

THE UNIFORM CIVIL CODE - BEYOND SECULARISM, FOR HUMAN RIGHTS AND GENDER JUSTICE

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ABSTRACT

The Preamble of the Indian Constitution enshrines India's Secular soul and there is no denying that in the country, one is free to practice their own religion, whichever manner it may be in, from clothes to traditions. India's diversity is because every religion, culture and custom are given the equal status for propagation and practice, protected by the law from discrimination. Neither does the State discriminate against any religion nor does it have an established religion that it endorses. To ensure that minorities are at par with the majority in terms of health, education and employment opportunities, certain affirmative actions have also been taken by the State, Reservation being one of them. Furthermore, to uphold the individuality of customs of the major religions India houses, the Family Law jurisprudence paves way for customary practices regarding marriage and its dissolution, inheritance, maintenance, etc., thereby earning the title of Personal Laws since they are personal to each religion. However, it has to be noted that traditions find their roots in the ancient belief system that more often than not put women subservient to their male counterparts and have a warped understanding of dharma, sin, etc. Be it a woman's share in property or rights after marriage, customary practices subjected them to accept inequality and injustice. Indian Family Law jurisprudence relies on customary practices to uphold the sanctity and validity of the personal matters, but certain practices emerged not because of the religious texts but from the culture propagated. Although interchangeable, there does exist a difference between the two which makes all the difference- from exploitation of a certain section of the society to guaranteed privileges of the other.

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In this paper, the author deliberates upon the debate surrounding the Uniform Civil Code from the tangents of Human Rights, Fundamental and Constitutional rights and Gender Justice. Case studies on the State of Goa and key countries have also been discussed to comprehend the implications enactment of the Code may hold for India. The author has relied upon secondary sources like Government statistics to experiments, surveys and reports undertaken by various legitimate organizations as well as relevant legal precedents given by the Indian courts. At the end of the paper, the reader shall have a comprehensive idea of the overall debate surrounding the sensitive topic the author has opined upon.

INTRODUCTION

India has a diverse set of Personal laws that determine key aspects of an individual's rights and liabilities, from the body to property. Since Personal laws are associated with Family law jurisprudence, it is inevitable that the rules governing men and women would also vary slightly owing to the different assumptions of gender roles. Women have historically been subjected to discrimination owing to the cultural beliefs and value systems that stem from religious understandings. The pertinent question to be raised here is whether it is the Religion that preaches differential treatment or the Culture? This can be understood by the case *Re B and G (Children)*² wherein the Judge Sir James Munby laid down the distinction between religious practices and cultural practices- he noted in this case that the "Female Genital Mutilation (FGM) has no basis in the religion whereas male circumcision is performed for religious reasons". Religious practices deserve to be protected since they have a basis in the religion one follows, however, cultural practices derive their origin from the straightjacket application of the intended religious practice and thus, do not command the 'divinity' the original practice holds. In most cases, religious practices that are biased are practiced for moral, ethical and physical policing of women be it their body, identity and/or intellectual autonomy. The crux of this typical issue is that such religious practices essentially do not align with the religious ideology it derives its authority from- on one hand, the religion preaches equality while the practices promote discrimination.

Secularism in India ensures that each community is able to uphold its sanctity through established customary practices but with higher levels of literacy and awareness, people have started to question the validity and constitutionality of biased practices that have become tools

² Re B and G (Children) (No. 2), [2015] EWFC 3.

The Uniform Civil Code : Beyond Secularism for Human Rights and Gender Justice

to deprive one of equality and equity, in dignity as well as physically. Personal laws have come in conflict with Central and national legislations due to their apparent overriding effect on the applicability of legislations that are intended to be unbiased irrespective of one's caste or religion owing to the unwarranted need to uphold Secularism at every corner. The need for a Uniform Civil Code (UCC) was first felt after the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum*³ which brought out the bigotry prevailing in the Society. With the most recent case being of the Hijab Ban in Karnataka, that has been, the cry for speedy implementation of UCC has been felt all across.

THE RATIONALE BEHIND UNIFORM CIVIL CODE

Diversity in a country paints a beautiful picture capturing the intersectional heterogeneity that exists in the natural state, however, the probability of prevalence of a peaceful heterogeneity is threatened by the lack of consensus among the many factions living under its umbrella in terms of the defined laws and norms to be followed. In the words of Justice KS Hegde, "*Religion oriented personal laws were a concept of medieval times.....a society which is compartmentalised by its laws can hardly become a homogeneous unit...*". India has taken pride in it being the custodian of some of the oldest religions in the world but on the offside, human rights and gender justice activists have adamantly insisted that religion is one of the most stubborn policing methods the State has remained silent on. Ironically, it can be inferred from Part II of the Constitution of India (hereinafter, "the Constitution") that our lawmakers envisaged a 'singular' society with singular citizenship but failed to deliver one single set of civil laws that would govern the Family Law jurisprudence⁴. Article 44 of the Constitution⁵ states that "*the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*" and while 'shall' is not to substitute 'may', the Article's scope is limited since Part IV of the Constitution⁶ is not enforceable by a court, nevertheless, it is a duty on the part of the State to ensure that the principles under this Part is included in the laws formulated.

Apart from the obvious reason that Personal Laws violate human rights, it is also the brainchild of the British Raj that witnessed the advent of communal politics- their

³ Mohd. Ahmed Khan v. Shah Bano Begum, 1985 (2) SCC 566.

⁴ INDIA CONST. art. 9.

⁵ INDIA CONST. art. 44.

⁶ INDIA CONST. Part IV.

administrative policy of 'Divide and Rule' aimed to divide the communities not only socially but also legally. Since then, it has been normalised that Hindus are to be governed by Hindu law, Muslims by Muslim law, and so on and so forth. It is inevitable that a country that has witnessed such division for nearly two centuries would find it cumbersome to reverse this rule that had acclimatised itself in the society. There is no denying that each community was distinct from the other as was apparent from their culture, however, by legalising the differences by way of laws any aspect of unity in their family laws was thrown out the window. By bringing the religious lens to adjudicate interpersonal relationships established through marriage, be it inheritance, succession or even adoption, it was indirectly decided that human interactions, under the influence of a particular religion, change. In this manner, Communalism was already an existing issue hindering the true objective of Constitutionalism- a uniform and harmonised democratic system where the interests of each sub-group were catered to through a comprehensive legal system.

INSIGHT INTO THE DIMENSIONS OF THE CONFLICT

The broad dimensions of the issue revolving around the implementation of UCC are-

- The constitutional validity of the UCC in light of Part IV of the Constitution
- Conflict with the Secularist stance of Indian Personal laws in light of Freedom of Religion
- Both these issues against the gender discrimination faced by women as opposed to other groups

The above mentioned two issues are obvious as can be inferred from the prior brief discussion as well as the daily updates one gets from news and media sources. However, probably the most significant challenge that has to be tackled before venturing into the legal facet of this debate is the ground reality surrounding the unawareness, rather misinformation about UCC.

The conflict regarding the UCC revolves around the inherent ambiguity in the Constitution since arguments for and against UCC stem from it; apart from Article 14⁷ and Article 21⁸, Article 25⁹ states that every person is guaranteed the freedom to profess and

⁷ INDIA CONST. art. 14.

⁸ INDIA CONST. art. 21.

⁹ INDIA CONST. art. 25.

The Uniform Civil Code : Beyond Secularism for Human Rights and Gender Justice

propagate religion. However, the proviso to the law is that it does not stop the State from regulating or restricting such freedom in order to secure economic, financial, political or secular activities on grounds of public order or morality. Women have historically fallen prey to gender discrimination and the same continues to be the picture even today where according to a report published by the Pew Research Center, women in majority-male workplaces report higher rates of gender discrimination¹⁰. While this is on the workplace front, one can only imagine the prejudice pertaining to the four walls of a house- before a recent judgement¹¹ by the Supreme Court of India, the rights of daughters over their father's property (self-acquired or otherwise) was restricted. This judgement empowered daughters and wives over inheritance rights under the Hindu Succession Act, 1956¹². Certainly, this judgment is bound to encourage further litigation on cases where the daughters were denied their share, this may have been avoided had there been a uniformity in laws that would stand the test of time and social change.

There is a prevalent belief among the common people that implementation of UCC is equal to losing their religious freedom but the proposed law is only going to unite the differences that lie in different religious laws on the same subject matter, for example, the quantum of shares Hindu and Muslim daughters or wives have in their father's or husband's property is different and subject to certain conditions. The concern here is that the shares women of one community would hold over the property compared to the son's would be lesser compared to a different community. Therefore, not only women as a whole are subjected to discriminatory laws, they are further divided into religious factions. Similarly, maintenance allowance would be different for different communities. The fact that lack of uniformity in laws is regressive in nature was witnessed when *Triple Talaq* was criminalised¹³ under the Muslim Women (Protection of Rights on Marriage) Act, 2019¹⁴ citing that the practice falls within the purview of Section 498A of the Indian Penal Code, 1860¹⁵ that defines what amounts to cruelty and the punishment thereof. In the past also, many a times Courts have stated that the ambiguity is because there is no scope for streamlining the many laws that exist within the Family law jurisprudence.

¹⁰ Kim Parker, *Women in majority-male workplaces report higher rates of gender discrimination*, Pew Research Center (2017).

¹¹ Arunachala Gounder (Dead) by Lrs. v. Ponnusamy and Ors., Civil Appeal No. 6659 of 2011 (decided on Jan. 20th 2022).

¹² The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

¹³ Shayara Bano v. Union of India, AIR 2017 9 SCC 1 (SC).

¹⁴ The Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019 (India).

¹⁵ The Indian Penal Code, 1860, § 498A, No. 45 of 1860.

As stated above, Personal laws were a creation of the British rule in India. During the ancient period, there were no personal laws because the land was inhabited and ruled by Hindu rulers who followed the divine precedents laid down in Hindu holy scriptures and texts; during the Mughal rule, the only shift was felt when Muslims came to be ruled under the Muslim law and non-Muslims continuing under their own laws. Criminal laws were unbiased since that was considered outside the governing factors of Family law components. It was only during the British rule that the Divide and Rule/Conquer policy dominated most of the rules, regulations and orders passed out. National integration may not be possible only through regularising personal laws but it certainly is a plausible method but the 'vote politics' is what keeps the State from intervening in personal laws. Nonetheless, the answer to the question of whether UCC is a certain means to achieve national or collective integration can be comprehended by studying the practicality of Goa's UCC policies-

India had retained the Portuguese Civil Code of 1867¹⁶ that was applicable on every resident of the State irrespective of the religion they followed. Subsequently, it was mandatory for marriages to be registered with a provision for a prenuptial agreement. Inheritance laws were also different since there exists no distinction between a male or female heir. In light of practices particular to a certain community, polygamy is also prohibited. On the other hand, there do exist certain loopholes in the Goa Civil Code like permitting bigamy for Hindu men in case the first wife fails to deliver a child (primary clause) or a son (secondary clause). Adoption is only available for Hindus whereas the Church is given authority to solemnise as well as dissolve marriages¹⁷.

The Goa Civil Code¹⁸ is not without its flaws but through the feedback received upon its implementation, it would be easier for the Centre to formulate a better equipped law that does not empower as well as degrade the dignity of women. While the entire argument revolving around the speedy implementation of UCC is feministic in nature, denying equality to women by refusing attempts to disassociate their dignity from orthodox, age-old religious and cultural beliefs to transition into the liberal beliefs where human worth is weighed by their gender or sexual orientation. Human Rights violation need not be as tangible and visible as the current Russia-Ukraine war has presented. Continued regressive discriminatory policies inflict

¹⁶ The Portuguese Civil Code of 1867, Charter of Law of 1st of July 1867.

¹⁷ Dibakar Dutta, *BJP vows to implement UCC in Uttarakhand if it wins Assembly elections. Here is how Goa is running its UCC programme*, OpIndia (2022).

¹⁸ The Goan Civil Code is the popular referral name for the Portuguese Civil Code of 1867 that has been retained by virtue of Section 5(1) of the Goa, Daman and Diu Administration Act, 1962.

The Uniform Civil Code : Beyond Secularism for Human Rights and Gender Justice

mental, emotional and psychological trauma that can be inter-generational. Equality, fairness and justice are intricate principles of Human Rights that cannot be alienated from any individual, irrespective of their age, gender or caste. The shape of Secularism as we see it today is not only pigeonholed, built on orthodox ideas of order and discipline, they blatantly disregard the will, desires and in certain circumstances, the consent of the women. The personal laws are fragmented and promote contradictory ideologies that would be structurally codified under one single head¹⁹, further helping in the national integration by bridging such gaps existing in the legal system.

Many argue that UCC is not a needed measure to nationally integrate the country's laws but fail to acknowledge that had the Indian Penal Code, 1860²⁰ been a fragmented law with conflicting interpretations, even there the State would be urged to create a unified law since it would essentially smoothen the criminal proceedings necessary to validate chargesheet filing and subsequent trial proceedings. No law is alien from any significant statute since the primary legislations were stipulated to cater to most of the offences and their lawful counteracts, therefore, if UCC is ultimately drawn, it would be easier and efficient to correlate it with relevant provisions of statutes like the Indian Penal Code without having to go back and forth just to ensure that there exist no discrepancy in the interpretation of the personal law. Efficient interpretation of the law with respect to the just punishment would ensure justice is served on time to the victim and in case of misuse as well, the proposed law would provide precise remedies available to the aggrieved party.

Howsoever it may be put, it has to be clarified by the media that Uniform Civil Code is not a state mechanism to subjugate the interests of the minorities, instead it is to bring them at par with those in dominant positions and form the majority. Secularism in its true sense means that the State shall have no official religion neither shall it endorse one to that effect; if UCC is executed, it would further not allow the State to cherry-pick any particular religion as right or the other as wrong. If everything is brought under the same jurisdiction, the chances of misuse, abuse and preferential treatment would be furthermore tedious for no prima facie distinction shall exist to set one apart from other, although the origin of the law may be from different schools of thought.

¹⁹ Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

²⁰ The Indian Penal Code, 1860, No. 45 of 1860.

CONCLUSION

The implementation of Uniform Civil Code is a possibility that is in the far future since the alleged Right-Wing stance of the current ruling party, the Bharatiya Janata Party (BJP), has continued to provoke strong reactions from minority communities (religion and class wise). What has to be understood is that the objective behind UCC is not to hijack any particular community's religious rights or freedom, rather it is to equalise the legal aspect of religious practices. It should be self-explanatory that since the law is titled 'Uniform Civil Code', it will simply compile the enforceability of the contractual obligations relationships falling under the Family Law statutes mandate. In the case of *Minerva Hills v. Union of India*,²¹ the Supreme Court held that there has to be harmony between the Fundamental Rights and Directive Principles of State Policy. Considering the discriminatory nature of Personal laws, it violates the aggrieved party's rights guaranteed under Article 19²² and Article 21; implementing UCC would essentially restore the inequity thus caused. The real-time case study of the UCC being followed in the state of Goa demonstrates that it certainly is not a tool to deprive any particular community, nevertheless, even Goa's UCC is not uniform as it is portrayed. On the basis of this as a live case study the Centre can formulate a better, holistic approach to cull out a remedy that would advance the cause of gender justice and freedom of religion, speech and expression.

²¹ *Minerva Hills v. Union of India*, AIR 1980 SC 1789.

²² The Constitution of India, 1950, art. 19.