

## “Uniform Civil Code – A Constitutional Mandate”

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### Abstract

This paper talks about approximately Uniform Civil Code and its enforceability. Various aspect of its applicability is tested and this paper discusses about the connection of the Uniform Civil Code with the Secularism and discusses how the implementation of the Uniform Civil Code can also result in the disintegration of the state and how this could lead to the breakdown of the peace and concord most of the human beings. This paper tries to explain the constitutional mandate is upon whom to enforce Uniform Civil Code whether it is government or Judiciary.

**Keywords:** Uniform Civil Code, enforcement, Government, Judiciary.

### Introduction

India is a land of diverse and multiple cultures which have existed through ages. Social groups with different ideology have been living in this country since long time. If we see such divergence than we will find the source is Religion. It does not only make a way into and influence the ideology and spirituality but also ultimately noticeable in material world association between people in and among religious circle. Religion plays a very important role in regulating the behaviour of men and women. India as land of diversities based on religion is affecting people cultural and civil life ranging from marriage to inheritance. On the other hand, India is a secular state. A secular state is that which does not have state religion, it treats all religion equally without any discrimination. The Concept of “Uniform Civil Code” is very much enshrined in our constitution which is the replica of the Secularism. This paper will highlight upon whom is the constitutional mandate to enforce the Uniform Civil Code. Will it be stand in black and white in our Constitution or be in reality?

The Preamble of the Constitution of India is the main or basic characteristics of constitution itself. The preamble declares “Secularism” is one of the important features of the constitution. It was inserted in the preamble by Constitution (42nd Amendment) Act. 1976. ‘Secularism’ means a State which does not recognise any religion as a State religion. It treats all religions equally. The concept of secularism was already, implicit in the Constitution. “liberty belief, faith and worship”. Articles 25 to 28 of the Constitution guarantee to every person the freedom of conscience and the right to profess practise and propagates religion. In *St. Xavier College v. State of Gujarat*<sup>1</sup> Supreme Court has said, “although the words secular State are not expressly mentioned in the Constitution but there can be no doubt that Constitution-makers wanted to establish such a State” and accordingly Articles 25 to 28 have been included in the Constitution. In *S. R. Bommai v. Union of India*<sup>2</sup>, Supreme Court has

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<sup>1</sup> AIR 1974 SC 1389

<sup>2</sup> (1994) SCC 1

held that “secularism is the basic feature of the Constitution. In *Aruna Roy v. Union of India*<sup>3</sup>, Supreme Court has said that secularism has a positive meaning that is developing, understanding and respect towards different religions. Basically, the idea of Uniform Civil Code (UCC) is not expressly defined in the constitution but certain provisions as justice, equality, freedom, and secular, etc. are safeguards the interests of all the citizens of India without any discrimination is itself a quality of the uniform civil code. The concept of uniform civil code is enshrined in Part IV of the Constitution which deals with Directive Principles of State Policy under Article 44. The directives mentioned in Part IV of the Constitution of India are not justifiable rights of the citizens yet they are most important for the governance of the country. These directives impose on the state of the duty to take positive actions in certain directions to promote the welfare of the people and to achieve economic independence. To put an end to the country’s suffering from contingency arising from religion and sect the framers of the constitution tried their best by incorporating Uniform Civil Code. The language of Article 44 states that “*The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.*” By the incorporation of Article 44 and the secularism the constitution framers opened the door for the uniformity in spite of their pains to protect religious freedoms of the citizen. Uniform Civil Code administers the identical set of secular civil laws to manipulate anybody, even those belonging to distinctive religions and areas. The purview of Uniform Civil Code cover the entire body of laws relating to properties and other personal matters like marriage, divorce, succession, maintenance, adoption, inheritance etc.<sup>4</sup> The requirement of uniform civil code essentially way unifying the personal laws of citizens to have one set of secular law dealing with these factors in an effort to apply to all citizens of India no matter the community they belong to. Though the exact contours of this kind of uniform code have no longer been spelt out, it must presumably contain the most modern and innovative elements of all present personal laws whilst discarding those that are retrograde. Goa is the only state which has Uniform Civil Code. The Goa Civil Code collectively called Family Laws, was framed and enforced by the Portuguese colonial rulers through various legislations in the 19<sup>th</sup> and 20<sup>th</sup> centuries. After the liberation of Goa in 1961, the Indian State scrapped all the colonial laws and extended the central laws to the territory but made the exception of retaining the Family Laws because all the communities in Goa wanted it. The most significant provision in this law is the pre-nuptial Public Deed regarding the disposal of immovable and movable property in the event of divorce or death. During matrimony, both parents have a common right over the estate, but on dissolution, the property has to be divided equally; son and daughters have the equal right on the property. As the procedure involves compulsory registration of marriage, this effectively checks child and bigamous marriage.<sup>5</sup> The philosophy at the back of the Portuguese Civil Code was to bolster the family

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<sup>3</sup> AIR 2003 SC 3176

<sup>4</sup> Fraizan Mustafa, “*Why Legal Pluralism Matters*”, The Indian Express, November 16, 2015.

<sup>5</sup> Gauri Kalkurni, “*Uniform civil code*”, available at:<http://www.legalserviceindia.com/articles/ucc.html> Accessed on 14 April 2020@ 19:00

as the spine of society via inculcating a spirit of tolerance between husband and spouse and presenting for in-built protect in opposition to injustice via one spouse against the opposite.<sup>6</sup>

The mere three words and the nation breaks into hysterical jubilation and frantic wailing. These three words are enough to divide the nation into two categories - politically, socially and religiously. Politically, the nation is divided as BJP, which propagates implementation of the Uniform Civil Code (hereinafter referred to as the UCC) and the non BJP including the Congress party, Samajwadi party, who are against the implementation of the UCC. Socially, the intelligentsia of the country, who analyse logically the pros and cons of the UCC and the illiterate who have no opinion of their own and succumb to the political pressure are at opposite poles. And, religiously, there is a dangerous widening schism between the majority Hindus and the minority community mostly the Muslims.<sup>7</sup>

### **Judicial Aspect of Uniform Civil Code**

The judiciary is considered guard of justice. It has a primary responsibility to provide justice to every individual whenever it has been breached and thereby correct the wrong which has been perpetrated. Principle of Natural Justice is very much followed by the courts. But, as may be seen in the following discussion, much of the pronouncements depend upon the judge himself and the social environment which surrounds him. This is especially true with regard to the aspects of uniform civil code, which has acquired various dimensions or observations over the years.<sup>8</sup> In India the Supreme Court in the year 1985 directed the parliament to frame Uniform Civil Code in the case of Mohammad Ahmed Khan v. Shah Bano Begam<sup>9</sup>, popularly known as Shah Bano Case. In this case, a indigent Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure<sup>10</sup> after she was given triple *talaq* by him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The Court also held that Article 44 of the Constitution has remained a dead letter. The then Chief Justice of India Y.V. Chandrachud observed that "A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies". Following this decision nationwide agitations, meetings and debates were held. The then Rajiv Gandhi Government overturned the judgment of Shah Bano Case decision by enacting a legislation Muslim Women (Right to Protection on Divorce) Act, 1986. The Muslim Women (Protection of Rights on Divorce) Act, 1986 was a controversially named landmark legislation passed by the Parliament of India in 1986 to allegedly protect the rights of muslim women who have been divorced by, or have obtained divorce from , their husbands. According to the stated objects of the Act, when a Muslim divorced woman is unable to support herself after the iddat period that she must observe after the death of her spouse or after a divorce, during which she may not marry another man, the magistrate is empowered to make an order for

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<sup>6</sup> Ibid

<sup>7</sup> Supra 5

<sup>8</sup> Dipa Dube, *Rape Laws in India*, 69 (Butterworths India, 2008).

<sup>9</sup> AIR 1985 SC 945

<sup>10</sup> The Code of Criminal Procedure, 1973, Section 125: Order for Maintenance of Wives, Children and parents.

payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law. But when a divorced woman has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the maintenance. The liability of husband to pay the maintenance was thus restricted to the period of the iddat only. This legislation which curtailed the right of a Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure. The explanation given for implementing this Act was that the Supreme Court had simply made an inspection for enacting the uniform civil code; not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within. Again in the case of *Sarla Mudgal v, Union of India*<sup>11</sup> the Supreme Court has directed the Prime Minister Narsimha Rao to take fresh look at Art. 44 of the Constitution which enjoins the State to secure a uniform civil code which, accordingly to the court is necessary for both protection of the demoralized and endorsement of national unity and integrity. The Court directed the Union Government through the Secretary to Ministry of law and Justice, to file an affidavit by August 1995 indicating the steps taken and efforts made, by the Government, towards securing a uniform civil code for the citizens of India.<sup>12</sup>

The above direction was given by the Court while dealing with case where the question for consideration was whether a Hindu husband married under Hindu law, after conversion to Islam, without dissolving the first marriage, can solemnise a second marriage. The Court has held that such a marriage will be illegal and the husband can be prosecuted for bigamy under Section 494 of the Indian Penal Code.

In this case four petitions were filed. The petition was filed by a registered society working for the welfare of woman as public interest litigation. The second was filed by one Meena Mathur. She contended that she was married to one Jitendra in 1978 and they had three children out of the wedlock. In 1988 her husband solemnised second marriage with one Sunita Narula *alias* Fatima after they converted to Islam. In the third case, Sunita *alias* Fatima contended that after marrying her Jitendra Mathur had again reverted back to Hinduism and leaving his first wife. Her grievance was that she still continues to be a Muslim but not being maintained by her husband and has no protection under either of the personal law. In the third case, the petitioner Gita Rani contended that she was married to one Pradeep Kumar according to Hindu rites in 1988. In 1991 she came to know that her husband ran away with one Deepa and after conversion to Islam married her. The fourth petitioner Sushmita Ghosh contended in the Court that she was married to G. C. Ghosh according to Hindu rites in 1984 but in 1992 her husband told her that he did not like her and he would embrace Islam and marry one Vinita Gupta. She prayed that her husband be restrained from entering into second marriage with Vinita Gupta.

On the facts of the cases, the Court held that a Hindu marriage continues to exist even after one of the spouse converted to Islam. There is no automatic dissolution of Hindu marriage. It can only be dissolved by a decree of divorce on any of the grounds mentioned in section 13

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<sup>11</sup> (1995) 3 SCC 635

<sup>12</sup> J N Pandey, Indian Constitutional Law

of the Hindu Marriage Act. Accordingly, the Court held that the second marriage of Hindu after his conversion to Islam was null and void in terms of Section 494 IPC and the husband was liable to be prosecuted for bigamy.

As regards the question of “Uniform Civil Code” the Division Bench (Kuldip Singh and R. M. Sahai, JJ.) in their separate but concurrent judgments said that since 1951 a number of Governments have come and gone but they have failed to make any efforts towards implementing the constitutional mandate under Art. 44 of the Constitution. Consequently the problem today is that many Hindus have changed their religion and have converted to Islam only for the purpose of escaping the consequence of bigamy. This is so because Muslim Law permits more than one wife and to the extent of four. Kuldip Singh, J., said that Art. 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Marriage, succession and like matters are of a secular nature and therefore, they can be regulated by law. No religion permits deliberate distortions, the judges declared. Much apprehension prevails about bigamy in Islam itself. In many Islamic countries as in Syria, Tunisia Morocco, Pakistan, Iran and other Islamic countries have codified their personal law to check its abuse.

He pointed out that even in America it has been judicially commended that the follow of polygamy is injurious to “public morals” even though some religion may make it mandatory or pleasing for its followers. It can be regulated by the State just it can prohibit human sacrifice or the practice of Sati in the interest of public order.

This ruling of the court has aroused the hope that one of the greatest evil of Indian Society will be removed. But unfortunately the Court, while hearing an appeal filed by one of the accused in the above case, clarified that its direction was only an obiter dicta and not legally binding on the Government. This clarification was given by Mr. Justice Kuldip Singh who had directed the Government to take immediate steps for implementing the mandate of Art. 44 of the Constitution. Even before the clarification of the court the Prime Minister had told to the Muslim Ulemas of Rampur, U.P. that his Government would not implement the constitutional mandate under Art. 44 of the Constitution.<sup>13</sup> In one more important case *Pragati Varghese v. Cyril George Varghese*<sup>14</sup> the Full Bench of the Bombay High Court has struck down Section 10 of the Indian Divorce Act under which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the ground that it violates the fundamental right of a Christian woman to live with human dignity under Art. 21 of the Constitution. The Court also affirmed Sections 17 and 20 of the Act invalid which provided that a termination or divorce passed by a District Court was required to be confirmed by a 3 Judges of the High Court. The Court said that Section 10 of the Act compels the wife to continue to live with a man who has deserted her or treated her with cruelty. Such a life is sub-human. There is denial to dissolve the marriage when the marriage has broken down irretrievably. In another significant judgment in *Noor Saba Khatoon v. Mohd, Quasim*<sup>15</sup>

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<sup>13</sup> Supra 12

<sup>14</sup> AIR 1997 Bom. 349

<sup>15</sup> AIR 1997 SC 3280

Supreme Court has held that a divorced Muslim woman is allowed to claim maintenance for her children till they become major. The Court held that both under the Muslim Personal Law and under Section 125 of the Criminal Procedure Code, 1973 the obligation of the father was absolute when the children were living with the divorced wife. This ruling was giving by the Court while allowing an appeal by Ms. Noor Saba Khatoon challenging the judgment of the Patna High Court which had reduced the amount of maintenance. The Court made it clear that this right was not restricted, affected or controlled by divorced wife. Right to claim maintenance for two years from the date of birth of the children under Section 3(1) (B) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The children of Muslim parents are entitled to claim maintenance under Section 125 of the Criminal Procedure Code for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of female, till they get married. The appellant Ms. Noor Saba Khatoon was married with respondent husband Mohd. Quasim according to Muslim rites on Oct. 27, 1980. During the wedlock, three children—two daughters and a son—were born and subsequently the husband divorced the appellant. The Trial Court granted husbands to pay at the rate of Rs. 200 P.M. for herself and as the rate of Rs. 50/- per month for each of the three minor children. The Appellate Court held that she was entitled to maintenance only for two years under the Muslim Women Act. 1986. The Patna High Court further modified the Appellate Courts order and held that only one child was entitled for maintenance for a period of two years.

The Supreme Court set aside the judgment of the High Court. The Court held that the High Court fell in complete error in holding that the right to maintenance of the children under Section 125 of the Cr. P.C. was taken away and superseded by Section 3 (1) (B) of the 1986 Act. The Court directed the husband to pay the arrears of maintenance in respect of the children within one year in four equal periodical instalments. Any single evasion in the payment of arrears would entitle the appellant to recover the entire balance amount with 12 per cent interest as per law.<sup>16</sup> Again the Punjab and Haryana High Court has directed a Muslim husband to pay alimony to his divorced wife and minor children even after the expiry of the Iddat period. The High Court rejected the plea of husband that his liability ceased immediately after the expiry of Iddat period. The liability of the father to maintain his minor child has been finally Settled by the Supreme Court in the Noor Saba Khatoon case, the Court said. Sections 125 to 128 of the Cr. P. C., 1973 a self contained procedure has been provided for a wife, divorced or not to claim maintenance from husband or other relations. The High Court held “the purpose of these provision were to provide immediate means of subsistence to the applicant before she withered away by hard way of life and realities for lack of minimum means and were applicable to all applicants irrespective of community caste or creed they belong to”. The Court said, “We have opted for a secular republic, secularism under the law means that the State does not owe loyalty to any particular religion and there is no State religion. The Constitution gives equal freedom to all religions and everyone has the freedom to follow and propagate his own religion. But the religion of individual or denomination has nothing to do in the matter of socio-economic laws of the State”. The

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<sup>16</sup> Supra 12

freedom of religion under the Constitution does not allow religion to infringe adversely on the secular rights of the citizens and the power of the State to regulate the socio economic relations. In another landmark judgment in *Danial Latif v. Union of India*<sup>17</sup> a five Judge Constitution Bench of the Supreme Court upheld the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and held that a Muslim divorced woman right to maintenance even after iddat period under the 1986 Act. The Court said that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which clearly extends beyond the iddat period in terms of Section 3(I)(a) of the Act. Also, a divorced woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relations who are liable to maintain her in proportion to the properties which they may inherit on her death according to Muslim Law from such divorced woman including her children and parents. If the relatives are found unable to pay her maintenance the Magistrate may direct the State Wakf Board established under the Wakf Act to pay such maintenance. The above decisions of the Court will make the job of introducing the Common Civil Code much easier. In *John Vallamattan v. Union of India*<sup>18</sup> a three Judge Bench of the Supreme Court consisting of C.J. V.N. Khare, S.B. Sinha and Dr. A.R. Lakshmanan, JJ. has once again expressed regret for non enactment of Common Civil Code. In the instant case the petitioners have challenged the validity of Section 118 of the Indian Succession Act on the ground that it was discriminatory under Article 14 as well- as violative of Articles 25 and 26 of the Constitution. Section 118 of the Act imposed restriction on a Christian having nephew or a niece or any other relative as regards his power to bequeath his property for religious or charitable purposes. The definition in the Act did not include wife of a testator as near relative while an adopted son was included as a relative. So a Christian testator having a nephew or niece must execute the will at least 12 months before his death and deposit it within 6 months otherwise the bequest for religious or charitable use would be void. This restriction did not apply to a person having wife. The court held that Section 118 of the Succession Act is unconstitutional being violative of Article 14 of the Constitution. The majority said that Articles 25 and 26 have no application in this case as disposition of property for religious and charitable uses is not an integral part of Christian religion. Articles 25 and 26 only protect those rituals and ceremonies that are integral part of religion. The Chief Justice of India in view of the facts of the instant case forcefully reiterated the view that the Common Civil Code be enacted as it would solve such problems. He said, “Article 44 is based on the premise that there is no necessary connection between religion and person law in a civilized society.” Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz Articles 25 and 44 show that former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given

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<sup>17</sup> AIR 2001 SC 3262

<sup>18</sup> AIR 2003 SC 2902

effect to. A Common Civil Code will enhance the cause of national integration by removing the contradictions based on ideologies. Thus one thing is observed after analysing the judgments given by the Apex Court that the Supreme Court has on several occasion directed the government to bring into reality the concept of Uniform Civil Code and the urgency of the same can be inferred from the same.

It is likewise important here, to estimate the role of judiciary in recognize of Article 44 of the Constitution, despite the fact that like any other constitutional directives, the mandate of Article forty four too, isn't always enforceable in a Court of Law. And it is also vital to mention that judiciary isn't mainly covered inside the definition of "State" as relevant to Directive Principles enshrined in Part IV of the Constitution. Therefore, judiciary can't be anticipated to have taken any direct step to make sure the implementation of the mandate. Nevertheless, the role of judiciary is an awful lot more considerable than that of govt system, in one way or other, toward accomplishing this Constitutional goal, either by upholding the validity of the unifying or partially unifying social legislation while challenged at the ground of unconstitutional discrimination or by upholding those criminal provisions which if liberally interpreted might provide uniform own family regulation in fragments, applicable to all residents. In the case of *Shahulameedu v. Zubaida Beevi*<sup>19</sup> regarding the importance of Article 44 Justice Krishna Iyer said: "The Indian Constitution directs that the State should endeavor to have a Uniform Civil Code applicable to the entire Indian community, and indeed when motivated by a high public policy, Section 488 has made such a law. It would be improper for an Indian court to exclude any section of the community born and bred up on Indian earth from the benefits of that law..."

It is pointless to emphasise that judiciary can play a totally important position to impress energy in moulding the general public opinion in prefer of the Code. Indeed it has been doing so, even though its progress within the area of own family regulation is a lot slower while compared it its progressive stand-in evolving and upholding socio-monetary depilation.

The Judiciary, specifically in current years, has made a extraordinary contribution in the direction of reaching this constitutional intention enshrined in Article 44 , for a Uniform Civil Code. Beside Shah Bano's case, the Supreme Court has reiterated its recommendation in favor of Uniform Civil Code in some of instances which suggests a nice sign of infusing and imbibes such ideals inside the minds of the general public. Thus, it can be concluded from the above-stated motives that the majority of Muslims in India are against the idea of not unusual Civil Code. However, it is submitted that this objective of the constitutional the aim can still be done if innovative codification of the Muslim Personal Law itself is made at this stage, which could perhaps prepare the Muslim thoughts to simply accept any such exchange in remote regulation of Muslims in India isn't always a monolithic prison system. It is an admixture of various conventional standards and divergent legislative provisions.

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<sup>19</sup> (1970) KLT 4.

**All marriages must be registered<sup>20</sup>**

In a landmark judgment the Supreme has held that all marriages, irrespective of their religion, be compulsorily registered. Moved by the plight of women fighting for their rights under marriage like maintenance and custody of their children, a two Judge Bench of the Supreme Court comprising Justices Arijit Pasayat and S.H. Kapadia directed the Centre and State Governments to amend the law or frame rules and notify them within three months. The Court directed the government to provide for “consequences of non-registration of marriages” in the rules which should be formalised after inviting public response and considering them. The Court said the rules so framed would continue to operate till the respective governments framed proper legislations for the compulsory registration of marriages. Giving no room for appeasement or dilution of the objective to be achieved through such legislations, Justice Pasayat said all new laws to be framed by the governments have to be placed for scrutiny before the Supreme Court. The Court felt that this ruling was necessitated by the need of time as certain unscrupulous husbands deny marriages leaving the spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property. The ruling of the Court will itself facilitate the object of having a common civil code as most the problems relating to it are due to the non- of marriages. The benefits of this ruling are as follows:-

It will—

- (1) prevent child marriage;
- (2) check bigamy and polygamy;
- (3) help women to exercise their rights under marriage—maintenance—custody of children;
- (4) enable widows to claim inheritance and
- (5) deter husbands from deserting their wives.

**Conclusion**

After analysing the various decision of the Apex Court of India, it is concluded that the constitutional mandate to enforce the Uniform Civil Code is upon the Government. Various governments come and go but they only come with a line that they will bring Uniform Civil Code into reality but they failed due to the fear of division of the votes. Present Modi Government has also mentioned about the reality of Uniform Civil Code. If we see the role of Judiciary we find that judicially constantly mandating the Uniform Civil Code.

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