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The Concept of Uniform Civil Code and The Personal Laws in India

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In many cases, the Supreme Court has held that secularism as a part of the basic structure of the Constitution. Major religions practiced in India are Islam, Hinduism, Jainism, Buddhism, Sikhism and, Christianity. In India, there are laws according to religion and Goa is the only state in India to have a UCC called as the Portuguese Civil Code or Napolean Code or Goa Civil Code. Article 25(1) states- Freedom of conscience and free profession, practice and propagation of religion. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion Conflict between Right to freedom of religion and UCC is discussed, with particular emphasis on Goa Model i.e the Portuguese Civil Code. A guided procedure of how UCC could be implemented in India, along with the prevailing conflicts, and whether the UCC model will be successful in Indian Diaspora is discussed, with special emphasis on Muslim Personal Laws and its conflict with Hindu Laws.

Personal laws, applicable in India, are not only suffering from several infirmities but also consist of many outdated provisions. In fact, such provisions are not in practice at all, and it is also not practicable to follow them in present time. Existing personal law system should be replaced with a modem approach towards law. Uniform" refers one and the same in every circumstance, However, "Common" refers to same in similar

conditions. However, w.r.t Art. 44 of the Constitution, they are usually used interchangeably as synonym of one other.

The word ‘Civil’ derived from the Latin word "Civil" which means a citizen. The word "Civil" when used as an adjective to "law" as in Civil law, is defined in oxford dictionary as related to the private individual rights and remedies of a citizen as differentiating from criminal political, etc."Black's Law Dictionary defines it as relating to private individual rights and remedies sought for by civil actions as differentiated with criminal proceedings".[1] 'Code' from the Latin word 'Codex' refers to a book.[2] "Code" means a collection of system of laws. Nowadays, term 'code' means sense of a comprehensive work of legislation which regulates a large portion of law and arranged systematically and based on uniform principles. Section (S.) 2(1) of CPC, 1908, defines "Code" as Code includes rules. The words 'civil code' means a law which is related to civil matter and “civil code” refers to a branch of law which is total codification of civil legislation.

THE CONCEPT OF HINDU PERSONAL LAW

HINDU MARRIAGE ACT, 1955

As per S. 14, provides "No petition for divorce to be presented within one year of marriage." But western culture has greatly affected the mindset of Indian society. Now the person who wants to be released immediately from the tie of marriage, and when Indian personal law system has already adopted "the Break Down Theory" of marriage, there seems no any logic to let this provision remain. In India, for institution of marriage, it is always tried to keep the couple together forever, but when the situation is such that the parties cannot reside with each other at all, and also are residing separately, they should not be made to wait one year to file a divorce petition. Now-a-days it is observed that even the marriage of one day or few days results in

[1] Judicial Officer’s Law Lexicon, 965,2008/09
[2] Encyclopaedia Americana, Vol.7, 1960, 194.

decision of taking divorce, due to the gravity of the circumstances arose from the act of any of the party. In such circumstances, to make such people wait makes no sense.

THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

Proviso (a) of s.6 of the said Act, mandates that "no person shall be entitled to act as the natural guardian of a minor under the provisions of this section- (a) if he has ceased to be a Hindu, or...." This cannot be treated as valid provision in a Secular country like India. Just conversion to another religion cannot be a valid ground to snatch any legal right from a person.

S.7 of the said Act, mandates that, "...if he has a wife living, he shall not adopt except with the consent of his wife unless the wife... has ceased to be a Hindu...." Apart from this, two other conditions are also imposed, when there is no need for the husband to take the consent of the wife for adoption. But the condition quoted above cannot be valid in a secular country. If wife has converted to any other religion then too, she cannot be made to suffer any such inability in her legal right. S.11 (iii) of the said Act, mandates, "...if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty one years older than the person to be adopted..." andS.11 (iv) mandates, "...if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted...." A person who is above the age of 18 years can adopt a child under this Act. In such circumstances, such mandatory provision cannot be imposed, because looking to the adoption ratio and percentage of abandoned and orphaned children, it is required to enhance and improve the conditions for adoption to match the standard of social need. For instance, if a woman of thirty years, wishes to adopt a male child of eleven years, why to impose restriction on that. On the part of the government the basic parameter of adoption must be within the interest and welfare of the child must be of pivotal importance. S.ll(i) mandates, "if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, Son's son or Son's

Son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption." And S. ll(ii) mandates, "if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made, must not have a Hindu daughter or Son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption." These provisions are not up to the need of the society because if a person has the monetary and social capacity to brought up ten children healthily, and he or she wishes to provide shelter and family to orphan and abandoned children, why he or she should be prevented from such act which is in the interest of the orphan and abandoned children and at last in the interest of the development of the society and country. Such kind of technical incapacity, not only prohibits such persons to adopt but also bans the future of the child that is tube adopted.

S.41(6)(b) of the JUVENILE JUSTICE ACT, 2000 provides, "the court may allow a child to be given in adoption-... ...(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters;" This is a contrary provision than S.11(i)and S.11 (ii) of the HAMA. S.10(i) mandates, "No person shall be capable of being taken in adoption unless... (i) he or she is a Hindu;" This literally means, only Hindu child can be adopted. But when an abandoned or orphan child is in question, how to determine his or her caste or religion? In such circumstances the basic concept of adoption fails on the part of law because it is observed that, when people adopt from orphanage, they do not even bother to know the caste or religion of the child.

THE CONCEPT OF MUSLIM PERSONAL LAW

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

To come out from the hues and cries started after Shah Bano's case, among Muslim community, the then government enacted this legislation. Provisions of this Act, are quite contrary to the basic principles of justice. Some of such provisions are; S.3(l)(a) of this Act provides for "a reasonable and fair provision and

maintenance to be made and paid to her within the iddat period by her former husband; " and s.3(l)(b) provides, "where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;...." Both the provisions cannot be sustained logically in present time. These provisions are not only illogical but also are bias towards rights of Muslim women. Though the basic object of this Act was, "to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto", but when these provisions are studied deeply, it literally reveals that, this Act was not enacted to protect the rights of women, but it was enacted to benefit the male group of the Muslim community. As per s. 3(b), responsibility cast upon husband to bear the maintenance to the children where the woman divorced maintains her children, is limited to two years only. A husband or a father cannot be allowed to enjoy such kind of illogical liberty or right. Divorcee women cannot be left to the sympathy of the other people. This is neither logical nor acceptable. Not only in present era, but also it was illogical and unacceptable at the time of enactment of this legislation. The rights provided under above two clauses are contrary to the concept ofsocial justice to women,

S.4 of this Act provides for "order for payment of maintenance" is totally inconsistent with the object of this legislation itself, because as per this provision; after iddat period, the magistrate may make an order for maintenance to be obtained from her immediate relatives who may inherit her property upon her death as per Muslim law. Moreover one of the factors which are to be considered before granting such order, is "the standard of life enjoyed by her during her marriage...." This is an illogical provision because a woman who would have any property, she would not need to approach any relative for her maintenance, and when the husband is not made responsible to give the maintenance to estranged wife after iddat period, the status she

enjoyed during her marriage cannot be considered. The first proviso of this section provides that, such women can get maintenance from her children and if children are unable to maintain her, her parents would be liable for maintenance to her. and on their inability, the order for maintenance can be passed against such "Other relatives as may appear to the Magistrate to have the means of paying the same...." S.4(2) states that, if there is no such relative or such relatives are not at all able to maintain her, "... the Magistrate may, by order, direct the State Wakf Board established under s. 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance...." These provisions themselves prove them self quite contrary to the concept of providing dignified and healthy atmosphere for development of women. This provision puts a woman in the category of a beggar. There is no any substantive reason, why husband should not be made responsible for the maintenance of wife and children?

S.5 of this Act, renders option to each party, and states as, "if on the first date of the first hearing of the application under sub-section 2 of s. 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions ofs. 125 to 128 of the Code of Criminal Procedure, 1973 (Cr.PC); and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly...". This means, it is upto the mercy of the husband who will never opt to do any such act which can help his wife. Because the provisions under this legislation are in favour of husband rather than the provisions under S. 125 to 128 of Cr.PC. Hence, this provision is impracticable and unjustifiable. After the enactment of this Act too, the Muslim women have approached courts u/ss.125 to 128 of Cr.PC, for the protection of their rights. This Act was enacted to protect the rights of divorced women, but it has totally failed to fulfill the objects. No provision of this Act seems to have been based on any ancient source of

Muslim law then too, Muslims accepted it and in fact demanded it. This proves that people welcomed the law of their choice and not of the choice of religion because, it is well accepted that Prophet Mohammad was the first to recognize rights of women but, this legislation, in fact, curtails the rights of women.

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

This is, "an act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie:".[3]Though this legislation was enacted in the period of Britishers and, it was not opposed. None of the provisions of this Act has any consistency with Holy Quran or with any other ancient source of Muslim Law, but then too, it was brought in practice.

THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937

S.2 provides the description of the particulars, regarding which the Muslim Personal Law (Shariat) can be applied. Whether a Muslim will be benefited with the provisions of this section or not would depend upon the conditions prescribed under s.3 of this Act. As per the provision of s. 3, when the prescribed authority is satisfied that a person who is a Muslim, and who is competent to contract as per S.11of the ICA, 1872, and who is a resident of India , has made declaration as per prescribed form that he wishes to be benefited with the provisions of this section, can allow him to be governed by s. 2. and thereafter "...the declaring and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified..." But, if the prescribed authority refutes to take such declaration, the declarant can file appeal against such order and on allowing such appeal, the declarant or his minor children and their

[3] Muslim Laws 14, Bare Act with short Notes (Universal Law Publishing Co., New Delhi, 2015).

descendants shall be governed by the S.2 of this Act. This Act provides lot of variations. The choice to be governed or not to be governed by a law, cannot be left to any person.

THE CONCEPT OF CHRISTIAN PERSONAL LAW

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

This legislation was enacted to manage the affairs relating to marriages among Christians. Many of the provisions are not of use at all in present time, in context of Indian society.

S.3 of this Act, provides "interpretation clause". It includes interpretation of "Church of England", "Anglican", "Church of Scotland", and "Church of Rome". In present time, these terms have no use in India.

S.5(2) prescribes that, marriage of a Christian can be solemnized by a Clergyman of Scotland's Churchandthat marriage should be solemnized as per the , rites, ceremonies, customs of the Scotland's church. At present, this provision do not have any logic because it is totally impracticable that any Clergyman of Scotland would perform marriage ceremony of Indian Christian. Moreover, word "may" itself clears that another person other than mentioned in this section, can solemnized the marriage. Who are those other persons, is not cleared anywhere in this Act. S.10 of this Act is for marriages to be contracted between six am in the morning and seven pm in the evening, can be said to be logical for convenience of the different people or authorities associated with marriage ceremony, but then the exceptions given under this section are not logical in present context of Christians residing in India, because in any general term a Clergyman of England or Rome or Scotland's Church, do not have any existence in India in present time. Other provisions of this legislation, are on factual and procedural aspects and do not show or refer to any religious base or validity. Part V of this legislation provides for the "marriages solemnized by, or in the presence of, a Marriage Registrar", this itself indicates that the marriages can be solemnized even without going to the Churches and

also in the absence of the Priest of a Church. Moreover, it literally means, no any religious ceremony is mandatory for solemnizing marriages among Christians in India.

THE INDIAN DIVORCE ACT, 1869

S.3 of this Act, provides interpretation clause. S.3(5) provides interpretation of term "Minor Children". According to this provision, "in the case of sons of native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of native fathers, girls who have not completed the age of thirteen years; in other cases, it means unmarried children who have not completed the age of eighteen years." This interpretation clause is contrary to the provisions of Indian Majority Act, 1875 and Indian Penal Code, 1860 (IPC). Hence, this creates ambiguity.

S.10 provides "grounds for dissolution of marriage". There are ten grounds for divorce under this section. Looking to the social changes and needs of the society, these grounds need to be divided in three parts i.e., (i) Void marriages, (ii) Voidable marriages and (iii) grounds for divorce. UnderS.10(ii)conversion to other religion, is a valid reason for divorce but looking to the present social changes, this ground, requires to be omitted.

THE CONCEPT OF PARSI PERSONAL LAW

THE PARSI MARRIAGE AND DIVORCE ACT, 1936

The above mentioned legislation is near about in tune with the present social need. But then too, there are few unnecessary and illogical provisions in this Act also. Many definitions are given under section 2 of this Act. S.2 (l) states, “"Chief Justice" includes senior Judge," this cannot be accepted practically and logically

because in India, the top most post in judiciary is the Chief Justice of SCof India and after that, is the Chief Justice of a HC. The term "Senior Judge" of any other category cannot be called as Chief Justice.

S.3 provides, requisite to validity of Parsi marriage. Sub-section (a) and (c) have a common concept as mentioned under S.4 of Special Marriage Act, 1954. Only clause(b) mandates, “a marriage under this legislation or a marriage of Parsis is valid if, it is solemnized according to ceremony called "Ashirwad' by a priest and this has to be carried out in the presence of two Parsi witnesses.” The ceremony of "Ashirwad" is performed before "the Holy Fire". But this is a customary practice and not of "religious nature". In present time, there is no need to have such separate system, exclusively for Parsis. Suits or petitions can be brought to the family court or district court. Hence, this part is totally unnecessary. The grounds provided under this provisions 32 of Act, need to be divided under the heads of, (i) Void Marriages, (ii) Voidable Marriages and; (iii) Grounds of divorce. It is also required to add other grounds of divorce as mentioned under Special Marriage Act, 1954 (SMA). Moreover, S.32(j) of this Act provides "conversions" as one of the grounds of divorce, which is totally unconstitutional and unjustifiable in present time.

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