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UNIFORM CIVIL CODE: CONSTITUTIONAL AND JUDICIAL PERSPECTIVE

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Abstract

In a country of a million customs and communities like India, personal law have cropped up as one of the key factors of conflict among the people. The requirement for a Uniform Civil code in India has been debated and argued several times and it still remains one among the foremost controversial issues remarked in our Constitution.

A Uniform Civil Code connotes the idea of same set of civil rules for the citizens irrespective of their religion, caste, etc. Uniform Civil Code administers a singular set of secular civil laws to govern all citizens, irrespective of their religions, caste or regions. The common areas covered by a civil code include personal status, rights related to acquisition and administration of property and marriage, divorce and adoption. The present paper describes constitutional perspective of Uniform Civil Code and secularism in India. The paper also discusses approach of judiciary and need for uniform civil code. Uniform Civil Code tends to simplify Indian legal system and making Indian society more homogeneous.

Key Words: Uniform Civil Code, India, Constitutional Perspective, Judicial Response, Personal Laws.

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The Concept and Meaning of the UCC:

The expression 'Uniform Civil Code' (UCC) consists of three terms- 'Uniform', 'Civil' and 'Code'. The word Uniform refers to the form of a thing. The Constitution of India in its Article - 44 uses the expression 'Uniform' instead of the 'Common', but, generally these two terms have been used as synonym in the discussions relating to the said provision. The few commentators have pointed out that although the term 'Uniform' is very often confused as a synonym for the term 'Common' yet Uniform is different word in the sense that former means one and the same in all circumstances whatsoever, and the latter refers to same in similar conditions. We have used the both term as synonym.

The term 'Civil' is a very elastic expression and is used in number of sense: The word is derived from the Latin word 'Civils' meaning a citizen.[1] When it is used as an adjective to the term 'Law', it means pertaining to the private rights and remedies of a citizen, as distinguished from criminal, political etc.[2]

The expression 'Civil law' has its predecessor in the 'jus civil' of the Roman law in which it acquired various meaning in the course of time, none of them, however, covers what in English juristic terminology is called Civil law.[3]

Thus, the expression 'civil law' which is derived from its Latin equivalent – 'jus', refers to the municipal law of a state. It refers to body of private law but does not include public or international law. It is also used in contradiction of the criminal law.[4]

Constitutional Provisions and the Uniform Civil Code:

There are several provisions in the India constitution which are directly or indirectly related to the UCC. The UCC may be discussed under the three important heads namely: The Fundamental Rights, The Directive Principles of the State Policy.

[1] Similar meaning has been given in –words and phrases permanent edition, Vol.-VII, 1952, P. 328. Encyclopedia Americana, Vol.-6, (1960), 734.
[2] The Shorter Oxford English Dictionary, Vol.- I (1973), 34
[3] Encyclopedia Americana, Vol.-6 (1960) 734
[4] Encyclopedia Americana, Vol.-5 (1959) 743

Uniform Civil Code and Fundamental Rights:

In a normative constitutional system which guarantees basic human rights to the subjects any of the actions of state directly or indirectly permitting, assisting, or enforcing discriminatory or unjust practices made by the people even in their interpersonal relations is basically *control legem*. There is no reason why the blessings of civil liberty should not percolate to the levels of inter-personal relations. From the view point of strict constitutionalism there cannot be a different conclusion, especially in the Indian context. But unfortunately, the development of law in this regard does not augur well. The result is that the natural elasticity in fundamental rights could not be made use of the full extent to incorporate the welfares goal of fair and just civil code.

Under Article 13 of the constitution every law contravening any of the provisions of Part III is declared to be void. Under Article 14 it is ordained that the state shall not deny to any person equality before law and equal protection of the laws. When state agency is made use for implementing customs, usages, and laws allowing discrimination in the matter of matrimonial rights, succession, partition, maintenance and guardianship. There is clear violation of Art. 14.[5] According to Art. 21 of the constitution everyone is entitled to personal liberty and its deprival shall be in accordance with the procedure established by Law. Recent decisions of the Supreme Court have established that such procedure shall be just, fair and reasonable.[6] As family is a form of association it is amenable only to reasonable restrictions by the laws on the ground of public order and morality. On the whole these constitutional provisions insist on fair conditions even in the sphere of personal law.

In addition, there are provisions enabling or directing the state to bring about social reforms. According to Article 25(2) (b) nothing in this article, (namely, Art. 25(1) guaranteeing freedom of religion) shall affect the operation of any existing law or prevent the state from "making any law providing for social welfare and reform…" Under Art. 15(3), State is empowered to make laws creating special provisions for women and children. Further the right to conserve religion under Art. 29(1) cannot be interpreted to protect personal laws either for the reason that personal

5 This is with the nation that judiciary is also state under Art. 12 of the Constitution, a principle which is not well established.

6 *Meneka Gandhi v. Union of India*, 1978 1 (SCC) 248

law is not an essential matter of religion or for the reason that state is enabling to make a social reforms under Article 25(1).

The application of Part III of the Constitution as touchstone to test the constitutional validity of personal laws revolves around the issue whether personal law is law at all for the purpose of Part III of the Constitution. Logically speaking this is an unnecessary controversy because personal law either based on custom or in the form of statutes is a set of legal norms regulating the behavioural rights and obligations of people and is enforced by court of law or by state power. However, in ***State of Bombay v. Narasu Appa Mali***,[7] the Bombay High Court in answering the question whether Hindu Bigamous Marriage Act, 1946 which imposed prohibition upon bigamy only upon Hindus and not upon Muslim, held that since personal law was not law under Article 13 the need of testing it under Art. 14 did not arise at all. Chagla C. J. and Gajendragadkar J. laid emphasis on omission of the term personal law in Article 13 and restrictive interpretation of the phrase 'custom or usage' in Art. 13. They gathered support from Article 17, Article 25(2) and Article 44 for the view that the constitution makers had assumed that different personal law were to prevail subject to modification by the State for the purpose of social reforms. According to the learned judges, if Hindu personal law became void by reason of Article 13 then it was unnecessary to specifically provide for Article 17 or Article 25(2).

It is submitted with respect, the reasoning adapted by the learned judges were fallacious. Firstly, the definition of the term law in Article 13(3) is an inclusive definition and hence the logic of omission or restrictive interpretation of 'custom or usages' cannot be sustained. The more relevant test for law under Article 13(3) is whether the concerned norms are capable of being enforced by the state poser.

Articles 17 and 25 (2) are illustrative of abundant caution and express thinking made by the Constitution makers for reforming the social habits. There is no support to the proposition that the State cannot interfere in the field of personal law through any provision of Part III of the Constitution.

7 AIR 1950 Bom. L. This is view is criticized by A.M. Bhattacharji "Personal Law and State Action" AIR 1982 Jour, p. 113.

In ***Sri Krishna Singh v. Mathura Ahir***[8] the Supreme Court held the view that personal law is not law for the purpose of Part III of the Constitution. This case also came in a peculiar circumstance. In this case after the death of Swami Atmavivekanand of 'Sant Math' Mathura Ahir, his closest discipline was appointed as new Mahant by the 'Bhesh of Sant Math' in the formal Bhandra ceremony according to the wishes of late Atmavivekanda. Srikrishna Singh, son of Atma Vivekanand (in his purvahrama) was in possession of the properties belonging to the math. When the new Mahant claimed the property of Math, it was defend by Krishna Singh that the rule that natural son served his relations with father the moment the latter adopted sanyasa was discriminatory and that the Shudra cannot become a Mahant of Sant math. About the first point of defence the court viewed that the said rule was not discriminatory and that even if it was discriminatory since personal law was not law under Art. 13 it could not be quashed. About the second point, the court elaborately dealt with the conventions of devolution of Mahantship in Sant Math Sampradaya and upheld the validity of the appointment. The proposition that the personal law was not under Article 13 was not essential for the decision of the case. In both Narasu Appa and Krishna Singh the impugned law or customs were in spirit not voilative of Articles 14, 15 and 16. The Court has reasoned on the basis of right to equality itself, to arrive at similar conclusion. Since judiciary was in ambivalence and since the elastic and activist content of right to equality had not emerged as an influencing for the judiciary traversed a narrow path.

In ***Sheokaran Singh v. Daulatram***,[9] the High Court of Rajasthan struck down the rule of Damdupat in Hindu law as violative of Article 14 of the Constitution. It reasoned that Damdupat was a commercial custom and thus governed by Article 13.

The Supreme Court was called to decide the question whether personal law of Muslims relating to pre-emption as law under Article 13 and whether it was violative of Article 19 (1) (f), for the first time in ***Sant Ram v. Labh Singh***[10] in 1965. The Court answered that the definition of the phrase 'laws in force' is dependent upon the definition of law' in Art. (3) (B) and that both the definitions control the meaning of Article 13 (1). As principles relating to preemption where

8 AIR 1980 SC 707.
9 AIR 1953 Raj.
10 AIR 1965 SC 314.

based on customs and usages they was governed that it violated Article19 (1) (f) which guaranteed right to acquire hold and dispose property.

Concerning the statutory personal laws enacted after the commencement of the Constitution, the approach of the judiciary in recent times is to scrutinize them under the light of various provisions of Part III without delving into the technical question whether personal law is law. In T. ***Sareetha v. Venkatasubbaiah***,[11] the Andhra Pradesh High Court considered Sec. 9 of the Hindu Marriage Act providing for retention of conjugal rights to the spouses living separately without reasonable justification as violative to personal liberty under Article 21 of the Constitution. The Court viewed that if unwilling spouse is coerced by State power to cohabit with the other spouse there is violation of right privacy. In ***Harvinder Kaur v. Hermender Singh***,[12] the Delhi High Court upheld the constitutional validity of Sec. 9 as a reasonable regulation protecting the institution of marriage in accordance with Art. 21. In ***Saroj Rani***,[13] case the Supreme Court affirmed the view of Delhi High Court and rejected the view of Chaudhary J. of A.P. High Court. It is to be remembered that the issue of personal law as law did not figure in these cases. The question has become a non-issue in these cases.

About the desirability of applying Part III provision to peruse the personal laws there can hardly be any meaningful objection. The principle of equality, liberty and security has great relevance in a sphere where exploitation and discrimination prevail and the persuasions of love and affection are sometimes banished. The application of Part III will ensure just and fair legal relations in different personal laws. This much more desirable rather than quarrelling on the pedagogic concept of uniform civil code. Once the concepts of justice and liberty are instilled into the realm of personal law, Uniform Civil Code will be easier to pursue. As Mohammed Ghouse has observed: The Fundamental Rights available to a Muslim law to save it from being condemned as unconstitutional. The Muslims can have no objections to such adaptations as most of them have discarded the license to polygamy and unilateral divorce given to them"[14]

11 AIR 1983 AP 357.
12 AIR 1984 Del. 66.
13 AIR 1984 SC 1562
14 Quran, sura 2, 226 and V 2285 and v. 237 p. 232.

The judicial activism of purging the personal law under the aegis of part III has certain advantages. Such an approach is generally free from the defect of playing to the emotional and religious convictions of people.[15] In the backdrop of unjustifiable legislative inertia and hesitation, the activist approach of the judiciary is a ray of hope Secondly, as the 'purging' approach is from the view point of the policy underlying Part III, the result is also accepted to be fair provided that there is no substitution of arbitrariness in personal law by judicial arbitrariness.

Personal Law and Directive Principles:

Article 44

After 'fundamental rights' it is now the turn of the 'directive principles of state policy', contained in Part IV of the Indian Constitution. Article 44, placed in this part of the Constitution, happens to be the most controversial, misunderstood and misused provision. Although this article will be discussed at length in 'Chapter V' of this work, a brief account of its mandate becomes necessary here. It lays down that:

"That State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

Undoubtedly, the expression 'civil code' used in this article refers to a code of law relating to those matters which are, at present being regulated or governed by different personal laws. This inference is crystal clear from the debates in Constituent Assembly discussed earlier is the instant chapter. It is noteworthy take like all other directive principles specified in the Constitution, the provision of article 44 too "shall not be enforceable by any court", but it is "nevertheless fundamental in the governance of the country" and has to be "applied" by the State "in making laws".[16]

15 Resentment by the Muslim community about *Shah Bano* decision (AIR 1985 SC 955) is unfortunately an exception.

16 Article 37 of the Constitution of India.

Despite its being "legally non-enforceable", the Court at times has raised the issue of the enactment of a 'uniform civil code' more often when the case did not require any such incidental generated by the obiter dicta in Shah Bano's Case,[17] Jordan Diengdesh's case[18] and Sarla Mudgal's case,.[19]

Uniform Civil Code: Judicial Approach:

In the post-colonial India, the role of Judiciary in the implementation of uniform civil code is very appreciable. In fact it is the judiciary, which through its interpretations tries to bring the personal laws of different communities into one common mainstream and thus paved the way towards uniform civil code. The Judges of various High Courts and Supreme Court became the main instrument for bringing important gradual legal developments which also put its impact on the question of uniform civil code. Some of the important examples of Judiciary in this direction are as under:

In ***State of Bombay v. Narasu App Mali***[20] the Bombay prevention of Hindu Bigamous Marrigages Act, was challenged. The Act had imposed severe penalty on Hindu for contracting a bigamous marriage. In this case the validity of the abolition of the polygamy in particular community was also challenged. The then Chief Justice of Bombay High Court J. M.C. Chagla observed that one community might be prepared to accept the social reforms, another community may not yet be prepared for it. Article 14 does not lay down that the State legislature may not be right while deciding to bring about the social reforms by stages and stages may be territorial or they may be community wise. J. Gajendradgkar opined that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provision contained in Article 14 of the Constitution. He observed that the validity of Hindu Bigamous Marriages Act has been challenged particular on two grounds. It is first contended that the personal laws applicable to the Hindus and the Mohammadans to the union of India are subject to the provisions contained in part III of the Constitution and they would be void to the extent to which these provisions are inconsistent with the Fundamental Rights.

17 *Mohd. Ahmad Khan v.Shah Bano,,* AIR 1985 SC 945.
18 *Ms. Jordan Dienghed v. S.S. Chopra*, AIR 1985 SC 935.
19 *Sarla Mudgal v. Union of India*, (1955) 3 SCC 635.
20 AIR 1952, Bombay, 84.

Further these personal laws allow only polygamy and not polyandry so it was also argued that these laws also discriminate against women only on the ground of sex. If that is so the provisions of the personal laws that permit polygamy, they are against the provisions contained in the Article 15(1) or in other words after the commencement of constitution the bigamous marriages amongst the Hindus as well as the Mohammedans, they were not valid or void. So in this case the Court did not only uphold the validity of the legislation it also emphasized that the said legislation was a step to secure the Uniform Civil Code.

In the case of Mrs***. Zohra Khatoon v. Mohd. Ibrahim***[21] A substantial question of law was raised and the High Court of Allahabad which cancelled the orders of the maintenance allowance passed by the Magistrate on the grounds the when the divorced proceedings start from the female side under the dissolution of Muslim Marriage Act 1939, in those cases wife cannot claim maintenance from her former husband neither under the Muslim law nor under Sec. 125 of Cr.P.C. Ultimately the Supreme Court overruled the decision of the High court on the ground that it is based on the wrong interpretation of the Clause1(b) of the explanation to section 125 under this clause the wife continues to be wife even though she has been divorced her husband or has otherwise obtained divorce and has not remarried.

Similarly in the case of ***Sarla Mudgil v. Union of India***[22] J. Kuldip Singh also put emphasis on the need of uniform civil code and judgment delivered by him is again a step towards uniform civil code. The questions involved in this case are that whether a Hindu husband, married under Hindu law, by embracing Islam can solemnize a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be Hindu? Whether the apostate husband would be the guilty of offence under Sec. 494 of Indian Penal Code? Supreme Court observed that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouse converts and the other refuses to do so.

Where a marriage took place under Hindu law the parties acquire a status and certain rights by the marriage itself under law governing the Hindu marriage and if one of the parties is allowed to

[21] AIR 1981 SC 1243.
[22] (1995) 3 SCC 635.

dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be a Hindu.

We, therefore hold that under the Hindu Personal Laws as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage. Thus the second marriage performed by the husband is void marriage and he is liable for the offence of bigamy.

The next important case relating to Muslim Personal Law and Uniform Civil Code is ***Mohd. Ahmad Khan vs. Shah Bano Begum***[23] The appellant, Mohd. Ahmad Khan, being an advocate by profession at Indore, M.P. married to respondent in 1932. In 1975 the appellant broke the matrimonial home by driving Shah Bano Begum out of matrimonial home. During this period the respondent gave birth to three sons and two daughters. In 1978 the respondent filed a suit under section 125 Cr.P.C. in the court of judicial magistrate 1st class, Indore, asking for the maintenance provision at the rate of Rs. 500/- per month. On November 6, 1978, the appellant divorced the respondent exercising the so called unilateral power of talaaq irrevocably. In his defence the appellant advanced the argument that by virtue of talaaq, she seized to be his wife, he was no more under obligation to maintain her and he had already paid maintenance to her at the rate of Rs. 200/- per month for about two years. He deposited Rs. 3000/- in the court in lieu of dower during the period of iddat. In August 1979, the lower court directed the appellant to pay a sum of Rs. 25 per month by way of maintenance. The respondent went in appeal to the Madhya Pradesh High Court in 1980 for the enhancement of maintenance amount. The High Court enhanced the maintenance amount to Rs. 179.20 per month. Against this order the husband approached the highest judicial institution through special leave.

A Bench consisting of Mr. Justice Miirtaza Fazle AH and Mr. Justice A. Vardharajan were of the opinion that these two cases were not correctly decided, hence they referred this appeal to a larger Bench on Feb. 3, 1981 stating that : "As this case involves substantial questions of law of far reaching consequences, we feel that the decisions of this court in ***Bai Tahira vs. AH Hussain***

[23] AIR 1995 SC945

fissoly Chotia[24] and ***Fazlun Bi vs. K. Khader Vali***[25] require reconsideration because, in our opinion they are not only in direct contravention of the plain and the ambiguous language of section 127 (2) (b) of the Code of Criminal Procedure 1973... The decisions also appear to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of Muslim Personal Law (Shariat) Apphcation Act, 1937 - An Act which was not noticed by the aforesaid decision. We, therefore, direct that the matter may be placed before the honourable Chief Justice for being heard by a larger Bench consisting of more than three judges." A Constitution Bench consisting of five judges {Chandrachud, C.J., D.A. Desai, J.O., Chenappa Reddy, J.L.S., Venkat Ramiah, J. and Rangnath Mishra J.) heard the case. Chief Justice Chandrachud wrote and delivered the judgement. Technically, the case related to the maintenance of Muslim divorcee but the observations of the court regarding Muslim Personal Law and Uniform Civil Code created a controversy in the socio-legal and political arena. The question of maintenance of Muslim divorcee and the applicability of section 125 of Cr.P.C. was settled by the Supreme Court in Bai Tahira and Fuzlin Bi case. In Shah Bano case apart from observations relating to the maintenance of Muslim divorcee the Supreme Court held that: (i) There is no conflict between provisions of Section 125 of Criminal Procedure Code and Muslim Personal Law in the matter of maintenance of divorcee, however, in case of any conflict section 125 shall prevail over the Personal Law. (ii) That a Muslim divorcee has a right to obtain maintenance till her remarriage or death under section 125 of the code and if she is unable to maintain herself, her ex-husband has a duty to provide for her maintenance till her remarriage or death. (iii) That if a husband, even he be a Muslim, marries another women the wife has a right to refuse to live with him and yet obtain maintenance from him. (iv) Moreover the Supreme Court has strongly criticized the Government of India for its reluctance to enact Uniform Civil Code in view of the sensitivity of the Muslim community. Regarding the implementation of Article 44 of the Constitution, the Court pointed out the apathy of the Legislature that it has not been sincere enough to bring the Uniform Civil Code into practice.[26]

[24] Bai Tahira vs. Ali Hussain Fissalli Chothia, 1979 CrLJ 151.
[25] Fazlun Bi vs. Khader Vali, AIR 1980 SC 1730.
[26] The court relied on Tahir Mahmood's Thesis for the "Uniform Civil Code". See for detail Tahir Mahmood, Muslim Personal Law, pp. 200-202 (1977)

Conclusion:

Regarding the Uniform Civil Code there is a lack of awareness among the people especially in the minorities. It is true that they do not know the actual meaning and extent of the code. They think that if the law gets enacted then they have to follow the religious practices of the majority and hence they will lose their identity. So the first step should be to make the people aware as to what is the actual meaning and scope of UCC. A Commission should be set up to determine the scope and extent of the Code. The Parliament should enact a draft code specifying the contents. It needs to segregate the essential religious practices and the secular practices related to religion. Only those activities that are financial or matters related to secular character like maintenance orinheritance should be regulated by the State and not the religious or customary practices like saptapathi, nikah etc. It means religious practices of one community will not be forced on another. Provisions regarding the validity of marriage should include the age of the parties, registration of the marriage etc. The people especially the minorities should be assured that there will be no encroachment with their Right to Religion. Then, the draft should be made available for the public opinion and nationwide campaigns and discussions should be held. After considering the viewpoint of the commission, the Parliament should enact a code which is applicable throughout the country irrespective of religion, race, caste, creed etc.

Careful reading of these cases, thus, teaches that the Indian Constitution with its wider social welfare agenda would not and could not tolerate principled total exemption from social welfare agenda when matters of Muslim personal laws were at stake. Thus, outwardly, it only appears as though Muslim Personal law in India has remained largely uncodified Shariat law. In reality, it has been just as much subject to the skilful combined efforts of India's Judiciary and Parliaments to harmonies all Indian personal laws without abolishing the personal law system. So the Indian State tiptoed slowly and carefully around the issue of legal reforms, cleverly manipulative like an ancient Indian ruler inspired by the traditional Indian science of governance (arthasatra). Ancient lessons about outwitting one's adversaries, here a potential inner enemy, had to be most skillfully employed. Indian Muslim law could not be allowed to remain outside the Constitutional umbrella, but it also could not be abolished. So it actually helped the post-modern Indian state that Muslims, in an incautious moment, had demanded a separate statutory law for themselves. They promptly got it, but not on their terms, as we now know.