

UNIFORM CIVIL CODE IN INDIA – A DISTANT DREAM

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Introduction

In India there had never been an Indian personal Law. Instead there are several personal laws, applicable to various religious communities i.e the Hindus, Muslims, Christians, Jews and Parsees. Each of this is known as the personal law of the particular community and covers matters of personal relationship like marriage, adoption, inheritance and succession, maintenance and guardianship. Two major personal laws in India are the Hindu and the Muslim. Like most personal laws they are linked with religion and customary practices. The Constitution enjoins upon the state to 'secure for the citizens a uniform civil code throughout the territory of India'. When the constitution was made many members were obsessed with the idea of national integration, therefore the debate on Uniform Civil Code has ever since not stopped.

In the past there have been several cases of Muslim women who have been voicing against the vice of triple talaq, since 1976, fighting cases right up to the Supreme Court, such as Bia Tahira, Zohra Kahatoon, Shaha Bano, Shamim Ara, Iqbal Bano, Shamima Farooqi. The latest among many Muslim Women voicing against the most controversial practice of 'talaq, talaq, talaq, are Shyara Bano and Afreen Rehman who have moved the Supreme Court recently.

A Divisional Bench of Justice Anil Dave and A.K. Goyal entertaining her plea on February 29, 2016, issued notice in a petition filed by Shyara Bano from Uttarakhand. Shyara Bano's petition stated that she was subject to cruelty and Dowry demand from her husband. She also alleged that she was given drugs for memory loss, in the result for which she became critically ill, and at the point of time her husband divorced her by triple talaq.²

In addition to challenging the divorce deed, the petitioner has challenged the constitutional validity of s.2 of the Muslim Personal Law (Shariyat) APPLICATION Act 1937, in so far as it seeks to recognise and validate polygamy, triple *talaq (talaq – e – bidat) and nikah halala*. She has also challenged the Dissolution of Muslim Marriage Act.1939 in so far as it fails to provide, Indian Muslim women with protection from bigamy. Similarly in the case of Jaipur, Afreen Rehman, the Supreme Court has recent issued notice to her husband, the Entre, the Ministry of Law and Justice and the All India Muslim Personal law Board to give their replies within 30 days.³

Meaning and Concept of Uniform Civil Code

A Consensus needs to be drawn between the coinage of the term 'Criminal Law' and 'Civil Law'. The 'Criminal Laws' of the land forbid certain acts. One is forbidden to steal, kill, rape, abduct, assault, cheat or obstruct a public servant in the execution of his duty. One is forbidden to evade taxes and customs or make counterfeit coins. Anyone who does those acts is liable to punishment. On the other hand 'Civil Law' does not forbid any action on the pain of punishment. Nor does it, equally, commend any action (like payment of taxes). One need not marry, divorce, adopt, buy property, make a will, or stake one's claim as an heir. If one chooses to do any of these things Civil Law tells us how to do them. If we ignore it there is no fine or punishment under Civil Law. But its protection is withdrawn.⁴

In the phrase Uniform Civil Code, the term civil code is used to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. The demand for a uniform civil code essentially means

unifying all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to.

The bone of contention revolving around Uniform Civil Code 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.

Conceptual Framework of the Uniform Civil Code.

Article 44 of the Constitution purporting to envisage a Uniform Civil Code for all citizens lays down that, "The State shall endeavour to secure for the citizen a Uniform Civil Code through out the territory of India.". However, the constitutional promise itself is infinitely complicated. Public and political debates have not considered what exactly the "duties" are created by Article 44. So far, all interpretive efforts have eluded narrative coherence.

The duty is not merely to legislate but to "secure" a code. Perhaps by "*uniform*" we understand that all citizens should be subject to the same law, regardless of community, religion, and identity. But when the personal law stands anchored in the freedom to practice religion, state intervention may violate a fundamental right. Further, who decides what religion requires? What legal and social meaning is to be invested in Article 51-A (f), which talks of the fundamental duty of all citizens "to value and preserve the rich heritage of composite culture"? When may this conflict with Article 51-A (e) those talks of the need to "renounce practices derogatory of women"? The duty (in clause "h") to "develop the scientific temper, humanism and the spirit of enquiry and reform" reinforces social inclusion in religion and the state.⁵

And indeed when is a "*code*" ? If codification is to avoid merely articulating majoritarian might, it ought to be a historically-calibrated state venture at social consensus. Here, adjudicatory leadership matters as much as national leadership. Is piecemeal normative cleansing of dis-valued difference less eligible than a total UCC? Is reasoned judicial enunciation to be preferred over "state endeavour"? The question is: How best to secure a codification that genuinely endeavours to remove discrimination and prejudice against women's and child rights? The German historical jurist Fredrick von Savigny said (in mid-19th century) that codification involved both a "technical element" (the knowledge of customs that are to be codified) and a "political element" (the question of political will to codify). Do we know enough about the personal law of various tribal communities from which the UCC may choose? Or, the laws of various Hindu and Muslim communities? Do we know enough about the religious personal law of other Indian communities? It is a sad mistake to think that a UCC is all about Hindu-Muslim relations and identities.⁶

Indian Constitution and the Uniform Civil Code

The Uniform Civil Code is, by and large, a child of independent India.⁷ Article 15 of the constitution of India lays down a guarantee to every citizen that consists of 'No discrimination on any ground only of religion race, caste, sex, place of birth or any of these. Article 15 (3) provides that for women and children special provision can be made by the state, women empowerment enjoys constitutional protection of this Article 15 (3). Article 39 (a) (d) and (e) lay down certain principles of policy that

are to be followed by State. Men and Women citizens shall enjoy equal right to an adequate means of livelihood. There shall be equal pay for equal work for both men and women and that the health and strength of worker's men and women shall not be abused. Article 42 provides for just and humane condition of work and maternity relief. Article 44 also provides that 'The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India'.⁸

The Indian Constitution, in its part IV, Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. However, it is only a directive principle of state policy; therefore it cannot be enforced in a court of law. It is the prerogative of the state to introduce Uniform Civil Code. The Constituent Assembly Debates clearly shows that there was a wide spread opposition to the incorporation of Article 44 (Article 35 in the Draft Constitution), particularly from the Muslim members. The Uniform Civil Code is required not only to ensure (a) uniformity of laws between communities, but also (b) uniformity of laws within communities ensuring equalities between the rights of men and women. One of the major problems that has provoked exciting polemics and aggravated majority pressures is the enactment of a uniform civil code for the citizens throughout the territory of India, as desiderated in Article 44. The provision is cautiously worded and calls upon the State to 'endeavour' to secure such a code. It is neither time-bound nor carries a compulsive urgency.⁹

International Human Rights Perspective.

Under International law, a state that ratifies an international instrument becomes legally bound to implement its provisions. Accordingly India having ratified the International Covenant on Civil and Political Rights, 1966, and International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is bound to enforce the relevant provisions and ensure gender equality under its national laws. However, women in India under Hindu, Muslim and Christian laws continue to suffer discrimination and inequalities in the matter of marriage, succession, divorce and inheritance.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a unique international convention in that it was based on the need for special formulation that would assert, protect and promote women's human rights. The Convention expressly states that discrimination against women is socially and culturally constructed and encompasses public and private spheres, thereby bringing within its fold the domain of the family. India too has ratified CEDAW with a declaration to limit its obligations relating to changing the discriminatory cultural practices within the community and the family. Hence, with regard to articles 5(a)[2] and 16(1)[3] of the Convention, the India declares that "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent". India's reservation is an *unqualified* exemption from state interference into customary practices and it also fails to specify a time frame. This reservation can only be construed as being inconsistent with the objectives and purpose of the Convention and an indication of the utter lack of political will on part of the Indian state, even in face of international duties and obligations, to bring about an egalitarian, uniform civil law in the country.¹⁰

Judicial Decisions

The development of Uniform Civil Code law in India is traceable in the several landmark decisions of the Supreme Court, whereby new interpretations have been drawn. In *Mohammad Ahmed Khan v. Shah Bano Begum*,¹¹ popularly known as Shah Banos case, the Supreme Court held that "It is also a

matter of regret that Article 44 of our Constitution has remained a dead letter.” Though this decision was highly criticized by Muslim Fundamentalists, yet it was considered as a liberal interpretation of law as required by gender justice. Later on, under pressure from Muslim Fundamentalists, the central Government passed the Muslim Women’s (Protection of rights on Divorce) Act 1986, which denied right of maintenance to Muslim women under section 125 Cr.P.C.

*In Sarla Mudgal (Smt.), President, Kalyani and others v. Union of India and others*¹², Kuldip Singh J., while delivering the judgment directed the Government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that, “Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article 44, Therefore the Supreme Court requested the Government of India, through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for its citizens a uniform civil code through out the territory of India.” However, in *Ahmadabad Women’s Action Group (AWAG) v. Union of India*,¹³ a PIL was filed challenging gender discriminatory provisions in Hindu, Muslim and Christian statutory and non-statutory law. This time Supreme Court became a bit reserved and held that the matter of removal of gender discrimination in personal laws “involves issues of State policies with which the court will not ordinarily have any concern.” The decision was criticized that the apex court had virtually abdicated its role as a sentinel in protecting the principles of equality

Merits of Uniform Civil Code :

The Uniform Civil Code has been put on the back burner by the government. What could be taken up is the reform of the personal law with a view to make them fair for everyone. Uniformity of law is not condition precedent for national Integration. Differential laws may be applied for differential communities as each community wants to retain its identity. The aim should be to gradually reform these personal laws.¹⁴

Some advantages 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 would 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.

Conclusion

Justice without equality was not palatable to the framers of the Constitution. Secularism, justice, liberty, equality and fraternity are all inseparable from one another. So are clarity and security. No one of them can stand without the others.

For the purposes of the Uniform Civil Code, there are some inherent limitations faced, if they were to be realised truly. Firstly the Scheduled Tribes have not been taken into account they form the second largest minority of India. Secondly children are also ignored in these policies. They are the weakest and the most vulnerable group. They are also the most neglected and ill-used. What adds importance to the situation is the fact that the future of this country lies with them. Thirdly uniform civil code is not gender centric, focusing only on women, yet the policy framers continue to ignore the status of women.

The notion that all secularism consists of equal status to all religions which can continue to include all aspects of life finds an echo in the reassurances sought or given that a Uniform Civil Code will embody what is best in all personal laws, rather than demanding that the Uniform Civil Code should confer the best possible rights on all citizens.

(Endnotes)

- 1 Assistant Professor, Modern Law College, Pune.
- 2 Dr. Sir Mohammed Iqbal, *Talaq, Talaq, Talaq- the end!*, 16, Lawyers update, Vol XXII, Part 6. June 2016
- 3 Dr. Sir Mohammed Iqbal, *Talaq, Talaq, Talaq- the end!* 16, Lawyers update, Vol XXII, Part 6. June 2016
- 4 Vasudha Dhagamwad, *Towards the Uniform Civil Code*, 74, (6th ed) (2010)
- 5 Upendra Baxi, *Securing the Code*, The Indian Express, Published: July 20, 2016 12:45 am, available at <http://indianexpress.com/article/opinion/columns/uniform-civil-code-article-44-2924463/>, last seen on 21/07/2016.
- 6 Upendra Baxi, *Securing the Code*, The Indian Express, Published: July 20, 2016 12:45 am, available at <http://indianexpress.com/article/opinion/columns/uniform-civil-code-article-44-2924463/>, last seen on 21/07/2016.
- 7 Vasudha Dhagamwar, *Towards the Uniform Civil Code*, 1(1st ed, 1989).
- 8 M.P.Jain , *Indian Constitutional Law*, 1129, Vol 2,(6th ed 2010).
- 9 Ibid.
- 10 Available at [www. http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/#.V5BZFdK7iko](http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/#.V5BZFdK7iko) last seen 20/07/2016 at 01:00 pm.
- 11 (1985) 2 SCC 556.
- 12 AIR 1995 SC 1531
- 13 AIR 1997 SC 3614.
- 14 S.P. Sathe, *Judicial Activism in India*, 193,(2nd ed, 2010).