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UNIFORM CIVIL CODE: A NEED OF THE HOUR

The Author

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I. INTRODUCTION

Economic independence of women has been identified as a major catalyst in achieving equality for women. Equality in a patriarchal society largely rests on the Orwellian¹ concept of all are equal but some are more equal than others. Therefore the definition and institutionalization of equal rights as a concept of law is tremendously important to combat the rising tides of gender inequality in India. In order to even the disparity in the social and economic structure of women, many laws have been passed and reforms made.² These include the right to receive equal pay³, maternity benefit⁴, to own or inherit property⁵, to terminate unwanted pregnancies⁶ and the right to be protected from cruelty⁷ at the hand of husbands.

A secular republic needs a common law for all citizens rather than differentiated rules based on religious practices. This was a key issue debated during the making of the Constitution. Our founding fathers have been cautious in their phraseology while drafting Article 44 and therefore in a situation where the nation is in the grip of communal tension hurry must make way to moderation.⁸ Initially the idea of Uniform Civil Code was raised in the Constituent Assembly in 1947 and it was incorporated as one of the Directive Principles of the State Policy by the sub-committee on Fundamental Rights and clause 39 of the draft Directive Principles of the State Policy provided that the State shall endeavour to secure for the citizen a Uniform Civil Code. The arguments put forward was that different personal laws of communities based on religion, “kept India back from advancing to nationhood” and it was suggested that a Uniform Civil Code “should be guaranteed to Indian people within a period of five to ten years.” The Chairman of the drafting committee of the Constitution, Dr. B. R. Ambedkar, said that, “We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able

¹ Relates to a political system in which the government controls every aspect of people's lives. (Term named after British author George Orwell).

² Jhuma Sen, “Matrimonial Property Rights: Is India Ready for a Law”, *Journal of Indian Law and Society*, vol. 1, 2009, p. 129

³ The Equal Remuneration Act, 1976.

⁴ The Maternity Benefits Act, 1961.

⁵ Hindu Succession Act, 1956.

⁶ Medical Termination of Pregnancy Act, 1971.

⁷ Hindu Marriage Act, 1955.

⁸ V. R. Krishna Iyer, “Unifying Personal Laws”, *The Hindu*, September 06, 2003. (Available at: <http://www.thehindu.com/2003/09/06/stories/2003090600831000.htm>).

to invade so far as the marriage and succession ... and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change.” Though Dr. B. R. Ambedkar was supported by Gopalaswamy Ayyangar and others but Pandit Jawaharlal Nehru intervened in the debate. Nehru said in the Parliament, “I do not think at the present time the time is “ripe” for me to try to push it (Uniform Civil Code) through”.⁹ After six decades of the adoption of Constitution, the time has come where the Parliament has to give effect to Article 44 of the Constitution to get uniformity among the personal laws over matters relating to marriage, divorce, adoption, guardianship, maintenance etc., which was the dream of the founding fathers of our Constitution.

II. LEGISLATIVE COMPETENCE

The Constitution empowers the Parliament to legislate with respect to family relations governed by the personal laws by a Common Civil Code as it derives its authority from Article 44 of the Indian Constitution. The object of Article 44 is to introduce a uniform personal law for the purpose of the national consolidation. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the Constitution guarantees Freedom of conscience and of Religion under Article 25, it seeks to divest religion from personal and social relation and from laws governing inheritance, succession and marriage, just as it has been done even in Muslim countries like Turkey or Egypt. The object is not to encroach upon religious liberties. Clause 2(a) of Article 25 reserves such right of the State.¹⁰

Uniform Civil Law which attributes for the uniformity in various aspects like marriage, divorce, maintenance and the like and to eliminate unequal status and loyalties created in a democratic and a secular society of the India. The concept of marriage, divorce, adoptions are considered as secular acts. The religious freedom to practice would extend only to those rites and observances which are essence of religion and would not cover secular activities which go by name of the religion and are no part of true religion. Such matters for example, are those that come within the scope of the expression of ‘personal laws’, *e.g.*, relating to marriage, adoption and the like, as regards which the Hindu and Mohammedan laws are founded on religious scriptures, and yet they do not form the essence of either of religion.¹¹

A practice of having four wives is permissible under Muslim Law. It was held that such practice does not acquire the sanction of the religion merely because it is permitted. Such practice could be regulated by legislation in the interest of public order, morality, health and social welfare and reforms.¹² When observance of practice is optional, then the same is not essence of religion. Hence the matters of personal law are subject to regulation by the State in larger interest of society under the legislative power in this respect conferred by Entry 5 of List III Schedule VII of the Indian Constitution.¹³

⁹ VII CAD p. 550, 551.

¹⁰ D. D. Basu, *Commentary on the Constitution of India*, 8th ed., vol. 3, (Nagpur: LexisNexis Butterworths, 2008) p. 4132.

¹¹ *Ramprasad v. State of U. P.*, AIR 1957 All 411.

¹² *Javed v. State of Haryana*, AIR 2003 SC 3057.

¹³ *Narayana v. State of A.P.*, AIR 1996 SC 1765.

Marrying a second wife, during the lifetime of the first cannot be said to be an integral part of the Hindu or Muslim religion.¹⁴ The protection under Articles 25 – 26 can only be extended to the practices which are closely associated with the religion or which form the essence of religion which are inextricably interwoven, without which the religion has no existence.

In *Keshavanand Bharati v. State of Kerala*,¹⁵ JJ. Hegde and Mukherjea, observed: “The Fundamental rights and Directive Principles constitute the ‘conscience of the Constitution.’ there is no antithesis between the Fundamental Rights and Directive Principles... and one supplements the other” and JJ. Shelat and Grover observed: “Both Parts III (Fundamental Rights) and IV (Directive Principles of the State Policy)... have to be balanced and harmonized.. then alone the dignity of the individual can be achieved...They were meant to supplement each other”.¹⁶

The Hon’ble Supreme Court in *S. R. Bommai v. Union of India*¹⁷ held that the power of Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 is to yet to be realized.

In *Mohammad Ahmed Khan v. Shah Bano Begum*,¹⁸ it was observed: “It is also matter of regret that Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. It is for the State which is charged with the duty of securing a Uniform Civil Code for the citizens of this country and unquestionably, it has the legislative competence to do so. Piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of Common Civil Code. Justice to all is a far more satisfactory way of dispensing justice from case to case”.

III. NON VIOLATION OF FUNDAMENTAL RIGHTS

It is also important to note here that Article 3 of the UN Convention on Declaration on the Elimination of Violence against Women states that¹⁹: “Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:

- a) The right to life;
- b) The right to equality;
- c) The right to equal protection under the law;
- d) The right to be free from all forms of discrimination;”

As for the case in India, our country is a signatory member of The United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979. Under this Convention it has viewed that any sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Article 15²⁰ obliges States to guarantee “women equality with men before the law,” including “a legal capacity identical to that of men.” Article

¹⁴ *Badruddin v. Aisha*, (1957) ALJ 300.

¹⁵ AIR 1973 SC 1461.

¹⁶ M. P. Jain, *Indian Constitutional Law*, 6th ed., (Nagpur: LexisNexis Butterworths Wadhwa, 2010) p. 1491.

¹⁷ AIR 1994 SC 1918.

¹⁸ AIR 1985 SC 945.

¹⁹ Declaration of Elimination of Violence against Women, Article 3, U.N. GAOR., 48th Session, Supp. No. 49, U.N. Doc. A/RES/48/104 (1993), (entered into force December. 20, 1993).

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, adopted Dec. 18, 1979, Article 15, G.A. Res. 32/180, UN GAOR, 34th Session, Supp. No. 46, U. N. Doc. A/34/46 U.N.T.S. 13 (entered into force Sept. 3, 1981).

16 prohibits discrimination against women in all matters relating to marriage and family relations.

In *Sarla Mudgal v. Union of India*,²¹ while insisting the need for a Common Civil Code, the court held that “fundamental rights relating to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation, the same can be superseded by a Uniform Civil Code. 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 rights enshrined under Arts. 25, 26 and 27.”

IV. UNIFORM CIVIL CODE: JUDICIAL APPROACH

A “religious belief system” has some of the following relevant features: belief in a supreme being, belief in transcendent reality, a moral code, a world view accounting for people’s role in the universe, sacred rituals, worship and prayer, a sacred text, membership in a social organization. But “there is no single feature or set of features that constitutes the essence of religion”. Rather, a belief system may be more or less religious depending on how closely it resembles the paradigm “having all eight features”.²²

In *State of Bombay v. Narasu Appa Mali*,²³ and *Krishna Singh v. Mathura Ahir*,²⁴ the Bombay High Court and Supreme Court were of the opinion that all personal laws as a class are beyond the grip of Article 13(1) of the Constitution to dwell upon their validity or invalidity on the touch-stone of Part III of the Constitution.

The Supreme Court and various High Courts in plethora of judgments have expressed various opinions with regards to common civil code. In *John Vallamattom v. UOI*,²⁵ the Hon’ble Supreme Court observed that, “A Common Civil Code will help the cause of national integration by removing all contradictions based on ideologies”. In *Sarla Mudgal v. Union of India*²⁶, the Hon’ble Supreme Court observed that, “where more than 80% of citizens have already been brought under codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of uniform civil code for all citizens in India.

Even the Law Commission in its 211th Report²⁷ underlined what it called the need to have common codes to regulate affairs such as marriage and divorce. It asserted that bringing uniformity in personal laws “will be in accordance with the underlying principle of Article 44 of the Constitution relating to Uniform Civil Code.”

Since no fundamental right can be absolute in a modern State, the freedom of religion cannot be absolute.²⁸ The Special feature of Article 25 is that our Constitution makers have embodied the limitations which have been evolved by judicial pronouncements in America or Australia, in the Constitution itself, and the language of Articles 25 and 26 is sufficiently

²¹ AIR 1995 SC 1531.

²² Treeman, “The misguided search for the Constitutional definition of religion”, 71 Geo LJ 1519 (1983). Cited in: Basu D. D., *Commentary on the Constitution of India*, 8th ed., vol. 3, (Nagpur: LexisNexis Butterworths Wadhwa, 2008) p. 3473.

²³ AIR 1952 Bom 84.

²⁴ AIR 1980 SC 707.

²⁵ AIR 2003 SC 2902.

²⁶ (1995) 3 SCC 635.

²⁷ Available at <http://lawcommissionofindia.nic.in/reports/report211.pdf>.

²⁸ *Govindlalji v. State of Rajasthan*, AIR 1963 SC 1638.

clear to enable us to determine without the aid of foreign authorities what matters come within the purview of religion and what do not.²⁹

In a secular State which guarantees constitutional protection to religious freedom, secular matters should not be allowed to get mixed up with matters of religion as far as possible. Where the nature of given practice is clearly secular, there is no difficulty. In doubt border line cases, if a religious denomination or a section thereof is found to consider it a matter of religion, it stands to reason, religion being a matter of faith with individuals or communities to accept the claim of community as conclusive and extend the protection of Article 26 (b) to such practices.³⁰

The Hon'ble Supreme Court in the case of *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*³¹ held that, "the matters of personal law are subject to regulation or restriction by the State in the larger interests of society.

In *Narayana v. State of Andhra Pradesh*,³² the Hon'ble Supreme Court held that "Every aspect of religion is not safeguarded by the Constitution. The non-essential or non-integral parts of religion are subject to regulation by the State in the interest of the community.

In *Lily Thomas v. Union of India*, while dealing with the validity of the second marriage contracted by a Hindu husband after his conversion to Islam, the Supreme Court clarified that the court had not issued any directions for the codification of a common civil code and that the judges constituting the different benches had only expressed their views in the facts and circumstances under these cases. It appears that the Apex Court, which showed great judicial activism initially with regard to uniform civil code, has taken a backward step with this clarification.

V. DISCRIMINATION IN AND AMONG PERSONAL LAWS

In the 1950s, when Hindu Law was codified many people opposed, even the then President, Dr. Rajendra Prasad opposed to it. The Hindu codified laws was brought in as a parliamentary majority and so far as religious interference is concerned, *Shariah* has very clear aspect on criminal law but we have uniform criminal code and the Muslims or All Indian Muslim Personal Law Board are not objecting to it.

Syed Abul A'la Maududi, founder of *Jamaat – e – Islami* in his book 'The Rights and Duties of Spouses' says – "The law known as Mohammeden Law both in its letter and spirit is very different from Islamic Shariat and its application does not deserve to be described as enforcement of Islamic Laws, this sorry state of affairs has immensely damaged the civil life of Muslims.

In respect of several important matters the provisions of the Muslim Law governing Muslims by religion and other personal laws governing the other religious communities like those of the Hindus, the Christians, the Parsis *etc.*, are discriminatory to one another, is apparent on and stares at the face. But even then, we can refer some of those provisions by way of illustrations:

- i. The Muslims are polygamous, but the Hindus, Christians and Parsis are monogamous.

²⁹ *Commissioner H. R. E. v. Lakshmindra*, AIR 1954 SC 282.

³⁰ See "Matters of Religion – Cases and Comments – V", *Journal of Indian Law Institute*, 1963, p. 509.

³¹ AIR 2004 SC 2984.

³² *Narayana v. State of Andhra Pradesh*, AIR 1996 SC 1765.

- ii. The Muslims area allowed extrajudicial divorce, but the Hindus, Christians and Parsis can affect divorce only through Court.

Under Muslim law, husbands possess power to dissolve his marriage as and when he likes it necessary. *Talaq* can be pronounced by the husband without the intervention of court. A Muslim wife cannot divorce her husband of her own accord, she can do so only through order of the court by proving one of the grounds mentioned under Dissolution of Muslim Marriage Act, 1939, the mode given to them are discriminatory only on the basis of sex, thus there needs to be a uniform law which does not discriminate on the basis of sex or religion.

- iii. Under the Muslim Law, a divorced wife is not entitled to any maintenance, from the husband, except during the period of *iddat*. But the other Personal Laws allow a divorcee wife post-divorce permanent alimony.
- iv. Under the Muslim Law, a daughter inherits half the share of son; but under the Hindu Law, a daughter shares equally with a son.
- v. Under Muslim Law, a person cannot dispose of more than one-third of his properties by will; but the other personal laws do not impose any such restrictions.

Now, if all these discriminations follow from the different personal laws and the personal laws apply to a person only on the ground of his belonging to or professing a particular religion, then these discriminations are also operating on the ground of religion only and Article 15 of the Indian Constitution forbidding discrimination on the ground of religion alone would strike down all these provisions an unconstitutional and *ultra vires*.³³

VI. CONCLUSION

There is no doubt that the Uniform Civil Code is the ultimate aim of our Constitution makers and Article 44 is the mandate to the State. Unfortunately, successive Governments in India have done precious little to implement or ever endeavour to implement this Constitutional directive for reason best known to them excepting the enactment of a solitary secular piece of legislation known as the Special Marriage Act, 1954, which can be taken advantage of by any citizen in this country irrespective of his religion.

It is in this context that we need to understand the issue of the uniform civil code. The time has come to place personal laws of all religions under a scanner and reject those laws that violate the Constitution. Personal laws of all religions discriminate against women on matters of marriage, divorce, inheritance and so on. There is an urgent need to cull out the just and equitable laws of all religions and form a blueprint for a uniform civil code based on gender justice. The Hindu code cannot be applied uniformly to all religions. On the other hand, triple talaq would have to go, as would polygamy and all the advantages that accrue to Hindu undivided families in matters of property and inheritance.³⁴

The Uniform Civil Code is necessary because personal laws are inconsistent with our declaration *i.e.*, “to constitute India into Socialist Secular Democratic Republic” and it is almost impossible to achieve the golden goals as set out in the Preamble of the Constitution without the Common

³³ S. A. Kader, A. M. Bhattacharjee *Muslim Law and the Constitution*, 3rd ed., (Kolkata: Eastern Law House, 2016) pp. 252, 253.

³⁴ Shabana Azmi, “Women, Stand Up For Your Rights”, *The Times of India*, July 7, 2005.

Civil Code. The Government should draft a Common Civil Code with the opinion of Law Commission, National Human Right Commission, and National Commission for Women, Former Attorney Generals, Solicitor Generals and Judges of the Supreme Court and must implement the Uniform Civil Code in spirit of the Article 44 of the Constitution on priority. While our economic growth has been the highest in the world, our social growth has not happened at all. Socially and culturally, we have degraded to a point where we are neither modern nor traditional. Bringing the Uniform Civil Code would reduce and help in simplifying many technicalities and loopholes, present in existing personal laws. The concept of one nation, one law is more than a neat *hashtag* and goes back to the drafting of the Constitution. Every modern nation has it, and it is time that we have it too and achieve the grand vision which was envisioned at the time of framing our Constitution.³⁵

In this backdrop, one can say that in our country, personal laws continuously affect the lives and rights of a large number of women of all most all the communities. Although various efforts are being done by the means of international instruments, reforms of national laws, changing judicial trends, recommendations of Law Commissions and other social elite groups to ensure gender equality but still women in our country are not treated equally and discriminated in the field of family law especially in cases of marriage, divorce, maintenance, inheritance etc. In these situations, a gender-just code is the need of the time. So a Uniform Civil Code is very important for the protection of oppressed women, to protect their human rights, to remove discrimination against them irrespective of their religion or community they belong and, lastly to make our national laws in accordance with the international instruments which are legally binding on India through various international conventions and international Human Rights instruments which are ratified by India.

³⁵ Tanushree, "Uniform Civil Code in India: An Analysis" *Journal on Contemporary Issues of Law*, vol. 2, Issue 9, p. 10.

