



Uniform civil code: A critical appraisal of constitutional prospective

Omlata Raj

Research Scholar, Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh, India

Abstract

This paper depicts personal laws in India, the issues of uniform common code and gender equity from a human rights perspective. A Uniform Civil Code indicates the possibility of same arrangement of common principles or civil rules for the citizens independent of their religion are they Hindus, Muslims or Christians. This supersedes the rights of citizens to be governed under different personal laws based on their religion or ethnicity. The purpose concealed in the uniform civil code is to eliminate the contradictions based on religious ideologies and promote the concept of national integration. All these things would be discussed in the paper and later we will reach into the conclusion that whether uniform civil code would really bring welfare to the society or not.

Keywords: equality, fraternity, uniform, personal laws, integrity, secularism, fundamental, religion, profess, practise, propagate

Introduction

A Uniform Civil Code suggests the possibility of same arrangement of common guidelines for the citizens independent of their religion, position, and so on. Common law administers the matters relating to adoption, marriage, succession, inheritance etc. The purpose underlying a uniform common code is to help the idea of national unification by disposal of inconsistencies in light of religious belief systems.

Over Sixty-seven years ago, we the people of India, gave to ourselves a glorious constitution—a sovereign, democratic, republic where there would be Justice, Liberty Equality and Fraternity. The Constitution secured for us certain fundamental rights, and the right to enforce them through the courts. Other rights which could not be achieved immediately were placed in the next chapter, known as Directive Principles of State Policy. The framers of the constitution with a view to achieve uniformity of law incorporated Article 44 that runs as follows:

“The State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India”^[1].

Several issues arise from this single line. What does uniform civil code Mean here? We already had a uniform criminal code—one that applied to all in the territory of India. We also had a number of civil laws which were uniform, like the Contract Act, the Transfer of Property Act, the Civil Procedure Code, etc. So, this uniform civil code really referred to family laws, sometimes called personal laws.

Aim and object of enacting uniform civil code

The purpose of enacting Uniform Civil Code is National Consolidation, Unity and Integrity and secularism demanded it. It became a debate about uniformity versus minority rights, secularism versus religious laws and modernisation versus tradition, in the context of the new nation-state. The ultimate object of Article 44 is secularity in family law: 'the call for uniformity is merely the means'. In recent years, the issue has become considerably more

complicated with the changing positions of women's groups and sharp divisions on a range of issues relating to it^[2]. The main argument of those who spoke in favour of such a code was that it has the potential to unite India because Hindus and Muslims had followed the “common customary Hindu civil code” smoothly till 1937 when “the Muslim League-British combine” divided them by imposing sharia on Muslims through the Muslim Personal Law (Shariat) Application Act^[3].

So what Uniformity means? In today's context word Uniform in Article 44 must be taken to mean equality in sense of sameness, sameness being achieved not necessarily by single code. We already have uniform laws in matters other than family affairs such as marriage, succession, divorce, maintenance, inheritance adoption etc. It is this area which is to be made uniform or equal. This concept of Uniformity or equality are contained under Article 44 must be understood not only in the context of Article 14 & 15 which talks about equality but also Article 25 which provides that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion^[4]. Article 25 in fact allows different communities to practice the religion and thus incidentally to have their different personal laws. The right granted to different communities under Article 25 by using the word uniform all that Article 44 means is that the right conferred by the Constitution shall be equally available and applicable to all, to each individual it does not mandate that this must be done by one law although it may not necessarily be. Article 25 allows every person the freedom to freely profess and practise his/ her/ their/ religion which includes the freedom to be governed by and follow his/he/their personal laws personal law is embedded in their religion. The extent of the right under Article 25 was clearly stated by Dr. Ambedkar during the Parliamentary debate relating to the Hindu Code Bill. Many members have challenged the bill on the ground that it is discretionary. He referred to Article 25 and said that Profession of a particular religion carries with it the personal laws of that person. In view of the fact that, the Constitution allows the different communities to

practise their religion and incidentally also to have their own law there is nothing discriminatory in allowing one community to have their own law or to modify it in any way they like and to treat the law of the other community in a different way or to modify it.

Balancing of interest between DPSP and Fundamental Right

Can the Directive Principles of State Policy of Article 44 takes away from this Fundamental Right to have once own personal law and in the background of Article 25 can be said that uniformity in the personal laws refers to Article 44 only means a single common code? Courts and Jurist have however assumed that the word Uniform Civil Code under Article 44 means a single law or common law without referring to article 25. Article 44 of the Constitution needs to be interpreted inconsonance with the spirit of the Constitution. What the directive principle of state policy means is that there should be uniform laws but not necessarily a common law. The expressions 'uniform' and 'common' are often used interchangeably but they have different connotations. Extension of the majority community's law to all the minorities would doubtless make a common law but would it make a uniform law'. The word 'uniform' in article 44 means that all communities must be governed by uniform principles of gender justice and human justice. Each personal law therefore needs to be critiqued from the perspective of social and gender justice. It means the modernisation and humanisation of each personal law. A uniform law would mean not necessarily a common law but different personal laws based on uniform principles or equality of sexes and liberty of the individual. Let there be reform of each personal law so as to weed out gender injustice and outmoded traditions or practices. Article 44 of the Constitution must be interpreted in conjunction with article 14 of the Constitution which guarantees equality before the law and equal protection of the law. Article 14 allows classification of the people and traditions, cultures and even religion in conjunction with either or both of them could be the basis of classification. This was the essence of the decision given by the Bombay High Court in *Narasu Appa Mali's case* ^[5] in which two of India's most versatile judges namely, Chief Justice Chagla and Justice Gajendra Gadkar upheld the Bombay Prevention of Bigamous Marriages Act, 1946 on the ground that the prohibition of polygamy among Hindus was not a different treatment to the Hindus on the ground of religion but was because of the different traditions, history of social reform and cultures. Certainly there can be no discrimination on the ground of caste or sex and therefore such traditions which place women in subordinate position will have to be disregarded. Revision of the personal laws from such stand point will ultimately take us towards a uniform civil code ^[6]. Such uniformity can sustain the diversity of the laws. Uniform civil code should not be construed as a mandate for regimentation of the laws because such regimentation smacks of totalitarianism.

Uniform civil code and role of judiciary

Who is responsible for affecting this uniformity? The word State under Article will cover all branches of government namely Legislature, Executive and Judiciary. In the case of *Mrs. Zohra Khatoon v. Mohd. Ibrahim* ^[7], A substantial question of law was raised and the High Court of Allahabad

which cancelled the orders of the maintenance allowance passed by the Magistrate on the grounds the when the divorced proceedings start from the female side under the dissolution of Muslim Marriage Act 1939, in those cases wife cannot claim maintenance from her former husband neither under the Muslim law nor under Sec. 125 of Cr.P.C. Ultimately the Supreme Court overruled the decision of the High court on the ground that it is based on the wrong interpretation of the Clause 1(b) of the explanation to section 125 under this clause the wife continues to be wife even though she has been divorced her husband or has otherwise obtained divorce and has not remarried.

In *Sarla Mudgal vs Union of India* ^[8] the Court has directed the Government of India through Secretary Ministry of Law and Justice to file an affidavit of a responsible officer in this court indicating therein the steps taken and efforts made by the Government of India towards securing a "Uniform Civil Code" for the citizens of India. In the case of *John Vallamattan vs Union of India* ^[9] the Supreme Court once again regret for non-enactment of Uniform Civil Code.

The decision appears to almost compel the Executive to frame Uniform Civil Code. Article 25 itself allows statutory modification of personal law. Article 25(1) and 2(b) provides right to interfere with personal law of any community in the interest of public order, morality and health for providing social welfare and reform as well as to restrict any economic, financial, political, or other secular activity which may be associated with religious practice is retained. Article 26 allows every religious denomination to manage its own affairs and a matter of religion is subject to Article 25(2). Entry 5 of concurrent list of 7 Schedule of the Constitution allows both the centre and state to make laws in respect of all matters before the commencement of Constitution governed by personal law.

It is one of the Directive Principles of State Policy (DPs) which are not enforceable in any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws ^[10]. The object of the Directive Principles is to embody the concept of Welfare State ^[11]. It set forth the Humanitarian socialist precepts that were the aims of the Indian social Revolution. Parts III and IV essentially forms a basic element of the Constitution without which its identity will completely change. Our Constitution makers did not contemplate any disharmony between Fundamental Right and Directive Principles. It can be well said Directive Principles prescribe the goal to be attended and the Fundamental Right laid down the means by which the goal was to be achieved ^[12]. Directive Principles are obligations of the State towards the fulfilment of which every State action must be directed and interpreted ^[13].

The need for uniform civil code has been felt for more than a century. India as a country has already suffered a lot in the absence of a Uniform Civil Code. The society has been fragmented in the name of religions, sects and sex. Even at present, in India, there are different laws governing rights related to personal matters or laws like marriage, divorce, maintenance, adoption and inheritance for different communities. The laws governing inheritance or divorce among Hindus are thus, very different from those pertaining to Muslims or Christians and so on. In India, most family law is determined by the religion of the parties concerned Hindus, Sikhs, Jains and Buddhists come under Hindu law,

whereas Muslims and Christians have their own laws. Muslim law is based on the Shariat; in all other communities, laws are codified by an Act of the Indian parliament. There are other sets of laws to deal with criminal and civil cases, such as the Criminal Procedure Code, 1973 and the Indian Penal Code, 1862. The multifarious castes and creeds and their sets of beliefs or practices are bewilderingly confusing and nowhere is a scenario like in India, of various personal laws jostling together is allowed.

The demand for a uniform civil code essentially means unifying all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. Though the exact contours of such a uniform code have not been spelt out, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde. India has set before itself the ideal of a secular society and in that context achievement of a uniform civil code becomes more desirable. Such a code will do away with diversity in matrimonial laws, simplify the Indian legal system and make Indian society more homogeneous. It will de-link law from religion which is a very desirable objective to achieve in a secular and socialist pattern of society^[14]. It will create a national identity and will help in containing fissiparous tendencies in the country. The uniform civil code will contain uniform provisions applicable to everyone and based on social justice and gender equality in family matters. According to the Committee on the Status of Women in India, "The continuance of various personal laws which accept discrimination between men and women violate the fundamental rights and the Preamble to the Constitution which promises to secure to all citizens "equality of status, and is against the spirit of natural integration". The Committee recommended expeditious implementation of the constitutional directive in Article 44 by adopting a Uniform Civil Code^[15].

Conclusion

The expression Civil Code has not been defined in the Constitution. A civil code is a systematic collection of laws and statutes governing the civil matters of the citizens in the country relating to matters like marriage, divorce, adoption, custody of children, inheritance, succession to property etc. In present context, it means the law (Substantive as well as procedural) relating to private rights of citizens in relation to each other and is to be distinguished from public law, such as International Law or Revenue Law and even Criminal law, where one of the parties is State. Dr Ambedkar explained the Fact, "the bulk of these different items of civil law have already been codified during the British Rule and the only major items still remaining for a uniform code are Marriage, Divorce, inheritance, and succession" (adoption and guardianship)^[16]. It is noticeable point that several enactment which have been made by Parliament since Independent in the name of Hindu Code relating to Marriage, Divorce, inheritance, and succession" (adoption and guardianship) relates only to Hindus which includes Buddhist, Jains, and Sikhs and it exclude Muslim who are more vehemently objecting to the framing of a Uniform Civil Code for all the Citizens of India. The Uniform Civil Code would carve a harmony between protection of fundamental rights and religious ideology of people.

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