

IS THE UNIFORM CIVIL CODE THE ONLY REMEDY FOR ELIMINATING DISCRIMINATION?

- *Najla Pazhayakath*¹

ABSTRACT

This paper discusses whether the Uniform Civil Code is the only remedy for eliminating discrimination under the personal laws in India. Replacement of religious, cultural-oriented laws by a secular uniform code was the topic of debate before independence. Later, the constitutional makers added the Uniform Civil Code in Part IV of the Indian Constitution. The Constitution recognized legal pluralism and secularism, and also it protected the religious rights of the people under part III of the Constitution. This paper explains the judicial approaches when conflicts arise between Fundamental Rights, Directive Principles, and two Fundamental Rights. The judgments in this matter consider the harmonization of two conflicting rights. For solving the conflicts among rights, most people suggest enacting a Uniform Civil Code. These arguments are limiting the scope of the concept of secularism and evading the concept of multiculturalism. This paper concludes with a suggestion to make uniformity in laws through progressive interpretation within the religion rather than forcing a uniform code on the people practicing different cultures.

INTRODUCTION

Indian Jurisprudence regards law as not a static or eternal concept but as changing and evolving with the evolution of society.² Law is in some way rooted in religion.³ Every school of thought, every religion, and prophet constitutes the fundamental and practical social change factor within that school. Different religions, in general agreements, have some foundational

¹ The Author is a Research Scholar at School of Legal Studies, Cochin University of Science and Technology and can be accessed at najlap2008@gmail.com

² S.S. Dawan, *Secularism in Indian Jurisprudence*, in *SECULARISM: IMPLICATION FOR LAW AND LIFE IN INDIA*, 102–138 (1966).

³ DENNIS LLOYD, *THE IDEA OF LAW* 47 (1964).

views.⁴ Aldous Huxley's perennial philosophy says that every religion or thought has eternal values such as truth, justice, etc.⁵

We know that India is a religiously pluralistic society. But India has no state religion. There are no express provisions like the first amendment of the USA, prohibiting the establishment of religion by law.⁶ For emphasizing no state religion, the Indian Constitution added the word 'secularism' to the preamble.⁷ At the same time, the Constitution of India gives all persons equally entitled to freedom of conscience and the right to profess, practice, and propagate their religion.⁸ And this freedom to practice religion and the freedom to manage religious affairs⁹ are not absolute rights; they are subject to public order, morality, and health.

LEGAL RECOGNITION OF PERSONAL LAWS

In India, before colonization, Hindus and Muslims with very few exceptions were governed by their respective laws in religious and secular matters.¹⁰ The British continued with the same policy concerning the personal issues of Hindus and Muslims. At the beginning of the 17th century, the British legal principles and notions of justice influenced the Indian judicial system. The British allowed the Muslims to continue to be governed by their laws. This permission assumed a statutory status under Charter Act 1753, which George II granted. After this, the Muslims could obtain an exemption from the Mayor's Court to get their cases adjudicated based on their law.¹¹ Section XV of the Regulation IV of 1793 enacted by Lord Cornwallis provided that, "*in suits regarding succession, inheritance, marriage and caste, and all religious usages or institutions, the Mohammedan Laws with respect to Muhammadans and Hindu Laws with respect to Hindus, are to be considered as the general rules by which the judges are to form their decisions*".¹²

Personal Laws are one of the unique components of the Indian Legal system.¹³ Different personal laws in India govern different religious communities like the Muslims, the Hindus,

⁴ CAFER S. YAREN, ISLAMIC THOUGHT ON THE EXISTENCE OF GOD- WITH CONTRIBUTIONS FROM CONTEMPORARY WESTERN PHILOSOPHY OF RELIGION (2003).

⁵ ALDOUS HUXLEY, THE PERENNIAL PHILOSOPHY (1947).

⁶ VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1058 (1999).

⁷ THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976.

⁸ INDIA CONST. art. 21.

⁹ Article 26 *Id.*

¹⁰ Cutchi Memons, Mappilahs, Nairs etc.

¹¹ DR. PARAS DIWAN, MUSLIM LAW IN MODERN INDIA (6 ed. 1993).

¹² DR. MOHAMMED SHABBIR, MUSLIM PERSONAL LAW AND JUDICIARY (1988).

¹³ Denkila Bhutia, *A Study of the Status of Personal Laws in India with Reference to Article 13 and Judicial Review under Constitution of India*, December, 2018.

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and others. They are governed by the laws which govern matters of marriage, inheritance, etc., of people belonging to a particular religion. In *Inayatullah v. Gobind Dayal*¹⁴, Mahmood J said, “*It is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dissevered from it*”.

Muslims and Hindus are different not only in religion but also in their historical background, social habits, cultural outlook, educational development, etc. So, the Muslims and Hindus are classified separately and subjected to the different status of laws. Such classification is not based on religion alone. In the cases of *State of Bombay v. Narasu Appa Mali*¹⁵ and *Srinivasa Aiyar v. Saraswati Ammal*,¹⁶ the courts held that different laws for the Hindus and the Muslims were not on religion only but social and other developments of and various other considerations peculiar to each of the communities.

Many provisions in the personal laws in India dis-privilege women. The primary reason behind this discrimination is the unequal status of women in existing personal laws. The gap between the old laws and the new needs of society is inevitable. This can be narrowed down effectively by legislation. But the legislative reforms lead to opposition from the conservative sentiments. The Hindu Succession Act, 1956 and the Indian Succession Act, 1925 improved the situations and changed their provisions to ensure equal justice. Such a gap can also be filled up by progressively interpreting the existing laws and making a decision according to the needs of society. The judiciary has taken a hands-off attitude towards personal law till 1975.¹⁷ Later, the judiciary started to interpret personal laws in a progressive way.¹⁸

STEP FOR ELIMINATING GENDER DISPARITIES

The Constitution guarantees all persons the equal protection of the laws and prohibits the State from denying any person equality before the law.¹⁹ Nothing in this section prevents the State from making special laws for what the Constitution regards as the weaker section of the society. The beneficiaries of preferential treatment are indicated clearly in the Constitution.²⁰ Preferential treatment of women and children is well explained. Most women

¹⁴ *Inayatullah v. Gobind Dayal*, (1885) ILR 7 All 775.

¹⁵ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

¹⁶ *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad 193.

¹⁷ *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*, 1985 AIR 945.

¹⁸ see *Mrs. Mary Roy v. State of Kerala*, 1986 AIR 1011; *Shayara Bano v. Union of India and Ors*, AIR 2017 9 SCC 1 (SC); *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1.

¹⁹ Article 14

²⁰ Articles 15(3), 15(4) and 16(4) THE CONSTITUTION OF INDIA, 1950, *supra* note 7.

in India face different kinds of inequalities in socially, economically, and politically or other challenges both physically and mentally. The personal and customary laws of the Hindus and Muslims imposed particular disabilities and restraints on them.

The majority of the people opined that enactment of the Uniform Civil Code is the only solution for eliminating these disparities under personal laws. Dr. Ambedkar observed that, during the debates in the Constituent Assembly regarding Article 44 (on the draft Article 35), “*India is the only country that was not covered by any uniform civil code was marriage and succession. It was the intention of those who enacted this Article as part of the Constitution to bring about that change.*”²¹ Is it the only remedy for ensuring equal justice to women under personal laws? In *Gurdial Kaur v. Mangal Singh*²², the Court observed that it would be impossible to codify different personal laws in this country into one uniform Code of laws relating to all matters covering all castes, creeds, and communities.

*Sri Krishna Singh v. Mathura Ahir and Ors*²³, the Court held that Personal Laws are immune from being subject to Part III of the Constitution. In the judgment of *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*²⁴, the Supreme Court began to test personal laws on the touchstone of fundamental rights. This approach enabled the courts to either strike down any particular statutory provision in any law or reinterpret them harmoniously with Part III of the Indian Constitution.²⁵

LEGAL IMPEDIMENTS IN THE ENACTMENT OF UNIFORM CIVIL CODE

We know that Women's interests have not been prioritized in personal laws and practices. The Constitution of India enshrines the principles of justice, liberty, and equality for all citizens of the country. It guarantees the dignity of individuals irrespective of their sex, religion, or place of birth. Therefore, certain general and specific provisions were incorporated into the Constitution for promoting equal justice. Freedom of individuals, if needed, should be annexed for the accomplishment of social justice. The goal of the welfare state can be achieved

²¹ CAD, Vol. VII, 550–551.

²² *Gurdial Kaur v. Mangal Singh*, AIR 1968 Punj 396 (398).

²³ *Sri Krishna Singh v. Mathura Ahir and Ors*, 1980 AIR 707.

²⁴ *MOHD. AHMED KHAN V. SHAH BANO BEGUM AND ORS*, *supra* note 16.

²⁵ *Bhutia*, *supra* note 12 at 228.

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only through the instrumentality of social justice, and the claims of social justice must be treated as paramount and primary. The first and the vital principle enjoins that the State shall secure a social order in which social, economic, and political justice shall inform all the institutions of national life. The directives are in the nature of duties which the Constitution calls upon the State to perform to achieve the welfare state.²⁶

There are two types of conflicts that arise in the Constitution provisions. One is the conflict between two Fundamental Rights, such as Freedom of Religion²⁷ versus the Right to Equality.²⁸ The other is conflicts between Fundamental Rights and Directive Principles such as Freedom of Religion versus the Uniform Civil Code.²⁹ How to resolve these conflicts is still a crucial question before the legislature and judiciary.

a) Conflicts between two fundamental rights:

Fundamental rights are primarily of individual character and are mainly meant to protect individuals against arbitrary state action. Conflict of fundamental rights means the existence of one right is causing the other right to lose its character. When there is a conflict between two articles of part III of the Indian Constitution, the Supreme Court has resorted to applying the 'balancing test'. If the balancing was not possible or a constitutional dilemma happened, the Court applied the test of 'greater community interest' or interest of the collective or social order.³⁰

There can be conflicts between two fundamental rights or two rights in the same Article. In certain circumstances, conflicts may arise between the same person's fundamental rights, which means one fundamental right enjoyed by him may come in conflict with the other fundamental right guaranteed to him. In all these situations, the Court has to examine where lies the more significant public interest while balancing the two conflicting rights. It is the paramount collective interest that would ultimately prevail.³¹ The Supreme Court has introduced a three-step formula; 1) the facts and the circumstances of both violations are

²⁶ SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES 58 (1992).

²⁷ Article 25(1)(b) THE CONSTITUTION OF INDIA, 1950, *supra* note 7.

²⁸ Articles 14 and 15 *Id.*

²⁹ Article 44 *Id.*

³⁰ Asha Ranjan v. State of Bihar, (2017) 4 SCC 397.

³¹ P. Gopalakrishnan v. State of Kerala, (2020) 9 SCC 161; Mazdoor Kishan Shakti Sangathan v. Union of India, AIR 2018 SC 3476.

considered 2) the competing interests are measured, and 3) a balance is sought to creatively interpret the violations by ensuring that none is wholly made extinct.³²

b) Conflicts between fundamental rights and directive principles

Whether the directive principles are inferior to the Fundamental Rights? Whether it is an essential part of the Constitution? There are several questions raised before the judiciary. Jawaharlal Nehru observed that the directive principle represents a dynamic move towards a particular objective. The Fundamental Rights represent something static to preserve certain rights which exist. Both are rights. But sometimes, the dynamic movement and the static stand still do not quite fit into each other.³³

However, there is no express conflict between Fundamental Rights and Directive Principles. They are complementary and supplementary. H.M. Seervai said that Directive Principles do not enlarge the legislative powers. A law implementing Directive Principles may confer rights on persons, which will be statutory rights. The Fundamental Rights cannot be taken away by any law in view of Article 13(2). Thus, the former will prevail in a conflict between fundamental rights and statutory rights.³⁴

One of the important cases in the sphere of conflict is the *State of Madras v. Champakam Dorairajan*³⁵. The Supreme court held that the chapter of fundamental rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the Article provided in Part III. The directive principles cannot override the provisions found in part III but must conform to and run as a subsidiary to the chapter on fundamental rights.³⁶ P.K. Tripathi criticised the most unfavourable opinion expressed by the Supreme Court on the value and effectiveness of the directive principle.³⁷

Later, the Constitution First (Amendment) Act, 1951 was enacted and added Article 15(4) to advance socially and educationally backward classes and the scheduled castes and tribes. Through this amendment, the legislature gives importance to directive principles rather than fundamental rights. But the judiciary did not give much importance to directive

³² ASHA RANJAN V. STATE OF BIHAR, *supra* note 29.

³³ LSD(1951) II. COLS 8822-23

³⁴ H.M. Seervai, constitutional law of india 1618

³⁵ State of Madras v. Smt. Champakam Dorairajan, 1951 AIR 226.

³⁶ Article 29(2) and Article 46 were discussed

³⁷ P.K. TRIPATHI, SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION (1972).

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principles.³⁸ If any Act which prima facie infringe the fundamental right of the citizen, as such would be void under Article 13 of the Constitution of India.³⁹

To bring harmony between the directive principles and the fundamental rights, it is essential that the courts give due consideration to the directive principles in interpreting the provisions relating to the fundamental rights. The appropriate directive principle should be used to determine the implications of phrases like 'public interest, 'public purpose,' and 'reasonable restriction' used with reference to fundamental rights.⁴⁰

The Directive Principles were not the mere policy of any political party because the principles fixed by the Constitution for directing the State to act accordingly.⁴¹ Any legislation which implements one of the directive principles would prima facie be reasonable unless it could be considered that there was an arbitrary or excessive invasion of the fundamental right.

In *Mohammed Hanif Qureshi v. State of Bihar*,⁴² the State argued that the laws made by the State for discharging the fundamental obligation imposed on them, so that the Fundamental Rights conferred by part III must be regarded as subordinate to the State laws and the directive principles, were equally, if not more, fundamental and must prevail. The Court rejected the contentions and held that the State should not make any laws which take away or abridge the fundamental rights.⁴³ The directive principles cannot override this categorical restriction imposed on the State's legislative power. However, the Court introduced the doctrine of harmonious construction as a new technique for interpreting these issues. In determining the scope and ambit of fundamental rights, the Court may not entirely ignore these directive principles but should adopt the principles of harmonious construction.⁴⁴

Justice Mudholkar said that for solving the conflict between fundamental rights and directive principles, the former should be interpreted in the light of the latter.⁴⁵ *Golaknath v. State of Punjab*⁴⁶ held that the fundamental right and directive principles of state policy formed an 'integrated scheme' and were elastic enough to respond to the changing needs of the society.

³⁸ Nusserwanji Balsara v. State of Bombay, AIR 1951 Bom.210, Jagawant Kaur v. Kesar singh

³⁹ S Fazal Ali, The State of Bombay and Another v. F.N. Balsara, 1951 AIR 318.

⁴⁰ CHANDER, *supra* note 25 at 63.

⁴¹ State of Bihar v. Kameshwar Singh, 1952 SC 252.

⁴² Mohammed Hanif Qureshi v. State of Bihar, AIR1958 SC731.

⁴³ *Id.*

⁴⁴ In Re Kerala Education Bill, (1959)SCR955 688.

⁴⁵ Sajjan Singh v. State of Rajasthan, AIR 1965 SC845.

⁴⁶ Justice Subba Rao, AIR1967 SC1643

But the legislation to implement the directive principle came into conflict with fundamental rights. The State may enact legislation contravening the fundamental rights while implementing the directive principles.⁴⁷ So, enacting a uniform civil code for gender justice infringes the fundamental rights of freedom and expression of their religion and the right to profess and practice religion. Moreover, it hurts religious sentiments and may raise some sensitive protestants. The people who oppose the Uniform Civil Code, neglect the question of elevation of the status of women and focus only on the cultural plurality and religious rights.⁴⁸

ALTERNATIVE REMEDY FOR SOLVING GENDER DISPARITIES IN THE PERSONAL LAWS

The conflicts between directive principles and fundamental rights and inter fundamental rights in personal laws will cause unending trouble to both legislature and judiciary. In this context, paramount collective interest is elevating the status of women under personal laws. To promote paramount collective interest, balancing the conflicting rights is necessary. Whether the balancing between the conflicting rights is possible? The balancing can be possible only through interpreting the existing laws in a progressive way and making a decision according to the needs of society.

In resolving the inevitable tension between the negative and positive aspects of religious freedom and seeking to promote the tolerance that the basic law mandates, the State must strive to bring about an acceptable compromise.⁴⁹ Religious problems can only be solved if there are grounds within a religious tradition calling for toleration or respect for the rights of others to have divergent beliefs.

Fortunately, there are resources within most religious traditions that support according to others such respect. For example, we know that traditional and classical Islamic law has not had an effective framework comparable to the modern legal system. The *Sharia* must regain its previous rational and pluralist tradition to overcome the contemporary challenges the Muslims face today.⁵⁰ Some additional tools of Islamic jurisprudence, such as *masaleh*

⁴⁷ CHANDER, *supra* note 25 at 51.

⁴⁸ Bhutia, *supra* note 12 at 233.

⁴⁹ JACKSON AND TUSHNET, *supra* note 5 at 1179.

⁵⁰ HOSSEIN ESMAEILI, IRMGARD MARBOE & JAVAID REHMAN, *THE RULE OF LAW, FREEDOM OF EXPRESSION, AND ISLAMIC LAW* (2017).

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mursalah (consideration of public interest), *urf* (custom), and *ijtihad* (juristic reasoning), are available and can be applied while interpreting the cases relating to Muslim personal laws.

In his 'Religion of Religions', Dr. Radhakrishnan reflects the Indian concept: “*our historical religions will have to transform themselves into the universal faith, or they will fade away. This prospect may appear stranger and unwelcome to some, but it has a truth and beauty of its own. It is working in the minds of men and will soon be a realised fact.*”⁵¹

CONCLUSION

A secular state should not deprive any individual's religious and cultural rights. In recent years, secularism has come under criticism for giving much space to the public use of reason and sometimes for fostering a thin understanding of public deliberation that can obstruct the creation of a genuinely pluralistic society. Religions are rooted in culture. The cultural identity of the various minority communities was lost by the act of legislature and judiciary in India.

However, the structured and codified personal laws make a uniformity among the persons who believe in the same religion. Today the concept of multiculturalism overrides the concept of uniform civil Code and even the concept of secularism because secularism focuses on religion rather than culture. But multiculturalism accommodates all kinds of cultural and religious practices. For example, In Canada, the province of Ontario passed an Arbitration Act, which is helpful for religious minorities accustomed to their law in family and other disputes.⁵² I am concluding with a suggestion that India has to relook its attitude towards personal law and do a progressive reading within the ambit of personal laws itself. It can be possible on the basis of the jurisprudential study. Also, India needs to recognize the concept of multiculturalism rather than the out fashioned concept of 'one nation and unified law.

⁵¹ CHANDER, *supra* note 25.

⁵² ARBITRATION ACT, 1991 Province of Ontario, Canada.