

UNIFORM CIVIL CODE VIS A VIS PERSONAL LAWS IN INDIA: A CRITICAL STUDY¹

INTRODUCTION

India, sheltering nine recognised religions manned by millions and headed by proportional amount of laws. The plurality of personal and family law displays the wide array of culture and opportunities enabling many to enjoy a befitting life of their choosing.

Personal laws govern issues such as inheritance, marriage inter alia divorce, adoption and so much more. Christian Marriage Act, 1872 enlists and codifies mandates for Christians much like Indian Succession Act, 1925 and the Indian Divorce Act, 1869. Jews are managed by un-codified customary marriage law. The Islamic sect of population are governed by Sharia Law finding its roots in the Quran. Hindu laws have been secularized and have been brought on par with today's ideologies whereas Muslim laws are still primarily un-amended, unmodified since its inception. Separate matrimonial laws are observed for Parsees as well. Each religious group is essentially crewed and overseen by a diverse legislations.

This sporadic and patchy hive of codified and un-codified laws governing matters like marriage, divorce, adoption etc., frustrates the legitimate expectation co-operative legitimate society and a polity.

The Constituent Assembly with a view of achieving the same left the imprints in Article 44 of Indian Constitution. It persuades the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India. Contrary to widespread belief of this idea being communal, the Directive Principle promotes the spirit of secularism highlighted in our preamble and seeks to replace the multiplicity of personal laws.

Many of the personal laws streaming from religions are not necessarily valid in today's era where one seeks for liberation and individuality. Where certain faiths have housed the amendments and revisions, many are not open to these changes. Where individualism, humanity and welfare are the goal for a legal framework, religious text, totalitarian or otherwise should not play a role in making rules and mandates. It doesn't deny religious freedom but guarantees harmony among the diverse cultures and its co-existence. Where laws are in place

¹ Sayan Dasgupta, Presidency University, Bengaluru.

which give women a lower standing and consider their worth lesser than the counter-part, it would provide for equality and justice.

The genesis of the codification of legislation can be dated back to colonial era where, in October 1840 the Lex Loci² Report underscored on the quintessence for codification of Indian laws in relation to crime, contract, evidence, etc. The recommendations further bracketed the exclusion of Hindu and Muslim laws form codification.

The Preamble of the Constitution stating “Secular” means that there “shall be no state religion” and “the state shall not discriminate on the basis of religion”³. Each faith or religion has its own touchstone ideologies and commitments and uniform civil code tries to strike a balance between them. Uniform Civil Code targets at endorsing justice, equality and national integration. The enactment of the code will promote Gender equality and prosperity of women. The very spirit and soul of preamble traceable in Article 15 is violated by the personal law system for the constellation of religions. It goes against the very ideology and the milestone of secularism, equality, equity and egalitarianism promised and guaranteed by the Constitution.

Justice exercised in the Islamic rule was based on scriptural and religious texts administered by Qazis but there was no similar counterpart assured for the litigation concerning Hindus. In pursuance of an egalitarianism or a debatable convenient regiment, the British made regulations for the administration of civil justice for the native population without discrimination between Hindus and Muslims.⁴

COMPARITIVE ANALYSIS

The Uniform Civil Code formulated by Napoleon Bonaparte has undergone a series of changes since its inception by Western Legislations and Democracies like France to secure equal rights for women. A uniform civil code has been established in France since 1804 but had botched to attain equality for women. A string of historic and landmark judgments in the Common Law improved the status of women in society.

Case Study of a Precedent set by the State of Goa

The Civil Code of 1867 by a decree in 1869 was extended to the Provinces of Portuguese. One of these overseas Provinces was Goa, ruled for about 400 years. When Goa was integrated to

² Gray v. Blight, 112 F.2d 696 (10th Cir. 1940).

³ 42nd Amendment of the Constitution of India enacted in the year 1976.

⁴ Circulate Among the Judicial Officers of the State, Jafar Abbas, Rasool Mohammad Merchant v. State of Gujarat

the State, Union of India, the Uniform Civil Code prevailed and was applicable to all its residents regardless of religion, sex or any other social factorials. Subsequent to 1961, all Portuguese legislations were repealed by the Indian Parliament except for the Portuguese Civil Code of 1867. Laterally, Daman and Diu Administration Act 1962, regulations and legislations potent in those territories of Portugal annexation as Goa and Daman and Diu, along with the Civil Code persisted. Consequently, it became the internal law of the newly accrued Union Territories. This code regulated all civil liabilities of person encompassing the personal matters. A few provisions were however repealed which corresponded with the legal enactments of the State were extended to the said Union Territories such as Indian Contract Act, 1872, Indian Transfer of Property Act 1882 being a few of many. However, provisions concerning the matters of Successions, Tort, Family, and Property were kept intact and were unparalleled by the laws already in place set by the Indian Union. Affiliated to the impression of uniformity, personal laws are not given any distinctive position below UCC, for instance, Muslims are prohibited to follow Shariat dictates. Also, no marriage according to the Code becomes binding and legal till it is registered with the Civil Marriage Registration System in place in Goa, while the nature of marriage is strictly contractual⁵.

Judicial Pronouncements

It has been pointed out by many legal experts that the Hon'ble Supreme Court has squandered away the opportunity to address the issue of UCC when it decided the case of Triple Talaq, Shayara Bano v. Union of India⁶. In the controversial yet much celebrated case of Shah Bano, the Bench of the Apex Court pronounced that it was a matter of regret that Article 44 was nothing more than a "dead letter"⁷.

"Muslim Personal Laws"⁸, a book of stirring plea by Dr Tahir Mahmood said "In pursuance of the goal of secularism, the State must stop administering religion based personal laws".⁹

The Apex Court in as early as 1985 has highlighted the need of such Uniformity in Civil Code and recommended the Legislature to take steps towards that vision. In the case of Agnes Alias Kunjumol v. Regeena Thomas¹⁰, the Apex Bench of Supreme Court emphasised the need of a Uniform Civil Code. Similarly, in another decision of the Hon'ble Court of Ms Jordan

⁵ Sanjay S/O. Fondu Bhandare v. Mrs. Lina W/O. Sanjay Bhandare, Karnataka HC in W.P. No. 81958 of 2013

⁶ (2017) 9 SCC 1.

⁷ 1985 SCR (3) 844

⁸ 1977 Edn. Pages 200-202

⁹ 1985 SCR (3) 844

¹⁰ 2011 (1) KLT 588

Diengdeh v. S.S. Chopra¹¹ had observed stating “The time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people, irrespective of religion or caste.” It was again pronounced by the bench in the case of Sarla Mudgal v. Union of India¹² as to how implementation of Uniform Civil Code was imperative for national unity, integrity and protection.

On the opposite end of the spectrum, Sahai. J. had opined that uniform civil code needs to be delegated to the able law commission which could assess the climate of its acceptability. It is a change which needs acceptance from the statesmen to the masses.

In a case, Maharishi Avadhesh v. Union of India¹³, calling for a Writ Petition being filed to direct the Union to introduce Uniform Civil Code was dismissed stating that it was a matter of Legislation to deal with and not Judiciary.

Parallel to that, in Pannalal Bansilal v. State of Andhra Pradesh¹⁴ held that notwithstanding the fact that Uniform Civil Code is exceedingly feasible and advantageous, it could never be enacted in a single go since that would play a role of isolating sects instead of integrating them.

It is evident in the Law Commission report on implementation of Uniform Civil Code twined to replace the personal legislations that the magnum opus of the constituent assembly was that of selected members and not of elected members. It cannot be concluded or resolved that they would embody the will of people or the widely held. Hence, putting the disputed nomenclature “Uniform Civil Code” in Directive Principles rather than placing it in the Fundamental Rights was thought to be a rooted idea grounded in justice and equity.

Moral philosophy and political ideologies of T.H Green echo that the state should play a part in self-realization of the individuals and not interfere. The state should only facilitate and persuade the process. Acceptance should flow from the polity for the common good. Article 44 takes cognisance of the datum that there exists distinctive religions and wants a uniform system of personal laws to be a dogma for welfare.

The rationale in the case of The State of Bombay v. Narasu Appa Mali¹⁵ stated that the personal laws do not derive their validity and competence from the legislature. Rather, it derives the said

¹¹ A.I.R. 1985 S.C. 935

¹² A.I.R. 1995 SC 153

¹³ 1944 SCC, Suppl. (1) 713

¹⁴ A.I.R. 1996 SC 1023

¹⁵ AIR 1952 Bom 84.

pedestal from scriptures. Hence, it would fall outside the ambit of “law in force” in the Part III of Indian Constitution thereby making it immune to judicial scrutiny and intervention.

In the past decade, the populace has become more cognisant and knowledgeable about the gender and sexually ambiguous and other sexualities emanating from the media and judicial limelight recognising the sub-par treatment meted out to the minorities. Today’s civilization accepts the need and importance of equality of not only genders but also many sexualities. Uniform Civil Code would play a part in giving civil rights to those who have received less than humane treatment throughout the centuries. It would end the long standing battle between the conventional, conservative and the oppressed and victims of an administration with sclerosis.

EXECUTIVE SUMMARY

A Uniform Civil Code has many advantages. It would guarantee equal rights among all genders, religions and people of all sexual orientations. In pursuance of this egalitarian society, the government has made several efforts such as The Special Marriage Act, 1954 and bills introduced in the parliament in 1955 and 1956 codifying laws relating to Hindus. Personal laws grounded on religious values have spawned an autonomous judicial system functioning on beliefs and traditions. Article 37 definitely leaves an apprehension that the Directive Principles numbering from Article 37 to 51 that it “shall not be enforceable by any court”. But there have been many historic judgments creating a harmony of the Fundamental Rights and DPSP.

Communalism spawns discriminations under two heads. One is between the two genders and the other under the head of religion. Endeavours of State to ensure national integrity and unity seems achievable only under the Article 44. Of late, Delhi High Court has issued notices to the Central Government on a petition filed by BJP and Advocate Upadhyay seeking Uniform Civil Code to ensure justice between the binary sexes and inspire unity. This case would undeniably give traction and draw the limelight on the essentiality and urgency of Uniform Civil Code. However, the process should be consensual and collective rather than something which is positive and authoritative. Moral abandonment and ignorance should never be practised in any form. Primary duty of a citizen in a polity is welfare of that State. The fact that religion plays a crucial role in developmental stages of a child in a society like India cannot be denied and the same can never be detached entirely. But when there is a dilemma between religious beliefs and equality amongst all inter alia other advantages that a country would need to progress,

religion can never trump. The laudable goal of creating an egalitarian society seems implausible but is the very objective set down by the framers of the constitution in Article 14. Every contention and ratio laid down in a court is a step towards that goal. It is incumbent upon all of us to implement and assent to it. We should all strive for that modernity, however slow it is.

