



A Study On The Uniform Civil Code In India With Special Reference To Socio- Legal Perspective

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Abstract: The Directive Principles of State Policy are outlined in Part IV of India's Constitution. Although these principles are unenforceable, they are crucial to the nation's governance. Article 44 of the Constitution, which imposes a requirement on the state to develop a Uniform Civil Code, contains one such directive principle. The Supreme Court has issued numerous directives for its execution over the years. But as a result of heavy politics, it remains just a pipe dream. Because there is no single rule that applies to all religious communities regarding personal issues like marriage, divorce, adoptions, etc., separate personal laws apply to each community. These laws, which permit gender discrimination, have their origins and legitimacy in the religious texts and customs of the country.

Index Terms - Essential religious practices, Personal laws,, Right to Equality, Secular activities, Uniform Civil Code.

I. INTRODUCTION

“Injustice anywhere is a threat to justice everywhere”- Martin Luther King

The Constitution of India is the grundnorm which provides all its citizens, Fundamental Rights under Part III and the mechanism to enforce them. Also, Directive Principles of State Policy under Part IV provides for rights which are non-enforceable but the principles laid down are nevertheless fundamental in the governance of the country and it is the duty of the state to apply these principles in making laws. The Fundamental Rights set forth in Part III of the Indian Constitution are the norm and are subject to judicial review. Additionally, Directive Principles of State Policy under Part IV allows for rights that are not enforceable, but the outlined principles are nonetheless essential to the nation's governance, and it is the state's responsibility to use these principles when passing laws. Article 44, which states that "The State must endeavour to secure for the Citizens consistent civil Code across the Territory of India," has one such Directive Principle. Similar to the Uniform Criminal Code, the Uniform Civil Code ("UCC") applies to all groups regardless of their race, religion, ethnicity, caste, or creed.

The Indian Contract Act, Transfer of Property Act, and Code of Civil Procedure, which are uniformly applicable throughout the territory of India, are just a few examples of the various aspects of personal relations that the Civil Code relates to, such as contracts, property, marriage, and inheritance. But there is still a different area of laws that are not consistently applied in addition to these civil laws. The laws that govern a person's family typically no matter where they travel, and which vary for different religions, include laws dealing to marriages, divorces, succession, adoptions, maintenance, etc.[2] The October 1840 Lex Loci Report underlined the need for uniformity in the codification of Indian law with regard to crimes, evidence, contracts, and other areas, but it also suggested that personal laws of Hindus and Muslims be retained outside the scope of such codification. [3]

Some of these rules—particularly Hindu laws—have now been codified, but others still pertain to religious communities as personal laws that have not been formalized. According to Article 44 of the Indian Constitution, the State has an affirmative obligation to adopt a UCC that applies equally to all citizens of India, regardless of their ethnicity, religion, caste, or other characteristics. But despite being in effect for 66 years, it is still just a piece of paper. This essay discusses and analyzes the socio-legal issues of a UCC in India in light of recent rulings.

II. RESEARCH METHODOLOGY

By referencing the Constitution's founding fathers' intentions on the matter, the study analyses whether a UCC is constitutional in India. After that, it explores how judicial activism has affected judicial changes. Additionally, the author poses a few queries and offers justifications. The research paper then strikes a compromise between the rights to religious freedom and equality. The latter section of the paper makes an attempt to address the issue.

III. INFERENCES

1. CONSTITUENT ASSEMBLY DEBATES:

The Sub-Committee of the Fundamental Rights had included UCC as one of the Directive Principles of State Policy. Article 35 of the draft Constitution read: *"The State shall endeavour to secure for citizens a Uniform Civil Code throughout the territory of India"*.^[4] However, it was recommended that while a UCC is highly desirable, its application should be made on an entirely voluntary basis.^[5]

The motion was strongly contested by the Muslim representatives on the ground that interferences in Muslim Personal Laws would amount to infringement of their Fundamental Rights. Mohammed Ismail Sahib, Naziruddin Ahmed, Mahmood Ali Baig Sahib Bahadur and B. Pocker Sahib Bahadur proposed various amendments to Article 35 of the draft Constitution. They sought the insertion of a proviso to the effect of 'nothing in this Article shall affect the personal law of the citizen'.^[6] No community shall be obliged to give up its own personal law^[7] which shall not be changed except with their prior approval^[8].

Alladi Krishnaswami Ayyar convincingly rebutted their arguments by saying that a civil code runs into every department of civil relations to the law of contracts, to the law of property and similar matters. *"How can there be any objection to the general statement here that the State shall endeavour to secure a uniform civil code throughout the territory of India?"*^[9] K.M. Munshi then drew the attention of the House towards the Hindu Law Draft which was before the legislative assembly. He argued that most of the provisions of the new Bill run counter to the injunctions by *Manu* and *Yagnyavalkya*.^[10] He then emphasized that after all we are an advancing society and in a stage where we must unify and consolidate the nation by every means without interfering with religious practices.

Dr. Ambedkar, the principal architect of the Indian Constitution refused to accept the amendments which had been moved to this article. He was strongly in favour of a UCC and argued, *"We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. This country has also practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far."*^[11]

2. JUDICIAL DEVELOPMENTS

In 1985, for the first time in Indian history, the Supreme Court in *Mohammad Ahmed Khan v. Shah Bano Begum*^[12], directed the Parliament to enact a UCC. The court said that it is a matter of regret that Article 44 of our Constitution has remained a dead letter. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. This was reiterated in *Jorden Diengdeh v. S.S. Chopra* wherein the Court was of the view that a legislative intervention was warranted in order to provide for a uniform code of marriage and divorce.^[13] The court in *Sarla Mudgal v. Union of India*^[16] insisted on the need for a UCC and held that fundamental rights relating to religion of members of any community would not be affected thereby.^[14]

After *Sarla Mudgal's* case there appears a slight shift in the judicial trend. The court in *Pannalal Bansilal v. State of Andhra Pradesh* emphasized that a uniform law, though highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation.^[15] In a democratic country like

India which is governed by the rule of law, laws should be made uniform slowly and gradually and not abruptly. The Government should entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation.^[16] The court also clarified that the opinion of the court in *Sarla Mudgal's* case is not binding and is merely a suggestion. But, in the year 2003, Chief Justice V.N. Khare in *John Vallamattom v. Union of India*^[17] again insisted that a uniform civil code will help the cause of national integration by removing the contradictions based on ideologies.

In past few years the courts through judicial activism have made efforts to get rid of gender discriminatory practices which are in disguise of religious practices. More recently on 23rd September 2015, the Gujarat High Court in *Yunusbai Usmanbai Shaikh v. State of Gujarat*^[18] ordered to stop Muslim Polygamy which it termed as "heinously patriarchal".^{[19][20]} After one month in October, the Supreme Court in *Prakash v. Phulavati*^[21] ordered an examination of practices like polygamy and triple *talaq* in Muslim Personal law and declared them "injurious to public morals".^[22] The Supreme Court's latest reminder for implementation of UCC came on 12th October 2015. The court observed that there is "total confusion" due to personal laws governing different religious practices and asked the Centre whether it was willing to implement Uniform Civil Code in the country.^[23]

IV. OBSERVATIONS:

1. Arguments & Counter-arguments

One of the arguments given by the minorities against the enactment of Uniform Civil Code is that it infringes their Fundamental Right to Freedom of Religion. It is their Fundamental Right to *profess, practice and propagate religion* by following their personal laws. But, a valid question arises as to how a practice (like triple *talaq*) may be considered within the purview of religious activity despite the fact that it is not sanctioned by the religious text? In Muslim Law, *talaq-al-bidat* is considered as an impure form of divorce.^[24] There is no sanction in the Quran regarding *talaq-al-bidat* and *shias* do not recognise its validity.^[25] Even though contrary to the Shariat, the *sunnis* follow this form of *talaq* as an irregular form. As a matter of fact, many Muslim countries have reformed their Muslim Personal Laws and abolished gender discriminatory practices like polygyny and triple *talaq*. The practice of having more than one wife is totally prohibited in Tunisia and Turkey and in countries like Pakistan, Bangladesh, Indonesia, Iraq, Somalia, Syria, Egypt, Morocco, Iran it is severely restricted.^[26] Also, the practice of triple *talaq* has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq. In Pakistan and Bangladesh any form of extra-judicial *talaq* is not valid unless confirmed by an Arbitration Council.²⁹ If Muslim countries can reform Muslim Personal Law then why are Indian Muslims living under laws passed in the 1930s?³⁰ The personal laws of other communities including Muslims should be reformed similar to that of reforms in Hindu laws as proposed by 174th Law Commission Report.^[27]

Another argument against the enactment is that the minorities are not ready for its implementation and the call should come from the community only. Even after 66 years of enactment of Article 44 the communities are not ready, then when will they be ready is a question that needs to be answered. Was the Hindu community ready when the Shastric Hindu laws were drastically changed in 1955-56?^[28] If the issue of willingness would be checked before the enactment, then laws dealing with sati, child labour, forced labour, widow remarriage, female infanticide etc. could have never been enacted.

In USA, Australia, UK and other parts of Europe, various minorities including Muslims have accepted the civil laws applicable uniformly to all citizens.³³ Why do minorities in India have such a feeling of insecurity? The answer to that is the issue of UCC has been politicized by the political parties and there is a lack of political courage to bring about change. There is a fear of losing votes of the minorities especially of Muslims and this is the reason why Article 44 is still a dead letter law even after 66 years of enactment.

Another argument against its enactment is that the Personal laws must not be subjected to Part III of the Constitution as the word law in Article 13(4) does not include Personal Laws. In *Harvinder Kaur v. Harmandar Singh*^[29], the court even compared the introduction of constitutional law in personal laws as 'introducing a bull in a china shop.' But, this view was criticised by several jurists. Justice A. M. Bhattacharjee argued that how can a personal law which is enforced everyday by courts not be 'law' especially when 'custom' is included in Article 13 to attract the fundamental rights dispensation?^{[30][31]}

It is true that the judges cannot give orders or direct the legislature to make laws. The question of a common civil code is a matter of policy and the concern of the legislature, not of courts.^[32] Therefore, the directions issued by them for implementation of UCC are not binding and are merely suggestions. But having said that

we should not forget the intention of the founding fathers of the Constitution. Article 44 is a mandatory provision binding the Government, and it is incumbent upon it to give effect to this provision. The Constitution was enacted for the whole country, it is binding for the whole country, and every section and community must accept its provision and its directives.^[33]

Further, there is also a question whether it is possible to reconcile the personal laws of various communities and enact a uniform code? It is true that it is not possible to reconcile the religious customs and practices of various communities but it is possible to harmonize the secular part of those religions. Personal laws pertain to secular activities and hence fall within the regulatory power of the state.^[34] It means similar to the Uniform Civil Code in Goa, a UCC if enacted would deal only with the secular part of the religion and not the essential religious practices. How can the maintenance of a Muslim woman be different from a woman from other community? Therefore, issues like maintenance are outside the ambit of 'essential religious practices' and comes within the purview of secular practices.

The biggest hurdle in the way of its implementation is the feeling of losing their religious identity among the minorities. How can there be any apprehension of losing their identity when the Constitution guarantees Right to Freedom of Religion and Cultural and Educational Rights in Part III? The Constitution guarantees freedom of religion, freedom of conscience, and freedom to profess, practice and propagate religion, to all persons in India.^[35] It also guarantees to the minority the right to conserve their language, script or culture^[36] and also the right to establish and administer educational institutions^[37]. Moreover, Article 27 of the International Covenant on Civil and Political Rights ("ICCPR") reads:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."^[38]

But, the argument is that the right to be governed under different personal laws is within the ambit of Article 25 and the same will be violated if UCC comes into existence. The next part of the paper will make this point clear.

2. Balancing Right to Equality and Freedom of Religion

Fundamental Rights in India are not absolute in nature and the Right to Freedom of Religion as provided under Article 25(1) of the Constitution is no exception. Article 25(1) guarantees freedom of religion, freedom of conscience, and freedom to profess, practice and propagate religion to all persons in India. But at the same time it is *"subjected to the other provisions of this Part"* including Right to Equality under Article 14 and 15. However, even if freedom of religion encompasses the right to be governed by personal law, it does not cover the right to perpetuate denial of equality or personal liberty to a section of people who are governed by such personal law.^[39] Therefore, the personal law is not immune from the intervention of the sovereign legislature. The makers of the Constitution while drafting the said provision sought to distinguish between the essence of a religion and other secular activities which might be associated with religious practice but did not form a part of the core of the religion. They accepted the principle that if a religious practice covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it.^[40] The legislation so enacted will not infringe the Fundamental Right to Freedom of Religion of the minorities and with this end they inserted Cl. 2(a) as follows:

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practices."

The difference between essential religious practices and secular practices had been explained in great detail in a recent case of *Nikhil Soni v. Union of India*. The court clarified that a practice may be a religious practice but not an essential and integral part of the religion.^[41] The Constitution under Article 25(1) protects only those religious practices which form an essential and integral part of religion. Practices other than those come under the ambit of secular activities which are not protected and can be regulated by the legislature. Thus, practices such as witchcraft, superstition, ordeals, sati, child marriage, prohibitions against widow remarriage, caste discrimination, triple *talaq* and polygamy may be barred or regulated.^[42]

Therefore, once it is held that there are customs and practices which do not form part of the essence of religion but is only a secular activity connected with religion; the Legislature would be competent to make a uniform law relating to such secular activities by implementing Article 44 of the Constitution.^[43] Therefore, a UCC if

enacted will be well within the purview of Constitutional provisions and will not be violative of Right to Freedom of Religion. Uniform Civil Code vs. Common Civil Code

Article 44 suggests a uniform civil code and not a common civil code. The expressions 'uniform' and 'common' are often used interchangeably but they have different connotations. The word 'common' means shared among several⁴⁸ while 'uniform' means conforming to one rule, not different at different places, applicable to all places or divisions of the country, applying alike to all within a class⁴⁹.

According to S.P. Sathe, the word 'uniform' in article 44 means that all communities must be governed by uniform principles of social and gender justice.^[44] It beckons the modernisation and humanisation of each personal law. A uniform law would not necessarily mean a common law but different personal laws based on uniform principles of equality of sexes and liberty of the individual.⁵¹ But, this interpretation of the word 'uniform' is not possible for the purpose of Article 44. By analysing the Constituent Assembly debates and the arguments of the members including Dr. B.R. Ambedkar, it is very clear that they intended a *Civil Code, uniform in its content and applicable to the whole of the country.*^[45]

According to the Black's Law Dictionary, a statute is uniform in its operation when it operates equally upon all persons who are brought within the relations and circumstances provided for; when all persons under the same conditions and in the same circumstances are treated alike, and classification is reasonable and naturally inherent in the subject-matter.⁵³ The word "uniform" as applied to laws have a meaning antithetical to special or discriminatory laws.⁵⁴

The practice of providing unequal shares in coparcenary property to a brother and sister under *Mitakshara* Hindu law, or the custom of burning a Hindu widow to death on her husband's funeral pyre, or the practice of giving unequal shares in property to male and female heirs after a Parsi man dies intestate, or indiscriminate polygamy by a man, or the practice of divorcing a lawfully wedded wife by triple *talaq*, or the refusal to maintain a divorced wife after the period of *iddat* are all practices derogatory to the dignity of women. Therefore, if a member of a religious community resorts to such practices or raises an objection to the implementation of Article 44 he becomes guilty of violation of the Preamble, and Article 51A and also of the guarantee of non-discrimination on the ground of religion in Articles 15(1) and 14 of the Constitution.^[46]

The principles of equality, justice and non-discrimination are far more important than unequal, unjust and discriminatory personal laws associated with particular religions.^[47] Therefore, a Uniform Civil Code if enacted would be tested on the touchstone of Fundamental Right to Equality and operate without distinction or discrimination throughout the country.

Conclusion

Regarding the Uniform Civil Code there is a lack of awareness among the people especially in the minorities. It is true that they do not know the actual meaning and extent of the code. They think that if the law gets enacted then they have to follow the religious practices of the majority and hence they will lose their identity. So the first step should be to make the people aware as to what is the actual meaning and scope of UCC. A Commission should be set up to determine the scope and extent of the Code. The Parliament should enact a draft code specifying the contents. It needs to segregate the essential religious practices and the secular practices related to religion. Only those activities that are financial or matters related to secular character like maintenance or inheritance should be regulated by the State and not the religious or customary practices like *saptapathi*, *nikah* etc. It means religious practices of one community will not be forced on another. Provisions regarding the validity of marriage should include the age of the parties, registration of the marriage etc. The people especially the minorities should be assured that there will be no encroachment with their Right to Religion. Then, the draft should be made available for the public opinion and nationwide campaigns and discussions should be held. After considering the viewpoint of the commission, the Parliament should enact a code which is applicable throughout the country irrespective of religion, race, caste, creed etc.

The main aim should be to realize the intentions of the founding fathers of the Constitution enshrined in the Preamble. We should not forget the values and principles embodied in the supreme law of the land to secure social justice; liberty of belief, faith and worship; equality of status; and unity and integrity of the nation. There should be a balance between Right to Freedom of Religion and Right to Equality. Uniformity in diversity should be the main objective of the code. In a country like India where Rule of Law prevails, the Constitution cannot be subservient to personal laws. The discriminatory practices like triple *talaq* which are in disguise of religious practices and customs must be subjected on the touchstone of Article 14 and 15. Right to Equality which is the basic structure of the Constitution should be given priority over the so called religious practices. In the words of Leila Seth, "If we can't give them all the rights in one go, let us progress little by little, but let us not be stagnant. Let us move towards gender-just laws and a uniform civil code"

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