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With this thought, we hereby present to you

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# **UNIFORM CIVIL CODE AND GENDER JUSTICE: -** **A CRITICAL APPRAISAL**

AUTHORED BY - PARVATI ARUN

## **ABSTRACT**

The Uniform Civil Code (UCC) is a proposal which has been made under Article 44 of the Constitution Of India under the Directive Principles of State Policies to bring a sense of uniformity into the legal framework. Uniform Civil Code has been a subject of intense debate since the framing of the Indian Constitution. The Uniform Civil Code aims to formulate a single personal law for all Indian citizens regardless of religion, gender and sexual orientation in relation to matters such as marriage, divorce, adoption, inheritance and succession. The implementation of the proposed Code has been extremely inconsistent due to the diversity of religious customs and traditions pervading across the land of India where personal laws ensure validity to their religious affiliations. A focal argument which has risen in favour of the Uniform Civil is the dire need for gender equality under the personal laws which have been framed in the country as it work towards eliminating the discrimination prevalent against women , for example in cases such as ; in The Hindu Succession Act,2005 despite legislative amendments indicating progressive measures such as granting daughters an equal share in joint family property , if a woman passes away intestate , childless or spouseless , her share of property is acquired either by her husband , parents or their legal heirs.<sup>1</sup>

Other religious communities such as the Parsi and Muslim communities also have gender discrimination entrenched within its personal laws in the form of restriction in accessing inheritance rights and the denial of sufficient maintenance and inheritance rights along with the practice of polygamy pervading within the community respectively.

It remains essential to identify solutions to confront discrimination against women as well as sexual minorities living in India present in relation to personal matters. This article tries to understand the

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<sup>1</sup> Bibek Debroy , Aditya Sinha, *Opinion: Why India Needs A Uniform Civil Code*, NDTV (June 29, 2023), <https://www.ndtv.com/opinion/why-india-needs-a-uniform-civil-code-4161333> (last visited Sept. 19, 2023).

proposed Uniform Civil Code through the realm of gender justice and whether it would act as an instrument to satisfy the remedies of women across different religious communities in India.

**Keywords:** - religion, gender justice, Uniform Civil Code, discrimination

## **ORIGIN OF UNIFORM CIVIL CODE AND ITS INCORPORATION OF GENDER JUSTICE**

The history of Uniform Civil Code can be traced back to the period of East India Company rule which tried to impose uniformity upon the social and religious customs in India. During the British rule in India, a Divide and Rule policy was implemented to ensure their separation and amplify the extent of religious division and bigotry within the country.

During the post colonial time period, the matter of Uniform Civil Code was brought into the Constitutional Assembly debates which included members like Dr B.R Ambedkar who felt that the Uniform Civil Code was a necessary instrument to eliminate the discrimination prevalent within religious communities, especially against women and minority groups. Other members like K.M Munshi and Alladi Krishnaswamy also defended the proposal of Uniform Civil Code as they believed that it would bring in harmony and promote the spirit of national integrity within the country while this idea was vehemently denied by the orthodox Hindu and Muslim communities. It was only post-independence, during the drafting of the Indian Constitution, that the Constituent Assembly debated Article 35 on 23 November 1948 and directed the state to implement a Uniform Civil Code across India. It was based on the conception that ‘personal laws’ reflected the divine law of the religious texts and contained anti-women practices projected as customary laws (Parashar 1992). Thus, it was believed that human intervention in the form of a Uniform Civil Code was an effort towards an egalitarian society.<sup>2</sup>

In Volume 7 of the CAD (7.65.178) he said that, “I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature

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<sup>2</sup> Rohini Dahiya, *Gender Justice in India: Outlook on Uniform Civil Code*, SPRF (May 7, 2021), <https://sprf.in/gender-justice-in-india-outlook-on-uniform-civil-code/> (last visited Sept. 20, 2023).



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.”<sup>3</sup>

The emphasis on Uniform Civil Code can also be seen in the proposal of the Hindu Code Bill which sought to place a civil code instead of the Hindu personal law which was stalled by the Indian Parliament due to opposition from the Hindu community due to its policies of propagating equality in marriage which eventually led Dr Ambedkar to resign as Law and Justice Minister from the Cabinet.<sup>3</sup>

## **DISCRIMINATION DUE TO RELIGIOUS PERSONAL LAWS**

Personal laws in India are based on religious customs and practices and this differs in terms of matters such as marriage, divorce, adoption, succession, inheritance etc. from religion to religion which leads to discriminatory emanating from legal procedures.

Personal laws guiding the practices of religious communities in India stem from the deep and persisting connection between religion and personal life in our culture. This leads to discriminatory practices being legitimised against women under the garb of religion and customs.

The idea of equality is deeply entrenched in the Constitution of India in the form of Article 14(1) which emphasizes on equal treatment before law, Article 15 (2) which prohibits discrimination on the basis of religion, race , caste , sex , place of birth and Article 13(1) which states that all laws in force in India before the commencement of this Constitution , insofar as they are inconsistent with the provisions of this part ,shall to the extent of such inconsistency, be void.<sup>4</sup>

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<sup>3</sup> Kumar Singh, *Ambedkar and Uniform Code. Why Ambedkar supported Uniform Civil Code*, THE HINDU BUSINESS LINE (Apr. 14, 2021), <https://www.thehindubusinessline.com/opinion/why-ambedkar-supported-uniform-civil-code/article34320070.ece> (last visited Sept. 20, 2023).

<sup>4</sup> legal Service India, *Lawyers in India*, Advocates, Law Firms, Attorney directory, Lawyer, vaki <https://www.legalserviceindia.com/legal/article-6521-article-13-of-indian-constitution-easy-explanation> (last visited Sept 22, 2023)

However, several religious communities use the provisions relegated in Article 25 (4) and 26 (5) of the Constitution to elaborate on the freedom of religion which incorporates the freedom to profess, propagate and practice the religion as well as manage religious affairs to legitimise discriminatory practices prevalent in their communities.

In India, women under Hindu personal laws are not considered to be on par with men and restricted in various ways such as: -

- I. Under The Hindu Succession Act , 1956 ( applicable to Hindus , Buddhists , Jains and Sikhs) , the property of a married woman who dies intestate goes to her husband or children ,or to the heirs of the husband in their absence. According to Section 15 of the Hindu Succession Act , any property inherited by a Hindu woman from her father or mother is passed down to the heirs of the father. This clearly conveys that the devolution of the property of a Hindu woman occurs through the male lineage present in her family. In case of a Hindu male whose property is being inherited , the devolution occurs entirely through the male lineage and in the absence of heirs , through the agnates or co agnates as mandated under Section 3 (1)(a) of the Act. The Bombay High Court , in the case of Mamta Dinesh Vakil vs Bansu S.Wadhwa<sup>5</sup> declared Section 15 of the Act as discriminatory on the basis of gender. Despite this judgement , the judicial attitude towards the provision still remains knotty.
- II. Section 27 of the Hindu Marriage Act ,1956 claims that when property is being distributed during the course of divorce, it is essential that such property must be acquired during the marriage and that it must jointly belong to the husband and wife. Several provisions elaborated upon by the Supreme Court have focused on ensuring that Section 27 would ensure that women attain remedies since there have been no specifications related to what properties a woman can be entitled to and such judgements have been met with very little practical success.<sup>6</sup>
- III. Hindu women can claim maintenance under Section 24 of the Hindu Marriage Act,1956 which can be substantiated further with the help of Section 125 (1) CrPC yet there are practical

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<sup>5</sup> Mamta Dinesh Vakil vs Bansu S.Wadhwa, MANU/MH/1869/2012

<sup>6</sup> Shalaka Patel, *After Triple Talaq, a Look At the Other Discriminatory Personal Laws That Need to Go*, The Wire (Aug. 28, 2017), <https://thewire.in/gender/personal-law-reform-gender> , ( last visited Sep 22,2023)

difficulties entrenched in the procurement of maintenance as there is lack of support from the authorities and the Court.

Muslim personal laws also legitimise several discriminatory practices such as :-

- I. Polygamy is practiced under Muslim personal law where a man can have four wives but a woman practicing the religion cannot marry than once and would be prosecuted for bigamy under Section 494 IPC. In *State of Bombay v. Narasu Appa Mali*<sup>7</sup>, Chagla, C.J. observed – “There can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even section 494, Penal Code, which makes bigamy an offence applies to Parsis, Christians and others, but not to Muslim men because polygamy is recognized as a valid institution when a Muslim male marries more than one wife”<sup>7</sup>
- II. A divorced Muslim woman can only be legally entitled to her mahr and the maintenance which is paid during the Iddat period according to the Muslim Women (Protection Of Rights On Divorce) Act, 1986 which was incorporated to counter the backlash received from *Mohammed Ahmed Khan vs Shah Bano Begum* (1985)
- III. Under both the schools, the male generally gets a share twice of what his female counterpart gets. When the son and the daughter inherit together the son gets twice of what the daughter gets. The husband gets 1/4th share and the wife 1/8th share when there is a child and when there is no child 1/2th and 1/4th respectively.<sup>8</sup>

Christian personal laws also follow several discriminatory practices in the nature of: -

- I. Under Section 10 of The Indian Divorce Act, 1869, a woman could petition for divorce against her husband only under the purview of Victorian grounds such as incestuous adultery, bigamy with adultery, rape, sodomy or bestiality and the provision under Section 17 of the Act which mandates that a decree granted by a District Court for the dissolution of the marriage had to be confirmed by a full Bench in order to preserve the sanctity of marriage. This provision was later eliminated by the Indian Divorce (Amendment) Act, 2001 which introduced reasonable grounds for divorce which was elaborated through Section 10 A which mandated divorce

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<sup>7</sup> *Narasu Appa Mali*, 1951 SCC OnLine Bom 7288, 7289

<sup>8</sup> Nishitha Jain, *Gender Inequality in Hindu and Muslim Personal Laws in India*, 1 International Journal of Law Management & Humanities 1-10 (2018).

with mutual separation with a two year waiting period.

Parsi personal laws also contain several discriminatory provisions against women such as: -

- I. Under The Parsi Marriage and Divorce Act, Parsi daughters who married non Parsi men were not granted property rights and non Parsi wives of Parsi men were only granted rights to half of the property.

All religious personal laws in India very clearly clarify that women are not considered as equal to men which has lead several individual leaders to challenge the constitutionality of the discriminatory aspects of such cases as several of these practices adversely affect a woman's right to dignity under Article 21 of the Indian Constitution. Even The Special Marriage Act, 1954 which is secular in nature suffers due to lacunae in its implementation and is not able to ensure the provision of gender justice. This has also lead to important questions being raised through landmark judgements like Mohd. Ahmed Khan vs Shah Bano Begum (1985), Sarla Mugdal vs Union Of India (1995) , Lily Thomas vs Union Of India (2000) and Shayara Bano vs Union Of India (2017) on whether constitutional protection should be accorded to practices which are in contravention of fundamental rights.

### **LIMITING EFFECTS OF UNIFORM CIVIL CODE: -**

According to the Consultation Paper of 2018 , the Law Commission Of India has adeptly mentioned that pluralism is embedded in the veins of Indian society and that national advancement is not possible when “cultural difference informs people's identity, and its preservation guarantees the territorial integrity of the nation.”<sup>9</sup>

The Consultation Paper also indicated that women considered religion as an important facet of their cultural identity and maintained that constitutional provisions should not be construed as a refuge for social evils like dowry, triple talaq, child marriage, slavery etc under religion. It has also acknowledged the need for eliminating the discriminatory practices within religious communities rather than drafting a Uniform Civil Code which dilutes the difference prevalent in our society, thus indicating the presence of a robust democracy.

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<sup>9</sup> Saumya Uma, *What A Gender-Just Uniform Civil Code Could Look Like*, The Wire (July 2, 2023), <https://thewire.in/law/what-a-gender-just-uniform-civil-code-could-look-like>, (last visited Sep 23,2023)

While delving upon the question of a Uniform Civil Code, it is essential to note the effect that it has on religious and cultural minorities persisting in India. In *Sarla Mudgal v. Union of India*, Justice RM Sahai observed that the idea of a UCC can be conceptualised in practice only when the "social climate is properly built up by the elite of the society, statesmen amongst leaders, who instead of gaining personal mileage rise above and awaken the masses to accept the change".<sup>10</sup>

This judgement clarified that it was essential for communities to accept a progressive version of the personal laws in order to ensure its benefits and the 21<sup>st</sup> Law Commission Report also states that it is important to recognise cultural distinction as it is woven within the fabric of India.<sup>11</sup>

Indian womens' rights lawyer Flavia Agnes in her book *Personal Laws In India : The Distortion of Equality* mentions that a Uniform Civil Code proposal must focus on the concerns and needs of women from marginalised communities as they can be treated disproportionately in terms of accessing remedies.<sup>12</sup>

## **HELPING WOMEN SEEK REMEDIES**

There is an inherent issue with the assumption that the Uniform Civil Code will solve the underlying problem of gender discrimination in India without paying adequate attention to the myriad of social , economic and political structures which eternalize such inequality. It is also essential to accord protection to sexual minorities in India through policies benefitting their rights and ensuring them with remedies.

Due to political duress , the convoluted issue of Uniform Civil Code has received traction in the media and has led the 22<sup>nd</sup> Law Commission to revisit the matter despite the 18<sup>th</sup> Law Commission suggesting for reforms of personal laws guiding the practices of different religious communities. The political discourse surrounding a potential Uniform Civil Code has been mired in controversy as it

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<sup>10</sup> *Sarla Mudgal vs Union Of India* ( AIR 1995 SS 1531)

<sup>11</sup> Pooja Rajawat & Jayam Jha, *Will a uniform civil code help address the problem of gender inequality in India?*, The New Indian Express (Apr. 18, 2023), <https://www.newindianexpress.com/web-only/2023/apr/18/will-a-uniform-civil-code-help-address-the-problem-of-gender-inequality-in-india-2567124.html> ( last visited Sept 23 ,2023)

<sup>12</sup> Pooja Rajawat & Jayam Jha, *Will a uniform civil code help address the problem of gender inequality in India?*, The New Indian Express (Apr. 18, 2023), <https://www.newindianexpress.com/web-only/2023/apr/18/will-a-uniform-civil-code-help-address-the-problem-of-gender-inequality-in-india-2567124.html> (last visited Sept 23 ,2023)

emphasises on regional polarisation and majoritarian attitude prevailing in India thus abandoning the core concern of ensuring gender justice.

The question of Uniform Civil Code can be raised only under a harmonious social and political climate while dispelling fears and polarisation affecting the current societal equilibrium as it might prove to be counter productive in the future. The notion of ‘substantive equality’ is deliberately overlooked, which recognises differential treatment for minorities and other weaker and marginalised sections of society.<sup>13</sup>

In order to treat the issue of gender discrimination in a serious manner, it is essential to reform and eliminate all forms of discrimination within the religious personal laws so that men and women can be on an equal footing by granting them dignity, empowerment and protection from being exploited. This sentiment has reverberated even in several judgements which mentioned the lack of feasibility present in a Uniform Civil Code and assured that women’s conditions can be reformed only through gradual progressive change by focusing on acute issues plaguing them. Several feminist organisations and leaders have also employed the same rhetoric of reforming personal laws within religious communities. This position can be seen in Flavia Agnes’ organisation which supports this strategy through her organisation Majilis. Several organisations such as All India Democratic Women's Association (AIDWA), Bharatia Muslim Mahila Andolan and The Joint Women’s Programme also work on dealing with the discriminatory provisions under the religious personal laws in India and actively reforming them to much success.<sup>14</sup>

Uniform Civil Code has been proposed as an instrument to achieve the goal of gender equality thus guaranteeing women with equal access to constitutional rights but there the judicial and legislative process concerning discussions around its implementation has been entrenched in majoritarian politics and regional polarisation, so it is essential that such a major proposal should be raised only in

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<sup>13</sup> Aftab Alam, *Uniform Civil Code should not be pushed through in haste; first make all personal laws gender-just* Read more at: <https://www.southasiamonitor.org/spotlight/uniform-civil-code-should-not-be-pushed-through-haste-first-make-all-personal-laws-gender>, South Asia Monitor (July 15, 2023), <https://www.southasiamonitor.org/spotlight/uniform-civil-code-should-not-be-pushed-through-haste-first-make-all-personal-laws-gender> (last visited Sept 23, 2023)

<sup>14</sup> Tanja Herklotz, *Dead Letters? The Uniform Civil Code Through the Eyes of the Indian Women's Movement and the Indian Supreme Court*, 46 *Generiert durch Humboldt-Universität zu Berlin* 148-174 (2016).

an appropriate political and social climate , as echoed by Justice R.M Sahai in the judgement of Sarla Mudgal vs Union Of India (1995). It is essential to reform personal laws within religious communities and eliminate discriminatory provisions in the context of gender discrimination and ensure that the laws are in compliance with their fundamental rights and assure them equal status and dignity similar to men instead of clamouring for uniformity, as it tends to get mired with assumptions centering on political bias, majoritarianism and hate mongering.

