

# IS INDIA READY FOR UNIFORM CIVIL CODE?

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*Uniform Civil Code does not in any way means that India will have HINDU FAMILY LAWS for all, as some people are making it to be. Actually this means that the archaic practices and family laws of the medieval times will be replaced by codes which are SECULAR, MODERN AND AGREEABLE to all the sections of the society.*

*– Arvind Adityaraj.*

**ABSTRACT:** *At the time of inception of constitutionalism in India the Framers of constitution were with the intention to have Uniform civil code for the citizens of India same is represented by Article 44 of the Constitution of India which lays down that the State shall work towards administering the same set of civil laws to govern people belonging to different regions and religions.*

*The present work is about judicious study of the much debated and controversial topic of a suitable legislation on Uniform Civil Code for all the citizens of India despite their religion or race or ethnicity in compliance with the constitutional mandate under Article 44.*

*Though a number of judgments in the Supreme Court have shown a marked inclination towards the establishment toward the UCC, no concrete step has been taken so far in this regard, in part due to the unresolved debate regarding the freedom of religion granted by Article 25 and 26, moreover Supreme Court in its recent observations has made it clear a UCC does not impinge upon the 'right to religion'. Through this paper, the idea of UCC is mooted keeping in mind the history of the country, its composite culture when it comes to personal laws, as well as the current political and social scenario.*

**Keywords:** *Uniform Civil Code, Secularism, Equality, Rule of Law.*

**INTRODUCTION:** India has multiplicity of family laws. The Christians have their Christians Marriage Act 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925. The Jews have their uncodified customary marriage law and in their succession matters they are governed by the Succession Act of 1925. The Parsis have their own Parsi Marriage and Divorce Act, 1936, and their own separate law of inheritance contained in the Succession Act which is somewhat different from the rest of the Succession Act. Hindus and Muslims have their own separate different from the rest of the Succession Act. Hindus and Muslims have their own separate persona laws. Hindu law has by and large been secularized and modernized by statutory enactments. On the other hand Muslim law is still primarily unmodified and traditional its content and approach.

The law is communal insofar as each community or religious group has its own distinct law to govern domestic relations. It is also personal insofar as each person carries his own law wherever he goes in India. The family law is partly statutory and partly non-statutory. The present-day family law is thus a maze. There is no *lex loci* in India in matters of marriage, succession and family-relations. Thus is very confusing. With a view to achieve uniformity of law, its secularization and making it equitable and non-discriminatory, the Constitution contains Art.44 of the Directive Principles of State Policy which runs as follows; “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”.

The Common Civil Code: Constitutional Aspect- Article 44 of the Constitution of India requires the State to strive to secure for its citizens a Common Civil Code throughout India.

The secular activities, such as inheritance covered by personal laws should be separated from religion. A uniform law thus prepared and made applicable to all would on the contrary promote national unity. It was pointed out at that time that, firstly, as Common Civil Code would infringe the fundamental right of freedom of religion as mentioned in Article 25 and secondly, it would amount to a tyranny to the minority. The first objection is misconceived because secular activity associated with religious practice is exempted from this

guarantee and since personal laws (as argued from this point of view) pertains to secular activities they fail within the regulatory power of the state. Regarding the second point, nowhere in advanced Muslim countries has the personal law of each minority been recognized as so sacrosanct as to prevent the enactment of a civil code. In Turkey and Egypt no minority is permitted to have such rights.

If you will look to the countries in Europe which have a civil code, everyone who goes there from any part of the world and every minority has to the Civil Code. It is not felt to be tyrannical to the minority". Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity, but there are many factors- and important factors- which still offer serious dangers to our national consolidation.

Communalism breeds discrimination at two levels: one, between people of different religions and two, between the two sexes. This dangerous and ruinous effect should be done away with, possibly by introducing a Uniform Civil Code. For women who constitute almost half the population of India, the Uniform Civil Code provide with equality and justice in courts of law- irrespective of their religion in matters pertaining to marriage , divorce, maintenance, custody of children, inheritance rights, adoption etc.

The only step taken forward in this direction was the codification of the Hindu law in spite of great protest; but the codification of Muslim law or enacting a Common Civil Code is a sensitive issue owing to its politicization. Enlightened Muslim opinion however, is in favour of codification.

### **UNIFORM CIVIL CODE AND THE PERSONAL LAWS:**

The women are considered inferior in most of the personal matters as compared to men, especially when it comes to the discussion of the topic of the matrimony or the succession, adoption or even the inheritance. Under the Hindu Law specifically, in the year 1955 and 1996, the Hindu women did not enjoy equal rights along with the Hindu men be it anything or any matter. Before 1955 polygamy was prevalent among the Hindus. The Hindu women could not hold any property as its absolute owner except in the case of Stridhan. She had only limited estate which was passed onto the legal last full heirs of the male owner called revisionary on her death. She owned a limited interest, in the sense that whenever an issue came up for the desertion of the property and mortgaging or selling the property, she could not do it on her own.

When it came to the matter of adoption a Hindu women did not have the right to adopt a child on her own. She could not be natural guardian of her children during the life of her husband. These examples are illustrative enough to show the patriarchal nature of the Indian society. Even though the Hindu law has been codified, certain discriminatory provisions still exist even today. For example a Hindu woman is not a coparcener in Hindu coparceners except in a few states like Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu.

Consequently she is not entitled to the share in the coparcenary. Thus it is oblivion to the fact that the codification of personal laws of Hindus has not succeeded completely in eradicating the gender inequality.

When it comes to discussing about the Muslim Law, in the Pre Islamic Arabia, the women enjoyed a secondary status because since then it has been a patriarchy since then. The women since then were considered secondary to men. The advent of Islam has contributed much when it comes to the deterioration of the Muslim women and the escalation of their problems. The Holy Quran gives equal rights to men and women and places women in a respectable position.

However, there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior. In Islam, a man is allowed to marry four times whereas the women cannot and if they do they are treated as unchaste and impure. Women are not even given the right to divorce their husbands, when particularly the method of divorcing the wife by the husband by pronouncing triple Talaq is highly discriminatory. This is in spite of the message given in the Holy Quran. This has been held void<sup>1</sup> and unlawful, recently in the Allahabad High court judgement.

Even in the matter of succession, a Muslim woman is discriminated against the assertion of certain Muslim scholars that the Islam in this regard is more progressive and liberal. The legal position is that when two scholars or residuary of opposite sex but of the same degree inherit the property of the deceased, the Muslim male gets twice the share of the female. Even in the matter of maintenance, the Muslim wife is not required to be maintained beyond the Iddat period.

<sup>1</sup> Shayara Bano vs Union Of India And Ors., W.P. (C) No. 118 of 2016.

The Criminal Procedure Code which imposes an obligation on the husband to maintain his wife including divorced wife until she maintains herself is a secular law and is applicable to all, however there is a controversy regarding the Muslim men following this provision.

In the famous case of Mohd Ahmed Khan v. Shah Bano Begum<sup>1</sup>, the Supreme Court speaking through Y.V. Chandrachud, the then Chief Justice held that the Section 125<sup>2</sup> of the Criminal Procedure Code is also applicable to the Muslims and that even a Muslim husband is liable to maintain his divorced wife beyond the Iddat period. The controversy began and the parliament had passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to overrule the judgement in the Shah Bano Case. The effect of this act is that a Muslim husband is not liable to maintain his divorced wife beyond the Iddat period unless both the spouses submit to the court at the appropriate time that they would like to be governed by the Criminal Procedure Code. This is like having the provision but not using it for the sake of protection of the Personal law space and not giving enough justice to the woman who is suffering so much.

### **UNIFORM CIVIL CODE AND THE INDIAN CONSTITUTION:**

The main problem lies in the fact that if the makers of Constitution had intended for a uniform Civil code to be enforced in India, then they should not have placed it under Article 44 of the Constitution as a part of the Directive Principles of the State Policy. The Directive Principles of State Policy contained in the Part IV (Art. 36 - 51), as the name suggests are mere directions to the State. They need not be mandatorily followed and are not enforceable by the Court. They are merely positive obligations on the State which will help in good governance.

The Preamble of the Indian Constitution clearly states that India is a Secular, Democratic, Republic. This means that there is no State religion. A secular state shall not discriminate against anyone on the ground of religion. A religion is only concerned with relation of man with God. It means that religion should not be interfering with the mundane life of an individual. The process of secularisation is intimately connected with the goal of uniform Civil Code like a cause and effect. In the case of S.R. Bommai v. Union of India<sup>3</sup> as per the Justice Jeevan Reddy, it was held that religion is the matter of individual faith and cannot be mixed with secular activities and can be regulated by the State by enacting a law. In India, there exists a concept of positive secularism as distinguished from the doctrine of secularism accepted by the United States and the European States i.e. there is a wall of separation between the religion and the state.

In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European States went through the stages of renaissance, reformation and enlightenment and thus they can enact a law stating that State shall not interfere with the religion. On the contrary, India has not undergone any kind of renaissance or reformation and thus the responsibility lies on the state to interfere in the matters of religion so as to remove the impediments in the governance of the state. The reason why a country like India cannot undergo a renaissance is very clear. The chances are that the conflicts, instead of decreasing may go on increasing and showing reverse effects on the laws that are made. For instance, a practice or a tradition in one's personal law may be acceptable but on the other hand, it may not be acceptable to the people of other personal laws. So, when the traditions will be in practice, the nature of the conflict will transform itself from general differences to hard-core animosity. People find it difficult to accept or adapt to certain changes and when it comes to a society like India where religion defines the way of life, people connect themselves with their religion instead of understanding that it is the religion which is made by human beings and that human beings are not made by the religion. This thought finds itself in the graveyard because some people still believe in burning. There needs to be a uniform law which governs and regulate the behaviour of people of all the religions and not any particular section of the society.

The Preamble of the Indian Constitution resolves to constitute a "Secular" Democratic Republic. This means that there is no state religion or in other words the state does not operate on any one particular religion and shall not discriminate on the ground of religion. Article 25 and 26 of the Constitution of India as enforceable fundamental rights guarantee freedom

<sup>2</sup> S. 125. Order for maintenance of wives, children and parents:

(1) If any person having sufficient means neglects or refuses to maintain- (a) his wife, unable to maintain herself, or

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875 ); is deemed not to have attained his majority;  
(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

<sup>3</sup> 1994 AIR 1918.

of religion and freedom to manage religious affairs. At the same time Article 44 which is not enforceable in a court of Law states that the state shall endeavour to secure a uniform civil code in India. Uniform civil Code is the uniform method or the uniform law that governs the people as a uniform law and does not discriminate on the basis of any religion or faith.

As a new principle evolves and comes into the knowledge of the people several questions arise and criticisms pave their way. In unification of the personal laws, an important question that arose was what will be the ingredients of the Uniform civil code. Since, the personal laws of each religion contain separate provisions, their unification will bring not only resentment, but also enmity in the public towards one another, therefore the Uniform Civil Code will need to bring in such laws that strike a balance between the protection of the fundamental rights and the religious principles of the different communities that exist in the country. Issues such as marriage, divorce, maintenance etc. can be matters of secular nature and law can regulate them.

### **Uniform Civil Code in Goa:**

Goa is the only state in India that has uniform civil code regardless of religion, gender, caste. Goa has a common family law. Thus Goa is the only Indian state that has a uniform civil code. In Goa Hindu, Muslim, Christians all are bound with the same law related to marriage, divorce, succession. When the Goa became the part of union territory in 1961 by the virtue of the Goa Daman and Diu administration act 1962 the parliament authorized the Portuguese civil code of 1867 to Goa and shall be amended and repealed by the competent legislature.

In Goa marriages is a contract between two people of different sex with the purpose of living together and constitute the legitimate family which is register before the office of civil registrar. And the particular rules and regulation has to be followed by the parties after that they can live together and start their life but there are certain restrictions according to which these categories of person are prohibited to perform marriage for example: any spouse convicted of committing or abetting the murder of other spouse shall not marry.

### **Special Marriage Act, 1954:**

This form of marriage act provides a civil marriage of two person of different sex irrespective of their religion. This law prevailed in Indian to have their marriage outside the customs of their personal law. This law is applied in all over the India except Jammu and Kashmir because they have given the special status under article 370. His law is almost identical to the Hindu marriage act 1955 this law gives idea of how the law is secularized towards the Hindus. The special marriage acts all Muslim community people to marry under it. Under this act polygamy was illegal and the system of succession would be governed by Indian succession act even the system of divorced is also governed by this law. But for divorce there are certain provisions that are followed in Goa. Muslim community people that have register their marriage in Goa cannot take more than one wife according to this act and during the marriage time period all the property and wealth owned by the couple each spouse have right in the property the share half –half of the property and if spouse dies the half share of the property were goes to the other. And the other half property was divided between the children in the same ratio.

### **Merits of Uniform Civil Code:**

If a Common Civil Code is enacted and enforced:

- ❖ It would help and accelerate national integration;
- ❖ Overlapping provisions of law could be avoided;
- ❖ Litigation due to personal law world decrease;
- ❖ Sense of oneness and the national spirit would be roused, and
- ❖ The country would emerge with new force and power to face any odds finally defeating the communal and the divisionist forces.

Israel, Japan, France and Russia are strong today because of their sense of oneness which we have yet to develop and propagate.

India has set before itself the ideal of a secular society and in that context achievement of a uniform civil code becomes all the more desirable such a code will do away with diversity in matrimonial laws, simplify the Indian legal system and make Indian society more homogeneous. It will de-link law from religion which is a very desirable objective to achieve in a secular and socialist pattern of society. It will create a national identity and

will help in containing fissiparous tendencies in the country .The uniform civil code will contain uniform provisions applicable to everyone and based on social justice and gender equality in family matters.

According to the Committee on the Status of Women in India: “The continuance of various personal laws which accept discrimination between men and women violate the fundamental rights and the Preamble to the Constitution which promises to secure to all citizens “equality of status, and is against the spirit of natural integration”. The Committee recommended expeditious implementation of the constitutional directive in Art 44 by adopting a Uniform Civil Code.

### **Approach of The Judiciary:**

The Supreme Court for the first time, directed the Parliament to frame a UCC in the year 1985 in the case of Mohammad Ahmed Khan v. Shah Bano Begum, popularly known as the Shah Bano case, In this case, a penurious Muslim women claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure after she was given triple Talaq from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The Court also held that Article 44 of the Constitution has remained a dead letter. The then Chief Justice of India Y. V. Chandrachud observed that,

“A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies”

After this decision, nationwide discussions, meetings, and agitation were held. The then Rajiv Gandhi led Government overturned the Shah Bano case decision by way of Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim woman for maintenance under Section 125 of the Code of criminal Procedure. The explanation given for implementing this Act was that the Supreme Court had merely made an observation for enacting the UCC; not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

In Mary Roy v. State of Kerala, the question argued before the Supreme Court was that certain provisions of the Travancore Christian Succession Act, 1916, were unconstitutional under Art. 14 Under these provisions, on the death of an intestate, his widow was entitled to have only a life interest terminable at her death or remarriage and his daughter. It was also argued that the Travancore Act had been superseded by the Indian Succession Act, 1925. The Supreme Court avoided examining the question whether gender inequality in matters of succession and inheritance violated Art.14, but , nevertheless, ruled that the Travancore Act had been superseded by the Indian Succession Act Mary Roy has been characterized as a “~momentous’ decision in the direction of ensuring gender equality in the matter of succession.

Finally, the Supreme Court has issued a directive to the Union of India in Sarla Mudgal v. Union of India to “endeavour” framing a Uniform Civil Code and report to it by August, 1996 the steps taken. The Supreme Court opined that: “Those who preferred to remain in India after the partition fully knew that the Indian leaders did not believe in two- nation or three “nation theory and that in the Indian Republic there was to be only one nation- and no community could claim to remain a separate entity on the basis of religion”.

It is, however, to be noted what the Supreme Court expressed in Lily Thomas case. The Court said that the directives as detailed in Part IV of the Constitution are not enforceable in courts as they do not create any justiciable rights in favour of any person. The Supreme Court has no power to give directions for enforcement of the Directive Principles. Therefore to allay all apprehensions, it is reiterated that the Supreme Court had not issued any directions for the codification of a Common Civil Code.

The Supreme Court’s latest reminder to the government of its Constitutional obligations to enact a UCC came in July 2003, when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. The priest from Kerala, John Vallamattom filed a writ petition in the year 1997 stating the Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench comprising of Chief justice of India V.N.Khare, Justice S.B. Sinha and Justice A.R. Lakshamanan struck down the Section declaring it to be unconstitutional. Chief justice Khare stated that, “We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the

territory of India it is a matter of great regrets that Article 44 of the Constitution has been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies”.

Thus, as seen above, the apex court has on several instances directed the government of realize the Directive Principle enshrined in our Constitution and the urgency to do so can be inferred from the same.

### **Secularism VS Uniform Civil Code:**

The spine of controversy revolving around UCC has been secularism and the freedom of religion enumerated in the Constitution of India. The Preamble of the Constitution states that India is a “secular democratic republic”. This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an individual.

In S.R. Bommai v. Union of India, as per Justice Jeevan Reddy, it was held that “religion is the matter of individual faith and cannot be mixed with secular activities, Secular activities can be regulated by the State by enacting a law”.

In India, there exist a concept of “positive secularism” as distinguished from doctrine of secularism accepted by America and some European states i.e. there is a wall of separation between religion and State. In India, positive secularism separates spiritualism with individual faith.

Article 25 and 26 guarantee right to freedom of religion, Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part iii the Constitution, Article 25 also empowers the State to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Articles 25 and 26 is not limited to matters of doctrine of belief. It extends to acts done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion.

Uniform Civil Code is not opposed to secularism or will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The UCC will not and shall not result in interference of one’s religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a Nikah or a Muslim be forced to carry out Saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law. The whole debate can be summed up by the judgment given by Justice R.M. Sahai. He said: “Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedom are not autonomy but oppression. Therefore, a unified code is imperative, both for protection of the oppressed and for promotion of national unity and solidarity.”

### **Common Civil Code: Need Or No Need?**

The four cases of, Shah Bano Begum , Mary Roy , National Anthem and Sarla Mudgal, expose the domination of religion over a community be it Muslim, Syrian Christian or Jehovites. It is a tyranny of the minority over majority. The unity of India would be at stake if religion is allowed to tighten its grip over Indian society. We have been a Sovereign Socialist Secular Democratic Republic and the State has no religion; it favours none and is a foe to none. Humanism is our creed and a Common Law for all Indian is our ideal. We believe and subscribe to rule of law and it is only a Common Civil Code that would help establish the rule of law. It is the panacea for all our ills.

Dr. Ambedkar, the principal architect of the Indian Constitution was of the view that the provision relating to a uniform civil code should be included in the fundamental rights chapter and thus should be made justifiable. However, on the point whether the same should be the committee was divided. Rajkumari Amrit Kaur, M.R. Masani and Hansa Mehta wrote in a dissenting note “We are not satisfied with the acceptance of a Uniform Civil Code as an ultimate social objective. One of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keeps the nation divided into water-right compartments in many aspects of life.... a uniform civil code should be guaranteed to the Indian people of five to ten years”.

### **CONCLUSION & SUGGESTIONS:**

The Uniform Civil Code is not just a matter of gender justice, it is also a question of how a nation accommodates its own diversity. In India, freedom of religion exists with other rights like equality and non-discrimination. Instead of reaching in indiscriminately or leaving cultures entirely to themselves, India's liberal multiculturalism strikes a balance. It has been more ready to reform majority practices, while offering protections to vulnerable individuals within minority groups.

Is there a better way for India to negotiate this? The common view is that the Western democracies are a template for liberalism. But how do the US and France conceptualise law and religious freedom, the balance between majority and minority group rights? What do Canada and the UK do? But the problem is that India cannot have the Western Countries as a model because the conditions are not similar. Most of the western countries, despite claiming to be secular, tend to show a bias towards Christianity and the Middle East Countries clearly follow Islamic Law. Even as we push for a Uniform Civil Code, we should know that law cannot exist too far apart from social norms. Without social support, or state capacities to implement our own principles, we risk pushing people into seeking alternative community justice, like sharia courts or khap panchayats. A common civil code will have to be careful in its choices. Then there remains the question of whether it should be obligatory, erasing all personal law, or whether it should allow Indians the option of choosing to live under their own religious umbrellas, if they prefer. Either way, it is time that we outline our ideals and disagreements, in the pursuit of a dream common civil code. In the seven decades since the Constitution was enacted, there has been no sincere effort to even start such a dialogue.

It is also clear that Uniform Civil Code is not violative of Article 25 and 26 of the Constitution. It should rather be a new law and not the blend of personal laws. The problem in blending personal laws is that there is every chance for a bias to arise. The Parliament should introduce a new code similar to the Special Marriage Act of 1954 which does not extend any favours or bias towards any religion.

What the people must understand is that religion and laws are two different concepts. This is because the Constitution allows the people to follow their religion which will continue despite the enactment of a uniform code. The uniform code will nowhere curb their right to follow or profess their religion. For example, the religious scriptures prescribe punishments for crimes but the Indian Penal Code, 1860 is the only penal laws that are followed in India. Thus, it is high time that people start viewing religion and law as two different concepts and focus on the empowerment of all class of people. There is an urgent need to bring in uniform laws in India.

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