

UNIFORM CIVIL CODE – INCLUSION OF FAITH & RELIGIOUS PRACTICES: A STEP FORWARD

- Aniket Kumar & Sudhanshu Sachan¹

ABSTRACT

India is a country where people follow different religions, culture and traditions owing to which there are different practices and norms particular to each religion. The diversity of religion does not hinder the social structure of the country. It is the practices that are an impediment to the law of the land irrespective of the religion to which they belong; be it the exclusion of certain age group of women from Sabrimala Temple or banning entry of women in mosques to the issues of Triple Talak and Hijab. These prevailing incidents have reignited the debate around Uniform Civil Code (hereinafter referred as “UCC”) in the country.

The Constitution of India provides for India being a secular country not having any religion as a state religion & also provides for freedom of religion under Articles 25 & 26. The extensive indifference between various religious norms and the fundamental right to profess one’s religion have made the implementation of UCC a tough task. The non-application of UCC leads to the problems of gender inequality caused due to the difference in religious practices.

There is no doubt that laws having a wider scope and applicability on everyone irrespective of their religion i.e., divorce, marriage, adoption can be regulated by the UCC but when it comes to the inherent practices of each religion i.e., entry of women into temples and mosques etc. the question still pertains as to whether the UCC would be able to transcend these religious norms or not. The authors in this paper tend to analyse this question and argue for the inclusion of the same under the UCC with special reference to the issue of entry of women in mosques. The authors also analyse the effect of the same on the religious rights guaranteed under the Constitution. The authors advocate that the inclusion of these religious practices under the UCC would help in achieving the cherished goal of social justice enshrined under the Constitution.

¹ The authors are students of Central University of South Bihar. The authors can be accessed at aniketsingh129@gmail.com , sudhanshusachan17@gmail.com.

INTRODUCTION

India is a country where people follow different religions, culture and traditions owing to which there are different practices and norms particular to each religion. The diversity of religion does not hinder the social structure of the country. This diversity is the beauty of our country which entails in it the common identity of nationalism despite the differences. The constitution which is law of the land has provided an instrumentality under Article 44 which provides for the enactment of uniform civil code by the State. The constitution was enacted for the whole country, and every section and community must accept its provision and its directives.² The concept of Uniform Civil Code (hereinafter referred as UCC) has now gained a significant attention in the light of the contemporary issues which are directly in violation of the natural laws but are still going on in the name of religious practices. The intervention of courts on triple talak, hijab row etc. shows that the practices which have been carried out in the name of religious autonomy are not only violative of the law of the land rather do not even find concrete evidence to be backed by their parent religion. The absence of any backing by the religion itself shows that these practices are a way of imposition of certain ideology rather than a facet of the religion.

The issue of entry of certain class of women in the Sabrimala temple which was resolved by the Hon'ble Supreme court garnered more attention as to the question that to what extent the rituals or practices of a religion can be regulated by the judiciary and by what means are these to be regulated. The judgement also voiced the interference of courts in the issue of non-entry of women in the mosques.

Apart from these major issues, a pertinent question that needs to be answered is whether the courts have to step in every time a religious practice or dogma is in dispute with the fundamental rights; not to forget the plethora of pending cases in the court. Another approach can be suggested as the enactment of a Uniform Civil Code, but it is difficult to imagine a comprehensive code that regulates each and every aspect of all the practices of various religions.

² M.C. Chagla, *Plea for Uniform Civil Code*, WEEKLY ROUND TABLE, 7, 1973.

Uniform Civil Code- Inclusion of Faith & Religious Practices: A Step Forward

Through this paper the authors have tried to analyse the possibility of inclusion of the respective religious norms in UCC. The authors have also tried to explore the judicial view of conflict between UCC and freedom of religion and the way forward to enactment of a Uniform Civil Code.

GENDER JUSTICE & UNIFORM CIVIL CODE

There is a need to bring UCC primarily for three purposes; *national consolidation, equality of laws & gender justice*.³ The case for national consolidation is difficult to implement on ground. While on the other hand, the argument for achieving gender justice makes a stronger case for enactment of the UCC. The case for equality of laws is a kind of mix of the former & the latter. Achieving national integrity & gender justice would subsequently lead to equality of laws.

In the words of Rosemarie Tong, '*Gender Justice..., requires us, first to make the rule of the game fair and, second, to make certain that none of the runners in the race for society's goods and services is systematically disadvantaged*'.⁴ Gender justice is not only about bringing men & women at the same pedestal but is about making an environment where they both can be treated as wholly human.⁵ The goal of gender justice, set in the larger context of social justice is yet to see the light of the day. Even after 75 years of independence, the other half of the population still lives with the shackles of regressive practices in the name of religion. It has been argued that labelling customs & social practices as "law" provide them impunity against being questioned for their patent discrimination & are "*retrogressive & impose primitive androcentric practices*".⁶

Various religious norms of different religions are *prima facie* discriminatory against women; ***Exempli Gratia***, "*Under Muslim law, husband's apostasy from Islam results in automatic dissolution of a Muslim marriage though wife's apostasy does not. Under Hindu law, a spouse converting to another religion confers on the other spouse a right to sue for*

³ Akhilendra Pratap Singh, *Utility of Uniform Civil Code*, 59 JOURNAL OF THE INDIAN LAW INSTITUTE, 178, 179 (2017).

⁴ Mrs. Prabhavati K.S. Baskey, *Uniform Civil Code vis a vis Gender Justice in India*, 3 INTERNATIONAL JOURNAL FOR INNOVATIVE RESEARCH IN MULTIDISCIPLINARY FIELD, 23, 25 (2017).

⁵ Medha Sarin, *Uniform Civil Code for Gender Justice*, 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, 665, 667 (2020).

⁶ Rohini Dahiya, *Gender Justice in India: Outlook on Uniform Civil Code*, SOCIAL AND POLITICAL RESEARCH FOUNDATION, (2021).

*divorce. The same is the position under Parsee law. Under Christian law, apostasy does not affect the marriage but where the apostate husband has married again, the wife gets a right to sue*⁷ Other discriminatory practices include the issue of entry of women in mosques which is presently sub-judice⁸ before the Hon'ble Supreme Court.

The authors tend to argue that these inherent religious practices that are discriminatory & arbitrary in nature should be regulated by bringing them under the ambit of the UCC. The state has the power to make laws on the regulation of the same under Article 25 (2) (a) of the Constitution of India read with the restrictions given under Article 25 (1) of the Constitution.

FREEDOM OF RELIGION AND UNIFORM CIVIL CODE

The Constitution of India guarantees Freedom of Religion to every individual which emphasize the secular nature of Indian polity which the founding fathers considered to be the very basis of our constitution.⁹ The right to freedom of religion provides all persons entitlement to freedom of conscience and right to freely profess, practice and propagate religion.¹⁰ The rights under Article 25-28 of the constitution embody the principles of religious tolerance that is a basic feature of Indian Civilization.¹¹ Clause 2 of the Article permits the state to make any law to regulate or restrict any secular activity that maybe associated with any religious practice.

The term 'Religion' has not been defined in the Constitution, but Hon'ble Supreme court has defined it comprehensively as '*Religion is certainly a matter of faith with individuals or communities, and it is not necessarily theistic*¹². The latter part was for the religions that do not believe in existence of any god i.e., Buddhism, Jainism. For the purposes of this part, religion is not limited to beliefs but includes any practice which are regarded as part of its religion by a community¹³ and can extend to the matters of food and dress.¹⁴

Article 26 deals with the religious rights of group of individuals known as religious denominations subject to public order, morality and health. For a group to be categorized as religious denominations, they must have common faith, common organisation and a distinctive

⁷ D. C. Manooja, *Uniform Civil Code: A Suggestion*, 42 JOURNAL OF THE INDIAN LAW INSTITUTE, 448, 456 (2000).

⁸ Yasmeen Zubair Ahmed & Anr. v. Union of India & Ors, WRIT PETITION (CIVIL) NO. 472 OF 2019.

⁹ Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

¹⁰ INDIAN CONST., art. 25, cl. (1).

¹¹ MP SINGH, VN SHUKLA'S CONSTITUTION OF INDIA, (13 ed., Eastern Book Company, 2015)

¹² Commissioner, HRE v. Sri Lakshmindra Thirtha Swamiar of Shirur Matt, AIR 1954 SC 282

¹³ Jagdishwara Nand v. Police commissioner, Calcutta, AIR 1984 SC 51.

¹⁴ Ram Chandra Deb v. State of Orissa, AIR 1959 Orrisa 5

Uniform Civil Code- Inclusion of Faith & Religious Practices: A Step Forward

name.¹⁵ Article 25 protects the religious freedom of an individual whereas Article 26 deals with collective rights of religious denomination.¹⁶

Article 44 of the constitution states that '*The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.*' The word "Uniform" in Art 44 means that all communities must be governed by the uniform principles of gender justice and human justice¹⁷. A uniform law would not necessarily mean a common law, but different personal law based on uniform principles.¹⁸ This particular provision came under intense debate during the constituent assembly proceedings and the representatives of minority sections were vocal against this provision. The major objections that were put in the Constituent assembly were *firstly* it would step on the religious freedom of the individuals and groups, & *secondly* it would be an imposition of majority will against the minority.

The objection of the first part have been removed by the clause 2 of Article 25 which excludes the secular activities associated with religious practices from purview of freedom of religion. However, the second objection is the one which still entails in the minds of the minority group. In the words of Maulana Hasrat Mohani, "*I would like to say that any party, political or communal, has no right to interfere in the personal law of any group.... If anyone who thinks that he can interfere in the personal laws of the Muslims, then I would say to him that the results will be harmful*"¹⁹

However, a part of the constitutional forefathers also argued the inclusion of this provision was necessary by giving the examples of Turkey and Egypt where even in advanced Muslim Countries, the personal laws do not have such sanctity as to impede the enactment of a civil code.²⁰

Dr. B. R. Ambedkar in his final statement stated that the State has only given the power to legislate on the personal laws only and not to do away with them. Even if the state has got

¹⁵ SP Mittal v. Union of India, (1983) 1 SCC 51.

¹⁶ Supra note 12, para 26.

¹⁷ Dr. Jayshree Das, *Uniform Civil Code for Gender Justice*, 1 MSSV JOURNAL OF HUMANITIES AND SOCIAL.

¹⁸ Sathya Narayan, *Selected works of S.P.Sathe, Social Justice and Legal Transformation*, 3 OXFORD UNIVERSITY PRESS, 91 (2015).

¹⁹ Constituent Assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 759.

²⁰ KM Munshi, Constituent assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 547-548

power any government would not exercise its power in such a way that it gives rise to a rebellion.²¹

In a nutshell it can be said that the religious freedom has been provided by the same state which has the power to enact a Uniform Civil Code. In the current scenario, any attempt to effect or change personal laws can give rise to rebellion as in the Shah Bano case or the Sabrimala case. So, the enactment of Uniform Civil Code has to be done in a way that it does not only give regards to religious freedom but also respect public opinion.

UCC: JUDICIAL VIEW

The power to enact the UCC has been cast upon the state and Judiciary being an organ of the State has time to time enunciated the need of a Uniform Civil Code. The Hon'ble Court has time to time emphasized the need for the enactment of a Uniform Civil Law.

In the recent case of **Jose Paulo Coutinho v. Maria Luiza**²², the Supreme Court held that, *"While the authors of the Constitution in Article 44 in Part IV managing with the Directive Principles of State Policy had trusted and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard"*. In the case of **ABC v NCT of Delhi**²³ the court managed with the issue of guardianship of a Christian unwed mother without the consent of the child's father. While ruling the case in the woman's favour, the court commented- *"It would be inverse for us to underscore that our Directive Principles imagine the presence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation"*

Similarly, in other cases too, the Honourable Supreme Court has marked the necessity of implementation of a Uniform Civil Code. In the case of **John Vallatam v. Union of India**²⁴, *"Parliament is still to step in for framing a UCC in the Country. A UCC will help the cause of the national integration by removing the contradiction based on ideologies."* Justice MC Chagla while making a vehement plea for UCC wrote, Article 44 is a mandatory provision binding the government and it is incumbent upon it to give effect to its provision.²⁵

²¹ Dr. B. R. Ambedkar, Constituent Assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 779.

²² Jose Paulo Coutinho v. Maria Luiza, Civil Appeal No. 7378 of 2010.

²³ ABC v NCT of Delhi, 2015 SCOnline SC 609

²⁴ John Vallamattom v. Union of India 2003 (5) SCC 384.

²⁵ Supra at 1.

Uniform Civil Code- Inclusion of Faith & Religious Practices: A Step Forward

It is clear by the decisions of the Honourable Court that the desirability of Uniform Civil Code can hardly be doubted. The UCC can come into effect or accepted by the people only when social climate is properly built up, the politicians leaders rise above their personal motivations and awaken the people to accept the change for the betterment of the nation at large.²⁶ India being a diverse land with large religious and social diversities, it is highly essential to have a Uniform Civil Code at the earliest to bridge the gap created by various personal laws which have crept in through the years.²⁷

THE ISSUE OF NON – ENTRY OF MUSLIM WOMEN IN MOSQUES

A PIL has been filed before the Hon'ble Supreme Court challenging the non-entry of Muslim women in mosques as violative of Article 14, 15, 21, 25 & 29 of the Constitution of India. The petitioner Yasmeen Zuber Ahmed Peerzade had written a letter to Mohmdiya Jama Masjid, Bopodi, Pune seeking permission to offer namaj in the mosque. The permission was denied by the authorities with the caveat that the issue has been sent for consideration to higher authorities. There was no response from the higher authorities after which the petitioner wrote to the Imam who categorically denied permission. Aggrieved from the same, the writ was filed before the Hon'ble Supreme Court.

It is *prima facie* clear that not allowing women in mosques is violative of Article 14, 15, 21, 25 & 29 of the Constitution of India. The authors place their reliance on the celebrated judgment of **Dr. Noorjehan Safia Niaz and anr. v. State of Maharashtra & ors.**²⁸, wherein the Bombay High Court and later the Supreme Court quashed the ban imposed on the entry of women in the sanctum sanctorum of the Haji Ali Shrine. The ban was quashed on the grounds that it contravened Articles 14, 15 and 25 of the Constitution. Even the All -India Muslim Personal Law Board has submitted in their counter affidavit that Muslim women are free to enter mosques and Islamic texts do not restrict their entry.

Given the same, the larger question that the authors seek to address is that there are similar practices existing in other religions as well & are not being questioned in the name of religious practices. *Exempli gratia*, the issue related to parsi women married to a non-parisi into the holy

²⁶ Lily Thomas etc. v. Union of India and others AIR 2000 SC 1650

²⁷ Atish Chakraborty, *Uniform Civil Code & the Indian Judiciary*, SSRN (2017).

²⁸ Dr. Noorjehan Safia Niaz and Anr v. State of Maharashtra and Ors. Manu/Mh/1532/2016

fire place of an agyari²⁹ or the issue regarding the powers of constitutional courts to go into the question of whether a particular religious practice of a religion satisfies the *essential religious test*, w.r.t. the female genital mutilation (*hereinafter referred to as FGM*) in the Dawoodi Bohra Community.³⁰ The practice of FGM, in India, is common in the Bohra community, where it is referred to as “Khatna” or “Khafz/Khafd”. “*Khatna essentially involves cutting the tip of a girl’s clitoris when she is 6-7 years old.*”³¹ The reason behind this practice is deep rooted discrimination against women and girls. The other reasons include “*religious dicta, an aid to female hygiene and a tool to control or reduce female sexuality*”³². According to a study conducted mostly amongst the women of the Dawoodi Bohra community,³³ it was found that fulfilment of religious requirements, traditions and customs clubbed with the wish to curb the girl’s sexuality were the significant reasons for the flourishing practice. The existence of these inhumane practices is itself a question on the modern notions of human rights & social justice.

THE STEP AHEAD

The implementation of Uniform Civil Code is necessary to remove the gender discrimination and secure equality. The implementation until now has been halted due to the reasons of inactivity of the lawmakers probably because they do not want to compromise their electoral share of votes. One should also not forget the mass agitation of people whenever the courts have tried to interfere with any of the religious norms. Uniform Civil Code is thus required not only to ensure uniformity of laws between communities, but also uniformity of laws within communities ensuring equalities between the rights of men and women³⁴. The authors hereby suggest some possible approaches in furtherance of enactment of a Uniform Civil Code.

1. **Parallel Implementation:** An amendment was proposed to Article 35 of the draft constitution to add a proviso – ‘*Provided that any group, section or community shall*

²⁹ Kapil Sankhila, *Sabarimala May Lead to Uniform Civil Code — But Will We Accept It?*, THE QUINT (March 10, 2022, 10:05 P.M.), <https://www.thequint.com/amp/story/voices/opinion/sabarimala-temple-verdict-uniform-civil-code-supreme-court-fundamental-rights-indian-constitution#read-more>

³⁰ *Id.*

³¹ Female Genital Mutilation, Guide To Eliminating The FGM Practice In India

³² *Id.*

³³ R. Ghadiyally, ‘*All for ‘Izzat’: The Practice of Female Circumcision among Bohra Muslims*’, 66, (1991)

³⁴ F. Agnes, *Hindu Men Monogamy and Uniform Civil Code*, XXX (50) Economic and Political Weekly 32 (1995)

Uniform Civil Code- Inclusion of Faith & Religious Practices: A Step Forward

not be obliged to give up its own personal law in case it has such a law'.³⁵ To implement a civil law for all people, there should be a liberty given to people so as to choose between the law from which they wish to be governed. Securing a Uniform Civil Code should not negate the possibility of citizens to avail themselves of their religious laws of they wish.³⁶ This type of law is followed in Serbia, Croatia etc. and have proved a better way to impose a civil law by minimising any discontent or dissatisfaction. However, a major disagreement to this approach can be cited as this type of alternative remedy can be used by the persons to their own advantage.

2. **Laws based on Principles:** Article 44 provides for taking steps to secure a Uniform Civil Code meaning thereby that the steps not exclusively mean enacting concrete law. A better approach can be securing some established principles rather than enacting a concrete law. These principles should be consistent with gender justice, equality, rule of law and right to life of the people. A concrete law can create an impression that the lawmakers are directly infringing their religious rights but the just principles will be accepted by a society as a reform rather than a destructive step to their personal laws. However, one plausible argument that can be advanced against the same is that the principles, not being a concrete law are subject to interpretation by the courts every time any religious issue comes into dispute. This would further add to the burden of courts and even securing UCC would be of no avail.
3. **Gradual Implementation:** This third step is necessary to maintain communal harmony and remove the state of discontent among the people. The implementation should involve steps as to topic wise and chapter wise till the society is ready to step up for a change for the betterment of the country.

³⁵ Mohd. Ismail Sahab, Vol VII, 4 Nov 1948 – 8 Jan 1949, 540-541

³⁶ SHIMON SHETREET & HIRAM E. CHODOSH, UNIFORM CIVIL CODE FOR INDIA, (1st ed., Oxford University Press, 2015.)

CONCLUSION

The ideals of gender justice & equality within the communities can be achieved in a sustainable manner only when the communities/sects that are constantly carrying these ill-practices recognize the same as inhumane & put a stop to them at once. The authors are of the opinion that these discriminatory practices exist among all the religions in one way or the other. Bringing them under the ambit of the UCC for their regulation is the first & the foremost step towards recognizing them as an issue of significant concern. Unless & until, we recognize them as a problematic issue we won't move an inch forward towards their solution. This paper is an attempt towards the recognition of the same.

We also need to look towards the bigger picture, in the sense, the idea of an India that we wish to create. If these practices continue to exist, they will surely act as a blackspot tarnishing the reputation of *Bharat* and will raise unanswerable questions about our stand on such issues. It is high time to build a narrative & create a discourse that can lead to the withering away of these practices.