

INDIAN JOURNAL OF CONSTITUTIONAL STUDIES

Issue - May, 2017

Volume I Issue IV

Copyright © 2016-17. All rights reserved with the Editors of Indian Journal of Constitutional Studies.

ISSN 2456 - 5008

Published bimonthly

- - Disclaimer - -

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of the Indian Journal of Constitutional Studies. The Indian Journal of Constitutional Studies (hereinafter IJCS) and its affiliates holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Board or Board of Advisors for the Indian Journal of Constitutional Studies. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Board or the Board of Advisors for IJCS are not responsible for any errors caused due to oversight or otherwise.

- - Note - -

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

Publisher Details -

Bishikh Mohanty

E33, AWHO Colony Chandrasekharapur, Sailashree Vihar,

Khorda, Odisha, Pin - 751021

Telephone: +91 8106743973

Email: editor@ijcons.com

The Board of Advisors

Dr. Bisnu Charan Patro

Assistant - Editor, National Institute of Health and Family Welfare

Ms. Sudha Kaveri

Asst. Professor, Damodaram Sanjivayya National Law University

Panel of Experts

Ms. Prathyusha Samvedam

LL.M., National Law University, Jodhpur

Adv. Siddharth Sharma

M.P. High Court

The Board of Editors

Mr. Bishikh Mohanty

Managing Editor

Ms. Ammu Sasidharan

Senior Editor

Ms. Vanya Srikant

Compiling Editor

Associate Editors

Ms. Sudipta Lenka

Mr. Himanshu Gupta

Ms. Yashasvi Gupta

Ms. Ojaswini Tripathi

- Acknowledgement -

Efforts from many quarters have gone into the successful publication of this Inaugural Issue of the Indian Journal of Constitutional Studies. We would like to express a deep sense of gratitude towards our blind peers who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributors for contributing extraordinary submissions to the issue which stood at par on the rigorous scrutiny.

UNIFORM CIVIL CODE: IN THE LIGHT OF JUDICIAL STAND ON PERSONAL LAWS

THE AUTHOR

Vineet Kumar, Sumit Mishra, students of National Law University, Odisha

CONTENTS

- I. Introduction
 - II. Origins of the Debate on UCC
 - III. Analysis of Leading Judicial Pronouncements on UCC
 - IV. Conclusion
-

I. INTRODUCTION

A civil code determines a systematic body of laws which govern rights dealing with business, negligence and also personal matters such as marriage, divorce, maintenance, adoption and inheritance. Whereas A uniform civil code can be construed as a concept of one nation one law which is any day more than a neat hashtag. It is a proposal to replace various personal laws based on scriptures, customs tradition and culture, for all the major religious community in India. The debate to implement a UCC has been going on for decades but it is important to identify and acknowledge as to whom will this effect. Questions such as meaning and value of uniformity and who exactly shall end up as the beneficiary have been raised time and again.

The constitution of India, through its article 44 ensures UCC throughout the territory of India for all its citizens. This code will ensure that all citizens are governed by the same set of secular civil laws. The sole object of the code is effective enhancement of national integration by bringing all communities under one umbrella. Article 44 states that “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India”

According to the Constitution of India, it is a “Secular Democratic Republic”,¹ which means that there is no State religion. it respects the freedom of an individual and gives him/her the choice to follow any religion of his/her choice, which, as per is a guaranteed right under the Constitution of India by the virtue of Article 15 (Prohibition of discrimination on grounds of religion, race, cast, sex or place of birth) and Article 25 (Freedom of conscience and free profession, practice and propagation of religion).

It is also important to note that why UCC is in so much news now a days. A plea was filed on March 30, 2017 in the Honorable SC for protecting individual fundamental rights by seeking the enactment of the UCC. The law commission, in July 2016, was asked to study the viability and practicability of bringing the UCC in India. Therefore it can be said that the uniform civil code presently remains an aspiration and no steps have been taken by the state to put into practice. It is

¹ Preamble, The Constitution of India, 1950.

said that this code is need of the hour to make it easier for the courts not only to deliver justice but also to put the lower courts at ease.

For those debating for the right time it is important to note that time has never been wrong or right since the adoption and enactment of the constitution. But it seems the country is in a new mood, a mood looking towards depreciating intolerance, a mood towards reducing gender gaps, a mood towards reducing unwanted religious and communal gaps.

It has also been witnessed that time and again court has directly or indirectly stepped into this matter and advised legislation to reform personal laws and form a uniform civil code.

II. ORIGINS OF THE DEBATE ON UCC

The origins of the debate surrounding the Uniform Civil Code can be traced back to the pre-independence era in the AIWC movement. This movement raised the issue of unequal treatment of men and women within personal laws. In 1940, the National Planning Committee, while focusing on economic dimension of women's rights resolved that women should be equal to men and recommended enactment of a Uniform Civil Code.² M.R. Masani, Hansa Mehta and Amrit Kaur have been important players in raising the demands for uniform legislation. Further, some scholars have, in recent times, differentiated between a "uniform civil code" and a "common civil code" and have held that the demand for a uniform code is premised upon modernity and gender injustice, whereas the common code would only ensure commonality of oppression.³

In its periodic report before the United Nations Committee on Elimination of All Forms of Discrimination Against Women (CEDAW), India openly admitted that "the personal laws of the major religious communities had traditionally governed marital and family relations, with the Government maintaining a policy of non- interference in such laws in the absence of a demand for change from individual religious communities".⁴ Further, under Hindu law, if the root cause of the problem is to be solved, the issue of caste panchayats is significant. Their decisions have no legal sanctity and derive support from community recognition.

Apart from Muslim personal law, bigamy is illegal under every other personal law. They are governed by the Shariat law and the Muslim Personal Law (Shariat) Application Act, 1937 was passed in order to ensure that they are insulated from common law in regard to personal laws. Act XV of 1872, Act II of 1936 and Act XXV of 1955 recognize bigamous marriage as illegal for Christians, Parsis and Hindus (with Buddhists, Sikhs and Jains) respectively. Uniform code, if enacted, will impinge on polygamous marriages in Muslims. In almost all recent cases where the need for a Uniform Civil Code has been emphasised women were at the receiving end of torture in the garb of religious immunity.⁵

² Family Laws & Constitutional Claims, Flavia Agnes, Vol. 1, Oxford University Press, 149.

³ Cf. Dhagamvar, 1989.

⁴ United Nations Report of the Committee on the Elimination of All Forms of Discrimination Against Women, 8, Supp. No. 38, A/55/38, 22nd Session 17 Jan-4 Feb 2000 and 23rd Session 12-30 June, General Assembly Official Records, New York, 2000.

⁵ Nilanjana Bhaduri Jha, "Does India really need a Uniform Civil Code?," Times of India, Aug 2, 2003.

In the next section, a descriptive and an analytical approach has been used to see the judicial stance by cases by case analysis.

III. ANALYSIS OF LEADING JUDICIAL PRONOUNCEMENTS ON UCC

JUDICIAL PRONOUNCEMENTS FAVORING THE UCC

The judicial stance in the context of a uniform law has been affirmative. *The State of Bombay v. Narasu Appa Mali*⁶ was the first such case which touched upon this matter. In this case the judges discussed the Validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The court in this case said that for the sake of social reforms and state welfare religious practices can be censored. In my opinion the judges ‘sat on the fence’⁷ but indirectly said that UCC should be implemented for the betterment of the state.

As Per Chagla C.J.: A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole. And as per Gajendragadkar J.: Religion in a modern democratic State is purely a matter of the individual and his God; with the religious beliefs of the citizen and his religious practices normally the State would not interfere. But if these religious beliefs or practices conflict with matters of social reform or welfare on which the State wants to legislate, such religious beliefs or practices must yield to the higher requirements of social welfare and reform. This is the plain meaning of the provisions of Article 25(1) and Article 25(2) of the Constitution read together.

In the landmark judgment of *Mohd. Ahmed Khan v. Shah Bano Begum and Ors.*⁸ It was discussed that whether maintenance can be claimed in case of a divorced Muslim wife. Sec 125 of CrPC talks about the maintenance to be given to the woman after divorce and according to the judgment of this case it can be claimed in case of a divorced Muslim woman as well.⁹ The court strappingly educated the state as to how the UCC will remove disparity between various communities and bring the nation together. In the exact words of the Coram “A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies” not only this the court also advocated the idea of UCC as it would save the time of the court and such steps such as providing maintenance in this particular case and similar stances taken to meet the ends of justice cannot be an alternative to UCC. This case also administers the need of UCC in achieving the goal of a secular state by quoting a line from

⁶ *The State of Bombay v. Narasu Appa Mali*, (1952) AIR 84 (Bom).

⁷ ‘Sat on the fence’ can be construed to be something, which is not opined. In the above mentioned case the judges did not explicitly ask the legislature to implement UCC, but instead favored any such law passed by the state suppress religious practice which might result in welfare of the state.

⁸ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) AIR 945 (SC).

⁹ Later, The Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed by the congress government, which reversed this judgment by limiting certain period (90 days) to claim for such maintenance.

Dr. Tahir Mahmood's book¹⁰ which said "In pursuance of the goal of secularism, the State must stop administering religion-based personal laws".

The court again came up with its reasoning as to why UCC should be enacted by the government. The then Chief Justice K.M. Lahiri in *Ka Steldoris Syiemlieh v. U. Skipland Sanglyne and Anr.*¹¹ said "The prime object of Article 44 is to bring about integrity of the Nation by securing for the citizens a uniform Civil Code throughout the country. Hindu Divorce Law, Christian Divorce Law, Islamic Divorce Law, and so forth are diverse laws meant for Indian brothers and sisters. Although Indian are one but Civil Codes, including Laws governing divorces are divergent, separate and distinct. A common Civil Code will bring unity and integrity. Divergent Codes may be one of the deterrent factors impeding integration. We feel that the best of the divorce laws should be assimilated and so structured that the Common Code may not affect the sentiments and feelings of any section of persons belonging to any religious faith or group. If the legal system is to ensure and preserve the health of society so that people may live worthwhile and productive lives; and, when lawyers are viewed as "social physicians" whose services contribute towards the achievement of the laws ultimate goal that is, good of the society, we feel that it is the duty of the social reformer, "social physicians" and all thinking person's to grapple with the problem of contemporary society and resolve it. Being members of a functional group, learned members of the noble profession, are best suited to the task of transforming the attitude and belief of the people. We feel that a uniform Civil Code throughout the territory of India shall concretise the unity of our country and shall bring about total integration."

In 1985 after the repercussions of Shah Bano judgment, the court did not seem happy and strongly advised the government to work for the codification of uniform civil laws. The judgment of *Ms. Jorden Diengdeh v. S.S. Chopra*¹² not only showed the frustration of the judicial bench but also the need of implementing UCC. The case began with the bench reminding the importance of Uniform Civil code and the gravity¹³ for the need of such code. The case dealt with dissolution of marriage where the court held that it is better to breakdown marriage rather than just providing judicial separation as done by the high court earlier in this case. The jury seemed to be very strict and adherent in regard to enactment of the UCC. Therefore it sent a copy of judgment to the ministry of law, which signifies the severity of the matter as well as it, clearly shows the stance of the judiciary in affirmation to enactment of UCC.

Time and again the court came up with various views involving passing of the UCC. Some of the cases where the court advised the government for the same are mentioned further. In *Rayani Appaiah v. Spl . Tahsildar , L.R. Addanki*¹⁴ the importance of uniformity regarding the rights of the widow in the Hindu succession act and Mitakshara School were mentioned. The court also concluded as to how uniformity may be taken as a step in towards formulation of UCC. *Smt.*

¹⁰ Muslim Personal Law 200-02 (1977, 6th Edition, Reprint 2013, LexisNexis).

¹¹ K.M. Lahiri in *Ka Steldoris Syiemlieh v. U. Skipland Sanglyne and Anr.*, (1986) AIR 24 (Gau).

¹² *Ms. Jorden Diengdeh v. S.S. Chopra*, (1985) AIR 935 (SC).

¹³ The case in the following words "the present case is yet another, which focuses attention on the immediate and compulsive need for a uniform civil code" mentions in strong words the seriousness of the issue.

¹⁴ *Rayani Appaiah v. Spl . Tahsildar , L . R . Addanki*, (1988) 1 APLJ 1 (AP).

*Jacintha Kamath v. K. Padmanabha Kamath*¹⁵ dealt with the dissolution of a non Hindu marriage where one party is hindu and the other is not. The court pointed out that until and unless the UCC is not enacted such problem will be faced.

The court at ample times has cited earlier cases to remind the legislature bodies to work effectively for a uniform civil code. As *Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India*¹⁶ discusses various judgments which guides the legislature towards formulation of the uniform civil code. The following opinion of Justice Sahai “The desirability of Uniform Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society; statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change.” used in this case should shake the conscience of the legislature and inspire them to work upon it.

Also the court has given various reasoning and views to impress the legislature to work towards the formulation of the UCC. The court In the Matter of Manuel Theodore D'Souza took a distinct view in regard of UCC. Justice F.I. Rebello pointed out how adoption of child is right that flows from article 21 as part of right to life. Therefore it can be said that since it's a fundamental right and not subject to provisions of personal law, it shall be governed in the same manner throughout the country. His approach makes the importance of UCC constitutionally strong.

In *Smt. Sarla Mudgal, President, Kalyani and others v. Union of India*¹⁷ and others the court requested the then Prime Minister of India to take a fresh look at UCC. The court also directed the Secretary,Ministry of law and justice to file affidavit of any responsible officer to show the steps taken for the same. Justice Sahai in discussed the urgency and necessity for such a legislation. He also opined that a secular state would always look for a uniform civil law.¹⁸

The court in various cases has also sympathized with the legislature as to how complex it is to codify such a law which might bring national integration on one hand but equally result in the outburst of some communities. One such case was *Pannalal Bansilal Patil and others etc. v. State of Andhra Pradesh*¹⁹ and another which mentions the necessity and consequences of UCC.

The Coram has mentioned that how difficult it is to enact such a law in one go. Considering the diversity of faith people have in their respective religions, beliefs or tenets propounded by different religions or their off-shoots, it becomes difficult to bring all of them together to be governed by one law. Making law and amendment is a slow process.²⁰ Also in the Shah Bano case the court outlined the problem of the political and communal pressure the government faces

¹⁵ Smt. Jacintha Kamath v. K. Padmanabha Kamath, (1992) AIR 372 (Kant).

¹⁶ Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India, (1997) AIR 3614 (SC).

¹⁷ Smt. Sarla Mudgal, President, Kalyani and others v. Union of India, (1995) AIR 1531 (SC).

¹⁸ “When Constitution was framed with secularism as its ideal and goal, the consensus and conviction to be one, socially, found its expression in Article 44 of the Constitution. But religious freedom, which is the basic foundation of secularism, was guaranteed by Articles 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscience, but the right to profess, practice and propagate religion. What is religion? Any faith or belief.” Are the exact words of Justice Sahai cited from the judgment of Smt. Sarla Mudgal, President, Kalyani and others v. Union of India, *ibid*.

¹⁹ Pannalal Bansilal Patil and others etc. v. State of Andhra Pradesh, (1996) AIR 1023(SC).

²⁰ *Ibid*.

in implementing UCC. But since at the end of the day it is the government itself who has the legislative competence to do so therefore for the sake of state welfare the government needs to implement the UCC as soon as possible.

JUDICIAL PRONOUNCEMENTS APPREHENSIVE OF UCC

Not every time has the court given such judgment, which strongly favored the formulation of uniform civil code. *Kamal V.M. Allaudin v. Raja Shaikh*²¹ and basically discussed the matrimonial jurisdiction of high court. The judges in this case saw establishment of family court and family court act as a strong step towards achievement of uniform civil code.²² In my words, instead of catalyzing the process of formation of civil code, it would slow the already lazy process. The family court would no doubt help in providing justice but in this since we are dealing with UCC, therefore formulation of family courts though is a great step towards achieving justice but may decelerate the process.

However anachronistic it may appear to be, even to-day in India, proclaimed to be "Secular" in the National Charter and mandated thereby almost four decades ago to secure to all its citizens a Uniform Civil Code, "religion" is still being allowed to have a dominant and decisive role even in secular matters relating to law and its administration and the rights and status of a person in matters relating to marriage, succession, guardianship and the like still depend on the religion he would belong to.²³

In some judgments, the judiciary, instead of proposing a new legislations, has tried to clarify the intention of the prevailing laws to the public. This has helped in countering certain misconceptions. In the matter of *Nazeer v. Shemeena*, Karnataka High Court clarified the intention of legislature behind the provision of "triple talaq" and how it is to be executed. It was held that 'triple talaq' in single utterance is not approved by Quran and is illegal.²⁴ It was further held that having different set of personal laws for different communities will not be an infringement of Article 14 but such communities should not discriminate against the members of the ground of gender, unless such discrimination is based upon religious precepts. These words of judiciary indicate that discrimination on the basis of gender is an unacceptable act, but when the same is based upon religious belief system, it amounts to lawful conduct and does not harm anybody. In other words, a religious belief or precept which gives rise to a feeling of discrimination cannot be said to be unlawful.

The judiciary has also not failed to remind the legislature of diverse grounds for divorce under personal laws. These laws keep getting altered by various communities on the grounds of religious practices and this poses a problem of a wide range of defenses to be taken by one party (which is mostly the husband) and other party is left with little or nothing. For this reason, the Court has time and again recommended that instead of such variety of grounds of divorce,

²¹ *Kamal V.M. Allaudin v. Raja Shaikh*, (1990) AIR 299 (Bom).

²² According to Justice M.G. Chaudhary, "Even though the Act does not travel to the extent of laying down a uniform Civil Code for all the communities and leaves that area untouched, yet, in the matter of procedure it aims at bringing about uniformity. It can be regarded as a major step in the direction of reform and uniformity."

²³ *Raj Kumar Gupta v. Barbara Gupta*, (1989) AIR 165 (Cal).

²⁴ *Nazeer v. Shemeena*, (2017) 2 AIR 18 (KHC).

“irretrievable breakdown” should be made a uniform ground for divorce, along with mutual consent of the parties. Even the authors have suggested that this is a high time to consider that Indian society needs a uniform ground for divorce in order to gain gender equality and prevent violation of rights of women who face unbearable torture in the name of religious practices and societal pressure. Their contention is that where factually marriage has broken down irretrievably, no useful purpose will be served in finding out the guilt or innocence of the parties and in such cases law proceeds to cut off the tie.²⁵

Later in *Ismayil v. Fathima*²⁶ and another the court tried to explain that equality and equal protection of law must be given uniform and common meaning. The case discusses about the maintenance given in case of divorce, and maintenance shall be interpreted in the same manner for every religion under different personal laws. The court here tried to achieve uniform law through same interpretation for each same issue in different personal laws and not to wait for parliament to enact a civil code. In my opinion the court in this case ignored the long lasting aspects and benefits of the codified uniform civil law and tempted to use a short living alternative.

The court also has prevented itself from interfering in formulation of UCC. For e.g. in the case of *Unnooli alias Kuttimalu and others v. Theyyu*²⁷ they left the matter upon legislature while deciding the case considering the fact that such considerations are matter of parliaments and not courts.

In *Naveen Kohli v. Neelu Kohli*, the Apex Court strongly permitted dissolution of thirty year old mismatch couple. Urging the government to bring an amendment to the Hindu Marriage Act and give “irretrievable breakdown” a legal sanctity as a valid ground for divorce, the Court held that “irrevocable break down of marriage” as a ground for divorce was prevalent in many other countries and recommended the Union of India to seriously consider bringing an amendment in Hindu Marriage Act, 1955 to incorporate irretrievable break down of marriage as a ground for the grant of divorce.²⁸ Following the same lines, the judiciary has granted divorce when it concluded that the marriage has reached the point of irretrievable breakdown. For instance, when a wife, who was living separate of the husband for 13 years, denied any physical relationship and wanted her husband to leave his parents and live separately, the court granted the divorce.²⁹ It concluded that irreparable breakdown was obvious as the differences between the parties and a decade of ever growing distance cannot be brushed aside so easily and lightly.

Even the Law Commission has suggested that irretrievable breakdown should be incorporated as a separate ground for divorce.³⁰ The Parliament has yet not enacted on the recommendation but

²⁵ Shiv Sahai Singh, *Unification of Divorce Laws in India*, 376 (1993)

²⁶ *Ismayil v. Fathima and Another*. (2011) 3 ILR 961 (Ker).

²⁷ *Unnooli alias Kuttimalu and others v. Theyyu*, (1969) KLJ 620 (Ker).

²⁸ *Naveen Kohli v. Neelu kohli*, (2006) 4 SCC 558 (SC).

²⁹ *Ramesh Jangid v. Sunita*, (2008) 1 HLR 8 (Raj).

³⁰ Law Commission of India Report No. 217, March 2009, available on <http://lawcommissionofindia.nic.in/reports/report217.pdf>, last accessed April 20, 2017.

the states are free to take lead by exercising their power under entry 5 of the concurrent list under the Seventh schedule.³¹

IV. CONCLUSION

In light of our discussion of the above cases, it can be seen that the judicial stance on the Uniform Civil Code has been largely and overwhelmingly positive. In most cases the Courts have sternly advised the legislature to take up the task of enacting the UCC effectively and expeditiously. The Courts have restrained themselves from ruling on any aspect relating to the UCC; rather they have shifted this enormous burden on the legislature and rightly so. However, in a handful of cases, various Courts have made their apprehensions regarding the efficacy of the Uniform Civil Code evident. The apprehensions have been based on the grounds of freedom of religion and the timing and manner of bringing about the UCC.

In our opinion, the apprehensions raised by the Courts have not contributed to the nuanced debate surrounding the UCC. Apprehensions regarding the timing and manner of implementation of the UCC are misplaced concerns; rather than being constructive such concerns have been mostly obstructive, hindering any prospect of expediting the advent of the UCC. Further, a UCC shall be a concrete step towards realizing the Constitutional goal of a truly secular nation. A UCC shall also serve as a torch bearer of gender equality, leading to prospects of a more just and egalitarian society. The judiciary has rightly supported the idea of a UCC and asked the legislature to act upon it. It is true that legislating upon such a subject is a daunting task as it cannot be bereft of political considerations. But it is necessary that the legislature, either at the Centre or any of the states, take up the task nonetheless and work constructively to bring about a UCC.

³¹ Ramesh Chander Nagpal, *Modern Hindu Law*, 182 (2008).