

CONCEPTUAL ANALYSIS AND HISTORICAL PERSPECTIVE OF THE PHILOSOPHY OF UNIFORM CIVIL CODE

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ABSTRACT

The personal law system is an earlier institution or invention, reflecting the recognition of different forms of belief and practice among a large population which mostly gave crucial importance to local customs. Therefore, early Christians, Jews, Parsis and later also Muslims could previously live under Hindu domination and follow their own personal law systems. Later local Muslim rulers, and then the Moghuls, also accepted the same system with some modifications and saw the advantages of cosmopolitan plurality. The British colonial structures, thus, were simply built as a kind of superstructure onto established pattern and fitted into the pre-existing Indian framework. In India the expression 'Civil Code' is used in a very specific sense, meaning thereby a code of law regulating civil matters including marriage, divorce, inheritance and those other subjects which are presently governed by different personal laws. The expression 'Uniform Civil Code' has a reference to enacting a uniform family law indented to replace different personal laws governing Hindus, Muslims, Christians, Parsis and Jews in matrimonial and other related matters. Unified Code is imperative for both for protection of the oppressed and promotion of national unity and solidarity. Thus, Justice Kuldip Singh observed in Sarla Mudgal Case that "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" is an unequivocal mandate under Art 44 of the Constitution of India which seeks to introduce a uniform personal law. Thus, the concept of Uniform Civil Code is confined to Uniform Family Code for members of all communities living in the country, not merely for the sake of uniformity but also for securing social justice to weaker sections in different communities in the spheres of marriage, divorce, custody, adoption, and inheritance. Accordingly, in this humble work, an attempt is made to

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study historical perspective of the philosophy of Uniform Civil Code.

INTRODUCTION

Uniform Civil Code as mentioned under Article 44 of the Indian Constitution consists of three terms. The word 'Uniform' means one and the same in all circumstances and is generally used as a synonym to the word 'Common' which means same in similar conditions.

The word 'Civil' when used with an adjective called Law, it means private rights and remedies of the citizen which are distinguished from criminal law. The term 'Civil Law' is not only referred in family related issues and but includes other attributes as well such contracts, compensation etc.³

The term 'Code' refers to complete work of legislation dealing with larger portion of law containing uniform principles arranged systematically.

HISTORICAL PERSPECTIVES OF UNIFORM CIVIL CODE:

ANCIENT PERIOD

In Ancient India the primitive society was dependent upon various factors. There are many external factors such as customs, usages, beliefs, natural resources, conventions and ecological background. Also the society was dependent upon other internal factors as well such as interpretation and understanding of emotions, attitudes, personality, aptitudes and will power. It is also based upon the physical structure and its formation.⁴

The Hindu Law principles as mentioned in Vedas or Hindu Texts were truly inspired in ancient India and the scriptures of Hindu Law does not contain much attributes of positive law. Various theories on secular law are mixed with ethical, religious and moral matter.⁵ Though the aim to secularise law existed even long time back but however was distinct from the sacred law.

³ A.N. Govinda Rao, The Modern Values and Social Practices 36 (1995).

⁴ Surendra J. Patel, An Assessment of the Civil Code Movement: Crisis and Solutions, 121 (Pioneer Publications, Ahmedabad 1992).

⁵ S.S. Nigam, Uniform Civil Code and Secularism, in G.S. Sharma's "Secularism: Its Implications for Law and Life in India 22 (1966).

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Truly, in its prolonged history there have been various attempts made occasionally to secularize the law. It is even asserted that secular law continually existed simultaneously with, however in different form and was a sacred law which was administered by the King. From around 4th century B.C., the impact of theology on the state commenced to fall. The law which is positive in nature started to be differentiated from spiritual rituals and traditional customs. The politics started to show that former one was more crucial.⁶

The Indian policies laid down the means of Hindu Sages were no longer concerned with spiritual ceremonies and rites, but additionally served as a code of ethics and morality and even ruled out social intercourse or even matters of politics and government.⁷

The state was considered as a welfare state dealing with matters of only social interest and kept itself aloof from the personal laws. The society was considered as an organisational body.

The leaders of the Hindu society were Hindu sages who laid down the universal laws for the society. These rules and regulations did not only govern the religious ceremonies and rites but even manage the social intercourse of their lives. They also govern the entire code of ethics. However, the religious and civil laws were distinguished from each other. This belief was claimed by the Hindu sages who were basically the founders of Hindu Law and were spiritually enlightened. They were spiritually efficient to evolve practices in order to regulate the conduct of human beings.⁸

MEDIEVAL PERIOD

The evolution of Muslim rule in Medieval Period of India the Muslim Law became enforceable throughout the state. As the Muslim rulers were aloof from the Hindu System of Law, they did not follow the Hindu law but in fact started following their own Mohammedan Law. They appreciated the Hindu law system and did not interfere their machinery of state and allowed them to continue in the same manner. Hence in the administration of civil law in the state two systems were developed one of Muslim Law and one of Hindu Law. Hence the system

⁶V.D. KULSHRESHTHA, LANDMARKS IN INDIAN HISTORY 22 (1981).

⁷ B.S. NAGARAJAN, SOME GLIMPSES ON INDIAN HISTORY, CULTURE AND CIVILIZATION, 191 (Pooja Publications, Ghoshal Street Calcutta 1976).

⁸ *Ibid.*

of two personal laws started proceeding parallelly in the administration of state, thereby respecting each other's personal laws⁹ until the emergence of British era in India.

After the evolution of the concept of crimes and their theories of punishments were largely similar to those of Hindu Law and Muslim Law. These punishments were however not applicable to non-Muslims.¹⁰ The non-Muslims were categorised into two categories such as Jimmis and Mustamins. They were governed from time to time by the promulgation of the rulers. Broadly, the Jimmis were governed by the Muslim Rulers and the Mustamins were known as modern aliens who held the akin position.

It is therefore clear that all non-Muslims were governed by Muslim Rule in the Medieval Era with the privilege of enjoying their own traditional and customary laws. Hence the Hindus under the Muslim Rule enjoyed various immunities in case of proprietary and other profane concerns. They even had the privilege to exercise freedom to practice their respective religions, ceremonies and rites.¹¹

Under the Muslim era when both the parties in conflict are Hindus then in such case the judgement was given by Pandits and Hindu Lawyers. The same view was shared by Syed Ramjan and even the whole of Shara law was not discriminatory and rigid when applied to Hindus. Also, it is mentioned in the entire Shara Law that non-Muslims will not be governed by Islamic Law.¹²

There were two Muslim codes called Fiqh-e- Firoz Shahi and Fatwa-e-Alamgiri by which the Muslims were regulated, and a systematic judicial process was followed to regulate them. As per the Fatwa-e-Alamgiri the affairs of non-Muslims in this era were governed by the principles of their own religion and not as per the Islamic Law. The Hindus in this era in matters of civil law were governed by their respective religions and not as per the Islamic Code in matters of marriage, inheritance and other related concerns.

The Muslim rulers interfered with Islamic Law in the matters of Hindus only when it affected and contravenes the Muslim Law. The biggest example of this is Criminal Law where

⁹ NILIMA CHAKRAVARTY, MUSLIM RULE IN INDIA, 98 (Sumeet Publishers Limited, Asaf Ali Road, New Delhi 1981).

¹⁰ A.B.M. Habibu Uah, The Foundation of Muslim Rule in India (1945).

¹¹ *Ibid.*

¹² *Ibid.*

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even non-Muslims were governed by Islamic Law. However, there were two exceptions in the matter of Ordeals and Oaths where the Muslims had to take the oath of God and Hindus had to take the oath of Cow. As the law of the land during that era was that of Islamic Law therefore legislation and judiciary both enforced Islamic Law only to administer in the matters of civil and criminal. Still, the non-Muslims had the freedom and privilege to govern themselves in matters of marriage, inheritance etc., by their own personal laws as each community was had their own personal laws.

Hence while concluding the governing policies of Muslim Law were the creation of parallel system of civil law where Muslims were governed by the Islamic Law and non-Muslims by their personal laws. Whereas in matters of Crime even the non-Muslims were governed by the Islamic Law instead of System of Punishment followed in Hindu Law.

BRITISH PERIOD

The Muslim Judicial Administration continued to remain in force even after the Britishers occupied India. The position of Britishers however changed with due course of time when they came up with their own systems to deal with civil matters and changed various aspects of criminal law.

The Britishers did not intend to hurt the religious aspects of various communities of Hindu and Muslim law which were closely interwoven with religion. Therefore, Britishers provided immunity to certain subjects of Hindu and Muslim¹³ in order to maintain friendly relations with both the communities by not interfering with their religious beliefs and imposing their laws on them. This step was initiated to maintain friendly trade relations with Hindus and Muslims.

Britishers came to India in 1601 as trading merchants and incorporated East India Company. Various trading posts were established in first seventy years at coastal places and applied the Law of England in various settlements of Madras, Bombay and Calcutta during the first century of their judicial power.¹⁴

¹³ A.N. Govinda Rao, *The Modern Values and Social Practices* 93 (1995).

¹⁴ S.J. Patel, *Legal and Constitutional History of India* 121 (1958).

During the British power in India a set pattern was followed for the application of laws on the native people which was divided into two categories: Philosophy of Neutrality and Codification of Laws.

(i) *Philosophy of Neutrality:*

In the British Era it was quite evident that they tried to enact new common laws applicable for all the Indians but they made sure not to intervene with the justice administration.¹⁵ In 1772 Warren Hastings came up with certain schemes to deal with disputes in civil matters such as conflicts regarding property, marriage, inheritance, partnerships and such disputes were to be decided by Mofussil Diwani Adalat of the district in which concerned dispute occurred. Such Adalat was headed by the collector of that district in the post of Judge.¹⁶

The Supreme Court of Judicature of Calcutta, Madras and Bombay were established in 1774 and dealt with cases pertaining to enforcement of Hindu Law and Muslim Law on Hindus and Muslims respectively.

The system of law at that time was quite chaotic and very confusing because of the different kinds of systems followed in Presidency Towns and Mofussil of Presidency which thereby led to uncertainty and doubts regarding the applicability of the territory. It was therefore necessary to legalise the entire system and to arrange all the provisions systematically to ensure effective administration of justice in the heterogeneous system of rules and regulations.¹⁷

(ii) *Codification of laws*

It was observed by the Britishers that in spite of having personal laws being followed in various regions of India i.e., Hindu Law in Hindu Community and Muslim Law in Muslim Community, still there was a dire need to change the general law of the land.

Due to various personal laws applied in British India for civil matters by village courts, provincial courts and district courts, the 19th century legal system in British era was full of

¹⁵ *Ibid.*

¹⁶ Tahir Mahmood, *An Indian Civil Code and Islamic Law*, 54 (Institute of Constitutional and Parliamentary Studies, New Delhi, Published by N.M. Tripathi Private Limited, Bombay 1976).

¹⁷ *Ibid.*

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ambiguous in nature and created a lot of chaos. Also, in matters of criminal cases the application of Muslim Law on Muslims, Hindus and others became obsolete. This led to the emergence of the codification of laws in India. Other reasons for fastening the process of codification of laws were creation of Law Commission by Charter Act, 1833, appointment of law member in such commission, formation of All India Legislature and huge influence of Jeremy Bentham on codification of criminal laws in order to bring uniformity and certainty.

After a lot of efforts and hard work, the criminal laws in India got codified under the chairmanship of Lord Macaulay in 1832 into Indian Penal Code, 1861 and Criminal Procedure Code, 1898. Hence uniformity was achieved but for civil laws there was no common civil code.

Before the implementation of Indian Contract Act, 1872 there were two separate contract laws applicable in India. The Hindu law of Contract applied on Hindus and Muslim law of Contract applied on Muslims. In recent trends the subject matters which are not included in the Indian Contract Act, 1872, such matters are dealt by Hindus according to their own Law of Contract and by Muslims according to their own Law of Contract.

ORIGIN OF UNIFORM CIVIL CODE IN INDIA

The National Planning Committee in 1940 raised the demand of having Uniform Civil Code in India. This idea was advocated by analysing the report submitted to Planning Committee by a subcommittee called, 'Women's Role in Planned Economy'. The report suggested for the enactment of Uniform Civil Code temporarily which can be later in future could gradually change all the personal laws followed by various religions in India.¹⁸

However, this idea was opposed by the Muslim members and even by the various other members of the National Planning Committee and other sub-committees.

All India Women's Conference in 1940 prepared a charter of Women's Rights which included various suggestions pertaining to reforms in various personal laws but did not provide for the enactment of the Uniform Civil Code in India.

¹⁸ *Supra* Note 12.

CONSTITUENT ASSEMBLY DEBATES

The Personal Laws in India are deeply rooted in India and despite the various efforts of past rulers such laws cannot be uprooted from the Indian social set up. The importance of usages, customs, scriptures, regional variations have historical importance in India. Customs hold very important place in the modern set up of personal laws and are even reflected in the multiplicity, variety, diversity in the area of personal laws in India.

The idea of Common laws was proposed to remove the multi-cultural personal laws due to which it became hindrance in the administration of justice. If the proposed Common law gets implemented then irrespective of the religion all will be governed by the Common Law which will further help in secularising and simplifying the various provisions of the Indian Constitution such as property, adoption, maintenance, guardianship and equality of justice in administration of the same. This will indeed help the Constitution to achieve its goal.

The Constituent Assembly in 1947 proposed the idea of Uniform Civil Code as the Directive Principle of State Policy which read as “The State shall endeavour to secure for the citizens a Uniform Civil Code.” The Fundamental Rights as the sub-committee on the debate of Article 35 put some recommendations for the application of clause 39 which should be done on an entirely voluntary basis for all the citizens of India.¹⁹

Even though the provision was merely directive to the state policy, but various objections were raised by the Muslim Members of the Constituent Assembly such as Mohammad Ismail, Pocker Bahadur, Mehaboob Ali Baig, Naziruddin Ahmad from Bengal and Hussain Imam from Bihar. They all even pleaded to make certain amendments in order to allow their community to let them follow their personal laws.²⁰

In the arguments of Muslim Members, one of the speaker constructed draft of Article 35 quite narrowly. It was rightly put by Mahboob Ali Baig that Article 35(which is now Article 44) did not give any right to the state to legislate on personal laws. It was recommended by Naziruddin Ahmed that although the draft clause of Article 19 contain certain exceptions related to religious practices and laws but it did not cover other religious practices and laws.

¹⁹Partha S. Ghosh, Uniform Civil Code: History of a Controversy, Mainstream, 17-18 (1995).

²⁰ *Ibid.*

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Hence the term ‘Civil Code’ under draft of Article 35 (now as Article 44) did not contain the personal laws of the citizens.²¹

Muslim members also asserted that India being a secular country should not be intruded with the legislative power to interfere with the religious beliefs and practices of any community in India. It was pointed out by Naziruddin Ahamad that why has not been done 175 years by the Britishers and in 500 years by the Muslim Community, how can any state be given a power to interfere with the religious beliefs of the communities. As India being a secular country should be permitted to practice and preach their own religion and also the citizens should be allowed to follow their own personal laws.²²

Another reason by which Muslim members opposed the Article 35(now known as Article 44) was due to its impracticability nature and it is not expedient to enact in India which is a country with diverse population, and it is feasible to enact uniform laws in India.

Finally, the Muslim Members proposed certain amendments on Article 35 in order to relieve the state from their interference in the personal laws of the country²³. Hence as a result of lengthy debates was that Article 35 was re numbered as Article 44 without any amendments. It thus read as: “The state shall endeavour to secure for citizens a Uniform Civil Code throughout the territories of India.”

THE GOA CIVIL CODE: A PROGRESSIVE MODEL

In the 19th and 20th centuries the Portuguese rulers came up with several legislation on Family Laws which was collectively called the Goa Civil Code. The colonial laws were scrapped by the Indian Government in 1961 after the Liberalisation of Goa. In order to remove the colonial provisions the Indian Government enacted the Goa and Daman Diu Act of Administration which extended the central laws of the country to the territory of Goa but the Portuguese Laws remained in force in the territory of Goa as it was welcomed and accepted by all the religious communities of the state.

The most important principle of the Portuguese Civil Code was to strengthen the society’s backbone by making a strong relation between husband and wife, developing in them

²¹ *Ibid.*

²² Surendra J. Patel, An Assessment of the Civil Code Movement: Crisis and Solutions, 128 (1992).

²³ *Ibid.*

the spirit of tolerance and also to provide all kinds of safeguards in order to prevent any sort of injustice occurred by one spouse to the other. One of the most important provision of this Civil Code was provision of Public Deed before marriage which dealt with disposing off the movable and immovable properties at the even divorce or death of either spouse. At the time of marriage the parents of both the spouses have common right on the estate but at the time of divorce it has to be divided equally among all.

It is quite pleasant to observe that some provisions of Goa Civil Code are considered better and progressive than the Hindu Marriage Act and Hindu Succession Act. The dream of the makers of the Constitution of the enforcement of the Uniform Civil Code in India can observed only in the regions of Goa and Daman and Diu. Indeed it would be a regressive step to see the uniformity of personal laws in Goa to be scrapped down.

The Goa Civil Code is non-discriminatory in nature. People belonging to different castes in Goa are governed by same law in matters of marriage, divorce, succession and protection of children. Such kind of benefits are not available elsewhere in India. Also in Goa it is compulsory to get marriage registered as it is considered as a contract under the Portuguese Law. By getting their marriages registered the married women in Goa have certain benefits as they can establish their rights on the outset which is not available for other women of the country. Such compulsion of registration of marriages are sufficient proof to check the bigamous nature of marriages.²⁴

There are various modes of marital options under the Goa System such as assets separation which were in existence before marriage, after marriage mixing of properties, property being absolutely separated and total regime.

One of the most unique component of Civil Code applicable in Goa was that the properties which were in the name of the spouses before marriage, the properties which they acquired during the marriage or after the marriage are considered as the common property of both the spouses till the time their marriage remains in subsistence. At the time of death of either spouse, separation or dissolution of marriage such properties are equally divided among the two. This is the most welcoming piece of legislation for women which is not prevalent in

²⁴ Kamveer Singh Chahal, *The Crusade for the Implementation of UCC and Homogenising the Personal Laws*, (2004).

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the rest of the country and due to which the women suffer and feel vulnerable at the whims of the husbands and loose legislations.

Even after the application of the Uniform Law in Goa it was not free from flaws. It gave right to the Hindu men to commit second marriage if his wife is not able to give a child till the age of 25 or a boy child till the age of 30 which was an outdated provision and was also against the sanctity of the Indian Constitution. Such laws which promote gender inequality and degrade the status of women in society are not welcomed in a liberal society like India.²⁵

After various attempts made by some Muslims Rulers to scrap down the Common Law in Goa and encouraged people through their speeches to follow the Muslim Personal law failed miserably. Finally the Muslims who were liberal won with majority and continued to follow the common law system in Goa.

THE COURT'S ROLE IN SECURING A UNIFORM CIVIL CODE

(i) *Judicial Approach Before the Shah Bano Case-*

Many Scholars were of the view that discriminatory personal laws should be struck down as it violates the fundamental right of Equality and is also against the Constitutional Spirit of Art 44 whereas the opposite views completely differ where the scholars were of the belief that personal laws come under the purview of right to religion which is not 'law' as per Article 13 of the Constitution, hence it is beyond the reach of Fundamental Rights.

In *State of Bombay v Narasu Appa Mali*²⁶ the court upheld the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The court stated the reason that Uniform Civil Code should be implemented in the Country, but it must be brought in stages by the state. Till then the personal laws prevailing in the country owe the origin to their religious texts and hence different codes are applicable to Hindus and Muslims.

In *Mohamad Yunus v Syed Unnissa*²⁷ the Supreme Court observed that all questions pertaining to Muslim succession, adoption, inheritance, marriages, dower, gifts, guardianships

²⁵ *Ibid.*

²⁶ *State of Bombay v Narasu Appa Mali*, A.I.R. 1952 Bom 84.

²⁷ *Mohamad Yunus v Syed Unnissa*, A.I.R. 1961 S.C. 808.

and dissolution of marriages shall be governed by Muslim Personal Law (Shariat) only and not by any other legislation in India.

(ii) *Shah Bano and aftermath-*

In *Mohd. Ahmed Khan v Shah Bano Begum*²⁸ the wife was divorced by her husband by declaring talaq. After which the wife was not able to maintain herself and went to the court to claim maintenance under sec 125 of Cr.PC. The Muslim Personal Law, however, did not apply to the said case. After the judgement the Muslims were outraged and saw that move as an attempt to enforce Uniform Civil Code upon them forcefully. The Rajiv Gandhi Government, then under pressure passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 which overturned the Shah Bano Ruling.

In *Mrs. Jorden Diengdish v S.S. Chopra*²⁹ a Christian woman who married a Sikh man was denied divorce and got judicial separation because of unequal personal laws. The Supreme court felt the need of having Uniform Laws applicable to all irrespective of the religion.

In *Sarla Mudgal v Union of India*³⁰ another historic judgement where the Supreme Court declared second marriage committed by Hindus by converting themselves into Islam, during the persistence of first marriage as void and punishable under section 494 of Indian Penal Code.

In *Danial Latifi v. Union of India*,³¹ another landmark judgement of the Supreme Court of India where validity of the Muslim Women (Protection of Rights on divorce) Act, 1986, was challenged. Section 3(1)(a) of the Act says that Muslim men will pay maintenance depending upon their financial means which is contrary to their personal laws which clearly lays down that Muslim men to pay maintenance unconditionally during iddat period. Also the court laid down that Muslims can follow their personal laws so far it does not contravene with the social welfare obligations which are applicable uniformly to all Indians.

²⁸ *Mohd. Ahmed Khan v Shah Bano Begum*, A.I.R 1985 S.C. 945.

²⁹ *Mrs. Jorden Diengdish v S.S. Chopra*, A.I.R 1985 S.C. 935.

³⁰ *Sarla Mudgal v Union of India*, A.I.R 1995 S.C. 1531.

³¹ *Danial Latifi v. Union of India*, J.T. 2001(8) S.C. 218.

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In *Shayara Bano v Union of India*³² the Supreme Court again emphasised the need of implementing Uniform Civil Code in India by putting ban on the practice of Triple Talaq by Muslims and declare it unconstitutional.

It has been noted that Judiciary has been very progressive post-independence in moulding the various discriminatory personal laws and therefore such approach must be adopted by the state as well in achieving the constitutional goals as laid down in the Art 44 of the Indian Constitution.

CONCLUSION

Uniform Civil Code is the spirit of Secularism in India which cannot be achieved by just amending the personal laws of the communities. In order to ensure that justice and harmony prevails in India, it is imperative that different personal laws should not dominate the citizens of the country, nor they should get suppressed by the enforcement of Uniform Civil Code in India. Many countries have modified their discriminatory personal laws such as Polygamy got banned in Syria, Egypt, Turkey and hence India should also aim to achieve a secular non-discriminatory law for its citizens.

In order to achieve the and assure the dignity of women in the Indian society, it is now imperative that all the discriminatory provisions of law should be shredded off from the society and uniformity and certainty in laws should be welcomed in order to protect their basic human rights.

SUGGESTIONS

- The enactment of the Uniform Civil Code applicable to all the citizens from diverse religions is indeed a positive and necessary socio-legal reform to provide with equality or equal protection of Law.
- An effective and reasonable legislation called the Uniform Civil Code would help in erasing the discriminatory practices as practiced under different Personal Laws or specific Customary Laws, without disturbing or interfering in the basic tenants or freedom in community's religious aspect.

³² Shayara Bano v Union of India, A.I.R 2017 9 S.C.C. 1 (S.C.).

- Implementation of Uniform Civil Code will help to achieve the goal laid down in Art 14 of the Constitution ie. Right to Equality.
- A Model Framework of Uniform Civil Code should be made in order to ensure the basic tenants of Preamble of the Indian Constitution such as Equality, Fraternity and Uniformity.