
EMERGING TRENDS IN FAMILY LAW

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1. Family Court

Marriage as an institution has become the subject of great judicial scrutiny. There are a number of judicial provisions dealing with marriage and its various aspects. The need to establish the Family Courts was first emphasized by the late Smt. Durgabi Deshmukh. After a tour of China in 1953, where she had occasion to study the working of family courts, Smt. Deshmukh discussed the subject with Justice Chagla and Justice Gajendragadkar and then made a proposal to set up Family Courts in India to Prime Minister Pt. Jawahar Lal Nehru.

The formation of family court was a mile stone in the history of Indian judiciary. The Family Courts Act 1984 established the creation of Family Courts through a Gazette notification by the Central Government. These courts are to be established in a town or city where the population exceeds one million or in any area where the State Government considers to establish it. One or more judges constitute the Family Courts but each judge is competent to exercise all the powers of the court.

The Family Courts Act also covers areas of the following Acts

- i. Hindu Marriage Act, 1955
- ii. Special Marriage Act, 1954
- iii. Hindu Adoption and Maintenance Act, 1956
- iv. Parsi Marriage and Divorce Act, 1936
- v. Indian Divorce Act, 1869
- vi. Christian Marriage Act, 1972
- vii. Dissolution of Muslim Marriage Act, 1939
- viii. Hindu Minority and Guardianship Act, 1956
- ix. Criminal Procedure Code, 1973, Sec 125, 126, 127 and 128
- x. Guardians and Wards Act, 1890

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament states that it is “An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.”

Functions

The Family Courts are free to evolve their own rules of procedure, and once a Family Court does so, the rules so framed override the rules of procedure contemplated under the Code of Civil Procedure. In fact, the Code of Civil Procedure was amended in order to fulfil the purpose behind setting up of the Family Courts.

Special emphasis is put on settling the disputes by mediation and conciliation. This ensures that the matter is solved by an agreement between both the parties and reduces the chances of any further conflict. The aim is to give priority to mutual agreement over the usual process of adjudication. In short, the aim of these courts is to form a congenial atmosphere where family

disputes are resolved amicably. The cases are kept away from the trappings of a formal legal system.

The Act stipulates that a party is not entitled to be represented by a lawyer without the express permission of the Court. However, invariably the court grants this permission and usually it is a lawyer which represents the parties. The most unique aspect regarding the proceedings before the Family Court are that they are first referred to conciliation and only when the conciliation proceedings fail to resolve the issue successfully, the matter taken up for trial by the Court. The Conciliators are professionals who are appointed by the Court. Once a final order is passed, the aggrieved party has an option of filing an appeal before the High Court. Such appeal is to be heard by a bench consisting of two judges.

Legal Jurisdiction of Family Law Courts

The legal jurisdiction of Family Courts extends to all matters that pertain to matrimonial issues, maintenance, alimony and custody of children in a marital dispute or a divorce. Further, Family Courts deal with the following:

- Suits or proceedings between parties to a marriage for a decree of restitution of conjugal rights, judicial separation, nullity of marriage or divorce.
- Maintenance related issues.
- For an order of injunction in certain circumstances arising in a matrimonial relationship.
- For declaring legitimacy of any person.
- Suits or proceedings between parties regarding dispute about the property.
- Guardianship or custody of any minor or child.

Powers of Indian Family Courts

Family courts are empowered to formulate their own procedures but till then they have to follow the Civil Procedure Code.

- Evidence need not be recorded.
- Judgment can be concise with statement of the case, points for determining decision and reasons.
- Appeal to the High Court can be filed within thirty days from the date of judgment, order or decree of the Family Court.
- If the party desires, in camera proceedings can be conducted.
- No party to a suit or proceeding under the Family Court shall be entitled to be represented by a legal practitioner but the court may requisition the services of a legal expert as amicus curiae.

Association of social welfare agencies

The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of:

- a) institutions or organisations engaged in social welfare or the representatives thereof;
- b) persons professionally engaged in promoting the welfare of the family;
- c) persons working the field of social welfare; and
- d) any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

Counsellors, officers and other employees of Family Courts

- 1) The State Government shall, in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.
- 2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.

2. Uniform Civil Code

Uniform civil code basically, precisely and in a lay man's language means one country one rule, legally the term civil code means to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. Uniform civil code essentially means unifying all these "personal laws" to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to, though an exact figure has not been painted yet but Though the exact contours of such a uniform code have not been spelt out, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde. Basically uniform civil code is a try to give the whole picture a more regulated and systematic look.

In India, we have a criminal code that is equally applicable to all, irrespective of religion, caste, gender and domicile. However, a similar code does not exist especially with respect to divorce and succession and we are still governed by the personal laws. These personal laws are varied in their sources, philosophy and application. Thus, a major constraint arises while bringing people governed by different religions under one roof.

Article 44 of the Constitution of India declares that "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."

A uniform civil code administers the same set of secular civil laws to govern all people irrespective of their religion, caste and tribe. This supersedes the right of citizens to be

governed under different personal laws based on their religion or caste or tribe. Such codes are in place in most modern nations.

Though Dr. B.R. Ambedkar was an extensive supporter of the Uniform Civil Code, he couldn't get it through more than a status of Directive Principle due to opposition from the members. This directive principle is aimed to achieve, gradually, rather than at once, more far-reaching equality for all citizens. The state has been entrusted with this voluminous task. However, no significant steps have been taken by any government till now.

Apart from being an important issue regarding secularism in India, it became one of the most controversial topics in contemporary politics during the Shah Bano case in 1985. The debate then focused on the Muslim Personal Law, which is partially based on the Sharia law and remains unreformed since 1937, permitting unilateral divorce and polygamy in the country.

The Bano case made it a politicized public issue focused on identity politics—by means of attacking specific religious minorities versus protecting its cultural identity. In contemporary politics, the Hindu right-wing Bharatiya Janta Party and the Left support it while the Congress Party and All India Muslim Personal Law Board oppose it. Goa has a common family law, thus being the only Indian state to have a uniform civil code. The Special Marriage Act, 1954 permits any citizen to have a civil marriage outside the realm of any specific religious personal law.

Personal laws were first framed during the British Raj, mainly for Hindu and Muslim citizens. The British feared opposition from community leaders and refrained from further interfering within this domestic sphere. The demand for a uniform civil code was first put forward by women activists in the beginning of the twentieth century, with the objective of women's rights, equality and secularism. Till Independence in 1947, a few law reforms were passed to improve the condition of women, especially Hindu widows. In 1956, the Indian Parliament passed Hindu Code Bill amidst significant opposition. Though a demand for a uniform civil code was made by Prime Minister Jawaharlal Nehru, his supporters and women activists, they had to finally accept the compromise of it being added to the Directive Principles because of heavy opposition.

British India (1858–1947)

The debate for a uniform civil code dates back to the colonial period in India. The Lex Loci Report of October 1840 emphasised the importance and necessity of uniformity in codification of Indian law, relating to crimes, evidences and contract but it recommended that personal laws of Hindus and Muslims should be kept outside such codification. According to their understanding of religious divisions in India, the British separated this sphere which would be governed by religious scriptures and customs of the various communities (Hindus, Muslims, Christians and later Parsis). These laws were applied by the local courts or panchayats when dealing with regular cases involving civil disputes between people of the same religion; the State would only intervene in exceptional cases. Thus, the British let the Indian public have the benefit of self-government in their own domestic matters with the Queen's 1859 Proclamation promising absolute non-interference in religious matters. The personal laws involved inheritance, succession, marriage and religious ceremonies. The public

sphere was governed by the British and Anglo-Indian law in terms of crime, land relations, laws of contract and evidence—all this applied equally to every citizen irrespective of religion.

Throughout the country, there was a variation in preference for scriptural or customary laws because in many Hindu and Muslim communities, these were sometimes at conflict; such instances were present in communities like the Jats and the Dravidians. The Shudras, for instance, allowed widow remarriage—completely contrary to the scriptural Hindu law. The Hindu laws got preference because of their relative ease in implementation, preference for such a Brahminical system by both British and Indian judges and their fear of opposition from the high caste Hindus. The difficulty in investigating each specific practice of any community, case-by-case, made customary laws harder to implement. Towards the end of the nineteenth century, favouring local opinion, the recognition of individual customs and traditions increased.

The Muslim Personal law or Sharia law, was not strictly enforced as compared to the Hindu law. It had no uniformity in its application at lower courts and was severely restricted because of bureaucratic procedures. This led to the customary law, which was often more discriminatory against women, to be applied over it. Women, mainly in northern and western India, often were restrained from property inheritance and dowry settlements, both of which the Sharia provides. Due to pressure from the Muslim elite, the Shariat law of 1937 was passed which stipulated that all Indian Muslims would be governed by Islamic laws on marriage, divorce, maintenance, adoption, succession and inheritance.

Legislative reforms

The Hindu law discriminated against women by depriving them of inheritance, remarriage and divorce. Their condition, especially that of Hindu widows and daughters, was poor due to this and other prevalent customs. The British and social reformers like Ishwar Chandra Vidyasagar were instrumental in outlawing such customs by getting reforms passed through legislative processes. Since the British feared opposition from orthodox community leaders, only the Indian Succession Act 1865, which was also one of the first laws to ensure women's economic security, attempted to shift the personal laws to the realm of civil. The Indian Marriage Act 1864 had procedures and reforms solely for Christian marriages. There were law reforms passed which were beneficial to women like the Hindu Widow Remarriage Act of 1856, Married Women's Property Act of 1923 and the Hindu Inheritance (Removal of Disabilities) Act, 1928, which in a significant move, permitted a Hindu woman's right to property.

The call for equal rights for women was only at its initial stages in India at that time and the reluctance of the British government further deterred the passing of such reforms. The All India Women's Conference (AIWC) expressed its disappointment with the male-dominated legislature and Lakshmi Menon said in an AIWC conference in 1933, "If we are to seek divorce in court, we are to state that we are not Hindus, and are not guided by Hindu law. The members in the Legislative assembly who are men will not help us in bringing any drastic changes which will be of benefit to us." The women's organisations demanded a uniform civil code to replace the existing personal laws, basing it on the Karachi Congress resolution which guaranteed gender-equality.

The passing of the Hindu Women's right to Property Act of 1937, also known as the Deshmukh bill, led to the formation of the B. N. Rau committee, which was set up to determine the necessity of common Hindu laws. The committee concluded that it was time of a uniform civil code, which would give equal rights to women keeping with the modern trends of society but their focus was primarily on reforming the Hindu law in accordance with the scriptures. The committee reviewed the 1937 Act and recommended a civil code of marriage and succession; it was set up again in 1944 and send its report to the Indian Parliament in 1947.

The Special Marriage Act, which gave the Indian citizens an option of a civil marriage, was enacted first in 1872. It had a limited application because it required those involved to renounce their religion and was applicable only to Hindus. The later Special Marriage (Amendment) Act, 1923 permitted Hindus, Buddhists, Sikhs and Jains to marry either under their personal law or under the act without renouncing their religion as well as retaining their succession rights

Indian approach

Constitution of India, Directive principle of state policy, Art.44 says that the government of India should strive to bring a Uniform Civil code in the country. But as Article 37 of the Constitution itself makes clear, the directive principles "shall not be enforceable by any court". Nevertheless, they are "fundamental in the governance of the country".

Therefore it has never been tried hard to bring a uniform civil code though it has been in manifestation but in no one's action. But there have been many incidents that India needs a Uniform Civil Code.

Md. Ahmed Khan v. Shah Bano Begum commonly referred to as the Shah Bano case, was a controversial maintenance lawsuit in India. Shah Bano, a 62-year-old Muslim mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. She filed a criminal suit in the Supreme court of India, in which she won the right to alimony from her husband. However, she was subsequently denied the alimony when the Indian Parliament reversed the judgement under pressure from Islamic orthodoxy. The judgement in favour of the woman in this case evoked criticisms among Muslims some of whom cited Quran to show that the judgement was in conflict with Islamic law. It triggered controversy about the extent of having different civil codes for different religions, especially for Muslims in India. This case caused the Congress government, with its absolute majority, to pass the Muslim Women (Protection of Rights on Divorce) Act, 1986 which diluted the judgment of the Supreme Court and, in reality, denied even utterly destitute Muslim divorcées the right to alimony from their former husbands. However, in the later judgments including Daniel Latifi case and Shamima Farooqui v. Shahid Khan case, the Supreme Court of India interpreted the act in a manner reassuring the validity of the case and consequently upheld the Shah Bano judgement and The Muslim Women (Protection of Rights on Divorce) Act 1986 was nullified. Many Muslims including All India Shia Personal Law Board supported the Supreme Court of India's order to make the right to maintenance of a divorced Muslim wife absolute.

The Act has led to Muslim women receiving a large, one-time payment from their husbands during the period of iddat, instead of a maximum monthly payment of ₹500 – an upper limit which has since been removed. Cases of women getting lump sum payments for lifetime maintenance are becoming common. However it is seen that despite its unique feature of no

ceiling on quantum of maintenance, the Act is sparingly used because of the lack of its knowledge even among lawyers. The legal fraternity generally uses the Cr.P.C. provision while moving maintenance petitions, considering it handy.

The Shah Bano case had once again spurred the debate on the Uniform Civil Code in India. Ironically, the Hindu Right led by parties like the Jan Sangh which had strongly opposed reform of Hindu law in the 1950s, in its metamorphosis as the Bharatiya Janata Party, became an advocate for secular laws across the board. However, their opposition to the reforms was based on the argument that no similar provisions would be applied for the Muslims on the claim that they weren't sufficiently advanced. The pressure exerted by orthodox Muslims caused women's organizations and secularists to cave in.

The constitutional validity of The Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged before the Supreme Court in *Danial Latifi & Anr v. Union Of India* by Daniel Latifi in 2001, who was the lawyer of Shah Bano in the Shah Bano case. The Supreme Court tried to maintain a balancing act, attempting to uphold Muslim women's rights without addressing the constitutionality of gender and religious discrimination in personal law. Court reiterated the validity of the Shah Bano judgment. The Muslim Personal Law Board, an intervenor, questioned the authority of the court to interpret religious texts.

The Court concluded that the Act does not, in fact, preclude maintenance for divorced Muslim women, and that Muslim men must pay spousal support until such time as the divorced wife remarries. However the Court held that if the Act accorded Muslim divorcees unequal rights to spousal support compared with the provisions of the secular law under section 125 of the Criminal Procedure Code, then the law would in fact, be unconstitutional. Further the Supreme Court construed the statutory provision in such a manner that it does not fall foul of articles 14 and 15 of the Constitution of India. The provision in question is Section 3(1)(a) of the 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 means that reasonable and fair provision and maintenance is not limited for the iddat period (as evidenced by the use of word "within" and not "for"). It extends for the entire life of the divorced wife until she remarries.

Issue of diversity: Different religions & customs

India is a diverse country, has different religion and different religion has different customs in it, so will there be any uniformity left, India has a uniform set of rules for everything then why not personal laws.

Danial Latifi v. Union of India, the most controversial question which has been politically significant in the recent past in the background of a secular constitution and the concept of welfare state is that whether or not a divorced Muslim woman after divorce post iddat period is entitled to maintenance by her husband or not. The iddat period is generally considered to be three menstrual courses if she is subject to menstruation, three lunar months if she is not subject to menstruation or if she is pregnant at the time of her divorce the period between her divorce and the delivery of child or the termination of pregnancy, whichever is earlier. Generally it is taken to be three months.

A divorced Muslim woman is entitled to maintenance from her husband during the period of iddat, after that Muslim personal law though nowhere expressly permits maintenance after divorce but it also does not prohibit, specifically or impliedly, it anywhere. In fact interpretation of the Holy Quran shows that the Islam as a religion calls for providing maintenance to a divorced woman on a reasonable scale, and this is a duty of every righteous god fearing person.

In the Shah Bano case the Quran board passed some other law, how could a court's order be subjected.

Impact on personal laws

The perception that a uniform civil code would necessitate changes in only Muslim personal law is quite incorrect. As women's organisations and others have repeatedly pointed out, personal laws governing different communities in India have a common feature — they are all gender-biased.

For instance, the law pertaining to succession among Hindus is unequal in the way it treats men and women. A truly modern, secular, non-discriminatory and progressive code would, therefore, mean changes in all personal laws. The concept of the "Hindu undivided family", at least insofar as it pertains to succession, would also obviously have to undergo a change under a uniform civil code. Similarly, Muslim, Christian and other personal laws too would have to change. This also explains why historically changes in personal law have been resisted not just by one community, but by the ruling orthodoxy in all of them.

Problems in enforcing Uniform Civil Code

Since it involves a change in laws, an obvious prerequisite is sufficient support for the move within Parliament. The reason this has been difficult to achieve has been because most parties have held the view that the reform of laws pertaining to the personal domain is better done by pressure for such change from within communities rather than as an imposition from above. Further, for historical reasons, the demand for a uniform civil code has acquired communal overtones which have overshadowed the innate merits of the proposal.

To put the delay in perspective, however, it should be added that Article 44 of the Constitution is by no means the only directive principle to have not been implemented more than half a century after it was laid down. Most directive principles continue to remain pious doctrines rather than the law of the land.

Dispute post 1985

The debate for a uniform civil code, with its diverse implications and concerning secularism in the country, is one of the most controversial issues in twenty-first century Indian politics. The major problems for implementing it are the country's diversity and religious laws, which not only differ sect-wise, but also by community, caste and region. Women's rights groups have said that this issue is only based on their rights and security, irrespective of its

politicization. The arguments for it are: its mention in Article 44 of the Constitution, need for strengthening the unity and integrity of the country, rejection of different laws for different communities, importance for gender equality and reforming the archaic personal laws of Muslims—which allow unilateral divorce and polygamy. According to Qutub Kidwai, the Muslim Personal laws are “Anglo-Mohammadan” rather than solely Islamic. The Hindu nationalists view this issue in concept of their law, which they say, is secular and equal to both sexes. In the country, demanding a uniform civil code is seen negatively by religious authorities and secular sections of society because of identity politics. The Sangh Parivar and the Bharatiya Janata Party(BJP)—one of the two major political parties in India, had taken up this issue to gain Hindu support. The BJP was the first party in the country to promise it if elected into power.

Goa is the only state in India which has a uniform civil code. The Goa Family Law, is the set of civil laws, originally the Portuguese Civil Code, continued to be implemented after its annexation in 1961.

In September 2003, in an interactive session in PGI Chandigarh, then President A. P. J. Abdul Kalam supported the need of Uniform Civil Code, keeping in view the population of the country.

Sikhs and Buddhists objected to the wording of Article 25 which terms them as Hindus with personal laws being applied to them. However, the same article also guarantees the right of members of the Sikh faith to bear a Kirpan.

In October 2015, Supreme Court of India asserted the need of a Uniform Civil Code and said that, “This cannot be accepted, otherwise every religion will say it has a right to decide various issues as a matter of its personal law. We don’t agree with this at all. It has to be done through a decree of a court”.

Opinion of the Supreme Court

The supreme court is quite helpless on this issue it has many a times stated that Supreme court cannot direct the Parliament to pass the UCC, previously in the year while hearing a case pertaining to whether a Christian has the right to bequeath property to a charity, the court regretted the fact that the state had not yet implemented a uniform civil code. This is not the first time that the apex court has expressed itself in favour of a uniform civil code or taken a dim view of the government’s and legislature’s inability to bring it into being. There have been other occasions like during the Shah Bano case and later in the Sarla Mudgal case where too the apex court has come out strongly in favour of the enactment of a uniform civil code. However, none of these comments are binding on the executive or the legislature and do not amount to orders. At best, they exert some moral pressure on the Indian state to move towards formulating a uniform civil code.

The Supreme Court in the judgment said that

“If you want to have a uniform civil code have it, you want to follow the uniform civil code, follow it. But you must take a decision soon,” a bench headed by justice Vikramjit Sen told solicitor general Ranjit Kumar.

In the above case Albert Anthony has challenged the validity of Section 10A (1) of the Divorce Act, 1869, saying the two-year mandatory period of separation was biased against the Christian community amounting to “hostile discrimination”.

The Kerala and Karnataka high courts had declared the provision unconstitutional but Christians living in the other states were being denied benefit of the two judgments, he said.

Granting relief to unwed mothers who did not want to reveal the name of their child’s father in a guardianship case, justice Sen had in July strongly advocated such a code.

Recently a very recent PIL was also filed by Ashwini Kumar Upadhyay, a lawyer and a member of the BJP which was quashed by the court and the three-judge bench led by Chief Justice T S Thakur said the apex court’s observations for enacting a common law can only be in the “realm of hope and expectations” but a mandamus (directive) cannot be issued to the government.

The bench, also comprising Justices A K Sikri and R Banumathi, observed that it is for a person, aggrieved over violation of rights and discrimination due to a personal law, to move the court and somebody from a different community or religion cannot seek a common code alleging vices.

“The law is well-settled on this issue. We have taken a view that these are decisions to be taken by Parliament. How can we issue a mandamus in a matter like this? We can understand your commitment to achieving the constitutional goal but this cannot be done through a mandamus from the court,” the bench told senior advocate Gopal Subramaniam.

Reasons for Delay of Uniform Civil Code

Since it involves a change in laws, an obvious prerequisite is sufficient support for the move within Parliament. The reason this has been difficult to achieve has been because most parties have held the view that the reform of laws pertaining to the personal domain is better done by pressure for such change from within communities rather than as an imposition from above. Further, for historical reasons, the demand for a uniform civil code has acquired communal overtones which have overshadowed the innate merits of the proposal.

To put the delay in perspective, however, it should be added that Article 44 of the Constitution is by no means the only directive principle to have not been implemented more than half a century after it was laid down. Most directive principles continue to remain pious doctrines rather than the law of the land.

Secularism versus Uniform Civil Code

The spine of controversy revolving around UCC has been secularism and the freedom of religion enumerated in the Constitution of India. The preamble of the Constitution states that India is a “secular democratic republic” This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God.

It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an individual.

In **S.R. Bommai v. Union of India**, as per Justice Jeevan Reddy, it was held that religion is the matter of individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the State by enacting a law.

In India, there exist a concept of “positive secularism” as distinguished from doctrine of secularism accepted by America and some European states i.e. there is a wall of separation between religion and State. In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European countries went through the stages of renaissance, reformation and enlightenment and thus they can enact a law stating that State shall not interfere with religion. On the contrary, India has not gone through these stages and thus the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State.

Articles 25 and 26 guarantee the right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution. Article 25 also empowers the State to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Articles 25 and 26 is not limited to matters of doctrine of belief. It extends to acts done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion.

UCC is not opposed to secularism or will not violate Article 25 and 26. Article 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 secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The UCC will not and shall not result in interference of one’s religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law.

Codification

The biggest obstacle in implementing the UCC, apart from obtaining a consensus, is the drafting. Should UCC be a blend of all the personal laws or should it be a new law adhering to the constitutional mandate? There is a lot of literature churned out on UCC but there is no model law drafted. Many think that under the guise of UCC, the Hindu law will be imposed on all. The possibility of UCC being only a repackaged Hindu law was ruled out by Prime Minister Atal Bihari Vajpayee when he said that there will be a new code based on gender equality and comprising the best elements in all the personal laws.

The UCC should carve a balance between protection of fundamental rights and religious dogmas of individuals. It should be a code, which is just and proper according to a man of ordinary prudence, without any bias with regards to religious or political considerations.

Working of UCC and the Indian scenario

How foolproof will be the UCC? Will there be more abuse and less obedience of UCC? Will UCC have negative effect on the society? Such questions are bound to be raised after the implementation of the UCC. All laws are formulated to be obeyed, but they are abused. This does not mean that law should not be implemented. Similarly, there is a great possibility of the UCC being abused, but this should not eschew the Parliament from enacting the UCC; the social welfare and benefits resulting from the implementation of UCC are far greater.

While explaining the reason for including Article 44 in the Directives Principles, it was observed,

“When you want to consolidate a community, you have to take into consideration the benefits which may accrue to the whole community and not to the customs of a part of it. If you look at the countries in Europe, which have a Civil Code, everyone who goes there forms a part of the world and every minority has to submit to that Civil Code. It is not felt to be tyrannical to the minorities.”

Some legal experts argue that progressive law is welcomed but a suitable atmosphere must be created in which all sections feel secure enough to sit together and cull out the most progressive of their personal laws. But this can be answered by an example of Hindu law. When the Hindu Code Bill, which covers Buddhist, Sikhs, Jains as well as different religious denominations of Hindus, was notified, there was a lot of protest. And the then Law Minister, Dr. Ambedkar, had said that for India's unity, the country needs a codified law. In a similar fashion, the UCC can be implemented, which will cover all the religions, whether major or minor, practiced in India and any person who comes to India has to abide by the Code.

Not many know that a UCC exists in the small state of Goa accepted by all communities. The Goa Civil Code collectively called Family Laws, was framed and enforced by the Portuguese colonial rulers through various legislations in the 19th and 20th 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.

The philosophy behind the Portuguese Civil Code was to strengthen the family as the backbone of society by inculcating a spirit of tolerance between husband and wife and providing for inbuilt safeguard against injustice by one spouse against the other.

Commenting that the dream of a UCC in the country finds its realization in Goa, former Chief Justice of India Y.V. Chandrachud had once expressed hope that it would one day “awaken the rest of bigoted India.

3. Constitutional Mandate

Introduction

The Constitution is the basic law of the land. It designs the structure, powers and functions of the state and rights and duties of its citizens. In fact “it is a document having a special sanctity which sets out the framework and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs”. Constitution is necessary for several reasons. According to Gilchrist “the Constitution of a state is body of laws, written or unwritten which determines the organisation of the Government, the distribution of powers to the various organs of the Government and the general principles of which these powers are to be exercised”. The Constitution guarantees certain fundamental rights and freedoms to the people of the country to enable them to realise their expectations and fulfill their aspirations. It lays down values for the state in the form of directive principles to carry its vision, mission and commission.

In India we have a Constitution of our own. The very important fact is that the Constitution of India is not the product of a political revolution alone but of the continuous efforts, research and deliberations made by eminent scholars and prominent representatives of the people. Rome is not built in a day so is the Indian Constitution. The struggle for independence was thus over by 15th August, 1947. One of the important tasks undertaken by independent India was framing of a new Constitution. To fulfill this objective the Constituent Assembly appointed various committees to deal with different aspects of the Constitution. On August, 29th, 1947 a Drafting Committee of 7 members was set up under the chairmanship of Dr. B.R. Ambedkar. The Draft Constitution was submitted and published in January, 1948. The people of India were given 8 months to discuss the draft and propose amendments. As many as 7,635 amendments were proposed and 2,473 were actually discussed. The Constituent Assembly held 11 sessions. The Draft Constitution was considered for 114 days. In all, the Constituent Assembly sat for 2 years 11 months and 18 days. The net result is the Constitution of India. The New Constitution of India was adopted by the Constituent Assembly on 26 November, 1949 and came into force on 26 January, 1950.

Constitutional Mandate

The basic principles or constitutional mandates can be traced from the preamble, fundamental rights, directive principles of state policy, other relevant portions of the Constitution and judicial precedents. The Preamble is an introduction to the Constitution to understand the intention, purpose and object of making of the Constitution. The Constitution-makers gave to the preamble “the place of pride”. In re Berubari union’s case the Supreme Court held that the preamble is a key to open the mind of the makers, and shows general purpose for which they made several provisions in the Constitution.

The object behind incorporation of fundamental rights in Chapter-III of the Constitution is to establish a Government of law and not of men. In short to say to establish the rule of law. The idea of welfare state can be achieved only if the Government makes an endeavour to implement the objectives enshrined in the Preamble and Directive Principles of State Policy. The Supreme

Court and High Courts in India played a dynamic and significant role in expanding the horizons of the Constitutional principles. The basic Constitutional principles are discussed here under:

- **Justice:** Justice includes social, economic and political. The high ideals of the Constitution of India are adumbrated in its preamble which proposes to secure to all its citizens, trilogy of Justice-social, economic and political. The same ideals are incorporated in the Directive Principles of State Policy. Here the state is under an obligation to strive to promote the welfare of the people by securing social order. Social justice is governed by valid moral principles. In a pluralistic society like India the main problem is not of equality and equal freedom to all, but the problem is that certain classes of people have to be given some preferential treatment in access to public resources which is called access to justice.
- **Liberty:** For any organised society civil liberties are a pre-condition. Liberty includes thought, expression, belief, faith and worship. Every citizen has right to express his conviction and opinion freely by words of mouth, writing, printing, pictures or any other mode of representation. It helps an individual to attain self-fulfillment and discovery of truth. Article 19 of the Constitution guarantees to the citizens of India the following six freedoms : Freedom of speech and expression, Freedom of assembly, Freedom to form association, Freedom of movement, Freedom to reside and settle and Freedom of profession, occupation, trade or business. These six freedoms are not absolute but subject reasonable restrictions provided under the Constitution.
- **Equality:** Article 14 states that “ the State shall not deny to any person equality before the law and equal protection of laws within the territory of India”. The nature of this right is not mere individual right of admonition to the State. This right is of two ways, 1)Equality before law and 2) the Equal protection of laws. It is similar to Article 7 of Universal Declaration of Human Rights. “Equality before law” is derived from English Common Law. It is a negative concept. It says that there is no special privilege in favour of any person, all are equally subject to the ordinary law of the land. It is developed from the Dicey’s concept of ‘Rule of law’. Whereas “Equal protection of laws” is a positive concept taken from 14th amendment of the USA Constitution. It means, among equals the law should be equally applicable and equally administered. That means ‘like should be treated alike’. Therefore Article 14 permits reasonable classification of persons, objects and transactions. In E.P Rayappa’s Case the Supreme Court held that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned with traditional and doctrinaire limits. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence”. Article 14 provides equality in general whereas Articles 15 & 16 provides equality in specific cases like access to public places and public employment by recognising the doctrine of compensatory discrimination.

The constitutional policy of compensatory discrimination is based upon the notion that certain social groups in India were inherently unequal and were victims of social discrimination from the time immemorial. Therefore, they need special protection in public life and public employment.

- **Fraternity:** The object of fraternity is to ensure dignity of individual and the unity and integrity of the nation. We are living in a pluralistic society with different languages, religions, cultures, denominations, etc. Fraternity reflects all these groups should live in perfect harmony and brotherhood. i.e. unity in diversity.
- **Sovereignty:** The term sovereignty has been drawn from the Latin word ‘supernus’ which means paramount or supreme. To say that the state (country) free to conduct its administration and formulate its social and economic policies according to the requirements. It can resolve differences between various groups or associations within its jurisdiction. Further, the state is free to conduct its external relations as it likes without interference from any outside power or authority. The Indian Constitution accorded such sovereign authority to India i.e. Bharath.
- **Socialist and Secular:** Socialism stands for equality. In the capitalistic society social and economic inequalities will prevail. Socialism is a means for the removal of extreme inequalities by preventing concentration of wealth in the hands of few. Further, socialism ensures distribution of public resources to all sections of people irrespective of their status.

Ours is a secular Constitution by accepting the concept of unity in diversity. In fact in a secular country, there is no state religion, state is neutral in the matters of religion and state shall not promote or propagate any religion either directly or indirectly. State’s interference in religion is only to coordinate the secular matters of the religion.

- **Democratic and Republic:** In democracy the ultimate sovereignty is vested with the people. In democracy the citizens of the country shall participate in making of the law of the country either by directly or through their representatives. Indian democracy is a representative democracy.

The term Republic signifies that there shall be an elected head of the state who will be the chief executive of the country. Republic is against the concept of hereditary monarch. The President of India, unlike the British King is not a hereditary monarch. But an elected person chosen for a limited period.

- **Supremacy of the Constitution:** The founding fathers of the Constitution made the Indian Constitution supreme law of the land. The concept of the ‘king can do no wrong’ is not applicable to Indian democracy. All functionaries of the state are under the Constitution and subject to the Constitution. This supremacy is conferred through the will of the people.
- **Judicial Review:** The most important function of judiciary under a written Constitution is to keep all authorities within the constitutional limits. This function is performed by way of judicial review. Article 13 provides for the ‘judicial review’ of all legislations in India, past as well as future. This power has been conferred on the Supreme Court and High Courts under Articles 32 and 226 respectively to declare any law unconstitutional, if it is inconsistent with the provisions of Part-III of the Constitution.

Constitutional Mandates and Welfare State

The purpose of the fundamental rights is to protect individuals and to ensure certain basic, inalienable human, and natural rights against any arbitrary action of the state. The purpose of the Directive Principles is to fix certain social and economic goals to be achieved by the State to promote welfare of the people. The Directive Principles of State Policy enshrined in the Constitution from Article 36 to 51 may be classified into three groups and described as under:

Social and Economic Character

- i. Social order based on justice.
- ii. Equal right of men and women to adequate means of livelihood.
- iii. Distribution of ownership and control of material resources of the community to the common good.
- iv. To ensure that the economic system should not result in concentration of wealth and means of production to common detriment.
- v. Equal pay for equal work for both men and women.
- vi. To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocation unsuited to their age or strength.
- vii. That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment.

Social Security Character

- i. Participation of workers in management of Industries.
- ii. Right to work, education and public assistance in certain cases.
- iii. Just and human conditions of work.
- iv. Living wage for workers.
- v. Provision for child care and education to children below the age of six years.
- vi. Duty to raise the standards of living and improvement of health.
- vii. Promotion of educational and economic interest of weaker sections.
- viii. Equal justice and free legal aid to economically backward classes.

Community Welfare Character

- i. Uniform Civil Code
- ii. Organisation of agriculture and animal husbandry
- iii. Protection and improvement of forests and wild life
- iv. Protection of monuments and places and objects of national importance
- v. Separation of Judiciary from Executive
- vi. Promotion of International Peace and Security
- vii. Organisation of Village Panchayats

4. Conversion and its effects

Religion is a very sensitive and personal aspect of individual's life and the constitution of India guarantees the freedom of conscience and religion to people of all denominations. Thus, a person is free to profess any faith or relinquish his faith of birth and convert to another religion. However, in view of the diversity personal laws in our country, upon apostasy the personal law of the convert words. conversion of a spouse gives to the non-convert spouse, a ground for matrimonial relief.

The logic underlying the grant of relief in case of conversion is. however, not merely a legal one, viz., that after conversion, the convert will be governed by different personal law, but also because conversion could mean a radical change in the personality of the convert. The event is often very much akin to a breakdown of the marriage and goes to the root of conjugal life of the spouses.

I. Marriage

Conversion could have the following legal effects on the marriage:

- i. An automatic dissolution of the marriage.
- ii. A ground for divorce at the instance of the non-convert.
- iii. A ground for divorce at the instance of the convert.

As to, (i), though there is no statutory provision to that effect in any of the personal laws, under the Islamic law, a husband who renounces Islam is an apostate, and as such,, his marriage with his Muslim wife is dissolved ipso facto According to Mulla, apostasy of the husband from Islam operates as a complete and immediate dissolution of the marriage.

As to (ii), conversion is a ground available for divorce and judicial separation at the instance of the non-convert under all the personal law statutes.

As to (iii), the converts Marriage Dissolution Act, 1866, which seeks to legalise, under certain circumstances, the dissolution of marriage of converts to Christianity, is the only relevant statute.

Statutory Provisions

Hindu Law

Under s. 13(1)(ii) of the Hindu Marriage Act, 1955:

Any marriage solemnized, whether before or after the commencement of this Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has ceased to be a Hindu by conversion to another religion.

This is available as a ground for judicial separation also. prior to 1976 the grounds for divorce and judicial separation were different and change of religion was not a ground for judicial

separation. After the 1976 Amendment, the grounds available for divorce and judicial separation are the same and hence conversion is now a ground for judicial separation as well.

In **Madanan seetha Ramalu v. Madanan vimla**, a husband was granted divorce on his wife converting to Christianity after marriage.

It is important to note that conversion does not automatically affect a marriage tie, and secondly, it is the non-convert spouse only who can seek matrimonial relief on this ground. A spouse who gives up Hinduism and adopts another faith cannot go to the court and seek any relief on this ground. This is banned even under the provisions of s. 23(1)(a), viz., that the petitioner cannot be allowed to take advantage of his or her own wrong or disability.

The issue whether a marriage performed under the Hindu Law can be dissolved under the Hindu Marriage Act, 1955 by a spouse who ceases to be a Hindu by conversion to another religion, was considered by the Delhi High Court in **Vilayat Raj v. Sunita**. The parties were Hindu at the time of marriage in 1978. They separated in 1980 and in 1981 the husband filed a petition for divorce under s. 13(1)(ia) on the ground of cruelty. In the petition he set his religion as Mohammedan at the time of filing the same. The wife challenged his right to file a petition under the Hindu Marriage Act, 1955, on the ground that he was no longer a Hindu, while the lower court accepted the wife's plea, the High court reversed the order. It held that the relevant date on which both parties are required to be Hindus in order to file petition under the Hindu marriage Act, 1955, is the date of marriage and not the date of filing the petition. The court observed:

“conversion does not per se operate to deprive the party of rights which may be otherwise available to him under the Act. [A] party is not entitled to take advantage of his own wrong or disability and gain from a situation which he has brought about resulting in detriment to other spouse. But if the aggrieved party does not seek dissolution on this ground does it debar the other party from approaching the court on other grounds, which are available to him under the Act? It would appear not.”

The court made reference to the provisions of the Dissolution of Muslim marriage Act, 1939. Under S.4 of the Act, renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself, operate to dissolve her marriage. However, by a proviso to the section, it is clarified that after such renunciation or conversion, the woman shall still be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in s. 2. According to the court, even though the Hindu marriage Act, 1955 does not make any specific provision to this effect, the converted spouse would nonetheless be entitled to file a suit under it because he is not seeking any relief on the ground of conversion nor is his case based on it in any manner. Thus, it implies that even upon conversion a converted spouse can go to court and seek relief under the provisions of the Hindu Marriage Act, 1955, provided he does not base the relief on the ground of his conversion.

As to whether a spouse who has consented to the other's conversion is estopped from seeking relief on this ground, the court answered in the negative in **Suresh Babu v. V.P. Leela** a husband converted to Islam and the wife file a petition for divorce on this ground. The husband's defence was that since she had given him such permission she was not entitled to seek divorce on this ground. The court however, rejected her argument and held that even if she had given her consent, the act of renunciation of Hinduism and conversion to Islam is a

matrimonial wrong and a ground for divorce under s. 13(1Xii) of the Hindu Marriage Act, 1955.

Vide proviso to section 23(2) of the Act. when the ground for divorce is conversion of the non-petitioner, then there is no duty cast upon the court to make an effort to bring about reconciliation between the parties. However, in **Bini v. Sundaran K.V**, here the family court granted divorce to the husband on the wife's admission that she had converted to another religion, the same was set aside on appeal by the wife. It was held that even though under the provision of the Hindu Marriage Act, 1955 endeavour for reconciliation was not mandatory but after the enactment of the Family Courts Act, 1984, even in grounds excepted by the Hindu Marriage Act, the family court is bound to make efforts for reconciliation. Passing of decree on mere admission of conversion by a spouse was against the spirit and mandate of the provisions under the Family Courts Act, the court held.

Under the Hindu and maintenance Act, 1956, a Hindu wife whose husband has ceased to be a Hindu by conversion to another religion, has a right to stay separately from him and seek maintenance.

Muslim Law

Prior to the enactment of the Dissolution of Muslim Marriages Act, 1939 (DMMA), conversion of either spouse had the effect of automatic dissolution of the marriage under the Muslim personal Law. The present law however, is different and it makes a difference between a Muslim wife who was before her marriage a non-Muslim and a wife who was a Muslim before marriage. In the former case, the conversion of the wife would result in instant dissolution of the marriage. In other words, if a woman converts to Islam from some other faith and then re-embraces her former faith, then it will have the effect of immediate dissolution of her marriage. To take an example, a Muslim male marries a woman who was a Hindu prior to marriage but she converts to Islam and gets married. After sometime, she renounces Islam and converts to Christianity. This will not ipso facto dissolve the marriage, because she has not re-embraced her former faith, viz., Hinduism. Had she re-embraced Hinduism, it would have had the effect of immediate dissolution of the marriage bond. Thus, in **Munavvar-ul-Islam v. Rishu Arora**, a Hindu wife converted to Islam at the time of marriage. On her re-conversion back to her original faith viz Hinduism, her marriage stood dissolved. Her case falls under the second proviso to s. 4 of the Act, and the pre-existing Muslim Personal Law under which apostasy of either party to a marriage ipso facto dissolves the marriage, would apply.

In the case of a Muslim married woman, her renunciation of Islam or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. Thus, if she remarries before the dissolution of her marriage, she can be prosecuted, bigamy. However, even after such reconciliation or conversion, the woman is entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in s. 2 of the Act, viz, unknown whereabouts of the husband, neglect, imprisonment of husband, failure to perform marital obligations, impotency, insanity, and cruelty. She can also exercise her option of puberty by repudiation of the marriage. The husband's apostasy is not a ground on which she may seek dissolution.

If a husband renounces Islam, the marriage stands automatically dissolved. Thus if his wife remarries even before the expiry of iddat, she will not be guilty of bigamy under s.494 of the Indian Penal Code, 1860. in **Abdul Ghani v/s Azizul Huq**. a Muslim man and woman got married. After sometime, the husband embraced Christianity but reverted to Islam during the wife's iddat. Before the expiry of the iddat period, however, the wife got married to another man. The first husband thereupon filed a complaint against the wife, her father and her second husband under s.494. It was held that no offence had been made.

The court remarked:

Whatever view be taken of the uncertain status of the parties during the period of iddat and however illegal and void under Mohammedan law the second marriage of the woman during the period of iddat may be, there is no foundation for any charge under. s 494 of IPC against her. Her second marriage is not void by reason of its taking. place during life of prior husband but by reason of special doctrine of the Mohammedan law of iddat with which the Indian Penal Code has nothing to do.

II. Right to Inheritance in the Property

In Hindu law a person who converts to another religion from Hinduism could not inherit from the Hindu relation. His/ her right of inheritance comes to end on conversion. Similarly, under Muslim law a convert from Islam to some other religion is prohibited from inheriting the property. The stated rule has been abrogated by the Caste Disabilities Removal Act, 1850. This provision can also be called Freedom of Religion Act. The above rule has removed all the disabilities pertaining to the conversion of religion. It is subject to other law made by the concerned authorities.

III. Right to claim Maintenance

Under Section 24 of the Hindu Adoptions and Maintenance Act, 1956 conversion from Hinduism restricts the right of convert to claim maintenance. But if a husband renounces Hinduism, his Hindu wife becomes entitled to separate residence and maintenance from him under Section 18 (2) (f) of Hindu Adoption and Maintenance Act, 1956.

In Muslim law, if a person converts to other religion, it affects a forfeiture of the pre-existing maintenance rights. When a husband renounces Islam, the marriage comes to an end and the wife can claim maintenance from husband during iddat period.

IV. Guardianship rights

In guardianship court always looks upon the welfare of the child. As per Section 13 of Hindu Minority and Guardianship Act, 1956 welfare of the child is of paramount consideration. So whenever the parents convert to another religion, this factor is taken into consideration while appointing person as guardian. If a mother converts to other religion, it does not affect her right to guardianship till the time her conversion does not come in between the welfare of the child.

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Bibliography:

https://www.academia.edu/3354551/Family_Courts_-_Objectives_and_Functioning

<https://lawtimesjournal.in/uniform-civil-code/>

<http://egyankosh.ac.in/bitstream/123456789/38768/3/Unit-5%20pdf>

<http://www.legalserviceindia.com/helpline/conversion.htm>

<https://bnblegal.com/article/conversion-religion-effects/>

WWW.BNWJOURNAL.COM