

UNIFORM CIVIL CODE: FAR FROM REALITY

Written by *Rachna Nain*

3rd year BA LLB Student, Institute of law, Nirma University

ABSTRACT

The idea Uniform Civil Code refers to the common set of secular civil laws which will govern all citizens of India with no consideration of their Religion, Caste, language or tribe. India has a common code for laws related to contract, transfer of property, penal laws and other civil laws which are independent of religion. The further areas of laws which will be governed under it are the Personal Laws related to Adoption and maintenance, Marriage, Divorce, and Inheritance and acquisition and Administration of property. The mandate of article 44 of DPSP directs the state to make a Uniform Civil Code. This research paper is the result of the questions emerged in the debate of Uniform Civil Code. The analysis is with respect to the present condition of the communities at grassroots level vis-à-vis the need for the hour. The paper questions the concept of unified civil code being propagated and also till what extent is it feasible for the Indian population. This paper majorly focuses on the drawbacks of such code with analyzing UCC of Goa and also discuss options available other than this utopian idea of a single code.

INTRODUCTION

India being the second most populated country and the largest democracy of the world has diverse population. The diversity of country is seen in linguistic, cultural and religious identities. Religions not just have been filling in as the establishment of the way of life of India, however have had tremendous impact on Indian politics and society. In India, religion is a lifestyle. It is an integral part of the whole Indian tradition. According to the All India Religion Census Data 2011 around 99% of the total population associate themselves with religion out of which 82% follows Hindu religion, 14.23% are Muslims and 2.30% are Muslims. Taking in account this diversity which has existed in India since ages was the constitution of India framed. The preamble of Indian constitution is the reflection of protected soul of the nation. It goes for to constitute India as a Sovereign, Secular, Democratic, Republic. It needs to secure Justice, freedom, and fairness to the citizens and this is how our constitution works for advancing fraternity while guaranteeing respect of the individual and unity in the diversity. It contains those components which forms the soul of the Constitution. In this way, every one of the arrangements given in the preamble are moving towards a specific objective i.e. fraternity assuring mutual respect for each other. In this sense it can be construed from the preamble that fundamental rights and DPSP of state policy are Complementary to each other. India is a secular country, which implies that it doesn't take after any one specific religion or there is no official religion for the nation. It implies that the state won't be subject to any sort of religious institutions for taking choices for the state, it won't meddle with the religious issues and the religion won't meddle with the viability of the state. This is additionally reflected in its elected political framework, whereby legislative and administrative authority is shared between the central government and the states.

The term Uniform Civil Code refers to the common set of secular civil laws which will govern all citizens of India with no consideration of their Religion, Caste, language or tribe. India has a common code for laws related to contract, transfer of property, penal laws and other civil laws which are independent of religion. The further areas of laws which will be governed under it are the Personal Laws related to Adoption and maintenance, Divorce, Marriage, Divorce, and Inheritance and acquisition and Administration of property. It was in the decade of 1930 that the demand for Uniform Civil Code was first made by the All India Women's Conference, pursuing equal rights for women, irrespective of religion, in marriage, inheritance, succession,

adoption and divorce. While the Constituent Assembly¹ and Parliament was of the opinion that is Uniform Civil Code is desirable, but having gone through the intricacies and having discussed between the members they concluded that the assembly did not want to force a common code upon any religious community in a time of difficulty and insecurity. They included it as a Directive Principle of State Policy² in the Constitution, expecting its enactment at the right time is a mandate upon the state under Article 44 of the Constitution as directive principle of state policy. As per the provision under Article 37 of the Constitution which says directive principles of state policy are not enforceable by the Court of Law.

UNIFORM CIVIL CODE AND CONSTITUTION OF INDIA

- 1) Indian constitution is a **federal constitution**³ for India bring a Union of States with few features of unitary constitution, this statement itself implies that the constitution of India carries in it the fragrance of federal features in it. A federal constitution will not have uniformity. The division of powers⁴ between the states and the centre is a proof of the independent powers to legislate within their sphere of activity and none violates its limits and tries to encroach upon the functions of others. The enactment of a common code for the subject as diverse as personal rights I not only infringement of personal rights of the people but also a question mark on the federal character of the Indian constitution and the entire purpose dividing powers of legislature is defeated.
- 2) The **Seventh Schedule** of the constitution of India contains three Legislative Lists which enumerate subjects of administration, viz., Union, State and Concurrent Legislative Lists. The third list which is Concurrent List which holds subject matter on which both state and union can legislate and apparently it includes 47 subjects including economic and social planning, bankruptcy, criminal law, marriage, divorce, bankruptcy, trade unions, electricity, etc. The simple derivation of this could be that union can make 1 enactment on these subject of personal

¹ CONSTITUENT ASSEMBLY OF INDIA - VOLUME VII

² CONSTITUTION OF INDIA, part IV

³ CONSTITUTION OF INDIA, article 1

⁴ CONSTITUTION OF INDIA, part XI

law and all the states can make their separate enactments for the same, inclusion of these subjects in list III indicates the clear intention framers of constitution to recognize the diversity of personal laws and the need for several enactments for a single subject. Hence, it has never promoted Uniform Civil Code for personal laws.

- 3) Let the observation Narrow down to the specific provision which talks about Uniform Civil Code which is **Article 44** in part IV of Constitution of India, it states “The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India.”

This article is not very in accord with the possible framework of Uniform Civil Code which is based on this article itself. Several issues comes out from the interpretation of this article, some of them being:

- What does **uniformity** mean and how is it necessary for the nation? Does this mean a single code common code for all or does this mean uniform in terms of rights and liabilities?
- What does **endeavour**⁵ supposed to mean in this regard? Who is to endeavour this uniformity? Is state here only central government or the state as under the Article 12 of constitution of India?
- How is this uniformity **necessary** ? How is this preferable over the personal laws and customs followed by people from thousands of years?

These are the questions which are first to answered before framing of any common civil code for the citizens of India governing most private of affairs of the people. The article is not clear enough to make an enactment based on the article which has no clear interpretation.

- 4) Understanding the social necessity of having enactments which are gender neutral and promotes the true spirit of constitution it is all the more important to see whether one provision is in contradiction with any other provision and if it is then which right will give due importance over other. Comparing **article 25**⁶ and **article 44** of the constitution Justice R.M.Sahai in his judgment⁷ in the case of Sarla Mudgal stated

“When Constitution was framed with secularism as its ideal and goal, the consensus and conviction to be one, socially, found its expression in Article 44 of the Constitution. But

⁵ Try hard to do or achieve something

⁶ CONSTITUTION OF INDIA, part IV

⁷ Smt. Sarla Mudgal, President, Kalyani & Ors.v Union of India, (1995) 1 S.C.C. 635

religious freedom, the basic foundation of secularism, was guaranteed by Articles 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief. The Court has expanded religious liberty in its various phases guaranteed by the Constitution and extended it to practices and even external overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely, practice and propagate religion.”

The article 25 of the constitution has given the fundamental right to religion for all its citizen which allows people to follow their religion and thus evidently their personal laws and it is irreducible minimum. The state has the duty to bring uniformity which is in the sense of constitutional equality and not one single code. Dr. B.R.Ambedkar⁸ has said “ the profession of a particular religion carries with it the personal law of that person” , making it evident that personal laws of any religion forms integral part of that religion and hence are protected under the fundamental rights. The Right to Religion cannot be compromised with in the name of uniformity in personal laws considering that a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the primary step is supposed to be to rationalize the personal law of the minorities to develop religious and cultural amity.

ANALYSIS OF UNIFORM CIVIL CODE IN GOA

Having discussed so much about uniform civil code in india it is the time to lift the veil from the Uniform Civil Code which is considered as a possible framework for the Uniform Civil Code for India. The way the word 'uniform common code' is bandied around, it displays a fabrication of uniformity being compared with equality. Laws can be uniformly appropriate to all in regarding women’s rights, and they can likewise be uniformly relevant to all groups in neglecting women's rights. At the end of the day, they can likewise be uniform in discriminating. That is a lesson to draw from Goa's Family Laws. Closely and briefly analyzing

⁸ CONSTITUENT ASSEMBLY OF INDIA - VOLUME VII

the Goa Civil Code⁹, there are a number of provisions which lead our society to the source of light to achieve greater equality and social justice. However, understanding it as a successful legislation is not the correct interpretation to be made. Having analyzing the provisions of this act it is seen that there are many provisions which are gender unjust and have defeated the purpose of giving away the personal laws for a better enactment.

- 1) On one hand the law imposes **monogamy** on parties without any exception of religion but the same law also allows “Gentile Hindus of Goa” to legally practice **bigamy**, if their wife has not given birth to a child till the age or 25 or could not produce male heir by the age 30. This exception is only available to the males, the non-production of children is considered to be only because of the woman, giving birth to a male heir is more important than securing rights for the women. This law is not only gender unjust but it also depicts the mentality of the patriarchal society.
- 2) There is an unparallel concept of property rights in matrimonial relations, which are not present in the personal laws of the any of the religions and that is reason the reason most of the times property falls in the lap of the males and he gets the right to mortgage, or dispose the property as per his wish. In Goa, if no contract is made with respect to property at the time of marriage, the system working in default is the **communio of assets**, which says that “upon marriage, couples will hold whatever assets they have each or jointly acquired or inherited before or after marriage as co-owners of property”. People have a way of opting out of this by making pre-marital contract in which they can decide whether the properties acquired before marriage will be held separately and that after marriage will form the communion or if properties, whether acquired before or after the marriage, will all be held separately. The applicability of this provision is uniform to all the communities. But the condition. There are 2 implication of this provision of law, first is that even though the property of both the spouse is to be shared equally but the control over use of that properties is still in hand of the husband and only in the cases where husband is incapable due to some reason like insanity it is with the wife. Second is if the husband does not have his ancestral property in his name the wife has no right over that

⁹ Portugal Civil Code, 1867

property leaving her handicapped at time of divorce. Is this the uniformity we are aspiring for where one gender has privilege to control the assets across all communities.

- 3) The legal acknowledgement of socially accepted religious forms of marriage, if not qualified, has influence by way of heterogeneous procedures and grounds for **annulment of marriage**, or for divorce. A marriage which is solemnized in the church have the option of being annulled in the Church, for specific reasons, for instance non-consummation of marriage. Once a marriage is annulled by the Tribunal of the Church, the said annulment is then confirmed by the high court mechanically, after ensuring that there was no bias in the decision making in respect of any of the parties to the case. On the other hand, if the matrimonial petition were to be filed in the civil court, non-consummation of marriage is not a ground for either annulment or separation or divorce, for any community. The non-catholic marriages which does not take place in church have no right to seek divorce on the grounds of **non- consummation of marriage**.
- 4) An examination of Goa's tryst with the UCC uncovers much. It appears, for instance that '**uniformity**' can take distinctive shapes. It gives a stark update that uniformity isn't as such a rights-stacked word. It can likewise mean uniformity in segregation in that you can have **biased arrangements** pertinent over all religions – uniformly. It points out the way that inconvenience of uniformity among unequal's can make disparity, and that the presence of plural frameworks, both formal and non-formal, is really perfect for the different religious groups who need to strategies with the constrained information and inside the restricted power they have. Most importantly, this nationalist agenda to introduce Uniform Civil Code is becoming detrimental to human rights.
- 5) In this way, it is critical to see here how the alleged UCC works out diversely for various groups in Goa. We should not overlook the conditions for registration of marriage are diverse for Catholics when compared to non-Catholics. Regardless of the possibility that common enlistment of marriage has been obligatory for Goans, what is really considered **marriage**, generally and socially over every religious group, is the **religious ceremony and gathering**. The paper enlistment before government officials is viewed as a law to be followed, marriages

are still the same all that is changed is the need for 2 signatures. This situation is contrary to what is the objective of UCC. Many of the people, and particularly women are not even aware of the 2 signature with a gap of 15 days, one of which is declaration of intention which is applicable to everyone and II is confirmation which is supposed to be done before church for Catholics and civil registrar for non-Catholics. The lack of knowledge of the law allows the tie up of the state with the Church, wherein the signature in Church Marriage Registration Book is treated as the second signature. Needless to say the religious practices which are socially acceptable are accounted for in the law, when it concentrates on Catholics. That is the bright side of the law that it recognizes the popular relevance and significance of religious marriage. The women who are unaware of 2 signature procedure are sometimes tricked into marrying which is not even recognized as there is no registration of marriage, this has led to many children born out of such marriage to be considered illegitimate and women suffering because of not having any matrimonial rights

THE WAYS TO ACHIEVE UNIFORMITY WITHOUT COMMON CIVIL CODE

1. The legislature has time and again aspired to bring secular laws applying to all irrespective of religion. This is a positive approach to bring about constitutional uniformity, section 498a in the Indian Penal Code is one such example. Child Marriage Prohibition Act, 2006 under which a marriage is voidable¹⁰ at the option of any of the contracting parties who was a child at the time of marriage is also applicable to all the religion irrespective of their religion. Recently more secular rights over adoption of child is given to the people who does not have any such provision in their personal laws. *Shabnam Hashmi V Union of India*¹¹, the Supreme Court of India declared that the right to adopt a child by a person as per the provisions of the Juvenile Justice Act¹² would be applicable to all the citizens of the country and would prevail over all personal laws and religious codes in the country. This is the way forward to the uniformity of nation where laws are being made nondiscriminatory and the injustice within the personal laws

¹⁰ The Prohibition of Child Marriage Act, 2006 Act No. 6 OF 2007, section 3

¹¹ *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1

¹² Juvenile Justice (Care and Protection of Children) Act, 2000 , section 41

are worked with through different central laws instead of one single law taking the sole basis of religious identity which is in the personal laws of the people.

2. The onus is upon the court to interpret the law in more flexible manner making them gender just. The courts shall be forthcoming with regards to constitutionality of personal laws. In section 6 of Guardianship Act¹³ it is stated that the father is the lawful guardian and only in his absence is the mother legal guardian. Now the situation where father is either incapable, incompetent, drunkard or not committed to the welfare of the child, the Supreme Court remains silent on the constitutionality of the law and only read it down a little stating that if the father is incompetent mother can be lawful guardian. Under Section 15 of the Hindu Succession Act¹⁴ if a married woman who is earning or dies without making a will then the family the husband has better claim over her property than her own parents. An example¹⁵ of court actively participating in examining the constitutionality of a law and striking down an unconstitutional law was by Kerala High Court which struck down section 10¹⁶ of Divorce Act for it being discriminatory on the grounds of sex. After this judgment a number of other High Courts struck down the law and faced by this judicial turmoil the parliament in 2001 amended¹⁷ section 10 making the grounds equal for both men and women. This is the stand Courts should take while deciding matters of personal law and shying away from the responsibility and nudging the legislature to change the law only would not suffice the purpose.
3. The judiciary in its judgments has always nudged the legislature to make a unified civil code for all the people for national integration and it is the legislature which can dispense justice to all through the way of a common law. Formulation of law and its implementation will require acceptance from the communities themselves and the resistance is the reason which further has consequences if such a unified law is implemented in one go. The communities coming up for the change in the personal law and their flexibility in acceptance of such change is more important than the state dictating the citizens as to how to live.

¹³ Hindu Minority and Guardianship Act, 1956, section 6

¹⁴ Hindu Succession Act, 1956 ,Act No. 30 of 1956, section 15

¹⁵ Omprakash and ors. Vs. Radhacharan and ors., 2009

¹⁶ Indian Divorce Act, 1869

¹⁷ The Indian Divorce (Amendment) Act, 2001, Act No.51 of 2001

4. There is no guarantee to the claim that a single unified law will be gender just and will reject all kind of discrimination and the best example of this is the Uniform Civil Code of Goa which gender discriminatory in itself and such discrimination is not the result of different personal laws based on religion but patriarchal mindset of the society which would be reflected in that unified single law too. Taking the example of polygamy in Muslim in legally recognized and hence there are provisions for the wives but this is not exclusive to Muslims. Hindu men are polygamous too, except that because polygamy is legally banned in Hindu law, subsequent wives have no legal standing and no protection under the law. In such a scenario which law is more discriminatory is the question to ponder upon. Hence, the more plausible solution is to recognize and acknowledge the practices prevalent in society and are rooted in their practices instead of ignoring them and making a utopian law which people don't relate to and reject.

CONCLUSION

This paper was an attempt to justice to the fact that the need of the hour is not enactment of a single unified law for all the people disregarding their religious identity and their commitment to the personal laws. Having studied all the drawbacks of a single governing law, the challenges faced by the state and the people along with the challenges in bringing uniformity it is further the question to ponder upon that if not a Common Civil Code then what could be the way forward. In present times imagining the people being governed by single law seems to be a utopian concept and there are a few more practical solutions.

1. Uniformity is achievable by providing a uniform base to the constitutional values of each system of personal laws by honoring the Article 44 of Indian Constitution. Instead of making a single code which resembles to no religion and to which people have no interest in acceptance the legislature along with judiciary shall make each personal law and each system within a religion constitutionally compatible.
2. The legislature enacts the law hence the onus of making a constitutionally compatible law is on the legislature itself. The legislature shall reexamine the unconstitutionality of the laws and make them gender just. A simple amendment in law making conditions same for both men and women will make the law neutral and gender just.

3. There is a need of enactment of gender just laws in the cases where there are no laws at all. The Muslim law needs to be codified and be made gender just defining the rights and liabilities of all which different liberal interpretations are not possible as is rampant at present.
4. The force has to come from within the community for changing their personal laws. Which is supposed to be taken up upon consultation of the community. The insecurities of minorities that they are swiped away by majority is creating a resistance among them. The Administration has a role to play in educating the mass about their rights and liabilities under constitution and desire of change coming from the community will lead to uniformity conserving the secular character of the country.

It is not easy to bring about uniformity without extending hands to accept the change and to cooperate for bringing about such change. The responsibility is not one legislature singularly but also on judiciary and administration. The process to achieve such uniformity will take time but will be at par with the constitutional values.