

JOURNEY OF UNIFORM CIVIL CODE: MOVING FROM DIRECTIVE GOAL TO NEED

Mrs. Mayura Borde*

Introduction :

India is the country having 5,000 year old civilization, 325 languages spoken, 18 official languages, 29 States and 7 Union Territories, fragmented into various religions. We find diversity in India in various contexts. As it is a large country with population we can find the variability among cultural patterns, Physical features, Linguistic-religious diversity, caste pattern, etc. India is a country where people professes and represents major religions of the world like Hinduism, Buddhism, Jainism and Sikhism and it is also a home of Jewish, Zoroastrian, Muslim and Christian Community. For maintaining the unity in diversity in the context of law all civil and criminal laws are same for all irrespective of their caste, language, religion. In the family matters like Marriage, divorce, adoption, Maintenance, Inheritance, Succession all are governed by their personal laws. These Personal Laws are framed during the British Raj e.g. For Hindus- Hindu Widow's Remarriage Act, 1856; For Muslims- Shariat Act, 1937, Dissolution of Muslim Marriages Act, 1939, For Parsi- Parsi Marriage and Divorce Act, 1936; For Christians Native Converts Marriage Dissolution Act, 1869, Indian Christian Marriage Act, 1872, etc. So the present paper is deliberating upon the Discrimination in matter of personal laws, the grounds for discrimination and need of Uniform Civil code.

Uniform Civil Code :

The term Uniform Civil Code implies the same set of secular civil laws to govern all peoples irrespective of their Religion, Caste and tribe. The areas covered under it are the Laws related to Marriage, Divorce, Adoption, and Inheritance and acquisition and Administration of property¹. The idea of Uniform Civil Code was mooted in the Constituent Assembly in 1947. The Sub Committee on Fundamental Rights had included Uniform Civil Code as one of the Directive Principles of State Policy Clause 39 of the Draft D.P.S. Under Article 44 of Constitution of India Uniform Civil Code is a mandate on State as a directive . By virtue of Article 37 though it is directive principles of state policy not enforceable by the Court of Law; it does not undermine the importance this. A former Chief Justice of India² has observed that *"In any event, the non implementation of provision contained in Article 44 amounts to a great failure of Indian Democracy and the sooner we take suitable action in that behalf, the better and in the process of evolving a new secular social order, a common civil code is must"* A former Supreme Court Judge has also observed³ that *"Religion oriented personal laws were a concept of medieval times- alien to modern societies which are secular as well as cosmopolitan and so long as our laws are religion-orientes, we can hardly build up a homogeneous nation"*

Discrimination In Various Personal Laws

Some provisions which reflects major difference in Personal Laws are summarize as below:

1) Monogamy: Under Muslim Law Polygamous marriage for Muslim male is valid while For Hindus, Parsis, and Christians Monogamy is essential condition for valid marriage.

2) Extra-judicial Divorce: Muslim Male can give extra-judicial Divorce; Hindus, Parsis, and Christians can effect divorce only through court.

3) Divorce: Muslim man can give divorce to wife at whim or pleasure but under Hindu, Christian and Parsi Law divorce wife can be divorced only on grounds mentioned in their respective Laws.

4) Husband's Apostasy:

Muslim Law: Automatic dissolution of Muslim marriage this provision is not applicable to wife.

Hindu Law: Apostasy of either spouse confers on non-apostasy spouse the right to sue for divorce⁴.

Parsi Law: Apostasy of Parsi spouse confer power to sue for dissolution of marriage to non-apostasy spouse⁵.

Christian Law: Apostasy has no effect on Christian marriage except when apostate husband married again, wife would entitle to sue for divorce.

5) Maintenance: Under Muslim Law wife is entitle to maintenance during the Iddat period only while other Laws allows a post-divorce permanent alimony.

6) Share of daughter: Under Muslim personal Law and under Indian Succession Act Parsi and others who are not Hindus, Muslim, Buddhist, Sikhs Daughter inherits the half the share of a son while under Hindu Law daughter shares equally with the son.

7) Will: Under Muslim Law, a person can dispose only 1/3rd property while other personal Laws does not impose such limitation.

8) Right of Pre-emption: Muslim Law confers on a person right to pre-empt any property in respect of which he is a co-sharer but other personal Laws does not confer such right.

Personal Laws and Fundamental Rights :

For Justifying Personal Laws it has been argued that in addition to religion some other grounds like their historical Background, social habits, educational development, cultural outlook and various other matters are also present.

In *State of Bombay vs. Narasu Appa Mali*⁶ the validity of Bombay Anti-Bigamy law was challenged as it created discrimination on the ground of Religion alone. This case is pertaining to the 'Bombay Prohibition of Bigamous Marriage, Act, 1946, the constitutional validity of which was challenged on the basis of Article 14, 15 & 25 of the Constitution of India. Two major issues were involved in this case:

A) Whether the Personal laws of Hindus, or of any other community, is "Law" within the Meaning of Article 13 (3) (b) and Article 372 (3), Explanation 1?

B) Whether an alteration of the personal law of one community, without a similar alteration in that of others, violates equality?

Bombay High Court in considering the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, said that personal law was not included in the "law" referred to in Article 13 (3) and was not the "law in force" saved by Art. 372 (3). It was also declared that Bombay Prevention of Hindu Bigamous Marriage Act, 1946 is not violative of Article 14 as the State was free to embark on social reforms in stages.

Hon'ble Court upheld the exclusion of Muslim from the operation of law not because the Hindus and Muslims profess the different faith but because the legislature found the Hindus to be more ripe for the reform in question in view of their social background and outlook, educational and cultural developments and various other distinguishing factors.

Bombay High Court in this case ruled that:

1. Personal laws are not 'laws in force' under Article 13 of the Constitution as they are based on religious precepts and customary practices; and
2. The principles enshrined in the Part III of the Constitution cannot be applied to the personal laws.

In *Shrinivasa Aiyer vs. Saraswati Ammal*⁷ Division Bench of Madras High Court upheld the application provisions of Madras Anti- bigamy Law to Hindus alone on the ground that "*Such different Laws for Hindus and Muslims were not on the ground of religion only but on social and other developments of and various other considerations peculiar to each of the communities.*"

The essence of both of these judgments is that they can preserve their personal laws peculiar to themselves. Bhopal High Court⁸ and Mysore High Court⁹ also recognize that "*Fundamental Difference between the personal laws of Hindus and Muslims attempted to justify them on the ground that the classification of the two religious communities into two separate classes was a reasonable classification 'based upon the outlook of persons belonging to the two communities'¹⁰ and their past history, 'difference in culture etc.'¹¹"*

By these judgments it appears that the judges has strained their every nerve to find out and put forward any extra-religious factor as a ground or as an additional ground for classifying the Muslims and the Hindus into separate classes for the application of their separate personal laws.¹²

Role of Indian Judiciary in Highlighting Necessity of Uniform Civil Code :

In the *Shah Bano Case*¹³, a petition was filed by Shah Bano under Section 125 of the Criminal Procedure Code, against her husband. Supreme Court upheld that a Muslim wife has a right under Section 125 of the Criminal Procedural Code. Hence, Section 125 overrides the personal law. The appellant raised a contention that he was not obliged to maintain her also because he had paid her Mehr¹⁴. The Court inferred that Mehr is an amount to be paid in consideration of marriage. Thus Mehr is not supposed to be associated with divorce. The Court reached to a conclusion that steps need to be taken in the Muslim community to bring reforms by altering and modifying their personal laws¹⁵.

In *Sarla Mudgal vs. Union of India*¹⁶ Supreme Court directed Govt. to take fresh look at Art.44 of the Constitution.

Not only relating to marriage and divorce in matter of Succession also this need has been felt In *John Vallamattom v. Union of India*¹⁷, Section 118 of the Indian Succession Act, 1925 was challenged on the ground of discrimination. The petitioners were aggrieved by the section because it provided discriminatory treatment to the Christian community only. According to Section 118, the Will made by a Christian for bequeathing any property to a religious or charitable purpose should be bequeathed, in not less than twelve months before his death. The property should also be deposited within six months of the execution of the will. This section was violative of Article 14 and Article 15 of the Constitution. It discriminated the Christians amongst the non- Christians as it restricted their power to bequeath their property for religious and charitable purposes. Since the time of the death of a person cannot be determined, a Christian if dies within 12 months of the execution of the Will, loses its significance. The given provision was only meant for the Christians having a nephew, niece or nearest relative. Hence, it also discriminated such Christians from the other Christians. Hon'ble Supreme Court declared Section 118 of Indian Succession Act unconstitutional as it is violative of article 14 of Constitution.

In the matter of a Uniform Civil Code, India's binding obligation under international law have also started attracting attention of legal and other experts. Satyabrata Rai Chawdhuri, rightly observed in 2003¹⁸:- [Since] different treatment for any religious group is violative of the UN Covenant on Civil and Political Rights and the Declaration on the Rights to Development adopted by the world conference on Human Rights, it is hoped that Parliament will frame a common civil code without further delay, divesting religion from social relations and personal law

So a Uniform Civil Code is very important for the protection of oppressed women, to protect their human rights, to remove discrimination against them irrespective of their religion or community they belong and, lastly to make our national laws in accordance with the international instruments which are legally binding on India through various international conventions and international Human Rights instruments which are ratified by India. I think at the present time, the time is ripe for us to try to push it (Uniform Civil Code) through. To sum up in last, it can be said for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a unified code is an absolute necessity on which there can be no compromise.

Suggestions :

Some of the suggestions for removing Discrimination are

- Polygamy should be banned
- Compulsory Registration of marriage
- Recognition of women as a natural guardian

Conclusion :

Whenever necessary courts have adopted activist approach and also declined to deal with the area which is completely the province of the State. One thing is clear after analyzing the provisions of law, judgments delivered by the Courts in India and the situation in which Part III and Personal laws are coexists, that it is only for the State/Legislature to take some appropriate steps either in the form of: 1. Enacting a uniform civil code or 2. Rationalizing or improving or removing the discriminations from the existing personal laws. The absence of Uniform Civil Code, is an incongruity that cannot be justified with all the emphasis is placed on secularism and modernization. In the context of fast changing social needs the age old religion based personal laws have created innumerable practical difficulties. To remove all these efforts and courage will be required to enact Uniform Civil Code.

(Endnotes)

- 1 *Assistant Professor Modern Law College, Pune.
Alka Bharati, "Uniform Civil Code in India – still a distant dream" American International Journal of Research in Humanities, Arts and Social Sciences ISSN (Print): 2328-3734
- 2 Gajendragadkar, Secularism and Constitution of India, 1971, p.126
- 3 K.S. Hegde, Islamic Law in Modern India, edited by Tahir Mahmood, Indian law Institute, 1972, p.3.
- 4 Hindu Marriage Act, 1955 s.13(1(ii))
- 5 Parsi Marriage and divorce Act, 1936, S.32(v)
- 6 AIR 1952 Bom 84.
- 7 AIR 1952 Mad 193
- 8 Abdullah Khan vs. Chandani Bai AIR 1956 Bhopal 71 (72)
- 9 Sudha vs. Sankappa Rai AIR 1963 Mysore 245 (247)
- 10 AIR 1956 Bhopal 71 (72)
- 11 AIR 1963 Mysore 245 (247)
- 12 Justice A.M. Bhattacharjee
- 13 Mohd. Ahamad Khan v. Shah Bano Begum AIR 1985 SC 945
- 14 It is a gift of money, possessions or property made by the husband to the wife, which becomes her exclusive property

- 15 H.B. Kesahva and aparajita Gupta “Religious equality vs. freedom of religion The need for a Uniform Civil Code”, International Journal For research and Analysis, Vol.3 Issue 2
- 16 (1995) 3 SCC 635
- 17 AIR 2003 S.C. 2902
- 18 Satyabrata Rai Chawdhuri, “A Common Civil Code : It is a Constitutional Obligation” 10, The Tribune, 30 July 2003. Edited by shodhganga.inflibnet.ac.in/bitstream/10603/54472/.../11_chapter%204.p..