



# Uniform Civil Code: As An Instrumentality Urgently Needed to Protect Neglected Children in India

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In this world, sometimes a person is punished by the God as well as by the State and society for his wrongs, mistakes and blunder. But sometimes a person is punished by the God, State and society for no fault of him/her and such person has to suffer the unwanted and undesirable punishment throughout his/her life. In this category on the top come a “Neglected Child”. A neglected child is deprived of all the facilities, opportunities, privileges and rights too, which every person enjoys in her/his life. Not only this but they (neglected children) are devoid and deprived their human rights too, which have been provided by the Natural law, Municipal law as well as by International law for them. A “Neglected Child” suffer continuous deprivation of raring and caring, food and shelter, clothes and garments, education and medicines, house and home, rest and peace in his/her life at every stage. A child may become “neglected” due to “broken home”, illegal birth, void marriage, conflict of laws and wars between the nations because at the outbreak of war between two countries, parents fled for their life not caring sometime that which family member has been left behind.

Thus, in India law relating to child and family law has undergone a sea change over the last seventy years with most family laws being enacted by the Indian Parliament after Indian independence from British rule in 1947.<sup>1</sup> For example, the family law system that developed from the Mitakshara school<sup>2</sup>, which essentially focused on the extended family, has been transformed into one based on the nuclear family. This metamorphosis was an inevitable result of the changing social conditions and attitudes that, in turn, led to various social revolutions in India.

<sup>1</sup> Indian Independence Act, 1947, [8<sup>th</sup> July, 1947] 10 & 11 Geo. 6. Chapter 30 (UK).

<sup>2</sup> Law according to the ancient scriptures of The Hindu. See Elaine E. Southerland, *The Future of Child and Family Law – International Predictions*, Cambridge University Press, U.K., 2015, p. 144.

The Constitution of India, which forms the basis of family law, was enacted on 26<sup>th</sup> November, 1949 and its preamble resolved to constitute India as a union of states and a sovereign, socialist, secular democratic republic.<sup>3</sup>

The Constitution of India is the foundation of every law in the country. Thus, the process of child welfare is established in the roots of the Constitution. It provides various rights that are universally recognized as child rights and gives them places in Part III as fundamental rights. Not only but also the various laws related to children are empowered and guided by the constitution too. Part III of the Constitution of India secures to its citizens 'fundamental rights', which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under Articles 225 and 32, respectively, of the Constitution of India. Under the constitutional scheme, freedom of religion and the right to freely profess, practise and propagate religion is sacrosanct and is thus enforceable by a writ.

Simultaneously, Part IV of the Indian Constitution lays down "Directive Principles of State Policy" that are not enforceable by any court but are, nevertheless, fundamental in the governance of the country, and it is the duty of the state to apply these principles when making law. Under Article 44 of the Constitution, the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, realistically speaking, a uniform civil code remains an aspiration that India has yet to realise.

### **Child under the Constitution of India :**

Undoubtedly, children are future of the country and need special protection because of the physical and mental faculties they possess. There are various constitutional provisions relating to the child. State Government under Article 15(3) of the Constitution is empowered to make special provisions for the children. As provided under Article 39(c) of the Constitution the children of tender age should not be subject to abuse and they should be given opportunities and facilities to develop in a healthy manner. Freedom and dignity of children should be protected.

Article 24 of the Constitution prohibits employment of children in factories etc. This Article states that— "*No child below the age of 14 years shall be employed to work in any factory or mine or engaged in other hazardous employment*". Article 45 of the Constitution makes provision for free and compulsory education for children. It states that "*the state shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children unless they complete the age of 14 years*". Further, Article 47 states that it is the duty of the State to raise the level of nutrition and standard of living and to improve public health. This Article provides that "*the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavour to bring about*

<sup>3</sup> The Preamble to the Constitution of India enacted on 26<sup>th</sup> November, 1949 solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic.

prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and drugs which are injurious to health". The Apex Court in Unni Krishnan case<sup>4</sup>, observed that keeping in view of the aforesaid constitutional provision the abolition of child labour in India is definitely a matter of great public concern and significance.<sup>5</sup>

Article 39 of the Constitution specifically requires the state to ensure for protection of children and child care. Right to live with human dignity free from exploitation<sup>6</sup>, enshrined in Article 21 derives its life breadth from the Directive Principles of state policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 of the Constitution. It may not be possible to compel the state through courts to make provisions by statutory enactment for ensuring basic essentials to live with human dignity but where such enactments exist the state can be obliged to ensure observance of such legislation.<sup>7</sup>

### **Various Laws for different religious groups:**

Every child has right to lead a decent life. The physical, mental and social well being of a child depends upon the family to which she/he belongs or where he/she has been brought up as well as the environment in which they live and the persons with whom they live. In the process of socialisation during childhood the family and school are two important institutions which play significant role for integrated development of the child.

The Indian legal system follows the Common Law model, but India is a land of diversity with numerous religions being practised in the country. Thus, personal law is often governed by statutes specific to particular religious groups, with those to whom the statute applies and the appropriate court or body where remedies can be sought being defined in the statute. While Hindu personal law has undergone a continuous process of codification, reflecting changing social conditions, Muslim personal law has been left comparatively untouched by legislators. The Hindu Marriage Act, 1955, codifying marriage law, applies to any person who is a Hindu, Buddhist, Jaina or Sikh and to any other person who is not a Muslim, Christian, Parsi or Jew. The Act also applies to Hindus resident outside the territory of India. There are specific statutes applying to Parsis<sup>8</sup>, Christians<sup>9</sup> and Muslims<sup>10</sup> living in India. The Hindu Minority and Guardianship Act, 1956 applies to Hindus, while the Guardian and Wards Act, 1890 applies to non-Hindus.

This system of different personal laws does not tell the whole story, however, the Special Marriage Act, 1954 governs all matrimonial causes of persons who do not profess any particular religion or are foreigners. It provides for a special form of marriage and for the registration of marriage and divorces and is used by some Hindus, non-Hindus and foreigners marrying in India who opt out of ceremonial marriage

<sup>4</sup> AIR 1993 SC 2178.

<sup>5</sup> S.P. Shaw, *Laws of the Child*, Alia Law Agency, Allahabad, 1<sup>st</sup> Edn. 2000, p. 69.

<sup>6</sup> *Francis Coralie Mullin v. W.C. Khambra & Ors.*, AIR 1980 SC 849.

<sup>7</sup> *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 82.

<sup>8</sup> The Parsi Marriage and Divorce Act 1936, as amended in 1988.

<sup>9</sup> The Christian Marriage Act, 1872, and the Divorce Act, 1869 as amended in 2001.

<sup>10</sup> The Muslim Personal Law (Shariat) Application Act, 1937, the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

under their respective personal laws. Divorce can also be obtained by non-Hindus under this Act. While the Hindu Succession Act, 1956 codifies testate and intestate succession for Hindus, the Indian Succession Act, 1925, consolidating testamentary and intestate succession, applies to all unless parties opt out and choose to be governed by the codified law. Interestingly, Section 125 of the Code of Criminal Procedure, 1973 provides that any person may approach a magistrate seeking maintenance, giving an independent remedy irrespective of religion.

The appropriate judicial forum for the enforcement and adjudication of matrimonial and other related disputes is designated in the relevant legislations. Every state in India has civil and criminal courts that operate under the overall jurisdiction of the State High Court. In addition, the Indian Parliament has enacted the Family Courts Act, 1984 to provide for the establishment of Family Courts with a view to promoting conciliation and securing the speedy settlement of disputes relating to marriage and family affairs.<sup>11</sup> Despite the existence of an organised, well-regulated and established hierarchy of judicial courts in India, unrecognized parallel community and religious courts continue to operate and their role has been criticised by the judicial courts, since such unauthorized bodies work without the authority of law and are not part of the judicial system.

For example, in **Vishwa Lochan Madan v. Union of India and Others**<sup>12</sup>, the Supreme Court of India issued notices to the central government, state governments the All India Muslim Personal Law Board (AIMPLB) and Darul Uloom (an Islamic seminary) in respect of the existence of these parallel unconstitutional courts which pose a challenge to the Indian judicial system. The petitioner was seeking immediate dissolution of all Islamic and Shariat (also known as sharia) courts in India. He sought a ban on the establishment of such Islamic courts, along with a declaration that *fatwas* have no legal authority, and requested the Court to direct the central and the state governments to take effective steps to dissolve all Darul Qazas and Shariat courts in India. The petitioner further sought a direction from the Court to the All India Muslim Personal Law Board and Darul Uloom, Deoband, other seminaries and Muslim organisations asking them to refrain from establishing a parallel Muslim Judicial System (Nizam-e-Qaza).

Thus, marriage, divorce, child custody, maintenance and ancillary relief are undergoing a sea change in terms of the concepts themselves and the goals they seek to achieve in India. One finds that laws passed decades ago are now in urgent need of reform. Times have changed, but the law has not kept pace. The judiciary renders an indispensable service in providing relief on a case-by-case basis. But that is not enough. Often viewed as an example of judicial activism, a court decision may provide relief in a particular case on the basis of a given set of facts and circumstances. However, no broader precedent is set. Thus, responsibility for finding the solution lies with the legislature which must enact legislation. Family laws- particularly those meant to protect and serve the interests of children- must be amended to provide a better future for India. The discussion herein is by no means exhaustive. It is merely an overview of a number of

<sup>11</sup> Section 125 of the Code of Criminal Procedure, 1973.

<sup>12</sup> (2014) 7 SCC 707.

examples of law that require change for a better future for children. The global effort in this direction prompts India to follow suitable system of adjudication and enforcement machinery.

### **The Need for a Uniform Civil Code to Protect Neglected Children in India:**

Article 44 of the Constitution of India requires the state to secure for the citizens of India a uniform civil code throughout the territory of India. As has been pointed out that the India has a unique blend of codified personal laws of Hindus, Christians, Parsis and, to some extent, of Muslims. However, there is no single, uniform family law statute applicable to all Indians.

For the first time, in **Mohammad Ahmed Khan v. Shah Bano Begum**<sup>13</sup>, the Supreme Court of India directed the Indian Parliament to frame a uniform civil code. There, a penurious Muslim woman claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure, 1973 after her husband pronounced triple talaq, effecting divorce by announcing the word 'talaq' three times. The Apex Court held that the Muslim woman had a right to maintenance under Section 125 of the Code and also held that Article 44 of the Constitution, prescribing that the state shall endeavour to secure for its citizens a uniform civil code in India, had remained a dead letter. To undo the above decision, the Muslim Women (Right to Protection on Divorce) Act, 1986, which clarified the right of a Muslim woman to maintenance under Section 125 of the Code, was enacted by the Indian Parliament.

In **Sarla Mudgal v. Union of India**<sup>14</sup>, the question that arose was whether a Hindu husband, married under Hindu law, could, by embracing the Islamic religion, solemnise a second marriage. The Supreme Court held that a Hindu marriage solemnised under Hindu Law can only be dissolved under the Hindu Marriage Act and conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage. Further, it was held that a second marriage solemnised after converting to Islam constituted the offence of bigamy under Section 494 of the Indian Penal Code.

The Supreme Court reiterated the need for Parliament to frame a Common Civil Code that will help the cause of national integration by removing contradictions based on ideologies. Thus, the Directive Principle of enacting a uniform civil code has been urged by the Apex Court repeatedly in a number of decisions as a matter of urgency. Unfortunately, in a subsequent decision<sup>15</sup> the Apex Court clarified that the Court had not issued any directions for the codification of a common civil code and that the judges constituting the different benches had only expressed their views on the facts and the circumstances of the cases before them. However, this ought not to deter the efforts of the Supreme Court in issuing mandatory directions to the Indian Government to draft a common civil code, applicable to all communities, irrespective of their religion and practices in a secular India. Hopefully, the Apex Court may review its findings in some other case and issue mandatory directions to the Central Government to create a common civil code applicable to all communities irrespective of their religion.

<sup>13</sup> AIR 1985 SC 945.

<sup>14</sup> AIR 1995 SC 1531.

<sup>15</sup> *Lily Thomas v. Union of India* [2000] (6) SCC 224.

It may be seen that this development in regard to the question of age of consent in cases of rape was reached after the famous case of **Tuka Ram and Another v. State of Maharashtra**<sup>16</sup>, also known as Mathura rape case, which involved a minor. Further, Section 377 of the Indian Penal Code which speaks about unnatural offences<sup>17</sup> had been traditionally used to cover offences targeting children of both sexes. One example of usage of this provision in such cases is **Childline India Foundation & Another v. Alan John Waters & Ors.**<sup>18</sup> The explanation attached to it says, penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The Supreme Court in the case of **Gaurav Jain v. Union of India and Others**<sup>19</sup> observed that child prostitutes constitute 12 per cent to 15 per cent of the prostitutes of any area. These children may be compelled to pay for day-to-day living of adults as well as other small children in the family especially when there is a financial scarcity in the family. In other cases, such children may be used by prostitution kingpins or pimps to earn money by way of engaging them in prostitution. In this regard, mention must be made of the case of **Bachpan Bachao Andolan v. Union of India and Others**<sup>20</sup> where it was observed that sex tourism involving children is growing alarmingly in India and there are huge numbers of prostitution agencies who illegally supply minor girls for this purpose.

This is evident from the observations made in the **Bachpan Bachao Andolan case**<sup>21</sup>, where it was noted: *“Three significant elements constitute trafficking: (a) the action involving recruitment and transportation; (b) the means employed such as force, coercion, fraud or deception including abuse of power and bribes; and (c) the purpose being exploitation including prostitution. It must be noted that to fulfil the third condition as has been mentioned above, Section 5C of Immoral Traffic (Prevention) Act, 1956 must also be considered which criminalises visiting brothels for sexual exploitation of trafficked victims. Sections 6, 9 and 10A further criminalise detention for prostitution especially in custody (Section 9) and correctional institutes (Section 10A)”*.

However, as may be understood from the aforementioned discussions, Immoral Traffic (Prevention) Act is specifically meant for criminalizing prostitution including child prostitution when the victim is trafficked, engaged forcefully in the prostitution without his/her consent.

It was only when the juvenile accused in the Nirbhaya gang-rape case got acquitted in December 20, 2015, they were subsequently convicted and found guilty and were awarded death sentences. Four of accused hanged in the month of March 20, 2020 that the Bill got the assent of the president as the Supreme Court of India specifically emphasized upon government action towards revamping the juvenile justice administration, especially for heinous offences, including sexual offences committed by juvenile offenders,

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<sup>16</sup> 1979 AIR 185.

<sup>17</sup> Section 377, IPC states that *“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine”*.

<sup>18</sup> (2011) 6 SCC 261.

<sup>19</sup> AIR 1997 SC 3021.

<sup>20</sup> (2011) 5 SCC 1.

<sup>21</sup> *Bachpan Bachao Andolan v. Union of India & Others*, (2011) 5 SCC 1.

when the court was moved for considering the said juvenile offender at par with adult offenders for prosecution and sentencing him. As such, while the Juvenile Justice (Care and Protection of Children) Act, 2015, also covers other issues regarding adoption which were not covered by the earlier version, it is now functional for administering juvenile justice; the specific features of the amended law includes classification of the offences as per the seriousness and the periods of punishments as awarded by any penal law dealing with such offences; specific provisions for children in conflict with law, who may need care and protection and Juvenile Justice Board's (JJB's) duty to transfer such cases to the child welfare committees; special power to the Juvenile Justice Board to consider the mental maturity of the juvenile offenders not below the age of 16, so as to provide their opinions as whether such juveniles can be tried as adults for heinous and serious offences and the like. Nonetheless, the amended Act may be tremendously beneficial to regulate sexual offences targeting children and also those offences which are committed by children against children. It is pertinent to mention that neglected children mostly turned as criminal as well victims and prey of such illegal activities.

### **Secularism and a Uniform Civil Code :**

The preamble of the Indian Constitution resolves to constitute a 'Secular' Democratic Republic. This means that there is no state religion and that the state shall not discriminate on the ground of religion. Articles 25 and 26 of the Constitution of India guarantee the fundamental rights of freedom of religion and freedom to manage one's religious affairs. At the same time, Article 44 (which is not enforceable in a court of law) provides that the state shall endeavour to secure a uniform civil code in India. How are these different provisions to be reconciled? What will be the ingredients of a uniform civil code? Since the personal laws of each religion contain separate ingredients, the uniform civil code will need to strike a balance between protection of fundamental rights and respect for the religious principles of different communities. Marriage, divorce, succession, inheritance and maintenance can be matters of a secular nature and law can regulate them. India needs a codified law that will cover all religions in relation to the personal laws of different communities.

It is imperative in a multi-religious society that a unified code is promulgated for the sake of national unity and solidarity. Different streams of religion have to merge towards a common destination and some unified principles must emerge in the true spirit of secularism. India needs a unified code of family law providing for all its constituent religions. Whether it is the endeavour of the state, the mandate of the court or the will of the people, it is an issue that only time will decide for a true Indian Secular Democratic Republic.

The views of the Indian Apex Court on matters such as the registration of marriages, inter-caste marriages, child marriages, the Dowry Prohibition Act, 1961, divorce, a uniform civil code and a secular approach have been referred to earlier. A legislature that is slow to respond to societal changes and a proactive judiciary that is keen to encourage reforms in law is therefore clearly visible in India. Even in matters affecting the environment, pollution and the health of the people, the role of the judiciary in India

has been very constructive. The vibrant, dynamic and open jurisprudential system in India is flexible and well suited to meeting the changing needs of the people. There could therefore be reform in family law through decisions of the courts even if there is opposition, in respect of personal laws, from religious communities. If a uniform civil code does not come about as a result of legislation, judicial precedent will always supply reforms to improve the plight of children and women who are affected the most. Accordingly the Indian judiciary deserves to be applauded in this context.

### Conclusion:

In this respect, it can be said that the researcher has found that Indian law is neglecting with reference to “Neglected Children”. So, the new developments in socio-legal understanding regarding this issue is looking in India. The concept of child sexual abuse cannot be restricted to any specific form or within specific gender (e.g., ‘males are always perpetrators and females are always victims’). The discussions on child sexual abuse laws may however be divided into three periods, namely, (i) Pre-Protection of Children from Sexual Offences Act, (ii) the Protection of Children from Sexual Offences Act, and (iii) Post-**Independent Thought v. Union of India judgement**<sup>22</sup>, which pronounced sexual intercourse with child bride as rape. In the period earlier to the Protection of Children from Sexual Offences Act, the understanding regarding the gender of the victims and the perpetrators was extremely narrow. The Protection of Children from Sexual Offences Act brought in a new understanding whereby the Parliament recognized the rights of any child (irrespective of gender and gender orientation) against sexual exploitation. The Protection of Children from Sexual Offences Act also broadened the concept of the gender of offender irrespective of age. Simultaneously, Juvenile Justice (Care and Protection of Children Amendment) Act, 2015 broadened the understanding regarding dealing with matured teens who may have committed heinous crimes along with other developments in the arena of management of juvenile delinquency.

While child and family law in India is advancing at a great pace, much still remains to be done to improve it. With the changing international atmosphere and interactive diplomatic relations, many new treaties and understandings are being concluded in the area of private international law. India is a part of that process and is successful in understanding the needs of both its resident and non-resident citizens, there being a pressing need for India to resolve the family law problems of the some thirty million non-resident Indians.

Thus, modern concepts and issues including commercial surrogacy, inter-country adoptions, inter-parental child removal, inter-continental matrimonial litigation and instances of global child abuse present new challenges. The law never anticipated this new generation of legal issues and, so, statutory law in India contains no provisions to address them or redress them.

<sup>22</sup> (2017) 10 SCC 800.



Thus, marriage, divorce, child custody, maintenance and ancillary relief are undergoing a sea change in terms of the concepts themselves and the goals they seek to achieve in India. One finds that laws passed decades ago are now in urgent need of reform. Times have changed, but the law has not kept pace. The judiciary renders an indispensable service in providing relief on a case-by-case basis. But that is not enough. Often viewed as an example of judicial activism, a court decision may provide relief in a particular case on the basis of a given set of facts and circumstances. However, no broader precedent is set. Thus, responsibility for finding the solution lies with the legislature which must enact legislation. Family laws- particularly those meant to protect and serve the interests of children- must be amended to provide a better future for India. So, what urgently required is that there is no specific separate legislation in India to deal with the increasing problem of “Neglected Children”. No statute, civil or criminal defines specifically as who is and what is a neglected children. This gap or short comings may be filled up either by passing an independent legislation or enacting the Uniform Civil Code, which may douse the different kinds of fires emanating in the Indian society. It may put a full-stop for some excuses on which the violator escapes or wants to save themselves from exploitation the situation on the basis of their personal laws. Thus, it can be said that Uniform Civil Code may act as an urgent instrumentality to solve the problem of “Neglected Children” in India, to some extent though not fully. So, the India legislature should not “neglect” or “refuse” to take care of the “Neglected Children” who are the consequences of social, family and legal complications and suffers throughout their life for no fault of their own.

