

# Uniform Civil Code A Heedless Quest?

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The necessity or otherwise of a uniform civil code cannot be debated in the absence of a coherent conception of what the ucc will be and what it will do. Although it has urged the government to enact one, the Supreme Court's own judgments reveal the hollowness in its understanding of the ucc. Perhaps, uniformity itself is no answer to the myriad problems of religion-based personal laws.

The writ petition filed in the Supreme Court by Shayara Bano questioning the constitutional validity of the "triple talaq" (Madhukalya 2016) has brought into the public domain once again the debate on the question of a uniform civil code (ucc) for all of India. In such debates, the ucc is put forth as a single solution to the myriad problems of the many religion-based personal laws in India. It is an idea that has received the support of the courts, many organisations working for women's rights, and, of course, one major political party.

It is also complete fiction.

The ucc, as articulated by even its most ardent proponents, is completely devoid of content. Its content seems to be whatever is necessary to make it essential to solve a particular problem that it is posed as a solution to. This is best seen especially in the manner in which it has been taken up by the Supreme Court once every decade for the last four decades.

## Supreme Court Judgments

The first time that the courts spoke of a ucc was when the Supreme Court in *Mohd Ahmed Khan v Shah Bano Begum and Others* (1985: para 32) exhorted the central government to enact a "common civil code" in the interests of national integration. Why the Supreme Court felt the need to mention a "common civil code" on the facts of this case is mystifying, as the law it had to interpret and apply in that case—Section 125 of the Code of Criminal Procedure, 1973—had long been held to apply across the board to adherents of all religions, irrespective of their own personal laws.<sup>1</sup> The Court reiterated the same issue a few weeks later in a slightly different context, that of a marriage between a Christian woman and a Sikh man under the Indian

Christian Marriage Act, 1872 in *Jordan Diengdeh v S S Chopra* (1985). This time, the Court was concerned with the irretrievable breakdown of marriage between the parties and the fact that a divorce could not be granted on this basis alone.

The Court urged the government to come up with a ucc once again a decade later in a public interest litigation seeking to outlaw the practice of Hindu men abandoning their wives, without lawfully divorcing them, and converting to Islam for the sole purpose of marrying a second time (*Sarla Mudgal, President, Kalyani and Others v Union of India and Others* 1995). This time, the justification offered was to prevent Hindu men from converting to Islam for the sole purpose of getting married a second time. Why a ucc is necessary to tackle fraud, beyond existing legal principles and criminal laws, is never fully articulated by the Court. In the *Sarla Mudgal* case (1995: Para 1), the Court explicitly holds up the Hindu Code as the model on the basis of which the ucc should be drawn up.

This was clarified later by the Supreme Court to some extent in *Lily Thomas, Etc, Etc v Union of India and Others* (2000) to say that the Court could not direct the centre to introduce a ucc, but that did not stop the Supreme Court from once again affirming the necessity and desirability of one in *John Vallamattom and Another v Union of India* (2003), this time in the context of succession. A little more than a decade after this, the Supreme Court has once again lamented the absence of a ucc in the context of the guardianship of a Christian child, without going into why a simple change in the Guardians and Wards Act would not suffice (*ABC v The State (NCT of Delhi)* 2015).

Contrary views have also been expressed by the Court on occasion. Justice Sahai's concurring opinion in the *Sarla Mudgal* case and the judgment in *Pannalal Bansilal Pitti and Others v State of Andhra Pradesh and Another* (1996) both concede that while a uniform law may be desirable, it cannot be imposed

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in one go and consensus needs to be built on the aspect.

### On 'Uniformity'

Perusing these judgments, it is obvious that the Court has absolutely no idea what a ucc looks like and what such a code should do. In each case, it has been offered as a panacea for a particular issue with which the Court was faced, as though the only real problem with India's personal laws is not their misogyny or obsolescence, but their lack of uniformity. The Court in all these cases clings to the constitutional directive of Article 44, as if it were a clear articulation of the idea of what a ucc is.

Article 44 is itself laconic. It merely exhorts the state to create a "uniform civil code" for the whole nation. No other part of the Constitution even mentions the ucc. On the other hand, Articles 371A and 371G expressly exclude the applicability of parliamentary law on customary practices unless the legislatures of Nagaland and Mizoram, respectively, give their approval. Likewise, the Sixth Schedule of the Constitution vests exclusive lawmaking power regarding customs and family law to the regional and district councils in tribal areas of Assam, Meghalaya, Tripura and Mizoram. A ucc made by Parliament, therefore, cannot apply to all of India, especially the north-eastern states.

The Constituent Assembly while debating Article 44 (then draft Article 35) also had no clear conception of what the ucc would be. Even those who defend the ucc discuss it in the most general of terms.<sup>2</sup> While rejecting a proposed amendment that a ucc could not impinge on personal laws, B R Ambedkar clarifies that such a code need not necessarily be mandatory, and it would, in fact, possibly be optional (GoI 1999). This would suggest that what Ambedkar really had in mind was something like the Special Marriage Act, 1954 under which persons could choose to get married under that law and thereby be governed by the Indian Succession Act, 1925.

Even the Hindu code, which sought to create a uniform law governing all Hindus, is not uniform in some of the most fundamental aspects of family law. The validity of a marriage is linked to the customs and ceremonies of the particular

community;<sup>3</sup> the inheritance rights of the members of the family is different for communities in Kerala and Tamil Nadu;<sup>4</sup> who is capable of being adopted also depends on the custom and usage;<sup>5</sup> the Hindu Minority and Guardianship Act, 1956 does not automatically apply to members of Scheduled Tribes.<sup>6</sup> The claim that "since Hindus are governed by a uniform law, why not everyone else" falls flat at the very first step—the law is not uniform for all Hindus in the first place. While, no doubt, the Hindu code makes several aspects of Hindu personal law uniform, it leaves custom and local practice undisturbed in several aspects.

Even the much touted example of a ucc, the Portuguese Civil Procedure Code, 1939 applicable to all communities in Goa, is not equally applicable to all communities. It has different rules for Catholics and different rules for all other communities. It even recognised a limited form of bigamy for Hindus (Noronha 2014).

If a ucc is really about "uniformity," it will remove the requirement of religious ceremonies for the validity of marriages, abolish the concept of coparcenary property, and remove all distinctions between converts and non-converts over the inheritance of property. If uniformity in all respects is not desirable, then that is an acknowledgement of the folly of promoting a ucc without understanding the specifics of what it entails. If the goal is to address iniquities in personal laws of different religions, such iniquities must be addressed on their own terms instead of demanding adherence to a ucc.

Whether it is the courts, the Constituent Assembly or even those who are proposing the ucc as a panacea to gender inequality in laws or "national integrity," no one seems to have a clear conception of what such a code would actually look like.

Perhaps, the ucc should be compared to Lewis Carroll's (1950) fabled Snark—no one knows what it looks like or what it is supposed to do. Like Carroll's intrepid crew, we have nothing but a blank paper where there should be a map describing how and where one might find the ucc. A line here about Muslim women's rights, an argument there against polygamy do not make for a "code." The inability of anyone advocating the ucc to come up

with a coherent draft of what they are talking about seems to suggest that the ucc, like the Snark, is a Boojum that will make its finder disappear!

### NOTES

- 1 See, for instance, *Bai Tahira A v Ali Hussain Fissalli Chothia and Another* (1979) and *Fuzlunbi v K Khader Vali and Another* (1980).
- 2 Speeches of Alladi Krishnaswami Iyengar and K M Munshi (GoI 1999).
- 3 Section 7 of the Hindu Marriage Act, 1955.
- 4 Section 17 of the Hindu Succession Act, 1956.
- 5 Section 10 of the Hindu Adoptions and Maintenance Act, 1956.
- 6 Section 3 of the Hindu Minority and Guardianship Act, 1956.

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