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Uniform Civil Code: The Judicial Journey

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ABSTRACT

Uniform Civil Code has seen lot of controversy right from drafting of Constitution. The representatives of Constituent Assembly from minority communities had expressed their apprehensions that the Code may infringe their fundamental right to religion. Whereas many were of the opinion that it would help integrate the country. That was the reason that it was kept in Directive Principles of State Policy.

The issue of the Uniform Civil Code came before the Apex Court in Shah Bano, Sarla Mudgal, Lily Thomas, Shabnam Hashmi, and Jose Paulo Coutinho cases. The Court stressed the necessity to frame Uniform Civil Code as it could help in integrating the country. While doing so, the Court was aware of the apprehensions expressed by the framers of the Constitution and the mandate to place in Directive Principles of State Policy.

In the past, there have been instances where two religious communities were being governed under one law in matters relating to succession. The live examples in India, where the matters relating to Uniform Civil Code are governed outside the personal laws, happen to be the Portuguese Civil Code, which is applicable in Goa, Juvenile Justice Act, 2000, and the Special Marriages Act, 1954.

Even though the judiciary cannot direct the Legislature to enact the Code except by stressing the need for it, still the observations coming from the Apex Court have to be seriously considered by the Parliament. Small steps can be taken progressively towards the achievement of this goal. There is a need for Parliament to take the call.

I. INTRODUCTION

Online India is a diverse country with its citizens practicing multiple religions, and this is reflected in our legal system in the form of religion-based personal laws. Implementing a common personal law for all the citizens or a Uniform Civil Code has been the hot topic right from the framing of the Constitution. There is an ongoing debate over the aspect of whether the personal laws based on customs and religion shall be replaced by a common set of rules for every citizen or not.

Implementing a Uniform Civil Code would mean that all sections of the society would be

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governed by the same set of laws and treated equally, irrespective of their religion.

II. UNIFORM CIVIL CODE

Uniform Civil Code generally means that all sections of the society would be treated equally and will be governed by the same set of personal laws uniformly. A uniform civil code would include the laws on personal religious matters of marriage, divorce, inheritance, adoption, and maintenance.

Article 44 of the Constitution states that “The State shall endeavor to secure the citizen a Uniform Civil Code throughout the territory of India”.

Article 44 is a part of Directive Principles of State policy. It was not implemented at the time of drafting of the Constitution, as the Constituent Assembly did not find it to be an appropriate move at that time. Thus, they termed it as a directive principle of state policy so that the legislature could try to implement the Uniform Civil Code in the future.

However, Article 37 of the Constitution itself makes it clear the Directive Principles of State Policy “shall not be enforceable by any court”. This means that only legislature has the power to legislate on the matter. Thus, it can be said that although our Constitution itself believes that a Uniform Civil Code should be implemented in some manner, it does not make this implementation mandatory.

III. JUDICIAL JOURNEY

During the course of time The Apex Court had occasion to deal with the issue of Uniform Civil Code in the following cases:

(A) Mohammed Ahmed Khan Versus Shah Bano Begum ²

1. Facts Of The Case

In this case, Shah Bano, who had been divorced by her Muslim husband, claimed maintenance under section 125 of Criminal Procedure Code. The husband took the plea that his liability under Muslim Law was to pay maintenance during the period of “Iddat” and after divorce, he was not required to maintain her.

2. Observation Of The Court

The Supreme Court negated the plea and held that the claim of maintenance under section 125 Cr.P.C. was independent of Personal Law. In addition the Court held that the Muslim

² (1985) 2 SCC 556

husband had an obligation under his Personal Law also to maintain divorced wife.

On Uniform Civil Code

Taking note of the loopholes in personal laws and consequent plight of women, the Supreme Court emphasized the importance of bringing out Uniform Civil Code and observed:

“It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.”

So two aspects were emphasized by the Supreme Court:

1. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.
2. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country.

(C) Sarla Mudgal And Ors. Versus Union Of India³

1. Facts Of The Case

Sarla Mudgal was the president of a non-profit organisation, Kalyani, which worked for the welfare of distressed families and needy women. The other three petitioners were aggrieved

³ (1995) 3 SCC 635

parties as they had found out that their spouses had converted to Islam to marry another woman without dissolving the first marriage. The petitioners had accordingly approached the Court to declare their spouse's second marriage void and invalid.

2. Questions Involved

- Whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise a second marriage.
- Whether such a marriage, without having the first marriage dissolved under law, would be a valid marriage even when the first wife continues to be Hindu.
- Whether the apostate husband would be guilty of the offence under Section 494 of the IPC.

3. Observations Of The Court

The Supreme Court held that converting to another religion for the purpose of remarrying, even when the first marriage is not dissolved, goes against the morals of equity, good conscience, and natural justice. Mere conversion to another religion would not dissolve the first marriage. It focussed on the fact that Hindu marriages are dealt by Hindu Marriage Act 1955, and a Hindu marriage can only be dissolved by procedures highlighted in section 13 of the said act.

The second marriage by a conversion would therefore be in violation of the law and as such void in terms of Section 494 of Indian Penal Code. Any act which is in violation of mandatory provisions of law is *per se* void".

4. On Uniform Civil Code

Interestingly, the Court opened its Judgment with the need to have Uniform Civil Code in place. The observations of the Court are being reproduced below:

"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" is an unequivocal mandate under Article [44](#) of the Constitution of India which seeks to introduce a uniform personal law a decisive step towards national consolidation. Pandit Jawahar Lal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through." It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians." The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu

Marriage Act, 1955. The Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more that 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.”

So according to the Court

1. Even after a period of 41 years, the Rulers of the day were not in a mood to retrieve Article 44 from the cold storage.
2. When more that 80% of the citizens had already been brought under the codified Hindu personal law in contrast to traditional Hindu Law, there was no justification to keep in abeyance the introduction of "uniform civil code" for all citizens of country.

(D) Lily Thomas Vs Union Of India⁴

1. Facts Of The Case

In this case a writ petition was filed by petitioner Sushmita Ghosh that her Hindu husband, during subsistence of marriage, had converted to Islam just with a view to solemnise second marriage and had prayed that the second marriage be declared null and void.

2. Observations Of The Court

It was held that if a Hindu person marries again during subsistence of earlier marriage, the same would be void under sections 11 and 17 of Hindu Marriage Act and shall also invite prosecution under section 494 IPC. Important part was that conversion to other religion does not dissolve the earlier marriage solemnised under Hindu Marriage Act.

3. On Uniform Civil Code

The observations of the Court were:

“This Court has time and again reiterated the position that Directives, as detailed in Part IV of the Constitution are not enforceable in Courts as they do not create any justiciable rights in favour of any person. Reference in this behalf can be made to the judgment of this Court in P.M. Ashwathanarayana Setty & Ors. v. State of Karnataka & Ors., AIR 1989 Supreme Court 100, His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr., 1973(4) SCC 225. In this case also no directions appeared to have been issued by this Court for the purpose of

⁴ (2000) 6 SCC 224

having uniform Civil Code within the meaning of Article 44 of the Constitution. Kuldeep Singh, J. in his judgment only requested the Government to have a fresh look at Article 44 of the Constitution in the light of words used in that Article. In that context the direction was issued to the Government for filing an affidavit to indicate the steps taken and efforts made in that behalf. Sahai, J. in his concurrent but separate judgment only suggested the ways and means, if deemed proper, for implementation of the aforesaid Directives. The judges comprising the Bench were not the only judges to express their anguish. Such an observation had earlier also been made in Shah Bano's case (supra) and Ms. Jorden Diengdeh v. S.S. Chopra, 1985(3) SCC 62.”

So, the Court clarified

1. The provisions of Part IV of the Constitution were not enforceable or justiciable.
2. The Court in earlier cases had suggested ways and means to consider the implementation of Article 44, which could only be done by legislative means.

(E) Shabnam Hashmi V. Union Of India⁵

1. Facts Of The Case

The petitioner, Ms. Shabnam Hashmi, a Muslim woman, had approached the court for declaring the right to adopt a child and right to be adopted, a fundamental right. Being a Muslim, she was subject to the Muslim Shariat Law which did not recognise an adopted child to be on par with a biological child.

2. Observations Of The Court

According to the Court, even though Article 21 of Constitution of India was a developing right, but the time was not yet ripe for elevating the right of adoption as a fundamental right. The Court took note of Juvenile Justice Act 2000 in detail and declared that an independent right of adoption existed therein, which could not be affected by any prohibition of Muslim personal law. The Court observed that Juvenile Justice Act was a small step towards realisation of goal of Article 44 of the Constitution.

3. On Uniform Civil Code

It was so observed by the Court:

“To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the

⁵ (2014) 4 SCC 1

provisions of an enabling statute. At the cost of repetition, we would like to say that an optional legislation that does not contain an unavoidable imperative, cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.”

So, according to the Court:

1. The Juvenile Justice Act 2000 was a small step towards realisation of Uniform Civil Code under Article 44 of the Constitution.
2. The right of adoption conferred by Juvenile Justice Act 2000 was an independent right and could not be obliterated by the Muslim Personal Law.
3. It was for communities to sink their differences with regard to their personal beliefs for achieving the goal of Uniform Civil Code.

(F) Jose Paulo Coutinho Versus Maria Luiza Valentina Pereira & Anr. ⁶

1. Facts Of The Case

In the present case there was a dispute with respect to succession of self-acquired properties of a domicile of Goa, who had settled in Bombay and had acquired a part of property in Bombay as well. The dispute arose as to whether Portuguese Civil Code shall apply to property purchased by him at Bombay or it will be governed by Indian Succession Act.

2. Observations Of The Court

Among various issues that arose, it was observed by the Court:

1. That the Portuguese Civil Code, which was a special Act and had been made applicable by the Indian Parliament, shall apply not only to the properties of Goan domicile situated in Goa but also to properties purchased by him in other states.
2. The Portuguese Civil Code consisted of two parts – one consisted of substantial civil laws including that of succession, whereas other consisted of procedure.
3. The Portuguese Civil Code applied to all residents of Goa irrespective of caste or religion, meaning thereby that personal laws of communities did not apply to them. For example, Muslim men could not practice polygamy and could not exercise verbal divorce.


⁶ (2019) 20 SCC 85

4. There are different provisions with respect to succession in Indian Succession Act, Hindu Succession Act, Muslim Personal Law (Shariat) Application Act, 1937. However all religious communities in Goa are governed by same provision of law i.e. The Portuguese Civil Code.

3. On Uniform Civil Code

In this background the court noted:

“It is interesting to note that whereas the Founders of the Constitution in Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in *Mohd. Ahmed Khan v. Shah Bano Begum*⁶ and *Sarla Mudgal v. Union of India*⁷.

However, Goa is a shining example of an Indian State which has a Uniform Civil Code applicable to all, regardless of religion except while  ⁹⁶ protecting certain limited rights.”

So, according to the Court:

1. Goa was shining example where different religious communities were governed, not by their personal laws, but by a Uniform Code with respect to civil matters including that of succession.
2. Despite the hopes and expectations of framers of Constitution, no step had been taken in this regard by the Parliament.

IV. DEBATE ON UNIFORM CIVIL CODE IN THE CONSTITUENT ASSEMBLY

The Constituent Assembly debated upon the Uniform Civil Code extensively. When the issue came up for discussion in the Constituent Assembly, Mohammed Ismail Sahib, Baig Sahib Bahadur, Pocker Sahib Bahadur and Naziruddin Ahmed opposed the Article while K.M Munshi and Dr. B.R Ambedkar and Alladi Krishnaswami Ayyar were in favour of the Article which said “The state shall endeavour to secure for its citizens, a uniform civil code throughout the territory of India.”

(A) Mohammed Ismail Sahib

He claimed that a uniform civil code would generate disharmony whereas “if people were allowed to follow their own personal law, there would be no discontent”. He suggested that the

article be amended and that any group, section or a particular community shall not be obliged to give up its own personal law. According to him, people have the fundamental right to follow their religion as well as their personal laws.

(B) Baig Sahib Bahadur

Baig Sahib Bahadur said that in a secular state, citizens belonging to different communities must have the freedom to observe their own life and their own personal laws. According to him, in case of Muslims, laws of succession, inheritance, marriage and divorce were completely dependent upon their religion. He stressed on the fact that a secular state did not mean that there must be a common language, religion, culture and other practices for all the people of that state.

(C) Pocker Sahib Bahadur

According to him it was the duty of the majority to secure the rights of every minority. He requested the House to consider this article from the point of view of the various communities that exist in this country and not only from the point of view of Muslim community. He said that if this Article was introduced, it would lead to deprivation of rights to freedom of conscience, freedom of religious practices and freedom of following one's personal laws.

(D) Naziruddin Ahmed

Naziruddin Ahmed advocated the gradual implementation of laws over a period of time pertaining to provisions of Uniform Civil Code, similar to what had been done by the British over a long period of time by enacting different laws like Transfer of Property Act, Civil Procedure Code, Evidence Act and like. And any change in personal laws should be done with consent of people.

(E) K M Munshi

According to him the country could not be unified if there were different laws prevailing in different parts. Citing an example, he stated that law of Mitakshara was applicable in one part of country, whereas Dayabagha school was prevalent in Bengal. Similarly, the law of Mayukha applied elsewhere in other parts. According to him, it would provide a chaotic environment to live in country having different laws in different places. He further said that it would also be a stumbling block in unification of country.

(F) Dr B.R Ambedkar

According to Dr. Ambedkar, the country was already being governed by a uniform code by virtue of Penal laws, Transfer of Property Act and Negotiable Instruments Act etc except in cases of marriage and succession. He gave an example of North-West Frontier Province where

Muslims were governed by Hindu Law upto 1935 and not Shariat Law, with respect to the matters of succession and some other matters. He further cited the examples of United Provinces, the Central Provinces and Bombay, where Muslims were being governed by Hindu Law in the matter of succession upto 1937. Not only that, in North Malabar, the Marumakkathayam Law applied not only to Hindus but to Muslims as well.

He meant that since all communities were already being governed by one law except marriage and succession, Uniform Civil Code could find its place in these areas as well.

(G) Alladi Krishnaswami Ayyar

He said that when the British ruled this country, they enacted criminal laws, law of contract and other civil laws about which there were already provisions in Muslim laws. And these laws were accepted by the Muslims without any demur.

Similarly, law of Contracts govern the transactions between Hindus and Muslim and between Muslims and Muslims. They are governed by Anglo-Indian jurisprudence and not by Koran. According to him, governance by a common law did not cause any strife or strain between the communities but had united them. He advocated adopting the Uniform Civil Code.

V. SUCCESSFUL FUNCTIONING OF UNIFORM CODE IN SOME INTERNATIONAL JURISDICTIONS

It would pertinent to note that many of the countries of the world do have their own codified civil and personal laws applicable on all its citizens uniformly. The origin of such uniform code is believed to be in Roman Law, which was later on adopted by the French and Germans. Some other European nations also followed suit.

(A) Roman Law

Civil law refers to a set of rules that define the personal rights of citizens and makes them justiciable. It covers all the related areas of law such as contracts, torts, property and family law. The concept of civil law can be traced back to the Romans. The Romans used doctrines to develop a code, that determined how legal issues would be decided and was known as **Jus Civile**.

Emperor Justinian who took over the throne in 527 CE, was responsible for the enactment of this code. He constituted a team of law commissioners to codify all laws and statutes, decrees and writings of jurists etc. At the peak of its development, it covered personal law, family law, contractual law, the law of corporate and mercantile bodies as well as the law of property and succession as well as court procedures. In fact, Roman law remained in use in Europe, more

particularly in Germany. It also helped in formation of laws and codes of different countries although it had been interpreted, developed, and adapted to later conditions by generations of jurists and had received additions from non-Roman sources.

(B) France And Napoleon's Civil Code

After the fall of the Roman Empire, the earliest European states that took up the task to formulate a civil code were Austria, Prussia, Bavaria etc. However, France codified the civil laws in a methodical and well-organized manner. Napoleon's civil code was introduced in France as early as 1804. It replaced over 300 local codes of civil law. It superimposed itself on both customary law and existing legal statutes and covered the vast area of property, goods, usufruct, servitudes, succession, wills, gifts and contracts.

VI. CONCLUSION

As discussed above, India has seen governance of different religious and ethnic communities by a single set of common laws in certain situations. This has taken place despite the fact that different personal laws had different provisions for dealing with various legal issues, including civil and criminal disputes. In order to summarise, these instances are listed below:

1. In the North-West Frontier Province, Muslims were governed by Hindu Law up to 1935 and not Shariat Law with respect to the matters of succession and some other matters.
2. In the United Provinces, the Central Provinces, and Bombay, the Muslims were being governed by Hindu Law in the matter of succession up to 1937.
3. Not only that, in North Malabar, the Marumakkathayam Law applied not only to Hindus but to Muslims as well.
4. The country is already being governed by a uniform code by virtue of Penal laws, Transfer of Property Act and Negotiable Instruments Act etc except in cases of marriage and succession.
5. The Special Marriage Act is another example where parties are governed under this Act and not personal laws.
6. The right to adoption conferred by Juvenile Justice Act 2000 was held to be a small step towards realisation of Uniform Civil Code under Article 44 of the Constitution, which stood independent of Muslim Shariat Law.

7. As stated by Justice Deepak Gupta, Goa was a shining example, where different religious communities were being governed under the same law (Portuguese Civil Code) with respect to many civil matters including succession.

In view of the totality of circumstances and observations of the Apex Court, small steps can be taken by the Legislature to realise the Constitutional goal of having a Uniform Civil Code. This would also help in eradicating various disparities existing in different religious practices.
