



UNIFORM CIVIL CODE: IS IT A BETTER CHOICE THAN PERSONAL RELIGIOUS LAWS?

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ABSTRACT

Article 44 of the Constitution of India, 1950 states that the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. Till date there is no prevalence of the Uniform Civil Code in the country because of the personal religious laws which were effective way before the constitution was drafted. Personal religious laws are one of the biggest obstacles in enacting the Uniform Civil Code in the country. There has been a constant debate over enactment of the Uniform Civil Code.

Goa as one of the only states is an exception to the rule of religion specific civil code in India. By enacting a Uniform Civil Code in India one of the most crucial problems of gender inequality can draw to a close, as it deals with uniform laws on civil matters like marriage, adoption, inheritance, succession, divorce. Muslim personal law largely discriminates women and their rights. Not only Muslim laws but other

personal laws have provisions that do not adequately provide justice to women.

On the other side are the religious personal laws which have been prevalent in the country since the very beginning. India is such a vast country with such diverse religions that having uniform laws for everyone is beyond the bounds of possibility. The framers of the constitution didn't intend uniformity of personal laws and only provided for Article 44 in the constitution so that it could be enacted by the state to make an endeavor to govern all its citizens by one uniform code.

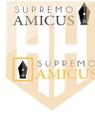
This research paper elaborates upon whether Uniform Civil Code is a better choice than religious personal laws for a vast and diverse country like India.

Keywords: Uniform Civil Code, Secularism, Personal Religious Laws

INTRODUCTION

The purpose of Article 44 of the Constitution of India is to have common laws for all the communities which are currently governed by their religious personal laws. Preamble to the Constitution of India is framed with great care and deliberation so that it reflects the high purpose and noble objective of the Constitution makers.¹It includes the principles of Sovereign, Democratic, Republic, ideas based on the ideology of justice, liberty, equality and fraternity.

¹Pradeep Jain v. Union of India, AIR 1984 SC 1420 (India).



Later the principles of secularism and socialism were added to the preamble through 42nd amendment in 1976. In general, the term secularism refers to, where in the state having no official religion and gives full opportunity to all persons to profess, practice and propagate religion of their own choice.

Dr. Radhakrishnan, former President of India, in his book *Recovery of Faith* said that, "When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives. Though faith in Supreme is the basic principle of Indian tradition, the Indian state will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given special status or accorded special privileges in national or international relations for that would be violation of the basic principles of democracy and contrary to the best interest of religion and government. The religious impartiality of the Indian state is not to be confused with secularism or atheism. Secularism as here defined is in accordance with the ancient religious tradition of India."²The Supreme Court has declared that secularism is a part of fundamental right and an unalienable segment of the basic structure of the country's political system.³Clearly, the Preamble facilitates the country and

people to be secular that is to profess, practice and propagate religion of their own choice with reasonable restrictions.

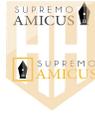
Fundamental rights regarding freedom of religion were subsisted in the Constitution before its commencement in 1950. Right to practice religion is conferred under Article 25, 26, 27 and 28 of the Constitution of India, 1950. It shields individual's or group's religion by making religious rights as fundamental rights. For people religion is not just a casual part of their personal life. Religion plays a primary role in lives of most of the people. Religion is not just a part of your lifestyle, but it's your identity, your personality, your soul. How different religions emerged and how people believed the personal religious laws to be the supreme and on the other side the evolution of the concept of the common civil code is further elaborated in the paper.

BACKGROUND OF PERSONAL RELIGIOUS LAWS

During the reign of Hindu dynasty, there was minimal interference of the state with Hindu law. The daily affairs were regulated by personal laws. The state kept itself away from the personal laws and it was considered as welfare organization dealing with any matter involving social interest. Also the Hindu sages were considered to be the leaders of the society and almost all the laws were laid down by these influential leaders. The rules not only considered religious ceremonies and

² RADHAKRISHNAN, RECOVERY OF FAITH 202 (George Allen & Unwin Ltd.)

³State of Karnataka v. Praveen Bhai Thogadia, AIR 2004 SC 2081 (India).



rights but acted as court of ethics, morality and governed social intercourse of the life. Laws were considered as an integral part of religion in that era. The laws given by these Hindu sages were considered to be supreme because they were divinely inspired and had sufficient spiritual efficiency to evolve practices to regulate the human conduct from time to time.⁴It's a well-known fact that the entire spectrum of social, political and economic life of the people revolved around the rules and regulations laid down by the divinely inspired agents like the sages and philosophers of manus, calibre who dominated the entire Hindu period.⁵Since in that era there were no other religious communities, the question of conflict between different personal laws did not arise. With slight difference of opinions about personal laws in small Hindu communities the uniformity of law was a general rule than an exception.⁶

After the Hindu era, came the Muslim era, wherein the Prophet who was considered to be the religious head of the Muslims, gradually elevated to be the head of the state. Every Muslim was required to owe allegiance to single head who was called imam or caliph. The caliph was required to rule in accordance with tenets of Koran, which were believed to be of divine origin.

Consequently no individual could alter the law or question the authority of imam.⁷When the Muslims invaded India, it became very difficult for them to follow the rules and orders of caliph since all of them were scattered in faraway places. The Mughals were strangers to the country; they could not understand the Hindu personal laws. So they started practicing their own religion and also accepted the Hindu personal laws side by side. Therefore, Muslim personal law was established in the country.

The Personal laws are rooted in British rule in India. With the advancement of East India Company, the only changes which were bought in the laws of the country were changes in the civil and criminal codes, matters pertaining to 'law and order' as these enabled them to regulate trade and commerce with which they were primarily concerned. They made no changes in the personal religious laws of any of the communities residing in India.

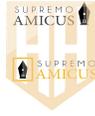
The Personal laws govern marriage, divorce, inheritance, succession, maintenance and adoption. Each Personal religious law has their own set of provisions which govern their community. Needless, the personal laws are the character of the society. In 1955 & 1956, the Hindu law was codified in the

⁴ Dr. ParminderKaur, *Personal laws of India vis a vis Uniform Civil code a retrospective and prospective discussion*, LAW MANTRA, <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>.

⁵ U.C. Sarkar, *It's character and evolution*, 6 Journal of Indian Law institute 214, (1964).

⁶ Dr. ParminderKaur, *Personal laws of India vis a vis Uniform Civil code a retrospective and prospective discussion*, LAW MANTRA, <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>.

⁷2 M. RAMA JOIS, *LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 4* (M Tripathi Pvt Ltd, 1990).



Parliament. As a result the following codes came into force in the year 1955 & 1956: the Hindu Marriage Act, 1955, the Hindu succession act, 1955, the Hindu minority and Guardianship act, 1956 and the Hindu Adoption and Maintenance act, 1956. Hindu law applies to not only those who are born in Hindu caste but also includes Sikhs, Jains and Buddhists. The codification of the Hindu laws was a progressive step of the parliament. Initially women did not have equal rights as compared to men in the family matters. Only a part of the property was kept as maintenance for the women. For instance, usually fathers are considered to be the natural guardians of the child and not the mother. It was only after the amendment of 2005 where the section 4⁸, section 6⁹, section 23¹⁰, section 24¹¹ and section 30¹² of the Hindu succession act, 1956 were amended. As a result of this amendment the Hindu women were given coparcenary rights in the joint family property. Same number of shares were allotted to the daughters and as they were allotted to the son. The amount of maintenance given to the wife is decided depending from case to case like in one of the landmark cases where in different courts assigned different amount of maintenance to the wife.¹³ In case of Muslim laws, there is no codification of laws. Muslims follow what has been written in Quran. There is

a clear demarcation of a sect within Muslims as well, that is, Shia and Sunni, both have a little difference of approach towards the personal laws applicable to them. The customs, traditions followed during nikah are similar yet different. The division between Shia and Sunni originated in the dispute concerning the question of imam, which arose for decision and settlement immediately on the death of the Prophet.¹⁴ The Shia argued that the office should go by right of appointment and succession, and that the Imam was to be confined to the Prophet's family or his nominees. The Sunni, on the other hand, ultimately chose their Caliph (or Imam) by means of votes.¹⁵ Thus, the difference between the two lies in political events, rather in law or jurisprudence. It is mentioned in the Quran that the woman is entitled to maintenance till the period of iddat, Iddat refers to a period of 3 menstrual cycle or 3 lunar months. In case the wife is pregnant the period will extend up to the time of delivery, or abortion even if it is beyond 3 months.¹⁶ Once the period of iddat is over, the husband is no more liable to give her maintenance. Quran is not a complete code in itself; it has been formed in fragments over a period of 23 years from 609 to 632 A.D.

It doesn't matter if a person is Hindu or a Muslim or a Christian or a Parsi, religion

⁸The Hindu Succession (Amendment) Act, 2005.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Mohd. Ahmed Khan v. Shah Bano Begum (1985 SCR (3) 844)

¹⁴ Jake Burman, *What is difference between Sunni and Shia? Ancient Muslim rivalry*, EXPRESS, January 6, 2016.

¹⁵ John Harney, *How do Shia and Sunni Islam differ?*, N.Y. TIMES, January 3, 2016.

¹⁶ PROF. KUSUM, FAMILY LAW-I, 279 (4 ed. 2015).



is the supreme body in everyone's life. Though our age has largely ceased to understand the meaning of religion, it is still in desperate need of that which religion alone can give.¹⁷ We live in an age of tension, danger and opportunities. Believing in one's own faith helps in knowing our insufficiencies and overcoming them. Till today customs and traditions prevail over the law in our country. If they are negated, soon enough religions will lose their perspective in social sphere. A study of different religions indicates that they have philosophical depth, spiritual intensity, vigour of thought and human sympathy. Holiness, Purity and charity are not the exclusive possessions of any religion in the world.¹⁸

UNIFORM CIVIL CODE: AN OVERVIEW

Article 44 of the Constitution of India, 1950 aims at securing a uniform civil code for its citizens. Earlier it was viewed by the framers of the constitution that a certain amount of modernization is required before a uniform civil code is imposed on citizens belonging to different communities. Not much steps have been taken towards achieving the ideal of a uniform civil code. For the enactment of uniform civil code it is necessary that law be separated from religion. Till date Goa is the only state

which has successfully adopted uniform civil code.

The underlying principle of uniform civil code is the replacement of personal laws which are based on the scriptures and customs of religion with a common set of law governing every citizen. Uniform civil code is an umbrella under which all the laws governing rights relating to property, marriage, divorce, adoption inheritance and maintenance are covered. It will ultimately unify all the personal laws and give one set of secular laws and these laws will be applied to all the citizens irrespective of the religion they follow.

For the enactment of uniform civil code attempts have been made from time to time, also through the Shah Bano¹⁹ case and Danial Latifi²⁰ case the Supreme Court through its decisions has been giving directions to the government for implementing the same. Also the court strives to reform the personal laws and to remove gender inequality.

It was in 1947, when the idea of uniform civil code was first raised in the constituent assembly. It was then incorporated as one of the directive principles of state policy by the sub-committee on fundamental rights. The argument put forward was that different personal laws of communities based on religion, "kept India back from advancing to nationhood" and it as suggested that a

¹⁷ RADHAKRISHNAN, RECOVERY OF FAITH 203 (George Allen & Unwin Ltd.)

¹⁸ RADHAKRISHNAN, RECOVERY OF FAITH 204 (George Allen & Unwin Ltd.)

¹⁹ 1985 SCR (3) 844

²⁰ A.I.R. 2001 S.C. 3958.



uniform civil code “should be guaranteed to Indian people within a period of five to ten years”.²¹ Dr. B.R. Ambedkar was of the opinion that, “We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far as the marriage and succession ... and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change.”²² This opinion of his was contrasted by many. Pt. Jawahar Lal Nehru said in 1954 in the Parliament, “I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through.”²³ Hence uniform civil code was considered to be a politically sensitive topic and was placed as Article 44 of the Constitution of India, 1950 under the directive principle of state policy.

The intention of uniform civil code can be understood through various case laws. The landmark case in this respect is **Mohd. Ahmed Khan v. Shah Bano Begum**²⁴ also known as the **Shah Bano case**. In the above mentioned case the issue in question was, whether a Muslim husband was liable to maintain his wife even after the period of iddat has come to an end. In this case the woman along with her five children was thrown out the

house when the husband got into second marriage with another woman. The husband divorced his former wife by way of irrevocable talaq and took the defense that she had ceased to be his wife and hence was under no obligation to provide her with maintenance. He had also claimed to have submitted a sum of Rs.3000 by way of Mahr during the period of iddat. A petition was filed by the respondent under section 125 of the Criminal Procedure Code, 1973. The petition was upheld by the magistrate and the appellant was ordered to pay Rs.25 per month as maintenance. In a revisional application this amount was increased to Rs.179.11 per month. This decision was appealed by the appellant in the higher court and the same was dismissed. The Supreme Court had ruled that even if the period of iddat came to an end, a Muslim husband is liable to pay for the maintenance of the divorced wife. The court regretted that Article 44 of the Constitution of India has remained a “dead letter” as there is no evidence of any official activity for framing a common civil code for the country. The Court had emphasized “A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.” The court accepted the difficulties that were involved in bringing people of different faiths on a common platform but nevertheless in the absence of such a code, and the inaction of the

²¹ Mohit Sharma, *Declassifying the Uniform Civil Code*, LIVE LAW, (October 16, 2016), <http://www.livelaw.in/declassifying-uniform-civil-code/>.

²² Ibid.

²³ Ibid.

²⁴ AIR 1985 S.C. 945, 954 (India).



legislatures to reform personal laws, the role of the law reformer has to be assumed by the courts themselves.²⁵

In the case of **Sarla Mudgal v. Union of India**²⁶, a Hindu man who was already married under the Hindu Laws converted himself into Islam and solemnized second marriage. The issue in question was whether the second marriage without the first marriage having been dissolved, would be valid qua the first wife who continued to be a Hindu. The court ruled that under section 494 of Indian Penal Code, 1860, the second marriage of the husband would be void. Cases with similar facts are still prevalent in the country as there are no general rules for matrimony. It was after this case that the court felt the need of uniform civil code so as to protect the rights of the oppressed and to promote national unity and solidarity.

In another case of **Danial Latif v. Union of India**²⁷, the problems faced by a Muslim divorcee woman have been elaborated. By interpreting section 3 of the Muslim Women Act, 1986, the court drew inference that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. This ruling of the court was seen by orthodox Muslims as anti shariat while the liberal accepted it as progressive.

The court has time and again emphasized on the point that it is not necessary that a

relation should be there between religion and personal laws. It has also pointed out to the fact that no government in India has till date been successful in implementing uniform civil code and has accordingly urged the government to have a look at article 44 of the Constitution of India. The case of **Lily Thomas v. Union of India**²⁸ has clarified the remarks made by Supreme Court in **Sarla Mudgal v. Union of India**²⁹. The court asserted that it had not issued any direction in that case for the enactment of a common civil code.³⁰

The problems faced by our country can be eradicated only if laws and present day social and political realities go hand in hand. The debate between uniform civil code and religious personal laws is further elaborated in the next chapter.

CONTROVERSIAL DEBATE OVER UNIFORM CIVIL CODE AND PERSONAL RELIGIOUS LAWS

There has been a constant debate over the prevalence of Uniform Civil Code and Personal religious laws in India. Every aspect has its pros and cons, same goes with Uniform Civil Code and Personal religious laws.

Uniform Civil Code is mentioned under Article 44 of the Constitution. With enactment of the common civil code it is said that it would curb gender injustice. It is said that one of the shortcomings of the

²⁵M P JAIN, INDIAN CONSTITUTIONAL LAW, 1431 (7 ed. 2014).

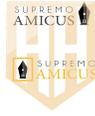
²⁶A.I.R. 1995 S.C. 1531, 1538.

²⁷A.I.R. 2001 S.C. 3958.

²⁸A.I.R. 2000 S.C. 1650.

²⁹A.I.R. 1995 S.C. 1531, 1538.

³⁰M P JAIN, INDIAN CONSTITUTIONAL LAW, 1432 (7 ed. 2014).



personal religious laws is gender injustice, especially in case of Muslim women.

There have been a lot of cases in the Indian history; one of the landmark cases is the **Shah Bano case**³¹ where in how is the wife supposed to put up with her and her children's living expenses without any kind of maintenance given to her. Ultimately, in the final judgment given by the court Shah Bano was given maintenance under section 125 of the Code of Criminal Procedure, 1973. Another important case was of **Danial Latifi v. Union of India**³² where it was decided that a Muslim husband was liable to maintain his divorced wife even after the period of iddat was over. Not only in case of Muslim women, but there has been gender injustice against women of other communities as well. Like in the case of Hindu women, there were no coparcenary rights for women before the amendment of 2005 in the Hindu Succession Act, 1956.

The Uniform Civil Code has been kept in the cold storage since a very long time. It's been 41 years and still no government has been able to implement Article 44 of the Constitution of India. With the enactment of Uniform Civil Code, there are going to be uniform laws for all the matters, there are going to be just and equitable laws for women. Uniformity of laws would overcome the problem of gender injustice. It would not only overcome gender injustice against women on religious basis but it would

also strengthen the secular fabric of the country.

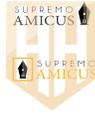
Next problem which can be diminished by enabling Uniform civil code is the problem of equality amongst the different sects of the societies. Minorities usually feel neglected because of the religious laws of the Hindus, Muslims and other major communities being prevailed over other's laws. It would simply promote unity through uniformity of laws. Some of the personal laws of the minority are not even recognized by the state. Unifying the laws would enable the minority being recognized in the society. There should be no distinction in the matters of marriage, divorce, inheritance, succession and maintenance. When there can be a uniform criminal code for the whole of the country then why not a uniform civil code? To nurture secularism, Uniform Civil code is certainly needed. However, it can be implemented only when there is wide acceptance from all religious communities after discussing all the pros and cons as no decision, however reformatory, could be thrust on the people without their acceptance³³

On the other side are personal religious laws which have been prevailing in the country since the very beginning. For a country like India it is practically impossible to enforce Uniform Civil code. With such diverse cultures and religions spread all over the country it can get a little tough to enforce the common civil code which is going to bind all the

³¹ 1985 SCR (3) 844

³² 2001 AIR 3958

³³ M. Venkaiah Naidu, *Why not a common Civil Code for all?*, THE HINDU, September 18, 2016



religions and communities together and give them a common platform to deal with the civil matters. The makers of the constitution had this mindset that, India is yet to reach that stage of modernization where it can accept the common civil code and thus did not enforce it at that time. In some cases, as some minorities fear, it may lead to a situation where reconciliation is impossible, pushing the state to choose between two religious beliefs or practices.³⁴

How will the makers of the Uniform Civil Code decide which laws to compile in the code? Which religion is to be given preference? The customs and traditions of religions are very different from each other. For instance, Section 10 of the Christian Marriage Act, 1872 says that a marriage can only be solemnized between 6 am and 7 pm, isn't it common in other faiths to solemnize marriages early in the morning or late in the night? How can this be made uniform in the code? Also, it is prohibited in the Hindu law that two individuals who are related to each other, say children of siblings cannot get married to each other. Whereas Muslim law does not prohibit this. Children of siblings can get married to each other. How will this be governed under uniform civil code? There is no middle path in here. It will lead to communal riots, if Uniform Civil code gives preference to any one particular religion. Every

individual thinks that their religion is the best amongst all so they would want their law to be made uniform to all. It is definitely necessary for the government to treat its citizens equally irrespective of their religion, caste or gender. It essentially means there should be uniformity of rights and not uniformity of laws. It is very difficult for the government to bridge the gap between all the religions in our country.

Flavia Agnes, a women's rights lawyer said that "It is far better to reform personal laws and ensure that laws of all communities are gender-just rather than enacting a law which is uniformly applicable to everyone across religions."³⁵ There might be a lot of countries which are being governed by the uniform Civil Code, but for a country like India, practically it is very onerous task to impose a common civil code on the people of the country. With the present state of mind of the people it is not going to be amiable for the people to accept Uniform Civil code. As of now there is no need of the common civil code, since people do not have the kind of modernization which was required by the makers of the constitution to implement the Uniform Civil Code in India.

CONCLUSION

³⁴JayakumarSelvaraj, *A Non-Discriminatory Uniform Civil Code May Be a Step Too Far for Hindus Too*, THE WIRE, (January 19, 2017), <https://thewire.in/100520/need-for-a-non-discriminatory-uniform-civil-code/> .

³⁵ S. Naskar, *Aim Should Be Uniformity of Rights, Not a Uniform Law: Flavia Agnes on a UCC*, THE WIRE (October 19, 2016), <https://thewire.in/74183/interview-flavia-agnes-says-the-aim-should-be-the-uniformity-of-rights-rather-than-the-ucc/>.



To summarize, Hindu and Muslim laws are not just a religion but has become our identities. There is no second opinion to the fact that uniform civil code will help us bring gender equality and also help in protecting the rights of the communities. But in a country like India which is so diverse in its nature, implementing uniform civil code will be a big challenge for which the people are not yet ready. The concept of uniform civil code looks good on paper but its enactment poses a task as easy as looking for a needle in the haystack. It has been observed, personal laws have never been a new phenomenon for the country and from beginning only people have been deriving their personal laws from their respective scriptures and holy books. With uniform code also comes the fear of communal riots and unrest in the country.

Furthermore, minority communities, in fear of extinction, such as the Zoroastrian community have adopted the culture of marrying within themselves in order to preserve their community. Uniform civil code has failed to instill the feeling of protection amongst the minorities and in such a case, if uniform civil code becomes the law of the land their fears might become a reality. The courts through its ruling have always amendment the shortcomings of the personal law and also in the hour of need legislature has always backed these personal laws. No direct connection can be established between reforming certain personal laws and a uniform law for the entire nation. Uniformity in law has been always readily accepted where it was needed like in cases of criminal laws. By

bringing uniform civil code we will be fencing the fundamental rights that have been guaranteed to its citizens under Article 25 to 30 of the Constitution of India. Therefore we can conclude that state legislative authority forms the basis of personal laws and hence just like any other state laws it can be made subjected to the Constitution.

