

Hindrances in Applicability of Uniform Civil Code

Dr. Maninderjit Singh

Assistant Professor of Law at S.A.S.M College of Law, Patiala

INTRODUCTION

India is the land of multi religions. Personal law is the oldest part of the legal system of India, which governs both the Hindus and Muslims. Hindu Marriage Act, 1955 is the law relating to marriage which is applicable to the majority population of India, constituted of Hindus and of some other minority religions, which is the Act for amending and codifying the laws of marriage among Hindus and other said religions. Ceremonies during a marriage is essential element under this Act and the registration of marriage is optional one. The said act also takes care regarding the matters of divorce and maintenance. Hindu Succession Act, 1956 is for governing succession matters among the Hindus. The Hindu Adoptions and Maintenance Act, 1956 and Hindu Minority and Guardianship Act, 1956 are the laws relating with succession, maintenance and adoption.

Indian Parliament had also enacted Special Marriage Act, 1954, for providing special provisions of marriage, registration of marriage and divorce in the certain other cases. This Act is resorted to by non-Hindus, Hindus and foreigners for solemnizing the marriage through registration, marrying in India, who does not want the ceremonial marriage under their own personal laws. Registration of marriage is compulsory under this Act. Non-Hindus can also obtain Divorce under this Act.

The performance of ceremonies is compulsory under Hindu Marriage Act. It is compulsory to prove the ceremonies for proving a valid Hindu marriage. Even if a marriage is not registered, then also a Hindu marriage is valid on account of proving the proper performance of ceremonies of marriage provided in the Act. Traditions in are exception of the said compulsory condition of performance of ceremonies. Parse Marriage and Divorce Act 1936, which has amended in 1988, is an Act for amending the law of marriage and divorce belonging to the Parse people in India. Christian Marriage Act of 1872 was an enactment for consolidation and amendment of the law regarding the solemnization of marriages among the Christians in India. The Divorce Act, 1869 which was amended in 2001, is also an Act for amending the law regarding divorce and regarding matrimonial causes among the Indian Christians. The Muslim Personal Law (Shariat) Application Act of 1937, The Muslim Women (Protection of Rights on Divorce) Act of 1986, The Muslim Women (Protection of Rights on Divorce) Rules of 1986 and The Dissolution of Muslim Marriages Act of 1939 apply to the Muslims who are living in the India.

When this situation comes to the Hindu Law, we found problem arising regarding the registration of marriages and so, the inability for nullifying the child marriages. Child marriages practically all the religions in India are being accepted and so these marriages cannot be registered for want of fulfillment minimum age condition of the marriage. Our Supreme Court in case Seema vs. Ashwani Kumar directed all the states of India for enacting rules regarding mandatory registration of marriages of all the religions in prescribed time period. This reform worked very positively for checking the child marriages in India, also prevented the marriages performing without the consent of the parties. It also became useful for checking bigamy or polygamy, enabling the women for their rights of the maintenance, residence and inheritance, stopped the husbands from deserting their wives and for making check on the selling of girls under the pretext of the marriage. These are consequences of then on-registration of the marriages which has created huge number of the spouses abandoned in the India, which have been deserted by the non residents of India, who mostly reside abroad. However, the implementation of this aspect of law is still under process.

Additional courts create problem, when this aspect comes towards the Muslim Law. The Indian Supreme Court during the process of case Vishwa Lochan Madan vs. Union of India and ors had issued notices to the government of centre, all the State governments, AIMPLB (All India Muslim Personal Law Board) and some other parties, regarding the matter of existence of Shari at and Islamic Courts in India parallel to each others, which are creating a challenge for the Muslim community.

JUDICIAL PERSPECTIVE

Our Supreme Court has again called for UCC recently. Firstly, The Supreme Court had directed to the Parliament for framing a UCC in 1985 in case titled as *Mohammad Ahmed Khan vs. Shah Bano Begum*¹ which is popularly known in the name of Shah Bano case. In the said case, a poor Muslim wife claimed maintenance under Section 125 of the Code of Criminal Procedure, from her husband, when triple talaq was given to her by her husband. Supreme Court had held that it is right of Muslim women under Section 125 of the Code of Criminal Procedure for getting maintenance from their husband. In this case Court had also held that 44th Article of the Indian Constitution is having remained like a dead letter. Y.V. Chandra chud, at that time Chief Justice of India observed that,

"Auni form civil code will definitely help the national integration cause by removing the different loyalties to the law which are having conflicting ideologies"

Very high level discussions, agitation and meetings were held after the decision of this case. At that time government of India led by Rajiv Gandhi had overturned the consequences of said case by enactment of Muslim Women (Right to Protection on Divorce) Act 1986, which had curtailed the rights of Muslim woman for getting maintenance under Section 125 of the code. Explanation was given by the government for implementation this Act that the Court had only made the observation of enactment the UCC, which is not binding on the Parliament or on the government and that interference with personal laws should not be there, without the demand from within. Second time the Supreme Court had again directed to the government for enforcement of Article 44 in case *Sarla Mudgal vs. Union of India*². There was question in this case that a Hindu male, already married under Hindu law, can perform second marriage, after adopting the Islam religion. But the Court had held that Hindu marriage which is solemnized under Hindu law, can be only dissolved on the grounds only which have been specified in the provisions of Hindu Marriage Act 1955. Marrying again after adopting the Islam would not dissolve the Hindu marriage, by itself under the Act. However second marriage if solemnized after the conversion to Islam is an offence punishable under Section 494 of Indian Penal Code.

Justice Kuldip Singh stated that Article 44 of the constitution has to be taken out from its cold storage in which it is lying since its birth. Honorable Justice referred for the codification of Hindu personal law and had held that,

"More than 80 percent from the citizens have been covered under the codified law and there would not be any justification for keeping in the abeyance, further for introduction of 'uniform civil code' for the citizens belonging to all the religions in India."

The Supreme Court also again sent reminder to government of India for enactment of UCC, which is its Constitutional obligation in July, 2003 in case *John Vallamattom vs. Union of India*³ wherein a Christian priest had challenged Constitutional validity of the Section 118 of Indian Succession Act, while knocking the door of court. John Vallamattom who was a priest belonging from Kerala had filed the writ petition in 1997 stating wherein that Section 118 of the Act was discriminatory for the Christians in India as it was imposing unreasonable restrictions on their act of donating their property for the purpose of their religion or charitable by the will. The then Chief Justice of India V.N. Khare, Justice A.R. Lakshamanan and Justice S.B. Sinha, members of a bench, had struck down the said Section by declaring it as unconstitutional. Chief Justice V.N. Khare stated,

"We would like that the State should make endeavor for securing to all citizens uniform civil code in whole of the country of India as required by the constitution. Article 44 of Indian Constitution is not applied till now, which is the matter great regrets. Parliament has not still framed the uniform civil code in country. The uniform civil code shall help the cause for national integration while removing discrepancies basing on the ideologies."

Thereafter our Supreme Court has again given its verdict in '*Shyra Bano*'⁴ case, vide which practice of triple talaq was declared as unconstitutional.

We have seen that the court has many times made directions to the government for realizing about the

¹ AIR 1985 SC 945

² AIR 1995 SC 153

³ AIR 2003 SC 2902

⁴ Supra note 187

directive principles mentioned in our Constitution and regarding urgency for doing so, so that it can be implemented from the Government.

DISCRIMINATION IN THE VARIOUS PERSONAL LAWS

Discrimination in the various personal laws is mentioned as under:-

- Muslims Laws allow for polygamy but the Hindu, Parsee and Christian laws do not allow the same.
- Marriage under the Muslim law is like a civil contract but under the Hindu Law it is regarded as a sacramental union.
- It depicts from the Definition of a marriage under the Muslim law that there is no requirement of female witness equivalent to the male witness.
- Muslim husbands are allowed to extra judicial divorce, but the Muslim females, males and females belonging to the Hindu, Parsee and Christian religion can only affect divorce through court.
- Muslim Females can only get the divorce through court on some specified grounds. Same is about the position of female Hindus, Christians and Parsees.
- In the Muslim law a wife after divorce is not entitled for the maintenance and only entitled for *Iddat* period. But in The Hindu, Parsee and Christian law there is provision for getting maintenance by a wife after divorce till her death or till her marriage.
- Under the Muslim law, husband's conversion or apostasy from the Islam results the automatic dissolution of the marriage but apostasy or conversion by a Muslim wife does not so. There is different position in Hindu law, if a spouse converts to any other religion, their marriage does not come to an end, but it gives a right to the other spouse for getting divorce. The position under Parsee law is same as of Hindu Law. Under the Christian law, conversion or apostasy do not affect marriage, but if the husband gets marriage again after apostasy then the wife can get the divorce from her husband.
- Under the Muslim law a daughter can inherit the half share of her son. But in Hindu, Christian and Parsee Law position is different.
- According to Muslim law the divorced wife cannot arrange marriage with her previous husband, without getting marriage with some other man and after that he has pronounced the divorce to her or he has died after the marriage. No such like condition is compulsory under Hindu, Parsee or Christian law.
- A Muslim person is not having power under Law for disposing off more than his 1/3 share in the property by way of will. But the laws of other said religions do not cast any such imposition. In the case of joint Hindu family property, only share of a person could be disposed of by will the whole joint family property cannot be disposed of.
- Females under the Mitakshara law are not coparceners. The Coparcenary is consisting only in male members of the family. Such like system is not in the other personal laws. After the passing of Hindu Succession Act 1956, the concept regarding coparcenary is still there. State of Kerala has abolished Mitakshara joint family system in the year of 1975 and state of Andhra Pradesh did as same in 1986 and adopted the Dayabhaga joint family system, in which brother and sister are entitled for equal share in joint property of the joint family.
- The Muslim law, Parsee law and the Christian law are not having any provision for adoption of child, but Hindu law permits the same.
- Acknowledgement of paternity is recognized in Muslim law which clears legitimacy of a child, while other laws are not like the same.
- Under the provisions of Muslim law a child is deemed as legitimate if it was born within the prescribed period of separation of the spouses (after the divorce or the otherwise). There is variation of 10 months from 4 years regarding the same. Indian courts do not recognize to *Hanafi* law, in which separation of two years is permitted, and to shafi law, in which separation of four years is permitted, because it cannot be happened in the due course of nature. All the said three laws do not confer the legitimacy if the period of separation is more than 270 to 280 days.

CODIFICATION

Biggest problem in the implementation of UCC, except from obtaining a common consent, is also the drafting. Whether UCC should be a mixture of the personal laws of every religion or it should be the new law of the constitutional mandate? A lot of literature is there, which is churned out on the UCC but model law is not drafted. Many people think that under the pretext of UCC, Hindu law shall be enforced on all. But this possibility was denied by Prime Minister Atal Bihari Vajpayee by saying that new code will be gender equality based and it will comprise of the best elements from all of the personal laws.

A balance should be carved out in the UCC in between protection of the fundamental rights and the religious beliefs of the individuals. This code should be proper and just according to a common man without any political or religious biases.

CONCEPTUALIZING UCC AND THEMISCONCEPTION OF IT

It worth for analyze that it is practicable or convenient for accommodation the diversified laws and prepare a uniform and regular code acceptable to every community. Article 44 of our Constitution describes the uniform common code to all of the Indians, which was the subject matter of a civil argument in the Chennai. The main point of view of the people talking for such the code is that it is possible in India because Hindus and Muslims had followed “common-customary Hindu civil code” till 1937 very easily. But “the Muslim League British combiner” had divided them by implementing ‘sharia’ on the Muslims through ‘Muslim Personal Law Application (Sharia) Act’.

If we thoroughly examine this matter from the time of Lord Cornwallis till the Act of 1937, we found that a few people from Muslim minority took after the Hindu custom before the Act of 1937. Actually, this segment had right under the laws, for instance, the Mahomedan Inheritance Act (II of 1897) and the Cutchi Memons Act 1920 for deciding on “Mohamed a Law”. Regarding the majority part of the Muslims, there is sufficient evidence and confirmation for showing that they had taken after the Muslim law and not Hindu common code. So, we can say that the contention that we had joined together with the common individual law, is false. Before the Cornwallis Warren Hastings had said in 1772that:-

“...in the matters of marriage, inheritance and other such type of religious affairs, the laws of the ‘Quran’ for the Mahomedans and laws of ‘Shastra’ for the Gentoos [Hindus], shall be always adhered to...”⁵

Even when Indian Penal Code was formulated in 1860, the Muslim personal law was not touched. The above discussions demonstrate that Personal Laws were never looked for bringing together, but the reason behind was not that Britishers had feared from massive explosion. They were very skilful for handling such type of circumstances. Main reason for not implementation the common civil code like the common criminal code is that there is not understood for the need to do so. They feel never needed for wasting their power and vitality for handling the circumstances not productive or fruitful to them. Macaulay has given importance in his account to such circumstance in India while saying that administration need not interfere to personal matters of the people and he say that people know their business better than them.

At the time of making Hindu marriage law, polygamy was avoided in the Hindus in all the sects and all the groups. Has it really reduced the bigamy in Hindus? But statistics are saying the different story. Did it really do for denying the second spouses in their entitled marriages to living arrangement, maintenance, and so on, and denies their pride because they are alluding to in the court procedures as the courtesans, keeps and mistress, who are of without the rights. They have denied their entitlement the existence of their poise and the entitlement for their survival under the Article 21 of Constitution, just saying that Constitution secures the women and individuals of certain class, people not fitting into their system, could be thrown away. The Child Marriage Restriction Act recommending the minimum age of 18 years for the young girls in the Hindus has minimized the child marriages. Again the statistic shows the different story because the youngster marriages among the Hindus are more than the child marriages among the Muslims. Child marriages become less when there enhances the financial status of community and not of because that there is such a law. Hence, it is not incorrect to say that concept of the UCC neglects ground reality of place of the law reforms and is communal.

In case if the UCC is going made hostile and communally vitiated to the minority way, there is possibility that it will carry lots of the contradictions and it will lead to the mess. Our media has also disregarded the landmark achievements by judiciary. There may be a constructive method for reforming the bad laws within the scope of any personal law in it. The real need is not the Uniform Civil Code but consistency of rights in the various religious communities keeping in mind essence of the ‘religious belief’. we can say it as “Reform from Within”, similar to as the Hindu law was reformed, Christian Law was also improved and the Muslim law has also been reformed without any of the major political debate

FOREMOST REASONS WHY INDIA NEEDS A UNIFORM CIVIL CODE

The supporters of a uniform civil code are campaigning even before independence of the India. India remained always the place of multiple colors and the spices. Before independence of 1947, it might have been hard for

⁵Richard Shweder: *Engaging Cultural Differences; The Multicultural Challenge in liberal democracy* (Russell Sage Foundation, New York)

pointing out as to what constituted the India. Fighting with the British rule and thereafter winning the independence helped in creation of this nation which we call 'India'. It was even known during that time that for further uniting India and for making it the real secular nation we shall need the uniform civil code. But even after long time of independence we are not able for doing this. The reasons for not implementation of the universal civil code are complex and it is a different topic in itself, but this all is fate of political will. Our Politicians always play a vote bank politics. They always try for appeasing the different groups and castes instead of making attempt for integrating our nation. We should focus on the positive aspect of the matter Instead the negative. Let us talk regarding the reasons as to why we are in need of a uniform civil code.

IT PROMOTES REAL SECULARISM

There is selective secularism in India right now, meaning thereby that in some aspects we are secular and in some aspects we are not secular. The uniform civil code means it bounds all the citizens of India shall follow the one and same types of law irrespective of their religion. I personally feel it sound and fair for every person of a secular country. A uniform civil code is not meaning it will not allow the people to follow their own religion, but just meaning that everybody shall be treated with the same Law. That would be the real secularism.

The case of *Lata Singh vs. State of Uttar Pradesh*⁶ is an important and landmark judgment in the legal history of our country. In the said case Hon'ble Justice Ashok Bhan and Markandey Katju, JJ had allowed this writ petition under the Article 32 filed by **Lata Singh** for enforcement of her right. She had approached the court for marrying a person of her own choice with her own will, which was allowed by the court.

ALL CITIZENS SHOULD BE TREATED AS SAME

Now we are having personal laws basing upon the different type of religions. It means that the Muslims can marry many wives in India, But a Christian or a Hindu shall be prosecuted for the same act. It is not showing the equality for every citizen. The laws related to marriage, divorce, inheritance, maintenance and land etc. should be one and same for all the citizens of India. We find it the only way for ensuring that all the Indians should be treated equally.

IT WILL EMPOWER THE WOMEN WITH MORE RIGHTS

This code will also help for improvement of the condition of Indian women. Indian society is very much misogynistic and patriarchal by allowing the old prevailing rules for governing the family life issues. We are condemning for mistreatment and subjugation to all the Indian women. The uniform civil code will be helpful for changing these old aged traditions which are not having any place in the modern society, where we can understand that the women should be given the equal rights and they should be treated fairly.

EVERY MODERN NATION HAS OCCUPIED THE PRINCIPLE OF UCC

Uniform civil code is mostly found in modern and progressive nations. It is the sign that this nation is not having any caste and religious based politics. Our economic growth is showing the satisfactory height in all over the world, but our social growth is not having such position. We can say that our social and culture position is standing on a point that we are neither having a modern position nor a traditional. The uniform civil code will help our society for moving forward and taking the India towards the goal of becoming it a developed country.

IT WILL RESTRICT THE RIGIDITY AND ARBITRARINESS OF PERSONAL LAWS

Basically personal laws are the loop hole for exploitation by the people having power. Our Panchayats are continuously giving the judgments which are against the constitution and we are not doing anything about the issue. Human rights are being violated by female feticides and by honor killings in all over the country. We have constituted the alternate judicial system by allowing the personal laws which still operate on the values of thousands years old. The uniform civil code will change these all.

IT WILL HELP FOR REDUCING THE VOTE BANK POLITICS

The uniform civil code will help for reducing the vote bank politics which most of the political parties used to indulge in during the elections. If Law covers all the religions in the same way, there will be fewer chances that the politicians will offer the certain minorities for exchanging their votes. Without a uniform civil code it is detrimental for the true democracy, therefore it has to change.

⁶*Lata Singh vs. State of Uttar Pradesh*(2006) 5 SCC 475

CONCLUSION

The uniform civil code will be helpful for the integrity of the India and it shall be more than scale from it has been ever since the independence. Huge animosity is created by the preferential treatment of law to special religious communities which possibly should be avoided by the uniform civil code. It will be helpful for bringing every citizen of India, despite of caste, tribe or religion, under the one civil code.

From the above discussions we found that there is much need of Uniform Civil Code in India. Indian judiciary had played a fare role in this aspect and given verdicts many times in favor of Uniform civil code. Indian Parliament has also introduced many enactments in this regard despite of many hindrances.