
UNIFORM CIVIL CODE: AN EMBODIMENT OF THE IDEA OF UNITY IN DIVERSITY

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ABSTRACT

This article attempts to trace the issue surrounding a Uniform Civil Code from the Ancient to Contemporary period and discuss what the idea contains within itself. In India, the debate around a Uniform Civil Code usually pops up the thoughts of a policy that is going to deprive people practicing a particular religion of their religious rights and freedoms and undermine their constitutionally guaranteed rights under Part III of the Constitution of India, 1950, this article also attempts to discuss if that is truly the case.

This article also focuses on existing legislations and judicial precedents which already contain a Uniform Civil Code on various aspects of personal laws which is congruent with Constitutional morality which is spread out and not codified in one document which often propagates the misconception that India does not have a Uniform Civil Code which is not completely accurate. It is true that in certain areas of Personal Laws, there is a need to create legislation which does not go contrary to guaranteed Fundamental Rights however, though scattered in various statutes and precedents, it is safe to say that we have come a long way on the path of Constitutionalism and critical role has been played by Legislature and more importantly Judiciary which I will try to show through this article.

Keywords: Constitution, Fundamental Rights, Personal Law, UCC.

INTRODUCTION

Meaning of UCC:

It is often mistakenly believed that the law laid down in the UCC would be some militant law that will erase or undermine the traditions and customs of various religions and subsets within those religions, but it is not the underlying idea of a UCC. It is not the objective of a UCC to attack personal law but to defend fundamental rights wherever personal law tends to undermine people's fundamental rights. ***Uniformity is not Conformity***, meaning thereby that a Uniform Civil Code doesn't imply that all citizens must conform to the same set of beliefs rather it only suggests that all citizens need be governed by the same set of civil laws irrespective of their beliefs. It means Uniformity in the application of laws, not Uniformity in one's culture or religion. This distinction is important because it upholds India's social fabric of Unity in Diversity while simultaneously promoting a shared sense of national identity. A Uniform Civil Code will ensure that one be able to practice and propagate his/her beliefs without the detriment of others thereby only interfering to the extent of violation of the rights of others. To make things more clear let us try to understand the meaning of a Uniform Civil Code. It is a **Code**, meaning thereby a collection of rules that are being followed for a very long period but not properly codified in one place which should be read together since they have a common nexus, the subject matter of this code is limited to **Civil** matters only such as Family Law, Property, Contract, Tort, etc. To be more clear, we already have a Uniform Criminal Code in India that we all abide by irrespective of Religion, Caste, or Gender with very minor exceptions here and there as long as they discriminate within the parameters of permissible classification set forth by the phrase 'Equal protection of Laws' under Article 14 of the Indian Constitution which says, *'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'* Now such a code can be **Uniform** in various ways but we must choose a model that is sensitive to cultural and personal differences between different religions since we are a land of diversity and it would be an insult to our Constitutional fathers and mothers if we don't respect people's religious rights and freedoms that have been guaranteed by our Constitution under Article 25 of the Constitution of India and simply

override them using the reasonable restrictions¹ under Article 25 of the Constitution of India unless we have to, such as in cases of violations of sacred fundamental rights such as Articles 14, 15 and 21. So instead of having an absolute homogeneous Uniform Code, we can adopt A Uniform Civil Code with necessary exceptions as per personal laws that are not violative of other sacred fundamental rights such as Article 14, 15, and 21. The Constitution of India under Article 44 directs the State to create a Uniform Civil Code; it reads, *'The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.'* India already has a uniform criminal code applicable to everyone within its jurisdiction, as well as several uniform civil statutes such as the Indian Contract Act, 1872; the Transfer of Property Act, 1882 and the Civil Procedure Code, the Uniform Civil Code referenced here is different. This code is primarily concerned with personal laws dealing with marriage, divorce, inheritance, and adoption. Constitution of India, Schedule 7, List III, Entry 5 gives both the Parliament and State Legislatures to enact laws on these matters; it reads as follows, *'Marriage and divorce; infants and minors; adoption; wills, intestacy, and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.'*

India is a land of diversity unified by One Constitution so the most appropriate framework of UCC in India would be to keep these personal differences in all these personal laws intact to the extent of their conformity with other fundamental rights of others guaranteed under Part III of the Constitution of India.

Scope:

The scope of this Article is limited to a Uniform Civil Code for personal laws related to Marriage, Separation, Divorce, Maintenance, Adoption, Guardianship and Ward, Inheritance, and Succession in different religions. Since other civil matters are not in dispute and a common consensus and acceptance in matters of Contract and Tort law is there in people from all religions.

¹ Right to Religion under Article 25 is subject to other Fundamental Rights under Part III of the Constitution of India due to the language of the Article that says, *'Subject to public order, morality and health and to the other provisions of this Part'*

Relevance:

The need for a Uniform Civil Code is mainly to eliminate gender inequalities in personal laws and take the pressure away from Courts, in the absence of such a code citizens need to approach constitutional courts to enforce their fundamental rights which are violated by personal laws and judiciary has been playing a crucial role in upholding the fundamental rights and declaring practices under personal laws unconstitutional and void from time to time and also directing the Parliament to bring a Uniform Civil Code to put an end to flooding of such petitions. The issue of a Uniform Civil Code has been in controversy for a very long time and demands and opposition have always been in the public discussion since the time of making of Indian Constitution. The fear of apprehension of non-acceptance from particular religious groups leading to further division in the nation led to the insertion of Article 44 of the Indian Constitution in Chapter IV 'Directive Principles of States Policy' at the time of its making in 1949 which in a nutshell means that when the government feels that the time is right and it has necessary legitimate means of enforcing such a Code, it should enact one throughout the territory of India. The present serving government led by Mr. Prime Minister Narendra Modi has been constantly announcing in its election manifesto both in 2014 and in 2019 where it said that *'Article 44 of the constitution of India lists Uniform Civil Code as one of the Directive Principles of state policy. BJP believes that there cannot be gender equality till such time India adopts a Uniform Civil Code, which protects the rights of all women, and the BJP reiterates its stand to draft a Uniform Civil Code, drawing upon the best traditions and harmonizing them with the modern times'*. Since the current government has been very good (judging by the past) in fulfilling what is popularly painted as *Controversial promises*, it is very much possible that in the coming times, such a Code can become the law of the land. Presently the 22nd Law Commission of India chaired by Mr. Ritu Raj Awasthi is examining the subject matter of the Uniform Civil Code. On June 14, 2023, the Law Commission of India issued a public notice soliciting opinions and comments on the Uniform Civil Code (UCC).

EVOLUTION OF LEGAL PROCESS WITH SPECIAL REFERENCE TO PERSONAL LAW**Ancient and Medieval:**

In Ancient India, people were governed by Vedas and Smritis, in particular Manu Smriti and Yajnavalkya Smriti both in matters of Civil as well as Criminal Laws. However, in the Medieval period due to the advent of Muslim rulers, *Shariat* became the predominant law in matters of Criminal matters and the *Personal Law* of muslim and non-muslim parties was applied in matters of Civil matters. *Fatwa Alamgiri* was widely accepted as the comprehensive law for Muslim Personal Law which was written during the reign of Aurangzeb after taking into consideration all rules under Muslim Personal Law. *Nawab* was the king, and *Qazi* was the judge who resolved disputes among parties by applying Shariat or Personal Laws of non-muslims who used to refer the matters to *Mufti* on which the law was silent for judicial interpretation and decide the matters accordingly after receiving such interpretation.

Modern:

In 1765, the East India Company bought Civil (Revenue) rights of Bengal, Bihar, and Orissa. Due to rising corruption in the East India Company, a better Judicial Plan was introduced in 1772 by Warren Hastings. Courts were established to deal with civil matters in which *Personal Laws* of parties were applied after taking necessary advice from Hindu and Muslim religious leaders & *Shariat* was applied in criminal matters.

In 1781, Britishers were still reluctant to interfere with the personal law of parties therefore *Mitakshara and Dayabhaga* rules were still applied for Hindus, *Shariat* was applied for Muslims, and in cases of other minorities *English Law* was applied after taking into consideration critical personal law of said minorities & and in Criminal matters *English Law* slowly started to be applied to all religions and we started moving from *Shariat Criminal Law* to *English Law* in matters mainly of procedure. The crime was no longer a violation of rights between private individuals but a *Violation against the State*. Barbaric punishments under *Shariat* law were reduced in use and proportionate punishment started to be applied. Also, the role of Mens Rea or the guilty intention of the offender became more relevant in determining the criminal liability of offenders.

Between 1772-1815 approximately till 4th Governor General of Bengal, *English Law* was starting to dominate criminal matters and the *Personal Law* of parties was dominating civil matters.

In 1828, William Bentinck became the first governor-general of India, and in 1829 with the help of famous social reformer Raja Ram Mohan Roy, ***he became the first one to interfere in civil law*** by enacting Prohibition of Sati Act, 1829 which made it a criminal offense for anyone to support, encourage or participate in the practice of Sati and banned Female Infanticide. However, the last known case of Sati was in 1987 by a woman named *Roopkanwar* who was 18 years of age at the time she voluntarily decided to follow the now-abolished practice of Sati. Though now we can argue that it was a criminal matter and not civil, however, it was also part of customs so indeed it was the first major interference by the British in the civil matter of Hindus.

In 1834, the First Law Commission under the chairmanship of *Thomas Babington Macaulay* was handed over the task of drafting a General Criminal Law (which we currently know as the Indian Penal Code) and Lex Loci.

In 1848, Lord Dalhousie became the Governor General of India and lasted till 1856. In 1850 with the help of famous social reformer Ishwar Chandra Vidya Sagar enacted the Religious Disabilities Act, 1850 which enabled a convert from Hinduism to another religion to inherit the property of his father. At the time, some Hindus regarded this as an incentive to give up one's religious faith and didn't like the change. In 1853, the Second Law Commission under the chairmanship of *John Romilly* was formed and handed over the task of reviewing the report of the First Law Commission and drafting a code for civil and criminal procedure and for penal law (which we currently refer to as CPC, CrPC, IPC). In 1856, the Hindu Widow Remarriage Act was drafted by Dalhousie which was passed by his successor Lord Canning in 1856 before the rebellion of 1857 which allowed Hindu Widows to remarry after the demise of their husband. ***This was the first time the British interfered in civil (personal-family) law.***

In 1857, after the First War of Indian Independence, British Crown took control and company rule ended and the Government of India Act, of 1858 led to the British Crown assuming direct control of India in the form of the new British Raj.

In 1859, recommendations of the Second Law Commission were accepted and CPC, 1859, IPC, 1860, and CrPC, 1861 were passed.

In 1861, the Third Law Commission under the chairmanship of *John Romilly* was formed, Members with legal backgrounds were added to the Viceroy committee, and *Henry Maine* was called for various law reforms in 1862 which led to passing of around 30 laws such as the Indian Evidence Act, 1872, Indian Contract Act, 1872, Oath Act, 1873 among others between the period of 1860-1880.

We see that the British were starting to lay down a legal system and also starting to intermeddle in civil and family matters which were handled according to one's personal law regulated by religion and custom, *William Bentinck* in 1829 and *Dalhousie* in 1850 and 1856. However, this interference was mainly in the Hindu personal law, various speculated reasons for this are that various Hindu social reformers themselves wanted to bring these social reforms so it became easier for the British to do so however there were signs of hostility with no such cooperation from the Muslim community hence it was difficult to make social reforms in Muslim personal law. One more reason could be the British policy of *Divide and Rule* by distinct handling of the Hindus and Muslims.

In 1873, the Special Marriage Act was passed (presently Special Marriage Act, 1954) which we also refer to as paving the way for court marriage in laymen's terms which allowed people to be able to marry, take divorce, etc. outside of traditions and customs and get legal recognition as Husband and Wife.

In 1874, a major development in Women's right to property was made by the passing of the Married Women's Property Rights Act which declared certain properties to be the married women's separate property. Sec 4 of the Act reads as, '***Married women's earnings to be their separate property*** —*The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation or trade carried on by her and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill, and all savings from and investments of such wages, earnings, and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings, and property.*'

In 1891, the Age of Consent Act was passed which raised the age of consent for marriage of females from 10 years to 12 years which was further increased by the Child Marriage Restraint

Act, 1929 (*Sarda Act*) to 14 years for females and 18 years for males. This Act of 1929 was later amended in 1978 by Act 2 of 1978 which came into force on Oct. 2nd, 1978 which again rose the age to 18 years for female and 21 years for male.

In 1928, the Hindu Inheritance (Removal of Disabilities) Act was passed. Sec 2 of the Act reads as '*Persons not to be excluded from inheritance or rights in joint family property - Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from any right or share in joint family property by reason only of any disease deformity or physical or mental defect.*' This was the first time, Women got some rights relating to property.

In 1937, another major development in Women's right to property rights came through the the Hindu Women's Right to Property Act (*Deshmukh Act*) which gave Hindu widow's an equal share to that of the surviving son under section 3 of the Act. The interest was limited and not absolute but it was a start anyways.

Up to 1937, a lot of laws regulating Hindu Personal Law were passed however the Muslim community was not welcoming of any such interference in their personal laws and there was a consensus for it. Public opinion led to the passing of the Muslim Personal Law (*Shariat*) Application Act, 1937 which meant that let us govern our affairs in accordance with our divine directives. On one hand, Hindu personal laws were taking a backseat however that was not the case in the case of Muslim personal law which was still driving the civil affairs in the Muslim community.

In 1939, a few additional grounds were given for divorce to Muslim married women for cases like desertion, no whereabouts of husband, neglect to maintain, etc.

In 1941, a committee under the chairmanship of *B. N. Rao* was created for recommendations relating to the codification of Hindu Law. In 1944, the committee submitted its First report however, further research was required to be done. In Feb. 1947, the committee submitted its Second report to our Constituent assembly. Some of the key points in the report were related to Monogamy making Bigamy/Polygamy punishable, Divorce was introduced in Hindu Marriage on certain grounds, Maintenance provisions for divorced wives, and Joint Family Property Rights to

Women. Many conservative/traditional Hindu leaders of Congress of the time opposed such a major interference in Hindu personal law such as Vallabhbhai Patel (though not very openly), Rajendra Prasad (very overt opposition), Purushottam Das Tandon, J. B. Kriplani, etc.

In 1950, India adopted and enacted its own Constitution however, the Hindu Code Bill was still not passed. Purushottam Das Tandon was the president of Congress at the time, Vallabhbhai Patel was the Deputy PM, Jawahar Lal Nehru said that he will put his intentions of passing the Hindu Code Bill before the people before the First General Elections in 1952 and if he won, he will know for sure the will of the people and then pass Hindu Code Bill.

In 1952, Jawahar Lal Nehru won by sweeping majority by winning 364 out of 489 seats in Lok Sabha. He was president of Congress from 1951-54 and during 1955-59, his close allies were the president of Congress so he had support from the party during this time. The Law minister of the newly formed government supported Jawahar Lal Nehru since he was the one who appointed him, The Unfortunate demise of Vallabhbhai Patel in 1950 also reduced major opposition to the passing of the Hindu Code Bill, Mahatma Gandhi died in January 1948, J. B. Kriplani was not having that much influence to stop the passing of Hindu Code Bill also. All these events led to passing of Hindu Code Bill in form of 4 Statues which are the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority & Guardianship Act, 1956 and the Hindu Adoption & Maintenance Act, 1956.

Hindu: By Hindu Marriage Act, 1955, Bigamy became an offence punishable under section 494,495 IPC which was further tightened by Supreme Court's judgment in 1995² where the Court said that conversion by a married Hindu man to Islam doesn't automatically dissolve his earlier marriage with a Hindu woman and therefore such a person is liable to be prosecuted for bigamy if he again marries according to Muslim personal law, there were for the first time grounds for divorce created in Hindu marriage which was regarded as a sacrament which cannot be dissolved. The age of Marriage was 18 for females and 21 for males.

By the Hindu Succession Act, 1956, there were no longer separate schools of Mitakshara and Dayabhaga deciding the rules of inheritance and succession in the Hindu community. Earlier to

² *Sarla Mughdal v. Union of India*, AIR 1995 SC 1531

the passing of this Act, Hindu personal law on property was governed by 2 documents explaining Yajnavalkya Smriti which were *Mitaksahara* written by Vigyaneshwar prevalent in Mithila region, Banaras region, Maharashtra/Bombay region and Dravid/Madras region and *Dayabhaga* written by Jimutvahana prevalent in Bengal region and Assam region.

| Mitakshara | Dayabhaga |
|---|--|
| Only Son entitled | Only Son entitled |
| 3 types of Property (Self acquired, Ancestral, other) | No such distinction in property |
| Right of Son created on Birth | Rights of Son created on Death of Father |
| Partition while Father was alive allowed | Not Allowed |
| Limited Estate for Women | Limited Estate for Women |

This distinction was ended by the passing of Hindu Succession Act of 1956; this Act was very much influenced by Mitakshara customs. Women's rights to property were earlier limited (*Deshmukh* Act), now they were absolute after the passing of the amendment of 2005 which now guarantees equal rights and liabilities of daughters to that of sons as a Coparcener.

By the Hindu Adoption and Maintenance Act, 1956, Hindus got the right to adopt a child however, there is no such option for other religions until the Supreme Court Judgment in 2014³ created a landmark precedent regarding the right to adopt to people from all religious communities under

³ *Shabnam Hashmi v. Union of India*, AIR 2014 SC 1281

the Juvenile Justice Act, 2000 which was held to be secular in nature and anyone irrespective of their religion can adopt a child.

It can be rightly claimed based on these 4 laws along with various amendments within it as well as judicial precedents that there is no more discrimination based on caste or sex in the Hindu community by the legal system of this country which is in accordance with the spirit of our Constitution. This community has been very accepting in welcoming the changes that were made for incorporating Constitutional values in civil and personal affairs for better protection of fundamental rights.

Christian: In India, marriage between Christians is regulated by the Christian Marriage Act; 1872, Divorce between Christians by Indian Divorce Act, 1869; Succession between Christians is regulated by the Indian Succession Act, 1925 and Guardianship by Guardians and Wards Act, 1890. There was not much opposition by the Christians since the British were themselves Christian and Indian Christians had very similar values. In certain provisions of law, wherever there was a violation of fundamental rights, Courts stepped in and rectified the issues and such changes were accepted by the Christian community.

In Kerala, the Travancore succession Act was applicable and not the Indian Succession Act, 1925 in which only sons were entitled to property and not daughters. In 1986⁴, Supreme Court ruled in favor of Mary Roy by holding that the Indian Succession Act, 1925 has repealed this earlier law and therefore daughters will get equal rights in property to that of a son according to the Indian Succession Act, 1925.

In 2003⁵ judgment of Supreme Court, Sec 118 of Indian Succession Act, 1925 was declared unconstitutional because it negatively discriminated against Christians where it said that, *'a person having a nephew or niece or nearer relative cannot bequeath any property for religious or charitable use unless a particular procedure is followed. The harsh and rigorous procedure envisaged under Section 118 of the Act in relation to testamentary disposition of property for religious and charitable use does not apply to members of Hindu, Mohammadan, Buddhist, Sikh*

⁴ *Mrs. Mary Roy Etc. v. State Of Kerala & Ors*, 1986 AIR 1011 SC

⁵ *John Vallamattom v. Union of India*, AIR 2003 SC

or Jaina Community by virtue of Section 58 of the Act.' Also, the Supreme Court opined that India needs a Uniform civil code.

In case of the Indian Divorce Act, 1869, the Bombay High Court in 1997⁶ declared Sec 10 of the Act to be unconstitutional on the grounds of violation of Article 14 because it discriminated between husband and wife only on the grounds of sex/gender. It allowed the husband to file for divorce only on the ground of the adultery of the wife, but if the wife were to file for divorce then adultery by the husband alone was not sufficient ground for divorce.

In the 2001 amendment of the Indian Divorce Act, 1869, section 10A was added and a provision for Divorce by mutual consent was inserted if living in separation for 2 years at least. In 2015⁷, this provision was questioned for negative discrimination and the Supreme Court urged the Centre to make necessary amendments. Albert Anthony wanted divorce by mutual consent, but the lower court told him to wait for 2 years, when the matter reached the Supreme Court, it was argued that in other communities this period is only for 1 year. *'Provisions for divorce by mutual consent in other statutes such as Section 28 of The Special Marriage Act, 1954, Section 13-B of The Hindu Marriage Act, 1955, and Section 32 B of The Parsi Marriage and Divorce Act, 1936 require and prescribe statutory period of separation as one year. Consequently, it acts as oppression to the members of Christian community intending to seek divorce by mutual consent.'* It further said, *"Only on the basis of religion there exists a hostile discrimination as only the Christians, who are governed by the provisions 10 A (1) of the Divorce Act, require to observe separation for a period of two years before applying for divorce by mutual consent. However, members of other communities are required to observe separation for a period of one year only before applying for divorce by mutual consent under similar provisions in other statutes."* A Division Bench of Kerala High Court said in 2010⁸ that this period of 2 years is to read as 1 year.

Parsi: In India, the affairs of marriage and divorce among people from the Parsi community are regulated by the Parsi Marriage & Divorce Act, 1936; Succession and Guardianship are regulated by the same law through which Christians are regulated which are Indian Succession Act, 1925

⁶ *Mrs. Pragati Varghese And Etc. v. Cyril George Varghese And Etc*, AIR 1997 Bom 349

⁷ *Albert Anthony v. Union Of India*

⁸ *Saumya Ann Thomas v. The Union of India and others*

and Guardianship and Wards Act, 1890. The age of marriage is 21 for males and 18 for females. Bigamy is a punishable offence in Parsi marriage also.

Jew: The Jews in India have no statute or written law regulating their marriage/divorce. They follow their traditions. A Jewish couple married in 2012 sought divorce by mutual consent in a family court; their petition was dismissed⁹ since there is no such provision in uncodified Jewish law governing their matrimonial affair. There is a need to codify law that can afford a necessary remedy.

Muslim: In India, Muslims don't have any codified law governing their personal affairs with the exception of Dissolution of Muslim Marriage Act, 1939 which only provides for some additional grounds for divorce other than what is already available according to the Muslim Personal Law. The Muslim Personal Law (*Shariat*) Application Act, 1937 is one other such law which under section 2 of the Act says that *'Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, illa, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).'*

The main points of contention in Muslim personal law from the perspective of a UCC are practices like **Polygyny** meaning that one Muslim man can have up to 4 wives, **Nikah-Halala** which means that in the scenario where the Muslim husband divorces his wife and later realizes that it was a mistake and now willing to remarry her, the wife first has to go through this procedure called Nikah-Halala where firstly, she now has to get married with another Muslim man, secondly, consummate (have sexual intercourse with him) the marriage and then thirdly, get divorced by the later husband. It is only after this procedure is followed that she can get remarried to her former

⁹ Rosy Sequeira, "Jews Have Own Laws, Can't Decide on Their Divorce Pleas: Mumbai Court", *The Times of India*, Nov. 11, 2018, available at: <https://timesofindia.indiatimes.com/city/mumbai/jews-have-own-laws-cant-decide-on-their-divorce-pleas-says-court/articleshow/66573728.cms> (last visited on Oct. 18, 2023).

husband. This practice is considered by the opponents as very humiliating and robs women of their integrity because and all because the former husband made an error of judgment when he decided to divorce her in the first place, there being no recognition or way for *Adoption* in the Muslim community, *Divorce* in the form of Talaq-e-biddat which is also known as Instantaneous Talaq where the husband can instantaneously utter *Talaq* three times in a row and divorce takes place without any possibility of saving of marriage, and *Maintenance* of Muslim wives after they are divorced according to Muslim personal law is only for about 3 months which is called as period of *Iddat* (period of 3 menstrual cycles).

PERSONAL LAWS AND CONSTITUTION

The easy way to bring a law in conformity with the Constitution of India is to codify it and thereby bring it within the judicial review of the Supreme Court of India and various High Courts. The personal laws of Hindu, Buddhist, Jain, Sikh, Christian, and Parsi are substantially codified to shape them within permissible Constitutional limits and at the same time preserve the customs and personal beliefs to the extent of their conformity with sacrosanct Constitution principles encoded under Part III of the Constitution of India, 1950. In the Jew community, it is only partially codified but in the Muslim community, this is not entirely the case that is why it is often perceived as if UCC is being proposed just to undermine Muslim personal law however that is not a correct position. All other religions have already substantially been brought within permissible Constitutional limits and the Muslim community is the main one that is left out from this and hence at the center of debates around UCC.

Article 13(1) of the Constitution of India declares Pre-Constitutional laws to be unconstitutional and void to the extent of their inconsistency with the provisions of part III, Constitution of India, and provides that, '*All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*' Article 13(3)(b)¹⁰ of the Constitution defines the term 'laws in force' and it omits to mention customs unlike the definition of the term 'law' which does include

¹⁰ "Laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

customs under Article 13(3)(a)¹¹, Constitution of India. This distinction is important because in the famous case of 1951¹² decided by the Bombay High Court, Muslim Personal Law (Shariat) Application Act, 1937 came under scrutiny as to whether provisions of the Constitution can bring Muslim Personal Law under judicial review. This Act was passed in 1937 making it a Pre Constitutional Law and thereby raising the question of whether the phrase ‘laws in force’ under Article 13(1) includes the Muslim Personal Law (Shariat) Application Act, 1937 within its ambit. If yes, then a judicial review of Muslim personal laws can be done, if no, such judicial review cannot be done. The Court interpreted the provisions in favor of the latter and held that ‘laws in force’ don’t include the Muslim Personal Law (Shariat) Application Act, 1937 since this statute only refers to Muslim personal law customs and not create any new law, thereby shielding this Act of 1937 from judicial review and shockingly this judgment is still not challenged before the Supreme Court and though criticized, yet a good law.

The critics of the judgment state that the Court could have upheld an alternate interpretation that would bring the Muslim personal law within judicial review and such discriminatory practices could have been declared unconstitutional and void. Such an alternate way would be as follows; Muslim Personal Law (Shariat) Application Act, 1937, although giving all the power to personal law, is still legislation passed by the Legislature or other competent authority in the territory of India which brings it within the definition of ‘laws in force’, which brings it within Article 13(1) and therefore within powers of judicial review by Supreme Court and High Courts of India.

Hindu, Buddhist, Jain, Sikh:

All 4 statutes Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority & Guardianship Act, 1956, Hindu Adoption & Maintenance Act, 1956 are equally applicable to persons who are Buddhist, Jain, and Sikh by provisions¹³ under all 4 of these statutes which declare that the provisions of these statutes are equally applicable to them. The provisions of these statutes

¹¹ “Law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

¹² *The State Of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84

¹³ Sec 2, The Hindu Marriage Act, 1955

Sec 2, The Hindu Succession Act, 1956

Sec 3, The Hindu Minority and Guardianship Act, 1956

Sec 2, The Hindu Adoptions and Maintenance Act, 1956

along with the amendments therein have stood Constitutional scrutiny so far and the Hindu community has been the subject of these changes furthering gender equality right from the very beginning since 1829 to 1956 (including amendment of 2005 in Hindu Succession Act, 1956 guaranteeing equal coparcener rights to daughter same as a son). With the Supreme Court interventions from time to time mainly in 1995¹⁴ where the Court held that the first marriage must be dissolved under the Hindu Marriage Act, 1955 before he decides to marry another woman. The man's first marriage would therefore, still be valid and under Hindu law, and his second marriage, solemnized after his conversion, would be illegal under Section 494 of the Indian Penal Code, 1860, and punishable accordingly. The Supreme Court defended the rights of Women under Article 21 of the Constitution of India to have a dignified life.

Christians:

Christians also have codified laws that govern their personal affairs relating to marriage, divorce, succession, inheritance, guardianship, and adoption in the form of the Christian Marriage Act; 1872, Indian Divorce Act, 1869 Indian Succession Act, 1925, Guardians and Wards Act, 1890 and provisions of Chapter VIII, Juvenile Justice Act, 2015 for adoption which is a Secular Act and does not discriminate the eligibility to adopt based on religion. Various judicial interventions have been made to remove some of the disputed provisions that have been discriminating against Christians in general or Christian women such as making sure in 1986¹⁵ that gender-neutral provisions providing equal rights to sons and daughters under the Indian Succession Act, 1925 are applied in Kerala where an earlier law Travancore Succession Act was discriminating negatively against daughters; also Sec 118 of the Indian Succession Act, 1925 was declared unconstitutional in 2003¹⁶ by Hon'ble Supreme Court which discriminated negatively against Christians by not allowing them to transfer their property for religious purposes, unlike people from other faiths. Similarly, in 2015¹⁷ in the case of Albert Anthony, he wanted divorce by mutual consent, but the lower court told him to wait for 2 years since Sec 10A of the Indian Divorce Act, 1869 provides for it, when the matter reached the Supreme Court, it was argued that in the other communities this

¹⁴ *Sarla Mughdal v. Union of India*, AIR 1995 SC 1531

¹⁵ *Mrs. Mary Roy Etc. v. State Of Kerala & Ors*, 1986 AIR 1011 SC

¹⁶ *John Vallamattom v. Union of India*, AIR 2003 SC

¹⁷ *Albert Anthony v. Union Of India*

period is only for 1 year. ‘Provisions for divorce by mutual consent in other statutes such as Section 28 of The Special Marriage Act, 1954, Section 13-B of The Hindu Marriage Act, 1955, and Section 32 B of The Parsi Marriage and Divorce Act, 1936 require and prescribe statutory period of separation as one year. Consequently, it acts as oppression to the members of Christian community intending to seek divorce by mutual consent.’ It was also said that, “Only on the basis of religion there exists a hostile discrimination as only the Christians, who are governed by the provisions 10 A (1) of the Divorce Act, require to observe separation for a period of two years before applying for divorce by mutual consent. However, members of other communities are required to observe separation for a period of one year only before applying for divorce by mutual consent under similar provisions in other statutes.” A Division Bench of Kerala High Court said in 2010¹⁸ that this period of 2 years is to be read as 1 year.

Parsi:

Parsi community also has codified laws governing their personal affairs relating to marriage, divorce, succession, inheritance, guardianship, and adoption in the form of the Parsi Marriage & Divorce Act, 1936, Indian Succession Act, 1925 Guardianship and Wards Act, 1890 and Juvenile Justice Act, 2015 for adoption which is a Secular Act and does not discriminate the eligibility to adopt based on religion. One of the matters in dispute is **Goolrokh Gupta v Burjor Pardiwala**¹⁹ which is presently pending in the Supreme Court, *The Gujarat High Court’s judgement in 2012 stated that after marrying a non-Parsi man, a Parsi woman is ‘deemed to have acquired’ her husband’s religion. The petitioner contends that this is inconsistent with the purpose of the Special Marriage Act, 1954. Also the Act does not state that the religion of the parties is affected in any way. The judgment of the Gujarat High Court pertains specifically to women and not men who have married a person belonging to a different religion. The petitioner contends that this classification is discriminatory and violative of Articles 14, 15 and 21 of the Constitution*²⁰.

¹⁸ *Saunmya Ann Thomas v. The Union of India and others*

¹⁹ SLP (C) 18889/2012

²⁰ Gauri Kashyap, “Parsi Excommunication: Special Leave Petition Summary”, *Supreme Court Observer*, May 28, 2021, available at: <https://www.scobserver.in/reports/goolrokh-gupta-burjor-pardiwala-parsi-excommunication-special-leave-petition-summary/> (last visited on Oct. 19, 2023).

Jew:

Jews in India are generally governed by their customs and traditions in matters of marriage, they don't recognize divorce. However, there have been instances such as in 2012²¹ where a married Jew couple approached the court for seeking divorce but due to the absence of any legal codified mechanism the courts were not able to afford any remedy to the applicants. There is a need to codify their matrimonial laws as well.

Muslim:

In India, the Muslim Personal Law (Shariat) Application Act, 1937 only shields personal law when it comes to civil matters but in criminal matters, IPC and other minor criminal laws are widely accepted by the Muslim community. There is no provision for courts or the procedure to be followed in this Act which leaves the matters to be decided by *Qazis and Muftis (for guidance when law is silent)* according to the personal law. Section 5 of the Act was later repealed and a new law was enacted in 1939²² which provided some additional grounds for taking of divorce by women, it doesn't provide for provisions relating to maintenance after divorce is taken place. *Marriage (Nikah)* in Islam is like a contract called *Nikahnama*, there is a Dowr (*Mehr*) that moves from Husband to Wife as monetary security in case of dissolution of marriage through death or divorce for the survival of the wife, many studies claim that this amount is generally too low to ensure the survival of women in cases of dissolution of marriage, also it is not practically feasible for women to raise this concern at the time of accepting (*Qubool*) the proposal (*Ijab*) which makes her look bad and materialistic at the time.

The **maintenance** to Muslim women after getting divorced by husbands has also been a very contentious issue. In cases of divorce by a Muslim man which is an unequivocal right of the man, the personal law only obligates him to maintain her wife for about 3 months period (*Iddat* period) after which she is on her own. This dispute was finally attempted to be put at rest by the Hon'ble

²¹ Rosy Sequeira, "Jews Have Own Laws, Can't Decide on Their Divorce Pleas: Mumbai Court", *The Times of India*, Nov. 11, 2018, available at: <https://timesofindia.indiatimes.com/city/mumbai/jews-have-own-laws-cant-decide-on-their-divorce-pleas-says-court/articleshow/66573728.cms> (last visited on Oct. 18, 2023).

²² Dissolution of Muslim Marriage Act, 1939

Supreme Court of India in 1985²³ where the Apex Court held that Sec. 125, Code of Civil Procedure, 1973 which provides provision for maintenance to wife by husband for a lifetime until she is remarried or if found to be living in adultery is a secular provision and it applies to all women irrespective of their religion without any discrimination whatsoever. However, this win was short-lived when allegedly the then government led by Prime Minister Rajiv Gandhi in an attempt to appease the Muslim community, who were not happy with the judgment, enacted The Muslim Women (Protection of Rights on Divorce) Act, 1986 which contrary to its name reversed the Supreme Court judgment in spirit and restored the position as existed in the Muslim personal law which confined the liability of husband till iddat period when it provided under sec 3 that, '*a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband..*'. However, in a surprising turn of events, in 2001²⁴, on the petition of one of the advocates representing Shah Bano Begum, Hon'ble Supreme Court interpreted the provisions of the Act in such a beautiful manner to bring back the spirit of 1985²⁵ judgment and held that;

'(1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.'

²³ Mohd. Ahmed Khan v. Shah Bano Begum And Ors, AIR 1985 SC 945

²⁴ Danial Latifi & Anr v. Union Of India, AIR 2001 SC

²⁵ Mohd. Ahmed Khan v. Shah Bano Begum And Ors, AIR 1985 SC 945

Due to such a crucial role of the Supreme Court, a married Muslim woman who is not able to maintain herself after being divorced can get maintenance in the same manner though via a different route as any other woman in India.

Divorce in the Muslim community is broadly of 2 types, *Talaq-e-Sunnat* (permissible and widely accepted) & *Talaq-e-Biddat* (considered against the teachings of Prophet Mohammad, bad and not widely accepted), *Talaq-e-Sunnat* is of further 2 types; *Talaq-e-ahasan* means divorce by husband by Uttering of the word *Talaq* one time in the lifetime, which is then followed by withdrawal of conjugal relations during *Iddat* period at which time it becomes Irrevocable and Final, this is considered the most proper form since it provides for the utterance of the evil word ‘Talaq’ only once & cooling period to have better chances for saving of the marriage & *Talaq-hasan* (Divorce by husband by Uttering of the word *Talaq* three times in three consecutive months which is then followed by withdrawal of conjugal relations during *Iddat* period at which time it becomes Irrevocable and Final, this is not so improper²⁶, an oral observation made by Justice Sanjay Kishan Kaul while hearing a petition. The main form of divorce in dispute was *Talaq-e-Biddat* (Triple Talaq / Instantaneous divorce) which was declared unconstitutional for violating fundamental rights under Part III of the Indian Constitution. The five Judge Bench of the Supreme Court pronounced its decision in 2017²⁷ the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority. Also, the Government of India criminalized²⁸ the practice of Triple Talaq with up to 3 years imprisonment & declared it to be void and illegal²⁹ by ‘The Muslim Women (Protection of Rights on Marriage) Act, 2019’ to put an end to it.

Islam doesn’t recognize **Adoption**³⁰ unlike the option available for the Hindu community under the Hindu Adoption and Maintenance Act, 1956. However in 2014³¹, Hon’ble Supreme Court made it clear that if any person from Muslim community wishes to adopt a child, he/she can do so by the provisions of Juvenile Justice Act, 2000 (now Juvenile Justice Act, 2015) which is a secular law and applies to any person irrespective of their religion where the court said that, ‘To us, the

²⁶ *Benazeer Heena v. Union of India And Ors.* WP(C) No. 348/2022 (PIL)

²⁷ *Shayara Bano v. Union Of India*, AIR 2017 SC

²⁸ Sec 4, The Muslim Women (Protection of Rights on Marriage) Act, 2019

²⁹ Sec 3, The Muslim Women (Protection of Rights on Marriage) Act, 2019

³⁰ Vijaysinh G. Sodha, “Adoption Rights and Islamic Jurisprudence” 5 *International Journal of Research and Analytical Reviews (IJRAR)* (2018).

³¹ *Shabnam Hashmi v. Union of India*, AIR 2014 SC 1281

Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honored, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved.' This judgment paved the way for a person from any religious community to be able to adopt a child even when their religion doesn't recognize it and to have legal recognition of the adoptive son/daughter & adoptive parents as the real son/daughter & parents for all intents and purposes.

Polygyny is another disputed tenet of Muslim personal law, a man is allowed to have up to 4 wives if he can treat and provide for them equally without discrimination among the wives, a woman however is only allowed 1 husband at a time and in case of violation severe consequences for her will follow.

Nikah-Halala is one of the biggest such disputed practices where in the scenario where the Muslim husband divorces his wife and later realizes that it was a mistake and is now willing to remarry her, the wife first has to go through this procedure called Nikah-Halala where firstly, she now has to get married to another Muslim man, secondly, consummate (have sexual intercourse with him) the marriage and then thirdly, get divorced by the later husband. It is only after this procedure is followed that she can get remarried to her former husband. Critics say that even if the instances of such a practice actually happening were to be nil, the fact that it exists is degrading to the honor of the women.

Presently, a petition challenging both Polygamy and Nikah-Halala is pending before the Supreme Court filed by Petitioner Sameena Begum. The petitioner prayed for the Court to;

- *'Declare Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, unconstitutional to the extent of its validation of the practice of polygamy and Nikah Halala.*
- *Declare the applicability of Sections 498A, 375 and 494 of the IPC on Triple Talaq, Nikah Halala and and Polygamy respectively.*

- *Direct the Law Commission of India to publish its report introducing the Uniform Civil Code in furtherance of Article 44 of the Constitution*³²

The petitioner referred to and relied upon the banning of such practices for being violative of Articles 14, 15 and 21 of the Constitution of India.

There are inequalities when it comes to **inheritance** between men and women, with women receiving half a share of what the men receive on the ground of sex/gender which is in direct violation of Articles 14 and 15 of the Constitution of India.

CONCLUSION

Even though it is often understood that India doesn't have a Uniform Civil Code, however, it is not entirely true. India does substantially have a Uniform Civil Code, it is just scattered in various statutes and judicial precedents. The legal development of civil laws in a bid to defend and uphold citizen's fundamental rights has led to birth of a constitutionally consistent approach in matters that are at the center of the discussion around UCC. For example, Every married and divorced woman irrespective of her religion is entitled to claim **maintenance** if she is not empowered enough on her own from her husband under section 125 of CrPC except Muslim women in whose case the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 along with the Judicial Interpretation of said provisions by Hon'ble Supreme Court in 2001³³ apply and she is also now able to get maintenance similarly like women from other religions without facing any negative discrimination under their personal law which would have restricted such rights only up to the *Iddat* period and not beyond. Similarly, in matters of **adoption**, the Juvenile Justice Act, 2015 enables people from any religion (including Muslims whose personal law doesn't recognize adoption) to be able to adopt a child by the provisions of the Act after Supreme Court's intervention in 2014³⁴, the Hindu community already has the Hindu Adoption and Maintenance Act, 1956 which enables them to adopt. In matters of **divorce**, Triple Talaq has been declared

³² Gauri Kashyap, "Muslim Marriage Laws: Writ Petition Summary (Sameena Begum)" *Supreme Court Observer* (2021).

³³ *Daniyal Latifi & Anr v. Union of India*, AIR 2001 SC

³⁴ *Shabnam Hashmi v. Union of India*, AIR 2014 SC 1281

unconstitutional in 2017³⁵ and criminalized in 2019³⁶ which was at the core of dispute when it comes to divorce in the Muslim community. There is already the Special Marriage Act, 1954, Indian Divorce Act, 1869 which enables inter-religious **marriages** if parties wish to do so, Indian Inheritance Act, 1925 for deciding matters of **succession**, etc. What the Uniform Civil Code will effectively do is bring these scattered laws under one document and after preserving the diversities by keeping constitutional friendly customs across all religions, it will provide for a uniform set of guidelines regulating matters of personal affairs which can ensure better protection of people's rights under the Constitution.

The most desirable model of UCC will be the one accommodating personal differences while upholding Constitutional values. The pursuit of gender equality is deeply ingrained in the Indian Constitution. Articles 14 and 15 guarantee that the state should not deprive anyone of their entitlement to legal equality and equal protection while prohibiting bias against any citizen based on religion, race, caste, gender, place of birth, or any combination thereof. To uphold these provisions, Article 13 nullifies any laws that clash with the principles of equality. However, the legitimacy of religious personal laws vis-a-vis the Constitution remains ambiguous, highlighting the need for a UCC to align personal laws with the constitutional mandate for gender equality.

Goa is a breathing example of the feasibility of a Uniform Civil Code where all persons belonging to any religion accept and abide by the Uniform laws governing their personal affairs in matters of marriage, divorce, succession, etc. Polygyny and Triple Talaq are not permitted in Goa and the Muslim Community welcomingly accepts it. While not totally without its drawbacks, the Goa model provides a suitable framework for the broader implementation of a UCC in India, by showcasing what a secular code might look like.

The idea of UCC is not *Anti-Muslim* or *For-Hinduism*, rather it is **Pro-Constitution**, to say otherwise is shifting the goal post and diverting the people from real issues, it is not the first time Personal and Religious morality i.e. do's and don'ts of society have been put subservient to the Constitutional morality to further the goals of Equality, Liberty, and Justice set forth by the Constitutional Fathers and Mothers but many times before, in Indian Society such a change has

³⁵ *Shayara Bano v. Union of India*, AIR 2017 SC

³⁶ The Muslim Women (Protection of Rights on Marriage) Act, 2019

been incorporated and welcomed by various religious classes from 1829 till now despite minor opposition in the beginning followed by a widespread acceptance. To take away the unwanted burden over courts and remove unjust and unequal treatment between the genders, it is high time we adopt and enact a Uniform Civil Code which represents in its essence, our sacred principle of Unity in Diversity.

“India is a Growing Tradition, not a Fixed Revelation”

--Dr. Sarvpalli Radhakrishnan