

IS INDIA YET READY TO EMBRACE THE GRAND CONSTITUTIONAL DIRECTIVE OF UNIFORM CIVIL CODE?

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ABSTRACT

The studied idea of uniformity and standardization by institutional instrumentalities respecting antiquated traditions, habits, conduct and conventions, which has earned a commendable degree of legitimacy, seems manifestly foreign to and alienated from the social fabric and cultural moorings which tend to epitomize a community, people or nation as such. The command of tradition becomes so vociferous and obstinate owing to the continuous process of its legitimization through intergenerational perpetuation that any attempt to break the status quo becomes an immediate context of disputation even if it is bona fide, having statutory affiliation, scientific and subsumes an utilitarian or a felicific component for the progression of the common masses. The above narrative essentially vindicates the growing furor and ire of the members of the Muslim community, some of whom happen to be self-proclaimed zealous custodians of Islam, whenever any attempt is made even to tinker with their personal laws, inspired by Article 44 of the Constitution of India – adoption of an Uniform Civil Code applicable to all in India. This essay is a modest attempt to appreciate the social, economic, political, intellectual and legal maturity of India after seven decades since Independence to accommodate a shift towards singularity of approach amidst roaring undercurrents of diversity. This paper attempts to deal with the idea of Uniform Civil Code in the light of the Constitution of India, the Law Commission's stance and finally the author's submission as to the preparedness of India to adopt Uniform Civil Code as a viable option in tune with the Constitutional mandate.

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INTRODUCTION

The debate with regard to the Uniform Civil Code in India has traversed through notably three stages - consolidation and convergence at the national level, legal equality and the concept of gender justice.² The socio-cultural matrix of India is manifestly pluralistic in nature owing to intermingling of diverse races, cultures, religions, languages and economic realities. This vast diversity provides much needed rationality to accord India the status of a sub-continent. Any attempt to analyze the contribution made by the Indians to free India from the yoke of foreign servitude will be imperfect or rather lopsided if it is made with intent to disproportionately betray credit to any one religious, cultural, linguistic or racial community. The contributions, sacrifices and ceaseless efforts for political independence came from all and sundry as each and every one witnessed a shared destiny, and it is this sentiment or impulse that more than justifies the microcosmic character of the Indian polity. It is almost an acceptable fact that the normative objectives of governance and political possibility are in a constant tussle. It is highly significant to revisit the popular discourse on Uniform Civil Code to fortify the whole idea of constitutional democracy.³ It is an established reality that there is a multi-layered interaction between society and religion in India and most of the social conventions owe their unflinching allegiance to the religious prescriptions. In other words, religion shapes society to a large extent. Law may apparently draw its inspiration from the social dynamics and with changing times it is the duty of a progressive nation to accommodate the shifting pulse of the society into legislative enactments to accord it a contemporary status adequately reflective of the changing social expectations at varying levels in its evolutionary trajectory. But if we are patient enough to observe the functioning of the interactive process of law and society, perhaps the most compelling justification that lies at the core of all contradictions and complexities is the lacuna in adequately representing the voices of all the pockets of several communities. Such a true and precise representation of the sentiments of all the communities whether religious, linguistic or racial become highly problematic thereby making it really difficult to enact laws that are accommodative of the demands, desires and expectations of all. Thus, the basic problem which is perhaps the source of unending conflict between law and society is the lack of comprehensive machinery and democratic tools to subsume multi-chromatic prisms which constitute our nation called India in the form of a richly variegated society. The idea of a

² Peter Ronald DeSouza, *Politics of the Uniform Civil Code in India*, L ECON. POLIT. WKLY. 50- (2015).

³ *Id.*

Is India yet ready to embrace the grand Constitutional Directive of Uniform Civil Code ?

Uniform Civil Code⁴ is fraught with numerous challenges primarily resulting from the profound interconnectedness of law and religion of the Muslim community. The fight with regard to full-fledged implementation of the Uniform Civil Code is not between men and women but between forces of progress and forces of reaction.⁵ So far as the penal laws of the country is concerned, it has been possible to confer nationwide legitimacy to the Indian Penal Code and other penal enactments which are applicable to all humans irrespective of caste, color, sex, religion, language and other categories of assortment. But when it comes to personal laws of the land regulating marriage, divorce, succession, probate, testamentary disposition of property and the like, the Muslim community has shown a vehement reluctance to allow statutory enactments to tinker with their age-old personal law which is nothing but the injunctions of the Koran. The Muslim society holds more or less a unified opinion about the fact that their personal laws are sacrosanct, and courts and legislators cannot be allowed to distort their religious instructions.⁶

HUMAN RIGHTS VIS-À-VIS RELIGION

It is quite shocking for a person who is conscious of the insuperable values of human rights discourse to locate several inconsistencies in the practices of the Muslim community so far as their conduct in the realm of personal law is concerned. Firstly, the Muslim society almost in all the regions of world with some notable exceptions are not ready to consider women as an integral and functional component of the society so much so that any voice of dissent with regard to any practices or any alternative version of thoughts adopted by the Muslim women are looked upon with condemnation and the Muslim patriarchy in such incidents are quick to dilute such strands of thoughts as feminist ideologies which are nothing more than incitement or provocation to destabilize an ideal society. This brings us to a position where we can well understand the status of Muslim females.⁷ They are nothing more than carriers of generation which the bountiful nature has showered upon them as a biological truism. Years of torture, cruelty, regimentation and dogged disciplining of the female community among the Muslims have robbed them of the strength to question and fight for the injustice meted out to them.⁸ All these days the Muslim women have remained silent witnesses to the specter of horror,

⁴ Article 44 in The Constitution Of India 1949, , <https://indiankanoon.org/doc/1406604/> (last visited Feb 24, 2022).

⁵ Leila Seth, *A Uniform Civil Code : towards gender justice*, 31 40–54 (2005).

⁶ SYED KHALID RASHID, *MUSLIM LAW* (5th ed. 2009).

⁷ *Id.*

⁸ TAHERA. AFTAB, *INSCRIBING SOUTH ASIAN MUSLIM WOMEN : AN ANNOTATED BIBLIOGRAPHY & RESEARCH GUIDE* (Online-Au ed. 2008).

unfairness and blatant violation of human rights in every walk of life.⁹ But with the growing human rights consciousness on a global scale and due to the large scale integration of nations and cultures, the inhuman treatment towards the Muslim women has become glaringly obvious. Gandhi once remarked curtly that law alone cannot assure total equality in a nation. What is also required along with bold legislations is the transformation of social attitudes. Law at best can be a pointer and a veritable guidepost.¹⁰ The Muslim intelligentsias who are most of the time open to influences of the liberal education have increasingly realized the unjust environment in which the Muslim women are destined to live. The “madrasa” form of education, the “burqah” system, triple “talaq”, doctrine of “halala”, the doctrine of “iddat” are the truest insignia of the retrograde practices at whose receiving end lie the hapless Muslim women.¹¹

THE COMMON CIVIL CODE – A CONSTITUTIONAL DIRECTIVE

The Indian Constitution envisages a pattern of uniform civil code as an ideal directive for an ideal government to realize and practice.¹² It is noteworthy to mention that uniform civil code was initially thought to be put into the Fundamental Rights chapter but later was finally incorporated in the Directive Principles of State Policy by the makers which is sufficiently indicative of the politics of compromise¹³ and lengthy Constituent Assembly debates - all of which underscore that the then socio-economic and political realities were not in favor of such an attempt and therefore the makers of the Indian Constitution thought it prudent to keep it as an ideal or a directive for the State to be realized at a subsequent point of time when the legal, political and socio-economic temperament of the nation would be mature enough to accept and accommodate such an ideal. So, it is a question of preparedness¹⁴ of the people of this country to transform the dream of a uniform civil code into a reality. Moreover, the idea of Uniform Civil Code also finds a robust encouragement and support from the international legal regime as India is a signatory of ICCPR and CEDAW. It means India is legally bound to put its provisions into effect. Historically, Indian women affiliating to various religions such as Hinduism, Islam and Christianity have suffered and still continue to suffer tragically a notable

⁹ Vrinda Narain, *Gender and community : Muslim women's rights in India* 202 (2001).

¹⁰ Seth, *supra* note 4.

¹¹ AQIL AHMED, *MOHAMMEDAN LAW* (24th ed. 2011).

¹² Article 44 in *The Constitution Of India 1949*, *supra* note 3.

¹³ DeSouza, *supra* note 1.

¹⁴ IS INDIA READY FOR A UNIFORM CIVIL CODE? – Lexlife India, , <https://lexlife.in/2021/05/06/is-india-ready-for-a-uniform-civil-code/> (last visited Feb 24, 2022).

Is India yet ready to embrace the grand Constitutional Directive of Uniform Civil Code ?

degree of discrimination when it comes to the personal laws relating to matters of marriage, succession, divorce and inheritance. Therefore, it is highly imperative to keenly look into the various personal laws of our country with a view to critically decipher the areas of discrimination and conflict not only with the ideals and ethos of the Indian Constitution but also with the essential tenets and spirit of the international laws and treaties reflecting global 'equality' jurisprudence. Such an exercise will no doubt help us take a constructive step towards fulfilling the greater ideal of gender justice.¹⁵ Further there is no denying the fact that the Constitution apart from being a social document also owes allegiance to its role as the supreme law of the land and because of the complex multifarious role of the Constitution; several conflicting claims are engendered in the process of its functioning. The dominant theme of the Indian Constitution is equality and social justice. The Preamble to the Indian Constitution urges in unwavering terms social and economic justice for all its citizens. India is a secular country and establishing a uniform civil code is perhaps the most patent ideal of any secular nation. Religion cannot be allowed to transcend its legitimate confines and if it does, it tends to jeopardize the meaning of secularism through distorted interpretation. The most notable objections to adopting a uniform civil code in India seem to be two.¹⁶ Firstly, it would, if adopted, result in infringement of the right to freedom of religion envisaged in Article 25 of the Constitution of India and secondly it would be utterly despotic to the minority community. However, the first objection is misconceived. Article 44 of the Constitution of India in no way impedes the functioning of Article 25 of the Constitution of India. Freedom of religion or observance of any particular religious faith is one thing and perpetuation of several personal laws directed by respective religious motivations by adherents of different faiths is quite another. The latter serves to encourage splintered religious ideologies and perspectives thereby undermining the grand constitutional goal of a uniform civil code. As regards the second objection it may be said that the enactment of a uniform civil code would not be tyrannical to minorities. The personal laws of the Indian sub-continent which are deeply enmeshed with the dominant sentiments and edicts of various religions seem quite despotic and discriminatory at times when it comes to property and other rights of women in relation to men. It seems that somehow the deeply embedded patriarchy manifestly reflects in the personal laws of India. These laws therefore have hardly favored Indian women or secured their rights as equal citizens of this country. On the contrary, the retention of these personal laws across various religious

¹⁵ Jyoti Rattan, *UNIFORM CIVIL CODE IN INDIA : A BINDING OBLIGATION UNDER INTERNATIONAL AND DOMESTIC LAW*, 46 577–587 (2018), <https://www.jstor.org/stable/43951938>.

¹⁶ V.N. SHUKLA, *CONSTITUTION OF INDIA* (Mahendra Pal Singh ed., 11th ed. 2008).

faiths has served well to deepen the schisms between the Hindu majority and minority religions like Islam and Christianity among others. In addition to this, the personal laws have over the years amplified inter-faith tensions and conflicts by introducing identity politics. Hence it will not at all be an overstatement to say that instead of realizing the dream of 'one' India, these laws have sown the seeds of fissiparous forces that have in effect gone a long way in segregating this country on religious and political lines. Perhaps this is the most crucial moment to fructify the lofty aspirations of the architects of the Indian Constitution to adopt a Uniform Civil Code.¹⁷ There are several advanced Muslim countries where the personal laws of the Muslims were never considered to be so sacrosanct and immutable so as to justify non-adoption of a standard civil code meant for persons belonging to all religious denominations. If we consider countries like Turkey and Egypt, no minority in these countries were allowed to enjoy rights unique to their communities. When the Shariat Act 1937 was passed, the Khojas and the Kutchi Memons wanted to follow their own religious practices as a part of their personal laws but the Central legislation did not allow that and brought every community within the sweep of the blanket legislation.¹⁸ Therefore there is no legal logic in not enacting a uniform civil code in India when there are several countries in the world that have enacted a standard civil code and have thus set precedents. On the contrary, there are difficulties, problems and confusion if a particular religious group (Muslims) is allowed to maintain its unique practices. It is problematic because a religious community does not necessarily affiliate to a singular practice universal to that community as a global identity or standard. The observances of several personal laws become highly intriguing in a country like India with diverse cultures, religions and traditions. Therefore, it is desirable that there is a single Uniform Civil Code that applies to all and sundry in India. There is no gainsaying the fact that adopting the Uniform Civil Code is a grand constitutional directive and hence the State shall gradually try to realize the lofty constitutional ideals of unity and integrity. It is almost a known fact that India will find it difficult to witness a unified and integrated self of several religious groups having conflicting ideologies. When a set of laws in a country are used to uniformly regulate personal matters of citizens irrespective of their religious affiliations, it becomes the truest test of

¹⁷ Shalina A. Chibber, *Charting a new path toward gender equality in India: From religious personal laws to a uniform civil code*, 83 INDIANA LAW J. 695–717 (2008).

¹⁸ SHUKLA, *supra* note 15.

Is India yet ready to embrace the grand Constitutional Directive of Uniform Civil Code ?

secularism. Such a legal framework will no doubt put an end to gender discrimination on religious lines.¹⁹

LAW COMMISSION REPORT(S)

The Law Commission needs to appreciate the true character, scope and implications of Article 44 of the Constitution of India while responding to the governmental nudge for adoption of a Uniform Civil Code. There is no law commission report till date wholly and specially dedicated to adoption of a Uniform Civil Code. However, the 15th Law Commission's Report dealing with marriage and divorce amongst Christians in India have incidentally and tangentially touched upon some aspects of Uniform Civil Code. In the recent past, the Ministry of Law and Justice has asked the Law Commission to examine and report on issues pertaining to Uniform Civil Code. Since then the matter has become a highly debatable issue both in the print and the electronic media. Now, the law commission is trying to ascertain the pulse of the country to evaluate the feasibility of the model called Uniform Civil Code. In its efforts to do so, the Law Commission has also decided to take stock of the feelings and sentiments of the tribal people with regard to Uniform Civil Code as the true hallmark of a progressive democracy is societal inclusion and leaving aside tribal men and women in this analysis will be inapt and a lopsided approach since the final analysis will surely be defective for want of representation of all the social pockets.²⁰ There has been a widespread opposition from the tribal people respecting adoption of a Uniform Civil Code on the ground that such imposition of Uniform Civil Code will be repugnant to their ethos, culture and religious practices. The Law Commission Chairman Justice B.S. Chauhan in an exclusive interview to "India Today" said that at this initial stage the Law Commission is eliciting public opinion on Uniform Civil Code to ascertain the level of preparedness of the country as a whole to accept such standardization. But the Chairman was quite discreet about the fact that under no circumstances the Uniform Civil Code, if adopted, would bulldoze all personal laws based on unique religious affiliations as every person has a right to his own personal law. What the Law Commission would do at the most is integration of all the personal laws on such aspects which are found to

¹⁹ Union Minister Venkaiah Naidu on Uniform Civil Code: Why not a Common Civil Code for all? - The Hindu, <https://www.thehindu.com/opinion/lead/Union-Minister-Venkaiah-Naidu-on-Uniform-Civil-Code-Why-not-a-Common-Civil-Code-for-all/article62116269.ece> (last visited Feb 24, 2022).

²⁰ Uniform Civil Code: Law Commission open to suggestions from tribals | India News - Times of India, , <https://timesofindia.indiatimes.com/india/Uniform-Civil-Code-Law-Commission-open-to-suggestions-from-tribals/articleshow/55396452.cms> (last visited Feb 25, 2022).

be overlapping or having a certain degree of commonality across personal laws of different religious groups.²¹

CONCLUDING OBSERVATIONS:

The popular human rights discourse is fundamentally an equality narrative. The normative framework of the entire human rights thesis is equality or non-discrimination on unreasonable grounds. The Uniform Civil Code finds explicit expression in the Directive Principles of State Policy of the Constitution of India vide Article 44.²² It will be an interesting reflection in this juncture to interpret the minds of the makers of the Constitution. The inclusion of the idea of Uniform Civil Code in the Directive Principles of State Policy is not inadvertent but deliberate. The prime reason being the lack of preparedness or democratic maturity of the nation to go for Uniform Civil Code at the time India gained independence. India with such humongous diversity and a multi-chromatic society is an assimilation and confluence of several cultures and religions. The age-old traditions and customs have their deep roots embedded in the social fabric which cannot be brushed aside once and for all with a single stroke of legislative intent, no matter how pure and noble that intent is. In order to realize that a patient and harmonized attempt is called for and for this, the nation has to wait for the gradual process of psychological preparedness to set in on the collective psyche of the citizens of India. The disputations, the movements and the protests by various segments of the society for or against Uniform Civil Code are adequately reflective of the persistent tensions, conflicts and confusions that still plague us. If one section of the intellectuals are continuously calibrating the socio-psychic preparedness and maturity of the Indian democracy to embrace the grand constitutional directive of Uniform Civil Code to secularize personal laws relating to marriage, inheritance, succession, adoption etc., on the contrary, another section of the intelligentsia is stridently mooring for the inauguration of the Uniform Civil Code which according to them is long overdue. The Uniform Civil Code, if enacted, will no doubt deal with the personal laws of diverse religions pertaining to marriage, divorce, adoption, inheritance, succession and custody of children. Popular discourses seem to have created a lot of anxieties and apprehensions about polygamy in Islam. Several Islamic countries like Syria, Tunisia, and Pakistan etc. have codified personal laws. The provisions of those laws have either absolutely

²¹ Law Commission Chairman on Uniform Civil Code: Each religion would continue to have personal laws - India News, <https://www.indiatoday.in/india/story/uniform-civil-code-law-commission-chariman-religion-personal-laws-gender-justice-351904-2016-11-14> (last visited Feb 25, 2022).

²² Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9 GER. LAW J. 211–250 (2008).

Is India yet ready to embrace the grand Constitutional Directive of Uniform Civil Code ?

abrogated or substantially curtailed the obnoxious practice of polygamy. The American judiciary opines that the practice of polygamy is toxic to public morality despite the fact that some religions make it necessary for their respective followers.²³ It is quite unfortunate that India after several decades of gaining independence still cannot take a firm stand for adoption of a uniform civil code system.²⁴ The turbulence will eventually die down for sure and that will be the most appropriate time to allow the establishment of the Uniform Civil Code and thus transform one of the dreams of the makers of the Constitution into a palpable reality. Another dimension that requires to be emphasized upon is the lack of political will²⁵ to legislate enactments motivated by the lofty ideal of a Uniform Civil Code. The politics of vote banks has always undermined the progress and development of this nation. The shrewd politicians always want to reap personal benefits at social cost and public harm. They try their level best to keep the communal tensions and regional conflicts alive in order to perpetuate their rule euphemistically termed as governance. Moreover, the pathetic level of education, glaring deficit of awareness and scientific temper in India has always proved to be the aggravating factors that provoke clashes and disharmony among persons bearing diverse religious affiliations.²⁶ It seems it will take some more time before the citizens of this country realize that religion is not the sole identity of an individual. It is not the single most potent denominator to which every human kind needs to be subjected.²⁷ Uniform Civil Code is neither a Utopia which is unrealizable nor it is a panacea that, if established, will rule out all sources of conflicts. Although the uniform civil code is often projected as a master solution to all of India's problems by some, the realization of it is at times found to be so unworkable that it has repeatedly failed to garner enough motivation to fructify it.²⁸ India must witness sufficient political will, democratic maturity and a majority consensus of the citizens of this country before Uniform Civil Code becomes a proven reality and the order of the day.

²³ SHIMON SHETREET & HIRAM E. CHODOSH, *UNIFORM CIVIL CODE FOR INDIA: PROPOSED BLUEPRINT FOR SCHOLARLY DISCOURSE* (2015).

²⁴ Shabbeer Ahmed, *UNIFORM CIVIL CODE (ARTICLE 44 OF THE CONSTITUTION) A DEAD LETTER*, 67 545–552 (2018).

²⁵ DeSouza, *supra* note 1.

²⁶ AMARTYA SEN, *IDENTITY & VIOLENCE: THE ILLUSION OF DESTINY* (2006).

²⁷ *Id.*

²⁸ The Nagaland turmoil shows why a uniform civil code is neither possible nor desirable in India, , <https://scroll.in/article/829884/the-nagaland-turmoil-shows-why-a-uniform-civil-code-is-neither-possible-nor-desirable-in-india> (last visited Mar 1, 2022).