



RELIGION, SECULARISM AND PERSONAL LAW: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO UNIFORM CIVIL CODE AND RIGHT TO EQUALITY

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ABSTRACT

The Constitution of India in Part III through Articles 25 -28 has given the Right to Freedom of Religion. Article 15 (1) of the Indian Constitution states that ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’ and though in practice, the state has made separate provisions in the Family Laws of India for different religions. The ethical irony comes in whereby on one hand the legal framework recognises the principles of Right to Equality and does not define religion but on the other hand engages in practices relating to religion and makes provisions separately on the basis of religion.

Through the years 1954 onwards, began the era of Post-Independence enactment of religious laws in India. This provided in codification, the provisions governing marriage, family and divorce laws with regards to different religions in India.

The term Secular was first inserted into the Preamble of the Constitution of India through the 42nd Constitutional Amendment Act, 1976¹. It was widely perceived by many that even though the Amendment was enacted in 1976, the concept of Secularism

was enshrined in our constitution through Articles 25-28 effectively knows as Freedom of Religion.

Through the means of this paper, I aim to do a critical analysis of the provisions of Personal Laws, Secularism and Equality in India with special reference to the Uniform Civil Code of the Directive Principles of State Policy, Constitution of India.

INTRODUCTION

The Judicial Framework of India often tries to seclude itself from matters pertaining to religion and beliefs sighting it to be sensitive and rarely that it does involve itself actively in such matters, it takes a diplomatic stance. Recently, it reflected in the Ram JanmBhoomi – Babri Masjid Dispute wherein the Honourable Apex Court advised the parties to make fresh attempts to find a solution which leads to amicable settlement to the Ayodhya dispute, citing it as a "sensitive" and "sentimental matter". The passive nature of the Legal Fraternity in India, towards the issues of religion and personal laws are somewhat responsible for the non-applicability of Uniform Civil Code in India yet.

The Constitution of India does not define the term secular, however, through the 42nd Constitutional Amendment the term has been instituted to the Preamble of the Constitution. It is undisputed that the Personal Laws find their legal validity through Part III of the Constitution through Articles 25 -28 talks about the Right to Freedom of Religion. It is worth pointing out that the bare text of Article 25(1) is “Subject to public order, morality and health and to the other provisions of this Part”.

¹(42nd Constitutional Amendment Act, 1976)



Article 15 (1) of the Indian Constitution states that ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’ and though in practice, the state has made separate provisions in the Family Laws of India for different religions. The ethical irony comes in whereby on one hand the legal framework does not define secularism but claims to be a secular state but on the other hand engages in practices relating to non-secular acts while making provisions separately on the basis of religion.

The 42nd Constitutional Amendment 1976 was enacted to our constitution in January 1977 during the period of the Indian Emergency which lasted from 1975 to 1977. With the enactment of the 42nd Constitutional Amendment, the word Secular was added to the preamble to the constitution and thereby it made evident, in principle, that the country does not associate itself to any particular religion but is rather not connected to religious matters at all. However, in reality, the term secularism fails to justify its presence in the constitution. On one hand, the constitution proclaims the nation to be a ‘Sovereign Socialist Secular Democratic Republic’ and on the other hand in judicial proceedings oath is taken in the name of god and thereby engaging in a non-secular practice. Though there is a provision to give affirmation before pleading evidence but it is least in practice.

The presence of Personal Laws in India takes away the essence of being a secular state. It is illogical to be a Secular State, to

preach the concept of Equality and then to have separate legal provisions for different religions and thereby engaging in the policy of Differentiation. To catch up with the needs of the 21st century and to strengthen its status in the International Community, it is essential for India to move towards a Uniform Civil Code which would ensure that the concept of Secularism is actually practised and its presence in the Preamble to the Constitution is justified.

BARE TEXT OF THE RELEVANT ARTICLES OF THE CONSTITUTION OF INDIA

Part II

Article 13- Laws inconsistent with or in derogation of the fundamental rights.

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that



any such law or any part thereof may not be then in operation either at all or in particular areas.

[(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

Right to Equality

Article 14- Equality before Law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent

the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

Right to Freedom of Religion

Article 25- Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(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;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (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.

**PART IV****Article 44- Uniform civil code for the citizens**

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

UNIFORM CIVIL CODE, NATURAL SCHOOL OF LAW AND DWORKIN'S LIBERALISM

The very concept of having equality as a basic principle of the constitution and then having separate laws for people professing separate religions is violative of the maxim of *lex iniusta non est*. This maxim is the very basis of Natural Law Theory and is essential to have public order. If we place this maxim in connection with Article 13(2), Article 14, Article 15, Article 25 and Personal Laws, it can be clearly inferred that since Personal Laws are violative of the maxim of *Lex Iniusta Non Est*, they ab initio become violative of Article 14, and 15 and in affect cannot be protected by the umbrella of Article 25 hence void as per Article 13(2) of the Indian Constitution.

Ronald Dworkin's³ theory of liberalism⁴ talked about the principle of equality before law and how the government should "treat all those in its charge as equals, that is entitled to equal concern and respect". This concept also seems to be envisioned by the drafting committee of the Constitution of India which included Uniform Civil Code in the Directive Principles of State Policy, Part IV.

Shri. A. Thanu Pillai while discussing the matters related to the directive principles said "If you wish to provide for a common civil code for India, that must be in consonance with modern advanced conceptions of life. Our women are free; our marriage laws are in consonance with the up-to-date concepts of social existence. Have, we to go back to conceptions unacceptable in the modern world? I want only the future legislature to consider these aspects of the matter."⁵

However, later on through the years, due to political motivations and the fatal political nature of thriving on religious differences, saw the government introduce personal laws and thereby an unjust society. Uniform Civil Code is a must for an egalitarian society as it is impossible to achieve equality while having separate set of rules for people of different religions.

DIFFERENCE BETWEEN AN ATHEIST STATE & A SECULAR STATE**State Atheism**

According to Oxford University Press's *A Dictionary of Atheism*⁶, 'State Atheism' is the name given to the incorporation of positive atheism or non-theism into political regimes, particularly associated with Soviet systems." Essentially an atheist state does not recognise religion and customs. The policies and legislature in an atheist state have no regards to religion or religious practices, whatsoever. The role of religion is limited to the people and the state

²(Theories of Justice: An Overview)

³(Dworkin, 1977)

⁴(Kelly)

⁵(Constituent Assembly Debates Official Report; Volume XI)

⁶(Lois, 2016)



has nothing to do with it. People's Republic of China is an example of a state that follows state atheism.

Secularism

The Oxford Dictionary⁷ defines secularism as "The principle of separation of the state from religious institutions." In practise, this amounts to only recognition of religion and religious practices. A secular state is one which is neutral in matters of religion and it does not support religious practices but is not against it either.⁸

In a secular state, equality of law is prevalent in all fields of the society and there is no differentiation on the basis of religion. Freedom from religious institutions and customs is fundamental for the working of a Secular State. The Russian Federation is an example of a state that follows secularism.

JUSTIFICATION OF THE STATUS OF INDIA AS A SECULAR STATE DESPITE THE PRESENCE OF SEPARATE PROVISIONS FOR SEPARATE RELIGIONS.

The term Secular was added to the Preamble of the Constitution through the 42nd Constitutional Amendment, 1976 along with the term Socialist. It is widely considered that even though Secular was introduced later on, the concept of Secularism was an innate quality of the Constitution of India. The Drafting Committee of the Constitution indeed wanted it to be a Constitutional Democracy with Secularism as one of its main principles the same is reflected in the

Directive Principles of State Policy wherein through Article 44 the Drafting Committee made it expressively clear the Uniform Civil Code was an expectation from the governments to come.

When the Special Marriage Act, 1954 was enacted, it was seen as the first step towards Uniform Civil Code. However, with the Hindu Marriage Act and subsequent Personal Laws coming into picture, the focus shifted from Uniform Civil Code to Personal Laws which were codified and gave a legal backing to the customs and practices prevalent in the society.

It is argued that it was always perceived that the defilement of the concept of Secularism would be different for India as compared to the generally accepted meaning of Secularism. It is argued that for India Secularism means respecting all religions by making separate provisions for them within the legal framework.

This entire argument is absolutely demolished when we put into prospective the Directive Principles which envisions a Uniform Civil Code along with Right to Freedom of Religion which is subject to public order, morality and health and to the other provisions of Part III. Part III includes Article 14 which talks about equality before law and Article 15 which talks about the obligation of the state not to discriminate on the basis of religion, race, caste, sex or place of birth. Hence being subject to the provisions of Part III, Freedom of Religion as per Articles 25-28 will fail to justify the validity given to personal laws by the legislature because the Personal Laws clearly discriminate on the basis of Religion

⁷ (Definition of Secular)

⁸ (Temperman, 2010)



and also provide for separate provisions for citizens belonging to different religions. In the face of it Personal Laws are nothing but State Sponsored Religious Discrimination. Unless Uniform Civil Code is enacted, India can never justify itself as being a Secular State or reach the normative standards of equality. Shri Alladi Krishnaswami Ayyar in the constituent assembly stated “A Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform civil code throughout the territory of India?”

The second objection was that religion was in danger, that communities cannot live in amity if there is to be a uniform civil code. The article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system. In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging

always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue.

Now, my friend Mr. Pocker levelled an attack against the Drafting Committee on the ground that they did not know their business. I should like to know whether he has carefully read what happened even in the British regime. You must know that the Muslim law covers the field of contracts, the field of criminal law, the field of divorce law, the field of marriage and every part of law as contained in the Muslim law. When the British occupied this country, they said, we are going to introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, be they Hindus, be they Muslims. Did the Muslims take exception, and did they revolt against the British for introducing a single system of criminal law? Similarly, we have the law of contracts governing transactions between Muslims and Hindus, between Muslims and Muslims. They are governed not by the law of the Kuran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again, there are various principles in the law of transfer which have been borrowed from the English jurisprudence. Therefore, when there is impact between two civilizations or between two culture, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any section of the community,



it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.”⁹

THE CONSTITUTIONAL VALIDITY OF PERSONAL LAWS IN THE LIGHT OF RIGHT TO EQUALITY (ARTICLE 14 AND 15) AND ARTICLE 13(2) OF THE INDIAN CONSTITUTION.

Article 13 (2) of the Constitution of India states that “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

Personal Laws are void ab initio considering that they are violative of Article 14 which talks about Equality before Law and Article 15 which talks about Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Personal Laws are categorically applicable to people belonging to a particular religion and not open to any other. In practice, they amount to disparities in the way family law ought to be. For example, according to Muslim Law, bigamy is allowed and they are exempted from punishment under IPC whereas according to Hindu Law, bigamy is not allowed and they are not exempted from punishment under the IPC. Similarly, for Hindu Women to remarry their divorced husband, they don't have to go through any process whereas for Muslim Women to remarry their divorced husband they have to

first go observe the period of iddat and after two divorces they have to practice NikahHalala. These examples are proof that Personal Laws place citizens on different platforms on the basis of their religion and in turn are violative of Article 14 and 15 and in effect unconstitutional as per Article 13(2).

In the landmark case of *State of Bombay vs. NarasuAppa Mali*¹⁰, the Hon'ble Bombay High Court observed that Personal Laws are not law as per the definition of Law under Article 13 and hence not covered under Part III of the constitution. However, the Hon'ble High Court failed to appreciate the fact that Article 15(2) of the Constitution of India confers the right to make Personal Laws and hence for the purpose of Part III not including Personal Laws under Part III is Arbitrary. It is worth noting that the Personal Laws were codified by the parliament in years after the judgement.

The Hon'ble Supreme Court in the landmark judgement of *Ahmedabad Women Action Group v. Union of India*¹¹ had an opportunity to reverse the precedent set by the Hon'ble Bombay High Court in the NarasuAppa Mali case but the Apex Court concurred with the opinion of the NarasuAppa Mali Case and held that the personal laws are matter of State policies with which Court do not have any concern.

Later in the year 2017, while rendering its judgement in the landmark case of *ShayaraBano v. Union of India*¹² the Hon'ble Apex Court held the practice of Triple Talaq as unconstitutional and violative of Article 14 and 15 and did

⁹ (Constituent Assembly Debates Official Report; Volume VII)

¹⁰(AIR 1952 Bom 84)

¹¹(AIR 1997 SC 3614)

¹²(2017 SCCOnline SC 963)



interfere in the matter relating to personal law. However the Hon'ble Apex Court missed the opportunity to overrule its errored judgement in the 1997 Ahmedabad Women Action Group judgement. The Triple Talaq Judgement is considered a missed opportunity, "Though it declares instantaneous triple talaq unconstitutional, the verdict misses the chance to assert that personal laws cannot override fundamental rights."¹³

CONCLUSION

Uniform Civil Code is a necessary tool for a country as diverse as India to promote equality and justice. It is essential that all the citizens be subjected to the same laws with respect to everything. Till the time people are subjected to different laws for different religions, it will be impossible to attain Equality. It is essential that India becomes a Secular Country in the truest of its forms and distances itself from any provisions for Religious Laws or Institutions.

It is imperative to realise that the human rights of women in India have a direct connection with the personal laws that they are subjected to. Hence in the name of personal laws, the state itself is subjecting its citizens to inequality. If a uniform civil code would be enacted, it would be easier for the state to enforce rights of the people rather than taking them away.

It is worth noting that the current provisions are unconstitutional as per Article 13(2) in the light of Article 14, Article 15 and Article 25 of the constitution.

There can be no logical approach towards the notion that any law within the State cannot be covered under the ambit of the

Indian Constitution. Part III of the Indian Constitution that deals with the Fundamental Rights of the Citizens essentially covers everything that happens in the country and affects its citizens; undoubtedly personal laws are also a part of it. Through the verdict in the Triple Talaq Case, the Hon'ble Supreme Court opened its leeway towards personal laws and Right to Equality.

In the words of Dr. Bhim Rao Ambedkar "we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating through the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there, are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question

¹³(Vijayan, 2017)



whether we could do it. As I say, we have already done it.”¹⁴

In the light of the same it is time for the Personal Laws to make way for Uniform Civil Code. Obviously subject to Public Order, Morality and Health and to the other provisions of Part III of the Indian Constitution.

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¹⁴ (Constituent Assembly Debates Official Report; Volume VII)