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UNIFORM CIVIL CODE: AN UNBORN CHILD**THE AUTHOR**

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ABSTRACT

Uniform civil code a term not very new to public has been in midst of political minds of this country not since today but from the era of imperial rule. This term in itself is capable of creating political furore and ruckus as it is directly related to the most sensitive topic on which politics of this revered country depends i.e. RELIGION. Uniform Civil Code is not like any other normal legislation discussed in parliament, it would be a welfare legislation which would have a sound impact on the very lives of people. UCC the abbreviation for Uniform Civil Code aims at curbing the religious personal laws and bringing about single code for civil matter such as marriage, succession, adoption etc.

This research paper aims to bring out why Uniform Civil Code is the urgent need of the hour, how various rights of citizen of India especially women are being tampered with because of lack of such legislation and Judiciary's opinion on need and implementation of Uniform Civil Code.

This research paper would give readers an insight as to what issues must be tackled by the government while formulating this code and suggestive measures for its implementation, we have also done our best to compare the various compilation of civil codes across the world to best of capability via this research paper.

I. INTRODUCTION

While reading the Indian constitution we come across a one lined provision in part IV (which deals with directive principles of state policy) Article 44 pertaining to Uniform Civil Code but little does the layman know that it has deep intricacies involved.

Uniform Civil Code is a term which is not new to the Indian politics. A term which has been the main agenda of any political discourse not since today but since the long and eventful history of this country. Uniform Civil Code as the nomenclature suggests would bring about uniformity in personal laws across the country. It is intended to reduce division amongst people on grounds of religion and promote national integration but since integration and uniformity in India were

contrary to imperial ideology even they did not make any efforts for a common civil code. They instead established their hegemony over the local groups and made efforts to safeguard the personal laws of Hindus and Muslims. The Second Law Commission (1833) report expressly mentions that it safeguards the Muslim and Hindu law and also states that no British legislation shall make the Hindu or Muslim law or interfere with their personal laws.

Article 44 of the Indian constitution asks the state to endeavour for a uniform civil code. Now what exactly is uniform civil code, why is it a part of all political discussions in this country, or why is it the need of the hour? All these questions would be answered by our research paper which aims at providing even a layman deep understanding of the need for a common civil code.

Before talking about laws, it is essential to talk about the Philosophy of our Constitution. The very fact that we have a Constitution, and that it is Secular in nature, means that Constitution is above any religion, as far as laws are considered. Only those Religious practices or laws could be allowed which are not in repugnance to the Constitution. The moment any law is contrary to the nature of our Constitution, that law or practice is always liable to be discontinued any direction or legislation.

We have an IPC, which is a Unified Criminal Code, and the moment we understand that we can't have a religion specific criminal code, in the same breath we understood that we can't have a religion specific civil law as well as a matter of right. Just as an Appeal against a lower court's order is not as a matter of right, but only a legislative grant, similarly freedom to practice civil practices of religion is not a given right, but a statutory allowance, including Constitution. This is especially in the case of marriages, since marriage is not in personam, but in rem. When you marry someone, it is not an affair between you and the partner, but against the world as well. Thus the question of how and when of marriages are liable to be scrutinized by the government. There's nothing contrary in that to Article 25 and 26. Again, quoting the example of criminal law, Shanti Parv of Mahabharat specifies that the punishment for drinking alcohol is death. But it is not so in IPC; but nobody says that it is contrary to Article 25 and 26. Another example lays in Hindu Marriage Act- a civil law. Hindu Scriptures specify that the prohibited chain is 5 generations from mother's side, and 7 from father. However, Hindu Marriage Act specifies it as 3 and 5 respectively. However, no one says that it is contrary to Article 25 and 26. This understanding is required to answer the question in hand that is 'Whether UCC is needed in India or not?'

First of all, we must understand that our collective wisdom is still insufficient as compared to that of the drafters of the Constitution. The very fact that UCC was made as a DPSP should be sufficient enough reason. Apart from that, to answer this question, another thing to know is that in a country like India, Law has always been a propelling machine for change. Unlike many other countries, in India, first the law comes, then the progressive change. It is wrong to think that any change in personal laws should come from the society first, and then the law. It doesn't happen in India, and to demand so would be against the concept of progress itself. Now, a need for anything only arises when the status quo is proving to be insufficient. Here, in India, since last many decades, social outlook has proved itself to be grossly insufficient, and the social

framework has failed to provide justice to the persons wrongly affected. It is trite to say that some of our personal laws have no place in 21st century; they're against Article 21 itself. To not implement UCC in today's time would equate to being content with Article 21 being violated every single day. All those religious practices that have been proving contrary to Article 14, 19, and 21 shall be abolished with immediate effect. Religious laws, as everyone knows, are fixed, and have been fixed since hundreds of years. Their very age is a proof that they ought be out dated and misplaced in today's times. Law is an organic entity, and not a dead rock; any law which by its nature is not susceptible to change, shall be abolished the moment a better law appears. This research paper aims at dealing this question in the most precise manner.

II. UNIFORM CIVIL CODE IN CONSTITUENT ASSEMBLY DEBATE

During the Constituent Assembly debates right after the independence, the issue of Uniform Civil Code strangled the session of the house for about two years in Article 35 of the draft Constitution under the Directive Principles of State Policy. . There was much heated debate between the two groups. One consisted of the so called advocates of minority rights. This included Pocker Saheb, Mohammad Ismail, Naziruddin Ahmed, Mahoob Ali Beg, Hussian Imam Etc.

On the other hand there were representatives who opposed the idea and amendments put forward by the above group into the agenda. These include Dr. B.R. Ambedkar, C. Majumdar, K.M. Munshi, Alladi Krishnaswamy Ayyara etc.

There was considerable conflict of opinions amongst the members of the assembly because the issue consisted of personal laws of the religion. It was seen that all the Muslim leaders favoured the rules of British on civil code and termed it as “policy of neutrality”. On the other hand, the Hindu leaders emphasised the guarantee of religious freedom by draft article 19 did not exclude the jurisdiction of the state in matters of personal law.

The Muslim leaders argued that the draft of Article 35 is violation of Article 19 i.e. Freedom of religion and neither of the draft articles 19 and 35, empowered the state to legislate on personal laws.¹ They opined the idea of secularism here and therefore legislative powers shall not encroach upon the beliefs and practices of religions communities.

Dr. B.R. Ambedkar while presenting the contrary statement to the above presented the draft constitution to the assembly on November, 1948 and observed:

“The Draft Constitution has sought to forge means and methods whereby India will have a Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country”²

He also pointed that the aim of adopting the constitution is to have a uniform law in the matters of fundamental laws, civil laws and criminal laws.³ Accordingly, Article 35 of the draft

¹ Constituent Assembly Debates, M.A. Biag Saheb Bahadur's speech

² Constituent Assembly Debates, Dr. B.R. Ambedkar's speech

Constitution provided that “The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India.”

During the debate, Muslim leaders proposed certain amendments and emphasized on certain points. For example- Muhammad Ismail in his speech emphasised upon various points.⁴ Firstly the right of every community to follow its personal law is ‘a part of the fundamental right to religious freedom’. Secondly Retention of personal laws is guaranteed by treaties or statutes in many countries, e.g., Yugoslavia. Thirdly For securing ‘harmony through unity’, it is not necessary to regiment the civil law of the people.

Nazirrudin Ahemad wanted that there shall be no change in personal law without the prior approval of the respected community. He also stressed upon the various points⁵ i.e. firstly The provision of Article 35 clashed with the fundamental right to religious freedom, a provision regarding which had already been adopted by the Assembly; it would encourage the state to break that guarantee. Secondly While regulating secular activities associated with religious practices in exercise of the right given to it by the provision guaranteeing religious freedom, the state could enact laws like the Transfer of Property Act and the Sharda Act; it could make registration of all marriages compulsory; but it should not enact any law, say relating to the validity of marriages and divorces, since they were regulated by religion. Thirdly Time was not ‘ripe for effecting uniformity in civil laws; the powers given to the state to make the Civil Code uniform was in advance of time’. The goal should be towards a uniform civil code, but it should be gradual and with the consent of the people concerned.

Poker Saheb during the discussion also emphasized on certain points.⁶ He quoted the idea of British that they were able to rule India for so long was because of their policy of retention of personal laws. He termed Article 35 as tyrannous provision as civil code was intended to supersede the provisions of the various civil courts laws guaranteeing application of personal laws to cases of family law.

Hussain Imam too expressed his opinions on the matter.⁷ He stated that this is not the correct time for the implementation of Uniform Civil Code. For the implementation of such rule, the country shall first reach to an advance stage of literacy, and development etc.

It could be observed from the above the statements of the speakers that though some of the leaders held Uniform Civil Code as tyrannous rule the other said that the rule shall be considered with change in time in the future.

The Hindu leaders in the house also held the contrary views to that of the Muslim leaders. Ananthasayanam Ayyangar said that marriage in Islam was a contract and could, therefore, be regulated by the State.⁸

³ Constituent Assembly Debates, Dr. B.R. Ambedkar's speech

⁴ Constituent Assembly Debates, Muhammad Ismail's speech

⁵ Constituent Assembly Debates, Nazirrudin Ahemad's speech

⁶ Constituent Assembly Debates, Pocker Saheb's speech

⁷ Constituent Assembly Debates, Hussain Imaam's speech

K.M. Munshi also expressed certain views.⁹ He stated that the power of the parliament to enact Common Civil Code would be a part of regulating secular activities i.e. Common rule for all citizens. Also in many communities of Muslim religion like Khojas and Memons did not want to follow Shariat but were made to do so under Shariat Act, 1937. Religion should be divorced from personal law. Hindu code bill did not conform in its provisions to the precepts of Manu and Yajnavalkya. Also people should come forward to the idea projected by British that the personal law is the part of the religion.

III. FLAWS IN PERSONAL LAW APPLICABLE IN INDIA

There are many laws in India which are obsolete in nature. Either they are out-dated or have no relevance in the eyes of social reform. The personal laws in India which are considered as the part of Civil Code also has such laws embodied and are being followed. For example according to Manu

‘Neither by sale nor by desertion the wife can part her way from the husband’. But today the marriage in India is nowhere considered as that much indissoluble and sacred as even women today can also file the petition for divorce.

Similar to above there are many such rules in the personal law which need to be taken into account for modification.

There is a clear misconception in the mind of minority groups that with the implementation of Common Civil Code, Hindu law shall be smeared upon the personal laws of minorities. But there is one thing to keep in mind that with the formulation of Common Civil Code, all the personal laws of all the religions would be modified as the part of Social reform.

When we talk about the hindrances in personal laws, the same is not only in the Muslim law, but also in Hindu laws. The following are the examples of such hindrances and flaws in Hindu personal law. Also the Hon’ble Court from time to time gives dissenting opinion on the law itself and hampers the essence of that particular law. The same can be observed in Section 13 (i) (a) of Hindu Marriage Act in the Desertion as the ground of divorce which states that desertion is not only from the place, but also from the state of mind.¹⁰ But the Honorable court in the case of Ramesh v. Premlata¹¹ gave the judgment by not keeping in mind the above rule that, the husband cannot be said to be deserted even as he said his wife daily that he will desert her.

Also according to Snehlata v. Kewal¹², when a wife is forced to leave the matrimonial home, that is not amounted to desertion, But if the desertion was the result of cruelty against her in the matrimonial home, it is implied that she shall leave the matrimonial home permanently.

⁸ Constituent Assembly Debates, Ananthasayanam Ayyangar's speech

⁹ Constituent Assembly Debates, K.M. Munshi's speech

¹⁰ Modern Hindu Law by Dr. Paras Diwan, Pg 133

¹¹ Ramesh vs Premlata , 1979 MP 15

¹² Snehlata vs Kewal , 1986 Delhi 162

Animun Diserendi (The intention of deserting the spouse) shall be proved while filing the case of desertion. But the court in various cases such as *Rajrani v. Harbani*;¹³ *Poopulli v. Madathil*;¹⁴ *Shanti Devi v Govind Singh*,¹⁵ *Rukmini v Srinivasa*¹⁶ observed that when the wife leave the husband if she feel not safe with him, it does not amount to desertion. The question is how can the sole ground of desertion be taken into account if either spouse does not feel safe with the other?

According to the Section, to file a plea of desertion there shall be the desertion for at least 2 years. But what if there is ample cruelty before desertion of either spouse which did not make her/him viable to cohabit. Also how will it be proved that the deserted spouse did not attempt for cohabitation or the other spouse prevented her in doing so? There shall be no viable proof for the same. Although in the case of *Prabhavati vs Bipinchandra* the effort of cohabitation was proved through various sources, but what about certain cases where there is no proof? Also since 2 years is necessary to file a petition, but what if the deserted spouse makes effort to cohabit in the 23rd month?

The ground also does not talk about Mutual Desertion.¹⁷ Now what if one spouse has state of mind of deserting another and the other spouse deserts the former through action subsequently?

As far as the shortcomings with regard to Muslim Personal Law are concerned, it is equally flawed as compared to the Hindu Personal Law. The Muslim women has been continuously suffering because of polygamy, oral unilateral divorce, low Mahr amounts, lack of maintenance and other evils which plague Muslim society.

The on-going Muslim personal laws have been gender biased and have violated chief fundamental rights provided to women under the Constitution of India which promise equality to every individual. Such laws go against secularism and national integration. However there has been a clear distinction between the rights of men and women in the Quran; Purdah, the provisions for distribution of property, marriage laws sanctioning polygamy, etc. prove to be laws that are extensively discriminatory against women.

Muslim women face discrimination in many legal areas: Islam has set down no age bounds for marriage. Age of marriage depends on puberty, which may fluctuate. So girls may marry early as they mature early. So marriage depends on the biological characteristics of the girls rather than the age, this is actually astonishing. Among the Sunnis the proposal and acceptance should be made in presence and hearing of two adult male witnesses or one male and two female witnesses. That implies as per the Islamic law a woman's testimony is half to a man.

Marriage is a contract in Muslim personal law. At the time of marriage mahr given from the girl's side, no such rule for the boy's side which leads to gender inequality. The permission for polygamy among Muslims is traced to the Quran which states "You marry two, three or four

¹³ *Rajrani vs Harbans* 1972 Pat 392

¹⁴ *Poopulli vs Madathil* 1974 Ker 45

¹⁵ *Shankti Devi vs Govind Singh* 1983 Raj 211

¹⁶ *Rukmini vs Srinivasa* 1984 Kant 131

¹⁷ *Modern Hindu Law* by Dr. Paras Diwan, Pg 138

wives, but not more: but if you cannot deal equitably and justly with all you shall marry only one.¹⁸ A Mus-lim man may marry no. of wives but not exceeding 4 but a Muslim woman can marry only one Husband & if she marries added husband, she is legally responsible for bigamy under section 494 of Indian Penal code & the children of such a marriage are illegitimate. Also, particularly the mode of divorcing the wife by the husband by uttering triple “Talak” is highly discriminatory. Recently the Allahabad High Court has held that the practices of the triple Talak is unlawful and void.¹⁹

In the matter of alimony the divorced Muslim wife is not required to be maintained beyond the ‘Iddat’ period. A divorced woman is legally entitled only to her mehr and maintenance for the duration of iddat period settlement. Also Woman’s share of inheritance under both the schools, the male generally gets a share twice of what his female counterpart gets. When the son and the daughter succeed to the property together the son gets double of what the daughter gets. The husband gets 1/4th share and the wife 1/8th share when there is a child and when there is no child 1/2th and 1/4th respectively. In pre-Islamic days woman had no right of inheritance. In some communities in Jammu and Kashmir, a daughter can succeed only in the absence of all male agnates of the deceased. All such discriminatory provisions prove that Muslim personal law is not only flawed, but is also discriminatory in nature leading to social atrocities towards Muslim Women.

IV. JUDICIAL APPROACH TOWARDS UNIFORM CIVIL CODE

Time and again court has asked for the implementation of Uniform Civil Code. The same was observed in the landmark judgment of *Ms. Jordan Deingdeh v. S.S. Chopra*²⁰ where Court suggested that time had come for intervention of legislature in matters marriage and divorce to provide for Uniform Civil Code for way out of unhappy situations - Thus, it was directed to forward copy of order to Ministry of Law and Justice for such action as they might deem fit. Still no action on this has been taken till date. Also in *D.P. Joshi v. State of Madhya Bharat*,²¹ the apex court stated about the Uniform Civil Code that “It is extremely unlikely therefore those regional personal laws are allowed to become operative in any substantial matter”.

There are many other such judgments too cited by apex court which directed the government to implement Uniform Civil Code as a part of national integration. Similarly in the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum*,²² the court explicitly stated that "A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to

¹⁸ Mashhour A. Islamic law and gender equality- Could there be a common ground? : A study of divorce and polygamy in sharia law and contemporary legislation in Tunisia and Egypt. Human Rights Quarterly, 2005; 27(0):562-596.

¹⁹ Chawla M. Gender justice: Women and law in India, Deep and Deep Publications, New Delhi, 2006, 33-67.

²⁰ *Ms. Jordan Diengdeh vs S.S. Chopra*, 1985 AIR 935, 1985 SCR Supl. (1) 704

²¹ *D.P. Joshi vs State of Madhya Bharat*, 1955 AIR 334, 1955 SCR (1)1215

²² *Mohd. Ahmed Khan vs Shah Bano Begum*, 1985 AIR 945, 1985 SCR (3) 844

do so". The Common Civil Code instead being considered as a matter of religion appeasement, shall be considered as a part of Secular activity since it being not centric to any particular religion.

Justice R.M. Sahai lived on to say in *Sarla Mudgal, President, Kalyani v. Union of India*²³ that "Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not auctionary but oppression. Therefore, a Uniform Civil Code is imperative, both, for protection of the oppressed and for the promotion of national unity and solidarity".

Supreme Court in the case had directed the then Prime Minister Narsimha Rao to take a fresh look at Article 44. It is vital for both protection of the oppressed and promotion of integrity and unity.

Uniform Civil Code will not only confirm that there will be no person hiding behind the veil of religion and misusing personal laws for exploitation of women.

Muslim population today are not in the support of UCC since they consider the Sharia law supreme. But the case is totally opposite in case of Hindus which consists of 80% of the population in India that they compromised on their personal laws and accepted the codified law. Therefore if the majority population accepts the Codification of civil laws, the minority shall push their support for the same. Not only the population, even the Indian judiciary directed government for the implementation of such laws. If the Muslim majority countries like Turkey can codify their personal laws, than why not a country like India?

Also while implementing the Uniform civil code; there shall be an implementation through public opinion and criticism. All the good features of different personal law shall be taken into consideration and the evil rules shall be eradicated out. Also there are many rituals and ceremonies which are practiced under the umbrella of Freedom of religion. For e.g. Bakr- Eid which is celebrated throughout the Muslim community. Though it comes under religious festival of Muslims, but the same shall be held violate under Prevention of cruelty against animals Act, 1960.

There has been the argument from various political analysts and academicians that till date India did not reach a level for implementation of such codes and this shall be taken into consideration sometime in future. But the State of Goa is the best example for the same. Goa is the only state which implemented Uniform Civil Code. Although no legislation since independence passed such law in pursuance of unrest amongst minority groups, however the code exists in coastal state of Goa and all the people including Muslims, Christians and Hindus within the territory of it accepted this. It is interesting to note that Goa Civil Code is a uniform civil code in itself. It is followed since Portuguese time. Although there were chances to revoke the old law after the

²³ (SC)-1995-5-63 SUPREME COURT OF INDIA
Decided on May 10, 1995

departure of Portugal but locals raised the voice against that decision. This is an indication that people are willing to accept uniform code regardless of religion.

Y.V. Chandrachud, the Former Chief Justice of India also once stated that “the dream of Uniform Civil Code in the country finds its realization in Goa and he hoped that one day the rest of Bigoted India will awake and follow Goa model”²⁴

Goa is following uniform civil code since five decades; still all other states in India are governed by personal laws of religion. Goa has been a set example for the religion neutral state of India and defined secularism which is enshrined in the preamble of Indian constitution in true sense.

²⁴ <http://www.funonthenet.in/forums/index.php?topic=114557.0;wap2>