

Uniform Civil Code: A Need for Re-scrutiny

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ABSTRACT

The purpose of uniform civil code is to enact a uniform family law that will be applicable to all irrespective of their religion. Uniform civil code is considered as a panacea to eliminate the discrimination existing in different personal laws. It is viewed as a magic wand to achieve gender equality. Discussion and debate on implementation of uniform civil code have been going on since many decades. However, till date there has been no draft on uniform civil code nor there have been any blueprint or roadmaps prepared that will help realize the desired goals. Thus, the discourse on uniform civil code has somewhere missed the mark. The paper is an attempt to examine whether the whole debate on uniform civil code requires review and re-scrutiny. The methodology which has been adopted in the present study is doctrinal and analytical.

Keywords: Uniform civil code, personal laws, women.

1. INTRODUCTION

The debate in the Constituent Assembly under draft 35(Article 44 of the present Constitution) illustrate that the idea of uniform civil code was confined to uniformity of laws related to family matters. The purpose was not only the uniformity of family laws but also to secure social justice to vulnerable sections in the areas of marriage, divorce, custody of children, adoption and inheritance.ⁱ

India is a multi- cultural country with people of different religions being governed by their own personal laws. The different communities are governed by separate personal laws in matters involving marriage, divorce, adoption, inheritance and maintenance. Despite differences among them, the personal laws of every community are discriminatory toward women.ⁱⁱ

These personal laws being deeply rooted in tradition and religion are not in consonance with the spirit of the Constitution of India. The Constitution clearly states that discrimination on the basis of sex and religion violates Article 15. However, there are numerous laws that continue to violate these principle especially different personal laws.ⁱⁱⁱ There is a view that uniform civil code could be a magic wand that will eliminate the woes and sufferings of the women.^{iv}

In 2016, the Bharatiya Janta Party Government had asked the Law Commission to study whether uniform civil code can be implemented in India. The 21st Law Commission in its report has stated that a uniform civil code is not necessary or desirable. The Commission instead had recommended religion wise amendments in the personal laws in order to end discrimination against women within the communities and make civil laws gender neutral. Amid such state of

affairs now the question arises as to whether the issue concerning uniform civil code has missed the mark and requires re-scrutiny.

2. CONSTITUENT ASSEMBLY DEBATES

Uniform Civil Code was debated in the Constituent Assembly in 1947 as it was felt that uniformity of civil laws was essential for a unified and secular country. When Article 44 was placed in the Directive Principles instead of fundamental rights, Minoo Masani, Hansa Mehta and Rajkumari Amrit Kaur, members of the fundamental rights committee wanted this article to be implemented within ten years.^v According to the three members, they had stated that the existence of personal laws has kept India backward and has kept the country divided. They had stated that uniform civil code should be ensured to the people within a period of five to ten years.^{vi}

When the uniform civil code was mooted in the Constituent Assembly there was a strong opposition against the provision from the three Muslim members namely; Mohammad Ismail Sahib, Pucker Bahadur Sahib and Nazirruddin Ahmed. Hussain Imam pleaded for amendments that would allow a community to continue the personal law. Mahboob Ali Baig Sahib desired that there should be a provision that clearly stipulated that 'nothing in this article shall affect the personal laws of a citizen.'^{vii}

Responding to the amendments K.M. Munshi, Alladi Krishnaswamy Ayyar and B.R. Ambedkar were of the opinion that they were superfluous. Munshi argued that article on uniform civil code was just an enabling clause and whenever the Parliament considers it appropriate the personal of the country will be unified. He further was of the opinion that uniformity of civil laws was necessary for development of the society.^{viii}

Ambedkar with the greatest foresight rejected the amendments proposed by different members. He reiterated that the British rulers did unify the laws relating to crime, property, procedures-civil as well as criminal. All these laws are uniform throughout India. Some of these laws were in direct contravention of the principles propounded by Quran. But still they are prevalent without any objection.^{ix}

Ambedkar had remarked that religion cover every feature of a person's life right from birth till death in this country. He had stated that everything in this country is related to religion and if the personal law is continued to be protected then the issues concerning society will come to a standstill.^x Hence in the light of the majority view Article 44 was passed without any amendment.^{xi}

3. EFFORTS TOWARDS ADOPTION OF UNIFORM CIVIL CODE

3.1 Role of the Government

The first efforts towards uniform civil code were initiated in the year 1963. The then government had desired to constitute a committee for the purpose of examining as to how the other Muslim nations were dealing with the matters concerning family law reforms.^{xii} However this aspiration of the government could not see the light of the day. Also the government had asserted that the Muslim personal law will remain untouched till the time the Muslims themselves did not demand for reform.

Another step towards adoption of uniform civil code was undertaken by the then Prime Minister, Rajiv Gandhi. In the year 1986, the Law Ministry was directed by the Gandhi government to draft a uniform civil code and to place it before the Parliament at the earliest. He explicitly had mentioned that the law ministry had to take into account the views of the scholars, political parties, academicians and press by way of deliberation, then accordingly draft the code.^{xiii} This endeavor of the government also could not reach the desired goal.

After Bharatiya Janata Party (BJP) came into power in the year 2014 the matter on uniform civil code revived again. BJP have been advocating that uniform civil code is an answer towards achieving gender equality.^{xiv} In this regard BJP government had asked the Law Commission to examine whether the 'one law, one nation' was possible to be implemented in the country. The uniform civil code became contentious issues ever since the triple talaq matter became a highly publicized debate.^{xv} As a result in the year 2016, the Law Commission was entrusted with the task of examining the scope and feasibility of implementation of uniform civil code in the country.^{xvi}

3.2 Role of the Judiciary

The Apex court and the high courts have in some cases either suo-moto and in some cases when the personal laws were challenged on the grounds of being discriminatory had discussed the desirability of the adoption of a uniform civil code.

State of Bombay v. Narasu Appa Mali

In 1952 there was an occasion when the Bombay High court referred to the uniform civil code directive in the context of personal laws in the case of *State of Bombay v. Narasu Appa Mali*^{xvii}. In the said case the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged on the ground that the Act was discriminatory as the Muslims have been excluded from the operation of the Act in question. The court rejected the challenge and upheld the validity of the Act.^{xviii} Chief Justice Chagla found that the uniform code directive under Article 44 recognized separate and distinctive personal laws.

Shah Bano Case

In *Mohd. Ahmed Khan v. Shah Bano Begum & Ors*^{xix}, the Apex Court responded to the constitutional provision of uniform civil code in a major way for the first time. In this case, Shah Bano had approached the apex court looking for maintenance under Section 125 of the Code of Criminal Procedure after her husband pronounced talaq against her. The Supreme Court had held that Bano was entitled to receive maintenance from her husband as per Section 125 of Criminal Procedure Code, 1973. The court had observed that a common civil code will facilitate towards integrating the nation by eradicating contrasting loyalties to law which have contradictory ideologies.

This decision resulted into huge controversy; as a result the Parliament had to enact a new law in order to nullify the impact of the verdict.^{xx} The court directed the Parliament to outline a common civil code.^{xxi}

Jordan Diengdeh v. S.S. Chopra

Jordan Diengdeh v. S.S. Chopra^{xxii} dealt with the matter related to Christian personal law on marriage. The judgment begins with a reference to Shah Bano and an emphasis on the urgency of infusing life into Article 44. "The lack of a uniform civil code is described as a "totally unsatisfactory state of affairs". The court held that it is time to reform the law of marriage and to enact a uniform law that will govern everyone without any distinction on caste or religion.^{xxiii}

Sarla Mudgal v. Union of India

In *Sarla Mudgal v. Union of India*^{xxiv}, the Supreme Court had to decide whether a married Hindu man who converts to Islam can legitimately marry a second wife as permitted under Muslim personal law. The judgment begins with a citation of Article 44 and dedicates a whole paragraph to a critique of the government with regard to its reluctance to introduce a uniform civil code. The court stated that it seemed like the rulers of the day did not have any intention to retrieve Article 44 which has been in the state of abeyance since 1949.

Lily Thomas v. Union of India

In *Lily Thomas v. Union of India*^{xxv}, the Supreme Court considered the case of a couple initially married under the provisions of Hindu Marriage Act, 1955. The husband subsequently converted to Islam and took another wife.^{xxvi} The Apex Court held that there is no doubt that uniform civil code is required but it can be possible only when the leaders instead of working for personal gains work towards awakening the masses to accept the change.^{xxvii}

The debate on uniform civil code was once again ignited when the triple talaq issue in *Shayara Bano v. Union of India*^{xxviii} was brought before the Supreme Court. The Apex court invalidated the practice of instant triple talaq or talaq-e-bidat.^{xxix} While triple talaq practice provided the instant context, the clamour for a uniform civil code had increased since the coming into power of BJP. BJP has been a consistent supporter of uniform civil code as it views the multi-cultural and multi-religious personal laws as countervailing forces to unity and integrity of the nation.^{xxx} The Modi government, on 01 July 2016, had entrusted Law Commission with the task to study the scope and feasibility of uniform civil code and was directed to submit a report after discussions with experts and stakeholders.^{xxxi}

4. 21ST LAW COMMISSION'S REPORT

The 21st Law Commission of India was delegated with the task of addressing the issues concerning uniform civil code by the government of India in the year 2016. The Commission examined the ambiguity that has long surrounded the questions of personal law and uniform civil code in India.^{xxxii}

The Commission in its consultation paper on reform of family law has stated that it is neither necessary nor desirable to have one set of laws applicable to all the citizens of the country. The Commission instead had recommended religion wise amendments in Hindu, Muslim and Christian personal laws in order to end discrimination against women within the communities and make civil laws gender neutral.^{xxxiii}

The Law Commission noted that 'in doing so the Commission has endeavored to best protect and preserve diversity and plurality that constitute the cultural and social fabric of the nation.'^{xxxiv} Further the Commission stated that many nations are acknowledging the difference and the mere existence of difference do not mean that it amounts to discrimination rather it suggests for presence of a robust democracy.^{xxxv}

On the question of personal laws the Law Commission stated that, in case there is no unanimity in regard to uniform civil code, the Commission was of the opinion that the best option available is to safeguard the diversity of personal laws. But at the same time the personal laws should not

infringe the fundamental rights. The Commission had thus, suggested for codification of personal laws relating to family matters and in case of any inequalities in the codified laws, the same should be remedied by way of amendments.^{xxxvi}

5. NEED FOR RE-SCRUTINY

Uniform civil code is considered as a panacea to eliminate the discrimination existing in different personal laws. It is viewed as a magic wand to achieve gender equality. In 1940s, the National Planning Committee, while focusing on the economic dimension of women's rights, resolved that in a planned society, women's place shall be equal to that of men and to achieve this had recommended the enactment of a uniform civil code. Later, during the Constituent Assembly debates, the focus shifted from gender equality to national integration. Integration of communities in the modern state was sought to be achieved through uniformity of personal laws.^{xxxvii} The proceedings of the Constituent Assembly show a marked absence of discussion about the significance of a uniform civil code for women. The issue of uniform civil code either for reasons of ensuring gender equality or to further the cause of national integration have never been debated seriously. How will a uniform civil code ensure national integration or ensure gender equality is a matter of debate.^{xxxviii}

Almost every religion in India follows practices that are discriminatory towards women and thus causing a hindrance in their socio-economic progress.^{xxxix} The uniform civil code is considered a solution to do away with religious practices that is a major hurdle towards women's overall development. However there seem to be a problem in this proposed solution. Discussion and debate on implementation of uniform civil code have been going on since many decades. However, till date there has been no draft on uniform civil code nor there have been any blueprint prepared or any roadmap as to how it is going to look like. Also the debate on uniform civil code since the Constituent Assembly till date has not focused much on the rights of the women.^{xl}

For social reforms and to secure women's rights, uniformity in civil laws is considered important. However, amid the discussion on uniform civil code the whole discourse has failed to consider the voices of women. The issues concerning women have never been addressed in this whole debate of uniformity of civil laws.^{xli} The entire deliberation has been only on implementation of uniform civil code in order to eradicate the inequalities but how this can be achieved and the way forward have not been addressed.

Another issue with uniform civil code is whether it will be optional and not compulsory. Any arrangement that grant the people with the choice to be governed either by a uniform civil code or by their religious personal laws is not going to be beneficial to the women. Advocates of this view claim that an opt-in or opt-out provision respects group rights and protects individual

autonomy by allowing people to choose the law that will govern them. This argument misses two key issues; first an opt-in arrangement won't be of much help to the women as majority of women's voice in terms of making choices continues to remain neglected. The right of exit approach offers no real solution for women, because it does not furnish an answer to this question: how does a woman pragmatically make a choice between her community and her rights? This leads to the second problem. It is unjust to put the burden of settling the disputes upon the individual, while discharging the state of any liability for the situation. If the aim of a uniform civil code is to safeguard the community's most vulnerable members, then an optional arrangement will not be a success as it merely evades the state's duty to secure women's rights while doing nothing to ensure that those rights can ever be exercised.^{xlii}

The 21st Law Commission had declared that uniform civil code is neither necessary nor desirable and had recommended religion wise amendments in the personal laws to end discrimination against women within the communities and make civil laws gender neutral. However, how can one achieve this and how can amendments in the personal laws be an answer to do away with the inequalities is the question that needs to be addressed. The diversities in the religion existing in the country are so massive that an attempt to bring reform seems to be a herculean task.^{xliii}

Also the pertinent question arises as to whether amendments alone can be a solution to abolish gender inequalities. The classification of inequalities may vary from one community to another. First and foremost it is significant to examine and study the different types of inequalities and injustice existing in different societies. There is no doubt that almost all the personal laws are not gender neutral thus, the first step is to identify the various inequalities that exist and accordingly rectify the same.^{xliv} All these aspects have to be examined and taken into consideration before enactment of a uniform civil code.

6. CONCLUSION

Enactment of a uniform civil code seems to be an arduous task. First and foremost the government needs to address the issues concerning uniform civil code by having discourse involving all the stakeholders. Also it is high time that the government take some concrete action in order to implement the uniform civil code rather than dilly dallying around the issue for the purpose of short term political gain.^{xlv} The BJP government has taken initiatives towards implementation of uniform civil code however, a proper roadmap and the way forward is the need of the hour.

REFERENCES

- ⁱ Neema Qamar, *Need of a Uniform Civil code-A Critical Study* 8 (Laxmi Book, Solapur, 2015).
- ⁱⁱ Women between Community and State: Some Implications of the Uniform Civil Code Debates in India, Rajeswari Sunder Rajan Social Text, 65 (Volume 18, Number 4), Winter 2000, pp. 55-82 Duke University Press <https://muse.jhu.edu/article/31888/pdf>.
- ⁱⁱⁱ Qamar, *supra* at 3.
- ^{iv} Flavia Agnes, *Law and Gender Inequality, The Politics of Women's Rights in India* 1 (Oxford, New Delhi 1999).
- ^v Dinanath Raina, *Uniform Civil Code and Gender Justice, Reliance Publishing House New Delhi* 56 (Reliance Publishing House, New Delhi 1996).
- ^{vi} Note: 'One of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life. We are of the view that the uniform civil code should be guaranteed to the Indian people within the period of five to ten years in the same manner as the right to free and compulsory education has been guaranteed by clause 23 within ten years.' See, M.S. Ratnaparkhi, *Uniform Civil Code: An Ignored Constitutional Imperative* 7 (Atlantic Publisher, New Delhi 1997).
- ^{vii} *Ibid* at 11.
- ^{viii} Note: Munshi had said that the article was just an enabling clause and the whole idea was that 'as and when the Parliament thinks an attempt may be made to unify the personal laws of the country'. Munshi strongly advocated the uniformity of civil law to serve as a vehicle of societal growth in which, in the larger interest, some sacrifices were inevitable. See, Partha S.Ghosh, *The Politics of Personal Law in South Asia, Identity, Nationalism and the Uniform Civil Code* 76 (Routledge, New Delhi 2007).
- ^{ix} Ratnaparkhi, *supra* at 10.
- ^x Note: 'the religious conception in this country is so vast that they cover every aspect of the life from birth to death. There is nothing in this country which is not religious and if personal law is to be saved I am sure about it, that in social matters we will come to stand still. It is therefore, quite impossible for anybody to conceive that the personal laws shall be excluded from the jurisdiction of the state.'^x Constituent Assembly Debates, 1948, Vol. VII, 541, 721 & 756.
- ^{xi} Kiran Deshta, *Uniform Civil Code in Retrospect and Prospect* 116 (Deep & Deep Publications, New Delhi 2002).
- ^{xii} See, A.G. Noorani, *Reform of Muslim Personal Law*, Indian Express, May 21, 1972, also see Paras Diwan, *Muslim Law in India* 41 (1991)
- ^{xiii} See, Indian Express, September 27, 1986.
- ^{xiv} Bharatiya Janata Party, 2019. *Sankalp Patra Lok Sabha 2019* [Manifesto of the [Bharatiya Janata Party, 2019](#)].p 37.
[<https://www.thehinducentre.com/resources/article26769375.ece/binary/BJP-Election-2019-english.pdf>]. See, C.K. Mathew, *Uniform Civil Code, The Importance of Inclusive and Voluntary Approach*, The Hindu Centre for Politics and Public Policy, <https://www.thehinducentre.com/publications/issue-brief/article29796731.ece#three3>
- ^{xv} The Apex Court in *Shayara Bano v. Union of India* (2017) 9 SCC 1. declared triple talaq as unconstitutional. <http://www.dnaindia.com/india/report-uniform-civil-code-not-possible-personal-laws-can-never-be-done-away-with-law-commission-chairman-2565313>

^{xvi} http://economictimes.indiatimes.com/articleshow/63376499.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

^{xvii} AIR 1952 Bom. 84.

^{xviii} Raju, *supra* at 73.

^{xix} AIR 1985 SC 945.

^{xx} Note: The Rajiv Gandhi government in response to the controversy had to pass the Muslim Women (Protection of Rights in Divorce) Act, 1986. This Act made Sec. 125 non-operable for Muslim women.

^{xxi} Joydip Ghosal, *Understanding Uniform Civil Code and its Problem in Implementation*, https://www.researchgate.net/publication/335821723_UNDERSTANDING_UNIFORM_CIVIL_CODE_AND_ITS_PROBLEM_IN_IMPLEMENTATION

^{xxii} 1985 AIR 935; 1985 SCR Supl. (1) 704.

^{xxiii} The court held "surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste". Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court* Tanja Herklotz <https://edoc.hu-berlin.de/bitstream/handle/18452/9168/55.pdf?sequence=1>

^{xxivxxiv} (1995) 3SCC 635; JT 1995 (4) SC 331.

^{xxv} AIR 2000 SC 1650.

^{xxvi} Virendra Kumar, *Towards a Uniform Civil Code: Judicial Vicissitudes*, Journal of Indian Law Institute (2000).

^{xxvii} The Supreme Court had held that "The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."

^{xxviii} (2017) 9 SCC 1.

^{xxix} The Supreme Court, in its landmark judgment on 22 August 2017, had deemed instant triple talaq (talaq-e-biddah) unconstitutional and a violation of Article 14 of the Constitution, which provides for equality before the law.

^{xxx} <https://clpr.org.in/wp-content/uploads/2017/11/UCC-Part-3-Political-History.pdf>

^{xxxi} <https://www.olivegreens.co.in/blog/proposed-triple-talaq-bill-a-step-towards-uniform-civil-code>

^{xxxii} <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> Law

Commission of India Consultation Paper on Reform of Family Law.

^{xxxiii} <https://www.orfonline.org/expert-speak/43834-law-commission-for-religion-wise-amendments-to-address-issues-like-triple-talaq/>

^{xxxiv} Consultation Paper, *supra* at 1.

^{xxxv} *Ibid* at 7.

^{xxxvi} *Ibid* at 1.

^{xxxvii} Agnes, *supra* at , 192.

^{xxxviii} *Ibid*.

^{xxxix} Note: Any practice that leaves women socially, financially or emotionally vulnerable or subject to the whims and caprice of menfolk is incompatible with the letter and spirit of Articles 14 and 15 of the Constitution.

^{xl} <https://yourstory.com/2017/08/uniform-civil-code-indian-women-free>

^{xli} Shambhavi, *Uniform Civil Code: The Necessity and the Absurdity* 21 Vol. I, Journal of Indian Law Institute (2017).

^{xlii} http://ilj.law.indiana.edu/articles/83/83_2_Chibber.pdf

^{xliii} Imtiaz Ahmad, *Personal Laws: Promoting Reform from Within*, *EPW* Vol. 30, No. 452851-2852. (Nov. 11, 1995).

^{xliv} Shambhavi, *supra*.

^{xlv} Shabbeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, *Indian Journal of Political Science* (2006).