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Law, Modernity, Culture and Religion: A Dilemma on Progress

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ABSTRACT

The question of UCC being progressive and ignorant of cultural history and identity has been a prominent question of debate. The author feels that minorities specially in the context of Christian Women, and other minorities with or without bargaining power have been historically been ignored or force fitted into categories. The author would like explore and elaborate on this idea and also ponder about the effects of compartmentalisation on progress, culture and identity. In this process, the author would take into consideration aspects that revolve around culture, religion, individuality, fluidity and law.

Keywords: *Law, Identity, UCC, Modernity.*

I. INTRODUCTION

India, a unity in diversity is a multicultural society that nurtures pluralism in many areas including laws, legal systems, culture, values, tradition and even history. India being a secular country it is ought to be respecting the existence of different religions and their practises and religious personal laws. However, the diversity has not always unified everyone, existing laws and absence of laws have cornered and "invisibilized" and forgotten minorities and women. This could be attributed to the country's colonial past as well as the politics of the country. Most of the religious personal laws were enacted in the colonial times; Hindu laws just standing out, however, The Muslim Personal Law Application Act 1937, The Indian Christian Marriage 1872, The Guardians and Wards Act 1890 etc bears testimony to the same fact. The British had a fascination towards the Orient and its culture, the orientalist and imperialistic idea of bringing law into the land of savages was definitely an interesting project. The diverse "traditions" and "customs" of the population, the visible population, found its way to being religious "personal" laws as they were codified under the guidance of self-styled experts of religions, cultures and practices. However, the culture and needs of many vast sections of the populace were not included or recognised. For example, the essential practices in a Hindu Marriage are saptapadi and the sacred fire. Many communities and castes from different parts of the country never had such practises, though the law makes way to accept different customs, in practical situations, it

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was and continues to be very difficult to prove the existence of certain customs and traditions as they vary among regions, communities and families within a caste of a particular region. In the *Lingari Obulamma Case*[2], the Supreme Court put forth that there was no evidence of' any custom amongst Reddy's which outweighed the written text of law. Similarly, in *Dolgonti Raghava Reddy Cas*[3]*e*, an Andhra Pradesh High Court case, it was acknowledged that among the Reddy community of Telangana, saptapadi and homa were not essential for a valid marriage; however the court ruled out this dictum as the case was But the court ruled that sine the case was concerned with the Reddy's not of Telangana but Rayalaseema, and held that the same rule could not apply.

The author would like to shed some light on a peculiar yet vivid similarity in what the Hindu Marriage Act did and what the UCC might do. The author would like to hold on three main short comings of the effects of the Act which undoubtedly the UCC will also carry forward, namely; cultural ignorance and "invisibilisation" as discussed earlier in the above paragraph UCC is more likely to be ignorant and exclusive of the cultures and customs as its predecessors owing to its multiplicity and abundance; jeopardizing the position of women and gender justice and force fitting and illusive uniformity. Hindu Marriages until the Hindu Marriage Act 1955 were polygamous; the 1974 report of the Committee on the Status of Women, Towards Equality shows that the rate polygamous marriages among Hindus, Muslims and tribals for the period 1951-60 is as follows: Hindus - 5.06 per cent, Muslims - 4.31 per cent and Tribals - 17.98 per cent. No reflection A lot of work was put into correcting the act's shortcomings, which changed a Hindu marriage from a traditional, vedic "sanskar," or sacrament, to a contemporary, void contract. The act recognised all traditional forms and 'shastric' ceremonies as legitimate means of 'solemnising' the contract, and it did not require registration. The statute created a legal illusion that led to Hindus becoming uniform. Due to the act's vagueness, a Hindu man had plenty of room to avoid both the financial obligations to his second wife and the criminal repercussions of being married to more than one woman. Before the act, women in bigamous marriages had a right to maintenance and place of abode because polygamy was accepted by traditional Hindu law and customs. Women in bigamous partnerships lost their claim to maintenance, legality, and respectability when monogamy was introduced. The Supreme Court forced upon them practices that were previously reserved primarily for the higher castes of particular regions, therefore grounding the customs and rituals of a pluralistic society into an absurd notion of uniformity. In the event that a community followed a tradition that went against

[2] Lingari Obuilamma v L Venkata Reddy and Ors AIR 1979 SC 848
[3] Dolgonti Raghava Reddy AIR 1968 Andh Pra 117

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Shastric rituals, the custom had to be significant enough to catch the interest of a legal scholar, who would then be wise enough to include it in a legal treatise. Additionally, the custom had to have stayed unchanged over time. This would be like trying to find a needle in a hay stack in a large country with a dynamic population, confining societies that are rapidly changing due to the forces of modernization to fossilized forms completely cut off from their modern lives. [4] It is also to be noted that UCC or the modernising laws would be based on upper caste North Indian Hindu practices, considering the focus on Hindutva ideology of the present regime and the basic carcass of the HMA. The author would also like to focus on the tendency of personal religious laws and the like where the legislation force fits other categories into the umbrella of the same, even though they are inherently different for even opposing. One such example is the Hindu Marriage Act speaking for Sikhs, Buddhists and Jains at the same time. It is to be remembered these religions arose from dissatisfaction from Hinduism. Force fitting different communities and categories have been problematic, the author relies on the following case laws for drawing the above argument. In Shakuntala v Nilkanth 1973 .Mah U 310 the husband was accused of bigamy, however the first marriage performed as per Neo Buddhist rites was declared to be invalid as by virtue of the statute Buddhists are Hindus and ought to follow Hindu rites. Though this is absurd and arbitrary, the wife resorted to the exceptions to customs and tradition of communities; however, she could not prove the same as the customs were new and were named in scholarly works. Force fitting and compartmentalizing people and communities into arbitrary and exclusive and alien umbrella terms and laws results in confusion, chaos, injustice and cultural wrongs; most of all a sense of colonisation of the others.

Several scholars, writings and debates over the UCC brings light into the fact the conflict over UCC stems from the freedom of religion guaranteed by the Constitution, which places women's rights as individual citizens against the rights of communities that are entitled to their own laws. There is definitely a battle; National Integrity v cultural rights of communities; national integrity of the nation is “said” to be under threat from plurality of legal systems and from the very existence of differences from the Hindu/ Indian norm. However, the author believes that national integrity of nation emanates from the welfare of citizens and the security and sense of belonging the State offers to its citizens. In this light, viewing the plurality of religions, customs, laws and tradition, communities, and categories as opposed to the proclaimed and decorated mainstream Hindu religion as a threat to the nation as the existence and continuing of the above said in the context of UCC and the present political regime seems to be anti-Indian, un-Indian and anti-progressive India; is extremely problematic, leading to several internal conflicts,

[4] Agnes, F., 1995. Hindu men, monogamy and uniform civil code. *Economic and Political Weekly*, pp.3238-3244.

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identity and cultural crisis, inegalitarianism and forced arbitrariness. When the debate over UCC deepens further, there is a clash between fundamental rights involving religion, customs and communities and individuals as their own self. There is an "Intra Fundamental Rights Clash," wherein the right-bearer is understood as a member of a group as well as an individual citizen. Articles 14 through 24 of the constitution guarantee an individual's right to equality and freedom with regard to the former, while Articles 25 through 30 safeguard the rights of minorities to education and culture as well as their freedom of religion. Religious communities get their authority to be ruled by their own "personal laws" from the latter. [5]

It can be proven without doubt that religious personal laws have been patriarchal, however; it is not right to curtail the rights of religious communities and minorities in the pretext of the same. The author believes there is a need to reform each of the personal laws and make it come into terms with the contemporary times in ways that foster gender justice and minority rights. The author relies upon the history of divorce laws for Christian women, a minority in the country whose divorce was governed by the Indian Divorce Act, a colonial statute. The Act pre 2001 Amendment was far from women friendly. The unfair and discriminatory provisions of the IDA included: a husband could only file for divorce on the grounds of his wife's adultery; a wife seeking a dissolution of marriage had to prove another marital fault, such as desertion, cruelty, conversion, bigamy, etc., in addition to her adultery. Therefore, in order to terminate an unpleasant marriage, it was equally difficult for both parties to show adultery or adultery combined with another marital transgression[6]. Contrary to the provisions in the Parsi Marriage and Divorce Act, 1936 (PMDA)11 as amended in 1988, the Hindu Marriage Act, 1955 (HMA)10, and the Special Marriage Act, 1954 (SMA)9, there was no provision allowing the parties to separate by mutual consent, even if they felt that the marriage was unworkable and they could not continue together. In several instances, even the courts recognized the difficulties faced by the parties and the pointlessness of keeping the marriage bonds, but they were unable to provide any meaningful relief because no provision existed. However, the 2001 amendment brought in many positive changes, like mutual [7]divorce and maintenance rights, erasing the differences women in different communities had in terms of the protection under law. Thus, the author puts forth that the protection of minorities, women and inclusivity happens within respective statues by way of reforms and amendments to it in consultation with the communities

[5] Menon, N., 2015. Is feminism about'women'? A critical view on intersectionality from India. Economic and Political Weekly, pp.37-44.
[6] Kusum, 2001. THE INDIAN DIVORCE (AMENDMENT) ACT 2001: A CRITIQUE. Journal of the Indian Law Institute, 43(4), pp.550-558.
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 [ISSN 2581-5369]

and scholarships; and not by bringing everyone under an umbrella statute and assuming 'uniformity' and invalidating preexisting laws and traditions. Attempts to use an umbrella statute can also jeopardize the situation of those the statute intended to protect, as in the case of the issue of Domestic Violence Act. The Act has failed to understand and encompass how domestic violence needs to be treated in different regions of the country as the conditions and positions of women are different in different societies. It is not to be forgotten that for most women, the notion of a woman's role in her husband's home is highly valued in culture. The fact that the majority of women are financially dependent serves as the economic foundation for this cultural norm. In addition, it is unrealistic for them to anticipate receiving support or a portion of the assets upon divorce. Therefore, the right to live in the marital residence—which is technically the husband's house—is a meaningless or empty achievement.

The author believes that liberal legalism is based on the guarantee of fairness and non-arbitrariness to everyone despite their specific characteristics or differences in identity. Identity is something the law protects, and the debate on UCC is also connected to different notions of identity. However, in a Galanter approach, understanding of identity requires the court to adopt an empirical approach that does not attempt to resolve the blurring and overlap between categories and accepts multiple affiliations, but address itself to the particular legislation involved and tries to determine which affiliation is acceptable in the particular context. Therefore, it is important to reimagine national integrity in ways through which the so imagined national integrity and identity is not constructed through the marginalization and exclusion of a multiplicity of other interests and identities. [8]Also, the need to rethink the nation as a homogeneous entity, the legitimacy of the state to bring about social reform and also citizenship on the lines of Hindutva. There is a pressing need to also understand that each religious community is heterogeneous as practices differ from places to places etc. The author is of the opinion that reform initiatives from inside the communities themselves have a better chance of succeeding instead of a top-down approach as in the UCC in the ambiance of anti-minority sentiments and politics eroding the minority identity and the tendency of statutes to dismantle preexisting customs which were laxer and imposing and force fitting others into the ideas of the decorated majority.

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[8] Menon, N., 2015. Is feminism about'women'? A critical view on intersectionality from India. Economic and Political Weekly, pp.37-44.

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