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## FREEDOM OF RELIGION & EQUALITY BEFORE LAW- ISSUES & CHALLENGES WITH SPECIAL REFERENCE TO UNIFORM CIVIL CODE

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### Abstract

*Present paper discuss about the concept of equality enshrined in Art.14 of the Indian Constitution with reference to Art.25 of the Indian Constitution which guarantees Freedom of Religion to an individual. Over the period of time it is observed that Art. 25 of the Indian Constitution has become important fundamental right as it deals with matter of Religion. In Indian ext religion, culture, Customs & rituals plays very important role and have become integral part of Personal laws which governs matters pertaining to Marriage, Divorce, Maintenance, Succession etc. Due to this, there is no uniformity of laws pertaining to Marriage, Divorce & related matters which ultimately create discrimination and tend to shatter the fabric of Art.14 of the Indian Constitution. On this background we feel the need of Uniform Civil Code."*

### Introduction-

Socialist state, Democracy, Fraternity are most cherished principles of the Indian Constitution since its inception. Similarly the concept of secularism is also enshrined in the Indian Constitution which was made explicit through 42<sup>nd</sup> Constitutional Amendment by adding word "secularism" in preamble of the Indian Constitution. The concept of secularism envisages non-interference of the state in the matter of religion. When the Nation declares in preamble of its Constitution which is the Law of the Land, then the message is very loud and clear which states that State will not promote, propagate or preach any religion but at the same time concept of secularism also cast duty on state to protect individual's right to religion faith, belief towards any religion.

Drafting committee members of the Indian Constitution were very keen to confer fundamental rights to the citizens of this country for their social & individual development. However after careful study of each fundamental

right & its development in post independence period, there is a need to identify and analyze important fundamental rights which cannot be compromised. Art. 14 of the Indian Constitution talks about "Equality before Law & equal Protection of Law". Over the period of time concept of Equality have enlarged its boundaries from literal interpretation to liberal interpretation through judicial interpretation. However in modern era, when we talk about equality, we expect it in real sense and according to the spirit of the Indian Constitution.

On this background, when we look at some provisions of personal & statutory laws relating to law of marriage, divorce, maintenance, adoption, succession which are discriminatory in nature then we feel the sense on inequality. Various provisions of existing personal laws discriminate & underprivilege women. Since beginning much debated question that 'personal laws' are Laws under Art. 13 of the Indian Constitution? Can they be protected under Arts 25 to 28 of the Indian Constitution? Various provisions of personal laws make discrimination against women and subject her to inequality in the name of religion.

Since long time there is a discussion about conflict between freedom of religion and one's right to equality. Few fundamental thinkers within the society have always defended for absolute right of Religion and are very determined to say that personal laws & religious customs shall not be put for test against constitutional provisions. On the other hand social thinkers who advocates for Right of equality guaranteed by the Indian Constitution and they expect that law should overlook the cultural differences when it comes to equality.

### Personal Laws-Issues & Challenges-

Personal laws are one of the exceptional and sometimes repressive components of the Indian Legal System. Personal Laws are laws

which govern people belonging to a particular religion. Their origin & continuance can be traced to religious practice & customs. Personal laws are blend & collection of discrimination & inequalities, still they are followed blindly. Their existence & application is justified in pre-independence period, but in post independence period after the enactment of constitution their continuance in the light of fundamental rights & spirit of our constitution cannot be justified at all.

The amount of discrimination, especially against women they bring about violates basic principles of the Indian Constitution. There are differences in provisions relating to marriage, ground of divorce, age of consent, property rights, provision of compulsory registration of marriage etc. though in post-independent period Hindu personal laws were amended to the large extent by introducing Hindu Marriage Act-1955, Hindu Succession Act-1956 which directly hit on the coparcenary system of Hindus, Hindu Adoption & Maintenance Act-1956. In spite of all these things, personal law plays major role in matter of validity of marriage, ceremonies for performing marriage.

The provision of compulsory registration of marriage is not followed strictly. 270<sup>th</sup> Law Commission Report states that "Since Independence, numerous initiatives have been taken to address the issue of gender inequality. Reform initiatives taken so far have succeeded to a large extent, however, child marriages, bigamy and gender violence constitute to persist in our society, despite legislations prohibiting and penalizing such practices. Several disputes are pending before the court regarding matrimonial status of the parties"<sup>2</sup>

In Indian Society marriage is considered as foundation of good & healthy family and Good & healthy family is considered as foundation of good society. However we will notice different attitudes, rituals and customs which decide the validity of marriage. According to Hindus marriage is sacrament while Muslim treats marriage as contract. In Parsi personal law Ashirwad ceremony and registration of marriage is central idea. The procedure to obtain divorce is relatively easier for Muslim community than

a Hindu Community. There are lots of debate discussions on provision of triple talaq Muslim personal law which makes the posit of Muslim women vulnerable. There are different provisions with respect to maintenance of wife. Provisions of personal laws plays important role in providing maintenance to the wife. Hindu married women can ask for maintenance in case of divorce or separation from husband, when there is no provision of maintenance for Muslim women after the divorce.

The concept of adoption is popular, however procedure of adoption rights of adopted children are subject to provisions of personal laws. Under Hindu Law entire procedure of adoption governed by the Hindu Adoption & Maintenance Act 1956. But Muslim Personal Law instead adoption practices 'Kafala' system.<sup>3</sup> According to this system, child is placed under a Kaf foster parent who looks after the well being of the child including financial arrangements for the development of child. While there is no law as such for adoption in Christian Law. Parsi Law follows the custom of 'Palak'. As per this custom widow of a childless Parsi can adopt a child on the fourth day of her husband's death to perform certain last rights & rituals.

We also notice indifferent provisions relating to law of succession. The inheritance rights & shares in the property are mainly decided according to the provisions of personal laws. Especially provisions regarding share of a woman in the property & distribution of the property of women are influenced by personal laws. Presently if a woman is Hindu then she has got better rights in the property in comparison with woman who belongs to any other religion other than Hindu. But if a woman is Muslim then her property rights are different.

In British Colonial period, Britishers legislated on every aspect except personal laws. Britishers enacted Marriage & Divorce Laws of the Christians, but they never legislated on personal laws of other community since they were aware of the fact that matter of religion is very sensitive & it might threaten their existence in the India.

Uniform Civil Code- A need of time

To quote Choudhary Hyder Hussain, a prominent Muslim Lawyer of Lucknow "Living under the British rule for about two centuries we have come to consider it only natural for Hindus to be governed by Hindu Law and Muslims to be governed by Muslim Law; but it is wholly a medieval idea and has no place in Modern world. I would therefore strongly urge the necessity of having one single code to be named as Indian Civil Code applicable to everybody living within the territory of India irrespective of caste, creed or religion persuasions"<sup>14</sup>

In Constitutions Assembly Debate, Shri Minoo Masani, Raj Kumari Amril Kaur and Shrimati Hansa Meheta recorded their dissent they said

"We are not satisfied with the acceptance of the Uniform Civil Code as a ultimate social objective set out in Clause 39 as determined by the majority of the sub-committee. One of the factor that has kept India Back from advancing to Nation hood has been the existence of the personal laws based on religion which keep the Nation divided in watertight compartments in many aspects of life. We are of the view that a Uniform Civil Code should be guaranteed to the Indian People within the period of 5 to 10 years in the same manner as the right to free & compulsory primary Education has been guaranteed by clause 23 within 10 years."<sup>15</sup>

Philosophy of Britishers towards Personal laws was neutral. Unfortunately same belief & feeling continued in post-independence period and Government of the day hesitate to codify personal laws thoroughly in fear of losing vote-bank. No Government wants to take the blame of revamping entire personal laws which are discriminatory in nature. The Government instead of making any serious attempt in this direction tends to adopt an indifferent attitude. Till today, the Government has not played significant role to discharge the burden. No steps have been taken to implement Art. 44 of the Indian Constitution which talks about Uniform Civil Code.

In post-independence period idea of Uniform Civil Code was always looked down & considered as against the interest of Minority

communities and especially Muslim community. It was always projected that Uniform Civil Code violates the rights guaranteed Under Arts. 25 to 28 of the Indian Constitution which guarantees Right to Religion as fundamental right. However these rights are subject to certain restrictions and restrictions are mentioned in Art. 25 (2) itself. In my opinion, firstly Art. 25 which guarantee Right to Religion should be subject to Art. 14 of the Indian Constitution which promotes the idea of equality. No doubt, Hon'ble Supreme Court time & again emphasized that reasonable classification is allowed as the equality can be administer amongst equals only. However inequality in the name of Religion, cast, creed and sex should be protested in Modern India as it is against the spirit of the Indian Constitution.

The directives provided to the state under Art. 44 of the Indian Constitution & idea of Uniform Civil code should not be seen as conflict between Minority and Majority communities for their religious rights. However a broad thought should be given towards the idea of uniform civil code because after careful and systematic study of all personal laws we will notice that all personal laws by and large causes discrimination irrespective of the fact that they belong to minority community or majority community.

There are certain sections of the society & few Moderate thinkers who have advocated the idea of Uniform Civil Code. They express their views by saying that uniform Civil Code in India will bring dynamism & progress and there is no harm if the personal laws are changed to achieve this goal. We must understand that personal laws that applied to the conditions & circumstances 1400 years ago cannot be implemented in modern times. The views of Justice Chagla, Justice P.B. Gajendragadkar reflect that "state can embark upon a uniform legislations of an all embracing characters and is competent enough to decide to bring uniform legislations by stages may be territorial or community wise."<sup>16</sup> Justice Krishna Iyer while advocating his idea about Uniform Civil Code stated that "Uniform Civil Code is not only desirable but necessary when viewed from the angle of national integration" he advocated the idea of one country, one nationality, one citizenship & one legal system is axiomatic."<sup>17</sup>

### Conclusion-

India is multi-linguistic & multi-cultural country. As a Nation we will have to preserve this diversity. Freedom of religion & right to practice & propagate religion should be protected in secular democracy. However it is important to bear in mind that many social evils take shelter as 'religious customs' such as child marriage, Triple Talaaq, polygamy, unnecessary & unwanted religious customs & rituals. To protect these practices under the name of religion would be a great folly. These practices even do not conform to basic tenants of human rights and cannot be considered as integral part of religion. Even essential customs & rituals which are discriminatory in nature should not be reason to practice and continue. In 21<sup>st</sup> Century human civilization advancing in all spheres of life at that time discrimination based on religious customs & rituals which are affecting human rights of an individual cannot be accepted. Now time has come when laws relating to Marriage, divorce, maintenance, succession, adoption etc should be uniform to all inspite of different religion. Then only spirit & concept of equality mentioned in Art. 14 of the Indian Constitution can be maintained.

### (Endnotes)

- 1 I/C Principal MMM's SCLC, Pune
- 2 UNIFORM CIVIL CODE IN RETROSPECT AND PROSPECT, Kiran Deshta, Deep & Deep Publication, Delhi-2002.
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- 4 "A UNIFIED CODE OF INDIA" Choudhary Hyder Hussain, A.I.R. 1949, Journal Section, PP71-72.
- 5 CONSTITUTION ASSEMBLY'S DEBATE, (1948), Vol. VII, p. 543
- 6 "PLEA FOR UNIFORM CIVIL CODE", M.C. Chagla, Weekly Round Table, March 25-1973, P.7
- 7 Supra Note 1