

## **“A Critical Study on Uniform Civil Code: To Unify the Marriage and Divorce Laws in India”**

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### **INTRODUCTION**

In Indian constitution the provision for uniform civil code is provided under article 44 of Directive Principles of State Policy. Because of existence of many religious communities in India their civil laws are governed by personal laws of its own religion. The Uniform Civil Code has reference to enact uniform family law to replace personal laws governing Hindu, Muslim, Christian, Parsi and Jews which emphasis one civil law for one nation. Thus UCC will ultimately lead to simplification and modernisation of personal laws matters concern with marriage, divorce, adoption and inheritance.

It is relevant here to recall that before independence Hindus were governed by their own personal laws, but after Independence a large part of traditional Hindu laws was codified in 1955. In sharp contrast till today Muslims in family relations are governed by the Shariat based personal laws.

In India various systems of personal law prevail. The Hindu system is based on the ancient Sanskrit texts of Dharamashastras. It was modified in some respect by legislation. The Muslim system is based on Quran and other texts. This also modified to certain extent to few laws. There are matrimonial laws of the Christians and Parsees & India has accepted the ideal of secular state. Hence it is necessary to replace the various systems of personal law by a uniform civil code.

The diversities in the spheres of personal laws are so good and few of the principles are so unfair, inequitable and humiliating that there is every necessity to bring uniformity as also to give a feeling to every members that he or she enjoys equality of social status irrespective of race, religion, caste or sex.

The Uniform civil code is very much relevant and has also become the need of the day in the present situation of our country. It may be a strong tool in curbing the virus of communalism in our country. Fundamentalism is the root cause of communal discord and because of this the idea of having a uniform civil code for our country is resented by fundamentalists.

It is very relevant to mention the fact that UCC has been a demand of the women's movement from pre-independence days. Women's struggle for equality is intrinsically secular and it is a cardinal principle of that barriers to achieving equality erected in the name of religion, caste, custom, or tradition have to be dismantled. Thus, the concept of Uniform civil code' is confined to having a 'uniform family code' for members of all communities

living in the country, not merely for the sake of uniformity but also for securing social justice to weaker sections in different communities in spheres of marriage and divorce.

### **HISTORY AND IDEA OF UNIFORM CIVIL CODE**

“In the beginning of twentieth century, The demand for a uniform civil code was first put forward by women activists with the objective of women’s rights, equality and secularism. “when a demand for code was made by the national planning committee appointed by the Congress, the idea of UCC was introduced in national political debate in 1940.”<sup>1</sup>The sub-committee for the Women’s role in a planned Economy was specifically directed to study the role women would play in the future independent India, and it presented its report to the national planning committee in August, 1940. The report advocated for the enactment of UCC. It emphasized the proposed UCC to be an optional code to begin with, which gradually replace the different personal laws followed by various religious communities. This recommendation was endorsed by the national planning committee with one Muslim member opposing the idea of UCC.

#### **The constituent assembly and the uniform civil code:**

The directive to enact a UCC in the constitution was included as a result of the efforts of Minoo Masani, as a member of sub-committee, on fundamental right, he moved on 28<sup>th</sup> March 1947, that the state would be made responsible to enact a UCC in order to break down the barriers between various communities.

“where, majority of the sub-committee voted against its inclusion on the grounds that it was beyond the scope of fundamental rights. But Minoo Masani, Hansa Mehta, Rajkumar Amrit, and Ambedkar voted in favour of the inclusion of the clause on the UCC, However, when it was decided that the rights were divided into justiciable fundamental rights and non-justiciable Directive Principles, the sub-committee agreed to make the enactment of the UCC a directive principle.”<sup>2</sup>

In a dissent note to the report – three members – M.R Masani, Hansa Mehta and Amrit Kaur expressed their views on the uniform civil code as being non-justiciable in the following way:

“ One of the factors that has kept India back from advancing into national hood has been the existence of personal laws based on religion which keep the nation divided into watertight

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<sup>1</sup> A Parashar, women and family law reform in India, 1992, pp.230-235. <https://journals.sagepub.com/doi/abs/10.1177/097152159400100109?journalCode=ijga>

<sup>2</sup>Minutes of the meeting of the subcommittee on fundamental rights.28 march 1947, in Siva Roa, B., The framing of Indian constitution, 1968, Vol-ii,p.128.

compartments in many aspects of life. We are of the view that a uniform civil code should be guaranteed to the Indian people within a period 5 to 10 years..<sup>3</sup>

“Thereafter, a letter was written by Masani, Hansa Mehta and Rajkumari Amrit Kaur to the advisory committee in July 1947, asking the chairman to reconsider putting the clause on UCC in the list of fundamental right. However, this suggestion was not accepted and the UCC was made a Directive principle in the draft of the constitution.”<sup>4</sup>

‘After one and half year later, the Draft Constitution was presented by Dr. Ambedkar to the Constituent Assembly for deliberation on 4<sup>th</sup> November, 1948. The uniform civil code provision found its place in the Directive Principles of State Policy as Draft Article 35. The text of Article 35 went like this “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”<sup>5</sup>

When the UCC was debated in the constituent assembly, art.35( as clause 39 was renumbered) was strongly opposed by members of the Muslim community, Shri Mohammed Ismail Sahib, Shri Pocker Bahadur Sahib. Shri Mahboob Ali Baig Sahib Bahadur, all from Madras; Shri Naziruddin Ahmed from west Bengal, Shri Hussain from Bihar, pleaded for amendments in Art 35. Shri Mohammed Ismail Sahib wanted to add a proviso to article 35 that :

”Provided that any group, section or community of people shall not be obliged to give up its own personal law in the case. It has such a law”.<sup>6</sup>

“He said that the people have fundamental right follow their own religion. It is part of their religion and part of their culture and if any thing is done affecting the personal law, it would be interfere with their way of life and religion. He said that “purpose of UCC is to secure harmony through uniformity and it can be achieved when people are allowed to follow their own personal law.”

Pocker Sahib Bahadur supported the motion moved by Shri Mohamed Ismail sahib and he pointed out that majority divided on the uniform civil code and even if the majority community is in favour of it, it has to be condemned and it ought not to be allowed because in a democracy it is the duty of the majority to secure right of every minority.

At last Dr.Ambedker came into the debate and he strongly favoured the UCC for India but, at the same time he wanted to remove the fear psychosis of the Muslim members relating to the UCC. And here Dr. Ambedker came with an assurance. He said:

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<sup>3</sup>Uniform Civil Code constitutional history, <https://clpr.org.in/wp-content/uploads/2017/11/UCC-Part-1-Constitutional-History>.

<sup>4</sup> Supra at 3

<sup>5</sup>Uniform Civil Code , constitutional history,<https://clpr.org.in/wp-content/uploads/2017/11/UCC-Part-1-Constitutional-History>.

<sup>6</sup> Constitutional assembly debate.

“Article.35 merely proposes that the state shall endeavour to secure a civil code for the citizens of the country. It does not say that after the code is framed the state shall enforce it upon all citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declarations that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary”.<sup>7</sup>

In the end of the debate Article 35 was carried without any amendments, and it was latter renumbered as Article 44, and read:

“The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”.

## **PERSONAL LAWS AND PROBLEMS**

India is a secular state and nation, which means that it does not follow any one particular religion or there is no official religion for the country. As it is already said that India has different religions and languages, the people of various religions have been governed by their own personal laws since time immemorial. It leads to a different treatment meted out to different classes of people in their personal laws. “Hindu conceived of their marriages as a holy and a sacramental tie and not a contractual union.”<sup>8</sup>“The basic principles of Hindu Law are found in the ‘vedas’ or revealed texts, which are reputed to have been divinely inspired.”<sup>9</sup> Various laws are enacted for Hindus such as Hindu marriage Act 1995, Hindu adoption and maintenance Act etc for marriage, divorce and maintenance purposes. Muslim have, from the beginning, regarded their marriages as a contract. “Muslim marriage has been defined as a civil contract for the purpose of legalizing sexual intercourse and procreation of children.”<sup>10</sup> The Parsi marriage is also regarded as a contract through the religious ceremony of ashirvad is essential for its validity. “A Christian marriage in India is also a contract and it is usually solemnized by a minister of Religion licensed under the Christian marriage Act, 1872.”<sup>11</sup>

## **HINDU LAW**

In pre-independence period, women were facing many problems in the society and were not enjoying equal status, thereby inequality & practice of sati was prevailing and they were biased. Later on Raja Ram Mohan Roy and other social reformers started a social movement against sex inequality, against the practice of ‘sati’ and enforced widowhood. He stood by the government when the inhuman practice of Sati was penalized by law and pleaded successfully for it before the privy council against the petition filed by the orthodox section

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<sup>7</sup>ibid.

<sup>8</sup> Paras diwan, family law (10<sup>th</sup> edition) 2016, pg. no.24.

<sup>9</sup>Srivastava, Religious freedom in India, Pg no. 533.

<sup>10</sup>Paras diwan, family law (10<sup>th</sup> edition) 2016, pg. no. 25.

<sup>11</sup>Paras diwan, family law (10<sup>th</sup> edition) 2016, Pg. no.26.

of the community to repeal to Act. The agitation started, culminated in the passing of the Hindu Widow remarriage Act, 1856.

Then, the blow to the sacramental character was given by the passing of the Hindu Marriage Act, 1955, which recognizes the rights of the spouses to seek divorce, judicial separation and also introduced other matrimonial remedies.

“Under Hindu law, previous days polygamy was recognised and a Hindu male could marry any number of wives, though very few Hindus practised polygamy. The Hindu Marriage Act was enacted in 1955 by the Parliament of India and the act has abolished polygamy and introduced strict monogamy for all Hindus & divorce also has been recognised. The main purpose of the enactment was to amend and codify the law relating to marriage among Hindus. This enactment brought uniformity of law for all sections of Hindus. Hindu Marriage Act is not applicable in the state of Goa.<sup>12</sup>

“The “Goa Civil Code”, also called the Goa Family Law, is the set of civil laws that governs the residents of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single secular code/law governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.”<sup>13</sup>

Hindu marriage act 1955, provides provisions relating to conditions of valid marriage, age for getting married and provisions for judicial separation, for divorce and for annulment of marriages (Sec 10,13,14, & 11,12) as well as provisions for restitution of conjugal rights and provision to remarry after a valid divorce under section 15.

During post-independence period many legislations were passed and enforced such as, the Hindu (Bigamy prevention and divorce ) Act, 1949, the special marriage act .

“In Hindu Law, the problem arising is with the registration of marriages and thus, the inability to nullify child marriages. Child marriages in practically all religious communities in India are accepted practices and so they cannot be registered due to non-fulfillment of minimum age of marriage.”<sup>14</sup> Inter caste marriages has seen gradually increase nowadays, which indeed causing many issues with regard to matrimonial matters are concerned.

The Supreme Court of India in **Seema v. Ashwani Kumar**<sup>15</sup>, has directed all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time

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<sup>12</sup>Introduction to Hindu Marriage Act 1955, 15 June 2017, <https://www.legalbites.in/hindu-marriage-act-1955/>

<sup>13</sup> Ibid.

<sup>14</sup>Mounica Kasturi, need for Uniform Civil Code in India, 27 December 2014. <https://www.lawctopus.com/academike/need-uniform-civil-code-india/>

<sup>15</sup>2008 (1) SCC 180

bound period. This reform has struck a progressive blow to check child marriages, prevent marriages without consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage.

It is relevant here to mention that even though strict provisions relating conversion and bigamy provided under Hindu marriage act 1955, the country has come across many instances regarding converting to Muslim religion, merely to marry again which is prohibited by law.(ex: Dharmendra and Hema Malani) "Dharmendra left his first wife, converted to Islam and became Dilawar Khan before marrying his dream girl [Hema Malini](#)."<sup>16</sup>

Hence, even though special law had been enacted for Hindu religion, many drawbacks can be seen and state, failed in successfully implementing the law.

## MUSLIM LAW

In Pre-Islamic days, women were treated as chattels and were not given any right of inheritance and were absolutely dependent. It was prophet Mohammad who brought about a complete change in the position of women. Under the Muslim law marriage is considered as civil contract. After marriage woman does not lose her individuality. She remains a distinct member of the community; her existence of personality is not merged into that of her husband. The contract of marriage gives no power to anyone over her person or property beyond what the law defines.

The three central statutes were also passed during the British period, they are- The Wakf Act, 1913, the Muslim Personal Law (Shariat) Application, 1937, and the Dissolution of Muslim Marriage Act, 1939. In 1937, the Muslim Personal Law (Shariat) Application Act was passed with a view to abrogate these customs and bring Muslim communities under the Muslim law.

In India, Muslims personal laws are governed by the Shariat Law. In simpler terms, the Shariat Law is basically governed by the provisions of The Quran, and the teachings of the Prophet Mohammad.

"Marriage according to Mahomedan law is not a sacrament but a civil contract. All the rights & obligations it creates arise immediately and, are not dependent on any condition precedent such as the payment of dower by husband to a wife."<sup>17</sup>

When it comes to the Muslim Law, it is the additional courts that create the problem. The Supreme Court of India on Vishwa Lochan Madan v. Union of India<sup>18</sup> and other, issued

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<sup>16</sup><https://www.timesnownews.com/entertainment/news/bollywood-news/article/hema-malini-love-made-dharmendra-convert-to-islam-dilawar-khan-birthday-special/160011>.

<sup>17</sup> Dinshaw Fardunji Mulla, principles of Mahomedan law, 22<sup>nd</sup> edition, Pg no.338

<sup>18</sup> (2014) 7 SCC 707.



notices to the central government, State governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a challenge to the Indian judicial system. “A direction from the court was also sought to restrain these organizations from interfering with the marital status of Indian Muslim citizens or passing any judgments, remarks, fatwas or deciding matrimonial disputes amongst Muslims. The SC ruled that fatwas issued by Shariat courts or muftis had no legal sanctity, asserting that the defiance of fatwas will have no civil or criminal consequences. The court said that it would be illegal to impose these religion based opinions on personal issues on citizens in violation of their fundamental rights.

“Although laws like the Muslim Personal Law (Shariat) Application Act, 1937 and other laws are supposed to grant Muslim women rights and protect them from discriminatory customary laws, the absence of codification of Muslim personal laws has resulted in many of the rights granted in religious texts getting negated or diluted. Against this reality, Muslim women's groups have been campaigning for codification of personal law.”<sup>19</sup>

Previous to the enactment of the Dissolution of Muslim Marriages Act, 1939 (DMMA), conversion of either spouse had the effect of automatic dissolution of the marriage under the Muslim personal Law. The present law however is different and it makes a difference between a Muslim wife who was before her marriage a non-Muslim and a wife who was a Muslim before marriage. In the former case, the conversion of the wife would result in instant dissolution of marriage.

Under Muslim Personal law wife's right to receive maintenance from her husband during subsistence of marriage is absolute. As regards maintenance after divorce, the Muslim personal law provided for the husband's obligation to maintain her in a limited way. It is provided that wife is entitled to maintenance only during the continuance of marriage and not after it. A Muslim husband is obliged to maintain his divorced wife only up to the period of Iddat and thereafter, his liability is over.

It is relevant here to mention that, Muslim women are being victimized in process of divorce under Mahomedan law ‘triple talaq’. And state as witnessed many protest and agitation regarding same matter by Muslim women.

Hence, it is understood the fact that the absence of codification of Muslim personal laws has resulted in dilution of many of the rights to Muslim women.

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<sup>19</sup>Qazi Sarah Rasheed, K Sharma, codified Personal laws needed, Muslim Women’s Rights in India, 10 Sep 2016, <https://www.epw.in/journal/2016/37/commentary/muslim-womens-rights-india.html>

## **CHRISTIAN LAW**

In India, the Christians are governed by the Indian Divorce Act, 1869, and the Indian Christian Marriage Act, 1872, in the matters of matrimonial remedies and solemnization of marriage respectively. A Christian Marriage may be religious in form but it is a contract. It is usually solemnized by a Minister of Religion Licensed under the Christian Marriage Act, 1872. It can also be solemnized by the Marriage Registrar.<sup>20</sup> The marriage being a contract, Section 10 of the Indian Divorce Act, provides for its dissolution by a decree of divorce. Thus, the Christian marriage is a civil contract under modern law.

## **PARSI AND JEWS LAWS**

“The Parsi marriage is also regarded as a contract through the religious ceremony of ‘Ashirvad’ is essential for its validity. Literally meaning “blessing”, essential for its validity. ‘Ashirvad’ means a prayer or exhortation to the parties to observe their marital obligations. The marriage is solemnized by a Parsi priest in the presence of two witnesses.”<sup>21</sup>

## **JUDICIARY APPROACH**

Case laws

In *Ms. Jorden Diengdeh v. S.S Chopra*<sup>22</sup>

The supreme court after reviewing the various laws prevailing in the area of marriage in India said, it was time to reform the law relating to marriage, divorce and judicial separation and make a Uniform civil code applicable to all people irrespective of religion or caste as at present all these laws are far from being uniform. Court further observed that it's high time that the legislature should intervene in these matters to provide a Uniform Civil code.

In *Mohd. Ahmed Khan v. Shah Bano Begam*<sup>23</sup>

The supreme Court held that “it is also a matter of regret that Article 44 of our Constitution has remained a dead letter.” It is for the state which charged with the duty of securing a Uniform Civil Code for the citizens of the country and unquestionably, it has the legislative competence to do so. The apex court stated that a Muslim divorced women can claim maintenance under Section 125 of Cr.p.c. from her husband who divorced her.

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<sup>20</sup> Part 3 and part 4 of Christian marriage act 1872.

<sup>21</sup> Paras diwan, family law, 10<sup>th</sup> edition, 2013 Pg no.26.

<sup>22</sup> AIR 1985 SC 934.

<sup>23</sup> AIR 1985 SC 945



Later, on due to pressure from Muslim fundamentalists, the central government passed the Muslim women's (protection of rights on divorce ) Act, 1986, which denied right of maintenance to Muslim under section 125 of Cr.p.c.

Sarla Mudgal case is one of the pertinent cases which accentuated upon the need of Uniform Civil Code in India.

In Sarla Mudgal v. Union of India<sup>24</sup>

A Hindu husband who was married under Hindu law, embraced Islam and solemnized a second marriage. The question raised was whether the status of second marriage will be valid without dissolving the first marriage. However, the court said that the second marriage will be invalid. Further, SC opined this particular case that in the republic there was to be only one nation and therefore no community could claim to be a separate entity on the basis of religion.

After the landmark judgement of Shah Bano's case, there was a chaos in the Muslim personal law. The parliament passed and enforced the Muslim women (protection of Rights on Divorce ) Act, 1986, which provided that under section 3(1)(a), a divorced women is entitled to reasonable and fair provisions, and maintenance within the 'iddat' period.

One of the council, i.e, Danial Latifi challenged the above Act, claiming that it was unconstitutional, and in violation of Article 14 and 21.

In Danial Latifi and another v. union of India<sup>25</sup>

In this case, the petitioner, in his argument said that the Act is unconstitutional and has the potential of suffocating the Muslim women, and undermines the secular character, which is the basic feature of the Constitution. There is no reason to deprive the Muslim women of the applicability of section 1256 of Cr.p.c and present act is in violation of article 14 and 21. To this, the respondent said that personal laws are a legitimate basis for discrimination and therefore does not violate article 14 of the constitution.

The court thereby held that the said Act was not in violation of Article 14 and 21 of the Indian constitution.

The need for enactment of the Uniform Civil Code arose due to the recent petition filed against 'Triple talaq'.

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<sup>24</sup> 1995 SC1531:(1995) 3 SCC 635

<sup>25</sup> (2001) 7 SCC 740

In Shayara Bano v. Union of India<sup>26</sup>

Shayara Bano was married to Rizwan Ahmed for 15 years. In 2016, he divorced her through instantaneous triple talaq (talaq-e-biddat). She filed a Writ Petition in the Supreme Court asking it to hold three practices talaq-e-biddat, polygamy, nikah-halala-unconstitutional as they violate Articles 14,15,21,25 of the constitution.

On 16th February 2017, the Court asked Shayara Bano, the Union of India, various women' rights bodies, and the All India Muslim Personal Law Board (AIMPLB) to give written submissions on the issue of talaq-e-biddat, nikah-halala and polygamy. The Union of India and the women rights organizations like Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA) supported the Ms Bano's plea that these practices are unconstitutional. The AIMPLB has argued that uncodified Muslim personal law is not subject to constitutional judicial review and that these are essential practices of the Islamic religion and protected under Article 25 of the Constitution.

After accepting the Shayara Bano's petition, the Apex Court formed a 5 judge constitutional bench on 30<sup>th</sup> March 2017. The first hearing was on 11<sup>th</sup> May 2017. On 22nd August 2017, the 5 Judge Bench pronounced its decision in the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority.

## CONCLUSION

After such deliberate discussion it can be said that Uniform Civil Code has social, political, and religious colour. Due to diversity in personal laws, society has witnessed many obstacles in applying law to solve the problems or issues arising out of marriage and divorce aspects from different communities in the country and which is evident from above mentioned judicial approach in serving justice to the people. Hence to overcome this obstacle its necessary to enact Uniform Civil Code so that gender bias and inequality prevailing in the personal laws can be curtailed by bringing 'one nation, one civil law'.

Achieving this goal is possible only if the laws proposed in this legislation intends in satisfying each and every citizen of the nation by providing equality in procedures and by ensuring similar practices for every religious community in India.

At the end, I hereby conclude by saying that, as Uniform Civil Code is proposed to include one civil law for whole nation irrespective of any religious community in India, It will solve all the problems created by diverse personnel laws throughout the country.

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<sup>26</sup>(C) no. 118 of 2016