

NOTES AND COMMENTS

UNIFORM CIVIL CODE : AN IDEAL VISION OF MODERN INDIA

I. Introduction

Since the inception of the Constitution, India had endeavored to maintain her image as a secular State, maintaining safe distance equally from every religion professed and practiced within its territory. The founding fathers of the Constitution in order to provide a secular approach incorporated 'Right to Equality' and 'Right to Freedom of Religion' as inviolable rights subject to few exceptions. Along with these appreciable rights they have also added Part-IV in the Constitution to incorporate some very influential and progressive Directive Principles to realize the taste of social and economic democracy. Though all agree regarding their importance in the formation of a new, modernised, enlightened Nation but most controversial and debatable among them is Art.44¹ which stands for the implementation of a Uniform Civil Code in the territory of India to make Indians politically united by removing their religious coats. It is a desired goal to be achieved in a piecemeal manner with a commitment to justice and respect for diversity.

But religiously there exist a deep, widening schism between the majority Hindus and the Minority community of Muslims. This paper examines the growing demands in favor of a Uniform Civil Code that will put in place a set of provisions to administer and regulate personal matters of all citizens of India irrespective of religion is perhaps the need of the hour. It also analyses cases, judgements and their implications which have argued in favor of Uniform Civil Code to improve the social and economic conditions of particularly Muslim women by eradicating gender-based inequalities to achieve the desired goal of the constitution makers.

II. The Supreme Court on the Uniform Civil Code and Secularism

After the partition of India the Constitution makers expressed their the keen desire for a Uniform Civil Code. But due to huge discontent from minority communities in the drafting of constitution in the Constituent Assembly uniform civil code adopted the character of mere symbolism indicating that it is neither enforceable in court for its violation nor any political hedonism has been able to move beyond the rhetoric in this

¹ "The State shall endeavor to secure for the citizens a Uniform Civil Code Throughout the territory of India"

direction. Minorities (specially the Muslims) doubted the full implementation of a Uniform Civil Code as the curtailment of rights which they enjoy since time immemorial under Muslim Personal law. But the Supreme Court of India through its various remarkable judgements directed implementation of a Uniform Civil Code by homogenizing the personal laws to deal with Marriage, Divorce, Succession, inheritance and Maintenance. In this direction Parliament has enacted some progressive acts for instance 'The Hindu Marriage Act 1955', 'the Hindu Succession Act 1956', 'The Hindu Succession Act 1956', 'The Hindu Adoptions and Maintenance Act 1956' 'The Hindu Minority and Guardianship Act 1956' to replace the traditional laws based on different schools of thought to remove the stumbling blocks in the proper administration of justice.

Another notable step was taken by Parliament in the 1976 when Mrs. Gandhi's government passed the 42nd Constitutional Amendment Act² to add the word 'SECULAR' in the Preamble declaring that all religious denominations possess the same status & support from the State for their flourishing

The Supreme Court directed the Parliament to frame a Uniform Civil Code in the year 1985 in the case of '*Md. Ahmed Khan v Shah Bano Case*'³ popularly known as Shah Bano case. In this case a neglected Muslim woman Shah Bano knocked the door of Supreme Court claiming maintenance from her husband (Md. Ahmed Khan) under Section 125⁴ of the Criminal Procedure Code. She not only raised her voice against the dogmatic practices but also brought to the light the issue of gender inequality which has deprived the Muslim women to the Right to Equality

² 1976, 42nd Constitutional Amendment Act

³ Mohammed Ahmed Khan Vs Shah Bano Begum, AIR 1985 SC 945

⁴ "(1) if any person having a sufficient means neglect or refuse to maintain a) his wife, unable to maintain herself or, b) his legitimate or illegitimate minor child, whether married or not, unable to maintain himself, or c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of physical or mental abnormality or injury unable to maintain himself or d) his father or mother, unable to maintain himself or herself, a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such magistrate thinks fit, and to pay the same to such persons as the magistrate may from time to time direct: provided that the magistrate may order the father of a minor female child to in clause (b) to make such allowance, until she attains her majority, if the magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means

enshrined in the Art.14⁵ under Part-III of the constitution of India. The Apex court contended that Muslim women have the same right like any other Hindu woman to get financial assistance or 'alimony' from her husband under Section 125 of the '*Criminal Procedure Code*' of India. The Court also expressed deep regret by uttering that Art.44 of the Constitution has remained a 'dead letter'. The then Chief Justice of India Y.V. Chandrachud stated⁶ "*A common Civil Code will help the cause of National Integration by removing disparate loyalties to law which have conflicted ideologies*". Though there exist several hindrances in bringing persons of different religious communities on a general agreeable platform but as a remarkable beginning the court directed Parliament to start proceedings for the implementation of the 'Uniform Civil Code'.

Shah Bano case is considered as a landmark case in the process for the implementation of the Uniform Civil Code as it focused light on some crucial issues-

- a) It expressed the aspirational and progressive character of Muslim women who were in a position to challenge the religious orthodoxy.
- b) It provided the ample scope to the Supreme Court to interpret the prominence of uniform civil code which is secular in character over the religiously ordained nasty customs and personal laws.
- c) It brought into forefront the plight of the Muslim women and discrimination in matrimonial matters
- d) It was a firm and bold step in the direction of implementation of uniform civil code.

The judgement gave birth to a huge discontent throughout the Nation from Muslim community. They took the verdict as a way to intervene in their personal rights Conferred on them under the Constitution

Due to heavy agitations, reactions from within the conservative section of Muslim community the erstwhile Rajiv Gandhi government passed Muslim Woman (Protection of Rights on Divorce Act 1986⁷ nullifying the judgment given by Supreme Court in Shah Bano case. Following the rules of Muslim personal law the Act provided financial aid to a divorced woman only during the period of '*iddat*' or till 90 days after the divorce. Parliament reacted that the Apex court has only power for mere recommendations for enacting a Uniform Civil Code, not binding on the Parliament. Parliament should not interfere with the personal laws until the

⁵ "The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India"

⁶ Md. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945

⁷ The Muslim Woman (Protection of Rights on Divorce) Act 1986

demand comes from within the community to initiate required changes. The response given by Parliament made it clear that in a country like India political populism still dominates over rational principles and laws based on Equality, Human rights and Social justice. It showed that it was not only the pressure and sentiments of religious minorities but the absence of political will that prevents the implementation of uniform civil code.

Another landmark judgement in this direction was the case of '*Sarla Mudgal V Union of India*'⁸. In this case, the question raised regarding the legality of a second marriage by a Hindu after converting himself into Islam without giving divorce to his first wife. The court held conversion to Islam and marrying again would not, by itself, dissolve the Hindu Marriage under Section 494⁹ of the Indian Penal Code. Justice Kuldip Singh stated "*Article 44 has to be retrieved from the cold storage where it is lying since 1949*" reiterating that "*where more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of citizens in the territory of India*"¹⁰. The Supreme Court also expressed its regret uttering "*The desirability of uniform civil code can be hardly doubted but it can concretize only when social climate is properly built by the elite of the society and the statesmen, instead of gaining personal mileage, rise above and awaken the mass to accept the change*"¹¹

Another influential judgement in this direction came in July 2003¹², when a Christian priest John vallamattom filed a petition in the Supreme Court challenging the constitutional validity of section 118¹³ of the '*Indian Succession Act 1925*'. He argued section 118 was discriminatory against the Christian community as it imposed unreasonable and unnecessary restriction on their donation of property for religious and charitable purpose by will. The Court ruled section 118 came under the purview of Article 14 and 15 of the Constitution and there should not be any discrimination between various

⁸ *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531

⁹ "whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either deception for a term which may extend to seven years and shall also be liable to fine"

¹⁰ *Sarla mudgal v. Union of India*, AIR 1995 SC 1531

¹¹ ibid

¹² *John vallamattom v. Union of India*, AIR 2003 SC 2902

¹³ "No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons"

religious community. Supreme Court struck down 'section 118' declaring it to be unconstitutional.

Chief Justice Khare stated “we would like to state that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India. It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country”¹⁴

The controversies revolving around the enforcement of Uniform Civil Code has been the interpretation of the term ‘Secularism’ and ‘the Right to Freedom of Religion’ enumerated under the constitution. The Preamble clearly states India as “SECULAR DEMOCRATIC REPUBLIC” which postulates that there is no State recognized religion and the State shall not discriminate against anyone on the grounds of religion. In *S.R Bommai V Union of India case*¹⁵ the apex court hold that Secularism is a basic feature of the Constitution, following the ‘*Doctrine of Basic Structure*’ invented in the *Kesavananda Bharati case*¹⁶. Justice Jeevan Reddy made it clear that religion is oriented towards individual faith and it should not be mixed with secular policies and activities of the State. Secular activities can be directed in a proper and well defined way by the state through enacting required laws. Supreme Court in its various subsequent judgments uphold that as the process of national integration is still going on in a developing country like India, so the responsibility is with the State to interfere in the religious affairs of different communities to root out the impediments in the proper governance of the State.

Article 25 and 26 guarantee and protect the right to ‘*Freedom of Religion*’. Article 25¹⁷ secures to every person right to freedom of conscience and right to ‘Freely profess, practice and propagate religion’. But this right can be controlled to maintain public order, morality, health and other provisions relating to ‘Fundamental Rights’. On the other hand Article 26¹⁸ also secures to every religious community to manage their own

¹⁴ John Vallamattom v. Union of India AIR 2003 SC 2902

¹⁵ S.R.Bommai v. Union of India, 1994(3) SCC 1

¹⁶ Kesavananda Bharati v. State of Kerala, 1973 (4) SCC 225

¹⁷ “(1) subject to public order, morality, & health to the other provisions of this part, all persons are equally entitled to freedom of conscience & the right freely to profess, practice & propagate religion. (2) nothing in this Article shall affect the operation of any existing law or prevent the state from making the law - a) regulating or restricting any economic, financial, political or other secular welfare activities which may be associated with religious practice; b) providing for social welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and sections of Hindus”

¹⁸ “subject to public order, morality & health, every religious denomination or any section thereof shall have a right – a) to establish & maintain institutions for

religious matter without any fear. But for protection of larger public interest, it can also be curtailed and restricted indicating these rights are not absolute and sacrosanct of nature. But the argument is that Uniform Civil Code is neither against the 'Secularism' nor will create any barrier between religion and State enacted laws in a civilized, developed and modernized society. Justice Khare in a case uttered¹⁹ *"it is no matter of doubt that marriage, succession and the like matters of secular character can not be brought within the guarantee enshrined under Article 25 and 26 of the Constitution"*

Uniform Civil code has nothing to do in matter of relation between man with God. It only provides to maintain equality between man with man. Chief Justice Khare also made it clear that any legislation bringing succession and the related matters of the secular character within the ambit of Article 25 and 26 is dubious, since it must be rejected as void. Justice R.M. Sahai²⁰ quoted it very nicely when he said *"Ours is a Secular Democratic Republic. Freedom of Religion is the core of our culture"*. Hence uniform civil code is indispensable to promote 'unity and Solidarity'.

II.I. Article 29 and Uniform Civil Code

Whenever there is any attempt to introduce a uniform civil code under Art.44, a defence is always taken against Article 44 by uttering the words enumerated in Article 29 that guarantees right as to the protection of 'minority culture'. The Supreme Court in its various judgements declared that it has to be interpreted with Article 44 and 51A(f)²¹. It stated that Articles 25-28 grouped under the heading 'Freedom of Religion' and 'Cultural and Educational Rights' under Articles 29 and 30 ensures that culture referred to in Article 29(1)²² is something which may indicate any section of society. The distinction between culture & religion should be considered when arguing in favor of Article 44. Minority communities (particularly the Muslims brothers) have expressed that if Art. 44 is implemented, it will take away the separate identity of minority communities, but this is not true as there already exist Article 25 -27²³ of the Constitution of India to protect one's own religion, beliefs and sentiments

religious and charitable purposes; b) to manage its own affairs in matters of religion; c) to own and acquire movable or immovable property; d) to administer such property in accordance with law

¹⁹ John Vallamattom v. Union of India, AIR 2003 SC 2902

²⁰ Sarla Mudgal v. Union of India, AIR 1995 SC 1531

²¹ "to value & preserve the rich heritage of our composite culture

²² "Any section of the citizens residing in the territory on India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same"

²³ "no persons shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination"

II.II. Shayara Bano judgement : A new inspiration towards UCC

But the most path breaking judgment has been made by the Supreme Court in the famous '*Shayara Bano v. Union of India case*'.²⁴ The court delivered a stunning 3-2 verdict declaring '*talaq-e-biddat*' to be unconstitutional as it has no place in holy Quran. It made clear that only '*talaq-e-ahsan*' and '*talaq-e-hassan*' are permissible under holy Quran. Under distorted custom (*talaq-e-biddat*) a man who pronounces the word 'talaq' three times even through any electronic media is considered to have declared his solemn sacred marriage to a Muslim woman as null and void. It raised questions regarding the values of justice, gender equality, human rights, human dignity and secularism.

The judges asserted it is as unworthy and Justice Kurian Joseph raised his voice by claiming "*There can not be any constitutional protection to such a practice*"²⁵

Constitution is the Supreme law of the land, which needs to be situated above all religions and guarantees to each of its citizens the right to life and liberty. The Court directed the Parliament to enact a legislation within six months to govern marriage and divorce in Muslim community.

From Shah Bano to Shayara Bano the Supreme Court has focussed not only on religion but on gender friendly reforms of the personal laws. With the passage of time, there is a immediate need for having a common civil code for all citizens devoid of religion, ensuring that their fundamental and constitutional rights are protected. It constitutes a long journey for Indian Muslim women challenging the personal laws to uphold their protected rights to life and liberty under the Constitution.

III. Framework of the Uniform Civil Code

The main problem in implementing the uniform civil code, apart from obtaining a consensus is the drafting. What should be the content of a uniform civil code? Should it be a blend or synthesis of positive sides of all personal laws. Perhaps there exist a suspicious mentality within the minorities regarding the possibility of uniform civil code being only a conglomeration of Hindu law in order to dominate the minority culture; The Parliament must ensure that uniform civil code will carve a balance between protection of Fundamental Rights and Religious dogmas of individuals. It will be a Just and proper code without any bias with regards to religious and gender considerations. Uniform civil code should have the following features in order to be of ideal standard.

²⁴ *Shayara Bano v. Union of India*, AIR 2016 SC 118

²⁵ *Ibid*

- i) The new law first of all should encourage monogamy banning multiple marriages under any religion. Polygamy takes away the basic human rights of the women violating the '*Principle of Equality*'. Though it is an indispensable part of the Muslim Personal Law, but this practice in the 21st century is just considered as an 'outdated'. It reduces the scope of the right guaranteed and protected under Art. 21²⁶ of the Constitution.

A minimum particular age, already prescribed under '*Prohibition of Child Marriage Act 2006*' should be enforced properly without any discrimination. It will control the growing rate of child marriages. Strict and rigid punishment should be mentioned for violating this provision.

- ii) Adequate provisions for the 'registration of marriage' should be made compulsory which will provide solemnity or legal recognition to a marriage. It will obliterate all confusions regarding validity and legitimacy of the marriage.
- iii) There should be uniform laws with regard to the provisions of divorce. Decision and consent of women should be given priority under the new code of law. Provisions included under the Uniform law will be based on reasonableness. While framing the rules principles of natural justice should be considered.
- iv) Uniform law of '*Succession of property*' equally applicable to son and daughter should be secured to root out the gender-based inequalities in the male dominated society like India. Economic status, social security and personal dignity of women is influenced by their ownership and control over immovable property.
- v) Regarding provisions for the maintenance of women, apart from their own personal laws, a non-Muslim woman can claim financial maintenance under section 125 of the Criminal Procedure Code. A Muslim Woman can claim maintenance under the Muslim Women Act 1986 besides taking recourse of section 125.

Uniform civil code will never interfere in the religious practices of any religious community. It will neither force a Hindu to perform the religious practice of 'Nikah' or a Muslim to carry out 'Saptapadi'. But so far as the rights of Inheritance, Property, Maintenance and Succession is considered there will be a common law ensuring gender equality. Explaining the value of uniform civil code in the Constituent Assembly²⁷, it was

²⁶ "No person shall be deprived of his life or personal liberty except according to procedure established by law"

²⁷ Constituent Assembly Debates, Vol. VII, Page- 547

observed “*When you want to consolidate a community, you have to take into consideration the benefits which may accrue to the whole community and not to the customs or a part of it. If you look at the countries in Europe, which have a civil code, everyone who goes there forms a part of the world and every minority has to submit to that civil code. It is not felt to be tyrannical to the minorities*”

IV. Conclusion

A very progressive, liberal and broadminded outlook is desirable among the people to understand and realize the spirit of such a code. Uniform Civil Code is, in fact, the cornerstone of true secularism. Such a progressive reform will not only eradicate discrimination and evil practices against women on religious ground but will also strengthen the secular fabric of the country and promote unity and harmony among all. However it can be implemented only when there is a unanimity of thoughts among all religious communities. Communalism and sectarianism encourage discrimination at two levels, one - between people of different religion regarding the acceptability and validity of their religious views and two-between the two genders. This dangerous and ruinous effect should be done away with by implementing a Uniform Civil Code for all.

As women constitute almost half the population of India, the uniform civil code will provide with equality and justice in courts of law irrespective of their religion in matters pertaining to Marriage, Divorce, Maintenance, Succession and Inheritance etc. Various committees on the status of women in India also notified that various personal laws which permit discrimination between men and women on the grounds of religion violate the Fundamental Rights and the Preamble of the Constitution which promises to secure to all citizens ‘Equality of status’ and is against the spirit of national integration. Thus implementation of a Uniform Civil Code containing provisions applicable to every one and based on social justice and gender equality is the demanding cry of the hour.

The existing uniform civil code in Goa may be taken as our inspiration to achieve a uniform civil code within entire territory of India. It is desirous to have a common Civil Code breaking all the religious barriers which demand obedience from its followers ignoring the higher common interests. It will be nothing but incorporation of the most modern, enlightened, progressive elements of all existing personal laws. Continuing with certain unjust and discriminatory archaic practices under various personal laws go against the tenets of the Constitution. When several countries of the world have already evolved their Uniform Civil Code namely Israel, Japan, France and Russia, the Supreme Court of India compares those examples with the administration of the personal laws of India and urges for the ideal changes that need to be brought through

modern thought of equality and justice favoring women's rights in various aspects. Woman's right over the decisions regarding their marriage must be guaranteed and protected only by enacting uniform civil code that will relate to an enforceable claim and ensure women's freedom in their marital lives. While the existing social and cultural dynamics are complex, legal reform to improve women's right will potentially provide a way to reduce gender discrimination based on religion improving a range of socio – economic outcomes for women. This will ultimately lead us to an ideal safeguard of citizens rights. Voices are coming out from within the liberal minded Muslims to go for a reform in the legal system of the country by 'introducing a uniform civil code administering religion based personal laws'²⁸. Effective implementation of uniform civil code will help to empower women and root out fundamental injustice, ensuring gender equality and secular ideals of the Indian Constitution. In any case, submissiveness of women represent almost universal culture, which are not always based on biological difference. Broadly speaking these are the results of social organization based on patriarch, religious line and its institutions. The Vision of the Uniform Civil Code can not be realized in one go but taking up reforms by introducing uniform civil code in the absence of a politically conducive environment and willingness will be unwise. Needless to say while there is a Criminal Procedure Code, which equally applicable to all people devoid of religion then why there is no '*Uniform Civil Code*' dealing with matters like divorce, succession which are still governed by personal laws. It need to make sure that uniform civil code will not aim against any particular religion but to prevent the injustices occurred under the influence of religion. Uniform civil code will naturally be based on the principle of Jurisprudence while providing a sense of security and respect to people of various religious denominations. In the remarkable judgement of '*S.R.Bommai v. Union of india*'²⁹ the honourable Supreme Court explained "The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the fundamental law and basic structure of the Indian political system". The glorious ideal of uniform civil code will not only ensure Nation's unity but also take us into a new modernized dynamic India where people will be free from the whims and fancies of pundits, mullahs and bishops.

Soumalya Ghosh*

²⁸ Dr. Tahir Mahmood, *Muslim Personal Law*, vikash publishing house, Uttar Pradesh, 1977, 1st Edition, at 200 – 202

²⁹ S.R.Bommai v. Union of India, 1994(3) SCC 1

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