



## WILL ARTICLE 44 of INDIAN CONSTITUTION SEE THE LIGHT?

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### **Abstract**

Indian Constitution under Article 15 provides a guarantee to every citizen that no discrimination shall be made of any ground and also empowers state government to make special provisions for women and children - Even after 68 years of our Independence still we are finding discrimination through the personal laws - The legislation has not taken steps to give a light to Article 44 - We used to say Judiciary, Legislation, Executive and Media are four pillars of our democracy - Everyone is doing their duty by way of their expression but nothing will give effect for UCC - In this article, the author is going to discuss the how far the Judiciary and Legislation have done their part for implementing Article 44 of Indian Constitution? – What are the Reasons for non-implementation of Uniform Civil Code.

### **Introduction**

The term “**Civil Code**” is generally used to cover the entire body of laws governing the rights and duties relating to property and other personal matters like Marriage, Divorce, Maintenance, Adoption, and Inheritance. Here, the author is going to discuss the Uniform Civil Code. The term “Uniform Civil Code” has been originated from the concept of a civil law code. It envisages administering the same set of secular civil laws to govern different people belonging to different religions and regions. The first Prime Minister of India, Jawaharlal Nehru and the First Law Minister Dr.B.R.Ambedkar were both modernists who wished to reform archaic personal laws and bring Uniformity in Laws<sup>1</sup>, which was also recognized and accepted by the constituent sub-committee unanimously.

However, it was not implemented at the time, because of apprehensions of minorities. According to our Parent Law, Art.44 is the mandate upon the state Directive principles of state policy to promulgate a uniform Civil Code for the whole country. But even after 68 years of Independence it has been kept only as a letter in the book of law. Yet to give a life to Article 44. Recently, especially after the verdict of **Mohd. Ahmed Khan v. Shah Banu Begum**<sup>2</sup>, the definition of a “civil code” has been changed to include personal religious laws, customs and more which are directly or indirectly related to gender. The object of the code has been defined by the Supreme Court as “to effect an integration of India by bringing all communities on a common platform on matters which are presently governed by diverse personal laws, but which do not form the essence of any religion.”

A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies<sup>3</sup>. Because, the piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Hence, this paper is analyzing why it has not, yet come into existence? Is there any valuable reason? And what is the opinion of scholars and judges regarding this Article 44 of the Constitution?

### **Origin and Importance of Art: 44 of our Indian Constitution**

It is *sine quo non* to understand the origin of Article 44 and to understand the origin behind the Article 44, it is necessary to understand the history behind the concept of a “UCC”.

The scheme of the accession of various States in India was there in the 1935 Act. But it remained unimplemented due to the outbreak of World War - II. However, in order to unite and form India in one country, the Assembly nominated a Negotiating Committee on 21 December 1946. The committee consisted of Sardar Vallabhabhai Patel, Pandit Jawaharlal Nehru, Maulana Abul Kalam Azad, Pattabhi Sitaramaiyah, Shankar Rao Deo and N. Gopalswamy Ayangar. Later on, a special States department was created and Sardar Patel was the Minister in charge. The 316 States were merged into neighbouring provinces. As remarked, “The integration of India as one political and administrative unit is a unique event during the whole course of Indian history”<sup>4</sup>. The honour goes to Sardar Patel also.

<sup>1</sup> B.M.Gandhi, V.D.Kulshreshtha's Landmarks in Indian Legal & Constitutional History, 10<sup>th</sup> Edi, 2012, Eastern Book Co.

<sup>2</sup> 1985 AIR 945, 1985 SCR (3)844.

<sup>3</sup> Sarala Mudgal Kalyani

<sup>4</sup> The Constitutional law of India.



At this juncture, it must be remembered that for consolidation of this unification India needs a common civil code. This mandate has been included in the directive principles of State policy under Article 44 of Part IV of the Indian Constitution. But the government does not seem to think seriously in this regard. But the Central Government has, on many occasions, taken steps for implementing Article 44 of Part IV of the Indian Constitution. What steps they have taken, the author will discuss later. Because, first, we have to know what is Art.44 of Indian Constitutional Law?

#### **Article 44: Uniform Civil Code for Citizens of India**

Article 44 of the Indian Constitution states that *“The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”*. The term “Uniform Civil Code” has not been defined in the Indian Constitution.

**According to the Wikipedia, the free encyclopedia, Uniform civil code** means “the proposal to replace the personal laws based on the scriptures and customs of each major religious community in the country with a common set governing every citizen. Personal laws are distinguished from public law and the personal laws cover marriage, divorce, inheritance, adoption and maintenance, etc., In other words, Uniform Civil Code means that all Citizen of India has to follow the same laws irrespective of their religion. i.e., whether they are Hindus, Muslims, Christians, and Sikhs and Parsi whatever it may be, everyone should follow the same law for Marriage, Divorce, Adoption, Inheritance, and Maintenance.

If the Uniform Civil Code were coming into force, it will promote the real Secularism that has been enshrined in the preamble and under Article 25 of the Indian Constitution. Further, if UCC comes into effect that will also help in improving the condition of women in India. For example, the Islamic personal law that is based on Islamic religion allows, in an exceptional circumstances, the Islamic men to have four wives while a Hindu or a Christian will be prosecuted for doing the same. In a Modern world, all the laws related to marriage, succession, etc. should be equal for all Indians. It’s a sign of the modern progressive nation. It will develop the gender equality, it will help in reducing vote bank policy, avoiding overlapping provisions of personal law and litigation will be reduced due to personal laws.

A uniform Civil Code, may help people belongs to a different set of religion at large, rather adversely affect the personal lives of the people belongs different religion.

#### **Reasons for Non-Implementation of Uniform Civil Code**

One of the most controversial issues in the 21st-century are, Indian Politicians also getting votes through the system of caste, and community basis. Second main Problem is Country’s diversity and Religious laws, which do not only different sect wise, but also by the community, caste, and religion. The third one is that when Constituent Assembly debates were going on Muslim leaders feared that their personal law would be abrogated by having a Uniform Civil Code. Forth one is our people are thinking a Uniform Civil Code would infringe the fundamental right of freedom of religion as mentioned in Art: 25 of our Indian Constitution and would amount to a tyranny of the majority. The fifth one is misconceived because secular activity associated with the religious practice is exempted from this guarantee and since personal laws pertain to secular activities they fail within the regulatory power of the State.

#### **Part of Legislation for Enacting the Uniform Civil Code**

The legislation is the only effective instrument to make quick and symmetrical changes. The legislatures have taken the effort for codifying personal laws and make provisions to bring about gender equality. We have achieved codification of Hindu law in respect of Marriage, Divorce, Succession, Minority and Guardianship, Maintenance, Adoption and enactment of the Secular Special Marriage Act, 1954. It is also tangible progress in the direction of a Uniform Civil Code. The Dissolution of Muslim Marriages Act, 1939 was passed in spite of a great deal of opposition from Muslim orthodox but today no one questions it.

It is also important law reform legislation. In 2000, the Parliament has amended the Parsi Marriage and Divorce Act, 1936 and the Indian Divorce Act, 1869, which governs Christians, to make these laws more egalitarian and to bring in provisions comparable to the Special Marriage Act, 1954 into these acts. Indian Succession Act, 1925, in so far as it governs Parsi inheritance and succession, has also been amended in 1991 by inserting Section 51 to remove gender discrimination from this law. The Hindu Succession (Amendment) Act, 2005 was passed by the legislature, which has given the daughter coparceners rights in the property like a son. Section 23 of the Act has been omitted by the Hindu Succession (Amendment) Act, 2005<sup>5</sup>.

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<sup>5</sup> *The omitted was Special provision respecting dwelling houses.-Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house*



These are all achieved by the Legislature for activating the Art.44 of the Indian Constitutional Law. In spite of Minority apprehended yet to the success Uniform Civil Code. Even though Legislature has taken steps for implementing Uniform Civil Code, for examples the Central Government introduced the Adoption of Children Bill, 1972 in the Rajya Sabha, but it was subsequently dropped as some Muslims opposed it. The Adoption of Children Bill, 1980, aiming to provide for an enabling law, of the adoption application to all communities, other than the Muslim community, was opposed by the Bombay Zoroastrian Jason Committee, which formed a special committee to exempt part of the Bill. Like so many obstructions which came from different ways, hence, the Legislature is unable to take steps for lighting the Art.44.

### Role of Judicial Interpretations in Effectuating Uniform Civil Code

Yes, it has to make a pathway to enact the Uniform Civil Code through its' Judgments. Already it has taken its' steps to reform our personal laws and move towards a Uniform Civil Code. In family law still we find some unfair, inequitable and discriminatory provisions between the two sexes. Surely the time has now come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion and better start intervention of the legislature in these matters to provide for a uniform code of marriage and divorce. In case of **Mohd. Ahmed Khan v. Shah Banu Begum**<sup>6</sup>, the Supreme Court has ruled that a Muslim husband is liable to pay maintenance to the divorced wife beyond the iddat period. **Smt. Sarla Mudgal, President, Kalyani and others Vs. Union of India and others**<sup>7</sup> case plugged a loophole in the personal law and decided that conversion by a Hindu male to Islam by itself did not dissolve the first marriage. Therefore, the second marriage during its subsistence was punishable. Husbands now cannot escape prosecution for bigamy by converting to Islam. **Danial Latifi v. Union of India**<sup>8</sup>, read the Muslim Women (Protection of Rights on Divorce) Act, 1986 with Articles 14 and 15 of the Constitution, which prevent discrimination on the basis of sex, and held that the intention of the framers could not have been to deprive Muslim women of their rights.

The provision in question was Section 3 (1) (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986, which states that “a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband”. The court held this provision to mean that reasonable and fair provision and maintenance is not limited to the iddat period. It extends for the entire life of the divorced wife until she remarried. The decision is a silent move towards a Uniform Civil Code. Before the case of **BalwantKaur V. ChananShingh**<sup>9</sup>, Supreme Court while upholding the women's right to maintenance out of her father's estate, observed that Section 19 of the Hindu Adoptions and Maintenance Act, 1956 creates an independent and personal right for the daughter on her father's property during her lifetime if she is unable to maintain herself out of her earnings or other property. The court clarified that “a widowed daughter who was unable to obtain in maintenance from her in-laws, was to be treated as a dependent of her father. Once she was found to be dependent she had a pre-existing right to her father's property after his death”. Thus, it was held that the daughter had an absolute right to the property and will legitimately be the same.

In **Seema v. Ashwani Kumar**<sup>10</sup>, the Supreme Court directed State Governments to make the registration of marriages compulsory. This was also seen as a step towards a Uniform Civil Code. However, the judiciary has tried to bring the reforms that efforts are only piecemeal. Because In **Maharishi Avadhesh v. Union of India**<sup>11</sup>, the Supreme Court dismissed a petition seeking a writ of mandamus against the Government of India to introduce a Uniform Civil Code. The court took the view that it was a matter for the legislature. “The court cannot legislate in these matters”. In the same petition, the Supreme Court declined to grant a declaration nullifying the Muslim Women's Protection of Rights on Divorce Act, 1986, the Court also dismissed the prayer to direct the Government, not to enact a Shariat Act so as to affect the rights of Muslim women. The role of the judiciary is a helpless position of making Uniform Civil Code.

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*shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein: Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.*

<sup>6</sup>Supra Note:2.

<sup>7</sup> MANU/SC/0290/1995.

<sup>8</sup> MANU/SC/0595/2001.

<sup>9</sup>MANU/SC/0282/2000.

<sup>10</sup> MANU/SC/0996/2006.

<sup>11</sup> 1994 SCC, Supl. (1) 713.



In **ReynoldRajamani v. The Union of India**<sup>12</sup>, the Supreme Court rejected a prayer to remove the discrimination between men and women under section 10 of the Indian Divorce Act, 1869 (applicable to Christians). The court based its approach on the “limits” of the courts’ jurisdiction. It held that when a legislative provision enumerates the grounds for divorce, those grounds limit the courts’ jurisdiction and the court cannot re-write the law, so as to add grounds of divorce not permissible under the section. Hence, the role of the judiciary is, only to create circumstances to implement the Uniform Civil Code alone. Because, our Constitutional law directs that “The provisions contained in Part-IV shall not be enforceable by any court<sup>13</sup>”.

### Views of Uniform Civil Code by Judges and Scholars

Some Scholars and Judges had given their views regarding the Uniform Civil Code for and against not by today, they started before enacting our Indian Constitution. Firstly, Dr.Ambedkar, the principal architect of the Indian Constitution was of the view that the provision relating to a Uniform Civil Code should be included in the fundamental rights chapter and thus should be made justifiable. Then the Supreme Court in **The State of Bombay vs Narasu Appa**<sup>14</sup>, said that the need for uniformity in the matrimonial laws is essential to achieve a Uniform Civil Code. For example, the introduction of monogamy in Hindus and allowing polygamy in Muslims has created a discrimination of State policy. If we allowed the Uniform Civil Code it can be easily removed this discrimination. The Status of Women in India, 1971, A synopsis of the Report of the National Committee in its Page No.57 quoted that “the continuance of various personal laws which discriminate between men and women, violates the fundamental rights and the Preamble to the Constitution which promises equality of status to all citizens. It is also against the spirit of national integration and secularism<sup>15</sup>”. And several liberals and women’s groups have argued that a Uniform Civil Code would give more rights to women. Sujata Manohar in her treatise on a Secular law of Adoption and Tahir Mahmood in his Family Law and Social Change emphasizes the need for having a Uniform Law. In family law, we still find some unfair, inequitable and discriminatory provisions between the two sexes. V.Khalid J of the Kerala High Court is referring to a Muslim husband’s unbridled power of divorcing his wife raised the following questions in **Haneefa v. Parhumul Beevi**<sup>16</sup>.

Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be suitably amended to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. Here the questions are whether the conscience of the leaders of public opinion of the community will also be disturbed? And Krishna Iyer, J in **Shahulameedu V.SubaidaBeevi**<sup>17</sup> also expressed the same effect. In the words of Fyzee, the power to pronounce unilateral repudiation of marriage is a “One-sided engine of oppression in the hands of a Muslim husband”. Finally, the Committee, on the status of women in India, in its report, towards equality, presented in 1974, said the British policy of non-intervention with the family law resulted in stagnation on and social tensions were started. It is the time for the Parliament has to come forward to implement the Art.44.

### Suggestions and Conclusion

1. In order to move forward in the direction of achieving a uniform civil code, while giving the judgments with regard to cases which involves the conflict of Laws, courts need to be very clear and proactive in delivering it, since the impact of the judgment is great in realizing the need of Uniform Civil Code.
2. So for the only concrete step taken in the direction of achieving a Uniform Civil Code was the codification of Hindu Law, in spite of great protest; like, at least, Muslim law also should make codification.
3. Selection of principles and opinions can take from various schools of Islamic law.
4. Reinterpretation of Koranic text to suit the prevailing ideas.
5. Muslim Law as it stands today needs many changes, but orthodox Muslim public opinion shrews any act of reform. It looks at the law purely from a doctrinaire angle and not from a sociological Muslim community itself. The government can do this, but the demand must emanate from the Muslim Community.

<sup>12</sup> 1982 AIR 1261, 1983 SCR (1) 32.

<sup>13</sup> Article 37 of Indian Constitution.

<sup>14</sup> AIR 1952 Bom 84, (1951) 53 BOMLR 779, ILR 1951 Bom 775.

<sup>15</sup> Available at <http://www.arvindguptatoys.com/arvindgupta/JP-59.pdf>. Last assessed on 30.05.2016.

<sup>16</sup> 1972 KLT 512, 514. 1970 KLT 4.

<sup>17</sup> 1970K.L.T.4.