

# **The imperative for a Uniform Civil Code in India.**

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## **ABSTRACT**

The fundamental obligation of the state to endeavour to secure a Uniform Civil Code for India enshrined in Article 44 of the Indian Constitution remains unfulfilled though subject to continuing and heated debates since 1950 . Such code if realised would only fulfill the egalitarian secular ideology of the Constitution. Uniformity in civil laws would only augment the concept of national solidarity and equitable justice. The paper stresses upon the meaning and implications of a common civil code for India, the historical perspective, legislations on personal laws, Constituent Assembly debates on uniform civil code, constitutional scheme for it in a land of diversity, the real and the underlying need for it , the legislative efforts towards it post constitutional mainly, and the role of judiciary in not letting it take an absolute back seat in the country where governments come and go by constantly reminding them of the pious goal which they have to fulfill. Educational maturity and awareness, integrity of character and sense of oneness has to bypass superficial diversities in a democratic secular and republic country. A common criminal code reigns over diverse personal law punishments in India. Same should be done in the field of civil laws via an evolutionary process of reform, codification and simplification of the existing personal laws. Laws should be dynamic living up to the latest modern conditions of life and simple too . To have a common civil code for the citizens is to have a real rule of law submerged in the fragrance of justice- real, patent and empowering. A strong urge for broad secular commitment and pious resolution among all quarters of a thriving democracy like India- legislative, executive, judiciary and the people and their conjoint will can only aid in realising the constitutional goal of a common civil code.

### **Meaning and Implications**

The term ' Uniform Civil Code ' implies the idea of unification of various personal laws of different communities within the framework of uniform value system embracing marriage,

divorce, maintenance, inheritance and other civil laws of a plural society.<sup>1</sup> V.R Krishna Iyer remarks that uniform civil code is an elective and progressive corpus juris with an Indian flavour which abounds a formative, pro active relative policy to establish an integrated society where civil laws reflect a sense of basic secularity, social homogeneity and national identity. In this sense it is an evolutionary manifestation of cultural values, historical experience and contemporary socio economic realities.<sup>2</sup> Article 44 of the Indian Constitution requires the state to secure for the citizens a uniform civil code throughout the territory of India. In *Sarla Mudgal Vs Union of India*<sup>3</sup> the Supreme Court had directed the Prime Minister to take a fresh look at Article 44 of the Constitution which enjoins the state to secure a uniform civil code which according to the court is imperative for both protection of the oppressed and promotion of national unity and integrity. The court directed the Union Government through the Secretary to Minister of law and Justice to file an affidavit by August 1995 indicating the steps taken and efforts made by the government towards securing a uniform civil code for the citizens of India. The above direction was given by the court while dealing with a case where the question for consideration was whether a Hindu husband married under Hindu law after conversion to Islam without dissolving the first marriage could solemnize a second marriage. The court held that such a marriage would be illegal and the husband could be prosecuted for bigamy under section 494 of the Indian Penal Code. The court held that since 1950 a number of governments had come and gone but they had failed to make any efforts towards the implementation of constitutional mandate under Article 44 of the Constitution. Justice Kuldeep Singh said that Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of a secular nature and therefore they can be regulated by law. No religion permits deliberate distortions declared the judges. Much apprehension prevails about bigamy in Islam itself. Many Islamic nations such as Syria, Tunisia, Morocco, Pakistan and Iran have codified their personal law to check its abuse. He pointed out that even in America it had been judicially acclaimed that the practice of polygamy is injurious to 'public morals.' In the Indian context he opined that it can be regulated by the state just as it can prohibit the practice of Sati in the interest of public order.<sup>4</sup>

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1. P.B. Mukherjee, *The Critical Problem of the Indian Constitution* (1987).

2. B.R. Krishna Iyer, *Valedictory address of the seminar on Constitutional heritage- Role of the lawyers and legal Institutions* by Legal Education and Research Centre, Patiala House March 9, 1979.

3. 1995 3 SCC 635.

4. Dr J.N Pandey (*Constitutional law of India*), Central law Agency, at page 453.

The framers of the Indian Constitution in the situation of lack of consensus on the point left it for future governments to provide for a uniform civil code for the country. Unfortunately even after decades the nation still remains divided into watertight compartments in many aspects of life due to the existence of personal laws based on religion. According to Ashwinder Singh says it is a matter of regret that Article 44 of the Constitution has remained a dead letter and there is no evidence of any official activity for framing a common civil code for the country. On the contrary this goal which appeared feasible in the early phase of Independence has become a distant dream after so many years of Independence with the official statement that the situation is not ripe for formulation and implementation of Uniform Civil Code.<sup>5</sup>

### **The Concept of Uniform Civil Code - A Historical Perspective.**

The study of Hindu legal history shows that during Hindu period there was no interference of the state with Hindu law. They enjoyed complete immunity and the whole affairs were regulated by their personal laws. Hindus regarded law as an integral part of their religion, the prime reason behind this line of thought was that the sages being lawgivers were divinely inspired who had sufficient spiritual efficacy to evolve practices to regulate the human conduct from time to time.<sup>6</sup> The ancient hindu sages not only made new laws but also made provisions for repealing certain existing laws in practice.<sup>7</sup> Also the entire Hindu law in ancient India was almost identical with the Hindu conviction and uniformity of law was a general rule rather than an exception.

In the medieval period Arabs were the first Muslims who came to India in the 8th century and settled down in the Malabar Coast and Sindh. Beginning of the 12th century saw the downfall of the Hindu period when foreign invaders of Turkish race attacked and defeated local Hindu kings. The reasons for the gradual disintegration of Hindu Kingdom were many but the most prominent one was the want of a proper leadership which could unite Indians against the common enemy.<sup>8</sup> With the establishment of Muslim rule in India, Muslim law also became the enforceable law through the machinery of state but for Muslims only. Mohammedan rules did not interfere with the civil aspect of Hindu system of law. Thus two separate systems of personal laws came in vogue in India to be modified later only by the Britishers. As regards criminal law it was administered mostly by tribunals which made

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5 Ashwinder Singh, Uniform Civil Code: A Constitutional Vision (1987) at page 1.

6. U.C. Sarkar, Hindu law: Its Character and Evolution JILI (1964) 1984 at page 213.

7. B.S. Nagarjun, Some glimpses on Indian History Culture and Civilization, (1976)at page 191.

8. S.J. Patel, Legal and Constitutional History of India (1958) at page 25.

no distinction between the Hindu and Muslims or their laws.<sup>9</sup> It is patent that during the Muslim rule all non Muslims were governed in matters of their personal laws by their own traditional and customary laws. If both parties were Hindus in matters of property and other temporal concerns the Pandits or Hindu lawyers resolved them.<sup>10</sup> So the purely Islamic civil code governing the law of inheritance, marriage and other analogous matters of the Muslims did not at all apply to the Hindus who were allowed to be governed by their own laws on these topics.<sup>11</sup> Conclusively the effect of the judicial policy of the Muslim rulers was the creation of a parallel system of civil law, one governed exclusively by Hindu religion and the other by the Muslim and the introduction of Islamic criminal law in place of Hindu system of punishment.<sup>12</sup> When the British established themselves in India initially they continued the Muslim pattern of judicial administration but gradually after consolidating their position they introduced their own system to deal with the various matters of civil law and also completely changed the criminal law. But for the specific topics of Hindu and Muslim laws which were deeply interwoven with religion the policy of non interference was adopted. After all such interference was not at all conducive to their friendly trade with Hindus or Muslims or their political stability.<sup>13</sup> The rule regarding the application of the Hindu law to Hindus and Muslim law to the Muslims extended to His Majesty's Court of Judicature at Calcutta, Bombay and Madras established in 1774. Lord Cornwallis and Warren Hastings's policy was to preserve both Hindu and Muslim law. Many attempts were made by British to ascertain and define the principles of Hindu and Muslim law. Some Acts were also passed to ensure efficient administration of justice by providing for application of personal laws of Hindus and Muslims with respect to certain matters.<sup>14</sup> A time came when the imperative for codification of laws was directly felt. This was due to the chaos created by the legal system of India in the early 19th century. Different laws were applied by village, district and provincial courts. In many matters of civil nature Hindus and Muslims were governed by their own laws, non-Hindus and non-Muslims by other set of laws. Apart from the above factor movement for codification was hastened because of firstly the creation of an All India Legislature and formation of a Law Commission by Charter Act of 1833. Second was the influence of Bentham. The Chairman of the first Law Commission was Lord Macaulay who was a fore

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9. V.A. Smith, The Oxford History of India (1925) at page 118.

10. Epochs in Hindu Legal History (1958) at page 23.

11. Supra Note 7 at 45.

12. E.M.S. Nambooripad, Towards Common Civil Code, Mainstream (Annual) November 14, 1992 at page 130.

13. S.J. Patel, Legal and Constitutional History of India (1958) at page 121.

14. D.S. Shrivastava, Religious Freedom in India: A Historical and Constitutional study (1st edition) at page 219.

runner for the cause of codification of Indian laws but without wounding the feelings of Indians. He opined that respect must be paid to the feelings generated by differences of religion, of nation and caste. He batted vehemently for the principal "for uniformity where you can have it -diversity where you must have- but in all cases certainty".<sup>15</sup> Second Law Commission was the child of Charter Act 1853. It also put forward policies and principles of future codification in India. Third Law Commission in 1861 was appointed for preparation of draft code regarding civil law in India. The fourth law Commission in 1879 was appointed with a goal of codifying all the substantial laws prevailing in India. By the combined and enthusiastic efforts of the various law Commissions criminal laws were codified and the Indian Penal Code 1861, and the Criminal Procedure Code 1898 came into force and became applicable to all Indians irrespective of their religions. But there was no common civil code. As regards codification of criminal laws the effort repealed the prevailing respective Hindu and Muslim law of crimes. The Indian Contract Act 1872 abridged the Hindu and Muslim law in respect of matters governed by the Act. Previously the Hindu law of Contract applied to Hindus and Muslim law of Contract applied to the Muslims.

#### **Legislations on Personal Laws.**

Many laws were passed with the objective to introduce reforms in the old Hindu law much to the ire of a section of conservative and orthodox Hindus who considered this action as an attack upon their religious practices. Hindu Widows Remarriage Act legalized remarriage of Hindu widows, Hindu Women's Right to Property Act 1937 conferred on Indian women better property right. In 1929 Child Marriage Restraint Act was passed to discourage the ill practice. Many other Acts were passed in this direction. As regards Muslim law the legislative activity concerning it was scarce. As compared to Hindu law only a few changes through legislation were made in Muslim law because of the misleading notion that Muslim law is totally sacrosanct and opposed to change, in fact devoid of flexibility and dynamism.<sup>16</sup> The British passed the Muslim Personal law (Shariat) Application Act 1937 and Dissolution of Muslim Marriage Act 1939. In 1937 the Muslim Personal law Application Act was passed to abrogate the few Hindu customs observed by communities like Khojas, Bohras and Memons who were converts from Hinduism and brought these communities under the Muslim Law. In 1939 The Dissolution of Muslim Marriage Act was enacted which was based on Maliki School and more liberal than the Hanafi School.<sup>17</sup>

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15. Ibid, p148.

16. Tahir Mahmood, An Indian Civil Code and Islamic law(1976) at page 53.

17. Courts followed the Hanafi School and denied the right of judicial separation to the anguished wife.

### **Constituent Assembly Debates and Uniform Civil Code.**

In 1947 idea of a uniform civil code was mooted in the Constituent Assembly. Its Muslim members pleaded for amendments that would allow a community to keep its personal law. Also they asserted that the secular state of India should not via laws encroach upon the beliefs and practices of any religious communities. Mr Nasir uddin Ahmed said "What the British in 175 years failed to do, what the Muslims in the course of 500 years refrained from doing , we should not give power to the state to do all at once."<sup>18</sup> It was also argued that such a large and diversified country cannot possibly be stamped with one kind of anything. The dissenting members moved amendments depriving the state from interfering with personal laws of not only Muslims but other communities as well but only to be rejected by the Constituent Assembly. On the other hand Mr. Masani a Parsi, Rajkumar Kaur a Christian Shrimati Hansa Mehta a Hindu were the only three members of the Constituent Assembly who wanted the Uniform Civil Code to be justifiable fundamental right. Sri K.M. Munshi pointed out that Article 19 permitted legislation covering secular activities. He argued that a uniform civil code was essential for a unified and secular country. Shri Alladi Krishnan Swamy Iyer also opined that by ending a series of compelling communities in the country and seeking factors which would hold the welding together of the country the nation would transform into a real unified one.<sup>19</sup> He further held categorically that a civil code ran into every department of civil relations, to the law of property ,to the law of marriage to the law of succession, to the law of contract and similar matters. So what could be valid objections to the general statement that 'state shall endeavour to secure a Uniform Civil Code throughout the territory of India'.<sup>20</sup> Same were the arguments of Dr. Ambedkar who said it was futile to hold that Muslim law had been an immutable law which they had been following from ancient times. And if it was found necessary that for the purpose of evolving a single code applicable to all citizens irrespective of their religion if certain portions of Hindu law were incorporated into the new code the Muslim community should not be offended the moot reason being the common suitability for all.

### **Constitutional Scheme of Uniform Civil Code – Some Relevant Views.**

India is a land of diversity and Hindus, Muslims and Christians etc. follow their own personal law in family matters which to a great extent differ from one another. Chetna Gale and Govind kelkar opine that instead of serving the purpose of unity and integrity of the country such type of laws unfortunately encouraged separatist tendencies which were



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18. Clause 39 of the draft of the Directive Principles of the State Policy read, "The State shall endeavour to secure for the citizens a Uniform Civil Code."  
19. C.A.D. Volume VII.  
20. Ibid.

detrimental to any growing democracy.<sup>21</sup> E.M.S Namboodiripad was right when he said that a common civil code was the manifestation of equalization in family relations among persons who held different religious views but were like situated on temporal affairs. The process was a slow one but surely as the broad community got enlightened on secularism, the bigoted resistance to a common system of family laws would weaken and vanish. The field of common civil code needed an approach of reason and persuasion, of sober reflection and reform, of functional utility and of true national integration and subtle sensitivity.<sup>22</sup> Article 44 provides that the state shall endeavour to secure for the citizens of India uniform civil code throughout the the territory of India. The words 'endeavour' and 'secure' indicate that state can apply the liberal approach as well as can adopt intermediary arrangement for securing a uniform civil code for the citizens of India. Also the word 'state' used in Article 44 is of wide amplitude and has a close reference to article 12 of the Constitution. All authorities functioning under the Constitution are under pious obligation to make efforts towards one civil code.<sup>23</sup> Neeraj Bhatnagar said , " the fathers of the Constitution it is evident were quiet alive to the Himalayan difficulties likely to be faced on the way to the enactment of a uniform civil code .They therefore directed the state to endeavour to secure it. They wanted both the legislature and executive to lead the nation jointly to the era of a 'Uniform Civil Code'.<sup>24</sup> S.V. Krishna Mohan further said , "The very purpose of our democratic system is to remove all kinds of barriers i.e .caste ,creed, religion and to provide with a law which may help in maintaining a rule of law in the indian society".<sup>25</sup> The government however has adopted and maintained an overcautious approach to the mandate of article 44. The reason behind the governments indifference and apathy are not difficult to be discovered . It has repeatedly made itself clear that it is fully alive to the strong feelings against the concept of uniform civil code prevailing among certain sections of the citizens.<sup>26</sup> That the government does not wish to stifle these sensitive and reactionary feelings is evidenced by the fact that the stress in the Constitution is on making endeavour 'to secure' and not 'on enacting' a common civil code. Accordingly the state can discharge its constitutional obligation by an evolutionary process.<sup>27</sup> By directing the state to endeavour to secure such a code Article 44 has placed a greater responsibility on the executive organ of the state rather than the legislature to prepare the citizens to gradually accept a uniform civil code willingly and without compulsion.

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22. Towards Common Civil Code, Mainstream (Annual), November14, 1992 at page 130.

23. Neeraj Bhatnagar, The Scope of Uniform Civil Code : Some theoretical and Practical Considerations,

(1983), page 189.

24. Ibid.

25. Policy framework for an Ideal Indian Civil Code : Need for Affirmative Action, Journal of Socio Economic Studies, Volume VI, August 12, 1980 at page 57.

26. Partha. S. Ghosh, Uniform Civil Code: History of a Controversy, Mainstream, page 17, July 8, 1995.

27. R. Mahadevan, The Multiplicity of Personal laws and the Idea of a Common Civil Code, Blitz, January 12, 1990.

But according to Catherine Clementine even after many years of enforcement of the Constitution government had done nothing in this direction. She asked about what steps if any had the government taken to educate the masses on the social ideals enshrined in Article 44? Had it launched any program to build up public opinion in favour of that ideal? Did it adopt any measure to mitigate the influence of the obscurantist forces in the society? The answer to all these moot questions are in the negative.<sup>28</sup> The vehement opposition of a uniform civil code and of the family law reform by the Muslim masses is the result of the governments failure to make them understand these issues in their true perspective.<sup>29</sup>

### **The Practical Necessity.**

Discriminatory provisions in statutes in matrimonial in India are many. A Christian can marry non Christian only as per Christian rites<sup>30</sup>. Also the Act provides different rules for the solemnization of marriage for Indian Christians and other Christians.<sup>31</sup> Under the Dissolution of Muslim Marriages Act 1939 if a wife who is a Muslim by conversion reconverts to her original non Islamic faith the marriage remains intact. In the latter case the Act remains applicable resulting into the application of Muslim law to a non Muslim. To top up the woe remains of the judicial reluctance to interfere with old laws of the minorities. Here sadly we are reminded of Madras High Court's ruling that the difference between divorce rights of men and women under the Indian Divorce Act 1869 did not violate the Constitution.<sup>32</sup> If we talk about religion based discrimination under modern Hindu law we see that under the Hindu Marriage Act 1955 post marriage conversion by either spouse furnishes to the other spouse a ground for divorce.<sup>33</sup> Under the Hindu Succession Act 1956 children born to a Hindu after he or she has adopted another religion are disqualified from inheriting the property of a Hindu relative unless of course they have reconverted to Hinduism before the opening of succession<sup>34</sup>. So innocent persons suffer by reason of the accident of their birth which unfortunately may have taken prior to their parents or a higher ancestors conversion. Parallel to this there is a clear inducement for the reversion for the sake of obtaining property. Under the Hindu Minority and Guardianship Act 1956 such parents can no longer act as natural guardian of their minor Hindu children if they have renounced Hinduism<sup>35</sup>. Under the

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28. Personal laws and Complex Structure of Indian Society: A socio- legal Survey, Sujata Book Service, Ansari Road, Darya Ganj, New Delhi (1973) page 82.

29. Asgar Ali Engineer, Political and Reform Movements, Mainstream), August 31, 1996.



30. Section 4, Christian Marriage Act 1872.
31. Part VI SS 60-65.
32. Pappi Kutty Vs Sankanhi, A.I.R. 1953 Madras 910 .
33. Sec 13(i) (ii).
34. Sec 26.
35. Sec 6 Proviso Cl(b).

Hindu Adoption and Maintenance Act 1956 a married male needs his wife's consent for adoption only if she remains Hindu but it is not so if she had changed her religion.<sup>36</sup> Where the father himself has changed his religion the right of adoption can be exercised by his Hindu wife even without consulting him.<sup>37</sup> Adoption of only a Hindu child is allowed under the Act.<sup>38</sup> Right of adopting a son is denied to a person who has a Hindu son, grandson or great-grandson but the existence of a non Hindu son, grandson or great grandson is no bar.<sup>39</sup> In the matter of maintenance a non Hindu wife cannot claim it from her Hindu husband either while living with him or living separate.<sup>40</sup> But on the other hand can on the ground of a husband's conversion to non Hindu religion enjoy the right to live separate from him but also can avail of right to be maintained by him.<sup>41</sup> We find religion based discrimination the secular laws on marriage and succession. For example in case of Mitrasen Vs Maqbool Hasan.<sup>42</sup> X and his wife both Hindus embraced Islam. X died leaving two sons A and B the former being born before and the latter after their parents conversion. Muslim law governed the succession of the estate of X and his Muslim son Z inherited the estate to the exclusion of the Hindu son Y. So discrimination was not made on the ground of religion only but due to different set of laws governing different communities. Due to this two persons who were otherwise equally placed were nevertheless unequally treated and that too by law which should never be biased. As regards guardianship of minors in Githa Hariharan Vs R.B.I.<sup>43</sup> Supreme Court had ruled that mother and father both would be treated as a natural guardian of the minor child. Muslim law never recognises the mother as the natural guardian even after or in the absence of the father. Section 9 of Hindu Adoption and Maintenance Act dealing with persons capable of giving in adoption is also discriminative. The father on ceasing to be a Hindu would lose the right to give his child in adoption and that if mother ceases to be a Hindu her consent would no longer be necessary for giving away her child in adoption by the father. Such laws which discriminate on the ground of religion alone prejudicially effect the freedom of religion. Likewise Section 18 of the Hindu Adoption and Maintenance Act 1956 provides that a Hindu wife who is otherwise entitled shall not be entitled to separate residence and maintenance from husband if she ceases to be Hindu by conversion to another religion.

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36. Sec 7 (Provision).  
37. Sec 9 (3).

- 38. Sec 10 (i).
- 39. Sec 11(i).
- 40. Sec 18(1) and (3).
- 41. Sec 18 (2)(f).
- 42. A.I.R. 1930 P. C., 251.
- 43. A.I.R. 1998 SC 1149.

### **Legislative Efforts to wards Unification.**

The pre-independence legislative efforts comprise of (a) The first Civil Code on marriage 1872, (b) the Amending law of 1923, (c) The Muslim Personal laws (Shariat), (d) The Dissolution of Muslim Marriage Act 1939. The first civil code on marriage Bill was introduced by Sir Henry Maine. In it was proposed that any two citizens of India may have freedom of adopting the proposed secular law in place of their respective personal laws. The Bill was opposed from various quarters. James Stephens succeeded Sir Henry Maine and former agreed to restrict the application of the Bill only to those Indians who were not Hindus, Buddhists, Jains, Muslims, Christians or Parsis and enacted and enforced the Bill on March 22 1972. This was the first though a very small step towards unification of marriage laws in India. On February 26, 1912 B.N. Basu introduced a Bill seeking an amendment in the Act of 1872 in order to make its provision available to any two Indians intending to marry irrespective of their religion or faith. Mohammad Ali Jinnah was also in favour of secularising the family law but the amending Bill was rejected by the legislature. On the other hand Special Marriage Amendment Act 1923 made it possible for Hindus to marry either under their personal law or under the Special Marriage Act 1872 without renouncing their religion. As regards Muslims they resisted major changes in their personal laws henceforth protective provisions like Section 2 and Section 129 of Transfer of Property Act 1882 which expressly laid down that nothing in its provisions would affect any rule of the Muslim law of gift. Similarly the Indian Trust Act enacted in the same year made it clear that a Muslim law of wakf would remain unaffected by its provisions.<sup>44</sup> In 1925 Indian Succession Act specifically exempted all Muslims from the application of its provisions relating to inheritance, domicile, consanguinity, affinity and testamentary succession.<sup>45</sup> The Shariat Bill was introduced in the legislature seeking to make it compulsory for all the followers of Islam in the country to adhere to Islamic in place of local customs and usages in matters of marriage, divorce, inheritance, family relations and personal property etc. But in matters of wills, legacies and adoption the Muslims had the discretion to choose between customary law and Islamic law.<sup>46</sup> The Act had the object to raise the status of Muslim

women who were subject to the whims of the uncertain customary laws. Also it would ensure certainty and definiteness in mutual rights and obligations of the public.

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44. The Indian Trust Act 1882, section 1.

45. Sec 4(20)(1)(b), 23, 29 (1),58(1),221(2), 212(2), 213(2), 218 (1).

46. The Muslim Personal law Shariat Application Act 1937, Section 3.

Then came The Dissolution of Muslim Marriage Act 1939 whose object was to provide succor to the Hanafi women who could obtain a decree from the court dissolving her marriage in case the husband neglected to maintain her, deserted her, persistently made her life miserable and unprovided for.

#### **Post Constitutional Legislative Efforts.**

In place of a complete civil code only piecemeal steps had been taken in compliance with the mandate of Art 44 of the Constitution. For example in 1952 a new marriage bill was introduced in Parliament which was considered by the then law minister C.C. Biswas the first step towards the attainment of the objective of a uniform civil code and a great step forward in social legislation.<sup>47</sup> The Special Marriage Act 1954 came into force on January 1954. Any two Indians whether living in India or outside, whether professing same or different religions or no religion at all could contract a marriage under it. Even an existing marriage under whatever law it was originally solemnized could be turned into a secular marriage by registration under the new law if it fulfilled the conditions laid down in the Act. The Act also specified the grounds on which the court could dissolve marriage whether originally solemnized under its own provisions or contracted under any of the various personal laws but later registered under the provisions of the Special Marriage Act. As regards the Hindu Code Bill there were at the time at the time of its introduction in the parliament concerns as to why other personal laws were not being taken in the same ambit of reform. Consequently the personal law of the Hindus in isolation was secularised and the Muslim Personal Law was indefinitely postponed and therefore the object of Article 44 was defeated in the germinal stage only. Pandit Nehru was sure that Muslims were not ready for secularization of their personal law and he wanted to first prepare the ground for it. Till today Hindu laws have been changed via reformative amendments and the suitable pitch mentioned by Pandit Nehru is still unfound. The ideal of uniform civil code got a stunning blow when the Chief Secretary to the Govt of India testified before the Supreme Court in case of Mohd Ahmed

Khan Vs Shah Bano Begum<sup>48</sup> that in view of the Indian government the situation is not ripe for providing uniform civil code for Indian people and that Government of India has no plans whatsoever in the near future to provide for the same. The Indian legislature was moving in the path of implementation of the philosophy of Article 44 only to be stopped by the Shah Bano judgement and after that the passing of Muslim Women Protection of Rights on Divorce Act 1986 which marked the beginning of dark and hopeless phase in the history of

47. Law Minister's statement on the Bill given in the Rajya Sabha on July 28, 1952.

48. A.I.R.1985 S.C. 945.

efforts of Indian parliament in securing a uniform civil code for the country. In Sarla Mudgal Vs Union of India.<sup>49</sup> Supreme Court enquired from Indian Government about the efforts made by it in securing a uniform civil code. Again Chief Secretary to the Government of India lamented that situation was not ripe.

#### **Judicial Response and Activism.**

Parse Venkateshwar Rao opined that a Constitution as the fountainhead of all national institutions must response to the concrete social realities and multitudinous diversities remping in the social cybernetics<sup>50</sup> Here we are reminded of the enlightening observation of Justice Krishna Iyer which is as follows-"A Constitution is the documentation of the founding fathers of a nation and the fundamental directions for their fulfillment. So much so, an organic, not pedantic approach to interpretation must guide the judicial process. The healing art of harmonious construction and not the tempting game of hair splitting promotes the rhythm of the rule of law.<sup>51</sup> Judicial activism in such perspective should embrace every phase and feature of life- social, economic, moral, legal or political and do real justice and valuable justice. As regards judicial activism in relation to the question of uniform civil code in Shah Bano Case<sup>52</sup> Chief Justice Y.V. Chandrachud regretted that Article 44 remained a dead letter with no evidence of any official activity for framing a common civil code for the country. Similarly in Sarla Mudgal Vs Union of India Supreme Court requested the Government of India to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.<sup>53</sup> In B. Chandra Manil Kyamma Vs B.Sudarshan<sup>54</sup> court held that that second marriage is void from its inception and conversion to another religion cannot make it a valid one. Court tried to give practical shape to the basic tenets of Hindu and Muslim religion which has prohibited second marriage and favored monogamy. In Sarla Mudgal Vs Union of India<sup>55</sup> court rightfully held that a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.This position has not

changed after coming into force of the Hindu Marriage Act 1955 Apostacy does not end the marriage but can be a ground for divorce or judicial separation under the Hindu Marriage Act. In *Shrimati Johra Khaton Vs Mohammed Ibrahim*<sup>56</sup> Supreme Court by ignoring the

49. A.I.R.1995 S.C.1531.

50. Court in Crossfire, Indian Express, September 25, 1994.

51. *Fateh Chand Vs State of Maharashtra* A.I.R. 1997 S.C 1825.

52. *Supra* Note 48, as per Chandrachud C.J. (para 32).

53. AIR 1995 S.C 1531, at page 1539 (para 36 and 37).

54. (1989) A.P.L., H.L.R 183(1983) I D.M.C.109.

55. *Supra* Note 49.

56. A.I.R. 1981 S.C. 1243.

orthodox Muslim law covered the case of appellant under section 125 of the Criminal Procedure Code. This decision was a sound effort on the part of the judiciary towards one civil law. In *Shah Bano Begum's case*.<sup>57</sup> Apex Court held that there was no conflict between the provisions of Sec 125 CrPC and those of the Muslim Personal Law on the question of Muslim husbands obligation to provide maintenance for a divorced wife who was unable to maintain herself ignoring the text of personal law. By ignoring the texts of personal law and giving overriding effect to the general law of the land Supreme Court had via judicial activism encouraged the goal of one common civil code as intended by our Constitution drafters. In *P. Jayalakshmi vs Ravichandran*<sup>58</sup> similarly court held that maintenance under section 125 CrPC is an independent right and the pendency of the suit under Hindu Marriage Act in the family court cannot be treated as a bar for its maintainability outside the jurisdiction of family court. There were plethora of cases hence forth in which section 125 to 128 CrPC were applicable in the case of divorced Muslim women. Various activist and progressive judicial decisions had time and again made an objective and positive response to encourage the environment of uniform legislations for all communities. Judiciary has no doubt always made earnest efforts to ensure the implication of the mandate contained in Article 44 of the Constitution. It has time and again held that religious practices and customs are subject to state regulations especially to end discriminations wherever met with.

### **The Present Scenario.**

The issue of the uniform civil code has strongly emerged into India's political discourse recently mainly because many Muslim women affected adversely by the personal laws have been knocking on the door of Supreme Court to uphold their fundamental right to equality liberty and dignity as provided to them by the Constitution. The Union Law Ministry has requested the Law Commission to examine the matter sincerely in relation to the implementation of a uniform civil code. No doubt if that is done it shall provide equal status

to all citizens, would promote gender parity and support national integration. This would also steer clear or bypass the contentious and cumbersome and highly controversial issue of reform of existing personal laws. Certain quarters harp on the practical difficulties in doing so due to the tremendous cultural diversities in India cutting across the religions, sects, castes etc but demand for justice cannot take back seat in a democratic country. Did not the Hindu sentiment change with changing times motivated by increased awareness of concept of social justice and gender equality? Here we are reminded of how J.B. Kripalani a sociologist had charged the Nehru government with being communal. He said to Nehru,

57. Supra Note 48.

58. A.I.R. 1992 A.P. 190.

"I charge you with communalism because you are bringing forward a law about monogamy only for the Hindu community. You must bring it for the Muslim community. Take it from me that the Muslim community is prepared to have it but you are not brave enough to do it."<sup>59</sup> Some say that a uniform civil code may not be feasible, practical and easy in a large and varied country like India but complete reform and codification of Muslim law is not. The law makers and the judiciary should show the same interest and courage to decide for the welfare of Muslims just as they do for Hindus and Christians in India.<sup>60</sup> One more matter related with uniform civil code is the plethora of misconceptions surrounding it which seemingly makes it a villain in the eyes of many. Considerable number of Muslims are apprehensive that if uniform civil Code is implemented they would be forced to bury the dead and prevented from observing Namaz etc. So the Government should first by sensitization and awareness drives do away with these misconceptions.

India has ratified the International Covenant on Civil and Political Rights 1966 and the International Convention on the Elimination of all forms of Discrimination against Women 1979 and hence is bound to ensure gender justice under its national laws. So the realisation of a uniform civil code in India would not only be in compliance with natural justice, Indian constitutional ethos but also as per provisions and callings of international law. Decades have passed after the framing of the Constitution and yet the ideal under Article 44 is yet to be achieved. Only efforts in this direction intermittently have been from the aegis of our Apex Court which needs support from other quarters in the country as well. And we cannot forget that Goa has a uniform civil code and the rest of the country needs to follow suit. It is not impossible.



**Conclusion**

One nation, one citizenship, one flag and one common criminal code India boasts off. Time is ripe when one common civil code is brought forward and complete justice is done to the nation. Different streams of religion must follow some unified principles in the true spirit of secularism. The state, the court and the will of the people can only by working in unison towards this pious goal reach the final destination where justice, equality and fraternity would rein supreme. A dynamic program of uniform civil code can be framed with the conjoint effort of enlightened intelligentia and informed political action . The countdown must begin immediately to finally implement a master strategy for uniform civil code in india.

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59. The Times of India, October 25, 2016, p 9.

60. Supreme Court refused to give legal sanctity to divorce decree granted by ecclesiastical tribunals in 2017.