

UCC: ANTITHESIS OF MULTICULTURALISM AND PLURALISM

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INTRODUCTION

Notion of Secularism in India:

Hobbes was a strong advocate for religion being relegated to the private sphere and religion being irrelevant for the State.² Galanter says that no secular state can claim to be neutral or impartial as it only creates the limitations within which neutrality operates.³ D.E. Smith gives this elucidation, “*The secular state guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of her religion, is not constitutionally connected to a particular religion, nor seeks to promote or interfere with religion.*”⁴

However, this western interpretation of ‘secularism’ does not hold well in a pluralist society like India. The State plays the role of a neutral arbitrator wherein it is neutral towards religious communities, but also facilitates social justice and reform within them. Secularism is accommodative and pluralist.⁵ The Indian State maintains a ‘principled difference’ wherein state interference or non-interference keeps in mind religious liberty, equal citizenship, human rights and dignity. Rajeev Bhargava calls this ‘contextual secularism’.⁶ In India, the State may need to interfere in religious matters such as financial administration of temples and *maths*, admission of Harijans into Hindu temples, practice of excommunication, modification of religious personal laws etc for social reform.⁷

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² Charles Taylor, *Modes of Secularism*, in THEMES IN POLITICS: SECULARISM AND ITS CRITICS 35, 35 (Rajeev Bhargava ed., 1998).

³ MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 249 (1992).

⁴ D.E.SMITH, INDIA AS A SECULAR STATE, (1963); BHARGAVA, *Supra* note 1, at 177.

⁵ ASHIS NANDY, THE POLITICS OF SECULARISM AND THE RECOVERY OF RELIGIOUS TOLERANCE; BHARGAVA, *Supra* note 1, at 327.

⁶ Rajeev Bhargava, *What is Secularism For?*, in THEMES IN POLITICS: SECULARISM AND ITS CRITICS 515 (Rajeev Bhargava ed., 1998).

⁷ *Ratilal v. State of Bombay*, AIR 1953 Bom 242; *Commissioner, Hindu Religious Endowments v. Lakshmindra*, 1954 Supreme Court Appeals, pp 431; *State of Bombay v. Narasu Appa*, AIR 1952 Bom 84; *Taher Saifuddin v. Tyebbhaji Moosaji*, AIR 1953 Bom 183; *Venkatramana Deveru v. State of Mysore*, AIR 1958 SC 255; *Lakshmindra Theertha Swamiar v. Commissioner of Hindu Religious Endowments*, AIR 1952 Mad 613; *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad 193.

I shall begin the project by discussing the relationship between the State and religion and shall conclude by determining the limits of State intervention in religious matters. I shall discuss the Uniform Civil Code (UCC) in Article 44 of the Constitution and the debate surrounding it. I shall examine how it is a weapon in the hands of religious majorities and how it cannot secure gender justice in its currently proposed form. I shall also elaborate on the reactions of our state mechanisms to the UCC and compare other multicultural and pluralistic systems to see their incorporation of personal laws in legislations.

Is a UCC antithetical to multiculturalism?

Article 44: Uniform Civil Code- A double edged sword:

The Constituent Assembly Debates of 1947 discussed the UCC in great detail.

There were the ‘liberals’ such as Minoos Masani, Amrit Kaur, Hansa Mehta, Mahavir Tyagi, KT Shah and Munshi⁸, who wanted a UCC as a unifying and integrating force. However they were unable to ascertain the needs of numerically and politically unequal populations. Others such as Muhammed Ismail Sahib, Mehboob Ali Baig Sahib Bahadur, Rajendra Prasad, Vallabhai Patel, J.B. Kriplani, Pandit Thakur Bhargava claimed that secularism need not prevent application of personal laws and there was no necessity of a common law for religious communities.

The consensus arrived at was that it would be introduced as a Directive Principle of State Policy and it would be brought about slowly, only with communities’ consent.

Relationship between Personal Laws and UCC:

Personal laws regulate matters of family law, succession, religious endowments etc.

A UCC could be either a melting pot of all personal laws or it could comprise of the ‘best’ parts of all personal laws.

⁸ 7 CONSTITUENT ASSEMBLY DEBATES, 362 (9 November 1948); 7 CONSTITUENT ASSEMBLY DEBATES, 339-400 (15 November 1948); 7 CONSTITUENT ASSEMBLY DEBATES, 547-548 (23 November 1948).

Smith advocates for a UCC completely replacing personal laws. The State will determine what the ‘core of private faith, worship and practice’⁹ for each religion is and shall trim each personal law to cull out the ideal elements. This is a completely superficial approach that fails to recognize that the very core of religions may not coincide. For Christianity, it may be projection of religious experience beyond the realm of earthly law and for Islam; it may be discipline in social life.¹⁰ The State may not have the authority or expertise to determine what constitutes the ‘essence’.

Mansfield questions whether a UCC will actually be superior to the personal laws that Smith deems outdated, medieval and anachronistic. He says that religion may be more than private conduct; it may be an intrinsic part of their daily public lives.¹¹

The assumption that individuals can simply choose to not be governed by personal law denies the distinction between freedom of choice and freedom of conscience. Madison and Jefferson believed that belief is not about individual will, their conscience dictates and their duties are inalienable.¹² This plea to ask religious minorities to ‘soften their faith is a rude shock because it is insensitively implies that this is a matter of personal preference and is dispensable. This provides the basis for my second question, it is the duty of a secular state to not merely remain neutral but to allow for minorities to retain distinct identity and treatment.

Project of aggressive Hindu majoritarianism:

In the 1940s, when the Hindu Code Bill was introduced and UCC discussed, the Hindu Mahasabha strongly dissented. This dissent stemmed from patriarchal privileges and the accusation that secularism was being used to favour Muslim men. Ambedkar too had supported a UCC, but for a very different agenda. He did not want to impose it on communities; he merely wanted to rid religion of elements which violated human rights such as caste system and gender injustices.

⁹ SMITH, *Supra* note 3.

¹⁰ Marshall G.S.Hodgson, *A Comparison of Islam and Christianity as Frameworks for Religious Life*, 32 *Diogenes* 49-74 (Winter 1960); Carole Pateman, *Critiques of the Public/Private Dichotomy*, in *FEMINISM AND EQUALITY* 104 (Anne Phillips ed., 1987).

¹¹ JOHN H. MANSFIELD, PERSONAL LAWS OR A UNIFORM CIVIL CODE; Marc Galanter, *Secularism East and West*, 7(2) *Comparative Studies in Society and History* (Jan 1965); BHARGAVA, *Supra* note 1, at 248; FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHTS IN INDIA*, 192 (1999).

¹² JAMES MADISON, *MEMORIAL AND REMONSTRATE*, 7 (1785); Michael J. Sandel, *Religious Liberty: Freedom of Choice or Freedom of Conscience*, in *THEMES IN POLITICS: SECULARISM AND ITS CRITICS* 86 (Rajeev Bhargava ed., 1998); *Thornton v. Caldor Inc.*, 474 US 703 (1985).

Members of minority communities have to continuously defend their citizenship, despite their insistence on being governed by personal laws. They are branded as non-Indians and are put in a precarious position.¹³In multicultural societies, it is not necessary individuals that are units of society; communities may be the building blocks.¹⁴

The researcher would like to understand the ideological rationale behind the Hindu demand for a UCC. It requires minorities surrendering to the notions of national integration and unity propagated by Hindu supremacy. The UCC demands subjugation to Hindu hegemony. Statements made by members of the Hindu right (ABVP, RSS, VHP, BJP) smack of majoritarian impulses. Golwalker considered Hinduism as our national religion and Savarkar has labeled Christian converts as anti-national. We have Subramanian Swamy recognizing Muslims as citizens only if they concede to Indian origin, Rajendra Singh calling for Muslims living in India to respect Hindu sentiments¹⁵ and the only acceptable interpretations of the Quran are those in accordance with Indian traditions. Current controversies on ban of cow slaughter are manifestations of communal antagonism as beef is actually not a taboo for our Muslim and Christian population; it only offends upper caste Hindu sensibilities.

The fervent call for a UCC is backed by the agenda of preventing conversion to other religions. Conversions weaken Hindu majoritarianism, the hierarchical caste system and electoral vote banks.

The Hindu right is using the UCC now due to the assumption that the base model shall be Hindu Personal Law and there shall be assimilation of identities.¹⁶ It is simply an attempt to dissolve the presence of religious and ethnic particularism and replace it with the Hindu banner. Converts are painted as these helpless victims with no agency and campaigns such as Ghar Waapsi bring them back into the folds of Hinduism. The acceptance of Buddhism as a part of Hinduism makes it seem as if Dalit conversion movement never took place. Hinduism is like an absorbing sponge, becoming more gigantic and those who run away from its grasp are

¹³Ainslie T. Embree, *The Function of the Rashtriya Swayamsevak Sangh: To Define the Hindu Nation*, in ACCOUNTING FOR FUNDAMENTALISMS, THE FUNDAMENTALISM PROJECT 617–652 (Martin E. Marty and R. Scott Appleby eds., 1994); Stanley J. Tambiah, *The Crisis of Secularism in India*, in THEMES IN POLITICS: SECULARISM AND ITS CRITICS 435 (Rajeev Bhargava ed., 1998).

¹⁴ WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION, (2nd ed, 2002).

¹⁵ Bhartiya Janta Party, *BJP's White Paper on Ayodhya and the Ram Temple Movement*, April 1993.

¹⁶ Partha Chatterjee, *Secularism and Tolerance*, in THEMES IN POLITICS: SECULARISM AND ITS CRITICS 347 (Rajeev Bhargava ed., 1998).

outsiders and aliens.¹⁷ Policing interreligious marriages is based on the premise that Muslims should not become the majority in the state. Women are property, child bearers and it cannot be risked that they produce Muslim offspring. Sikhs, Muslims and Christians are accused of having hidden agendas of stealing Hindu women and wither Hindu ranks.

The UCC is backed by demonization of minority religions and the goal of reconversion. Christianity is a Western import and Islam is too backward.

This amalgamating agenda is incredibly naïve as it is one backed by Brahminical notions wherein they refuse to acknowledge the diversity within Hinduism itself in terms of linguistics, worship, food, art, culture, dress, marriage etc. Institutionalized inequality exists and the concept of 'Hindutva' is not one of SC, ST, OBC and Dravidian Hindus.

Problematic stance of the Judiciary:

The researcher shall establish that justifications for the UCC are extremely problematic as it places cultural and religious identities in a dangerous position by stating that they are a problem that needs to be fixed. They need to constantly justify their positions as citizens 'clinging' to the 'special privilege' of personal law.

Time and again the Judiciary has made its stance towards Hinduism clear. There is less emphasis on ignorant and superstitious elements and more focus on those elements which make Hinduism progressive, inclusive and unifying.¹⁸ Hinduism has been defined as 'a way of life'¹⁹ and Indianisation i.e. creating uniformity by erasing diversity²⁰ is a 'modern' term thrown around by the Jan Sangh and RSS which coerces minorities to make sacrifices for the betterment of the country.

¹⁷ Kumkum Sangari, *Gender Lines: Personal laws, Uniform laws, Conversion*, 27(5/6) Social Scientist 44 (May-Jun, 1999); Laura Dudley Jenkins, *Legal limits on Religious Conversion in India*, 71(2) Law and Contemporary Problems, Galanter-Influences scholars (Spring, 2008).

¹⁸ Bhaichand Tarachand v. Bombay, AIR 1952 Bom 233; State v. Puranchand, AIR 1958 MP 352; Venkataramana Devaru v. State of Mysore, AIR 1958 SC 255; Bhau Ram v. Baij Nath, AIR 1962 SC 1476; Punjarao v. Meshram, AIR 1965 SC 1179.

¹⁹ RY Prabhu v. P S Kunte (1996) 1 SCC 130.

²⁰ Nivedita Menon, *State/Gender/Community: Citizenship in Contemporary India*, 33(2) Economic & Political Weekly, (Jan. 31-Feb. 6, 1998).

Courts have deemed Hindu personal law to be supreme and unchangeable despite willingness of parties not to be bound by it.²¹

In the landmark judgement of Shah Bano²² case, the Judiciary actually said that a UCC is required as following personal laws is disloyalty to the nation state. The court expressed regret on Article 44 remaining a dead letter. In Sarla Mudgal v. UOI²³, the Court based its judgement on personal law instead of secular remedies. It too linked the need for UCC to backwardness of other religions, instead of discussing male privilege and entitlement. It also conveniently refused to recognize that bigamy is rampant in Hinduism as well. This judgement went so far to say “*Sikhs and Hindus have forsaken their sentiments for national unity and integration while others would not.*” Soon after this, VHP mentioned that it was setting up Hindu missionaries to meet the challenges posed by Islam.

These judgements have allowed Hindu fundamentalists to use Article 44 as a tool for Muslim bashing.²⁴ The Court posits that Hindus have reformed themselves; it is the Muslims who need to give up their special privileges.²⁵

The discussion on Hindu nationalism would be incomplete without mentioning the Babri Masjid demolition of 1992. The violent actions of religious nationalism have threatened the very survival of Muslim minority and the Court is feeding into the desire for a mono-communitarian state. Hindu revivalism has been brought to life and this unofficial promotion of Hinduism is backing minorities into a corner in the guise of patriotism.

Attempts at codification of personal laws:

‘Nehruvian secularism’ urged for codification of Hindu law which legalized intercaste marriage, legalized divorce and prohibited polygamy, gave daughters inheritance rights and allowed adoption of daughters. There were four Hindu Code Bills in 1955: Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship Act, Hindu Adoption and Maintenance Act.

²¹ Vilayat Raj v. Sunita, AIR 1983 Delhi 351.

²² Mohd. Ahmed Khan vs Shah Bano Begum And Ors, 1985 AIR 945.

²³ Sarla Mudgal and Ors. v. UOI, 1995 AIR 1531.

²⁴ Justice, Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity*, 44(44) Economic and Political Weekly, 47 (Oct. 31-Nov. 6, 2009).

²⁵ Editorial, *Reversing the Option: Civil Codes and Personal Laws*, 31(20) Economic and Political Weekly, 1181 (May 18, 1996).

However, there have been many arguments against codification as it regiments rules, ends diversity and may end up losing existing liberal practices. The Dissolution of Muslim Marriages Act, 1939 combined features of four schools of Muslim thought and ended up reducing remedies to seek divorce.²⁶

The Hindu Code Bill of 1950s included Buddhist, Jain and Sikh in the definition of 'Hindu'. So long as you are not Muslim, Christian, Jewish or Zoroastrian, even if you aren't an active follower of Hinduism, you shall be included as a 'Hindu'. Legislations such as Hindu Marriage Act and Hindu Adoption and Maintenance Act have made it clear that conversion to another religion will carry the risk of not being able to adopt, not getting maintenance, guardianship and property rights shall also be affected. The Special Marriage Act also has communal traits wherein there are conditions for inheritance based on whom you marry i.e. effectively dissuading interreligious marriages.

This attacked religious fluidity and was symptomatic of the problems that could arise with a UCC. This plural Hinduism and inclusion of more communities fed Hindu majoritarianism and tried to create an undifferentiated Hindu identity.²⁷ This answers the first research question as in current Indian scenario, the UCC is a deadly tool for homogenization.

Fundamentalism in the garb of women empowerment:

The UCC was initially supported by feminist groups but by the 1990s, the objective had been hijacked for political purposes. The urgency for personal law reform was intended for social reform, but it was used as a tool for bullying by those who did not care for the cause.²⁸ By pretending to be 'Champions for a feminist cause', they turned a secular, non-sexist demand to a communal one.²⁹

Women do not need a UCC which does not erase patriarchies in religion, but rather aggregates them. The demand for women rights cannot be combined with this essentialist unifying agenda as they do not deserve this. The State must respond to them by awarding them inalienable rights which cannot be violated by personal laws of any religion.

²⁶ SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA, POLITICAL AND PRIVATE REALITIES 71 (1990).

²⁷ SANGARI, *Supra* note 16, at 32.

²⁸ Rajeev Dhawan, *Religious Freedom in India*, 35 (1) *The American Journal of Comparative Law*.

²⁹ Flavia Agnes, *Women's Movement Within a Secular Framework: Redefining the Agenda*, 29(19) *Economic & Political Weekly* (May 7, 1994).

Separate legislations were suggested which would accommodate Women's access to property, guardianship rights, rights to matrimonial home, equal wages, crèche facilities, anti discriminatory job prospects and promotions.³⁰ Feminists stressed on the need for agency to make a well-informed political affiliation, regardless of biology or birth. They emphasized on how legislations imposed from above would be ineffective as opposed to reform from within personal laws.

A glance at multicultural and pluralistic societies:

Ayelet Sachar discussed 'religious particularist' model and 'secular absolutist' model of multiculturalism.³¹ In the first, religious communities have legal power and follow their own traditions in family law, property, marriage and divorce. The second one advocates for State supremacy in all family law matters. There is a uniform secular law and relegates religion to the private domain. This is prominently seen in Germany, France and Netherlands.

There also exists a 'modified absolutist system' wherein the State retains authority, but religious officials may have parallel authority. This is employed in Australia, Britain, Canada and USA.

In Turkey, there were massive reforms for a Western secular state. The caliphate was abolished, imperial family members were banished, Shari'a was replaced by Western legal codes-civil code from Switzerland; penal code from Italy, and a commercial code from Turkey. Religion of the state was no longer Islam. Muslims constitute more than 95 % of the population and still protest against the imposition of a secular law by the powerful elites without consultations and negotiations with the common people. Greece, Burma, Thailand, Ghana and Uganda also Muslims to be governed by Islamic tradition.

South Africa has been cautious while drafting its Constitution and legislations to show deference to personal law. A woman can choose to have her dispute settled in the private religious sphere or she can use mechanisms and laws of the secular legal arena.³² Reform from within personal law is also advocated in the spirit of 'justice, equity and good conscience' as

³⁰ *Working Group for Women Rights*: Amrita Chhachhi, Farida Khan, Gautam Navlakha, Kumkum Sangari, Neeraj Malik, Nivedita Menon, Ritu Menon, Tanika Sarkar, Uma Chakravarti, Urvashi Butalia, Zoya Hasan.

³¹ AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS – CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

³² Rashida Manjoo, *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights*, Human Rights Program at Harvard Law School, September 2006-December 2007.

specified in the Constitution. Israel too, through its activist courts is trying to bring some questions of personal law within the ambit of civil courts.³³

In 2003, Iraq, an Interim Governing Council passed a decree to abolish Iraq's Personal Status Law. Religious authorities would be given power to decide disputes and shari'a would apply. Women activists condemned this and demanded drafting of new personal laws.³⁴

Sudan recognizes religious diversity along with personal autonomy and equality to all citizens. Principles of natural justice are applied to personal law and actions in accordance with custom cannot be contrary to public order or morality.³⁵

It can be seen that most jurisdictions have chosen to not erase personal laws from public domain completely.

UCC- far cry from multiculturalism and pluralism

There are three options before us: compulsory or optional UCC or reform within personal laws. The clamour for a UCC has been in the context of communal violence, humiliation, degradation and oligarchic forms of social domination and systematic persecution.³⁶ Religious fundamentalism cannot be allowed to stamp on the seeds of pluralism and multiculturalism. Nehru felt that it was possible for religion to recede from public sphere but this may be seen as a modernist tyranny against pluralist traditions.³⁷ As Rawls said, individual justice cannot be sacrificed in the name of larger social interest.

Minorities often remain systematically unheard and it is through secularism that they can penetrate public debate.³⁸ Bhargava claims that sometimes, religious communities merit different treatment to promote religious liberty and citizenship. A secular state should provide for opportunities to follow their beliefs, and a UCC would deprive them of that agency. By treating everyone equally through a UCC, the State may actually provide discriminatory

³³ OFRIT LIVIATAN, JUDICIAL ACTIVISM AND RELIGION-BASED TENSIONS: THE CASE OF INDIA AND ISRAEL 2008.

³⁴ N. Efrati, *Negotiating Rights in Iraq: Women and the Personal Status Law*, 59(4) Middle East Journal 579 (Autumn, 2005).

³⁵ Natale Olwak Akolawin, *Personal Law in the Sudan-Trends and Developments*, 17(2) Journal of African Law (Summer, 1973).

³⁶ Susanne Hoerber Rudolph and Lloyd I. Rudolph, *Living with difference in India: Legal Pluralism and Legal Universalism in Historical Context*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA – A CALL TO JUDGEMENT, (Gerald James Larson ed., 2001).

³⁷ T.N. Madan, *Secularism in Its Place*, in THEMES IN POLITICS: SECULARISM AND ITS CRITICS 310 (Rajeev Bhargava ed., 1998); Akeel Bilgrami, *Two Concepts of Secularism: Reason, Modernity and Archimedean Ideal*, 29(28) Economic and Political Weekly (July, 1994).

³⁸ TAYLOR, *Supra* note 1, at 45.

treatment to citizens of different faiths, as it is asking them to shed their culture and adopt that of the majority. This answers my second research question as treating unequals equally is another form of injustice itself.

The researcher submits that umbrella legislation may cause jurisgenerative violence and threaten the very existence of historically different personal laws. Chatterjee holds that the state has no business in normalizing, defining, classifying and fixing minority identities.³⁹ In a society like India, we must encourage democratic processes, autonomy and self-representation for internal reform. Progression cannot be imposed; it must come about through evolution. Similarly, Mansfield discusses the need for respecting personal laws and compares the removal of religious identity to be a form of cultural genocide.⁴⁰ However, Bilgrami urges for 'emergent' and 'negotiated' secularism as opposed to 'Archimedean' secularism which is externally imposed. Bilgrami urges for some involvement of the state mechanisms through negotiations with moderate political leaders of communities so secularism can emerge and not be imposed.⁴¹ Democratization of public political sphere includes minorities in the debate and protects identities rather than eroding them.

The researcher sees the merit in both approaches, as both involve respecting diversity while simultaneously empowering communities.

Mahmood suggest UCC for different communities rather than one for the entire country wherein there is a referendum in each community and if the majority agrees, they are governed by it. He thinks we cant ignore ground realities and must remove evils form personal laws.⁴²

The researcher suggests that communities are more reliable than legislative authorities. Personal law can be reformed from within the community or the State can create legislations granting inalienable rights to women across religions.⁴³ Laws incorporating social and gender justice principles are required, not a blanket legislation using 'uniformity' to snuff out identities and histories. A UCC is antithetical to multiculturalism as it assumes that religious pluralism

³⁹ CHATTERJEE, *Supra* note 15, at 376.

⁴⁰ MANSFIELD, *Supra* note 10.

⁴¹ Secularism, Nationalism and Modernity, Akeel Bilgrami, Themes in politics: secularism and its critics, Rajeev Bhargava ed., Oxford India Paperbacks, 1998, p.411; Akeel Bilgrami, Secularism and the very concept of law.

⁴² T Mahmood 'Progressive codification of the Muslim personal law' in Mahmood (Ed) Islamic law in Modern Indi (1972) 80; T Mahmood 'Common Civil Code, personal laws and religious minorities' in Imam (ed) 476.

⁴³ Politics of Diversity: Religious communities and multiple patriarchies, Kumkum Sangari, EPW, Vol. 30, No. 51 (Dec. 23, 1995)

is the sum of different identities. Multiculturalism is much more complex and weaves an intricate web among minorities and marginalized sections. A bottom to top approach is democratic and will ensure respect to pluralist ethos. We must keep in mind that law develops in accordance with a larger human and social context.

