

UNIFORM CIVIL CODE

(Article 44 of the Constitution of India)

“The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India” Art. 44.

INTRODUCTION

The term ‘Uniform Civil Code’ is the proposal to replace the personal laws based on the scriptures and customs of each major religious community in the country with a common set governing every citizen. A society with stable norms is simply inconceivable without some kind of uniformity of the rules of conduct governing multiple relationships of its members united. That is why uniformity has been perennially given importance as the *summum bonum* of all legal codes, past and present.¹ This uniformity of norms, regulations and rules of conduct of society has always been instrumental in checking disorder and chaos in the society. At times, certain social disorders are caused due to the different discriminatory rules that govern different sections of society according to one’s own religion and custom. India has been for centuries a multi-religious and multi-ethnic society and yet it has the distinction of maintaining the unity in such diversities. At the same time, Indian history also affords traces of religious and ethnic tensions and conflicts besides that harmony.²

SCOPE

Article 25 guarantees religious freedom, whereas Art. 44 divests religion from social relations and personal law. Marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Article 25 and 26 – *John Vallamattom V U.O.I.* (2003)6 SCC 611: AIR 2003 SC 2902.

Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society.

IMPLEMENTATION

Art. 44 has not been given effect to Parliament. A common civil code will help the cause of national integration by removing the contradictions based on ideologies – *John Vallamathom v. U.O.I.* (2003)6 SCC 611: AIR 2003 SC 2902.

Ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. A unified civil code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalize the personal law of the minorities to develop religious and cultural amity – *Saria Mudgal v U.O.I.* AIR 1531: (1995)3 SCC 635.

¹ Cf. The Constitution of India, Article 44 – Uniform Civil Code for the citizens: The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

² Cf. Shiv Sahar Singh, *Unification of Divorce Laws in India* (New Delhi: Deep & Deep Publication, 1993), 1.

The Supreme Court has no power to give directions for the enforcement of the Directive Principles of State Policy which includes Art. 44, since 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 – *Lily Thomas v V.O.I.* (2000)6 SCC 224: AIR 2000 SC 1650.

Supreme Court requested the Government of India through the Prime Minister to endeavor to secure for the citizens a uniform civil code throughout the territory of India – *Saria Mudgal v U.O.I.* AIR 1995 SC1531: (1995) 3 SCC 635.

PERSONAL LAW VIS-À-VIS RELIGIOUS TENETS

India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before the court is to interpret the law of the land, not in the light of the tenets of the parties, religion but in keeping with the legislative intent and prevailing case laws – *ABC v State (NCT of Delhi)* (2015)10 SCC 1.

But it is imperative that interpretation of secular law of the land should be in such a manner as to attain parity in rights. So long there is no uniform civil code in India, it is found that persons of one religious group are really disadvantaged, the court has to interpret the law divorced from any religious tenets – *ABC v State (NCT of Delhi)* (2015)10 SCC 1.

MEANING OF CIVIL CODE

‘Uniform Civil Code’ of India is a term referring to the concept of an overarching Civil law. And the term ‘Civil law is a legal system, inspired by the Roman law, the primary feature of which is that laws are written into a collection, codified, and not determined³, as in common law, by judges. The principle of civil law is to provide all citizens with an accessible and written collection of the laws which are obligatory to all without discrimination. And the word, ‘code’ refers to a rule. Thus, uniform civil code administers the same set of secular civil laws to govern all people, even those belonging to different religions and regions.⁴

MATTERS RELATING TO UNIFORM CIVIL CODE

It is important to note that the term civil code is used to cover the entire body of laws governing the private rights relating to all personal matters like marriage, divorce, maintenance, adoption and inheritance. Certain subject matters of uniform civil code are as follow:

- a) Marriage, Divorce and Other Matrimonial clauses
- b) Succession (Inheritance)
- c) Guardianship
- d) Maintenance
- e) Adoption
- f) Partition
- g) Gifts and Wills

³ It could be changed, is that particular community needs modifications, refer Sarungbam Lucy, “Uniform Civil Code” The People’s Chronicle, December 03, 2015.

⁴ Cf. Shiv Sahar Singh, *Unification of Divorce Laws in India*, 2-3.

- h) Religious Institutions
- i) Joint Family System; and matters of Charitable trust etc.,

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 religion, community and culture they belong to.⁵

HISTORICAL BACKGROUND OF ARTICLE 44

India is divided into five religious communities, namely Hindus, Muslims, Christians, Parsies and Jews, but law is limited to matrimonial relations and remedy thereof, maintenance, succession, will, partition, religious endowment, adoption, guardianship etc., In India, most family laws are determined by the religion of the parties concerned. Hindus, Sikhs, Jains and Buddhists come under Hindu law, whereas Muslims and Christians have their own laws. Muslim law is based on the 'Sharia'⁶. Other sets of laws such as criminal laws, and civil laws on contract, evidence transfer of property, taxation were also codified as common for all.⁷

IN ANCIENT INDIA

In ancient time, the king was expected to encourage piety and virtue and also aid religious institutions. Government was not based on theocracy but on the will and desire of the king basing on 'dharma'. The ancient Hindu state, like today's modern India State, generally gave equal promotion to all religions. There were different schools of thoughts were propounded, namely the doctrine of agnosticism, atheism, materialism, Hinduism, Jainism, Buddhism, and later Judaism, Christianity, Zoroastrianism and Islam, all were permitted to propagate their teachings. While in Europe and America, the struggle for freedom of conscience was taking a toll, but India was already enjoying the freedom of conscience for a long time.⁸

IN MEDIEVAL INDIA

In the medieval times, besides the Hindu kings were ruling, the Mughal Empires emerged and thus spread the Muslim laws all over the country, wherever the Mughals ruled. The Muslims introduced proper court system in their empires and their judgments were based only on Quran. Hindus followed their customary Hindu laws.⁹

⁵ Cf. Fraizan Mustafa, "Why Legal Pluralism Matters", The Indian Express, November 16, 2015.

⁶ The Muslim Personal Law (Shariat) Application Act, 1937: As per Section 2 of the Act, Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and Wakfs, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

⁷ Cf. The Muslim Personal Law (Shariat) Application Act, 1937, sec. 2.

⁸ Cf. Donald Smith, *Legal History of India* (Princeton University Press, 2011), 23.

⁹ Cf. John L. Esposito, *Islam: The Straight Path* (Oxford University Press, 1988), 37-67.

IN BRITISH INDIA

The debate on Uniform Civil Code dates back to the colonial period. The *Lex Loci* Report of October 1840 emphasized the importance and necessity of uniformity in codification of Indian law relating to crimes, evidences, contract etc., but recommended that the personal laws of Hindus and Muslims should be kept outside such codification. However due to different necessities, during the British period, different laws were enacted for individual religious communities and as well as for common to all, to name a few:

The Caste Disability Removal Act, 1856, Hindu Widow Remarriage Act, 1856, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu Gains of learning Act, 1930, Hindu Women's Right to Property Act, 1937, the Hindu Married Women's Right to separate Residence and Maintenance Act, 1946, The Indian Succession Act, 1925, The Special Marriage Act, 1929, Shariat Act, 1937, Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956 etc., etc.,¹⁰

OBJECTIONS RAISED IN THE CONSTITUENT INDIA

The Muslims in the beginning said that firstly, it would infringe the Fundamental right to freedom of religion mentioned in Article 25. And secondly, it would be a tyranny to the minority. For this the response was given in this way: The first objection is misconceived. The directive contained in article 44 is in no way infringes the freedom of religion guaranteed by Article 25. Clause (2)107 of that article specifically saves the secular activities associated with religious practices from the guarantee of religious freedom contained in clause (1) of Article 25.

As regards to the second objection, the following speech of Shri K.M. Munshi, Member of the drafting Committee, in the Constituent Assembly, may well be quoted – “A further argument has been advanced that the enactment of a civil code would be tyrannical to minorities. Is it tyrannical? 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. Take for instance Turkey or Egypt.

RIGHT TO FREEDOM OF RELIGION

Article 25 of the Indian Constitution provides for freedom of conscience and free profession practice and propagation of religion. Accordingly, (1) it is Subject to public order, morality and health and to the other provision of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion; and (2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law – (a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus. In its explanation clause (1) it provides that the wearing and carrying of kirpans shall to deem to be included in the profession of the Sikh religion. Further, in explanation

¹⁰ Cf. D.D. Basu, *Commentary on the Constitution of India*, Vold. 2, 2008, 135.

–II, it provides that In sub-clauses(b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, jaina or Buddhist religion and the reference to Hindu religious institutions shall be construed accordingly.

It is important to note that Articles 25 and 26 should read together. The right guaranteed by Article 25 is an individual right, as distinguished from right of an organized body like religious denomination or any section there of dealt with by Article 26. Both these articles protect matters of religious doctrine or belief as well as acts done in pursuance of religion-rituals, observances, ceremonies and modes of worship. These articles embody the principles of religious toleration that has been the characteristic feature of Indian civilization from the start of history the instances and periods when this feature was absent being merely temporary aberration. Besides they serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the constitution.

Article 25 (1) guarantees to every person and not merely to the citizen of Indian the freedom of conscience and the right freely to profess, practice and propagate religion. The right is subject in every case to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the article. Sub-clause(a) of clause (2) saves the power of the state to make laws regulating or restricting any economic, financial, political or secular activity which may be associated with religious practice and sub-clause (b) reserves the State's power make laws providing for social welfare and social Reform even though they might interfere with religious practices. Freedom of conscience can notes a person's right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well-being. A person has freedom to believe in religious tents of any section or community. The right is not only to entertain such religious belief as may be approved of by his judgment or conscience but also to exhibit his sentiments in overt acts as are enjoined by his religion. In the words of the article, he may "Profess, practice and propagate his religion." To profess a religion means the right to declare freely and openly one's faith. He may freely practice his religion: "Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Rituals and observances ceremonies and modes of worship considered by a religion to be its integral part are also secured. What constitutes an essential part of a religion or a religious practice has to be decided by the courts with references to the doctrine of a particular religion and include practices regarded by the community as part of its religion. Again, he may propagate freely religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or a behalf of some church or institution. However, religious, freedom cannot be used as a protection against acts inimical to the public order, health and morality. Article 25, accordingly, declares that the religious freedom shall be subject to "Public order, health and morality.

FREEDOM TO MANAGE RELIGIOUS AFFAIRS

Subject to public order, morality and health every religious denomination or any section thereof shall have the following rights:

1. To establish and maintain institutions for religious and charitable purpose;
2. To manage its own affairs in matters of religion;
3. To won and acquire movable and immovable property; and
4. To administer such property in accordance with law.

This Article (Article 26) deals with a particular aspect of religious freedom. Under these articles every religious denomination or a section of it has the guaranteed right to establish and maintain institutions for religious and charitable purpose and to manage in its own way all affairs in matters of religion. Rights are also given to such denominations or a section of it to acquire and own movable and immovable properties and to administer such properties in accordance with law

MANAGEMENT OF RELIGIOUS AFFAIRS

Clause (b) of Article 26 confers on a religious denomination or a section of it the right to manage its own affairs in 'matter of religion'. The expression 'matter of religion' is not limited to matter of doctrines or belief; it extends also to act done in pursuance of religion and therefore, contain a guarantee for rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion. What constitutes as essential part of religion or religious practice has to be decided by the courts with reference to doctrines of the particular religion and included as an integral part of the religion. **Therefore, religion nowhere means matters regarding marriage, adoption, divorce, maintenance etc.** which are defined under different codes. **All the codes regarding various religious communities are made by human beings so there is every possibility that rulers of today can uniform all the different codes into a Uniform Civil Code.**

The right that will be emphasized is limited only to affairs in matters of religion. Secular functions, though connected with religious institutions, are not immune from State Interference. But to decide if a practice is religious or secular is not free from difficulty because sometimes, they are inextricably mixed up. The task of disengaging has nevertheless to be attempted in dealing with claims under Article 26(b). A practice will be religious if it can be regarded as an integral or essential part of the religion and that will depend on the evidence regarding the conscience of the community and the tenets of the religion. The second principle is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrines of a particular religion and includes practices which are regarded by the community as a part of its religion.

The following opinions are general observations that are found from the common folk with regarding the Uniform Civil Code:

WHAT ARE THE PROS OF THE UNIFORM CIVIL CODE?

To provide equal status to all citizens

In the modern era, a secular democratic republic should have a common civil and personal laws for its citizens irrespective of their religion, class, caste, gender etc.

To promote gender parity

It is commonly observed that personal laws of almost all religions are discriminatory towards women. Men are usually granted upper preferential status in matters of succession and inheritance. Uniform civil code will bring both men and women at par.

To accommodate the aspirations of the young population

A contemporary India is a totally new society with 55% of its population is below 25 years of age. Their social attitudes and aspirations are shaped by universal and global principles of equality, humanity, and modernity. Their view of shedding identity on the basis of any religion has to be given a serious consideration so as to utilize their full potential towards nation building.

To support the national integration

All Indian citizens are already equal before the court of law as the criminal laws and other civil laws (except personal laws) are same for all. With the implementation of Uniform Civil Code, all citizen will share the same set of personal laws. There will be no scope of politicization of issues of the discrimination or concessions or special privileges enjoyed by a particular community on the basis of their particular religious personal laws.

To bypass the contentious issue of reform of existing personal laws

Existing personal laws are mainly based on the upper-class patriarchal notions of the society in all religions. The demand of UCC is normally made by aggrieved women as a substitute for existing personal laws as patriarchal orthodox people still deem the reforms in personal laws will destroy their sanctity and oppose it profusely.

WHAT ARE THE CONS OF UNIFORM CIVIL CODE?

Practical difficulties due to diversity in India

It is practically tough to come up with a common and uniform set of rules for personal issues like marriage due to tremendous cultural diversity India across the religions, sects, castes, states etc.

Perception of UCC as encroachment on religious freedom

Many communities, particularly minority communities perceive Uniform Civil Code as an encroachment on their rights to religious freedom. They fear that a common code will neglect their traditions and impose rules which will be mainly dictated and influenced by the majority religious communities.

Interference of state in personal matters

The constitution provides for the right to freedom of religion of one's choice. With codification of uniform rules and its compulsion, the scope of the freedom of religion will be reduced.

Sensitive and tough task

Such a code, in its true spirit, must be brought about by borrowing freely from different personal laws, making gradual changes in each, issuing judicial pronouncements assuring gender equality, and adopting expansive interpretations on marriage, maintenance, adoption, and succession by acknowledging the benefits that one community secures from the others. This task will be very demanding time and human resource wise. The government should be sensitive and unbiased at each step while dealing with the majority and minority communities. Otherwise, it might turn out to be more disastrous in a form of communal violence.

TIME IS NOT YET SUITABLE FOR THIS REFORM

Considering a major opposition from Muslim community in India over this issue overlapping with controversies over beef, saffronization of school and college curriculum, love jihad, and the silence emanating from the top leadership on these controversies, there needs to be given sufficient time for instilling confidence in the community. Otherwise, these efforts towards common will be counterproductive leaving minority class particularly Muslims more insecure and vulnerable to get attracted towards fundamentalist and extremist ideologies.

SUGGESTIONS AND CONCLUSIONS

- At the end of the day, a UCC can only emerge through an evolutionary process, which preserves India's rich legal heritage, of which all the personal laws are equal constituents.
- The codification and implementation of UCC may not necessarily usher in the expected equality among genders and religions.
- Major sensitization efforts are needed to reform current personal law reforms which should first be initiated by the communities themselves.
- Current institutions need to be modernized, democratized and strengthened for this change. Sincere efforts towards women empowerment have to be taken for all women of all religions.

- The plural democracy is an identity of the modern India. Therefore, efforts should be focused on harmony in plurality than blanket uniformity for flourishing Indian democracy.

For Catholics and Christians in India, almost all walk of life, we follow the civil law, except cases connected to the grounds for the Annulment. This paper calls for an attention to think and be prepared, if the government is going to bring the uniform civil code for the nation, in what way we can protect the sacramental union of Christian Marriage is a question of the hour.

Thank you!

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