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UNIFORM CIVIL CODE: IN THE LIGHT OF JUDICIAL STAND ON PERSONAL LAWS

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Article 44 of the Indian constitution embraces the idea of Uniform Civil Code wherein it proposes that the personal laws based on writings of any religious groups or customs shall be superseded by a common set of rules governing every citizen. Though the personal laws are out of the purview of a common code, the substantive laws of crime, commerce, economy, contracts etc. are based on common law grounded on justice equity and good conscience. It is believed that Uniform Civil Code shall act as groundwork to bump off gender disparity in the country. India having ratified to Convention **on the Elimination of All Forms of Discrimination against Women** (CEDAW) is bound to assert, promote and protect women's human rights. But still women in India face huge discrimination in the matter of divorce, marriage, succession and inheritance which are governed by the personal laws. CEDAW has warned that "the Government's policy of non-intervention perpetuates sexual stereotypes, son preference and discrimination against women". The common code aims to annihilate retrograde personal laws and incorporate the most modern and progressive laws.

India has multiplicity of family laws. The Christians have their Christians Marriage Act 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925. The Jews have their uncodified customary marriage law and in their succession matters they are governed by the Succession Act of 1925. The Parsis have their own Parsi Marriage and Divorce Act, 1936, and their own separate law of inheritance contained in the Succession Act which is somewhat different from the rest of the Succession Act. Hindus and Muslims have their own separate personal laws different from the rest. It is found that personal laws prevailing in the country is having a negative effect on the discourse human rights. One of the main criticisms of personal law is that its provisions are discriminatory towards women. Thus it is pertinent to test the religious personal laws for their conformity with principles of equalitarianism conceptualized in the constitution. Polygamy is a disputatious issue in the present scenario .Though bigamy is penalised under the code of criminal procedure, it is still practiced by the Muslim community. Often non-Muslims convert to Islam for enjoying polygamy which in turn affects the harmony of the society. Hindu law didn't recognise divorce until the commencement of Hindu Marriage Act, 1956. According to the prevailing Mohemmadan Law in India a Muslim husband can untie marriage at any time without any reason or justification whereas this unbridled power is not vested upon women. For them to dissolve marriage they have to establish one or more grounds enumerated in Dissolution of Muslim Marriage Act, 1939. This in fact is against the principle of egalitarianism stated in the Articles 14 and 15 of the constitution and Universal declaration of Human Rights adopted by General Assembly of United Nations. Right to maintenance though of civil nature is also embodied in the code of criminal procedure to ensure protection of women. But the Dissolution of Marriage Act, 1939 abnegates divorced women from the right to claim

maintenance. According to the act a divorced women do not have the right of maintenance beyond three months or the period of Iddat. Until the amendment of Hindu Succession Act of 2005, women weren't regarded as coparceners. This was a commendable step to eliminate the in-built gender bias in the Indian society. In Islam women are only provided with the one-third of the total property which evidently put forward the inequality in Muslim community. When it comes to guardianship, all the personal laws regard men to be the natural guardian of the minor child. Adoption is another concept where a female suffers discrimination based purely on her marital status. India having pledged its commitment to upholding the normative regime of human rights is bound to strike all inequalities rising out of the personal laws. The supporters of UCC states that It would help and accelerate national integration ,and avoid overlapping provisions of law .Litigation due to personal can be decreased and sense of oneness and the national spirit would be roused.The country would emerge with new force and power to face any odds finally defeating the communal forces.

Articles 14,15 and 16 embrace equality ,uniformity ,and protection and exclude all sorts of discrimination. Article 15(1) provides that state shall not discriminate against any citizen on the grounds only of religion, race, sex, and place of birth or any of them. According to the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948 all are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination. Article 6(1) of the same enshrines that men and women are entitled to equal right to marriage, during marriage and its dissolution. Article 13(1) all laws in force since the pre-Constitution days which are inconsistent with the fundamental rights shall be void. Article 13(2) prevents the state from making any laws in future that are inconsistent to part III of the constitution. Article 44 in order to secure the aforesaid right wholly, directs the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India. Article 372 emanates that laws in force in the pre-constitution period shall remain in force unless altered by a competent authority. Thus it can be deduced that all the laws (personal) in India from the pre-constitution days unless and otherwise altered shall continue to apply in the territory. All personal laws must conform to the provisions of part III of the constitution. The court in many instances has put forward the idea of uniform civil code to strengthen the idea of egalitarianism and thus national integrity.

The Britishers though have codified criminal law, provided legislative immunities to Hindu and Muslim personal law. The Britishers did not want to hurt the religious susceptibilities of Indians as they considered that interference in religious matters was not at all conducive to their friendly trade with Hindus and Muslims or their political stability. Our founding fathers were very much cautious in phrasing article 44.Their main contention in favour of Uniform Civil Code was that personal laws based on religion kept India back from advancing to nationhood. 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 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.¹”However Nehru disagreed stating that it wasn’t the right time to put forward the idea of a common code. Thus they harmoniously construed Article 44. It is kept in Directive Principles of State Policy and calls upon the State to `endeavour' to secure such a code.

JUDICIAL STAND ON PERSONAL LAWS

The Judges of various High Courts and Supreme Court became the main instrument for bringing important gradual legal developments which also put its impact on the question of uniform civil code. Uniform Civil Code became a controversial topic in the contemporary politics in Shah Bano case. In *Md. Ahmed Khan v. Shah Bano Begum*², Shah Bano Begum a 62 year old lady filed a criminal suit in Supreme Court of India in which she succeeded and claimed alimony from her husband. It ruled against the tenets of Muslim personal law. She had been divorced by her husband. She filed suit for maintenance under Section 125 of Cr.P.C. When the case was brought before Supreme Court, it expressed the hope that Parliament would take steps to enact UCC as enjoined under by Article 44 of the Constitution. The Supreme Court held that “It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.” This agitated the Muslim fundamentalists and in order to secure the Muslim votes, the then prime minister changed his mind, despite agreeing with the judgment and thereby enacted the Muslim Women (Protection of Rights on Divorce) Act, 1985, whereby a Muslim women was taken out of the purview of section 125 of Cr.P.C. The Constitutional validity of this Act was challenged in the case of *Daniyal latifi and another v. Union of India*. One of the famous case in which the court recommended UCC include the case-*Sarla Mudgal v. Union of India*³ wherein polygamy of Hindu men after conversion to Islam was challenged. Constitutional validity of Section 10 of Indian Divorce Act was challenged in the case *Ammini E. J. v. India*⁴ on the ground of dual burden on the part of wife to prove two grounds at the same time in a petition for divorce. This was found to be arbitrary and discriminatory by Kerala High Court and as such struck down as unconstitutional. As a result of it, Legislature has amended the Section 10 by substituting it with the new one by virtue of Indian Divorce (Amendment) Act, 2001 and removed the discrimination. In all these cases court adhere to the idea of Uniform Civil Code.

According to Article 13(1) all the laws in India must fall within the ambit of part III of the constitution i.e., it should not be inconsistent to the fundamental rights. Thus the laws enacted after the promulgation of constitution like the Special Marriage Act of 1954, the Hindu Code of 1955-56, the Muslim Women (Protection of Rights on Divorce) Act etc. are the direct effect of state action and should fall within the ambit of 13(1). The major question with this respect is if the un codified personal laws will be hit by the provisions of equality in Article 14 and 15. It is argued that personal laws are not laws or laws in force within the horizon of Article 13 of the constitution. In the light of this statement is important to mention the judgement given by the

¹ Lok Sabha Secretariat, Constituent Assembly Debates Vol. III, 551, 23 Nov. 1948.

² [1985] AIR SC 945

³ [1995] 2 SCC 635

⁴ [1995] AIR Ker. 252

Bombay High Court in *State of Bombay v. Narasu Appa Mali*⁵. In this case the court had to decide if the personal laws applicable to Hindus and Muslims are law in force within the meaning of Article 13(1) and if it had to satisfy the requirements in Articles 14 and 15 of the constitution. The accused who was convicted under the Bombay Prevention of Hindu Bigamous Marriage Act challenged his conviction as ultra-virus of the constitution as it prohibited only Hindus and not Muslims from polygamy. The court here ruled that the law in force stated in Article 13(1) is not applicable to personal laws. A two- judge Bench of Supreme court, in *Krishna Singh v. Mathura Ahir*⁶ also took the same view and ruled that part III of the constitution does not touch upon the personal laws of the parties. In the said case the judge enforced the law as derived from recognised and authoritative sources of Hindu law, that is, Smritis and commentaries referred to, as interpreted in judgements of various High Courts, except, where such law is altered by any usage or custom or is modified or abrogated by statute. *Ahmedabad Women's Action Group (AWAG) v. Union of India*⁷ is the classic example of exercise of judicial restraint when it comes to dealing with or deciding a question in relation to personal, law and Part III of Indian Constitution. Here a PIL was filed by Ahmedabad Women's Action Group (AWAG) before the Supreme Court in 1977. In this case the Muslim personal law which give unbridled power to Muslim male to pronounce triple talaq without her consent was challenged on the ground that it was violative of Article 13, 14 and 15. In the writ they prayed to declare polygamy as an act of cruelty and they also put forward a contention to declare Musalman Wakf Validity Act, 1930 as void as it infringes Articles 14 and 15. But unfortunately the Supreme court denied all the above said reliefs. The Court held that the since the petition raised questions of social policy, this fell outside the scope of its power. It was stated by the court that the remedy lies somewhere, but not with the court. In *Harindar Kaur v. Harmandar Singh Choudhary*⁸ the learned judge held that "in a sensitive sphere which is at once intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond". The same was held in *Mathew v. Union of India*⁹. It was stated by many prominent writers that the conspicuous absence of reference to 'Personal Laws' coupled with the meaningful use of the term 'competent authority' alludes the fact that personal laws are outside the purview of Article 13(1).

Krishna Iyer in the famous case of *Assan Rawther v. Ammu Umma*¹⁰ disagreed the principle laid down in *Narasu Appa's* case stating that the personal law so called is a law by virtue of sanction of the sovereign behind it and is enforceable by sovereign. In *Rahmatullah and Khatoon Nisa v. State of UP*¹¹ the court held that talaq including talak -i-biddat appears contrary to provisions in Articles 14, 15, 21 and 51A of the constitution of India. Kerala High court in *Kunhi Mohammed v. Ayishakutty* disagreed with the rule laid down in *Narasu Appa's* case wherein it stated that personal law is also law (law in force) as contemplated by constitutional provisions. Any

⁵ [1951] ILR Bom 775

⁶ AIR 1980 SC 707(712)

⁷ [1997] AIR SC 3614

⁸ AIR 1984 Del 66

⁹ 1999(2)KLT 248

¹⁰ 1971 KLT 684

¹¹ II(1994)DMC 64

stipulation of personal law which is against part III shall also be declared void. It was stated in Sant Ram case that Article 13 include personal law also otherwise it would have been explicitly provided as an exception .Hence it wouldn't be wise to cut out personal laws from the sweep of Article 13 .All the laws will have to pass the test of constitutionality. It is to be noted that courts have adopted a cautious approach and has interpreted judicial review on personal law on case to case basis. The courts didn't declare any universal principle within this respect.

UNIFORM CIVIL CODE

In India there is a Uniform Civil Code covering almost all aspects of the human relationship. But the breeze of it has not yet reached the provinces of marriage, divorce and succession. It was held in Shabano Begum's case that a Uniform Civil Code will help the cause of national integration by removing retrograde laws from the personal law. In the very same year another judgement came in support of Uniform Code which suggested the legislature to intervene in matters to provide for a uniform code of marriage and divorce.(Jorden Diengdeh v. S.S Chopra¹²)Therefore unified civil code is required for promotion of national integrity and solidarity. As the demand for a UCC is being fiercely contested, the Goan code is projected as a model of uniformity for the rest of the country. But the fact is Goan Code grants recognition to various customary practices including Hindu polygamy .It do not however recognise talaq and nikkah regulated by the Muslim Personal Law. Though it is the socio economic goal enshrined in the constitution, it wouldn't be wise to enforce a compulsory code on all. That would definitely affect the national integration. It may turn out counterproductive to unity and integrity of nation. And from careful study of Hindu and Muslim personal law, it is impossible to have a common code for both these communities together. Thus before going for a common code it would be better to codify each personal law in India. Codification of personal law, especially amongst Hindus, has brought a sea change in the nature and application of law. Dr Tahir Mahmood is of the view that at present necessary codification and reforms of various personal laws, with the view of making them internally uniform and fool proof against the possibilities of abuse, seem to be pragmatic answer to call of Article 44.Krishna Iyer in his article stated that the special code may be enacted as optional legislation. He didn't support an obligatory code that coerced people.

It is often stated that Muslim community is the common threat to enactment of uniform civil code. If implemented in its letter and spirit, then these three words are sufficient enough to divide India politically, religiously and socially .In the same manner the existing Mohemmedan law on divorce and marriage is regarded as barbaric by majority in the country. But the pristine Shariah law prescribes easy and inexpensive procedure for an unwilling spouse to untie marriage with dignity. It isn't a cumbersome process at all. True Islamic law is in favour of break down theory of divorce. The Shariah law permits extra-judicial divorce to both men and women. Talaq according to Quran is only permissible under exceptional circumstance but is misunderstood as unbridled power of Muslim men. The khula mode of talaq provides the women the right to divorce at their mercy. However the Muslim law practiced in India is against the spirit of true Shariah. By the existing law, woman can have a unilateral extra-judicial divorce by talaq-e-

¹² AIR 1985 SC 935

tafweez only when the power as to the same is provided by her husband. She can also have a talaq by mubarat only if her husband consents. The Muslim personal law administered in India do not recognise khula. This is in fact a gender bias. Thus the immediate step to be taken is a progressive codification of Muslim Personal Law. There are some set of personal laws which are neither codified nor got amended. There is on-going demand among academicians, judiciary and other stakeholders, to improve those set of personal laws, especially Muslim personal law, owing to their clash with the provisions of Part III.
