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UNIFORM CIVIL CODE - WHY & WHY NOT YET.

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Abstract

The aim of the paper is to highlight why Uniform Civil Code (UCC) is needed, especially now, more than ever before. The primary reason behind this is that the whole perception of marriage, divorce, adoption, inheritance in the society has evolved to such an extent that not having a comprehensive, all-inclusive modern-day Uniform Civil Code to govern personal laws of people is infringing on people's basic fundamental rights guaranteed to them by the constitution of India. This paper shall individually discuss the problems associated with various religions' personal laws and then cumulatively as well. Moreover, this paper will illustrate the reasons as to why UCC is still not a law in India, where politics, religion, evolving notions of personal laws will be touched upon. This paper will conclude by providing an overview of the entire paper along with the way forward.

Keywords: Uniform Civil Code (UCC), religion, discrimination, inequality, marriage, divorce, adoption, inheritance LGBTQIA+, male, female, children

Introduction

"I do not understand why religion should be given this vast, expansive jurisdiction to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State."

- Dr. B.R. Ambedkar

Uniform Civil Code (UCC) is a proposal to formulate a system where every citizen of India would be governed by a common personal law irrespective of the religion they follow. The UCC is embodied in Article 44 of the Indian Constitution, which states that, “*the state shall endeavor to secure a UCC for the citizens throughout the territory of India*” and this article falls under the Directive Principles of State Policy, these principles consists of concepts like the UCC, which needed further research and study and were therefore, left for future governments to legislate upon.¹ Although, the Directive Principles of State Policy are un-enforceable in the Indian courts of law, but these are principles which the state must strive hard to follow in spirit till they are enacted as legislations in the future. The personal laws under UCC shall mainly consist of personal laws relating to marriage, divorce, adoption, and inheritance.

The Need for Uniform Civil Code (UCC)

Muslim Personal Law

Muslims in India are governed by the *Muslim Personal Law (Shariat) Application Act, 1937*, under which a Muslim man is allowed to marry up to four wives at the same time.² Moreover, only the husband is allowed to divorce his wife without any valid legal reason and the husband is not required to provide any financial support to the divorced spouse unlike other religions personal laws. *Mohd. Ahmed Khan v. Shah Bano Begum* was a landmark judgment given by the Supreme court of India where it opined that a Muslim man needs to provide financial support to their ex-wife after the three month period ‘*iddat*’ under ‘*Talaq-ul-Sunnat*’ is over, that is financial support is to be provided even after payment of ‘*Mehr*’.³ But in 1986, the Congress led government diluted the effect of the Supreme Court’s judgment by enacting the *Muslim Women (Protection of Rights on Divorce) Act, 1986*, limited the financial support that is, ‘*mehr*’ to the divorced wife for the ‘*iddat*’ period of three months (although the act has now been repealed and replaced but this provision still stands).⁴

Very little progress has been made since the *Shamim Ara v. State of UP* judgment in 2002,⁵ came where instant triple talaq or ‘*talaq-eh-biddat*’, was held unconstitutional by the Supreme Court. *Shayara Bano v. Union of India*,⁶ judgment and the law by the Central government, *Muslim*

¹ INDIA CONST. art. 44.

² Muslim Personal Law (Shariat) Application Act, 1937, No.26, Acts of Parliament 1937 (India).

³ *Mohd. Ahmed Khan v. Shah Bano Begum* [1985] 2 SCC 556.

⁴ Muslim Women (Protection of Rights on Divorce) Act, 1986, Act No. 25, Acts of Parliament 1986 (India).

⁵ *Shamim Ara v State of UP* [2002] 7 SCC 518.

⁶ *Shayara Bano v Union of India* [2017] 9 SCC 1.

Women (Protection of Rights on Marriage) Act, 2019,⁷ was just a reiteration of the 2002 judgment. Moreover, under the veil of freedom of religion a fundamental right under Article 25, the Muslim personal law treats a man and women differently, but Freedom of Religion does not supersede Article 15,⁸ because Article 25 itself, under Clause 2, states that “*this article shall not affect the operation of any existing law or prevent the state from making any law*”.⁹

Although, there is no provision for adoption of minors in Muslim personal law, but in 2014, in *Shabnam Hashmi v. Union of India & Ors.*¹⁰ the Supreme Court of India said that adoption by Muslim parents is possible through secular law. Here, the court has tried to resolve conflict by allowing adoption under secular law for Muslim parents, because by doing so, the court did not have to amend the personal law.

An ironic fact is that “*Islamic countries like Syria, Tunisia, Morocco, Pakistan, Iran etc... codified their personal laws... the practice of polygamy has been either totally prohibited or severely curtailed to check the misuse and abuse of this obnoxious practice. The tragedy is that a secular country like India is lagging behind in giving a red-carpet welcome to article 44*”.¹¹

Hindu Personal Law

The Hindu Marriage Act 1955 (HMA),¹² covers personal laws of Sikhs, Buddhists, Jains apart from Hindus, and people who are not Christians, Muslims, Jews, Parsi are also covered by this act. The one of the most important issues with the HMA, is that it puts excessive stress on ceremonies customs like ‘*Saptapadi*’ and ‘*Homa*’ to be performed during a marriage ceremony because a marriage between a woman and a man as per this act is solemnized when the requisite ceremonies are successfully performed. If this process is not followed properly, the marriage shall be declared as void by a court of law and the burden of proving the successful performance of a custom lies with the party who files, the lawsuit.¹³ The problem with customs here is that customs vary from region to region, community to community and caste to caste. This creates confusion and ambiguity, enough to make a marriage void in the eyes of law. And in a patriarchal society like India, this ambiguity, leads to practices where in a case of Bigamy, the injured spouse files a claim for financial maintenance, the guilty party (mostly men) circumvent the law by proving that

⁷ Muslim Women (Protection of Rights on Marriage) Act, 2019, Act No. 20, Acts of Parliament 2019 (India)

⁸ INDIA CONST. art. 15.

⁹ INDIA CONST. art. 25 cl. 2.

¹⁰ *Shabnam Hashmi v. Union of India & Ors.* [2014] 4 SCC 1.

¹¹ Shabbeer Ahmed & Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution)*

Dead Letter, 67 IJPS, 545 (2006), Accessed 29 October 2021. <http://www.jstor.org/stable/41856241>.

¹² Hindu Marriage Act, 1955, Act No. 25, Acts of Parliament 1955 (India).

¹³ *Priya Bala Ghosh v. Suresh Chandra Ghosh* AIR 1971 SC 1153.

their marriage was not valid in the eyes of the law, which shall lead to such claims to fail in a court of law.¹⁴ Moreover, the maintenance laws in India are conditional to certain 'norms of behavior', which bring into question the character of the wife and wants her to stay chaste. Moreover, the amount the husband must provide to the wife as maintenance is left to the discretion of the presiding judge, which in a patriarchal society, like India tends not to be favorable to the wife.¹⁵

Restitution of conjugal rights under the HMA provides for both the spouses to cohabit when they have separated, on the demand of either of the spouses, against the others will by a court of law. The intention behind is that it shall help the spouses to reconcile but often, it does more harm than good as it can damage the relationship even further. This provision has seen a lot of legal turmoil in India, where it has been removed or upheld multiple times, but finally in 1984, a regressive judgment by the Supreme Court in, *Saroj Rani v. Sudershan Kumar*,¹⁶ upheld this provision.

Irretrievable breakdown of matrimonial relationship, falls under 'No-fault' Divorce theory, (where neither party is at fault but cannot make the marriage work), is still not considered a valid ground for divorce. But the Supreme Court using its powers under section 142 of the Indian constitution,¹⁷ may grant divorce on such grounds (under HMA and SMA). But to obtain this, the appellants must follow the proper hierarchy of the legal system, that is, they can only petition the Supreme Court as a last legal recourse (as divorce is not a fundamental right), making the process very lengthy and tiresome.¹⁸

Although, some Hindu personal laws are evolving like the Hindu Succession Act 2005,¹⁹ where women are being treated almost equal to men, in terms of inheritance. But this law is not fool proof because when the wife dies, the husband inherits everything belonging to her (in case of no children), instead of it being divided amongst her husband, and her parents equally, which is the case when the husband dies. And thus, this provision violates 'right to equality' guaranteed under Article 15(1) of the constitution.²⁰

¹⁴ Vijender Kumar, *Bigamy and Hindu Marriage: A Socio Legal Study*, 59 JILI, 356 (2017), Accessed 29 October 2021, <https://www.jstor.org/stable/26826614>.

¹⁵ Asha Bajpai, *How Hindu Personal Law Can Be Reformed*, Times of India, Accessed 21 October 2021. <https://timesofindia.indiatimes.com/india/how-hindu-personal-law-can-be-reformed/articleshow/60726036.cms>.

¹⁶ *Saroj Rani v. Sudershan Kumar*, AIR 1984 SC 1562.

¹⁷ INDIA CONST. art. 142.

¹⁸ *Naveen Kohli v. Neelu Kohli* [2006] 4 SCC

¹⁹ Hindu Succession Act 2005, Act No. 39, Acts of Parliament 2005 (India).

²⁰ See *supra* 13 at 8.

Christian Personal Law

Section 10 of the Indian Divorce Act 1869, applicable to Christians is gender biased as women are placed under 'double discrimination', against the men of their own religion, because the husband may obtain a divorce on a single ground (adultery), but women may only obtain divorce, if they have at least 2 separate and independent grounds for divorce (like adultery and cruelty).²¹ And certain provisions of Christian personal laws vary from region to region, where those places have their own version of their personal law, which tend to be even more outdated and archaic.²²

John Vallamattom & Anr. v. Union of India,²³ while striking down a discriminatory provision in Christian succession in the ISA the Supreme court of India referred to *D.S Nakara v. Union of India*,²⁴ where it said that Article 14 forbade class legislation but permits reasonable classification for creation of legislation. The court here laid down twin tests of classifications which need to be satisfied, first is 'intelligible differentia' that distinguishes if the persons or things that are grouped together are being left out or not and the second test is that 'differentia' shall have a rational nexus to the objective being desired to be achieved by the statute in question. The court also opined that this provision of reasonable classification and the tests are there in essence to help the people hit by the rampant inequality present in our society. While delivering its judgement the Supreme court observed that if a UCC had existed such discrimination could have been avoided as it would treat all religion personal laws equally irrespective of religion. Moreover, the court also noted that Article 25 of the constitution of India, that gives the people in India the freedom to profess and practice religion of their choice.²⁵ And that while article 25 and article 26 guarantee freedom of religion but article 44 creates distinction between religion and personal laws. The court further observed that marriage, succession, and other personal law matters of a secular character do not fall under the guarantees enshrined under Article 25 and 26 of the Indian Constitution.²⁶

Parsi Personal Law

Although the Parsi succession law provides for the daughter to inherit her parents' possessions equally along with their son, but the amendment is still discriminatory, where a non-Parsi women

²¹ The Divorce Act 1869, §10, Act No. 4, Imperial Legislative Council, 1869 (India).

²² Flavia Agnes, *Reforms as If Women Mattered A Critique of the Proposed Christian Marriage Bill*, India together: The news in proportion, accessed October 29, 2021, <https://indiatogether.org/manushi/issue119/reforms.htm>.

²³ (2003) 6 SCC 611.

²⁴ AIR 1983 SC 130.

²⁵ INDIA CONST. art. 25.

²⁶ INDIA CONST. art. 26.

cannot inherit her Parsi husbands' possessions (only their children can). Moreover, the children of a Parsi women who is married to a non-Parsi man, then their children are not Parsis and the Parsi women also loses her rights to inherit her Parsi parents' possessions.²⁷

Goa Civil Code

Goa is the only state in India which technically, has a UCC, as when it was incorporated into India in 1961, it was allowed to keep its own civil code. Locals of Goa are governed by a single code irrespective of religion, ethnicity, and linguistic affiliation.

The positive here is that the married couple jointly hold ownership of assets (unless a prenuptial agreement is present). Practice of polygamy or verbal divorce is prohibited by Muslim men in Goa. And in inheritance laws there is no discrimination based on gender.

But the Goa civil code is not truly a UCC because of it now being outdated and the following religious specific provisions. Where Hindu men can practice bigamy if wife fails to deliver any child by the age of 25 years or male child by the age of 30 years. Special provisions for Roman Catholics to get married in a church are present, whereas all other marriages shall only be valid if legally registered. Divorce between Hindus is only possible on grounds of adultery by wife. There are also inequalities present in case of adopted and illegitimate children.²⁸

Special Marriage Act

Modern day India people are entering into relationships which were earlier considered as prohibited relationships by the society at large. Inter- caste, inter- regional, inter-community marriages, etc. come under the *Special Marriage Act 1954 (SMA)*,²⁹ and under this act the married couple is not governed by the personal laws of their (different) religions. This act also addresses divorce, adoption, inheritance, etc. for couples who have been married under it, that is marriages are solemnised irrespective of the religion or faith followed by either party. One major problem with the SMA is that it is limited to the extent that couples of the same religion cannot get married under it and thereby cannot use the benefits it has over other personal laws.

²⁷ Sanaya Dalal, *A Parsi Woman's Perspective on Being Denied Basic Rights*, NDTV, Accessed 29 October 2021. <https://www.ndtv.com/blog/a-parsi-womans-perspective-on-being-denied-basic-rights-1768775>.

²⁸ Partha S. Ghosh, 'THE POLITICS OF PERSONAL LAW IN SOUTH ASIA: IDENTITY, NATIONALISM AND THE UNIFORM CIVIL CODE', 19–22.

²⁹ Special Marriage Act 1954, Act No. 42, Acts of Parliament 1954 (India).

Cumulative Reasons

India requires a UCC because every single personal law in some form or the other violates the Articles 14,³⁰ 15,³¹ 19,³² and 21,³³ fundamental rights under the Indian constitution that guarantees right to equality, equal treatment for all irrespective of caste, race, gender, religion, freedom of expression, right to life, right to privacy and more. Furthermore, the people heading these religious personal law boards are the people who misuse these laws in their favor. And as India is still a patriarchal society, it leads to orthodox males making discriminatory personal laws for all. Moreover, if someone dares to speak up against the discriminatory provisions of their respective religion, then they are often boycotted by their families, friends, and community.

Restitution of Conjugal rights (defined above) was inserted by the British in their law for their people, which the Indian law makers used as precedent to insert it in Indian personal laws, but the British abolished this provision in 1970. This practice is present in every personal law in India (including the SMA), even though it has been abolished in the country from which it originated because of it being discriminatory, decades ago. So, the time has come for this provision to be removed from every personal law in India, which may only be possible through a UCC.

Conversion is a ground for divorce under every religious personal law in India, which is against the fundamental rights as India being a secular country allows everyone to profess any religion (or no religion) as they see fit for themselves. Thus, this right should not be curtailed or limited like this.

The argument that individual personal laws should be amended instead of enacting UCC is very weak because since Indian Independence the progress in this regard has been very slow and has not been uniform, and instead, it has created a lot of disagreements within every religion and a feeling of being discriminated against by other religions and communities, which shall lead to widespread discontentment and chaos.

A Law Commission was appointed by the Ministry of Law and Justice in the year 2016 to find the extent to which Uniform Civil Code (hereinafter know UCC) can be implemented across India. A report titled “Consultation Paper on Reform of Family Law” was submitted in 2018 by the Law

³⁰ INDIA CONST. art. 14.

³¹ See *supra* note 8 at 6.

³² INDIA CONST. art. 19.

³³ INDIA CONST. art. 21.

Commission. The findings called for action pertaining to further amendment and codification of Personal Laws, particularly in the fields of succession and inheritance and inheritance in India. In essence implementing UCC would align with Law commission's findings.³⁴

The Supreme Court, in the case *S.R. Bommai v Union of India*³⁵ judgment mentioned that by safeguarding the socio-cultural diversity and acknowledging the vast variety of people, beliefs, cultures and languages by placing and preservation of different types of people, beliefs, languages and placing them in a united manner is the essence of secularism in India. It may be inferred from the language that this judgment would welcome a secular UCC because without one discrimination and division based on religion would remain prevalent in India.

Why Uniform Civil Code is (Still) Not a Law?

Since Indian independence UCC was and is still being portrayed as an assault of religion, which thwarts secular reform. This has been propagated by greedy male chauvinists, so-called political pandits and defenders of religion. But what the UCC should aim at is secular reform in discriminatory provisions and acts present in the religious traditions and personal laws.³⁶

Politics

The implementation of a UCC may lead to massive protests from personal law boards and some people of India. Another point which should be taken into consideration is that, after the initial turmoil, a comprehensive and inclusive UCC might be welcomed by people, especially, the youth of the country (who would benefit the most).

Politics and the politically charged nature of religion, are the primary reasons as to why UCC is an unenforceable proposal in the Indian Constitution, whereas it should in fact be an enforceable fundamental right as envisaged. Furthermore, on an international level it shall portray India as a country which has entered the 21st century as an inclusive state where it strives to achieve equality for all, which shall in turn help India become a modern-day superpower in all aspects.

³⁴ Saxena, S., Badola, P., Gupta, S., Belove, O. and Mishra, A., 2018. *Consultation Paper on Reform of Family Law*. [online] Lawcommissionofindia.nic.in. Available at: <<https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>> [Accessed 4 October 2022].

35 AIR 1994 SC 1918.

³⁶ B. G. Verghese, *Who's afraid of a Uniform Civil Code?*, bgverghese.com. Accessed 29 October 2021. <https://bgverghese.com/code.htm>.

LGBTQIA+ Community

The lack of progressive UCC and regressive personal laws which ridicule or ignore marriage for the LGBTQIA+ community, is being used as an argument by Tushar Mehta the Solicitor general of India representing the Central government, to stipulate that, *“such marriages are not recognized in India, ...same sex marriage is not comparable with the traditional family unit concept present in India and is against the age old customs, traditions, cultural ethos and societal values, ...there exists a legitimate state interest in limiting the recognition of marriage opposite sexes only”*. And on 26th October 2021, the Solicitor General, further stated that, *“marriage is between a biological man and Biological women (thereby excluding the transgender community) and that there appears to be some miscommunication based on Navtej Johar case.... which has nothing to do with marriage.... Supreme court judgment decriminalized a ‘particular human behavior’ ...a penal offence.... but the said judgment was neither intended to nor did in fact legitimize the human conduct (marriage rights for the LGBTQIA+ community) in question”*.³⁷

This aspect is slowly but steadily coming into light is that the central government led by the BJP who is known for being conservative in nature, in their poll manifesto promised a UCC, the above shows that the government might be trying to avoid making the UCC because then they might have to address the issue of making the UCC inclusive of provisions of marriage and other personal laws for the LGBTQIA+ community of India because any stance against the LGBTQIA+ community might hurt and tarnish its ever growing international relations and popularity as a secular and inclusive democracy.

Legal requirements

India is in violation of International Covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979. The Indian government has ratified these treaties where it has declared that it would promote gender equality under all its national laws and as per international law if a country ratifies a treaty, it becomes duty bound to take actions to implement its provisions in their country. One can clearly infer that India is in violation of these treaties and the Indian government also accepts the violation of these treaties.³⁸ But the defense the government takes is that, in India traditional matters related to marriage divorce and other personal laws are governed by Religions

³⁷ Centre to HC Marriage is Between Biological Man and Biological Women, The Indian Express. Accessed 29 October 2021). <https://indianexpress.com/article/india/centre-to-hc-marriage-is-between-biological-man-and-biological-woman-7590713/>.

³⁸ Jyoti Rattan, *Uniform Civil Code in India: A Binding Obligation Under International and Domestic Law*, 46 JILI, 577 (2004). Accessed 29 October 2021. <http://www.jstor.org/stable/43951938>.

personal law boards, where the Government does not interfere because there is an absence of demand for change from individual religious communities. Which is wrong as Clause 2 of Article 25 which protects freedom of religion expressly states that *“this article shall not affect the operation of any existing law or prevent the state from making any law”* and hence, does not supersede Article 15 which provides for equality for all irrespective of gender, religion, race or caste or prevent the parliament making any laws in this regard.

Conclusion

Gender inequality and unequal treatment of people is ingrained in every religious personal law, thereby, the need has arisen to break these traditional barriers of community, caste, race, region, language, and gender, by challenging the archaic and outdated social order by formulating a comprehensive and all-inclusive UCC.

In the short-term implementation of a UCC Might not be feasible or turn out to be expensive but the situation would stabilize in the future because the UCC would first and foremost separate religion from personal laws, and the UCC should have straight forward laws of inheritance which would lead to straight forward application of personal laws and less ambiguity and thus, the burden on cases on the judiciary should reduce and thereby expenditure.

The law should be made in such a way that its provisions should be irrespective of religion. SMA may become the potential model on which UCC could be based upon because it provides for personal laws irrespective of religion. But this act is also not fool proof and needs to be updated to be in line with current times, and it must make provisions which are inclusive of rights for LGBTQIA+ marriages and other personal laws. Examples of progressive personal civil laws may be taken from the United States of America and majority of the European countries, who have or are updating their personal laws to be irrespective of religion and inclusive of marriage and other rights for the LGBTQIA+ community. And as some major provisions of the Indian constitution are inspired by principles of other constitutions, here as well, the personal laws of these countries may be taken as a model along with SMA, for formulating an India specific UCC. Moreover, public may fear that a UCC would be lacking in some respects or may become outdated in the future, (like the one present in Goa), but the solution for this is, periodical amendments, where the code may be updated to suit the present-day needs of the public.

Hence, the need of the hour is for a UCC, made irrespective of religion and inclusive of all, leaving the ritual embodied in religion may remain intact but which should only be for ceremonial purposes and within the bounds of the constitution of India.