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# Tussle between Religious Laws and Constitutional Laws

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## ABSTRACT

*India is a secular democracy, ideally, there should not be any kind of face-to-face between religion and laws of the land. But in reality, courts are called upon to resolve such kinds of issues of religion and their decision creates a long-lasting effect in society. Although states are out of this conflict ideally by declaring themselves secular but in litigation and court these conflicts appear. Then the burden of shortcomings of the legislature to clearly differentiate the personal laws and central legislative laws moves on the shoulders of the judiciary. Most of the cases of civil nature including marriage, divorce, inheritance of property, etc have to deal with this issue. In this article, we take a complete holistic view of these personal laws history to present the scenario and briefly comment on the decisions of the court in these cases. In the end, the possible solution is discussed in form of the Uniform Civil Code.*

**Keywords:** *Hindu Personal laws, Sharyat, Uniform Civil Code.*

## I. INTRODUCTION

What is religion? Isn't it a system of faith and worship or belief in some superpower? It is a very basic of human life which is not only to follow beliefs but they also form a way of life because the religious people follow a different kind of livelihood and moral duty of following all the rules. The religious enters boundary of law in which a person is compelled to follow or not to break their rules decided by that particular country. And hence it can be easily inferred that religion and law are interdependent. Until the concept of democracy of the states arrived people were bound to follow religious laws and owed a duty of care to that religion. And so the religion helped to maintain law and order in societies across the world.

India is home to people of different religions, 6,699,626 people follow other religions besides the six major religions namely Hinduism, Jainism, Islam, Buddhism, Sikhism, and Christianity. In India, legal rights are granted as a right to worship; the right to visit religious sites (such as

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the temple, mosque, church) to practice their religion and religion but subject to certain limitations set out in the Constitution.

It is evident from the past that the Indians were sensitive to their beliefs and customs. Whenever a foreign power tried to interfere with religious traditions, they became impatient and rebelled. Even the immediate cause of the 1857 Revolution was that Mangal Pandey was compelled to act in opposition to his beliefs. He was forced to remove the gun shell from his mouth which is believed to have been smeared with a mixture of beef and pork chops. When the Britishers did not respect their faith, it became a major cause of rebellion and led to the revolt against the British Raj.

The Indians are still the same when it comes to their faith and religion. Their religious feelings are one of the main concerns in their lives. Even now when someone mixes his religion with his culture, they take it upon themselves to defend their religion and bring charges against the accused. And this is where the war of religion and law starts. It is the law that is practical but religion that just works on beliefs. They are pillars for each other that limit each other's existence.

Our Constitution guarantees all citizens the right to practice any religious system of their choice. The right to practice one's religion is a constitutional right. But what happens when the right to freedom of religion and practice are closely linked to another constitutional right? Which of these rights should you win over?

## **II. HISTORY**

The Indian census has found that Hinduism accounts for 80.5% of the Indian population. The second-largest religion is Islam, with about 13.4% of the population. The third-largest Christian religion is 2.3%. The fourth-largest Sikhism religion is about 1.9% of the population of India. This diversity of religious systems from India today is the result, in addition to the existence and birth of indigenous religions, the integration of religions brought to the region by merchants, travelers, immigrants, and even invaders and conquerors. Other indigenous religions of India are Buddhism and Jainism. Ancient India was a melting pot of philosophical ideas, Shamanic religion, and Vedic religion, parallel traditions that existed for millennia. Both Buddhism and Jainism are a continuation of the Shramana culture, while modern Hinduism continues with the Vedic tradition. These existing cultures collectively have the same effect. Zoroastrianism and Judaism also have an ancient history in India and each has several thousand Indian followers.

Ancient history tells us about how different religions made their existence in the country.

Hinduism is considered the oldest religion not only in India but also in the world. Its law is called the Hindu law. Hindu were people who lived along the Hindi river that is the Indus River. The Supreme Court of India in the landmark case of *Shastri vs Muldas* expressly defined the term 'Hindu'. From marriage to succession and from conversion to reconversion all the laws are taken care of in the Hindu Laws. It comprises of five sections. Similarly in Islam, it is ruled by Sharia courts. Sharia is complex and its performance depends entirely on the quality and training of professionals. Islamic lawyers issue leadership and decisions. A guideline that is considered a legal decision is called a fatwa. There are five different schools for Sharia law. There are four Sunni teachings: Hanbali, Maliki, Shafi'i and Hanafi, and one Shia doctrine, Shia Jaafari. These five doctrines differ from one another in their interpretations of Sharia texts.

If we talk about other such religions, In the case of Christians, there is a separate branch of law known as Christian Law that is more dependent on certain principles. The Christian Law on Divorce in India has undergone changes in recent years. The Indian Divorce Act (Amendment) Act of 2001 has brought about significant changes in the grounds for divorce. At present Christian law in India has emerged as a separate legal entity, covering all family laws to date that affect Christians in India. Christian law is largely based on English law but there are rules that come from the power of customs and traditions.

Christian family law now has a number of different branches such as marriage laws, divorce, reimbursement, legal separation, succession, adoption, care, custody of minor children and compliance with canon law, and all that regulates family relationships.

### **III. LEGISLATURE AND THEIR CONTRADICTION TO RELIGIOUS BELIEVE**

There are a lot of laws that contradict the religious beliefs like-

Personal Islamic law derives its validity from the Quran and, as a result, cannot be questioned for constitutional reasons by international courts, including the Supreme Court. The *Jamiat Declaration* comes on the heels of an ongoing debate over whether Islamic law itself violates women's rights - especially regarding divorce and inheritance - and therefore against the equal right of the Constitution for all citizens, regardless of religion or gender.

Two separate constitutional claims - the right to freedom of religion, and the right to equality - appear contradictory, creating a confusing legal situation. This would raise the issue of establishing a Common Civil Code for all religions, a policy not only restricted to Hindu rights but also a large number of liberal statesmen who followed the decision in the *Shah Bano* case

during Rajiv Gandhi's time. There are other instances of religious law that go against the laws of the land. For example, in Indian law, attempted suicide is a criminal offense. But in Jainism, the abolition of commitment and non-violence by abstaining from food and drink, called Santhara, is not only permissible but is considered commendable.

The main difference between the Jain practice and the Islamic code regarding the status of women is that Santhara is voluntary and Muslim women have rules set for them.

Legal and ethical questions raised by such issues will cause controversy in the community. An issue that can only strengthen the Constitution, rather than weaken it. But still, the constitution covers them in the following sections-

Article 25: Freedom of conscience and free profession, practice, and propagation of religion.

Article 26: Freedom to manage religious affairs.

Article 27: Freedom as to payment of taxes for promotion of any particular religion.

Article 28: Freedom as to attendance at religious instruction or religious worship in certain educational institutions.<sup>3</sup>

#### IV. CASES WITH CONFLICTING SITUATIONS

Usually, the main conflict which arises between personal laws and constitutional laws is with Part 3 of the Indian constitution dealing with the fundamental rights of the citizens. Although it is clear that any law in violation of fundamental rights should be struck down but there are cases where courts take one side and in other cases they decided on another side.

**1. *Krishna Singh vs. Mathura Ahir and Ors. (07.09.1981 - SC) : MANU/SC/0389/1981***  
Bench of judges were deciding in case of possession of property whether Sudra can be Sanyasi or not. Although High Court had given judgment that handicap suffered by Sudra by personal laws will be a violation of Articles 14 and 15 of Indian Constitution. It would violation of right to equality because of discrimination on the basis of caste. But Supreme Court frowning on this decision "In our opinion, the learned judge failed to appreciate that part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he (the High Court judge) could not introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu laws, i.e. Smritis and commentaries referred to, as interpreted in the judgments of

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<sup>3</sup> Legislative.gov.in. 2021. Constitution of India|Legislative Department | Ministry of Law and Justice | GoI. [online] Available at: <<https://legislative.gov.in/constitution-of-india>> [Accessed 11 July 2021].

various High Courts, except where such law is altered by any usage or custom or abrogated by statute”.<sup>4</sup>

2. In *Maharshi Avdesh v. Union of India*, the petition was filed under article 32 of the constitution seeking direction for the respondent from enforcing Shariyat law, making Muslim Women Act (1986) as void as it is against the article 14 and 15. Supreme court dismissed the plea on the grounds that these are function of the legislature not judiciary.

On the other hand there are cases where court has tested these personal laws against the constitution:

3. *Madhu Kishwar v. the State of Bihar (1996 5 SCC 125)*, Provisions of Chotanagpur Tenancy Act, 1908 are challenged as they are creating discrimination with women. Court held that customs cannot be formed base for any legislature till it fulfills the requirements given by constitution. Court said, “..under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court.”<sup>5</sup> In this case court goes through constitutionally to check the violation of the fundamental rights.

4. *Githa Hariharan v. Reserve Bank of India (1999 2 SCC 228)*, in this case court was deciding the constitutional validity of Sec 6 of Hindu Minority and Guardianship act. The challenge was based on discrimination with women as the father is considered natural guardian of the minor, not the woman. The Court observed in para 9 says, “*Is that the correct way of understanding the section and does the word 'after' in the section only mean 'after the lifetime'? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e. six years after the Constitution. Did the Parliament intend to transgress the Constitutional limits and ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion - no.*”

5. *Daniel Latifi v. Union of India (AIR 2001 SC 3958)*, One of the counsels in famous Shah Bano case challenged the constitutional validity of Muslim Women Act (Protection of as against the Article 14 and 15 of the constitution. This case judgment validated the Judgment of Shah Bano case and says that Muslim women is entitled to get maintainance under Section 125 of

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<sup>4</sup> Indiatogether.org. 2021. India Together: Courts' flip-flop on personal laws, from Volume 3, Issue 4, of Combat Law. [online] Available at: <<http://www.indiatogether.org/combatlaw/vol3/issue4/flipflop.htm>> [Accessed 11 July 2021].

<sup>5</sup> *Id.*

Criminal Procedure Code even after the iddat period till the husband does not complete its duty under the Muslim Women (Protection of rights on divorce) act 1989. In this case also the constitutional provisions are maintained and judgment tries to maintain the balance between personal law and constitutional laws.

In present scenario there is changing world around us and with this changing world law also have to evolve but tradition, custom and religion most of the times appears stagnated. This trend can be seen in recent landmark cases:

1. *In Indian Young Lawyers Association & Ors. v. State of Kerala & Ors., (2016 SCC Online SC 1783)* (SABRIMALA TEMPLE CASE) , Supreme Court Bench with 4:1 ratio abolished the custom of not allowing girls and women of menstruating age to enter in the temple and explained the custom as unconstitutional and violation of article 14 of Constitution.<sup>6</sup>

2. *Shayara Bano v. Union Of India, (2017) 9 SCC 1*, the Constitutional bench of Supreme Court has decided by the ratio of 3:2 that talaq-ul-biddat is the custom and aw under Muslim Personal Law Application act,1937 so it is not valid in the present day as formed before the constitution and comes under the ambit of Article 13 (1) of constitution and hence void.

From the above case judgments we have seen how with the changing time and senario law is evolving it selves to compete with present das challenges but religion is still at stop.

## V. IS UNIFORM CIVIL CODE SOLUTION FOR THIS TUSSLE?

As already explained, India is such large diversity in every aspect and areas as result of which conflict is very common. From the view point of state if we see then it is very easy to say that to govern the easily it is necessary to bring all citizens under one umbrella there should be one rule governing them all, and from there the idea of Uniform Civil Code arises that every citizen is uniform without out difference.

It is not a new concept but already present in Article 44 of Indian Constitution, Directive Principal Of State Policies, says “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India”<sup>7</sup> but we even today not able to attain that kind of understanding in our society to implement and adopt the constitutional mandate. The words also selected in the constitution were very selective “endeavor” or to try hard instead of word implement. This also shows that the constitution makers were aware of the fact of its

<sup>6</sup> Sharma, D., 2021. Sabarimala Temple Archives | SCC Blog. [online] SCC Blog. Available at: <<https://www.scconline.com/blog/post/tag/sabarimala-temple/>> [Accessed 11 July 2021].

<sup>7</sup> Legislative.gov.in. 2021. Constitution of India|Legislative Department | Ministry of Law and Justice | GoI. [online] Available at: <<https://legislative.gov.in/constitution-of-india>> [Accessed 11 July 2021].

implication of such diverse society. In country like India, idea of Uniform Civil code looks like academic exercise. The true spirit of this article 44 is to make a homogenous society which is not divided on the basis of caste and religion which seems little difficult in India.

To bring every person in one boat in country like India it is necessary to converge the citizens towards a common shared topic of country like nationalism, defence of nation issues and other issues of national importance. These thing are practiced by different political parties but they only work for their political gain , once target achieved they leave it and move to the next election with next issue so this inconsistency creates a gap which is not required for UCC implementation.

There are other implications also like minorities can take defense of Article 25 because it gives right to freedom of religion which itself implies and enable them to manage personal laws according to their communities laws. There are many insecurities also in the minds of minorities regarding their freedom in Hindu majority country if UCC implemented. So governments have to deal with it also and clear their insecurities and doubts first before implementing UCC.

## VI. CONCLUSION

From time immemorial there is conflict between the personal laws and laws made by rulers to govern the state. The main reason is the ruler's mindset to govern the territory with uniformity without any discrimination but on the other end personal laws wants they superiority. This is unending continuous discussion to carry forward but in short frame, trend in present scenario can be understood which is tried to present in this article with the help of different case laws and judgments.

At the end , it is not necessary to be involved in discussion but it is necessary to understand the phenomenon and trend in society and to change accordingly which is most fantastic feature of homo sapiens which make them king of animal kingdom and they survived so long. And for the justice in society, Indian firmly believed and always showed their faith in "***Yato Dharmastato Jayah***".

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