal laws may be reformed from within, without a quantum leap into a common Civil Code. Mobilization of Muslim, Christian and Parsi opinion in this direction is sure to yield salutary results and reduce fundamentalist resistance.

*“Our ability to reach unity in diversity will be the beauty and the test of our civilization”*

*- Mahatma Gandhi*