



## UNBORN CHILD OF CONSTITUTION- UNIFORM CIVIL CODE

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### ABSTRACT

*“Religion is the opium of the masses.”*  
The above statement of Karl Marx emphasizes on how religion in its real existence is of such a nature that it has become significant as the people in society. Many a times, it so happens that people are so overwhelmed by religion that they overlook the basic human instincts and values that they should inculcate and begin to value religions more than individuals. For this, synthesis of the views, ideas and ideology needs to be integrated with a holistic approach. Ours is a diverse society-with different sects having heterogeneous beliefs, sometimes creating a dichotomy in the society. In furtherance to the notion of coherence in society, there must be some mechanism that binds all religions together, simultaneously regularizing it. The idea is to create a Uniform Civil Code functional throughout the territory of India regulating all the religions in the same manner pertaining to legal matters of religions. The bigoted fundamentalist revolt against sanctioning this code to bring into effect, claiming that it would meddle with their personal laws and violates their fundamental right to religion. However, the code is not having any truck with religious matters and its core concern is to regulate legal matters which are strangled in the religious domain like marriage, inheritance, succession, maintenance, divorce, etc. The researchers

*have preferred doctrinal mode of research in this paper. The researchers have also relied upon various judicial interpretations to indicate the significance of the subject, and have also tried to depict the status quo prevalent in the nation.*

**Keywords-** *Pseudo Identity Politics, Religious Freedom, Religious Pluralism, Secularism, Social Solidarity.*

### 1. Introduction

*“Sarv Dharma Sambhava”*

The meaning of this Sanskrit excerpt drives us to an ideology which embraces the concept of equality and harmony among all religions. Our country, since ages, has been preaching the same and has nurtured all the religions in its basket. Our country has been an originating and culminating point of a number of religions- Hinduism, Buddhism, Sikhism, Jainism and yet many other religions which have thrived in its lap.

Father of the Nation has also reiterated the same, *“I do not expect India of my dreams to develop one religion, i.e., to be wholly Hindu or wholly Christian or wholly Mussalman, but I want it to be wholly tolerant, with its religions working side by side with one another.”*

Nevertheless, our country has always respected diversity among communities, religions but what hurts the most is the divergence among that diversity. The presence of different sects of personal laws for same matters in different religions leads to the violation of fundamental rights of the individuals in general and of women in particular.



## (A) WHY UNIFORM CIVIL CODE?

There must be Rule of Law in the society as it denotes a way of life, commitment to certain principles and values to establish social, economic, cultural, educational and cultural conditions under which legitimate aspirations and human dignity may be realized, which is a priceless inheritance of our civilization; according to which, law must be a fair, just and reasonable law, it is not sufficient to have a law.<sup>1</sup>

While India was facing the heat of independence, our Muslim brothers constituted a separate religion centric nation. It was this time when the framers of the constitution recollected the fresh atrocities committed at the time of independence, so it was quite natural for the leaders of the divided India to aspire for the unity of the one nation, India, so that history might not repeat itself.<sup>2</sup> Granville Austin also said that despite the inroads on personal law during the British period, the idea of uniform civil code struck at the heart of custom and orthodoxy.

Few prominent statements in the Constitutional Assembly Debate need to be looked upon, when the matter of Uniform Civil Code was being discussed in the House to introduce the same in the Constitution of India as Article 35, which subsequently got its place in Directive Principles of the State Policy under Article 44.

However in the Constitutional Assembly Debate, an objection was raised in the House that religion would be in danger and communities won't be able to live in amity if there is to be a uniform civil code. In reply to the above objection, Shri Alladi Krishnaswami Ayyar answered that, "*the article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system.*"

Shri K. M. Munshi, had also expressed his concern on the enactment of the uniform code. He said that if a uniform code has to be enacted, the benefits which may accrue to the whole community shall be taken into consideration and not a part of it, in the path of consolidation of a community. So, a Uniform Code would not mean the domination and an act of tyranny of the majority; rather a unification of all the personal laws in such a way that the way of life of the whole country may in course of time be unified and secular.

He further emphasized that, religion must be divorced from ties of personal laws, from what may be called social relations or from the rights of parties as regards inheritance or

<sup>1</sup> Soli J. Sorabjee, *Rule Of Law Its Ambit And Dimension*, in *Rule of Law in a Free Society* 3-7 (N. R. Madhava Menon ed., 1<sup>st</sup> ed., 2008).

<sup>2</sup> Acharya Dr. Durga Das Basu, *Commentary on the Constitution of India* 4138 (Hon'ble Justice YV

Chandrachud et al. Hon'ble Justice S. S. Subramani et al. Hon'ble Justice B. P. Banerjee et al. V. R. Manohar, 8<sup>th</sup> ed., 2008).

<sup>3</sup> Austin Granville, *The Indian Constitution: Cornerstone of a Nation* 101 (18<sup>th</sup> ed., 2012).



succession. Shri K. M. Munshi while speaking in the favour of enactment to divorce religion from personal laws added that, “Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation.”

Despite a pledge to this effect in the constitution, a common civil law for all Indians was not enacted but left on sweet will of the legislators to enact the same somewhere in the future at the apt time. The framers of the constitution decided to reach to an amicable solution through inception of only “an idea” for the Uniform Civil Code which would bring about a uniformity and unanimity among all the religions.

Article 44 of the Constitution in the Directive Principles of State Policy reads as: “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”.

The article gives us a hope and duty to the legislators to enact a uniform code for all the religion throughout the territory of our nation. A Civil Code, as defined by *Shri Alladi Krishanaswami Ayyar*, has been pointed out as the law of contracts, as the law of property, as the law of succession, as the law of marriage and similar matters. Moreover, personal law has been defined in the *Entry 5 of List III of VIIIth Schedule of the*

*Constitution* as, “Matters relating to 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 has retained its identity as the center for diverse religion and cultures; consequently, the colonial administration left its legacy in the form of operation of separate personal laws for different religious communities in India.<sup>4</sup> This gave birth to *legal pluralism* in India as far as personal laws are concerned. This kind of legal pluralism has blurred the boundaries of the state and the society.<sup>5</sup>

Whenever, debate over Uniform Civil Code strikes, it leaves patches of conflict between the ideals which have been running through the veins of our country. To be precise, these are- existence of pluralistic society, secularism, patriarchal set-up of society and religious identity of minorities.

#### (B) PLURALISM

India is a country of faith residing in different religions based on beliefs or tenets propounded by different religions, similar problems were confronted by our founding fathers when it came for the purpose of unification and integration of people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different languages and dialects in different regions; resulting which

<sup>4</sup>Rajeshwari Sunder Rajan, *The Scandal of the State: Woman, Law and Citizenship in Postcolonial India* 147 (1<sup>st</sup> ed., 2003).

<sup>5</sup>Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* 326 (1<sup>st</sup> ed., 2011).



they provided us a secular Constitution to integrate all sections of the society as a united Bharat.<sup>6</sup>

However, the founding fathers decided to maintain the same living style to not to repeat the conflicts from which a new India was recovering recently and Uniform Civil Code was kept under the ambit of Directive Principles of State Policy. But, with so many disruptive forces of regionalism, communalism and linguism, now it is necessary to emphasize and reemphasize that the unity and integrity of India can be preserved only by a spirit of brotherhood.<sup>7</sup> It is the call of the hour bring the same brotherhood in a single thread via enactment of the uniform code.

#### (C) SECULARISM

There is not a single word, 'secularism' in our Constitution yet in its preamble it declares India to be secular nation, with secularism as its basic feature. Secularism has a wide expanse in its applicability, but with restrictions.

In pursuance of the goal of secularism, the State must stop administering religion-based personal laws.<sup>8</sup> Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation.<sup>9</sup>

Mr. Mohamad Ismail Sahib in the Constitutional Assembly Debate has said that *“the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people.”*

#### (D) PATRIARCHY

The nature of Indian society is patriarchal and it draws its emergence from the tenant of religion itself. But, the set-up often gets into conflict with the rights of the women and in cases, victimizes them. It can be turned upside down and status of women can be fortified by the enactment of the uniform code.

#### (E) RELIGIOUS IDENTITY OF MINORITY

The problem of minorities is basically one for the major communities to handle. The test of success must not be felt as what majority thought but how the minority communities felt.<sup>10</sup>

There is a division among various religions on the subject of Uniform Civil Code. Certain communities take defense of sacramental

<sup>6</sup>PannalalBansilalPatilv. State of Andhra Pradesh, AIR 1996 SC 1023 (India), ¶ 12.

<sup>7</sup>Shri RaghunathraoGanpatrao v. Union of India, AIR 1993 SC 1267 (India), ¶ 108.

<sup>8</sup>Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945 (India), ¶ 36.

<sup>9</sup>S.R. Bommai v. Union of India, AIR 1994 SC 1918 (India), ¶ 237. It has been stated by Sri K.M. Munshi during the Constituent Assembly Debates, which has been recognized in the Hon'ble Court in this case.

<sup>10</sup>Sarvepalli Gopal, *The Crisis of Secularism in India, Imperialists, Nationalists, Democrats: The Collected Essays* 346 (SrinathRaghavan ed., 1<sup>st</sup> ed., 2013).



origin of their personal laws due to which they cannot be altered. The Hon'ble Court in the case of *Ahmedabad Women Action Group (AWAG) and Ors. Vs. Union of India*,<sup>11</sup> noted that the personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians, in spite of that the Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil code" for the whole of India.

So, the sacrifice needs to be done from both sides, minority as well as majority community, reaching to a cordial juncture.

## 2. CONFLICT WITH THE PERSONAL LAWS

It will be wrong to say that to make Islam even with Hinduism, Uniform Civil Code is required. Rather differences among every religion and in between every religion prompts us to go in this direction.

Apart from the religious sentiments which may get affected by the enactment of uniform civil code, another aspect has also to be put in picture. Yes, we are talking about woman, who is behind the curtains, the glorified picture shows her pockets to be filled by number of empowerments as she is surrounded by all the legislation and protected by judiciary, yet she is facing the agony of unequal treatment and peeping from

the curtains, requiring a helping hand to pull her out and treat her on equal footings with each and every citizen of this country. And, this helping hand can be in the form of Uniform Civil Code by restricting the personal laws of the extent which does not violate their fundamental rights guaranteed under the Constitution of India.

Enactment of Uniform Civil Code has not only faced hue and cry from the side of followers of Mohamedan law but also from the various provisions of different set of personal laws, which is going to be discussed further in the chapter.

### (A) HINDUISM

The evolution and development of Hindu Law is acknowledged as having one of the most ancient pedigrees of any known system of jurisprudence.<sup>12</sup> The recent urbanization of customary rules of Hindu Law have altogether strengthened the each and every subject of the law on which it is being made applicable, let it be men or women. But then again, even after codification of laws and series of historical amendments in various legislations dealing with various arenas of personal laws of Hindus which ultimately projected towards the development of Uniform Civil Code, there are certain vicinities which can be checked after the enactment of the Uniform Civil Code.

**A.1 Marriage-** When Hindu Marriage Act was introduced, it ratified the rule of monogamy for all the Hindus, unlike the culture earlier followed which posed no restriction on monogamy. Apart from

<sup>11</sup>AIR 1997 SC 3614 (India), ¶ 13.

<sup>12</sup> 7Mulla *Principle of Hindu Law*, (S.A. Desai ed., 20<sup>th</sup> ed., 2007).



curbing up of this vice, it removed many other inequalities and tried to give equal rights to women as that of men.

Although, a Central Act has been enacted, almost all States have made the required Rules under the Hindu Marriage Act, 1956, but provisions of the various State Rules have not been uniform, under which registration of marriages has been kept optional.<sup>13</sup>

Despite of the presence of the Hindu Marriage Act, other legislations for rules governing marriages of Sikhs and among Hindus has been enacted, the presence of multiple legislations for the same subject devaluate the resolution of any law.

The Anand Marriage Act, 1909, still in force, was passed to recognize Sikh marriages performed by the religious rites known as “Anandkaraj”, but it contained no provision for registration of any such marriage.<sup>14</sup>

The Arya Marriage Validation Act, 1937 was passed to recognize inter-caste and inter-sect marriages among the Hindus; strangely, this Act which remains in force said nothing about the well-established Arya Samaj system of certification of marriages.<sup>15</sup>

**A.2 Divorce-** Section 13 of The Hindu Marriage Act provides certain grounds for the dissolution of marriage on which a

petition can be forwarded to obtain a judicial divorce, meanwhile at the same time, ironically Section 29(2) of the Act confers customary right on the spouses to obtain the dissolution of a Hindu marriage, wherein no authority is required.

**A.3 Succession-** When the Hindu Succession Act was enacted in 1956 which was a uniform and comprehensive rule of succession for both Mitakshara as well as Dayabhaga Schools, yet the orthodoxy in the enactment did not grant rightful place to the women in the Hindu Undivided family as far as their succession rights are concerned. Only after the Hindu Succession (Amendment) Act, 2005, the daughter were being allotted the same share as that of son and she became the coparcener by birth in the same manner as that of the son.<sup>16</sup>

**A.4 Tax Benefit-** Hindu Undivided Family (HUF), unlike any other religion gets a separate leverage in form of tax benefits as HUF is treated as a person<sup>17</sup> and while claiming for tax exemption a HUF can claim such exemption as a separate assessable entity alongside with other members of the family,<sup>18</sup> providing an additional benefit to the members of HUF.

These differences between inter and intra-religious activities, acts as a warfare inside and outside the religion. These feuds must be curbed through some sort of legislation

<sup>13</sup> Report No. 211, *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform* 15-16(2008) Law Commission of India (Oct. 5, 2017), <http://lawcommissionofindia.nic.in/reports/report211.pdf>.

<sup>14</sup>*Id.* at 16.

<sup>15</sup>*Id.* at 17.

<sup>16</sup> Section 6, The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1992, (India).

<sup>17</sup> Section 2(31), The Income-tax Act, 1961, No. 43, Acts of Parliament, (India).

<sup>18</sup> Section 80, The Income-tax Act, 1961, No. 43, Acts of Parliament, (India).



binding on every community, in this very case, probably the Uniform Civil Code.

#### (B) ISLAM

The one prominent religious group opposing the enactment of Uniform Civil Code are the followers of Islam and some of the members of the group are averting this Code only because of *Pseudo Identity Politics* played by them and naming this as of social stigma, which they cannot overrun, even at the cost of violating the fundamental rights of women in the society.

This is a violation of the principle of equality before the law, for Muslim women are at present being denied the rights given to the Indian women of other faiths. There is no room in a society which declares itself to be secular for inequalities which claim religious sanction. Religion should be divorced not only from the politics but also from the law.<sup>19</sup>

#### B.1 Marriage-

Polygamy-The most debated and disputed topic relating to marriages in Mohamedan Law has been polygamy which is allowed in our country, according to which a Mohamedan is allowed to have as much as four wives where as it is not lawful for a Mohamedan woman to have more than one husband, if her husband is alive.<sup>20</sup> Polygamy is totally prohibited in Tunisia, Turkey while in some countries such as Indonesia, Iraq, Somalia, Syria, Pakistan, Bangladesh, it is

permissibly only if authorized by State or some other prescribed authority.<sup>21</sup>

Age of Marriage-An another prominent issue which can be considered while considering uniform code is the age of marriage which is age of puberty and not of age of 18, i.e., age of majority, as in any other religion is considered while entering into the contract of marriage.

Mehr-Mehr is considered as a token of respect given to the wife by the husband as amount of consideration for the marriage, which is also one of the essentials to put the contract of marriage in force. Although dowry and mehr are two different things, but the authors pose a relevant yet, unnoticed question. Dowry which once possessed the same belief, "a token of respect", has been abolished being a social evil, then why not Mehr?

Mutta marriage-Another prominent debatable part of marriage under Muslim law is Mutta marriage recognized under Shia law, in which marriage continues for a fixed period of cohabitation, and the marriage also does not create mutual rights of inheritance between man and woman.<sup>22</sup>

Registration of Marriage-There are Muslim Marriage and Divorce Registration Acts in force only in six States of the nation providing for voluntary registration of

<sup>19</sup>Gopal, *supra* note 10 at 346.

<sup>20</sup>Sir Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* 334 (Prof. Iqbal Ali Khan ed., 20<sup>th</sup> ed., 2014).

<sup>21</sup>Basu, *supra* note 2, at 4145.

<sup>22</sup>Mulla, *supra* note 20, at 344.



marriages and divorces among the local Muslims.<sup>23</sup>

**B.2 Maintenance-** The dispute in Mohamedan law regarding the duty of husband to maintain his wife initiates after divorce as according to Mohamedan law, wife is entitled to get maintenance only upto the Iddat period.<sup>24</sup> But, this proposition got modified after the landmark judgement of *Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.*<sup>25</sup> in which the Hon'ble Supreme Court established the supremacy of Section 125 of the Criminal Procedure Code, 1973 over personal laws and awarded maintenance to the wife to be paid by husband even after the Iddat period.

But, due to uproar shown by the Muslim community, The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted by then government. In spite of enactment of this Act, Hon'ble Supreme Court in the series of its judgments, *Danial Latifi v. Union of India*,<sup>26</sup> *Shabana Bano v. Imran Khan*,<sup>27</sup> *Shamima Farooqui v. Shahid Khan*,<sup>28</sup> has shown the supremacy of Section 125 of Cr.P.C., 1973 over Section 3 of The Muslim Women (Protection of Rights on Divorce) Act, 1986 in which the divorced woman is entitled to get maintenance by her former husband until she remarries in case of poor financial position

**B.3 Divorce-** Islamic law recognizes various modes in which talak can be given, but, these

modes are discriminative towards wife and favors only unilateral divorce. She has no absolute right to obtain divorce, but can be exercised only in certain specific contingencies and conditions.<sup>29</sup> Islamic law recognizes the oral talak and this unguided power has been vested only upon the husband in which he may pronounce talak by uttering the word 'talak' and addressing it towards his wife. Talak-ul-Biddat is such mode of talak in which husband has the power to divorce women by uttering the word 'talak' thrice.

**B.4 Inheritance-** While inheriting the property of the father, son always gets more share as that of the daughter, discriminating only on the basis of sex in both Shia and Sunni law of inheritance.

It is due to the stubborn and rigid approach of customary and personal law; Muslim women are unable to breathe in the atmosphere of freedom and gender justice is a fragile myth for them.

(C) CHRISTIANITY

The Indian Christian Marriage Act 1872 is also discriminatory in many ways. The Act provides separate rules for the solemnization and registration of marriages of Indian Christians and other (native) Christians, and also for the followers of various Churches, which has made the Act complicated; and thus has made it conflictive with the Special

<sup>23</sup>Supra note 13, at 19.

<sup>24</sup>Mulla, *supra* note 20, at 353. Holy Quran on the issue of maintenance says that: "And for divorced women, maintenance (should be provided) on reasonable (scale). This is a duty on the pious." (11:241).

<sup>25</sup>AIR 1985 SC 945 (India).

<sup>26</sup>AIR 2001 SC 3958 (India).

<sup>27</sup>AIR 2010 SC 3205 (India).

<sup>28</sup>AIR 2015 SC 2025 (India).

<sup>29</sup>Mulla, *supra* note 20, at 416.





Marriage Act 1954, which also provides provisions of marriage with Christians.<sup>30</sup>

(D)PARSI

The system of a Parsi matrimonial Courts in the provisions of the Parsi Marriage and Divorce Act, 1936 where members of the community are invited to be on the jury, a system abolished in all other courts, still prevails; Section 50 of the Act provides for an archaic provision which allow the property of an adulterous wife to be settles in favour of her children.<sup>31</sup>

(E) MISCELLANEOUS

Moreover, Section 28 of the Indian Succession Act, 1925 read with schedule I of the Act declares adopted son as a closer relative than the mother as far as implementation of this Act is concerned. The above said law, prima facie is impugned in its very nature.

These laws relating to judicial separation, divorce and nullity of marriage are far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste.<sup>32</sup>

What should be a fate of such law which is violating fundamental rights of the citizens of this country or is against the principle of justice, equity and good conscience? The answer is very raw and simple, we must have to abolish the law or amend the same. If it is

the case of personal law, the answer is even rawer and simpler- Uniform Civil Code.

**3. UNIFORM CIVIL CODE: CONFLICT WITH THE CONSTITUTION**

Gathering the arguments raised in the above chapters, it can be noted that the enactment of Uniform Civil code has been now and then interpreted as conflictive of Article 25 of the Constitution and supportive towards Article 14 of the Constitution which has further been summarized below.

(A) OUTLOOK IN RESPECT OF ARTICLE 25.

The debate of conflict between Article 25 and Article 44 of the Constitution has been discussed at length in the case of *John Vallamattom and Anr. Vs. Union of India*,<sup>33</sup> wherein Hon'ble Justice V. N. Khare pointed that Article 25 merely protects the freedom to practice rituals and ceremonies etc. which are only the integral parts of the religion. He clarified that, "*Articles 25 guarantees religious freedom whereas Article 44 divests religion from social relations and personal law. Any legislation which brings succession and the like matter of secular character within the ambit of Articles 25 and 26 is a suspect legislation. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.*"<sup>34</sup>

<sup>30</sup>Supra note 13, at 22.

<sup>31</sup>The Oxford Handbook of The Indian Constitution 916 (SujitChoudhary et al. Madhav Khosla et al.PratapBhanu Mehta, 1<sup>st</sup> ed., 2016).

<sup>32</sup>Ms Jorden Diengdeh v. S.S. Chopra, AIR 1985 SC 935 (India), ¶ 7.

<sup>33</sup>AIR 2003 SC 2902 (India), ¶ 42.

<sup>34</sup>Id.at ¶ 44.



(B) OUTLOOK IN RESPECT OF ARTICLE 14.

Reforms have been introduced in the personal laws but it have only been brought up in certain communities. If one reform is available to members of one community it is not available to another. Whether this would not result into the discrimination between citizens of this country is a question asked now and then, and which must be answered by legislature. Members of one community get abstained from enjoying certain fundamental rights while the same rights are enjoyed by the members of another community.

The traditional Hindu Law - personal law of the Hindu - governing inheritance, succession and marriage was given go-bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.<sup>35</sup> These unequal, differential treatments by non-uniformities in the personal law often violates fundamental right of the citizens of our nation enshrined under Article 14 of the Constitution and, if it violates Article 14 of the Constitution, it affects the basic structure of the constitution. Thus incompetency of legislature must be thrown out and it can be done if they take any positive steps to legislate a uniform code for all the communities, all the religions.

(C) JUDICIAL VIEW

Showing resentment towards the enactment of Uniform Civil Code, Hon'ble Justice Y.V.

Chandrachudin the case of *Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.*,<sup>36</sup> regretted that "Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

The assessment of Uniform Civil Code in the case of *Smt. Sarla Mudgal, President, Kalyani and others vs. Union of India and others*<sup>37</sup> is considered one of the landmark cases on the subject-matter. The Hon'ble Supreme Court has shown relentlessness for the introduction of Uniform Civil Code and has particularized several grounds, few of which can be assessed below:

<sup>35</sup> *Supra* note 6, at ¶ 30.

<sup>36</sup> *Supra* note 8, at ¶ 35.

<sup>37</sup> AIR 1995 SC 1531 (India).



- a) Hindu Law has been codified in the 1950s itself by replacing the traditional Hindu law, covering 80% of the Citizens in this country and hence there is no justification whatsoever to keep in abeyance, any more, the introduction of “uniform civil code” for all citizens in the territory of India.<sup>38</sup>
- b) If we see the political history of India, justice was administered by the Qazis during the Muslim regime who would apply the Muslim Scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system continued until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mahomedans. This broad policy continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. But, in India, no community could claim to remain a separate entity on the basis of religion. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.<sup>39</sup>

Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August, 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a “uniform civil code” for the citizens of India.<sup>40</sup> But, it had remained in abeyance till October, 2016 when Law Commission of India sought public opinion on the matter of uniform civil code as per direction given by the elected Union Government.

On the point of enactment of the Uniform Civil Code, it was noted by the coram of Hon’ble Justice K. Ramaswamy and Hon’ble Justice B.L. Hansaria in *Pannala Bansilal Patil and others etc. Vs. State of Andhra Pradesh and another*,<sup>41</sup> that “the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages etc. only under the Regulations of 1781 framed by Warren Hastings. The Legislation - not religion - being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.”

(D) COMPLEXITIES

**D.1 Concurrent List-** The matter related to personal law has been put up under Entry 5 of List III of VIIth Schedule, i.e., under concurrent list which has authorized both the State as well as Union Government to enact

Furthermore, the Hon’ble Court also directed the Government of India through Secretary,

<sup>38</sup>*Id.* at ¶ 1.

<sup>39</sup>*Id.* at ¶ 33.

<sup>40</sup>*Id.* at ¶ 36.

<sup>41</sup>*Supra* note 6, at ¶ 33.



legislations on the same subject matter. But, the authors are proposing that because of sensitivity of the issue, it must be regularized only by a Central Act.

**D.2 Special status to certain states-** Article 244 of the Constitution gives immunity to the States of Assam, Meghalaya, Tripura and Mizoram from the applicability of the matters listed under Fifth Schedule in which any particular Act of Parliament or of the Legislature of the State shall not apply to these states if a notification for the same is issued by the Governor. Similarly, Article 371-A of the Constitution provides that no Act of Parliament in respect of religious or social practices of the Nagas and Naga customary law and procedure for the state of Nagaland, shall apply unless the legislative assembly of Nagaland by a resolution so decides.

These provisions enshrined under the Constitution giving special immunity to certain states may act as a hindrance in the path of enactment of Uniform Civil Code. It can be said that though Article 44 has been highly controversial and has gathered much critique from various authorities of personal laws and have been blamed of violating the fundamental right of religion.

However, only the enactment of Uniform Civil Code can bring the stability so desired by our society, removing all the conflicts. Hence, it must be noted that *“Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic*

*poles; without stability the law becomes not a chart of conduct, but a gore of chance: with only stability the law is as the still waters in which there is only stagnation and death.”*<sup>42</sup> Evolution always finds its own way and at times, it takes place by the change by human intervention. So, the history needs to be re-written by our own legislators to evolve and modify the laws existing in our society in a desired manner.

#### 4. STATUS QUO

The current status of Uniform Civil Code in our country is like treasure trove, wherein only one among the 28 states has enacted the law concerning Uniform Civil Code. A Uniform Civil Code in Goa has ruled out the socio-religious repercussion which is being witnessed in rest part of the country. The Goa, Daman and Diu (Administration) Act of 1962 ratified the prevalent Portuguese Civil Code of 1867 in the area, which was earlier enacted by the Portuguese through a Decree in the year of 1869.

The importance of the Code can be very well seen in the Judgment pronounced by the Honorable Bombay High Court in the case of *Shri Damodar Ramnath Alve vs. Shri Gokuldas Ramnath Alve and Ors.*<sup>43</sup>, in which Justice B.U. Wahane said:

*“The Code has, thus, proved to be a powerful weapon to create and forge a cohesive, well-knitted and homogeneous society with its citizens living in peace and harmony, as well*

<sup>42</sup>Supranote 33, at ¶ 35. Hon’ble Justice V. N. Khare pointed the quote of Albert Camus in the same judgment.

<sup>43</sup>(1997) 4 Bom CR 653 (India), ¶ 3.



*as to strengthen that basic unit of the society - the family - by safeguarding the interests of the children and of the widows. To some extent, therefore, the Code has fulfilled in the Territory of Goa, Daman and Diu that resolve so eloquently expressed in the Preamble of our Constitution to constitute India into a Secular Republic and to secure social and economic justice to all the citizens, equality of status and of opportunity and fraternity assuring the dignity of the individual.”*

But, this Code also encompasses certain anomalies which is yet to get resolved. One of them being the right to manage the property, in which husband and wife share equal right on the property, but husband precedes wife when it comes to managing of that property. Moreover wife comes way down the line after children, parents and siblings in case of death of her husband in case of a Hindu family.<sup>44</sup>

Another concern was pointed by the Justice Jagannatha Shetty Commission Report regarding the Civil Code prevailing in Goa as the original Civil Code of Portugal was replaced there in 1966 itself. It was also noted here that, *“the Goa Government had appointed a Law Commission in 1968 to go into the question and the Law Commission*

*recommended that all Portuguese laws were to be repealed and to extend all personal laws with slight modification. However, nothing further was done. The Uniform Civil Code in existence needs to be examined and the legislation has to be brought on par with the needs of the Society.”*<sup>45</sup>

#### STEPS TAKEN BY UNION GOVERNMENT

The current nominated government has also taken an endeavor to make a way for Uniform Civil Code for the rest of the country and in result, has delegated this task to Law Commission of India to prepare for such an option. The idea is to target social injustice rather than plurality of laws. To achieve such an objective, the Law Commission of India formulated a questionnaire for the citizens of this country to take into account their opinion towards the issue, which could be incorporated in the statute later.<sup>46</sup>

Earlier in its 174th Report on *“Property Rights of Women, Proposed Reforms under The Hindu Law”*, the Law Commission emphasized on the need of enactment of Uniform Civil Code by a peculiar instance under which if any Joint Family has properties in two states, one which is governed by the one Act and the other not so governed, it may result in two Kartas, one a daughter and the other a son. It will subsequently rise difficulties of pertaining to territorial application of the law.<sup>47</sup>

<sup>44</sup>Namita Kohli, All in the family: Goa Civil Code a model for the rest of the country?, Hindustan Times, Sep. 13, 2016, (Oct.10, 2017), <http://www.hindustantimes.com/india-news/all-in-the-family-is-the-go-civil-code-a-model-for-the-rest-of-the-country/story-4ImvwP0OrAST2hUnsZxtiL.html>.

<sup>45</sup>Chapter 2.5, First National Judicial Pay Commission.

<sup>46</sup>(Oct. 10, 2017), <http://lawcommissionofindia.nic.in/questionnaire.pdf>.

<sup>47</sup> 174th Report, Law Commission of India, Property Rights of Women, Proposed Reforms under The Hindu Law, Annexure – III, Working Paper on



### 5. CONCLUSION AND SUGGESTION

Moving towards the end of this essay, the authors propose that while enacting a Uniform Civil Code, it must be taken into consideration of the legislators that no one religion should overlap over the other; consensus of society must be there; evolution must be carefully noticed, which must be done by the enactment of only one Central Act, which must have overriding effect on all other personal laws through a non obstante clause in the new legislation, or repealing the existing personal laws.

Cutting the long story short, the words of Shri Alladi Krishnaswami Ayyar need a special attention, which were stated in the Constitutional Assembly Debate that, *“When there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other culture.”* This statement can only be put into effect if we move on from our old set of orthodox ideologies to a reformist one.

Furthermore, our country is a secular state and if the laws of the nation will discriminate its subjects on the basis of religions, then that secularity which is the bedrock of our Constitution and a fundamental base on which the pillars of our country lies, through which citizens of this country of various religions are residing together, will not stand tall; and if it hits the ground, we too will hit the ground.

The authors’ viewpoint is intended towards the enforcement of a code so uniform that instills the cardinal values of all personal laws into a single unified one rather than

manifold personal laws and aims that no individual is deprived of their rights just for the namesake of religion. Now, we would like to end this essay on the note of an optimist viewpoint of *Shri K. M. Munshi* on Uniform Civil Code- *“The sooner we forget this isolationist outlook on life, it will be better for the country.”*

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