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## CONSTITUTIONALITY OF UNIFORM CIVIL CODE (UCC)

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### Introduction

In civilized countries, the judiciary is given a place of greater significance because the courts constitute a dispute-resolving mechanism. And, in case of written constitution the judiciary has more specific and special role to play. In the countries having written constitution, courts are given power of declaring any law or administrative action, which may be inconsistent with constitution as unconstitutional and hence void.

Judiciary happens to be one of the most important organs in any modern democratic state. It is not only the interpreter of law but also the guardian of rights of the people. It seeks to establish a secular polity founded on social justice.

But at the same time it also guarantees to all persons equally freedom of conscience and the right to profess, practice and propagate religion and to manage their religious affairs and own property and administer property according to law. Although their rights are subject to reasonable restrictions but if they come in the way of the government while implementing the constitutional mandate contained in Article 44 of the Constitution, it is the judiciary who has empowered to decide the dispute between the two.

Though it is quite implicit from the spirit of Article 44 that the State<sup>1</sup> is under constitutional obligation to make earnest efforts towards the establishment of one civil code for all persons yet if these provisions come in direct conflict with related provisions in fundamental rights (Part III).

The courts have not only regulatory power but it has very wide powers to expound the provisions of the Constitution and bring into practice the basic philosophy of the Constitution and bring into practice the basic philosophy underlying the provision.

The conflict between right to religion and provision regarding Uniform Civil Code surfaces in the early days of the working of the constitution. How judiciary has worked as a balancing wheel to preserve the rights and promote the idea of Uniform Civil Code is the subject matter of discussion here.

<sup>1</sup> Article 12 (Part III). Article 36 says that State in Part IV has the same meaning as in Part III.

## Judicial Response to Polygamy

The first case which came to court regarding the conflict between right to freedom of religion and directive towards one civil code was the *State of Bombay v. Narasu Appa Mali*.<sup>2</sup> In this case the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged and was held *intra vires* the Constitution. The Act has imposed severe penalties on a Hindu for contracting a bigamous marriage.

Justice Gajendragadkar opined that the classification made between Hindu and Muslim for the purpose of legislation was reasonable and did not violate the equality provisions the Constitution contained in Article 14. He observed that the validity of the Bombay Prevention of Hindu Bigamous Marriage Act, XXV of 1946 has been challenged principally on two grounds. It is first contended that the personal laws applicable to Hindu and Mohammedans in the Union of India are subject to the provisions contained in part III of the Constitution of India and as such they would be void to the extent to which their provisions are inconsistent with the fundamental rights guaranteed by Part III. It is then argued that in so far as both these personal laws allow polygamy but not polyandry, they discriminate against women only on the ground of sex. If that is so, the provisions of the personal law permitting polygamy offended against the provisions contained in Article 15(1) and as such are void to the extent under Article 13(1). In other words, after the commencement of the Constitution bigamous marriage amongst the Hindus as well as the Mohammedans became void and the Hindus as well as the Mohammedans who entered into such bigamous marriages became liable to be punished under Section 494, Penal Code; and yet, the impugned Act specially provides for the punishment of the Hindus alone; that is how it discriminates against the Hindu solely on the ground of religion.<sup>3</sup>

Though examination of *The State of Bombay v. Narasu Appa Mali*'s<sup>4</sup> case reveals that the High Court favoured the introduction of the Uniform Civil Code and favoured the introduction of the Uniform Civil Code and rightly held that the institution of polygamy was not based on necessity. If there was no son out of first marriage then instead of taking recourse to second marriage the proper course was adoption of a son. As for the contention regarding discrimination between Hindus and Muslims, the court very clearly observed that the classification was reasonable and did not violate Article 14 of the Constitution.<sup>5</sup> The court did not only uphold the validity of the legislation but emphasized that the said legislation must be enforced in its true spirit as an essential step to secure for the citizens a Uniform Civil Code throughout the territory of India.<sup>6</sup>

Another case which came to Allahabad High Court was related to Muslim Personal Law. In the case<sup>7</sup> a very important issue was raised before the court. The petitioner in this case prayed before the court to pass a decree for the restitution of conjugal rights against his first wife. His main contention was that Muslim Personal Law allows second marriage even while first marriage subsists. He contended that he was, therefore, entitled to the consortium of the respondent under his Muslim personal law. The Court through Dhavan J. refused to grant a decree of restitution of conjugal rights, and observed<sup>8</sup> :

In *Shahulameedu vs. Subaida Beevi*,<sup>9</sup> Krishna Iyer, J. while upholding the rights of a Muslim wife to cohabit with her husband who had taken a second wife yet held her entitled to claim maintenance under section 488 of the (old) Criminal Procedure Code. He said that the view that the Muslim husband enjoyed an arbitrary, unilateral power to inflict divorce did not accord with Islamic injunctions. He went on to plead for monogamy among the Muslims. He referred to the Muslim scholarly opinion to show that the Koran enjoyed monogamy upon Muslims and departure therefrom was only as an exception. That is why a

<sup>2</sup> AIR 1952 Bom. 84

<sup>3</sup> *State of Bombay v. Narasu Appa Mali*; AIR 1952 Bom. 84

<sup>4</sup> AIR 1952 Bom. 84

<sup>5</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 87

<sup>6</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom.. 95

<sup>7</sup> *Itwari v. Asghari*, AIR 1960 All 684

<sup>8</sup> *Itwari v. Asghari*, AIR 1960 All 684

<sup>9</sup> (1970) KLT 4

number of Muslim countries<sup>10</sup> have prohibited polygamy. He further observed that a keen perception of the new frontiers of Indian law hinted at Article 44 of the Constitution was now necessary on the part of Parliament and the Judicature.

In *B. Chandra Manil Kyamma vs. B. Sudershan*,<sup>11</sup> the Andhra Pradesh High Court had to decide a very unique case. In this case a Hindu husband who had a Hindu wife contracted second marriage during the first marriage. This marriage was objected by the first wife. Thereafter to escape from the objection of the first wife, they converted to Islam and then remarried according to Islamic customs. The court held that this second marriage is void from its inception and conversion to another religion cannot make it a valid one. The court emphasized that strictly speaking both Hindu and Muslim tenets were against the second marriage during the life time of the first wife and therefore, this marriage is void.

Thus, the court in this case again stressed that second marriage may strictly be prohibited during the subsistence of first marriage. The court tried to give practical shape to the basic tenets of Hindu and Muslim religion which has prohibited second marriage. In this way the judiciary was always in favour of monogamy which is our cultural heritage.

### **Judicial Response to Property and Succession**

In *D. Chelliah Nadar vs. G. Lalita Bai*, the Madras High Court came across the very controversial issue that whether the Indian Christian regarding intestate succession would be governed by the Christian Succession Act, Regulation II of 1092 (Travancore) or Indian Succession Act, 1925. The brief facts of the case were that while the Indian Succession Act, 1865 was enforced in British India, the Travancore Regulation II of 1092, corresponding to 1916 was passed. The main object of this Act was consolidate and amend the rules of law applicable to intestate succession among the Indian Succession Act was passed in the year 1925. The Act was passed with a purpose to consolidate the law applicable to intestate and testamentary succession. The main issue in the case before the High Court was that whether with the coming into force of the Indian Succession Act, 1925, the Indian Christian will be governed by the Act of 1925 of Travancore Regulation II of 1092. The plaintiff submitted before the trial court that he may be governed by the State Law.

But the trial court rejected the plea and held that State law is no more in existence and stands repealed by the Indian Succession Act of 1925. The reading of the Act makes it crystal clear that the State Government under Section 3 of the Act, by an official notification in the official gazettee can exempt the operation of the said act. The reason being that subject-matter lies in the act. The reason being that the subject-matter lies in the concurrent list. Chief Justice Kailasam, while delivering the judgment for the court held:<sup>12</sup> In the case before us both the laws relate to intestate succession. Though the Travancore Regulation is confined to Christians in that State but the field of the legislation succession. Though the Travancore Regulation is confined to Christians in that State but the field of the legislation is the same. The Indian Succession Act has a universal application to the extent provided for under the Act. In the light of Section 29(2) of the Indian Succession Act neither the Travancore Regulation was repealed nor its applications was made inapplicable to Indian Christians in case of intestate succession. Thus taking into account all the facts of the case of Travancore Regulation is a law corresponding to the Indian Succession Act and therefore, the plaintiff would be governed by the Travancore Regulation II of 1092.

Thus in this case the judiciary tried to give full operation to the law which was in existence and avoided the conflict between the two which may not be helpful in the opinion of the court towards achieving the purpose of one common law governing matters regarding succession to the property of a deceased person.

<sup>10</sup> Like Syria Tunisia, Morocco, Pakistan, Iran and Islamic Republic of the erstwhile Soviet Union.

<sup>11</sup> (1989) A.P. I HLR 183; (1989) 1 DMC 109

<sup>12</sup> *D. Chelliah Nadar v. G. Lalita Bai*, p. 70

## Judicial Response to Divorce and Maintenance

The constitutionality of some personal laws was challenged or the court, *suo moto*, discussed the desirability of the enactment of a 'uniform civil code'.

### ***State of Bombay vs. Narasu Appa Mali, AIR 1952 Bom. 84*<sup>13</sup>.**

This is one of those cases where the legislative provisions modifying the old Hindu laws were challenged on the ground of being violative of article 14, 15 and 25 of the Constitution. In this case the Bombay High Court upheld the constitutionality of Bombay Prevention of Hindu Bigamous Marriages Act, 1946<sup>14</sup>. The Act imposed severe penalties on a Hindu for contracting a bigamous marriage.<sup>15</sup> The validity of this Act was challenged on the ground that it violated the freedom of religion guaranteed by article 25, and permitted classification on religious grounds only, forbidden by articles 14 and 15.

These arguments were rejected by, both, Chagla, C.J. and Gajendragadkar, Justice Gajendragadkar did not agree with the opinion that the legislative interference with the provisions as to marriage constituted an infringement with Hindu religion or religious practice. He asserted that a sonless man could obtain a son not only a second marriage but by adoption as well.<sup>16</sup>

A similar issue raised before the Madras High Court *Srinivasa Aiyar v. Saraswathi Ammal*<sup>17</sup> where the validity of the Madras Hindu (Bigamy and Divorce) Act of 1949, which also abolished polygamy among Hindus, was challenged. Challenge to the Act was made on substantially the same grounds on which the Bombay law was attacked. Like the Bombay High Court, the Madras High Court also upheld the constitutionality of the impugned Act, pointing out that the abolition of polygamy did not interfere with the religion because if a man did not have a natural born son, he could adopt one.<sup>18</sup> The High Court observed that the religious practice may be controlled by legislation if the state thinks that in the interest of the social welfare and reform it is necessary to do so.<sup>19</sup>

Again in *Ram Prasad vs. State of U.P.*,<sup>20</sup> almost identical issue was raised before the Allahabad High Court, which followed the decisions of Bombay and Madras High Courts upholding the validity of the statutory provisions prohibiting bigamy among Hindus.

### ***Mohd. Ahmad Khan vs. Shah Bano Begum, AIR 1985 SC 945*<sup>21</sup>.**

In this case the simple issue before the Court was whether the provisions of the Criminal Procedure Code 1973, providing a temporary relief to divorced women to be finally adjusted in their actual entitlement under the personal law applicable, was to apply Muslim women as well.<sup>22</sup> In arriving at its decision that "there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under section 125 (CrPC)..."<sup>23</sup> the court used inflammable obiter dicta which judicial wisdom required to be avoided.

Infact, the fault does not lie with the court only. It was Counsel Danial Latifi,<sup>24</sup> who saw nothing wrong in inviting the Supreme Court to Interpret a certain verse of the *Holy Quran*, and the court naively obliged him. Certainly it could have told him that it was beyond its jurisdiction to interpret or re-interpret that basic religious scripture, especially, when there were established Privy Council rulings warning the courts to

<sup>13</sup> *Narasu Appa Mali Case* (1952)

<sup>14</sup> Act XXV (25) of 1946.

<sup>15</sup> Section provides that 'whoever not being a minor (a minor is a person who is under sixteen years of age) contracts a bigamous marriage shall, on conviction, be punishable with imprisonment, for a term which may extend to seven years and shall also be liable for fine'.

<sup>16</sup> *Sate of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84.*

<sup>17</sup> (1952) Madras 193.

<sup>18</sup> *Srinivasa Aiyar v. Saraswathi Ammal, (1952) Madras 196.*

<sup>19</sup> *Srinivasa Aiyar v. Saraswathi Ammal, (1952) Madras 196.*

<sup>20</sup> AIR 1957 Allahabad 411.

<sup>21</sup> *Shah Bano Case* (1985)

<sup>22</sup> Sections 125 to 127 of Cr. P.C. 1973

<sup>23</sup> *Mohd. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945, 954.*

<sup>24</sup> Senior Advocate Supreme Court, supporting the appellant before the court.

keep away from such an adventure.<sup>25</sup>

What made the things worse was that the learned judge chose to close his judgement virtually declaring that the actual and final solution of the problem he was tackling lay in an immediate enactment of a uniform civil code. He observed that, “a common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.”<sup>26</sup>

The judgement as a whole could thus be read like this: Islam degrades women; Quran negates certain popular Muslim beliefs; therefore all Muslims must be subjected to a uniform civil code by altogether scrapping their personal law'. One may legitimately ask, was it in fact necessary to say all this to decide that the Cr.PC Provision on divorced wives' maintenance did not exclude Muslims from its scope? It is pertinent here to note what an eminent scholar observed about this judgment:

*“The ideas expressed by the Supreme Court at the end of the judgment in respect of the legendary uniform civil code were as un-called for as the attempt to put a new gloss on a Qur’anic verse. The enthusiastic support given by the court to an extremely controversial issue in respect of which the Muslim are awfully sensitive, and that to in a judgment directly concerning the Islamic personal law, is inexplicable. The obiter in the judgment could have been easily avoided without affecting in the least its ratio decidendi.”<sup>27</sup>*

### **Sarla Mudgal vs. Union of India, (1995) 3 SCC 635<sup>28</sup>.**

About a decade after the Shah Bano judgement, the Supreme Court of India handed down another high-voltage judgment in *Sarla Mudgal vs. Union of India* (10 May, 1995), which also became controversial due to its obiter dicta.

The issue before the court was that while the statutory Hindu law did not and the Muslim personal law as in force in India did allow bigamy, could a Hindu husband circumvent the restriction by announcing a sham conversion to Islam? The Court answering the question in “negative” observed:

*“We, therefore, hold that the second marriage of a Hindu husband after his conversion to Islam (without getting his first marriage dissolved) is a void marriage in terms of section 494 IPC.”<sup>29</sup>*

This sensible ratio decidendi is a welcome part of the judgement because the blatant abuse of the true Qur’anic law on bigamy—more often by non-Muslim than by Muslim themselves—is a growing social menace.<sup>30</sup> But what is puzzling about the judgment is that part of the ruling where the court ascribed the problem before it to the plurality of personal laws in the country and stressed the need for a uniform civil code as the remedy. Delivering the main judgment, Justice Kuldeep Singh observed:

“Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and the like matter of secular character cannot be bought within the guarantee enshrined under Articles 25, 26 and 27.

The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslim or the Christians. The Hindu along with Sikhs, Buddhists and Jains have forsaken their sentiments in the case of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a “common civil code” for the whole of India.”<sup>31</sup>

<sup>25</sup> *Aga Mohamed Jafar v. Koolsum Bibi*, (1897) 25 Cal. 9-18, *Baqar Ali v. Anjuman Ara*, (102) 25 All236, 254; 301 A,

<sup>26</sup> *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985, SC 945.

<sup>27</sup> *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985, SC 945.

<sup>28</sup> *Sarla Mudgal Case* (1995)

<sup>29</sup> *Ibid* p. 648.

<sup>30</sup> Tahir Mahmood in the Times of India, 17 June 1995.

<sup>31</sup> *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, 649-650.

**Ahmadabad Women Action Group (AWAG) vs. Union of India 1997<sup>32</sup>.**

In the instant case three writ petitions were filed before the Apex Court as public interest litigation under Article 32 of the Indian Constitution. In the Writ Petition (C) No. 494 of 1996, it was prayed to declare Muslim Personal Law which allows polygamy as void as offending Articles 14 & 15 of the Constitution.<sup>33</sup>

*Maharshi Avadhesh v. Union of India*,<sup>34</sup>

The Supreme Court of India dismissed a writ petition under Article 32 of the Constitution. The reliefs prayed in this case were as follows:

- a) To issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India;
- b) To declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15, and Articles 44, 38, 39, and 39 A of the Constitution of India; and
- c) To direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslims women and against their protection.

The court, again, while dismissing the writ petition observed :

*“That these are all matters for legislature. The court can not legislate in these matters.”*<sup>35</sup>

In *Personal Bansilal Pitti vs. State of A.P.*,<sup>36</sup> validity of sections 15, 16, 17, 29 (5) and 144 of the A.P. Charitable Hindu Religious and Endowments Act, 1987 were challenged. One of the questions before the court was whether it is necessary that the legislature should make law uniformly applicable to all religious institutions and endowments established and maintained by people professing all religions. The Court held :

*“A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. If would, therefore be inexpedient and incorrect to think that all law have to be made uniformly applicable to all people in one go”*<sup>37</sup>

In *State of Bombay vs. Narasu Appa Mali*,<sup>38</sup> (this case has been discussed at length in the beginning of this Chapter), while upholding the validity of the Bombay prevention of Hindu Bigamous Marriage Act, 1946, the Bombay High Court held that:

*“...in a democracy the Legislature is constituted by the chosen representative of the people. They are responsible for the welfare of the state and it is for them to lay down the policy that the state should pursue. Therefore, it is for them to determine what legislation to put up on the statute book in order to advance the welfare of the state”.*

The court also held that “Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all embracing character.” So far as the question of applicability of Part III of the Constitution to the personal laws, is concerned, both Chagla, C.J. and Gajendragadkar, J., were of the opinion that “the personal laws do not fall within Article 13 (I) at all.”

In *Krishna Singh v. Mathura Ahir*,<sup>39</sup> the Supreme Court, while considering the question whether a Sudra could be obtained to a religious order and become a Sanyasi or Yati and, therefore, installed as Mahant of

<sup>32</sup> AWAG Case, 1997

<sup>33</sup> Other relief prayed were: to declare Muslim Personal Law, which enables a Muslim male to give unilateral talaq to his wife without her consent and without resort to judicial process of courts, as void, offending Articles 13, 14 & 15 of the Constitution; to declare that the mere fact that a Muslim husband takes more than one wife in an act of cruelty within the meaning of clause VIII(f) of Section 2, the Dissolution of Muslim Marriage Act, 1939; to declare that

<sup>34</sup> 1994 Supp. (1) SCC 713.

<sup>35</sup> *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 714.

<sup>36</sup> (1996) 2 SCC 498

<sup>37</sup> *Personal Bansilal Pitti v. State of A.P.*, (1996) 2 SCC 510.

<sup>38</sup> AIR 1952 Bombay 84.

<sup>39</sup> (1981) 3 SCC 689.

the Garwaghat Math according to the tenets of the Sant Mat Sampradaya, observed :

*“Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he (judge) could not introduce his own concepts of modern time but should have enforced the law as derived from the recognized and authoritative sources of Hindu law.”*<sup>40</sup>

Thus on the basis of the observations made in its earlier decisions viz., Maharshi Awadhesh, Pannalal, Narasu Appa Mali, Mathura Ahir etc. cases the court came to the conclusion that the issues raised in the instant case i.e. *Ahmedabad Women A Group v. Union of India*,<sup>41</sup> were the matters of state policies with which the courts are not concerned. Hence the writ petitions were dismissed.

## Conclusion

To conclude, the forgoing discussion disclose that the judicial response to encourage the constitutional philosophy of uniform civil code has always been quite praise worthy. But unfortunately the efforts on the part of the legislature shows that nothing has so far been done by this august body to promote the philosophy of Article 44. The objective of uniform civil code can be achieved only if the three organs of the State endeavour to take imitative to put this philosophy into action.

Of course, the personal law of other communities are also neither uniform nor free from other problems. However, the personal law of any minority can not be obliterated while a separate ‘Hindu’ law remains intact.

As regards the substantive issue which the court confronted Justice R.M. Sahai correctly observed that, “much misapprehension prevails about bigamy in Islam.”<sup>42</sup> Islam, infact, makes monogamy as a rule and polygamy only as an exception. The man marrying a second, third or fourth wife, is burdened with the liability of doing justice among all of them. This justice has to be both social and economic.

As far as the order the court, directing the Government of India to file an affidavit within a stipulated time, indicating therein the steps taken and the effort made by the Government of India towards securing, a “uniform civil Code”, is concerned, it is nothing but the violation of judicial restraint envisaged by the doctrine of “separation of power”– which is an inherent characteristic of the Constitution of India.

Thus, it is clearly from the discussion in this chapter, that whenever the constitutionality of any provision(s) of any personal laws was challenged on the ground of being violative of fundamental rights, the court exercised self-restraint and left the matter for the wisdom of the legislature saying that it is matter of state policies, with which the court is not, ordinarily, concerned.

However, it is equally true that on many occasion the court unnecessarily stepped into the shoes of an activist, emphasizing the desirability of the enactment of a ‘uniform civil code’. This happened mostly when the issued involved in the cases did not at all require such incidental observations. Sometimes, even side-stepping the issues involved in the case, the court made un-called for remarks about ‘uniform civil code’.

<sup>40</sup> *Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 699

<sup>41</sup> (1997) 3 SCC 573.

<sup>42</sup> *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, 652.

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